FILED
United States Court of Appeals
Tenth Circuit

JAN 30 1991

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GEORGE L. MOTHERSHED,

Plaintiff-Appellant,

v.

SOUTHWESTERN BANK AND TRUST COMPANY, POST OAK OIL CO., CARRILEE A. BELL,

Defendants-Appellees.

No. 89-6144
(D.C. No. 88-1871-W)
(W.D. Okla.)

GEORGE L. MOTHERSHED,

Plaintiff-Appellant,

v.

CARROLL E. GREGG, GARY L. BROOKS,

Defendants-Appellees.

No. 89-6314
(D.C. No. 88-1504-W)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before MOORE and BARRETT, Circuit Judges, and SPARR,** District Judge.

**Honorable Daniel B. Sparr, District Judge, United States District Court for the District of Colorado, sitting by designation.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate records, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

The facts governing these appeals are as follows: In 1975, plaintiff, an attorney proceeding here pro se, acquired one-half ownership of an oil and gas lease from Post Oak Oil Co., a defendant in No. 89-6144. At that time, plaintiff and Carrilee A. Bell, also a defendant in No. 89-6144, were married. In 1981, plaintiff conveyed a mortgage interest in the lease to Southwestern Bank, the third defendant in No. 89-6144, as security for a promissory note.

In 1982, plaintiff and Bell were divorced. The divorce decree awarded one-half of plaintiff's interest in the lease to Bell. Plaintiff's retained counsel, defendants in No. 89-6314, represented him in various actions including his divorce from early 1982 through early 1986. In 1982, counsel established a revocable trust with plaintiff's children as beneficiaries. The trust encompassed the proceeds from plaintiff's interest in the lease. That trust was revoked in 1983 in order to prevent a foreclosure action by Southwestern Bank. A new trust was established with counsel as the beneficial owners. Plaintiff, Southwestern Bank, and counsel then entered into an agreement by which forty percent of the proceeds in the lease after operating expenses would be paid to Southwestern Bank towards the retirement of plaintiff's debt and sixty percent would be paid to counsel for payment of their fees.

In 1985, Post Oak Oil Co. and Bell released all their claims against plaintiff. The nature of these claims is unknown. At the same time, plaintiff executed a release of all his claims against Post Oak Oil Co. and Bell in consideration for which he received $110,000.

No. 89-6144

In his complaint in this case, plaintiff alleged that Post Oak Oil Co. and Bell had refused to surrender possession of the lease, but rather continued to drill new oil and gas wells on "lands which have been pooled and/or unitized with the [lease]." Plaintiff alleged that these defendants were trespassers on the lease. He requested (1) that title to the lease be quieted in him, (2) an accounting of the proceeds, (3) damages for conversion, (4) an injunction placing him in possession of the lease, and (5) exemplary damages.

Defendant Southwestern Bank filed an answer to the complaint. Defendants Post Oak Oil Co. and Bell filed motions to dismiss. All defendants filed motions for summary judgment. Plaintiff filed various motions and briefs in opposition.

The district court granted Post Oak Oil Co. and Bell's motions for summary judgment and denied Southwestern Bank's motion for summary judgment. Plaintiff appealed from this order. After plaintiff filed his notice of appeal, he moved in district court for certification pursuant to Fed. R. Civ. P. 54(b). That motion was granted. Therefore we have jurisdiction over this appeal. See Lewis v. B.F. Goodrich Co., 850 F.2d 641 (10th Cir. 1988); Federal Sav. & Loan Ins. Corp. v. Huff, 851 F.2d 316 (10th Cir. 1988). We also note that the district court has since granted plaintiff's motion to dismiss Southwestern Bank, and final judgment has therefore been entered.

On appeal, plaintiff argues that defendants' motions to dismiss and motions for summary judgment were, in effect, answers, and, therefore, the district court erred by allowing defendants to file two answers. He argues that because defendants did not raise affirmative defenses in their motions to dismiss, they were estopped from asserting such defenses in their motions for summary judgment. He also argues that affirmative defenses can only be raised in a motion for summary judgment when that motion is filed prior to the filing of an answer; defendants' "second answers" (the motions for summary judgment) should be stricken; and because defendants failed to defend, equity attached and, therefore, plaintiff should be granted complete relief. Finally, plaintiff argues that the district court erred in granting the motions for summary judgment prior to discovery.

If plaintiff had determined that discovery was necessary in order for him to present facts essential to oppose defendants' motions for summary judgment, he could have moved for a continuance pursuant to Fed. R. Civ. P. 56(f). See Weir v. Anaconda Co., 773 F.2d 1073, 1082 (10th Cir. 1985). This he did not do. We have considered plaintiff's remaining arguments and hold they are without merit.

No. 89-6314

In his complaint, plaintiff alleged that defendants exercised undue influence over him and threatened to abandon their representation of him unless he paid their fees. This threat allegedly forced him to enter into the 1983 trust agreement.

Plaintiff also alleged that defendants misrepresented both the value of the lease and the fact that Southwestern Bank was threatening to foreclose on its note in order to force him to enter into the 1983 trust agreement. Plaintiff alleged that defendants gave him "dishonest, false, untrue" "information, advice and counsel" in order to serve defendants' own interests. Plaintiff claimed unjust enrichment and fraudulent conversion. He also requested that title to the lease be quieted in him, an accounting, imposition of a constructive trust, injunctive relief, exemplary damages, and damages for negligence. Plaintiff later amended his complaint to add a RICO claim.

On August 17, 1989, the district court entered an order denying plaintiff's motion for default and granting defendant Gregg's request for leave to file an answer out of time. On September 5, 1989, the court entered an order granting defendants' motion to dismiss the RICO claim and denying plaintiff's motion to file a motion for summary judgment out of time. On September 13, 1989, a jury trial was held. The court granted defendants' motion to dismiss at the end of plaintiff's case in chief. On

September 14, 1989, plaintiff filed a notice of appeal from the court's orders of August 17 and September 5. Judgment was entered on the docket September 28, 1989.

Initially, defendants question our jurisdiction over this appeal. Although plaintiff denominated his appeal as being taken from interlocutory orders, he filed his notice of appeal after the court announced final judgment. Fully consummated decisions which are but steps towards final judgment merge into that judgment and, therefore, all stages of the proceedings can be reviewed on appeal from final judgment. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). Further, a notice of appeal filed after the announcement of final judgment, but prior to its entry on the docket, will be considered to have been filed after the entry on the docket. Fed. R. App. P. 4(a)(2). Therefore, we have jurisdiction over this appeal.

On appeal, plaintiff argues that attorney negligence or clerical error are not grounds for relieving defendants of a default judgment. Default judgment was not entered against defendants, therefore, the district court could not and did not relieve defendants of any such judgment. The district court did not abuse its discretion by denying plaintiff's motion for default judgment. See Grandbouche v. Clancy, 825 F.2d 1463, 1468 (10th Cir. 1987). Defendants did not fail "to plead or otherwise defend" this action. Fed. R. Civ. P. 55, emphasis added.

Plaintiff also argues that he was substantially prejudiced by the district court's refusal to permit him to file a late motion for summary judgment. Plaintiff filed his motion thirteen days prior to trial. The district court acted within its discretion in denying this motion. Cf. Las Vegas Ice & Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir. 1990).

Plaintiff argues that the district court erred in dismissing his RICO claims. We agree with the district court that plaintiff failed to allege the elements necessary to establish a RICO violation. See United States v. Turkette, 452 U.S. 576, 583 (1981).

Finally, plaintiff argues that because Fed. R. Civ. P. 11 requires the signature of pro se parties on pleadings filed in district court, defendant Gregg's unsigned pleadings should be stricken. Rule 11 requires an attorney or pro se party's signature as certification that the pleading is not frivolous. See Rule 11; White v. General Motors Corp.,Inc., 908 F.2d 675, 679 (10th Cir. 1990). There is no indication that sanctions should be awarded when the signature is missing, but the pleading, as here, is not frivolous.

After the entry of final judgment, the district court awarded defendants attorney's fees in the amount of $27,571.75. Plaintiff has filed a motion in this court to vacate that order. We are without jurisdiction over this order. Plaintiff's proper remedy was either to file a motion to alter or amend the judgment in district court within ten days pursuant to Fed. R. Civ. P. 59(e) or to file a notice of appeal from that order within thirty days. See Fed. R. App. P. 4(a). Plaintiff did neither.

The judgments of the United States District Court for the Western District of Oklahoma are AFFIRMED. Plaintiff's motion to vacate is DENIED.

ENTERED FOR THE COURT
PER CURIAM