SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

BRADLEE DEAN, et. al., Plaintiffs, v. **NBC UNIVERSAL, et. al.,** Defendants.	Civil Action No: 2011 CA 006055 B

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO VACATE

On February 21, 2012, Plaintiffs, Bradlee Dean and You Can Run But You Can't Hide International, respectfully filed a voluntary Notice of Dismissal without prejudice, pursuant to Rule 41(a)(1). On February 22, 2012 this Court confirmed during a telephonic conference that this case had been dismissed. On February 27, Defendants filed a Motion to Vacate Plaintiff's Notice of Dismissal without prejudice. Nevertheless, this motion is without merit.

First, the Notice of Dismissal was timely filed. This court never perfected a Motion for Summary Judgment. In this regard, Defendants, in their Opposition, conceded that this Court "*was considering* converting the Motion to Dismiss to a motion for summary judgment." Defs. Motion at 1 (emphasis added). As the Defendants indicate, this Court had never ruled that the Motion to Dismiss had been converted to motion for summary judgment, and no such order was ever issued. On deciding the interplay between Rule 12(b)(6) and 41(a)(1), no less than three separate circuits, the U.S. Court of Appeals for the Ninth Circuit, the U.S. Court of Appeals for the Fourth Circuit, and the U.S. Court of Appeals for the Sixth Circuit, have ruled and made crystal

clear that if there is no order converting the motion into that of summary judgment that the plaintiff is free to voluntarily dismiss. *See Swedberg v. Marotzke*, 339 F.3d 1139, 1140 (9th Cir. 2003), *Finley Lines Joint Protective Bd. Unit 200 v. Norfolk S. Corp.*, 109 F.3d 993 (4th Cir. 1997); *Aamot v. Kassel*, 1 F.3d 441 (6th Cir. 1993).[1] As in these three circuit court rulings, since this Court had not issued an actual order converting Defendants' Motion to Dismiss to one for summary judgment, Plaintiff's Notice to Dismiss was timely and as a matter of right under Rule 41(a)(1).

Further, Defendants' reliance on *Bernay v. Sales*, 435 A.2d 398, is misplaced. In *Bernay*, and in this case, the Court dismissed the case without prejudice because matters outside of the pleading were presented but not ruled upon. Rule 16(d) states that only when "matters outside the pleading are presented to *and not excluded by the court*" will the 12(b)(6) motion be treated as a motion for summary judgment. *Bernay* went on to say that "because appellee filed her notice of voluntary dismissal before the hearing on appellant's Rule 12(b)(6) motion, the trial court had no occasion to pass on the merits of the defense." *Bernay,* 435 A.2d at 403-404. The Court of Appeals affirmed the notice of dismissal filed as properly filed in that case. In this case, the Court never ruled on the admissibility of any affidavits presented by the Defendants or on the merits of the Motion to Dismiss. Thus, the Notice of Dismissal in this case should also be upheld as timely filed.

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[1] In the case at bar, this Court had given Plaintiff the opportunity to file affidavits, and had not ruled on the admissibility of Defendants' affidavits. Since this Court had not ruled and issued an order that it was converting Defendant's Motion to Dismiss into a Motion for Summary Judgment, Plaintiff's Notice to Dismiss was timely and as a matter of right under Rule 41(a)(1).

Second, as Defendants concede, even if the Notice of Dismissal was not timely filed – which it clearly was -- the judge may convert the Plaintiffs' notice into a motion to dismiss under 41(a)(2). *Bangor Baptist Church v. Maine, Dep't of Educ. & Cultural Servs.*, 92 F.R.D. 123, 124 (D. Me. 1981). This Court unequivocally confirmed in the telephonic conference of February 22, 2012 that the case was dismissed and should respectfully confirm that ruling once again by denying Defendants' Motion to Vacate.

Third, there has been no prejudice. Counsel for Defendants participated in only two telephonic conferences discussing the motions. The total amount of time that Defendants' counsel disingenuously contend caused them to "expend significant resources" for these telephonic conferences came out to less than one hour. Moreover, Defendants' decision to pursue the Motion to Vacate, which they hope would reinstate the Superior Court action, would then ironically and hypocritically then expose Defendants to the time and expense required to litigate the Superior Court action *as well as* the federal action. Indeed, the Motion to Vacate, if granted, would cause further expense. Defendants have already submitted an inappropriate motion to stay in the federal action, arguing improperly that Plaintiffs must be forced to litigate in Superior Court. This gambit unnecessarily runs up time and expense for all concerned, including this Court. Importantly, Plaintiffs had an absolute right to file a federal action, particularly under the circumstances. As the Court stated plainly in the telephonic conference of February 22, 2012, Plaintiff was and is acting in "good faith." (Plaintiff is ordering a transcript from that telephonic conference.) The Defendants are the ones who are trying to run up the bill, and this is tactical since they have vastly superior financial resources than do the

Plaintiffs, who are financial dwarfs compared with NBC. They would like to fight a war of attrition with Plaintiffs.

In this regard, the Notice of Dismissal was filed with sufficient notice before the oral arguments. Furthermore, Defendants knew of Plaintiffs' intention to dismiss before the Notice of Dismissal was filed. Plaintiff had informed the Court and Defendants in advance about the decision to file in district court in the telephonic conference of February 16, 2012. The Notice of Dismissal in the Superior Court action was given in good faith as soon as confirmation was received that the federal action was filed.

Fourth, Defendants' request for attorneys' fees is not proper and disingenuous. Plaintiff's federal action mirrors that of the Superior Court action. Thus, Defendants' will simply have to re-file essentially the same pleadings. There is little to do but simply put a new caption on and file. This holds true of Defendants' Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act of 2010 as well. Defendants will need to re-file this motion in order to preserve their right of appeal in district court and then the U.S. Court of Appeals for the District of Columbia Circuit. In short, the federal action will pick up right where this case left off.

Moreover, counsel for Defendants specializes in 1st Amendment law. They are the leading firm in 1st Amendment defense. All substantive material within Defendants' motions is largely boilerplate from other cases, pulled from other briefs. For example, before briefs were filed in this case, a nearly identical brief was submitted by counsel in Farah v. Esquire (D.D.C. No. 11-01179) (Exhibit 1). Again, ironically, counsel for both sides in this case represent other clients in the Farah litigation. To say that Defendants "expended significant resources" in copying and pasting portions of one brief to another

is disingenuous, especially when virtually the same boiler plate argument can be re-submitted in the federal action. There is no waste of resources, no waste of time.

Finally, it is well settled that Plaintiff has the right to choose the forum. *See Gulf Oil Corp v. Gilbert,* 330 U.S. 501, 509, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). Especially where there is a change of circumstance, the Plaintiff is entitled to proceed in the court of his or her choosing. Rule 41(a)(1) allows Plaintiff to voluntarily dismiss as a matter of right. As the U.S. Court of Appeal for the Ninth Circuit made clear "[w]e understand the argument that the rules may allow forum-shopping, but that argument is one for the Rules Committee and not for the court." *Swedberg*, 339 F.3d at 1146. The only apparent reason the Defendants want to remain in this Court is because they must have come to believe that this Court will rule in their favor.

For all these reasons, Defendants' Motion To Vacate must be denied.

Dated: March 26, 2012

Respectfully Submitted,

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