UNITED ST A T'ES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MEDlCAL SUPPLY CHAIN, INC.,

Plaintiff-Appellant,

v. No. 03-3342

USBANCORP, NA; USBANK PRIVATE CLIENT GROUP; CORPORATE TRUST; INSTITUTIONAL TRUST AND CUSTODY; MUTUAL FUND SERVICES, LLC.; PIPER JAf'FRA Y; ANDREW CESERE; SUSAN PAINb; LARS ANDERSON; BRIAN KABBES; UNKNOWN HEAL THCARE SUPPLIER,

Defendants~Appellees.

ORDER
Filed December 30~2004

Before McCONNELL, HOLLOWAY. and PORFILIO. Circuit Judges.

On November 8. 2004. we entered an order and judgment affirming the district court's dismissal of plaintiff's complaint alleging, among other things, violations of the Sherman Act, rs U.S.C. §§ *1-3711,* ~uu.uf the USA PATRIOT Act, Pub. L. No. 107.56, 115 Stat. 272 (2001). In the order and judgment. we

directed plaintiff and plaintiff's counsel, Bret D. Landrith, Esq., to show cause why they, jointly or severally, should not be sanctioned pursuant to Fed. R. App, P. 38 for pursuing a frivolous appeal. Plaintiff and Mr. Landrith were given an opportunity to file objections to the proposed sanctions, and they have done so. Based upon our review, we: conclude that Mr. Landrith's objections on hiS own behalf are inadequate to I!VOld. sanctions, We rurtner conclude, however, that given the nature of the claims presented, plaintiff is not as culpable as its counsel and, therefore, plaintiff should not bear the burden of sanctions.

Mr. Landrith objects to sanctions on the ground that the appellate arguments he advanced on plaintiffs bchalfbad merit. In particular, he maintains that he was coeeect when he argued that the diBtr~et court cH'oncously applied a heightened pleading standard to the Sherman Act claims and that he walt correct when he argued that the district court erroneously failed to recognize a private right of action in the USA PATRIOT Act for the claims asserted in the amended complaint.

The district r:OUTt found that the allegations underlying the Sherman Act claims were inadequate on several grounds, anyone of which would have justified dismissal. Section 1 of the Shennan Act prohibits contracts, combinations, or conspiracies in restraint of trade. 15 U.S.C. § 1. In his response to the show cause order, Mr. Landrith focuses on only one of the district court's grounds for

dismi~:Ia.l of the § 1 claim: that the amended complaint did not adequately allege the participation of two 0, more independent actors in the alleged contract, ccmbination, or conspiracy. Mr. Landrith contends that the district court applied a heightened pleading standard by ignoring the fact that defendant "Unknown Healthcare Supplier" qualified as an actor economically independent from the other defendants. all of whom were related to US Bancorp.

Our review shows that the district court did not apply a heightened pleading standard to the amended. complaint. Rather, Mr. Landl'itb·s reliance on the naming of an "Unknown Healthcare Supplier" a. a defendant ignores the fact that the allegations concerning this unknown defendant were completely speculative. The very existence of such a defendant, whom the amended complaint described as an entity "believed to be a supplier OT purchasing organization who has commenicated with US Bancorp NA, its emplcyees or its eubsj diari es about [plaintiff] fOT the purpose of obstructing or delaying (plaintiffs] entry into commerce," Amended Complaint, para. 30, had no factual support in the amended complaint. Allegations of an agreement between one or more of the defendants and the chimerical defendant Unknown Healrhcare Supplier certainly were not sufficient to establish a § 1 violation Mr. Landrith makes no comment on the other failings the district court found in the allegations of the 9 1 claim, any cne of which also would have justified the claim's dismissal.

The district court also found numerous flaws in tbe allegations relating to u violation of § 2 of the Shennan Act, which prohibits monopolization of trade. 15 U.S.C. § 2. There are two elements of a monopoly offense under § 2, the first of which is "possession of monopoly power in the relevant market." *United States* v, *Grinnell Corp.,* 384 U.S. 563, ~70 (1966). The district court found that plaintiff tailed to allege facts neoessary to estabU,h the: unt clement, including the exercise of monopoly power. the identity of a relevant product market, and the identity of the relevant geographic market.

In his response to the show cause order, Mr. Landrith raises only one brief argument in support of the § 2 allegations, and again that argument is misplaced. Citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.•* 472 U.S. 585 (1985), as "[tjhe leading case imposing § 2 liability for refusal to deal with competitors," Mr. Landrith argues that US Bancorp' s refusal to provide escrow services to plaintiff evidenced illegal auticompetitive behavior. Answer to Show Cause on Sanctions! at 3 (quotation omitted), *Aspen Skiing Co.* is quite inapposite, however, not the least because plaintiff and US Bancorp are not competitors,

The Court in *Aspen Skiing Co.* was concerned with whether the refusal of an established mouopol'ist to cooperate ·witb a smaller competitor in 12. marketing arrangement could be found to violate § 2. In answering that question, the Court noted that "the right of a monopolist to deal with whom he pleases" is qualified,

and that the exercise of that right "as a purposeful means of monopolizing interstate commerce is prohibited by the Shennan Act." 472 U.S. at 602. 603 (quotation omitted), One of the many problems with the amended complaint here was that it did not adequately allege facts that could establish US Bancorp as a monopolist in a relevant market in the first instance.

Plaiutiff tried to chore up these weaknesses on appeal by arguin.g that a liberal reading of the complaint revealed that the relevant geographic market was national aad tha.t there were two relevant product markets: healthcare supplies and capitali~atioD of healthcare technology companies. US Bancorp does not even compete in the healthcare supplies market) however, much less is it capable of monopolizing that market. Similarly. whatever the alleged market of "capitalization of healthcare technology companies" may be, it is clear that it is one in which plaintiff neither does nor intends to compete.

Plaintiffs arguments on appeal did little to address the many grounds for dismissal of the Sherman Act claims articulated by the district court, and Mr. Landrith's response to the show cause order does even less. The appeal of the Sherman Act claims was frivolous, and Mr. Landrith has provided no justifiention for its pursuit.

Plaintiff'« appeal also challenged the district court's dismissal of three claims alleged under the USA PATRIOr Act. It did so despite the fact that the

allegation of those claims prompted the district court to remind Mr. Landrith of his obligations under feci. It. Civ. P. 11(b)(2), and to advise him to "take greater care in ensuring that the claims he brings on his clients ı behalf are supported by the law and the facts." Memorandum &. Order of June 16ı2003, at 11.

The first of the USA PATR.IOT Act claims sought to impose liability for defendants' failure to adequately train their employees on the provisions of the Act or to designate! a compliance officer as provided for in section 352 of the Act (modifying 31 U,S.C. § 5318(h)(I»). The second claim alleged that by denying plaintiff escrow services, defendants misused their authority and used excessive force as enforcement officers under the Act. The third claim alleged that by denying plaintiff escrow services, defendants engaged in "domestic terrorism" as that term is defined in]8 U.S.C. § 2331, as modified by section 802 ofthe Act. The district court determined that plaintiff had no standing to assert the first of these; claims, that there was no private right of action in the Act for any of these claims, and that the allegations of the third claim were "completely divorced from rational thought," Memorandum & Order of June 16,2003. at 14·15.

Ignoring all but one of the grounds articulated by the district court, plaintiff argued on appeal that the district court erred in dismissing the USA PATRIOT Act claims because the Act does in fact provide a private tight of action for those claims. In his response to the show cause order, Mr. Landrith repeats the

atgumenUl advanced on appeal. He boldly declares that he declines to accept lhi!!: panet's "revisionist pronouncement about the lack ·of a private right of action in the USA PATRIOT Act," and he argues that the Act contains at least two private rights of action. Answer to Show Cause on Sanctions, at 4.

The two sections of the Act to which Mr. Landrith points are section 223 (codified at 18 U,S.C. § 2712), which relates to civil actions against the United States, its officers or employees, and section *355* (amending 12 U.S.C. § lS28(w)), whlch limits the immunity available to ıı financial institunou and its employees when voluntarily disclosing suspicious activity ill au employment reference if the disclosure is made with malicious intent. Even if these two sections did create private rights of action under the Act for some types of conduct, a matter we need not decide here) neither creates a private right of action for the conduct a.lleged in the Q.mended eomplaint, and CQUUIil"I '6 r"li~nce on them is frivolous.

Once again, the arguments advanced on appeal in support of the USA PATRIOr Act claims not only failed to address all the grounds for dismissal articulated by the district court, but they were themselves frivolous. Mr. Landrith's response to the show cause order only magnifies these deficits.

Rule 38 provides that if we determine that an appeal is frivolous. we may "award just damages and smgle or double costs to the appellee:' Sanctions under

Rule 38 serve two purposes: not only do they l'punilih the offender as a deterrence to future misconduct; but, with equal importance, they ... compensate a party who has had to finance the defense of a groundless action." *Braley* v. *Campbell,* 832 F.2d 1504, 1516 (lOth Cir. 1987) (Moore. J., dissenting).

An appeal may be frivolous as filed or as argued. *See Finch* v. *Hughes A.ircraft* **CS..** 926 ~.2d 1574. 1578-79 (Fed. Cir. 1991). This appeal was both. Keeping in mind that as between a party and its attorney) the impact of a sanction should be feLtby the onets) at fault, we conclude that only ~r. Landrith, and Dot plsintiff, should bear the burden of sanctions here. "[A]n attorney mast realize, even if a party does Dot, that the decision to appeal should be a considered one, taking into account what the district judge has said, not a knee-jerk-reactlen to every unfavorable ruling," *Braley,* 832 F.2d at 1513 (en bane) (quotation omitted). Mr. Laudriths n:SpOIlS~ to the show cause order demons-nates that he did not make the considered judgment required before taking an appeal here, nor has he considered what the district court, or this COUrt1 has said before advancing hili argumentj.

Aa a sanction under Rule 38. we assess attorney fees and double costs against Mr. Landrith, Procedures for the taxation of costs shall be in accordance with Fed. R. App. P. 39(d) and (e), The case shall be REMANDED to the district court to determine the amount of attor~ey feeQto be awarded as a sanericn.

Entered for the Court
PATRICK FISHER, Clerk

By:
Deputy Clerk

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directed plaintiff and plaintiff's counsel, Bret D. Landrith, Esq., to show cause why they, jointly or severally, should not be sanctioned pursuant to Fed. R. App. P. 38 for pursuing a frivolous appeal. Plaintiff and Mr. Landrith were given an opportunity to file objections to the proposed sanctions, and they have done so. Based upon our review, we conclude that Mr. Landrith's objections on his own behalf are inadequate to avoid sanctions. We further conclude, however, that given the nature of the claims presented, plaintiff is not as culpable as its counsel and, therefore, plaintiff should not bear the burden of sanctions.

Mr. Landrith objects to sanctions on the ground that the appellate arguments he advanced on plaintiff's behalf had merit. In particular, he maintains that he was correct when he argued that the district court erroneously applied a heightened pleading standard to the Sherman Act claims and that he was correct when he argued that the district court erroneously failed to recognize a private right of action in the USA PATRIOT Act for the claims asserted in the amended complaint.

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dismissal of the § 1 claim: that the amended complaint did not adequately allege the participation of two or more independent actors in the alleged contract, combination, or conspiracy. Mr. Landrith contends that the district court applied a heightened pleading standard by ignoring the fact that defendant "Unknown Healthcare Supplier" qualified as an actor economically independent from the other defendants, all of whom were related to US Bancorp.

Our review shows that the district court did not apply a heightened pleading standard to the amended complaint. Rather, Mr. Landrith's reliance on the naming of an "Unknown Healthcare Supplier" as a defendant ignores the fact that the allegations concerning this unknown defendant were completely speculative. The very existence of such a defendant, whom the amended complaint described as an entity "believed to be a supplier or purchasing organization who has communicated with US Bancorp NA, its employees or its subsidiaries about [plaintiff] for the purpose of obstructing or delaying [plaintiff's] entry into commerce," Amended Complaint, para. 30, had no factual support in the amended complaint. Allegations of an agreement between one or more of the defendants and the chimerical defendant Unknown Healthcare Supplier certainly were not sufficient to establish a § 1 violation. Mr. Landrith makes no comment on the other failings the district court found in the allegations of the § 1 claim, any one of which also would have justified the claim's dismissal.

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Plaintiff tried to shore up these weaknesses on appeal by arguing that a liberal reading of the complaint revealed that the relevant geographic market was national and that there were two relevant product markets: healthcare supplies and capitalization of healthcare technology companies. US Bancorp does not even compete in the healthcare supplies market, however, much less is it capable of monopolizing that market. Similarly, whatever the alleged market of "capitalization of healthcare technology companies" may be, it is clear that it is one in which plaintiff neither does nor intends to compete.

Plaintiff's arguments on appeal did little to address the many grounds for dismissal of the Sherman Act claims articulated by the district court, and Mr. Landrith's response to the show cause order does even less. The appeal of the Sherman Act claims was frivolous, and Mr. Landrith has provided no justification for its pursuit.

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Once again, the arguments advanced on appeal in support of the USA PATRIOT Act claims not only failed to address all the grounds for dismissal articulated by the district court, but they were themselves frivolous. Mr. Landrith's response to the show cause order only magnifies these deficits.

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As a sanction under Rule 38, we assess attorney fees and double costs against Mr. Landrith. Procedures for the taxation of costs shall be in accordance with Fed. R. App. P. 39(d) and (e). The case shall be REMANDED to the district court to determine the amount of attorney fees to be awarded as a sanction.

Entered for the Court
PATRICK FISHER, Clerk

By:
Deputy Clerk