

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DANIEL VIRNICH,

OPINION AND ORDER

Plaintiff,

09-cv-340-bbc

v.

JEFFREY VORWALD, MICHAEL POLSKY,
BECK, CHAET, BAMBURGER & POLSKY, S.C. and
AMERICAN TRUST AND SAVINGS BANK,

Defendants.

Plaintiff Daniel Virnich has filed a motion for relief from the judgment entered in this case on September 2, 2010. Dkt. #69. Plaintiff argues that he is entitled to relief under Fed. R. Civ. P. 60(b)(5) and (6) because of a recent decision by the Wisconsin Court of Appeals in a related case, American Trust & Savings Bank v. Communications Products Corp., 2013 WI App 30 (Jan. 31, 2013) (nonprecedential opinion). Because I conclude that the relief plaintiff seeks should be sought in the first instance in state court, I am denying his motion, except for his request to amend the judgment to dismiss the case without prejudice.

BACKGROUND

The origin of this lawsuit can be traced to several loan agreements in 1999 between defendant American Trust and Savings Bank and a company in which plaintiff had an

ownership interest, Communications Productions Corporation. After Communications Productions began experiencing financial difficulties, defendant American Trust filed a motion in the Circuit Court for Grant County, Wisconsin to appoint a receiver in 2003, on the ground that Communications Productions was in imminent danger of insolvency. The court granted the motion and appointed defendant Michael Polsky as the receiver. Although plaintiff and the other owner of Communications Productions challenged the receivership initially, they later withdrew that challenge.

Plaintiff joined a motion in the receivership action for leave to file a derivative action on behalf of Communications Productions against American Trust. While that motion was pending, plaintiff filed this lawsuit in which he alleged that American Trust, Polsky and others involved in the receivership action had conspired to injure his reputation, trade, business or profession, in violation of Wis. Stat. § 134.01. I dismissed the case after concluding that plaintiff had not adequately alleged that defendants acted with malice or in furtherance of a conspiracy, as required to state a claim under § 134.01. Dkt. #68. This made it unnecessary to consider defendants' alternative arguments that the court should abstain from hearing the case in light of the state proceedings and that defendants were immune from suit.

Judgment was entered on September 2, 2010 and plaintiff filed a notice of appeal. While the appeal in this case was pending, the state court concluded in the receivership proceedings that when withdrew his objection to the receivership, he had waived his right to seek damages against American Trust for actions related to the appointment of the

receiver. Plaintiff appealed that decision as well.

In its December 2011 decision, the Court of Appeals for the Seventh Circuit disagreed with my conclusion that plaintiff's allegations did not state a claim upon which relief may be granted under Wis. Stat. § 134.01. However, the court affirmed the judgment on the alternative ground that plaintiff's claim was barred under the doctrine of issue preclusion by the state court's determination that plaintiff had waived a damages claim against defendants. In particular, the court stated that "[a]ll of the actions that Virnich complains of in his section 134.01 conspiracy claim were taken either in pursuit of or under the auspices of the court-supervised receivership. In essence, Virnich is attempting to relitigate whether or not the imposition and ends of the receivership were proper." Virnich v. Vorwald, 664 F.3d 206, 214-15 (7th Cir. 2011). The court rejected plaintiff's arguments that issue preclusion should not apply because an appeal was pending in state court. Plaintiff then filed a motion to stay the mandate pending resolution of the state court appeal, arguing that, "[i]n the event that [the state court]'s decision is overturned on appeal, [an] essential element of the Panel's ruling effectively disappears and the Panel would have reversed Judge Crabb's decision on the pleadings issue." Dkt. #88-3. The court of appeals denied plaintiff's motion without comment.

On January 31, 2013, the Wisconsin Court of Appeals reversed the circuit court's decision regarding waiver, concluding that it

rests on the notion that there is an inconsistency between withdrawing an objection to a receivership, thereby agreeing to allow the receivership to proceed, and then later seeking damages based on the proposition that the receivership should never have been put in place. However, . . . [t]here is no

inconsistency CPC asserts that it withdrew its objection to the receivership to allow for a prompt asset sale before the assets lost even more value. We discern no factual disagreement on this point. Attempting to mitigate losses stemming from alleged misconduct is compatible with asserting a claim that you should not have been forced into the position of needing to mitigate losses in the first place.

American Trust & Savings Bank v. Communications Products Corp., 2013 WI App 30 . On August 1, 2013, the Wisconsin Supreme Court denied defendants’ petition for review. Plaintiff filed his Rule 60 motion in this court on August 26, 2013.

OPINION

In his motion for relief from judgment, plaintiff relies primarily on Fed. R. Civ. P. 60(b)(5). The relevant portion of that provision states that “the court may relieve a party . . . from a final judgment” if “it is based on an earlier judgment that has been reversed or vacated.” Plaintiff argues that the judgment in American Trust & Savings Bank v. Communications Products Corp., 2013 WI App 30, satisfies Rule 60(b)(5) because the Wisconsin Court of Appeals reversed the trial court decision that the Court of Appeals for the Seventh Circuit relied on in Virnich v. Vorwald, 664 F.3d 206 (7th Cir. 2011), to find that plaintiff’s claim in this case was barred under the doctrine of issue preclusion.

Even if I assume that plaintiff is correct that issue preclusion no longer applies, that does not mean that he is entitled to relief under Rule 60. “[B]ecause the decision to grant relief from judgment is closely related to the circumstances of the judgment and the equities of a particular case, district courts are given broad discretion to deny motions for relief from judgment.” Mendez v. Republic Bank, 725 F.3d 651, 657-58 (7th Cir. 2013). See also 12

Moore's Federal Practice § 60.22[1] at 60-69 (3d. ed.) (“The cases interpreting [Rule 60] have consistently held that . . . a party has no *right* to relief.”) (emphasis in original).

An obvious question raised by plaintiff's motion is why he does not assert his claim under Wis. Stat. § 134.01 in the remanded state court action. Because that is the lawsuit that created the preclusion problem and because that lawsuit will go forward regardless of the decision in this case, it makes sense from an efficiency perspective to allow that court to decide in the first instance the scope of relief that plaintiff may pursue.

Plaintiff's only response is that he believes that defendants will object to any attempts by him to assert his claim in state court. However, that would be inconsistent with defendants' statements in their briefs that state court is where plaintiff's claim belongs. Dkt. #91 at 5; dkt. #93 at 3. Although it is true that judgment was entered on plaintiff's claims in this case, any concern about the preclusive effect of this case is addressed easily by amending the judgment to dismiss plaintiff's claims without prejudice. Further, even if plaintiff is unable to assert his claim under Wis. Stat. § 134.01 in state court, it is likely that the state court will decide issues about the receivership that could resolve the § 134.01 claim or at least narrow it. I agree with defendants that it makes little sense to reopen this case only to dismiss it again if the state court renders another decision related to the issues in this case.

Alternatively, plaintiff argues that relief is appropriate under Fed. R. Civ. P. 60(b)(6), which authorizes relief from a judgment for “any other reason that justifies relief.” This argument is a nonstarter because the subsections in Rule 60(b) are “mutually exclusive,”

which means that a party cannot rely on subsection (6) if another provision is more on point. Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 393 (1993). In any event, plaintiff does not raise any arguments for granting relief under Rule 60(b)(6) that he did not raise under Rule 60(b)(5).

ORDER

IT IS ORDERED that plaintiff Daniel Virnich's motion for relief from the judgment, dkt. #86, is GRANTED IN PART. The clerk of court is directed to amend the September 2, 2010 judgment to state that the case is dismissed without prejudice to plaintiff's filing his claim in state court. Plaintiff's motion is DENIED in all other respects.

Entered this 23d day of December, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge

