No. 15-2053
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

L. KIRK TOMPKINS AND SUSIE TOMPKINS,

PLAINTIFFS-APPELLANTS,

v.

LIFEWAY CHRISTIAN RESOURCES OF THE SOUTHERN BAPTIST CONVENTION, A TENNESSEE NON-PROFIT CORPORATION; GLORIETA, 2.0, INC., A NEW MEXICO NON-PROFIT CORPORATION; THOM RAINER; JERRY RHYNE; LARRY D. CANNON; AND DAVID WEEKLEY,

DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
For the District of New Mexico
The Honorable James O. Browning, District Judge
The Honorable Robert H. Scott, Magistrate Judge
No. 1:13-CV-00840-JB-CG

APPELLANTS' SUPPLEMENTAL BRIEF

Seth Kretzer
LAW OFFICES OF SETH KRETZER
440 Louisiana Street; Suite 200
Houston, Texas 77002
seth@kretzerfirm.com
[Tel.] (713) 775-3050
Colorado Bar #: #: 48143

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APPELLANTS' STATEMENT OF PRIOR AND RELATED APPEALS

In accordance with 10th Circuit Rule 28.2(C)(1), Appellants state that there are no prior or related appeals.

JURISDICTIONAL STATEMENT

Appellate jurisdiction exists under 28 U.S.C. § 1291. The District Court dismissed the Tompkins' claims against all of the Respondents in this appeal on March 31, 2015. ROA Vol. IV, at 79. The Tompkins timely filed their Notice of Appeal that same day. ROA Vol. IV, at 101.

ISSUE PRESENTED FOR REVIEW

Whether the District Court committed reversible error in failing to make a sufficiently liberal reading of Tompkins' *pro se* pleadings, thereby holding the pleadings did not to contain a claim that the Tompkins' lease with LifeWay was void because of unconscionability.

STATEMENT OF LAW

District Courts in the Tenth Circuit are instructed to "read *pro se* complaints more liberally than those composed by lawyers and dismiss them only when it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Andrews v. Heaton*, 483 F.3d 1070, 1076 (10th Cir. 2007) (citation omitted). This "rule applies to all proceedings involving a *pro se* litigant." *Hall v. Bellmon*, 935 F.2d 1106, 1110 n.3 (10th Cir. 1991). *See also Overton v. United States*, 925 F.2d 1282 (10th Cir.1990) (liberally construing *pro se* pleadings in review of dispositive motion); *Carr v. Ferkham*, 2016 WL 705978, *1 (D. Colo. 2016) ("Plaintiffs are proceeding *pro se*. Thus, I have

construed their pleadings and papers more liberally and held them to a less stringent standard than formal pleadings drafted by lawyers.").

The core argument presented in this Supplemental Brief is that the Tomkins alleged facts that imply a severely unequal bargaining power and terms that are grossly unfair; the Tomkins' correlate proposition is that LifeWay's enforcement of the contract caused damage. In this way, the Tompkins' complaint affirmatively (if less than articulately voiced) raised a claim to declare the contract void. Had the District Court made an appropriately liberal reading of the Tomkins' complaint under the controlling legal standard enunciated in the *Andrews/Hall* line of Tenth Circuit cases, it would have identified these allegations and drawn the necessary inference so as to deny dismissal under Rule 12(b)(6).

STATEMENT OF THE CASE

A. Introduction

The Glorieta Conference Center ("Glorieta") consists of 2,400 acres of serene land in Glorieta, Santa Fe County, New Mexico. Glorieta was opened in 1952 as Southern Baptist Convention's second national conference center, and it has been operated since then by the Sunday School Board of the Southern Baptist Convention, which changed its name to LifeWay in 1998. Glorieta is an idyllic retreat, and has been a signature destination for Christian conferences and camps throughout its decades of operation. ROA Vol. I, at 267.

B. The Tompkins Family Lease

As a source of revenue over the last several decades, LifeWay leased small lots of land within Glorieta to individuals and churches. The lease agreements expressly required lessees to construct and/or maintain a permanent or temporary residence on the property. The Tompkins family was one of the original families to purchase a home on Glorieta. They assumed the lease of "Lot No. 71, Block No. 1" in 1960. ROA Vol. II, at 132, 137. The original lease contained the following relevant terms:

* Lessee is required to maintain a permanent residence;

* Any and all improvements to the property must be approved by LifeWay;

* Lessee is responsible for construction and maintenance of all utility infrastructure on the property;

* Fair-value purchase in the event that the "growth and development" of LifeWay's "enterprise" required termination of the lease:

> It is understood by Lessee that the growth and development of Lessor's enterprises may require the use and occupancy of the property herein leased, and in such event if in the judgment of Lessor the premises are so required by Lessor, Lessee agrees that Lessor shall have the right to declare this lease terminated, and upon said declaration Lessee agrees to surrender all right, claim and interest in said leased premises and to deliver immediate possession of said premises and the improvements thereon; provided, however, that if this lease is so terminated, Lessee shall have the right to reasonable compensation for the value of any improvements then on said premises placed there by Lessee, or to be reimbursed for the expense of removing any building or buildings from said premises to some other place on said Conference Center grounds, and if Lessor and Lessee cannot agree upon said compensation or value,

the value of said building or buildings or compensation shall be fixed by a board of two (2) appraisers, one to be selected by Lessor and one by Lessee, and if said two appraisers cannot agree on the value or compensation, then the matter of value or compensation shall be referred to an arbiter or umpire to be appointed by said two appraisers, for determination and decision, and the decision of said arbiter or umpire shall be final and conclusive and binding on both Lessor and Lessee.

* Lessee's use and occupancy of the property is under the supervision and control of LifeWay, which has the option of terminating the lease upon any violation of any rule or regulation governing use of Glorieta, and upon such termination Lessee shall receive fair-value compensation of the residence/improvements [according to the terms of Paragraph 9];

* Upon expiration of this lease, Lessee agrees that

    (a) LifeWay has right of purchase of residence/improvements according to value determined by Paragraph 9;

    (b) If LifeWay does not purchase the residence/improvements, Lessee has the option of entering into a new lease of the property;

    (c) If a new lease is not agreed on, Lessee may remove the residence/improvements within six months or leave them to become the property of LifeWay;

* Lessee pays all levies and taxes on the property.

ROA Vol. II, at 145-47.

The Tompkins rented the property and made vast improvements to the residence over the next fifty years. Improvements include remodeling and enlarging the residence, and updating the kitchen, bath, tile floors, and metal roof. ROA Vol.

II, at 132. According to the Tompkins, the residence with its improvements has a low-value appraisal of approximately $430,000. Id.

The terms of the lease between the Tompkins and LifeWay remained more or less the same until 2006, when LifeWay, clearly anticipating for the first time a future sale of the property, added the following terms:

> EXPIRATION AND TERMINATION OF AGREEMENT . . . The Agreement may be terminated by Glorieta prior to the expiration date for the following reasons:
>
> . . . d. Sale of Premises. If Glorieta, in its sole discretion, elects to sell the Premises[.]

ROA Vol. II, at 171-72. Around the same time, LifeWay encouraged homeowners to expect that the leases, which in the Tompkins' case had existed relatively unchanged for fifty years, would continue for another fifty years. In 2009, LifeWay announced changes in the operation of Glorieta Conference Center. ROA Vol. III, at 604. At that time, Byron Hill, LifeWay's executive director of conference operations, stated, "We've been here for more than 50 years and we believe the changes we are making will position Glorieta for the next 50 years." *Id*. Yet, around the same time, LifeWay was actively exploring ways to sell the property. ROA Vol. I, [DOC 31-2]. LifeWay sold Glorieta to Glorieta 2.0 on September 10, 2013, for $1. The terms of the sale did not include any protection for leaseholders.

This lease history reveals that Glorieta encouraged Christian individuals such as the Tompkins to make a life on the property, to establish a permanent residence,

and to maintain that residence according to a standard that complimented its pristine, idyllic surroundings. They encouraged this by initially offering decades of fair and enduring lease terms for a permanent life on Glorieta. Over time, however, after homeowners made significant investments in the property, LifeWay eroded those terms, such that at nearly any moment LifeWay could take the property with no compensation by forcing the leaseholder to make a Hobson's choice of either paying the exorbitant cost of having the residence dismantled and transported away or leaving it there for the benefit of Glorieta.

C. Glorieta 2.0 Makes Below-Market-Value Offers to Homeowners

On the eve of the sale, leaseholders scrambled to protect their homes. Under pressure from the community, Glorieta 2.0 eventually offered leaseholders the following options: a) Glorieta 2.0 would buy the leaseholders' homes at a price based on the home's square footage, up to a maximum of $100,000; b) the leaseholders could donate their homes to Glorieta 2.0, rather than spend money to dismantle and remove the homes; or c) Glorieta 2.0 would renew the leases for 12 years, provided that the homes and improvements would belong to Glorieta 2.0 at the end of that period. ROA Vol. 1, at [DOC 1-2]. In response, the Tompkins complained vociferously on behalf of themselves and other leaseholders. Apparently as a result of their complaints, Lot No 71, Block No. 1 was carved out of the sale agreement. The Tompkins' lot was not included in the sale, and continued to belong to LifeWay.

This carve-out had the effect of rescinding the offer of Glorieta 2.0 as to the Tompkins.

On September 11, 2013, LifeWay told the Tompkins that their lease would not be renewed, that LifeWay would not purchase their home or improvements, and that the Tompkins had six months from the lease expiration date to remove their home or it would become the property of LifeWay. The Tompkins' lease expired on September 30, 2013. ROA Vol. 1, at [DOC 28-1].

D. The Lawsuit Giving Rise To the Instant Appeal

Seeking to stop the sale, on September 4, 2013, the Tompkins, proceeding *pro se*, filing this lawsuit against approximately 127 defendants, including Respondents LifeWay, its officers and trustees, and Glorieta 2.0 and its officers. After the sale closed, the Tompkins amended their complaint seeking to invalidate the sale and alleging damages of $300,000.00. See Amended Complaint 27-29 at ¶¶57-64. Thereafter, the Tompkins agreed to dismiss 113 of the 127 named Defendants. See Order Dismissing Certain Defendants, filed November 21, 2013 (Doc.102). The remaining Defendants were:

- LifeWay Christian Resources.
- Thom Rainer, President and CEO of LifeWay.
- Jerry Rhyne, CFO of LifeWay.
- Larry D. Cannon, Secretary and General Counsel of LifeWay.

- Travis Best, a Trustee of LifeWay.
- Terry S. Braswell, a Trustee of LifeWay.
- Charles Craig Carlisle, a Trustee of LifeWay.
- Glorieta 2.0, Inc.
- David Weekley, Director of Glorieta 2.0, Inc.
- Leonard Russo, Director of Glorieta 2.0, Inc.
- Terry Looper, Director of Glorieta 2.0, Inc.
- The Southern Baptist Convention.
- The Executive Committee of the Southern Baptist Convention.
- Frank S. Page, President and CEO of the ECSBC.
- D. August Boto, Executive Vice President of the ECSBC.

See Order Regarding Subject Matter Jurisdiction & Lifting Stay, Vol. II, Doc. 121, at ¶ 3.

As to the remaining Defendants, the Tompkins raised the following allegations in their third and final amended complaint. The Tompkins allege that they are property owners and leaseholders within Glorieta. ROA Vol. II, at 488. The Tompkins allege generally that the sale of Glorieta has resulted in the loss of the Tompkins' private property. ROA Vol. II, at 491-93. They characterize this action as "arising out of the agreements and breach of contract." *Id.* at 494. They describe the Tompkins family leases. *Id*. at 494. They allege that LifeWay encouraged them

to continue leasing by making public assurances that Glorieta would continue existing in its current state for 50 more years, even though LifeWay was then anticipating a sale of the property. *Id.* at 495. To support their complaint they refer to LifeWay's September 11, 2013, letter notifying the Tompkins that their lease would not be renewed, that LifeWay would not purchase their home or improvements, and that the Tompkins had six months from the lease expiration date to remove their home or it would become the property of LifeWay. They allege that LifeWay caused the loss of their private property, valued at $430,000. ROA Vol. II, at 491-95. In effect, the Tompkins, while not expressly stating it, sufficiently raised a claim against LifeWay to void the contract between them.

The District Court failed to recognize this claim entirely. According to the District Court, Count I alleged that Defendants failed to abide by the SBC charter, bylaws, and constitution in allowing Glorieta to be sold. See Third Complaint at 5-7. According to the District Court, Count II alleged that Defendants participated in the fraudulent conveyance of Glorieta. *See* Third Am. Complaint at 7-9. Finally, according to the District Court, Count III alleged a breach of an implied contract between the Tompkins and LifeWay guaranteeing that LifeWay would not sell the property without the approval of two successive annual meetings of the Southern Baptist Convention, and that LifeWay would continue to renew the Tompkins' lease for another 50 years. See Third Am. Complaint at 9-12. The District Court did not

construe the Tompkins' Third Amended Complaint to include a claim that the LifeWay lease agreement was unconscionable.

The remaining fifteen Defendants filed three separate motions to dismiss the Third Amended Complaint. See Motions to Dismiss Third Am. Complaint, Vol. III, Docs. 131, 137, and 139. Defendants argued that Counts I and II should be dismissed for lack of standing. See, e.g., Motion to Dismiss Third Am. Complaint, Vol. III, Doc. 137, at 7-12. Defendants argued that Counts I and II should be dismissed to the extent that the sale of the Glorieta Conference Center was not in accord with its internal rules or religious purposes, because the First Amendment bars civil courts from interfering with the internal governance of churches and religious organizations. *Id*. at 12-13. Third, Defendants argued that Count III should be dismissed for failure to state a claim, because the Tompkins failed to allege any facts showing that implied contracts existed between LifeWay and Plaintiffs. *Id*. at 13-20. The individual Defendants argued that all counts against them should be dismissed for failure to state a claim. *Id*. at 23-26. LifeWay did not argue against the Tompkins' claim of unconscionability.

The Magistrate Judge Issued a Report and Recommendation (Vol. III, Doc. 170), and an Amended Report and Recommendation (Vol. III, Doc. 172), recommending that the motions to dismiss the Third Amended Complaint be granted. The Tompkins timely filed written objections pursuant to 28 U.S.C. §

636(b)(1), to which Defendants filed responses. See Plaintiffs' Exceptions to Magistrate's Recommendations, Vol. III, Doc. 173; Responses to Plaintiffs' Exceptions, Vol. IV, Docs. 174 & 176.

The District Court granted the motions to dismiss the Third Amended Complaint, see Memorandum Opinions and Orders, Vol. IV, Docs. 183, 184, and 186. The District Court's order did not mention the Tompkins' claim against LifeWay to void the contract between them.

E. Procedural History in This Court

The Tompkins filed a timely notice of appeal. See Notice of Appeal, Vol. IV, Doc. 187. Briefs were submitted by all parties, and, on January 28, 2016, undersigned counsel was appointed and directed to file a supplemental opening brief to address only the issues that are appropriate to raise on appeal.

SUMMARY OF ARGUMENT

In this supplemental opening brief, the Tompkins argue only that the District Court erred in construing the *pro se* pleadings to raise a breach of implied contract claim, rather than a claim against LifeWay to void the contract between them. Such an inherently one-sided agreement as the Tompkins-LifeWay lease agreement is against New Mexico public policy and is therefore void as unconscionable. The Tompkins ask this Court to read their pleadings as to include a claim to void the

lease agreement as unconscionable and remand that issue to the District Court for further proceedings.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* a Federal Rule of Civil Procedure 12(b)(6) dismissal of a complaint for failure to state a claim. *See Riddle v. Mondragon*, 83 F.3d 1197, 1201 (10th Cir.1996).

II. THE TOMPKINS' *PRO SE* PLEADINGS SATISFY RULE 12(B)(6)

A. The District Court Failed to Make A Sufficiently Liberal Reading of the Complaint

The District Court dismissed the Tompkins' contract claim against LifeWay pursuant to Federal Rule of Civil Procedure 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, the complaint need only contain allegations of fact that, taken as true, "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw reasonable inferences that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). In identifying reasonable inferences, the court must accept as true all of the allegations in the complaint. *See Ashcroft v. Iqbal*, 556 U.S. at 678.

More specifically, a *pro se* complaint such as this one is entitled to a broad reading, and the allegations must be liberally construed. *See Northington v. Jackson*,

973 F.2d 1518, 1520-21 (10th Cir. 1992). The District Court should have concluded that the Tompkins alleged sufficient facts on which recognized contract claims could be based. *See Hall v. Bellmon*, 935 F.2d at 1110. The Tompkins expressly alleged that they had entered into a contract with LifeWay, they alleged facts that imply a severely unequal bargaining power and terms that are grossly unfair, and that LifeWay's enforcement of the contract caused damage. In this way, the Tompkins' complaint successfully raised a claim to declare the contract void. Had the District Court made an appropriately liberal reading of the complaint, it would have identified these allegations and drawn the necessary inference with ease.

B. Unconscionability Doctrine

1. Introduction

New Mexico law has long held that "[u]nconscionability is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party." *Rivera v. Am. Gen. Fin. Serv. Inc*., 259 P.3d 803 (N.M. 2011) (quoting *Cordova v. Wold Finance Corp. of N.M.*, 208 P.3d 901, 907 (N.M. 2009). "The doctrine of contractual unconscionability can be analyzed from both procedural and substantive perspectives." *Id*.

In his seminal article, Professor Leff described the dual aspects of unconscionability -- procedural and substantive -- as two "legitimate" interests of

contract law, "bargaining naughtiness as 'procedural unconscionability,' and ... the resulting contract as 'substantive unconscionability.'" Arthur Allen Leff, *Unconscionability and the Code -- The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

2. Substantive Unconscionability

"Substantive unconscionability is found where the contract terms themselves are illegal, contrary to public policy, or grossly unfair." *State ex rel. King v. B & B Investment Group, Inc*., 329 P.3d 658, 670 (N.M. 2014).

The substantive analysis focuses on such issues as whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns. *Guthmann v. La Vida Llena*, 709 P.2d 675, 680 (N.M. 1985)). Contract provisions that unreasonably benefit one party over another are substantively unconscionable.

3. Procedural Unconscionability

"Analyzing procedural unconscionability requires the court to look beyond the four corners of the contract and examine factors 'including the relative bargaining strength, sophistication of the parties, and the extent to which either party felt free to accept or decline terms demanded by the other.'" *State ex rel. King v. B & B Investment Group, Inc*., 329 P.3d 658, 669 (N.M. 2014) (quoting *Cordova*).

III. THE TOMKINS' UNCONSCIONABILITY CLAIM IS VIABLE ON THE FACE OF THE PLEADINGS

The Tompkins' complaint adequately presents a claim to declare the LifeWay contract void on the basis of unconscionability, and this claim is unquestionably plausible on the face of their complaint under New Mexico law which recognizes the applicability of this doctrine to lease agreements. *Torres v. Montano*, 2012 WL 868941, *7 (N.M. App., Feb. 20, 2012) (finding that doctrine of unconscionability will apply to lease agreements where there is "fraud, real hardship, oppression, mistake or unconscionable results.").

A. LifeWay's Lease is Substantively Unconscionable

There is no question that the lease agreement here unreasonably benefits LifeWay. Upon its sole option to terminate a lease or let it expire, LifeWay gives itself a risk-free benefit of, in this case, a nearly half-million-dollar home. The Tompkins, in striking contrast, either lose their home or pay an exorbitant amount to have the home dismantled and removed (if possible) for transport to places unknown. There is clearly a plausible argument that this lease agreement is substantively unconscionable.

B. LifeWay's Lease is Procedurally Unconscionable

The Tompkins family had leased this property for over fifty years. Before signing their last lease with LifeWay, they had been reassured that LifeWay would continue for another fifty years. LifeWay added a term to the 2006 lease agreement to protect itself in the event of the sale of Glorieta, while telling the Tompkins that there would be no sale. Thus, in signing their leases with LifeWay in 2006 and 2012, the Tompkins were laboring under extremely asymetrical bargaining power.

By that point, they had already made extensive improvements to the residence and were operating under LifeWay's assurance that the lease arrangements would endure for years to come. Presented with the choice to continue to lease the grounds or not, without benefit of knowing LifeWay's true intention to sell, truly their only option was to continue to lease at whatever terms LifeWay would agree to.

C. Conclusion

In sum, the lease agreement at issue in the Tomkins' complaint is both substantively and procedurally unconscionable. The plausibility of the Tompkins' claim is clear.

CONCLUSION

The Tompkins respectfully request that this Court reverse the District Court's order dismissing their claim that their lease agreement with LifeWay is void pursuant to the doctrine of unconscionability, and remand the case for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

In light of the factual and procedural complexities presented in this case, the Tompkins request oral argument.

Dated: March 8, 2016

Respectfully submitted,

Seth Kretzer
LAW OFFICES OF SETH KRETZER
Colorado Bar #: #: 48143
440 Louisiana Street; Suite 200
Houston, Texas 77002
seth@kretzerfirm.com
[Tel.] (713) 775-3050

CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that Appellants' Supplemental Brief is proportionally spaced and contains 3,656 words, exclusive of the items identified in FED. R. APP. P. 32(A)(7)(B)(iii) as not counting toward the type-volume limitation. This figure was calculated through use of the word count function of Microsoft Word 2010, which was used to prepare the brief.

Respectfully submitted,

Seth Kretzer

CERTIFICATE OF PRIVACY REDACTIONS

Pursuant to 10th Circuit Rule 25.5, I hereby certify that Appellants' Supplemental Brief complies with the privacy and redaction requirements of FED. R. APP. P. 25(a)(5).

Seth Kretzer

Seth Kretzer

CERTIFICATE OF EXACT COPIES

I hereby certify that the hard copies of Appellants' Supplemental Brief which were submitted to the Court are exact copies of the Appellants' Supplemental Brief which was electronically filed on March 8, 2016.

Seth Kretzer

Seth Kretzer

CERTIFICATE OF VIRUS SCANNING

I hereby certify that I have scanned the electronic submission of Appellants' Supplemental Brief for viruses using the most recent version of a commercial scanning program and that the electronic submission is free of viruses.

Seth Kretzer

Seth Kretzer

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2016, a true and complete copy of Appellant's Supplemental Brief was electronically transmitted to the Clerk of the Court using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the parties of record below.

I further certify that, on this date, seven copies of the Appellants' Supplemental Brief were transmitted to the Clerk of the Court by Federal Express and one copy of Appellants' Supplemental Brief was transmitted to all counsel of record by ECF.

Seth Kretzer