No. 24-2420

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARIA GUADALUPE ELLIS,
on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

NIKE USA, INC. AND
NIKE RETAIL SERVICES, INC.,

Defendants-Appellees,

On Appeal from the
United States District Court for the Eastern District of Missouri
The Hon. Matthew T. Schelp
Case No. 4:23-cv-00632-MTS

BRIEF OF PLAINTIFF-APPELLANT

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant Maria Guadalupe Ellis ("Appellant" or "Plaintiff") brought this action against Defendants-Appellees Nike USA, Inc. and Nike Retail Services, Inc. ("Appellees" or "Defendants" or "Nike") alleging that Appellees falsely market and label the products in their self-proclaimed "Sustainability" clothing line.

On March 28, 2024, the District Court granted Appellee's motion to dismiss for failure to state a claim and dismissed Appellant's Amended Complaint with prejudice and without leave to amend. On April 16, 2024, Appellant filed a motion for reconsideration and leave to amend arguing that the District Court's dismissal of the Amended Complaint with prejudice or without leave to amend was a manifest error of law. Appellant's motion for reconsideration sought leave to amend her complaint or, in the alternative, entry of a judgment of dismissal without prejudice. On June 10, 2024, the District Court denied Appellant's motion for reconsideration finding that, because Appellant failed to properly request leave to amend, the Court's refusal to grant such leave does not amount to manifest error. The District Court's June 10, 2024 Order ignored Appellant's argument that the District Court abused its discretion in dismissing Plaintiff's Amended Complaint with prejudice.

Appellant respectfully requests the Court allow fifteen (15) minutes per side for oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Local Rule 26.1A, Plaintiff-Appellant Maria Guadalupe Ellis states that she is a Mexican citizen, permanent resident of the United States and resides in Missouri.

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JURISDICTIONAL STATEMENT

This appeal arises from proceedings before the Honorable Matthew T. Schelp in the United States District Court for the Eastern District of Missouri. The District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(d)(2)(A) because this case is a class action where the aggregate claims of all members of the proposed Classes are in excess of $5,000,000, exclusive of interests and costs, and Plaintiffs, as well as most members of the proposed Classes, which total more than 100 class members, are citizens of states different from the state of Defendants.

This appeal is taken from a judgment entered on April 16, 2024 dismissing the Amended Complaint with prejudice and without leave to amend, and a June 10, 2024 Order entered by the District Court denying Plaintiff-Appellant's motion for reconsideration seeking leave to amend her complaint or, in the alternative, entry of a judgment of dismissal without prejudice.

Plaintiff-Appellant timely filed a notice of appeal on July 9, 2024. This Court has jurisdiction of appeal pursuant to 28 U.S.C. § 1291 because the orders in question are "final decisions" within the meaning of the statute.

STATEMENT OF ISSUES PRESENTED

Whether the District Court abused its discretion in dismissing Plaintiff's Amended Complaint with prejudice.

Clayton v. White Hall School Dist., 778 F.2d 457 (8th Cir. 1985)

Pardee v. Stock, 712 F.2d 1290 (8th Cir. 1983)

Fletcher v. Southern Farm Bureau Life Insurance Co., 757 F.2d 953 (8th Cir. 1985) (*per curiam*)

Givens v. A.H. Robins Co., 751 F.2d 261 (8th Cir. 1984)

STATEMENT OF THE CASE

The underlying case at issue involves Defendants' attempts to exploit consumers preference for "green" products by representing to consumers that the products in their self-proclaimed "Sustainability" clothing line at issue (the "Sustainability' Collection Products" or the "Products") are made with recycled and sustainable materials that are not harmful to the environment. (App. 119, ¶¶ 4-6; R. Doc. 23, at ¶¶ 4-6). Plaintiff alleges among other things that the labeling and marketing of certain of these Products is false and misleading because the label and marketing carries false representations and statements that the Products are "made with recycled and organic fibers" and "sustainable" materials which "reduces waste and our carbon footprint" and support a "move to zero and zero waste." App. 119, 121-122, 127-133; R. Doc. 23, at ¶¶ 6, 14-16, 31-38. Plaintiff claims that the Products are not made with any "recycled and organic fibers" or "sustainable" materials because the Products are made with virgin synthetic and non-organic materials that are harmful to the environment. App. 119, 121-122, 133-136; R. Doc. 23, at ¶¶ 6, 14-16, 39-52.

On March 28, 2024, the District Court entered its Order granting Defendants' Motion to Dismiss Plaintiff's Amended Complaint finding that "[t]he lynchpin of every claim in Plaintiff's action is that Nike's products aren't what they say they are…[b]ut the Amended Complaint wholly fails to allege facts making that

plausible." App. 296; R. Doc. 34, at 4. The Court also ruled that Plaintiff "has not plausibly pleaded that she 'acted as a reasonable consumer would in light of all circumstances.'" App. 298; R. Doc. 34, at 6. In dismissing this action, the Court concluded:

> In sum, Plaintiff has failed to plausibly allege more than conclusory facts that the Defendant's statements were misleading, false, or fraudulent as required to establish liability. For this reason, all her claims necessarily fail. In addition, Plaintiff's MMPA claims fail because she has not plausibly alleged she acted as a reasonable consumer would in light of all the circumstances. As such, the Court will grant Defendants' Motion to Dismiss.

App. 301; R. Doc. 34, at 9.

Importantly, the Court's March 28, 2024 Order dismissing the Amended Complaint recognized that a claim could be stated. Indeed, the District Court specifically stated that it "'do[e]s not reject [Plaintiff's] bald allegation[]' on the ground that it is 'unrealistic or nonsensical.'" App. 298; R Doc. 34 at 6 (citing *Achcroft v. Iqbal*, 556 U.S. 662, 681 (2009)). The District Court noted that "'[i]t is the conclusory nature of [Plaintiff's] allegation[], rather than [its] extravagantly fanciful nature, that disentitles [it] to the presumption of truth.'" App. 298; R. Doc. 34, at 6.

On April 16, 2024, Plaintiff filed a Motion for Reconsideration and Leave to Amend with a Memorandum in Support arguing that the District Court's dismissal of Plaintiff's Amended Complaint with prejudice and without leave to amend was,

respectfully, a clear error of law. App. 303-305, 642-654; R. Docs. 36, 37. Plaintiff asked the District Court to reconsider and vacate its March 28, 2024 Order. App. 303-305, 642-654; R. Docs. 36, 37. Specifically, Plaintiff asked the District Court to enter an order granting Plaintiff's motion for reconsideration and leave to file a Second Amended Complaint before the Court dismisses the claims with prejudice for failure to plausibly allege a claim. App. 652, 686; R. Docs. 37, at 11, R. Docs. 39, at 14. In the alternative, because the District Court, respectively, abused its discretion in dismissing the Amended Complaint with prejudice, Plaintiff asked the District Court to, at a minimum, reconsider its dismissal of Plaintiff's Amended Complaint with prejudice and enter a judgment of dismissal without prejudice. App. 303-305, 642-654, 686; R. Docs. 36, 37, 39, at 14.

On June 10, 2024, the District Court denied Plaintiff's Motion for Reconsideration seeking leave to amend or, in the alternative, entry of a judgment of dismissal without prejudice finding that, because Appellant failed to properly request leave to amend, the Court's refusal to grant such leave does not amount to manifest error. App. 690; R. Doc. 40, at 2. The District Court reasoned that, because the Motion to Dismiss served as notice that the Amended Complaint may have been deficient, Plaintiff's failure to request leave to amend until after a final judgment had been issued amounts to unexcused delay. App. 690-691; R. Doc. 40, at 2-3. The District Court's June 10, 2024 Order ignored Plaintiff's argument that the District

Court abused its discretion in dismissing Plaintiff's Amended Complaint with prejudice. *See* App. 689-692; R. Doc. 40.

SUMMARY OF THE ARGUMENT

The District Court erred under any standard of review in dismissing Plaintiff-Appellant's Amended Complaint with prejudice. Absent a pattern of failed attempts to state a cognizable claim, a pattern of intentional delay, or contumacious conduct—none of which exist in this record—a district court's dismissal of a complaint with prejudice constitutes clear error and is, respectively, an abuse of discretion under Eighth Circuit law.

For these reasons, Plaintiff-Appellant requests that this Court vacate the judgment of dismissal of Plaintiff-Appellant's Amended Complaint with prejudice and remand for entry of a judgment of dismissal without prejudice.

ARGUMENT

I. Standard of Review

This Court generally reviews a district court's decision to dismiss an action with or without prejudice for abuse of discretion. *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 653 (8th Cir.1998); *Jaramillo v. Burkhart*, 59 F.3d 78, 79-80 (8th Cir. 1995); *Larson v. Stow*, 36 F.3d 1100 (Table), at *1 (8th Cir. Sept. 20, 1994). But where such decision is based on futility, this Court reviews the decision de novo. *See United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 822 (8th Cir. 2009).

II. The District Court's Dismissal of Plaintiff's Amended Complaint with Prejudice is an Abuse of Discretion and Clear Error Under Eighth Circuit Law

The District Court erred and abused its discretion by ordering dismissal of Appellant's Amended Complaint with prejudice (as opposed to without prejudice). App. 293-301, 689-692; R. Docs. 34, 40. The District Court's decision to dismiss the Amended Complaint with prejudice is clear error under Eighth Circuit law.

The District Court's decision to dismiss with prejudice was erroneous under any standard of review. Under Eighth Circuit precedent, dismissal with prejudice is a "drastic" and "extremely harsh" result. *Clayton v. White Hall School Dist.*, 778 F.2d 457, 460 (8th Cir. 1985) (finding that "the court abused its discretion in dismissing with prejudice") (emphasis in original). Indeed, this Court in *Clayton*

confirmed that the District Court's dismissal of Appellant's Amended Complaint with prejudice was clear error. The Eighth Circuit concluded that:

> Although we have affirmed the district court's dismissal of the complaint, we find the court abused its discretion in dismissing *with prejudice*. Dismissal with prejudice is a drastic and extremely harsh sanction. *Cunningham v. Yellowstone School District No. 14*, 774 F.2d 1170 (8th Cir.1985) (*per curiam*); *Pardee v. Stock*, 712 F.2d 1290, 1292 (8th Cir.1983). It is warranted only by a pattern of intentional delay by the plaintiff, *Fletcher v. Southern Farm Bureau Life Insurance Co.*, 757 F.2d 953, 956 (8th Cir.1985) (*per curiam*), or in "'cases of willful disobedience of a court order or continued or persistent failure to prosecute a complaint'." *Fletcher*, 757 F.2d 261, 263 (quoting *Givens v. A.H. Robins Co.*, 751 F.2d 261, 263 (8th Cir. 1984)). To deny forever the appellant's day in court is unjustified where, as here, there is no evidence of a pattern of delay or contumacious conduct.

Clayton, 778 F.2d at 457 (emphasis in original).[1] This Court "vacate[d] the judgment of dismissal with prejudice and remanded for entry of a judgment of dismissal without prejudice." *Id.*[2]

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[1] *See also Sterling v. United States*, 985 F.2d 411, 412 (8th Cir.1993) (*per curiam*) ("Dismissals with prejudice are drastic and extremely harsh sanction[s]" and "[c]ases should be dismissed with prejudice only where the plaintiff has intentionally delayed the action…or where the plaintiff has consistently and willfully failed to prosecute his claim.") (alteration in original) (internal quotation marks and citation omitted); *DiMercurio v. Malcom*, 716 F.3d 1138, 1140 (8th Cir.2013) (The Eighth Circuit has found such dismissals proper "only when there has been a clear record of delay or contumacious conduct by the plaintiff [.]") (internal quotation marks and citations omitted); *Norman v Arkansas Dept. of Educ.*, 79 F.3d 748, 751 (8th Cir. 1996) (citations omitted) (same); *Navarro v. Chief of Police, Des Moines, Iowa*, 523 F.2d 214, 216-17 (8th Cir. 1975) (*per curiam*) (same).

[2] The District Court relied on *Clayton* in concluding that "[b]y failing to properly request leave to amend, the Court's refusal to grant such leave does not amount to manifest error of law." App. 690; R. Doc. 40, at 2. But the District Court completely

Thus, under *Clayton* and Eighth Circuit precedent, Appellant respectively submits that the District Court "abused its discretion in dismissing [Plaintiff's Amended Complaint] *with prejudice*." *Id.* (emphasis in original). In the record before the Court, there is no pattern of intentional delay or contumacious conduct by the Appellant. *Id.* (citing *Fletcher*, 757 F.2d at 956). Nor is there evidence of a pattern of failed attempts to state a cognizable claim. Notably, before the Court's March 28, 2024 decision, Appellant had amended her Complaint once and did so as a matter of course in response to Appellees' first motion to dismiss. *See* App. 118-164; R. Doc. 23. Significantly, the amendment did not involve the addition of any new counts or substantive factual allegations. Had the District Court afforded Appellant the opportunity to replead, it would have been Appellant's first opportunity to remedy any perceived defects in the complaint identified by the District Court. Prior to the March 28, 2024 decision, Appellant received no indication from the District Court that any such defects existed. Upon learning of the District Court's determination that the Amended Complaint failed to satisfy the plausibility standards under Federal Rule of Civil Procedure 8 as set forth in the

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ignored this Court's holding in *Clayton* that the district court in that case "abused its discretion in dismissing [the complaint] *with prejudice*," *Clayton*, 778 F.2d at 457 (emphasis in original), which, again, confirms that the District Court's dismissal of Appellant's Amended Complaint with prejudice was clear error.

March 28 Order, the District Court had already issued its order dismissing the action with prejudice and closed the case.[3]

As such, this is not a case where Appellant has repeatedly failed to cure deficiencies previously allowed by the Court. *Foman v. Davis*, 371 U.S. 178, 182

[3] Any attempt by Appellees to argue that the District Court's finding in denying Plaintiff-Appellant post-dismissal leave to amend because the Motion to Dismiss served as notice that the Amended Complaint may have been deficient and Plaintiff-Appellant's failure to request leave to amend until after a final judgment had been issued amounts to "unexcused delay" that warrants dismissal with prejudice should be rejected. *See* App. 690-691; R. Doc. 40, at 2-3 (citing *Par v. Wolfe Clinic, P.C.*, 70 F.4th 441, 450 (8th Cir. 2023); *U.S. v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 744 (8th Cir. 2014)). Indeed, the District Court's finding of unexcused delay in seeking leave to amend is irrelevant to this Court's rulings in *Clayton*, et al. and whether the District Court abused its discretion in dismissing the Amended Complaint with prejudice. Both cases the District Court relied on, *Par* and *Mask of Ka-Nefer-Nefer*, ***dealt with the denial of post-dismissal motions for leave to amend because the motions to dismiss served as notice of the potential deficiencies in the respective complaints, but the plaintiffs inexcusably delayed filing motions for leave to amend until after the district courts dismissed their complaints***. *Par*, 70 F.4th at 449-50 (explaining that the district court did not abuse its discretion by denying plaintiff's motion to amend the complaint because "[the plaintiff] was on notice about the deficiencies in his complaint when the [defendant] filed its motion to dismiss"); *Mask of Ka-Nefer-Nefer*, 752 F.3d at 743-44 ("Numerous cases have ruled that ***'[u]nexcused delay is sufficient to justify the court's denial if the party is seeking to amend the pleadings after the district court has dismissed the claims it seeks to amend, particularly when the plaintiff was put on notice of the need to change the pleadings before the complaint was dismissed***, but failed to do so.'") (citations omitted) (emphasis added). As such, there can be no argument that the District Court's dismissal with prejudice was warranted by the type of delay that would permit such a harsh sanction under Eighth Circuit law. Again, prior to the March 28, 2024 dismissal, Appellant received no indication from the District Court that any such defects existed. As such, there was no pattern of intentional delay or contumacious conduct by the Appellant in the record before the Court that would warrant dismissal with prejudice. *Clayton*, 778 F.2d at 457.

(1962). Nor is this a "'case[] of willful disobedience of a court order or continued or persistent failure to prosecute a complaint'." *Fletcher*, 757 F.2d 261, 263 (quoting *Givens*, 751 F.2d at 263). As such, to deny Appellant's "day in court is unjustified where, as here, there is no evidence of a pattern of delay or contumacious conduct." *Clayton*, 778 F.2d at 460. The District Court's abrupt decision to order dismissal with prejudice and to deny Appellant's motion for reconsideration seeking entry of a judgment of dismissal without prejudice was erroneous and constituted an abuse of discretion under Eighth Circuit law.

To the extent that Appellees argue that the District Court's decision to dismiss *with prejudice* was proper because Appellant's claims are futile, the District Court made no such finding of futility. In fact, the Court's March 28, 2024 Order dismissing the Amended Complaint recognized that a claim could be stated. Indeed, the District Court specifically stated that it "'do[e]s not reject [Plaintiff's] bald allegation[]' on the ground that it is 'unrealistic or nonsensical.'" App. 298; R. Doc. 34, at 6 (citing *Achcroft v. Iqbal*, 556 U.S. 662, 681 (2009)). The District Court noted that "'[i]t is the conclusory nature of [Plaintiff's] allegation[], rather than [its] extravagantly fanciful nature, that disentitles [it] to the presumption of truth.'" App. 298; R. Doc. 34, at 6. And the Court's June 10, 2024 Order denying Appellant's Motion for Reconsideration and Leave to Amend was not based on any finding of futility. *See* App. 689-692; R. Doc. 40.

Because the District Court recognized that a claim could be stated and dismissal was not based on any finding of futility, Appellant could correct any alleged or identified defect in the pleading or otherwise state a claim for relief. In addition, Appellant could replead her claims against Appellees by asserting more detailed specificity to her allegations.

Again, the District Court's decision to order dismissal with prejudice and deny Plaintiff's motion for reconsideration and enter a judgment of dismissal without prejudice constitutes clear error and was an abuse of discretion under Eighth Circuit law.

CONCLUSION

The District Court erred under any standard of review in dismissing Plaintiff-Appellant's Amended Complaint with prejudice. Because there was no pattern of failed attempts to state a cognizable claim, pattern of intentional delay, or contumacious conduct in the record, the District Court's dismissal of a complaint with prejudice and denial of Plaintiff-Appellant's motion for reconsideration seeking entry of a judgment of dismissal without prejudice constitutes clear error and is an abuse of discretion under Eighth Circuit law. For the forgoing reasons, Plaintiff-Appellant requests that this Court vacate the judgment of dismissal of Plaintiff-Appellant's Amended Complaint with prejudice and remand for entry of a judgment of dismissal without prejudice.

Dated: August 19, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of FRAP5(c)(1) because, excluding the parts of the document exempted by FRAP 32(f), this document contains 2,862 words.

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Times New Roman font.

3. This brief has been scanned for viruses and is virus-free.

/s/ Daniel J. Orlowsky
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will by accomplished by the CM/ECF system.

/s/ Daniel J. Orlowsky
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