

No. 08-2457

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**THREE ANGELS BROADCASTING NETWORK, INC.,
an Illinois Non-Profit Corporation;
DANNY LEE SHELTON,**

Appellees,

v.

GAILON ARTHUR JOY and ROBERT PICKLE,

Appellants.

On Appeal from the United States District Court
For the District of Massachusetts
Case No. 07-40098

BRIEF OF THE APPELLEES

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RESPONSE TO JURISDICTIONAL STATEMENT

Appellees, Three Angels Broadcasting Network, Inc. and Danny Lee Shelton (collectively referred to herein as “3ABN”), disagree with appellants’ contention that this Court has appellate jurisdiction over this case. Appellants filed their notice of appeal before a “final decision” within the meaning of 28 U.S.C. § 1291, which vests this Court with appellate jurisdiction, was issued. Specifically, at the time the appeal was filed, and as of this writing, the district court continues its consideration of whether to impose an award of fees and costs under Fed. R. Civ. P. 41(a)(2) as an additional condition of dismissal. Until that motion is decided, the issue on appeal, whether the district court abused its discretion by not imposing all the terms that the appellants would have liked in dismissing the case, is not finally decided and therefore not reviewable.

This Court has jurisdiction over appeals from all “final decisions” of the district court. 28 U.S.C. § 1291. A final decision for purposes of § 1291 is one that “ends the litigation on the merits and leaves nothing for the courts to do but execute the judgment.” *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945). Collateral matters that remain pending, such as motions for costs or fees under Fed. R. Civ. P. 54, do not affect the finality of an order. But an award of costs and fees under Rule 41(a)(2) is a term that may be imposed to protect the defendant from prejudice. *Puerto Rico Maritime Shipping Authority v.*

Leith, 668 F.2d 46, 51 (1st Cir. 1981). A motion for fees and costs made to determine the conditions of a voluntary dismissal under Rule 41(a)(2) is therefore part and parcel of the “merits” of an order for voluntary dismissal, and is not a collateral issue in the context of this appeal.

At the hearing on the motion to voluntarily dismiss, Judge Saylor said:

let me add as a further condition that I will at least permit defendants to seek recovery of reasonable costs, fees, expenses ... if they file something within 21 days of the date of this order. I’m not promising that I will allow those to be paid, and I’ll permit plaintiffs to oppose it, but I will give you the opportunity to make that argument formally and with a specific itemized detailing of your costs and expenses.

(Addendum DA0016). Judge Saylor added: “And if I do ... decide to award any kind of costs or expenses or fees, it will obviously be a further condition of the order of voluntary dismissal.... And I’ll retain jurisdiction for that purpose.”

(Addendum DA0018). Thus, Judge Saylor did not intend his order granting dismissal to be final – he reserved the issue of costs, and imposed a briefing schedule.

Consistent with Judge Saylor’s statements at the hearing, the Electronic Clerk’s Notes of the hearing reflect that the dismissal was conditioned on the anticipated motion for costs, by stating “The Court orders dismissal with conditions stated on the record...Court orders any motion for costs to be filed by 11/21/08. Order of dismissal to issue.” (Addendum DA0001).

Appellants filed their motion for costs on November 13, 2008. (District Court Doc. 130, Joint Appendix JA0020). Without waiting for Judge Saylor's decision on their motion for costs, Appellants then filed their notice of appeal on the same day. (JA0020). The motion for costs remains pending at this moment.

The matter of costs and fees is not collateral to the merits of the dismissal because the only legal basis for an award of costs and fees is the authority granted the district court by Fed. R. Civ. P. 41(a)(2) to condition a voluntary dismissal "upon such terms that the court considers proper." Whether dismissal should be conditioned on payment of costs and fees is not collateral to the merits of a motion for voluntary dismissal – it *is* the merits. Until the district court decides all the conditions of dismissal, the decision is not final, and this Court has only part of the district court's decision before it. This appeal must therefore be dismissed as premature.

RESPONSE TO STATEMENT OF THE ISSUES

Appellants' statement of issues misidentifies sub-arguments as issues. Only two distinct appellate issues are before the Court:

1. Whether the district court abused its discretion by granting 3ABN's motion for voluntary dismissal under Fed. R. Civ. P. 41(a)(2), subject to the condition that any future suit involving the same facts and

that the public's confidence in 3ABN has been restored. As 3ABN's Board Chairman, Dr. Walt Thompson, stated:

When the Board came to the conclusion that 3ABN's reputation was no longer being significantly harmed by the Defendants' activities and that continuation of the lawsuit could not achieve more than what we had already achieved by other means, it was time to shut the lawsuit down.

(Id.).

Although 3ABN and Shelton continued to believe that they would have ultimately achieved a ruling in this case that the statements by Pickle and Joy were false and defamatory, the intervening developments reduced the need to obtain a ruling on the merits to the point that the expense and distraction inherent in litigation were no longer justified. (JA0306).

Thus, the "facts" recounted in appellants' brief were not accepted by the district court as true or relevant. If this Court were to consider any of them in reaching its decision it would be finding facts contrary to those found by the district court. It should also be noted that there was never an occasion for 3ABN and Shelton to submit evidence in support of the merits of their claims to the district court, and therefore there is nothing available in the district court record from which 3ABN and Shelton can respond to the web of innuendo and speculation that infests the appellants' brief.

had proceeded to trial has no bearing on the validity and enforcement of the protective order. Appellants' first amendment arguments should also be denied.

CONCLUSION

Pickle and Joy do not have a right to be sued to the point of a decision on the merits when circumstances change such that meaningful relief can no longer be achieved. They do, however, have a right to have dismissal conditioned on terms that the district court concludes are necessary to protect them from legal prejudice. The district court in this case properly considered Pickle and Joy's claims of prejudice and imposed only one condition, that any future suit by the appellees be brought in the same court so as to discourage forum shopping. The district court reserved the issue of costs and fees, and a motion on that subject remains pending that precludes full review by this Court of the decision below.

For the reasons stated in this brief, the appeal should be dismissed.

Respectfully submitted:

Dated: March 26, 2009

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CERTIFICATE OF SERVICE

I Amy Ditty, hereby certify that on March 23, 2009, I served a copy of this brief on the following by First Class U.S. Mail, postage prepaid:

Mr. Robert Pickle
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I also hereby certify that I served 10 paper copies and one CD copy of this brief on the Clerk of Court of the U.S. Court of Appeals for the First Circuit by way of First Class U.S. Mail, postage prepaid.

Dated: March 23, 2009

s/ Amy Ditty
Amy Ditty