UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3001
Summary Calendar

ROSETTA HILLARY,

Plaintiff-Appellant,

VERSUS

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-91-1312-D)

(January 13, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

In issue is whether the district court abused its discretion in denying plaintiff's motion for voluntary dismissal and, concomitantly, granting defendant summary judgment and thereby dismissing plaintiff's claim with prejudice, where a dismissal without prejudice would not only have exposed defendant to litigation in another forum, but also would have stripped defendant of an affirmative defense. Finding no reversible error, we **AFFIRM**.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Rosetta Hillary was a passenger on a TWA flight from Los Angeles, California, to St. Louis, Missouri, in March 1987. Hillary alleges that as she prepared to deplane in St. Louis, a TWA employee was removing a personal computer from an overhead bin above her seat; the computer fell, injuring her. Over four years later, in April 1991, Hillary sued TWA in federal district court in Louisiana, pursuant to diversity jurisdiction.[2]

TWA moved for summary judgment, asserting that Louisiana's one-year statute of limitations barred the claim.[3] In response, Hillary contended that, notwithstanding her filing suit in Louisiana, the "only solution to [her] dilemma" was to attempt to use Missouri's five-year statute of limitations, instead of Louisiana's.[4] In the alternative, Hillary moved for voluntary dismissal, under Fed. R. Civ. P. 41(a)(2), so that she could pursue

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[2] TWA has since filed for bankruptcy; the Bankruptcy Court in Delaware modified the automatic stay to allow Hillary to proceed, pursuant to a stipulation from Hillary that she would enforce any judgment she obtained only against TWA's insurers.

[3] Although the Louisiana statute is not identified, we assume that it is La. Civ. Code Ann. art. 3492 (West 1993), which provides, in relevant part: "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained...."

[4] Hillary conceded, however, that the district court in Louisiana had to apply Louisiana's statute of limitations, not Missouri's. In her memorandum in opposition to summary judgment, Hillary stated that she was "hardpressed [sic] to deny the correctness of defendant's position", *i.e.*, that the statute of limitations entitled TWA to summary judgment. She also stated that she realized that the court would "customarily apply the law of the forum to the issue of limitations in a diversity case... plaintiff can not refute the fact that Louisiana's prescriptive period has expired."

her case in federal court in Missouri. At the same time, Hillary filed suit against TWA in federal district court in Missouri.

In a judgment entered in December 1991, the Louisiana district court granted TWA's motion for summary judgment, based on Louisiana's statute of limitations, and denied Hillary's motion for voluntary dismissal without prejudice. Accordingly, it dismissed her claim with prejudice.

II.

Rule 41(a)(2) states in pertinent part that:

> an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.... Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

The district court's denial of a Rule 41(a)(2) motion is within its sound discretion; we review only for abuse of that discretion. ***Phillips v. Illinois Cent. Gulf R.R.***, 874 F.2d 984, 986 (5th Cir. 1989). The only issue before us is such abuse of discretion *vel non*, concerning Hillary's motion being denied, with the result that her claim was dismissed with, rather than without, prejudice.

In denying Hillary's Rule 41(a)(2) motion, the district court cited ***Phillips***, 874 F.2d 984. That case governs here, although Hillary urges us to follow the Eleventh Circuit's decision in ***McCants v. Ford Motor Co.***, 781 F.2d 855 (11th Cir. 1986).

McCants held that, absent bad faith on the part of the movant or "plain legal prejudice" to the defendant, a motion to dismiss under Rule 41(a)(2) should be granted, and the case dismissed without prejudice. ***Id.*** at 858. The ***McCants*** court also stated that

"the likelihood that a dismissal without prejudice will deny the defendant a statute of limitations defense does not constitute plain legal prejudice and hence should not alone preclude such a dismissal."[5] ***Id.***

In ***Phillips***, however, this court discussed the quoted language from ***McCants***, and reached a different result -- the result that TWA urges -- that the loss of a statute of limitations defense *is* plainly prejudicial to the defendant, making denial of the motion appropriate. ***Phillips***, 874 F.2d at 987. ***Phillips*** stated:

> We agree that the mere prospect of a second lawsuit on the same facts is not sufficiently prejudicial to the defendant to justify denial of a Rule 41(a)(2) motion to dismiss. In this case, however, the facts in the second lawsuit would differ in that the defendant would be stripped of an absolute defense to the suit -- the difference between winning the case without a trial and abiding the unknown outcome of such a proceeding. If this does not constitute clear legal prejudice to the defendant, it is hard to envision what would.

Id. (internal citation omitted); *but see* ***id.*** at 990 (Politz, J., dissenting); *see also* ***Ikospentakis v. Thalassic S.S. Agency***, 915 F.2d 176, 178 (5th Cir. 1990) (discussing ***Phillips***). This case presents us with the same situation-- the potential that, absent a dismissal with prejudice, TWA will be stripped of its absolute defense of the statute of limitations.[6] Therefore, we find no

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[5] Like the defendants in ***McCants*** and ***Phillips***, TWA can use the statute of limitations to bar Hillary's claim in the state where the Rule 41(a)(2) motion was filed, but would not be able to do so in a second forum-- here, Missouri, where the applicable statute is five years. Mo. Ann. Stat. § 516.120 (Vernon 1991).

[6] The district court order contains language that seems to limit, or modify, the dismissal, so that it applies only to that court:

abuse of discretion in the district court's denial of Hillary's motion for voluntary dismissal without prejudice, under the rule set out in ***Phillips***.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

> This ruling does not reach the merits of Plaintiff's claim, and this court expresses no opinion as to whether this matter can now be litigated in some other forum that does not apply the Louisiana prescriptive period. Accordingly,
>
> IT IS ORDERED that Defendant's Motion for Summary Judgment is hereby GRANTED, *dismissing Plaintiff's claim with prejudice in this court*.

(Emphasis added.)

As noted, Hillary states that she filed suit in Missouri when she filed her Rule 41(a)(2) motion in Louisiana. Of course, the district court in Missouri, not this court, controls that suit.