21-102-cv
Samake v. Thunder Lube, Inc., et al.

United States Court of Appeals
for the Second Circuit

AUGUST TERM 2021
No. 21-102-cv

SEKOUBA SAMAKE,
Plaintiff-Appellant,

v.

THUNDER LUBE, INC., ABKO ASSOCIATES, INC. AND DROR HERSHOWITZ,
Defendants-Appellees.

ARGUED: OCTOBER 8, 2021
DECIDED: JANUARY 27, 2022

Before: JACOBS, MENASHI, Circuit Judges, LIMAN, District Judge.[1]

Plaintiff Sekouba Samake appeals from the orders of the United States District Court for the Eastern District of New York (Vitaliano, J.) deeming his Rule 41(a)(1)(A)(i) notice of dismissal without prejudice withdrawn and compelling arbitration. On appeal, Samake argues that the district court should

[1] Judge Lewis J. Liman of the United States District Court for the Southern District of New York, sitting by designation.

have either denied the motion to compel arbitration or given effect to his earlier notice of dismissal.

We hold that (i) the district court properly retained jurisdiction following the notice of dismissal to conduct a Cheeks review of any possible settlement of Samake's Fair Labor Standards Act claims; and (ii) the district court reasonably interpreted Samake's request to continue the litigation as a withdrawal of the notice of dismissal, and, in its discretion, deemed it withdrawn. Having thus determined that the district court deemed the notice of dismissal withdrawn on June 25, 2019, and therefore had jurisdiction to enter the order to compel arbitration on December 22, 2020, we conclude that Samake failed to take a timely appeal of the order deeming his notice of dismissal withdrawn, and that the order to stay and compel arbitration is an unappealable interlocutory order.

We DISMISS the appeal for lack of jurisdiction.

JUDGE MENASHI concurs in the judgment in a separate opinion.

ABDUL K. HASSAN, Abdul Hassan Law Group, PLLC, Queens Village, NY, for Plaintiff-Appellant.

MICHAEL BRUK, Law Office of Michael Bruk, New York, NY, for Defendants-Appellees.

DENNIS JACOBS, Circuit Judge:

Plaintiff Sekouba Samake filed this suit against his former employer for alleged violations of the Fair Labor Standards Act and other laws. After the employer moved to compel arbitration, Samake filed a notice of voluntary dismissal without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). The next day, the district court entered an order retaining jurisdiction over the case pursuant to Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015), pending confirmation that the parties had not reached any settlement that would necessitate review.

In response, Samake filed a letter disclaiming a settlement but asserting that the case must continue in federal court. The court interpreted the letter as a request to withdraw the notice of dismissal, and ordered the parties to determine a briefing schedule for the pending motion to compel arbitration. The parties fully briefed the motion to compel arbitration, which the district court granted.

In Cheeks, this Court held that any Fair Labor Standards Act ("FLSA") settlement must be reviewed by the district court for compliance with that Act

before the parties may dismiss a case with prejudice by joint stipulation pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). See Cheeks, 796 F.3d at 206–207. The Court acknowledged that a stipulated dismissal is typically effective automatically under Rule 41(a)(1)(A)(ii), but cited the exception for an "applicable federal statute," Rule 41(a)(1)(A), and ruled that the FLSA is such a statute. Id. at 206.

We hold that the FLSA limits the automatic operation of Rule 41(a)(1)(A)(i), which concerns unilateral dismissals, as well as (ii), which concerns stipulated dismissals. Accordingly, the district court properly retained jurisdiction to inquire whether the parties had reached a settlement necessitating Cheeks review. Further, we conclude that the district court reasonably interpreted Samake's letter--filed while the district court retained jurisdiction--as a request to withdraw his unilateral dismissal, which it then in its discretion deemed withdrawn.

As a result, the withdrawal of Samake's notice of dismissal was effected on June 25, 2019. Since Samake failed to appeal it within the 30 days required under Federal Rule of Appellate Procedure 4(a)(1)(A), we lack jurisdiction to review it.

The order to compel arbitration, entered on December 22, 2020, was appealed within 30 days; but it is an unappealable interlocutory order. See 9 U.S.C. § 16(b). Since that is the only order that is presented to us, we dismiss this appeal for lack of appellate jurisdiction.

BACKGROUND

The facts that bear upon this appeal are procedural. On February 24, 2019, Plaintiff Sekouba Samake filed suit seeking unpaid overtime wages from his former employer, Thunder Lube, Inc. and others ("Thunder Lube") under the FLSA and other statutes. On May 16, 2019, Thunder Lube moved to compel arbitration. In response, on June 17, 2019, Samake filed a unilateral notice of voluntary dismissal without prejudice under Federal Rule of Civil Procedure 41(a)(1)(A)(i).

The next day, the district court entered a docket order (the "June 18 Order") reserving decision on whether to so-order the voluntary dismissal. The district court explained that, if the parties had reached a settlement, it was subject to court review and approval in order to ensure compliance with the FLSA pursuant to Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015).

The June 18 Order cited two district court decisions discussing Cheeks review: Gallardo v. PS Chicken Inc., 285 F. Supp. 3d 549 (E.D.N.Y. 2018), in which the parties "filed [a] stipulation of dismissal without prejudice in apparent effort to evade judicial review"; and Carson v. Team Brown Consulting, Inc., 416 F. Supp. 3d 137 (E.D.N.Y. 2017), which "discuss[ed] potential preclusive effect of a dismissal without prejudice in light of overbroad release provisions and the applicable statute of limitations." Joint App'x 3 (internal quotation marks omitted). Although Samake had "implie[d] that no settlement ha[d] been reached,"[2] the district court requested he "file a further letter on ECF, by June 24, 2019, stating whether the parties have reached a settlement, and, if so, whether they intend to file a motion for settlement approval" under Cheeks. Id.

Samake filed a letter as instructed, which advised that "there is no settlement of this action," but, addressing the concern expressed in Carson, went on to argue that the validity of the arbitration agreement must be reviewed because it may have "preclusive effect" on refiling his claims. Joint App'x 26–27.

[2] Samake filed a letter alongside his notice of dismissal explaining his decision, but did not specify whether any settlement had been reached.

Accordingly, Samake concluded, "this case must continue in this Court." Id.

On June 25, 2019, the district court entered another docket order (the "June 25 Order"), stating that "[i]n light of [Samake's] letter[] withdrawing the voluntary dismissal," the parties should inform the court whether and when they would continue briefing the pending motion to compel arbitration. Joint App'x 3. The parties conferred, and Samake submitted a letter stating that "Defendants are moving forward with their motion to compel arbitration." Joint App'x 28. The parties completed briefing as scheduled.

On December 22, 2020, the district court granted Thunder Lube's motion to compel arbitration. See Samake v. Thunder Lube Inc., No. 19-cv-01094, 2020 WL 11039197, at *1 (E.D.N.Y. Dec. 22, 2020). The district court rejected Samake's argument that the obligation to arbitrate was ambiguous, id. at *2; Samake's remaining arguments--that specific provisions conflicted with the FLSA--were left to the arbitrator: "Once a court finds that an agreement exists and governs the controversy at issue, the validity and meaning of specific provisions within the Agreement to arbitrate is a matter for the arbitrator to decide." Id. at *4

(internal quotation marks omitted).

Finally, the district court turned to the "entirely separate issue" raised by Samake "that should the Court find, as it has, his claims arbitrable, it should grant and order his earlier motion for voluntary dismissal rather than compel arbitration." Id. The district court rejected this argument because "Samake subsequently withdrew" his motion for voluntary dismissal. Id.

Samake filed a timely notice of appeal of that December 22 order. On appeal, Samake argues that either the arbitration agreement is invalid or that the district court was divested of jurisdiction to consider arbitrability because his notice of dismissal terminated the action on June 17.

DISCUSSION

Before we address the timeliness of Samake's appeal, we first consider whether the district court properly retained jurisdiction following Samake's notice of dismissal, and whether the district court properly deemed that notice of dismissal withdrawn, questions that bear upon our appellate jurisdiction for two reasons. See Jacobs v. Patent Enf't Fund, Inc., 230 F.3d 565, 567 (2d Cir. 2000) (addressing the district court's jurisdiction to enter the order on appeal before

reaching whether the appeal was properly before the circuit court).

First, Samake challenges the district court's jurisdiction to continue proceedings--and enter an order compelling arbitration--following his notice of voluntary dismissal. As this Court has observed in similar cases, "if the lower court had altogether lost jurisdiction over the action when the order was entered, an appeal from it will not be dismissed, but will be decided on the merits." Littman v. Bache & Co., 246 F.2d 490, 492 (2d Cir. 1957) (Hand, J.). "[U]nder the Littman formula, the question of our jurisdiction is thus dependent on our determination of the validity of the district court's action, [so] we must of course assert jurisdiction in order to make that determination." Thorp v. Scarne, 599 F.2d 1169, 1172 (2d Cir. 1979); see also Radack v. Norwegian Am. Line Agency, Inc., 318 F.2d 538, 543 n.5 (2d Cir. 1963) ("[T]here is a long line of cases to the effect that if the lower court has lost jurisdiction at the time an order is entered, an appeal will lie."). If Samake's notice of dismissal terminated the district court's jurisdiction, we have appellate jurisdiction to review the order to compel arbitration. That line of cases refutes the jurisdictional argument of the

concurring opinion.

Second, Samake argues that his appeal is timely because the notice of dismissal was not deemed withdrawn until the order to compel arbitration. Accordingly, if the notice of dismissal properly was deemed withdrawn, we must determine when the order was entered in order to decide whether the appeal from that order is timely.

A

"The applicability of Rule 41(a)(1)(A)(i) to the plaintiff's claim is a legal question which we review de novo." Youssef v. Tishman Constr. Corp., 744 F.3d 821, 824 (2d Cir. 2014) (internal quotation marks omitted). We conclude that, notwithstanding Samake's Rule 41(a)(1)(A)(i) voluntary dismissal without prejudice, the district court properly retained limited jurisdiction to conduct a Cheeks review.

Federal Rule of Civil Procedure 41(a)(1)(A) allows voluntary dismissal of a case (i) by a notice of dismissal filed by plaintiff prior to answer or motion for summary judgment, or (ii) by a stipulation of dismissal signed by all parties. Subject to "any applicable federal statute," Fed. R. Civ. P. 41(a)(1)(A), dismissal

under either Rule 41(a)(1)(A) approach requires no court action to be effective. ISC Holding AG v. Nobel Biocare Fin. AG, 688 F.3d 98, 111 (2d Cir. 2012).[3]

Cheeks held that "the FLSA [is] within Rule 41's 'applicable federal statute' exception," and that the district court therefore properly retained jurisdiction--notwithstanding the parties' joint stipulation of dismissal with prejudice pursuant to Rule 41(a)(1)(A)(ii)--to review and approve (or reject) the settlement. 796 F.3d at 200–01, 206. We observed that "the majority" of district courts concluded that preemptive review was preferable to waiting for a potential future suit seeking to set aside the settlement. Id. at 205 (quoting and rejecting the district court's reasoning in Picerni v. Bilingual Seit & Preschool Inc., 925 F. Supp. 2d 368, 373 (E.D.N.Y. 2013), that parties should be allowed "to

[3] The concurring opinion observes that, under our precedents, a voluntary dismissal under Rule 41(a)(1)(A) has automatic effect, absent the contrary operation of an applicable federal statute. See, e.g., Thorp, 599 F.2d at 1171 n.1. But Thorp supports the jurisdiction analysis here. Thorp acknowledged that the district court's order vacating the notice of dismissal was interlocutory, and no statute provided this Court with appellate jurisdiction over that order. Id. at 1171–72. The Court concluded nonetheless that it had appellate jurisdiction to review the order because the district court entered it after losing jurisdiction. Id. (citing Littman, 246 F.2d at 492). As illustrated supra, the same principle operates here.

take their chances that their settlement will not be effective").

We hold that the same result is warranted when the dismissal is effected unilaterally under Rule 41(a)(1)(A)(i) as when dismissal is effected by stipulation of all parties under (A)(ii). As a matter of grammar and structure, the exception to automatic dismissal for "any applicable federal statute" in subsection (A) applies equally to both subsections (A)(i) and (A)(ii); and Cheeks held that the FLSA is such an "applicable federal statute." Id. The plain text (set out in the margin) thus extends Cheeks to all dismissals under Rule 41(a)(1)(A).[4]

Additionally, the logic of Cheeks as applied to Rule 41(a)(1)(A)(ii) dismissals with prejudice applies equally to Rule 41(a)(1)(A)(i) dismissals without prejudice. Cheeks reasoned from "the unique policy considerations

---

[4] Federal Rule of Civil Procedure 41(a)(1)(A) reads as follows:

> *Without a Court Order*. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:
>
> (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
> (ii) a stipulation of dismissal signed by all parties who have appeared.

underlying the FLSA" that the district courts were required to review the fairness of a settlement waiving FLSA rights before giving effect to a stipulation of dismissal with prejudice of a complaint asserting such rights. 796 F.3d at 206. "[W]ithout judicial oversight, . . . employers may be more inclined to offer, and employees, even when represented by counsel, may be more inclined to accept, private settlements that ultimately are cheaper to the employer than compliance with the Act." Id. at 205–06 (quoting Socias v. Vornado Realty L.P., 297 F.R.D. 38, 41 (E.D.N.Y. 2014)). Thus, the court concluded that stipulated dismissals with prejudice require the approval of the district court or the DOL to take effect. Id. at 206. The concern of Cheeks was with the settlement that included as one of its terms the dismissal of the action, and not specifically with whether the dismissal was with prejudice or without. That is made clear by the "proposed FLSA settlements" that the court "highlight[ed]" as presenting "the potential for abuse in such settlements" and as "underscor[ing] why judicial approval in the FLSA setting is necessary." Id. They included settlements with highly restrictive confidentiality provisions, overbroad releases, and fee awards that were disproportionate and unreasonable, as well as settlements that were reached

because the plaintiffs were unemployed and desperate for any money they could find. Id. It was not dispositive that the settlements were resolved through a dismissal with prejudice. In each of them, the same pernicious effects could have been achieved with a dismissal without prejudice coupled with a broad release. Cold comfort that a plaintiff could unwittingly sign away FLSA claims in a secret settlement while representing to the district court that the dismissal is without prejudice.

Unless Cheeks review applies to (A)(i) as well as (A)(ii), parties could evade Cheeks review simply by negotiating a settlement and release, then filing a unilateral dismissal without prejudice rather than a stipulated dismissal. History demonstrates that such concerns beset FLSA settlements arrived at by voluntary dismissal just as they do dismissals that are stipulated.[5] Cheeks is binding

[5] See, e.g., Seck v. Dipna Rx, Inc., 16-cv-7262, 2017 WL 1906887, at *1 (S.D.N.Y. May 8, 2017) (stating "[t]his case underscores the wisdom of judicial or administrative review of all settlements of claims brought under the [FLSA]" after voluntary dismissal without prejudice where plaintiff later complained he was never paid under an undisclosed settlement); Carson v. Team Brown Consulting, Inc., 416 F. Supp. 3d 137, 139 (E.D.N.Y. 2017) (rejecting voluntary dismissal without prejudice used after magistrate ordered parties to file the settlement as an explicit attempt to avoid Cheeks review, which "would likely

precedent. If it is to retain any vitality, district courts necessarily have the authority and jurisdiction to review FLSA settlements when the agreement provides for the parties to end the case via Rule 41(a)(1)(A)(i) instead of (ii). Such review may be quite limited--for instance, in this case, all that was needed was confirmation that no settlement existed--but even such limited review will ensure the FLSA's goals continue to be served.

We therefore hold that the district court properly inquired as to the existence of any FLSA settlement, and the Rule 41(a)(1)(A)(i) notice of dismissal did not automatically divest the district court of jurisdiction. Had a FLSA settlement existed, the district court would then engage in a Cheeks fairness review, but in the absence of a settlement, the notice of dismissal should be so-

---

narrow [the settlement's] terms"); Gallardo v. PS Chicken Inc., 285 F. Supp. 3d 549, 553 (E.D.N.Y. 2018) (holding voluntary dismissal without prejudice was "attempting an end-run around Cheeks" and "such a circumvention, if unchecked, could become standard practice, effectively undermining the courts' statutory obligation to oversee the settlement of FLSA claims"); De Jesus v. Magnetic Contracting Corp., No. 19-cv-01842, 2019 WL 4737053, at *1 (E.D.N.Y. Sept. 27, 2019) (stating in response to notice of dismissal without prejudice that "[t]he circumstances raise a concern that the parties have covertly settled FLSA claims in an effort to evade judicial review required by Cheeks").

ordered.

B

The district court ruled in its June 25 Order that Samake's June 24 letter withdrew his notice of dismissal. The June 18 Order offered Samake the opportunity to dismiss the action simply by confirming the parties had not entered into a settlement. He could have done that, and the court would have had to give effect to his voluntary dismissal. Instead, Samake's letter disclaiming a settlement added that "this case must continue in this Court." Joint App'x 27. The letter in part envisioned further proceedings to ascertain whether dismissal would preclude further litigation of the claims--a point that courts have considered in deciding whether to approve a settlement, see Carson, 416 F. Supp. 3d at 140, but one which is irrelevant to dismissal in the absence of a settlement. At the same time, Samake's letter *also* requested further proceedings in the district court regarding the arbitration agreement's enforceability--proceedings incompatible with the voluntary dismissal, if ordered. And when the district court stated that the notice of dismissal had been withdrawn, Samake acquiesced. He did not raise a contemporaneous objection, or notice an appeal of

the June 25 Order.[6] See infra Part C. Instead, Samake proceeded to litigate the case. He negotiated a briefing schedule with Thunder Lube, then fully briefed the motion to compel arbitration that he now claims was never before the district court.

The district court's decision to effect Samake's affirmative request to continue litigating, made while the parties remained subject to its jurisdiction, see supra Part A, was within its discretion and provided clear guidance to the parties. No more was necessary. If Samake could dismiss his case without prejudice and then refile the same suit, there is no reason why Samake could not withdraw his notice of dismissal without prejudice before it had been acted upon and continue the case.

By stating on the record that Samake withdrew his notice of dismissal, the district court also shut down any gamesmanship. Samake argued both before the district court and here that either (1) he wins the motion to compel arbitration or (2) the district court was without jurisdiction to rule on the motion at all. But

[6] Likewise, Thunder Lube did not object to or notice an appeal of the June 25 Order, as it could have done if it disagreed with the district court's decision to deem Samake's notice of dismissal withdrawn.

the June 25 Order preempted this argument: the district court expressly acknowledged that Samake had withdrawn the notice of dismissal (a characterization which Samake only questioned after losing) and that the notice therefore was no longer pending before the court. Any other result would approve a gambit by which future FLSA plaintiffs seek an opinion that binds if they win, but becomes advisory post hoc if they lose.

The procedural history of this case is abnormal and irregular, and gives rise to a ruling that is particular to the situation. It may be that a future FLSA plaintiff similarly will seek to withdraw a voluntary dismissal rather than confirm that no settlement exists, or do both. In that situation, a district court may wish to follow a different procedure before deciding whether the plaintiff may do so, and considerations not present here--such as prejudice to the defendants from delay, or an attempt to evade the terms of an already agreed settlement--may suggest an alternate approach. We have no occasion to consider whether such approaches would be proper; we hold only that here, the district court's statement that the notice of dismissal was withdrawn, made clearly and

on the record, finally resolved that question on June 25, 2019.

C

Samake argues that his withdrawal of the notice of dismissal was not effected until the December 22, 2020 entry of the order to compel arbitration. As already discussed, the record is clear that Samake's withdrawal of the notice of dismissal was effected on June 25, when the district court described Samake's letter as "withdrawing the voluntary dismissal" and solicited further briefing on the motion to compel arbitration, an order which implicitly and necessarily relied on such withdrawal. The district court reiterated this timeline in the order to compel arbitration itself, referring to "the fact that Samake subsequently withdrew that motion [for voluntary dismissal]." Samake, 2020 WL 11039197, at *4.

Appellate jurisdiction turns on the existence (or not) of jurisdiction in the district court. Since (as we conclude) the district court had jurisdiction to enter the arbitration order, we lack jurisdiction to review it, under the ordinary rule making orders to compel arbitration unappealable. Whereas, if the district court lacked jurisdiction to enter the arbitration order--that is, if the district court was

automatically divested of jurisdiction by the notice of dismissal--the arbitration order would have been appealable under the principle of Littman. The question whether the district court had jurisdiction when it entered the arbitration order depends on whether the need for Cheeks review prolonged the district court's jurisdiction beyond the filing of the notice of dismissal. That is why (pace the concurrence) we have had to decide the applicability of Cheeks in order to establish whether we have appellate jurisdiction.

As we have concluded that Cheeks is applicable to a voluntary dismissal effected according to Rule 41(a)(1)(A)(i), the time for Samake to appeal the order concluding he withdrew his notice of dismissal was when the district court issued the June 25 Order. But a notice of appeal of such an order must be filed within thirty days, which Samake failed to do. See Fed. R. App. P. 4(a)(1)(A).

Accordingly, the only order from which a timely appeal could be taken is the order to compel arbitration; but such an order is interlocutory under 9 U.S.C. § 16(b) and we have no appellate jurisdiction to review it. See Katz v. Cellco Partnership, 794 F.3d 341, 346 (2d Cir. 2015) ("[T]he FAA explicitly denies the right to an immediate appeal from an interlocutory order that compels

arbitration or stays proceedings.").

As a result, this appeal must be dismissed for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, we **DISMISS** Samake's appeal for lack of jurisdiction.