Judge Leighton

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHINOOK INDIAN NATION, an Indian Tribe and a Washington nonprofit corporation, and as successor-in-interest to The Lower Band of Chinook Indians; and ANTHONY A. JOHNSON, individually and in his capacity as Chairman of the Chinook Indian Nation; and CONFEDERATED LOWER CHINOOK TRIBES AND BANDS, a Washington nonprofit corporation,

Plaintiffs,

v.

DAVID BERNHARDT, in his capacity as Secretary of the U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT; UNITED STATES OFAMERICA; and TARA KATUK MAC LEAN SWEENEY, in her capacity as Assistant Secretary – Indian Affairs,

Defendants.

CASE NO. C17-5668-RBL

DEFENDANTS' REPLY RE: MOTION FOR RECONSIDERATION

Defendants David Bernhardt, the U.S. Department of the Interior, and Tara Katuk Mac Lean Sweeney (hereafter collectively "the Department"), through their attorneys, Brian T. Moran, United States Attorney, and Brian C. Kipnis, Assistant United States Attorney, for the Western District of Washington, hereby reply to the opposition of defendants Chinook Indian Nation, Anthony A. Johnson, and the Confederated Lower Chinook Tribes and Bands (hereafter collectively "CIN), to

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the Department's motion for reconsideration of the January 10, 2020 Order on Cross-Motions for Summary Judgment.

INTRODUCTION

The Department seeks reconsideration of the January 10, 2020 Order on Cross-Motions for Summary Judgment insofar as it dismisses CIN's Claim III and Claim V "without prejudice." As the Department's motion establishes, a favorable motion for summary judgment necessarily results in a determination on the merits for the moving party.

CIN does not dispute this fundamental principle. Accordingly, its opposition tacks in two other directions. First, CIN advances an argument that rests upon cases dealing with a fundamentally different kind of motion, a motion to dismiss. A dismissal of a claim does not necessarily result in an adjudication on the merits. In contrast, as the case law set forth in the present motion for reconsideration establishes, a summary judgment always results in an adjudication on the merits.

CIN attempts to bolster its misguided argument by mischaracterizing the claims that were before the Court for adjudication. In addition to an APA claim, CIN chose to challenge the Department's final agency action as a violation of its rights to equal protection, due process and to petition the government. As to the constitutional claims, CIN contested only the equal protection claim, which the Court also found to be lacking in merit. It is those claims, not the fictitious claims asserted in CIN's opposition memorandum, that will form the basis for any *res judicata* effect of the Court's ruling on future litigation between the parties.

Moreover, in the doubtful circumstance that CIN actually had meritorious legal arguments to defend their due process and right to petition claims, they were obligated by the Department's summary judgment motion to advance those arguments.[1] But, as CIN's concession evidences, it consciously chose not to defend those claims from summary judgment. Under the circumstances, a determination on the merits is not only just, but what the law requires.

1 The law on both the due process and right to petition claims was wholly against CIN. CIN is able to assert no life, liberty or property interest that was affected by the Department's action. Hence, its due process claim was without any merit. CIN's right to petition claim overlooked the fact that it had already been afforded an opportunity to petition the Government.

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Later in its memorandum, CIN suggests that, without the filing of a motion to dismiss, and in the aftermath of the Court's adjudication of the Department's summary judgment motion, the Court should simply dismiss the claims in question without prejudice pursuant to Rule 41(a)(2), F.R.Civ.P. The suggestion should be rejected. The Federal Rules contemplate that (1) a voluntary dismissal by the Court must be sought by motion, and (2) the motion must be made *before* the summary judgment motion has been adjudicated. CIN's request meets neither condition.

Because the Department properly sought summary judgment on the two constitutional claims that are the subject of this motion, backed by ample legal authority, and because CIN chose to concede rather than defend against the Department's motion as to those claims, the motion for reconsideration should be granted and the claims should be dismissed with prejudice.

ARGUMENT

I. THE ONLY ACTION PLACED AT ISSUE BY CIN'S COMPLAINT WAS THE DEPARTMENT'S DECISION NOT TO ADOPT A PROPOSED REGULATION THAT ALLOWED FOR LIMITED RE-PETITIONING

CIN suggests that by merely conceding in the face of a summary judgment motion, the claim that is the subject of the motion is "effectively withdrawn from the court's consideration and not considered on the merits." Dkt. # 116, p. 5, *ll.* 16-13. In substance, CIN is suggesting that it can unilaterally "opt out" from defending a claim against a summary judgment motion and thereby save that claim for a future lawsuit. Of course, neither the Federal Rules nor any case authority, including the case cited by CIN, supports this proposition.[2]

Because the Department's summary judgment motion was properly supported, the Court had an obligation to proceed with an adjudication of the Department's motion and to rule on the merits.

The applicable rule is set forth in Rule 56(a), F.R.Civ.P.:

> (a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court *shall grant summary judgment if the*

2 CIN cites *Piedmont Environmental Council v. FERC*, 558 F.3d. 304, 319 (4th Cir. 2009), in support of its argument, but that case is inapposite. In *Piedmont*, the petitioners advanced a claim that the Court of Appeals determined was unripe. Thus, the Court dismissed those claims without prejudice. The Court did not allow the plaintiffs to "opt out" in the face of an adverse summary judgment motion. (Indeed, the case was a direct appeal.) Here, the Department's summary judgment motion did not argue that CIN's claims were unripe. The Department moved for judgment as a matter of law on the ground that those claims were defective on the merits, without any argument to the contrary from CIN.

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> *movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.* The court should state on the record the reasons for granting or denying the motion. (Emphasis added.)

The use of the word "shall" in the quoted language of Rule 56(a), Fed.R.Civ.P., is not there by happenstance. 10A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2728 (4th ed. 2020) (discussing 2010 revisions to Rule 56(a)). Ultimately, summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The foregoing quotation describes the present circumstances precisely.[3]

CIN's espoused concern that if the Court follows Rule 56(a)'s mandate, it will be negatively affected, is unconvincing. It was incumbent upon CIN to argue against the Department's summary judgment motion if it had a basis for such opposition. It consciously chose to forego a defense of those claims and it is now bound by the legal ramifications of its decision.

Because a properly supported summary judgment motion was submitted to the Court by the Department for adjudication on all relevant claims asserted by CIN, the Court had an obligation to adjudicate those claims regardless of any "concession" by CIN, and the Court's ruling would necessarily constitute a ruling on the merits and, hence, "with prejudice."

II. CIN CANNOT SIMPLY REQUEST THAT THE COURT DISMISS ITS CLAIMS WITHOUT PREJUDICE AFTER THE DEPARTMENT'S SUMMARY JUDGMENT MOTION HAS ALREADY BEEN ADJUDICATED

CIN blithely asserts that if the Court does not accept its first argument, it should just simply order, in this post-adjudication phase of the lawsuit, that the claims are dismissed without prejudice pursuant to Rule 41(a)(2), F.R.Civ.P.

At the outset, it is highly problematic that CIN asks for this relief by a simple request in an opposition memorandum to a motion for reconsideration, and without filing a motion of its own. Even more troublesome, this request comes after the Department has filed, and the Court has

3 CIN's reliance on *Nat'l Ass'n for the Advancement of Colored People v. Trump*, 298 F. Supp. 3d 209 (D.D.C.), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018), is also misplaced. The motion before the Court was a threshold motion brought pursuant to Rule 12(b), F.R.Civ.P., and not a motion for summary judgment pursuant to Rule 56, F.R.Civ.P. The mandatory language of Rule 56(a) does not apply to Rule 12(b)(6) motions.

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adjudicated, a motion for summary judgment that encompasses the relevant claims[4]

It is fundamental that, to obtain an order from a Court, a motion, with appropriate notice, must be filed. Rule 7(b)(1), F.R.Civ.P. ("A request for a court order must be made by motion."); and see 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2364 (4th ed. 2020) ("Such an order approving a dismissal [pursuant to Rule 41(a)(2)] should be obtained by motion.") LCR 7 of the Local Rules of the United States District Court specify the requirements for the form and scheduling of motions in this District. CIN did not follow any of those rules.

Second, CIN completely misconstrues the purpose of Rule 41(a)(2), F.R.Civ.P. The rule does not exist to provide an errant plaintiff, like CIN, with an easy escape from a difficult situation of its own making. To the contrary, the purpose of Rule 41(a)(2), F.R.Civ.P., "is primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *McCants v. Ford Motor Co., Inc.*, 781 F.2d 855, 856 (11th Cir. 1986) (citation and internal quotation marks omitted). *Thus, a district court considering a motion for dismissal should bear in mind principally the interests of the defendant, for it is the defendant's position that the court should protect. Id*. (emphasis added).

The rule permits the Court to impose compensatory conditions upon the party seeking dismissal that the dismissing party must be willing to bear in exchange for injuries caused to the non-dismissing party as a result of the late stage dismissal of a claim. These conditions are only limited by the creativity of opposing counsel and the Court's willingness to accept those conditions as necessary to effect a just result under the circumstances. Indeed, a party seeking a dismissal under Rule 41(a)(2) may be required, as the price for its requested dismissal, to pay all of the litigation costs of his opponent, including attorney's fees. 9 Charles Alan Wright & Arthur R.

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4 CIN cites *Pontenberg v. Boston Scientific Corp*., 252 F.3d. 1253 (11th Cir. 2001), for the proposition that the use of Rule 41(a) to effect a strategic voluntary dismissal of a claim in order to avoid an adverse summary judgment ruling on the merits, even after the summary judgment motion is filed, is tolerable. Be that as it may, the important fact in *Pontenberg* that CIN's memorandum overlooks is that the summary judgment motion was *pending* at the time the motion for voluntary dismissal was filed. *Id*. at 1259 ("Under our circuit precedent, delay alone, in the absence of bad faith, is insufficient to justify a dismissal with prejudice, *even where a fully briefed summary judgment motion is pending.*") (emphasis added). Here, of course, CIN did not file a motion for voluntary dismissal while the Department's summary judgment motion was still pending, and before the motion was adjudicated by the Court. CIN cites no case for the proposition that a party may seek to voluntary dismiss a claim without prejudice *after* a summary judgment motion has been filed, *after* the motion has been duly submitted for adjudication by the Court, and *after* the Court has adjudicated the motion.

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Miller, Federal Practice and Procedure § 2366 (4th ed. 2020).[5]

Regardless, it is entirely unheard of for a party to obtain a dismissal of claims under 41(a)(2), F.R.Civ.P., that are encompassed within a summary judgment motion that has already been adjudicated by the Court. The Court's obligation under Rule 56(a) is to adjudicate a properly supported summary judgment motion on the merits. Given that obligation, there is no circumstance in which a party could seeks a Rule 41(a)(2) dismissal without prejudice of a claim that is encompassed by a summary judgment motion *after* the adjudication of that motion by a Court.

In summary, CIN's request that the two constitutional claims that are the subject of this motion be dismissed without prejudice should be rejected.

CONCLUSION

For the foregoing reasons, and for those reasons stated in their principal memorandum, defendants David Bernhardt, the U.S. Department of the Interior, and Tara Katuk Mac Lean Sweeney, hereby request that the Court grant this motion and enter an order reconsidering its January 10, 2020 order (Dkt. # 112) insofar as it orders that CIN's Claim III and Claim V should be dismissed without prejudice, and ordering that those claims are dismissed with prejudice.

DATED this 6th day of February 2020.

Respectfully submitted,

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5 CIN suggests "that the effort [the Department] made in researching and crafting that portion of their partial summary judgment motion that was devoted to Plaintiffs' Due Process and First Amendment claims was modest." Dkt. #116, p. 7, *ll.* 12-15. This is purely *ipse dixit.*