American Freedom Defense Initiative et al v. Suburban Mobility Authorit...ansportation (SMART) et al Doc. 72

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

AMERICAN FREEDOM DEFENSE INITIATIVE; *et al.*,

Plaintiffs,

v.

SUBURBAN MOBILITY AUTHORITY for REGIONAL TRANSPORTATION ("SMART"); *et al.*,

Defendants.

No. 2:10-cv-12134-DPH-MJH

PLAINTIFFS' RESPONSE TO ORDER TO SHOW CAUSE

Hon. Denise Page Hood

Magistrate Judge Hluchaniuk

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ISSUE PRESENTED

I. Whether this case, which has been vigorously prosecuted by Plaintiffs from its inception and is currently awaiting this Court's ruling on the parties' cross-motions for summary judgment, can or should be dismissed because an originally named defendant, "Gary L. Hendrickson," who, as Plaintiffs subsequently learned from Defendants' counsel, was not an officer at SMART and thus had no involvement in this matter whatsoever and who apparently does not even exist insofar as this case is concerned, was "misjoined" as a party and thus never served.

ANSWER: No.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 4

Fed. R. Civ. P. 21

INTRODUCTION

On June 5, 2014, this Court issued an "Order to Show Cause" as to why this "case should not be dismissed for failure to prosecute, pursuant to E.D. Mich. LR 41.2" *See* E.D. Mich. LR 41.2 (stating that "when it appears . . . that the parties have taken no action for a reasonable time, the court may, on its own motion after reasonable notice or on application of a party, enter an order dismissing or remanding the case unless good cause is shown"). The short answer is that the parties have vigorously prosecuted this action and are currently awaiting this Court's ruling on their cross-motions for summary judgment (*i.e.*, there is nothing further for the parties to do).[1] Thus, it would be entirely improper to dismiss this case pursuant to E.D. Mich. LR 41.2.

As best as Plaintiffs can understand, in light of the fact that they *have* vigorously prosecuted this case, the "Show Cause Order" is related to *one* originally named defendant, "Gary L. Hendrickson," who was never served, never made an appearance either personally or through counsel, and who apparently does not exist, at least insofar as this case is concerned. Indeed, through communications with Defendants' counsel early on in this litigation when Plaintiffs were arranging for service of the complaint, Plaintiffs were informed that

[1] The Court heard oral argument on the parties' cross-motions for summary judgment on ***November 13, 2013***. (Minute Entry for proceedings).

there was no "Gary L. Hendrickson" at SMART. Consequently, there was nothing to "prosecute" as to Mr. Hendrickson (and, indeed, no one by this name to serve).[2]

On May 20, 2014, Ms. La Shawn R. Saulsberry, case manager to this Court, and Mr. David Yerushalmi, co-counsel for Plaintiffs, had an email exchange regarding the status of Mr. Hendrickson as a party in this case.[3] Ms. Saulsberry's initiating email to Mr. Yerushalmi stated, "Please advise the Court as to the status of defendant Gary Hendrickson." Mr. Yerushalmi promptly responded, copying opposing counsel on all future email correspondence with the Court, as follows: "We learned early on in this litigation that there was no Gary Hendrickson at SMART. The general manager during the relevant time was/is John Hertel, who is a party in this case. Consequently, other than being named in the original complaint, Gary Hendrickson was never served and thus never a party to this litigation." Ms. Saulsberry responded, "Thank you, The Court would need a Stipulated Order Dismissing that party." Mr. Yerushalmi promptly responded, "Can Plaintiffs not just file a Rule 41(a)(1)(A)(i) notice of dismissal since the opposing party, Hendrickson, has not filed an answer?," citing the relevant portion of Rule 41 involving voluntary dismissals. Mr. Yerushalmi then immediately

[2] In fact, counsel for Defendants, Mr. Avery Gordon, accepted service of the summons and complaint for each of the proper parties to this action (*i.e.*, SMART, John Hertel, and Beth Gibbons). (*See* Doc. Nos. 5-7).

[3] A true and correct copy of this email exchange is attached to this response as Exhibit 1.

followed up this correspondence with a subsequent email, stating, "Actually, this might be more proper for a Rule 21, which the court may do sua sponte. The problem with a Rule 41 is the confusion whether it is a dismissal of a party or the action. Rule 21 looks to us to be the better route," citing Rule 21, which provides, in relevant part, that "*on its own*, *the court may at any time*, on just terms, *add or drop a party*." Fed. R. Civ. P. 21 (emphasis added). Ms. Saulsberry never responded, and thus Plaintiffs understood that this matter was concluded since the Court had the authority to act "*on its own*" to resolve it.

As demonstrated below, there is *no* basis for dismissing this *action*, and it would be reversible error to do so. And insofar as the Court is requesting Plaintiffs' position on whether it should drop "Gary L. Hendrickson" as a party, Plaintiffs hereby request that the Court do so as it deems necessary.

ARGUMENT

The Sixth Circuit's rulings on voluntary dismissals under Rule 41 have not been models of clarity, which is why Mr. Yerushalmi suggested in his last email that the Court dismiss "Gary L. Hendrickson" *sua sponte* under Rule 21. The few published cases on the issue suggest that Rule 41 may be used only to dismiss an action in its entirety and may not be used as a vehicle to dismiss individual defendants. In *Philip Carey Manuf. Co. v. Taylor,* 286 F.2d 782 (6th Cir. 1961), the Sixth Circuit stated:

> Rule 41(a)(1) provides for the voluntary dismissal of an 'action' not a 'claim'; the word 'action' as used in the Rules denotes the entire controversy, whereas 'claim' refers to what has traditionally been termed 'cause of action.' Rule 21 provides that 'Parties may be dropped or added by order of the court on motion * * *' and we think that this rule <u>*is the one under which any action to eliminate . . . a party should be taken*</u>.

Id. at 785 (quoting *Harvey Aluminum, Inc. v. Am. Cyanamid Co.,* 203 F.2d 105, 108 (2d Cir. 1953)) (emphasis added).

Decades later, the Sixth Circuit relied on the interpretation of Rule 41(a)(1) in *Philip Carey* in concluding that Rule 21, and not Rule 41(a)(1), was the basis upon which the lower court dismissed a party from the action. *See Letherer v. Alger Group, L.L.C.,* 328 F.3d 262, 265-66 (6th Cir. 2003), *overruled on other grounds by Blackburn v. Oaktree Capital Mgmt., LLC,* 511 F.3d 633, 636 (6th Cir. 2008).

In sum, "[t]he Sixth Circuit has implied that Rule 21 is the proper vehicle for the dismissal of individual parties from the action, and that Rule 41 is appropriate only for dismissal of the entire action." *Stout v. Remetronix, Inc.*, Case No.: 3:13-CV-26, 2014 U.S. Dist. LEXIS 50469, at *2 (S.D. Ohio Apr. 11, 2014). Moreover, pursuant to the express terms of Rule 21, a "[m]isjoinder of parties is <u>*not a ground for dismissing an action*</u>." Fed. R. Civ. P. 21 (emphasis added). Indeed, the Sixth Circuit is clear on this point: "Courts cannot dismiss actions where there has been misjoinder of parties." *Letherer*, 328 F.3d at 267 (stating further that "[a]

misjoinder of parties also frequently is declared because no relief is demanded from one or more of the parties joined as defendants") (internal quotations and citation omitted).

Nevertheless, there is yet perhaps another Rule that resolves the issue raised by the Court's "Show Cause Order"—insofar as Plaintiffs properly understand the issue concerning the Court—and that is Rule 4(m). Under Rule 4(m), "[i]f a defendant is not served within 120 days after the complaint is filed, the court—on motion or *on its own* after notice to the plaintiff—must dismiss the action without prejudice *against that defendant*. . . ." Fed. R. Civ. P. 4(m) (emphasis added). As noted previously, "Gary L. Hendrickson" was not served because Plaintiffs know of no one by that name to serve. Moreover, the motion to dismiss contemplated by this Rule would logically come from the defendants. Nonetheless, Plaintiffs are certainly on notice that they do not have a cause of action against "Gary L. Hendrickson" and would thus have no objection to the Court, on its own, dismissing the action as "against *that* defendant." But again, as noted, there is no basis to dismiss this action as against the parties that are properly before the Court.

CONCLUSION

As demonstrated above, this Court *cannot* dismiss this action as against Defendants SMART, Hertel, and Gibbons, who are all proper parties, where there has been the misjoinder of a *single* party (*i.e.*, "Gary L. Hendrickson"). Moreover,

this Court can drop "Gary L. Hendrickson" as a party pursuant to its inherent authority under Rules 4 or 21 of the Federal Rules of Civil Procedure, and Plaintiffs would have no objection. Indeed, Plaintiffs would request that the Court do so as may be necessary to resolve the concerns that prompted the Court's "Show Cause Order."

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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/s/ David Yerushalmi
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/s/ Erin Mersino
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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

AMERICAN FREEDOM LAW CENTER

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