07-55999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

F. JOE YEAGER, Plaintiff & Appellant	)	**United States District Court** Case No. 05-CV-2089-BEN
v.	)	
CITY OF SAN DIEGO, et al., Defendants & Appellees.	)	

On Appeal from the United States District
Southern District of California

The Honorable Roger T. Benitez, United States District Court Judge

APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

JURISDICTION

On June 1, 2007, the United States District Court for the Southern District of California dismissed Appellant, Joe Yeager's Third Amended Complaint without leave to amend, thereby disposing of all claims between Appellant and Appellees. (ER 359.) The judgment was entered on June 4, 2007. (CT 218.) Appellant filed a timely notice of appeal on July 2, 2007. (CT 221.)

A district court's dismissal of the action without prejudice is a final appealable order. *See United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794-95 n.1 (1949); *Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984), *cert. denied*, 470 U.S. 1007 (1985). The Ninth Circuit Court of Appeals has jurisdiction to hear Appellant's appeal of the District Court's order dismissing his Third Appellant Complaint pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE FOR REVIEW

Whether the District Court abused its discretion when it dismissed Appellant's Third Amended Complaint without leave to amend based upon Appellant's failure to comply with Federal Rules of Civil Procedure Rule 12(b)(6) and Rule 8?

SUMMARY OF THE ARGUMENT

Appellant asserts in his opening brief the District Court abused its discretion when the court dismissed Appellant's Third Amended Complaint. (AOB p. 9) Appellant argues the court failed to read the complaint (AOB p. 9), was biased against Appellant (AOB p. 10), and the Third Amended Complaint met the requirements of the Federal Rules of Civil Procedure (AOB pp. 11-13).

Appellees contend the District Court acted well within its discretionary power when the court dismissed Appellant's Third Amended Complaint without leave to amend. Specifically, Appellant's Third Amended Complaint failed to state a claim against Appellees for which relief could be granted and Appellant's 83-page pleading did not contain a short and plain statement of the claims against Appellees sufficient to put Appellees on notice of their alleged wrongdoings.

The District Court's dismissal of Appellant's Third Amended Complaint without leave to amend was proper and should be upheld.

STATEMENT OF CASE

Since 2005, Appellant, a pro se litigant has made several attempts to file a complaint against 85 defendants. On December 5, 2006, Appellant's Second Amended Complaint was dismissed with leave to amend. (ER 29, CT 92.) Appellant filed a Third Amended Complaint on January 5, 2007. (ER 31, CT 95.) Appellees are among the 85 named defendants in Appellant's Third Amended Complaint.

On February 12, 2007, Attorney for Appellees, Philip Weiss, filed a motion to dismiss Appellant's Third Amended Complaint for failure to state a claim for which relief could be granted under Federal Rules Civil Procedure, Rule 12(b)(6) or alternatively pursuant to Rule 8(a)(2) which requires a plaintiff to submit a short and plain statement of the claim. (Appellees ER 1-30, CT 115.) On February 15, 2007, Attorney for Appellees, James Alcantara, filed a joinder to the motion to dismiss. (Appellees ER 39, CT 118.)

On June 1, 2007, the Honorable Roger T. Benitez, District Court Judge dismissed Appellant's Third Amended Complaint without leave to amend. (ER 358, CT 217, 218.) Appellant filed a notice of appeal on July 2, 2007. (CT 221.)

STATEMENT OF FACTS

Appellant owns a 27-year old, 45-foot sailing vessel known as S/V/ Generic, which is documented with the United States Coast Guard under Official No. 604499. Appellant has maintained his vessel in San Diego Bay for several years. Appellant has been cited four times for violating San Diego's anchoring ordinances, specifically, San Diego Municipal Code section 63.25 which prohibits a vessel from remaining at a designated anchorage for longer than 72 hours. In connection with one of Appellant's citations, Appellant was sentenced to 90 days in county jail and was ordered to stay away from Mission Bay Park. (Appellees ER 9-10.)

On February 6, 2005, Appellant's vessel sustained severe damage as a result of an on-board gasoline fire. The San Diego Unified Port District Harbor Police responded and extinguished the fire. Upon Appellant's release from jail, Appellant had his vessel towed to a 72-hour anchorage. Appellant remained at this anchorage beyond the 72-hour period and was again cited for violating the anchoring regulations. Appellant's burned vessel was thereupon towed to South Bay Boatyard where she currently remains. (Appellees ER 10-11.)

ARGUMENT

I.

APPELLANT'S THIRD AMENDED COMPLAINT FAILED TO STATE A CLAIM AGAINST APPELLEES

A. Standard Of Review.

A motion filed under Federal Rule of Civil Procedure, Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint and should only be granted where, as here, there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) A Rule 12(b)(6) motion should be granted only if, after construing the complaint in the light most favorable to the plaintiff *Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003), "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Pleadings filed by a pro se litigant are to be liberally construed. *Bretz v. Kelman*, 773 F.2d 1026, 1027, n. 1(9th Cir. 1985). However, complaints filed by pro se litigants must still be in compliance with Rule 12(b)(6) and are likewise properly dismissed if the district court "determines that the action . . . fails to state a claim on which relief may be granted." *Lopez v. Smith*, 203 F.3d 1122, 1124 (9th

Cir. 2000) (en banc).

On appeal, the reviewing court performs a de novo review of a dismissal under Rule 12(b)(6). *Stone v. Travelers Corp.*, 58 F.3d 434, 436-437 (9th Cir. 1995); *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1138 (9th Cir. 2005).

Here, the District Court went to great lengths to attempt to decipher the claims asserted by Appellant in his rambling, 83-page, Third Amended Complaint. (ER 358, CT 217.) Nevertheless, even after liberally construing Appellant's Third Amended Complaint in the light most favorable to Appellant, Appellant's Third Amended Complaint failed to set forth any claims against Appellees for which relief may be granted. The District Court's dismissal of Appellant's Third Amended Complaint under Rule 12(b)(6) was therefore proper and should be upheld.

B. State and Local Government Are Properly Empowered To Regulate Public Access to Moorings and Anchorages.

Appellant argues in his opening brief that the District Court improperly dismissed his action under Federal Rules of Civil Procedure, Rule 12(b)(6) because Third Amended Complaint sets forth a valid challenge to the constitutionality of state and local government enacting and regulating access to moorings and anchorages. (ER 44, 45, 104-107; CT 95; AOB pp. 25-43.) Appellant additionally contends the anchorage regulation and the enforcement thereof, infringed upon Appellant's constitutional rights of travel, free anchorage, and interstate

commerce. (Ibid.)

Appellant's constitutional challenges to the anchorage regulations run contrary to a long line of authority holding that anchorage and mooring rules are properly entrusted to the States in the absence of compelling government interests to the contrary. *Cushing, Etc. v. The John Fraser, Etc.*, 62 U.S. 184, 187 (1858) (noting that local authorities have a right to prescribe at what wharf a vessel may lie and how long she may remain there); *United States v. St. Louis & Mississippi Valley Transp. Co.*, 184 U.S. 247 [46 L.Ed. 520, 22 S.Ct. 350] (1902) (finding that local anchoring law did not violate the Commerce Clause); *Barber v. Hawaii*, 42 F.3d 1185, 1190 (9th Cir. 1994), *Beveridge v. Lewis*, 939 F.2d 859, 862 (9th Cir. 1991), *Colberg Inc. v. States of California ex rel. Dept. Pub. Wks.*, 67Cal.2d 408, 416 (1967). It is equally well established that the state may delegate its authority to manage and control public use to a local agency. *Graf v. San Diego Unified Port District*, 7 Cal.App.4th 1224, 1227 (1992); *City of Long Beach v. Lisenby*, 175 Cal.575, 579 (1917).

Appellant asserts the long line of cases permitting the states and local governments to regulate anchorages are based upon a misinterpretation of the United States Supreme Court ruling in *Cushing v. The John Fraser, supra*, 62 U.S. 184. (AOB p. 26.) While Appellant raises some interesting questions regarding the credibility of the witnesses and the competency of the sailors who were

involved in the original proceedings in *Cushing* (AOB pp. 29-30), the United States Supreme Court opinion in that matter is still controlling. Moreover, Appellant is unable to cite to any legal authority to support his argument that all the cases subsequent to *Cushing* have been wrongly decided.

The constitutional arguments asserted by Appellant, including the argument that Appellant has a constitutional right to free anchorage, have been repeatedly and soundly rejected by both the state and federal courts. In fact, the plaintiff in *Graf v. San Diego Unified Port District, supra*, 7 Cal.App.4th 1224, raised many of the same arguments asserted here by Appellant. In *Graf*, the California Court of Appeal rejected each of the constitutional challenges to the San Diego Unified Port District authority to regulate the usage of San Diego Bay, including the anchorage regulations. *Id.*, at pp. 1231-1232. Notably, the California Court of Appeal held that "[b]oaters hold no constitutional right to unregulated long-term anchoring in public waters." *Id.*, at p. 1233.

Appellees, who are private boat yards, marinas, and individuals associated with them, are not the agents of either the state or local government. Therefore, Appellant's claims concerning the constitutionality and legality of the State and local governments authority to regulate anchorages do not implicate Appellees who are private citizens and businesses. Additionally, even if it could be argued that Appellees acted as agents of the local government in the promotion or

enforcement of local anchoring regulations, Appellant's argument is still without merit. The clear weight of the law establishes that the States hold the authority to regulate anchorage and to delegate that regulatory power. Appellant has presented no authority to the contrary for the obvious reason - - none exists. The local anchorage regulations for the San Diego Bay, which were repeatedly violated by Appellant, are therefore not in conflict with federal law. Likewise, the local government's enforcement of those regulations is not an infringement upon Appellant's constitutional rights. *Graf, supra*, 7 Cal.App.4th at p. 1233.

Appellant's constitutional arguments against the San Diego Bay's anchorage regulations, and the enforcement thereof, do not qualify as a claim for relief that could be granted against any of the named defendants, including Appellees. The District Court's dismissal of the action pursuant to Rule 12(b)(6) was proper.

C. Appellant Failed To Allege A Cognizable Claim That Appellant's Violated The Sherman Anti-Trust Act or Engaged In A Conspiracy Against Appellant.

Appellant's tenth claim for relief in the Third Amended Complaint alleged "[t]he Marinas, Yacht Clubs and Boat yards are in violation of the Sherman Act and Clayton Acts." (ER 91-93 ¶ 69, CT 95.) Appellant's claim appears to be based upon Appellant's belief that the Marinas, Yacht Clubs and Boat yards worked together to convince the local government to enact the current anchorage and mooring regulations. Similar to each of the other claims for relief alleged in

the Third Amended Complaint, this claim was rejected by the District Court. (ER 358, 369, CT 217.)

Appellant's opening brief fails to address the District Court's dismissal of the cause of action against the marinas, yacht clubs, boatyards, and related individuals, based on the alleged violation of the Sherman Act or the Clayton Act. Appellant was correct in forfeiting his right to challenge this ruling, as any such argument would have been meritless. This is because, even if the Court were to assume Appellant's "conspiracy theory" was accurate and Appellees worked together to advocate for the enactment of the anchorage regulations (and certainly Appellant submitted no evidence of this to the District Court), those facts would not provide Appellant with a cause of action against Appellees for a violation of the Sherman Act or the Clayton Act.

As noted by the District Court judge, "[t]he Sherman Antitrust Act is not violated by the association of two or more persons formed for the purpose of petitioning the government." (ER 369, CT 217.) The Sherman Antitrust Act, as set forth at Title 15 of the United States Code, section 1-7, proscribes conduct that facilitates monopolies and other fair restriction of trade. The statute only applies to business practices that affect interstate commerce. Likewise the prohibitions set forth in the Clayton Act only apply to those who are engaged in interstate commerce.

In the Third Amended Complaint, Appellant presented no facts to establish that any of Appellees are involved in interstate commerce. Likewise, Appellant presented no facts to establish that Appellees business practices could impact or restrict interstate commerce. Because there are no facts alleged in the Third Amended Complaint that Appellees engaged in business practices which restricted or impacted interstate commerce, both the Sherman Act and the Clayton Act are inapplicable as a matter of law.

Furthermore, to the extent that any of Appellees may have supported the enactment of the anchorage regulations or urged the San Diego Unified Port District to enforce anchorage regulations, Appellees' conduct is entitled to immunity under the *Noerr-Pennington* doctrine. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the United States Supreme Court held that under the First Amendment, business competitors cannot be found in violation of the federal antitrust laws for joining together to lobby the government to change a law, even if done in a way that would reduce competition. There is simply nothing wrong with citizens gathering to support the enactment of a local regulation. Likewise, there is nothing unlawful in a group of maritime businesses voicing their opinions regarding regulations or ordinances.

D. Conclusion

The District Court granted appellant four opportunities to file a complaint that complied with Rule 12(b)(6) of the Federal Rules of Civil Procedure. Despite the guidance offered by the District Court judge, and the opportunities to amend the pleadings, Appellant was unable to prepare a complaint that set forth a claim for which relief could be granted against Appellees. Although Appellant is a pro se litigant, the District Court was not required to "swallow [Appellant's] invective hook, line and sinker." *Aulsojn v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996.) Appellant's repeated failure to state a cognizable legal theory against Appellees warranted the District Court's dismissal of the action. *Balisteri v. Pacifica Police Dep't*, *supra*, 901 F.2d at p. 699; *Conley v. Gibson*, *supra*, 355 U.S. at pp. 45-46.

II.

THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S THIRD AMENDED COMPLAINT WITHOUT LEAVE TO AMEND AFTER PROVIDING APPELLANT MULTIPLE OPPORTUNITIES TO COMPLY WITH RULE 8.

A. Standard of Review.

Federal Rule of Civil Procedure 8(a) requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8 requires "sufficient allegations to put defendants fairly on notice of the claims against them." *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991). The "short and plain statement" requirement of Rule 8 applies equally to represented parties and parties proceeding pro se. *Hofmann v. Farmilab NAL/URA*, 205 F.Supp.2d 900 (N.D. Ill. 2002).

A district court may dismiss with prejudice a complaint that does not comply with Rule 8(a) provided that meaningful less drastic sanctions have been explored. *Nevijel v. North Coast Life Ins. Co*., 651 F.2d 671, 674 (9th Cir. 1981) (holding that a district court may dismiss an action for a pro se party's failure to comply with Rule 8(a) if meaningful, less drastic sanctions have been explored).

An order for dismissal under Rule 8 is reviewed under an abuse of discretion standard. *Nevijel v. North Coast Life Ins. Co., supra*, 651 F.2d at pp. 673-674.

B. The District Court Properly Dismissed Appellant's Action After Less Drastic Measures Were Unsuccessful.

In this case, the District Court acted well within its discretionary authority when it dismissed Appellant's Third Amended Complaint without leave to amend. In accordance with this Court's holding in *Nevijel, supra,* prior to dismissing Appellant's case, the District Court first explored less drastic sanctions. *Id.*,at p. 674. The District Court granted Appellant multiple opportunities to amend the complaint to comply with Rule 8. (CT 75, 92.) The District Court even went so far as to provide Appellant a detailed explanation of exactly what Appellant needed to do to cure the deficiencies of his complaint and avoid dismissal of the action. (ER 29-30, CT 92.) Despite the fact that the District Court provided Appellant with multiple opportunities to amend the complaint to comply with Rule 8, Appellant's Third Amended Complaint still failed to provide the parties with a short or plain statement showing that he is entitled to relief.

Appellant argued in his opening brief that the Third Amended Complaint was in compliance with Rule 8 because, due to the large number of defendants, the Third Amended Complaint was as short and plain as possible. (AOB p. 18). Appellees disagree. As aptly noted by the District Court, "[t]here [wa]s nothing 'short' or 'plain' about Plaintiff's TAC." (ER 372, CT 217.) The Third Amended Complaint speaks for itself. It is nothing more than a rambling and largely unintelligible commentary by Appellant. The Third Amended Complaint failed to

provide a plain statement of why Appellant is entitled to relief from Appellees and failed to place Appellees fairly on notice of the claims against them. Appellees should not be forced to comb through a disjointed, rambling, 83-page document to discern what, if any, legal claims Appellant is trying to assert against them.

C. Conclusion.

Typically, the rule is "Three Strikes and You're Out." Appellant must have hit a few foul balls, because he had four attempts at filing a complaint before the District Court ended Appellant's "at-bat" and dismissed the action. After providing Appellant repeated opportunities to refine his complaint, the District Court acted well within its discretion when it dismissed Appellant's Third Amended Complaint with prejudice. *Nevijel v. North Coast Life. Ins. Co.*, *supra*, 651 F.2d at p. 674; *McKeever v. Block*, *supra*, 932 F.2d at p. 797.

CONCLUSION

A review of the factual background and history of this case yields the truly inescapable conclusion that Appellant's actual objective in bringing this law suit was not to vindicate any actual or perceived right. Rather, his true intention was and remains to exact vengeance on much of the recreational boating community in San Diego by foisting on dozens of faultless companies and individuals the substantial inconveniences and expenses necessarily associate with litigation. Appellant is well practiced in his gross abuse of the judicial system as evidenced by the fact that the California Superior Court for San Diego County formally deemed Appellant to be a vexatious litigant. (Appellees ER 34-38.)

The determination of the District Court was proper in all respect. For all of the above reasons and in the interest of fundamental justice, Appellees respectfully urge that this Honorable Court foreclose any possibility of any further gamesmanship by Appellant and the resulting squandering of crucial Court resources, and that it enter an Order affirming the decision of the District Court in all respects.

Dated: Respectfully Submitted,

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CERTIFICATE OF RELATED CASES

Counsel for appellant is unaware of any cases currently pending in this Court that are related for purposes of Circuit Rule 28-2.6.

DATED: January 17, 2008

By: AMANDA F. BENEDICT
Attorney for Appellees

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32-1

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I hereby certify that: the foregoing brief uses 14 point Times New Roman proportionately spaced type; text is double spaced and footnotes are single spaced; a word count of the word processing system used to prepare the brief indicates that the brief (not including the table of contents, the table of authorities, the statement of related cases, the certificate of compliance with Circuit Rule 32-1, or the proof of service) contains approximately 4,006 words.

DATED: January 17, 2008

By: AMANDA F. BENEDICT
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CERTIFICATE OF SERVICE

CASE NAME: JOE YEAGER V. CITY OF SAN DIEGO, ET AL

CASE NO: 07-55999

I, the undersigned, declare that: I am and was at the time of service of the papers herein referred to, over the age of eighteen years and not a party to the within action. I am employed in the County of San Diego, California, where the mailing occurred, and my business address is: 3790 Via De La Valle, Ste 313, Del Mar, CA 92014.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence and pleadings for mailing with the United States Postal Service, and that the mailings are deposited with the United States Postal Service the same day in the ordinary course of business. I caused to be served the following document(s):

Appellees Brief; Appellees Excerpts of Record

xx BY MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on this 17th day of January, 2008, Del Mar, California,

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