For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

YEARWOOD ENTERPRISES, INC. d/b/a **PARADISE GAS,** Appellant, v. **ANTILLES GAS CORP.,** Appellee.	)	**S. Ct. Civ. No. 2017-0101** Re: Super. Ct. Civ. No. 77/2017 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Michael C. Dunston

Considered: July 10, 2018
Filed: October 3, 2018

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

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OPINION OF THE COURT

CABRET, Associate Justice.

Yearwood Enterprises, Inc. ("Yearwood") appeals from the December 8, 2017 memorandum opinion and order of the Superior Court awarding attorney's fees and costs to Antilles Gas Corp. ("Antilles"), arguing that Yearwood's filing of its notice of voluntary dismissal

pursuant to V.I. R. CIV. P. 41(a)(1)(A)(i) divested the Superior Court of jurisdiction to rule on Antilles' motion for costs and fees. For the reasons that follow, we reject Yearwood's argument and affirm the Superior Court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 6, 2017, following a breakdown in the business relationship between the parties—both suppliers of propane gas, Yearwood filed a complaint against Antilles alleging violations of Virgin Islands antimonopoly laws and requesting a preliminary injunction as well as "an accounting and payment of monies owed." Yearwood later filed its first amended complaint, adding an additional count. On April 10, 2017, Antilles filed a motion to dismiss Yearwood's first amended complaint for failure to state a claim upon which relief can be granted pursuant to V.I. R. CIV. P. 12(b)(6).[1] The Superior Court, by memorandum opinion and order entered June 22, 2017, dismissed count three of Yearwood's first amended complaint—for accounting and payment of monies owed—with prejudice, as moot, because Antilles had paid the monies owed and Yearwood did not oppose the dismissal of this count. Over Yearwood's objection, the Superior Court dismissed the remaining counts without prejudice, granting Yearwood leave to file a second amended complaint within thirty days.

Rather than file a second amended complaint, on July 14, 2017, Yearwood filed a "notice of dismissal with prejudice" stating that Yearwood "elect[ed] to terminate [this action] in its entirety with prejudice, with each party to bear its own costs and attorney's fees." On July 18, the Superior Court apparently endorsed the notice of dismissal by writing the word "approved" on a

[1] Although Yearwood moved to dismiss under the previously applicable Federal Rule of Civil Procedure 12, because Virgin Islands Rule of Civil Procedure 12(b) is identical to the formerly applicable federal rule in all relevant respects, we refer only to the Virgin Islands rule for clarity and simplicity.

copy of Yearwood's notice, which the Clerk of the Court then entered as an "order of dismissal with prejudice." Antilles subsequently filed a motion requesting clarification or an extension of time within which to seek reconsideration of the Superior Court's apparent decision that each party should bear its own cost and fees, noting that while V.I. R. CIV. P. 41(a)(1)(A)(i) permits a plaintiff to unilaterally dismiss its own complaint if no answer or motion for summary judgment has been filed, the rule does not permit the plaintiff to unilaterally deny the prevailing party its statutory right to petition the court for an award of attorney's fees and costs. In response, Yearwood filed a "notice of no jurisdiction" on August 7, 2017, asserting that the Superior Court lacked jurisdiction to consider Antilles' motion because the matter was automatically closed upon the filing of Yearwood's notice of dismissal.

On August 17, 2017, Antilles filed its petition for attorney's fees seeking an award of $18,205. Yearwood failed to file any opposition or otherwise respond to Antilles' petition and on December 8, 2017, the Superior Court entered a memorandum opinion and order granting the petition and awarding Antilles $8,150 for attorney's fees. Yearwood timely filed a notice of appeal on December 18, 2017.

II. JURISDICTION AND STANDARD OF REVIEW

"The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." V.I. CODE ANN. tit. 4, § 32(a). Because the Superior Court's December 8, 2017 memorandum opinion and order fully adjudicated the issue of attorney's fees and costs, it is a final order, and we have jurisdiction over this appeal. *Kalloo v. Estate of Small*, 62 V.I. 571, 577 (V.I. 2015) (citing *In re Guardianship of Smith*, 58 V.I. 446, 449 (V.I. 2013)). Additionally, we review the Superior Court's interpretation of V.I. R. CIV. P. 41 *de novo, King v. Appleton*, 61 V.I. 339, 345 (V.I. 2014), and exercise plenary review over Yearwood's

challenge to the subject matter jurisdiction of the Superior Court. *Hansen v. O'Reilly*, 62 V.I. 494, 508 (V.I. 2015).

III. DISCUSSION

On appeal, Yearwood argues that the Superior Court erred by entering its December 8, 2017 order awarding attorney's fees after Yearwood filed its voluntary dismissal under V.I. R. CIV. P. 41(a)(1)(A)(i), "because [Yearwood's] dismissal terminated the case and completely extinguished the Superior Court's jurisdiction." (Appellant's Br. at 5). Yearwood cites language from some cases which, when read in isolation, might appear to support the general proposition that a trial court is divested of all jurisdiction upon the filing of a notice of voluntary dismissal. *See, e.g.*, *Janssen v. Harris*, 321 F.3d 998, 1000 (10th Cir. 2003) ("Once the notice of dismissal has been filed, the district court loses jurisdiction over the dismissed claims and may not address the merits of such claims or issue further orders pertaining to them.") (quoting *Duke Energy Trading & Mktg. v. Davis*, 267 F.3d 1042, 1049 (9th Cir. 2001)); *Columbia Equities, Ltd. v. Sedahl-Watts*, Civ. No. 2010-0095, 2017 WL 3461718, at *3 (D.V.I. August 11, 2017) (unpublished) ("It is well-established that voluntary dismissal 'deprives the district court of jurisdiction to decide the merits of the case.'") (quoting *In re Bath & Kitchen Fixtures Antitrust Litig.*, 535 F.3d 161, 166 (3d Cir. 2008)). However, as Judge Easterbrook has explained: "'Jurisdiction' is an all-purpose word denoting adjudicatory power. A court may have power to do some things but not others, and the use of 'lack of jurisdiction' to describe the things it may not do does not mean that the court is out of business." *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir. 1987). Indeed, even the cases cited by Yearwood specifically note that the filing of a notice of voluntary dismissal deprives the court of jurisdiction to rule *on the*

merits of the claims, and those decisions say nothing about the court's jurisdiction over collateral matters such as motions for attorney's fees.

In any event, despite Yearwood's broad assertion that its voluntary dismissal "completely extinguished" the Superior Court's jurisdiction, close examination of Yearwood's argument reveals that Yearwood does not, in fact, contend that the filing of a notice of voluntary dismissal *completely* deprived the Superior Court of jurisdiction. Rather, Yearwood concedes that the trial court retains jurisdiction to decide collateral issues such as sanctions, costs, and attorney's fees, but argues instead that the court's jurisdiction is "limited to instances where the collateral issues were already raised at the time of the plaintiff's voluntary dismissal." We disagree.

Virgin Islands Rule of Civil Procedure 41(a)(1)(A)(i) provides that "Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable statute, the plaintiff may dismiss an action without a court order by filing . . . a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." As we have explained before:[2]

> Rule 41(a)(1)(A)(i), by its own terms, automatically terminates the litigation upon its mere filing by the parties. As one learned treatise explains, "[a] voluntary dismissal under [Rule] 41(a)(1)(A)(i) is effected by the filing of a notice of dismissal with the clerk of court. Filing of the notice of dismissal automatically terminates the suit and itself closes the file. The plaintiff need not even serve or otherwise notify the defendant of the filing of the notice of dismissal in order to make it effective. Any further action or order by the court is neither necessary nor of any effect. The only function that a court might perform under [Rule] 41(a)(1)(A)(i) is to determine, should the question arise, whether an answer or motion for summary judgment has in fact been filed prior to the filing of a notice of dismissal."

[2] Although our decision in *Bertrand* considered the effect of previously applicable Federal Rule of Civil Procedure 41, Virgin Islands Rule of Civil Procedure 41 is identical to the previously applicable federal rule. Both parties have relied on *Bertrand* in their respective briefs on appeal and have presented no argument or suggestion that we should interpret the language of the Virgin Islands Rule differently than the identical language of the Federal Rule we considered in *Bertrand*. Thus, we find our decision in *Bertrand* interpreting Federal Rule 41 to be equally applicable in the interpretation of the recently adopted Virgin Islands Rule 41.

Island Tile & Marble, LLC v. Bertrand, 57 V.I. 596, 610 (V.I. 2012) (quoting 27A Tracy B. Farrell et al., FED. PROC., L. Ed. § 62:498 (2012) (footnotes omitted)).

Although we clarified in *Bertrand* that a valid notice of dismissal under Rule 41(a)(1)(A)(i) automatically terminates any litigation on the merits of the action, nothing in either *Bertrand* or the text of the rule itself speaks directly to the effect such a dismissal may have on the Superior Court's jurisdiction to decide collateral issues such as a petition for fees and costs. But as Yearwood concedes, the Supreme Court of the Unites States, interpreting the identical Federal Rule of Civil Procedure 41, has explained: "It is well established that a federal court may consider collateral issues after an action is no longer pending. For example, district courts may award costs after an action is dismissed for want of jurisdiction." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990). Yearwood also concedes that a trial court "retains jurisdiction to decide 'collateral' issues—such as sanctions, costs, and attorney's fees—after a plaintiff dismisses an action by notice." *See In re Bath & Kitchen Fixtures Antitrust Litig.*, 535 F.3d at 166 n. 8; (Appellant's Br. at 11).

Yearwood argues, however, that the Superior Court's jurisdiction over collateral issues "is not universal, but is instead limited to instances where the collateral issues were already raised at the time of the plaintiff's voluntary dismissal." Unsurprisingly, Yearwood fails to identify a single decision from any jurisdiction drawing such a distinction between jurisdiction over collateral issues raised before dismissal and jurisdiction over collateral issues raised after dismissal. Instead, Yearwood urges us to infer the existence of this purported rule on the basis of the particular factual circumstances presented in *Cooter*, as well as some decisions from the United States Court of Appeals for the Second Circuit predating the Supreme Court's opinion in *Cooter*. Such an inference, however, fails to withstand scrutiny.

Although Yearwood is correct that, in *Cooter*, the Supreme Court found that the district court retained jurisdiction to rule on the defendant's motion for sanctions which had, in fact, been filed before the plaintiff's voluntary dismissal, nothing in the Court's opinion suggests that its holding was limited to cases in which collateral issues are raised before dismissal. To the contrary, the Court explained that "motions for costs or attorney's fees are 'independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree,'" and so "even 'years after the entry of a judgment on the merits' a federal court could consider an award of counsel fees." *Cooter*, 496 U.S. at 395 (quoting *Sprague v. Ticonic National Bank*, 307 U.S. 161, 170 (1939) and *White v. New Hampshire Dep't. of Employment Security*, 455 U.S. 445, 451, n. 13 (1982)).

Yearwood also argues that *Santiago v. Victim Services Agency of the Metropolitan Assistance Corp.*, 753 F.2d 219 (2d Cir. 1985), "illustrates the correct treatment of an action more closely on point with the instant case." Although the court in *Santiago* held that the district court lacked jurisdiction to award attorneys' fees after appellants had filed a notice of dismissal of the action, the Second Circuit has since recognized that *Santiago* and its progeny were explicitly overruled by the Supreme Court's decision in *Cooter*. *See Valley Disposal, Inc. v. Cent. Vermont Solid Waste Mgmt. Dist.*, 71 F.3d 1053, 1054-56 (2d Cir. 1995) (concluding "that *Santiago* is no longer good law" and that "*Santiago*'s rationale—that a district court's jurisdiction evaporates upon dismissal of the complaint—was completely undermined by the Supreme Court's statement in *Cooter* . . . that motions for attorney's fees raise collateral issues that 'may be made after the principal suit has been terminated.'"). Thus, following the Supreme Court's decision in *Cooter*, Yearwood's argument, just like the *Santiago* decision itself, "no longer has any leg to stand on." *Id.* at 1057.

Though we are mindful that decisions of federal courts interpreting a rule of federal procedure represent persuasive rather than binding authority in the context of this Court's interpretation of an identical Virgin Islands rule, we see no reason to depart from well-established federal jurisprudence on this issue. *See Antilles Sch. v. Lembach*, 64 V.I. 400 (V.I. 2016) ("[C]ourts do not state that borrowed rules incorporate the construction given them by the highest court of [the] jurisdiction from which they were borrowed. Instead, courts typically view such earlier constructions of borrowed rules as [being] persuasive, not mandatory."). The proposition that the Superior Court should only retain jurisdiction over motions for fees and costs if those motions are filed before the entry of a final order—whether in the form of voluntary dismissal or otherwise—finds no support in the decisions of Virgin Islands courts and contradicts the longstanding rules of practice in this jurisdiction. Indeed, the interpretation of V.I. R. CIV. P. 41 suggested by Yearwood would only serve to frustrate the framework governing the award of fees and costs under Chapter 45 of Title 5 of the Virgin Islands Code and V.I. R. CIV. P. 54, expressly granting a prevailing party "30 days after the entry of a final judgment or a judgment allowing costs" within which to file a motion for costs and fees.

For these reasons, we reject Yearwood's argument and conclude that the Superior Court is not divested of jurisdiction to consider a motion for attorneys' fees and costs simply because that motion is filed after, rather than before, a plaintiff files a notice of dismissal under V.I. R. CIV. P. 41(a)(1)(A)(i).

IV. OTHER ISSUES

Yearwood also argues that, even if the Superior Court retained jurisdiction to consider Antilles' petition for fees and costs, the court erred both in determining that Antilles was the prevailing party and in fixing the amount of attorney's fees awarded to Antilles. But in apparent

reliance on its purported "notice of no jurisdiction," Yearwood failed to raise these arguments before the Superior Court and therefore they are both waived on appeal. V.I. R. APP. P. 22(m).

Additionally, Yearwood contends that its "non-objection" to the dismissal of count three, "while perhaps inartfully styled, functioned as a voluntary dismissal of [count three] under Virgin Islands Rule of Civil Procedure 41(a)(1)(A)(i)." In support, Yearwood quotes our decision in *Bertrand,* 57 V.I. at 610, in which we noted that "[t]he label placed on the paper filed by the plaintiff is of no moment, so that if a plaintiff is entitled to dismissal as of right under FED. R. CIV. P. 41(a)(1)(A)(i), the fact that the plaintiff files a 'motion to dismiss' rather than a notice of dismissal, or cites FED. R. CIV. P. 41(a)(2) as authority for the dismissal, has no effect on the right to dismiss as a matter of right." (quoting 27A Tracy B. Farrell et al., Fed. Proc., L. Ed. § 62:498 (2012). But this case does case not present the type of situation contemplated by the treatise excerpted in *Bertrand* in which a plaintiff's filing clearly expresses the party's intent to voluntarily dismiss his or her claims, but is inadvertently designated as a motion rather than a notice, or mistakenly cites the wrong subsection of Rule 41. *Cf. Smith v. Potter,* 513 F.3d 781, 783 (7th Cir. 2008) ("[T]he plaintiff's lawyer had captioned the Rule 41(a)(1) notice of dismissal 'motion to voluntarily dismiss the plaintiff's complaint.' The motion explained, however, that the plaintiff 'no longer wishes to proceed with the complaint,' and in an affidavit attached to the motion she said 'I wish to dismiss the above stated [i.e., this] case.' In substance, then, this was a Rule 41(a)(1) motion, as courts in similar cases have held.").

Here, Yearwood did not file a separate motion, response, or other document addressing its purported voluntary dismissal of count three, but merely inserted its statement of "non-objection" into its response to Antilles' motion to dismiss opposing dismissal of the other counts. And even that response, in relevant part, stated only that "[a]t this point, [Yearwood] does not oppose

Dismissal of Count III. . . .” This type of “non-opposition” functioned more like a failure to take a position on the issue than the type of affirmative expression of intent to dismiss generally required to invoke a party’s right to voluntarily dismiss an action under Rule 41(a)(1)(A)(i). Thus, although “this Court has repeatedly held “that the substance of a motion, and not its caption, shall determine under which rule that motion is construed,” Yearwood’s “non-opposition” to Antilles’ Motion to Dismiss does not constitute a notice of voluntary dismissal in either form or substance. *See Bertrand*, 57 V.I. at 611. In any event, for the reasons discussed above, we conclude that the Superior Court retains jurisdiction to decide collateral issues such as attorney’s fees even after voluntary dismissal of an action. Thus, for the purposes of resolving the sole question presented in this appeal, it is immaterial whether Yearwood’s “non-objection” is construed as a voluntary dismissal under Rule 41.

Finally, while the issue was not raised by Antilles on appeal, we question whether Yearwood’s notice of dismissal itself was valid and effective. At the time Yearwood filed its purported notice, the Superior Court had already granted Antilles’ motion to dismiss for failure to state a claim and dismissed Yearwood’s first amended complaint in its entirety—one count with prejudice and the remaining counts without prejudice. And though the court granted Yearwood leave to file a second amended complaint to remedy the deficiencies in its first amended complaint, the court’s grant of leave to refile does not alter the fact that, when Yearwood filed its notice of dismissal, there was no complaint before the court for Yearwood to dismiss. *See, e.g., Wilson-Cook Med., Inc. v. Wilson*, 942 F.2d 247, 252–53 (4th Cir. 1991) (concluding that a notice of voluntary dismissal is only effective as to those claims that are still a part of the action, and is

ineffective as to claims previously dismissed by the court for failure to state a claim upon which relief can be granted).

V. CONCLUSION

Yearwood's argument on appeal is based upon a strained interpretation of the United States Supreme Court's decision in *Cooter* and supported mainly by reference to decisions of the Second Circuit that no longer constitute good law. Moreover, the interpretation of V.I. R. CIV. P. 41(a)(1)(A)(i) proposed by Yearwood finds no support in our jurisprudence and would only serve to frustrate and undermine the existing framework governing awards of attorney's fees and costs in the Virgin Islands. Therefore, we hold that the Superior Court retained jurisdiction to consider a motion for attorney's fees following the voluntary dismissal of an action regardless of whether that motion was filed before or after the notice of dismissal. Thus, we affirm the Superior Court's December 8, 2017 memorandum opinion and order awarding attorney's fees and costs to Antilles.

Dated this 3rd day of October, 2018.

BY THE COURT:

/s/ Maria M. Cabret
MARIA M. CABRET
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court