In the

United States Court of Appeals

For the Seventh Circuit

No. 19-3211

TIM JON SEMMERLING,

Plaintiff-Appellant,

v.

CHERYL T. BORMANN
and UNITED STATES OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 18 CV 6640 — **Robert W. Gettleman**, *Judge*.

DECIDED AUGUST 18, 2020

BRENNAN, *Circuit Judge* (in chambers). Appellee the United States asks this court to summarily affirm the district court's dismissal of appellant Tim Jon Semmerling's complaint because his appellate brief does not assert any error in the district court's decision.

Semmerling worked as a contractor for the U.S. Military Commissions Defense Organization as part of the legal team for a person charged as an al-Qaeda enemy combatant.

Semmerling, who is gay, disclosed his sexuality to the lead attorney of that team, and Semmerling alleges that, despite promising secrecy, that attorney disclosed his sexuality to the client and told the client that Semmerling was infatuated with the client and was pursuing that interest.

Semmerling sued the lead attorney for state-law torts of defamation, negligence, and intentional infliction of emotional distress, and he sued the United States under the Federal Tort Claims Act, 28 U.S.C. § 2674, for negligence and intentional infliction of emotional distress. Both defendants moved to dismiss the complaint for failure to state a claim, FED. R. CIV. P. 12(b)(6), and the district court granted their motions. Semmerling has appealed and by counsel submitted a seven-page brief that is light on factual details and legal analysis.

The United States moves for summary affirmance. It highlights the sparseness of Semmerling's brief and asserts that summary affirmance is appropriate here because "[s]ummary affirmance may … be in order when the arguments in the opening brief are incomprehensible or completely insubstantial." *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006) (citing *Lee v. Clinton*, 209 F.3d 1025, 1025–27 (7th Cir. 2000), and *Williams v. Chrans*, 42 F.3d 1137, 1139 (7th Cir. 1994)). The co-appellee did not join the government's motion. She has filed a responsive brief in which she argues that Semmerling has waived any argument against the district court's order. She also defends the order on its merits.

The United States is correct that Semmerling's brief is substantively deficient in multiple ways. Federal Rule of Appellate Procedure 28 requires appellate briefs to include a statement of the case that sets out "facts relevant to the issues

submitted for review." FED. R. APP. P. 28(a)(6). But Semmerling's statement of the case is two sentences long and gives only the procedural posture. Although he argues that the district court should have ordered discovery to add cultural context to the complaint, he does not describe any discovery requests either that he made or that the district court denied. *See Friend v. Valley View Cmty. Unit Sch. Dist. 365U*, 789 F.3d 707, 711–12 (7th Cir. 2015) (striking any parts of brief that rely on unsupported facts).

Moreover, in his seven-page brief Semmerling includes almost no legal citations. Rule 28 also requires appellate briefs to contain an argument section that includes the appellant's contentions, reasons, and record citations. FED. R. APP. P. 28(a)(8). But Semmerling's argument section does not identify any legal errors in the district court's dismissal order. He focuses on the court's failure to order discovery, but he does not say how the lack of discovery prejudiced him. *See John v. Barron*, 897 F.2d 1387, 1393 (7th Cir. 1990) ("An appellant must not only raise issues in his brief, he must present them in a professional fashion. This court is not obligated to research and construct legal arguments open to parties, especially when they are represented by counsel as in this case." (citation omitted)).

That said, this court generally disfavors motions for summary affirmance. *See, e.g.*, *Fortner*, 455 F.3d at 754; *United States v. Lloyd*, 398 F.3d 978, 981 (7th Cir. 2005). As we explained in *Fortner*, more often than not such motions merely require that this court reviews the merits of a case multiple times—at the motions stage and at the decision stage. 455 F.3d at 754. The matter is further complicated where, as here, one appellee files a motion while the other files a brief, leaving this court to

consider whether the case has sufficient merit for the appellees to file a brief compliant with Rule 28 or should be summarily affirmed. Either way, the motion has resulted in the efforts that summary affirmance is meant to avoid.

Despite the shortcomings of Semmerling's brief, summary affirmance is not suitable here. Summary disposition is appropriate for cases in which the appellant's position is clearly frivolous. Although Semmerling's brief appears not to comply with the requirements of Rule 28, sparse briefing alone is not a reason to enter a merits judgment, and this case does not rise to the level of "incomprehensible or completely insubstantial" that we saw in *Lee*, 209 F.3d at 1025–27 (summarily affirming dismissal of suit that alleged the United States and China conspired to "bio-chemically and bio-technologically infect and invade" various people with a mind reading and mental torture device), and *Williams*, 42 F.3d at 1139 (summarily affirming denial of motion under Federal Rule of Civil Procedure 60(b), where this court had already reviewed the case twice and the Supreme Court had denied certiorari both times). Of course, the government is free to raise arguments for dismissal under Rule 28 in its brief; I defer that decision to the panel of this court assigned to hear this case on its merits.

One additional note: A review of the record shows that counsel for Semmerling, Attorney Raymond Wigell, survived a stroke shortly after the district court dismissed the complaint. In addition to his recovery, it appears that Wigell has been working to reconstruct his case files after the departure of an associate attorney who worked with him, and concurrent with the disruption brought on by the COVID-19 pandemic. Because I am deferring the resolution of the case to the merits panel, the parties now have the opportunity to brief

those merits, if they choose. Accordingly, I will permit Semmerling to request leave to strike the appellate brief currently on file and to submit a new brief, compliant with Rule 28, within one week of the date of this decision. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (reminding courts not to decide course of litigation over parties' wishes). Of course, the appellees may ask for (and receive) payment from counsel for having to respond twice.

The motion for summary affirmance is DENIED without prejudice to renewal of the arguments in the government's brief. Semmerling may, within seven days from this opinion, seek leave to strike his opening brief and to file a brief that complies with Rule 28. If he chooses to do so, this court will reset a briefing schedule, and the appellees may submit, along with their briefs, a request for reasonable attorney's fees—paid by Attorney Wigell—for the work required to produce the first, unnecessary response.

It is so ordered.