

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-Civ-King

EMMA YAIZA DIAZ et al.,

Plaintiffs,

v.

KURT S. BROWNING, Secretary of State of
Florida, et al.,

Defendants.

**MOTION FOR PARTIAL
DISMISSAL PURSUANT TO
SETTLEMENT
AGREEMENT**

Plaintiffs, with the consent of Defendant Supervisors of Elections Brenda Snipes (Broward County), Jerry Holland (Duval County), Lester Sola (Miami-Dade County), Bill Cowles (Orange County), and Arthur Anderson (Palm Beach County) (the “Supervisors”), hereby move pursuant to Federal Rule of Civil Procedure 41(a)(2) for an Order dismissing Plaintiffs’ claims against the Supervisors pursuant to the parties’ settlement agreement.

Preliminary Statement

In its Orders dated May 4 and June 26, 2007, the Court required Plaintiffs and Defendants to engage in mediation before retired State court judge Gerald T. Wetherington. (D.E. Nos. 243, 249) In his response to the Court’s Order, on May 8, 2007, Defendant Kurt Browning declined to participate in the mediation. (D.E. 244) Plaintiffs and the Supervisors met with Judge Wetherington in his offices and by teleconference on September 20 and 26 respectively and successfully reached an agreement settling the dispute between the parties, attached hereto as Exhibit 1.

The Settlement requires the approval of the Court and will not take effect until the Court enters an Order substantially in the form attached hereto as Exhibit 2. Importantly, the Order requires the parties to remain subject to the continuing jurisdiction of the Court with regard to any matter relating to the Settlement or the ultimate relief that may eventually be ordered in the matter. More specifically, the Supervisors, as the election officials responsible for implementation and enforcement of election law, will remain subject to the Court's continuing jurisdiction with regard to any declaratory or injunctive relief that may be ordered in this action.

In its May 4 Order, the Court noted that "mediation might result in a successful resolution of the case or at least a narrowing of the issues to be tried." (D.E. No. 243 at 2) That has been the case: as to the Supervisors, the case has been resolved successfully. As to Defendant Browning, the issues for trial have been considerably narrowed. With the Supervisors, as enforcers of the election law, subject to the Court's authority with regard to relief, the action may properly focus on the Plaintiffs, who have been injured as a result of that law, and Defendant Browning, who by his own admission is responsible for defending that law. (D.E. No. 244 at 1)

Defendant Browning will not be prejudiced by the dismissal of the Supervisors from this action. He will not lose any claim, defense or legal interest as a result of this dismissal. He has not been precluded from conducting discovery. In short, Defendant Browning's legal and factual position will be unchanged. Voluntary dismissals with prejudice are routinely granted under Rule 41(a)(2). Because the dismissal of the Supervisors narrows the issues in this action and does not prejudice Defendant Browning, this case should not be an exception.

Argument

**Defendant Browning will suffer no injury
as result of the Supervisors' dismissal *with* prejudice.**

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides that a party may voluntarily dismiss its claims, other than by stipulation by all parties, only if ordered by the Court and “upon such terms and conditions as the court deems proper.” Whether to grant a voluntary dismissal rests within the sound discretion of the court. *See Fisher v. Puerto Rico Marine Management, Inc.*, 940 F.2d 1502, 1503 (11th Cir. 1991). While dismissals *without* prejudice are not granted pursuant to Rule 41(a)(2) as a matter of right, *Id. at 1502*, several circuits have held that courts have no discretion to deny dismissals *with* prejudice, as the defendant receives all the relief that could have been granted after trial and is further protected by the doctrine of res judicata. *See, e.g., ITV Direct, Inc. v. Healthy Solutions, LLC*, 445 F.3d 66, 70 (1st Cir. 2006); *Smoot v. Fox*, 340 F.2d 301, 303 (6th Cir. 1964); *SEC v. Lorin*, 869 F. Supp. 1117, 1119 (S.D.N.Y. 1994); *Jon Evans Sons, Inc. v. Majik-Ironers, Inc.*, 95 F.R.D. 186, 190 (E.D. Pa. 1982).

While the Eleventh Circuit has not addressed whether a voluntary dismissal *with* prejudice under Rule 41(a)(2) should be granted as a matter of right, a recent case in the Middle District of Florida discusses the issue in some detail. In *Villa Glas G.m.b.H. v. Everstone Pty. LTD.*, the plaintiff moved for a voluntary dismissal, but the defendants objected. No. 6:06-cv-420-Orl-31DAB, 2007 WL 2126296 (M.D. Fla. July 23, 2007). The court noted that it could find “only a few cases” across the entire country where a plaintiff’s motion for dismiss with prejudice was denied. *Id. at *1*. In those rare instances, the dismissal was found to adversely affect the remaining or third parties. *Id.* Assessing the facts of the case before it, the court stated that defendants must

generally suffer some “plain prejudice,” and noted that defendants had asserted no counter-claims that would be defeated by a dismissal. *Id.* Continuing, the court found no showing or support for defendants’ claims that they would face “uncertainty” as a result of the dismissal or that they would be barred from asserting certain defenses. *Id.* at 2. Lacking clear support for defendants’ claims of prejudice, the Court granted plaintiffs’ motion for a voluntary dismissal. *Id.*

Like the defendants in *Villa Glas*, Defendant Browning will suffer no injury as a result of this dismissal. No counter-claims are pending. No defenses will be barred. Lastly, discovery in this action has concluded, and Defendant Browning has had every opportunity to gather evidence from his co-defendants.

Because the Supervisors will remain subject to the jurisdiction of the Court, the dismissal is entirely consistent with the Court’s previous ruling.

In its May 4, 2007 Order Denying Motion for Judgment on the Pleadings, the Court found that the Supervisors were proper parties to the action because they were responsible for the enforcement of Florida election law and, should the Plaintiffs ultimately prevail, the Court would enjoin Supervisors from enforcing laws found to violate the Plaintiffs’ rights to register and vote. (D.E. No. 242 at 4) For this reason, it is essential that the Supervisors, while no longer parties to the case, remain subject to the Court’s authority with regard to the implementation and enforcement of any relief that may eventually be ordered.

Plaintiffs and Supervisors have recognized this issue and accounted for it in their Settlement and proposed Order. The Settlement provides that “[t]he Court shall retain jurisdiction over all parties with regard to any ultimate relief that may be ordered

by the Court, the Settlement Agreement or the Order.” (Exhibit 1 at 3) Similarly, the Order provides:

The Court has jurisdiction, and shall retain continuing jurisdiction, over all parties to the Settlement with regard to any matter relating to the ultimate relief that may be ordered by the Court, this Order, and the Settlement, the terms of which are approved and incorporated herein. In particular, without affecting the finality of this Order in any way, this Court retains continuing jurisdiction over the implementation of the Settlement and all parties hereby for the purpose of construing, enforcing and administering the Settlement, and, if applicable, for the purpose of enforcing and administering any declaratory or injunctive relief relating to the claims in this action. Any application or proceeding by any party thereto shall be brought, in the first instance, to this Court for decision.

(Exhibit 2 at 2) With this language, the Supervisors will remain subject to the Court’s authority, consistent with the Court’s previous rulings as to the role of the Supervisors in the action.

The parties’ Settlement and proposed Order stand on firm legal footing.

In *Kokkonen v. Guardian Life Ins. Co. of America*, the Supreme Court stated:

If the parties *wish* to provide for the court's enforcement of a dismissal-producing settlement agreement, they can seek to do so. When the dismissal is pursuant to Federal Rule of Civil Procedure 41(a)(2)...the parties' compliance with the terms of the settlement contract (or the court's “retention of jurisdiction” over the settlement contract) may, in the court's discretion, be one of the terms set forth in the order.

511 U.S. 375, 380 (1994). Following *Kokkonen*, the 11th Circuit has elaborated:

[E]ven absent the entry of a formal consent decree, if the district court either incorporates the terms of a settlement into its final order of dismissal *or* expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties' agreement... A formal consent decree is unnecessary in these circumstances because the explicit retention of jurisdiction or the court's order specifically approving the terms of the settlement are, for these purposes, the functional equivalent of the entry of a consent decree.

American Disability Ass'n v. Chmielarz, 289 F.3d 1315, (11th Cir. 2002).

Conclusion

For the foregoing reasons, Plaintiffs and the Supervisors respectfully request an Order, substantially in the form attached hereto as Exhibit 2, dismissing Plaintiffs' claims against the Supervisors pursuant to the parties' settlement agreement.

Dated: New York, New York
October 3, 2007

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1.A(3), I certify that undersigned counsel made reasonable efforts to confer with counsel for Defendant Browning in a good faith effort to resolve the issues raised in this motion, but was unable to do so.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via U.S. mail this 3rd day of October, 2007, to counsel for the parties listed in Appendix A, attached hereto.

By: /s/ Robert Harris

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** Pro hac vice motion to be filed.