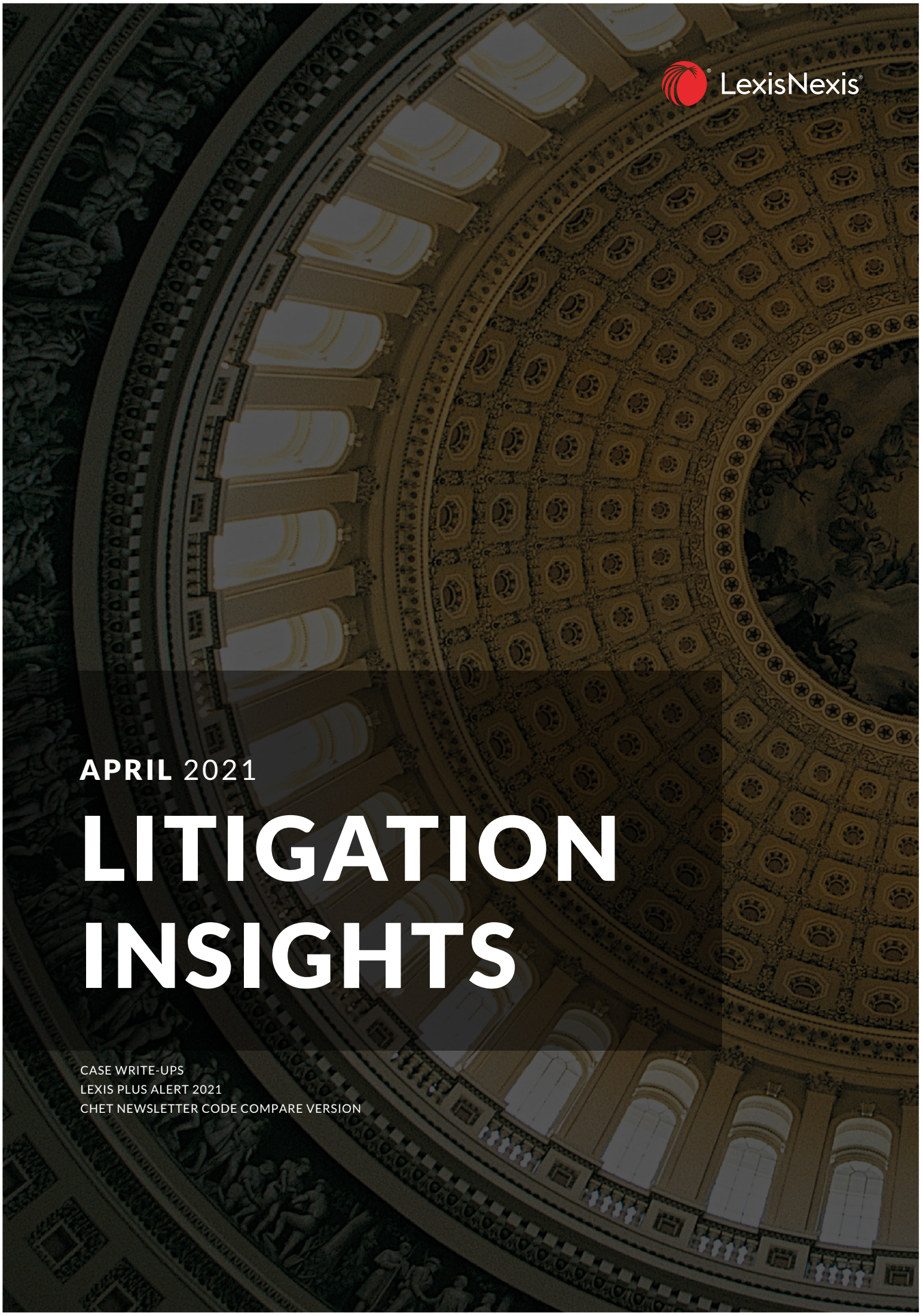
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# MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

## DISMISSAL

Jump to full summary

**Failure to Prosecute**

*Campbell v. Wilkinson*

988 F.3d 798, 2021 U.S. App. LEXIS 4921 (5th Cir. Feb. 19, 2021)

The Fifth Circuit holds that it will affirm a dismissal with prejudice for failure to prosecute only when (1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) lesser sanctions would not remedy the situation or would be futile.

## FINAL JUDGMENTS

Jump to full summary

**Dismissal**

*Wilcox v. Georgetown Univ.*

987 F.3d 143, 2021 U.S. App. LEXIS 3507 (D.C. Cir. Feb. 9, 2021)

The D.C. Circuit has held that the dismissal of a complaint without prejudice was not a final, appealable order in light of all the circumstances of the dismissal, even though the order dismissed the complaint in full and was accompanied by an electronic docket entry stating "[t]his case is closed."

## SUMMARY JUDGMENT

Jump to full summary

**Appellate Review of Denial of Summary Judgment**

*Omega SA v. 375 Canal, LLC*

984 F.3d 244, 2021 U.S. App. LEXIS 282 (2d Cir. Jan. 6, 2021)

The Second Circuit holds that it will not entertain a post-verdict appeal on an issue in a denied summary judgment motion, even when the purported error was "purely one of law," if two alternative paths to review were available to the challenging party: (1) the party might have petitioned for the right to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b); or (2) if the case proceeded to trial, the party could have filed a motion (and renewed motion) pursuant to Rule 50 for judgment as a matter of law and appealed the district court's denial of that motion.



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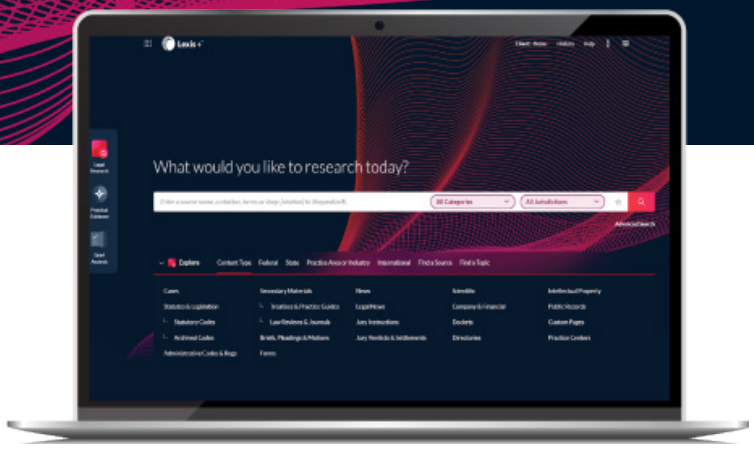


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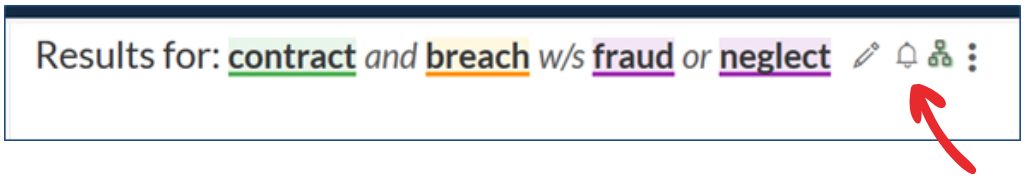


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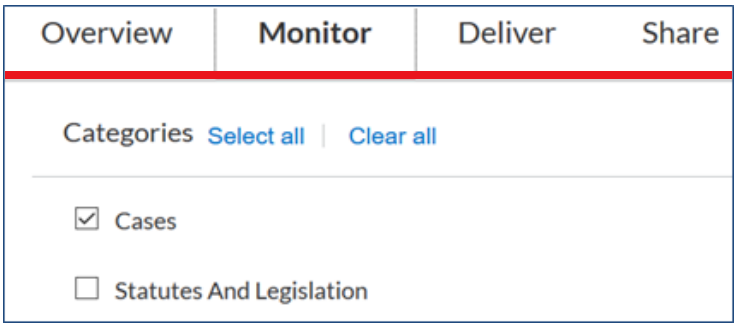


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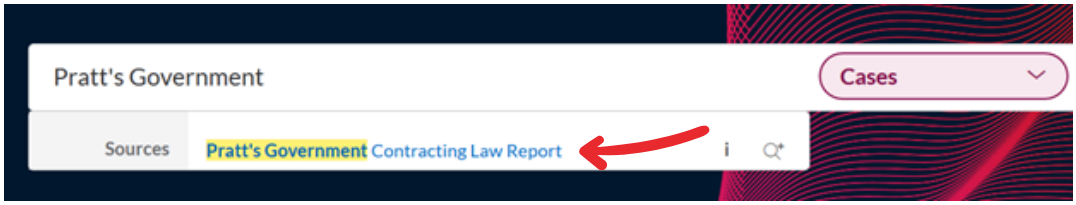
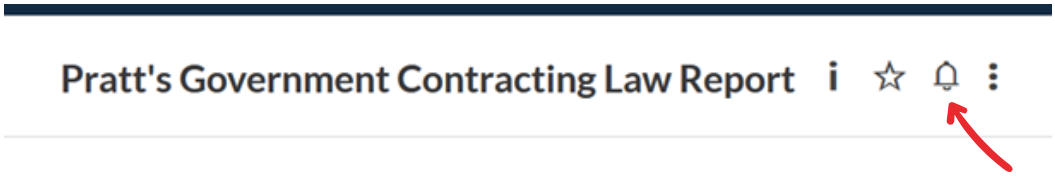



That will take you to a search page for that publication, where you just have to click the bell icon. After clicking the bell, go to the Deliver tab and choose the Email + Online option, then enter your email address and choose "as updates are available" to receive a list of new articles as they are published.

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By Chet Lexvold, LexisNexis Solutions Consultant for the Federal Government

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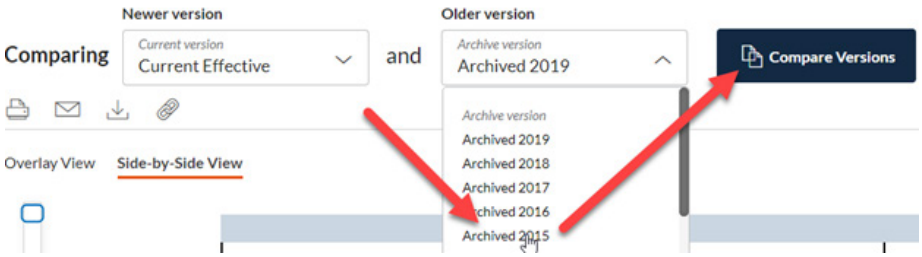


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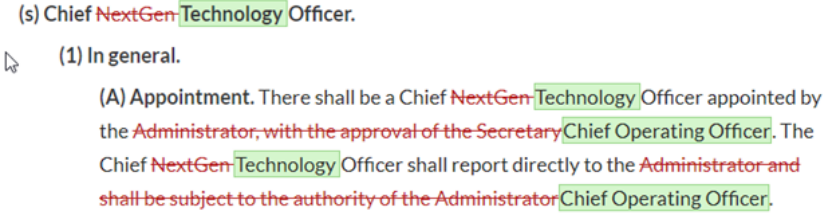


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# DISMISSAL

## Failure to Prosecute

*Campbell v. Wilkinson*

988 F.3d 798, 2021 U.S. App. LEXIS 4921 (5th Cir. Feb. 19, 2021)

**The Fifth Circuit holds that it will affirm a dismissal with prejudice for failure to prosecute only when (1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) lesser sanctions would not remedy the situation or would be futile.**

**Background.** Plaintiff filed this lawsuit in the Northern District of Texas, alleging discrimination and retaliation by his employer, the Federal Bureau of Prisons, in violation of Title VII of the Civil Rights Act. A few days later, the district court's Electronic Case Filing (ECF) system reminded plaintiff's counsel that, "if necessary, [attorneys] must comply with Local Rule 83.10(a) within 14 days or risk the possible dismissal of this case without prejudice or without further notice." Local Rule 83.10(a) stated that, absent leave of court or an applicable exemption, "local counsel is required in all cases where an attorney appearing in a case does not reside or maintain the attorney's principal office in this district."

Plaintiff's counsel neither resided nor maintained his office in the Northern District of Texas. Yet counsel did not obtain local counsel. Nor did he ask the court to waive the rule. Nor did he inform his client of the ECF notice or the local rule, or of his intention not to comply with either. He simply made a unilateral determination that the local rule did not apply to him, because he had practiced for decades in the Northern District of Texas, and because he lived and had an office less than ten miles away in the neighboring Eastern District of Texas.

Approximately six weeks after issuing the ECF notice, the district court reviewed the record, determined that counsel was not in compliance with the local rule, and dismissed the case without prejudice under Rule 41(b) of the Federal Rules of Civil Procedure. In response, counsel filed a motion to reconsider the dismissal and a motion to proceed without local counsel. The district court denied both motions. In doing so, the court noted that 45 days had elapsed between the ECF notification and the court's order of dismissal, without counsel either obtaining local counsel or requesting leave to proceed without local counsel. Plaintiff appealed.

**Appellate Court Treated Dismissal as With Prejudice.** The Fifth Circuit acknowledged that the district court dismissed this suit without prejudice. However, the court treated the dismissal as a dismissal with prejudice because, when further litigation of a claim will be time-barred, a dismissal without prejudice is as severe a sanction as a dismissal with prejudice, and the same standard of review is required. Plaintiff's Title VII claim was subject to a 90-day limitations period. When a Title VII complaint pursuant to an EEOC right-to-sue letter is later dismissed, the 90-day limitations period is not tolled [see 42 U.S.C. § 2000e-5(f)]. Thus, plaintiff was time-barred from bringing his suit again.

**Dismissal Was Not Warranted.** Under Rule 41(b), a defendant may move to dismiss the action or any claim against it if the plaintiff fails to prosecute or to comply with the rules of civil procedure or a court order. Case law has established that Rule 41(b) permits dismissal not only on motion of the defendant, but also on the court's own motion.

The Fifth Circuit noted that this case did not involve a violation of either the Federal Rules of Civil Procedure or a court order. It involved the violation of a local rule. But Rule 41(b) does not mention local rules. This absence of any express reference to "local rules" in Rule 41(b) thus raises the question whether it is ever appropriate to invoke Rule 41(b) based on nothing more than the violation of a local rule. The court explained that, outside the Rule 41(b) context, a "local rule must be adopted by a majority of the district judges and followed by all, in effect serving as a standing order within the district," and that a local rule is accordingly equivalent to "a court order" [see Jones v. Central Bank, 161 F.3d 311, 313 (5th Cir. 1998)]. The Fifth Circuit has not taken that approach within the Rule 41(b) context, however.

In Berry v. CIGNA/RSI-CIGNA, 975 F.2d 1188, 1190 (5th Cir. 1992), the Fifth Circuit reaffirmed that a "dismissal of plaintiff's suit for failure to file a motion for default judgment, as required by local rule, [is] treated as dismissal for failure to prosecute" under Rule 41(b). Thus, Berry did not dismiss under Rule 41(b) because a "local rule is a court order." Rather, Berry dismissed because it held that the particular violation of local rules presented there should be "treated as dismissal for failure to prosecute," as permitted under the plain text of Rule 41(b).

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Comparing the local rule in Berry with the local rule in this case, the court noted that in Berry, counsel failed to comply with a local rule that required the plaintiff to move for default judgment. Had the plaintiff complied with that rule, the case would have been terminated. So the court had some basis for treating the plaintiff's failure to move for default judgment, as required by local rule, as a failure to prosecute. Failure to hire local counsel, by contrast, does not affect the timing or resolution of proceedings. So the rationale underlying Berry—that a violation of a local rule might constitute a failure to prosecute—did not appear to fit the local rule violation presented here. Nevertheless, even if Berry applied, the court found that dismissal of plaintiff's Title VII claim was unwarranted because Berry sets forth a strict framework that district courts must meet to justify dismissal with prejudice.

Because dismissal with prejudice is a severe sanction, the district court's discretion in imposing that sanction is limited. The Fifth Circuit will affirm dismissals with prejudice for failure to prosecute only when (1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile. Furthermore, in most cases in which a dismissal with prejudice has been affirmed, at least one of three aggravating factors was present: (1) delay was caused by the plaintiff himself and not his attorney; (2) there was actual prejudice to the defendant; or (3) the delay was caused by intentional conduct.

The court found that the facts of this case did not fit these factors. To begin with, there was no "clear record of delay or contumacious conduct by the plaintiff." Counsel did not inform plaintiff about the local rule or the ECF notification. Counsel simply made a unilateral determination not to hire local counsel, based on his conclusion that the local rule did not apply to him. Thus, the failure to comply with local rules fell entirely on counsel.

In addition, the amount of time elapsed was insufficient to constitute a "clear record of delay." Decisions affirming Rule 41(b) dismissals with prejudice generally involve egregious and sometimes outrageous delays. The district court did not explain why a mere 45-day delay, without more, justified the severe sanction of dismissal with prejudice. Furthermore, there was no indication that the district court either "employed lesser sanctions that proved to be futile" or "expressly determined that lesser sanctions would not prompt diligent prosecution." Nor was there any record evidence to establish any of the aggravating factors discussed in Berry: the delay here was caused entirely by counsel, not by plaintiff. Defendants were not prejudiced because, as of the date of dismissal, no responsive pleadings were due and neither defendant had appeared in the case. And there was no evidence that counsel intended to delay proceedings. Counsel may have wrongly concluded the local rule did not apply to him, but he was otherwise ready and prepared to litigate plaintiff's case.

**Conclusion.** In sum, the record showed neither a clear record of delay or contumacious conduct, nor the futility of lesser sanctions, nor any aggravating factor. Therefore, the Fifth Circuit reversed the dismissal under Rule 41(b) and remanded for further proceedings.

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# FINAL JUDGMENTS

## Dismissal

*Wilcox v. Georgetown Univ.*

987 F.3d 143, 2021 U.S. App. LEXIS 3507 (D.C. Cir. Feb. 9, 2021)

**The D.C. Circuit has held that the dismissal of a complaint without prejudice was not a final, appealable order in light of all the circumstances of the dismissal, even though the order dismissed the complaint in full and was accompanied by an electronic docket entry stating "[t]his case is closed."**

**Background.** The plaintiffs, participants in Georgetown University's retirement plans, sued the university and individual fiduciaries, asserting breach-of-fiduciary-duty claims under ERISA. The district court found a lack of standing as to some claims and a failure to state a claim on which relief could be granted as to the remaining count. By order, the court then dismissed the complaint without prejudice. The electronic docket entry for the order read in relevant part, "See Order for details. This case is closed."

The district court then denied a motion for leave to amend the complaint, reasoning that because the dismissal order effectively entered judgment, it was too late for the plaintiffs to seek leave to amend the complaint. The plaintiffs appealed both the order of dismissal and the denial of leave to amend.

**Motion to Dismiss Appeal for Lack of Jurisdiction.** As a threshold matter, the D.C. Circuit considered the defendants' motion to dismiss the appeal for lack of jurisdiction. The defendants contended that because the district court had closed the case in January 2019, the order dismissing the complaint started the 30-day period for the plaintiffs to appeal [see Fed. R. App. P. 4(a)(1)(A)]. The defendants argued that the plaintiffs missed that deadline. According to the defendants, the notice of appeal was filed more than four months late, after the district court denied the plaintiffs' motion for leave to amend.

The D.C. Circuit observed that the jurisdictional and merits issues both turned on whether the dismissal order constituted a final judgment. If it did, then the court of appeals lacked jurisdiction over the untimely appeal. But if the dismissal order was not a final judgment, then the court of appeals had jurisdiction over the timely appeal, and the district court erred by relying on its dismissal in rejecting appellants' attempt to amend their complaint.

**Significance of Final Judgment.** The D.C. Circuit panel began with the basic principle that courts of appeals have jurisdiction over appeals from "final decisions" of the district courts [28 U.S.C. § 1291]. Federal Rule of Appellate Procedure 4(a)(1)(A) requires that a notice of appeal in a civil case be filed "within 30 days after entry of the judgment or order appealed from" [but see Fed. R. App. P. 4(a)(1)(B) (allowing 60 days to file notice of appeal if any party is United States, its agency, its officer or employee sued in official capacity, or its current or former officer or employee sued in individual capacity for act or omission performed on United States' behalf)]. A "judgment," as the term is used in the Federal Rules of Civil Procedure, is simply "any order from which an appeal lies" [Fed. R. Civ. P. 54(a)].

The court of appeals explained that generally, a dismissal of a complaint without prejudice is not a final, appealable order. Because the dismissal does not constitute entry of a final judgment, the complaint may be amended pursuant to Federal Rule of Civil Procedure 15(a) without filing a motion pursuant to Rule 59(e) or Rule 60(b). By contrast, dismissal of an "action" or "case" is presumptively final, whether with or without prejudice [see Ciralsky v. CIA, 355 F.3d 661, 666 (D.C. Cir. 2004)].

**Determining Whether Dismissal Is Final Order.** The clearest sign of finality is when a district court states that its dismissal is with prejudice and that the order of dismissal is final and appealable. But the court of appeals in this case noted that there are well-defined circumstances in which a dismissal of a complaint without prejudice is a final, appealable order.

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A dismissal without prejudice is a final order, for example, if the district court's order dismisses not just the complaint, but the "action" or "case." And in one case, an order stating that "the complaint" is dismissed was a final order because the district court expressly stated that it was "a final appealable order," the order granted a motion to dismiss the "action," and the order was preceded by the district court's warning to the plaintiffs that a failure to file a proper amended complaint would result in dismissal of the "case" [see Ciralsky v. CIA, 355 F.3d 661, 666–667 (D.C. Cir. 2004)].

As another example, the D.C. Circuit has adopted a presumption of finality for jurisdictional dismissals of complaints, including dismissals "without prejudice" [see Attias v. CareFirst, Inc., 865 F.3d 620, 624 (D.C. Cir. 2017)].

The D.C. Circuit has also recognized that apparently definitive dismissal language (e.g., "this case is closed") does not always signal finality. The court explained that district courts are periodically required to publicly report the number of motions that remain pending for longer than six months and the number of cases that remain open longer than three years [see 28 U.S.C. § 476(a)]. In some instances, a district court might "close" a case for reporting purposes only [see St. Marks Place Hous. Co. v. U.S. HUD, 610 F.3d 75, 81 (D.C. Cir. 2010)].

The D.C. Circuit summarized its approach as follows: "Even where a district court's order states that it is dismissing the complaint without prejudice, that can be a final decision if there are other sufficiently clear record indicia that it intended to dismiss the case or action."

**Application to Present Case.** Applying its approach in this case, the D.C. Circuit panel concluded that there were not sufficient indicia in the record that the district court had withdrawn from the case so as to make the dismissal order final and a Rule 15(a) amendment of the complaint unavailable. The district court did not state in either its dismissal order or memorandum opinion that amendment of the complaint would be futile. The order did not state that it was final and appealable. The memorandum opinion did not state that "the case" or "the action" was dismissed. The order did not state that it was dismissing all of the plaintiffs' "claims." The dismissal was not wholly for lack of subject-matter jurisdiction. And the defendants' motion to dismiss the complaint did not request dismissal of the "action."

The court of appeals rejected an argument that the dismissal should be deemed final because it encompassed all of the claims in the complaint; without more, an order dismissing an entire complaint without prejudice generally is not a final decision.

The court of appeals also rejected an argument that the dismissal was made final by the docket entry stating that "[t]his case is closed." When there is a signed order of the court, a docket entry cannot alter or amplify the substance of the order.

**Conclusion and Disposition.** Because neither the order of dismissal, its docket entry, nor the district court's memorandum opinion provided a clear indication that the district court had reached a final decision from which an appeal could properly be taken, the D.C. Circuit held that the dismissal order was not final; only the subsequent order denying leave to amend was final. Since the plaintiffs filed their notice of appeal within 30 days of the latter order, it was timely and the court of appeals had jurisdiction.

Accordingly, the court of appeals vacated the denial of the plaintiffs' motion for leave to amend their complaint and remanded the case to the district court to consider whether to grant leave to file the proposed amended complaint.

**Dissent.** Senior Circuit Judge Randolph dissented, opining that the district court's intention to close the case was clear and that the dismissal was therefore a final order.

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# SUMMARY JUDGMENT

## Appellate Review of Denial of Summary Judgment

*Omega SA v. 375 Canal, LLC*

984 F.3d 244, 2021 U.S. App. LEXIS 282 (2d Cir. Jan. 6, 2021)

**The Second Circuit holds that it will not entertain a post-verdict appeal on an issue in a denied summary judgment motion, even when the purported error was "purely one of law," if two alternative paths to review were available to the challenging party: (1) the party might have petitioned for the right to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b); or (2) if the case proceeded to trial, the party could have filed a motion (and renewed motion) pursuant to Rule 50 for judgment as a matter of law and appealed the district court's denial of that motion.**

**Background.** Defendant 375 Canal, LLC ("Canal"), owned the property located at 375 Canal Street in Manhattan. The property had a long history of litigation alleging counterfeiting and trademark violations. In 2006, the City of New York sued Canal for nuisance resulting from the sale of counterfeited merchandise at 375 Canal Street. Canal settled, paid an $8,000 penalty, and agreed that 375 Canal Street could not be used in any way for "the sale and/or possession of trademark counterfeit merchandise or pirated merchandise." Canal also agreed to unannounced warrantless searches by the police.

A similar lawsuit was filed against Canal in 2006 by Louis Vuitton Malletier. Canal entered into a consent order permanently enjoining Canal from violating Louis Vuitton's trademarks, requiring Canal to post signs for two years stating that the sale and purchase of counterfeit Louis Vuitton items was illegal, and allowing walk-throughs by Louis Vuitton representatives.

In 2009, the City of New York again sued Canal for nuisance resulting from the sale of counterfeit goods at 375 Canal Street. Canal again settled and agreed to a permanent prohibition against the "selling, facilitating the sale or possessing [of] trademark counterfeit merchandise." Canal paid a $10,000 penalty and agreed that the premises would be immediately closed by the police in the event of another violation.

During a police sting in December 2010, an individual identified as "Rahman" in police records sold a counterfeit Omega watch inside 375 Canal Street and was arrested. In September 2011, counsel for Swatch SA (which owns Omega) sent a letter to one of Canal's owners, informing him of the December 2010 arrest at 375 Canal Street and warning that Canal could be found liable for the conduct of its tenants for the sale of counterfeit products. Canal apparently took no action to stem the counterfeiting activity. In May 2012, an Omega private investigator visited 375 Canal Street and documented his purchase of a counterfeit Omega Seamaster watch. In September 2012, Omega sued Canal for contributory trademark infringement, alleging that Canal had continued to lease space at 375 Canal Street despite knowing that vendors at the property were selling counterfeit Omega goods.

After discovery, Canal moved for summary judgment, contending that Omega had not identified a specific vendor to whom Canal continued to lease property despite knowing or having reason to know that the specific vendor was selling counterfeit goods. In opposition, Omega argued that it did not need to identify a specific vendor because Omega's primary theory was one of willful blindness: Canal could not avoid liability by shielding itself from learning the identities of the vendors who were selling counterfeits. The district court denied Canal's motion, agreeing with Omega that Omega was not required to identify a specific vendor.

The case proceeded to trial by jury. At the close of Omega's evidence and also at the end of the trial, Canal moved under Rule 50 for judgment as a matter of law, and the court reserved its ruling (later denying the motions after the jury returned its verdict). The jury found that Canal had contributorily infringed four of Omega's trademarks and awarded $275,000 in statutory damages for each of four marks, totaling $1.1 million. The district court entered judgment and Canal filed a notice of appeal.

**Court Dismissed Appeal of Denial of Summary Judgment.** On appeal, Canal challenged, among other things, the district court's denial of its pre-trial motion for summary judgment, primarily on the ground that the district court did not require Omega to identify a specific vendor to whom Canal continued to lease property despite knowing or having reason to know of counterfeiting by that vendor.

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The Second Circuit rejected Canal's attempt to raise this argument in the context of the district court's pre-trial denial of summary judgment. The court explained that denial of summary judgment is an interlocutory decision. Once the case proceeds to a full trial on the merits, the trial record supersedes the record existing at the time of the summary judgment motion, and there is no basis for the appellate court to review issues raised in a denied motion overtaken by trial.

The Supreme Court has held that a party generally cannot "appeal an order denying summary judgment after a full trial on the merits" [Ortiz v. Jordan, 562 U.S. 180, 184, 131 S. Ct. 884, 178 L. Ed. 2d 703 (2011)]. That order "retains its interlocutory character," and therefore the appellate court lacks jurisdiction to review it on appeal. Even if the district court's denial of Canal's summary judgment motion qualified for an exception allowing review, the time to seek that review expired well in advance of trial. A notice of appeal generally must be "filed with the district clerk within 30 days after entry of the judgment or order appealed from" [Fed. R. App. P. 4(a)(1)(A); Fed. R. App. P. 5(a)(2); see also 28 U.S.C. § 2107(a)]. In this case, however, nearly two and a half years passed between the denial of summary judgment and Canal's filing of any notice of appeal. This appeal deadline is jurisdictional, and it independently required dismissal of Canal's challenge to the denial of summary judgment.

Furthermore, a motion for summary judgment does not preserve an issue for appellate review of a final judgment entered after trial because once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion. The Second Circuit has recognized an exception to this principle when the purported error was "purely one of law." But, even then, the court will not entertain post-verdict appeals on an issue raised in a denied summary judgment motion when two alternative paths to review were available to the challenging party: (1) the party may petition for the right to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b); or (2) if the case proceeds to trial, the party may file a motion (and renewed motions) pursuant to Rule 50 for judgment as a matter of law and appeal the district court's denial of that motion.

The court noted that Canal provided no explanation for why it could not have pursued one of these paths. At trial, Canal made two Rule 50 motions for judgment as a matter of law, but Canal chose not to appeal the denial of those motions. When a party could have moved pursuant to Rule 50 (or Rule 52 in a bench trial), the appellate court will not hear an appeal of a prior denied motion for summary judgment after a full trial on the merits. For these reasons, the appellate court refused to consider Canal's appeal relating to the district court's denial of its motion for summary judgment.

The court again acknowledged Second Circuit case law permitting review of a denial of summary judgment based on a pure question of law. However, the unanimous holding of the Supreme Court in Ortiz was that denial of summary judgment generally is not appealable at all because it is interlocutory, and even if it were appealable, the appellant would need to meet the jurisdictional deadline for filing a notice of appeal. A party seeking review of issues decided in a denial of summary judgment must either petition for the right to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) or, if the case proceeds to trial, either move pursuant to Rule 50 (or Rule 52) for judgment as a matter of law and appeal the district court's denial of that motion or challenge the jury instructions. For cases that proceed to trial, these mechanisms fully preserve a party's arguments for appellate review. If, due to "extraordinary circumstances," a party cannot avail itself of those options, it may appeal the final judgment entered after trial and raise an issue last raised in its motion for summary judgment only if that issue presents a "pure question of law."

**Conclusion.** Accordingly, the Second Circuit dismissed Canal's appeal of the district court's order denying summary judgment.