

**THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

BRADLEE DEAN, <i>et al.</i> ,)	
)	
Plaintiffs,)	Case No. 2011 CA 006055 B
)	Judge Joan Zeldon
v.)	
)	
NBC UNIVERSAL (NBC), <i>et al.</i> ,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

The Court has before it: (1) Defendants’ Motion to Vacate Notice of Dismissal, (2) Plaintiffs’ Opposition, (3) the Court’s Order dated March 30, 2012, (4) Plaintiffs’ Supplement to Plaintiffs’ Opposition to Defendant’s Motion to Dismiss (filed April 6, 2012), (5) Defendants’ Supplemental Reply in Support of Motion to Vacate Notice of Dismissal (filed April 16, 2012), (6) Plaintiffs’ Supplement in Opposition to Defendants’ Motion to Vacate (filed April 17, 2012), (7) Defendants’ Response to Plaintiffs’ Supplement in Opposition to Defendants’ Motion to Vacate (filed April 19, 2012), and (8) Plaintiffs’ Response to Defendants’ Supplement (filed April 19, 2012).¹ The Court will vacate the Notice of Dismissal and treat it as a motion to dismiss under Civil Rule 41(a)(2) for the reasons given below.

The record is clear that before Plaintiff filed its notice of dismissal on February 21, 2012, this Court, on February 17, 2012, explicitly converted Plaintiffs’ Motion to Dismiss into a Motion for Summary Judgment. Specifically, on February 17 the Court informed the parties on the record that “I have the discretion to treat [the Motion to Dismiss] as a motion for summary judgment and that’s the way I am proceeding.” The Court further said that “to decide this [case]

¹ Many of these filings exceed what is authorized by the Court’s Civil Rules. Although the Court considered them before rendering this decision, in the future it will not consider any filing not authorized by the Court’s Civil Rules that is unaccompanied by a Motion for Leave to File, which explains why such a filing is necessary.

on the motion for summary judgment, which is what I'm going to do at this point [Mr. Klayman] is required to file an affidavit from Bradlee Dean.”²

Even before it formally transformed Defendants' Motion to Dismiss into a motion for summary judgment, the Court put the parties on notice that it was likely to treat the Motion to Dismiss as a motion for summary judgment pursuant to Civil Rule 12(b)³ and afforded them “the opportunity to present all material made pertinent to Defendants' motion for summary judgment.” Order filed February 8, 2012; Conference Call on the Record, February 10, 2012.⁴ Defendants responded to the February 8 Order and February 10 Conference Call on February 14, 2012, by filing a Statement of Material Facts Pursuant to Superior Court Civil Rule 12-I(k).

The reason for converting Defendants' Motion to Dismiss to a Motion for Summary Judgment was that the Court had decided not to exclude materials outside the pleadings submitted to the Court by Defendants—namely, the Affidavit of Laura R. Handman, sworn to September 9, 2011, and its forty exhibits, including numerous articles, printouts from websites, blog posts written by Plaintiff Dean, compact discs, website addresses for The Rachel Maddow Show videos, transcripts, etc.

Once the Court formally announced to the parties on the record on February 17, 2012, that it was treating Defendants' Motion to Dismiss as a motion for summary judgment, Plaintiffs lost their right to file the voluntary dismissal on February 21, 2012. Under Rule 41(a)(1) a

² Court Order filed March 30, 2012, quoting the Court's decision, dated February 17, 2012. Plaintiffs assert that it was “inadvertent” that the Court did not issue a written order converting the Motion to Dismiss to one for summary judgment. There is no requirement in the Civil Rules or case law that the Court issue a written order.

³ The pertinent part of Civil Rule 12(b) reads: “If, on a motion asserting the defense numbered 6 [failure to state a claim upon which relief can be granted], matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”

⁴ During the February 10 Conference Call on the record, the Court and counsel for both sides engaged in an extensive discussion about why the Court was “probably” going to treat the Motion to Dismiss as a motion for summary judgment.

plaintiff may dismiss an action “without order of Court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs.” Once a Rule 12(b)(6) motion is converted into a motion for summary judgment, a plaintiff needs the permission of the Court to proceed with dismissal. *See generally Bernay v. Sales*, 435 A.2d 398, 401 (1982) (stating that an affidavit attached to a motion generally constitutes a matter outside the pleading, which if not excluded by a court converts a Rule 12(b)(6) motion into a motion for summary judgment).

Having decided to vacate the Plaintiff’s Notice of Dismissal⁵ because it was improperly filed in violation of Civil Rule 41(a)(1), the Court will treat it as Plaintiffs’ Motion to Dismiss under Civil Rule 41(a)(2),⁶ as requested by Plaintiffs. *Bangor Baptist Church v. State of Maine, Dep’t of Educ. & Cultural Servs.*, 92 F.R.D. 123, 124 (D. Me. 1981). As will be seen from the Ordering paragraphs below, the Court intends to grant Plaintiffs’ Motion to Dismiss, but only on the condition that the Plaintiffs recompense Defendants with reasonable fees and costs.

The D.C. Court of Appeals has made clear that the Court is well within its authority in conditioning a dismissal of a case in this posture upon the payment of attorneys’ fees and costs to cover work that “cannot be applied to the subsequent lawsuit concerning the same claims.” *Thoubboron v. Ford Motor Co.*, 809 A. 2d 1204, 1211 (2002). “The purpose of a ‘terms and

⁵ When during a status call the Court acknowledged that the case had been dismissed, all the Court was saying was that the docket reflected the filing of the Notice of Dismissal resulting in the closure of the case by the Clerk. The Court did not address whether the filed Notice was proper, and when informed by counsel for Defendants that it was not, the Court invited Defendants to file the instant Motion to Vacate the Dismissal so that the issue could be properly presented to the Court, together with Plaintiffs’ Opposition.

⁶ Civil Rule 41(a)(2) provides in pertinent part: “Except as provided in paragraph (1) of this subdivision of this Rule, an action shall not be dismissed at the plaintiff’s instance save upon order of the Court and upon such terms and conditions as the Court deems proper.”

conditions' clause is to protect a defendant from any prejudice⁷ or inconvenience that may result from a plaintiff's voluntary dismissal." *Id.* at (internal quotation marks omitted) (citation omitted). Indeed, the D.C. Court of Appeals has quoted with approval a decision by the Eighth Circuit holding "that a court's failure to condition a voluntary dismissal upon the plaintiff's payment of attorney's fees and costs may constitute an abuse of discretion." *Id.* at n.7 (citing *Belle-Midwest, Inc. v. Missouri Prop. & Cas. Ins. Guar. Assoc.*, 56 F.3d 977, 978 (8th Cir. 1995)). The appellate court in *Thoubboron* also made clear that the failure of a plaintiff to comply with the Court's conditions of dismissal may lead to dismissal of the case with prejudice. *Id.* at 1211–12.

Wherefore, it is this 23rd day of April, 2012, hereby

ORDERED, that the notice of dismissal filed by Plaintiffs in this case is vacated, and the case is **REINSTATED**; and it is further

ORDERED, that the notice of dismissal filed by Plaintiffs will be treated as a Motion for a Voluntary Dismissal; and it is further

ORDERED, that the Court will defer its decision on Plaintiffs' attributed Motion for Voluntary Dismissal until it, by subsequent order, resolves the conditions upon which this case may be dismissed (*i.e.*, the amount and timing of Plaintiffs' payment of reasonable attorneys' fees and costs); and it is further

ORDERED, that within ten business days from the docketing date of this Order, Defendants shall file evidence of costs for filings made by Defendants in this Superior Court case, and a memorandum of law supported by evidence in the form of time sheets and one or

⁷ Plaintiffs' through counsel said on the record that they had decided they preferred the federal District Court over the Superior Court in which to litigate this case because they liked recent rulings adverse to the District of Columbia's Anti-SLAPP Act of 2010, D.C. Code § 16-5501, *et seq.*

more affidavits explaining the time sheets and hourly charges covering work that cannot be applied to the subsequent lawsuit filed in the District Court for the District of Columbia, which would include work done, if any, in preparation for the hearing scheduled for February 24, 2012, participation in conference calls about Defendants' request to continue the hearing and how the motion to dismiss was being treated by the Court as a motion for summary judgment,⁸ work done on Defendants' Motion to Vacate Notice of Dismissal and Defendants' Supplemental Reply in Support of Motion to Vacate Notice of Dismissal, Defendants' Response to Plaintiffs' Supplement in Opposition to Defendants' Motion to Dismiss, the two motions to admit Attorneys Weiner and Talbert *pro hac vice*, Defendants' corporate disclosure statement under Superior Court Civil Rule 7.1 and the memoranda of law and exhibits filed in response to this Order; and it is further

ORDERED, that within ten business days of the filing date of the Defendants' submission described above, Plaintiffs shall respond to Defendants' specifically requested attorneys' fees and costs; and it is further

ORDERED, that failure of Plaintiffs to comply with such conditions of dismissal as the Court may hereafter impose will lead to a dismissal of this case with prejudice.

 

Joan Zeldon
Senior Judge
(Signed in Chambers)

⁸ Specifically, the conference calls were held January 24, 2012, February 10, 2012, February 17, 2012, and February 22, 2012.

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