

79967-9

No. 25217-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FEATURE REALTY, INC, a Nevada corporation;
MISSION SPRINGS, INC., a Washington corporation, now doing
business as Canyon Construction NW, Inc.,
JACK KRYSTAL, as Trustee of the KM Family Trust; and
RUSSELL V. LUGLI, individually and as Co-Trustee of the Lugli
Family Trust, the Nikki Trust, and the Alpha Trust,

Appellants,

v.

PRESTON GATES & ELLIS, LLP;
JERRY R. NEAL and JANE DOE NEAL, his wife, and the marital
community comprised thereof;

Respondents,

And TERRENCE L. BUTLER and JANE DOE BUTLER, his wife,
and the marital community comprised thereof,

Defendants in Trial Court.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

The “two dismissal” rule imposes a harsh remedy in derogation of the common law. Thus, only a *voluntary* and *unilateral* dismissal by the plaintiff counts for purposes of the “two dismissal” rule. In this case, the trial court concluded that Appellant Feature violated the two dismissal rule as to each Respondent, Mr. Neal and Preston Gates & Ellis, by counting a July 28, 2003 dismissal in an underlying California lawsuit as the first “voluntary” and “unilateral” dismissal for purposes of the two dismissal rule. This was error, as Mr. Neal had successfully persuaded the California Court to quash service against him, over Appellant Feature’s objection, months earlier on January 14, 2003. The California Court’s January 14, 2003 Order terminated all proceedings by Appellants against Mr. Neal in California. Feature, therefore, did not voluntarily or unilaterally dismiss Mr. Neal from the California case; the California Court terminated the California case against Mr. Neal, on Mr. Neal’s motion. See discussion, *infra*, pp.24-28. The trial court thus erred when it dismissed Feature’s current case against Mr. Neal.

During that same January 14, 2003 hearing in which the California Court granted Mr. Neal’s motion to quash, Preston Gates & Ellis

successfully persuaded the California Court to decline jurisdiction over Preston Gates & Ellis, and *forever stay* Feature's California case against it on grounds of *forum non conveniens*, again despite Appellant Feature's objection. Just like the order quashing service on Mr. Neal, the California Court's stay on grounds of *forum non conveniens* constituted a final order. See discussion, *infra*, pp. 28-35. This ruling meant that Feature could *never* proceed against Preston Gates & Ellis in California. At a later status conference in the case Preston Gates & Ellis, Mr. Butler and the California Court insisted that Feature dismiss the entire case and threatened sanctions against Feature if it did not.

The trial court erred when it counted as voluntary and unilateral a dismissal filed *after* the California Court had quashed service on Mr. Neal for lack of personal jurisdiction and stayed proceedings against Preston Gates & Ellis, *forever*, based upon *forum non conveniens*. This Court should therefore reverse the trial court, reinstate Appellants' complaint, and remand this case for trial on the merits.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err when it held that the July 28, 2003 California dismissal constituted a voluntary and unilateral dismissal of Mr.

Neal for purposes of the CR 41(a)(4) “two dismissal rule,” considering that the California Court had *involuntarily* terminated the California proceedings against Mr. Neal on January 14, 2003, for lack of personal jurisdiction over him?

Related Issues:

A. Did the California Court’s January 14, 2003 order holding that it did not have personal jurisdiction over Mr. Neal involuntarily terminate Feature’s California lawsuit against Mr. Neal, as a matter of California law?

B. Did the California Court’s January 14, 2003 order holding that it did not have personal jurisdiction over Mr. Neal constitute a final order for purposes of appeal as a matter of California law?

C. Considering the California Court’s January 14, 2003 order quashing service on him for lack of personal jurisdiction, may Mr. Neal nevertheless claim the benefit of the July 28, 2003 notice of dismissal for purposes of the two dismissal rule based upon principles of *res judicata* and privity?

2. Did the trial court err when it held that Feature voluntarily and unilaterally dismissed the California complaint against Preston Gates & Ellis on July 28, 2003, considering: (a) on January 14, 2003, the California Court had declined to exercise jurisdiction over Preston, Gates & Ellis based upon *forum non conveniens*, thus forever staying Feature's complaint and preventing Feature from ever proceeding in California against Preston; (b) the California Court's stay order constituted a final judgment as a matter of California law, and; (c) Feature filed the California notice of dismissal on July 28, 2003, only after the California Court demanded that Feature do so and stated its intention to impose sanctions against Feature if it did not file the dismissal?

Related Issues:

A. Did the California Court's January 14, 2003 order granting Preston Gates & Ellis' *forum non conveniens* defense forever stay Feature's California lawsuit against Preston Gates & Ellis in California?

B. Did the California Court's January 14, 2003 order staying Feature's California case due to *forum non conveniens* constitute a final appealable order as a matter of California law?

C. To avoid application of the two dismissal rule, does CR 41(a)(4) require a party to act in disrespect of a sister court's specific and lawful directive that the party dismiss a pending lawsuit and incur sanctions promised by the Court if it does not?

D. Does the Supreme Court's holding in *Spokane County v. Specialty Auto*, 153 Wn.2d 238, 247, 103 P.3d 792 (2004), that Washington courts should not "look into the reasons for the dismissal," mean that this Court must ignore objective, incontrovertible evidence establishing that a prior dismissal occurred at the specific instance and demand of a sister court and/or the defendants themselves?

3. Does estoppel bar Respondents from claiming that Feature voluntarily and unilaterally dismissed the California complaint, considering that Feature dismissed the California complaint only after the California Court sustained Respondents' objections to the California Court's exercise of jurisdiction over them and demanded that Feature dismiss its California complaint?

III. STATEMENT OF THE CASE

A. Appellants' Legal Malpractice Claim Against Respondents

Appellants Feature Realty, Inc., Mission Springs, Inc., and their principals (collectively referred to as "Feature") filed this legal malpractice action against their former attorneys, Jerry R. Neal and Preston Gates & Ellis, LLP.¹

Feature first retained Mr. Neal and Preston Gates & Ellis in connection with the Mission Springs development in 1991. CP 330, 335-492, 793-4. Feature filed its underlying lawsuit against the City of Spokane in 1995. CP 596. The trial court dismissed that complaint on summary judgment in 1996. CP 605, 795. After the Washington Supreme Court reinstated Feature's lawsuit in *Mission Springs, et al v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998), Feature naturally turned to Mr. Neal and Preston Gates & Ellis for representation in the Spring of 1998. CP 495, 795-7.

¹ Feature's complaint also named an independent California attorney, Terrence L. Butler, as a defendant. CP 11. The trial court dismissed Mr. Butler on summary judgment. CP 1198-9. Mr. Butler's representation of Feature terminated on or about March 28, 2000. CP 268 n. 6, 819. (Respondents agree that their representation did not terminate "until approximately February 2002"). CP 1073, 267-8. Feature thus does not brief the summary judgment in favor of Mr. Butler because, unlike Feature's claims against Mr. Neal and Preston Gates & Ellis, the continuous representation rule did not toll the statute of limitations on Feature's claims against Mr. Butler.

Mr. Neal and Preston Gates & Ellis represented Feature in connection with settlement of its claims against the City of Spokane following remand by the Supreme Court, including disputes that arose out of that settlement agreement. CP 795-9, 324 ¶¶13-14, 647 ¶¶13-14. By August 31, 1998, Mr. Neal had taken over as Feature's lead attorney in its settlement negotiations with the City. CP 667 ¶7, 659. Among other responsibilities, Feature relied on Mr. Neal to make certain that the Settlement Agreement with the City was properly approved. CP 659, 667.

Feature and the City entered into a Settlement Agreement in October, 1998. CP 667 ¶6. When the City later reneged on the settlement [CP 317 ¶4], first the United States District Court for the Eastern District of Washington and then the Ninth Circuit Court of Appeals declared the settlement void because the City Council of the City of Spokane had not approved it in an open, public meeting as required by RCW 42.32.010, *et seq. Feature Realty v. City of Spokane*, 331 F.3d 1082 (9th Cir. 2003). Mr. Neal and Preston Gates & Ellis continued to represent Feature in the underlying matter until at least March 14, 2002. CP 592, 613, 632 (Docket No. 178), 714, 795-799 ¶¶8-16.

Feature's legal malpractice complaint alleges that Mr. Neal and

Preston Gates & Ellis committed malpractice in connection with their representation of Feature in the underlying matter, and that Mr. Neal and Preston Gates & Ellis represented Feature without disclosing and obtaining Feature's informed consent to their conflicts of interest arising out of their legal representation of the City of Spokane. CP126-131.

B. The Two "Dismissals"

Feature originally filed its legal malpractice complaint against Mr. Neal, Preston Gates & Ellis, and former defendant Terrence L. Butler in the Los Angeles County Superior Court on July 5, 2002. CP 1152. Preston moved to stay Feature's California complaint on grounds of *forum non conveniens*. CP 718-39. (Preston's motion to stay based upon *forum non conveniens*, p. 1: "This action should be stayed under the doctrine of *forum non conveniens* while plaintiffs refile in Washington."). In a *separate* motion, Mr. Neal moved to quash the complaint for lack of personal jurisdiction, based upon lack of minimum contacts with California. CP 751-800, 802-3, 823 ¶3, 842 ¶2-3.

The California Court granted the motions of *both* Mr. Neal and Preston Gates & Ellis on January 14, 2003, effectively terminating

Feature's case² against Mr. Neal and declining to exercise jurisdiction over Preston Gates & Ellis. CP 802-3, 814-5 (pp. 8:22-9: 3), 823, 826, 842 ¶3. The Court then ordered Feature's case against Preston Gates & Ellis stayed, forever.³ See discussion, *infra*, pp. 28-34. Pursuant to California Code of Civil Procedure §904.1(a)(3), both the order quashing service as to Mr. Neal and the order staying proceedings were final, appealable orders, effectively terminating Feature's California case against both Neal and Preston Gates & Ellis. The California Court thus took the case "off calendar." CP 823 ¶3, 828.

On July 14, 2003, the California Court held a follow-up Case Management Conference, during which the Court insisted that Feature's California complaint—*already stayed*--must be dismissed. CP 832-837.⁴ When, in response to the Court's question, Feature's attorney would not rule out the possibility that Feature might try to continue to litigate the

² See discussion, *infra*, pp. 24-28.

³ The California motion transcripts refer to a "Tentative Ruling." A "Tentative Ruling" is part of the California Law & Motion process. Cal. Rules of Court, Rule 324 allows California courts to issue tentative rulings on motions, which the parties can either accept without appearance or contest. The court may thereafter still adopt its Tentative Ruling. The January 14, 2003 Transcript in the California proceedings refers to a "Tentative." In this case, the California Court adopted its "Tentative."

⁴ One law firm jointly represented Preston Gates & Ellis and Mr. Neal in the California case but appeared at the July 14, 2003 hearing solely on behalf of Preston. CP 836.

California case against Mr. Butler but sue Preston in Washington, **the Court stated that sanctions “will be granted”** against Feature unless it dismissed the case in its entirety. CP 832-4 (pp. 3:27-4:15), and 835-6 (p. 6:10-23), (again threatening sanctions if case not dismissed). The Court further stated “I would have dismissed it [in January] except that I thought that the better course of action was to give them a few months to file suit in Washington so it was a clean dismissal.” CP 833 (p. 4:5-8). See further, CP 835 (p. 6:21-23), (“I would like to have clean dismissals and never see any of you again”). The Court concluded its remarks as follows, [CP 837, p. 7:25-28]:

“What I would really like is to have the request for dismissal in the mail—not even in the mail—in my file and no appearances on the 29th.” [Emphasis added].

The California Court had, of course, quashed the complaint against Mr. Neal months before then, for lack of personal jurisdiction over him. The California Court had also declined jurisdiction and prohibited Feature from proceeding against Preston Gates & Ellis. Pursuant to the California Court’s insistence, under threat of sanctions, Ms. Kapetanacos, one of Feature’s California counsel, filed the requisite notice dismissing the California complaint against Preston Gates & Ellis on July 28, 2003. CP

824 ¶6, 840. The July 28, 2003 dismissal does not mention Mr. Neal. CP 840. California does *not* recognize a similar “two dismissal” rule. CP 860 ¶3.⁵

After the California Court’s January 14, 2003 order stayed the California proceedings, Feature eventually retained additional counsel to file a Washington complaint. CP 842 ¶4. Ms. Elizabeth Large thereafter filed Feature’s legal malpractice complaint in King County Superior Court, Case no. 03-2-31560-5 SEA, on July 24, 2003, just prior to the July 29, 2003 deadline imposed by the California Court and while the California case was still pending. CP 1161-7, 743 ¶5, 843 ¶7. Feature, as Mr. Neal and Preston Gates and Ellis correctly concede, did not serve the defendants with this first King County complaint. CP 1075. Feature instead voluntarily dismissed the first King County complaint on February 23, 2004, and re-filed the complaint with new counsel on March 2, 2004, King County Superior Court Case No. 04-2-04783-8 SEA. CP 321-7, 1075. This second King County complaint represents the complaint

⁵ RCW 5.24.010 required the trial court to take judicial notice of the law of California. RCW 5.24.020 and CR 44.1(c) grant the trial court broad discretion as to *how* it informs itself of foreign law and authorizes sworn testimony by an attorney licensed to practice law in the foreign jurisdiction. See, *Sherman v. Lunsford*, 44 Wn. App. 858, 864, 723 P.2d 1176 (1986); See, CP 1034-6. The trial court thus correctly denied Respondents’ motion to strike Mr. Morley’s declaration on this issue of California law. RP 11:9-16.

dismissed by the Spokane County Superior Court and before this Court in this appeal.

C. Trial Court Proceedings

On defendants' motion, the King County Superior Court ordered venue transferred to Spokane County Superior Court. CP 1, 3, 133-4. Following the transfer of venue and extensive discovery disputes,⁶ Mr. Neal and Preston moved for summary judgment asserting *res judicata* based upon the "two dismissal rule" of CR 41(a)(4), as well as the statute of limitations. CP 1070-1.

On April 21, 2006, the trial court granted summary judgment in favor of both Mr. Neal and Preston Gates & Ellis based upon the "two dismissal rule," but denied summary judgment on their statute of limitations defense because the continuous representation rule had tolled the statute of limitations until well within the three year period for filing suit.⁷ Concerning the "two dismissal" rule relative to Mr. Neal, the trial

6 See, Division III Case nos. 234061-III and 234843-III.

7 Respondents filed a notice of cross-appeal based upon the trial court's rejection of Respondents' statute of limitations defense. This Court notified the parties, on June 8, 2006, that Respondents "will not be considered a cross-appellant for purposes of briefing because, as stated in this notice of cross-appeal, it is purely prophylactic." The trial court correctly determined that "there is an issue of fact as to...this continuous representation" rule issue. RP 16:4-17:1. CP 283-9.

court reasoned [RP 13:15-14:4]:

Now, as to Mr. Neal, the suggestion is that he made a motion—excuse me, not a suggestion—the facts are that he made a motion [in the California case], and his motion was granted.

The difficulty I see with that—again, I don't see a dispute as to the facts, I don't think this invokes CR 56 necessarily—*the question is, what does that mean?*

Well, *I think as a legal matter it has no import because he's still part of the lawsuit until there is either an order dismissing him⁸ or—the fact that the summons has been quashed, there is all kinds of things that can happen at that point: It could be appealed, somebody could go out and re-serve him. I have no idea.*

And I don't think it is the Court's position to go behind and say, well, what did it all mean.

He made a motion. It was granted.

That is what I know. And that is the fact in the case. [Emphasis added].

The trial court denied Respondents' motion to strike the declaration of attorney Blaine Morley [RP 11:9-16], but partially granted Respondents' motion to strike those parts of the declarations of Joseph McMonigle and Anna Kapatnakos only to the extent they “go into intent or belief or feeling, or those types of things.” RP 10:2-11:8.

⁸ The trial court thus adopted an erroneous analysis of California law. See discussion, *infra*, pp. 24-27. Feature explained the correct analysis in the trial court. RP 39:8-41:12.

The trial court summary judgment in favor of defendants was not a final judgment for purposes of appeal because Preston Gates & Ellis had filed a counterclaim against Feature (in which it asserted that Feature still owed the law firm money for services rendered in connection with the underlying matters). The parties thereafter entered into a Stipulation dismissing the law firm's counterclaim, which they filed on May 10, 2006. CP 1202-3. As recognized in the parties Stipulation for dismissal of Preston's counterclaim, the April 21, 2006 Order became final and appealable after filing of that Stipulation. *Id.* Appellants timely filed their notice of appeal on May 19, 2006. CP 1204, 1207.

IV. SUMMARY OF ARGUMENT

This Court reviews all issues *de novo*. The Court narrowly construes the two dismissal rule set forth in CR 41(a)(4) to promote resolution of cases "on the merits." *Specialty Auto, supra*, 153 Wn.2d at 245. Only a "voluntary" and "unilateral" dismissal by the plaintiff counts for purposes of the two dismissal rule. *Id.*, at 247-48. The two dismissal rule thus applies *only* in the very limited context in which the plaintiff alone controlled dismissal, because only in that very limited situation can the plaintiff *prevent* the defendant from defeating plaintiff's unilateral

dismissal. Conversely, if the *defendant* affirmatively and successfully seeks termination of the case against him/it, the plaintiff's subsequent dismissal does *not* count toward the two dismissal rule because the plaintiff did *not* unilaterally control the dismissal and the purposes of the two dismissal rule would not be furthered by its application.

Feature did not voluntarily or unilaterally dismiss the California complaint against Mr. Neal. The California Court instead quashed service on Mr. Neal for lack of personal jurisdiction over him in California, *on Mr. Neal's motion and despite Feature's objection*. The California Court order *involuntarily* terminated Feature's California case against Mr. Neal, and Feature could not thereafter proceed against Mr. Neal in California, as there was no personal jurisdiction.

Feature also did not voluntarily or unilaterally dismiss the California complaint against Preston Gates & Ellis. The California Court instead refused to exercise jurisdiction over Preston Gates & Ellis on grounds of *forum non conveniens* and **forever stayed** all proceedings by Feature against Preston Gates & Ellis in California, *on the motion of Preston Gates & Ellis and despite Feature's objection*. Feature could not thereafter proceed against Preston Gates & Ellis in California.

After having terminating Feature's claims against Mr. Neal, and having granted a perpetual stay of Feature's claims against Preston Gates & Ellis, the California Court then demanded that Feature dismiss the California complaint and promised sanctions against Feature if it did not dismiss. Only then did Feature file a notice of dismissal in the California Court relative to Preston Gates & Ellis -- but *not* Mr. Neal who was already out of the case. Respondents assert that a litigant in such situations must disregard such demands by a sister court. Feature suggests this Court should not require litigants to act with disrespect toward the demands of a sister court, as the means of avoiding the harsh impact of the two dismissal rule.

It is this California dismissal, entered *after* the California Court's order quashing service as to Mr. Neal, and *after* the California Court's order perpetually staying proceedings against Preston Gates & Ellis, and *after* the California Court demanded that Feature file a dismissal, that the trial court relied upon as the *first* voluntary and unilateral dismissal to support its application of the two dismissal rule. This represented the *sole* basis upon which the trial court dismissed Feature's complaint in this case with prejudice as to both Mr. Neal and Preston Gates & Ellis.

Feature did not voluntarily or unilaterally dismiss either Mr. Neal or Preston Gates & Ellis from the California proceedings. Moreover, *Specialty Auto* does not require the Washington Courts to ignore objective, incontrovertible evidence that the defendant sought and/or agreed to the dismissal and the plaintiff merely acquiesced in the defendants' demands.

The trial court thus erred when it concluded that Feature voluntarily and unilaterally dismissed Mr. Neal and Preston Gates & Ellis from the California lawsuit. This Court should therefore reverse the trial court and remand this case for trial on the merits.

V. ARGUMENT

A. De Novo Review Applies to All Issues

This Court reviews all issues *de novo*, including the trial court's: (1) order granting summary judgment, *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475, 21 P.3d 707 (2001); (2) interpretation and application of CR 41(a)(4), *Spokane County v. Specialty Auto and Truck Painting, Inc.*, 153 Wn.2d 238, 244, 103 P.3d 792 (2004), and; (3) determinations of California law (*e.g.*, RP 13:5-14:4) concerning both the effect of the California Court's order granting Mr. Neal's motion to quash service on Mr. Neal for lack of personal jurisdiction and the California Court's order

staying the California action as to Preston Gates & Ellis based upon *forum non conveniens*, CR 44.1(c)(3); RCW 5.24.030. See further, *Byrne v. Cooper*, 11 Wn. App. 549, 554-55, 523 P.2d 1216 (1974).

B. The Two Dismissal Rule Applies Only in the Situation in Which the Plaintiff Alone Controlled Termination of the Lawsuit Without the Defendant's Consent

Civil Rule 41(a)(4) sets forth the Washington “two dismissal” rule:

Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or any state. [Emphasis added].

Civil Rule 41(a)(1)(A) and (B) provide for two, alternative means by which Washington plaintiffs may obtain a mandatory, voluntary dismissal. First, the plaintiff and defendant may agree to dismissal by way of a stipulation. CR 41(a)(1)(A). Second, the plaintiff may unilaterally dismiss, but only by motion (and order) prior to resting. CR 41(a)(1)(B).

A stipulated dismissal does not count as a voluntary and unilateral dismissal for purposes of the two dismissal rule, because a stipulation “does not support a finding that [the defendant] intended to relinquish any rights.” *Specialty Auto, supra*, 153 Wn.2d at 247, 248. In essence, a defendant who successfully seeks or agrees to dismissal may not later

complain because the plaintiff did not proceed with the dismissed complaint. Case law uniformly supports this conclusion.

Specialty Auto further teaches that the two dismissal rule of CR 41(a)(4) must be “narrowly construed” to “promote resolution on the merits,” reasoning [*id.* at 245]:

CR 1 requires Washington courts to interpret the court rules in a manner “that advances the underlying purpose of the rules, which is to reach a just determination in every action.” [Citation omitted]. The court rules are intended to reach the merits of an action. “[W]henever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form.”

Although the general purpose of the court rules is to promote resolution on the merits, the rules provide procedural safeguards to be narrowly construed in line with this general purpose. The narrow purpose of CR 41(a)(4) is to prevent the abuse and harassment of a defendant and the unfair use of dismissal. To achieve this purpose, we limit application of the “two dismissal” rule to dismissals that are the unilateral act by the plaintiff. [Citations omitted].

Accord, *Poloron Products, Inc. v. Lybrand Ross Bros. and Montgomery*, 534 F.2d 1012, 1027 (2nd Cir. 1976) (where “literal application” of the two dismissal rule would “close the courthouse doors to an otherwise proper litigant, a court should be most careful not to construe or apply the exception too broadly”), *quoted with approval, Murray v. Sevier*, 145 FRD 563, 567 (D. Kan. 1993).

The two dismissal rule thus only applies in the very limited context in which the *plaintiff alone controls dismissal* because “[t]here is *nothing the defendant can do to fan the ashes of that action into life and the court has no role to play.*” *Commercial Space Mgmt. Co. v. The Boeing Co.*, 193 F.3d 1074, 1077 (9th Cir. 1999), *quoting*, *American Cyanamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963). Indeed, the Washington Supreme Court relied on this same rationale in *Specialty Auto* when it explained that “[u]nder our holding, **a defendant may prevent abusive use of the rule simply by declining to stipulate to dismissal.**” *Specialty Auto, supra*, 153 Wn.2d at 246 n. 2 (emphasis added).

Accordingly, where (as here) the defendant himself/itself demands dismissal in the underlying *objective court record* without regard to plaintiff’s subjective motives, *the plaintiff’s subsequent acquiescence* in the defendants’ (and the Court’s) demand should not, and does not, trigger application of the two dismissal rule. *Specialty Auto* does not contradict this conclusion; instead, *Specialty Auto* *twice* recognizes that a defendant’s stipulation to dismissal constitutes a waiver of the “two dismissal” rule. *Id.*, 153 Wn.2d at 247-8 (*e.g.*, “the trial court found that neither dismissal

was by stipulation. We reject Spokane County's request that we look beyond this finding...").

C. The Difference Between "Involuntary" and "Voluntary" for Purposes of the Two Dismissal Rule.

The case law confirms the conclusion that a dismissal sought by the court or the defendant(s), does not trigger the two dismissal rule if the plaintiff merely acquiesces in the defendants' demands. *E.g., Sutton Place Development Co. v. Abacus Mtg. Investment Co.*, 826 F.2d 637, 638-41 (7th Cir. 1987) (after order of abatement (*i.e.*, "stay," as here), dismissal did not trigger two dismissal rule); *Hughes Supply, Inc. v. Friendly City Electric Fixture Co.*, 338 F.2d 329 (5th Cir. 1964) (plaintiff conceded defendants' venue and personal jurisdiction objections; subsequent dismissal did not trigger two dismissal rule); *Randall v. Merrill Lynch*, 820 F.2d 1317, 1321 (D.C. Cir. 1987) ("voluntary" within Fed. R. Civ. P. 41 "means that the party is filing the dismissal without being compelled by another party or the court"); *Dee-K Enterprises, Inc. v. Heveafil SDN. BHD.*, 177 FRD 351, 355 (E.D. Va. 1998) (dismissal on defendants' 12(b)(6) motion did not trigger "two dismissal" rule). Moreover, the "two dismissal" rule is also *not* triggered "where the plaintiff dismisses to

correct errors on the face of the complaint and *to respond to objections of the defendant*” or where the “dismissal is in some way irregular.” 24 Am. Jur. 2d *Dismissal* §92 (Aug. 2005) (emphasis added); 9 Wright & Miller, *Fed. Prac. & Proc. Civ.2d* §2368 (2005).

Sutton Place Development, supra, involved circumstances similar those present here. In *Sutton Place*, plaintiff filed a lawsuit in the Illinois state courts, which it later dismissed as against defendant Abacus. *Sutton Place, supra*, 826 F.2d at 638. The defendant sued Sutton Place in Florida, and Sutton Place counterclaimed. *Id.* Sutton Place next filed a third lawsuit in a United States District Court in Illinois—but Abacus was *not* a named defendant in this third lawsuit. Sutton Place filed Chapter 11 bankruptcy reorganization and then filed yet a fourth lawsuit, this time against *only* Abacus. This last case was assigned to “Judge Moran.”

Just as Preston Gates & Ellis did in Feature’s California lawsuit, Abacus obtained an order (from Sutton Place’s Bankruptcy Court) *staying* the case pending with Judge Moran, *i.e.*, “an order directing Sutton Place to abate” the case before Judge Moran. *Id.* Sutton Place then asked the Bankruptcy Court to modify the stay order to allow it to dismiss the case pending with Judge Moran. At a conference with the Court, just as in

Feature's California lawsuit, Abacus did not object to the dismissal.

Under those very similar circumstances, the Seventh Circuit explained that the resulting dismissal did *not* come within the "two dismissal" rule because (826 F.2d at 640-41):

The record makes it quite clear that dismissal of the suit before Judge Moran was sought only after the matter had been discussed fully before the bankruptcy judge and opposing counsel. It was clear to all that Sutton Place was seeking dismissal of the suit before Judge Moran—*not to harass Abacus but to consolidate its Chicago-based litigation*. [Quotation omitted]. While appellee's counsel did not explicitly waive reliance on the "two dismissal" rule, it is clear that he understood the reason for the appellants' course of action and raised no objection to it. [Emphasis added].

Specialty Auto, supra, is entirely consistent with this analysis.

Specialty Auto involved two appeals consolidated in the Supreme Court.

This Court undoubtedly knows well, and will appreciate, the critical differences between the underlying facts of the Division III case [*Spokane County v. Specialty Auto*, 119 Wn. App. 391, 79 P.3d 448 (2003)] and those present here. Thus, unlike Mr. Neal and Preston Gates & Ellis in this case, Specialty Auto neither sought nor obtained any court ruling that effectively dismissed the defendant or prevented the plaintiff County from proceeding with any of the underlying lawsuits. *Id.*, 119 Wn. App. at 394. Instead, the plaintiff County had filed three separate lawsuits, voluntarily

dismissed the first complaint, having *itself* “recogniz[ed] the authorization problem,” and voluntarily dismissed the third lawsuit “to synchronize” its action with Specialty Auto’s anticipated lawsuit. *Id.* These were unilateral choices by the County, completely outside Specialty Auto’s control.

In contrast, when the *defendant* affirmatively seeks, *and obtains*, dismissal (and/or permanent stay) of the plaintiff’s case, as Mr. Neal and Preston Gates & Ellis did in the California case, and the plaintiff merely acquiesces in the defendants’ demands, dismissal by the plaintiff *after* service has been quashed and proceedings stayed does not constitute a voluntary or unilateral dismissal for purposes of CR 41(a)(4).

D. Feature Did Not Voluntarily and Unilaterally Dismiss Mr. Neal From the California Lawsuit

The trial court reasoned that the January 14, 2003 order quashing service on Mr. Neal “has no import because he’s still part of the [California] lawsuit until there is...an order dismissing him.” RP 13:15-14:4. The trial court thus adopted a fundamentally erroneous interpretation of California law concerning the effect of the California Court’s order quashing service on Mr. Neal for lack of personal jurisdiction.

The California dismissal, dated July 28, 2003, does not mention Mr. Neal at all. CP 840. The reason the California dismissal does not mention Mr. Neal is because, as a matter of California law, the California Court's order quashing service on him due to lack of personal jurisdiction effectively terminated the litigation against Mr. Neal. In other words, Mr. Neal was *out* of the California case long before the July 28, 2003 dismissal, based upon the *involuntary* order quashing service of process.

California procedural law provides that "an order granting a motion to quash service of summons" constitutes a final, appealable order. Cal. C.C.P. §904.1(a)(3). [Appendix A]. Respondents' *agree*. RP 18:12-17. As a result, there need not be any additional dismissal of the party against whom service has been quashed in California. *Sabek v. Engelhard Corp.*, 65 Cal. App.4th 992, 76 Cal. Rptr.2d 882 (1998). In *Sabek*, as with Mr. Neal in the underlying California case, the trial court had granted the defendant corporation's motion to quash service for lack of personal jurisdiction. The plaintiff repeatedly amended its complaint and tried to persuade the trial court to re-consider its order quashing service. When the trial court denied the plaintiff's third motion for re-consideration, it also imposed sanctions. On appeal, the California Court of Appeal

rejected the *identical* analysis of California law adopted by the trial court in this case (RP 13:15-14:4), explaining (65 Cal. App.4th at 996-97, 998):

According to Sabek, an order granting a motion to quash, like an order sustaining a demurrer with leave to amend, “allows the plaintiff to serve any subsequent amended complaints.” Consequently, Sabek argues, the issue of minimum contacts should have been decided on the merits notwithstanding its delay in seeking reconsideration because ‘courts have the inherent jurisdiction to reconsider rulings until the ruling is finalized by entry of judgment.’...

Sabek protests that the doctrine of issue preclusion is inapplicable *because judgment was not rendered on the merits*. This argument is untenable. **The reason there was no judgment on the merits is that the court had no jurisdiction over the defendants; the lawsuit obviously could not proceed to judgment, The quashing of service ended the litigation as to Engelhard in a final, appealable order.** [Emphasis added].

Sabek did *not* pronounce new California law, but instead articulated long-established procedural precedent in California. *Kneeland v. Ethicon Suture Laboratories, Inc.*, 113 Cal. App.2d 335, 248 P.2d 447 (1952). In *Kneeland*, the trial court had quashed service on the defendant for lack of personal jurisdiction due to the lack of minimum contacts with California. This, of course, is precisely what occurred when the California Court granted Mr. Neal’s motion to quash. The plaintiff appealed. In a procedural quirk of timing, the California Code of Civil Procedure

amendment that explicitly provides for immediate appeal of an order quashing service went into effect nine days after entry of the order quashing service. As a result of this quirk of timing, the narrow issue before the Court in *Kneeland* was whether the order quashing service represented a final order for purposes of appeal regardless of whether the later amendment of the Code of Civil Procedure applied. The Court in *Kneeland* concluded that an order quashing service for lack of minimum contacts is, in fact, a final appealable order in any event, explaining (113 Cal. App.2d at 337):

While it is true that, in a sense, the action is not final in that the defendant cannot have the action dismissed as against it until the statutory period for lack of prosecution has passed, **it is final as to the plaintiff in that it has been determined that defendant neither owned property nor did business in this state and hence cannot be served with summons.** While the order is not final in the sense that defendant is now entitled to a dismissal of the case against it of record, **it is final in the sense that for practical purposes, the court's order, so far as plaintiff's right to proceed against defendant is concerned, is tantamount to dismissal.** This is not a case of error in the method of service which can be cured by a new service. **It is a determination that, at least under existing conditions, defendant cannot be served.** If this adjudication is wrong, as plaintiff contends, he has been denied unfairly an opportunity to have the action of the court reviewed, and **in a very real sense the order is final as to him.** [Emphasis added].

When the California Court quashed service on Mr. Neal for lack of

personal jurisdiction, it effectively and *involuntarily* terminated Feature's case against him. Feature did not voluntarily dismiss Mr. Neal; the California Court terminated the proceedings against Mr. Neal *involuntarily, on Mr. Neal's motion*. This conclusion also explains why the July 28, 2003 notice of dismissal does not mention Mr. Neal, *i.e.*, he had long been out of the case.

An *involuntary* dismissal does not count toward the "two dismissal" rule. *E.g., Dee-K Enterprises, supra*, 177 FRD at 355; *Hughes Supply, supra*, 338 F.2d at 330-1. Mr. Neal, therefore, can only point to one *voluntary, unilateral* dismissal in his favor, *i.e.*, the King County dismissal. This conclusion is also consistent with the requirement that CR 41(a)(4) be narrowly construed and limited in application. The trial court thus erred when it held that Feature twice voluntarily dismissed its claims against Mr. Neal.

E. Feature Did Not Voluntarily and Unilaterally Dismiss Preston Gates & Ellis from the California Lawsuit

The trial court also erred when it concluded that Feature had twice voluntarily dismissed its claims against Preston Gates & Ellis. In California, *forum non conveniens* represents an equitable doctrine pursuant

to which a court *declines exercise of jurisdiction* when the court concludes that the action may be more appropriately and justly tried elsewhere. *E.g., American Cenwood Corp. v. American Home Assurance Co.*, 87 Cal. App.4th 431, 435, 104 Cal. Rptr.2d 670, 673 (2001).⁹ When a California court grants a motion based upon *forum non conveniens*, “the court shall stay or dismiss the action in whole or in part on any conditions that may be just.” Cal. C.C.P. §410.30(a). [Appendix B].

Thus, just like the order quashing services as to Mr. Neal, “an order...granting a motion to stay or dismiss the action on the ground of inconvenient forum” constitutes a final, appealable order in California. Cal. C.C.P. §904.1. [Appendix A]. See further, *Youngblood v. Bd. of Supervisors of San Diego County*, 22 Cal.3d 644, 651, 586 P.2d 556, 150 Cal. Rptr. 242 (1978) (recognizing that stay order may be appealed if based on *forum non conveniens*). See discussion, *supra*, p. 24-28. As a result, the California Court’s order granting the motion of Preston Gates & Ellis for a stay based upon *forum non conveniens* also constituted a final,

⁹ Washington law is generally the same. *E.g., Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579, 555 P.2d 997 (1976) (“discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum.”).

appealable order.¹⁰

Just as *Sabek* and *Kneeland* explained relative to an order quashing service for lack of personal jurisdiction, Feature's California lawsuit against Preston Gates & Ellis could *never* go forward against Preston Gates & Ellis because the California Court had entered a final, appealable order, on the motion of Preston Gates & Ellis, *forever* staying the case based upon *forum non conveniens*. In the words of *Sabek, supra*, 65 Cal. App. 4th at 998, "the lawsuit obviously could not proceed to judgment" against Preston Gates & Ellis. Feature, therefore, did not voluntarily and unilaterally terminate the California litigation against Preston Gates & Ellis; the California Court *involuntarily* terminated Feature's California lawsuit against Preston Gates & Ellis, on the law firm's motion and over Feature's strenuous objection.

Respondents nevertheless assert that "the defendants' pleadings [and] the California court's demands...can be relevant only if they show [Feature's] motives, intent, state of mind, fear, concern about coercion. All of that is off-limits under the *Specialty Auto* test." RP 15:19-25. Respondents overstate the holding of *Specialty Auto*. When objective,

¹⁰ Rule 2 of the California Rules of Court allowed 60 days in which to appeal the January 14, 2003 stay order. [Appendix C.]

incontrovertible evidence, *not* generated by the plaintiff's subjective thoughts, shows that the *defendant* demanded or agreed to the dismissal, the dismissal is not "unilateral" or "voluntary." *E.g., Specialty Auto, supra*, 153 Wn.2d at 246 and n. 2. The Supreme Court's consideration of the Division III case in *Specialty Auto* thus emphasized that "the trial court found that neither dismissal was by stipulation" in its analysis of the Division III appeal, and the Supreme Court *affirmed* the trial court in the consolidated *Faust v. Bellingham Lodge 493* appeal specifically because of the existence of such a stipulation. *Specialty Auto, supra*, 153 Wn.2d at 247-8. Accord, *ASX Investment Corp. v. Newton*, 183 F.3d 1265, 1267-9 (11th Cir. 1999).

Accordingly, where *objective, incontrovertible evidence* shows that the defendant in fact sought the dismissal (and/or stay), on the formal court record, and the plaintiff merely acquiesced in the defendants' demands, then the dismissal is not "voluntary" or "unilateral" for purposes of CR 41(a)(4). Accord, *Poloron, supra*, 534 F.2d at 1017-8 (distinction should be made between a unilateral dismissal by the plaintiff and one that results from the mutual agreement of all the parties *because the danger of repeated unilateral dismissals is not implicated by a consensual,*

stipulated dismissal); *Loubier v. Modern Acoustics, Inc.*, 178 FRD 17, 20-22 (D. Conn. 1998); *Island Stevedoring, Inc. v. Barge CCBI*, 129 FRD 430, 432 (D. P.R. 1990) (“While the parties did not file a formal stipulation, the record in the case clearly indicates that the first dismissal resulted from negotiations and a consent agreement among the parties”), *quoted with approval, In re: Chi Chi’s, Inc.*, 338 B.R. 618, 624, 625 (D. Del. Bkrptcy 2006); *Western Group Nurseries, Inc. v. Ergas*, 221 F.Supp.2d 1362, 1371 (S.D. Fla. 2002) (“It is clear that the two dismissal rule does not apply where the defendant consents to one or more of the voluntary dismissals.”)

Consistent with this conclusion, Washington expressly recognizes and enforces oral stipulations and oral judicial admissions, such as those evidenced by the motions, briefs, declarations and oral arguments urged by both Mr. Neal and Preston, Gates & Ellis in the underlying California case. See, *e.g.*, RCW 2.44.010(1) (recognizing oral stipulations in open court); *State v. Parra*, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993) (“Stipulations are favored by courts”); *In re Lynch*, 114 Wn.2d 598, 603 and n. 5, 789 P.2d 752 (1990) (statements during argument “are binding against him as judicial admissions”); *State v. Wolf*, 134 Wn. App. 196, 202 n. 26, 139

P.3d 414 (2006)(oral concession made during closing argument represents judicial admission). Accord, Cal. C.C.P. §283(1) (authorizing oral stipulations)[see further, CP 826-8]; *Smith v. Walter E. Heller & Co., Inc.*, 82 Cal. App.3d 259, 269, 147 Cal. Rptr. 1, 7 (1978) (“judicial admission may...be an allegation of a pleading or an attorney’s concession or stipulation to facts” and “is a conclusive concession ... which has the effect of removing it from the issues.”), *cited with approval*, *Uram v. Abex Corp.*, 217 Cal. App.3d 1425, 1433, 266 Cal. Rptr. 695, 700 (1990).

Feature thus does not rely upon subjective evidence of its own subjective intent concerning the reasons for the California dismissal; Feature instead relies upon the pleadings, declarations and oral arguments of Mr. Neal and Preston Gates & Ellis in the California Court, and the California Trial Court’s own statements, which establish that the California dismissal was neither unilateral nor voluntary. This analysis is entirely consistent with *Specialty Auto, supra*.

Respondents nevertheless argue, citing *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corp.*, 933 F.2d 724, 727 (9th Cir. 1991), that the Court may ignore this objective, incontrovertible evidence of defendants’ successful demands to terminate

the California case because Feature purportedly had other “alternatives” to dismissal of the California case. In *Lake at Las Vegas*, the plaintiff asserted that “its action would have been subject to dismissal” under Nevada law. Defendants in *Lake at Las Vegas* had not filed any such motion. *Id.*, at 725. The Ninth Circuit thus explained that the plaintiff could have waited for the defendants to actually file a motion to dismiss, but the plaintiff had not done so. *Id.* In stark contrast here, Mr. Neal *had already filed a successful motion* for involuntary dismissal for lack of personal jurisdiction, and Preston Gates & Ellis *had already filed a successful motion* for perpetual stay. Mr. Neal had no reason to file a motion to dismiss the California complaint; indeed, he could not have filed a motion to dismiss without having made a general appearance. Cal. C.C.P. §1014. Preston Gates & Ellis likewise had no reason to file a motion to dismiss the California case, as all proceedings against it had been stayed. As to these California defendants then, Feature had no alternative, unless it was prepared to disregard the California Court’s demands and risk the imposition of sanctions.¹¹ *Lake at Las Vegas* is

¹¹ Respondents insist that Feature should have ignored the California Court’s demand that it dismiss the case, and the Court’s unambiguous threat of sanctions if Feature did not do so. This Court should not construe CR 41(a)(4) so as to require litigants to act disrespectfully toward a sister court as a means to avoid application of the two dismissal

therefore inapposite.

Feature did not obtain the voluntary and unilateral dismissal of Mr. Neal; instead, the California Court *involuntarily* terminated Feature's case against Mr. Neal, on Mr. Neal's motion. Feature also did not voluntarily and unilaterally dismiss Preston Gates & Ellis; instead, the California Court *involuntarily* prohibited Feature from proceeding against Preston Gates & Ellis in California because the California Court had declined jurisdiction over the law firm based on the law firm's motion. Feature only later filed the notice of dismissal precisely as Preston Gates & Ellis and the California Court had demanded.

The trial court therefore also erred when it dismissed Feature's complaint against Preston Gates & Ellis.

F. "Privity" Does Not Save Mr. Neal

Even though the California Court involuntarily terminated Feature's case against Mr. Neal in January, 2003, Mr. Neal nevertheless argues that *if* the July 28, 2003 dismissal constitutes a "voluntary" dismissal for purposes of CR 41(a)(4) as to Preston, Gates & Ellis, then he

rule. See, *Keesling v. State*, 458 A.2d 435, 438 (Md. App. 1983) (two dismissal rule did not apply because "it would have been improper for Keesling, in his second declaration, to plead directly contrary to the Baltimore court's judgment"); *Bezanson v. First National Bank of Boston*, 633 A.2d 75, 77 (Me. 1993).

too should reap the benefit of that dismissal by virtue of “res judicata and privity.” CP 914-6. Conversely, if the Court agrees with Feature that the July 28, 2003 dismissal of Preston Gates & Ellis was *not* unilateral or voluntary for purposes of CR 41(a)(4), then the issue of “privity” becomes moot, as Mr. Neal cannot identify a second dismissal.

Civil Rule 41(a)(4) does not allow a party who obtained an *earlier, involuntary* dismissal to nevertheless count a *subsequent* (allegedly) voluntary dismissal in that same lawsuit as voluntary and unilateral for purposes of the two dismissal rule, because the earlier involuntary dismissal obviates the danger of repetitive unilateral dismissals as to that defendant. For example, in *Keesling v. State, supra*, the plaintiff filed and voluntarily dismissed a federal lawsuit against the State and others. *Id.*, 458 A.2d at 436-7. Plaintiff thereafter filed a second complaint against the State and others, in Baltimore City Superior Court. The trial court granted summary judgment in the State’s favor on the basis of sovereign immunity. Plaintiff amended this second lawsuit, *omitting* the State as a defendant. Plaintiff then filed a *third* lawsuit, which again named the State as a defendant, but asserted a different theory of liability. *Id.* Although the plaintiff had effectively dismissed the State from the second

lawsuit, the Maryland Court held that omission was *not* a “voluntary” dismissal for purposes of the two dismissal rule “because it would have been improper for Keesling...to plead directly contrary to the Baltimore court’s judgment.” *Id.* at 438. See, *Friedman v. Washburn Co.*, 145 F.2d 715, 719-20 (7th Cir. 1944), *cited with approval*, *Ogden Allied Security Services, Inc. v. Draper & Kramer*, 137 FRD 259, 260-61 (N.D. Ill. 1991).

Relying upon *Lake at Las Vegas, supra*, and *Manning v. South Carolina Dept. of Hwy. and Pub. Trans.*, 914 F.2d 44 (4th Cir. 1990), Mr. Neal nevertheless argues that the two dismissal rule protects all potential defendants who may assert “privity” with a twice-dismissed defendant, even if the defendant claiming privity had obtained a *prior, involuntary* dismissal in the same case. The two dismissal rule itself does not expressly apply to those in “privity” and the courts have been understandably reluctant to extend the two dismissal rule beyond the “same” named defendants because “courts [should] be ‘especially careful not to extend the scope of [the] narrow exception [in Fed. R. Civ. P. 41(a)(1)] when the purpose for the exception would not be served.’” *Ogden Allied Security, supra*, 137 FRD at 260-61, *quoting, Sutton Place Dev., supra*, 826 F.2d at 640 (acknowledging that Rule 41 does *not*

specifically extend two dismissal rule to those in “privity”). Accord, *American Cyanamid Co. v. Capuano*, 381 F.3d 6, 17 (1st Cir. 2004) (two dismissal rule did not apply because “[R]es judicata will not attach if the claim asserted in the second suit could not have been asserted in the first.”), quoting, *Mass. Sch. Of Law v. ABA*, 142 F.3d 26, 38 (1st Cir. 1998); *Murray v. Sevier*, *supra*, 145 FRD at 566-7 (no violation of two dismissal rule, even though plaintiffs filed six lawsuits against various members of the same association, and dismissed all but one of those lawsuits); *Falkenstein v. Braufman*, 88 N.W.2d 884, 888-9 (Minn. 1958). Feature’s claims, of course, could not have been asserted in the California action because Mr. Neal had obtained an order quashing service and Preston Gates & Ellis had obtained an order forever staying the California action against it.

Beyond the obvious differences due to Mr. Neal’s prior, successful motion to quash for lack of personal jurisdiction, *Lake at Las Vegas* also very explicitly limited its “privity” holding to its specific facts, explaining (933 F.2d at 728):

We need not decide whether a Rule 41(a)(1) dismissal of less than all parties should be sufficient in every instance to trigger the two dismissal bar. We hold only that *upon these facts*, the Rule applies...

We need not define the precise parameters of the applicable test. **We hold only that the wholly-owned subsidiary and partnership in which that subsidiary is the general partner may invoke the two dismissals of the subsidiary's parent and claim Rule 41(a)(4) res judicata.** [Emphasis added].

Lake at Las Vegas, therefore, “merely found that the relationship between defendants sufficient to render them ‘substantially the same’” for purposes of the two dismissal rule. *Murray v. Sevier, supra*, 145 FRD at 566.

Similarly, in *Manning, supra*, the Court relied upon the two dismissal rule to dismiss a third lawsuit against a Deputy Attorney General, who had not been identified *by name* in the plaintiff's previously-dismissed first (1982) lawsuit. The 1982 lawsuit had, however, specifically named individual “John Doe” defendants, one of whom plaintiff admitted was this self-same Deputy Attorney General. *Id.*, 46-8 and n. 2. Plaintiff argued that “the 1982 dismissal should not count because Evans was not named as a defendant.” *Id.* at 48. Although the Court expressed its holding in terms of “privity,” its analysis relied primarily on testimony by the plaintiff and his attorney that the Deputy Attorney General and the John Doe defendant named in the dismissed 1982 lawsuit were the same person. *Id.*

The California Court order quashing service on Mr. Neal for lack of personal jurisdiction conclusively determined that Feature could not have asserted its claims against Mr. Neal in the California proceeding. As a result, Mr. Neal could not claim “privity,” for purposes of *res judicata* based upon the California dismissal. Moreover, Respondents can point to no case in which a Court allowed an involuntarily-dismissed defendant to count the subsequent dismissal of the same lawsuit against other defendants as a voluntary dismissal for purpose of applying the two dismissal rule. Consistent with the narrow construction of CR 41(a)(4) in favor of having cases decided on their merits, this Court should not create such a new exception for Mr. Neal in this case.

G. Estoppel Bars Respondents from Claiming that Feature “Voluntarily” Dismissed the California Complaint.

The demands of Preston Gates & Ellis and Mr. Neal that the California Court dismiss Feature’s California complaint also estops them from now claiming that the dismissal was “voluntary.” The essential elements of equitable estoppel consist of: (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, and; (3) injury to the party who

relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission. *Berschauer/Phillips Construction Co., v. Seattle Sch. Dist.*, 124 Wn.2d 816, 831, 881 P.2d 986 (1994).

Preston Gates & Ellis and Mr. Neal demanded that the California complaint be dismissed. Feature filed the notice of dismissal only in reliance upon defendants' insistence that the California Court could not and should not exercise jurisdiction over Mr. Neal, personally, and Preston Gates & Ellis on grounds of *forum non conveniens*. Feature will obviously be injured if Respondents are now allowed to re-characterize the California dismissal as "voluntary" under such circumstances.

In a 2-1 split decision, *Guillen v. Pierce County*, 127 Wn. App. 278, 110 P.3d 1184 (2005), *review den'd*, 156 Wn.2d 1006 (2006), refused to equitably estop a county government from relying upon the two dismissal rule on the facts of that particular case. The *Guillen* Court explained that "[e]quitable estoppel against the government is not favored; [t]hus, when it is asserted against the government, it must be 'necessary to prevent a manifest injustice, and the exercise of government functions must not be impaired as a result.'" *Id.*, 127 Wn. App. at 289 (citations omitted). The Court further explained that it did not impose estoppel

against the County because “the County’s statement before the trial court can reasonably be read as asking *the court* to dismiss the second action and then suggesting that the Guillens could dismiss the first and refile.” *Id.*

Respondents, of course, are not governmental entities. No such heightened standard of proof applies against Feature, and its claim to estoppel need not overcome the policies protecting the exercise of governmental functions against application of equitable estoppel. Moreover, Mr. Neal affirmatively and successfully sought to have the California proceedings against him terminated. Preston Gates & Ellis also affirmatively and successfully sought to have the California proceedings stayed and terminated against it. There was nothing ambiguous about their demands.

Under these circumstances, the Court should estop Respondents from asserting the two dismissal rule based upon the July 28, 2003 California dismissal notice.

VI. CONCLUSION

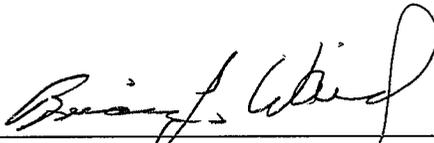
Plaintiffs did not voluntarily dismiss the California complaint. Mr. Neal had obtained an *involuntary* dismissal of the California complaint in January, 2003, long prior to the July 28, 2003 dismissal. There is no

reason that he should receive the benefit of the two dismissal rule, considering that the first dismissal upon which he relies was indisputably involuntary. Plaintiffs also did not voluntarily dismiss the California complaint as to Preston Gates & Ellis. The California Court had declined to exercise jurisdiction over Preston Gates & Ellis in January, 2003, and stayed the California action pending filing of the Washington complaint. The California Court had specifically **directed** Feature to dismiss its California complaint, and had **promised** to impose sanctions against Feature if it did not do as the Court instructed. Alternatively, estoppel bars the Respondents from gaining the benefit of the two dismissal rule, considering the specific facts of this case.

The trial court erred when it dismissed Feature's complaint based on the two dismissal rule of CR 41(a)(4). Appellants therefore ask that the Court reverse the dismissal of their complaint and remand this case for trial.

DATED this 20th day of October, 2006.

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APPENDIX A



West's Ann.Cal.C.C.P. § 904.1

Effective: October 10, 1999

WEST'S ANNOTATED CALIFORNIA CODES
 CODE OF CIVIL PROCEDURE
 PART 2. OF CIVIL ACTIONS
 TITLE 13. APPEALS IN CIVIL ACTIONS
 CHAPTER 1. APPEALS IN GENERAL

→ § 904.1. Appealable judgments and orders

(a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:

- (1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), (B) a judgment of contempt that is made final and conclusive by Section 1222, or (C) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or the superior court in a county in which there is no municipal court or the judge or judges thereof that relates to a matter pending in the municipal or superior court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition, or a judgment or order for the payment of monetary sanctions, upon petition for an extraordinary writ.
- (2) From an order made after a judgment made appealable by paragraph (1).
- (3) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.
- (4) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.
- (5) From an order discharging or refusing to discharge an attachment or granting a right to attach order.
- (6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.
- (7) From an order appointing a receiver.
- (8) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.
- (9) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.
- (10) From an order made appealable by the provisions of the Probate Code or the Family Code.
- (11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000).
- (12) From an order directing payment of monetary sanctions by a party or an attorney for a party if the amount

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West's Ann.Cal.C.C.P. § 904.1

exceeds five thousand dollars (\$5,000).

(13) From an order granting or denying a special motion to strike under Section 425.16.

(b) Sanction orders or judgments of five thousand dollars (\$5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ.

Current through Ch. 16 of 2006 Reg.Sess. urgency legislation

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END OF DOCUMENT

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APPENDIX B



West's Ann.Cal.C.C.P. § 410.30

Effective: [See Text Amendments]

West's Annotated California Codes Currentness
 Code of Civil Procedure (Refs & Annos)
 Part 2. Of Civil Actions (Refs & Annos)
 Title 5. Jurisdiction and Service of Process (Refs & Annos)
 ◻ Chapter 1. Jurisdiction and Forum (Refs & Annos)
 ◻ Article 2. Forum (Refs & Annos)

→§ 410.30. Stay or dismissal of action; general appearance

- (a) When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.
- (b) The provisions of Section 418.10 do not apply to a motion to stay or dismiss the action by a defendant who has made a general appearance.

CREDIT(S)

(Added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970. Amended by Stats.1972, c. 601, § 1; Stats.1986, c. 968, § 4, eff. Sept. 22, 1986; Stats.1972, c. 601, § 1, operative Jan. 1, 1992.)

COMMENT--JUDICIAL COUNCIL

Section 410.30 gives statutory recognition to the doctrine of *forum non conveniens*, which authorizes a court to decline to exercise its jurisdiction in appropriate instances on the ground that the plaintiff has unfairly or unreasonably invoked the jurisdiction of an inconvenient forum.

Inconvenient Forum

The various bases of judicial jurisdiction recognized under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution establish the outermost limits beyond which a state court may not exercise its judicial jurisdiction. Within those limits, the owner of a transitory cause of action will often have a wide choice of forums in which to bring his action. Some of these forums may have little relation either to the parties or to the cause of action and suit in them may increase greatly the burden to the defendant of making a defense. Under the doctrine of inconvenient forum, a court, even though it has jurisdiction, will not entertain the suit if it believes that the forum of filing is a seriously inconvenient forum for the trial of the action. But in such instances a more appropriate forum must be available to the plaintiff. For illustrative cases, see *Gulf Oil Corp. v. Gilbert* (1947) 330 U.S. 501, 508, 67 S.Ct. 839, 842; *Thomson v. Continental Ins. Co.* (1967) 66 Cal.2d 738, 742, 59 Cal.Rptr. 101, 427 P.2d 765 (application of inconvenient forum doctrine is extremely limited where the plaintiff is a bona fide resident of the forum state); *Goodwine v. Superior Court* (1965) 63 Cal.2d 481, 485, 47 Cal.Rptr. 201, 407 P.2d 1 (domicil of plaintiff in the state would ordinarily preclude granting a defendant's motion for dismissal); *Price v. Atchison, T. & S.F. Ry. Co.* (1954) 42 Cal.2d 577, 583, 268 P.2d 457, 43 A.L.R.2d 756 (nonresident plaintiff). See also RESTATEMENT (SECOND), CONFLICT OF LAWS, §

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APPENDIX C



Cal.Rules of Court, Rule 2

West's Annotated California Codes Currentness

California Rules of Court (Refs & Annos)

Title One. Appellate Rules (Refs & Annos)

Division I. Rules Relating to the Supreme Court and Courts of Appeal (Refs & Annos)

▣ Chapter 1. Rules on Appeal (Refs & Annos)

▣ Part I. Taking Civil Appeals (Refs & Annos)

→Rule 2. Time to appeal**(a) Normal time**

Unless a statute or rule 3 provides otherwise, a notice of appeal must be filed on or before the earliest of:

- (1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was mailed;
- (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or
- (3) 180 days after entry of judgment.

(b) No extension of time; late notice of appeal

Except as provided in rule 45.1, no court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal.

(c) Periodic payment of judgments against public entities

If a public entity elects, under Government Code section 984 and rule 389, to pay a judgment in periodic payments, subdivision (a) of this rule governs the time to appeal from that judgment but the periods prescribed in (a)(1) and (2) are each 90 days.

(d) What constitutes entry

For purposes of this rule:

- (1) The entry date of a judgment is the date the judgment is filed under Code of Civil Procedure section 668.5, or the date it is entered in the judgment book.
- (2) The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed; a written order prepared under rule 391 or similar local rule is not such an order prepared by direction of a minute order.
- (3) The entry date of an appealable order that is not entered in the minutes is the date the signed order is filed.

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Cal.Rules of Court, Rule 2

(4) The entry date of a decree of distribution in a probate proceeding is the date it is entered at length in the judgment book or other permanent court record.

(e) Premature notice of appeal

(1) A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment.

(2) The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment.

(f) Appealable order

As used in (a) and (e), "judgment" includes an appealable order if the appeal is from an appealable order.

CREDIT(S)

(Adopted, eff. Jan. 1, 2002. As amended, eff. Jan. 1, 2005.)

OFFICIAL FORMS

2005 Main Volume

<Mandatory and optional Forms adopted and approved by the Judicial Council are set out in West's California Judicial Council Forms Pamphlet.>

ADVISORY COMMITTEE COMMENT (2002)

Subdivision (a). Revised subdivision (a) simplifies the introductory exception clause of former subdivision (a) by deleting the specific reference to Code of Civil Procedure section 870; no reason appears to single out that statute from among the several statutes that provide notice of appeal filing times different from those provided in this rule (see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 473, p. 522). The general reference to the latter statutes is continued in the revised rule because of the serious consequence of a failure to file a timely notice of appeal (see revised subd. (e)).

Under revised subdivision (a)(1), a notice of entry of judgment (or a copy of the judgment) must show the date on which the clerk mailed the document, analogously to the clerk's "certificate of mailing" currently in use in many superior courts and required by certain Judicial Council forms (see, e.g., Form 1290 [*Notice of Entry of Judgment* in family law cases]). This is a substantive change intended to establish the date that the 60-day period under revised subdivision (a)(1) begins to run.

Revised subdivision (a)(1) also spells out what is implied in former subdivision (a), i.e., that the clerk mails the notice of entry of judgment (or a copy of the judgment) to "the party filing the notice of appeal." (See also revised subd. (a)(2).)

Revised subdivision (a)(2) requires that a notice of entry of judgment (or a copy of the judgment) served by or on a party be accompanied by proof of service. The proof of service establishes the date that the 60-day period under revised subdivision (a)(2) begins to run. Although the general definitional rule (rule 40) requires proof of service for all documents served by parties, the requirement is reiterated here

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APPENDIX D



Courts Home | Court Rules



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RULE 41
DISMISSAL OF ACTIONS

(a) Voluntary Dismissal.

(1) Mandatory. Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

(A) By stipulation. When all parties who have appeared so stipulate in writing; or

(B) By plaintiff before resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.

(2) Permissive. After plaintiff rests after his opening case, plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.

(3) Counterclaim. If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion for dismissal, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

(4) Effect. Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.

(b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

(1) Want of Prosecution on Motion of Party. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

(2) Dismissal on Clerk's Motion.

(A) Notice. In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party.

(B) Mailing notice; reinstatement. The clerk shall mail notice of impending dismissal not later than 30 days after the case becomes eligible for dismissal because of inactivity. A party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.

(C) Discovery in process. The filing of a document indicating that discovery is occurring between the parties shall constitute action of record for purposes of this rule.

(D) Other grounds for dismissal and reinstatement.

This rule is not a limitation upon any other power that the

court may have to dismiss or reinstate any action upon motion or otherwise.

(3) Defendant's Motion After Plaintiff Rests. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross Claim, or Third Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to subsection (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Notice of Settlements. If a case is settled after it has been assigned for trial, it shall be the duty of the attorneys or of any party appearing pro se to notify the court promptly of the settlement. If the settlement is made within 5 days before the trial date, the notice shall be made by telephone or in person. All notices of settlement shall be confirmed in writing to the clerk.

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APPENDIX E

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APR 21 2006

THOMAS R. FALLQUIST
SPOKANE COUNTY

THE HONORABLE HAROLD D. CLARKE III
Noted for Hearing: April 21, 2006, 10:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

FEATURE REALTY, INC., a Nevada Corporation; MISSION SPRINGS, INC., a Washington Corporation, now doing business as Canyon Construction NW, Inc.; JACK KRYSTAL, as Trustee of the KM Family Trust; and RUSSELL V. LUGLI, individually and as Co-Trustee of the Lugli Family Trust, the Nikki Trust, and the Alpha Trust,

Plaintiffs,

v.

PRESTON GATES & ELLIS LLP; JERRY R. NEAL and JANE DOE NEAL, his wife, and the marital community comprised thereof; and TERRENCE L. BUTLER and JANE DOE BUTLER, his wife, and the marital community comprised thereof,

Defendants.

NO. 2004-2-02098-5

ORDER GRANTING JOINT
DEFENSE MOTION FOR
SUMMARY JUDGMENT

All defendants have jointly moved for an order of summary judgment for dismissing this case. Oral argument was held on April 21, 2006. Moving parties Preston Gates & Ellis LLP and Jerry R. Neal were represented by Sirianni Youtz Meier & Spoonemore, Stephen J. Sirianni. Moving party Terrence L. Butler was represented by Mullin Cronin Casey & Blair, P.S., Timothy P. Cronin. All plaintiffs were represented by the Law Offices of Robert B. Gould, Robert B. Gould.

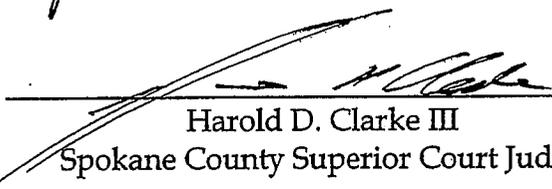
ORDER GRANTING JOINT DEFENSE MOTION
FOR SUMMARY JUDGMENT - 1

SIRIANNI YOUTZ
MEIER & SPOONEMORE
719 SECOND AVENUE, SUITE 1100
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

1 This Court considered the Joint Motion and Memorandum in Support of
2 Motion, the Declaration ^{and Supplemental Declaration} of Stephen J. Sirianni (with all attachments) in support of
3 motion, Plaintiff's Memorandum in Opposition to Motion, the Declarations of ^{Ward} ~~Marley, Kapranos, McManis, Bond~~ ^{Kryskel} in Opposition to Motion, and Defendants'
4 ^{the Developers Supplemental Submission Call} Reply Memorandum in Support of Motion, along with all applicable law. Based upon
5 the foregoing, this Court finds and concludes that there is no material issue of fact, and
6 that, as a matter of law, summary judgment should be entered dismissing this case.

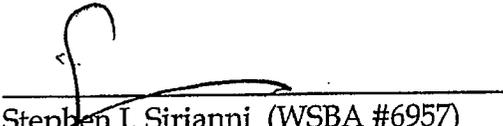
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8 It is, therefore, ORDERED, ADJUDGED and DECREED that: all claims
9 that were, could or should have been asserted by one, some, or all of the plaintiffs,
10 against any defendant, should be and are hereby fully, forever and unconditionally
11 dismissed, with prejudice and without costs.

12 DATED this 21st day of April, 2006.

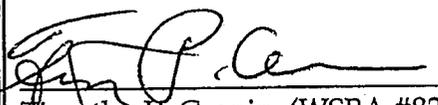
13
14 
15 Harold D. Clarke III
16 Spokane County Superior Court Judge

17 Presented by:

18 SIRIANNI YOUTZ
19 MEIER & SPOONEMORE

20 
21 Stephen J. Sirianni (WSBA #6957)
22 Attorneys for Defendant
23 Preston Gates & Ellis LLP and Jerry R. Neal

24 MULLIN CRONIN CASEY & BLAIR, P.S.

25 
26 Timothy P. Cronin (WSBA #8227)
Attorneys for Defendant
Terrence L. Butler

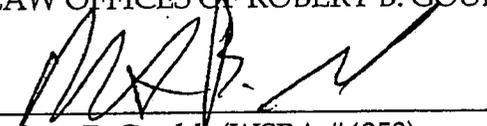
ORDER GRANTING JOINT DEFENSE MOTION
FOR SUMMARY JUDGMENT - 2

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SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

Defendants Motion to Strike
the Plaintiffs Opposition to same,
and the Defendants Reply to same,

1 Approved as to form, notice of
2 presentation waived:

3 LAW OFFICES OF ROBERT B. GOULD

4 
5 Robert B. Gould (WSBA #4353)
6 Attorneys for Plaintiffs
7
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ORDER GRANTING JOINT DEFENSE MOTION
FOR SUMMARY JUDGMENT - 3

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DEC 12 2006

In the Office of the Clerk of Court
Washington Court of Appeals, Division Three
By _____

No. 25217-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FEATURE REALTY, INC, a Nevada corporation;
MISSION SPRINGS, INC., a Washington corporation, now doing
business as Canyon Construction NW, Inc.,
JACK KRYSTAL, as Trustee of the KM Family Trust; and
RUSSELL V. LUGLI, individually and as Co-Trustee of the Lugli
Family Trust, the Nikki Trust, and the Alpha Trust,

Appellants,

v.

PRESTON GATES & ELLIS, LLP;
JERRY R. NEAL and JANE DOE NEAL, his wife, and the marital
community comprised thereof;

Respondents,

And TERRENCE L. BUTLER and JANE DOE BUTLER, his wife,
and the marital community comprised thereof,

Defendants in Trial Court.

**APPELLANTS' STATEMENT OF
ADDITIONAL AUTHORITY [RAP 10.8]**

Law Offices of Robert B. Gould
Robert B. Gould, WSBA No. 4353
Brian J. Waid, WSBA N. 26038
2110 N. Pacific Street, Suite 100
Seattle, WA 98103-9181, (206) 633-4442
Attorneys for Appellants

Pursuant to RAP 10.8, appellants Feature Realty, Inc., *et al.*, respectfully submit and request consideration of *Murray v. Conseco, Inc.*, ___ F.3d ___, 2006 WL 3019404 (7th Cir. 10/25/06), decided after submission of Appellants' Opening Brief.

This additional authority supports Appellants' argument that, by conceding a defendants' affirmatively-pleaded jurisdictional defense, a plaintiff does not voluntarily dismiss the complaint for purposes of the "two dismissal rule." *Murray v. Conseco, supra*, 2006 WL at *3. This additional authority thus supports Appellants' analyses set forth in Appellants' Opening Brief, pp. 20-35.

Appellants' additional authority also supports Appellants' argument that CR 41 does not require a plaintiff to act in contempt and/or defiance of a court's instructions to dismiss the plaintiffs' complaint, just to avoid application of the two dismissal rule. *Murray, supra*, at *3. This additional authority thus supports Appellants' analysis set forth in Appellants' Opening Brief, p. 34 and n. 11.

A copy of Appellants' additional authority is attached to this pleading, for the convenience of the Court and the parties.

DATED this 11 day of December, 2006.

Respectfully submitted,

LAW OFFICES OF ROBERT B. GOULD

By: 

Robert B. Gould, WSBA No. 4353
Brian J. Waid, WSBA No. 26038
Attorneys for Appellants

Westlaw.

--- F.3d ----

Page 1

--- F.3d ----, 2006 WL 3019404 (C.A.7 (Ind.))
 (Cite as: --- F.3d ----)

Briefs and Other Related Documents

Murray v. Conseco, Inc.C.A.7 (Ind.),2006.Only the Westlaw citation is currently available.

United States Court of Appeals,Seventh Circuit.

Dennis E. MURRAY, Sr. and James D. Massey,
 Plaintiffs-Appellants,

v.

CONSECO, INCORPORATED and Conseco
 Services, L.L.C., Defendants-Appellees.

No. 06-1124.

Argued Sept. 13, 2006.

Decided Oct. 25, 2006.

Background: In action alleging fraud and various violations of securities, banking, and tying laws against financial services providers, the United States District Court for the Southern District of Indiana, Larry J. McKinney, Chief Judge, dismissed action with prejudice. Plaintiffs appealed.

Holding: The Court of Appeals, Bauer, Circuit Judge, held that plaintiffs' notice of consent to dismiss first amended complaint was not a "voluntary dismissal," subject to the two-dismissal rule.

Vacated and remanded with instructions.

[1] Federal Civil Procedure 170A 1714

170A Federal Civil Procedure

170AXI Dismissal

170AXI(A) Voluntary Dismissal

170Ak1713 Effect

170Ak1714 k. Successive Dismissals.

Most Cited Cases

Plaintiffs' notice of consent to dismiss first amended complaint was not a "voluntary dismissal," subject to the two-dismissal rule, requiring that second

voluntary dismissal be with prejudice; the notice was filed in response to defendants' motion to dismiss for lack of subject matter jurisdiction, which was filed after the answer and was not signed by all the parties, plaintiffs consented only to lack of subject matter jurisdiction, and District Court lacked authority to dismiss with prejudice for lack of subject matter jurisdiction. Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 1708

170A Federal Civil Procedure

170AXI Dismissal

170AXI(A) Voluntary Dismissal

170Ak1708 k. Notice. Most Cited Cases

Federal Courts 170B 29.1

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk29 Objections to Jurisdiction,

Determination and Waiver

170Bk29.1 k. In General. Most Cited

Cases

When a plaintiff alerts the court that it lacks jurisdiction to hear his case, he is not necessarily invoking the voluntary dismissal rule. Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

When a plaintiff alerts the court that it lacks jurisdiction to hear his case, he is not necessarily invoking the voluntary dismissal rule. Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1742(1)

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)2 Grounds in General

170Ak1742 Want of Jurisdiction

170Ak1742(1) k. In General. Most

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--- F.3d ---

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--- F.3d ---, 2006 WL 3019404 (C.A.7 (Ind.))
 (Cite as: --- F.3d ---)

Cited Cases

Federal Courts 170B ↪29.1

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk29 Objections to Jurisdiction,
Determination and Waiver

170Bk29.1 k. In General. Most Cited

Cases

While a plaintiff can choose at his discretion to file a voluntary notice of dismissal, he is duty-bound to inform the district court of jurisdictional problems. Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

While a plaintiff can choose at his discretion to file a voluntary notice of dismissal, he is duty-bound to inform the district court of jurisdictional problems. Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

[4] Federal Courts 170B ↪29.1

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk29 Objections to Jurisdiction,
Determination and Waiver

170Bk29.1 k. In General. Most Cited

Cases

A dismissal for lack of subject matter jurisdiction is not on the merits. Fed.Rules Civ.Proc.Rule 12(h)(3), 28 U.S.C.A.

[5] Federal Courts 170B ↪30

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk29 Objections to Jurisdiction,
Determination and Waiver

170Bk30 k. Power and Duty of Court.

Most Cited Cases

A court that lacks subject matter jurisdiction cannot dismiss a case with prejudice.

Ronald J. Waicukauski (argued), Price, Potter, Jackson, Waicukauski & Mellowitz, Indianapolis,

IN, for Plaintiffs-Appellants.

Stephen C. Hackney (argued), Kirkland & Ellis, Washington, DC, for Defendants-Appellees.

Before BAUER, WOOD, and WILLIAMS, Circuit Judges.

BAUER, Circuit Judge.

*1 Dennis E. Murray and James D. Massey filed a declaratory judgment action against Conseco, Incorporated and Conseco Services, L.L.C., alleging fraud and various violations of securities, banking, and tying laws. The defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and also questioned the court's subject matter jurisdiction. The plaintiffs then filed a "notice of consent to dismiss" conceding that the court lacked jurisdiction. The district court granted defendants' motion to dismiss based on lack of subject matter jurisdiction without prejudice. The defendants filed a motion for reconsideration, arguing that pursuant to the two-dismissal rule of Fed.R.Civ.P. 41 the dismissal should be with prejudice. The district court granted this motion, which is the subject of this appeal. We vacate and remand.

I. Background

On October 9, 2003, Dennis E. Murray and James D. Massey filed suit against Conseco, Incorporated, Conseco Services, L.L.C., Merrill Lynch & Co., Inc., Price-WaterhouseCoopers, LLP, Bank of America, N.A., and JP Morgan Chase Bank. Plaintiffs invoked 28 U.S.C. § 1331 as the basis for federal subject matter jurisdiction. On November 14, 2003, plaintiffs filed a voluntary notice of dismissal under Fed.R.Civ.P. 41(a).

On the same day, plaintiffs filed the instant action against only Conseco, Incorporated and Conseco Services, L.L.C. ("Conseco Entities"). On May 16, 2005, plaintiffs were granted leave to file a first amended complaint. This amended complaint contained nine counts: (1) declaratory judgment due to change in control; (2) declaratory judgment for indemnity; (3) declaratory judgment to require exhaustion of other remedies; (4) declaratory judgment and rescission due to violation of regulation U; (5) rescission and damages due to

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prohibited tying; (6) declaratory judgment for indemnity based on conditional releases; (7) state securities claim under Indiana Code §§ 23-2-1-12 and 23-2-1-19; (8) common law fraud; and, (9) federal securities claim under 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5. Like its predecessors, the first amended complaint asserted 28 U.S.C. § 1331 as the basis for jurisdiction.

On July 15, 2005, Conseco Entities moved to dismiss the first amended complaint with prejudice under Fed.R.Civ.P. 12(b)(6). In Conseco Entities' motion, they questioned the court's subject matter jurisdiction.

On September 22, 2005, plaintiffs filed a "notice of consent to dismiss first amended complaint" in which they conceded that the district court lacked subject matter jurisdiction. The notice stated:

Defendants contend that pursuant to the well-pleaded complaint rule, there is no federal question jurisdiction and accordingly, the First Amended Complaint should be dismissed for lack of subject matter jurisdiction. (Defts. Mem. in Support of Mot. to Dismiss, pp. 9-11). After considering the authorities on which defendants rely, plaintiffs agree that the well-pleaded complaint rule precludes finding federal question jurisdiction and accordingly, plaintiffs consent to dismissal of their First Amended Complaint for lack of federal subject matter jurisdiction.

*2 Simultaneously with the filing of this notice, plaintiff Dennis Murray is filing a motion for leave to file Plaintiff's Second Amended Complaint in which federal jurisdiction is asserted for the first time on diversity grounds. Murray is a citizen of Ohio and defendants have their principal places of business in Indiana. Since James Massey is a citizen of Indiana, there is no diversity as to Mr. Massey and his claims will need to be resolved in a state court proceeding.

Also on September 22, 2005, plaintiff Murray filed a motion for leave to file a second amended complaint in which he brought the same claims as those he filed in the original complaint, however, upon the basis of diversity jurisdiction rather than federal subject matter jurisdiction. On September

26, 2005, Conseco Entities filed an opposition to plaintiffs' motion for leave to file a second amended complaint. In this motion, Conseco Entities asked the district court to dismiss the case with prejudice, arguing that plaintiffs' "notice of consent to dismiss first amended complaint" was a voluntary dismissal subject to the two-dismissal rule set forth in Fed.R.Civ.P. 41(a)(1).

On October 13, 2005, the district court granted Conseco Entities' motion to dismiss without prejudice. On October 17, 2005, Conseco Entities filed a motion for reconsideration arguing that the court should dismiss the case with prejudice because the court, in fact, had subject matter jurisdiction, and alternatively, the two-dismissal rule operated irrespective of whether subject matter jurisdiction existed.

On December 13, 2005, the district court again determined that the court lacked subject matter jurisdiction and now concluded that the dismissal triggered the two-dismissal rule of Rule 41(a)(1). In its decision, the court agreed with Conseco Entities that Rule 41(a)(1) operated regardless of whether the court has jurisdiction and then dismissed the case with prejudice. Plaintiffs appeal this decision.

II. Discussion

A. Rule 41(a)

[1] Plaintiffs argue that the district court erred in finding that plaintiffs' "notice of consent to dismiss first amended complaint" was a voluntary dismissal. We agree.

Fed.R.Civ.P. 41(a) provides that, 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

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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.

The plain language of Rule 41(a)(1) limits voluntary dismissals to documents filed before service of an answer or motion for summary judgment, or to stipulations of dismissal signed by all parties. Here, Rule 41(a)(1) is not implicated because the motion was filed after the answer and was not signed by all parties.

*3 [2][3] Further, plaintiffs' notice was filed in response to an issue first raised in defendants' motion to dismiss, that the well-pleaded complaint rule would prevent a finding of federal question jurisdiction over plaintiffs' claims. In so doing, plaintiffs "consented" to the court's dismissal of its first amended complaint for lack of subject matter jurisdiction. When a plaintiff alerts the court that it lacks jurisdiction to hear his case, he is not necessarily invoking Rule 41(a)(1). While a plaintiff can choose at his discretion to file a Rule 41(a)(1) notice of dismissal, he is duty-bound to inform the district court of jurisdictional problems. See *BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 551 (7th Cir.2002) (noting that "lawyers who practice in federal court have an obligation to assist the judges to keep within the boundaries fixed by the Constitution and Congress"). The district court, having been made aware that it lacks jurisdiction, is then required to dismiss the action. See Fed.R.Civ.P. 12(h)(3). We conclude that there was no voluntary dismissal and, as such, the two-dismissal rule is not implicated in this case.

B. Subject Matter Jurisdiction

[4][5] The district court held that it lacked subject matter jurisdiction over the first amended complaint, yet dismissed the case with prejudice. Plaintiffs argue that this ruling was in error. We agree. A dismissal for lack of subject matter jurisdiction is not on the merits. *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1277 (7th Cir.1983); *Frederiksen v. City of Lockport*, 384 F.3d 437, 438 (7th Cir.2004);

Johnson v. Wattenbarger, 361 F.3d 991, 993 (7th Cir.2004). " 'No jurisdiction' and 'with prejudice' are mutually exclusive." *Frederiksen v. City of Lockport*, 384 F.3d at 438. A court that lacks subject matter jurisdiction cannot dismiss a case with prejudice. *Id.*

III. Conclusion

For the foregoing reasons, we vacate the district court's dismissal with prejudice and the entry of judgment in favor of defendants and remand with instructions to enter a dismissal of the first amended complaint without prejudice for lack of subject matter jurisdiction and to again grant plaintiffs' motion for leave to file a second amended complaint based on diversity jurisdiction.

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Briefs and Other Related Documents (Back to top)

- 2006 WL 1497508 (Appellate Brief) Reply Brief of Plaintiffs-Appellants (May 12, 2006)
- 2006 WL 1354169 (Appellate Brief) Brief of Defendants-Appellees (Apr. 28, 2006) Original Image of this Document (PDF)
- 2006 WL 951823 (Appellate Brief) Brief and Short Appendix of Plaintiffs-Appellants (Mar. 29, 2006) Original Image of this Document with Appendix (PDF)
- 06-1124 (Docket) (Jan. 12, 2006)

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