

¹ Order, Feb. 23, 2012.

On October 23, 2012, Plaintiff filed another Small Claims Complaint against Plaintiff in Case No. ST-12-SM-581, on the same claims set forth in his February 2, 2012, Complaint. Once again, pursuant to Defendant's November 7, 2012, Motion, the case was transferred from the Small Claims Division to the Civil Division on November 27, 2012 as Case No. ST-12-CV-710. Pursuant to a written request from Plaintiff to dismiss the Complaint, both Case No. ST-12-SM-581 and Case No. ST-12-CV-710 were dismissed without prejudice in a December 13, 2012, Order. In a December 28, 2012, Motion, Plaintiff seeks to amend *nunc pro tunc* the December 13, 2012, Order, to dismiss ST-12-SM-581 and ST-12-CV-710 from dismissal *without* prejudice to dismissal *with* prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(B).²

DISCUSSION

Fed. R. Civ. P. 41(a) states that a voluntary dismissal must be granted as follows:

- (1) *By the Plaintiff*
 - (A) *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.
 - (B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as adjudication on the merits.
- (2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. . . . Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

² Plaintiff did not respond to Defendant's December 28, 2012, Motion to Amend a Court Order by January 25, 2013, the deadline set by the Court in a January 16, 2013, Order.

In other words, Fed. R. Civ. P. 41(a)(1)(B), which embodies what is also known as the “double dismissal rule,” considers a second dismissal without a Court Order under either Fed. R. Civ. P. 41(a)(1)(A)(i) or Fed. R. Civ. P. 41(a)(1)(A)(ii) as an adjudication on the merits.³

Here, Plaintiff’s Motion to Dismiss without Prejudice in Case No. ST-12-CV-143 was pursuant to Fed. R. Civ. P. 41(a)(2), a voluntary dismissal by court order, because Defendant had already filed an answer and no stipulation of dismissal was signed by all the parties. Thus, even if Plaintiff’s second order for dismissal regarding ST-12-SM-581 and ST-12-CV-710 was pursuant to Fed. R. Civ. P. 41(a)(1), Defendant cannot yet invoke the double dismissal rule. Specifically, the purpose of the double dismissal rule, which abrogates a Plaintiff’s right to bring a claim, is to

to prevent abuse of the privilege of notice dismissal granted in Rule 41(a)(1). Multiple suits against the same defendant, withdrawn by the unilateral act of the plaintiff, without court intervention, could in some situations provide an opportunity for harassment.⁴

In other words, the double dismissal rule protects Defendant from potential harassment only when Plaintiff has avoided court oversight by invoking Fed. R. Civ. P. 41(a)(1) for a

³ Generally “[t]he Two Dismissal Rule applies to actions filed in state court on the first occasion. However, if the second action is filed and dismissed in state court, it will not trigger the Two Dismissal Rule unless the state has a similar rule.” STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, *FEDERAL CIVIL RULES HANDBOOK*, at 961 (2012) (internal citations omitted). However, because “practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith . . . the Federal Rules of Civil Procedure,” the double dismissal rule does apply to a second action filed and dismissed in the Superior Court of the Virgin Islands. Super. Ct. R. 7.

⁴ *Schapiro, on Behalf of Schapiro v. Schapiro*, CIV.A.95-CV-2408, 1995 WL 550636 (E.D. Pa. Sept. 13, 1995) (citing *Smith, Kline & French Laboratories v. A.H. Robins Co.*, 61 F.R.D. 24, 30 (E.D.Pa.1973)) (internal citations omitted). See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 394, 110 S. Ct. 2447, 2455, 110 L. Ed. 2d 359 (1990) (“Rule 41(a)(1) permits a plaintiff to dismiss an action without prejudice only when he files a notice of dismissal before the defendant files an answer or motion for summary judgment and only if the plaintiff has never previously dismissed an action ‘based on or including the same claim.’ Once the defendant has filed a summary judgment motion or answer, the plaintiff may dismiss the action only by stipulation, Rule 41(a)(1)(ii), or by order of the court, ‘upon such terms and conditions as the court deems proper’ If the plaintiff invokes Rule 41(a)(1) a second time for an ‘action based on or including the same claim,’ the action must be dismissed with prejudice.”) (internal citations omitted).

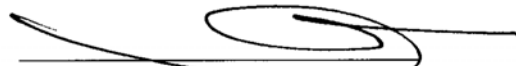
second time. Here, the Court retained its oversight in Plaintiff's first Motion to Dismiss, as demonstrated by the Court's September 20, 2012, Order granting Plaintiff's Motion.

However, Plaintiff's second handwritten "Notice" for Dismissal regarding Cases Nos. ST-12-SM-581 and ST-12-CV-710 was pursuant to Fed. R. Civ. P. 41(a)(1), a voluntary dismissal by the plaintiff, because it was filed before Defendant had filed either an answer or motion for summary judgment.⁵ Thus, if Plaintiff files another complaint based on the same claims as set forth in his October 23, 2012, Complaint and subsequently moves for voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1), the double dismissal rule will apply. Accordingly, Defendant's Motion to Amend a Court Order and Petition to Have Motion Deemed Admitted are denied. An Order consistent with this Opinion shall follow.

Dated: February 28 2013

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by Donna D. Donovan
Donna D. Donovan
Court Clerk Supervisor 3/1/13


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

⁵ Plaintiff's request for dismissal shall be construed as a "notice or stipulation" for the purposes of this Memorandum Opinion because Plaintiff's handwritten "notice" simply stated the following: "Order to the Superior Court of the Virgin Islands Division St. Thomas to Dismissal the Case Please No ST12SM0000518" and was signed by Plaintiff. Although the Court issued an Order granting Plaintiff's "Order" of dismissal on December 13, 2013, this Order was simply recognizing Defendant's Notice of Dismissal, since no court order is necessarily required when an action is dismissed pursuant to Fed. R. Civ. P. 41(a)(1). See *Qureshi v. U.S.*, 600 F.3d 523, 525 (5th Cir. 2010) ("Rule 41(a)(1) is the shortest and surest route to abort a complaint when it is applicable. So long as plaintiff has not been served with his adversary's answer or motion for summary judgment he need do no more than file a notice of dismissal with the Clerk.")