United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 10, 2019*
Decided April 12, 2019

Before

AMY C. BARRETT, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-2795

ANTONIO VERNON,
Plaintiff-Appellant,

v.

CBS TELEVISION STUDIOS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 17 C 568

Matthew F. Kennelly,
Judge.

ORDER

Antonio Vernon sued television networks, production companies, and actors for stealing his idea for a show called *Cyber Police*. The district court dismissed his complaint for want of prosecution. Vernon moved to reopen and file a third amended complaint. The court reinstated the case, which was then reassigned to a different judge.

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* The defendants were not served with process in the district court and are not participating in this appeal. We have agreed to decide this case without oral argument because the brief and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

The new judge reviewed the motions to reopen and file an amended complaint and denied them both because the proposed amended complaint failed to state a claim. In lieu of appealing, Vernon moved for reconsideration (twice) and to file a fourth amended complaint. This appeal concerns only the denials of Vernon's last two motions for reconsideration and to file a fourth amended complaint. We affirm.

Vernon created the show *Cyber Police* and sent three scripts to a production company. Months later, he saw shows including *Intelligence*, *CSI: Cyber*, and *Cybergeddon*, which he thought were copies of *Cyber Police*. He sued in a California district court, alleging breach-of-contract and copyright-infringement claims against various production companies, television networks, and actors involved in the programs. After amending his complaint, Vernon asked for his case to be transferred to the Northern District of Illinois, *see* 28 U.S.C. §§ 1404, 1406, and the California court obliged.

Vernon then moved for leave to file a second amended complaint. The district court—Judge Shadur—dismissed the complaint for failing to include a short and plain statement of the claims, as required by Federal Rule of Civil Procedure 8. Judge Shadur allowed Vernon to file a proposed third amended complaint within five weeks and warned that if he missed the deadline his case would be dismissed for want of prosecution. After five *months* passed, the judge dismissed the case and entered judgment. Two weeks later, Vernon moved to reopen his case and file a third amended complaint. Judge Shadur granted the motion to reopen, accepting Vernon's explanation for the delay. But, without ruling on the motion for leave to amend, Judge Shadur requested that the Executive Committee randomly reassign the case due to his ongoing post-surgical rehabilitation. *See* N.D. ILL. L.R. 40.1.

In September 2017, the case was reassigned to Judge Kennelly. In October, the judge re-reviewed Vernon's motions to reopen and file a third amended complaint and denied them both because Vernon's proposed third amended complaint did not state a claim, and there was no basis to believe that he could file a viable complaint if given the chance. Judge Kennelly "decline[d] to vacate the judgment."

Eight months later, in June 2018, Vernon moved under Federal Rule of Civil Procedure 60 for reconsideration, arguing that his proposed third amended complaint did state a claim. He also moved for leave to file a fourth amended complaint with "significant changes." In a July order, the judge denied his motions, concluding that the latest proposed amended complaint still failed to state a claim. Vernon then moved to

"modify the record," a motion that the judge summarily denied in August. Vernon filed a notice of appeal, and in a prior order we limited the appeal to only the July and August 2018 decisions. *See* FED. R. APP. P. 4(a)(1).

On appeal, Vernon first contends that Judge Kennelly abused his discretion in July when he denied the Rule 60 motion to reconsider because, Vernon argues, the motion adequately explained why his proposed complaint stated a claim. But his argument that his complaint stated a claim was not proper under Rule 60 because it was an argument that could have been addressed by this court, and "[a] Rule 60(b) motion is not a substitute for appeal." *Stoller v. Pure Fishing Inc.*, 528 F.3d 478, 480 (7th Cir. 2008). Otherwise, a litigant could extend the time to appeal beyond the time limits provided in the Federal Rules. *See Banks v. Chicago Bd. of Educ.*, 750 F.3d 663, 667–68 (7th Cir. 2014); *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000). The court did not abuse its discretion in denying Vernon's Rule 60(b) motion.

Regarding the denial of Vernon's request to submit a fourth amended complaint, we agree with the district court that the proposed complaint did not state a claim. The court already had noted in October 2017 that the proposed third amended complaint did not state a breach-of-contract claim. Vernon's allegation of an "idea submission implied contract" with the production company was insufficient to plausibly suggest that the company intended to enter into an agreement and establish an implied-in-fact contract, or that the company was unjustly enriched after receiving his scripts such that we would find an implied-in-law contract. *See Marcatante v. City of Chicago*, 657 F.3d 433, 440, 442 (7th Cir. 2011). And nothing was added in the fourth amended complaint that could plausibly suggest the existence of any contract. For the same reason, Vernon failed to state a claim of tortious interference. *See Webb v. Frawley*, 906 F.3d 569, 577 (7th Cir. 2018).

As for the copyright-related claims, Vernon described the supposedly copied features of his work—agents fighting cybercrime, "romantic strife," and "computer hijacking"—but those features are too common and standard to plausibly suggest that the defendants' shows were "substantially similar" to his. *See Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1100–01 (7th Cir. 2017); *Gaiman v. McFarlane*, 360 F.3d 644, 659–60 (7th Cir. 2004). Vernon argues that he made "significant changes" between the third and fourth amended complaints about his theory of "source misrepresentation" under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2. But Vernon did not allege any misrepresentation made *to him* about the copied works. *See id.*; *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d

801, 844, 849 (Ill. 2005). He instead pleaded only that the defendants copied *Cyber Police* from him and then "misrepresented the source" of the ideas to others.

Last, the court did not abuse its discretion in August when summarily denying Vernon's motion to "modify the record." Vernon's motion argued that in October 2017 Judge Kennelly should not have "decline[d] to vacate the judgment" and instead should have proceeded as if his case were already reopened. But Vernon had presented this contention in previous motions, and we have repeatedly held that, even for pro se litigants, a district judge does not abuse his discretion by declining to revisit the same arguments that he has previously rejected. *See Stoller*, 528 F.3d at 479–80. Further, Vernon has not explained to us how he was prejudiced by Judge Kennelly's 2017 decision. He is preoccupied with what he considers a conflict between Judge Shadur's order granting his motion to reopen and Judge Kennelly's order declining to vacate the judgment because Vernon did not submit a proposed amended complaint that stated a claim. A district court is free to reconsider its own interlocutory rulings, *see Mintz v. Caterpillar Inc.*, 788 F.3d 673, 679 (7th Cir. 2015), so Judge Kennelly was entitled to determine whether the case should be reopened. But, in any case, Judge Shadur expressly reserved for the new judge the question whether the new complaint stated a claim; there is no conflict with Judge Kennelly's order doing just that.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTONIO VERNON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 17 C 568**
	)	
CBS TELEVISION STUDIOS, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Antonio Vernon filed a *pro se* lawsuit in the Central District of California. The judge in that district granted Vernon's request to transfer the case to this district, which is where Vernon resides. The judge to whom the case was previously assigned advised Vernon that his second amended complaint was deficient and ruled that if Vernon did not file a proposed third amended complaint that complied with Federal Rule of Civil Procedure 8, he would dismiss the case for want of prosecution. That same judge dismissed the case for want of prosecution shortly before retiring from the bench. Vernon then filed a timely motion seeking reconsideration of the order and reinstatement of the case, stating that he had been advised that he understood, based on communications with personnel working for the judge, that everything was on hold due to the judge's absence. Vernon has submitted a proposed third amended complaint. The Court has reviewed it to determine whether to reinstate the case.

Vernon has sued CBS Corp., CBS Television Studios, ABC Studios, Walt Disney Co., a representative of Lighthouse Management & Media, Dare to Pass, Yahoo! Inc.,

three representatives of William Morris Endeavor Entertainment, a representative of United Talent Agency, Cinema Gypsy, the actor Laurence Fishburne, and several other defendants. All of the defendants are located in southern California except for one that is located in Nevada.

The gist of Vernon's third amended complaint is that he developed the concept and a synopsis for a dramatic television series called *Cyber Police*, involving "a cybercrime fighting specialist unit of a crime fighting agency," 3rd Am. Compl. ¶ 51, and later wrote and submitted to the Copyright Office scripts for several episodes. He also submitted some or all of these materials to Cinema Gypsy, identified as Fishburne's production company. He says that the defendants produced television series, including *CSI: Cyber*, *Intelligence*, *Criminal Minds: Beyond Borders*, *Cybergeddon*, and *Rewind*, that allegedly adopted the same or similar concepts and used similar character and plot elements as *Cyber Police*.

Vernon has sued the defendants for breach of alleged implied-in-fact and implied-in-law contracts, copyright infringement, false designation of origin, "tortious interference for source misrepresentation," and "third party interference with a contract." He seeks to recover "a financial accounting-based remedy in the $500 million to $ multi-billion order of magnitude." 3rd Am. Compl. ¶ 245.

Vernon's third amended complaint suffers from many of the same deficiencies as the earlier version that the previously assigned judge dismissed. In particular, it does not include a "short and plain statement" of his claim, Fed. R. Civ. P. 8(a)(2), and it does not adequately explain what each defendant did that was wrong. But there are far more significant problems. First of all, Vernon's allegations regarding the submission of his

materials to certain defendants—which is basically all he alleges—do not come close to giving rise to a contract implied in fact or law. A contract implied in fact is one in which a contractual duty is imposed "by a promissory expression which may be inferred from the facts and circumstances and the expression on the part of the promisor which show an intention to be bound." *Marcatante v. City of Chicago*, 657 F.3d 433, 440 (7th Cir. 2011) (internal quotation marks omitted). Vernon alleges nothing suggesting any intention on the part of any of the defendants to be bound to him in any way. A contract implied in law is one where there is no actual agreement, but a duty is imposed to prevent unjust enrichment. *See, e.g., Midcoast Aviation, Inc. v. Gen. Elec. Credit Corp.*, 907 F.3d 732, 743 (7th Cir. 1990). Vernon's allegations do not come close to stating a viable claim along these lines; the elements that he says defendants took from *Cyber Police* (allegations whose truth the Court assumes, but does not find, for present purposes) are far too general to give rise to a claim the defendants were unjustly enriched at his expense. Second, Vernon's copyright-based claims are deficient. For most of the defendants he has not even alleged access to his copyrighted materials, and for all of them, the general similarities he notes between *Cyber Police* and the defendants' shows are too general to permit an inference of substantial similarity. *See generally Tillman v. New Line Cinema*, 295 F. App'x 840, 842-43 (7th Cir. 2008). Third, for the same reasons, Vernon's "source misrepresentation" claims are deficient. And finally, because he has no viable contract–based claims, Vernon's claims for tortious interference with contract fail.

Conclusion

For the reasons stated above, though the Court does not adopt the previously-

assigned judge's finding of want of prosecution, the Court denies Vernon's motion for reconsideration and reinstatement [dkt. nos. 48 & 52], because he has not submitted a viable third amended complaint, and there is no basis to believe he could do so if given another opportunity. The Court therefore declines to vacate the judgment.

Date: October 16, 2017

MATTHEW F. KENNELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 6.2.2
Eastern Division

Antonio Vernon

Plaintiff,

v.

Case No.: 1:17–cv–00568
Honorable Matthew F. Kennelly

CBS Television Studios, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, July 18, 2018:

MINUTE entry before the Honorable Matthew F. Kennelly: On 8/28/2017, another judge of this court dismissed this case due to plaintiff's failure to prosecute it. Judgment was entered at that time. About two weeks later, plaintiff (who is proceeding pro se) filed a motion for reconsideration and to reinstate the case, along with a proposed third amended complaint. Because the judge originally assigned had retired, the case was reassigned to this Court. On 10/16/2017, the Court issued a decision denying plaintiff's motion for reconsideration / reinstatement, concluding that plaintiff's proposed third amended complaint did not state a viable claim. Plaintiff never filed a notice of appeal either from the original judgment or from the denial of the motion for reconsideration / reinstatement. There was no further activity in the case for a little over eight months. Then, on 6/21/2018, plaintiff filed a proposed fourth amended complaint along with what appears to be a motion under Rule 60(b) to vacate the Court's 10/16/2017 order denying reconsideration / reinstatement. The Court denies plaintiff's motion to vacate as well as his request to file the proposed fourth amended complaint. The motion arises, if at all, only under Rule 60(b)(6), and as such was not made within a reasonable time of the Court's earlier order. Plaintiff has offered no viable explanation for his eight month delay (he cites a data loss but says that the data was recovered as of 1/22/2018, about five months before he filed the motion). Second, plaintiff still has not asserted a viable claim. For these reasons, the Court denies plaintiff's motion to vacate as well as his motion to file a fourth amendment complaint and also vacates the hearing set for 7/19/2018. (mk)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Antonio Vernon, Plaintiff, v. CBS Television Studios, et al., Defendants.	)))))))	Case No: 17 C 568 Judge: Kennelly

ORDER

Plaintiff's motion to modify or correct the record is denied [62].

MATTHEW F. KENNELLY
United States District Judge

Date: 8/10/2018

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTONIO VERNON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 17 C 568
	)	
CBS TELEVISION STUDIOS, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

On February 16, 2017 this Court issued a minute entry (Dkt. No. 41) in this action, which had been transferred to this District Court from its place of origin in the Central District of California, that denied plaintiff Antonio Vernon ("Vernon") (1) leave to proceed in forma pauperis, (2) the appointment of counsel and (3) leave to file a proposed Second Amended Complaint, while directing Vernon to file a proposed Third Amended Complaint ("TAC") instead. That minute entry also set a July 19 status hearing to address the anticipated TAC. Unfortunately this Court then fell victim to the sudden onset of spinal stenosis in late May, requiring major surgery on June 8, and so this Court was compelled to issue brief memorandum orders in all cases on its calendar that previously had hearings set in both June and July (the time period required for post-operative nerve rehabilitation is a lengthy one).

Meanwhile no TAC was filed. This Court continued to monitor its calendar while away from the courthouse and, when more than six months had elapsed since the entry of the February 16 minute entry, it dismissed this action on August 28 for want of prosecution (Dkt. No. 45).

Now Vernon has filed a pro se "Motion To Reinstate and File Third Amended Complaint" (Dkt. No. 48, filed on September 14). In that motion Vernon represents that he had in fact prepared a TAC but had not filed it because he "was in limbo awaiting a rescheduled status hearing and contacted the court to understand the status of the case and the timeframe for a rescheduling."[1]

This Court finds that assertion sufficiently plausible to justify granting the motion for reinstatement, and it so orders. But the unfortunate timing of the surgery and the ensuing rehabilitative efforts have left this Court without any law clerk support, requiring the reassignment of substantially its entire calendar to its colleagues on a computer-generated random assignment basis.

Accordingly this Court is now requesting the District Court's Executive Committee to reassign this action to one of its colleagues under the same computer-dictated procedure. It is expected that the assignee judge will then proceed to a determination as to whether leave to file the proposed TAC should be granted.

Milton I. Shadur
Senior United States District Judge

Date: September 20, 2017

[1] In that respect Vernon states that he called members of this Court's staff for that purpose.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTONIO VERNON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 17 C 568
	)	
CBS TELEVISION STUDIOS, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

On February 16, 2017 this Court entered an order based on its extended in-court oral statement on that day, as summarized in this minute entry (Dkt. No. 41):

> For the reasons explained at length in the Court's oral statement, plaintiff's application for leave to proceed in forma pauperis [Dkt. No. 37], plaintiff's motion for attorney representation [Dkt. No. 38] and plaintiff's motion to file a proposed second amended complaint [Dkt. No. 35] are all denied. Again for the reasons explained by the court orally, if plaintiff fails to file, before 3/28/2017 a proposed third amended complaint (designation as such solely to avoid confusion with the proposed second amended complaint) that complies reasonably with the requirements of Fed. R. Civ. P. 8(a), this action will be dismissed for want of prosecution.

Although that target date was extended twice (the last time to July 19), this Court's unanticipated falling victim to severe spinal stenosis that required surgery, followed by a post-surgery rehabilitation process that is still under way, caused it to vacate that last-set status hearing date (see Dkt. No. 44).

None of those delays, however, justifies the protracted failure of plaintiff Antonio Vernon ("Vernon") or his counsel to present their proposed third amended complaint.[1] Accordingly, as forecast in Dkt. No. 41, this action is dismissed for want of prosecution. If Vernon or his counsel wishes to undo the effect of that dismissal, Fed. R. Civ. P. 59(e) permits the filing of a motion to alter or amend the judgment no later than 28 days after today's entry.

Milton I. Shadur
Senior United States District Judge

Date: August 28, 2017

[1] Indeed, Vernon originally filed this action in the Central District of California back in October 2016, then successfully moved for its transfer to this District Court in a November 2 request (Dkt. No. 14). That transfer was implemented on January 25 of this year. Thus Vernon's delay referred to in the text is only a portion of his inaction that supports this order of dismissal for want of prosecution.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 23, 2018

Before

Joel M. Flaum, *Circuit Judge*
Ilana Diamond Rovner, *Circuit Judge*
Michael Y. Scudder, *Circuit Judge*

By the Court:

ANTONIO VERNON, Plaintiff-Appellant,	] Appeal from the United] States District Court for] the Northern District of
No. 18-2795 v.	] Illinois, Eastern Division.
CBS TELEVISION STUDIOS, et al., Defendants-Appellees.	] No. 1:17-cv-00568] Matthew F. Kennelly,] Judge.

ORDER

On consideration of the papers filed in this appeal and review of the short record,

IT IS ORDERED that the appeal is LIMITED to a review of the orders entered on July 18, 2018 and August 10, 2018, denying appellant's two post-judgment motions.

Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a civil case be filed in the district court within 30 days of the entry of the judgment or order appealed. In this case judgment was entered on August 28, 2017, and the order denying appellant's motion to reinstate (filed on September 14, 2017) was entered on October 16, 2017, starting the time to appeal. The notice of appeal filed on August 17, 2018, therefore, is about 10 months late. The district court has not granted an extension of the appeal period, *see* Rule 4(a)(5), and this court is not empowered to do so, *see* Fed. R. App. P. 26(b).

This appeal is timely only as to the orders entered on July 18, 2018, and August 10, 2018, denying appellant Antonio Vernon's motion to vacate (filed on June 21, 2018) and motion to modify or correct (filed on August 6, 2018).

IT IS FURTHER ORDERED that this appeal, as LIMITED by this order, shall proceed to briefing. The briefing schedule is as follows:

1. The plaintiff-appellant shall file his brief and required short appendix on or before December 3, 2018.

NOTE: **Counsel should note that the digital copy of the brief required by Circuit Rule 31(e) must contain the entire brief from cover to cover. The language in the rule that "[the disk contain nothing more than the text of the brief..." means that the disk must not contain other files, not that tabular matter or other sections of the brief not included in the word count should be omitted. The parties are advised that Federal Rule of Appellate Procedure 26(c), which allows for three additional days after service by mail, does not apply when the due dates of briefs are set by order of this court. All briefs are due by the dates ordered.**