

No.

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY ARTRIP,

Petitioner,

v.

BALL CORPORATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Federal Circuit erred in affirming the district court's dismissal of Petitioner's patent infringement claim, as well as in failing to allow the Petitioner leave to amend his complaint.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Jerry Artrip, Petitioner

Ball Corporation, *et al.*, Respondent

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that a writ of certiorari issue to review the Denial of his petition to overturn the dismissal of his patent infringement case by the United States Court of Appeals for the Federal Circuit on May 23, 2018.

OPINIONS BELOW

The May 23, 2018, Order of the United States Court of Appeals for the Federal Circuit denying Artrip's petition to overturn the dismissal of his patent infringement case, which decision is herein sought to be reviewed, was not published, but can be found at *Artrip v. Ball Corp.*, 735 F. App'x 708, 709 (Fed. Cir. 2018). The November 3, 2017, Opinion of the United States District Court for the Western District of Virginia can be found at *Artrip v. Ball Corp.*, No. 1:14CV00014, 2017 WL 5037470, at *1 (W.D. Va. Nov. 3, 2017).

BASIS FOR JURISDICTION IN THIS COURT

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Federal Rule of Civil Procedure 8(a) states:

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2006), provides a standard for assessing the propriety of claims under Rule 8.

35 U.S.C. § 271 states in part, “whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.”

STATEMENT OF THE CASE

Donald Artrip is the owner of eleven patents relating to a press assembly and method for forming the lift-tab can ends used for opening beverage cans technology, notably including the following: U.S. Patent Nos. 5,511,920; 5,660,516; 6,022,179; 7,063,492; 7,234,907; 7,237,998; 7,237,999; and 7,344,347. The patented assemblies

and systems changed the lift- tab can end assembly process and eliminated the need for a human tab press operator to turn and move the tabs between machines. The appellate court did not reference anything about the process patents. The appellate court only ruled on the machine patents.

In March of 2014, Artrip filed a pro se complaint in the Western District of Virginia accusing Alcoa Aluminum Company and The Ball Company of infringing the all patents. After obtaining counsel shortly thereafter, Artrip filed an amended complaint asserting that Alcoa indirectly infringed and Ball directly infringed upon all eight of the Artrip patents.

In 2015, Artrip filed a second amended complaint modifying these allegations. The second amended complaint accused Alcoa and Ball of infringing the '179, '492, '907, '998, and '999 patents. For each, Artrip alleged Alcoa contributed infringement by supplying the necessary “food grade coiled aluminum sheets with special coating” that met “required specifications for said invention” and “constitut[ed] a material part of the invention,” and Alcoa knew the aluminum “to be especially made or especially adapted for use in an infringement.” J.A. 272–78, ¶¶ 5, 8, 11, 14, 17, 20. The complaint further alleged that Ball directly infringed the patent by using a system “that embodies the patented invention.” J.A. 272–77, ¶¶ 4, 7, 10, 13, 16, 19.

Alcoa and Ball each moved to dismiss the second amended complaint for failure to state a claim on which relief could be granted, and the district court granted the motions. The court concluded that Artrip's claims for direct infringement were insufficient because they did not identify the infringing Ball equipment or explain how Ball's use of that equipment infringes any claim, and that it "would be unjust to permit Artrip to move forward with a complaint that does not alert Ball as to what it has done wrong." *Artrip v. Ball Corp.*, No. 1:14-cv-00014-JPJ-PMS, 2017 WL 3669518, at *4 (W.D. Va. Aug. 24, 2017). The complaint was dismissed without prejudice, with the court informing Artrip that any amended complaint "must comply with the pleading requirements of Rule 8(a), *Twombly*, and *Iqbal*. In particular, it must plead specific facts supporting Artrip's claims." at *5.

Shortly thereafter, Artrip then filed his third amended complaint. In that complaint, he alleged that Ball directly infringed five of the patents—the '492, '907, '998, '999, and '347 patents. '347 was the last Artrip patent issued and Artrip contends *Iqbal* does not apply as *Iqbal* was decided 20.5 months after Jerry Artrip's filing. The complaint stated that "one or more of the machines at least at the Bristol Plant" infringed the patents because those machines were for forming and attaching lift tabs to can ends and included each element of the independent claims. J.A. 324–35, ¶¶ 9, 11, 13, 15, 17. The complaint went on to identify Ball facilities other than the Bristol plant and stated that on

information and belief, “one or more machines in each of Ball’s Operating Plants infringe one or more of the Patents-in-Suit.” J.A. 335–36, ¶¶ 19–20.

In response, Ball again moved to dismiss on the grounds that Artrip did not state a claim on which relief could be granted. The district court found that the third amended complaint contained “minimal facts” and that the “conclusory” allegation that Ball infringed the patents by using “one or more machines” according to the claims did not meet the pleading standard. *Artrip v. Ball Corp.*, No. 1:14-cv-00014-JPJ-JMS, 2017 WL 5037470, at *3 (W.D. Va. Nov.3, 2017).

On November 3, 2017, the district court agreed, and because Artrip had “notice of the applicable pleading standard, had multiple opportunities to meet it, and has failed to do so,” the district court dismissed the third amended complaint with prejudice and denied leave to amend. at *4. The same day, the court entered a final order dismissing Artrip’s action against Ball.

Before Artrip’s counsel withdrew from the case, Artrip filed a pro se notice of appeal. The notice listed both Alcoa and Ball in the case caption, but it specifically designated the district court’s November 3, 2017 order, which dismissed the third amended complaint against only Ball, as the subject of the appeal.

On May 23, 2018, the United States Court of Appeals for the Federal Circuit affirmed the decision

of the district court. In its affirmation of the dismissal, the Federal Circuit held that:

Mr. Artrip's second amended complaint was his third complaint presented to the court and his second filed by counsel. Alcoa had already alerted Mr. Artrip to potential deficiencies in the contributory infringement allegations in his first amended complaint, including a lack of adequate support for his assertion that the aluminum provided by Alcoa had no substantial noninfringing use. But Mr. Artrip was nevertheless unable to state a plausible claim for contributory infringement in his second amended complaint. In these circumstances, we cannot say the district court abused its discretion in denying further leave to amend.

Meanwhile, with regard to the denial of leave to amend, the Federal Circuit held:

A district court does not abuse its discretion where it denies leave after "repeated failure to cure deficiencies by amendments previously allowed." *Foman*, 371 U.S. at 182. When the district court dismissed the direct infringement allegations in Mr. Artrip's second amended complaint, it identified particular deficiencies in that complaint and instructed Mr. Artrip to plead specific facts supporting his infringement allegations going forward. As discussed above, the third amended

complaint did not do so. In these circumstances, the district court did not abuse its discretion in denying further leave to amend.

This Petition for Certiorari followed.

REASONS TO GRANT THIS PETITION

I. THE DECISION OF THE FEDERAL CIRCUIT TO AFFIRM THE DISMISSAL OF ARTRIP'S PATENT INFRINGEMENT CASE CONFLICTS WITH THE CLEAR PURPOSE OF FEDERAL RULE OF CIVIL PROCEDURE 8(A).

This Court should accept this Petition because in denying Artrip's Petition the Federal Circuit incorrectly construed and applied the spirit of Federal Rule of Civil Procedure 8(a), as elucidated by *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 1949 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed. 2d 929 (2006). In choosing to deny Artrip's petition, the Federal Circuit denied his opportunity to seek redress for infringement on his patents. This denial in turn violated the spirit of the rulings of this Court, a violation made all the harsher by the affirmation of the denial of Artrip's ability to amend his claim. Artrip claims that application of *Iqbal* was not proper as the suit was filed March 18, 2014 well before *Iqbal* went into effect during December 2015. In that regard Patent 347 was not barred by laches. In addition, 347 was not included and *Iqbal* does not

disqualify the 347 patent, because from March 18, 2008 to March 18, 2014 is exactly six years and not six years and one day by civil procedures 6(a) per the Court's decision in *Jerry Hurst v. USA*. The Judge violated the civil procedures 6(a) by saying that from March 18, 2008 to March 18, 2014 was six years and one day which is an erroneous factual finding. According to civil procedure 6(a) the instigating event of one year was March 18, 2008 and the anniversary date was March 18, 2009 likewise, six years fell on March 18, 2014 which exactly six years..

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief,” with 8(e) This Court has noted that Rule 8 marks a “notable and generous departure from the hypertechnical, code-pleading regime of a prior era” in order to allow plausible claims to reach discovery. *Iqbal*, 556 U.S. at 678. To sufficiently meet this requirement in order to survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570).

Under the notice pleading standard employed by the federal courts, the complaint need only give the defendant notice of what the claim is and the grounds upon which it rests; specific facts are not necessary. *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197 (2007). When construing the facts stated in the claim, Federal Rule of Civil Procedure 8(e) mandates that courts read the pleadings to be

“construed so as to do justice.” In common practice, this means construing the complaint liberally in favor of the plaintiff¹ before deciding to dismiss. *See, e.g., Gregory v. Daly*, 243 F.3d 687, 692 (2d Cir. 2001) (“it is enough to assert facts from which, construing the complaint liberally and in the plaintiff’s favor, one could infer such a violation”). Thus, to satisfy this standard, a complaint must provide sufficient factual ground to sustain the elements of a violation. Artrip contends that under the notice pleading standard, Artrip’s complaint state a valid cause of action, however, Artrip contends that application of the *Iqbal* standard was misused.

The statutory language of 35 U.S.C. § 271 establishes the requisite elements of a patent infringement claim by stating, “whoever without

¹ This liberal reading in favor of the plaintiff is even more generous in the case of pro se complaints. As this Court ruled in *Estelle v. Gamble*,

a *pro se* complaint, ‘however inartfully pleaded,’ must be held to ‘less stringent standards than formal pleadings drafted by lawyers’ and can only be dismissed for failure to state a claim if it appears ‘beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’ 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976) (quoting *Haines v. Kerner*, 404 U.S. 519, 520–21, 92 S. Ct. 594, 596 (1972)). While Artrip’s most recently amended complaints were written by counsel, his initial complaint was pro se. The trial court should thus have been using a significantly more liberal interpretation of Artrip’s complaint from the beginning. If it had done so, the chain of amendments ultimately leading to the present dismissal with prejudice could have been avoided and Artrip could have seen his day in court.

authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.”

Within his amended complaint, Artrip alleged that certain machines within a specific production facility of Ball’s performed the specific tasks designated by his several patents using Alcoa aluminum. While short and plain, Artrip’s complaint clearly alleged that Ball was directly using machinery that violated his patents, satisfying the requisite elements for patent infringement under 35 U.S.C. § 271. By affirming the district court’s denial, the Federal Circuit employed an overly strict interpretation of the standard set out in *Iqbal and Twombly*. Because Artrip’s complaint satisfied the elements of the claim, and provided sufficient grounds for the defendants to be on notice of his claim, the proper course of action would have been to allow Artrip’s claim to go to trial, not dismissal.

II. THE DENIAL OF ARTRIP’S ABILITY TO AMEND HIS CLAIM WAS IN CLEAR VIOLATION OF THE SPIRIT OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Even if the courts found necessary to employ this overly strict interpretation of Rule 8(a), the proper next step would have been to allow Artrip to amend the claim, not to dismiss with prejudice.

The portion of the Federal Rules of Civil Procedure dealing with amended claims, Rule 15(a),

states that “the court should freely give leave [to make amendments] when justice so requires.” This is in keeping with the longstanding policy of this court that “[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.” *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962).

To support the dismissal of Artrip’s claim with prejudice, the Federal Circuit cited *Glaser v. Enzo Biochem, Inc.*, 464 F.3d 474, 480 (4th Cir. 2006). Though *Glaser* did also concern a complaint dismissed with prejudice after multiple amended claims, it is readily distinguishable from Artrip’s claim. Most notably, the claim in *Glaser* had been amended four times before its ultimate dismissal, with the court giving equal weight to the plaintiff having “an unprecedented thirteen months of unilateral pre-complaint discovery under Bankruptcy Rule 2004.” *Id.*

This stands in stark contrast to Artrip, whose third amended complaint was dismissed with prejudice. Even the closeness in number of amended complaints between the two is misleading, however, as Artrip’s initial complaint was filed pro se. Thus, Artrip’s counsel were given two fewer attempts than those of *Glaser*. At no time did Artrip have access to the kind of extensive pre-complaint discovery seen in *Glaser* that would have aided his ability to file a complaint as detailed as the court wrongfully demanded.

Artrip was not given the opportunity to freely amend his complaint in order to be afforded the opportunity to test his claim on the merits. Though he did file two amended complaints against Alcoa and three against Ball, this was initially caused by the transition from a pro se filing to one handled by counsel. His most recent complaint, as discussed previously, stated the elements necessary to put the defendants on notice and allow the claim to be properly settled in court.

Instead of allowing Artrip that sacred opportunity, however, both the district court and the Federal Circuit instead slammed the door shut, preventing Artrip any chance to seek relief.

III. THE FEDERAL CIRCUIT ERRED IN FAILING TO FULLY REVIEW THE CLAIMS AGAINST ALCOA.

The Federal Circuit did not fully address the trial court's dismissal of Artrip's claims against Alcoa; instead, the Federal Circuit merely rubberstamped the trial court's finding that Artrip failed to meet the standard set out in *Iqbal* because the claim did not lay out the elements of contributory infringement. However, because Alcoa directly infringed on Artrip's patents, the contributory claim standard of *Iqbal* was improper.

As discussed in I., *Iqbal* sets out a standard for claims that should be significantly more liberally construed than the courts did in Artrip's case.

Beyond its overly strict construction of this standard, however, the Federal Circuit misapplied the *Iqbal* standard in treating the claim as contributory infringement, when it was in fact direct infringement.

Though Alcoa is primarily a supplier of aluminum, it also uses and makes machines that infringe upon Artrip's patents. This falls well within the standard of "whoever without authority makes, uses, offers to sell, or sells any patented invention" language of 35 U.S.C. § 271, and thus should have been treated as a direct infringement claim.

That in turn means that Artrip's claim against Alcoa should have been allowed to be further amended beyond the second amended claim, as was his claim against Ball. While Artrip clearly labeled both Alcoa and Ball as co-equal infringers in his claims, to the extent that this specifically was not clear with regard to Alcoa, the proper avenue to address this would have been to allow a third amended complaint against Alcoa, as the court allowed against Ball, because Alcoa was a direct infringer, because it made the machine and Alcoa was an induced infringer because they induced Ball by showing them it was profitable by not having an operator.²

² In addition to previously discussed Rule 15(a), Rule 6 also provides a framework for the proper timetable for computing and extending time limits. As with Rule 15, Rule 6 has traditionally been construed very liberally to prevent good faith attempts at receiving justice from being turned away by

CONCLUSION

Jerry Artrip merely seeks to have his claims heard. Unfortunately, an overly strict reading of case law and the Rules of Federal Civil Procedure have prevented Artrip from receiving his day in court, despite the fact that he offered reasonably specific claims to support his complaint. In addition, one of his patent was prevented from receiving proper consideration at all, because the district court held the 347 patent in stay until the Iqbal standard went into effect. In addition the court erred, with regard to suit 347, that was filed six years from the issue date almost two (2) years before when the Iqbal standard went into effect. By reversing the decision of the Federal Circuit Court of Appeals, this Court can right the miscarriage of justice done at the lower court levels.

technicality. *See United States v. Hurst*, 322 F.3d 1256, 1260-61 (10th Cir. 2003) (reversing an overly strict interpretation of Rule 6 in favor of a more generous timetable to better serve the justice of the case); *Prashker v. Beech Aircraft Corp.*, 24 F.R.D. 315, 316 (D. Del. 1959) (“There can be no question that the observance of the limitations of time in many of the Rules should be accorded a very liberal construction to insure a just result.”). Rule 6(a) states the anniversary date of the initiating event is one year. In this case March 18, 2008 is the initiating event, and March 18, 2009 is the anniversary. Therefore, according to Artrip’s main contention, March 18, 2014 is six (6) years from the anniversary, not six (6) years plus one (1) day. Should any question arise as to whether Artrip’s claims with regard to Alcoa were filed in a timely manner, this standard should apply.

Respectfully submitted,

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