[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 10-13822
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 27, 2011
JOHN LEY
CLERK

D.C. Docket No. 5:09-cv-00447-TJC-GRJ

WILLIAM L. RICHARDS, JR.,

Plaintiff-Appellant,

versus

FINANCIAL SERVICES AUTHORITY,

Defendant-Appellee.

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

(May 27, 2011)

Before WILSON, ANDERSON and BLACK, Circuit Judges.

PER CURIAM:

William Richards, Jr. appeals the district court's dismissal of his diversity complaint for lack of personal jurisdiction over the defendant, Financial Services Authority ("FSA"), a nongovernmental regulator of the financial industry in the United Kingdom, as well as the district court's denial of his request for leave to amend his complaint. The district court dismissed Richards's complaint with prejudice because there was no causal connection between Richards's cause of action and FSA's activities in the forum state in order to confer specific jurisdiction, because Richards offered no proof to refute FSA's evidence that it had nothing to do with the alleged acts in the complaint and that the documents supporting the complaint were forgeries. The court also rejected Richards's argument that FSA was subject to personal jurisdiction based on a forum selection clause in a November 2008 contract, because FSA presented unrefuted proof that the contract was forged. The court also denied Richards's request for leave to amend his complaint to set forth a basis for personal jurisdiction, noting that his complaint relied "entirely upon forged documents," and concluding that any amendment would be futile.

I.

On appeal, Richards argues that the district court erred in dismissing his complaint for lack of personal jurisdiction because he was only required to make a

prima facie showing of jurisdiction to defeat a motion to dismiss, which he did by referencing the November 2008 contract, which provided that the parties would submit to jurisdiction in the appropriate United States federal district court. Richards also argues that he alleged a basis for specific jurisdiction based on FSA's telephonic and electronic communications into Florida. Richards argues that the affidavits submitted by FSA are contradictory, and that the court accordingly should have viewed the facts in the light most favorable to him.

We review a district court's dismissal for lack of personal jurisdiction *de novo*. *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162, 1166 (11th Cir. 2005). The district court must accept the facts alleged in the complaint as true, to the extent that they are uncontroverted by the defendant's affidavits. *Madara v. Hall,* 916 F.2d 1510, 1514 (11th Cir. 1990). Where the defendant submits affidavits contrary to the allegations in the complaint, however, the burden shifts back to the plaintiff to submit proof which establishes a basis for the court's exercise of jurisdiction over the defendant, unless the defendant's affidavits contain only conclusory assertions that the defendant is not subject to jurisdiction. *Stubbs v. Wyndam Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006). Where the plaintiff's complaint and supporting affidavits and documents conflict with the defendants' affidavits, the court must

construe all reasonable inferences in favor of the plaintiff. *Id*. We do not liberally construe the pleadings of a licensed attorney proceeding *pro se*, as we otherwise would for a *pro se* litigant. *Olivares v. Martin*, 555 F.2d 1192, 1194 n.1 (5th Cir. 1977).

"A federal court sitting in diversity may exercise personal jurisdiction to the extent authorized by the law of the state in which it sits and to the extent allowed under the Constitution." *Stubbs*, 447 F.3d at 1360. Accordingly, in Florida, a plaintiff in federal court bears the burden to establish (1) that a nonresident defendant is subject to jurisdiction under Florida's long-arm statute, and (2) that sufficient minimum contacts exist to satisfy the due process requirements of the Fourteenth Amendment. *Id*. at 1360*; see also Madara,* 916 F.2d at 1514.

Federal courts sitting in diversity in Florida must apply state law regarding the applicability of forum selection clauses in conferring personal jurisdiction. *Alexander Proudfoot Co. World Headquarters, L.P. v. Thayer*, 877 F.2d 912, 919 (11th Cir. 1989). "In Florida, conferral of personal jurisdiction clauses are not enforced unless an independent ground for personal jurisdiction exists under the Florida Long Arm Statute[.]" *Id*. at 918 (citing *McRae v. J.D./M.D., Inc*., 511 So.2d 540 (Fla.1987)).

Florida's long-arm statute provides that:

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself . . . to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
>
> > (a) Operating, conducting, engaging in, or carrying on a business venture in this state or having an office or agency in this state.
> >
> > (b) Committing a tortious act within this state.
> >
> > . . . .
> >
> > (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
> >
> > > 1. The defendant was engaged in solicitation or service activities within this state; or
> > >
> > > 2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.
> >
> > (g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

FLA. STAT. § 48.193(1).[1]

---

[1] Florida's long-arm statute also provides for general jurisdiction where a defendant is "engaged in substantial and not isolated activity" within Florida. FLA. STAT. 48.193(2). The district court found that FSA was not engaged in substantial activity in Florida to trigger the general jurisdiction provision of the long-arm statute. Because Richards does not dispute this finding on appeal, he has abandoned any argument that FSA is subject to general jurisdiction. *See Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (holding that a *pro se* litigant abandons any issues he does not brief on appeal).

Because the construction and application of the Florida long-arm statute is a question of Florida law, we must construe the long-arm statute as would the Florida Supreme Court. *See Horizon*, 421 F.3d at 1166-67. A mere showing that a nonresident company engaged in telephonic and electronic communications into the state of Florida is insufficient to find that a company "conducted business" in Florida under FLA. STAT. § 48.193(1)(a). *See Horizon*, 421 F.3d at 1167 (citing *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 628 (11th Cir. 1996)). However, allegations about an out-of-state defendant's telephonic, electronic, or written communications into Florida are sufficient to trigger jurisdiction under § 48.193(1)(b) of the long-arm statute if there is a"connexity" between the alleged communications and a cause of action in tort. *Id*. at 1168.

Here, the district court properly dismissed Richards's complaint. First, because Florida law does not allow a forum selection clause to serve as an independent ground for the exercise of personal jurisdiction, the November 2008 contract alone is not an adequate basis to exercise jurisdiction over FSA, even if the contract was valid. Next, Richards failed to present any proof or evidence to rebut FSA's evidence that it was in no way involved in the events alleged in the complaint, and accordingly, failed to meet his burden of establishing personal jurisdiction. Additionally, Richards's argument that FSA submitted contradictory

affidavits is factually inaccurate, and does not in any way refute FSA's evidence that the documents supporting Richards's complaint were forgeries. Richards's argument that FSA is subject to specific jurisdiction based on e-mail communications is similarly without merit, as Richards has failed to present any evidence to refute FSA's proof that the e-mail was fraudulent. Accordingly, the district court correctly found that it had no basis to exercise personal jurisdiction over FSA pursuant to the Florida long-arm statute.

II.

Richards also argues that the district court erred in finding that he could not establish a factual basis for personal jurisdiction over FSA if granted leave to amend, because he has alleged a basis for specific jurisdiction over FSA under the Florida long-arm statute based on FSA's e-mail communication.

We review a district court's denial of a motion to file an amended complaint for abuse of discretion. *Hall v. United Ins. Co. of America*, 367 F.3d 1255, 1262 (11th Cir. 2004). "Ordinarily, if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, leave to amend should be freely given." *Id*. (internal quotations and citations omitted). Conversely, a district court may properly deny leave to amend the complaint under Fed.R.Civ.P. 15(a) when such amendment would be futile, such as when the amended complaint would still

be subject to dismissal. *Id*. at 1262-63. Additionally, "[w]here a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly" pursuant to Fed.R.Civ.P. 7(b). *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009) (quoting *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1222 (11th Cir. 1999)).

The district court did not abuse its discretion in denying Richards's request for leave to amend his complaint because Richards failed to file a separate motion for leave to amend his initial complaint, and thus, failed to comply with Fed.R.Civ.P. 7(b). Moreover, any amendment that Richards could make would be futile, because there is no basis for subjecting FSA to personal jurisdiction because Richards has not asserted that he has any facts or evidence that would demonstrate that FSA was in any way involved in the events alleged in his complaint. We accordingly affirm the district court's denial of Richards's request for leave to amend and dismissal of Richards's complaint with prejudice. However, because we grant FSA's motion for sanctions against Richards in the form of reasonable attorney's fees and double costs, we remand to the district court for the limited purpose of calculating and assessing appropriate sanctions.

AFFIRMED, WITH LIMITED REMAND.[2]

[2] We deny Richards' "Motion of Appellant Requesting Appeals Court to Vacate the Order of the Trial Court and Granting Appellant Leave to Amend Pleadings."