MANDATE

23-86-cv (L)
Travco Ins. Co. v. Dinerman

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of December, two thousand twenty-three.

PRESENT: DENNIS JACOBS,
RAYMOND J. LOHIER, JR.,
WILLIAM J. NARDINI,
Circuit Judges.

TRAVCO INSURANCE COMPANY, AS SUBROGEE OF ERIC VICTOR,

Plaintiff-Counter-Defendant-Appellee,

v.

Nos. 23-86-cv(L),
23-163-cv(CON)

SALLY DINERMAN, IRA DINERMAN,

*Defendants-Counter-Claimants-Appellants.**

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* The Clerk of Court is directed to amend the caption as set forth above.

FOR PLAINTIFF-COUNTER-DEFENDANT-APPELLEE:	Daniel J. Krisch, Halloran & Sage LLP, Hartford, CT
FOR DEFENDANTS-COUNTER-CLAIMANTS-APPELLANTS	Sally Dinerman, *pro se*, Brooklyn NY; Ira Dinerman, *pro se*, Brooklyn, NY

Appeal from a judgment of the United States District Court for the Eastern District of New York (Hector Gonzalez, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Appellants Sally and Ira Dinerman, proceeding *pro se*, appeal the judgment and various orders of the United States District Court for the Eastern District of New York (Gonzalez, *J.*) granting the appellee's motion for voluntary dismissal with prejudice under Federal Rule of Civil Procedure 41(a)(2), denying their motion for attorneys' fees, and denying their motion for reconsideration. We assume the parties' familiarity with the underlying facts, the procedural history, and issues on appeal, to which we refer only as necessary to explain our decision to affirm.

This appeal stems from an action brought by Travco Insurance Company ("Travco") against the Dinermans as a result of fire and water damage to an

loose
apartment insured by Travco. Travco blamed the Dinermans, who lived in an adjoining apartment, for the damage and sought to recover over $161,000. Years into the litigation, the Dinermans mailed Travco a check for $20,000—an amount corresponding exactly to a settlement offer that they had previously made to Travco. Travco cashed the check and informed the Dinermans that it fully settled Travco's claims against them. After the Dinermans refused to sign a stipulation of dismissal, Travco moved under Rule 41(a)(2) to voluntarily dismiss its case against the Dinermans with prejudice. The Dinermans filed a response that the District Court construed as opposing Travco's motion and also moving for attorneys' fees. The District Court granted Travco's motion to voluntarily dismiss the case with prejudice and denied the Dinermans' motion for attorneys' fees and their subsequent motion for reconsideration.[1] 01 1724

I. Voluntary Dismissal Under Rule 41(a)(2)

We review a voluntary dismissal under Rule 41(a)(2) for abuse of

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[1] Travco raises a challenge to this Court's appellate jurisdiction. A party ordinarily lacks standing to appeal an order unless aggrieved by it, and by extension cannot appeal a judgment or decree entered in his or her favor. *See Spencer v. Casavilla*, 44 F.3d 74, 78 (2d Cir. 1994). Because the District Court's judgment could be viewed as ratifying the existence of a settlement agreement that the Dinermans dispute, the Dinermans are sufficiently aggrieved by the District Court's judgment to have standing to appeal.

discretion. *Correspondent Servs. Corp. v. First Equities Corp.*, 338 F.3d 119, 124 (2d Cir. 2003). We "liberally construe pleadings and briefs submitted by pro se litigants, reading such submissions to raise the strongest arguments they suggest." *Publicola v. Lomenzo*, 54 F.4th 108, 111 (2d Cir. 2022).

Here, the dismissal *with prejudice* of the claims against the Dinermans has "the effect of a final adjudication on the merits *favorable*" to them. *Nemaizer v. Baker*, 793 F.2d 58, 60 (2d Cir. 1986) (emphasis added). In other words, the Dinermans won the case below and cannot be sued again by Travco for claims arising from the apartment fire. *See id.* at 60–61. On appeal, they nevertheless claim that they never agreed to settle with Travco and want Travco to return the $20,000 payment. In effect, the Dinermans challenge the Rule 41(a)(2) dismissal on the ground that it prevents them from recovering that payment.

We are not persuaded. While we review Rule 41(a)(2) dismissals for possible harm to the defendant when the plaintiff's claims are dismissed *without* prejudice, we do not do the same for claims that are dismissed *with* prejudice. *Cf. Camilli v. Grimes*, 436 F.3d 120, 123 (2d Cir. 2006) (finding, in the context of evaluating a Rule 41(a)(2) dismissal without prejudice, that factors such as "vexatiousness on the plaintiff's part" and "the extent to which the suit has

progressed" have "little relevance" when "no possibility of relitigation at the instance solely of the plaintiff exists"). And while the District Court here assumed without deciding in its dismissal order that the parties had reached a settlement, the dismissal was premised on the plaintiff's desire to discontinue the case, not the existence of a settlement. *See* Fed. R. Civ. P. 41(a)(2) (providing that a dismissal pursuant to a court order may be conditioned on terms that the court considers proper).

Because the District Court did not finally decide whether there was a settlement, that issue remains unresolved. The dismissal itself does not prevent the Dinermans from challenging the existence of the settlement and attempting to recoup the $20,000 payment in a separate action. *See Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 94 (2d Cir. 2005) (noting that issue preclusion applies under New York law only if "the issue in question was actually and necessarily decided in a prior proceeding" (quotation marks omitted)); *see In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 199 (2d Cir. 2000) (finding a lack of prejudice in denial of motion to intervene when a party "remain[ed] free to file a separate action"); *D'Alto v. Dahon California, Inc.*, 100 F.3d 281, 283 (2d Cir. 1996) ("[S]tarting a litigation all over again does not constitute legal prejudice.").

In summary, the Dinermans have not shown that the District Court abused its discretion in granting the motion for voluntary dismissal or denying the motion for reconsideration. *See Warren v. Pataki*, 823 F.3d 125, 137 (2d Cir. 2016).

II. Motion for Attorneys' Fees

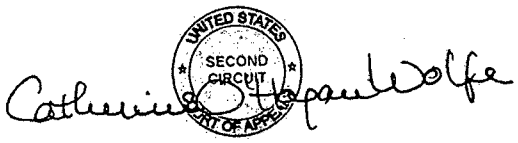
We review the denial of attorneys' fees for abuse of discretion. *Scarangella v. Grp. Health, Inc.*, 731 F.3d 146, 151 (2d Cir. 2013). "Under the prevailing American rule, in a federal action, attorneys' fees cannot be recovered by the successful party in the absence of statutory authority for the award." *Odeon Capital Grp. LLC v. Ackerman*, 864 F.3d 191, 198 (2d Cir. 2017) (quotation marks omitted). However, "[p]ursuant to its inherent equitable powers . . . a court may award attorneys' fees when the opposing counsel acts in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* (quotation marks omitted). Here, the Dinermans failed to show that Travco's subrogation claim was meritless or brought for improper purposes. *See Kerin v. U.S. Postal Serv.*, 218 F.3d 185, 190 (2d Cir. 2000). We accordingly affirm the District Court's order denying the motion for attorneys' fees.

CONCLUSION

We have considered the Dinermans' remaining arguments and conclude

that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:
Cathrine O'Hagan Wolfe, Clerk of Court



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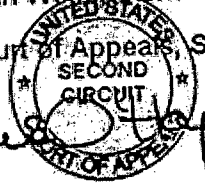
United States Court of Appeals, Second Circuit



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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of January, two thousand twenty-four,

Before: Dennis Jacobs,
Raymond J. Lohier, Jr.,
William J. Nardini,
Circuit Judges.

TravCo Insurance Company, as subrogee of Eric Victor,

Plaintiff-Counter-Defendant-Appellee,

v.

Sally Dinerman, Ira Dinerman,

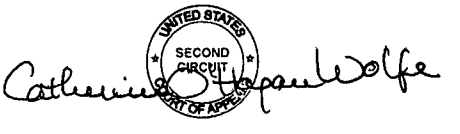
Defendants-Counter-Claimants-Appellants.

ORDER
Docket No. 23-86(L), 23-163(Con)

Sally Dinerman and Ira Dinerman having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TRAVCO INSURANCE COMPANY,

Plaintiff,

v.

SALLY DINERMAN and IRA DINERMAN,

Defendants.

MEMORANDUM & ORDER
16-cv-1064 (HG) (RER)

HECTOR GONZALEZ, United States District Judge:

Plaintiff Travco Insurance Company ("Travco") moves to voluntarily dismiss its action pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure ("Rule 41(a)(2)"). ECF No. 168 (the "Motion"). *Pro se* Defendants, Sally and Ira Dinerman (collectively "Defendants"), oppose the Motion and cross-move for attorneys' fees. ECF Nos. 169, 170, 171. The Court grants Plaintiff's motion for voluntary dismissal, with prejudice, and denies Defendants' cross-motion for attorneys' fees.

BACKGROUND

Travco originally commenced this diversity action over six years ago, on March 3, 2016, in its capacity as subrogee of its insured, Eric Victor, to recover for fire and water damage to Victor's property allegedly caused by the negligence of Defendants, Victor's next-door neighbors. ECF No. 1 ¶¶ 7–9. Defendants were initially represented separately by two different attorneys, but have both been proceeding *pro se* together since 2019. *See* ECF No. 59 (motion to withdraw as Sally Dinerman's attorney); ECF No. 88 (motion to withdraw as Ira Dinerman's attorney). On August 21, 2019, Magistrate Judge Reyes certified that discovery was closed. ECF Text Entry, August 21, 2019. Plaintiff filed a motion for summary judgment on June 22,

2020, ECF No. 124, which was denied, ECF No. 130. The parties filed a joint pretrial order on October 1, 2021. ECF No. 140.

Over the course of the next year, before the Court set a date for trial, the parties engaged in repeated settlement discussions. *See* ECF No. 145 (referring the case to the EDNY's Trial Ready Rapid Mediation Pilot Program); ECF Text Order, June 3, 2022 (referring the case to the EDNY's Court-Annexed Mediation Program); ECF Minute Entry, November 3, 2022 (settlement conference before Judge Reyes); ECF Minute Entry, November 8, 2022 (settlement conference before Judge Reyes); ECF Minute Entry, November 10, 2022 (settlement conference before Judge Gonzalez). On December 14, 2022, Plaintiff filed the instant motion, informing the Court that the Defendants had settled the case for $20,000, that it had received a settlement check to that effect, and that "the funds have been received and deposited in Plaintiff's bank account."[1] ECF No. 168 at 1. Plaintiff sent Defendants a stipulation of dismissal to close the case, but Defendants refused to sign it. *Id.* at 2. Plaintiff thereafter moved to dismiss the case pursuant to Rule 41(a)(2). *Id.*

Pro se Defendants responded to the Motion in three, handwritten letters that were difficult for the Court to discern. ECF Nos. 169, 170,[2] 171. Nevertheless, the Court reads Defendants' letters as an opposition to the Motion, *see* ECF No. 169 ("I need my day in court."), ECF No. 171 ("We need our day in court."), and as a cross-motion for legal fees, *see* ECF No.

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[1] Plaintiff reports it was originally seeking $161,057.84 in damages arising from a fire, plus interest. ECF No. 168 at 2.

[2] The Court finds the second letter, ECF No. 170, particularly difficult to read. From what it can understand, the letter appears to be raising the same issues and objections that Defendants raise in the other two letters.

169 ("[W]e . . . need legal fees too."), ECF No. 171 (discussing the legal fees Defendants incurred early in the litigation).

DISCUSSION

A. Rule 41(a)(2) Dismissal

When a plaintiff no longer wishes to continue litigation, but the parties cannot come to an agreement to discontinue the action, a court order is necessary.[3] *See* Fed. R. Civ. P. 41(a)(2) ("[A]n action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper."). In *Catanzano v. Wing*, the Second Circuit laid out the standard to apply when considering an application under Rule 41(a)(2):

> It is within the district court's sound discretion to deny a Rule 41(a)(2) motion to dismiss. *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990). Generally, however, a voluntary dismissal without prejudice under Rule 41(a)(2) will be allowed "if the defendant will not be prejudiced thereby." *Wakefield v. N. Telecom, Inc.*, 769 F.2d 109, 114 (2d Cir. 1985).

277 F.3d 99, 109, 110 (2d Cir. 2001).

A plaintiff does not have a right to see a case dismissed *without* prejudice. *Id.* However, here, Plaintiff appears to have no wish to continue this litigation and does not ask the Court to dismiss the case without prejudice. *See* ECF No. 168 at 2 ("[P]laintiff has no interest or ethical right to continue the prosecution of this civil lawsuit."). In situations like this, where a plaintiff does not oppose dismissing a case with prejudice, there is no risk of potential harm or legal prejudice to defendants. *See Beer v. John Hancock Life Ins. Co.*, 211 F.R.D. 67, 68 (N.D.N.Y. 2002); *see also Schwarz v. Folloder*, 767 F.2d 125, 129 (5th Cir. 1985) ("[N]o matter when a

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[3] In situations where all parties agree to discontinue litigation, no court order is required. *See* Fed. R. Civ. P. 41(a)(1).

dismissal with prejudice is granted, it does not harm the defendant: The defendant receives all that he would have received had the case been completed."). Given that "there is no evidence of prejudice to defendants by such a dismissal and no other interests are at stake,"[4] there is no reason for the Court not to dismiss the case. *See Beer*, 211 F.R.D. at 68.

B. Attorneys' Fees

"[U]nder the American Rule, absent statutory authorization or an established contrary exception, each party bears its own attorney's fees." *Colombrito v. Kelly*, 764 F.2d 122, 133 (2d Cir. 1985).

> The only pertinent exception for present purposes is the court's inherent authority to award fees when a party litigates frivolously or in bad faith. The bad faith exception permits an award upon a showing that the claim is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons. Neither meritlessness alone, nor improper motives alone, will suffice.

Id. at 133 (internal quotations and citations omitted).

In other words, for an award of attorneys' fees to be appropriate, Defendants would need to show that: "[P]laintiff commenced the litigation wantonly, or for purposes of harassment, delay or other improper purposes" or that there is "evidence of a pattern of bringing potentially meritorious claims and then dismissing them with prejudice after inflicting substantial costs on defendants and the judicial system or any other similarly egregious behavior." *Beer*, 211 F.R.D. at 69–70. In situations like this, where a case is dismissed with prejudice, an award of attorneys'

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[4] On March 25, 2016, Defendants' Answer on ECF is filed as "ANSWER to 1 Complaint, COUNTERCLAIM against Travco Insurance Company," *see* ECF No. 5. The Answer is again handwritten, and difficult to understand. However, the Court does not read it as asserting any sort of counterclaim, and it does not appear that the issue has ever arisen again in the six years the case has been litigated. Thus, the Court does not see this as an interest that would be impacted by dismissal.

fees is strongly disfavored. *See Colombrito*, 764 F.2d at 134 ("The reason for denying a fee award upon dismissal of claims with prejudice is simply that the defendant, unlike a defendant against whom a claim has been dismissed without prejudice, has been freed of the risk of relitigation of the issues just as if the case had been adjudicated in his favor at trial . . . . We would not want to discourage such a salutory disposition of litigation by threatening to award attorneys' fees if a plaintiff did not complete a trial.").

While the *pro se* Defendants request attorneys' fees in their response letters to the Motion, they provide no meritorious reason why such fees are warranted. Defendants accuse the Plaintiff of "white collar crime" that caused "pain[,] suffering [and,] emotional anguish" and ask for "whatever . . . the Court deems appropriate to [at] least make us whole and discourage this behavior on [Plaintiff's] part." ECF No. 171. However, Defendants do not specify what behavior they object to, other than the fact that Plaintiff brought this suit in the first place.

The Court finds that under these circumstances, Defendants have not made the necessary showing warranting the award of attorneys' fees. There is no evidence that Plaintiff commenced this litigation wantonly, or for purposes of harassment. There is certainly no evidence of a pattern on the part of Plaintiff of bringing similar claims and then dismissing them with prejudice. Plaintiff is simply an insurance company seeking to recover damages, in its capacity as subrogee, following a fire that began in Defendants' home and spread to the neighboring property insured by Plaintiff. *See Otsego Mut. Fire Ins. Co. v. Dinerman*, No. 158600/2016, 2017 WL 1534392, at *1 (N.Y. Sup. Ct. Apr. 20, 2017). While the Court is sympathetic to the stress and emotional anguish that any litigation causes, the fact that litigation is emotionally taxing is not a sufficient basis for the Court to award attorneys' fees to Defendants.

CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff's motion for voluntary dismissal, with prejudice, and DENIES Defendants' cross-motion for attorneys' fees.

SO ORDERED.

/s/ Hector Gonzalez
HECTOR GONZALEZ
United States District Judge

Dated: Brooklyn, New York
January 9, 2023

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

May 28, 2024

Sally Dinerman
1141 E. 13th St.
Brooklyn, NY 11230

RE: Dinerman, et vir v. TravCo Ins. Co.
USAP2 23-86, 23-163
No: 23A900

Dear Ms. Dinerman:

The above-entitled petition for writ of certiorari was postmarked May 23, 2024 and received May 28, 2024. The papers are returned for the following reason(s):

If submitting a handwritten petition, please ensure that it is legible. Rule 14.4.

The motion for leave to proceed in forma pauperis must be signed by both co-petitioners. Rules 33.2 and 39.

All exhibits the petitioner believes essential to understand the petition is to be placed at the appendix, immediately following the petition. Rule 14.1(i)(vi).

A petition submitted in the format of Rule 33.2 should not be bound. Please staple or binder clip in the upper left hand corner only. You may also use a rubber band.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

When making the required corrections to a petition, no change to the substance of the petition may be made.

Sincerely,
Scott S. Harris, Clerk
By:

Sara Simmons
(202) 479-3023

Enclosures

Additional material from this filing is available in the Clerk's Office.