APPELLATE

APPEALABILITY OF DISMISSALS "WITHOUT PREJUDICE"*

by Phillip J. DeRosier

A fundamental rule of appellate jurisdiction is the need for a "final" decision. In Michigan, a final judgment or order is typically "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). So what about dismissals "without prejudice," i.e., dismissals that permit the action potentially to be refiled later? Are those orders immediately appealable as a matter of right? It depends.

On the one hand, the Michigan Court of Appeals has strongly rebuked the notion that stipulated orders dismissing claims "without prejudice" may be appealed, even if they also dismiss other claims involuntarily. Since an order dismissing less than all of the claims of all of the parties is not a "final order" for the purpose of bringing an appeal as of right, it is tempting to consider stipulating to the dismissal of the remaining claims or counterclaims "without prejudice" or with some other language preserving the ability to reinstate those claims in the event of an appellate reversal. But the Court of Appeals rejected that approach in *City of Detroit v Michigan*, 262 Mich App 542; 686 NW2d 514 (2004). The Court explained that dismissing claims without prejudice creates the possibility of "piecemeal" appeals, which the court rules are designed to prevent:

> The parties' stipulation to dismiss the remaining claims without prejudice is not a final order that may be appealed as of right; it does not resolve the merits of the remaining claims and, as such, those claims are "not barred from being resurrected on that docket at some future date." *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 136; 624 NW2d 197 (2000). The parties' stipulation to dismiss the remaining claims was clearly designed to circumvent trial procedures and court rules and obtain appellate review of one of the trial court's initial determinations without precluding further substantive proceedings on the remaining claims. This method of appealing trial court decisions piecemeal is exactly what our Supreme Court attempted to eliminate through the "final judgment" rule.

Id. at 545.

On the other hand, the Court has distinguished situations involving dismissals "without prejudice" that are involuntary. In *MLive Media Group v City of Grand Rapids*, 321 Mich App 263; 909 NW2d 282 (2017), the city of Grand Rapids filed a declaratory action in federal court seeking a determination of its rights and obligations with respect to recordings made of calls to a non-public police department telephone line. While that case was pending, the Grand Rapids Press, which had requests copies of the recordings under Michigan's Freedom of Information Act, filed a complaint in the Kent County Circuit seeking to compel disclosure of the recordings. The trial court dismissed the claim without prejudice, deferring to the federal action under the doctrine of comity. On appeal, the city argued that the Court of Appeals lacked jurisdiction over the appeal, citing *Detroit* and arguing that the dismissal without prejudice rendered the trial court's order non-final. The Court of Appeals disagreed, reasoning that *Detroit* was distinguishable because it involved claims dismissed by stipulation:

> [T]he trial court entered an order denying MLive's motion for summary disposition and dismissing MLive's only claim without prejudice after reviewing both parties' opposing arguments. Therefore, the order is final, MCR 7.202(6)(a)(i), and Detroit is distinguishable on the facts.

Id. at 268.

The Court of Appeals has reached a similar result in cases involving dismissals without prejudice in favor of arbitration, so long as the trial court does not retain jurisdiction. See *Rooyaker & Sitz, PLLC v Plante & Moran, PLLC,* 276 Mich App 146, ; 742 NW2d 409 (2007) ("[B]ecause there was nothing left for the trial court to decide and it did not state that it was retaining jurisdiction [when it dismissed the case in favor of arbitration], we conclude that the trial court's order was a final order appealable as of right.").

The same goes for cases dismissed under the doctrine of primary jurisdiction (i.e., where a case must initially be decided by an administrative agency). See *Attorney General v Blue Cross Blue Shield of Michigan*, 291 Mich App 64, 75-76; 810 NW2d 603 (2010) ("[T]here was nothing left for the trial court to decide regarding count II after its decision to refer the claim to the OFIR Commissioner, and the trial court did not state in the October 6, 2008, order dismissing that count without prejudice that it was retaining jurisdiction of that count. . . . Therefore, here as in Rooyakker, there was nothing left for the trial court to decide, and all claims were finally 'disposed' of within the meaning of MCR 7.202(6)(a)(i).").

As cases like *MLive, Rooyaker*, and *Attorney Genera*l demonstrate (and likely others), dismissing a case "without prejudice" does not necessarily prevent an order from being appealed as a matter of right. So long as the dismissal order was not stipulated to, and the trial court did not retain jurisdiction, there is an argument that the order is final and may be appealed.

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