6-1-2023

3909 Realty LLC v. City of Philadelphia Dept Licenses & Inspections

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 22-2593

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3909 REALTY LLC;
GUY SHITRIT;
GUY ADVISORY GROUP LLC,

Appellants

v.

CITY OF PHILADELPHIA DEPARTMENT OF LICENSES AND INSPECTIONS

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-21-cv-00030)
District Judge: Honorable Chad F. Kenney

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Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
May 18, 2023

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Before: GREENAWAY, JR., PHIPPS, and CHUNG, *Circuit Judges*.

(Filed: June 1, 2023)

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OPINION*

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PHIPPS, *Circuit Judge*.

This dispute over the City of Philadelphia's demolition of a 1260-square-foot, three-bedroom, one-bath building on or about August 11, 2020, has yet to run its full

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

course in the District Court. Although the District Court struck the plaintiffs' second amended complaint, it did not do so on futility grounds. Instead, the District Court struck the second amended complaint because the plaintiffs did not first seek leave of court or the City's written consent, as required by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 15(a)(2). As elaborated on below, that order is not a final order subject to appeal under 28 U.S.C. § 1291. Without a final decision or any other basis for appellate jurisdiction, we will dismiss this appeal.

BACKGROUND

On November 23, 2020, the demolished building's owner, 3909 Realty LLC, along with its owner and managing member (collectively '3909 Realty') sued the City in the Court of Common Pleas of Philadelphia County. Among the counts in its complaint, 3909 Realty asserted a takings claim under the Fifth Amendment. Because that claim arises under federal law, *see* 28 U.S.C. § 1331, the City had the option to remove the case to federal court, *see id.* § 1441(a).

On January 5, 2021, the City removed the case and then moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b). Instead of opposing that motion, 3909 Realty amended its complaint within the time permitted by the District Court to amend "as a matter of course." Fed. R. Civ. P. 15(a)(1) (permitting such amendment within twenty-one days of the earlier of service of an answer or "service of a motion under Rule 12(b)"); *see also id.* 6(b)(1)(A) (allowing district courts to extend court deadlines, subject to exceptions). That amended complaint became the operative pleading, and with the original complaint having "no legal effect," *W. Run Student Hous. Assocs., LLC v. Huntington Nat'l Bank*, 712 F.3d 165, 171 (3d Cir. 2013) (quoting *New*

Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc., 101 F.3d 1492, 1504 (3d Cir. 1996)), the District Court denied the City's motion to dismiss.

The City then moved to dismiss the amended complaint. On June 8, 2021, the District Court granted that motion and dismissed the amended complaint without prejudice. The text of the dismissal order and the accompanying memorandum did not expressly provide for amendment, yet as a dismissal on Rule 12(b)(6) grounds designated as 'without prejudice,' the order did not preclude later amendment. *See Newark Branch, NAACP v. Town of Harrison*, 907 F.2d 1408, 1417 (3d Cir. 1990) ("[A]lthough the district court's order [does] not mention amendment, an implicit invitation to amplify the complaint is found in the phrase 'without prejudice.'" (second alteration in original) (quoting *Borelli v. City of Reading*, 532 F.2d 950, 951 (3d Cir. 1976) (per curiam))).

By Rule 15, any subsequent amendment would require "the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Without either the City's consent or the District Court's leave, 3909 Realty filed a second amended complaint on June 7, 2022 – one day shy of a year after the District Court dismissed the amended complaint without prejudice. Because that filing did not comply with Rule 15, the District Court struck it.

On August 10, 2022, one day before the estimated two-year anniversary of the building's demolition, 3909 Realty filed two motions. *Cf. Kach v. Hose*, 589 F.3d 626, 634 (3d Cir. 2009) ("The statute of limitations for a § 1983 claim arising in Pennsylvania is two years." (citing 42 Pa. Cons. Stat. § 5524(2))). The first motion requested reconsideration of the striking of the second amended complaint. The second motion sought leave to file the second amended complaint. The District Court denied the motion for reconsideration the next day. Before the District Court ruled on the motion for leave

to amend, 3909 Realty filed a notice of appeal. The District Court later denied 3909 Realty's motion for leave to amend without prejudice, expressly allowing the motion's "renewal once Plaintiffs' appeal is resolved." Order, at 1 (Nov. 7, 2022).

DISCUSSION

1. The Order Striking the Second Amended Complaint Is Not a Final Appealable Decision.

To be final for purposes of appeal, a decision must "terminate an action" such that "a district court disassociates itself from a case." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (first quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545 (1949); and then quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)). The District Court's order striking 3909 Realty's second amended complaint did not do that. The order did not state that it was the final decision in the case, nor was it accompanied by a separate judgment to so indicate. *See* Fed. R. Civ. P. 58(a). Also, at the time of its appeal, 3909 Realty's motion for leave to file a second amended complaint was pending, further establishing that the District Court had not disassociated itself from the case for finality purposes. *Cf.* 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.1 (3d ed. Apr. 2023 update) ("If a motion to amend is pending and unresolved at the time of dismissal, finality likewise requires disposition of the pending motion."). Accordingly, the striking of the second amended complaint is not itself a final decision subject to appeal.

2. The Striking of the Second Amended Complaint Did Not Convert the Without-Prejudice Dismissal of the First Amended Complaint into a Final Appealable Decision.

3909 Realty argues that the order striking its second amended complaint converted the earlier order dismissing the first amended complaint without prejudice into a final decision. But the striking of a pleading is not a recognized circumstance that transforms

an otherwise unappealable dismissal without prejudice into a final decision. *See, e.g.*, *Weber v. McGrogan*, 939 F.3d 232, 237–38 (3d Cir. 2019) (explaining the stand-on-the-complaint doctrine). At most, 3909 Realty asserts that the District Court proceedings effectively ended because the statute of limitations expired sometime *after* the order striking the second amended complaint. *See Newark Branch, NAACP*, 907 F.2d at 1416. But even if so, that argument finds no support in this Court's precedents. While some cases in this Court have treated without-prejudice dismissals as final decisions when the statute of limitations had run, even those cases did not address the unique situation presented here – 3909 filed the notice of appeal while its motion for leave to file a further amended complaint remained pending.[1] Thus, this case does not fall within a recognized circumstance for converting a dismissal without prejudice into an immediately appealable final order.

3. The Order Striking the Second Amended Complaint Is Not Immediately Appealable Under the Collateral Order Doctrine.

3909 Realty also contends that the order striking its second amended complaint qualifies as a collateral order subject to immediate appeal. *See generally Saint-Jean v. Palisades Interstate Park Comm'n*, 49 F.4th 830, 835 (3d Cir. 2022) (explaining that the collateral order doctrine recognizes "a 'small class' of orders that, even without terminating the proceedings, are nonetheless subject to appeal" (quoting *Cohen*, 337 U.S. at 546)). But one of the requirements for a collateral order is that the order "must be effectively unreviewable on appeal from a final judgment." *Id.* (citing *Mohawk Indus.*, 558 U.S. at 106). And here, 3909 Realty now presses that the District Court, in

[1] *See, e.g.*, *Ahmed v. Dragovich*, 297 F.3d 201, 203, 207–10 (3d Cir. 2002); *Umbenhauer v. Woog*, 969 F.2d 25, 30 n.6 (3d Cir. 1992); *Trevino-Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874, 877, 878 n.4 (3d Cir. 1990); *Green v. Humphrey Elevator & Truck Co.*, 816 F.2d 877, 878 n.4 (3d Cir. 1987); *Fassett v. Delta Kappa Epsilon (N.Y.)*, 807 F.2d 1150, 1155–57 (3d Cir. 1986).

dismissing the first amended complaint without prejudice, had to expressly provide leave to amend, and that by not doing so, it could not later strike an amended pleading for failure to seek leave to amend. That issue could be raised and effectively reviewed on appeal of a final decision. Accordingly, the striking of the second amended complaint is not a collateral order subject to immediate appeal.

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For the foregoing reasons, this appeal is dismissed for lack of appellate jurisdiction.