

United States Court of Appeals For the First Circuit

No. 18-1532

DANIEL ROSARIO-GONZALEZ,

Plaintiff - Appellant,

v.

UNITED STATES (DEPARTMENT OF VETERANS AFFAIRS),

Defendant - Appellee.

Before

Howard, Chief Judge,
Lynch and Barron, Circuit Judges.

ORDER OF COURT

Entered: October 2, 2019

Plaintiff-appellant Daniel Rosario-Gonzalez's "Motion for Reconsideration," construed as a petition for rehearing, is denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Daniel Rosario-Gonzalez
Agnes I Cordero
Mariana E. Bauza Almonte
David O. Martorani-Dale
Billie Kathryn Debrason

Appendix D

United States Court of Appeals For the First Circuit

No. 18-1532

DANIEL ROSARIO-GONZALEZ,

Plaintiff - Appellant,

v.

UNITED STATES (DEPARTMENT OF VETERANS AFFAIRS),

Defendant - Appellee.

Before

Howard, Chief Judge,
Lynch and Barron, Circuit Judges.

JUDGMENT

Entered: September 9, 2019

Plaintiff-appellant Daniel Rosario-Gonzalez appeals pro se from the district court's dismissal with prejudice, pursuant to Fed.R.Civ.P. 41(b), of his malpractice and wrongful death suit against the United States (Veterans Administration Medical Center San Juan), which defendants had removed to federal court. The district court dismissed the complaint for "serial noncompliance with Court orders." May 17, 2018 Order, Dkt # 80, p. 2.

Appellant objects to the dismissal with prejudice, contending that defendant's motion to dismiss the complaint conceded that the court lacked subject matter jurisdiction. But, the United States had moved to dismiss for lack of personal jurisdiction, owing to plaintiff's failure to properly effect service of process. See Defendant's Motion to Dismiss, Dkt # 14. Under Rule 41(b), a district court may dismiss an action if the plaintiff "fails to prosecute or to comply with [the Federal Rules] or a court order." Here, it appears that Rosario-Gonzalez did all three. He failed to prosecute by failing to effect service on defendants; he failed to comply with Fed.R.Civ.P. 4(m), requiring service of process "within 90 days after the complaint is filed;" and he failed to obey repeated orders of the court to complete service of process.

While failure to complete timely service of process "will lead to a dismissal without prejudice; further delay by the plaintiff, or a delay following an extension of time for serving the process, can lead to a dismissal with prejudice under Rule 41(b)." 9 Wright and Miller, Federal

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Practice & Procedure § 2370 (3d ed.); see also O'Rourke Bros. Inc. v. Nesbitt Burns, Inc., 201 F.3d 948, 953 (7th Cir. 2000).

Given that Rosario-Gonzalez repeatedly and vociferously asserted that he did not want to pursue his case in the federal courts, which have exclusive jurisdiction over his FTCA claims, see 28 U.S.C. 1346(b)(1), dismissal with prejudice was appropriate.

Affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc:

Daniel Rosario-Gonzalez

Agnes I Cordero

Mariana E. Bauza Almonte

David O. Martorani-Dale

Billie Kathryn Debrason

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

DANIEL ROSARIO GONZÁLEZ,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 16-2824 (DRD)

17-2143 (DRD)

JUDGMENT

Pursuant to the Court's Order (Docket No. 80) the Court hereby enters final judgment **DISMISSING THE INSTANT CASE WITH PREJUDICE** for plaintiff, Daniel Rosario González' serial noncompliance with Court orders.

THIS CASE IS NOW CLOSED FOR ALL ADMINISTRATIVE AND STATISTICAL PURPOSES.

IT IS SO ORDERED, ADJUDGED AND DECREED.

In San Juan, Puerto Rico, this 17th day of May, 2018.

S/ Daniel R. Dominguez

Senior U.S. District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

DANIEL ROSARIO GONZÁLEZ,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL NO. 16-2824 (DRD)

17-2143 (DRD)

Consolidated Cases

ORDER

On October 13, 2016, defendant, United States of America (Department of Veterans Administration) filed a *Notice of Removal* in case titled *Daniel Rosario-Gonzalez v. United States of America*, Civil Case Number DAC2016-0566 (703) before the Puerto Rico Court of First Instance, Bayamón Superior Court. See Docket No. 1. The removal was brought pursuant to Federal Officer Removal Statute, 28 U.S.C. § 1442 and Title 28 U.S.C. §§ 1446, 2679, since it is a civil tort claim for money damages against the Federal Government of the United States of America.¹ *Id.*; see also 42 U.S.C. § 233(C). As such, the District Court has exclusive jurisdiction over the instant claim. 28 U.S.C. § 1346(b)(1).

Upon the removal to Federal Court, the United States submitted it had not been properly served with process by Plaintiff, Daniel Rosario González, in clear violation of Fed. R. Civ. P. 49(i)(1) and 4(m). See Docket No. 14. As such, on September 30, 2017, the Court quashed the process of service and “plaintiff [was] granted a term of 90 days from the date of issuance of

¹ The defendant is the VA Caribbean Healthcare System also known as the Veterans Hospital.

Appendix A

[the] Order to complete service of process [upon the United States] in full compliance with Fed. R. Civ. P. 4(i)(1).” See Docket No. 52. Plaintiff refused to complete the service of process upon the United States and insisted on a dismissal without prejudice of the instant claim and a return of the same to the Puerto Rico Court of First Instance. See Docket No. 56.

Due to Plaintiff’s refusal to comply with the Court Order at Docket No. 52, the Court entered an Order wherein the Court once again stressed that,

“the District Court “. . . shall have **exclusive jurisdiction** of civil actions on claims against the United States, for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” 28 U.S.C. § 1346(b)(1). (Emphasis ours). Inasmuch as Plaintiff’s wrongful death and medical malpractice torts claim action against the United States falls under the Federal Tort Claims Act, the Federal Court has exclusive jurisdiction over those claims. See 28 U.S.C. § 2671, et seq.

Docket No. 59. Further, the Court forewarned that “[e]ither Plaintiff accepts that the instant case falls within federal jurisdiction or he is going to find himself in a potential judgment adverse to his interest. Since this would be the second dismissal of the instant case, the same would have to be with prejudice.” *Id.* Accordingly, Plaintiff was ordered to complete service of process upon the United States within the 90-day period granted by the Court or he would face a dismissal with prejudice of the instant claim.

Plaintiff once again disregarded Court orders and filed a *Response to Docket 59* wherein he ordered the Court to dismiss the instant action without prejudice. See Docket No. 60. Subsequently, Plaintiff filed a motion entitled *Jurisprudence by which Puerto Rico’s District Court Judges Must Abide* (Docket No. 61) wherein Plaintiff renewed his request for dismissal of the instant case without prejudice. Accordingly, the Court denied Plaintiff’s motion and issued the following Order:

"ORDER denying 61 Motion to Dismiss for Lack of Jurisdiction. Plaintiff is ordered to complete service of process upon the United States of America, in full compliance with Fed. R. Civ. P. 4(i)(1) by January 31, 2018. Failure to comply with the Court's Order will result in a dismissal of the instant claim. NO FURTHER EXTENSIONS WILL BE GRANTED. See Order at Docket No. 57 for further details."

Docket No. 62. Plaintiff renewed his request for dismissal without prejudice and once again refused to comply with the Court orders. See Docket No. 65.

Considering Plaintiff's reiterated noncompliance with Court orders, he was provided until May 18, 2018 to show cause why the instant case should not be dismissed with prejudice for lack of prosecution and reiterated failure to comply with this Court's orders pursuant to Fed. R. Civ. P. 41(b). See Docket No. 77. Plaintiff once more renewed his request for dismissal without prejudice and refused to comply with Court orders. See Docket No. 79.

Consequently, after having provided the Plaintiff two (2) opportunities in the instant case and a prior opportunity in case number 09-cv-2200 (DRD) for the same set of events, the Court **DISMISSES** the instant action **WITH PREJUDICE**² for Plaintiff, Daniel Rosario González' serial noncompliance with Court orders. See *Hawke Capital Partners, L.P. v. Aeromed Servs. Corp.*, 300 F.R.D. 52, 57 (D.P.R. 2014) (citing *Torres- Alamo v. Puerto Rico*, 502 F.3d 20, 25 (1st Cir. 2007)); Fed R. Civ. P. 41(b). Judgment is to be entered accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, on this 17th day of May, 2018.

S/Daniel R. Domínguez
Daniel R. Domínguez
United States District Judge

² Given that the instant case is a successive claim for the same damages, the dismissal must be with prejudice. See *Daniel Rosario-González v. United States of America, et al.*, civil case no. 09-cv-2200 (DRD); see also Fed. R. Civ. P. 41(a)(B).