

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

December 11, 2019

Elisabeth A. Shumaker
Clerk of Court

ALI MEHDIPOUR,

Plaintiff - Appellant,

v.

CITY OF MIDWEST CITY, a political subdivision and municipality; CITY OF OKLAHOMA CITY, a political subdivision and municipality; BRETT BAKER, Individually, a Midwest City Police Officer; BRADLEY CONLEY, Individually, an Oklahoma City Police Officer; BRUCE GLOVER, Individually, a Midwest City Police Officer; JEREMY ZUNIGA, Individually, a Midwest City Police Officer; JEFF COFFEY,

Defendants - Appellees.

No. 19-6021
(D.C. No. 5:17-CV-00298-G)
(W.D. Okla.)

ORDER

Before TYMKOVICH, Chief Judge, PHILLIPS and McHUGH, Circuit Judges.

Appellant Ali Mehdipour seeks to appeal the district court's denial of his motion to vacate a previously-entered order. [See ECF No. 56 (denying motion to vacate ECF No. 48)]. This matter is now before the court following receipt and review of all parties' principal briefs, Mehdipour's *Motion for Extension of Time to Supplemental [sic] Brief* (the "Motion"), the supplemental brief Mehdipour tendered with the Motion, and Mehdipour's reply brief. As a preliminary matter, the court construes the Motion as a

Appendix "A"

motion to file a supplemental brief, grants the Motion as construed, and directs its Clerk to accept the supplemental brief Mehdipour tendered with the Motion as filed.

Upon consideration of the parties' briefs, the district court's docket, and the applicable law, the court dismisses Mehdipour's appeal as prematurely filed for the reasons set forth below.

A. Procedural History Before Appeal

Mehdipour—then proceeding through counsel although now proceeding pro se—filed a complaint against the City of Oklahoma City (“Oklahoma City”) and the City of Midwest City (“Midwest City”), three individuals employed as Midwest City police officers (Brett Baker, Bruce Glover, and Jeremy Zuniga) and one individual employed as an Oklahoma City police officer (Bradley Conley). After motions practice, the district court permitted Mehdipour to file a First Amended Complaint, in which he again named Oklahoma City, Midwest City, and Officers Baker, Glover, and Zuniga. He did not rename Officer Conley as a defendant, but instead joined another Oklahoma City police officer (Jeff Coffey). In both complaints, Mehdipour sought money damages under both federal and state law for his alleged unlawful arrest and prosecution.

On defendants' motions, the district court dismissed all claims except a state law trespass claim against Oklahoma City. [ECF Nos. 15, 38-43]. Oklahoma City sought leave to file a second motion to dismiss Mehdipour's trespass claim. In lieu of filing a response, Mehdipour's counsel submitted a stipulation to dismiss the last remaining claim without prejudice, which Oklahoma City's counsel also signed. [ECF No. 46]. Because

no unresolved claims appeared to remain against any defendant, the Clerk of the district court terminated the matter in her records on December 14, 2017.

More than four months later, Mehdipour—then proceeding pro se—filed a document titled “Notice of Abandonment of Counsel” [ECF No. 47], complaining that his attorney had abandoned him and he had just discovered that his case had been dismissed. Mehdipour stated that he “believe[d] a Rule 59 or 60 motion [was] in order to reopen the case, and request[ed] leave of the Court to file such a motion, or in the alternative, for the Court to instruct [him] . . . how to proceed.” [Id.].

The district court entered an order on April 30, 2018: (a) observing that, “[o]n December 14, 2017, Mehdipour ‘by and thr[ough] his attorney of record[,] and the City . . . filed a Joint Stipulation of Dismissal Without Prejudice,’ (b) advising Mehdipour that it could not provide legal advice or tell him how to prosecute the matter; and (c) to the extent Mehdipour sought additional time to file a motion under Rule 59 or 60(b), denying that request. [ECF No. 48 (citing Fed. R. Civ. P. 6(b)(2) (court must not extend time to act under Fed. R. Civ. P. 59(b), (d), and (e) and 60(b))].

Some seven months later, Mehdipour filed a Motion to Vacate the Court’s Order of April 30, 2018 [ECF No. 50], which he denominated a Rule 60(b) motion and in which he argued that vacatur of the district court’s April 30, 2018 Order is warranted since his attorney was not authorized to dismiss his trespass claim against Oklahoma City and the court thus erred in terminating the action based on the parties’ stipulation. On January 22, 2019, the district court denied the motion to vacate, as well as Mehdipour’s separate motion to terminate his counsel. [ECF No. 56]. Mehdipour then filed a notice of his intent

to appeal “the Order of dismissal of this action entered on January 22nd, 2019.” [ECF No. 57].

B. Procedural History Following Appeal

Upon opening of the appeal, this court issued a jurisdictional show cause order, questioning whether the district court case was final because: (1) the stipulation dismissing the trespass claim against Oklahoma City was not signed “by all parties who [had] appeared,” Fed. R. Civ. P. 41(a)(1)(A)(ii), and thus appeared not to be self-executing, *Anderson-Tully Co. v. Fed. Ins. Co.*, No. 08-5524, 2009 WL 3048388, **5 (6th Cir. 2009) (unpublished) (holding that a Rule 41(a)(1)(A)(ii) stipulation was not effective because it was not signed by all parties who had appeared); and (2) even if the stipulated dismissal was self-executing, it was a dismissal without prejudice and “[p]arties may not confer appellate jurisdiction upon [this court] by obtaining a voluntary dismissal without prejudice of some claims so that others may be appealed.” *Heimann v. Snead*, 133 F.3d 767, 769 (10th Cir. 1998) (per curiam).

Mehdipour responded to the show cause order by requesting a stay in this court and moving for certification in the district court under Fed. R. Civ. P. 54(b). This court abated the appeal pending the district court’s determination of the motion for Rule 54(b) certification. The district court denied Rule 54(b) certification, holding that: (1) the stipulation to dismiss Mehdipour’s state-law trespass claim against Oklahoma City was not self-executing; and (2) because the stipulation was not self-executing, Mehdipour’s trespass claim against Oklahoma City had not been disposed of and thus could not be deemed final. [ECF No. 64]. The district court then declined to exercise supplemental

jurisdiction over the trespass claim, dismissed it, and entered judgment by separate order. [Id.; ECF No. 65]. In compliance with this court’s jurisdictional show cause order, Mehdipour provided a copy of ECF No. 65 to this court, but did not file a new or amended notice of appeal.

For the reasons discussed below, this court lacks jurisdiction to review the January 22, 2019 order denying the motion through which Mehdipour sought to vacate both the district court’s April 30, 2018 order and the termination of the action based on the joint stipulation of dismissal of his trespass claim against Oklahoma City.

C. Analysis

Except in limited circumstances, this court’s appellate jurisdiction is limited to review of final decisions. 28 U.S.C. § 1291; *see also Albright v. Unum Life Ins. Co.*, 59 F.3d 1089, 1092 (10th Cir. 1995) (“Under § 1291, we have jurisdiction only over ‘final’ decisions of the district court—that is, those decisions that leave nothing for the court to do but execute judgment.” (citation and internal quotation marks omitted)).

When the district court entered its January 22, 2019 order disposing of Mehdipour’s “Rule 60(b)” motion to vacate, it had not yet disposed of all of Mehdipour’s claims. Accordingly, at that time and in the absence of the district court’s designation of final judgment on fewer than all of Mehdipour’s claims pursuant to Rule 54(b), the district court retained the ability to revise “any order or other decision, however designated” *See Fed. R. Civ. P. 54(b); see also Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983) (“[E]very order short of a final decree is subject to reopening at the discretion of the district judge.”); *Wagoner v. Wagoner*, 938

F.2d 1120, 1122 n.1 (10th Cir. 1991) (purported Rule 59 motion was, in reality, “nothing more than an interlocutory motion invoking the district court’s general discretionary authority to review and revise interlocutory rulings prior to entry of final judgment”).

Neither Mehdipour’s reference to Rule 60(b) in his motion to vacate the April 30, 2018 order and the joint stipulation of dismissal—nor the district court’s reference to that Rule in its order denying that motion—confer finality on the district court’s proceedings: a Rule 60(b) motion can only follow a “judgment,” which the district court’s order here is not for the reasons set forth above. *See Fed. R. Civ. P. 60(b); Home Loan Inv. Co. v. St. Paul Mercury Ins. Co.*, 827 F.3d 1256, 1270 n.12 (10th Cir. 2016) (“[W]e look beyond the form of the motion to the substance of the relief requested.” (citation and internal quotation marks omitted)).

The order Mehdipour seeks to appeal did not follow a judgment and likewise did not itself end the litigation on the merits. Instead, the district court subsequently entered an order effectively revisiting that order, vacating the dismissal of Mehdipour’s trespass claim against Oklahoma City on the basis of the stipulation of dismissal, but instead declining to exercise supplemental jurisdiction over that claim and dismissing it without prejudice on that basis. [*See* ECF No. 64].

Further, Mehdipour’s notice of appeal is not subject to ripening pursuant to Federal Rule of Appellate Procedure 4(a)(2), which rule provides that “[a] notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.” Although the

district court has since dismissed Mehdipour's trespass claim against Oklahoma City and entered judgment by separate order, the application of Rule 4(a)(2) extends only to decisions "that *would be* appealable if immediately followed by entry of judgment."

FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 276 (1991) (emphasis in original). Rule 4(a)(2) does not apply to "clearly interlocutory decision[s]" like the district court's order denying vacatur of the dismissal of a claim that the district court subsequently revisited and effectively vacated on a different basis. *See id.*; *see also Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 778 (10th Cir. 1993) (holding that, under Rule 4(a)(2), "a premature notice of appeal retains its validity only when the order appealed from is likely to remain unchanged in both its form and its content").

"When prematurity of a notice of appeal cannot be 'cured' by Rule 4(a)(2), the aggrieved party must await a final judgment before filing a notice of appeal to challenge the allegedly erroneous ruling." *Constien v. United States*, 628 F.3d 1207, 1210 (10th Cir. 2010). Following the initiation of this appeal, the district court entered final judgment. However, the notice of appeal Mehdipour filed on February 13, 2019 was filed prematurely and is insufficient to appeal either the subsequently-entered order dismissing the trespass claim on different grounds or the district court's entry of final judgment. *See id.*, 628 F.3d at 1210 (noting that "a premature notice of appeal may be a legal nullity in some circumstances"). Mehdipour could have—but did not—file a second notice of appeal in accord with the Federal Rules of Appellate Procedure. *See, e.g.*, Fed. R. App. P. 4. Accordingly, this court is without jurisdiction to review the order Mehdipour seeks to appeal.

APPEAL DISMISSED.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk



by: Lisa A. Lee
Counsel to the Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ALI MEHDIPOUR,

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CITY OF MIDWEST CITY et al.,

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Defendants.

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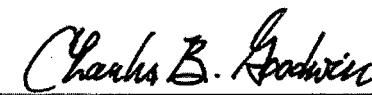
Case No. CIV-17-298-G

JUDGMENT

In accordance with the Court's Orders of June 15, 2017, November 29, 2017, and June 20th, 2019:

- (1) the Court declines to exercise supplemental jurisdiction over Plaintiff's state-law trespass claim against Defendant City of Oklahoma City; and
- (2) Plaintiff's remaining federal and state-law claims are dismissed without prejudice.

DATED this 20th day of June, 2019.


CHARLES B. GOODWIN
United States District Judge