TAUSS v. JEVREMOVIC Doc. 6

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CALVIN A. TAUSS	:	CIVIL ACTION
	:	
v.	:	
	:	
GEORGE JEVREMOVIC	:	NO. 16-4702

MEMORANDUM

Padova, J. **July 19, 2017**

Pro se plaintiff Calvin A. Tauss brings suit against George Jevremovic, alleging injuries arising from the breach of a contract entered into between Tauss and Jevremovic's company, Material Culture. Jevremovic has filed a Motion to Dismiss the Complaint. For the following reasons, we grant Jevremovic's Motion in part and deny it in part and dismiss the Complaint with prejudice.

I. BACKGROUND

Tauss, a North Carolina resident, is an avid collector of East Asian antiquities. (Compl. Ex. 1, "Cause for Action" at 1.) In January 2014, in order to dispose of his collection of antiquities, he contacted Material Culture, a consignment business operating out of Pennsylvania.[1] (Compl. Ex. 3, "Timeline of Events" at 1.) George Jevremovic, the owner of Material Culture, offered to sell Plaintiff's collection of antiquities through public auctions. (Id. at 1-2.) Tauss and Material Culture entered into a Consignment Agreement on October 18, 2014, pursuant to which Material Culture would sell Tauss's antiquities. (Compl. Ex. 2-A, Consignment Agreement.) The Consignment Agreement includes a provision stating that no

[1]According to the Pennsylvania Department of State Corporations Bureau, Material Culture is a fictitious name for New Material Culture, Inc., a Pennsylvania corporation. See https://www.corporations.pa.gov/Search/CorpSearch, then search for Material Culture and New Material Culture, Inc.

Dockets.Justia.com

reserves would be placed on items sold by Material Culture for Mr. Tauss and that estimates made by Material Culture were neither guarantees nor reserve prices for any items. (Consignment Agreement ¶ 4.)

Tauss transported his collection of East Asian antiquities to Philadelphia and the items were offered for sale in Material Culture's online auctions. (Compl. Ex. 3, "Timeline of Events" at 5.) Many of Tauss's items were sold at auction by Material Culture over a period of several months. (Id. at 6.) After a December 2014 auction, in which Material Culture refused to honor a $4,900 bid for a jade necklace, Tauss contacted the Federal Bureau of Investigation about what he perceived as a scam on the part of Material Culture. (Compl. Ex. 3, "Timeline of Events," at 6-7.) Tauss was dissatisfied with the prices at which Material Culture had sold his antiquities and filed suit against Jevremovic in North Carolina state court in August of 2015. (Id. at 7-8.) The state court action was dismissed because the Consignment Agreement contains a forum selection clause, which states that the parties "agree that any dispute arising out of the terms and conditions of this agreement will be brought before a court of competent jurisdiction within the State of Pennsylvania." (Consignment Agreement ¶ 11.)

Tauss then brought suit in the Western District of North Carolina, which transferred the case to this district because of the forum selection clause in the contract. Tauss v. Jevremovic, Civ. A. No. 15-148, Order at 7 (W.D. N.C. Aug. 12, 2016).[2] Jevremovic now moves to dismiss the Complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

---

[2] A copy of the August 12, 2016 Order is attached to the Motion to Dismiss as Exhibit G. In addition to transferring the suit to this Court, the Western District of North Carolina also determined that the Complaint did not state a claim for violation of the federal RICO statute upon which relief can be granted. Tauss, Order at 2-3.

II. LEGAL STANDARD

When we review pro se pleadings in the context of a Motion to Dismiss, we liberally construe the allegations of the complaint and hold them "to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (citing Estelle v. Gamble, 429 U.S. 97, 106 (1976) and Fed. R. Civ. P. 8(f)). We also "apply the applicable law, irrespective of whether the pro se litigant has mentioned it by name." Dluhos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003) (citation omitted). Nevertheless, even a pro se complaint "must contain a least a modicum of factual specificity, identifying the particular conduct of the defendant that is alleged to have harmed the plaintiff, so that the court can determine that the complaint is not frivolous and a defendant has adequate notice to frame an answer." Lawrence v. Mental-Health Doctor, Civ. A. No. 12-642, 2013 WL 1285461, at *2 (E.D. Pa. Mar. 28, 2013) (citation omitted).

III. DISCUSSION

Jevremovic moves to dismiss Tauss's Complaint, arguing that this Court lacks jurisdiction over this suit and that, regardless of whether we have jurisdiction, Tauss has failed to state a claim upon which relief can be granted.

A. Subject Matter Jurisdiction

"When a motion under Rule 12 is 'based on more than one ground, the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined.'" Curtis v. Unionville-Chadds Ford Sch. Dist., Civ. A. No. 12-4786, 2013 WL 1874919, at *3 (E.D. Pa. May 1, 2013) (quoting Jeffrey Banks, Ltd. v. Jos. A. Bank

Clothiers, Inc., 619 F. Supp. 998, 1001 n.–7 (D._Md._1985)). Thus, we must first address Jevremovic's argument that we lack subject matter jurisdiction over this proceeding. To establish subject matter jurisdiction, a plaintiff must show that his or her action arises "under the Constitution, laws or treaties of the United States," as provided by 28 U.S.C. § 1331 ("federal question jurisdiction"), or that the parties are of diverse citizenship and the amount in controversy exceeds $75,000, pursuant to 28 U.S.C. § 1332 ("diversity jurisdiction").

A motion to dismiss for lack of subject matter jurisdiction brought pursuant to Rule 12(b)(1) "may be treated as either a facial or factual challenge to the court's subject matter jurisdiction." Gould Elecs. Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000) (citing Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)). Here, Jeremovic brings a facial attack. "A facial attack, as the adjective indicates, is an argument that considers a claim on its face and asserts that it is insufficient to invoke the subject matter jurisdiction of the court. . . ." Constitution Party of Pennsylvania v. Aichele, 757 F.3d 347, 358 (3d Cir. 2014). "Such an attack can occur before the moving party has filed an answer or otherwise contested the factual allegations of the complaint." Id. (citing Mortensen, 549 F.2d at 889–92). As such, "a facial attack 'contests the sufficiency of the pleadings.'" Id. (quoting In re Schering Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 243 (3d Cir. 2012)).

"In reviewing a facial attack, 'the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff.'" Id. (quoting In re Schering Plough Corp., 678 F.3d at 243). "Thus, a facial attack calls for a district court to apply the same standard of review it would use in considering a motion to dismiss under Rule 12(b)(6), i.e., construing the alleged facts in favor of the nonmoving party." Id. (citing In re Schering Plough Corp., 678 F.3d at 243). Jevremovic has

not asked us to consider any documents outside of the Complaint and its attachments. Consequently, we treat the Motion to Dismiss as a facial attack.

As the United States District Court for the Western District of North Carolina previously determined that the Complaint does not state a claim pursuant to federal law, we lack federal question jurisdiction over this action pursuant to § 1331. See Tauss, Order at 2-2. The decision of the Western District of North Carolina is the law of this case and we may not revisit it. See Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988) (stating that the law of the case doctrine "applies as much to the decisions of a coordinate court in the same case as to the court's own decisions" (citations omitted).[3] The Western District of North Carolina, however, did not consider whether the federal courts have diversity jurisdiction over this action.

The Complaint alleges that the parties are diverse, as Jevremovic is alleged to reside in Pennsylvania and Tauss is alleged to reside in North Carolina. (Compl. at 1.) Moreover, while the Complaint does not specify the exact amount of damages Tauss believes that he incurred, we find that, construed liberally, the Complaint alleges that Tauss suffered more than $75,000 in damages. Specifically, the Complaint alleges that the items Material Culture was supposed to auction for Tauss should have attracted "400,000 IN ENTRY BIDS…ALONE." (Compl. Ex. 1, "Cause for Action" at 1.) The Consignment Agreement provides that Material Culture would be entitled to no more than 25% of the proceeds of the auctions of Tauss's antiquities. (Consignment Agreement ¶ 2.) Therefore, if all of Tauss' antiquities sold at the prices that Tauss believes they should have commanded, Tauss would have been paid approximately

[3]The Supreme Court explained in Christianson, that "Federal courts routinely apply law-of-the-case principles to transfer decisions of coordinate courts." Id. (listing cases). "Indeed, the policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation." Id. (citations omitted).

$300,000.00. However, Tauss has been paid only $8313.75 by Material Culture. (Compl. Ex. 2-A ¶ 10.) Consequently, read in the light most favorable to Plaintiff, the Complaint alleges more than $290,000.00 in damages. Thus, we conclude that both of the requirements for diversity jurisdiction pursuant to § 1332 are met in this case and that this Court has diversity jurisdiction over the claims alleged in the Complaint. Consequently, we deny the Motion to Dismiss insofar as it seeks dismissal of this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

B. Failure to State a Claim

When considering a motion to dismiss pursuant to Rule 12(b)(6), we "consider only the complaint, exhibits attached to the complaint, [and] matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." Mayer v. Belichick, 605 F.3d 223, 230 (3d Cir. 2010) (citing Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)). We take the factual allegations of the complaint as true and "construe the complaint in the light most favorable to the plaintiff." DelRio-Mocci v. Connolly Props., Inc., 672 F.3d 241, 245 (3d Cir. 2012) (citing Warren Gen. Hosp. v. Amgen, Inc., 643 F.3d 77, 84 (3d Cir. 2011)). Legal conclusions, however, receive no deference, as the court is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" Wood v. Moss, 134 S. Ct. 2056, 2065 n.5 (2014) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

A plaintiff's pleading obligation is to set forth "'a short and plain statement of the claim,'" which gives the defendant "'fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (alteration in original) (quoting Fed. R. Civ. P. 8(a)(2) and Conley v. Gibson, 355 U.S. 41, 47 (1957)). The complaint

must contain "'sufficient factual matter to show that the claim is facially plausible,' thus enabling 'the court to draw the reasonable inference that the defendant is liable for [the] misconduct alleged.'" Warren Gen. Hosp., 643 F.3d at 84 (quoting Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009)). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556). In the end, we will grant a motion to dismiss brought pursuant to Rule 12(b)(6) if the factual allegations in the complaint are not sufficient "'to raise a right to relief above the speculative level.'" W. Run Student Hous. Assocs., LLC v. Huntington Nat'l Bank, 712 F.3d 165, 169 (3d Cir. 2013) (quoting Twombly, 550 U.S. at 555).

Jevremovic argues that we should dismiss the Complaint because it fails to state a claim against him upon which relief can be granted. While Tauss does not clearly identify the causes of action he is attempting to assert in his Complaint, he appears to be asserting a claim for breach of contract against Jevremovic. Jevremovic argues that this claim cannot survive because he is not a party to the Consignment Agreement, which is the contract at the center of this dispute.

"It is fundamental contract law in Pennsylvania that one cannot be liable for breach of contract unless one is a party to that contract." Accurso v. Infra-Red Servs., Inc., 23 F. Supp. 3d 494, 503 (E.D. Pa. 2014) (internal quotation omitted). Moreover, even though the Complaint alleges that Tauss negotiated the Consignment Agreement with Jevremovic, when a party contracts with a corporation through the corporation's agent, the contract binds only the corporation, which alone is liable for its breach, not the corporation's owner or agent. See Daniel Adams Assocs., Inc. v. Rimbach Pub., Inc., 519 A.2d 997, 1000-0 (Pa. 1987) ("Where a party contracts with a corporation through a corporate agent who acts within the scope of his

authority and reveals his principal, the corporate principal alone is liable for breach of the contract." (citations omitted)).

Here, the Consignment Agreement is between Tauss and Material Culture. Jevremovic is not a party to the Consignment Agreement. Therefore, he cannot be liable to Tauss for a breach of that contract. We conclude that the Complaint thus fails to state a claim for breach of contract against Jevremovic and must be dismissed. Accordingly, we grant the Motion to Dismiss to the extent that it seeks dismissal of this action pursuant to Rule 12(b)(6).

IV. CONCLUSION

For the foregoing reasons, we grant Jevremovic's Motion to Dismiss and dismiss the Complaint with prejudice. [4] An appropriate Order follows.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J.

---

[4] When "a complaint is vulnerable to 12(b)(6) dismissal, a District Court must permit corrective amendment unless an amendment would be inequitable or futile," even if the plaintiff has not sought leave to amend. Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004) (citation omitted). "Dismissal without leave to amend is justified only on the grounds of bad faith, undue delay, prejudice, or futility." Id. (citation omitted). "Futility means that the complaint, as amended, would fail to state a claim upon which relief could be granted." Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000) (citing In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997)) (internal quotation omitted). Here, amendment would be futile, as Tauss cannot amend his Complaint to state a breach of contract claim against Jevremovic because the contract in question is between Tauss and Material Culture, not Jevremovic. See Accurso, 73 F. Supp. 3d at 503; Daniel Adams Assoc., 519 A.2d at 1000. Our dismissal of this claim, however, is without prejudice to any claim that Tauss may seek to assert against Material Culture in a different proceeding.