NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 11-7109

KAREN HUDES,

Appellant,

vs.

AETNA LIFE INSURANCE COMPANY *et al..*,

Appellees.

On Appeal from the United States District Court for the District of Columbia in Case No.1:10-CV-01444-JEB (Hon. James E. Boasberg, Judge)

BRIEF FOR DEFENDANT-APPELLEE MARK E. SCHREIBER

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SEPTEMBER 5, 2012

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the United States District Court for the District of Columbia and in this Court are listed in the Brief for Appellant Karen Hudes.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant Karen Hudes.

C. Related Cases

This case has not previously been before this Court or any other Court. There are no related cases.

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* Authorities upon which we chiefly rely are marked with asterisks.

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GLOSSARY

IBRD	International Bank for Reconstruction and Development
World Bank	Commonly refers to the IBRD. The World Bank Group is comprised of the IBRD, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, and the International Centre for Settlement of Investment Disputes

STATEMENT OF THE ISSUES

1. By failing to present any legal argument challenging the District Court's dismissal of all claims against Schreiber, has Hudes waived any challenge to the judgment entered on Schreiber's behalf?

2. Was the District Court correct in dismissing all federal claims against Schreiber?

3. Did the District Court abuse its discretion in declining to exercise supplemental jurisdiction over the deficiently pled state law claims that Hudes tried to assert against Schreiber?

PERTINENT STATUTES AND REGULATIONS

Fed. R. App. P. 28 (a)

STATEMENT OF THE CASE

This litigation began on December 17, 2009, when Karen Hudes sued Aetna Corp., John and Jane Does 1-100, and Mark Schreiber in the United States District Court for the District of Maryland. (JA 0002, 0040). Two and a half months later, Hudes amended her complaint, substituted Aetna Life Insurance Co. for Aetna Corp. and added the IBRD as a Defendant. (JA 0003, 004041). The Defendants filed motions to dismiss or to transfer the action, and on August 23, 2010, the case was transferred to the United States District Court for the District of Columbia. (JA 0003, 0005, 0041).

Shortly after the case was transferred, Hudes amended her complaint yet again and added KPMG LLP as a Defendant. (JA 0003, 0041). Schreiber moved to dismiss that complaint pursuant to Fed. R. Civ. P. 12 (b)(1) as Hudes failed to allege facts invoking the District Court's subject matter jurisdiction, and pursuant to Fed. R. Civ. P. 12 (b)(6) as Hudes failed to state a claim upon which relief could be granted. After Hudes fully responded to the Defendants' various motions to dismiss, the Court issued its Memorandum Opinion on August 30, 2011, dismissing all "federal causes of action against all Defendants" with prejudice and dismissing the "Maryland state common-law claims" without prejudice. (JA 0037, 0060). Hudes noted her appeal on September 27, 2011. (JA 0061).

STATEMENT OF THE FACTS

Hudes "worked as a lawyer at the World Bank for twenty years before being terminated." (JA 0037). In her Second Amended Complaint, she made the following allegations regarding Schreiber:

- "Defendant Mark E. Schreiber (hereinafter "Schreiber") is a hired gun who has defamed Plaintiff, abused Plaintiff's confidential medical records, inflicted emotional distress on Plaintiff and damaged Plaintiff's career in violation of HIPAA, Sarbanes-Oxley and Dodd-Frank." (Second Amended Complaint ¶ 2 JA 0024).

- IBRD's Office of Ethics and Business Conduct ("EBC") "further invaded Plaintiff's privacy by hiring Defendant Schreiber as a consultant. EBC tried to shield its malfeasance by hiring Defendant Schreiber to defame Plaintiff." (*Id.* ¶¶ 19, 20 JA 0032).

- Plaintiff claims the right to "prompt judicial resolution" of "Schreiber's violations of Plaintiff's federal and state privacy rights." (*Id.* ¶ 23 JA 0033).

- "Defendants Aetna and Schreiber are running roughshod over well-accepted principles of medical and legal ethics, laws regulating the confidentiality of medical records, and Sarbanes-Oxley." (*Id.* ¶ 28 JA 0035).

- "Plaintiff's career has been damaged by Defendant Schreiber's breach of Sarbanes-Oxley and Dodd-Frank, HIPAA, and General Sections 4-302 (a) and (d) of the Annotated Code of Maryland." (*Id.*).

Those were the only allegations made against, or concerning, Schreiber. It is not clear what, if any, cognizable cause of action Hudes was trying to assert against Schreiber. She claimed that the World Bank hired Schreiber as a "consultant," and that he then defamed her, abused her "confidential records," inflicted emotional distress on her, and somehow violated various federal statutory schemes. She did not identify any allegedly defamatory statements or how any purported (but entirely unspecified) emotional distress gave rise to a cause of action, and she failed to cite which specific federal statutory provisions Schreiber allegedly violated. In short, Hudes's claim against Schreiber was comprised solely of conclusory allegations that were devoid of any factual content. As the District Court stated, the "only other piece of information" that could be "glean[ed] about Schreiber from Plaintiff's Second Amended Complaint, factual or otherwise, is

that Plaintiff identifies him in her caption as being affiliated with 'Edwards Angell Palmer & Dodge' of Boston, Massachusetts." (JA 0052).[1]

The District Court concluded that Hudes fell "woefully short" of the pleading requirements established by Fed. R. Civ. P. 8. (JA 0052-53) (citing *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)). In the words of the Court, "[n]owhere does she plead the facts necessary to support any cause of action under any of the farrago of federal and state statutes she accuses him of violating," including her purported defamation claim as well as her federal statutory claims:

> Plaintiff's Second Amended Complaint does not allege a single statement made by Schreiber, let alone contain facts sufficient to support the elements of a claim for defamation. Plaintiff's nebulous and conclusory allegations surrounding Schreiber's conduct fare no better when evaluated against the elements Plaintiff must prove to establish violations of Sarbanes-Oxley, the Dodd-Frank Act, or HIPAA.

(JA 0053).

The Court concluded that Hudes "already had three attempts" at stating a federal claim against Schreiber, "and it is readily apparent that if she had a federal claim against him, she would have articulated it by now." (JA 0054) As for the state law claims, the Court declined to exercise supplemental jurisdiction over those deficiently pled claims and therefore dismissed those claims without prejudice. (JA 056).

[1] Schreiber was, and is, a partner in that firm, which is now known as Edwards Wildman Palmer LLP.

SUMMARY OF ARGUMENT

In her Brief, Hudes focuses exclusively on the dismissal of her claims against the IBRD. Although she appealed from the dismissal of her claims against Schreiber, and although she briefly mentions Schreiber in her Brief, she does not argue that the District Court erred in dismissing her claims against Schreiber and she does not provide any reason why the judgment entered in favor of Schreiber should be reversed or vacated. In short, she makes no arguments with respect to her claims against Schreiber and she therefore has waived any such claim. For that reason alone, the judgment in his favor should be affirmed.

In any event, the District Court was correct in dismissing all federal claims against Schreiber and the District Court did not abuse its discretion when it declined to exercise supplemental jurisdiction over Hudes's deficiently pled state law claims against Schreiber.

ARGUMENT

A. By failing to present any legal argument challenging the District Court's dismissal of all claims against Schreiber, Hudes has waived any challenge to the judgment entered on Schreiber's behalf.

In her Brief, Hudes's discussion of Schreiber, her claims against Schreiber, and the District Court's ruling on those claims consists – in total – of two quick mentions in her Statement of the Case and a perfunctory request at the end of her Conclusion. In her Statement of the Case, Hudes claims that she "transferred" her

claims against IBRD to the U.S. District Court for the District of Maryland, "where she was suing Aetna for disclosing to IBRD [her] confidential medical records and Schreiber for defamation and damage to her career." (Hudes Brief p. 11). She asserts that IBRD's Ethics Office "hired Schreiber in violation of IBRD's Staff Rule 8.02 Protections and Procedures for Reporting Misconduct (Whistleblowing) JA 32." (*Id.*). In her Conclusion, she "requests permission to amend the complaint to include Schreiber's specific defamatory actions which were unknown to appellant at the time of the complaint. Schreiber's defamatory report has damaged Hudes' career." (*Id.* p. 33).

Those efforts fall far short of what is needed to pursue an argument on appeal. Fed. R. App. Proc. 28 (a)(9) provides that the argument section of the appellant's brief must contain:

> **(A)** appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies: and
>
> **(B)** for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues).

Failure to abide by those clear requirements constitutes a waiver of her arguments concerning Schreiber and mandates affirmance of the District Court's judgment in favor of Schreiber. In *Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir.

1996), this Court held that the Appellants waived five of their nine issues because they failed to brief those issues in the argument section of their brief:

> In their "Statement of the Issues," appellants list nine challenges to the Access Act. Appellants' Br., at vi. *By failing to brief five of these challenges, they have waived them*. *See* FED. R.APP. P. 28(a)(6); *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n*, 485 F.2d 786, 790 n. 16 (D.C.Cir.1973) (where petitioners offer "no argument whatever" in support of certain issues on appeal, court will decline to consider them). *Rule 28(a)(6) requires that the argument section of an appellate brief "contain the contentions of the appellant on the issues presented, and the reasons therefor ... ."* FED. R.APP. P. 28(a)(6). Simply listing the issues on review without briefing them does not preserve them. *Cratty v. United States*, 163 F.2d 844, 851 (D.C.Cir.1947) (where certain grounds for appeal are "stated by the appellants but not urged in their brief," they are treated as abandoned). We therefore address only the arguments appellants have briefed. . . .

(Emphasis added); *accord United States v. Wade*, 255 F.3d 833, 839 (D.C. Cir. 2001); *United States v. Feuver*, 236 F.3d 725, 727 n. 3 (D.C. Cir. 2001); *Artis v. Greenspan*, 158 F.3d 1301, 1302 n. 1 (D.C. Cir.1998); *see Petit v. U.S. Dept. of Educ.*, 675 F.3d 769, 779 (D.C. Cir. 2012); *Catawba County v. EPA*, 571 F.3d 20, 38 (D.C. Cir. 2009); *New York v. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005) (a party waives an argument if it is not raised in the opening brief).

Hudes has waived any issues she might have had regarding the dismissal of all claims against Schreiber. She does not contend that the Court erred in dismissing with prejudice the federal claims against Schreiber. Nor does she

contend that the Court abused its discretion in declining to exercise supplemental jurisdiction over her deficiently pled state law claims. Having failed even to articulate any such contention, she also fails to cite any legal authority to support the non-existent legal contentions. As Hudes has made no legal arguments contending that the Court erred in any respect to its disposition of her against Schreiber, the judgment in Schreiber's favor should be affirmed.

B. The District Court was correct in dismissing all federal claims against Schreiber.

In her Second Amended Complaint, Hudes alleged that Schreiber had violated "HIPAA, Sarbanes-Oxley and Dodd-Frank." (Second Amended Complaint ¶ 2 JA 0024). In its Memorandum Opinion, the District Court correctly held that Hudes had no actionable federal claim:

> Plaintiff is not entitled to protection under Sarbanes-Oxley's whistleblower-protection provisions because, as explained in Section III.A.2, *supra* [JA 0047-49], Sarbanes-Oxley only applies to publicly traded companies. As Schreiber was never her employer, she cannot state a claim against him for violating the Dodd-Frank Act's whistleblower-protection provisions. See Dodd-Frank § 922(h)(1)(A) ("No employer may discharge . . .") (emphasis added). Finally, as explained in Section III.D, *infra* [JA 0058-60], HIPAA does not provide a private cause of action. Any amended HIPAA claim against Schreiber could thus not survive a Rule 12(b)(1) motion to dismiss and would be futile. See Johnson v. Quander, 370 F.Supp.2d 79, 100 (D.D.C 2005), aff'd, 440 F.3d 489 (D.C. Cir. 2006) ("[B]ecause no private right of action exists under HIPAA, this Court does not have subject matter jurisdiction over this claim and it must be dismissed.").

(JA 0054-55).[2] As stated above, Hudes does not argue that the District Court erred in reaching that decision and thus dismissing all federal claims against Schreiber. Indeed, for the reasons stated in its Memorandum Opinion, the District Court was correct and its judgment should be affirmed.

C. The District Court did not abuse its discretion in declining to exercise supplemental jurisdiction over the deficiently pled state law claims that Hudes had tried to assert against Schreiber.

The District Court acted well within its discretion when it declined to exercise supplemental jurisdiction and dismissed Hudes's state law claims without prejudice. District Courts have supplemental jurisdiction over state law "claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367 (a). A District Court may decline to exercise supplemental jurisdiction if it "has dismissed all claims over which it has original jurisdiction." *Id.* § 1367 (c)(3). The decision whether to exercise supplemental jurisdiction under those circumstances is left to the District Court's discretion, and this Court reviews the District Court's decision under an abuse of discretion standard. *Shekoyan v. Sibley Int'l*, 409 F.3d 414, 423 (D.C. Cir. 2005).

[2] This Court "review[s] *de novo* the district court's grant of a motion to dismiss for lack of subject-matter jurisdiction under Rule 12 (b)(1) . . . and for failure to state a claim under Rule 12 (b)(6) . . . ." *Kim v. United States*, 632 F.3d 713, 715 (D.C. Cir. 2011) (citations omitted).

Here, the District Court acted in accordance with Section 1367 (c)(3) when it dismissed without prejudice all of Hudes's purported state law claims for which she asserted supplemental jurisdiction under subsection (a). In making that decision, the Court considered "judicial economy, convenience and fairness to litigants." *Id.* (JA 0055). As the Court noted:

> "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7 (1988); see also Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48 F.3d 1260, 1267 (D.C. Cir. 1995) (finding the discretion set out in Carnegie-Mellon Univ. "unaffected by the subsequent enactment of 28 U.S.C. 1367(d), in the Judicial Improvements Act of 1990").

(JA 0055-56).

The Court carefully considered the requisite factors and concluded that those "factors weigh against retention of the case." (JA 0056). Hudes does not argue that the Court abused its discretion in making that decision. In fact, the Court did not abuse its discretion and its decision should be affirmed. *See Shekoyan v. Sibley Int'l*, 409 F.3d at 424 (Where the District Court considered the requisite factors when making its decision whether to exercise supplemental jurisdiction, the Court did not abuse its discretion).

Hudes, however, asks – in the Conclusion section of her Brief – that she be allowed "to amend the complaint to include Schreiber's specific defamatory actions which were unknown to [her] at the time of the complaint." (Hudes Brief at 33). It is not clear what relief she is seeking. If she is suggesting that the Court should have exercised supplemental jurisdiction and then allowed her to amend her complaint again, she does not explain how the Court purportedly abused its discretion. On that basis alone, the argument should be rejected.

Furthermore, she points to no place in the record where she moved for leave to amend but was denied her request. Indeed, she made no such request. "When a plaintiff fails to seek leave from the District Court to amend its complaint, either before or after its complaint is dismissed, it forfeits the right to seek leave to amend on appeal." *City of Harper Woods Employees' Ret. Sys. v. Oliver*, 589 F.3d 1292, 1304 (D.C. Cir. 2009) (citations omitted); *see Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1279 (D.C. Cir. 1994) (Plaintiffs failed to move for leave to amend their complaint and the District Court did not abuse its discretion by failing to grant such leave *sua sponte*); *see also Ciralsky v. CIA*, 355 F.3d 661, 671 (D.C. Cir. 2004) (Holding that the District Court did not abuse its discretion when it failed to give leave to amend where the dismissal was without prejudice).

Moreover, she deserved no further opportunities to plead a cause of action. Hudes holds a law degree from Yale University and had twenty years of

experience as a lawyer in the Legal Department at the World Bank. (JA 0054). As the District Court correctly noted, Hudes therefore "is not entitled to the relaxed pleading standards generally afforded *pro* se plaintiffs." (JA 0054) (citing *Ning Ye v. Holder*, 644 F.Supp.2d 112, 116 (D.D.C. 2009)). Indeed, on the cover page of her Brief, Hudes identifies herself as the "*Pro Se Attorney for Plaintiff-Appellant.*"

She had three opportunities to plead a cause of action against Schreiber and she fell woefully short each time. It is telling that she now claims the "specific defamatory actions were unknown to [her]" when she first sued Schreiber for defamation. (Hudes Brief at 33). In other words, Hudes sued Schreiber for defamation before she even knew the contents of any allegedly defamatory statements. Given her utter and repeated failure to abide by the requirements of Fed. R. Civ. P. 11, she certainly deserves no further opportunities to plead her baseless claim for defamation.

CONCLUSION

For the foregoing reasons, Schreiber respectfully requests that this Honorable Court affirm the judgment of the District Court. [3]

Respectfully submitted,

LERCH, EARLY & BREWER, CHTD.

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[3] Given Hudes's maintenance of an appeal against Schreiber – while making no substantive legal arguments in support of that appeal in her opening brief as required under Fed. R. App. P. 28 – Schreiber reserves his right to seek relief under Fed. R. App. P. 38, which applies to frivolous appeals.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

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September 5, 2012
Date

(s)/s/ Stanley J. Reed

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United States Court of Appeals
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CERTIFICATE OF SERVICE

KAREN HUDES v AETNA LIFE INSURANCE COMPANY, *et al.*, No. 11-7109

I, Elissa Matias, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by LERCH, EARLY & BREWER, CHTD., Attorneys for Appellee Mark E. Schreiber to print this document. I am an employee of Counsel Press.

On **September 5, 2012**, Counsel for Appellee has authorized me to electronically file the foregoing **Brief for Appellee Mark E. Schreiber** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to any of the following registered CM/ECF users:

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September 5, 2012

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