No. 21-124160-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

BENCHMARK PROPERTY REMODELING, LLC,
Plaintiff-Appellant,
v.
GRANDMOTHERS, INC,
COREFIRST BANK & TRUST,
KANSAS DEPARTMENT OF REVENUE,
ROBERT ZIBELL, STATE OF KANSAS

Defendants-Appellees.

BRIEF OF APPELLEE, STATE OF KANSAS, DEPARTMENT OF REVENUE

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THE HONORABLE MARY CHRISTOPHER, JUDGE
DISTRICT COURT CASE NO. 2019-CV-000008

Adam D. King #27272
Kansas Department of Revenue
109 SW 9th St, PO Box 3506
Topeka, Kansas 66601
(785) 296-6055 Phone
(785) 296-5213 Fax
adam.king@ks.gov
ATTORNEY FOR APPELLEE

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NATURE OF THE CASE

This case arises out of a remodeling job performed by the appellant, Benchmark, on property owned by appellee, Grandmothers, and leased by appellee, KDOR. Pursuant to its agreement, as reflected in KDOR's lease with Grandmothers, KDOR agreed to pay Grandmothers the amount of money specified in Benchmark's bids for remodeling work in order for Grandmothers to have the work performed on its building. Benchmark completed the work. KDOR paid the amounts specified in the lease to Grandmothers, but Grandmothers did not pay the full amount to Benchmark. Benchmark sued both Grandmothers and KDOR for, among other things, breach of contract.

KDOR moved for judgment on the pleadings, arguing that what Benchmark alleged was a contract with KDOR, was not, on its face, a contract between Benchmark and KDOR, or in the alternative, that KDOR fulfilled its obligations under the contract Benchmark was alleging, by Benchmark's own admission. The district court granted KDOR's motion for judgment on the pleadings. Benchmark has appealed.

STATEMENT OF THE ISSUES

I. WHETHER THE COURT HAS JURISDICTION OVER THIS APPEAL ARISING FROM A JOURNAL ENTRY OF DISMISSAL WITHOUT PREJUDICE

II. WHETHER THE DISTRICT COURT ERRED IN GRANTING KDOR'S MOTION FOR JUDGMENT ON THE PLEADINGS

RESPONSE TO BENCHMARK'S STATEMENT OF FACTS

As it relates to KDOR, this appeal pertains to the district court's judgment in favor of KDOR on a motion for judgment on the pleadings. Therefore, the facts before this court for review are limited to the facts alleged in the Second Amended Petition and attachments thereto. (R. vol. 1, pp. 214-324).

ARGUMENTS AND AUTHORITIES

I. WHETHER THE COURT HAS JURISDICTION OVER THIS APPEAL ARISING FROM A JOURNAL ENTRY OF DISMISSAL WITHOUT PREJUDICE

Standard of Review

Jurisdiction is a question of law, over which appellate courts exercise unlimited review. *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, Syl. ¶ 1, 244 P.3d 642, 646 (2010). Appellate courts have a duty to dismiss where the record discloses a lack of jurisdiction. *Id.* at Syl. ¶ 2.

Arguments and Authorities

KDOR was dismissed from this action in the district court on its motion for judgment on the pleadings in July 2020. (R. vol. 3, p. 121). Subsequently, Grandmothers won a motion for partial summary judgment on some of the issues between Benchmark and Grandmothers. (R. vol. 3, p.

143). Benchmark voluntarily dismissed its remaining issues, without prejudice, in favor of pursuing this appeal. (R. vol. 3, p. 166).

In its August 31, 2021 order, this court directed the parties to brief the question of whether the court has jurisdiction over this appeal. The court highlighted two cases to be reviewed: *Smith v. Welch*, 265 Kan. 868, 967 P.2d 727 (1998) and *Arnold v. Hewitt*, 32 Kan. App. 2d 500, 85 P.3d 220 (2004).

K.S.A. 60-2102(a) authorizes a party to bring an appeal. In this case, Benchmark argues it has a right to appeal pursuant to K.S.A. 60-2102(a)(4). K.S.A. 60-2102(a)(4) states appellate jurisdiction of the court of appeals may be invoked by appeal from "a final decision in any action, ... in any appeal or cross appeal from a final decision, any act or ruling from the beginning of the proceedings shall be reviewable." The statute does not define "final decision." The issue is whether the dismissal of KDOR, the finding of partial summary judgment for Grandmothers, and the voluntary dismissal without prejudice of Benchmark's remaining claims constitute a "final decision" by the court thus creating appellate jurisdiction.

Precedent is clear that a "final decision" is "one which finally decides and disposes of the entire merits of the controversy and reserves

no further questions of directions for the future or further action of the court." *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. at 610, 244 P.3d at 653. The "final decision" rule aims to prevent courts from deciding cases in separate stages (also known as piecemeal appeals). There are strong policy reasons against "piecemeal appeals" because such an approach creates a lack of judicial consistency and efficiency. *See Arnold v. Hewitt*, 32 Kan.App.2d at 505, 85 P.3d at 224.

Benchmark's reliance on *Smith v. Welch* is misplaced. The procedural facts of that case are similar to the facts here. The district court granted summary judgment to the defendant on several claims, and the plaintiff voluntarily dismissed the remaining claims to appeal the grant of summary judgment. 265 Kan. at 868, 967 P.2d at 729. The Supreme Court granted review of the appeal pursuant to K.S.A. 20-3018(c). *Id.* at 870, 967 P.2d at 729. However, there was no analysis in that case of the question of jurisdiction presented here.

Other cases, such as *Arnold v. Hewitt*, give greater guidance. In *Arnold*, the plaintiffs sued their insurance company for breach of contract, fraudulent misrepresentation, and negligent failure to procure insurance. 32 Kan. App. 2d at 500, 85 P.3d at 220. The district court granted the defendant's motion for summary judgment on all claims except

negligence. *Id.* at 501, 85 P.3d at 222. Then the district court allowed the plaintiffs to dismiss the remaining negligence claim without prejudice. *Id.* The plaintiffs then filed a notice of appeal. *Id.* At the same time, the plaintiffs refiled their negligence claim in the district court. *Id.*

The appellate court noted a decision is final "when all the issues in the case have been determined" and a final decision "generally disposes of the entire merits of the case and leaves no further questions or the possibility of future directions or actions by the court." *Id.* The plaintiffs argued that voluntarily dismissing the negligence claim ended the proceedings in the district court, and the refiling of the claim in district court should not affect the jurisdiction of the appellate court and even cited *Smith v. Welch. Id.* The court found because the plaintiffs refiled the negligence claim while pursuing an appeal of the other claims, they complicated the jurisdictional issue. *Id.* at 505, 85 P.3d at 224. In doing so, the plaintiffs created a "piecemeal trial." *Id.* at 504, 85 P.3d at. Ultimately the court held the plaintiffs' appeal would "render meaningless the statutory provisions invoking the jurisdiction of this court" and they lacked jurisdiction because a final decision must "dispose of the entire merits of the case." *Id.* at 505, 85 P.3d at 224.

In the present appeal, Benchmark seeks to distinguish *Arnold* because, unlike in *Arnold*, Benchmark has not refiled a new case involving the claims it voluntarily dismissed. Nevertheless, Benchmark expressly states that its strategy was an attempt to make the orders appealable (Response to Show Cause Order, p. 5). Benchmark's suggestion that it was attempting to avoid "two trials" furthermore, suggests that were it to prevail in this appeal, it would attempt to revive the dismissed claims. (Response to Show Cause Order, p. 4). This is the very kind of piecemeal appeal this rule is designed to prevent.

Finally, federal court precedent provides persuasive authority that there is no jurisdiction. Court interpretations of the Federal Rules of Civil Procedure are used as highly persuasive authority for Kansas courts. *Fredericks v. Foltz*, 221 Kan. 28, 30, 557 P.2d 1252, 1255 (1976). In fact, the court in *Arnold v. Hewitt* used the Tenth Circuit interpretation of "final order" to justify their reasoning for denying jurisdiction of claims voluntarily dismissed without prejudice. 32 Kan. App. 2d at 504, 85 P.3d at 223.

Among the federal circuits, several have held that parties cannot use voluntary dismissals without prejudice to get around the final-judgment rule. *See Blue v. Dist. Columbia Public Schs.*, 764 F.3d 11, 17 (D.C. Cir. 2014);

Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210 (2d Cir. 2005); *Marshall v. Kansas City S. Ry. Co.*, 378 F.3d 495, 499 (5th Cir. 2004). The Tenth Circuit also follows this rule. In *Cook v. Rocky Mountain Bank Note Co.* it held it was without jurisdiction over the matter of a plaintiff pursuing appellate review of a dismissed outrageous conduct claim after voluntarily dismissing other claims was without jurisdiction. 974 F.2d 147, 148 (10th Cir. 1992). The court reasoned the plaintiff could still refile claims in district court thus the decision was not based on the merits and was not final. *Id.*

Even the circuits that do allow this procedure provide little help to Benchmark here. For example, in *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064 (9th Cir. 2002), the court granted appellate jurisdiction over a partial summary judgment order after the plaintiff voluntarily dismissed without prejudice the other pending claims. *Id.* The court determined the claims that were dismissed without prejudice held little weight to the claim as a whole and didn't impact the case even, on the small chance, that they would be relitigated. *Id.* Additionally, there was nothing on the record showing intent to manufacture jurisdiction. *Id.* By contrast, Benchmark as much as admits it was attempting to manufacture jurisdiction (Response to Show Cause Order, p. 5) and strongly hints that it intends to attempt to

revive the dismissed issues should it prevail in this appeal. (Response to Show Cause Order, p. 4 and Appellant's Brief, pp. 14-15). What is the point of dismissing, *without prejudice* otherwise?

This court should conclude that the voluntary dismissal of some of the issues, without prejudice, did not resolve the whole case on the merits and this court is without jurisdiction over this appeal.

II. WHETHER THE DISTRICT COURT ERRED IN GRANTING KDOR'S MOTION FOR JUDGMENT ON THE PLEADINGS

Standard of Review

"An appellate court's review of whether the district court properly granted a motion for judgment on the pleadings in unlimited." *Mashaney v. Board of Indigents' Defense Services*, 302 Kan. 625, 639, 355 P.3d 667, 677 (2015).

> A motion for judgment on the pleadings under 60–212(c), filed by a defendant, is based upon the premise that the moving party is entitled to judgment on the face of the pleadings themselves and the basic question to be determined is whether, upon the admitted facts, the plaintiffs have stated a cause of action. [Citation omitted.] The motion serves as a means of disposing of the case without a trial where the total result of the pleadings frame the issues in such manner that the disposition of the case is a matter of law on the facts alleged or admitted, leaving no real issue to be tried. [Citation omitted.] The motion operates as an admission by movant of all fact allegations in the opposing party's pleadings. [Citations omitted.]
>
> *Id.* at 638, 355 P.3d 677.

Arguments and Authorities

Even under the high bar set for a motion for judgment on the pleadings, Benchmark fails to establish a case.

First, Benchmark makes much of the fact that it has alleged the existence of a contract between Benchmark, KDOR and Grandmothers. Nevertheless, in its brief, Benchmark conveniently omits the details which it included in its Second Amended Petition which explain the contents of the contract it is alleging existed. Paragraph 17 of the Second Amended Petition states:

> 17. KDOR and Grandmothers memorialized the agreement by executing the Third Amendment to the Lease, attached hereto as **Exhibit 1,** which states:
>
> This Amendment governs construction contemplated per the quotes dated 5/28/2018, 6/04/2018 8/01/2018, and 8/02/2018 from Benchmark Property Remodeling, LLC, attached hereto as Exhibit A and corresponding floor plans, attached as Exhibit B. The Lessee shall pay a lump sum payment of $136,052.39 to the Lessor for the satisfactory work completed upon successful installation. Payment by the Lessee is contingent on the Lessee's satisfaction of all work completed. The related items will become a fixture of the leased premises and will remain upon and be surrendered with the leased premises at the termination of the Real Estate Lease Agreement.
>
> (R. vol. 1, pp. 217-18 ¶ 17. Underlining added for emphasis, bolding in the original).

As the court can see, Benchmark is alleging in its Second Amended Petition, that the agreement it is claiming existed is memorialized in the above quoted language, which Benchmark attached to the Second Amended Petition. If this amendment to the lease between KDOR and Grandmothers is a memorialization of the agreement reached between Benchmark, KDOR and Grandmothers—*as Benchmark alleges*—then it is plain that KDOR's (the Lessee's) obligation was to pay Grandmothers (the Lessor) upon satisfactory completion of the work. Benchmark acknowledges that it is undisputed that KDOR did this. (Benchmark's Appellate Brief, p. 21; R. vol. 1, p. 220 ¶ 51).

But this isn't the only place in its Second Amended Petition where Benchmark alleges the content of its supposed contract between itself, KDOR and Grandmothers. In paragraph 46 of the Second Amended Petition (under the section entitled "Count I—Breach of Contract"), Benchmark alleges that

> 46. On or about September 5, 2018 Benchmark, Grandmothers, and KDOR, entered into a valid, enforceable agreement pursuant to which Benchmark agreed to perform the work identified in Exhibit A to **Exhibit 1**, in exchange for payment for the same.
>
> (R. vol. 1, p. 220. Emphasis original).

The court should take notice that the September 5, 2018 date is the date of the final signature on the amendment to the lease between KDOR and Grandmothers, which Benchmark previously alleged (R. vol. 1, pp. 217-18, paragraph 17) memorialized the agreement it is here describing. (R. vol 1, p. 234). The "Exhibit A to Exhibit 1" mentioned here, is attached to the amended lease between KDOR and Grandmothers. (R. vol 1, p. 235 et seq.). The allegation that this agreement was entered into on the same day that the lease between KDOR and Grandmothers was amended, lends further credence to the interpretation that Benchmark is asserting that the terms of lease are—or at least accurately memorialize—the terms agreed to in the supposed contract.

But Benchmark goes even further in its Second Amended Petition, identifying the content of KDOR's lease with Grandmothers with the supposed agreement between Benchmark, KDOR and Grandmothers. In paragraphs 47-51 of the Second Amended Petition, Benchmark alleges the elements of the agreement it asserts was reached between all three parties in paragraph 46.

> 47. KDOR agreed to pay Grandmothers the total amount owed to Benchmark, $136,052.39, to pay to Benchmark upon Benchmark's completion of the work.
>
> 48. Grandmothers agreed to pay Benchmark for its work on the Project.

49. The agreement is supported by adequate consideration.

50. Benchmark completed all work required by Exhibit A to **Exhibit 1**, and its work was accepted in its entirety by KDOR.

51. KDOR paid the full amount owed, $136,052.39, to Grandmothers.

(R. vol. 1, p. 220 ¶¶ 47-51).

In other words, the substance of the contract that Benchmark alleges all three parties entered into in ¶ 46, exactly mirrors the requirements from the amendment to the lease between KDOR and Grandmothers. Benchmark itself explicitly affirms that the content of that lease amendment memorialized the contents of the agreement (R. vol. 1, pp. 217-18 ¶ 17). Benchmark even attaches that amendment to the lease between KDOR and Grandmothers to its Second Amended Petition to show the contents of the memorialization of the agreement it alleges all three parties had. (R. vol. 1, pp. 217-18 ¶ 17 and R. vol 1, p. 233 et seq.).

If this court accepts as true the allegation that Benchmark, KDOR and Grandmothers had an agreement and that agreement was memorialized in the amendment to the lease between KDOR and Grandmothers, and the substance of that agreement is described by Benchmark in ¶¶ 46-51 of the Second Amended Petition, then by the terms

of the Second Amended Petition itself, KDOR has satisfied any contractual obligations it owed.

In its appellate brief, Benchmark seeks to shift its argument subtly but substantially, from its plain allegations in the Second Amended Petition to something different. Benchmark now argues to this court that KDOR had accepted Benchmark's bids and memorialized—not a three-way agreement between itself, Benchmark and Grandmothers, as in ¶ 17 of the Second Amended Petition—but the acceptance of Benchmark's bids. (Benchmark Appellate Brief p. 6). In the Second Amended Petition, as demonstrated above, Benchmark alleges that the amended lease memorialized the content of a three-way agreement. Now Benchmark attempts to restyle the amendment to the lease as a "payment agreement between KDOR and Grandmothers" to which it admits it was not a party. (Benchmark Appellate Brief, p. 4). While it is true that this court may consider any possible legal theory, *Campbell v. Husky Hoggs, Inc.*, 292 Kan. 225, 227, 255 P.3d 1, 4 (2011), it must be a theory based on the facts and inferences of the pleadings. In this case, the Second Amended Petition, as demonstrated above, is explicitly contrary to the theory Benchmark now attempts to advance.

The other primary position Benchmark attempts to advance in this appeal is that the district court found that there was no contract between Benchmark and KDOR and that this finding is contrary to the district court's obligation, on a motion for judgment on the pleadings, to accept as true the facts alleged and make inferences in favor of the non-moving party. However, the district court's decision was more nuanced than this.

First of all, the district court, clearly indicated that it was viewing the petition as true, and in the light most favorable to Benchmark. (R. vol. 3, p. 125, Conclusion of law # 7).

Second, the district court concluded that the amended lease between KDOR and Grandmothers was not, on the face of it, a contract involving Benchmark (as Benchmark was implicitly arguing in the Second Amended Petition, see above). (R. vol. 3, pp. 124-25, Conclusion of law ##4-5).

Finally, the district court concluded that there was nothing to indicate that Benchmark was alleging the existence of a contract besides the amended lease between KDOR and Grandmothers. (R. vol. 3, p. 124, Conclusion of law # 3). The allegation of the substance of a contract between KDOR and Benchmark was supposedly seen in the amendment to the lease between KDOR and Grandmothers (which the court rejected), nor could the existence of bids be construed as an allegation of a contract.

(R. vol. 3, pp. 124-25, Conclusions of law ## 3 and 4). The district court, after discounting the fact that the amended lease constituted the allegation of a contract between Benchmark and KDOR, was correct to assert there was no other allegation in the Second Amended Petition itself of a contract between Benchmark and KDOR besides this.

Even if this court concludes that the district court used incorrect language in its Conclusion of law # 3 when it suggested that no documentation had been provided evidencing the existence of a contract between Benchmark and KDOR (R. vol. 3, p. 124, Conclusion of law # 3), the district court's ultimate decision can, and should, be upheld as right for the wrong reason. *In re Estate of Broderick,* 286 Kan. 1071, 1082, 191 P.3d 284, 292 (2008).

WHEREFORE, this court should affirm the district court's ruling, granting judgment on the pleadings to KDOR.

/s/ Adam D. King
Adam D. King #27272
Kansas Department of Revenue
109 SW 9th St, PO Box 3506
Topeka, Kansas 66601
(785) 296-6055 Phone
(785) 296-5213 Fax
adam.king@ks.gov

ATTORNEY FOR DEFENDANT KANSAS DEPARTMENT OF REVENUE AND STATE OF KANSAS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 6, 2022 the foregoing "Appellee's Brief for KDOR" was e-filed with the Appellate Court e-filing system which will generate a notice to the counsel for the parties listed below.

Diane Hastings Lewis
Brown & Ruprecht, PC
2323 Grand Blvd, Suite 1100
Kansas City, MO 64108
dlewis@brlawkc.com
Counsel for Appellant

Lauren Bartree and Patrick Riordan
3735 SW Wannamaker, Rd.
Topeka, KS 66610
bartree@rfb-lawfirm.com
riordan@rgb-lawfirm.com
Counsel for Appellee CoreFirst

Bryan W. Smith
Smith Law Firm
5930 Sw 29th Street, Suite 200
Topeka, KS 66614-2538
bryan@bryansmithlaw.com
Counsel for Appellee Grandmothers

/s/ Adam D. King
Adam D. King, #27272

KeyCite Yellow Flag - Negative Treatment
Distinguished by Shatsky v. Palestine Liberation Organization, D.C.Cir., April 14, 2020

764 F.3d 11
United States Court of Appeals, District of Columbia Circuit.

Ayanna BLUE, Appellant
v.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS, et al., Appellees.

No. 12–7122
|
Argued May 9, 2014.
|
Decided Aug. 29, 2014.

Synopsis

Background: Student at school for emotionally disturbed students sued teacher with whom she had sexual relationship, as well as District of Columbia, alleging claims under § 1983 and Title IX as well as common law claims for negligent supervision, negligent hiring and retention, intentional infliction of emotional distress, and breach of fiduciary duty. The United States District Court for the District of Columbia, James E. Boasberg, J., 850 F.Supp.2d 16, granted District of Columbia's motion to dismiss, and student subsequently entered joint stipulation of dismissal with teacher. Student then appealed dismissal of her claims against the District.

Holdings: The Court of Appeals, Pillard, Circuit Judge, held that:

[1] district court's order dismissing student's claims against District of Columbia was not final and thus was non-appealable, and

[2] student's voluntary dismissal of her claims against teacher did not suffice to finalize order dismissing claims against District of Columbia.

Appeal dismissed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (10)

[1] **Federal Courts** ⇐ In general; necessity

Appellate jurisdiction is generally limited to review of final decisions. 28 U.S.C.A. § 1291.

1 Cases that cite this headnote

[2] **Federal Courts** ⇐ What constitutes final judgment

A district court's decision is not final, as generally required for appellate jurisdiction, unless it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. 28 U.S.C.A. § 1291.

7 Cases that cite this headnote

[3] **Federal Courts** ⇐ In general; necessity

The final judgment rule for appellate jurisdiction means that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits. 28 U.S.C.A. § 1291.

[4] **Federal Courts** ⇐ Particular cases

District court's order dismissing student's Title IX, § 1983, and common law claims against District of Columbia arising from sexual relationship she had with teacher while attending school for emotionally disturbed students was not final and thus was non-appealable because it did not adjudicate her claims against teacher, unless exception to final judgment rule applied. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681; 28 U.S.C.A. § 1291; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

[5] **Federal Courts** ⇐ Certification and Leave to Appeal

Rule authorizing district court to direct entry of a final judgment as to less than the entire case, by making an express determination that there is no just reason for delay in entering an appealable order as to some of the claims or parties, creates an avenue by which district court may expressly authorize an appeal from an order disposing of part of a case without waiting for final decisions to be rendered on all claims in the case. 28 U.S.C.A. § 1291; Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

10 Cases that cite this headnote

[6] **Federal Courts** ⇦ Particular cases

Student's voluntary dismissal of her claims against teacher, with whom she had sexual relationship while attending school for emotionally disturbed students, did not suffice to finalize district court's prior order dismissing student's related Title IX, § 1983, and common law claims against District of Columbia, and thus did not render the prior order final and appealable; dismissal was party-initiated, without prejudice, and subject to a confidential settlement agreement with a tolling provision, district court neither found that there was no reason for delay of appeal of the claims against the District of Columbia nor directed entry of judgment separately on those claims, and court's minute order was a ministerial acknowledgement of joint stipulation between student and teacher and her attendant motion for voluntary dismissal. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681; 28 U.S.C.A. § 1291; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

2 Cases that cite this headnote

[7] **Federal Courts** ⇦ Multiple Claims or Parties

Court of Appeals permits a plaintiff, in at least some circumstances, to voluntarily dismiss remaining claims or remaining parties from an action as a way to conclude the whole case in the district court and ready it for appeal, but in order to thus produce an appealable final order, a voluntary dismissal typically must be made with prejudice. 28 U.S.C.A. § 1291; Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

7 Cases that cite this headnote

[8] **Federal Courts** ⇦ Multiple Claims or Parties

Voluntary but non-prejudicial dismissals of remaining claims are generally insufficient to render final and appealable a prior order disposing of only part of the case. 28 U.S.C.A. § 1291; Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

8 Cases that cite this headnote

[9] **Federal Courts** ⇦ Certification and Leave to Appeal

The purpose of rule authorizing district court to direct entry of a final judgment as to less than the entire case, so as to authorize an appeal from an order disposing of part of a case

without waiting for final decisions to be rendered on all claims in the case, is to prevent parties from taking over the dispatcher function that the rule vests in the trial judge to control the circumstances and timing of the entry of final judgment. 28 U.S.C.A. § 1291; Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

8 Cases that cite this headnote

[10] Federal Civil Procedure ⇐ Grounds and objections

A district court must grant a motion for voluntary dismissal unless it finds that dismissal will inflict clear legal prejudice on a defendant.

3 Cases that cite this headnote

***12** Appeal from the United States District Court for the District of Columbia (No. 1:10–cv–01504).

Attorneys and Law Firms

Natalie A. Baughman argued the cause for appellant. With her on the briefs was Scott D. Gilbert. Mark A. Packman entered an appearance.

Carl J. Schifferle, Assistant Attorney General, Office of the Attorney General for the District of Columbia, argued the cause for appellees. With him on the brief were Irvin B. Nathan, Attorney General, ***13** Todd S. Kim, Solicitor General, and Loren L. AliKhan, Deputy Solicitor General.

Before: GARLAND, Chief Judge, and SRINIVASAN and PILLARD, Circuit Judges.

Opinion

Opinion for the Court filed by Circuit Judge PILLARD.

PILLARD, Circuit Judge:

****183** Robert Weismiller, a 57–year–old teacher at a public high school for emotionally disturbed teens, started a sexual relationship with his 18–year–old student, Ayanna Blue, in the fall of 2008. Weismiller had been fired repeatedly from other area schools for inappropriate sexual contact with students, yet the District of Columbia hired him to teach emotionally vulnerable youths. In the chaotic and poorly supervised school at which he taught, Weismiller preyed on Blue, and within five months she was pregnant with his child. Blue sued Weismiller and the District of Columbia

for damages from violations of her constitutional, statutory, and common-law rights arising out of Weismiller's actions. [1]

In this appeal, Blue now seeks review of the district court's order granting the District's motion to dismiss. Blue's appeal is premature, however, because this case lacks a final judgment within the meaning of 28 U.S.C. § 1291, and no exception to that rule applies. Accordingly, we dismiss for lack of appellate jurisdiction.

I

The District of Columbia created the Transition Academy at Shadd (Shadd) as a special school for emotionally disturbed students. But the school was under-resourced and poorly run, with uncertified teachers, inadequate classrooms, and a lack of supervision and control so pervasive it was described as "unsafe for any student." Education experts and District political leaders described the school as an "extreme disappointment," a "failure," and a "disaster." Into this precarious setting the District hired Robert Weismiller, a man with a record of unlawful sexual contact with children at area schools. Before he joined the Shadd faculty, Weismiller had moved from school to school in the Washington D.C. area (the complaint lists nine different schools over more than three decades), had unlawful sexual relationships with at least four of his students, and was repeatedly fired for misconduct.

Ayanna Blue was a student at Shadd in the fall of 2008. While Blue was enrolled in Weismiller's class, he began to make sexual advances toward her. He told her, "If I were 30 years younger, I would marry you." He flirted with her, gave her his personal phone number, called her at home, and frequently drove her home from school in his car. Faculty and staff observed Weismiller spending time alone with Blue in the classroom almost every day, sometimes with the lights off. Weismiller had intercourse with Blue in the classroom and in his car. It was an open secret at Shadd that Weismiller and Blue were having sex.

Shadd personnel knew that Weismiller's conduct toward Blue was inappropriate. Several Shadd employees remarked on how much time the two spent alone together ****184 *14** Rumors spread that they were having sex. An aide reports that he told Weismiller not to allow Blue in his classroom when the aide was there; another opined that he would not let an emotionally disturbed young woman spend so much time alone with a male teacher who was not her counselor. A teacher sought to "investigate" by going into Weismiller's classroom at lunch a few times in an effort to observe the two together, but apparently took no further steps. In December 2008, Blue told school personnel that she thought she was pregnant. They sent her to the school's health office for a pregnancy test. That test result was negative, but only a few months later, by early 2009, Blue was pregnant. The

District investigated, found no reason to conclude that Weismiller had done anything wrong, and declined to fire or discipline him.

Blue sued the District and Weismiller for compensatory and punitive damages arising out of the school's and Weismiller's treatment of her. Against the District she raised claims for negligent hiring and retention, and violation of her right to freedom from sex discrimination in education under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. Against both the District and Weismiller she claimed violations of her constitutional right to equal protection and bodily integrity under 42 U.S.C. § 1983, and breach of fiduciary duty and intentional infliction of emotional distress in violation of District of Columbia law.

The District, but not Weismiller, moved to dismiss, and the district court granted that motion, dismissing Blue's claims. *Blue v. Dist. of Columbia,* 850 F.Supp.2d 16, 38 (D.D.C.2012). Blue's Section 1983 claims failed for want of factual allegations that her harms resulted from a District custom, policy, or practice, *id.* at 23–31 (relying on *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)), and the Title IX claims foundered on the absence of allegations that an appropriate District official had actual knowledge of Weismiller's conduct, *id.* at 31–36. Blue's claims against the District for violations of District of Columbia law failed because Blue did not comply with the District of Columbia's sovereign immunity waiver statute, D.C.Code § 12–309, which requires that suits against the District be preceded by advance written notice to the Mayor, which Blue failed to provide. [2]

Following the district court's order dismissing claims against the District, Blue moved that court to enter final judgment against the District pursuant to Federal Rule of Civil Procedure 54(b). The court declined to do so while the claims against Weismiller remained unresolved because, according to the district court, "the issues [raised by the legal claims against each defendant] are largely intertwined and could thus result in piecemeal appeals." J.A. 60.

Seven months later, Blue entered a joint stipulation of dismissal with Weismiller under Federal Rule of Civil Procedure 41(a)(1)(A)(ii), agreeing that "this action shall be dismissed without prejudice, subject to a tolling agreement entered between the Parties." J.A. 61–62. The docket reflects a Minute Order entered the same day that reads: "Pursuant to the parties' joint stipulation of Dismissal, the Court ORDERS that the case against Defendant **185 *15 Weismiller is DISMISSED WITHOUT PREJUDICE." J.A. 8.

Blue now appeals the district court's order dismissing her claims against the District.

II.

[1] [2] [3] In order to establish that we have jurisdiction over her appeal, Blue must show that she appeals from a final order of the district court. Our appellate jurisdiction under 28 U.S.C. § 1291 is generally limited to review of "final decisions." A decision is not final unless it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard,* 486 U.S. 517, 521–22, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988) (quoting *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945)). The final judgment rule means that "a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). The rule serves the policy of the federal courts, dating from the Judiciary Act of 1789, disfavoring piecemeal appellate review. That policy protects the district court's independence, prevents multiple, costly, and harassing appeals, and advances efficient judicial administration. *See Cunningham v. Hamilton Cnty.,* 527 U.S. 198, 203–04, 119 S.Ct. 1915, 144 L.Ed.2d 184 (1999). The district court here has not denominated any order in this case as final and appealable.

[4] The difficulty for Blue is that she has not appealed her claims against both defendants, but only the order dismissing her claims against the District, while she relies on a voluntary dismissal and tolling agreement to hold her claims against Weismiller for later resolution. The finality of any order, like Blue's, that adjudicates fewer than all of the claims, or claims against fewer than all of the parties, is determined by Federal Rule of Civil Procedure 54(b). According to that Rule:

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed.R.Civ.P. 54(b). Under the terms of Rule 54(b), the order from which Blue seeks to appeal is non-final and so non-appealable because it did not adjudicate the claims against Weismiller. Rule 54(b) has two exceptions of potential relevance here. First, if the district court finds that there is no reason for delay and that entry of final judgment is warranted, it may enter final judgment on fewer than all the claims. Second, if the plaintiff voluntarily dismisses the remaining claims, she

can in some circumstances thereby finalize the district court proceedings for purposes of appeal. We consider in turn each of these exceptions as they relate to Blue's appeal.

A.

[5] The district court has authority under Rule 54(b) to "direct entry of a final judgment" as to less than the entire case by making an express determination "that there is no just reason for delay" in entering an appealable order as to some of the claims or parties. Fed.R.Civ.P. 54(b). That exception enables the district court to "meet the demonstrated need for flexibility" in providing for appellate review in complex cases, by acting as a "dispatcher ... permitted to determine, in the first instance, the appropriate time when each ****186 *16** final decision upon one or more but less than all of the claims in a multiple claims action is ready for appeal." *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427, 435, 76 S.Ct. 895, 100 L.Ed. 1297 (1956) (internal quotation marks omitted). The Rule thus creates an avenue by which a district court may expressly authorize an appeal from an order disposing of part of a case "without waiting for final decisions to be rendered on all claims in the case." *Id.*

That exception is unavailable to Blue here, however, because the district court expressly denied her motion for entry of final judgment under Rule 54(b), in view of the then-pending, related claims against Weismiller. Blue has since stipulated to dismiss the claims against Weismiller, and she now points to that stipulation in support of her contention that judgment is final. The joint stipulation of dismissal with Weismiller was sufficient to finalize proceedings in the district court, she urges, because she voluntarily dismissed the "entire action" against him, rather than "only a complaint" or a "single claim." Appellant Br. at 14–18; Appellant Reply Br. at 5–7. But Blue does not now seek to appeal any dismissal of "the entire action," nor could she, as the claims against Weismiller have not been decided. And Blue concedes that the district court has not revisited its earlier denial of final judgment as to the order dismissing the claims against the District that is under appeal, *see* Oral Arg. Rec. at 10:55–11:30, nor has she moved it to do so. The district court's denial of Blue's motion for final judgment remains the court's last word on Blue's claims against the District despite Blue's subsequent voluntary dismissal, so the order from which Blue appeals is not final and appealable.

B.

[6] The second exception is also unavailable to Blue, because her stipulation of voluntary dismissal does not suffice to finalize the order she seeks to appeal. The dismissal was party-initiated, without prejudice, and subject to a confidential settlement agreement with a tolling

provision.[3] Such a dismissal does not create a single, final disposition for appellate review because it does not merge the claims thereby dismissed into the court's earlier order. It accordingly fails to provide the requisite assurance that the trial court proceedings were complete and will not result in multiple, piecemeal appeals. As noted, the record fails to show that the district court ever took the steps Rule 54(b) requires. The district court neither (1) found that there is no reason for delay of appeal of the claims against the District nor (2) directed entry of judgment separately **187 *17 on those claims. The voluntary dismissal does nothing to cure that defect.

[7] Every circuit permits a plaintiff, in at least some circumstances, voluntarily to dismiss remaining claims or remaining parties from an action as a way to conclude the whole case in the district court and ready it for appeal. In order to thus produce an appealable final order, however, a voluntary dismissal typically must be made with prejudice. In *Robinson–Reeder v. American Council on Education,* for example, where we lacked jurisdiction over an appeal as to Title VII claims because related defamation claims had been dismissed only without prejudice, we noted that "[t]here is little doubt" that the Title VII claims would have been appealable "had the remaining claim been dismissed *with* prejudice." 571 F.3d 1333, 1338 (D.C.Cir.2009). Other circuits, too, treat voluntary dismissals of all remaining claims as sufficient to finalize a district court order for review when those dismissals are made with prejudice. *See John's Insulation, Inc. v. L. Addison & Assocs., Inc.,* 156 F.3d 101, 107 (1st Cir.1998); *Ali v. Fed. Ins. Co.,* 719 F.3d 83, 89–90 (2d Cir.2013); *Trevino–Barton v. Pittsburgh Nat'l Bank,* 919 F.2d 874, 878 (3d Cir.1990); *Independence News, Inc. v. City of Charlotte,* 568 F.3d 148, 153 & n. 2 (4th Cir.2009); *Marshall v. Kan. City S. Ry. Co.,* 378 F.3d 495, 500 (5th Cir.2004); *Libbey–Owens–Ford Co. v. Blue Cross & Blue Shield Mut. of Ohio,* 982 F.2d 1031, 1034 (6th Cir.1993); *West v. Macht,* 197 F.3d 1185, 1188 (7th Cir.1999); *Helm Fin. Corp. v. MNVA R.R.,* 212 F.3d 1076, 1080 (8th Cir.2000); *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC,* 548 F.3d 738, 750 (9th Cir.2008); *Martin v. Franklin Capital Corp.,* 251 F.3d 1284, 1288 (10th Cir.2001); *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.,* 549 F.3d 1344, 1356 (11th Cir.2008).

Where the voluntary dismissal is without prejudice to refiling the dismissed claims, as was Blue's stipulation here, there is no similarly universal consensus. Some circuits allow dismissals without prejudice to finalize trial court proceedings for appellate review at least some of the time. *See, e.g., James v. Price Stern Sloan, Inc.,* 283 F.3d 1064, 1070 (9th Cir.2002); *Mo. ex rel. Nixon v. Coeur D'Alene Tribe,* 164 F.3d 1102, 1106 (8th Cir.1999). Every circuit, however, appears to acknowledge a presumption against that practice. *See Robinson–Reeder,* 571 F.3d at 1338–39 & n. 6; *see also Scanlon v. M.V. SUPER SERVANT 3,* 429 F.3d 6, 8 (1st Cir.2005); *Ali,* 719 F.3d at 88; *Fed. Home Loan Mortg. Corp. v. Scottsdale Ins. Co.,* 316 F.3d 431, 438 (3d Cir.2003); *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local*

27, 728 F.3d 354, 359 (4th Cir.2013); *Swope v. Columbian Chems. Co.,* 281 F.3d 185, 192 (5th Cir.2002); *Laczay v. Ross Adhesives,* 855 F.2d 351, 354 (6th Cir.1988); *Muzikowski v. Paramount Pictures Corp.,* 322 F.3d 918, 923 (7th Cir.2003); *Helm Fin. Corp.,* 212 F.3d at 1080; *Romoland Sch. Dist.,* 548 F.3d at 748; *Jackson v. Volvo Trucks N. Am., Inc.,* 462 F.3d 1234, 1238 (10th Cir.2006); *State Treasurer v. Barry,* 168 F.3d 8, 14–16 (11th Cir.1999); 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3914.8, at 623–24 (2d ed.1992) (endorsing a rule that would require plaintiffs to fully abandon their remaining claims in exchange for the right of immediate appeal).

[8] In keeping with that broad consensus, our circuit treats voluntary but non-prejudicial dismissals of remaining claims as generally insufficient to render final and appealable a prior order disposing of only part of the case. *See Robinson–Reeder,* 571 F.3d at 1338–40. In *Robinson–Reeder,* we found insufficient the plaintiff's effort ****188 *18** to finalize for appeal the district court's dismissal of her Title VII claim because her stipulated dismissal of her other claim was without prejudice. *Id.* at 1335–36. We held that we lacked jurisdiction over that appeal because dismissal of the "only remaining ... claim" was insufficient "to permit appeal of those ... claims that the court did adjudicate." *Id.* at 1338–40.

[9] The purpose of Rule 54(b) is to prevent parties from taking over the "dispatcher" function that the Rule vests in the trial judge to control the circumstances and timing of the entry of final judgment. *Id.* at 1340 (citing *Sears, Roebuck & Co.,* 351 U.S. at 435, 76 S.Ct. 895). Rule 54(b) empowers the district judge to balance the benefits of quick review of an order disposing of part of a case against the risks of multiple appeals. The judge, not the parties, is meant to be the dispatcher who controls the circumstances and timing of the entry of final judgment. *See id.* We have declined to treat dismissals without prejudice as finalizing trial court proceedings for appellate review because routinely allowing appeals from non-prejudicial dismissals would undermine Rule 54(b)'s careful limits on piecemeal appeals. If a party's non-prejudicial dismissal of any still-pending claims could, without more, render final and appealable any earlier order disposing of other claims, litigants, not district judges, would control the timing of appeal. Parties could agree to appeal their suit in stages, periodically dismissing all remaining claims without prejudice as they went, agreeing to reinstate them once the court of appeals weighed in on individual issues. The resulting fragmentary appeals would burden courts and litigants, foster uncertainty, and undermine the salutary aims that Rule 54(b) and the final judgment rule promote.

Blue counters that, at least in some circumstances, dismissal without prejudice can render a district court order final and appealable. But Blue invokes cases of court-ordered, involuntary dismissal, not the party-initiated voluntary dismissal at issue here. *See, e.g., United States v. Wallace & Tiernan Co.,* 336 U.S. 793, 794 n. 1, 69 S.Ct. 824, 93 L.Ed. 1042 (1949); *Ciralsky v. CIA,* 355

F.3d 661, 665 (D.C.Cir.2004). Involuntary dismissal, even when it is without prejudice, unlike party-initiated voluntary dismissal, does not threaten the role of the district court as gatekeeper for the court of appeals. A court's order of involuntary dismissal does not risk empowering parties to take over the district court's "dispatcher function" and can therefore be treated as final and appealable consistent with Rule 54(b).

The fact that Blue's two groups of claims are against two different defendants does not mean that they should be treated differently from the distinct claims in *Robinson–Reeder,* all of which ran against the same defendant. The language and purposes of Rule 54(b) and *Robinson–Reeder* do not support any such distinction. Rule 54(b) was amended in 1961 to treat dismissals of fewer than all claims and fewer than all parties identically. *See* Fed.R.Civ.P. 54(b) advisory committee's note to 1961 Amendment. The amendment reflects the reality that the values of Rule 54(b) are equally applicable in both situations. *See* *Shirey v. Bensalem Twp.,* 663 F.2d 472, 475 (3d Cir.1981). Non-prejudicial dismissals of remaining parties, like non-prejudicial dismissals of remaining claims, could be used to generate overlapping lawsuits, piecemeal appeals, and splintered and harassing litigation. In each situation, it is equally important to avoid opportunities for party manipulation and wasteful litigation while empowering the district court, in appropriate circumstances ****189 *19** to authorize immediate review of orders disposing of only part of a case.

[10] Blue contends that, even if the joint stipulation of dismissal were alone insufficient to finalize the case for appeal, the district court's entry of a Minute Order distinguishes this case from *Robinson–Reeder.* But the Minute Order appears to have been a ministerial acknowledgement of the parties' joint stipulation and Blue's attendant motion for voluntary dismissal. A district court must grant a motion for voluntary dismissal unless it finds "that dismissal will inflict clear legal prejudice on a defendant." *Kellmer v. Raines,* 674 F.3d 848, 851 (D.C.Cir.2012) (quoting *Conafay v. Wyeth Labs.,* 841 F.2d 417, 419 (D.C.Cir.1988)). Because dismissal of claims against a defendant rarely prejudices that party, the grant of a voluntary dismissal is virtually automatic. There is thus no reason in law nor in the record in this case to conclude that the district court's Minute Order was an affirmative finality determination intended to satisfy the requirements of Rule 54(b).

* * *

Blue will be able to obtain appellate review of the district court's dismissal of her claims against the District, but first she will have to obtain a final judgment from the district court. She might do so by asking the district court to reconsider its decision to deny her motion to enter judgment against the District pursuant to Rule 54(b) and expressly certify that there is no just reason for delay of Blue's appeal of that dismissal. Alternatively, she might reinstate her claims against Weismiller by filing a Rule 15 motion to amend her complaint and litigate them to a final disposition, dismiss those claims with prejudice, or otherwise resolve them in a manner that satisfies the district court that entry of final judgment is warranted.

Because we conclude that there is no final judgment within the meaning of 28 U.S.C. § 1291, we dismiss this appeal for lack of appellate jurisdiction.

So ordered.

All Citations

764 F.3d 11, 412 U.S.App.D.C. 181, 89 Fed.R.Serv.3d 567, 308 Ed. Law Rep. 624

Footnotes

1 The facts recited here are from the Second Amended Complaint, and are taken as true on appeal from a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See* *Atherton v. D.C. Office of Mayor,* 567 F.3d 672, 681 (D.C.Cir.2009). For simplicity we refer to the three municipal defendants collectively as the District. Blue also sued the District of Columbia Public Schools (DCPS) and former DCPS Chancellor Michelle Rhee, but the district court held that Rhee and DCPS are improper or redundant defendants, and Blue does not appeal that aspect of the district court's decision.

2 Blue relied on the DCPS investigative report into Weismiller's conduct, which she argued gave District officials actual notice of her claims, but the district court held that the report did not suffice under the District of Columbia courts' precedents requiring that the District's sovereign immunity waiver be strictly interpreted. *Blue,* 850 F.Supp.2d at 36–38.

3 The parties filed their stipulation "pursuant to Rule 41(a)(1)(A)(ii)," but that subpart limits voluntary dismissal—once the opposing party has answered, as Weismiller had—to cases in which the plaintiff files a stipulation of dismissal "signed by all parties who have appeared." Fed.R.Civ.P. 41(a)(1)(A)(ii). The District had appeared, yet did not sign the stipulation. Blue alternatively contends that, even if her failure to get the District defendants' signatures made her ineligible for a Rule 41 voluntary dismissal under subsection (a)(1), the voluntary dismissal was nonetheless effective under subsection (a)(2). That provision empowers a court to permit a voluntary dismissal "by court order," on "terms that the court considers proper." Fed.R.Civ.P. 41(a)(2). Blue characterizes the Minute Order as a Rule 41(a)(2) court order authorizing her voluntary dismissal, but there is no indication that the district court meant it as such. It is thus unclear both whether the incompletely signed stipulation was valid under Rule 41(a)(1) and whether the court meant to approve dismissal under Rule 41(a)(2).

Because it is immaterial whether the dismissal in this case was pursuant to Rule 41(a)(1) or Rule 41(a)(2), we need not resolve these Rule 41 issues.

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Declined to Follow by Doe v. U.S., Fed.Cir., January 22, 2008

425 F.3d 207
United States Court of Appeals,
Second Circuit.

RABBI JACOB JOSEPH SCHOOL, Plaintiff–Appellant,
v.
PROVINCE OF MENDOZA, Bank of New York
and JP Morgan Chase Bank, Defendants–Appellees.

Docket No. 05–10803 CV.
|
Argued: July 12, 2005.
|
Decided: Sept. 30, 2005.

Synopsis

Background: Bond holder brought state court action against issuer, seeking to prevent issuer from consummating an offer to exchange existing bonds for new ones. Issuer obtained removal. The United States District Court for the Southern District of New York, Baer, J., dismissed with prejudice all claims but one, and dismissed last claim without prejudice pursuant to rule governing voluntary dismissals. Holder appealed, and issuer moved to dismiss appeal.

[Holding:] The Court of Appeals, Dennis Jacobs, Circuit Judge, held that district court's order was not a final, appealable order, in view of voluntary dismissal of one claim without prejudice.

Appeal dismissed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (4)

[1] Federal Courts What constitutes finality in general

Generally, a final, appealable order is an order of the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. 28 U.S.C.A. § 1291.

8 Cases that cite this headnote

[2] **Federal Courts** ⇐ On appeal from final judgment

A party who loses on a dispositive issue that affects only a portion of his claims may elect to abandon the unaffected claims, invite a final judgment, and thereby secure review of the adverse ruling. 28 U.S.C.A. § 1291.

4 Cases that cite this headnote

[3] **Federal Courts** ⇐ Dismissal or nonsuit in general

Immediate appeal is unavailable to a plaintiff who seeks review of an adverse decision on some of its claims by voluntarily dismissing the others without prejudice; a plaintiff who voluntarily dismisses his action without prejudice may reinstate his action regardless of the decision of the appellate court, so permitting an appeal is clearly an end-run around the final judgment rule. 28 U.S.C.A. § 1291.

22 Cases that cite this headnote

[4] **Federal Courts** ⇐ Dismissal or nonsuit in general

District court order dismissing most of plaintiff's claims with prejudice was not final appealable order, and thus Court of Appeals lacked jurisdiction to hear plaintiff's appeal, where one of plaintiff's claims had been voluntarily dismissed without prejudice, notwithstanding alleged prudential advantage of permitting appeal so it could be consolidated with appeal in separate case involving virtually identical facts and claims. 28 U.S.C.A. § 1291; Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

14 Cases that cite this headnote

Attorneys and Law Firms

***208** Eli Feit, Heller, Horowitz & Feit, P.C., New York, N.Y. (Stuart A. Blander of counsel) for Plaintiff–Appellant.

Jonathan I. Blackman, Cleary Gottlieb Steen & Hamilton LLP, New York, N.Y. (Carmine D. Boccuzzi, Michael J. Byars, of counsel) for Defendant–Appellee Province of Mendoza.

Before: JACOBS, B.D. PARKER, Circuit Judges, and HURD, District Judge. *

Opinion

JACOBS, Circuit Judge.

The Argentinian Province of Mendoza (the "Province") moves to dismiss for lack of jurisdiction this appeal from a order entered in the United States District Court for the Southern District of New York (Baer, *J.*), which dismissed the complaint of the Rabbi Jacob Joseph School (the "School"). Following an adverse decision regarding all but one of its claims, the School voluntarily dismissed its remaining cause of action—without prejudice—pursuant to Fed.R.Civ.P. 41(a)(2). Concluding that the district court's dismissal order is not final, we grant the motion and dismiss this appeal for lack of appellate jurisdiction.

I

The School is a holder of bonds issued by the Province. The complaint arises out of the School's effort to prevent the Province from consummating an offer to exchange existing bonds for new ones. The complaint was originally filed in state court, was removed to federal court, and was transferred to the Southern District of New York, where an action involving virtually identical facts and claims was then pending before Judge Baer, *see Greylock Global Opportunity Master Fund Ltd. v. Province of Mendoza,* 2004 WL 2515351. In the *Greylock* action, the district court granted summary judgment in favor of the Province, *Greylock Global Opportunity Master Fund Ltd. v. Province of Mendoza,* 2005 WL 289723 (S.D.N.Y. Feb.8, 2005); that same day, the district court denied the School's motion to join additional defendants as "futile" in light of its *Greylock* decision, *see* ***209** *Rabbi Jacob Joseph Sch. v. Province of Mendoza,* No. 04 Civ. 9102(HB), Order (S.D.N.Y. Feb. 8, 2005) (order denying motion to join additional defendants). At a subsequent status conference, the district court ruled that all but one of the School's claims were foreclosed by the *Greylock* decision (or were otherwise without merit). The claim remaining, the First Cause of Action, alleged breach of contract for failure to pay interest due on the existing bonds (the "First Cause of Action").

The survival of that last claim notwithstanding, the parties submitted letters that the district court accurately construed as motions to dismiss the complaint altogether. The School submitted a proposed dismissal order, which provided, in pertinent part:

> [I]t is ORDERED that, with the exception of the plaintiff's claim to recover monies currently due on the subject Bonds [(the "First Cause of Action")], which claim is *dismissed without prejudice and without leave to replead in this action,* the action is dismissed with prejudice as against all defendants and the Clerk is directed to close the file.

(emphasis added). Relying on the parties' submissions, the district court dismissed all of the School's claims with prejudice (the "March 25 Order"), except for the First Cause of Action, which it dismissed without prejudice. Tellingly, the district court struck the School's proposed language dismissing the First Cause of Action "without leave to replead in this action." *Rabbi Jacob Joseph Sch. v. Province of Mendoza,* No. 04 Civ. 9102(HB), Order at 3 (S.D.N.Y. Mar. 25, 2005) (order dismissing claims).

The School promptly appealed from the district court's March 25 Order and moved for consolidation of its appeal with the *Greylock* appeal (which is pending before this Court under docket number 05–1803). The Province opposed consolidation and sought dismissal of the School's appeal for want of jurisdiction. This Court denied the consolidation motion on the ground that this appeal seemed "premature," *Rabbi Jacob Joseph Sch. v. Province of Mendoza,* No. 05–1414, Order (2d Cir. Apr. 21, 2005) (order denying motion for consolidation), and likewise denied a renewed consolidation motion, *Greylock Global Opportunity Master Fund Ltd. v. Province of Mendoza,* Nos. 05–1414, Order (2d Cir. Sept. 6, 2005) (order denying renewed motion for consolidation). We now must decide whether the March 25 dismissal from which the School appeals is final within the meaning of 28 U.S.C. § 1291. [1]

While its appeal was pending before this Court, the School moved in the district court for certification pursuant to Fed.R.Civ.P. 54(b) to permit entry of final judgment and consolidation of its case with the pending *Greylock* appeal. Rule 54(b) provides that:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The district court referred the motion to Magistrate Judge Fox, who recommended that Judge Baer deny the School's ***210** Rule 54(b) motion as "moot" on the basis that "the Interest Claim [i.e., the First Cause of Action] was not dismissed voluntarily" and that the March 25 Order was a "final appealable order under 28 U.S.C. § 1291." *Rabbi Jacob Joseph Sch. v. Province of Mendoza,* 04 Civ. 9102(HB) (S.D.N.Y. June 3, 2005) (Report & Recommendation) (Fox, *M.J.*). The Province filed written objections to the Report and Recommendation, to which the School responded.

Reviewing *de novo* the recommendations to which the Province objected, the district court found that the Report and Recommendation "misconstrued the requirements of the final judgment rule," sustained the Province's objections, and denied Rule 54(b) certification. *Rabbi Jacob Joseph Sch. v. Province of Mendoza,* 04 Civ. 9102(HB), Order at 1, 3 (S.D.N.Y. July 7, 2005) (order denying Rule 54(b) certification). In so ruling, the district court clarified its March 25 Order, noting that "while [it] did not explicitly cite Rule 41(a) of the Federal Rules of Civil Procedure in the March 25 Order, [the School] nevertheless submitted a proposed order, and obtained dismissal of [its] first claim voluntarily in an effort to secure an immediate appeal." *Id.* at 2. The court observed that "it is well settled in this Circuit that, in general, a plaintiff cannot appeal an adverse decision on some claims by simply voluntarily dismissing the remaining claims without prejudice." *Id.* at 2 (citing *Chappelle v. Beacon Commc'ns Corp.,* 84 F.3d 652 (2d Cir.1996); *Purdy v. Zeldes,* 337 F.3d 253 (2d Cir.2003)).

II

[1] Our jurisdiction is limited to appeals from final decisions of the district courts pursuant to 28 U.S.C. § 1291 (with certain exceptions inapplicable here). "Generally, a final order is an order of the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Hallock v. Bonner,* 387 F.3d 147, 152 (2d Cir.2004) (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)).

[2] Immediate appeal is available to a party willing to suffer voluntarily the district court's dismissal of the whole action *with prejudice:* "A party who loses on a dispositive issue that affects only a portion of his claims may elect to abandon the unaffected claims, invite a final judgment, and thereby secure review of the adverse ruling." *Atlanta Shipping Corp. v. Chemical Bank,* 818 F.2d 240, 246 (2d Cir.1987); *see also Chappelle v. Beacon Commc'ns. Corp.,* 84 F.3d 652, 653–54 (2d Cir.1996). This rule "furthers the goal of judicial economy by permitting a plaintiff to forgo litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end." *Chappelle,* 84 F.3d at 654 (2d Cir.1996).

[3] By the same token, immediate appeal is unavailable to a plaintiff who seeks review of an adverse decision on some of its claims by voluntarily dismissing the others *without prejudice.* A plaintiff who voluntarily dismisses his action without prejudice "may reinstate his action regardless of the decision of the appellate court, [so] permitting an appeal is clearly an end-run around the final judgment rule". *Palmieri v. Defaria,* 88 F.3d 136, 140 (2d Cir.1996) "[B]ecause a dismissal without prejudice does not preclude another action on the same claims, a plaintiff who is permitted to appeal following a voluntary dismissal without prejudice will effectively have secured an otherwise unavailable interlocutory appeal." *Chappelle,* 84 F.3d at 654. Tolerance of that practice would violate the long-recognized federal policy "against piecemeal appeals", *Lowry & Co.* ***211** *v. S.S. Le Moyne D'Iberville,* 372 F.2d 123, 124 (2d Cir.1967). *See Chappelle,* 84 F.3d at 654–55 (citing with approval a panel of the Ninth Circuit in *Dannenberg v. Software Toolworks Inc.,* 16 F.3d 1073, 1076–77 (9th Cir.1994)).

[4] The School voluntarily dismissed without prejudice its First Cause of Action pursuant to Fed.R.Civ.P. 41(a)(2), which provides for dismissal of an action "at plaintiff's insistence ... upon such terms and conditions as the court deems proper." Fed.R.Civ.P. 41(a)(2) ("Unless otherwise specified in the order, a dismissal under [Fed.R.Civ.P. 41(a)(2)] is without prejudice."). The district court's denial of the School's Rule 54(b) motion explicitly recognizes that the dismissal of the First Cause of Action was both voluntary and without prejudice. And at oral argument of the motion to dismiss in this Court, the School expressly declined to abandon the claim with prejudice.

The School argues that the rule in *Chappelle* is prudential rather than jurisdictional. *See, e.g., Great Rivers Coop. v. Farmland Indus.,* 198 F.3d 685, 689 (8th Cir.1999) (holding that "the question whether parties will be permitted to 'manufacture' appeals" by voluntarily dismissing their claims without prejudice "is not jurisdictional"). As a matter of prudence, the School urges that we should overlook the contrivance that brings this appeal to us, because doing so would allow this appeal to be heard in tandem with the nearly identical issues already presented to us in the *Greylock* appeal. The School's argument finds no support in the law of this Circuit and we are not persuaded by the reasoning of the circuit to which the School cites, *see Great Rivers Coop.,* 198 F.3d at 689. It may be more efficient to hear the *Greylock* appeal and this appeal simultaneously, as the School contends; then again, it might have been still more efficient to have heard the School as amicus in Greylock's appeal taken from a final order. In any event, we read *Chappelle* as a jurisdictional rule, interpreting as it does the jurisdictional limitations imposed by 28 U.S.C. § 1291.

For the foregoing reasons, the Province's motion is granted and this appeal (docket number 05–1803) is dismissed. The School's motion to refer the Province's motion to dismiss to the merits panel is denied as moot.

All Citations

425 F.3d 207, 62 Fed.R.Serv.3d 1087

Footnotes

* The Honorable David N. Hurd, United States District Judge for the Northern District of New York, sitting by designation.

1 Although this appeal (docket number 05–1803) is not consolidated with the *Greylock* appeal (docket number 05–1414), the Province's motion invited confusion by bearing both docket numbers and was therefore erroneously docketed under the *Greylock* docket number, 05–1414.

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Doe v. U.S., Fed.Cir., January 22, 2008

378 F.3d 495
United States Court of Appeals,
Fifth Circuit.

Merlean MARSHALL, individually and on behalf of all wrongful death beneficiaries of Lucy R. Shepard, deceased; Alonzo Marshall, individually and on behalf of all wrongful death beneficiaries of Lucy R. Shepard, deceased; Eric Shepard, individually and on behalf of all wrongful death beneficiaries of Lucy R. Shepard, deceased; Plaintiffs–Appellants,

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY; Eric W. Robinson; Robert E. Everett; C.L. Duett; John Does, 1 Thru 10; Defendants–Appellees.

No. 03–61067
|
Summary Calendar.
|
Aug. 4, 2004.

Synopsis

Background: Representatives of motorist's wrongful death beneficiaries brought action in state court against railroad and members of train crew after motorist was killed in collision with train. Following removal, the United States District Court for the Southern District of Mississippi, Henry T. Wingate, Chief Judge, dismissed the train crew defendants and granted plaintiffs' motion for final judgment in favor of railroad. Plaintiffs appealed.

[Holding:] The Court of Appeals held that order dismissing action was without prejudice, precluding exercise of appellate jurisdiction.

Appeal dismissed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (4)

[1] **Federal Courts** ⇐ In general; necessity
Federal Courts ⇐ In general; necessity
Federal Courts ⇐ Multiple Claims or Parties
Generally, all claims and issues in a case must be adjudicated in the district court, and a final judgment or order must be issued, before Court of Appeals' jurisdiction can be invoked. 28 U.S.C.A. § 1291.

6 Cases that cite this headnote

[2] **Federal Courts** ⇐ What constitutes final judgment
"Final judgment rule" creates appellate jurisdiction only after a decision that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. 28 U.S.C.A. § 1291.

4 Cases that cite this headnote

[3] **Federal Courts** ⇐ Multiple Claims or Parties
A party cannot use voluntary dismissal without prejudice as an end-run around the final judgment rule to convert an otherwise non-final, and thus non-appealable ruling into a final decision appealable under the appellate jurisdiction statute. 28 U.S.C.A. § 1291; Fed. Rules Civ.Proc.Rule 41(a), 28 U.S.C.A.

12 Cases that cite this headnote

[4] **Federal Courts** ⇐ Dismissal or nonsuit in general
Order dismissing wrongful death action pursuant to plaintiffs' motion for final judgment, which did not state whether dismissal being sought was to be with or without prejudice, was without prejudice, precluding exercise of appellate jurisdiction; although order purported to enter a final judgment in favor of defendants and stated that plaintiffs had moved for final judgment with prejudice, it stated court was dismissing action under rule governing voluntary dismissals, which provided that dismissals are without prejudice unless otherwise specified, and plaintiffs argued on appeal that they requested final judgment without prejudice. 28 U.S.C.A. § 1291; Fed. Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

20 Cases that cite this headnote

Attorneys and Law Firms

***496** Leonard J. McClellan, Herbert Lee, Jr., Lee & Associates, Jackson, MS, for Plaintiffs–Appellants.

Charles T. Ozier, Charles Henry Russell, III, Wise, Carter, Child & Caraway, Jackson, MS, for Defendants–Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before JOLLY, DAVIS and WIENER, Circuit Judges.

Opinion

PER CURIAM:

On appeal, Plaintiffs–Appellants identified in the caption of this case ("Plaintiffs") challenge the district court's denial of their motion for remand to state court. The district court had ruled that the non-diverse defendants were fraudulently joined and refused to certify an interlocutory appeal of that ruling to us. After one unsuccessful attempt to appeal that decision to our court, Plaintiffs continued their efforts to gain an expedited appeal on this issue by attempting to manufacture appellate jurisdiction by voluntarily seeking dismissal of their claims against the diverse Defendant–Appellee, Kansas City Southern Railway Company ("KCS"). In so doing, Plaintiffs have forfeited their right to appeal—presumably inadvertently—because we must also dismiss this second appeal for lack of appellate jurisdiction.

I. FACTS & PROCEEDINGS

This case arises out of a fatal railroad crossing accident that occurred in Scott County, Mississippi. The accident occurred when a van, driven by Lucy R. Shepard, collided with a KCS train. Shepard was killed, and her passenger, Phyllis B. McKee, was injured. Plaintiffs, as representatives of Shepard's wrongful death beneficiaries, filed this action in Mississippi state court asserting, *inter alia,* claims under that state's wrongful death statute. McKee filed a separate negligence action (the "*McKee* case").[1] In addition to KCS,[2] ***497** three members of the train crew, C.L. Duett, Eric Robinson, and Robert Everett (collectively the "train crew"), were named as defendants in

both actions for their allegedly negligent operation of the train. While this suit was pending in state court, Defendants propounded requests for admissions asking Plaintiffs to admit that there was no basis for joining the train crew defendants in this action. Plaintiffs failed to respond timely to Defendants' requests for admissions. Arguing that Plaintiffs' failure to respond resulted in the conclusive admission that no viable cause of action existed against the train crew,[3] Defendants removed the action to federal court on the assertion that the train crew defendants, who are Mississippi residents, were fraudulently joined solely to defeat diversity jurisdiction.

Plaintiffs filed a motion in district court seeking remand to state court. In support of this motion, Plaintiffs submitted a sworn statement by Officer Jeff Pitts, a witness to the collision between KCS's train and Shepard's van. The district court ordered that a remand deposition of Officer Pitts be taken and that the parties submit a transcript of his deposition to the court.

After reviewing Officer Pitts' deposition, the district court denied Plaintiffs' motion for remand. The court concluded that Officer Pitts' deposition "work[ed] against the plaintiffs" and that they could not establish any cause of action against the train crew. The district court consequently dismissed the train crew defendants from the action. Plaintiffs filed a motion for reconsideration to which they appended additional evidence and documentation to demonstrate the train crew's potential liability. The district court denied this motion, too.

Plaintiffs then appealed the district court's denial of their motion for remand and dismissal of the train crew defendants to this court. As the district court's remand decision was not certified for interlocutory appellate review under 28 U.S.C. § 1292(b) or Federal Rule of Civil Procedure 54(b), we dismissed that effort to obtain an interlocutory review because we lacked appellate jurisdiction.[4]

Next, the district court entered a scheduling order establishing a discovery completion deadline and setting the case for trial. Meanwhile, the *McKee* case had proceeded to trial, and a jury had rendered a verdict in favor of KCS.[5] On learning of that verdict, Plaintiffs filed a pleading styled Motion for Entry of Final ***498** Judgment in Favor of Defendant (the "Motion for Final Judgment"). This motion, which professed to rely on Federal Rule of Civil Procedure 54, stated that this case and the *McKee* case involved the same defendant (KCS) and identical issues. In their motion, Plaintiffs asserted that, "[s]ince the Court and [KCS] have previously opined that the jury's verdict in *McKee* and the final judgment entered pursuant to that verdict are binding upon the Plaintiff and [KCS] herein, there is no just reason to delay the entry of a final judgment in this action." Plaintiffs, therefore, asked the district court to "direct the entry of a final judgment against the Plaintiff and in favor of the Defendant in this action." Importantly, the Motion for Final Judgment said nothing about whether Plaintiffs were seeking dismissal with or without prejudice.

KCS filed a response in which it stated that Plaintiffs had miscited Rule 54 as the governing rule. Instead, explained KCS, "[t]he proper rule under which the Plaintiff should be proceeding is Rule 41(a)(2)." KCS made the following representation:

> Defendant [KCS] has no objection to Plaintiff's request for dismissal of her claims against this Defendant and for entry of final judgment *with prejudice* in this Defendant's favor. It is apparent from Plaintiffs' Motion, and from representations by her counsel to this Defendant and the Court, that Plaintiff wishes to terminate proceedings before this Court and appeal to the Fifth Circuit Court of Appeals this Court's rulings denying the Plaintiffs' Motion to Remand and Motion to Reconsider Order Denying Remand. Defendant would agree to entry of an order dismissing Plaintiffs' claims *with prejudice* and expressly reserving the Plaintiffs' right to challenge this Court's subject matter jurisdiction over this action on appeal to the Fifth Circuit.[6]

Before the district court ruled on the Motion for Final Judgment, though, Plaintiffs filed yet another motion for reconsideration of the district court's initial order denying remand. This time they cited evidence from the *McKee* trial to demonstrate the viability of their claims against the train crew defendants.

In ruling on Plaintiffs' two pending motions, the district court first acknowledged that Plaintiffs had predicated their Motion for Final Judgement on Rule 54(b), but agreed with KCS and construed Plaintiffs' motion as one for voluntary dismissal under Rule 41(a)(2). The district court then granted Plaintiffs' motion, stating:

> There is no counterclaim in the instant case and the defendants do not object to the plaintiffs' motion. Therefore, the above styled and numbered cause is hereby dismissed in accordance with Rule 41(a)(2). As a special condition of this dismissal, the plaintiffs' motion for this court to enter a final judgment in favor of the defendants ... is hereby granted. This court hereby grants final judgment in favor of the defendants.

In the same order, the district court went on to deny Plaintiffs' renewed motion for reconsideration of the remand issue. Plaintiffs timely filed their notice of appeal, designating this order as the decision from which they were appealing.

II. ANALYSIS

Plaintiffs appeal the district court's denial of their motion for remand. In support, Plaintiffs advance arguments essentially identical to those advanced in McKee's appeal to this court, contesting the district ***499** court's denial of her motion for remand.[7] By attempting to manufacture appellate jurisdiction through the voluntarily dismissal of the remainder of their action against KCS, however, Plaintiffs have unwittingly stepped into the so-called "finality trap,"[8] thereby forfeiting altogether their right to appeal the district court's remand decision.

A. MANUFACTURING APPELLATE JURISDICTION TO OBTAIN A QUASI–INTERLOCUTORY APPEAL

[1] **[2]** The starting point of our analysis is 28 U.S.C. § 1291, the jurisdictional statute on which Plaintiffs now rely in seeking appellate relief from us. Generally, all claims and issues in a case must be adjudicated in the district court, and a final judgment or order must be issued, before our jurisdiction can be invoked under § 1291.[9] This "final judgment rule" creates appellate jurisdiction only after a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[10] Here, the district court refused to certify its denial of Plaintiffs' motion for remand for an interlocutory appeal under 28 U.S.C. § 1292(b). Neither did the court enter a final judgment pursuant to Rule 54(b) in favor of the dismissed train crew defendants.[11]

All parties agree that the *McKee* case and this action involved the same defendant (KSC), identical operative facts, and substantially overlapping legal claims. Additionally, both cases proceeded before the same district judge. Consequently, after the jury rendered a verdict for KCS in the *McKee* case, the Plaintiff (and possibly the district court as well) apparently expected KCS to raise the defense of *res judicata* or issue preclusion in this case. Critically, though, nothing in the record reflects any assertion of these defenses by KCS.[12] Instead, Plaintiffs preemptively filed their Motion for Final Judgment, asking the district court to "direct the entry of a final judgment against the Plaintiff[s] and in favor of the Defendant in this action." In effect, Plaintiffs sought to manufacture a final judgment—and through it appellate jurisdiction—to obtain an immediate appellate ruling on the question of fraudulent joinder.

[3] The Plaintiffs' problem with the strategy they employed is that it runs headlong into the "settled rule in the Fifth Circuit that appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims *without prejudice*. ***500** "[13] And, a Rule 41(a) dismissal without prejudice is not deemed to be a "final decision" for the purposes of § 1291. This rule can be traced

back to our decision in *Ryan v. Occidental Petroleum Corp.* [14] In *Ryan*, we explained that when a district court grants a party's request for a voluntary dismissal, he "gets what he seeks, i.e., a dismissal without an adjudication on the merits, and he is entitled to bring a later suit on the same cause of action." [15] Therefore, a party cannot use voluntary dismissal *without* prejudice as an end-run around the final judgment rule to convert an otherwise non-final—and thus non-appealable—ruling into a final decision appealable under § 1291. [16]

Typically, the *Ryan* rule operates when a plaintiff has filed multiple claims against a single party, or against multiple parties, and the district court has dismissed some but not all of the claims. Then, in an effort to preserve his remaining claims while simultaneously appealing the adverse dismissal, the plaintiff implores the district court to dismiss his remaining claims *without* prejudice and enter a final judgment. [17] *Ryan* eschews this practice of manufacturing § 1291 appellate jurisdiction and disallows the manipulative plaintiff from having his cake (the ability to refile the claims voluntarily dismissed) and eating it too (getting an early appellate bite at reversing the claims dismissed involuntarily). [18] This prohibition of quasi-interlocutory appeals applies equally to a plaintiff's attempt to use a Rule 41(a) voluntary dismissal to construct the jurisdictional basis for appealing a district court's denial of a motion for remand. [19]

In contrast, when a plaintiff agrees to have his remaining claims dismissed *with* prejudice, *Ryan*'s rule is not implicated because the plaintiff is precluded from refiling the same action elsewhere. "[I]f the plaintiff is unsuccessful in challenging the district court's action, then the dismissal operates as an adjudication on the merits and the litigation is terminated." [20] Thus, the policy against permitting interlocutory appeals in all but those limited circumstances that are specifically prescribed in the Federal Rules and the Judicial Code is furthered because when "the appellant voluntarily dismisses his action with prejudice and loses on appeal, the district court is saved the time and effort of conducting extended trial proceedings and there is in addition no possibility of piecemeal appeals." [21]

The determinative question for the issue here presented, then, is whether the district court's dismissal of this action was with or without prejudice.

B. DISMISSAL WITH OR WITHOUT PREJUDICE?

[4] Because the district court's order granting Plaintiff's Motion for Final Judgment ***501** is silent on the question of prejudice, it is reasonably susceptible to two contradictory readings. On the one hand, the order states that the court is dismissing the action "in accordance with Rule 41(a)(2)," which expressly states that dismissals under that rule are without prejudice "[u]nless otherwise specified in the order." [22] On the other hand, the district court's order purports to engraft a "special condition" on the dismissal by granting Plaintiffs' Motion for Final Judgment and entering "a

final judgment in favor of the defendants." And, earlier in its order, the district court remarked that Plaintiffs' Motion for Final Judgment was "mov[ing] for a final judgment *with prejudice* pursuant to Rule 54(b)." [23] As noted previously, though, Plaintiffs' motion does not state whether the dismissal being sought was to be with or without prejudice.

In their reply brief on appeal, Plaintiffs vigorously assert that their motion "requested entry of final judgment, but not with prejudice." Absent this assertion, we could conceivably interpret the district court's order either way; and if we were to construe it as a dismissal *with* prejudice, we would have appellate jurisdiction and could proceed to resolve Plaintiffs' challenge to the district court's denial of their motion for remand. [24] But, given (1) Plaintiffs' most recent insistence that the dismissal at issue was *without* prejudice and (2) the express language in Rule 41(a)(2) that a dismissal under that rule is *without* prejudice "[u]nless otherwise specified in the order" (which it is not), we are constrained to conclude that the dismissal was, in fact, *without* prejudice. [25] Therefore, the *Ryan* rule controls our decision, and we must dismiss this appeal for lack of appellate jurisdiction.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' appeal is dismissed for lack of jurisdiction.

DISMISSED.

All Citations

378 F.3d 495, 59 Fed.R.Serv.3d 243

Footnotes

1 *See* *McKee v. Kansas City S. Ry. Co.*, 358 F.3d 329 (5th Cir.2004). As with this action, the *McKee* case was also removed to federal court, where it was presided over by the same district judge who handled this case.

2 KCS is a Missouri corporation with its home office and principal place of business in Kansas City.

3 The requests for admissions were issued pursuant to Miss. R. Civ. P. 36. The parties sharply contest whether the district court could properly treat Plaintiffs' failure to respond timely to

the requests as a conclusive admission. That dispute, however, does not affect our decision today.

4 *Marshall v. Kansas City S. Ry. Co.*, 45 Fed. Appx. 322 (5th Cir.2002) ("*Marshall I*"). *After* filing their notice of appeal in *Marshall I,* Plaintiffs filed a Rule 54 motion in the district court to have a final judgment entered in favor of the train crew defendants. But because Plaintiffs had already filed their notice of appeal, the district court never ruled on that Rule 54 motion. *See* *Texas Comptroller of Pub. Accounts v. Transtexas Gas Corp. (In re Transtexas Gas Corp.),* 303 F.3d 571, 578–79 (5th Cir.2002). In other words, Plaintiffs put the cart before the horse by filing their notice of appeal *before* submitting their Rule 54 motion.

5 In the *McKee* case, the district court had also dismissed the train crew defendants after concluding that they had been fraudulently joined. 358 F.3d at 332.

6 Emphasis added.

7 *See* *McKee,* 358 F.3d at 333–37.

8 Terry W. Schackmann & Barry L. Pickens, *The Finality Trap: Accidentally Losing Your Right to Appeal,* 58 J. MO. B. 78 (2002).

9 This provision provides, in pertinent part, that "[t]he courts of appeals ... shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States ... except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (emphasis added).

10 *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 373, 101 S.Ct. 669, 673, 66 L.Ed.2d 571 (1981) (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978)). For now, we disregard the narrow exception to the final judgment rule embodied in the collateral order doctrine.

11 *See supra* note 4.

12 In their Motion for Final Judgment, Plaintiffs stated that the district court and KCS had "previously opined that the jury's verdict in *McKee* and the final judgment entered pursuant to that verdict [were] binding upon the Plaintiff and [KCS] herein," but the record is devoid of any ruling, opinion, or statement by the district judge to this effect. KCS never filed any supplemental pleading asserting the affirmative defense of *res judicata* or issue preclusion. *See* FED.R.CIV.P. 8(c).

13 *Swope v. Columbian Chems. Co.,* 281 F.3d 185, 192 (5th Cir.2002) (emphasis added).

14 577 F.2d 298 (5th Cir.1978).

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15 *Id.* at 302.

16 *See id.*

17 *See* Schackmann & Pickens, *supra* note 8, at 78–80.

18 *See generally* *Swope,* 281 F.3d at 192–94; *State Treasurer of Michigan v. Barry,* 168 F.3d 8, 14–16 (11th Cir.1999). *See also* Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing" A Final Judgment Through Voluntary Dismissal of Peripheral Claims,* 48 MERCER L.REV. 979 (1997).

19 *See, e.g.,* *Martin v. Franklin Capital Corp.,* 251 F.3d 1284, 1288–89 (10th Cir.2001); *Concha v. London,* 62 F.3d 1493, 1506–08 (9th Cir.1995).

20 *Martin,* 251 F.3d at 1289 (quoting *Concha,* 62 F.3d at 1507).

21 *Id.* (quoting *Concha,* 62 F.3d at 1508 n. 8). *See also* Cochran, *supra* note 18.

22 FED.R.CIV.P. 41(a)(2). *See* *Plumberman, Inc. v. Urban Sys. Dev. Corp.,* 605 F.2d 161, 161 (5th Cir.1979) (holding that if a Rule 41(a)(2) dismissal order fails to specify whether the dismissal is with or without prejudice, the dismissal is treated as one without prejudice). *See also* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2367, at 318–19 (2d ed. 1995) ("If the court's order is silent on this point, the dismissal is without prejudice.").

23 Emphasis added.

24 For their part, the Defendants rely on two Eleventh Circuit decisions that have gone far beyond *Ryan* 's scope to hold that appellate jurisdiction is lacking even if the plaintiff has his underlying action dismissed with prejudice. *Druhan v. American Mut. Life,* 166 F.3d 1324, 1325–27 (11th Cir.1999); *Woodard v. STP Corp.,* 170 F.3d 1043, 1044 (11th Cir.1999). The Eleventh Circuit's reasoning in these decisions seems to conflict with the rationale underlying *Ryan. See* *Swope,* 281 F.3d at 192–94; *Barry,* 168 F.3d at 14–16; Cochran, *supra* note 18. We need not wrestle with this question today because *Druhan* and *Woodard* are not binding on us, and they would not affect the ultimate outcome of this appeal.

25 *See* Cochran, *supra* note 18, at 1017 ("Litigants have the responsibility to obtain dismissal orders of peripheral claims that state they are dismissed with prejudice and to account for the resolution of all pieces of the district court litigation.").

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by James v. Price Stern Sloan, Inc., 9th Cir.(Wash.), March 12, 2002

974 F.2d 147
United States Court of Appeals,
Tenth Circuit.

Delores J. COOK, Plaintiff–Appellant,
v.
ROCKY MOUNTAIN BANK NOTE COMPANY, a Colorado corporation, and Romo Corp., a Colorado corporation, Defendants–Appellees.

No. 91–1418.
|
Sept. 3, 1992.

Synopsis
Following dismissal of her outrageous conduct claim, plaintiff filed voluntary dismissal of her remaining claims without prejudice. The United States District Court for the District of Colorado, Sherman G. Finesilver, Chief Judge, granted this request, and plaintiff appealed dismissal of her outrageous conduct claim. The Court of Appeals, Tacha, Circuit Judge, held that when plaintiff voluntarily requests dismissal of her remaining claims without prejudice in order to appeal from order that dismisses another claim with prejudice, order is not a "final order" for appeal purposes.

Appeal dismissed.

Procedural Posture(s): On Appeal.

West Headnotes (1)

[1] Federal Courts ⇐ Multiple Claims or Parties

When plaintiff voluntarily requests dismissal of her remaining claims without prejudice in order to appeal from order that dismisses another claim with prejudice, order is not a "final order" for appeal purposes. 28 U.S.C.A. § 1291.

53 Cases that cite this headnote

Attorneys and Law Firms

***147** A.A. Lee Hegner, Denver, Colo., for plaintiff-appellant.

Raymond M. Deeny and N. Dawn Webber, of Sherman & Howard, Colorado Springs, Colo., for defendants-appellees.

Before MOORE, TACHA, and BRORBY, Circuit Judges.

Opinion

TACHA, Circuit Judge.

Appellant Delores Cook appeals from a district court order dismissing her third claim for relief. Appellees contend that we lack jurisdiction to hear this appeal. We agree and dismiss the appeal for lack of jurisdiction. [1]

BACKGROUND

On August 21, 1991, Cook filed an action in the District Court for the City and County of Denver, Colorado in which she alleged three claims for relief against appellees. On August 29, 1991, appellees removed the action to the United States District Court for the District of Colorado. On September 16, 1991, appellees filed a motion to dismiss Cook's third claim for relief, which alleged that appellees' actions in relation to appellant's employment constituted "outrageous conduct." Holding that appellant's outrageous conduct claim is preempted by the Age Discrimination in Employment ***148** Act, 29 U.S.C. §§ 621–634, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the district court granted appellees' motion and dismissed Cook's third claim for relief with prejudice.

On December 2, 1991, the district court rejected Cook's motion for reconsideration, and Cook filed a notice of appeal. This court then required Cook to show cause why her appeal should not be dismissed because there was not a Fed.R.Civ.P. 54(b) certification from the district court. On December 27, 1991, Cook requested that the district court grant a Rule 54(b) certification. The district court denied the request. Cook subsequently asked the district court to dismiss her first and second claims for relief without prejudice. The district court granted this request on January 15, 1992.

DISCUSSION

Cook contends that we have jurisdiction over this appeal under 28 U.S.C. § 1291 because her third claim for relief was dismissed with prejudice and because her remaining claims are no longer before the district court. She asserts that her third claim for relief is now appealable under § 1291. In resolving this contention, we are guided by the Fifth Circuit's decision in *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298 (5th Cir.1978). In *Ryan,* the district court dismissed a number of claims in the plaintiff's complaint for failure to state a claim. The plaintiff wished to appeal immediately the dismissal of these claims and sought a certification order from the district court pursuant to Rule 54(b). At first, the district court granted the certification order, but subsequently vacated the certification order and granted the plaintiff's motion for a voluntary dismissal of the remaining substantive claims without prejudice. The plaintiff then appealed the claims that had been dismissed with prejudice. *Id.* at 300.

In deciding that it lacked jurisdiction over the appeal, the Fifth Circuit held that the two different orders dismissing the appeal did not amount to a final order because they did not resolve the plaintiff's claims on the merits. *Id.* at 301. The court also found that it did not have jurisdiction because the district court retained jurisdiction over some nonsubstantive allegations in the complaint. *Id.* at 302. Finally, the court stated that "[i]f the district court did not think certification appropriate, it could not properly arrive at the same result through the device of allowing a voluntary dismissal." *Id.* at 302–03.

We agree with the reasoning of the Fifth Circuit. A plaintiff cannot be allowed to undermine the requirements of Rule 54(b) by seeking voluntarily dismissal of her remaining claims and then appealing the claim that was dismissed with prejudice. Here, Cook has attempted to subvert the requirements of Rule 54(b) by voluntarily dismissing her first and second claims when the district court would not grant certification on her third claim for relief. Under 28 U.S.C. § 1291, we have jurisdiction only over final orders of the district court. Although the district court no longer has jurisdiction over any part of this action, we cannot conclude that its two orders render Cook's action final for purposes of appeal. Because her first two claims for relief were dismissed without prejudice, she remains free to file another complaint raising those same claims. In summary, when a plaintiff voluntarily requests dismissal of her remaining claims without prejudice in order to appeal from an order that dismisses another claim with prejudice, we conclude that the order is not "final" for purposes of § 1291. Therefore, this appeal is DISMISSED. The mandate shall issue forthwith.

All Citations

974 F.2d 147, 59 Fair Empl.Prac.Cas. (BNA) 1345, 59 Empl. Prac. Dec. P 41,762, 23 Fed.R.Serv.3d 860

Footnotes

1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The case is therefore ordered submitted without oral argument.

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Wilson v. Kennedy, Colo.App., August 13, 2020

283 F.3d 1064
United States Court of Appeals,
Ninth Circuit.

Robin JAMES, a married person in her separate capacity, Plaintiff–Appellant,
v.
PRICE STERN SLOAN, INC., a Delaware corporation; Penguin Putnam, Inc., a Delaware corporation, Defendants–Appellees.

No. 00–35321.
|
Argued and Submitted Sept. 12, 2001.
|
Filed March 12, 2002.

Synopsis

Illustrator brought action against publisher alleging that publisher lost pieces of illustrator's original artwork. Publisher moved for partial summary judgment and the United States District Court for the Western District of Washington, Robert S. Lasnik, J., granted the motion. Illustrator appealed and publisher challenged appellate jurisdiction. The Court of Appeals, Kozinski, Circuit Judge, held that the District Court's judgment granting partial summary judgment and dismissing remaining claims without prejudice was a final, appealable judgment.

Affirmed.

West Headnotes (3)

[1] Federal Courts ⇐ Summary Judgment

A district court order granting partial summary judgment in favor of publisher and dismissing remaining claims without prejudice on illustrator's voluntary motion was a final, appealable order in action brought by illustrator against publisher arising out of publisher's alleged loss of illustrator's original artwork, absent evidence that illustrator attempted to manipulate appellate jurisdiction by artificially manufacturing finality; illustrator sought the court's permission to dismiss the claims, accepted the court's

conditions on dismissal, and did not attempt to press the claims in a different federal lawsuit simultaneously with the appeal. 28 U.S.C.A. § 1291.

73 Cases that cite this headnote

[2] **Federal Courts** ⇐ Summary Judgment

A court of appeals may review partial summary judgments for compliance with the requirements of finality, but accords a great deference to the district court. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

30 Cases that cite this headnote

[3] **Federal Courts** ⇐ What constitutes final judgment

When a party that has suffered an adverse partial judgment subsequently dismisses remaining claims without prejudice with the approval of the district court, and the record reveals no evidence of intent to manipulate appellate jurisdiction, the judgment entered after the district court grants the motion to dismiss is final and appealable as a final decision of the district court. 28 U.S.C.A. § 1291.

293 Cases that cite this headnote

Attorneys and Law Firms

***1065** John P. Mele, Ryan, Swanson & Cleveland, PLLC, Seattle, WA, argued the cause for the plaintiff-appellant.

David R. Goodnight, Dorsey & Whitney LLP, Seattle, WA, argued the cause for the defendants-appellees; Joseph C. Klein assisted on the brief.

Appeal from the United States District Court for the Western District of Washington; Robert S. Lasnik, District Judge, Presiding. D.C. No. CV–99–00456–RSL.

Before: KOZINSKI and GOULD, Circuit Judges, and SCHWARZER, Senior District Judge.*

Opinion

KOZINSKI, Circuit Judge:

Robin James is a successful artist. For five years, from 1977 to 1982, she illustrated a series of children's books published by Price Stern Sloan, Inc. [1] As the books became popular, the originals of James's illustrations rose in value. Years later, James requested that Price Stern return her original artwork. Price Stern complied by returning all the artwork that it could locate. Having eventually returned about half of the illustrations, Price Stern informed James that the remaining artwork had been irretrievably lost.

James sued Price Stern, claiming compensation for the lost artwork. Price Stern countered by arguing that the contracts governing James's work between 1977 and 1982 assigned the ownership of the artwork to Price Stern. The district court granted Price Stern's motion for partial summary judgment with respect to claims related to those contracts. James appeals and we must determine whether we have jurisdiction. [2]

The partial summary judgment disposed only of the claims brought under the contracts concluded between 1977 and 1982; it did not adjudicate claims related to two post–1982 book series. [3] After the district court granted partial summary judgment for Price Stern, James petitioned for dismissal of the remaining claims. The district court granted the motion, dismissed these claims without prejudice and entered what on its face appears to be a final judgment against James. The question we must answer is whether the judgment was, indeed, final.

The judgment summarized the court's two interim dispositions: the partial summary judgment for Price Stern and the dismissal of James's remaining claims. As to form, then, the judgment comports with the requirement of finality by disposing of all pending claims; after entry of this judgment, James had "no claims left for the district court to hear." *Horn v. Berdon, Inc. Defined Benefit Pension Plan,* 938 F.2d 125, 127 n. 1 (9th Cir.1991).

Price Stern argues, however, that James's appeal lacks finality because dismissal ***1066** of some of James's claims *without* prejudice leaves her free to resurrect these claims on remand if her appeal is successful. Relying on *Dannenberg v. Software Toolworks,* 16 F.3d 1073 (9th Cir.1994), and *Cheng v. Commissioner,* 878 F.2d 306 (9th Cir.1989), Price Stern argues that a losing party's non-prejudicial dismissal of some claims is invariably "an impermissible attempt to 'manufacture finality' " as to the remaining claims.

[1] We start by observing that there is no evidence James attempted to manipulate our appellate jurisdiction by artificially "manufacturing" finality. We have always regarded evidence of such manipulation as the necessary condition for disallowing an appeal where a party dismissed its claims without prejudice. *See Dannenberg,* 16 F.3d at 1076–77; *Cheng,* 878 F.2d at 310–11; *Fletcher v. Gagosian,* 604 F.2d 637, 638–39 (9th Cir.1979). In *Dannenberg* and *Cheng,* finality was achieved by a stipulation that if the judgment is reversed on appeal, appellant would

be permitted to reinstate the dismissed claims. *Dannenberg,* 16 F.3d at 1074; *Cheng,* 878 F.2d at 308–09. The stipulation kept the dismissed claims on ice while appeal was taken from a partial judgment, circumventing the final judgment rule and arrogating to the parties the gatekeeping role of the district court.

Admittedly, a dismissal of some claims without prejudice always presents a possibility that the dismissing party would attempt to resurrect them in the event of reversal. But, absent a stipulation such as that in *Dannenberg,* plaintiff assumes the risk that, by the time the case returns to district court, the claim will be barred by the statute of limitations or laches. Such a unilateral dismissal is therefore much less likely to reflect manipulation. The court's approval of the motion is usually sufficient to ensure that everything is kosher. Of course, the other party's failure to oppose the dismissal may be collusive (i.e. the result of a side agreement not brought to the court's attention), but Price Stern mentions no such agreement, and it would surely be aware of one if it did exist.

Dannenberg itself emphasized this distinction, drawing a contrast with *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530 (9th Cir.1984). In *Robertson,* we allowed an appeal where, after the district court partially dismissed his complaint, the plaintiff voluntarily dismissed the remaining counts without prejudice. *Id.* at 533. As *Dannenberg* explained, "[i]n *Robertson,* [unlike] in this case, the claims disappeared from the district court once the plaintiff dismissed them. Here, as in *Cheng,* the parties stipulated to revive the dismissed claims in the event of a reversal on appeal. In essence, the claims remained in the district court pending a decision by this court. We see this as a clear, and impermissible, attempt to circumvent Rule 54(b)." *Dannenberg,* 16 F.3d at 1077.[4] The case for finding jurisdiction here is arguably even stronger than in *Robertson.* While in *Robertson* the dismissal was accomplished without the district court's approval, under Rule 41(a)(1), *Robertson,* 749 F.2d at 533, James's dismissal was pursuant to court order under Rule 41(a)(2). The district court's participation in the process is an additional factor alleviating concerns about a possible manipulation of the appellate process.

Our situation also differs from *Fletcher v. Gagosian,* 604 F.2d 637 (9th Cir.1979). In *Fletcher,* after the district court "categorically refused" to grant a Rule 54(b) severance, plaintiffs dismissed the remaining claims without informing the district court, filed a simultaneous appeal and, before ***1067** the appeal was even considered, "refile[d] the dismissed portion as a separate lawsuit." *Id.* at 638–39. Not surprisingly, we found manipulation. Finding "nothing in th[e] record purporting to be a judgment and nothing indicating that the district court intended to have a judgment entered," we held that a party may not "convert[ ] what had been an unappealable order into an appealable order, without the district judge's participation and perhaps without his personal knowledge." *Id.* at 638. Our case presents none of the concerns identified in *Fletcher.* James sought the district court's permission to dismiss the remaining claims, accepted the court's condition that the result

of discovery be available in any subsequent proceeding between the parties, and did not attempt to press the claims in a different federal lawsuit simultaneously with the appeal. [5]

Our case is even farther removed from two other cases discussed in *Dannenberg,* *Huey v. Teledyne, Inc.,* 608 F.2d 1234 (9th Cir.1979), and *Ash v. Cvetkov,* 739 F.2d 493 (9th Cir.1984). These cases involved, not final judgments severable for immediate appeal pursuant to Rule 54(b), but interlocutory orders—a denial of class certification, *Huey,* 608 F.2d at 1236, and an order quashing writs of execution, *Ash,* 739 F.2d at 495—that could be appealed only if certified by the district court under 28 U.S.C. § 1292(b) as raising an important and unsettled question of law whose disposition will advance the ongoing proceedings. The appellant in those cases—the party objecting to the interlocutory order—simply refused to prosecute the case, which eventually resulted in a dismissal. On appeal from that dismissal, appellants sought to have us review the interlocutory orders in the course of the appeal.

This was unquestionably a manipulation of appellate process: "If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened." *Huey,* 608 F.2d at 1239 (quoting *Sullivan v. Pac. Indem. Co.,* 566 F.2d 444, 445 (3d Cir.1977)). We reaffirmed this position in *Ash,* where we held that "the sufferance of dismissal without prejudice because of failure to prosecute is not to be employed as an avenue for reaching issues which are not subject to interlocutory appeal as of right." *Ash,* 739 F.2d at 497. *Huey* and *Ash,* like *Dannenberg* and *Fletcher,* turned on manipulation and are therefore inapposite.

[2] Price Stern argues that James did engage in manipulation because she engineered an end-run around the procedures specified in Rule 54(b). This rule enables the district court to sever a partial final judgment for an immediate appeal. [6] Price ***1068** Stern argues that, because James is really appealing the partial summary judgment, she may do so only if this judgment is issued pursuant to Rule 54(b).

There is no evidence, however, that James attempted to circumvent Rule 54(b), or that the final judgment issued by the district court undermines the Rule 54(b) procedures. The record shows that James requested—and the district court intended to grant—a final, appealable judgment. In her motion to dismiss, James stated that "[a] federal court trial on the few remaining pieces of artwork would not be an efficient use of time and resources, given the small amount of artwork actually involved," and that "[o]nce those claims are dismissed, a final judgment can be entered." Price Stern did not oppose this request, asking only to condition dismissal on the right to use the result of discovery in any subsequent proceeding. Responding to Price Stern, James repeated that

"th[e] case is ripe for dismissal," and asked the district court to "enter judgment for defendants pursuant to Fed.R.Civ.P. 58."

James's reasons for seeking a dismissal of her remaining claims seem entirely legitimate. She presented them to the district court and Price Stern had an opportunity to argue that they were a subterfuge, but failed to do so. The district court must have been persuaded of the legitimacy of James's reasons because it granted the dismissal of the remaining claims, subject to the condition offered by Price Stern. By entering a final judgment under Rule 58 as to the claims under the ***1069** 1977–82 contracts, the district court made a determination that its adjudication of those claims was ripe for review; this is a judgment highly analogous to one the district court would have been required to make had James chosen not to dismiss the remaining claims. Indeed, Rule 58 specifically calls attention to the requirements of Rule 54(b), and we have no reason to doubt that the district court was mindful of the interplay between the two rules.

Our case therefore raises none of the concerns present in *Huey* and *Ash,* where appellants deliberately attempted to circumvent section 1292(b), or in *Fletcher,* where the appellant sought review despite the district court's express refusal to issue the judgment under Rule 54(b). Sending James back to the district court for a reissuance of the judgment pursuant to this rule would serve no useful purpose. In fact, it would be rather ironic to now ask the district court to certify, as Rule 54(b) requires, that "there is no just reason for delay" an appeal it authorized 24 months ago by entering a final judgment.

Our approach is consistent with that of other circuits. The Sixth Circuit held, in a situation indistinguishable from ours, that appellate jurisdiction exists where plaintiff, with the district court's permission, dismissed without prejudice the remaining claims in order to make the judgment appealable. *Hicks v. NLO, Inc.,* 825 F.2d 118, 120 (6th Cir.1987). *Hicks* interpreted *Fletcher* as we do today: Because the district court approved the dismissal, *Fletcher* 's concern that "permitting a plaintiff to appeal after a voluntary dismissal about which the district judge knows nothing prevents the judge from having the opportunity to review in the context of the total litigation the earlier order dismissing part of the complaint" was absent. *Hicks,* 825 F.2d at 120 (discussing *Fletcher v. Gagosian,* 604 F.2d 637 (9th Cir.1979)). When "the district judge signed the order of dismissal, the judge was aware that all claims were now disposed of." *Id.*

The Eighth Circuit has reached a similar conclusion where "[f]ollowing the granting of the motion for partial summary judgment, the court, on the parties' joint motion to dismiss ..., dismissed without prejudice the remainder of the case. The effect of that action was to make the judgment granting partial summary judgment a final judgment for purposes of appeal, even though the district court had not so certified under Fed.R.Civ.P. 54(b)." *Chrysler Motors Corp. v. Thomas Auto Co.,* 939 F.2d 538, 540 (8th Cir.1991) (citation omitted). [7]

The Seventh Circuit has taken a similar view. *See* *Division 241 Amalgamated Transit Union v. Suscy,* 538 F.2d 1264, 1266 & n. 1 (7th Cir.1976) (allowing an appeal where the dismissal of the remaining counts was made with the permission of the district judge). Although the Seventh Circuit has, on occasion, disallowed an appeal after a dismissal without prejudice, it has done so only where the record revealed that the district court and the parties have schemed to create jurisdiction over an essentially interlocutory appeal. *See* *Horwitz v. Alloy Auto. Co.,* 957 F.2d 1431, 1435 (7th Cir.1992) ("What [the district court] did for the parties was to dismiss the good counts with leave to later reinstate them so that the counts dismissed for cause could be appealed. That did not terminate the litigation and no one contemplated that it would. It was not a final order.") (citation omitted); *see also* *United States v. Kaufmann,* 985 F.2d 884, 890–91 (7th Cir.1993) ("*Horwitz* did not ***1070** announce a principle that dismissal of some claims without prejudice deprives a judgment on the merits of all other claims of finality for purposes of appeal. Rather, the court concentrated on the intent of the district court and the parties to bypass the rules.").

Although there is no unanimity on this issue, *see, e.g.,* *State Treasurer v. Barry,* 168 F.3d 8 (11th Cir.1999) (holding that appellate jurisdiction is lacking where a party dismissed the remaining claims without prejudice); *Chappelle v. Beacon Communications Corp.,* 84 F.3d 652, 653–54 (2d Cir.1996) (same); *Cook v. Rocky Mountain Bank Note Co.,* 974 F.2d 147, 148 (10th Cir.1992) (same); *Ryan v. Occidental Petroleum,* 577 F.2d 298 (5th Cir.1978) (same), we find the reasoning of the Sixth, Seventh and Eight Circuits more persuasive. [8]

[3] We therefore hold that when a party that has suffered an adverse partial judgment subsequently dismisses remaining claims without prejudice with the approval of the district court, and the record reveals no evidence of intent to manipulate our appellate jurisdiction, the judgment entered after the district court grants the motion to dismiss is final and appealable under 28 U.S.C. § 1291.

In a separately filed memorandum disposition, we affirm the district court's judgment on the merits.

AFFIRMED.

All Citations

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Footnotes

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

1 Price Stern has been subsequently acquired by Putnam Berkeley Group, Inc., the predecessor of co-appellee Penguin Putnam, Inc. Price Stern is now a subdivision and an imprint of Penguin Putnam.

2 This is the only subject of this opinion. The merits are resolved in a memorandum disposition. *See* 9th Cir. R. 36–3.

3 The parties agree that James retained the ownership of the original artwork completed under the post 1982 contracts. Price Stern, however, reserved the right to raise other defenses against claims brought under these contracts.

4 Fed.R.Civ.P. 54(b) allows the district court to sever a final judgment with respect to particular claims (or parties) for an immediate appeal.

5 *Fletcher* itself drew this distinction, discussing the Seventh Circuit decision in *Division 241, Amalgamated Transit Union v. Suscy,* 538 F.2d 1264, 1266 (7th Cir.1976). *Suscy* allowed an appeal where, after the district court dismissed one of the claims, "the plaintiff moved for, and obtained, a dismissal of the remaining counts by the district judge." *Fletcher,* 604 F.2d at 639.

6 Some of our cases use the phrase "Rule 54(b) certification." *E.g., Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 923 (9th Cir.2001); *Holley v. Crank,* 258 F.3d 1127, 1130 (9th Cir.2001); *Brookes v. Comm'r,* 163 F.3d 1124, 1129 (9th Cir.1998); *Int'l Techs. Consultants, Inc. v. Pilkington PLC,* 137 F.3d 1382, 1386 (9th Cir.1998); *Zucker v. Maxicare Health Plans, Inc.,* 14 F.3d 477, 483 (9th Cir.1994). This is a misnomer born of confusion between Rule 54(b) and 28 U.S.C. § 1292(b), only the latter of which requires a certification. The two procedures apply to different situations. *See generally* 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2658.2, at 89–95 (1998) [hereinafter Wright & Miller]. Rule 54(b) applies where the district court has entered a final judgment as to particular claims or parties, yet that judgment is not immediately appealable because other issues in the case remain unresolved. Pursuant to Rule 54(b), the district court may sever this partial judgment for immediate appeal whenever it determines that there is no just reason for delay. A court of appeals may, of course, review such judgments for compliance with the requirements of finality, but accords a

great deference to the district court. *Texaco, Inc. v. Ponsoldt,* 939 F.2d 794, 797–98 (9th Cir.1991).

By contrast, section 1292(b) addresses the situation where a party wishes to appeal an interlocutory order, such as pertaining to discovery, *see Tennenbaum v. Deloitte & Touche,* 77 F.3d 337, 338–39 (9th Cir.1996), denying summary judgment, *Brewster v. Shasta County,* 275 F.3d 803, 805 (9th Cir.2001), denying a motion to remand, *Lee v. Am. Nat'l Ins. Co.,* 260 F.3d 997, 1000 (9th Cir.2001), or decertifying a class, *Smith v. Univ. of Wash., Law School,* 233 F.3d 1188, 1192–93 (9th Cir.2000). Normally, such interlocutory orders are not immediately appealable. In rare circumstances, the district court may approve an immediate appeal of such an order by certifying that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Even where the district court makes such a certification, the court of appeals nevertheless has discretion to reject the interlocutory appeal, and does so quite frequently. *See* 16 Wright, Miller & Cooper § 3929, at 363.

Section 1292(b) is a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly. This explains the reasons for the specific form of the certification required of the district court and de novo review thereof by the court of appeals. *See, e.g., In re Cement Antitrust Litig. (MDL No. 296),* 673 F.2d 1020, 1026 (9th Cir.1982). By contrast, a Rule 54(b) severance is consistent with the final judgment rule because the judgment being severed is a final one, whose appeal is authorized by 28 U.S.C. § 1291. Referring to a Rule 54(b) severance order as a "certification" misleadingly brings to mind the kind of rigorous judgment embodied in the section 1292(b) certification process. In reality, issuance of a Rule 54(b) order is a fairly routine act that is reversed only in the rarest instances. *See, e.g., In re First T.D. & Inv., Inc.,* 253 F.3d 520, 531–33 (9th Cir.2001); *Ariz. State Carpenters Pension Trust Fund v. Miller,* 938 F.2d 1038, 1040 (9th Cir.1991).

7 While not having addressed the issue explicitly, the First Circuit has also allowed an appeal in similar circumstances. *J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.,* 76 F.3d 1245, 1250 (1st Cir.1996).

8 Even circuits that adhere to the purportedly bright-line rule of disallowing appeals if some claims are dismissed without prejudice are ultimately forced to graft numerous exceptions onto this rule, if not depart from it outright. *See, e.g., Schoenfeld v. Babbitt,* 168 F.3d 1257, 1265–66 (11th Cir.1999) (allowing an appeal where the dismissal without prejudice precedes

the judgment); *Chappelle,* 84 F.3d at 653–54 (enumerating the Second Circuit exceptions to the rule); *Kirkland v. Nat'l Mortgage Network, Inc.,* 884 F.2d 1367, 1369–70 (11th Cir.1989) (allowing an appeal where the appellant had opposed the appellee's non-prejudicial dismissal of the remaining claims); *Studstill v. Borg Warner Leasing,* 806 F.2d 1005, 1007–08 (11th Cir.1986) (allowing an appeal after a voluntary dismissal without prejudice, and noting that although it will not review the dismissed claims, the plaintiff may be free to refile these claims in the district court); *LeCompte v. Mr. Chip, Inc.,* 528 F.2d 601, 604–05 (5th Cir.1976) (allowing an appeal from a voluntary dismissal without prejudice where the district judge subjected the dismissal to a number of conditions). The rule adopted by these circuits is also not without its critics. *See, e.g., Barry,* 168 F.3d at 16–21 (Cox, J., concurring) (arguing that the rule is ultimately—and deeply—misguided and should be overruled).

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