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United States District Court, S.D. Florida.

Jane DOE, et al., Plaintiffs,
v.
AUTOMATTIC, INC., Defendant.

Case No. 11-23007-CIV-COOKE/TURNOFF
|
Signed 09/27/2013

Attorneys and Law Firms

Robert N. Nicholson, Erin Michelle Bengele, Nicholson & Eastin, LLP, Fort Lauderdale, FL, Patricia Maria Baloyra, Mark Francis Raymond, Broad and Cassel, Miami, FL, for Plaintiffs.

Brian S. Dervishi, Weissman & Dervishi, P.A., Patricia Maria Baloyra, Broad and Cassel, Miami, FL, Melinda M. Morton, Bergeson, LLP, San Jose, CA, for Defendant.

ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT AND TO RECONSIDER AND VACATE ORDER DISMISSING AMENDED COMPLAINT

MARCIA G. COOKE, United States District Judge

***1** THIS MATTER is before me upon Plaintiffs' Motion for Leave to File Second Amended Complaint and to Reconsider and Vacate Order Dismissing Amended Complaint ("Motion for Leave and Reconsideration") (ECF No. 42). Defendant Automattic, Inc. filed, under seal, its Response to Plaintiffs' Motion for Leave to File Second Amended Complaint and to Reconsider and Vacate Order Dismissing Amended Complaint (ECF No. 48), to which Plaintiffs timely submitted, under seal, their Reply in Support of Plaintiffs' Motion for Leave to File Second Amended Complaint and to Reconsider and Vacate Order Dismissing Amended Complaint (ECF No. 57). Therefore, Plaintiffs' Motion for Leave and Reconsideration is fully briefed and ripe for adjudication. For the reasons provided herein, Plaintiffs' Motion for Leave and Reconsideration is denied.

I. BACKGROUND [1]

1 The facts underlying this action are set forth more fully in the Sealed Order Granting Defendant's Motion to Dismiss (ECF No. 41).

In this action, which originated as a pure bill of discovery against Defendant Automattic, Inc. ("Defendant" or "Automattic"), Plaintiffs, who have been subject to a campaign of anonymous threats, intimidation, and defamation on the Internet, sought to obtain from Automattic information about the identities of the parties that own and control "Barbados Underground" and the identities of the authors of the comments featured on the website so that they may pursue claims against the owner(s) and authors directly.

On or about January 9, 2013, I dismissed Plaintiffs' Amended Complaint for Bill of Discovery ("Amended Complaint") following a determination that Plaintiffs' Amended Complaint failed to properly plead and establish the amount in controversy prerequisite for diversity jurisdiction under 28 U.S.C. § 1332, and therefore, this Court lacked subject matter jurisdiction over this action. *See* Sealed Order Granting Defendant's Motion to Dismiss at 4-6, ECF No. 41. I did not grant Plaintiffs' leave to amend their Amended Complaint. *See id.* at 6.

Plaintiffs now seek leave to file a Second Amended Complaint and the vacatur of the Sealed Order Granting Defendant's Motion to Dismiss ("Order"), pursuant to Federal Rules of Civil Procedure 15(a)(2) and 59(e), asserting that since the Order "was the first pronouncement by this Court that Plaintiffs' Amended Complaint failed to articulate adequate jurisdiction before this Court," they "should have [been] allowed [ ] an opportunity to amend to demonstrate to the Court that it indeed has jurisdiction over this matter." Pl.'s Reply at 1.

Plaintiffs' Second Amended Complaint asserts claims under the federal RICO statute, state law claims for conspiracy, intentional infliction of emotional distress, and defamation against defendants learned from Automattic's informal production of information to Plaintiffs. Plaintiffs' Second Amended Complaint also alleges the same pure bill of discovery against Automattic, and includes a second defendant, Euclid

Internet Solutions, Inc. ("Euclid"). In this manner, Plaintiffs claim this Court has original federal question jurisdiction pursuant to 28 U.S.C. § 1331 because of the federal RICO claim, and supplemental jurisdiction of all state law claims, including the pure bill of discovery, pursuant to 28 U.S.C. § 1367.

II. LEGAL STANDARDS

A. Rule 59(e)

***2** Federal Rules of Civil Procedure 59(e) permits the amendment or alteration of a judgment if a motion requesting same is filed within 28 days after the entry of the judgment at issue. Fed. R. Civ. P. 59(e). A Rule 59(e) motion "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 (2008). Rather, "[t]here are three grounds which justify the filing of a motion for reconsideration: '1) an intervening change in controlling law; 2) the availability of new evidence; and 3) the need to correct clear error or prevent manifest injustice.' " *City of Fort Lauderdale v. Scott*, No. 10-61122-CIV, 2011 WL 1085327 (S.D. Fla. March 21, 2011) (quoting *Williams v. Cruise Ships Catering & Service Int'l, N.V.*, 320 F. Supp. 2d 1347, 1357-58 (S.D. Fla. 2004)).

The appellate court reviews a denial of a Rule 59(e) motion only for abuse of discretion. *See Hardy v. Wood*, 342 F. App'x 441, 446 n.5 (citing *Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1267 (11th Cir. 1998)).

B. Rule 15

Rule 15 of the Federal Rules of Civil Procedure provides that a plaintiff may amend his or her complaint once as a matter of course within twenty-one days after serving it or within twenty-one days after the earlier of service of the responsive pleading or service of a motion under Rule 12(b), (e), or (f). Fed. R. Civ. P. 15(a)(1). Thereafter, a plaintiff may amend his or her complaint only with the opposing party's written consent or the court's leave. Fed. R. Civ. P. 15(a)(2).

District courts are encouraged to "freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2); *126th Ave. Landfill, Inc. v. Pinellas County, Florida*, 459 F. App'x 896, 897 n.1 (11th Cir. 2012). "[T]his mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.' " *Foman*, 371 U.S. at 182; *see also Patel v. Georgia Dept. BHDD*, 485 F. App'x 982, 982 (11th Cir. 2012).

"[T]he grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman*, 371 U.S. at 182.

III. ANALYSIS

A. Vacatur of Order Granting Defendant's Motion to Dismiss is Unwarranted

Prior to seeking leave to amend their Amended Complaint, Plaintiffs must initially have the Order Granting Defendant's Motion to Dismiss set aside, as, in the current state of this action, there is not an operative complaint to amend. This must be accomplished by the standard set forth in determining motions pursuant to Rule 59(e). *See Jallali v. Nat'l Bd. of Osteopathic Med. Examiners, Inc.*, 518 F. App'x 863, 867 (11th Cir. 2013) (upholding the district court's denial of plaintiff's Rule 59(e) motion in conjunction with motion to amend complaint following a dismissal, where the plaintiff had not offered any grounds justifying reconsideration due to district court's reasoning that: (1) plaintiff "had every opportunity to amend his pleadings to remove [one of the named defendants] as a defendant in the earlier stages of this litigation"; (2) "was aware of the strategic risk he took in keeping [the named defendant] as a defendant to this action"; and (3) "could have sought leave to amend his pleadings to enable him to argue diversity jurisdiction before [the district court's] Order of Dismissal was entered," but did not, when it appeared that plaintiff's motion attempted to take "a second bite at the apple to take procedural steps that he should have taken before the

Order of Dismissal was made"). Similar to the plaintiff in *Jallali*, here, Plaintiffs made no attempt to argue why their Rule 59(e) motion should be granted on any of the recognized grounds justifying reconsideration. Plaintiffs have not proffered any intervening change in controlling law, new evidence previously unattainable, or need to correct clear error or prevent manifest injustice. Because none of these grounds exist in this matter, Plaintiffs motion for reconsideration warrants denial.

***3** However, the Eleventh Circuit has also permitted the liberal standard of granting leave to amend set forth in Rule 15(a) to "apply when a plaintiff seeks to amend after a judgment of dismissal has been entered by asking the district court to vacate its order of dismissal pursuant to Fed.R.Civ.P. 59(e)." *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1077 (11th Cir. 2004) (citing *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988)). Yet, where the court reviews the proposed amended complaint and determines that "the proposed amendments were futile because the Second Amended Complaint still failed to state a claim," the court may properly deny the motion for reconsideration as well as deny leave to amend. *Spanish Broad. Sys. of Fla., Inc.*, 376 F.3d 1065 at 1077, 1079 (11th Cir. 2004) ("Because SBS, even in the proposed Second Amended Complaint, offered only conclusory allegations of harm to competition, we cannot say that the district court abused its discretion in denying the motion for reconsideration and the implicit motion for leave to amend the complaint."). As in *Spanish Broadcasting System of Florida, Inc.*, Plaintiffs' proposed amendments are futile to confer jurisdiction upon this Court, and therefore, Plaintiffs' Motion for Leave and Reconsideration must be denied.

B. Plaintiffs' Proposed Amendment of Amended Complaint is Futile

Contrary to Plaintiffs' assertion, a party does not have the right, in every instance, to amend his complaint upon its initial dismissal. Rather, "[b]ecause justice does not require district courts to waste their time on hopeless cases, leave may be denied if a proposed amendment fails to correct the deficiencies in the original complaint or otherwise fails to state a claim." *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1255 (11th Cir. 2008); *see also Jemison v. Mitchell*, 380 F. App'x 904, 907 (11th Cir. 2010) ("Dismissal with prejudice is proper, however, ... if a more carefully drafted complaint could not state a valid claim."). It was evident that Plaintiffs' claim for a pure bill of discovery, based on the pled facts, accepted as true, could not be maintained due to lack of jurisdiction. My inclination was correct as Plaintiffs have now returned seeking to plead an entirely new case with vastly different defendants in order to gain jurisdiction through a back door not provided by federal statute or the Federal Rules of Civil Procedure.

Title 28 U.S.C. § 1367 permits the district courts to "have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). However, "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-- ... (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, ... or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." *Id.* § 1367(c)(2), (4). "[A] federal court has jurisdiction over an entire action, including state-law claims, whenever the federal-law claims and state-law claims in the case 'derive from a common nucleus of operative fact' and are 'such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding.' " *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)).

Pendent jurisdiction is a doctrine of discretion, not of plaintiff's right, and hence the power need not be exercised in every case in which it is found to exist. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966); *see also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) ("*Gibbs* emphasized that 'pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.' ").

Given that "[a] pure bill of discovery is an equitable remedy which lies 'to obtain the disclosure of facts within the defendant's knowledge, or deeds or writings or other things in his custody, in aid of the prosecution or defense of an action pending or about to be commenced in some other court[,]' [and] [t]he purpose of a pure bill is to identify 'the proper parties against whom and the proper legal theories under which to *subsequently sue for relief*,' " *Mesia v. Florida Agr. & Mech. Univ. Sch. of Law*, 605 F. Supp. 2d 1230, 1232 (M.D. Fla. 2009) (emphasis supplied) (quoting *First Nat'l Bank v. Dade-Broward Co.*, [125 Fla.

594] 171 So. 510 (Fla. 1936); *Sunbeam Television Corp. v. Columbia Broadcasting System, Inc.*, 694 F. Supp. 889 (S.D. Fla. 1988)), it is difficult to find that Plaintiffs proposed Second Amended Complaint satisfies the second element required in attaining supplemental jurisdiction. Specifically, it is unlikely a plaintiff would be expected to try a pure bill of discovery and a RICO action "all in one judicial proceeding."

***4** Plaintiffs could pursue their RICO claims against the named Racketeering Defendants and in that action seek discovery from the Bill of Discovery Defendants using the discovery tools provided in the Federal Rules of Civil Procedure. To bring a cause of action specifically for a pure bill of discovery demonstrates that the discovery of information is not part of the same case or controversy as the RICO action, and is a method to seek "disclosure of facts within the defendant's knowledge, or deeds or writings or other things in his custody, in aid of the prosecution or defense of an action pending or about to be commenced in some other court." *Carr v. Bombardier Aerospace Corp.*, No. 10-MC-60917, 2010 WL 2220336 (S.D. Fla. June 3, 2010) (dismissing plaintiff's complaint for pure bill of discovery without leave to amend to confirm his allegations of discriminatory conduct to state claim under the Age Discrimination in Employment Act, which plaintiff asserts would establish subject matter jurisdiction for a federal cause of action, finding that even if the court assumes that plaintiff's allegations are true, "the existence of a possible cause of action to be brought at some time in the future does not establish subject matter jurisdiction over the Petition for discovery").

Moreover, here, Plaintiffs were aware of the facts on which they now base the proposed Second Amended Complaint, and only seek such an amendment after having tested, and failed, with their first theory of jurisdiction. Instances such as these permit a denial of the motion to amend.

> [A]wareness of facts and failure to include them in the complaint might give rise to the inference that the plaintiff was engaging in tactical maneuvers to force the court to consider various theories seriatim. In such a case, where the movant first presents a theory difficult to establish but favorable and, only after that fails, a less favorable theory, denial of leave to amend on the grounds of bad faith may be appropriate.

Dussouy, 660 F.2d at 599.

IV. CONCLUSION

Plaintiffs' proffer no grounds on which to reconsider the Sealed Order Granting Defendant's Motion to Dismiss, and the proposed Second Amended Complaint fails to cure the jurisdictional deficiencies inherent in Plaintiffs' claim. Accordingly, Plaintiffs' Motion for Leave to File Second Amended Complaint and to Reconsider and Vacate Order Dismissing Amended Complaint (ECF No. 42) is **DENIED**.

DONE and ORDERED in chambers in Miami, Florida this 27th day of September 2013.

All Citations

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