IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-31233

United States Court of Appeals
Fifth Circuit
FILED
August 24, 2018
Lyle W. Cayce
Clerk

TARSIA WILLIAMS; BRECK WILLIAMS,

Plaintiffs - Appellants

v.

TAYLOR-SEIDENBACH, INCORPORATED,

Defendant - Appellee

consolidated with 16-31236

TARSIA WILLIAMS; BRECK WILLIAMS,

Plaintiffs - Appellants

v.

MCCARTY CORPORATION,

Defendant - Appellee

consolidated with 17-30230

TARSIA WILLIAMS; BRECK WILLIAMS,

Plaintiffs - Appellants

v.

BOEING COMPANY,

Defendant - Appellee

consolidated with 17-30231

TARSIA WILLIAMS; BRECK WILLIAMS,

Plaintiffs - Appellants

v.

LOCKHEED MARTIN CORPORATION, individually and as successor-in-interest to Martin Marietta, Incorporated,

Defendant - Appellee

Appeals from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:09-CV-65

Before DENNIS, CLEMENT, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

We decide whether we have jurisdiction over four consolidated appeals when the district court dismissed remaining defendants without prejudice and did not enter an order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. We dismiss the appeals for lack of jurisdiction.

I. Facts and Proceedings

Decedent Frank Williams, Jr. ("Williams"), a former employee of Lockheed Martin Corporation's ("Lockheed Martin") predecessor, Martin

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Marietta Corporation, allegedly contracted malignant mesothelioma through exposure to asbestos. Williams claimed that such asbestos exposure occurred during the normal course of his employment as a mechanical engineer at the NASA Michoud Assembly Facility ("MAF"), beginning prior to 1974. In November 2008, Williams filed suit in Civil District Court for the Parish of Orleans, asserting multiple liability theories, such as negligence, intentional tort, fraud, strict liability and absolute liability, against several defendants, including Taylor-Seidenbach Incorporated ("TSI"), McCarty Corporation ("McCarty"), Boeing Company ("Boeing"), and Lockheed Martin. Thereafter, Lockheed Martin removed the action to the United States District Court for the Eastern District of Louisiana ("E.D. La."), alleging that federal subject matter exists under the federal officer removal statute, 28 U.S.C. § 1442.

Subsequently, the Judicial Panel on Multidistrict Litigation transferred the action to the *In re: Asbestos Products Liability Litigation*, MDL No. 875, pending in the United States District Court for the Eastern District of Pennsylvania ("Asbestos MDL court"). While the matter was pending in the Asbestos MDL court, Williams's two children, Tarsia Williams and Breck Williams ("the Williamses"), were substituted as plaintiffs following their father's death. The Asbestos MDL court denied two motions to remand filed by the Williamses, issued various orders relevant to discovery matters, granted motions for summary judgment as to several defendants, and ultimately remanded the entire case (including the remaining claims) back to the E.D. La. for further proceedings.

Following remand to the E.D. La., the Williamses moved to voluntarily dismiss their claims against four remaining defendants. The E.D. La. dismissed the claims against one remaining defendant with prejudice. However, neither the Williamses' motion nor the E.D. La.'s order of dismissal

relevant to the other three defendants stated whether the dismissal was with or without prejudice. Thereafter, the Williamses filed several notices of appeal with this court relevant to various orders concerning Boeing, TSI, McCarty, and Lockheed Martin.[1]

Subsequently, the Williamses filed a motion in the E.D. La., seeking a final judgment under Federal Rule of Civil Procedure 54. While that motion was pending in the E.D. La., however, Lockheed Martin and Boeing filed motions to dismiss the pending appeals in this court for lack of jurisdiction, which we granted. In granting Lockheed Martin's motion, this court explained that because one of the orders of dismissal was silent as to whether the dismissal of certain defendants was with or without prejudice, and because the Williamses seemingly conceded that a Rule 54 order was necessary to invoke appellate jurisdiction by filing for such relief with the district court, we did not have jurisdiction over the appeal.

The Williamses then filed a "Motion to Request Final Judgment Under Rule 58(b)(1)(C)" in the E.D. La., despite their pending Rule 54 motion. In support of their Rule 58 motion, they argued that "[j]udgments in favor of all Defendants be certified as final and appealable under the provisions of Rule 58(b)(1)(C)" because "[a]ll claims against all Defendants have been dismissed and there are no defendants left before this court." The E.D. La. granted the Williamses' Rule 58 motion and dismissed the Rule 54 motion as moot. Additionally, prior to the E.D. La.'s order on the Williamses' Rule 58 motion, the court consolidated *Tarsia Williams, et al. v. Lockheed Martin Corp.*, Civil

[1] The Williamses also filed notices of appeal relevant to orders concerning Reilly-Benton Company, Inc., Standard Services Company, Inc., and Insulation Technology, Inc.

Action No. 09-65, with another civil action filed by the Williamses, which also concerned their deceased's father alleged exposure to asbestos at the MAF.

The Williamses again filed notices of appeal relevant to various discovery orders and the grant of summary judgment motions in favor of Lockheed Martin and Boeing. The appellees now challenge whether this court possesses appellate jurisdiction, arguing that the E.D. La. never rendered a final decision as contemplated by 28 U.S.C. § 1291.

II. Standard of Review

This court reviews whether a district court completely disposed of a claim for relief *de novo*, and we may raise the issue at any time since it implicates our jurisdiction. *Tetra Techs., Inc. v. Cont'l Ins. Co.*, 755 F.3d 222, 228 (5th Cir. 2014).

III. Discussion

As a threshold matter, Appellees TSI, McCarty, Boeing, and Lockheed Martin seek dismissal of the Williamses' appeals for lack of appellate jurisdiction.[2] Appellees essentially argue that: (1) this court lacks jurisdiction because the district court did not render a final decision as contemplated by 28 U.S.C. § 1291, and appellate jurisdiction cannot be manufactured by dismissing remaining defendants without prejudice; and (2) the consolidation of the Williamses' original civil action with another civil action renders the matters a single "judicial unit" for purposes of Rule 54 of the Federal Rules of Civil Procedure.

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[2] In connection with the issue of appellate jurisdiction, Lockheed Martin filed "Defendant-Appellee Lockheed Martin Corporation's Motion to Dismiss Appeal for Lack of Jurisdiction," and this court ordered that the motion to dismiss be carried with the case. TSI, McCarty, and Boeing, however, raise the issue of appellate jurisdiction within their briefs.

Our jurisdictional analysis necessarily begins with 28 U.S.C. § 1291, which dictates that this court "shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." Prior to invoking our jurisdiction under § 1291, generally "all claims and issues in a case must be adjudicated in the district court, and a final judgment or order must be issued." *Marshall v. Kan. City S. Ry. Co.*, 378 F.3d 495, 499 (5th Cir. 2004). Thus, this "final judgment rule" creates appellate jurisdiction only after a district court's "decision that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Id.* (citing *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981)). Consequently, a district court labeling a judgment final does not necessarily make it so. *Witherspoon v. White*, 111 F.3d 399, 401 (5th Cir. 1997).

Additionally, we have a settled rule that "appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims without prejudice," *Swope v. Columbian Chems. Co.*, 281 F.3d 185, 192 (5th Cir. 2002), and for purposes of § 1291, a dismissal without prejudice is not considered a "final decision." *Marshall*, 378 F.3d at 500. Thus, "a party seeking to create finality through dismissal without prejudice of remaining claims must file for Rule 54(b) certification with the trial court," *Swope*, 281 F.3d at 193, as Rule 54(b) allows the district court to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties" in an action that involves more than one claim for relief, or multiple parties, if there is no just reason for delay. Fed. R. Civ. P. 54(b).

Under these settled principles, we lack jurisdiction over the instant appeals. The E.D. La.'s order dismissing three remaining defendants was silent as to whether the dismissal was with or without prejudice, and this court

presumes that a voluntary dismissal takes place without prejudice, unless stated otherwise. *See* Fed. R. Civ. P. 41(a); *Marshall*, 378 F.3d at 501 ("[G]iven . . . the express language in Rule 41(a)(2) that a dismissal under that rule is *without* prejudice 'unless otherwise specified in the order' (which it is not), we are constrained to conclude that the dismissal was, in fact, *without* prejudice."). Thus, the E.D. La.'s order of dismissal, which did not indicate whether it was with or without prejudice, was not a "final decision" under § 1291 and did not create appellate jurisdiction.

Moreover, the E.D. La.'s grant of the Williamses' Rule 58 motion for entry of judgment similarly did not create appellate jurisdiction, as such order did not alter the district court's dismissal of multiple defendants *without* prejudice. While the Williamses argue that a district court granting a motion that requests final judgment under Rule 58(b)(1)(C) does in fact create a final judgment, this assertion is incorrect. Rule 58(b)(1)(C) only directs the clerk to "promptly prepare, sign, and enter the judgment when . . . the court denies all relief," but the rule specifically states that it is subject to Rule 54(b). Fed. R. Civ. P. 58(b)(1)(C). Thus, we would have jurisdiction over the involuntary dismissals if the E.D. La. had certified them under Rule 54(b).

The Williamses also reference the E.D. La.'s citation to this court's *Yesh Music* v. *Lakewood Church*, 727 F.3d 356, 362-63 (5th Cir. 2013) decision, to support their argument that the current appeals stemmed from a "final decision" of the district court. While the E.D. La. cited *Yesh Music* for the proposition that a voluntary dismissal without prejudice is a final judgment, the *Yesh Music* decision only held that a voluntary dismissal without prejudice qualifies as a final proceeding under Federal Rule of Civil Procedure 60(b). *Id.*

Therefore, its holding is inapplicable under the instant circumstances, and we do not possess appellate jurisdiction over the instant appeals.[3]

IV. Conclusion

Accordingly, the Williamses' appeals are DISMISSED for lack of jurisdiction.

[3] Given our conclusion that we do not possess appellate jurisdiction over the instant appeals on the basis that the district court did not render a final decision as contemplated by 28 U.S.C. § 1291, it is unnecessary to address the appellees' consolidation argument.