FILED
United States Court of Appeals
Tenth Circuit

June 13, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MELISSA LOUISE PHILLIPS,

Plaintiff - Appellant,

v.

CHARLIE ROGERS, in his individual capacity as Pittsburg County Commissioner; MIKE ELROD, in his individual capacity as Assistant Commissioner; LISA ERICKSON ENDRES, in her official capacity as Assistant General Counsel for ODOT; JAMES PETERS,

Defendants - Appellees.

No. 22-6089
(D.C. No. 5:21-CV-00955-PRW)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BALDOCK**, and **CARSON**, Circuit Judges.

Melissa Phillips, proceeding pro se, appeals from the district court's dismissal of her civil rights suit under 42 U.S.C. § 1983. The order is not an appealable decision because the district court dismissed the claims without prejudice and the

* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

court did not provide any indication that it intended the dismissal to be a final order. We therefore dismiss this appeal for lack of jurisdiction.

Ms. Phillips' amended complaint alleged federal takings and discrimination claims as well as state-law claims. The district court granted the defendants' motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), concluding that Ms. Phillips' factual allegations were insufficient to state a plausible claim. The court dismissed all of her federal claims without prejudice and declined to exercise jurisdiction over her state claims.

The dismissal of the federal claims without prejudice raises a jurisdictional issue.[1] "[W]e have an independent duty to examine our jurisdiction." *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1274 (10th Cir. 2001). "Generally, only final decisions of the district court are appealable." *Id.* at 1275; 28 U.S.C. § 1291. We have recognized that "a dismissal without prejudice is usually not a final decision," unless "the dismissal finally disposes of the case so that it is not subject to further proceedings in federal court." *Amazon*, 273 F.3d at 1275.

"[I]n this circuit, . . . [a] dismissal of the complaint is ordinarily a non-final, nonappealable order (since amendment would generally be available), while a dismissal of the entire action is ordinarily final." *Moya v. Schollenbarger*, 465 F.3d

[1] This court's jurisdiction is not affected by (1) the district court's declining to exercise supplemental jurisdiction over the state-law claims, *see Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 n.4 (10th Cir. 2001), or (2) the existence of claims against an unserved defendant, *see Raiser v. Utah Cnty.*, 409 F.3d 1243, 1245 n.2 (10th Cir. 2005).

444, 448-49 (10th Cir. 2006) (internal quotation marks omitted). However, "we have long recognized that the requirement of finality imposed by section 1291 is to be given a practical rather than a technical construction. In evaluating finality, therefore, we look to the *substance* and *objective intent* of the district court's order, not just its terminology." *Id.* at 449 (citation and internal quotation marks omitted). "The critical determination as to whether an order is final is whether plaintiff has been effectively excluded from federal court under the present circumstances." *Amazon*, 273 F.3d at 1275 (brackets and internal quotation marks omitted).

Moya set forth several principles to assist in making a finality determination. *See* 465 F.3d at 450-51. The first three are not applicable here. The district court did not "expressly and unambiguously dismiss[] [the] entire action," *id.* at 450, which would make the decision final. Also, the district court did not expressly deny Ms. Phillips leave to amend, nor were its "grounds for dismissal . . . such that the defect cannot be cured through an amendment to the complaint," which for practical purposes would make the decision final. *Id.* at 450-51. Neither did the district court expressly grant leave to amend, which would make the decision not final. *See id.* at 451.

For cases that do not fit these categories, such as this one, "we look to the language of the district court's order, the legal basis of the district court's decision, and the circumstances attending dismissal to determine the district court's intent in issuing its order—dismissal of the complaint alone or actual dismissal of plaintiff's entire action." *Id.* (internal quotation marks omitted). "If the effect of the district court order is that the plaintiff is effectively excluded from federal court, then the district court must have

intended to dismiss the entire action and our appellate jurisdiction is proper." *Id.* (citation and internal quotation marks omitted).

Evaluating these factors, we cannot conclude that Ms. Phillips has been effectively excluded from federal court. The order explicitly dismissed Ms. Phillips' claims, not her action. And considering the circumstances attending dismissal, we note that the court did not enter a separate judgment under Federal Rule of Civil Procedure 58 after issuing its dismissal order. Although the lack of a separate judgment is not determinative, it undermines an inference that the district court intended the litigation to be finished.

Further, the district court's grounds for granting the Rule 12(b)(6) motions conceivably could be cured by allowing Ms. Phillips to amend her complaint. For example, regarding her takings claims (which arose out of work on a road), the court held that the "Amended Complaint, amongst other things, does not identify or describe the actions of officials [Ms. Phillips] seeks to hold personally liable," R. at 553, and "she . . . does not claim to own that road [and] [t]he Amended Complaint is otherwise devoid of any discernable factual allegations which might indicate that any of her private property was actually damaged or 'taken' by the county officials," *id.* at 554. The court identified similar flaws with regard to her discrimination claims, stating that "[t]he Amended Complaint again neither clarifies each Defendant's personal involvement in the alleged discrimination nor describes any acts actually taken by them," and that "Plaintiff also does not contend that any Defendant treated her differently from anyone else or was motivated by some class-based

discriminatory intent sufficient to make out a plausible equal protection claim under § 1983." *Id.* at 554-55. In *Moya*, we noted that similar statements "seem to indicate that the district court thought that an amendment alleging additional facts could cure the defects and that dismissal was therefore just of the complaint." 465 F.3d at 453 (footnote omitted). Moreover, because these observations all identify amendable defects, this case is unlike those in which "the dismissals—though nominally just of complaints—practically disposed of entire actions and thus were final decisions." *Id.* at 450; *cf. id.* at 449-50 (collecting cases in which dismissals were considered final and appealable because they could not be cured by amendment).

For these reasons, we conclude that the district court's dismissal of Ms. Phillips' claims is not a final, appealable decision, and we dismiss the appeal for lack of jurisdiction. We deny Ms. Phillips' motions to provide new evidence and to impose sanctions on opposing counsel.

Entered for the Court

Joel M. Carson III
Circuit Judge