Sherrill v. Bressor et al

2024 | Cited 0 times | D. Arizona | April 16, 2024

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Patrick Sherrill,

Plaintiff, v. Martin Bressor, et al.,

Defendants.

No. CV-23-02708-PHX-ROS ORDER

Plaintiff Patrick Sherrill and Defendant Martin Bressor worked together at the Veterans Affairs Medical Center in Phoenix. In 2021 and 2022, Sherrill filed claims with the Equal Employment Opportunity Commission and other government entities regarding Bressor. Bressor then sued Sherrill in state court for defamation. After that case was removed to federal court, Bressor voluntarily dismissed his claim. Sherrill then filed earlier suit was improper. Bressor seeks to dismiss this suit, arguing the amount in controversy is not sufficient to establish diversity jurisdiction and that The complaint contains sufficient factual allegations regarding the amount in controversy and the legal theories do not merit dismissal. Therefore, the motion to dismiss will be denied.

BACKGROUND From 2020 to September 2022, Sherrill worked at the VA in Phoenix. Bressor was supervisor (Doc. 1 at 2). In 2021, Sherrill submitted a complaint to the Veterans Affairs Office of Accountability and Whistleblower Protection regarding learned of that complaint and Bressor allegedly retaliated against Sherrill. Those retaliatory acts prompted Sherrill to file additional complaints with the same office as well as complaints with the EEOC and Management. Bressor then filed suit against Sherrill in state court.

state court complaint, filed on September 28, 2022, alleged a CV-23-1382, Doc. 1-4 at 6). The complaint alleged Sherrill had stated Bressor -10 at 36). The complaint recounted additional statements, including statements Sherrill had made in his official filings with the EEOC and other entities. (CV-23-1382, Doc. 1-10 at 36-37). Sherrill filed a motion to dismiss arguing some of the statements identified in the complaint could not be the basis for a defamation claim because those

statements were made in official proceedings. Sherrill y the statute of limitations.

The state court granted motion to dismiss with leave to amend. The state court reasoned the complaint alleged the defamation claim was based on a single statement, but the complaint did not identify which of the various statements was that single statement. The state court also noted that depending on which of the statements was at issue, the defamation claim might be untimely. The state court explained defamation claims are subject to a one-year statute of limitations 28, 2022 1

, would not CV-23-1382, Doc. 1-10 at 3). A few weeks after that order, Bressor filed an amended complaint. (CV-23-1382, Doc. 1-4 at 2). The amended complaint contained largely the same set of allegations, but the amended complaint made clear the defamation claim was based exclusively on a statement by Sherrill that for making statements regarding veterans CV-23-1382, Doc. 1-4 at 6). 1 This appears to have been a typo and the state court likely meant September 28, 2021.

After the amended complaint was filed in state court, the United States removed the case to federal court. The United States believed was based on actions Sherrill took within the scope of his employment at the VA. (CV-23-1382, Doc. 1 at 2). Thus, the United States believed should be viewed as a claim under the Federal Tort Claims . Pursuant to the FTCA, the United States was substituted as the named defendant and the United States then filed a motion to dismiss. That motion argued the FTCA did not allow defamation claims but, even if it did, Bressor had not exhausted his administrative remedies before filing suit. (CV-23-1382, Doc. 5). On July 31, 2023, ten days after the motion to dismiss was filed, Bressor filed a notice of voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). (CV-23- 1382, Doc. 9).

Around the time Bressor dismissed his complaint, Sherrill moved to Utah. Sherrill

On December 27, 2023, Sherrill filed the present case in this court based on diversity jurisdiction.

2 Sherrill alleges two claims under Arizona Both of these claims are based on earlier suit. Sherrill alleges the earlier suit caused him to suffer more than $75,000 in damages based on significant emotional distress, financial c. 1 at 10). Bressor filed a motion to dismiss, arguing the amount in controversy are not sufficient but, even if they are are not viable.

2 Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001). Therefore, allegations regarding residency are not sufficient to establish diversity jurisdiction. However, the complaint also alleges Sherrill moved to Utah to get away from Bressor. Accordingly, it seems likely the parties have diverse citizenships. To ensure the citizenship requirement is met, the parties must comply with Federal Rule of Civil Procedure 7.1(a)(2) that requires all parties in a diversity case file a statement identifying their citizenship.

ANALYSIS I. Diversity Jurisdiction

Federal courts ha Lincoln Prop. Co. v. Roche, 546 U.S. 81, 89 (2005). Bressor argues the amount in controversy requirement is not met because allegation he suffered more than $75,000 in damages. (Doc. 8 at 5). Because Sherrill filed

this case in federal court, Bressor faces a high burden in challenging the amount in controversy.

When a case is originally filed in federal court, the amount in controversy is Geographic Expeditions, Inc. v. Est. of Lhotka ex rel. Lhotka, 599 F.3d 1102, 1106 (9th Cir. 2010). When looking a complaint, the amount of damages a plaintiff alleges appear[s] to Id. The Ninth Circuit recognizes three situations clearly meet the legal certainty standard: 1) when the terms of a contract limit the plaintiff s possible recovery; 2) when a specific rule of law or measure of damages limits the amount of damages recoverable; and 3) when independent facts show that the amount of damages was claimed merely to obtain federal court jurisdiction. Naffe v. Frey, 789 F.3d 1030, 1040 (9th Cir. 2015). The present case does not fall under any of these situations.

The parties have not identified a contract that might li nor have they identified a damages. In addition, there is no indication or argument that Sherrill alleged the amount

in controversy merely to obtain federal jurisdiction. Id. S damages are based on Such damages are hard to quantify but unable to recover more than $75,000. See Tarter v. Bendt, 2021 WL 282265, at *12 (Ariz.

Ct. App. 2021) (discussing award of $150,000 for reputational harm). Therefore, the amount in controversy requirement for diversity jurisdiction is satisfied.

II. Wrongful Institution of Civil Proceedings

That claim requires allegations supporting five elements. The defendant must have: civil action which was (2) motivated by malice, (3) begun without probable cause, (4) Bradshaw v. State Farm Mut. Auto. Ins. Co., 758 P.2d 1313, 1319 (Ariz. 1988). Bressor challenges the sufficiency of the complaint on only the fourth element re favorable termination. ccording to Bressor, that requirement can be met only if the (Doc. 8 at 6). Because Bressor voluntarily dismissed his earlier suit before any ruling on

the merits, he believes are not sufficient. Arizona does not Bressor proposes.

The favorable termination element requires looking form of prior Frey v. Stoneman, 722 P.2d 274, 279 (Ariz. 1986). A plaintiff

choosing to a confession that the case was without merit. Id. is met. See Lane v. Terry H. Pillinger, P.C., 939 P.2d 430, 432 (Ariz. Ct. App. 1997) (noting voluntary dismis may under some circumstances Alternatively, voluntarily dismissing a case may not reflect anything about the merits, such as when a

Frey, 722 P.2d at 279. In that situation, the The allegations and arguments in the current case, as well as the record in the earlier suit, establish suit can plausibly be construed

Bressor dismissed his case shortly after the United States filed a motion to dismiss presenting two arguments. The United States argued actionable under the FTCA and, even if actionable, Bressor had not exhausted his

administrative remedies before filing suit. Bressor now argues he voluntarily dismissed the case only so that he could pursue his administrative remedies. That argument, however, decision to name Sherrill as the defendant was improper. Once he exhausts his administrative remedies, Bressor plans to initiate another suit asserting the onduct. Thus, Bressor plans to pursue a FTCA claim. In that situation, the only proper defendant will be the United States. See Lance v. United States in an FTCA action Having confirmed that is his intent, identify

Sherrill as the defendant, instead of the United States, was doomed from the start.

against Sherrill was flawed for a related reason regarding the FTCA. Bressor sued Sherrill for defamation. Bressor now argues he will pursue that claim against the United States once he exhausts his administrative remedies. But it is well-established the FTCA Kaiser v. Blue Cross of California, 347 F.3d 1107, 1117 (9th Cir. 2003). See

also Roundtree v. United States, 40 F.3d 1036, 1039 n.2 (9th Cir. 1994) (noting defamation Accordingly, Bressor defamation claim, even after he exhausts his administrative remedies, has no chance of

success against the United States. 3

In summary, complaint alleged a claim against the wrong party was doomed as a matter of law. Under these circumstances, choice to dismiss his claim may plausibly be viewed as Frey v. Stoneman, 722 P.2d 274, 279 (Ariz. 1986). Accordingly, Sherrill claim for wrongful institution of civil proceedings will be allowed to proceed. 4 3 Bressor argues when Sherrill committed the allegedly wrongful acts, but Bressor concedes the certification that conclusion. (Doc. 8 at 2). Bressor at presumption once his administrative remedies are exhausted. Bressor would be free to make such a challenge but there is no requirement he exhaust his administrative remedies before doing so. De Martinez v. Lamagno, 515 U.S. 417, 434 (1995) (holding scope of employment certifications are subject to judicial review). In fact, if Bressor believed Sherrill was not acting within the scope of his employment the most appropriate time to raise that issue was 4 This conclusion may need to be revisited upon development of the record.

III. Abuse of Process

Bressor argues this claim is barred by the statute of limitations or, if timely, the claim fails for some other unidentified reason.

Arizona law explicitly identifies malicious prosecution 5

claims, as subject to a one-year statute of limitations. A.R.S. § 12-541(1). That statute does not mention abuse of process claims. Bressor argues, however, that malicious prosecution and abuse of process claims are so similar that they must be subject to the same statute of limitations. The Arizona Court of Appeals has addressed and rejected this exact argument. Zeman v. Brian H. Baumkirchner, 2016 WL 3176442, at *2 (Ariz. Ct. App. 2016). 6

That court noted and claims. Id. And while the one-year limitations period found in A.R.S. § 12- claims for malicious prosecution, claims. Id. The Arizona Court of Appeals concluded the failure to mention abuse of process claims indicated an intentional choice. Therefore, A.R.S. § 12-542, the statute of limitations that , was deemed applicable to abuse of process claims. Id.

The Court has not located any Arizona authority disagreeing with the interpretation of Arizona law in Zeman. Moreover, this Court previously relied on Zeman to conclude See also Sport Collectors Guild Inc. v. Bank of Am. NA, 2017 WL 3050979, at *7 (D. Ariz. 2017). Based on available authority, the Arizona Supreme Court would apply a two-year limitations period to an abuse of process claim. Bressor filed his state court complaint on September 28, 2022, and the present suit was filed on December 27, 2023, well within the 5 Arizona courts often use the terms interchangeably. See Giles v. Hill Lewis Marce, 988 P.2d 143, 145 n.1 (Ariz. Ct. App. 1999). 6 Bressor argues this is an unpublished case that cannot be cited. Arizona allows for citations to unpublished decisions Sup. Ct. R. 111(c)(1)(C). The decision was issued in 2016, meaning it may be cited under Arizona rules. But, in any event, it is unlikely the Arizona Supreme Court rule regarding citation of unpublished cases would govern in federal court. See, e.g., Emps. Ins. of Wausau v. Granite State Ins. Co., 330 F.3d 1214, 1220 (9th Cir. 2003) (two-year statute of limitations.

Bressor presents another argument seeking dismissal of the abuse of process claim to allow for discussion. In a section of his motion to dismiss provides quotations from five Arizona cases. Those quotations are not accompanied by any analysis. Instead, after quoting the five cases Bressor argues:

[Sherrill] has alleged that good faith offers of an equitable remedy in conjunction with an acceptance of nominal monetary relief is somehow related to a malicious intent and can only be explained as an improper motive and not within the scope of tort law. We disagree. (Doc. 8 at 9) (emphasis in original). This sentence appears to contain errors as, on its face, it argues Sherrill is pursuing but Bressor Presumably Sherrill is not, in fact, arguing his abuse of process tort claim But if Sherrill were arguing that point, presumably Bressor would be happy to agree.

alternative argument for dismissing the abuse of process claim, his reply does not contain any

discussion reply argues only the statute of limitations issue. (Doc. 10 at 5-6). The Court Greenwood v. F.A.A., 28 F.3d 971, 977 (9th Cir.

1994). Absent meaningful development of an argument for dismissing the abuse of process claim, the claim will be allowed to proceed. 7

IV. Leave to File Surreply

Sherrill filed a motion seeking leave to file a surreply. (Doc. 11). Sherrill believes Bressor -2). Bressor opposes the motion, claiming his reply his motion to dismiss. (Doc. 12 at 2). There is no need to correct the record. Therefore, the request to file the surreply will 7 (Doc. 8 at 9). That request is premature and will be denied. be denied.

Accordingly, IT IS ORDERED the Motion to Dismiss (Doc. 8) is DENIED IN FULL. IT IS FURTHER ORDERED the Motion to File Surreply (Doc. 11) is DENIED. Dated this 16th day of April, 2024.

Honorable Roslyn O. Silver Senior United States District Judge