United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7062 **September Term, 2019**

FILED ON: April 24, 2020

JOSHUA J. ANGEL,
APPELLANT

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-01142)

Before: HENDERSON, GRIFFITH, and WILKINS, *Circuit Judges*.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and the briefs of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons set out below, it is

ORDERED and **ADJUDGED** that the decision of the district court be **AFFIRMED**.

The Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, commonly known as Fannie Mae and Freddie Mac, are government-sponsored enterprises that buy and sell mortgage loans. In 2012, Fannie and Freddie entered into an agreement with the U.S. Treasury Department known as the Third Amendment. "In simple terms, the Third Amendment requires Fannie and Freddie to pay quarterly to Treasury a dividend equal to their net worth—however much or little that might be." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 602 (D.C. Cir. 2017). Because the Third Amendment provides that "the entire net worth of the Companies [is] payable in perpetuity to" the government, there are "no remaining assets from which dividends could ever be paid" to private shareholders. Compl. ¶ 68, J.A. 30.

Joshua Angel, who owns shares of Fannie and Freddie stock, sued the companies and their directors in 2018. Angel alleged that the defendants' adoption of the Third Amendment "rendered a nullity [his] contractual right . . . to receive dividend payments." *Id.* ¶ 110, J.A. 41. The district court dismissed his complaint with prejudice. *See* 3/6/19 Order, J.A. 213. Angel's claims were time-barred, the court held, because they "accrued at the time of the enactment of the Third Amendment—over five years ago and outside the limitations period for any [applicable] cause of action" under Delaware and Virginia law, which governed his claims against Fannie and Freddie, respectively. 3/6/19 Mem. Op. at 5, J.A. 205. The court rejected Angel's argument that his claims were timely because the directors "continue[d] to breach the contracts . . . each quarter they fail[ed] to declare a dividend." *Id.* at 6, J.A. 206. Rather, "the alleged original sin—the Third Amendment—produce[d] all the damage that Mr. Angel claims." *Id.* at 7, J.A. 207. Although it was "true that each quarter the Third Amendment operate[d] to deprive Mr. Angel of the possibility of a dividend," that was "simply the continued ill effects of a single wrong." *Id.*

Angel moved for leave to amend his complaint. In his new complaint, he alleged that the directors of Fannie and Freddie were obligated not to actually *declare* a dividend every quarter, but rather to "make a reasonable, good-faith *determination* . . . every fiscal quarter as to whether or not to declare a dividend," which Angel called the "Quarterly Dividend Duty." Proposed First Am. Compl. ¶ 4, J.A. 248 (emphasis added). The court denied the motion. Angel's new complaint was futile, the court held, because it "merely spill[ed] more ink rehashing" his theory that contractual breaches occurred each quarter. 5/24/19 Mem. Op. at 3, J.A. 314. Angel appealed. *See* 12 U.S.C. § 1452(f)(2); 28 U.S.C. § 1291.

We affirm. The district court properly dismissed Angel's initial complaint as time-barred. That pleading's allegations concern the adoption of the Third Amendment, which occurred more than five years before Angel filed suit, outside the limitations period for any applicable cause of action. *See, e.g.*, Compl. intro. para. (suing the companies' directors "as of August 17, 2012," the date of the Third Amendment); *id.* ¶ 1 (suing "for damages incurred in connection with" the adoption of the Third Amendment); *id.* ¶ 79 (the Third Amendment "effectively nullified[] and eliminated the Board's exercise of its contractual dividend declaration functions").

We reject Angel's argument that his theory of a "Quarterly Dividend Duty" makes his claims timely. Angel provides us with no reason to believe that the law of Delaware, Virginia, or any other jurisdiction imposes on corporate directors a periodic duty to determine whether to declare a dividend. *Cf. K&D LLC v. Trump Old Post Office LLC*, 951 F.3d 503, 510 (D.C. Cir. 2020). The cases that Angel cites concern the actual failure to declare and pay a dividend, not a failure to deliberate. *See* Angel Br. 4; Reply Br. 6. But Angel writes repeatedly that he does not challenge the directors' actual failure to declare a dividend. *See, e.g.*, Angel Br. 34 ("Plaintiff does not assert that Defendants breached the contract by failing to declare dividends but rather, by failing to determine whether to declare them . . . each fiscal quarter.").

Angel's theory is an especially poor fit for a case like this. On his logic, the directors of a corporation that has no funds with which to pay a dividend, and under current law will never have any such funds, *see* Compl. ¶ 68, must deliberate every quarter about whether to declare a dividend.

Even the cases Angel cites require "sufficient earnings or surplus not necessarily needed in the business" before the court will ask whether the directors improperly refused to declare a dividend. *Penn v. Pemberton & Penn, Inc.*, 189 Va. 649, 658 (1949); *accord* DEL. CODE ANN. tit. 8, § 170; VA. CODE ANN. § 13.1-653(C). Fannie and Freddie have no such surplus.

Angel raises several procedural arguments, all of which we reject. First, he says the district court erred by dismissing his complaint without "accept[ing] the allegations of [the Quarterly Dividend Duty] and breaches as true." Angel Br. 31. But "on a motion to dismiss, courts are not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and citation omitted).

Next, Angel says the district court erred by dismissing his complaint with prejudice and denying him leave to amend his complaint. We disagree. "Dismissal with prejudice is warranted when the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1340 (D.C. Cir. 2015) (internal quotation marks and citation omitted). There are no other facts consistent with Angel's complaint that would make his claims, which accrued upon the adoption of the Third Amendment in 2012, timely.

Finally, Angel argues that remand is required because a "dismissal *with prejudice* is warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency," *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (internal quotation marks and citation omitted), and the district court made no such determination here. But we have affirmed a dismissal with prejudice absent that explicit determination when it was clear that the plaintiff's claims, like Angel's, failed as a matter of law. *See Abbas*, 783 F.3d at 1340.

For the foregoing reasons, we affirm the judgment of the district court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk