

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 2, 2019

Elisabeth A. Shumaker  
Clerk of Court

BEUS GILBERT PLLC,

Plaintiff,

v.

DONALD L. ROBERTSON TRUST,

Defendant Crossclaimant -  
Appellant,

and

BRIGHAM YOUNG UNIVERSITY,

Defendant Cross Defendant -  
Appellee.

No. 19-4026  
(D.C. No. 2:12-CV-00970-RJS)  
(D. Utah)

**ORDER**

Before **HOLMES**, **MORITZ**, and **CARSON**, Circuit Judges.

This matter is before the court on the jurisdictional show cause orders it issued on March 27, 2019 and April 29, 2019, the responses of the Donald L. Robertson Trust to both show cause orders, and the response of Brigham Young University to the second show cause order. Upon consideration of these materials, the district court docket, and the applicable law, the court dismisses this appeal for the reasons set forth below.

In the consolidated cases underlying this appeal: (1) Brigham Young University (“BYU”), Daniel Simmons, and Weilin Xie resolved their claims one against another by

settlement [ECF Nos. 138, 140] and all parties stipulated to the return of the interpleaded funds to BYU [ECF No. 215], leaving pending a cross-claim BYU asserted against Donald L. Robertson (for whom his trust was later substituted (collectively, for ease of reference, the “Trust”)) [ECF No. 112] and cross-claims the Trust asserted against all defendants [ECF No. 116]; (2) the district court dismissed the Trust’s cross-claims without prejudice [ECF No. 215], denied leave to amend with prejudice [ECF No. 263]; and—finding that “it appears there are no remaining live claims in this consolidated case”—dismissed the case and entered judgment “in favor of Cross Claim Defendant [BYU].” [ECF Nos. 264, 265]. At that time, however, BYU had not dismissed its cross-claim against the Trust, nor had the district court otherwise disposed of that claim. Accordingly, this court issued a jurisdictional show cause order, questioning the finality of the district court’s judgment and thus of appellate jurisdiction. *See* 28 U.S.C. § 1291; *see also Albright v. Unum Life Ins. Co.*, 59 F.3d 1089, 1092 (10th Cir. 1995).

Following issuance of the show cause order, the Trust filed a response in which it “request[ed] a short period of time by which to secure an order or judgment explicitly adjudicating BYU’s cross-claim,” and later provided this court with a copy of a *Stipulated Notice of Voluntary Dismissal of Pending Cross-Claim for Declaratory Judgment* pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) in which the parties stipulated to the district court’s dismissal of BYU’s cross-claim against the Trust “without prejudice.”

The court then issued a second jurisdictional show cause order on the basis that “[p]arties may not confer appellate jurisdiction upon [this court] by obtaining a voluntary dismissal without prejudice of some claims so that others may be appealed.” *Heimann v.*

*Snead*, 133 F.3d 767, 769 (10th Cir. 1998) (per curiam); *see also Cook v. Rocky Mtn. Bank Note Co.*, 974 F.2d 147, 148 (10th Cir. 1992) (“[W]hen a plaintiff voluntarily requests dismissal of [its] remaining claims without prejudice in order to appeal from an order that dismisses another claim with prejudice, . . . the order is not ‘final’ for purposes of § 1291.”).

In response, the Trust argued that the district court had adjudicated BYU’s cross-claim and/or that the cross-claim was moot, and thus that this court has jurisdiction under 28 U.S.C. § 1291. At our direction, BYU also filed a response, in which it: (1) stated its belief that “its voluntarily dismissed counterclaim for declaratory judgment is moot, and therefore the voluntary dismissal itself does not affect whether this Court has jurisdiction over the Trust’s appeal;” but also (2) stated that “[t]he ‘without prejudice’ appellation in the voluntary dismissal means only that BYU’s cross-claim could hypothetically be revived; but under governing law, that revival could only occur if the claim ceases to be moot,” *i.e.*, “if this Court were to reverse the district court’s judgment and reinstate the Trust’s claim for breach of contract.”

The parties’ arguments are insufficient to overcome this court’s “general rule . . . that a party cannot obtain appellate jurisdiction where the district court has dismissed at least one claim without prejudice because the case has not been fully disposed of in the lower court.” *Jackson v. Volvo Trucks*, 462 F.3d 1234, 1238 (10th Cir. 2006). The parties chose to dismiss BYU’s cross-claim “without prejudice” and responded to this court’s order raising the issue—not by dismissing the cross-claim “with prejudice” or seeking certification under Fed. R. Civ. P. 54(b)—but instead arguing that the district court had

fully and finally resolved that claim while simultaneously acknowledging that BYU could “hypothetically” revive that claim.

The stipulated dismissal of BYU’s cross-claim without prejudice to accommodate the Trust’s appeal of the order denying it leave to amend its own cross-claims renders the district court’s judgment “not ‘final’ for purposes of § 1291.” *Cook*, 974 F.2d at 148.

Accordingly, the court lacks jurisdiction to consider this appeal. *See id.*

**APPEAL DISMISSED.**

Entered for the Court  
ELISABETH A. SHUMAKER, Clerk

A handwritten signature in black ink, appearing to read "LA Lee".

by: Lisa A. Lee  
Counsel to the Clerk