[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13222

Non-Argument Calendar

CATHY COHEN,

Plaintiff-Appellant,

versus

BURLINGTON, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:18-cv-81420-BB

Before ROSENBAUM, JILL PRYOR, and NEWSOM, Circuit Judges.

PER CURIAM:

Plaintiff Cathy Cohen appeals the district court's order denying her motion to vacate a default judgment entered in her favor against Burlington, Inc. as well her motion seeking leave to amend the complaint to name a new defendant. We do not reach the merits of the issues that Cohen raises on appeal. Instead, because the allegations in Cohen's complaint failed to establish diversity jurisdiction, we must vacate and remand with instructions for the district court to dismiss the case for lack of subject matter jurisdiction.

I.

In 2016, Cohen was shopping at a Burlington Coat Factory store in Florida when a product display allegedly injured her. Through her attorney Michael Gulisano, Cohen filed a lawsuit in district court in the Southern District of Florida, bringing a negligence claim against defendant "Burlington, Inc."

In the complaint, Cohen alleged that the district court had subject matter jurisdiction under 28 U.S.C. § 1332 because the matter was between citizens of different states and the amount in controversy exceeded $75,000. According to the complaint, Cohen was a citizen of North Carolina, and Burlington, Inc. was a corporation "formed under the laws of New Jersey." Doc. 1 at 1.[1] The

[1] "Doc." numbers refer to the district court's docket entries.

complaint contained no allegation about Burlington, Inc.'s principal place of business.

Cohen served CT Corporation System, whom she identified as Burlington, Inc.'s registered agent, with a summons and a copy of the complaint. When Burlington, Inc. failed to file an answer or otherwise timely respond to the complaint, the district court clerk entered a default. After a hearing, the district court entered a final default judgment against Burlington, Inc. and awarded Cohen $677,774.75 in damages. The district court did not address whether the allegations in Cohen's complaint were sufficient to establish diversity jurisdiction.

When Cohen sought to collect the judgment, she ran into difficulty because, as it turned out, no entity named "Burlington, Inc." existed. Cohen then filed a motion to amend the default judgment so that all references to "Burlington, Inc." would become "Burlington, Inc. a/k/a Burlington Stores, Inc. a/k/a Burlington Coat Factory Warehouse Corporation." Gulisano, her attorney, represented to the court that Burlington, Inc. was the same entity as Burlington Stores, Inc. ("BSI") and Burlington Coat Factory Warehouse Corporation ("BCFWC") because BSI and BCFWC used the fictitious name Burlington, Inc.

BSI and BCFWC then appeared in the action and opposed the motion to amend, arguing that they were two "entirely new . . . entities" that "[had] no relationship to named defendant 'Burlington, Inc.'" Doc. 41 at 2. They also filed a motion for sanctions against Gulisano.

The district court denied the motion to amend and granted the motion for sanctions. The district court found that there was no support for the assertion that Burlington, Inc. was the same entity as, or the fictitious name of, BSI or BCFWC. The court concluded that the motion to amend represented an improper "backdoor attempt to correct an improperly named party and recover a [] default judgment" from entities that had never been named in the complaint, which amounted to "an abuse of the judicial process." Doc. 50 at 11.

As to the motion for sanctions, the district court found that Gulisano had made "affirmative misrepresentations in his submissions to the [c]ourt" and acted in "bad faith." *Id.* at 15–16. The court imposed sanctions against Gulisano under Rule 11, ordering him to pay approximately $19,500 to cover attorney's fees that BSI and BCFWC incurred in resisting Cohen's attempts to collect the judgment. The court also referred Gulisano to the Florida Bar for disciplinary action.

After the court imposed the sanctions, Cohen filed a motion to vacate the default judgment and requested leave to amend her complaint to name BSI as a defendant. While the motion was pending, Gulisano filed a notice of appeal challenging the sanctions order. The district court concluded that the notice of appeal divested it of jurisdiction and denied the motion to vacate as moot.

In Gulisano's appeal, we affirmed the district court's sanctions order. *See Gulisano v. Burlington, Inc.*, 34 F.4th 935 (11th Cir. 2022). We described Gulisano's argument that Burlington, Inc. was

the fictitious name of BSI and BCFWC as "frivolous," noting that "there were no facts to support it" and that Gulisano eventually admitted to the district court that Burlington, Inc. did not exist. *Id.* at 943. We explained that "even the most minimal investigation would have alerted" Gulisano "that there was no such entity as 'Burlington, Inc.'" *Id.* at 944.

After Gulisano's sanctions appeal was complete, Cohen filed in the district court a second motion to vacate the default judgment and for leave to file an amended complaint. Relying on Rule 60 of the Federal Rules of Civil Procedure, she asked the district court to vacate the default judgment entered in the action and to permit her to file an amended complaint. She attached to her motion a copy of her proposed amended complaint. In the proposed amended complaint, Cohen named BSI alone as a defendant and alleged that there was diversity jurisdiction because BSI was "a New Jersey corporation registered to do business in Florida." Doc. 84-1 at 2. Cohen did not identify BSI's state of incorporation or where its principal place of business was located.

BSI and BCFWC opposed Cohen's motion, arguing that the court should deny it in its entirety. Cohen attached to her reply in support of her motion a revised proposed amended complaint, which named both BSI and BCFWC as defendants. In the revised proposed amended complaint, Cohen alleged that there was diversity jurisdiction because BSI was a "New Jersey corporation" and BCFWC was a "Florida corporation." Doc. 86-1 at 2. The revised

proposed amended complaint included no allegations about either entity's principal place of business or state of incorporation.

The district court denied Cohen's motion. It refused to vacate the judgment against Burlington, Inc. or to allow Cohen to amend her complaint. The court declined to vacate the judgment against Burlington, Inc. because, it reasoned, the judgment did not "prejudice any entity," since Burlington, Inc. did not exist. Doc. 87 at 9. And because the court had entered final judgment, which had not been vacated, the court denied the request for leave to amend. The court's order did not address whether the allegations in the original complaint or either of the proposed amended complaints were sufficient to establish subject matter jurisdiction.

Cohen appealed. On appeal, after examining Cohen's original complaint, we issued a jurisdictional question asking the parties to address whether the district court had subject matter jurisdiction at the outset of the case. We noted that the original complaint's allegations about the citizenship of Burlington, Inc. appeared to be deficient. We also asked the parties whether, if the allegations were inadequate, Cohen could amend the complaint to cure the deficiency given that Burlington, Inc. apparently did not exist.

In response to the jurisdictional question, Cohen admitted that the jurisdictional allegations in the complaint were inadequate. She asked for permission to correct the defect by filing one of the proposed amended complaints she had attempted to file in the district court.

BSI and BCFWC also responded to the jurisdictional question. They argued that the district court lacked subject matter jurisdiction from the start because the original complaint contained no allegation about Burlington, Inc.'s principal place of business. This defect could not be cured, they argued, because it was now known that Burlington, Inc. was a non-existent entity, so there was no way for Cohen to make a plausible allegation about Burlington, Inc.'s principal place of business.

II.

We conclude that subject matter jurisdiction is lacking in this case. "When a plaintiff files suit in federal court, she must allege facts that, if true, show federal subject matter jurisdiction over her case exists." *Travaglio v. Am. Exp. Co.*, 735 F.3d 1266, 1268 (11th Cir. 2013). When a federal court's jurisdiction is based upon diversity, the allegations "must include the citizenship of each party, so that the court is satisfied that no plaintiff is a citizen of the same state as any defendant." *Id.*; *see* 28 U.S.C. § 1332(a). For diversity jurisdiction purposes, a corporation is deemed a citizen of its state of incorporation and the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1).[2] "[I]f a complaint's factual allegations do not assure the court it has subject matter jurisdiction, then the court is without power to do anything in the case." *Travaglio*, 735 F.3d at 1269; *see also Belleri v. United States*, 712 F.3d 543, 547 (11th

[2] A corporation's principal place of business is "the place where the corporation's high level officers direct, control, and coordinate the corporation's activities." *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010).

Cir.2013) ("We may not consider the merits of [a] complaint unless and until we are assured of our subject matter jurisdiction.").

Usually, when a complaint's allegations regarding diversity jurisdiction are insufficient, the plaintiff will be able to amend her complaint, even on appeal, to correct the deficiency. *See* 28 U.S.C. § 1653 (providing that "[d]efective allegations of jurisdiction may be amended . . . in the trial or appellate courts"); *see also Morales v. Zenith Ins. Co.*, 714 F.3d 1220, 1226 n.12 (11th Cir. 2013) (treating pleadings as amended on appeal to correct jurisdictional defect). Although § 1653 permits a party to amend a complaint on appeal to correct "inadequate jurisdictional allegations," the statute "does not provide a remedy for defective jurisdiction itself." *Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co.*, 700 F.2d 889, 893 (2d Cir. 1983); *see Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989) (explaining that § 1653 allows "appellate courts to remedy" only "inadequate jurisdictional allegations, but not defective jurisdictional facts"). Put another way, § 1653 "cannot be used to create jurisdiction retroactively where it did not previously exist." *Arena v. Graybar Elec. Co.*, 669 F.3d 214, 224 (5th Cir. 2012) (internal quotation marks omitted). We have thus explained that "§ 1653 would be an inappropriate vehicle by which to amend [a] complaint to add new parties" on appeal to create diversity jurisdiction. *Laborers Local 938 Joint Health & Welfare Tr. Fund v. B.R. Starnes Co.*, 827 F.2d 1454, 1457 n.4. (11th Cir. 1987).

Here, the allegations in Cohen's original complaint about Burlington, Inc.'s citizenship were fatally defective. The complaint

alleged nothing about Burlington, Inc.'s principal place of business and thus failed to establish diversity of citizenship. *See* 28 U.S.C. § 1332(c)(1). Because the complaint's allegations were insufficient to establish subject matter jurisdiction, the district court was without power to do anything in the case. *See Travaglio*, 735 F.3d at 1268. It is true that § 1653 permits amendment to correct defective allegations of jurisdiction. But given Cohen's admission that Burlington, Inc. does not exist, it would be impossible for her to correct the defect with new allegations about Burlington, Inc.'s principal place of business.

Cohen argues that we should allow her to amend her complaint in a different way: to change the defendant identified in the complaint from Burlington, Inc. to BSI (and possibly BCFWC). But § 1653 does not authorize a plaintiff to amend her complaint on appeal to add a new defendant. *See Laborers Local 938*, 827 F.2d at 1457 n.4.[3]

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[3] In arguing that we should permit her to amend the complaint to name BSI (and possibly BCFWC), Cohen relies on our unpublished decision in *A.W. v. Tuscaloosa City School Board of Education*, 744 F. App'x 668 (11th Cir. 2018) (unpublished). But we are not bound by unpublished decisions. *See S.-Owners Ins. v. Easdon Rhodes & Assocs.*, 872 F.3d 1161, 1165 n.4 (11th Cir. 2017).

In any event, we fail to see how *A.W.* helps Cohen because that case addressed a different question. In *A.W.*, we explained that under Federal Rule of Civil Procedure 15 a ***district court*** may permit a plaintiff to amend her complaint to correct a defect related to subject matter jurisdiction. *Id.* at 673. But nothing in our opinion addressed whether § 1653 authorizes a plaintiff to amend her complaint by adding an entirely new party to the case to correct a jurisdictional defect identified on appeal.

After reviewing the allegations in the original complaint, we are not assured of our subject matter jurisdiction. Accordingly, we vacate the district court's default judgment as to Burlington, Inc. and remand with instructions that the district court dismiss for want of subject matter jurisdiction.

VACATED and REMANDED.