

DIVERSITY JURISDICTION

Future Attorney's Fees Are Included in Amount-in-Controversy Calculation

Fritsch v. Swift Transp. Co. of Ariz.

2018 U.S. App. LEXIS 22036 (9th Cir. Aug. 8, 2018)

The Ninth Circuit holds that if a plaintiff would be entitled under a contract or statute to future attorney's fees, those fees are at stake in the litigation and should be included in the amount in controversy.

Facts and Procedural Background. An employee brought a class action against his employer for alleged violations of state labor laws concerning wages and hours. In his mediation brief, he included a damages chart indicating a total of \$5,924,104, including unpaid overtime and double-time wages, interest on unpaid overtime wages, unpaid meal and rest period premiums, wage statement and waiting time penalties, and attorney's fees and costs incurred to that date. Within 30 days of receiving the chart, the defendant removed the case, alleging Class Action Fairness Act (CAFA) jurisdiction based on an amount in controversy of \$5,392,700 (the plaintiff's total minus the interest payments). The defendant also estimated that future attorney's fees would increase the amount in controversy to \$6,553,375.

The district court remanded the case on the ground CAFA's \$5 million amount-in-controversy requirement was not satisfied. The court reasoned that damages for unpaid rest periods could not be included because the plaintiff had not included a claim for failure to provide rest periods. The court also excluded future attorneys' fees, holding that only fees incurred as of the removal date could be included. These exclusions reduced the amount in controversy to \$4,778,575.

While defendant's petition for permission to appeal the remand was pending [*see* 28 U.S.C. § 1453(c)], the Ninth Circuit decided *Chavez v. JPMorgan Chase & Co.*, holding that the amount in controversy is not limited to damages incurred prior to removal, but rather encompasses all relief a court may grant on the complaint that is operative at the time of removal [*Chavez v. JP Morgan Chase & Co.*, 888 F.3d 413, 414–415 (9th Cir. 2018)]. The Ninth Circuit then granted the defendant's petition to appeal, and two days later, the defendant filed a second removal notice based on *Chavez*. The Ninth Circuit reversed the district court's remand order, sending the case back to that court.

Second Removal Did Not Moot Appeal of Remand Order. The plaintiff argued that because the case was again pending in district court, which was the relief the defendant sought in appealing the remand on the first removal, that appeal was moot. Based on the collateral consequences doctrine, the Ninth Circuit disagreed. The court noted that in his motion to remand the defendant's second removal, the plaintiff argued that removal was untimely. If the Ninth Circuit were to dismiss the appeal of the first remand, the defendant would have to defend against the timeliness challenge, which it would not have to do if the Ninth

Circuit held that the first remand was erroneous. Therefore, a Ninth Circuit decision on the merits of the first remand would have collateral consequences, which precluded mootness.

Defendant Had Burden to Prove Amount in Controversy. When it is unclear or ambiguous from the face of a state-court complaint whether the requisite amount in controversy for federal jurisdiction is pled, the removing defendant bears the burden of establishing, by a preponderance of the evidence, that the amount in controversy exceeds the jurisdictional threshold. In a CAFA case, the jurisdictional threshold is \$5 million [28 U.S.C. § 1332(d)(2)]. In determining whether the defendant satisfied this burden, the court considers the complaint, allegations in the removal petition, and summary-judgment-type evidence relevant to the amount in controversy at the time of removal.

Amount in Controversy Includes Future Attorney's Fees. The amount in controversy is the amount at stake in the underlying litigation. It includes any result of the litigation, excluding interest and costs, that entails a payment by the defendant. It includes attorney's fees that may be awarded under fee-shifting statutes or contracts. It is determined at the time of removal, but as the court held in *Chavez*, it is not limited to amounts already incurred at that time. In *Chavez*, the Ninth Circuit did not expressly address whether attorney's fees incurred after removal are properly included in the amount-in-controversy calculation. In this case, based on *Chavez* and other precedents, the court held that a court must include future attorney's fees recoverable by statute or contract because they are amounts to which the plaintiff would be entitled if the plaintiff is successful.

Under California law, the plaintiff was entitled to attorney's fees if successful. Therefore, the amount in controversy in this case included future attorney's fees. The Ninth Circuit remanded the case to the district court to determine whether the defendant could carry its burden to prove that the amount in controversy, including those fees, exceeded \$5 million.

The plaintiff argued that future attorney's fees should not be included in the amount in controversy because they are inherently speculative and can be avoided if the defendant decides to settle. The Seventh Circuit had adopted a similar position in a case involving the jurisdictional provision in the Magnuson-Moss Warranty Act [15 U.S.C. § 2310(d)]. The Seventh Circuit held that the amount in controversy could not include future attorney's fees because "[u]nlike future income lost to injury, legal fees are avoidable" if the defendant promptly settles the case [*Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955, 959 (7th Cir. 1998)].

The Ninth Circuit disagreed with the plaintiff and the Seventh Circuit. The court relied on earlier binding precedent establishing that attorney's fees awarded under fee-shifting statutes or contracts are part of the amount in controversy [*Gonzales v. CarMax Auto Superstores, LLC*, 840 F.3d 644, 648 (9th Cir. 2016)] and that

the amount in controversy includes all relief to which the plaintiff is entitled if the action succeeds [Chavez v. JP Morgan Chase & Co., 888 F.3d 413, 481 (9th Cir. 2018)]. The court concluded that this includes future attorney's fees.

The Ninth Circuit was not concerned with the speculative nature of future attorney's fees. The court reasoned that district courts are well equipped to determine whether defendants have carried their burden of proving attorney's fees and to determine when a fee estimate is too speculative because of the likelihood of a prompt settlement. The court pointed out that unlike in the Seventh Circuit, where the defendant need show only "a reasonable probability" that the amount in controversy exceeds the jurisdictional minimum, in the Ninth Circuit the defendant must prove the jurisdictional threshold is met by a preponderance of the evidence, using "summary-judgment-type evidence." The court also noted district courts' expertise in evaluating litigation expenses using their knowledge of customary rates and their experience concerning reasonable and proper fees.

Twenty-Five-Percent Rule Rejected. The Ninth Circuit also rejected the defendant's argument that the amount of attorney's fees in controversy in class actions should always be 25 percent of all other alleged recovery. The defendant relied on earlier common-fund cases in which the Ninth Circuit estimated reasonable attorney's fees to be 25 percent of the total recovery. However, the Ninth Circuit did not find a per-se rule appropriate in this context, in which the defendant had to prove the amount of attorney's fees at stake by a preponderance of the evidence. Moreover, the court noted, the district court's calculation of future attorney's fees must take into account statutory and contractual restrictions on attorney's fees. The court left the calculation of attorney's fees at stake to the district court on remand.

DISMISSAL

Court's Imposition of Terms and Conditions

Paysys Int'l, Inc. v. Atos IT Servs. Ltd.

2018 U.S. App. LEXIS 23067 (2d Cir. Aug. 20, 2018)

In a case of first impression in the circuit, the Second Circuit holds that when a court intends to impose conditions on a Rule 41(a)(2) dismissal, the plaintiff is entitled to an opportunity to withdraw its motion and continue litigating the case if it decides the court's conditions are "too onerous."

Background. In a series of agreements between 1988 and 2001 (collectively referred to as "the Agreement"), plaintiff gave defendant non-exclusive rights to use software plaintiff had developed, and to grant licenses for that software within a specified territory. The Agreement also provided that, in the event of litigation between the parties with respect to any claim that defendant committed a territorial violation, the prevailing party would be entitled to an award of its reasonable attorney's fees. In 2014, plaintiff filed a complaint against defendant asserting, among other things, that defendant had breached the terms of the Agreement. In its second amended complaint, plaintiff explicitly alleged that defendant's breach included multiple violations of the Agreement's territorial restrictions.

Three years into the litigation, 12 of plaintiff's 13 original claims had been dismissed. On April 6, 2017, plaintiff moved, pursuant to Rule 41(a)(2), to voluntarily dismiss its sole remaining claim for breach of contract. Plaintiff's motion sought a dismissal with prejudice, and also offered to provide defendant a perpetual, global license to its software. Before the court ruled on motion to dismiss, the parties also filed summary judgment motions on the remaining claim. The district court directed the parties to confer and indicate whether defendant consented to a grant of dismissal in lieu of litigating the summary judgment motions. Defendant asserted that it would consent if the court also recognized defendant as the "prevailing party" under the Agreement's fee-shifting provision and therefore condition the grant of voluntary dismissal on plaintiff's payment of defendant's attorney's fees. Plaintiff contended that if such a condition were imposed, it should be entitled to an opportunity to decide whether to reject that condition by withdrawing its motion.

On July 7, 2017, the district court issued a final order granting plaintiff's motion for dismissal on the condition that it pay defendant's attorney's fees, denying plaintiff the opportunity to avoid that condition by withdrawing its motion, and denying as moot the pending summary judgment motions. The court determined that defendant was the "prevailing party" for purposes of the fee-shifting provision because it had succeeded in getting the majority of plaintiff's claims dismissed and significantly narrowing the remaining breach of contract claim before plaintiff moved to dismiss it. The court also held that plaintiff was not entitled to an opportunity to withdraw its motion because the fee-shifting

obligation was a contractual one to which it had already agreed. Plaintiff appealed.

Plaintiff Has Right to Withdraw Motion for Dismissal If Terms Are Too Onerous. Rule 41(a)(2) of the Federal Rules of Civil Procedure provides that an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. The Second Circuit explained that Rule 41(a)(2) dismissals are at the district court's discretion and only will be reviewed for an abuse of that discretion. Plaintiff contended that although Rule 41(a)(2) permits the district court to require that additional conditions be met before it will grant a request for voluntary dismissal, a plaintiff is nevertheless entitled to an opportunity to withdraw its motion and continue litigating the case if it determines that the court's conditions are "too onerous." The Second Circuit noted that it had not previously adopted plaintiff's view.

In *Gravatt v. Columbia University* [845 F.2d 54 (2d Cir. 1988)], the Second Circuit held that "fundamental fairness" required that a plaintiff be afforded an opportunity to withdraw its Rule 41(a)(2) motion to dismiss in a case in which the district court's condition would have converted a requested dismissal *without* prejudice to one *with* prejudice. The court reasoned that a plaintiff filing a Rule 41 motion to dismiss its case without prejudice knowingly takes on the risk that the motion could be denied, but not that its claim, not yet adjudicated, will be effectively rejected on its merits by virtue of the preclusive effect of a dismissal with prejudice. In the course of arriving at that conclusion, the *Gravatt* court observed that other Circuits "have gone even further, expressing the view that a plaintiff, moving under Rule 41(a)(2), should be afforded this opportunity whenever the terms and conditions on which the dismissal is to be granted are 'too onerous.'" But because the ruling rested on the distinctive features of a dismissal with prejudice, the court found it unnecessary to decide at that time whether to adopt the broader rule endorsed by other Circuits.

Citing *Moore*'s, the Second Circuit acknowledged that, since *Gravatt*, it has become commonly accepted that a plaintiff has the option of withdrawing a motion to dismiss if it finds the conditions too onerous. The Second Circuit concluded that this view comports with both the plain text of Rule 41(a)(2) and the policies behind it. As noted above, Rule 41(a)(2) provides that, after the defendant has filed a responsive pleading and if the motion is not on consent, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." The Rule thus empowers the district court to either dismiss the case on its own terms or to deny a requested dismissal, if those terms are not met. However, acceptance of the court's terms, like the motion to dismiss itself, must be *voluntary*. A court should not label something as a term and condition yet not afford the affected party an opportunity to consider the options before making a decision. That conclusion is consistent with the concern underpinning the holding in *Gravatt*: when a plaintiff files a motion for dismissal under Rule 41(a)(2), it takes on the risk is that its motion will be denied, not that

the motion will carry additional consequences to which the plaintiff does not consent.

The court emphasized that it is the *plaintiff*, rather than the court, who has the choice between accepting the conditions and obtaining dismissal or, if the conditions are too burdensome, withdrawing the dismissal motion and proceeding on the merits. Thus, in this case, the district court erred when it decided plaintiff could not reject its fee-shifting condition as too onerous simply because, in the court's view, plaintiff had already accepted that obligation as a reasonable one by assenting to the Agreement's fee-shifting provision.

The court also found that giving the plaintiff an opportunity to withdraw its motion is also consistent with the policies behind Rule 41(a)(2). Rule 41(a) permits voluntary dismissals of cases, regardless of whether they might otherwise have sufficient merit to be litigated through trial. When a plaintiff decides that its case is no longer worth litigating, it is efficient to incentivize that party to dismiss its case (on terms that will not prejudice the defendant), rather than remain in court, wasting the court's resources and those of the opposing party. There is little benefit to anyone if a plaintiff refrains from filing a Rule 41 motion simply because it fears that the conditions imposed on a grant of dismissal *might* be more costly to it than continuing the litigation, and it has no opportunity to find out what those terms might be without becoming bound to them.

The court rejected defendant's argument that the rule is intended to prevent prejudice to the defendant and it would be further prejudiced if plaintiff is permitted to avoid the district court's fee shifting condition, withdraw its motion, and continue litigating the case. Nothing entitles a defendant to the benefit of the court's terms *other* than the plaintiff's agreement to comply with them in exchange for a grant of dismissal. Moreover, defendant is in no worse position if plaintiff withdraws its motion than if plaintiff had never filed the motion at all. If defendant turns out to be correct that it is entitled to prevail on its summary judgment motion and to have plaintiff pay attorney's fees for the entirety of the litigation, then it will not be prejudiced: any additional fees it incurs following plaintiff's withdrawal should also be assigned to plaintiff in due course. If, in contrast, defendant turns out not to be entitled to summary judgment on the remaining claim, it has no claim in justice to require plaintiff to decide whether to continue litigating or accept conditions that might attach if it abandons its case.

Conclusion. The Second Circuit concluded that the district court erred by denying plaintiff an opportunity to withdraw its motion rather than comply with the court's proposed conditions. Accordingly, the appellate court remanded so that plaintiff could have a reasonable period of time in which to make that decision. Plaintiff also asked the court to direct the district court to decide the extent of the attorney's fees it would have to pay before plaintiff would be required to decide whether or not to withdraw. Finding no binding authority requiring that the issues

be decided in that order, the Second Circuit declined to force the district court to provide such information, and expressed no view as to whether it would be within the court's discretion to do so if it chooses.

RELIEF FROM JUDGMENT

Stipulated Judgment of Dismissal

Nat'l City Golf Fin. v. Scott

899 F.3d 412, 2018 U.S. App. LEXIS 22187 (5th Cir. Aug. 9, 2018)

The Fifth Circuit holds that after the parties unconditionally dismiss an action by stipulation, Rule 60(b) provides the only possible avenue for the district court to reopen the case.

Background. This case involved a claim that defendant Scott had allegedly signed, but failed to honor, a personal guaranty of his business entity's debt. The parties eventually settled, with Scott agreeing to pay \$500,000 in exchange for a release of the plaintiff's claims. The parties also expressly agreed to abide by the settlement terms even if they later discovered new claims or material facts. After executing the settlement agreement, the parties filed an unconditional stipulation of dismissal without prejudice under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The plaintiff eventually resolved its claims against other defendants, and the case was over.

Nearly a year after the settlement agreement, Scott obtained an expert report that the purported signature of Scott on the personal guaranty was in fact a fake. (Scott suspected that his business partner had forged the signature. And a few weeks after the settlement in this case, Scott had executed—but not filed—an affidavit denying that the signature on the guaranty was his.)

Exactly a year after executing the settlement agreement, Scott filed a motion to rescind the settlement agreement and re-join the action as a defendant. The motion, which asserted state-law grounds of fraud, unilateral mistake, and unjust enrichment, was denied by the district court. Scott appealed.

Threshold Question. The Fifth Circuit began with the threshold question of jurisdiction. Ordinarily a stipulation of dismissal under Rule 41(a)(1)(A)(ii) strips the district court of subject-matter jurisdiction. The court of appeals saw only two possible bases for the district court to reassume jurisdiction: ancillary jurisdiction and Federal Rule of Civil Procedure 60(b). The court of appeals concluded that only Rule 60(b) was potentially applicable in this case.

No Ancillary Jurisdiction. The doctrine of ancillary jurisdiction empowers a district court (1) to resolve “factually interdependent” claims, or (2) to address issues implicating the ability to manage the court's proceedings, vindicate its authority, and effectuate its decrees [*Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379–380, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)]. The Fifth Circuit determined that neither aspect of the doctrine gave the district court power to resolve Scott's motion. The first kind of ancillary jurisdiction disappears when the original federal dispute is dismissed. And the second kind of ancillary jurisdiction does not include enforcing or vacating a settlement that prompted a

Rule 41(a)(1)(A)(ii) stipulation of dismissal, unless the district court either incorporated the terms of a settlement agreement in a dismissal order or otherwise clearly indicated in the dismissal order an intent to retain jurisdiction to enforce the settlement agreement [*see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381–382, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)]. Because there was no order incorporating the settlement terms or retaining enforcement jurisdiction in this case, the district court did not have ancillary jurisdiction to grant Scott’s motion.

Rule 60(b) Relief Is Possible, But Not Under Circumstances of This Case. The Fifth Circuit next considered Rule 60(b), which allows a district court to relieve a party from a final judgment, order, or proceeding [Fed. R. Civ. P. 60(b)]. The Fifth Circuit has previously held that a Rule 41(a)(1)(A) dismissal qualifies as a “final proceeding” subject to vacatur under Rule 60(b) [*Yesh Music v. Lakewood Church*, 727 F.3d 356, 362–363 (5th Cir. 2013)]. The court of appeals cited *Moore’s* in support of this conclusion and noted that other circuits agree [*see 8 Moore’s Federal Practice* (3d ed.) § 41.34[6][g]; *Cummings v. Greater Cleveland Reg’l Transit Auth.*, 865 F.3d 844, 848 (6th Cir. 2017); *Geo. P. Reintjes Co. v. Riley Stoker Corp.*, 71 F.3d 44, 46 (1st Cir. 1995)].

Turning to the merits of Scott’s motion, the Fifth Circuit concluded that Rule 60(b) relief was not appropriate in the circumstances of this case. The rule provides six possible grounds for relief: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) voidness of the judgment; (5) satisfaction, release, or discharge of the judgment, or reversal or vacatur of an underlying judgment, or the inequity of continuing to apply the judgment prospectively; or (6) any other reason that justifies relief.

The Fifth Circuit considered each of these grounds in turn, concluding that Scott could not satisfy any of them. In particular, the court of appeals emphasized that the first ground—mistake or excusable neglect—was not met because Scott, in the settlement agreement, had explicitly assumed the risk of such mistake or neglect. And the second ground—newly discovered evidence—was not satisfied, because Scott had always had access to the guaranty agreement and to his own memory of signing or not signing it. Also, the third ground for relief—fraud or misrepresentation by an opposing party—was inapposite because Scott had not alleged any fraud by the plaintiff (the suspected forgery by Scott’s business partner was not attributable to the plaintiff).

Conclusion and Disposition. Because relief under Rule 60(b) was not warranted, the Fifth Circuit affirmed the district court’s judgment denying Scott’s motion to rescind the settlement and reopen the case.