

FEB 18 2014

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERBERT BURKART, individually;
TANJA M BURKART, individually and
the marital community thereof,

Plaintiffs - Appellants,

v.

GLOBAL ADVISORY GROUP, INC., a
Washington corporation,

Defendant,

And

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., a
Delaware corporation; BAC HOME
LOANS SERVICING, LP, a foreign
corporation; BANK OF AMERICA NA, a
national bank; BANK OF AMERICA
CORPORATION, a Delaware corporation;
COUNTRYWIDE FINANCIAL
CORPORATION, a Delaware corporation;
COUNTRYWIDE HOME LOANS, INC.,
a New York corporation; LINDA GREEN
DOES 1-10,

No. 12-35886

D.C. No. 2:11-cv-01921-RAJ

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendants - Appellees.

Appeal from the United States District Court
for the Western District of Washington
Richard A. Jones, District Judge, Presiding

Submitted February 7, 2014**
Seattle, Washington

Before: GOULD and CHRISTEN, Circuit Judges, and KOBAYASHI, District Judge.***

Plaintiffs Herbert and Tanja Burkart contest language in the district court's order dismissing their complaint with leave to amend. The district court dismissed Plaintiffs' complaint because it did not meet the pleading standard of Federal Rule of Civil Procedure 8(a). In its order, the district court gave guidance on how to replead Plaintiffs' claims so as to comply with Rule 8(a). This guidance included a direction that Plaintiffs "must consider" an unpublished Washington Court of Appeals decision¹ as part of repleading their Washington Consumer Protection Act claim. Instead of amending their complaint, Plaintiffs appealed. The district court

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Leslie E. Kobayashi, District Judge for the U.S. District Court for the District of Hawaii, sitting by designation.

¹ *Peterson v. Citibank, N.A.*, 170 Wash. App. 1035, at *3 (2012) (discussing *Bain v. Metro. Mortg. Grp., Inc.*, 285 P.3d 34 (Wash. 2012) (en banc)).

then dismissed the case without prejudice for failure to prosecute under Federal Rule of Civil Procedure 41(b).

Plaintiffs challenge the district court's power to direct Plaintiffs to consider an unpublished state court decision when amending their complaint. However, a dismissal with leave to amend is not an appealable final order under 28 U.S.C. § 1291. *Greensprings Baptist Christian Fellowship Trust v. Cilley*, 629 F.3d 1064, 1068 (9th Cir. 2010); *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136-37 (9th Cir. 1997) (en banc). Nor does the specific guidance within the district court's order satisfy the stringent requirements of an appealable collateral order. *See Greensprings*, 629 F.3d at 1066-67. The district court's repleading guidance is not effectively unreviewable because any subsequent determination by the district court on the applicability of the unpublished Washington Court of Appeals case to Plaintiffs' CPA claim would be reviewable once the district court rendered a final judgment. *See DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1014 (9th Cir. 2013). The unpublished case, moreover, pointed Plaintiffs in the direction of the Washington State Supreme Court decision that it cited.

The district court's later dismissal without prejudice of Plaintiffs' case under Rule 41(b) does not give us jurisdiction to hear a premature appeal. *See Serine v.*

Peterson, 989 F.2d 371, 373 (9th Cir. 1993). Accordingly, we dismiss this appeal for lack of jurisdiction.

DISMISSED.