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United States Court of Appeals
Tenth Circuit

July 26, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WILLIAM SCOTT BEDFORD; RAY H. PACE AND SONDRA N. PACE, HUSBAND AND WIFE,

Plaintiffs - Appellees,

v.

MARY NOWLIN,

Defendant - Appellant,

and

THE HELEN AND MARY NOWLIN IRREVOCABLE COMMON LAW TRUST DATED FEBRUARY 28, 1927,

Defendant.

No. 20-7070
(D.C. No. 6:18-CV-00184-RAW)
(E.D. Okla.)

ORDER AND JUDGMENT[*]

Before **MATHESON**, **BRISCOE**, and **CARSON**, Circuit Judges.

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[*] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

In this quiet title action that Appellant Mary Nowlin removed to federal court, the district court dismissed her defenses and counterclaims with prejudice and entered default judgment against her and a trust held for her and her sister ("the Trust")[1] as a sanction for her repeated violation of court orders. In doing so, the court entered judgment quieting title to the property in Appellees William Scott Bedford and Sondra Pace.[2] Nowlin now appeals the sanctions order and judgment. We affirm the portion of the sanctions order dismissing Nowlin's defenses and counterclaims with prejudice, but because the court entered judgment on the merits of the quiet title claim without first determining whether it had subject matter jurisdiction, we vacate the judgment and remand the case to the district court with directions to remand the case to state court as improperly removed.

BACKGROUND

The Trust filed documents claiming an interest in two tracts of land as a result of a 1906 Indian land grant. Bedford and Pace filed the quiet title action in Oklahoma state court, contending they are the rightful owners and seeking to remove the cloud on their title caused by the Trust's asserted interest in the property.

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[1] The full name of the Trust is The Helen and Mary Nowlin Irrevocable Common Law Trust Dated February 28, 1927. It is not a party to the appeal.

[2] Ray Pace was a plaintiff in the district court and is named as an appellee in our caption. His wife, Sondra Pace, filed a suggestion of death, notifying us that he died while the appeal was pending. His personal representative has not moved to be substituted as a party, and we take no action as a result of his death. *See* Fed. R. App. P. 43(a)(1).

Nowlin, who claimed to be the trustee, removed the case to the United States District Court for the Eastern District of Oklahoma pursuant to 28 U.S.C. § 1441(a), contending it involved a federal question based on her invocation of federal laws in the documents she had filed against the property. She filed counterclaims asserting title through her father, who she maintained was the rightful heir of an alleged original Chickasaw Indian allottee of the tracts. She also filed motions challenging Appellees' standing to claim title in the property, contending that the Trust's rights to the property were inalienable based on restrictions imposed by Congress on the transfer of Indian property.

Appellees disputed the district court's subject matter jurisdiction and requested that the case be remanded to state court. The court ordered Nowlin and the Trust to explain the basis of its jurisdiction and provide documents supporting their jurisdictional claims or show cause why the case should not be remanded. It soon became clear that the Trust would not participate in the proceedings[3] and that Nowlin, who was pro se, was therefore the only active defendant. Her responses to the court's order were unhelpful and the court, still questioning whether removal was

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[3] After noting attempts by non-party Helen Nowlin to file documents on behalf of the Trust, the district court twice ordered the Trust to retain counsel since it was a legal entity that could only appear through a licensed attorney. *See Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 202 (1993) (holding that the rule that corporations must be represented by licensed counsel "applies equally to all artificial entities"); *Harrison v. Wahatoyas, L.L.C.*, 253 F.3d 552, 556 (10th Cir. 2001) (recognizing that corporations and business entities cannot be represented in court "through a non-attorney corporate officer appearing pro se"). The Trust did not respond to those orders and no lawyer appeared on its behalf.

appropriate, indicated that it would determine whether it had jurisdiction after the issues were ferreted out in more detail.

Meanwhile, Nowlin evaded Appellees' attempts to conduct discovery, complicating their and the court's efforts to gain a clearer understanding of her defenses and claims and to determine the basis for the court's jurisdiction. Two years into the litigation and after several unsuccessful attempts to schedule Nowlin's deposition, Appellees moved to compel her attendance for a deposition. In response, she filed numerous motions, including a motion to stay all discovery, which she characterized as "harassment." Suppl. R. at 63 (internal quotation marks omitted). As the district court put it, she "appear[ed] to take the position that no discovery should occur because the court should simply grant judgment in her favor." *Id.* The court denied her motions and ordered her to submit to a remote deposition.[4] She responded by filing objections, seeking a protective order, and moving to quash the deposition subpoenas. The court overruled her objections, denied her motions, and again ordered her to submit to a deposition, this time warning her that her "failure to comply with court orders and to participate in a deposition may result in a dismissal of her defenses and counterclaims and a default judgment" against her. *Id.* at 66.

Persisting in her efforts to avoid being deposed, Nowlin filed more objections, declaring that until the district court decided the standing issue, "there will be no

[4] Nowlin complains in her brief on appeal that she could not have attended an in-person deposition for health and logistical reasons, but those complaints are unproductive given that the court ordered her to attend a remote deposition.

further harassment about discovery or a deposition." R. at 272. Appellees filed another motion to compel. The court overruled Nowlin's objections and granted the motion to compel, repeating its warning that continued noncompliance could result in dismissal of Nowlin's defenses and counterclaims and entry of default judgment. Undaunted, Nowlin filed a motion to suppress and more objections. The court overruled her objections, denied her motion, and reaffirmed its previous order that Nowlin submit to a deposition.

When Nowlin again disobeyed the court's orders related to discovery, Appellees filed a motion pursuant to Fed. R. Civ. P. 37(b)(2), seeking dismissal of Nowlin's defenses and counterclaims and entry of default judgment as a sanction for her refusal to obey the court's discovery orders. After recounting Nowlin's history of disobeying court orders and noting the deleterious effects of her abusive litigation tactics, the district court granted the motion. Nowlin then filed a motion for reconsideration under Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, which the court denied.

DISCUSSION

The parties do not challenge the district court's subject matter jurisdiction, but we have an obligation to examine its jurisdiction "whether or not raised by the parties." *Loc. 514 Transp. Workers Union of Am. v. Keating*, 358 F.3d 743, 749 n.6 (10th Cir. 2004) (internal quotation marks omitted); *see also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (noting that a federal appellate court has a "special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower

courts . . . , even though the parties are prepared to concede it," and holding that "if the record discloses that the lower court was without jurisdiction [the appellate] court will notice the defect, although the parties make no contention concerning it." (internal quotation marks omitted)).

"[A] federal court generally may not rule on the merits of a case without first determining that it has [subject matter] jurisdiction." *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) (explaining that "jurisdictional questions ordinarily must precede merits determinations in dispositional order"). Regardless of whether the district court had jurisdiction over the quiet title action, however, it had adjudicatory jurisdiction to decide the removal issues. *See Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 (10th Cir. 2005) (holding that "federal courts always have jurisdiction to consider their own jurisdiction"). It also had adjudicatory jurisdiction over collateral, non-merits issues relating to abuse of the judicial process—like whether and how to sanction Nowlin for disobeying its orders. *See Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992) (holding that a district court may impose Fed. R. Civ. P. 11 sanctions for conduct that occurred during a proceeding in which the court mistakenly concluded it had subject matter jurisdiction); *see also Olcott v. Del. Flood Co.*, 76 F.3d 1538, 1541, 1557 (10th Cir. 1996) (relying on *Willy* in upholding a district court's imposition of sanctions under Rule 37 despite its subsequent dismissal of the underlying claims as time-barred).

Under Rule 37 of the Federal Rules of Civil Procedure, a district court may impose sanctions, including dismissal in whole or in part and entry of default

judgment against the party who disobeys a discovery order. Fed. R. Civ. P. 37(b)(2)(A)(v), (vi). Rule 41 also allows a district court to dismiss a defendant's counterclaims for failure to comply with court rules or orders. Fed. R. Civ. P. 41(b), (c). Pro se litigants like Nowlin are not immune from sanctions for failing to obey a discovery order.[5] *See Klein-Becker USA, LLC v. Englert*, 711 F.3d 1153, 1160 (10th Cir. 2013) (affirming a district court's imposition of a default judgment as a Rule 37 sanction even though the offending party appeared pro se).

District courts have "very broad discretion to use sanctions where necessary" to ensure "the expeditious and sound management of the preparation of cases for trial." *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1320 (10th Cir. 2011) (internal quotation marks omitted). The "[d]etermination of the correct sanction for a discovery violation is a fact-specific inquiry that the district court is best qualified to make." *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992). Sanctions must be "just" and related to the claim "at issue in the order to provide discovery." *Id.* (internal quotation marks omitted). *Ehrenhaus* lists five factors a court should consider before choosing dismissal as a sanction: "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that

[5] As in the district court, Nowlin's pro se status on appeal entitles her to a liberal construction of her filings. *Ledbetter v. City of Topeka*, 318 F.3d 1183, 1187 (10th Cir. 2003). We thus make some allowances for deficiencies, but we "cannot take on the responsibility of serving as [her] attorney in constructing arguments" for her. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." *Id.* at 921 (ellipsis and internal citations and quotation marks omitted). "Only when the aggravating factors outweigh the judicial system's strong predisposition to resolve cases on their merits is dismissal an appropriate sanction." *Id.* (internal quotation marks omitted).

We review discovery sanctions for abuse of discretion. *Klein-Becker*, 711 F.3d at 1159. A district court abuses its discretion when its decision is "arbitrary, capricious, whimsical, or manifestly unreasonable." *Jensen v. W. Jordan City*, 968 F.3d 1187, 1200 (10th Cir. 2020) (internal quotation marks omitted), *cert. denied*, 209 L. Ed. 2d 753 (2021). Under this standard, we will uphold a district court's decision unless we have "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* at 1200-01 (internal quotation marks omitted). We have held that a "district court's considerable discretion in [determining an appropriate sanction] easily embraces the right to dismiss or enter default judgment in a case under Rule 37(b) when a litigant has disobeyed two orders compelling" discovery. *Lee*, 638 F.3d at 1320-21.

Applying the *Ehrenhaus* factors here, the district court concluded "[t]he interests of justice demand dismissal." R. at 483. As for the first two factors, the court found Nowlin's "continued interference with the judicial process" "brought discovery to a standstill," requiring Appellees to "file numerous motions to compel" and the court to focus on resolving discovery disputes instead of the merits. *Id.* It

acknowledged her arguments regarding the merits of the parties' title dispute, but found she failed to provide a "logical factual connection" between the land grant and her claims and refused to engage in discovery that might explain the basis for her claims. *Id.* at 480. The court explained that "[t]he indecipherable nature of [her] claims" made deposing her critical to Appellees' ability to defend against her counterclaims, *id.* at 483, and that her "methods of ignoring, objecting to and flatly refusing to appear for her deposition and court hearings . . . stifled the process," *id.* at 480; *see also id.* at 481 (finding that "[t]he case has been stuck in neutral for two years as a result of [Nowlin's] dilatory tactics"). The court thus found that her actions made "it impossible for [it] to decode the claims and proceed to a conclusion" on the merits, *id.* at 481, and prejudiced Appellees by interfering with their "quiet enjoyment and use of their property during . . . [the] stalemate" and "causing [them] to incur expenses in litigation and experience wholly unreasonable delay," *id.* at 483.

Turning to the remaining *Ehrenhaus* factors, the court found Nowlin made "no effort to comply with discovery rules or orders and offered no explanation for her noncompliance," and "intentional[ly] attempt[ed] to thwart the process." *Id.* at 483. It noted that in light of her habitual disobedience of its orders, it warned her of the possibility of dismissal and default judgment as a sanction for continued noncompliance, but she "ignore[d] those warnings." *Id.* Describing her actions as "willful," *id.* at 483, the court concluded it was no longer "obliged to engage in futile attempts to unravel" her "cryptic, indecipherable and vituperative" filings, *id.* at 480-81. The court did not expressly address whether lesser sanctions might be

effective, but implicit in its findings is the conclusion that no sanction short of dismissal would have had any effect on Nowlin's behavior.[6]

As already explained, the district court had jurisdiction to sanction Nowlin for disobeying its discovery orders without first determining its subject matter jurisdiction over the quiet title action. The questions for us to decide are whether the chosen sanction constituted an abuse of discretion and whether the resultant judgment exceeded the district court's jurisdiction.

1. The District Court Did Not Abuse its Discretion by Dismissing Nowlin's Defenses and Counterclaims with Prejudice as a Sanction

On appeal, Nowlin asserts that "at no time did [she] intentionally violate a district court order," Aplt. Br. at 14, disputes the necessity of her deposition and maintains that discovery "was being used as a weapon or punishment against [her]" for filing her counterclaims, *id.* at 28, and contends the court erred by dismissing her counterclaims without first deciding the merits of the parties' title dispute. But, other than claiming her disobedience was not intentional, she does not contest the district court's factual findings regarding her failure to comply with its orders. Nor does she challenge its application of the *Ehrenhaus* factors or its determination that dismissal of her counterclaims and entry of default judgment were appropriate sanctions for her

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[6] Although it is the better practice to address all of the *Ehrenhaus* factors, a district court does not abuse its discretion by imposing dismissal as a sanction without expressly addressing the efficacy of lesser sanctions when the record supports dismissal based on the other factors. *See Ehrenhaus*, 965 F.2d at 922.

noncompliance. And she cites no authority supporting her contention that the court was required to resolve the merits of the title dispute before sanctioning her.

This court has repeatedly upheld dismissal, including dismissal with prejudice, as a sanction for a party's refusal to obey court orders. *See Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 852, 856 (10th Cir. 2018) (affirming order dismissing counterclaims with prejudice); *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992) (collecting cases). We recognize that Nowlin believes the district court erred by ordering her to submit to a deposition without addressing her arguments challenging Appellees' standing to claim title. But she was not free to decide on her own that the court had to resolve that issue before allowing any discovery, and her disagreement with its orders did not justify her noncompliance. *See Auto-Owners*, 886 F.3d at 856 (affirming dismissal of counterclaims as a sanction for noncompliance with disclosure order despite disobedient party's contention that court lacked authority to order disclosure). "If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal." *Maness v. Meyers*, 419 U.S. 449, 458 (1975). Thus, the district court properly held that Nowlin acted willfully when she disobeyed its orders, despite her subjective belief that the orders were invalid. *See GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.,* 445 U.S. 375, 386 (1980) (holding that those subject to a court order "are expected to obey that [order] until it is modified or reversed, even if they have proper grounds to object to the order"); *Walker v. City of Birmingham*, 388 U.S. 307, 316-17, 320 (1967)

(upholding criminal contempt for violation of injunction, even where injunction raised "substantial constitutional issues").

Our review of the record supports the district court's determination that the *Ehrenhaus* factors were satisfied here, and Nowlin has given us no reason to conclude otherwise. Accordingly, we conclude the district court did not abuse its discretion by dismissing her defenses and counterclaims with prejudice.[7] *See Lee*, 638 F.3d at 1320-21.

Nor has Nowlin given us any reason to question the propriety of the district court's order denying her combined Rule 59 and 60 motion. She devoted the bulk of her motion to reasserting her merits claims. She only briefly addressed the fact that the district court dismissed her counterclaims as a sanction, but even then, her arguments failed to directly challenge the order, taking issue instead with other orders striking some of her motions and requiring her to attend meetings in person.[8] The district court denied the motion in a minute order. We ordinarily review the denial of Rule 59(e) and 60(b) motions for abuse of discretion, *see Rogers v. Andrus Transp. Servs.*, 502 F.3d 1147, 1153 (10th Cir. 2007), but we have no basis for reviewing the minute order under any standard because it does not explain the basis

[7] We may affirm a district court's dismissal order despite its failure to expressly address lesser sanctions when the record supports dismissal based on the other factors. *See Ehrenhaus*, 965 F.2d at 922.

[8] The court ordered that Nowlin's deposition be conducted on an online platform so she could attend remotely. We assume her reference to orders requiring her to attend meetings in person was to the court's pre-pandemic order requiring her to attend a pretrial conference in person, which the court later vacated.

for the court's ruling. In any event, we find no grounds for disturbing the order given that Nowlin's motion did not meaningfully challenge the underlying sanctions order.

2. The District Court Erred by Quieting Title Without First Determining its Subject Matter Jurisdiction

The district court questioned its subject matter jurisdiction soon after Nowlin removed the case to federal court, as did Appellees in their motion for remand. Nowlin's recalcitrance, however, clearly frustrated the court's efforts to determine its jurisdiction. As a result, the court never resolved the question. Yet after dismissing Nowlin's defenses and counterclaims, the court entered default judgment quieting title in Appellees and effectively adjudicating the merits. Specifically, the court held that (1) they are the owners "in good and perfect title to the . . . property," R. at 497-98; (2) their title "is superior to and has priority over any right, title or interest [in the property] asserted by [Nowlin and the Trust]," *id.* at 498; and (3) Nowlin and the Trust "took no interest in [the property] under the law of descent and distribution" and "have no interest" in it, *id.*[9] The court also enjoined Nowlin and the Trust from "setting up or asserting any right, title, interest or estate in or to the [property] adverse to [Appellees' title] in and to the [property]." *Id.* at 499.

We conclude that by quieting title in Appellees without first determining its subject matter jurisdiction the court went beyond what is permitted under *Willy*.

[9] Nowlin did not establish that a trust existed, and the district court held that if a trust did exist, it was "complicit in [her] transgressions." R. at 480 n.1. Accordingly, the court entered judgment against both her and the Trust. In doing so, it quieted and confirmed title in Bedford and Pace as against her and the Trust.

There, the Supreme Court upheld the district court's imposition of sanctions when it mistakenly thought it had jurisdiction. 503 U.S. at 137. And the challenged sanction was "collateral to the merits of the case" so did not "deal with the court's assessment of the . . . legal merits, over which [it] lacked jurisdiction." *Id.* at 131-32. As the Court explained, a district court may impose "housekeeping" sanctions, *id.* at 136 (internal quotation marks omitted), even if it lacks subject matter jurisdiction because such sanctions are "not a judgment on the merits" and do "not signify a district court's assessment of the legal merits" of the disobedient party's claims, *id.* at 138 (internal quotation marks omitted). Here, the court questioned whether it had jurisdiction and entered a sanctions order that effectively decided the merits anyway.

It is Nowlin's burden to establish that her removal of Appellees' case to federal court was proper. *See Dutcher v. Matheson*, 733 F.3d 980, 985 (10th Cir. 2013) (explaining that removing party must establish jurisdiction by a preponderance of the evidence). Nowlin failed to meet her burden because she refused to provide jurisdictional discovery and did not clarify and provide documentary support for her claims in her response to the district court's show cause order. As a result, the court should have remanded the case to state court instead of deciding the merits by quieting title. *See* 28 U.S.C. § 1447(c) (providing that a federal court must remand a removed action to state court "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction"); *Cunningham v. BHP Petroleum Gr. Brit. PLC*, 427 F.3d 1238, 1245-46 (10th Cir. 2005) (affirming district court order concluding it lacked subject matter jurisdiction and vacating post-removal

substantive rulings, explaining that "because the district court never had jurisdiction over the case, it had no power to rule on any substantive motions or to enter judgment").

We thus vacate the judgment and remand the case to the district court with directions to remand the case to state court as improperly removed. In doing so, we note that the dismissal with prejudice of Nowlin's defenses and counterclaims has the effect of a judgment on the merits, *see* Fed. R. Civ. P. 41(b), and the state court can decide on remand whether any claims Nowlin and the Trust might raise in the state court action are barred under preclusion principles.

CONCLUSION

We affirm the district court's order dismissing Nowlin's defenses and counterclaims with prejudice as a sanction for disobeying its discovery orders. We vacate the judgment quieting title in the Appellees and remand to the district court with directions to remand the case to state court.

Entered for the Court

Mary Beck Briscoe
Circuit Judge