No.

IN THE
Supreme Court of the United States

Y.W.,

Petitioner,

v.

PATRICIA AUFIERO,

Respondents.

On Petition for Writ of Certiorari
To the Court of Appeals for The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Whether the mere using of the word "dismissed" is enough to make an order final within the meaning of 28 U.S.C. 1291, where the without prejudice dismissal is the result of an anticipated settlement and allows the claim to continue at a later date if the settlement fails?

2. Whether the Court's holding in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 198 L. Ed. 2d 132 (2017) applies to a claim dismissed without prejudice?

3. Whether finality would attach to an order dismissing an action without prejudice where further developments might continue the claim?

PARTIES TO THE PROCEEDINGS

The petitioner is Y.W.

The Respondents are PATRICIA AUFIERO, UNKNOWN TEACHER and NEW MILFORD BOARD OF EDUCATION.

The settled parties are KIMBERLY ROBERTS and VERONICA ZERON.

There were no other named parties in this action below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

TABLE OF APPENDICES

Page(s)

Y.W. respectfully petitions for a writ of certiorari from a dismissal by a motions panel for the U.S. Court of Appeals for the Third Circuit ("Third Circuit").

In the last term, the Court deferred a similar question "whether finality would attach to an order denying stay relief if the bankruptcy court enters it 'without prejudice' because further developments might change the stay calculus." *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 592, 205 L. Ed. 2d 419 (2020). The same principle is presented here whether finality would attach to an order dismissing an action without prejudice where further developments might continue the claim.

ORDERS BELOW

On April 27, 2020, a Third Circuit motions panel dismissed Y.W.'s appeal for lack of appellate jurisdiction; Hon. Kent A. Jordan dissented. (a1). On June 1, 2020, the Third Circuit denied rehearing en banc. Both were rendered without any opinion. (a5).

JURISDICTION

The United States District Court of New Jersey had Jurisdiction under 42 USC 1983. On June 1, 2020, the Third Circuit denied a timely petition for rehearing. (a5). Under 28 USC 1254(1), the Court has the "power to review a court of appeals' decision to dismiss for lack of jurisdiction." (*Hohn v. United States*, 524 U.S. 236, 247 (1998)). Timeliness fits U.S. Sup. Ct. R. 13.1, 13.3 (as extended by Order dated March, 19, 2020).

PROVISIONS INVOLVED

28 USC 1291 in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . ."

Rule 41 of Federal Rules of Civil Procedure ("FRCP") in relevant parts: (a) Voluntary Dismissal.

> (1) By the Plaintiff. (A) Without a Court Order. …the plaintiff may dismiss an action without a court order by filing: … (ii) a stipulation of dismissal signed by all parties who have appeared. (B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice . . .
>
> (2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. . . Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

RELEVANT DATES

District Court dismisses with prejudice Patricia Aufiero, Unknown Teacher, and New Milford Board of Education. (a11)	Sep. 10, 2015
District Court dismisses action in anticipation of settlement with Kimberly Roberts and Veronica Zeron. (a9)	Nov. 8, 2018
Stipulation of discontinuance is filed. (a8)	Aug. 7, 2019
District Court enters final order directing the Clerk to close the case. (a7)	Aug. 8, 2019

Y.W. filed notice of appeal. (a13)	Aug. 14, 2019
Third Circuit orders the parties to answer when the time to appeal began, November 8, 2018 or August 8, 2019. (a3)	Aug. 23, 2019
Third Circuit dismisses appeal. (a1)	Apr. 27, 2020
Rehearing en banc is denied. (a5)	Jun. 1, 2020

STATEMENT OF THE CASE

1. Petitioner Y.W. filed a 42 USC 1983 action. On September 10, 2015, the District Court dismissed with prejudice Patricia Aufiero, Unknown Teacher, and New Milford Board of Education (hereinafter "respondents") and continued the action against Kimberly Roberts and Veronica Zeron individually ("Roberts-Zeron"). (a11).

After summary judgment, on November 8, 2018, the District Court facilitated settlement between Y.W. and Roberts-Zeron ("settling parties") and placed a tentative settlement on the record, as anticipated upon (i) negotiating and executing a release, (ii) nonparty, the State of New Jersey indemnifies Roberts-Zeron, making the settlement depended on an internal State process requiring a stipulation of discontinuance with prejudice against Roberts-Zeron, and (iii) twelve weeks for settlement funds to arrive. (a10). Respondents did not participate in the settlement process.

Shortly thereafter, the District Court *sua sponte* dismissed the action stating, the parties "indicated that the action has been settled and the terms of the settlement having been placed on the record in open court"

("November Order"). (a9). The dismissal came without prior notice or request by either party. (a10).

The settling parties knew that the November Order is not final, the action will continue to trial should settlement fail. So, when settlement finalized, on August 7, 2019, the settling parties' filed discontinuance and requested a final order disposing of the action. (a7).

On August 8, 2019, the District Court entered a final order pursuant to NJ R USDCT L.Civ.R. 41.1(b) and FRCP Rule 41(a)(2) disposing of the action and directing the Clerk of the District Court to close the case ("Final Order"). (a7). On August 14, 2019, Y.W. filed a notice of appeal for the dismissal of respondents. (a13).

2. On August 23, 2019, the Clerk for the Third Circuit ordered the parties to respond: "Given the two dismissal orders, however, it is unclear whether Appellant's time to appeal the 2015 order ran from the date of entry of the November 8, 2018 order or the August [8], 2019 order. If the time to appeal began in November 2018, then the notice of appeal would be untimely." (a3).

3. On April 27, 2020, the Third Circuit in one sentence (a1-2), without oral argument, held:

> After considering the parties' responses regarding jurisdiction, the plaintiff's appeal is DISMISSED for lack of appellate jurisdiction.
>
> Judge Jordan dissents from this aspect of the order and would refer the jurisdictional issue to a merits panel.

On May 4, 2020, Y.W. timely sought rehearing *en banc* and was denied on June 1, 2020. (a5).

4. The uncertainty came from the following: (i) the November Order only "dismissed" the matter, the Final Order was "a final order disposing of this action"; (ii) the November Order did not state whether it is intended as a final disposition, the Final Order did that; (iii) the November Order did not state whether it is with prejudice, the Final Order did that; (iv) the November Order lacks any direction to the clerk, such as closing the case or issue judgment, the Final Order directs that; and (v) the November Order came *sua sponte* without prior notice to, or request by, the settling parties.

It is submitted that the Third Circuit held the November Order created finality while aware that under FRCP 41(a)(1) and (a)(2) the dismissal was without prejudice. Even assuming the dismissal was with prejudice, the claim would continue if the settlement failed.

REASONS FOR GRANTING THE WRIT

THE THIRD CIRCUIT CONTRAVENES WITH *MICROSOFT CORP. V. BAKER* (2017) BY GIVING FINALITY TO A WITHOUT PREJUDICE DISMISSAL OF AN ACTION WHEN THE CLAIM CAN CONTINUE OR REVIVE.

1. In *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 198 L. Ed. 2d 132 (2017), the Court held that finality must be "determined" from an inability to "revive" the remaining claim. *Id*. The Court cited "the general rule has been that the whole case and every matter in controversy in it must be decided in a single appeal." *Id* at

1712. One "cannot transform a tentative interlocutory order, into a final judgment within the meaning of § 1291 simply by dismissing their claims with prejudice—subject, no less, to the right to 'revive' those claims." *Id.* Can finality attach to a dismissal without prejudice if the claim can continue in the same action?

2. In *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001), the Court adopted the definition of Black's Law Dictionary (7th ed. 1999) and held the FRCP 41(a) "primary meaning of 'dismissal without prejudice, we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim." *Id.* The without prejudice dismissal only "removed [the case] from the court's docket." *Id* at 506. That said, the claim can revive after a dismissal without prejudice.

Semtek holds that a dismissal without prejudice leaves the claim alive and allows the claim to return later. *Microsoft* holds that if a claim can revive after dismissal there is no finality, as the claim is still actionable. Together, they present the principle that a FRCP 41(a) dismissal without prejudice of an action, where the claim can continue or revive, prevents "final decision" of 28 USC § 1291 from operating.

The November Order was without prejudice under FRCP 41(a)(1)(B) or (a)(2) and was premised on a pending settlement where the action would continue for trial if the settlement fell through. The same was held in the case antecedent to *Microsoft*: "In view of the tentative nature of the settlement, this case is not moot."

Coopers & Lybrand v. Livesay, 437 U.S. 463, 466 (1978). Yet, the Third Circuit conflicts with *Microsoft* when it held that the dismissal without prejudice on a tentative settlement created finality.

3. In the Third Circuit there is no "distinctions within the universe of dismissals," when the district court dismisses a "case without prejudice" it is deemed "final and appealable." *Blair v. Scott Specialty Gases*, 283 F.3d 595, 602 (3d Cir. 2002) . In 2013, *Blair* was expanded to hold that "when the district court dismisses the case without prejudice" a "separate action" is required to revive the claim. *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 246–47 (3d Cir. 2013). "Even dismissals without prejudice have been held to be final and appealable if they end the suit so far as the District Court was concerned." *Doe v. Hesketh*, 828 F.3d 159, 165 (3d Cir. 2016), *State Nat'l Ins. Co. v. Cty. of Camden*, 824 F.3d 399, 408 (3d Cir. 2016).

In 2018, after *Microsoft*, the Third Circuit still follows and holds the *Blair* precedent as "true even though the dismissal was without prejudice." *Cup v. Ampco Pittsburgh Corp.*, 903 F.3d 58, 62 (3d Cir. 2018).

The Third Circuit's precedent of *Blair* and *Freeman* cannot be reconciled with *Microsoft*.[1] Specifically, *Semtek* holds that a dismissal without prejudice allows

[1] Except in the limited context of appealing a dismissal without prejudice as "a final decision with respect to an arbitration." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414, 203 L. Ed. 2d 636 (2019). 9 USC 16(a)(3) provides the exception and is inapplicable to FRCP 41(a) settlements.

a party to revive a claim before the same court and *Microsoft* holds that if a claim can be revived after dismissal there is no finality.

Freeman gave finality to the November Order to a dismissal without prejudice, with the understanding that if settlement fails, Y.W. could not continue the claim in the same action under *Semtek*, but would have to bring a separate action. Thus, the Third Circuit under *Freeman* attached finality to the November Order.

The Third Circuit's holding, if not reversed, attaches appellate jurisdiction to an order not yet final. This assumes appellate jurisdiction in an extemporaneous manner by prematurely giving a losing party the advantage of appellate jurisdiction when its remaining claim can continue or revive, all while depriving proper appellate jurisdiction from the party who awaits until the case is completely final.

Indeed, the Third Circuit's precedent as applied is a trap for the unwary and creates a guessing procedure. A lawyer would need to file a notice of appeal from every tentative dismissal order to avoid malpractice. This practice encourages premature notices of appeal leading to a superfluous undertaking and multiplicitous proceedings. A similar example occurred in *Weber v. McGrogan*, 939 F.3d 232 (3d Cir. 2019) where neither party knew and understood whether the district court's action created finality.

I. THE CIRCUITS CONFLICT ON WHETHER AN APPEAL MAY BE TAKEN BY VOLUNTARY DISMISSING CLAIMS OR PARTIES FROM AN ACTION.

The presented controversy is frequently so close a question that "[t]he federal courts of appeals have issued conflicting decisions on whether and when a voluntary dismissal without prejudice constitutes a final judgment for purposes of appeal." *Dukore v. D.C.*, 799 F.3d 1137, 1140 (D.C. Cir. 2015). "Where the voluntary dismissal is without prejudice to refiling the dismissed claims, … there is no similarly universal consensus. Some circuits allow dismissals without prejudice to finalize trial court proceedings for appellate review at least some of the time." *Blue v. D.C. Pub. Sch.*, 764 F.3d 11, 17 (D.C. Cir. 2014). Albeit *Microsoft*, this conflict persists.

The following is a synopsis of the ongoing conflict in the Circuits. By no means are they exhaustive, as the Eleventh Circuit noted: "Our precedent splinters in multiple directions on whether voluntary dismissals without prejudice are final." *Corley v. Long-Lewis, Inc.*, 965 F.3d 1222, 1228 (11th Cir. 2020).

1. The Ninth and Eleventh Circuits hold there is finality from dismissal of an action even when it is without prejudice. *California Ins. Guarantee Ass'n v. Azar*, 940 F.3d 1061, 1067 n. 4 (9th Cir. 2019), and *Corley v. Long-Lewis, Inc.*, 965 F.3d 1222, 1228 (11th Cir. 2020).

In the exact opposite direction, the Second, D.C., Ninth and Tenth Circuits hold that a dismissal without

prejudice does not create finality. *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207, 210 (2d Cir. 2005), *Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1026 (D.C. Cir. 2020), *Galaza v. Wolf*, 954 F.3d 1267, 1272 (9th Cir. 2020), and *Eastom v. City of Tulsa*, 783 F.3d 1181, 1184 (10th Cir. 2015).

2. In one line of cases, the Third Circuit held that an order closing a case after "the full and final settlement" is not a "final decision" even if there was a mistaken assumption that litigation has terminated. *Penn W. Assocs., Inc. v. Cohen*, 371 F.3d 118, 128 (3d Cir. 2004). An "order dismissing a complaint without prejudice is not a final and appealable order." *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 460 F.3d 470, 477 (3d Cir. 2006). "Where a dismissal is without prejudice, the judgment may not be final and appealable under 28 U.S.C. § 1291." *Palakovic v. Wetzel*, 854 F.3d 209, 219 (3d Cir. 2017). The "dismissal without prejudice did not provide for appellate jurisdiction." *Weber v. McGrogan*, 939 F.3d 232, 242 (3d Cir. 2019).

In the exact opposite direction, the Third Circuit held that "even dismissals without prejudice have been held to be final and appealable if they end the suit so far as the District Court was concerned." *Doe v. Hesketh*, 828 F.3d 159, 165 (3d Cir. 2016), *Cup v. Ampco Pittsburgh Corp.*, 903 F.3d 58, 62 (3d Cir. 2018), *Blair v. Scott Specialty Gases*, 283 F.3d 595, 602 (3d Cir. 2002), and *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 246–47 (3d Cir. 2013).

3. A panel for the Fourth Circuit attempted to "reconcile conflicting cases" as "the earliest opinion controls,"

and held "an order dismissing an action without prejudice" is appealable. *Bing v. Brivo Sys., LLC*, 959 F.3d 605, 614 (4th Cir. 2020). One week later, a panel for the Fourth Circuit utilized *Bing* to distinguish *Microsoft* as weighing finality on whether a case is "practically over" instead of "legally over" under the assumption that the *Microsoft* "appeal did not turn on the merits of the legal claims that they asserted." *Affinity Living Grp., LLC v. StarStone Specialty Ins. Co.*, 959 F.3d 634, 638 (4th Cir. 2020).

4. The Fifth Circuit in 2013 recognized "whether a voluntary dismissal could be a 'proceeding'" to qualify as final is "in conflict with every other circuit to have considered the same question." *Yesh Music v. Lakewood Church*, 727 F.3d 356, 362 (5th Cir. 2013). In 2020, an en banc court acknowledged the conflict without resolving it, and held claims "dismissed without prejudice" are "as if they are still before the district court, which they could be at any moment." *Williams v. Seidenbach*, 958 F.3d 341, 348 (5th Cir. 2020) (en banc). One week later, a panel for the Fifth Circuit held *Williams* "did not end up overruling our decades-old caselaw holding that there is not an appealable final judgment when some claims are dismissed without prejudice." *CBX Res., L.L.C. v. ACE Am. Ins. Co.*, 959 F.3d 175, 176 (5th Cir. 2020). Two months later, a different panel reached the opposite holding, "the dismissal of an action – whether with or without prejudice – is final and appealable …. the judgment should be read that way because … it looks both ways." *Umbrella Inv. Grp., LLC v. Wolters Kluwer Fin. Servs., Inc.*, ___ F.3d ___, ___ (5th Cir. Aug. 25, 2020).

5. The Court's review is necessary because the Circuit conflict creates confusion. A resolution of this conflict cannot come from further development by Circuits "in particular controversies or inventive litigation ploys." *Microsoft*, 137 S. Ct. at 1714. "Congress authorized this Court to determine when a decision is final for purposes of § 1291, and to provide for appellate review of interlocutory orders not covered by statute…." *Id.* The Circuits do not have the liberty to refine 1291. Any prolonging of this conflict will not serve the calling of appellate jurisdiction that should be exercised in appropriate times and declined at inappropriate times. Thus, certiorari is necessary for an unsettled question.

II. THE THIRD CIRCUIT DEPARTURE FROM STANDARD AND ORDINARY COURSE OF JUDICIAL PROCEDURE CALLS FOR EXERCISING SUPERVISORY POWER.

Another reason the Court should grant certiorari is because the Third Circuit departed too far from the accepted and usual course of judicial proceedings.

1. The Internal Operating Procedures in the Third Circuit states: "Summary action may be taken only by unanimous vote of the [motion] panel." CTA3 App. I, IOP 10.6. In direct contravention of its own procedures, the motions panel took summary action despite Judge Jordan's dissent. (a2). This handling shows that there was an obvious departure from the accepted and usual course of judicial proceedings.

2. While the motion panel was reviewing this case, on January 20, 2020, a merits panel in *Papera v. Pennsylvania Quarried Bluestone Co.*, 948 F.3d 607, 611 (3d Cir. 2020) adopted the Fourth Circuit "clear-statement rule" and held that a dismissal on a tentative settlement cannot be treated as cutting off litigation unless the order "gives plaintiffs fair warning before inflicting the 'drastic consequence'." *Id.* Yet, here, the motions panel departed from its own precedent by presuming that the November Order resulting from a tentative settlement cut off litigation, even though nothing in that Order gave notice of ending litigation.

3. "Rule 41(a)(2) does not apply to circumstances where plaintiff can secure consent to a stipulated dismissal. Because all of the parties stipulated to dismissal in the underlying action, the dismissal of the case was pursuant to Rule 41(a)(1)(ii) and not by order of the district court." *Hester v. Tyson Foods*, 160 F.3d 911, 916 (2d Cir. 1998) citing *9 Wright & Miller*, Federal Practice and Procedure § 2364. The Third Circuit and two other Circuits also held that a district court may not "deprive" parties of dismissal by stipulation. *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 81 (3d Cir. 1994), *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1190 (8th Cir. 1984), *In re Wolf*, 842 F.2d 464, 466 (D.C. Cir. 1988). In this appeal, the settling parties filed a stipulation of discontinuance. The Third Circuit holding the November Order as final deprived the parties from the right to discontinuance by stipulation.

Overall, the Third Circuit departed from the usual appellate practice by failing to recognize that: (i) the Internal Operating Procedures for the Third Circuit do not allow a motion panel to dispose an appeal without an unanimous vote; (ii) the November Order did not come at the parties request and was without warning of cutting off litigation; (iii) a without prejudice dismissal does not bear finality if the actionable claim can continue; and (iv) the parties intended and filed a discontinuance with prejudice. The premature disposition of Y.W.'s appeal shows that the Third Circuit "has so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power" to warrant certiorari. U.S. Sup. Ct. R. 10(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Brooklyn, NY
October 1, 2020

Respectfully submitted,

Leopold Gross, Esq.
Gross & Associates PLLC

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CCO-064

No. 19-2914

Y.W.,
Appellant v.

KIMBERLY ROBERTS; VERONICA ZERON; PATRICIA AUFIERO; UNKNOWN TEACHER; NEW MILFORD BOARD OF EDUCATION
(D.N.J. No. 2-14-cv-01642)

Present: JORDAN, KRAUSE and MATEY, Circuit Judges

1. Clerk's Submission for Possible Dismissal due to Jurisdictional Defect.
2. Appellant's Response to Submission for Possible Dismissal due to Jurisdictional Defect.
3. Appellee's Response to Submission for Possible Dismissal due to Jurisdictional Defect.
4. Appellant's Reply to Response to Submission for Possible Dismissal due to Jurisdictional Defect.
5. Motion filed by Appellant for Protective Order.

Respectfully,
Clerk/clw

ORDER

After considering the parties' responses regarding jurisdiction, the plaintiff's appeal is DISMISSED

for lack of appellate jurisdiction.[1]

Plaintiff's motion for a protective order is granted in part. The docket will continue to identify the plaintiff by his initials only and any future filings by the parties in this Court shall do the same for plaintiff and his immediate family. Documents containing their full names must be redacted or, if necessary, the subject of a further motion to seal. The motion's other requests are denied.

By the Court,
s/ Cheryl Ann Krause
Circuit Judge
/Seal /

Dated: April 27, 2020
CLW/cc: Levi Huebner, Esq.
Vittorio S. LaPira, Esq.

A True Copy:
Patricia S. Dodszuweit,
Clerk
Certified Order Issued in
Lieu of Mandate

[1] Judge Jordan dissents from this aspect of the order and would refer the jurisdictional issue to a merits panel.

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 19-2914

Y.W. v. Roberts
(D.N.J. No. 2-14-cv-01642)

ORDER

Appellant seeks review of an order entered September 11, 2015, dismissing a portion of the claims asserted in the underlying District Court action. On November 8, 2018, an order of dismissal was entered by the District Court as the parties settled the remaining claims. On August 7, 2019, Appellant filed a request for a final order disposing of the action, which the District Court entered on August 12, 2019. This notice of appeal followed on August 14, 2019. Given the two dismissal orders, however, it is unclear whether Appellant's time to appeal the 2015 order ran from the date of entry of the November 8, 2018 order or the August 12, 2019 order. If the time to appeal began in November 2018, then the notice of appeal would be untimely. See Fed. R. App. P. 4(a)(1).

All parties must file written responses addressing this issue within fourteen (14) days from the date of this order. It is noted that this Court cannot extend the time to file a notice of appeal. See Fed. R. App. P. 26(b). Only the district court may do so in the limited circumstances provided by Fed. R. App. P. 4(a)(5) and 4(a)(6).

For the Court,

s/ Patricia S. Dodszuweit
Clerk
Dated: August 23, 2019

CLW/cc: Lawrence Katz, Esq.
Shmuel Bushwick, Esq.
Ashley L. Costello, Esq.
Erica T. Parkes, Esq.
Randall B. Weaver, Esq.
Benjamin H. Zieman, Esq.
Vittorio S. LaPira, Esq.

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 19-2914

Y. W.,

Appellant

v.

KIMBERLY ROBERTS; VERONICA ZERON;
PATRICIA AUFIERO; UNKNOWN TEACHER;
NEW MILFORD BOARD OF EDUCATION

On Appeal from the United States District Court for
the District of New Jersey
(D.C. 2-14-cv-01642)
District Judge: William J. Martini

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for

rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Date: June 1, 2020
Lmr/cc: Levi Huebner
Vittorio S. LaPira

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Y.W., *Plaintiff* vs. Kimberly Roberts, Veronica Zeran, Patricia Aufiero, an Unknown Teacher, and New Milford Board of Education, *Defendants.*	X	Case: 14-cv-1642 (WJM) (MF) ORDER

Hon. William J. Martini, United States District Court Judge:

Pursuant to Local Rule 41.1 (b) and Rule 41(a)(2) of the Federal Rules of Civil Procedure, as indicated previously by an order from this Court dated November 8, 2018 (ECF 135) the parties reached a settlement agreement with Kimberly Roberts and Veronica Zeran and plaintiff Y.W.; the parties have now executed the terms of their settlement agreement and move by stipulation requesting that the Court enter a final order disposing of this action.

IT IS on this day of 8th, August, 2019, HEREBY DECREED:

ORDERED that the Clerk of the Court is directed to terminate Kimberly Roberts and Veronica Zeran from this action; and

ORDERED as a final order disposing of this action and the Court does not retain jurisdiction, the Clerk of the Court is directed to close this case.

Newark, New Jersey

SO ORDERED:
s/ William J. Martini, USDJ

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Y.W., *Plaintiff* vs. Kimberly Roberts, Veronica Zeron, Patricia Aufiero, an Unknown Teacher, and New Milford Board of Education, *Defendants.*	X	Case: 14-cv-1642 (WJM) (MF) **STIPULATION OF DISMISSAL WITH PREJUDICE**

This matter having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that Plaintiff's complaint is voluntarily dismissed against Defendants Kimberly Roberts and Veronica Zeron and its employees, with prejudice and without costs.

It is hereby jointly requested that the Court enter an order, pursuant to Local Rule 41.1(b) and Rule 41(a)(2) of the Federal Rules of Civil Procedure, terminating this action against Kimberly Roberts and Veronica Zeron and entering a final order disposing of this action.

Dated: Newark, NJ
August 7, 2019

By: /s/ Lawrence Katz	By: /s/ Randall B. Weaver,
Lawrence Katz, Law Offices of Lawrence Katz, 70 East Sunrise Highway, Suite 500 Valley Stream, NY 11581 *Attorneys for Plaintiff*	Gurbir S. Grewal Attorney General Of New Jersey Randall B. Weaver, Deputy Attorney General 25 Market Street Trenton, NJ 08625-0116 *Attorneys for Kimberly Roberts, Veronica Zeron*

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Y.W.	2:14-CV-1642 WJM
Plaintiff,	ORDER
v.	
KIMBERLY ROBERTS, et al,	
Defendants.	

The parties appearing on November 8, 2018 for a Settlement Conference and the parties having indicated that the action has been settled and the terms of the settlement having been placed on the record in open court, therefore;

It is on this 8th day of November, 2018

ORDERED that the above captioned matter is hereby dismissed.

s/William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MINUTES OF PROCEEDINGS

JUDGE WILLIAM J. MARTINI **DATE**: 11/8/18

Court Reporter: Yvonne Davion Court Clerk: Gail Hansen

Other:

TITLE OF CASE:

Y.W. 2:14-cv-1642

v.
Roberts, et al

Appearances:

Levi Huebner & Lawrence Katz for Plaintiff

DAG's Randall Weaver & Shmuel Bushwick for Defendants

NATURE OF PROCEEDINGS: SETTLEMENT CONFERENCE

Parties indicated action settled; terms of the settlement placed on the record in open court; Court discussed settlement terms with Plaintiff; State will turn over funds with 12 weeks, etc.

Gail A. Hansen, Deputy

Time Commenced: 11:00 a.m.- 1:35 p.m. (in chambers)

Time Concluded: 1:35 p.m. 1:45 p.m. (in court)

Total Time: 2 hours 45 minutes

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Y.W. **Plaintiff,** **v.** **KIMBERLY ROBERTS, VERONICA ZERON, PATRICIA AUFIERO, UNKNOWN TEACHER, and NEW MILFORD BOARD OF EDUCATION.** **Defendants.**	Civ. No. 2:14-01642 (WJM) **ORDER**

THIS MATTER comes before the Court on a motion to dismiss filed by Kimberly Roberts and Veronica Zeron (collectively "the DCPP Defendants"), as well as a motion to dismiss filed by Patricia Aufiero, Unknown Teacher, and New Milford Board of Education (collectively, "the School Defendants"); for the reasons set forth in the accompanying opinion; and for good cause appearing;

IT IS on this 10th day of September 2015, hereby,

ORDERED that the motion to dismiss filed by the School Defendants is **GRANTED**; and it is further

ORDERED that the amended complaint as against the School Defendants is **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that Count Four of the amended complaint as against all Defendants is **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that the motion to dismiss filed by

the DCPP Defendants is **GRANTED in part and DENIED in part**; and it is further

ORDERED that any 42 U.S.C. § 1983 (section 1983) claims against the DCPP Defendants in their official capacities are **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that Plaintiff's section 1983 Fourth Amendment claim against the DCPP Defendants in their individual capacities is **DISMISSED WITHOUT PREJUDICE**; and it is further

ORDERED that Plaintiff may proceed on his section 1983 substantive and procedural due process claims against the DCPP Defendants in their individual capacities.

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

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516-374-2118

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Y.W., *Plaintiff,* vs KIMBERLY ROBERTS; VERONICA ZERON; PATRICIA AUFIERO; UNKNOWN TEACHER, and NEW MILFORD BOARD OF EDUCATION, *Defendants.*	**Civil Action No.: 14-1642 (WJM)(MF) (SEALED)**

NOTICE OF APPEAL

Notice is hereby given that Plaintiff, Y.W. appeals to the United States Court of Appeals for the Third Circuit after a final order disposing this case (ECF 137) from an opinion (ECF 51) and an order (ECF 52) dated September 10, 2015, which terminated the parties Patricia Aufiero, Unknown Teacher, and New Milford Board Of Education upon a motion decided pursuant to FRCP 12(b), along with every relevant order of the United States District Court, District of New Jersey, entered in this action.[1]

[1] For purposes of clarity, this notice of appeal is not directed against Kimberly Roberts or Veronica Zeron, as all claims Y.W. had against them are settled.

Dated: Valley Stream, NY

August 14, 2019

Respectfully submitted,

/s/
By: Lawrence Katz

Lawrence Katz certify that on August 14, 2019 I sent a copy of this Notice of Appeal by FedEx delivery to the following:

1. Attorney General for the State of New Jersey, 25 Market Street, Trenton NJ 08625; and
2. Fogarty & Hara, Esqs, 21-00 Route 208 South, Fair Lawn, NJ 07410 attorneys for Patricia Aufiero, Unknown Teacher, and New Milford Board Of Education.

I certify that the foregoing is true to the best of my knowledge.

Dated: Newark, NJ
August 14, 2019

Respectfully submitted,

/s/ Lawrence Katz