FEDERAL CIVIL PROCEDURE: VOLUNTARY DISMISSAL UNDER RULE 41(a)(1)

CONSIDERABLE controversy has arisen under the Federal Rules of Civil Procedure as to when during litigation the plaintiff loses his absolute right to a voluntary dismissal. Rule 41(a)(1) allows a plaintiff to dismiss his action without court order at any time before service by the adverse party of an answer or of a motion for summary judgment. Lower federal court decisions are in conflict over what constitutes an answer or a motion for summary judgment under this rule. In a recent district court decision, *Tele-Views News Co. v. S.R.B. TV Publishing Co.*,[1] a motion for summary judgment was construed for the purposes of rule 41(a)(1) to include a motion to dismiss for failure to state a claim upon which relief could be granted.

The *Tele-Views News* suit was instituted originally in the Northern District of Illinois. Defendant filed a motion to dismiss under rule 12(b)(6)[2] and simultaneously sought transfer to the Eastern District of Pennsylvania.[3] After the court ordered the action transferred,[4] plaintiff filed a notice of voluntary dismissal with the clerk of the Illinois court. Defendant moved to vacate plaintiff's notice of dismissal on the ground that the motion to transfer barred subsequent voluntary dismissal. The Illinois district court transferred the entire record to the district court in Pennsylvania without ruling on either defendant's motion or on plaintiff's notice of dismissal. Prior to a decision by the Pennsylvania district court on these issues, plaintiff instituted an identical suit in the Southern District of Iowa.

Defendant petitioned the Pennsylvania district court to enjoin plaintiff from proceeding with the suit brought in Iowa. Plaintiff, however, contended that the Pennsylvania district court lacked jurisdiction to grant such an injunction, because the suit had been dismissed in Illinois. The Pennsylvania district court ruled that it did have jurisdiction,[5] and held that the filing of a motion to dismiss for failure to

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[1] 28 F.R.D. 303 (E.D. Pa. 1961).

[2] FED. R. CIV. P. 12(b)(6).

[3] Although plaintiff joined S.R.B. TV Publishing Co., Inc. and Triangle Publications, Inc. as co-defendants, only Triangle Publications, Inc. filed a motion to transfer and a motion to dismiss for failure to state a claim.

[4] Under 28 U.S.C. § 1404(a) (1958).

[5] *Accord*, Littman v. Bache & Co., 252 F.2d 479 (2d Cir. 1958) (cited by the court with approval). In *Littman* the court held that until the merits of the controversy

state a claim was equivalent to a motion for summary judgment for the purposes of applying rule 41(a)(1), thus barring plaintiff from dismissing without court order.[6]

While at common law a plaintiff had the absolute right to abandon his action at any time before verdict,[7] substantial inroads have been made into this doctrine, primarily through statutory enactments.[8] Prior to the adoption of the Federal Rules of Civil Procedure, federal courts were required under the Conformity Act[9] to apply a variety of state rules governing voluntary dismissals in actions at law. In equity suits, however, federal judges were allowed limited discretion in deciding at which point in the proceeding plaintiff could abandon his action without court order.[10] The drafters of the Federal Rules sought to restrict voluntary dismissal to an early stage in civil actions. Rule 41(a)(1) presently provides:

> . . . [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, which ever first occurs. . . .[11]

have been raised, defendant's motion to transfer does not deprive the transferring court of jurisdiction. *But see* Sims v. Union News Co., 120 F. Supp. 116 (S.D.N.Y. 1954).

[6] In a memorandum handed down on July 21, 1961, the court held that despite defendant's prior motion to dismiss for failure to state a claim, plaintiff effectively dismissed the action when he filed a notice of voluntary dismissal in the District Court of Northern Illinois. After reargument on defendant's motion, the court reversed its prior decision in a memorandum of September 18, 1961, and held that defendant's motion did preclude plaintiff from dismissing voluntarily. The issue of jurisdiction, *supra* n.5, was not reconsidered in the court's second memorandum.

[7] See Head, *The History and Development of Non-Suit*, 27 W. VA. L.Q. 20 (1920); Note, 54 COLUM. L. REV. 616 (1954); Note, 37 VA. L. REV. 969 (1951).

[8] See Annot., 89 A.L.R. 13 (1934); Note, VA. L. REV., *supra* note 7.

[9] 28 U.S.C. § 724 (1934).

[10] "The usual ground for denying a complainant in equity the right to dismiss his bill without prejudice is that his cause has proceeded so far that the defendant is in a position to demand on the pleadings an opportunity to seek affirmative relief and he would be prejudiced by being remitted to a separate action." *Ex parte* Skinner & Eddy Corp., 265 U.S. 86, 93-94 (1924). *Accord*, Jones v. SEC, 298 U.S. 1 (1936); Pullman's Palace Car. Co. v. Central Transp. Co., 171 U.S. 138 (1898).

[11] As originally promulgated, defendant could preclude plaintiff from dismissing voluntarily under rule 41(a)(1) only by filing an answer. Since a 1946 amendment to the rules, a motion for summary judgment also prevents later voluntary dismissal. The reason for this addition was set forth in the Notes of the Advisory Committee on Rules, App. 28 U.S.C. at 5163 (1958), following rule 41: "Omission of reference to a motion for summary judgment in the original rule was subject to criticism. . . . A motion for summary judgment may be forthcoming prior to answer. Since a motion may require even more research and preparation than the answer itself, there is good reason why the service of motion, like that of answer, should prevent a voluntary dismissal by the adversary without court approval."

This rule permits plaintiff to dismiss voluntarily, but prevents abuse of that right by restricting its exercise to an early stage in the proceedings.[12]

Although early decisions arising under rule 41(a)(1) interpreted answer to mean appearance,[13] the federal courts subsequently rejected this view and adopted a narrow interpretation of answer and motion for summary judgment.[14] A plaintiff generally has been refused voluntary dismissal only after the defendant has served a formal answer which complies with the requirements of rule 7,[15] or has made motion for summary judgment under rule 56.[16] For example, federal courts have held that a plaintiff was not deprived of his right to dismiss volun-

[12] See 5 MOORE, FEDERAL PRACTICE ¶ 1007 (2d ed. 1950). In states which allow voluntary dismissal at a late stage in the proceeding, a plaintiff may bring suit repeatedly, imposing hardship on defendant and court. McCann v. Bently Stores Corp., 34 F. Supp. 234 (W.D. Mo. 1940). See Note, 26 TEXAS L. REV. 91 (1947) for examples of abuses under such a state procedure. The purpose of rule 41 was to prevent such abuses in the federal courts.

[13] See, *e.g.*, Love v. Silas Mason Co., 66 F. Supp. 753 (W.D. La. 1946) (prior to the 1946 amendment, plaintiff prevented from voluntarily dismissing by filing of motion for summary judgment, which court deemed constituted an appearance).

[14] This approach to rule 41 is illustrated by the oft-quoted opinion in Wilson v. Fremont Cake and Meal Co., 83 F. Supp. 900, 904, 905 (D. Neb. 1949): "The employment of the term *answer* in rule 41(a)(1) cannot be assigned to inadvertance.... It signifies an answer as that expression is used in the rules, and thus used, it does not include a motion. . . . [Y]et, it [the Supreme Court] saw fit to bracket one type of motion only with an answer in defining the pleadings whose service should thereafter prevent the plaintiff's dismissal at will of his action."

It is interesting to note that the court in the instant case was in accord with *Wilson* in its first memorandum: "It is obvious that a literal reading of the rule compels the conclusion that the plaintiff *did* succeed in dismissing this suit, since the notice of dismissal was filed before the defendant served an answer or a motion for summary judgment. . . . Although we are in sympathy with the defendant's positiou, we think . . . that we are not free to rewrite the provisions of rule 41." Tele-Views News Co. v. S.R.B. TV Publishing Co., 28 F.R.D. 303, 304 (E.D. Pa. 1961).

[15] FED. R. CIV. P. 7(a) "Pleadings. There shall be a complaint and an answer. . . ." See Forms 20 and 21 in APP. OF FORMS, FED. R. CIV. P. See generally 2 MOORE, FEDERAL PRACTICE ¶ 1501-1510 (2d ed. 1950). The court in Winslow v. National Electric Products Corp., 5 F.R.D. 126, 131 (W.D. Pa. 1946) indicated the requirements for an answer: "Although there is no need for the defendant to set forth any evidence or to expose its defense in detail, an answer does require, however, a statement of such definite material that the plaiutiffs will be informed of the defense they must be prepared to meet."

In Butler v. Denton, 150 F.2d 687 (10th Cir. 1945), the court took a position opposed to Wilson v. Fremont Cake and Meal Co., *supra* n.14, and held that a petition for intervention by the Government prevented the plaintiff from dismissing as of right. The court reasoned that the petition for intervention had raised justiciable issues.

[16] FED. R. CIV. P. 56.

tarily after a motion for change of venue,[17] a motion challenging the court's jurisdiction,[18] a motion for stay pending arbitration,[19] or a motion to dismiss for failure to state a claim upon which relief can be granted.[20]

The Court of Appeals for the Second Circuit abandoned a narrow interpretation of answer under rule 41(a)(1) in *Harvey Aluminum, Inc. v. American Cyanamid Co.*[21] in denying voluntary dismissal after the merits of the controversy had been considered upon hearing for a preliminary injunction. While admitting that notice of voluntary dismissal had been filed prior to answer or motion for summary judgment, the court held that the essential purpose of the rule would be defeated by its literal application to the case at bar.

The court in *Tele-Views News Co. v. S.R.B. TV Publishing Co.*[22] took an approach similar to that of the Second Circuit and held that plaintiff could not dismiss voluntarily after the court had an opportunity to make a final determination of the entire action. Defendant's motion to dismiss for failure to state a claim was accompanied by supporting affidavits, and according to the court, the district court in Illinois could have treated this as a motion for summary judgment by operation of rule 12(b)(6).[23] If this were the sole ground for the decision, the holding would not represent a departure from previous cases. However, the court stated that even if viewed as a genuine motion to dismiss, without supporting affidavits, plaintiff could not dismiss voluntarily after the motion had been filed. The court observed that a motion to dismiss for failure to state a claim, like a motion for summary judgment, may present the court with the opportunity to make a final determination of the entire controversy. A decision favorable to defendant of either motion would be res judicata as to any subsequent suit by plaintiff on the same set of facts.[24]

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[17] Toulmin v. Industrial Metal Protectives, Inc., 135 F. Supp. 925 (D. Del. 1955).

[18] Kilpatrick v. Texas & Pac. Ry., 166 F.2d 788 (2d Cir. 1948).

[19] Rife v. McElwee-Courbis Construction Co., 16 F.R.D. 11 (M.D. Pa. 1954).

[20] Sachs v. Italia Societa Anonima Di Navigazione, 30 F. Supp. 442 (S.D.N.Y. 1939). *Cf.* Pennsylvania R.R. v. Daoust Const. Co., 193 F.2d 659 (7th Cir. 1952) (issue was responsive pleading under rule 41(c)).

[21] 203 F.2d 105 (2d Cir.), *cert. denied*, 345 U.S. 964 (1953).

[22] 28 F.R.D. 303 (E.D. Pa. 1961).

[23] FED. R. CIV. P. 12(b) "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

[24] See RESTATEMENT, JUDGMENTS § 50, comment *c* (1942).

A fear that the right to voluntary dismissal might be used to unfair advantage by a plaintiff, subjecting a defendant to multiple and expensive law suits,[25] was a strong factor in prompting the courts in *Harvey* and *Tele-Views News* to depart from a literal application of rule 41(a)(1).[26] If the court in the instant case had felt that plaintiff were seeking to circumvent the dictates of rule 1,[27] it might possibly have denied plaintiff the right to dismiss voluntarily on the ground of vexatiousness.[28]

Disregarding any question of vexatiousness, the problem of applying rule 41(a)(1) to the facts of a particular case remains. One solution would be to delete rule 41(a)(1) and retain only the present 41(a)(2).[29]

[25] A plaintiff, under rule 41(a)(1), is permitted to dismiss voluntarily only once: "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state action based on or including the same claim." The rule applies, however, only where the second dismissal is in a United States district court. See Rader v. Baltimore & Ohio Ry., 108 F.2d 980 (7th Cir.), *cert. denied*, 309 U.S. 682 (1940). After dismissing voluntarily, therefore, a plaintiff may bring at least one more suit based on the same facts, and in some instances, more than one.

[26] In *Harvey* the court was influenced by the patent unfairness of allowing plaintiff to dismiss voluntarily after the defendant had expended a large amount of money and devoted a great deal of time in preparing for trial. See Note, 54 COLUM. L. REV. 616 (1954); Note, 63 YALE L.J. 738 (1954). The court in the instant case indicates that the same considerations may have influenced its decision. The court recognized that ". . . . both the motion for summary judgment and the motion to dismiss for failure to state a claim involve considerable preparation by counsel and study by the court." 28 F.R.D. at 308.

[27] FED. R. CIV. P. 1. "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

[28] A court may enjoin plaintiff from bringing additional suits in other forums when it feels that subsequent actions will be for the purpose of vexing and annoying defendant. Higgins v. California Prune and Apricot Growers, Inc., 282 Fed. 550 (2d Cir. 1922). *Accord*, Henjes v. Aetna Ins. Co., 39 F. Supp. 419 (E.D.N.Y. 1941). But because plaintiff may dismiss voluntarily solely to prevent removal by defendant, Mott v. Connecticut General Life Ins. Co., 2 F.R.D. 523 (N.D. Iowa 1942), the courts have been reluctant to deny dismissal on the ground of vexatiousness. The dissent in Littman v. Bache & Co., 252 F.2d 479, 481 (2d Cir. 1958) suggests that vexatiousness may be a valid ground on which to deny voluntary dismissal. In his dissent Judge Lumbard said: "the plaintiff presumed upon the court in an attempt to shift his forum. . . . The District Court has an area of discretion to prevent trifling tactics of this nature."

[29] At present, rule 41(a)(2) operates only after the defendant has filed an answer or a motion for summary judgment. If rule 41(a)(1) were deleted, rule 41(a) would then read: "*By Order of Court.* An action shall not be dismissed at the

This would abolish plaintiff's right to voluntary dismissal and vest in the presiding judge complete discretion to decide on what terms and conditions plaintiff should be allowed to dismiss.[30]

Alternatively, rule 41(a)(1) could be changed to conform to the holdings in *Harvey* and *Tele-Views News*, and thus deny voluntary dismissal after the court has had an opportunity to consider the merits of the controversy. The substitution of this criterion for the present standard under rule 41(a)(1) would necessarily vest a measure of discretion in the presiding judge, but would not abolish completely the plaintiff's right of voluntary dismissal. Moreover, the suggested revision would set forth the true criterion by which the courts in recent cases have interpreted the rule. Such a revision would provide more certain notice to litigants of when plaintiff may dismiss his action and would have the additional advantage of more nearly achieving the purpose for which rule 41(a)(1) originally was promulgated.

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plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." This solution is suggested in Note, 63 YALE L.J. 738 (1954).

[30] In applying rule 41(a)(2) the courts tend to allow dismissal without prejudice if the adverse party can be made reasonably whole by the imposition of terms and conditions. This generally can be done by requiring plaintiff to reimburse defendant for all reasonable costs in preparing for trial. See Mott v. Connecticut General Life Ins. Co., 2 F.R.D. 523 (N.D. Iowa 1942); McCann v. Bently Stores Corp., 32 F. Supp. 234 (W.D. Mo. 1940).