FILED
United States Court of Appeals
Tenth Circuit

April 30, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BEUS GILBERT PLLC,

Plaintiff,

v.

DONALD L. ROBERTSON TRUST,

Defendant Crossclaimant - Appellant,

v.

BRIGHAM YOUNG UNIVERSITY,

Defendant Crossclaim Defendant - Appellee.

No. 20-4061
(D.C. Nos. 2:12-CV-00970-RJS & 2:14-CV-00206-RJS)
(D. Utah)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **EBEL** and **BACHARACH**, Circuit Judges.

This case arises out of the discovery of the COX-2 enzyme. The discovery proved lucrative, leading three biochemists to claim partial credit. Among them was Dr. Donald L. Robertson, who allegedly helped

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* This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

discover the enzyme while working as a biochemistry professor at Brigham Young University. The discovery was shared with a major pharmaceutical company, which used the information to develop a blockbuster drug called "Celebrex." BYU sued the pharmaceutical company and settled in 2012 for $450 million.

After paying attorney's fees, BYU kept 55% for itself and agreed to distribute the other 45% to the biochemists responsible for the discovery. Dr. Robertson and the two other biochemists disagreed on the allocation, and litigation ensued.

During the litigation, Dr. Robertson died. His successor in interest, the Donald L. Robertson Trust, moved for leave to file amended crossclaims against BYU for breach of contract and misappropriation of trade secrets. The district court denied the motion, and the Trust appeals.

In deciding this appeal, we conclude that the Trust's allegations

- state a valid claim for breach of contract and
- show that the limitations period had already expired for a claim of misappropriation of trade secrets.

Given these conclusions, we partially affirm and partially reverse the denial of leave to amend.

I. The Denial of Leave to Amend

The Trust challenges the denial of leave to amend the crossclaims to add claims for breach of contract and misappropriation of trade secrets.

The district court denied the motion as futile, concluding that the amended claims would not survive a motion to dismiss.

A. The Standard of Review for Futility

When reviewing a denial of leave to amend, we ordinarily apply the abuse-of-discretion standard. *Johnson v. Spencer*, 950 F.3d 680, 720–21 (10th Cir. 2020). But when a district court disallows amendments based on futility, we conduct de novo review. *Id.* Here the district court concluded that the amendments were futile because they would not survive a motion to dismiss for failure to state a valid claim. So our review is de novo.

Dismissal for failure to state a claim is proper only if the allegations lack enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim is facially plausible when the allegations give rise to a reasonable inference that the defendant is liable." *Mayfield v. Bethards*, 826 F.3d 1252, 1255 (10th Cir. 2016).

In determining facial plausibility, "we will disregard conclusory statements and look only to . . . the remaining[] factual allegations . . . ." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012). But "specific facts" are unnecessary; the claimant needs only to provide "fair notice" of the claim and its grounds. *Id.* at 1192. We credit the "well-pled factual allegations," viewing them "in the light most favorable" to the claimant and in "the context of the entire [crossclaim.]" *Evans v. Diamond*,

957 F.3d 1098, 1100 (10th Cir. 2020) (quoting *Peterson v. Grisham*, 594 F.3d 723, 727 (10th Cir. 2010)); *Ullery v. Bradley*, 949 F.3d 1282, 1288 (10th Cir. 2020).

B. The Proposed Addition of a Crossclaim for Breach of Contract

For substantive legal principles on the proposed amendment to the crossclaim for breach of contract, we apply Utah law. *Corneveaux v. CUNA Mut. Ins. Grp.*, 76 F.3d 1498, 1506 (10th Cir. 1996). Under Utah law, a contract claim requires four elements:

1. the existence of a contract,
2. the performance by the party seeking recovery,
3. a breach by the other party, and
4. the existence of damages.

Am. W. Bank Members, L.C. v. State, 342 P.3d 224, 230–31 (Utah 2014). The district court denied the adequacy of allegations on the first two elements: a contract and Dr. Robertson's performance.[1] We disagree with the district court.

[1] BYU does not question satisfaction of the last two elements (a contractual breach and the existence of damages).

1. The Trust plausibly alleged a contract and Dr. Robertson's performance.

In our view, the Trust's amended crossclaim for breach of contract satisfied the first two elements by alleging a contract and Dr. Robertson's performance.

a. The Trust plausibly alleged a contract between Dr. Robertson and BYU based on the IP Policies in effect from 1989 to 1992 and adopted in 1992.

For a contract claim, the Trust must allege a contract between Dr. Robertson and BYU. The district court regarded the allegations as deficient for failing to say

- what the material terms were or
- when and how a contract had been formed.

We disagree because the Trust plausibly alleged that Dr. Robertson and BYU had entered into implied contracts governed by the IP Policies

- in effect from 1989 to 1992 and
- adopted in 1992.[2]

[2] The complaint refers to "the BYU IP Policy that was in effect from 1989 through 1992 during the development of COX-2." *See, e.g.*, Appellant's App'x vol. 2, at 78–79, ¶¶ 27, 38. The Trust has explained in district court and on appeal that this reference encompasses the IP Policy adopted in 1992. *Id.* at 199, 201, 207–210, 225, 229–33; Appellant's Opening Br. at 24, 34; Appellant's Reply Br. at 2, 8.

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