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October 7, 2020 Volume 19, Issue 40

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This Week's Feature

Federal Procedure: Dismissing a Single Party in Multiparty Litigation—Check Your Jurisdiction!

By Megan Basham Davis

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There is an uneven circuit split as to whether Rule 41 of the Federal Rules of Civil Procedure permits dismissal of a single party in a multiparty case.

Voluntary dismissal is generally addressed by Rule 41(a) of the Federal Rules of Civil Procedure and, in practice, tends to be a perfunctory, one-page filing. However, there is an uneven circuit split as to whether Rule 41 of the Federal Rules of Civil Procedure permits dismissal of a single party in a multiparty case. Rule 41(a) provides in pertinent part that the plaintiff "may dismiss an *action*" without a court order by making a required filing. *See* Fed. R. Civ. P. 41(a)(1) (emphasis added). The Sixth Circuit interprets the scope of an "action" narrowly to mean only dismissal of the "entire controversy," not a single party. *Mullins v. C.R. Bard, Inc.*, No. 0:19-CV-85-JMH-EBA, 2020 WL 4288400, at *1 (E.D. Ky. July 27, 2020) (citing *Philip Carey Mfg. Co. v. Taylor*, 286 F.2d 782, 785 (6th Cir. 1961)).

The Second Circuit has also followed this approach, though it has been called into question. *See Baksh v. Captain*, No. 99-CV-1806 (ILG), 2000 WL 33177209, at *2 (E.D.N.Y. Dec. 11, 2000) (discussing *Harvey Aluminum, Inc. v. Am. Cyanamid Co.*, 203 F.2d 105 (2d Cir.), *cert. denied*, 345 U.S. 1964 (1953)).

However, most other circuits do not hold to a "literal" reading of the word "action" in Rule 41. *See Van Leeuwen v. Bank of Am., N.A.*, 304 F.R.D. 691, 693 (D. Utah 2015) (collecting cases). The majority rule permits a plaintiff "to dismiss fewer than all of the named defendants" because it "is consistent with… Rule 41(a)(1)," which was "designed to permit a disengagement of the parties at the behest of the plaintiff… in the early stages of a suit, before the defendant has expended time and effort" in case preparation. *Id. See also* Wright & Miller, Federal Practice and Procedure: Civil 2d §2362 (describing this interpretation as "the sounder view" with "the weight of judicial authority").

Sixth Circuit practitioners who want to dismiss less than the entire controversy still have a procedural route to do so. Rule 21 provides that, "on motion or on its own, the court may at any time, on just terms, add or drop a party." Fed. R. Civ. P. 21. However, note that "[i]n exercising its discretion under Rule 21, the Court must consider prejudice to the nonmoving party." *Mullins*, 2020 WL 4288400, at *3–4 (citing *Wilkerson v. Brakebill*, No. 3:15-cv-435, 2017 WL 401212 (E.D. Tenn. Jan. 30, 2017)). Ironically "[t]he inquiry overlaps with Rule 41 standards as guidance in evaluating potential prejudice to the non-movant." *Id.* (internal citation omitted).

Because the Rule 21 standard requires consideration of the same factors as Rule 41, the Sixth Circuit's differentiation on this issue can come across as pedantic, as other circuits have pragmatically determined. *See Van Leeuwen*, 304 F.R.D. at 693 (describing a "literal interpretation" of Rule 41 as "relatively cumbersome"). Nevertheless, Second- and Sixth-Circuit practitioners should be careful to rely on the proper rule when moving to dismiss a single party in a multiparty case, and to satisfy the court that the Rule 21 factors weigh in favor of dismissal. When dismissing a plaintiff, the court will consider "(1) defendant's effort and expense of preparation for trial; (2) excessive delay and lack of diligence on plaintiff's part in prosecuting the case; (3) insufficient explanation for the need for

dismissal; and (4) whether a motion for summary judgment is pending." *Mullins*, 2020 WL 4288400, at *4 (citing *Grover v. Eli Lily & Co.*, 33 F.3d 716, 718 (6th Cir. 1994)).

In *Mullins*, the U.S. District Court for the Eastern District of Kentucky even weighed these factors when the parties jointly moved to dismiss the plaintiff's claims under Rule 41(a)(1)(A)(ii). *See id.* Practitioners should therefore prepare a motion that adequately addresses these factors and not take dismissal for granted with a perfunctory filing. As the old adage goes, an ounce of prevention is worth a pound of cure.

Megan Basham Davis *is an associate at* **Nelson Mullins Riley & Scarborough***'s West Virginia office in Huntington, West Virginia. She focuses her practice on representing businesses in complex civil litigation matters. Megan joined Nelson Mullins following two clerkships, first with U.S. Magistrate Judge Candace J. Smith and then with U.S. District Judge David L. Bunning in the U.S. District Court for the Eastern District of Kentucky. Megan's intimate knowledge of judicial decision-making and federal procedure is frequently drawn upon to guide litigation strategy and achieve favorable outcomes for her clients.*

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A Message from the President

DRI Nominating Committee Appointments

Dear DRI Members,

Each year at DRI's Annual Meeting, the Nominating Committee convenes for the purpose of making a recommendation to the DRI Board of Directors as to the open officer positions of Secretary–Treasurer and Second Vice President, and four National Directors. An integral and cherished part of the nominating process is the opportunity for members and candidates to appear before the Nominating Committee to provide information and comment on the various candidates. Due to the pandemic limitations, this year members can provide information to the Nominating Committee in one of two ways: 1) in writing, or 2) via a five-minute video Zoom appearance before the committee. Both methods will be given equal weight by the Nominating Committee.

Zoom interviews are available only to DRI members who are registered for the Annual Meeting. The window for signing up for a Zoom video appearance slot is October 9–16. For instructions on how to sign up, click here.

Written letters of support are being accepted now and until Thursday, October 22, at 7:00 p.m. Central. You do not have to be a DRI member or be registered for the Annual Meeting to provide a written submission. Written letters of support should be sent via email to Dean Martinez, DRI Chief Executive Officer (dmartinez@dri.org) *and* Nancy Parz (nparz@dri.org), DRO Executive Vice President, Membership and Programming. Each candidate's Declaration of Candidacy is available for viewing the DRI website (click here).

These Officer and Board elections are extremely important and vital to the future of DRI. We very much encourage each of you to participate in the process.

Thank you for your membership and support of DRI. "See you" at the virtual Annual Meeting October 21–23! Be sure to register now.

Warm regards,

Phil Willman, DRI President