
COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT.

No. 2000-P-1005

MIDDLESEX SUPERIOR COURT No. 98-04820.

WILLIAM SILVERSTEIN,
DEFENDANT - IN - COUNTERCLAIM / APPELLANT,

V.

MICROSYSTEMS SOFTWARE INC., ET AL.,
PLAINTIFFS - IN - COUNTERCLAIM / APPELLEES.

ON APPEAL FROM A JUDGMENT
OF THE MIDDLESEX SUPERIOR COURT.

REPLY BRIEF OF THE APPELLANT, WILLIAM SILVERSTEIN.

PHILIP R. OLENICK
BBO No. 378605
101 TREMONT STREET-SUITE 801
BOSTON, MASSACHUSETTS 02108
(617) 357-5660

Table of Contents.

Table of Authorities Cited iii

1. MSI and TLC misstate both the facts and the law in their brief. 1

 a. There is a reviewable judgment in this case 1

 b. The Superior Court had no discretion to refuse to rule on summary judgment 2

 c. No basis was shown for the exercise of discretion to grant the motion to dismiss without prejudice – the reason given for moving to dismiss was, in fact, a reason to dismiss *with* prejudice. 6

 d. MSI and TLC misrepresent William Silverstein’s Brief. 9

Conclusion 10

Addendum (In the Appellant’s Principal Brief)

Table of Authorities Cited.

CASES.

Bucchiere v. New England Telephone and Telegraph Company, 396 Mass. 639 (1986) 3, 7
Less v. Berkshire Housing Services, Inc., 2000 WL 1349252 (D. Mass. 2000) 5-7
Lucille E. Moran v. District Court of Central Middlesex, 347 Mass. 241 (1964) 2
Puerto Rico Maritime Shipping Authority v. Leith, 668 F.2d 46 (1981) 5, 8
United States of America v. All Funds, Monies, Securities, Mutual Fund Shares and Stocks Held in Fidelity Investments, et al., 81 F.3d 147, 1996 WL 141789 (1st Cir. 1996) 5, 7

MASSACHUSETTS RULES OF CIVIL PROCEDURE.

Rule 41 4
Rule 56(c) 3, 4

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1. MSI and TLC misstate both the facts and the law in their brief.

The libel plaintiffs, Microsystems Software, Inc. (“MSI”) and The Learning Company (“TLC”), argue that no appeal can lie from a court’s refusal to rule on a motion for summary judgment, that the Superior Court’s action here can only be appealed on an abuse of discretion standard, and that some unspecified issue in this appeal was not presented below. None of those arguments is correct, either factually or legally.

a. There is a reviewable judgment in this case.

MSI and TLC start by saying that the refusal of the Superior Court to rule on William Silverstein’s summary judgment motion means there’s no judgment to be appealed.

That argument ignores that the Superior Court in fact entered not one but *two* judgments: one in September of 1999 under Rule 68 (at A.60 and Add.3) – which gave William Silverstein judgment against the defendants on all claims, including their libel counterclaim – and one in April of 2000 (at A.457 and Add.2), at the instance of MSI and TLC over William Silverstein’s objection, dismissing their libel counterclaim without prejudice.

While the parties disagree about whether any part of the case remained alive after the September 1999 judg-

ment, all parties agree that nothing remained before the Superior Court after the April 2000 judgment. Clearly, this isn't an interlocutory appeal. The defendants suggest that one cannot appeal from the Superior Court's *refusal to rule* on a motion for summary judgment – but they cite no case that says that.¹

b. The Superior Court had no discretion to refuse to rule on summary judgment.

MSI and TLC don't contend that no appeal can lie from a judgment entered under Rule 41. In fact, they cite several appellate decisions dealing with the propriety of Rule 41 dismissals in their brief. They argue, however,

1. MSI and TLC claim that *Lucille E. Moran v. District Court of Central Middlesex*, 347 Mass. 241 (1964), is authority on this point. What *Moran* held was that an order of commitment under chapter 123 was not a judgment, as it did not adjudicate the individual's mental competence, only authorizing temporary restraint.

Moran held that a commitment order could be modified or dissolved in later proceedings, unlike a judgment, which can only be challenged on direct appeal. In fact, *Moran* observed in its first paragraph that the plaintiff there was "no longer a patient or subject to confinement or restraint" – which suggests that another reason for dismissing that appeal was that it was moot.

Moran has no bearing on a refusal to rule on a summary judgment motion. However, while the order in *Moran* was subject to collateral attack, the undoing of one judgment by another (as occurred here) *is* a subject for direct appeal.

that a Superior Court's dismissal under Rule 41 is reviewable only on an abuse of discretion standard.²

What they ignore is that before it could even address the motion under Rule 41, the Superior Court had to first rule on the motion for summary judgment.

The third sentence of Rule 56(c) makes it clear that, when the record supports the motion, the grant of summary judgment is *mandatory*, not discretionary:

"The judgment sought *shall be rendered forthwith* if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[emphasis added]³

Thus, contrary to MSI's and TLC's suggestion that what is being appealed from was a purely discretionary decision, what Silverstein is appealing is the refusal of the Superior Court to make an entry of judgment that Rule

2. Their lead case for this proposition, *Bucchiere v. New England Telephone and Telegraph Company*, 396 Mass. 639 (1986), deals with a different situation from here, as it deals not with a plaintiff's motion for voluntary dismissal without prejudice but with a defendant's motion for involuntary dismissal for failure to prosecute.

3. The way Rule 56(c) is worded, there's no discretion in the grant or denial of summary judgment. Once the Court decides whether the moving party is entitled – as a matter of law – to judgment on the record before it, summary judgment is either required or prohibited.

56(c) goes so far as to say is not only mandatory but must be made *forthwith*.

This aspect of the case shows the difference between this case and those submitted by MSI and TLC: since the motion for summary judgment was in the middle of being argued when the motion under Rule 41 was submitted, an affirmative denial, on the merits, of the motion for summary judgment – after completed argument on that motion – was a condition precedent to even considering a motion for dismissal without prejudice.⁴ Once a motion for summary judgment has been disposed of, the Superior Court may have some discretion in ruling on a motion to dismiss (discussed *infra*), but it has no discretion to even entertain it while summary judgment is before it.

The cases MSI and TLC cite do not dispute this.

4. As noted (and quoted from) on page 35 of William Silverstein's principal brief, Rule 41(a)(1) only allows a plaintiff to dismiss as of right before the defendant has answered or filed for summary judgment. The clear implication of this specific reference to summary judgment – when taken together with the mandatory nature of summary judgment – is that the court must first deal with an outstanding motion for summary judgment – or secure the plaintiff's agreement to the condition that a voluntary dismissal be *with* prejudice, under Rule 41(a)(2).

There was *no* summary judgment motion in *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 48 (1981), in which a plaintiff's motion to dismiss without prejudice under Rule 41 was allowed to a plaintiff who argued – as the defendant had as well, in its own motion to dismiss – that the court lacked subject matter jurisdiction over the case. Of course, in the absence of subject matter jurisdiction, dismissal without prejudice is mandatory.

In *United States of America v. All Funds, Monies, Securities, Mutual Fund Shares and Stocks Held in Fidelity Investments, et al.*, 81 F.3d 147, 1996 WL 141789 at **1 to **2 (1st Cir. 1996), summary judgment *had already been denied – repeatedly* – before the government moved to dismiss without prejudice. Renewing a motion for summary judgment which had already been denied – a month *after* the government moved to dismiss voluntarily – is qualitatively different from what occurred here, where MSI and TLC moved to dismiss in the middle of the hearing on William Silverstein's motion for summary judgment.

In *Less v. Berkshire Housing Services, Inc.*, 2000 WL 1349252 (D. Mass. 2000), the defendant didn't serve its summary judgment motion until seven weeks after the

plaintiff's Rule 41 motion – and expressly consented to the court's deciding the Rule 41 motion first by saying that the plaintiff needn't respond to the summary judgment motion until after the Rule 41 motion had been decided (at *5).

- c. No basis was shown for the exercise of discretion to grant the motion to dismiss without prejudice – the reason given for moving to dismiss was, in fact, a reason to dismiss *with* prejudice.

This case did not meet the test MSI and TLC draw from *Less*: Whether the party opposing a Rule 41 motion would suffer “plain legal prejudice” from its allowance. On page 5 of their brief, MSI and TLC attempt to suggest that no such prejudice occurred here, but to do so they left off their list of Silverstein's claimed prejudices the most important prejudice that Silverstein points to:

- Stripping from Silverstein his September 1999 judgment against MSI and TLC on their libel claim against him (along with every other claim in the case). Granting MSI's and TLC's motion to dismiss their libel claim without prejudice stripped Silverstein of a final judgment he already had.

That cannot be called a mere “technical disadvantage.”⁵

5. This calls to mind Justice Brennan's favorite bumper sticker, which pointed out that “The Constitution is not a Technicality.”

All of the cases cited by MSI and TLC on the question of discretion under Rule 41 showed some weighing of competing prejudices and some reason for doing what the court did:

In *Less* the reason for granting dismissal without prejudice was to allow the case to be brought in the MCAD or EEOC – the plaintiff had made it clear from the outset that his only reason for filing in court was to obtain a protective injunction in the meantime. No prejudice was shown by the defendant, since discovery in the case hadn't even begun. (*3 to *4).

In *Bucchiere, supra* n. 2, the reason for allowing dismissal with prejudice for failure to prosecute was that almost seven years after filing their complaint, the plaintiffs had taken no affirmative steps to prosecute their claimed class action against the defendants: they had taken no discovery and had not even sought to have a class certified. (369 Mass. at 640)

In *United States of America v. All Funds, Monies, Securities, Mutual Fund Shares and Stocks Held in Fidelity Investments*, the court dismissed a civil forfeiture proceeding in deference to a parallel criminal forfeiture proceeding that was already going on, noting

that the defendant lost nothing and actually had better procedural protections in the criminal proceeding. (**2)

The quotes in MSI's and TLC's brief from *Puerto Rico Maritime Shipping Authority v. Leith* about avoiding deciding "complicated legal question[s]" and resolving "factual issue[s]" dealt with avoiding the futility of litigating all that if the outcome could be that the court had no jurisdiction – better to let the plaintiff take the case to state court where jurisdiction was clear. No countervailing prejudice was shown. (668 F.2d at 50)

In the instant case, however, MSI and TLC showed *no reason* to make the dismissal be "without prejudice." At the hearing on William Silverstein's motion for summary judgment, they said they wanted to dismiss "to allow the parties to get on with their lives." In their motion they said – to the same effect – that they "wish to spare the parties the additional inconvenience and expense of continued litigation." (See Add.1 or A.400)

On its face, that is a reason for dismissal *with* prejudice. It certainly did not justify the prejudice to William Silverstein that resulted from dismissing the

libel claim without prejudice.⁶

d. MSI and TLC misrepresent William Silverstein's Brief.

As to MSI's and TLC's arguments about whether the Rule 68 Judgment gave William Silverstein judgment against them on all claims, including the libel claim, William Silverstein refers this Court back to his principal brief – except that he must take issue with the claim in the MSI/TLC brief that:

“As Silverstein admits, Microsystems' offer of judgment expressly encompassed only Silverstein's claims against it and was silent as to Microsystems' counterclaim against Silverstein (Id.; P1. Brief at 4).”

(MSI/TLC Brief at pp. 3-4)

6. Rounding out their barrage of procedural challenges, MSI and TLC also argue that a party cannot appeal on the basis of an argument not made below – but William Silverstein *did* argue below the issues he is arguing here. In addition to arguing the merits of his summary judgment motion below, he argued the procedural issues presented here as well.

In William Silverstein's opposition to the motion for voluntary dismissal without prejudice (reproduced in the Appendix starting at A.405), he stressed that he was entitled to consideration and decision on the merits of his motion for summary judgment to prevent First Amendment chill (at A.409), requested that his summary judgment motion be considered, in the alternative, a S.L.A.P.P. motion (at A.410-411), and stated that he would be forced to appeal if a dismissal without prejudice was entered, because it would rob him of the prior judgment in his favor on the defendants' libel counterclaim inherent in the September 1999 judgment (at A.413).

William Silverstein's principal brief "admits" no such thing but argues vigorously to the contrary, at pages 38 to 40. Page 4 quotes the nearly-identical language of the Rule 68 offer and the judgment based on it – but, being a factual recitation, that page does not take any position about what either of those documents *meant*. However, it is clear on their face that the wording MSI's and TLC's counsel chose – judgment in the case – gave William Silverstein judgment on the case as a whole, not just on his own claims.⁷

Conclusion.

A ruling on – and denial of – summary judgment on the libel counterclaim was a condition precedent even to consideration of MSI's and TLC's motion to voluntarily dismiss the libel counterclaim without prejudice.

William Silverstein asks that the April 2000 judgment dismissing the libel counterclaim without prejudice be vacated, and that the libel counterclaim be

7. In fact, MSI and TLC unsuccessfully moved to have the September 1999 judgment amended to specifically exclude their counterclaim – see A.75 (the denial of that motion is noted in the margin at A.73).

In that motion they relied on the right to move to alter or amend a judgment – but this was a judgment that they had framed themselves in the first place!

dismissed with prejudice by the grant of summary judgment in his favor by this Court – or that the summary judgment motion be remanded to the Superior Court for decision at the trial court level.⁸

Respectfully submitted,

WILLIAM SILVERSTEIN,

By his attorney,

PHILIP R. OLENICK
BBO No. 378605
101 Tremont Street-Suite 801
Boston, Massachusetts 02108
(617) 356-5660

8. Obviously, judicial economy would be best served if this Court decided the summary judgment motion on its own, as that would avoid the risk of this Court's having to entertain another appeal on that question.

That decision should not be difficult, as the fact section of William Silverstein's principal brief shows that almost everything the plaintiff said in support of his motion for summary judgment was admitted by MSI and TLC in writing or at the depositions of their managers, Richard and Debra Gorgens, Larry Mason, and Reed Lewis.

In fact, it should not even be necessary to look at the facts, as the September 1999 judgment should be held to preclude the counterclaim both procedurally, due to its wording, and logically, even if that judgment was only on William Silverstein's claims: A libel claim cannot succeed in the face of a judgment in favor of the speaker on claims based on all the same opinions.