No. 18-521

IN THE

Supreme Court of the United States

SIMPSON JUAN,

Petitioner,

—v.—

JNESO DISTRICT COUNCIL 1, ST MICHAELS MEDICAL CENTER, MEMBER OF CATHOLIC HEALTH EAST,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a litigant may seek to circumvent the strict deadlines set by the Federal Rules of Appellate Procedure for filing an appeal from a final appealable decision of the District Court, by requesting that the Appellate Court "reinstate" an appeal it remanded to the District Court for further consideration and which the Appellate Court did not retain jurisdiction over?

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondent makes the following disclosure: JNESO, District Council 1 has no parent company- and no publicly held entity owns 10% or more of its stock.

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STATEMENT OF THE CASE

This is relatively mundane case involving nothing more than the failure of a litigant to comply with the strict deadlines set forth in the Federal Rules of Appellate Procedure on multiple occasions for filing a timely Notice of Appeal from District Court decisions as well as failing to timely file his lawsuit against the Respondent, JNESO, District Council 1 ("JNESO" or "Respondent"). Rather, the litigant, Petitioner Simpson Juan ("Juan" or "Petitioner") is attempting to circumvent the strict deadlines set forth in the Federal Rules of Appellate Procedure by requesting that this Court incorporate language into Federal Rule of Civil Procedure 54(b) that is not contained in that Rule simply to save that litigant from his own failure to meet the time deadlines for filing an appeal with the United States Court of Appeals for the Third Circuit.

As background, JNESO is a labor organization as that term is defined by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq*. (Pet. App. A10). At all times relevant to this action, JNESO represented certain healthcare workers employed at St. Michael's Medical Center ("St. Michael's or "SMMC") located in Newark, New Jersey. (Pet. App. A10). Petitioner at all times relevant to this action was employed by St. Michael's as a certified respiratory therapist and as such a member of the bargaining unit that JNESO represents at St. Michael's. (Pet. App. A10).

This matter has its genesis in an incident occurring on or about February 10, 2013 when an asthma patient at St. Michael's began to experience acute breathing difficulty while she was undergoing a magnetic resonance imaging procedure ("MRI"). Generally, SMMC terminated Petitioner as a result of his refusal

to follow a physician's instructions in connection with administering proper care to that patient. (Pet. App. A10-11). More specifically, St. Michael's alleged that Juan acted unprofessionally in refusing to abide by the attending physician's, Dr. Koneru, request that Juan take the physician's order for a medication, albuterol, to St. Michael's pharmacy so that the medication could be obtained to assist the distressed patient, to the potential detriment of that patient. Based on this February 10, 2013 incident, St. Michael's initially suspended Juan without pay on February 14, 2013 pending investigation and thereafter terminated Juan on February 25, 2013.

JNESO timely grieved Juan's termination and after St. Michael's denied the grievance submitted the case to arbitration pursuant to JNESO's and St. Michael's Collective Bargaining Agreement before the New Jersey State Board of Mediation. Arbitrator John F. Tesauro, Sr. was appointed as the arbitrator to hear the case. (Pet. App. A11).

Arbitrator Tesauro previously served as the Executive Director of the New Jersey State Board of Mediation from 1976 through 2003. He also has extensive experience serving as a labor arbitrator and mediator in both public and private sector disputes. From 1955 through 1967, he served as President of Steelworkers Union Local 5092 and from 1956 through 1967 as Vice President of the AFL-CIO Bucks County, Pennsylvania.

The arbitration hearing was held on July 16, 2013 at which time St. Michael's presented certain witnesses, including Dr. Koneru, Human Resources Director Brendan Farrelly and Juan's supervisor, Respiratory Care Manager Jeanne Culliname. Juan testified on his own behalf. (Pet. App. 11). JNESO's

case was presented to Arbitrator Tesauro by its labor counsel.

On September 10, 2013, Arbitrator Tesauro rendered his decision finding that St. Michael's had established just cause to discipline and terminate Juan based on the incident of February 10, 2013. As such, Arbitrator Tesauro upheld the termination of Juan. (Pet. App. A11).

Juan conceded that on January 28, 2014, JNESO Labor Representative Meredith Larson notified him of Arbitrator Tesauro's adverse decision. Juan claimed, however, that he was not provided with a copy of that decision. (Pet. App. A11). Juan further alleged that by letter dated February 25, 2014 to then JNESO President Joan Campagna and other JNESO officials he claimed that JNESO had failed to present on his behalf at the arbitration what he deemed to be certain "favorable" evidence and inquired as to what steps JNESO was going to take now to redress what he perceived to be his "unjust termination." (Pet. App. A11).

Petitioner does not dispute that thereafter he received a copy of Arbitrator Tesauro's adverse decision on January 8, 2015 when same was provided to his attorney by JNESO. (Pet. App. A17).

In a correspondence to his attorney, Samuel J. Halpern, Esq., dated January 23, 2015, Juan further confirmed that he was made aware by JNESO on January 28, 2014 of Arbitrator's Tesauro's decision upholding his termination and that he was further made aware by JNESO of its decision of March 20, 2014 not to appeal Arbitrator Tesauro's adverse decision. He further conceded that he was aware by that time that his former co-worker and JNESO member, Judy Rivera, who was also terminated by St. Michael's in

regard to the incident leading to Juan's termination, had been successful in the arbitration brought on her behalf by JNESO against St. Michael's and was reinstated to her position with that entity. That decision was rendered on or about January 14, 2014 by a different arbitrator, Gary Kendellen, the former Regional Director for Region 22 of the National Labor Relations Board who became an arbitrator after retiring from the National Labor Relations Board. (Pet. App. A14).

On or about September 10, 2015, Juan filed a two (2) Count Complaint in the Superior Court of New Jersey, Law Division, Middlesex County, against JNESO and St. Michael's bearing Docket Number MID-L-5414-15. Count I of the Complaint alleged that JNESO breached its duty of fair representation as to Juan. Count II alleges that his termination by St. Michael's was due to his age and national origin in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.*[1] (Pet. App. A11-12). JNESO timely removed this action to federal court based on federal question jurisdiction on February 5, 2016. (Pet. App. A12).

In reviewing the Complaint filed by Juan it appeared that he was claiming in Count I, that JNESO allegedly breached its duty of fair representation,

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[1] St. Michael's on August 10, 2015 had filed a Chapter 11 Petition with the United States Bankruptcy Court District of New Jersey captioned *In re: Saint Michael's Medical Center*, Case No.: 15-24999-VFP. Said bankruptcy matter was pending at the time the lawsuit was filed, and upon information and belief is still pending. As such, the automatic stay provision of the United States Bankruptcy Code had at the time the Complaint was filed applied as to the claim against St. Michael's in the instant action. 11 U.S.C. § 362(a). (Pet. App. A19-21).

pursuant to 29 U.S.C. § 159(a), to him in its handling of the arbitration concerning his termination of employment. (Pet. App. A11-12).

JNESO filed a Motion to Dismiss that portion of Juan's Complaint applicable to JNESO pursuant to Federal Rule of Civil Procedure 12(b)(6) as time barred under the applicable six (6) month statute of limitations for bringing duty of fair representation claims against a labor union by a bargaining unit member. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 141, 169 (1983). Opposition to JNESO's Motion to Dismiss was filed on behalf of Juan. (Pet. App. A12).

In an Order entered July 7, 2016, the Honorable William J. Martini, U.S.D.J. informed the parties that pursuant to Federal Rule of Civil Procedure 12(d) he intended to convert the Motion to Dismiss to a Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. He further gave the parties until July 21, 2016 to submit any additional materials for the Court to consider prior to him rendering a decision. Neither party submitted any further materials to the District Court. (Pet. App. A17).

In an Opinion and an Order both entered July 27, 2016, Judge Martini granted summary judgment in favor of JNESO finding that Juan's claim was brought beyond the six-(6) month statute of limitations and therefore time-barred.[2] In so doing, Judge Martini

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[2] As the District Court determined that Juan's claim was time barred the District Court did not reach JNESO's alternative argument for dismissing the Complaint, that as pled it failed to state a valid claim of the breach of the duty of fair representation. (Pet. App. A11).

rejected Juan's contention that the Court should apply the discovery rule finding that Juan knew of JNESO's alleged wrongdoing underlying his claim against JNESO by no later than January 23, 2015, the date corresponding to his letter to his attorney. He further rejected Juan's argument that the doctrine of equitable tolling of the statute of limitations should apply finding that Juan had not been diligent in pursuing his claim. The District Court further found that to the extent Juan was alleging that JNESO's decision not to appeal Arbitrator Tesauro's decision constituted a breach of the duty of fair representation that claim was likewise time barred as the limitations period for such a claim commenced when the litigant becomes aware of the union's decision not to appeal the arbitrator's decision. The District Court found at the very latest, Juan knew of JNESO's decision not to appeal on January 23, 2015 when he explained his grievances with JNESO to his attorney, Mr. Halpern. (Pet. App. A10-18).

Juan appealed to the United States Court of Appeals for the Third Circuit which by Order dated August 1, 2017 remanded, without retaining jurisdiction, the case to the District Court in light of the fact that the appeal was interlocutory, due to the pending bankruptcy proceeding involving co-defendant St. Michael's, with instructions that the Court could certify the Judgment in favor of JNESO as final pursuant to Federal Rule of Civil Procedure 54(b) if it determined that its Order satisfied the Federal Rule of Civil Procedure 54(b) certification criteria. (Pet. App. A19-24).

Subsequent thereto by Order entered October 20, 2017, the District Court certified the July 27, 2016 Judgment in favor of JNESO as final. (Pet. App. A25-27). Mr. Juan did not thereafter file an appeal from

the October 20, 2017 Order certifying the July 27, 2016 decision as final.

On or about January 12, 2018, Juan entered into a Consent Order in the bankruptcy proceeding to lift the automatic stay to allow him to proceed against St. Michael's insurance carrier only in regard to the allegations contained in Count II of the Complaint. (Pet. App. A28-33). By letter dated, January 18, 2018, Mr. Halpern forwarded to the District Court a copy of the Consent Order entered in the St. Michael's bankruptcy proceeding and requested that the District Court remand the case to state court.

By letter dated January 23, 2018 to the Honorable William J. Martini, U.S.D.J., JNESO notified the Court as to its concerns regarding remanding the entire case back to the state court especially in light of the potential second appeal of the Court's Order dismissing Juan's claim against JNESO as certified by the Court as final on October 20, 2017. In that letter, JNESO advised the Court that its attorney had inquired of Mr. Halpern if by seeking to remand this case to the state court was it his client's intention to waive his federal claims against JNESO. In response, Mr. Halpern advised that he would need to speak with this client, but did not believe that Mr. Juan would do so. (Pet. App. A38-40).

On April 18, 2018, Juan filed a Motion to Remand the state law component of the case to state court. (Pet. App. A34-35). On May 7, 2018, JNESO filed its response to Juan's Motion to Remand. While JNESO took no position in regard to remanding that portion of the case concerning co-defendant St. Michael's, JNESO objected to remanding or keeping open Juan's claim against JNESO. In that regard, JNESO noted that the District Court by Order entered October 20,

2017 had certified the July 27, 2016 Judgment in favor of JNESO as final and as of that time Juan had not taken any steps to perfect his appeal in regard to the District Court's favorable decision for JNESO which it certified as final on October 20, 2017. As such, Juan should have filed a Notice of Appeal within the time parameters permitted under Federal Rule of Appellate Procedure 4(a)(1)(A) from the October 20, 2017 Order. He did not do so thereby waiving his right to appeal that decision or the July 27, 2016 decision.

By Order entered June 13, 2018, Judge Martini granted Juan's Motion to Remand his claim as against St. Michael's. As to Juan's claim against JNESO, Judge Martini agreed with JNESO, that Juan had 30 days to file a Notice of Appeal from the October 20, 2017 Order certifying the July 27, 2016 as final. His failure to do so forfeited his right to appeal now. (Pet. App. A41-45).

Rather than appeal from Judge Martini's June 13, 2018 Order, Mr. Juan instead filed a Motion to Reinstate his previously dismissed appeal with the United States Court of Appeals for the Third Circuit on or about July 12, 2018. (Pet. App. A2-3). On July 18, 2018, the United States Court of Appeals denied Mr. Juan's Motion to Reinstate. (Pet. App. A1).

REASONS FOR DENYING THE PETITION

I. The United States Court of Appeals Did Not Retain Jurisdiction Over This Matter Upon Remanding the Case to the District Court

Mr. Juan's application to this Court is based upon the faulty premise that by its August 1, 2017 Order, the United States Court of Appeals retained jurisdiction

over this matter after remanding same to the District Court to determine if the claim against JNESO can be certified as final pursuant to Federal Rule of Civil Procedure 54(b). In so doing, Juan has failed to identify anywhere in the Third Circuit's August 1, 2017 Order where it stated affirmatively that it was retaining jurisdiction over this matter after its remand to the District Court. (Pet. App. A19-21). Indeed, the cover letter from the Clerk of this Court specifically noted that the August 1, 2017 Order was that Court's "dispositive order in the above-captioned matter, which serves as the Court's judgment. Fed. R. App. P. 36." The Order further gave the parties notice of their rights to seek reconsideration or en banc consideration or to file a writ of certiorari and the time parameters for doing so. (Pet. App. A19-24).

It is a common practice among the Courts of Appeals to retain jurisdiction over an appeal while making a limited remand for additional findings or explanations. Basic illustrations of same include a "controlled remand to determine whether there is federal subject-matter jurisdiction," as well as "remands to determine justiciability or personal jurisdiction." 16 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 3937.1, pp. 847–48 (3d ed. 2012) (footnote omitted); *see, e.g.*, *Friery v. Los Angeles Unified Sch. Dist.*, 448 F.3d 1146, 1150 (9th Cir. 2006) (limited remand for Article III standing determination); *Fort Knox Music Inc. v. Baptiste*, 203 F.3d 193, 197 (2d Cir. 2000) (limited remand for personal jurisdiction determination); *Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc.*, 768 F.2d 189, 190–91 (7th Cir. 1985) (limited remand for diversity-of-citizenship determination).

Critically, in those cases, and absent in this case, is the Appellate Court stating that it was retaining

jurisdiction over the matter on the limited remand or otherwise directing the District Court to render a decision or take affirmative action by a date certain and report back to the Circuit Court. *See also In re Lipitor Antitrust Litigation*, 855 F.3d 126, 151–52 (3d Cir. 2017) (Court specifically retained jurisdiction over the appeal while the District Court resolved the diversity-of-citizenship issue and, if necessary, jurisdiction over the Daiichi Sankyo defendants); *National Ass'n of Home Builders v. Norton*, 325 F.3d 1165, 1168 (9th Cir. 2003) ("This matter is therefore remanded to the district court for the limited purpose of its granting or denying plaintiffs' motion for a Rule 54(b) certification. In making its determination, the district court should address how separation of judgment on the listing from judgment on the habitat complies with the statutory direction, 16 U.S.C. § 1533(a)(3)(A), that the listing and habitat determinations shall be made concurrently. Said motion shall be made promptly and, in no event, more than 21 days after the entry of this order. The district court is requested to rule on said motion promptly. This panel shall retain jurisdiction over this appeal. A certified copy of this order shall serve as the mandate of limited remand:").

Unlike in those cases, the United States Court of Appeals for the Third Circuit in its August 1, 2017 Order did not state that it was retaining jurisdiction or direct the District Court to take certain affirmative steps within a specified deadline or for the parties to report back to that Court upon the District Court certifying its Order of Dismissal as to JNESO as final. This Court simply remanded understanding that the decision regarding certification under Federal Rule of Civil Procedure 54(b) rested in the exclusive purview of the District Court judge.

Indeed, were this Court to accept Juan's invitation to reopen or reinstate an appeal that was dismissed without the Appellate Court retaining jurisdiction and without deadlines for the District Court to complete its assigned tasks on remand it would leave the case open for reinstatement for an indefinite length of time until, as in this case, Juan took the affirmative steps to reinstate the appeal. As such, JNESO would be prejudiced by being deprived of any finality in this case. Furthermore, such a ruling would ignore the fact that the District Court may never decide to certify the Order of Dismissal as final.

II. Plaintiff's Effort to Seek to Reinstate the Appeal is Simply a Ruse to Avoid the Consequences of his Failure to Timely Appeal from the Court's Rule 54(b) Certification Order.

In accordance with the directive of this Court in its Order of August 1, 2017, the District Court certified its July 27, 2016 Order as final pursuant to Federal Rule of Civil Procedure 54(b) on October 20, 2017. (Pet. App. A 25-27).

Under 28 U.S.C. § 1291, "[t]he courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States." Generally, an order which terminates fewer than all claims pending in an action or claims against fewer than all the parties to an action does not constitute a "final" order for purposes of 28 U.S.C. § 1291. *See Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427, 431–32, (1956); *Carter v. City of Phila.,* 181 F.3d 339, 343 (3d Cir. 1999). Under Federal Rule of Civil Procedure 54(b) ("Rule 54(b)"), however, a district court may convert an order adjudicating less than an entire action to the end that it becomes a "final" decision

over which a court of appeals may exercise jurisdiction under 28 U.S.C. § 1291.

In a case that is before a court of appeals pursuant to Rule 54(b), that Court's jurisdiction thus "depends upon whether the district court properly granted 54(b) certification." *Allis–Chalmers Corp. v. Phila. Elec. Co.,* 521 F.2d 360, 362 (3d Cir. 1975). Rule 54(b) (emphasis added) provides:

> Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties *only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated,* that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties *does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment* adjudicating all the claims and all the parties' rights and liabilities.

By allowing a district court to enter a final judgment on an order adjudicating only a portion of the matters pending before it in multi-party or multi-claim litigation and thus allowing an immediate appeal, Rule 54(b) "attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties." *Allis–Chalmers,* 521 F.2d at 363.

In the instant matter, the District Court's Order of October 20, 2017 certifying as final that Court's July 27, 2016 Order commenced the time period for Plaintiff to file a Notice of Appeal to this Court as that Order was a final order as to Juan's claim against JNESO.

"A final order is one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Welch v. Folsom,* 925 F.2d 666, 668 (3d Cir.1991). For purposes of appeals under 28 U.S.C. § 1291, "A summary judgment that fully disposes of all claims among all parties is final." 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc.: Juris.2d § 3914.28 (2d ed. 1992), at 202; *see Hampton v. Borough of Tinton Falls Police Dept.,* 98 F.3d 107, 111 (3d Cir. 1996) ("The district court granted summary judgment for the defendants as to all counts of plaintiffs' complaint. ... The district court's grant of summary judgment is a final order that disposed of all claims, and this court therefore has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.").

Because the Order of July 27, 2016 disposes of all claims with respect to JNESO that order was a final order within the meaning of 28 U.S.C. § 1291 as certified by this Court on October 20, 2017 and the time to appeal commenced on October 20, 2017.

Federal Rule of Appellate Procedure 4(a)(1)(A) requires that a notice of appeal be filed "with the district clerk within 30 days after the judgment or order appealed from is entered." It is a well-established rule that "[t]he time limits for filing a notice of appeal are 'mandatory and jurisdictional.'" *In re Rashid,* 210 F.3d 201, 204 (3d Cir. 2000) (quoting *Krebs Chrysler–Plymouth, Inc. v. Valley Motors, Inc.,* 141 F.3d 490,

495 (3d Cir. 1998)); *see, e.g., Browder v. Director, Dept. of Corrections of Illinois,* 434 U.S. 257, 264 (1978) (same); *U.S. v. Vastola,* 989 F.2d 1318, 1321 (3d Cir. 1993) (same). Here Mr. Juan never filed a Notice of Appeal from the October 20, 2017 Order. As the time period by which to file that Notice of Appeal long ago expired, the Third Circuit lacked jurisdiction to review the summary judgment granted in favor of JNESO by the District Court. *Selkridge v. United of Omaha Life Ins. Co.*, 360 F.3d 155, 160–61 (3d Cir. 2004).

Alternatively even if it could be argued that Juan could have timely appealed from the District Court's Order of June 13, 2018 remanding the claim against St. Michael's to state court and finding his claim against JNESO to be final and non-appealable he, once again, failed to do so.

Rather, to circumvent the mandatory time limits to appeal and his failure, on two (2) occasions, to timely file an appeal from the District Court's October 20, 2017 Order and the June 13, 2018 Order, respectively, Juan asked the United States Court of Appeals for the Third Circuit and now this Court to correct his oversight and reinstate his prior appeal. For the reasons noted above his request is improper and inconsistent with the directives of the United States Court of Appeals for the Third Circuit in its August 1, 2017 Order and the strict deadlines to appeal as stated in Federal Rule of Appellate Procedure 4. JNESO is entitled to finality of this matter and should not have to wait until such time as Juan decides to seek to come before the Third Circuit on an appeal that should have been filed with this Court over six (6) months ago prior to him filing his Motion to Reinstate. His Motion to Reinstate was simply a ruse to avoid the consequences of his failure to timely appeal the District Court's two (2) Orders.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Mr. Juan's Writ of Certiorari must be denied.

Respectfully submitted,

/s/ Raymond G. Heineman

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