FILED
United States Court of Appeals
Tenth Circuit

August 4, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SCOTT B. SULLIVAN,

Plaintiff - Appellant,

v.

UNIVERSITY OF KANSAS HOSPITAL AUTHORITY; MICHELLE SAFFORD; BOB PAGE; UNIVERSITY OF KANSAS PHYSICIANS; JUDSON BERTSCH; LARRY CORDELL; PHILLIP HYLTON; KEVIN BROWN; TIFFANY WILLIAMS; MOHSEN TAHANI; BRADLEY S. JACKSON; MARK O. SCOTT; BRANDON WELSH; JOHN LEEVER; NEUROSURGERY OF SOUTH KANSAS CITY; JOHN CLOUGH, MD; ELLEN KAY CARPENTER; HCA HEALTHCARE, INC.; FAMILY HEALTH MEDICAL GROUP OF OVERLAND PARK, LLC; HERBERT MCCOWEN; RICHARD RUIZ; MENORAH MEDICAL CENTER; BRADLEY J. MCILNAY; DIANA RUTHERFORD; SUSAN WILLIAMS; STEVE SULLIVAN; LISA SULLIVAN; JANET GEREAU; JONATHAN ALAN KECK, II; ADVENTIST HEALTH SYSTEMS; GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; SHAWNEE MISSION MEDICAL CENTER; KEN BACON; HARLOW SCHMIDT; AMANDA DISKIN; MARK FENTON; SHAWNEE MISSION PRIMARY CARE; GREGORY SWEAT; NEUROSURGERY ASSOCIATES OF KANSAS; STEVEN HESS; NEW HAVEN SEVENTH-DAY ADVENTIST

No. 22-3117
(D.C. No. 2:22-CV-02045-KHV-TJJ)
(D. Kan.)

CHURCH; DOUGLAS ELSEY; DOUG LUDWIG; STEVE IRVIN; REBECCA MESSERLI,

Defendants - Appellees.

SCOTT B. SULLIVAN,

Plaintiff - Appellant,

v.

UNIVERSITY OF KANSAS HOSPITAL AUTHORITY; MICHELLE SAFFORD,

Defendants - Appellees.

No. 23-3020
(D.C. No. 2:22-CV-02490-SRB)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **PHILLIPS** and **McHUGH**, Circuit Judges.

Scott B. Sullivan, proceeding pro se,[1] challenges the dismissal of two related lawsuits in which he attempted to seek review, in independent actions under Rule 60

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of these appeals. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Because Mr. Sullivan appears pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

of the Federal Rules of Civil Procedure, of three judgments that this court had previously affirmed. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

The two actions at issue in these appeals are part of Mr. Sullivan's wide-ranging litigation efforts relating to a workplace injury in January 2012. His serial lawsuits are premised on the allegation that after his disabling injury, a number of individuals and entities conspired to deny him the appropriate medical treatment.

This litigation has been the subject of previous appeals in this Court. *See Sullivan v. Univ. of Kan. Hosp. Auth.*, 844 F. App'x 43 (10th Cir. 2021) ("*UKHA I*"). After we issued *UKHA I*, Mr. Sullivan filed two independent actions under Rule 60 seeking relief from the judgments we affirmed in *UKHA I*.

The district court issued orders dismissing each of Mr. Sullivan's Rule 60 actions under the screening provisions of 28 U.S.C. § 1915(e)(2). In each case, Mr. Sullivan filed a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). The district court also denied each of those motions. Mr. Sullivan appeals the dismissal of his lawsuits as well as the denials of his Rule 59(e) motions.[2]

[2] The appeals have not been consolidated, but they raise the identical claim arising from the same facts. We therefore address them in a single disposition.

II. Discussion

A. Dismissal of Rule 60 actions

"We apply the same standard of review for dismissals under § 1915(e)(2)(B)(ii) that we employ for Federal Rule of Civil Procedure 12(b)(6) motions to dismiss for failure to state a claim." *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). We review a dismissal under Rule 12(b)(6) de novo. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). "In doing so, we ask whether there is plausibility in the complaint." *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1191 (10th Cir. 2009) (brackets and internal quotation marks omitted). "The complaint does not need detailed factual allegations, but the factual allegations must be enough to raise a right to relief above the speculative level." *Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1234 (10th Cir. 2020). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).[3]

Mr. Sullivan challenges the dismissal of his Rule 60 actions. We affirm for three reasons. First, actions brought under the first three subsections of Rule 60(b) must be filed "no more than a year after the entry of judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c). Mr. Sullivan did not meet this deadline in either

[3] Mr. Sullivan appears to argue the *Iqbal/Twombly* plausibility standard should not apply given his pro se status. A *pro se* litigant's pleadings, however, are judged by the same legal standards that apply to all litigants. *See Ogden v. San Juan Cnty.*, 32 F.3d 452, 455 (10th Cir. 1994).

case. Second, even if his lawsuits were timely, the proper vehicle for seeking relief under Rule 60(b) is by motion in the case or cases where the final judgment or order was entered, not by an independent action as Mr. Sullivan attempted to do here. *See* 12 James Wm. Moore, Moore's Fed. Prac. § 60.60[1] (3d ed. 2023) (a Rule 60(b) motion must be brought "in the court and in the action in which the judgment was rendered" (internal quotation marks omitted)). Third, to the extent Mr. Sullivan sought relief under Rule 60(d), which does authorize an independent action, his respective complaints did not allege facts to support a claim of fraud on the court.

B. Denial of Rule 59(e) motions

Mr. Sullivan also challenges the denial of his Rule 59(e) motions to alter or amend the judgments. Relief under Rule 59(e) is available where there is: "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, [or] (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). A court may grant such a motion if it "has misapprehended the facts, a party's position, or the controlling law." *Id.* We review the denial of a Rule 59(e) motion for abuse of discretion. *See Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1228 (10th Cir. 2016).

In appeal number 22-3117, the magistrate judge recommended denying the Rule 59(e) motion because Mr. Sullivan had failed to identify an intervening change in the law or evidence that was previously unavailable. The magistrate judge also rejected Mr. Sullivan's argument that the court committed clear legal error. The district court adopted the magistrate judges' report and recommendation, agreeing that Mr. Sullivan

had failed to provide a basis for relief under Rule 59(e). In his appellate brief in 22-3117, Mr. Sullivan fails to address the district court's reasoning and explain why it was wrong. We therefore affirm the district court's denial of the Rule 59(e) motion. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366, 1369 (10th Cir. 2015) (stating that an appellant must "explain what was wrong with the reasoning that the district court relied on in reaching its decision" and affirming the dismissal of a claim where appellant did not challenge the district court's reasoning).

In appeal number 23-3020, the district court set out the grounds warranting reconsideration, relying on our decision in *Servants of the Paraclete*. The court then concluded that Mr. Sullivan "ha[d] not identified any intervening change in controlling law or demonstrated the need to correct a clear error or prevent injustice." 23-3020, R. at 402. The court also noted that Mr. Sullivan "ha[d] not shown the availability of new evidence relative to his claims." *Id.* The court therefore denied the Rule 59(e) motion.

Mr. Sullivan argues the district court erred in applying *Servants of the Paraclete* to his Rule 59 motion because that case "refers specifically to second Rule 59 motions, not to a first request for equitable relief." No. 23-3020, Opening Br. at 49. *Servants of the Paraclete* involved an appeal from the denial of two Rule 60(b) motions, but its reasoning clearly addressed the grounds warranting a motion to reconsider. *See* 204 F.3d at 1012. Mr. Sullivan offers no further explanation for why that aspect of our decision would not apply to his Rule 59(e) motion. He has therefore failed to show the district court abused its discretion in denying his Rule 59(e) motion.

C. Appointment of Counsel

Finally, Mr. Sullivan contends the district court erred in failing to appoint him counsel. Because there is no constitutional right to appointment of counsel in a civil case, *Johnson v. Johnson*, 466 F.3d 1213, 1217 (10th Cir. 2006), our review is only for abuse of discretion, *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995). In deciding whether to appoint counsel, the court considers the following: (1) the merits of the party's claims; (2) "the nature and complexity of the factual and legal issues"; and (3) the party's "ability to investigate the facts and present [the] claims." *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1115 (10th Cir. 2004).

In appeal number 22-3117, the district court found that appointment of counsel would be inappropriate because his claims lacked sufficient merit. Mr. Sullivan does not address that reasoning, and we therefore affirm.[4] *See Nixon*, 784 F.3d at 1366, 1369. In 23-3020, the district court found "the record demonstrates that appointment of counsel would be inappropriate." No. 23-3020, R. at 402. Mr. Sullivan seems to argue on appeal that the district court did not evaluate the proper factors in denying his motion. But the district court recited the applicable factors, and we have no reason to believe the court failed to consider them.

[4] Mr. Sullivan argues the district court erred by not holding an evidentiary hearing on his motion, but the district court acted well within its discretion. We also reject his apparent argument that under the Americans with Disabilities Act, his disabilities entitle him to the appointment of counsel irrespective of the merits of his claims.

In short, we discern no abuse of discretion in the district court's denial of Mr. Sullivan's requests to appoint counsel, and therefore affirm.

III. Conclusion

We affirm the district court's rulings in all respects.

Entered for the Court

Carolyn B. McHugh
Circuit Judge