

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 17-12694  
Non-Argument Calendar

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D.C. Docket No. 6:13-cv-01746-GAP-KRS

ESTATE OF GREGORY V. FAULL,  
by Curt Jacobus, Esq., his duly appointed Personal Representative,

Plaintiff-Appellant,

versus

JOHN MCAFEE,

Defendant-Appellee,

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Appeal from the United States District Court  
for the Middle District of Florida

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(February 13, 2018)

Before WILSON, JORDAN and HULL, Circuit Judges.

PER CURIAM:

The estate of Gregory V. Faull (“the Estate”) appeals from the district court’s order denying as futile its motion for leave to file a third amended complaint. This case arises out of the November 11, 2012 murder of Gregory Faull at his vacation home in Belize, allegedly at the hands of the defendant John McAfee and/or individuals acting on McAfee’s orders. On appeal, the Estate argues that the district court should have granted its motion for leave to amend because the allegations in the proposed third amended complaint and attached transcript of a documentary film about McAfee stated a plausible claim for wrongful death against McAfee under Florida law. After careful review, we reverse the denial of the Estate’s motion for leave to amend and file the third amended complaint and remand for further proceedings consistent with this opinion.

### **I. MOTIONS TO AMEND**

We review the district court’s denial of a motion for leave to amend a complaint for an abuse of discretion. Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla., 641 F.3d 1259, 1264 (11th Cir. 2011). “But we review de novo the underlying legal conclusion of whether a particular amendment to the complaint would be futile,” accepting as true the well-pleaded factual allegations in the proposed amended complaint and construing them in the light most favorable to the plaintiff. Chang v. JPMorgan Chase Bank, N.A., 845 F.3d 1087, 1092 n.2,

1093-94 (11th Cir. 2017) (internal quotation marks omitted). District courts should “freely give” leave to amend a complaint “when justice so requires.”

Fed. R. Civ. P. 15(a)(2). Nevertheless, the district court properly may deny leave to amend if the amendment would be futile, such as when the complaint, as amended, would still be subject to dismissal for failure to state a claim for relief.

Chang, 845 F.3d at 1094.

“To state a claim for relief, ‘a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.’” Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009)). In assessing whether a complaint states a plausible claim, courts may consider documents attached to the complaint as part of the complaint. Reese v. Ellis, Painter, Ratterree & Adams, LLP, 678 F.3d 1211, 1215-16 (11th Cir. 2012). A claim is facially plausible when the plaintiff pleads sufficient facts from which the district court may reasonably infer that the defendant is liable for the alleged misconduct. Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949.

This standard requires that the plaintiff do more than “tender[] naked assertion[s] devoid of further factual enhancement” or plead facts that are “merely consistent with a defendant’s liability.” Id. (internal quotation marks omitted) (second alteration in original). Nevertheless, a plaintiff “need not prove his case on the pleadings” in order to state a claim for relief, and a district court may not

reject a well-pleaded complaint “simply because it strikes a savvy judge that actual proof of those facts is improbable.” Speaker v. U.S. Dep’t of Health & Human Servs., 623 F.3d 1371, 1386 (11th Cir. 2010); Watts v. Fla. Int’l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007) (internal quotation marks omitted).

Under Florida law, a decedent’s personal representative may bring a wrongful death action on behalf of the decedent’s estate and survivors “[w]hen the death of a person is caused by the wrongful act . . . of any person . . . and the event would have entitled the person injured to maintain an action and recover damages if the death had not ensued . . . .” Fla. Stat. § 768.19; see also id. § 768.20.

## **II. ALLEGATIONS IN THE THIRD AMENDED COMPLAINT**

Here, the well-pleaded factual allegations in the third amended complaint, accepted as true, plausibly state a wrongful death claim against McAfee under Florida law for the death of Faull. The third amended complaint does not simply “tender[] naked assertion[s]” of McAfee’s liability without providing “further factual enhancement” to support those allegations. Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949. Rather, as described below, the third amended complaint and attached documentary transcript set out detailed factual allegations concerning: (1) McAfee’s employment of armed guards and past history of using those guards to violently assault individuals with whom he had disagreements; (2) the dispute between McAfee and Faull in the days leading up to Faull’s murder; (3) the

circumstances of Faull's death; and (4) McAfee's flight from Belize to avoid police questioning regarding the murder.

The third amended complaint contains the following allegations. At the time of the murder, McAfee and Faull were next door neighbors, living in adjacent beachfront properties in the Mata Grande area of Ambergris Caye, Belize.

McAfee had lived in Belize for some time prior to Faull's murder, employed a contingent of armed guards (some of whom were gang members or had criminal records) for personal protection, possessed numerous guns and tasers, and kept a pack of 8 to 12 aggressive dogs. On one occasion in 2011, prior to Faull's murder, McAfee allegedly directed several individuals to severely beat a local man named David Middleton, with whom McAfee had a disagreement, ultimately resulting in Middleton's death.

Prior to the murder, Faull and McAfee became embroiled in a heated dispute regarding McAfee's violent dogs after Faull witnessed the dogs attacking a young female tourist. Faull confronted McAfee about the attack, and also complained to local authorities about the problems caused by McAfee's dogs. As a result of this dispute, McAfee threatened to kill Faull if he ever set foot on McAfee's property again.

Subsequently, on November 8 or 9, 2012, McAfee's dogs were poisoned on his property. The morning after McAfee's dogs were poisoned, McAfee directed

one of his employees, Cassian Chavarria, to deposit \$5,000 into the bank account of a “local violent male,” Eddie McKoy. Two days later, in the morning hours of November 11, 2012, McKoy called Chavarria and asked Chavarria to come pick him up at a location approximately 600 feet from Faull’s home. Later that morning, Faull’s housekeeper discovered Faull’s body lying in a pool of blood on the floor inside his house. The police investigation revealed that Faull was shot once in the head with a 9mm handgun, had multiple Taser marks on his body, and had a foreign fingernail embedded in his scalp. McAfee allegedly used Tasers to discipline his dogs.

Belizean authorities quickly identified McAfee as the primary suspect in Faull’s murder, and made numerous attempts to locate McAfee for questioning. By his own admission, McAfee intentionally hid from authorities to avoid being questioned about Faull’s murder or taken into custody. McAfee eventually fled to Guatemala in December 2012, where he was apprehended by Guatemalan authorities. After being taken into Guatemalan custody, McAfee, again by his own admission, faked a heart attack, allowing him to travel to the United States and avoid being extradited back to Belize to face questioning regarding Faull’s murder. McAfee has not returned to Belize since the murder and has never made himself available for questioning by the Belizean authorities about the murder.

Accepting the above allegations as true, the Estate pled sufficient facts from which the district court could reasonably infer that McAfee paid McKoy<sup>1</sup> to kill Faull and, therefore, is liable for Faull's death under Florida's wrongful death statute. See Fla. Stat. § 768.19; Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949. In concluding otherwise, the district court focused on the perceived lack of evidentiary support in the attached documentary transcript for some of the allegations in the third amended complaint, noting that some allegations were "disputed" or based on hearsay and that "the Estate has not shown that . . . it has been able to obtain statements from individuals with personal knowledge or other evidence that would support the most important allegations regarding McAfee's liability."

Whether the allegations have "evidentiary support," however, is not the correct inquiry in considering whether a plaintiff's complaint states a claim for relief. See Speaker, 623 F.3d at 1386 (explaining that plaintiff need not prove his case on the pleadings in order to state a claim). Nor does it matter whether the district court believes it unlikely that the plaintiff ultimately will be able to produce evidence in support of his claims. See Watts, 495 F.3d at 1295. Rather, the crucial

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<sup>1</sup>Although the district court correctly noted that, in the documentary transcript, McKoy denied receiving any payment from McAfee or committing the murder, we do not think this denial renders the allegations in third amended complaint implausible. That an accused hitman would deny involvement in a murder-for-hire plot during a recorded interview strikes us as unremarkable, and indeed, even McKoy stated that he would have to be "crazy to tell somebody that [he] killed someone."

question in determining whether or not a proposed amended complaint states a claim—and therefore whether the amendment would be futile—is whether the complaint “contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949 (emphasis added); Chang, 845 F.3d at 1094. As explained above, the Estate has satisfied this standard. Accordingly, we reverse the district court’s order denying as futile<sup>2</sup> the Estate’s motion for leave to amend because the Estate’s proposed third amended complaint stated a plausible claim for relief.

The Estate argues that we should go one step further, and direct the district court on remand to enter a default judgment against McAfee on the third amended complaint<sup>3</sup> and conduct a jury trial on the issue of damages. The Estate contends that McAfee remains in default due to his prior failures to respond to the initial,

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<sup>2</sup>The district court also indicated that its decision to deny the Estate’s motion for leave to amend was based in part on the Estate’s repeated failure to cure the deficiencies identified in its previous complaints. However, the third amended complaint now states a plausible claim for relief and has cured the prior deficiencies.

<sup>3</sup>Prior to filing its motion for leave to file the third amended complaint, the Estate moved the district court for a default judgment on its second amended complaint. The district court denied the Estate’s motion for a default judgment, concluding that the second amended complaint failed to state a plausible claim for wrongful death against McAfee because many of the central allegations concerning McAfee’s liability for Faull’s murder were alleged “on information and belief” and lacked factual support.

We recognize that the Estate argues on appeal that, if we do not allow the third amended complaint, we should instead reverse the district court’s order denying the Estate’s motion for a default judgment on the second amended complaint. Because we conclude that the district court erred in denying as futile the Estate’s motion for leave to amend and to file the third amended complaint, the third amended complaint now becomes the operative complaint, and we do not address on appeal the district court’s default judgment ruling as to the second amended complaint.



amended, and second amended complaints in this case, and that the third amended complaint “fully states the factual basis” for entry of a default judgment.

A district court may enter a default judgment when a defendant has failed to plead or defend. Fed. R. Civ. P. 55(a), (b)(2); Surtain v. Hamlin Terrace Found., 789 F.3d 1239, 1244 (11th Cir. 2015). Default judgments are generally disfavored, however, in light of our strong policy of determining cases on the merits. Surtain, 789 F.3d at 1244-45. Thus, entry of a default judgment is warranted only where the pleadings provide a sufficient basis for such judgment. Id. at 1245. The standard for determining whether a sufficient basis exists is “akin to that necessary to survive a motion to dismiss for failure to state a claim.” Id. Nevertheless, district courts have broad discretion to determine whether a default judgment is appropriate in a given case, including the authority to conduct hearings to, among other things, “establish the truth of any allegation by evidence” or “investigate any other matter.” Fed. R. Civ. P. 55(b)(2)(C), (D); Surtain, 789 F.3d at 1244 (stating that denial of a motion for default judgment is reviewed for an abuse of discretion).

We deny the Estate’s request to direct entry of a default judgment on remand on the third amended complaint. The third amended complaint alleges a plausible claim for relief, but is only now being allowed filed. Thus, because the third amended complaint is now the operative complaint, McAfee must be given an opportunity to respond to the third amended complaint. See Krinsk v. SunTrust

Banks, Inc., 654 F.3d 1194, 1202 (11th Cir. 2011) (explaining that a defendant “will be allowed to plead anew in response to an amended complaint, as if it were the initial complaint, when the amended complaint changes the theory or scope of the case” (internal quotations and alteration omitted)); Fed. R. Civ. P.

12(a)(1)(A)(i) (providing that a defendant must serve an answer within 21 days after being served with a complaint). Depending on whether or not McAfee files an answer to the third amended complaint on remand, the district court may then consider in the first instance the issue of entry of a default judgment on the third amended complaint. See Fed. R. Civ. P. 55(b)(2).

The district court’s order denying the Estate’s motion for leave to amend and file the proposed third amended complaint is reversed and vacated, and this case is remanded to the district court for further proceedings as to the third amended complaint.

**REVERSED, VACATED AND REMANDED.**