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SUMMARY
April 6, 2023

2023COA33

No. 22CA0138, *USIC Locating Servs v. Project Res Grp* — Civil Procedure — Failure to Join a Party Under C.R.C.P. 19 — Joinder of Persons Needed for Just Adjudication — Voluntary Dismissal by Plaintiff

A division of the court of appeals addresses issues concerning the intersection between C.R.C.P. 12(b)(6) and 19, which govern a court's dismissal of an action for failure to join an indispensable party, and C.R.C.P. 41(a)(1)(A), which governs a plaintiff's voluntary dismissal of an action before the filing or service of an answer or motion for summary judgment.

The division concludes that the plaintiff's voluntary dismissal of its complaint under Rule 41(a)(1)(A) voided the trial court's prior orders on necessary and indispensable party issues under Rules 12(b)(6) and 19 and divested the trial court of jurisdiction to enter a later order dismissing the action with prejudice. Therefore, the

division vacates the trial court's dismissal *with* prejudice and remands with instructions to dismiss the action *without* prejudice.

The division also concludes that it lacks jurisdiction to consider the defendant's challenge to an order awarding attorney fees because the trial court has not reduced the amount of fees to a sum certain and, thus, the order is not final. Therefore, the division dismisses that portion of the appeal for lack of jurisdiction.

Court of Appeals No. 22CA0138
Arapahoe County District Court No. 20CV32078
Honorable Peter F. Michaelson, Judge

USIC Locating Services LLC,

Plaintiff-Appellant,

v.

Project Resources Group Inc.,

Defendant-Appellee.

APPEAL DISMISSED IN PART, JUDGMENT VACATED,
AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE GOMEZ
Dunn and Brown, JJ., concur

Announced April 6, 2023

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¶ 1 This case presents novel issues concerning the intersection between C.R.C.P. 12(b)(6) and 19, which govern a court’s dismissal of an action for failure to join an indispensable party, and C.R.C.P. 41(a)(1)(A), which governs a plaintiff’s voluntary dismissal of an action before the filing or service of an answer or motion for summary judgment. Based on our resolution of these issues, we vacate the trial court’s judgment dismissing *with* prejudice the action filed by USIC Locating Services LLC (USIC) against Project Resources Group Inc. (PRG), and we remand with instructions to dismiss the action *without* prejudice.

¶ 2 However, we dismiss the portion of USIC’s appeal challenging the trial court’s attorney fee order for lack of a final judgment.

I. Background

¶ 3 USIC and PRG both provide support services to utility companies across the United States. USIC assists utilities with locating and marking underground utility lines and covers the repair costs for lines that are damaged in an excavation. PRG is a third-party administrator that assists utilities with processing and submitting invoices to USIC for payment. PRG also functions as a debt collector, pursuing payments owed by USIC.

¶ 4 USIC filed this action in state court, alleging that PRG was “systematically . . . inflating the charges included on the invoices in an effort to deceive USIC into paying higher amounts.” According to USIC, “PRG charged USIC millions of dollars for work that was not done” and that the utilities “never claimed to have been done,” retaining the overages for itself. Based on those allegations, USIC asserted claims for fraudulent misrepresentation, negligent misrepresentation, conversion, unjust enrichment, civil theft, and violation of the Colorado Consumer Protection Act.

¶ 5 PRG initially removed the action to federal court based on diversity jurisdiction. But USIC objected under the forum defendant rule, which precludes a defendant who is a citizen of the forum state from removing an action based on diversity jurisdiction, and the action was remanded to state court.

¶ 6 PRG didn’t file an answer to the complaint. Instead, on remand, it moved to dismiss the complaint under Rule 12(b)(5) and (6) for failure to state a claim and failure to join the utilities. The trial court granted the motion in part, finding that the utilities were both necessary and indispensable parties under Rule 19 and giving USIC leave to amend the complaint “in order . . . to join [them].”

¶ 7 USIC amended its complaint, dropping its unjust enrichment claim and amending its other claims. However, it didn't join the utilities. Instead, it alleged that joinder wasn't necessary; would be destructive of its customer relationships; and would be impractical or impossible "because of the geographical diversity of [its utility customers and services], and in light of the jurisdictional restrictions imposed by the Constitution of the State of Colorado and [its] agreements with the various [c]ustomers."

¶ 8 PRG moved to dismiss the amended complaint. The court granted the motion and dismissed the amended complaint without prejudice under Rule 12(b)(6). In so doing, the court reaffirmed its earlier finding that the utilities were necessary and indispensable parties. It also rejected USIC's argument that the utilities couldn't feasibly be joined, although it acknowledged that it "ha[d] been unable fully to evaluate the feasibility argument because USIC has not identified the utility companies."

¶ 9 USIC then moved for leave to amend its complaint again and for a determination under Rule 19 that the utilities couldn't feasibly be joined and weren't indispensable. It provided some evidence on the issues of feasibility and indispensability and requested

discovery on those issues. Meanwhile, PRG moved for attorney fees and costs under section 13-17-201, C.R.S. 2022.

¶ 10 The court entered simultaneous orders resolving both sides' requests. As to USIC's requests, the court explained that its previous order "did not invite, but neither did it foreclose, further amendment of the complaint" and ordered 120 days of discovery on "the questions necessary to determine whether joinder of some or all of the [c]ustomers is feasible," after which USIC could renew or withdraw its motion. The court also denied PRG's request for fees and costs as "premature," noting that "[t]his case has not yet been fully resolved nor a final judgment issued."

¶ 11 About three weeks later, USIC filed a notice of voluntary dismissal without prejudice under Rule 41(a)(1)(A) and initiated a new action in federal court, which is stayed pending resolution of this appeal. In response to USIC's notice, the trial court issued an order acknowledging the dismissal as "so ordered by [the] court."

¶ 12 PRG then filed a renewed motion for attorney fees and costs, which the court granted. The court determined that PRG was entitled to recover its attorney fees, concluding that the court had "effectively dismissed" the case under Rule 12(b)(5); USIC thereafter

“stubbornly continued to litigate the case without complying in any meaningful way with the Court’s orders” allowing amendment of the complaint to join indispensable parties and discovery to support a third amendment; USIC’s voluntary dismissal “was, at best, a conditional confession” of PRG’s previously granted Rule 12(b)(5) motion; and a fee award under section 13-17-201 was “mandatory because [USIC’s] tort action was dismissed under Rule 12(b).” The court also determined that PRG was entitled to recover its costs under section 13-16-105, C.R.S. 2022, and C.R.C.P. 54. Finally, without explanation, the court ordered that, “[p]ursuant to C.R.C.P. . . . 58, [USIC’s] conditional dismissal without prejudice is now made absolute and this [action is] dismissed with prejudice.” At the parties’ request, the court stayed a determination of the amount of PRG’s attorney fees pending this appeal.

¶ 13 In this appeal, USIC contends that the trial court erred by (1) dismissing the action with prejudice under Rule 41(a)(1)(A); (2) finding the utilities to be necessary and indispensable parties under Rule 19; and (3) ordering that PRG could recover its attorney fees under section 13-17-201. We agree with the first contention,

decline to resolve the second, and don't reach the third because it relates to a non-final order over which we lack jurisdiction.

II. Dismissal of the Action Under C.R.C.P. 41(a)(1)(A)

¶ 14 USIC first contends that the trial court erred by converting its Rule 41(a)(1)(A) voluntary dismissal of the action *without* prejudice into a dismissal *with* prejudice. We agree.

¶ 15 Interpretation of the Colorado Rules of Civil Procedure presents a legal question, which we review de novo. *Brown v. Walker Com., Inc.*, 2022 CO 57, ¶ 14.

¶ 16 Under Rule 41(a)(1)(A), “an action may be dismissed by the plaintiff without order of court upon payment of costs . . . [b]y filing a notice of dismissal at any time before filing or service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs.” Such a voluntary dismissal is “without prejudice” “[u]nless otherwise stated in the notice of dismissal.” C.R.C.P. 41(a)(1). However, “a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once previously dismissed in any court an action based on or including the same claim.” *Id.*

¶ 17 This rule affords a plaintiff the right to “dismiss a first suit at an early stage . . . without prejudice and with no terms or conditions attached thereto.” *Alexander v. Morrison-Knudsen Co.*, 166 Colo. 118, 131, 444 P.2d 397, 404 (1968) (quoting *Engelhardt v. Bell & Howell Co.*, 299 F.2d 480, 482 (8th Cir. 1962)). At the same time, it also protects defendants “by providing that if the plaintiff takes advantage of [the] right of early dismissal on one occasion, [they] may not repeat the process with impunity.” *Id.* (quoting *Engelhardt*, 299 F.2d at 482).

¶ 18 We recognize that some federal courts have held that plaintiffs can’t use the comparable federal rule — Fed. R. Civ. P. 41(a)(1)(A)(i) — to voluntarily dismiss an action a court has already fully resolved. *See, e.g., Gargoyle Granite & Marble, Inc. v. Opustone, LLC*, No. 21-CV-00127, 2021 WL 5999133, at *2 (D. Idaho Dec. 20, 2021) (“[T]he court is unaware of any authority allowing a plaintiff to voluntarily dismiss its claims without prejudice *after* the court has already dismissed those claims. In the court’s view, Rule 41(a)(1) necessarily presupposes the existence of live claims to be voluntarily dismissed.”); *Salem v. Airline Pilots Ass’n, Int’l*, No. 91 C 3001, 1993 WL 524750, at *2 (N.D. Ill. Dec. 14, 1993) (unpublished

opinion) (“It would be improper to dismiss this case without prejudice because the case already has been dismissed with prejudice.”); *see also Alpha Spacecom, Inc. v. Hu*, 179 P.3d 62, 64 (Colo. App. 2007) (federal authorities interpreting the comparable federal rule are persuasive when interpreting Rule 41(a)(1)(A)).

¶ 19 PRG asks us to hold the same under Colorado’s rule. But we needn’t decide whether to do so because, as the trial court recognized, at the time USIC filed its notice of voluntary dismissal, the action hadn’t been fully resolved.

¶ 20 To be sure, the trial court by then had granted PRG’s second motion to dismiss and had dismissed the first amended complaint without prejudice. But even at that time, the court acknowledged that it “ha[d] been unable fully to evaluate the feasibility” of joining the utilities to the action. *See C.R.C.P. 19*.

¶ 21 Afterward, USIC moved for leave to amend the complaint again, requested determinations on lack of feasibility and lack of indispensability, and asked for discovery on those issues. In response, the court ruled that its earlier dismissal order hadn’t foreclosed further amendment of the complaint, and it ordered discovery on the issue of feasibility, after which USIC could renew

its requests regarding amendment of the complaint, feasibility, and indispensability. At the same time, the court also ruled that PRG's initial motion for attorney fees and costs was "premature," as the "case ha[d] not yet been fully resolved nor a final judgment issued."

¶ 22 That was the posture of the case when USIC filed its notice of voluntary dismissal a few weeks later. The court's subsequent characterization of USIC as "stubbornly continu[ing] to litigate the case without complying in any meaningful way with the Court's orders" doesn't change the nature of the earlier orders allowing discovery and additional pleadings.

¶ 23 Moreover, the court's recognition that the action "ha[d] not yet been fully resolved" at that time is consistent with the application of Rule 19. Rule 19(a) provides that if a court determines that a person who is subject to service of process should be joined in the action, "the court shall order that [they] be made a party." Rule 19(b) further provides that if that person cannot feasibly be made a party to the action, then "the court shall determine whether in the interest of justice the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable."

¶ 24 Based on these provisions, indispensable party determinations proceed in two steps. First, the court considers under Rule 19(a) whether the absent party is a necessary party who should be joined if it's feasible to do so. If so, the court orders the joinder. If, however, joinder is infeasible — for instance because the absent party isn't subject to service of process in the jurisdiction or would have a valid objection to venue — the court proceeds to step two: a determination of indispensability under Rule 19(b). If the court determines that the action cannot proceed without the absent necessary party, then that party is deemed indispensable and dismissal is appropriate. *See* 5A Stephen A. Hess, *Colorado Practice Series, Handbook on Civil Litigation* § 4:1 (2022 ed.) (describing the two steps); *see also* 7 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1604, Westlaw (3d ed. database updated Apr. 2022) (describing the steps under the comparable federal rule).

¶ 25 As a result, dismissal of an action based on a failure to join a necessary party is appropriate only where the party can feasibly be joined but the plaintiff refuses to join them, or where the party cannot feasibly be joined and is deemed indispensable. *See B.C.,*

Ltd. v. Krinhop, 815 P.2d 1016, 1018-19 (Colo. App. 1991); *Cruz-Cesario v. Don Carlos Mexican Foods*, 122 P.3d 1078, 1081-82 (Colo. App. 2005); *Potts v. Gordon*, 34 Colo. App. 128, 135, 525 P.2d 500, 504 (1974).

¶ 26 Here, as of the time USIC filed its notice of voluntary dismissal, the trial court had deemed the utilities necessary parties but hadn't fully resolved whether they could feasibly be joined and, if not, whether they were indispensable. Although the court had previously dismissed the first amended complaint and made an initial determination of indispensability, it later recognized that its actions were premature, given that it hadn't yet fully evaluated the issue of feasibility and that USIC had indicated it might, with the assistance of discovery, be able to establish a lack of both feasibility and indispensability. It was therefore proper for the court to allow discovery and further pleadings on those issues. *See Bison Res. Corp. v. Antero Res. Corp.*, No. 16CV107, 2017 WL 1164500, at *2 (N.D. W. Va. Mar. 28, 2017) (unpublished opinion) (noting that the court had previously directed the parties to conduct limited discovery on the feasibility of joining an absent party). *See generally* C.R.C.P. 26(d) (a party may not seek discovery before

service of the Case Management Order “[e]xcept when authorized . . . by order”).

¶ 27 Because those proceedings were still ongoing, the action wasn’t fully resolved. It’s also undisputed that PRG hadn’t yet filed or served an answer or motion for summary judgment (and its motion to dismiss hadn’t been converted to a motion for summary judgment) and that USIC hadn’t previously dismissed an action based on the same claims. Thus, USIC’s voluntary dismissal without prejudice under Rule 41(a)(1)(A) was proper.

¶ 28 Nonetheless, PRG argues that USIC shouldn’t be permitted to dismiss its complaint without prejudice because it was merely forum shopping, given its earlier objection to removal and later filing of a new action in federal court, and because the parties had expended time and resources litigating procedural issues before the trial court. But the right to a voluntary dismissal without prejudice under Rule 41(a)(1) — unlike under the more limited provisions of Rule 41(a)(2) applicable later in a proceeding — is absolute. See C.R.C.P. 41(a)(1)-(2); *Powers v. Pro. Rodeo Cowboys Ass’n*, 832 P.2d 1099, 1102-03 (Colo. App. 1992) (noting the limits on dismissal under Rule 41(a)(2)). Thus, the reasons for the dismissal are

irrelevant. *See Marques v. Fed. Reserve Bank of Chi.*, 286 F.3d 1014, 1017 (7th Cir. 2002) (“[O]ne doesn’t need a good reason, or even a sane or any reason, to dismiss a suit voluntarily. The right is absolute, as Rule 41(a)(1) and the cases interpreting it make clear”); *Janssen v. Harris*, 321 F.3d 998, 1000 (10th Cir. 2003) (“[A] plaintiff has an absolute right to dismiss without prejudice” under Fed. R. Civ. P. 41(a)(1)(A)(i).). The sole limitations are that plaintiffs can exercise this right only once, and only before a defendant has filed or served an answer or summary judgment motion. *See* C.R.C.P. 41(a)(1). And, of course, dismissing plaintiffs must pay the defendants’ costs. *See id.*

¶ 29 Because USIC’s Rule 41(a)(1)(A) notice of dismissal was proper, it automatically ended the action without the need for any court order or approval. *See* C.R.C.P. 41(a)(1) (the procedures effectuate a dismissal “without order of court”); *Alpha Spacecom*, 179 P.3d at 64 (“[I]f an answer or motion for summary judgment has not been filed, a plaintiff need only file a notice of dismissal

with the court to close the file pertaining to the plaintiff's complaint, and the case will stand dismissed without further court order.”).¹

¶ 30 Therefore, USIC's notice of dismissal deprived the trial court of jurisdiction to enter further substantive orders, including converting the dismissal without prejudice into one with prejudice. *See Alpha Spacecom*, 179 P.3d at 64-65 (the plaintiffs' voluntary dismissal under Rule 41(a)(1) divested the court of jurisdiction to grant the defendants' motion to dismiss, notwithstanding that the court had already orally ruled that two of the claims would be dismissed with prejudice); *Burden v. Greeven*, 953 P.2d 205, 207 (Colo. App. 1998) (the plaintiffs' voluntary dismissal under Rule 41(a)(1) divested the court of jurisdiction to rule on the defendants' pending motion to dismiss); *see also Blaize-Sampeur v. McDowell*, No. 05CV4275, 2007 WL 1958909, at *3 n.3 (E.D.N.Y. June 29, 2007) (unpublished opinion) (the plaintiffs had an absolute right to dismiss their claims against two non-answering defendants without prejudice under Fed. R. Civ. P. 41(a)(1),

¹ Because the notice of dismissal is effectual without the need for any court order or approval, the trial court's order acknowledging the dismissal as "so ordered by [the] court" was unnecessary.

notwithstanding that the court had previously granted the defendants' motions to dismiss and had ruled that the action would be dismissed with prejudice absent amendment of the complaint).

¶ 31 The notice of dismissal also rendered the court's prior nonfinal rulings on the issue of joinder void. *See Alpha Spacecom*, 179 P.3d at 65 ("We are persuaded by the numerous federal court decisions holding that an adjudication on the merits of a plaintiff's claims made prior to a valid voluntary dismissal under Rule 41(a)(1) is void."); *Barone v. United Airlines, Inc.*, 355 F. App'x 169, 179 n.6 (10th Cir. 2009) ("[A]s a general rule, a voluntary dismissal without prejudice leaves the parties as though the action had never been brought[.]" (quoting *Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 926 F.2d 959, 961 (10th Cir. 1991))).²

¶ 32 Accordingly, the trial court erred by ordering that the action was dismissed *with prejudice*. We therefore vacate the judgment

² Because, following the notice of voluntary dismissal, the trial court lacked jurisdiction to further consider the joinder issues or to consider the alleged failure to state a claim under C.R.C.P. 12(b)(5), we decline to address USIC's arguments regarding the joinder rulings and PRG's argument that Rule 12(b)(5) provides an alternative basis for affirming the judgment.

and remand the case with instructions to dismiss the action *without prejudice* under Rule 41(a)(1)(A).

III. Attorney Fees Under Section 13-17-201

¶ 33 USIC also contends that the trial court erred by ordering that PRG is entitled to recover attorney fees under section 13-17-201.

We conclude that we lack jurisdiction to consider this contention.

¶ 34 With limited exceptions not applicable here, our jurisdiction is limited to review of final judgments or orders. *Nguyen v. Lai*, 2022 COA 141, ¶ 13. And an award of attorney fees — which is distinct and separately appealable from a judgment on the merits — is not final until the trial court has determined the amount of the fees. *Kennedy v. Gillam Dev. Corp.*, 80 P.3d 927, 929 (Colo. App. 2003); *see also Guy v. Whitsitt*, 2020 COA 93, ¶ 34 (an order that decided a party’s entitlement to attorney fees but didn’t determine the amount of those fees was not final and appealable); *Williams v. Dep’t of Pub. Safety*, 2015 COA 180, ¶ 114 (same).

¶ 35 The trial court’s order did not determine the amount of fees and, therefore, it is not a final, appealable order. Accordingly, we lack jurisdiction over this portion of the appeal and must dismiss it.

IV. Appellate Attorney Fees

¶ 36 Finally, we reject PRG's request for appellate attorney fees under section 13-17-201. A party who successfully defends a dismissal order is entitled to recover their reasonable attorney fees incurred on appeal. *Kreft v. Adolph Coors Co.*, 170 P.3d 854, 859 (Colo. App. 2007). However, based on our decision, PRG did not successfully defend the dismissal order. Therefore, it is not entitled to appellate attorney fees.

V. Disposition

¶ 37 The judgment is vacated, and the case is remanded to the trial court with instructions to dismiss the action without prejudice. The portion of the appeal challenging the trial court's attorney fee order is dismissed.

JUDGE DUNN and JUDGE BROWN concur.