IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60789
Summary Calendar

ABEL ALONZO,

Plaintiff-Appellant,

VERSUS

DAIRY QUEEN OF CORPUS CHRISTI, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(94 CV 103)

July 26, 1995

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Abel Alonzo appeals a summary judgment in this suit brought pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. We dismiss the appeal as frivolous.

I.

[*] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Describing himself as needing a wheelchair for mobility and alleging physical barriers to his access to the Dairy Queen restaurant on South Padre Island Drive in Corpus Christi, Texas, Alonzo filed a state court suit against two parties, (1) Dairy Queen of Corpus Christi, Inc. ("DQCC"), as the franchisee operator, and (2) American Dairy Queen, Inc. ("ADQ"), as the franchisor. Alleging that the restaurant's facilities were not in compliance with the ADA, Alonzo sought declaratory and injunctive relief.

Upon learning that the restaurant and franchise had been sold, Alonzo filed a first amended complaint that is the same as the original complaint, except that it names the new owner of the Restaurant, Bayside Restaurant Company, Inc. ("Bayside"), instead of DQCC. ADQ removed the action to federal court.

Alonzo and Bayside entered into a settlement agreement pursuant to which, among other things, Bayside agreed to remove physical barriers that violated the ADA. Alonzo and Bayside agreed that they would file a joint motion to dismiss Bayside without prejudice and that the suit would not be re-filed if Bayside makes the alterations to the restaurant as described in the settlement. Alonzo and Bayside filed the joint motion to dismiss. ADQ was not a party to the settlement or to the joint motion. The district court granted the motion to dismiss Bayside.

Citing the settlement, ADQ moved for summary judgment or dismissal, arguing that it is not liable as a franchisor for ADA compliance and that the settlement leaves no active dispute between it and Alonzo. Alonzo filed a "Motion to Substitute Defendant and

Amend Complaint," seeking to substitute Bowen Enterprises, Inc. ("Bowen"), the franchisee of the Dairy Queen in Mathis, Texas, for Bayside. Alonzo alleged no relationship between Bayside and Bowen. He also filed a second amended complaint, alleging violations of the ADA at the Mathis Dairy Queen and naming Bowen and ADQ as defendants. The district court stayed proceedings for sixty days to allow Alonzo to resolve ADA violations with all Dairy Queen restaurants in Texas.

After the expiration of sixty days, the district court announced that it was "ridiculous" to substitute various Dairy Queen restaurants "one at a time." Denying the motion to substitute, the court told the parties that Alonzo could be substituting defendants "from now till doomsday and keep this on the docket for the next 35 years."

The district court also granted ADQ's motion for dismissal pursuant to FED. R. CIV. P. 12(b)(6). The court provided two grounds for the dismissal. First, Alonzo had obtained, in the settlement, the relief that he had sought in the lawsuit, leaving no claim against ADQ upon which relief could be granted. Additionally, the court held that ADQ, as franchisor, was not liable for the restaurant's compliance vel non with the ADA.

II.

Alonzo argues only that ADQ should be held liable for any ADA violations of its franchisees. He makes no argument about the district court's other ground for dismissing ADQ, i.e., that he had

settled all claims with respect to the restaurant. Nor does he argue that the district court erred in not allowing him to substitute Bowen and the Mathis Dairy Queen for Bayside and the restaurant. Issues not raised on appeal are abandoned. Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985).

The issue of ADQ's liability for its franchises' violations has now been settled favorably to ADQ in Neff v. American Dairy Queen Corp., No. 94-50552, slip op. 4746 (5th Cir. July 20, 1995). Even if we were to accept Alonzo's argument that ADQ should be liable for its franchisees's violations of the ADA, however, it would be meaningless for the instant suit. There are no claims pending regarding the conformity of the restaurant premises with the ADA's requirements, and there are no other Dairy Queen restaurants involved in this suit.

Given Alonzo's argument, this appeal could not possibly be resolved in such a way as to grant him any relief with respect to the suit that he filed. Alonzo's failure to argue that the district court erred in determining that no claims remained in the lawsuit renders the appeal moot. See Talbott Big Foot, Inc. v. Boudreaux (In re Talbott Big Foot, Inc.), 924 F.2d 85, 86-87 (5th Cir. 1991).[1]

III.

[1] Alonzo requests that this appeal be consolidated with Neff. The request is denied.

When ADQ removed the case to federal court, it was under the impression that DQCC was a named defendant. Shortly after removal, ADQ advised the court that it had not been served with the first amended state complaint naming Bayside instead of DQCC.

The district court docket sheet shows the defendants as DQCC, Bayside, and ADQ. The caption on the dismissal of Bayside shows only ADQ and Bayside as defendants. The same is true of the dismissal of ADQ. One might wonder whether DQCC is still a defendant.

The district court explained in the dismissal of ADQ that Alonzo had substituted Bayside for DQCC. This is consistent with the federal and state rules for substitution of parties and amendment of complaints. See FED. R. CIV. P. 25(c), 15(a), (c)(3); TEX. R. CIV. P. 64, 65 (West pamp. 1995).

DQCC was no longer a party in the state suit at the time of removal. With the exception of the brief period immediately following removal when ADQ was under the impression that DQCC was a defendant, no party treated DQCC as a defendant in federal court, and it did not appear in federal court. The district court did not treat it as a party, either. ADQ's initial misimpression, resulting from its not having been served with the first amended complaint, merely created an anomaly in this case.

There is no error and, moreover, this appeal is frivolous. It is hereby DISMISSED pursuant to 5TH CIR. R. 42.2.