

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY
DATE: JANUARY 23, 2019
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

1. [18-13412](#)-A-7 **IN RE: KIRANDEEP CHIMA**
[18-1063](#)

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
9-26-2018 [\[6\]](#)

CHIMA V. CHIMA
MATTHEW QUALL/ATTY. FOR PL.

Final Ruling

The default entered, the status conference is continued to March 27, 2019, at 10:00 a.m. Forthwith and without delay, plaintiff shall move to prove up that default. Not later than 14 days prior to the continued status conference, the plaintiff shall file a status report if judgment has not been entered or the adversary proceeding dismissed.

2. [18-11240](#)-A-7 **IN RE: DIANA XAVIER**
[18-1081](#)

STATUS CONFERENCE RE: COMPLAINT
11-19-2018 [\[1\]](#)

MANFREDO V. LAMPE & FROMSON ET
AL
SHARLENE ROBERTS-CAUDLE/ATTY. FOR PL.

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

3. [18-11240](#)-A-7 **IN RE: DIANA XAVIER**
[18-1083](#)

STATUS CONFERENCE RE: COMPLAINT
11-19-2018 [\[1\]](#)

MANFREDO V. RIVER-X ET AL
SHARLENE ROBERTS-CAUDLE/ATTY. FOR PL.
RESPONSIVE PLEADING

Final Ruling

The status conference is continued to February 13, 2019, at 10:00 a.m.

4. [17-12272](#)-A-7 **IN RE: LEONARD/SONYA HUTCHINSON**
[17-1076](#)

CONTINUED STATUS CONFERENCE RE: CROSSCLAIM BY JAMES EDWARD
SALVEN AGAINST THE UNITED STATES OF AMERICA, DEPARTMENT OF
TREASURY, INTERNAL REVENUE SERVICE
9-7-2017 [[7](#)]

HUTCHINSON ET AL V. SALVEN ET
AL
RUSSELL REYNOLDS/ATTY. FOR PL.
RESPONSIVE PLEADING

Final Ruling

The status conference is continued to February 27, 2019, at 10:00
a.m.

5. [17-12389](#)-A-7 **IN RE: DON ROSE OIL CO., INC.**
[17-1086](#)

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
9-5-2018 [[131](#)]

KODIAK MINING & MINERALS II
LLC ET AL V. DON ROSE OIL CO.,
VONN CHRISTENSON/ATTY. FOR PL.
RESPONSIVE PLEADING

No Ruling

6. [17-12389](#)-A-7 **IN RE: DON ROSE OIL CO., INC.**
[17-1086](#) [CLF-3](#)

MOTION FOR SUMMARY JUDGMENT
12-10-2018 [[200](#)]

KODIAK MINING & MINERALS II
LLC ET AL V. DON ROSE OIL CO.,
VONN CHRISTENSON/ATTY. FOR MV.

Final Ruling

The motion denied, the matter is dropped from calendar.

7. [17-12389](#)-A-7 **IN RE: DON ROSE OIL CO., INC.**
[17-1086](#) [LAK-4](#)

MOTION TO AMEND AND/OR MOTION TO AMEND
12-12-2018 [\[206\]](#)

KODIAK MINING & MINERALS II
LLC ET AL V. DON ROSE OIL CO.,
JAMIE DREHER/ATTY. FOR MV.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Amend Order Dismissing Second Amended Complaint

Notice: Written opposition filed

Disposition: Denied

Order: Civil minute order

The movants, defendants Sallyport Commercial Finance, LLC ("Sallyport") and Idemitsu Apollo Corporation ("Indemitsu Apollo"), move jointly to amend this court's order dismissing the Second Amended Complaint from without prejudice to with prejudice. Orders, November 2, 2018, ECF # 189, 190. Citing Rule 41(b), and to a lesser extent Rule 60(b), the movants argue that plaintiff Kodiak Mining & Minerals II, LLC's ("Kodiak Mining") failure to file a Third Amended Complaint within the time specified by the order entitles them to a dismissal with prejudice of those counts. Kodiak Mining opposes the motion.

HISTORY

The facts underlying this adversary proceeding are complex. See Civil minutes, July 18, 2018, ECF # 102. The bone of contention between the parties is whether the plaintiffs own the 200 acres of barite mineral rights or have certain rights to the proceeds of their sale. The dispute has two parts. The first part of the dispute arises from transactions between the debtor in the underlying chapter 7 case, Don Rose Oil, No. 17-12389, its founder Don Rose, and third parties that plaintiff Kodiak Mining contends are void. The second part of the dispute arises from a pre-petition settlement of the first part of the dispute and whether that settlement can now be avoided. If the settlement binds all parties and is not avoided, it will control, and this court will not reach the merits of the first part of the dispute.

The Second Amended Complaint pleads five counts. The second, third and fourth count seek redress for the events giving rise to the first part of the dispute. The first and fifth counts seek declaratory relief regarding the second part of the dispute, viz. the pre-petition settlement.

Defendants Sallyport and Indemitsu Apollo filed Rule 12(b)(6) motions attacking the Second Amended Complaint. As to Sallyport, the motion to dismiss was granted as to the first, second, third and fourth counts and denied as to the fifth count. Order, November 2, 2018, ECF # 189. As to Indemitsu Apollo, the motion to dismiss was granted in its entirety. Order, November 2, 2018, ECF # 190. As to each defendant, plaintiff Kodiak Mining was granted leave to file a Third Amended Complaint. Orders, November 2, 2018, ECF # 189, 190. But it was not required to do so. *Id.*

Later, Kodiak Mining signaled its intention not to file a Third Amended Complaint, and instead to stand on its fifth count of the Second Amended Complaint. Joint Status Report ¶ 23, December 10, 2018, ECF # 198.

This motion followed. Defendants Sallyport and Indemitsu Apollo contend that plaintiff Kodiak Mining's failure to file timely a Third Amended Complaint entitles them to amend the court's original orders granting the motions to dismiss from without prejudice to with prejudice.

LAW

Rule 12(b)(6)

Rule 12(b)(6) governs motions to dismiss where the complaint fails to state a cause of action upon which relief may be granted:

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion . . . (6) failure to state a claim upon which relief can be granted

Fed. R. Civ. P. 12(b)(6), incorporated by Fed. R. Bankr. P. 7012.

Rule 41(b)

Rule 41(b) governs involuntary dismissals, all involuntary dismissals. It is comprised of two sentences, aggregating 72 words. The first sentence has narrow application, which authorizes courts to dismiss actions for failure of prosecution or violations of rules/court orders. The second sentence is broader, and defines when an involuntary dismissal, including those under Rule 12(b)(6), *Cannon v. Loyola Univ. of Chicago*, 784 F.2d 777, 780 (7th Cir. 1986), bars further litigation on a particular claim. It states:

If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, **a dismissal under this**

subdivision (b) and any dismissal not under this rule--
except one for lack of jurisdiction, improper venue, or
failure to join a party under Rule 19--**operates as an**
adjudication on the merits.

Fed. R. Civ. P. 41(b), *incorporated by* Fed. R. Bankr. P. 7041
(emphasis added).

Rule 12(b) (6) and Rule 41(b) Compared and Contrasted

Dismissals under Rule 41(b) for failure of prosecution or violation of rules/court orders and under 12(b) (6) are each on the merits. Compare *Loyola Univ. of Chicago*, 784 F.3d at 780; *Myzer v. Bush*, No. 18-3067, 2018 WL 4368189 at *4 (10th Cir. September 13, 2018) (Rule 12(b) (6)), with Rule 41(b) (applicable to violation of court orders). But the rules are otherwise different. Rule 41(b) dismissals are sanctions and reviewable only for abuse of discretion. *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1064-65 (9th Cir. 2004). Rule 12(b) (6) dismissals are not sanctions and are reviewed de novo. *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995); *Marin Park*, 356 F.3d at 1064.

DISCUSSION

In this instance, Rule 41(b) does not provide a basis for the relief the movants seek. Case law construing Rule 41(b) as applied to the failure to file an amended complaint after the court has granted a Rule 12(b) (6) motion with leave to amend applies if the court **required** the plaintiff to file an amended complaint, but not if the court **authorized** filing of an amended complaint. *Applied Underwriters, Inc. v. Lichtenegger*, No. 17-16815, 2019 WL 190129 *4-5 (9th Cir. January 15, 2019); *Marin Park, Inc.*, 356 F.3d at 1064-65; *Yourish v. California Amplifier*, 191 F.3d 983 (9th Cir. 1999). As the court in *Marin Park* noted,

Where, however, the plaintiff makes an affirmative choice not to amend, and clearly communicates that choice to the court, there has been no disobedience to a court's order to amend; as *Yourish* itself noted, the plaintiff has the right to stand on the pleading. (citations omitted). **Hence we understand the *Ferdik-Yourish* rule to require a threatened Rule 12(b) (6) dismissal to ferment into a Rule 41(b) dismissal only upon a plaintiff's inaction.** When the plaintiff timely responds with a formal notice of his intent not to amend, the threatened dismissal merely ripens into a final, appealable judgment. (citations omitted). And that is just what should have happened here.

Marin Park, 356 F.3d at 1065 (emphasis added).

Here, the orders granting the motions to dismiss granted Kodiak Mining leave to amend but did not require it to do so. Orders, November 2, 2018, ECF # 189, 190. In fact, the order granting defendant Sallyport's motion to dismiss was bifurcated, and specifically contemplated that Kodiak Mining might elect to stand solely on the fifth count of the Second Amended Complaint. Order, November 2, 2018, ECF # 189. Moreover, Kodiak Mining has appropriately signaled its intention not to file a Third Amended Complaint.

In contrast, Rule 12(b)(6) already provides Sallyport and Idemitsu Apollo the relief they seek as a matter of law. A Rule 12(b)(6) dismissal is an adjudication on the merits. *Loyola Univ. of Chicago*, 784 F.2d at 780. As a consequence, once the period within which plaintiff Kodiak Mining had leave to file an amended complaint expired, the dismissal ripened into a dismissal with prejudice. Such claims are deemed waived for the purposes of appellate review. *Lacey v. Maricopa Cty.*, 693 F.3d 896, 928 (9th Cir. 2012); see also *Vien-Phuong Thi Ho v. ReconTrust Co., NA*, 858 F.3d 568, 577 (9th Cir.), cert. denied sub nom. *Ho v. ReconTrust Co.*, 138 S. Ct. 504, 199 L. Ed. 2d 385 (2017) (recounting that "[w]e have held that claims dismissed without prejudice and not repleaded are not preserved for appeal; they are instead considered 'voluntarily dismissed'" (citing *Lacey* at 928)).

It is important to note that the *Lacey* rule of waiver on "voluntarily dismissed" claims applies only to appeals. It does not apply to what happens at the trial court level. "However, *Lacey* is inapplicable when addressing res judicata; it only applies in deciding whether an issue is waived on appeal." *Clinton v. Marshall*, No. CV084178DOCDFMX, 2018 WL 1449387, at *8 (C.D. Cal. Mar. 5, 2018). "However, *Lacey* plainly limited the scope of waiver to appeals." *Id.* "The Court notes, however, that *Lacey* addressed the waiver of rights to appeal, not waiver of the right to reassert a claim in a later amended complaint." *Digby Adler Grp., LLC v. Mercedes-Benz U.S.A., LLC*, No. 14-CV-02349-TEH, 2015 WL 5138080, at *7 n.3 (N.D. Cal. Sept. 1, 2015). "This distinction between appellate review and district court review reflects the general principle, as expressed by the U.S. Supreme Court in *United States v. Dieter*, 429 U.S. 6, 8 (1976), that 'plenary consideration of an issue by an appellate court ordinarily requires more time than is required for disposition by a trial court of a petition for rehearing.' There is thus 'wisdom [in] giving district courts the opportunity promptly to correct their own alleged errors.'" *Philips v. Ford Motor Co.*, No. 14-CV-02989-LHK, 2016 WL 1745948, at *11 (N.D. Cal. May 3, 2016).

In other words, *Lacey* does not preclude, for example, a challenge to the dismissal order under Rule 60(b) or a request for further leave to amend under Rule 15(a)(2).

As a consequence, the joint motion will be denied.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Sallyport Commercial Finance, LLC and Idemistu Apollo Corporation's joint motion has been presented to the court. Having considered the motion together with papers filed in support and opposition, and having heard the arguments of counsel, if any,

IT IS ORDERED that the joint motion is denied.

8. [17-12389](#)-A-7 **IN RE: DON ROSE OIL CO., INC.**
[17-1086](#) [SSN-4](#)

MOTION TO DISMISS HAPPY ROCK MERCHANT SOLUTIONS, LLC
1-9-2019 [\[230\]](#)

KODIAK MINING & MINERALS II
LLC ET AL V. DON ROSE OIL CO.,
STEVEN NEWBURGH/ATTY. FOR MV.

Final Ruling

The motion denied, the matter is dropped from calendar.