

United States Court of Appeals For the First Circuit

Nos. 16-2294
16-2422

GEORGE E. KERSEY,

Plaintiff, Appellant,

v.

BECTON DICKINSON & CO., ESTATE OF JOSEPH R. PARADIS,

Defendants, Appellees,

CAROL PARADIS; WILLIAM MARSHALL,

Defendants.

Before

Howard, Chief Judge,
Thompson and Kayatta, Circuit Judges.

JUDGMENT

Entered: September 7, 2017

After careful de novo consideration, we affirm the dismissal of the amended complaint. We agree that amendment of the complaint did not cure the pleading deficiencies outlined by the district court in its August 25, 2016 memorandum and order. See Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001) ("Absent unusual circumstances, a party seeking to invoke diversity jurisdiction should be able to allege affirmatively the actual citizenship of the relevant parties."); Ill. Cent. Gulf R.R. Co. v. Pargas, Inc., 706 F.2d 633, 636 (stating basis upon which jurisdiction depends cannot be established "by mere inference[]"). Pleading federal question jurisdiction did not cure the pleading deficiency because the claims asserted against Becton Dickinson and Co. ("BD") in the amended complaint did not arise under the Constitution or 42 U.S.C. § 1983. In any event, the complaint was subject to dismissal on the merits because, assuming Massachusetts law applied to the contract claim, an incidental beneficiary of a contract has no standing to enforce the contract and acquires no rights against the contracting parties, see Alicea v. Machete Music, 744 F.3d 773, 784 (1st Cir. 2014); Public Serv. Co. of N.H. v. Hudson

Light & Power Dept., 938 F.2d 338, 341 n.8, 343 n.12 (1st Cir. 1991); and because the patent infringement claim asserted against BD stated no plausible ground for relief. See Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009) and Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007).

The district court was not required to issue summonses until after it screened the complaint and amended complaint under 28 U.S.C. § 1915(e)(2). Because no summonses ever issued and BD did not waive service of the summons and complaint by sending a copy of the proposed Rule 11 motion to Kersey, BD had no obligation to respond to the complaint. See Fed.R.Civ.P. 12(a) (stating when responsive pleading is required). Therefore, the district court properly denied Kersey's serial motions for entry of a default judgment against BD.

As for the district court's award of sanctions against Kersey under Rule 11 of the Federal Rules of Civil Procedure or the amount of the sanction award, Kersey has not sustained his "formidable" burden of establishing that the district court abused its discretion. See Silva v. Witschen, 19 F.3d 725, 727 (1st Cir. 1994) (citing inter alia Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990); Navarro-Ayala v. Nunez, 968 F.2d 1421, 1425 (1st Cir. 1992)).

Finally, Kersey offers no argument in his appellate brief about whether or how the district court erred in denying his motion to dismiss the writ of execution, so this issue has not been properly preserved for appeal. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

The district court's October 17, 2016 and November 21, 2016 orders are affirmed. BD's request for sanctions pursuant to Fed. R. App. P. 38 and 1st Cir. R. 38.0 is denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:

George E. Kersey
Jonathan MacKenzie Short
Carissa L. Rodrigue

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GEORGE E. KERSEY,

Plaintiff,

V.

BECTON DICKINSON AND CO., et al.

Defendants.

Civil No. 16-10495-LTS

MEMORANDUM AND ORDER

October 17, 2016

SOROKIN, J.

On August 25, 2016, the Court dismissed this action and stated that “[i]f Kersey wishes to pursue this action . . . he shall file an amended complaint that cures the pleading deficiencies of the original complaint, as outlined herein. . . . Failure to comply with this Order will result in dismissal of the action.” Doc. No. 19 at 7. Kersey’s Amended Complaint, Doc. No. 24, fails to comply with the Order. For example, the Order noted that “Because Kersey fails to allege his citizenship, the Court is unable to determine whether there is complete diversity of citizenship.” Doc. No. 19 at 5. In his Amended Complaint, Kersey again fails to allege his citizenship for diversity purposes, instead noting his Massachusetts P.O. box and stating that he is not a citizen of New Jersey, South Carolina, or Utah. Doc. No. 24 at 1. This is insufficient to cure the deficiencies as Kersey has still failed to allege his own citizenship. This case is dismissed WITH PREJUDICE.

This Court previously granted Defendant Becton Dickinson & Co.'s (BD) Motion for Sanctions, Doc. No. 15, and directed BD to submit its claim for attorney's fees and costs. Doc.

No. 19 at 7. BD submitted a motion for \$14,945.12¹ in attorney's fees for 39.1 hours of work by two attorneys with billing rates of \$488.75 (11.1 hours) and \$340 (28 hours). Doc. No. 21-1 at 5–7. While Plaintiff filed a document labelled as a “Response to Request of Defendant for Attorney Fees,” the document does not contain any assertion that Plaintiff disagrees with the hours or rates BD calculated.

Rule 11 sanctions “must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.” Fed. R. Civ. P. 11(c)(4). The Rule explicitly allows for the imposition of “part or all of the reasonable attorney’s fees and other expenses directly resulting from the violation” when the sanctions are imposed on a party’s motion. Id. Based on BD’s submission, all of these costs were incurred in drafting the Rule 11 motion. See Doc. No. 21-1 at 5–7. The Court has reviewed BD’s submission, hourly rates, and hours spent on the Rule 11 motion and finds that an award of the fees BD incurred in drafting the Rule 11 motion is reasonable and not more than what is sufficient to deter repetition of this conduct by Kersey. See Fed R. Civ. P. 11(c)(3) (“If warranted, the court may award to the prevailing party the reasonable expenses, including attorney’s fees, incurred for the motion.”). Kersey is ORDERED to reimburse Defendant BD in the amount of \$14,945.12.

SO ORDERED.

/s/ Leo T. Sorokin
Leo T. Sorokin
United States District Judge

¹ In BD’s Motion and the attached affidavit, it cites the figure as \$14,945.15. Doc. No. 21 at 2; Doc No. 21-1 at 2. But by BD’s own math, see Doc. No. 21-1 at 7, as well as by the Court’s lodestar calculation, the amount is actually \$14,945.12.

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CAROL PARADIS; WILLIAM MARSHALL,

Defendants.

Before

Howard, Chief Judge,
Torruella, Lynch, Thompson,
Kayatta and Barron, Circuit Judges.

ORDER OF COURT

Entered: October 31, 2017

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:

George E. Kersey

Jonathan MacKenzie Short

Carissa L. Rodrigue