UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-2647
Summary Calendar

DAVID AUGUSTIN AGUILAR,

Plaintiff-Appellee,

versus

SHELL OIL COMPANY, DOW CHEMICAL COMPANY, and OCCIDENTAL CHEMICAL CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-644)

(April 6, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendants-Appellants Shell Oil Co., Dow Chemical Co., and Occidental Chemical Corp. (collectively, Defendants) appeal the

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*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court's grant of Plaintiff-Appellee David Aguilar's motion to dismiss their notice of removal. Finding no reversible error, we affirm the dismissal of Defendants' Notice of Removal.

I

FACTS AND PROCEEDINGS

David Aguilar filed suit against Defendants in state court in Harris County, Texas, on February 10, 1993. Aguilar purported to sue individually and as representative of a class of similarly situated plaintiffs comprised of Costa Rican banana plantation workers, all of whom were allegedly rendered sterile after being exposed to chemicals (specifically, a nematicide containing 1, 2-Dibromo-3-Chloropropane (DBCP)) that were allegedly designed, manufactured, marketed, distributed, or sold by Defendants.

Shortly after filing the action in Harris County, Aguilar learned that another action, also arising from the exposure of Costa Rican banana plantation workers to DBCP, had been filed earlier in Galveston County, Texas. On March 3, 1993, prior to certification of a class action, and before any defendant had answered or filed any other response, Aguilar filed a notice of nonsuit of the Harris County Action pursuant to Rule 162 of the Texas Rules of Civil Procedure. The action was subsequently re-filed in Galveston County. (Shell has filed a motion to transfer venue to Harris County.)

On March 5, 1993, two days after Aguilar's nonsuit, Shell, joined by the other defendants, filed a Notice of Removal in an attempt to remove the case to federal court. Aguilar moved to

dismiss the notice of removal because, in light of his prior nonsuit, there was no action pending in state court to be removed. The Defendants contested the motion, arguing that Aguilar's nonsuit was ineffective because his request for class action status necessitated court approval prior to dismissal, and Aguilar failed to obtain such approval before filing his notice of nonsuit. The district court granted Aguilar's Motion to Dismiss Defendant's Notice of Removal. Defendants appeal.

II

ANALYSIS

Rule 162 of the Texas Rules of Civil Procedure governs a plaintiff's ability voluntarily to dismiss an action by nonsuit. That rule provides in pertinent part:

> At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes. Notice of the dismissal or non-suit shall be served . . . on any party who has answered or has been served with process without necessity of court order.
>
> Any dismissal pursuant to this rule shall not prejudice the right of any adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court.[1]

Rule 162, unlike its federal counterpart Rule 41(a)(1), does not except class actions from the general rule that plaintiffs may

[1]TEX. R. CIV. P. 162.

freely dismiss their own actions.[2] Texas Rule 162 has been enforced consistently according to its unambiguous language. The rule is construed liberally[3]: As long as an adverse party has not made a claim for affirmative relief, the right is absolute.[4]

There are, however, three principal limitations on a plaintiff's otherwise unfettered right to nonsuit his own case. The rule itself describes two of these limitations. First, a nonsuit may not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief.[5] Second, if a motion for sanctions is pending, or if the party taking the nonsuit has been ordered to pay attorney's fees or costs as sanctions for failure to comply with court orders, and has not paid the fees or

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[2]Fed. R. Civ. P. 41(a)(1) provides:
> Subject to the provisions of Rule 23(e) [governing class actions] . . . an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

[3]Greenberg v. Brookshire, 640 S.W.2d 870, 872 (Tex. 1982); Smith v. Columbian Carbon Co., 198 S.W.2d 727, 728 (Tex. 1947).

[4]BHP Petroleum Co. v. Millard, 800 S.W.2d 838, 840 (Tex. 1990).

[5]TEX. R. CIV. P. 162; see TEX. R. CIV. P. 96.

costs, the nonsuit has no effect on that liability.[6] The third and final limitation, which is the only one of any relevance here, is not expressed in the rule, but is jurisprudential. Case law recognizes the longstanding principle that the court will not grant a nonsuit if it would materially affect the legal status of the subject matter of the action or the rights of any party.[7]

Defendants contend that Texas Rule of Civil Procedure 42(e), not Rule 162, governs Aguilar's right to dismiss his suit. Rule 42(e), identical in wording to its federal counterpart, Rule 23(e), requires approval before a voluntary dismissal can be entered in a class action.[8] But even if the plaintiff's right to nonsuit a class action is subject to court approval under 42(e)SQwhich would constitute a fourth limitationSQthe question would still remain open whether Rule 42(e) applies to an as yet uncertified class.

We have held that an action filed in federal court requesting class certification must be presumed to be a class actionSQand thus subject to Federal Rule of Civil Procedure 23(e)SQas long as the

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[6]TEX. R. CIV. P. 162; see Tri-M Erectors, Inc. v. Clearwater Constructors, Inc., 788 S.W.2d 906, 908 (Tex. App.SQAustin 1990, writ denied).

[7]Wolf v. Wolf, 269 S.W.2d 488 (Tex. Civ. App.SQAustin 1925, writ dism'd w.o.j.).

[8]Both rules provide that

> [a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

TEX. R. CIV. P. 42(e); FED. R. CIV. P. 23(e).

question of class certification is pending.[9] Defendants do not direct us to any Texas authority, however, that so holds, and we find none. Although Texas appellate courts have referenced federal cases in the absence of Texas case law[10] to construe Rule 42(e), we have no reason to predict thatSQgiven the liberal construction of Texas Rule 162 regarding a plaintiff's right to nonsuitSQTexas courts would so restrict the right of a plaintiff voluntarily to nonsuit a putative "class action" prior to certification of the class. Until and unless the courts or legislature of Texas take that step, we refrain from stretching that far.

Thus it is Texas' Rule 162, rather than Texas' Rule 42(e) or Federal Rule 23(e), that governs Aguilar's ability to nonsuit his case in state court. Defendants have not demonstrated that nonsuit in state court will materially affect the legal status of the subject matter of the action or the rights of any partySQthe only relevant limitation on Aguilar's right to nonsuit. Potential class members are not harmed by the nonsuit in Harris County because the "class action" was immediately refiled in Galveston County, where similarly situated individuals have brought the same or similar claims against these same defendants. Therefore, the district court's dismissal of Defendants' Notice of Removal is

AFFIRMED.

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[9]Pearson v. Ecological Science Corp., 522 F.2d 171, 177 (5th Cir. 1975), cert. denied, 425 U.S. 912, 96 S. Ct. 1508, 47 L. Ed. 2d 762 (1976); McArthur v. Southern Airways, 556 F.2d 298, 302 (5th Cir. 1977).

[10]RSR Corp. v. Hayes, 673 S.W.2d 928, 931-32 (Tex. App.SQDallas 1984, writ dism'd w.o.j.).