No. 10-56068

United States Court Of Appeals For The Ninth Circuit

CRYSTAL MONIQUE LIGHTFOOT, et al.,

Plaintiffs and Appellants,

vs.

CENDANT MORTGAGE CORPORATION, et al.,

Defendants and Appellees.

Appeal from United States District Court,
Central District of California, Case No. 2:02-cv-06568
Hon. Consuelo B. Marshall, U.S. District Judge

Reply on Motion to Affirm; Opposition to Remand Motion

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I.

INTRODUCTION

Five years ago, the panel concluded that the federal courts had jurisdiction of this case, citing *Ultramar*. *Lightfoot v. Cendant Mortg. Corp.*, 465 Fed.Appx. 668, 669 (9th Cir. 2012), opn. withdrawn (Apr. 13, 2012).

Nothing has changed since then except for the Supreme Court's reversal of this Court's later decision to sustain federal jurisdiction on a different, additional ground; namely, Fannie Mae's charter. *Lightfoot v. Cendant Mortg. Corp.*, 769 F.3d 681, 690 (9th Cir. 2014), *rev'd*, __ U.S. __, 137 S.Ct. 553 (2017).

Seeking to prevent the Court from readopting the reasoning of its withdrawn panel decision, plaintiffs' opposition to the motion to affirm first argues that the Supreme Court's reversal binds this Court's hands on remand. Then, plaintiffs present several arguments trying to show that the panel's initial decision was mistaken.

Plaintiffs are wrong on both counts. The Supreme Court did not address or prevent this Court from re-addressing any ground of federal jurisdiction other than Fannie Mae's charter. The panel was not mistaken in its initial resolution of this appeal.

II.

THE SUPREME COURT LEFT ALTERNATIVE GROUNDS OF FEDERAL JURISDICTION OPEN ON REMAND

Plaintiffs first argue that because the Supreme Court's decision "reversed" this Court's judgment on one jurisdictional ground—Fannie Mae's charter—this Court cannot consider whether the federal courts may exercise jurisdiction over the case on any other ground. Opp., 10-11.

Plaintiffs err. The Supreme Court's reversal leaves no doubt on the one issue that the Supreme Court decided. *See Lightfoot*, 137 S. Ct. at 556. This Court's opinion was "absolutely wrong" in finding federal jurisdiction based on Fannie Mae's charter. *See* Opp., 10 (*citing* S. Ct. Style G. § 10.5 (2016)). That issue was before the Supreme Court, was disposed of by its decree, and is binding on this Court on remand. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895).

However, the Supreme Court decided no other issue. The high court's general reversal of this Court's judgment returns the parties to precisely the same situation they occupied before this Court's decision. *Kaplan v. Joseph*, 125 F.2d 602, 606 (7th Cir. 1942); *Keller v. Hall*, 111 F.2d 129, 131 (9th Cir. 1940); *Leader v. Apex Hosiery Co.*, 108 F.2d 71, 81 (3d Cir. 1939), aff'd, 310 U.S. 469 (1940). The parties are free to raise, and the Court is free to rule on, any issue other than the one the Supreme Court decided. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939); *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000).

Contrary to plaintiffs' argument, *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1041 (9th Cir. 2010) does not support their argument that the Supreme Court tied this Court's hands on remand. *See* Opp., 10. Instead, *Newdow* stands for the unremarkable, and here, irrelevant, proposition that when the Supreme Court reverses for lack of federal jurisdiction, no merits determination in the case by a federal court, trial or appellate, has any continuing force or effect.[1]

Defendants are not asking this Court to give effect to any prior merits determination in this case. Instead, they seek a re-determination of a jurisdictional issue: the same one this Court decided in its withdrawn panel opinion. Based on that re-determination that the federal courts have jurisdiction on a basis other than under Fannie Mae's charter, defendants also seek to have this Court re-decide the merits—or, more precisely, lack of merit—of plaintiffs' current appeal for the third time.[2]

In short, contrary to plaintiffs' argument, the Supreme Court's reversal does not prevent this Court from finding federal jurisdiction on a basis other than Fannie Mae's

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[1] To quote *Newdow*, 597 F.3d at 1041: "[W]hen the Supreme Court reverses a lower court's decision on a threshold question, such as prudential standing, it effectively holds the lower court erred by reaching the merits of the case. [Citation.] This is precisely what the Supreme Court did in *Elk Grove*. Because the Supreme Court held the *Newdow III* court erred by deciding the Establishment Clause question, *Newdow III's* holding on that question is not precedential. To hold otherwise would give precedential effect to the determination of an issue that should never have been decided."

[2] As pointed out in the opening memo., pp. 3-9, plaintiffs' claims have been ruled meritless many more times in the numerous other cases and appeals these plaintiffs have filed in a variety of different courts.

charter. Had the Supreme Court meant to tie this Court's hands on remand, it would not have entered a general reversal, but would have reversed with directions to remand the case to state court.

III.

THE WITHDRAWN PANEL OPINION WAS NOT WRONG

Plaintiffs' other arguments against affirmance are all attacks on the panel's withdrawn opinion. All are based on facts or authorities of which the panel was assuredly aware when it rendered that decision. None succeed in showing that the panel erred in entering its initial opinion.

A. The Removal Notice's Stated Ground Is No Longer Determinative

Plaintiffs first argue that the panel decision is wrong because Fannie Mae's notice of removal relied only on Fannie Mae's charter as a basis for federal jurisdiction and did not cite *Ultramar* as an alternative ground on which the federal courts could exercise jurisdiction over the case. Opp. 11-12.

The argument is factually correct, but legally wrong. The notice of removal did cite only one basis for federal jurisdiction: Fannie Mae's charter. Opp., Ex. B, ¶ 6. And it is also true that Fannie Mae cannot now, 15 years after it filed its notice of removal, amend that pleading to allege a new basis of federal jurisdiction. *See* Opp., 11 (*citing O'Halloran v. Univ. of Washington*, 856 F.2d 1375, 1381 (9th Cir. 1988)).

However, the passage of time has done more than just end the chance to amend the notice of removal. As the opening memo., pp. 5-7, recites, during the decade and a half after removal of this case: The district court granted the motion to dismiss the case on res judicata grounds. Chilton Decl., Ex. D, #59, Ex. F. This Court dismissed plaintiffs' appeal. 9th Cir. No. 03-33389; Chilton Decl., Ex. D, #68. The Supreme Court denied review. *Hollis-Arrington v. Cendant Mortg. Corp*., 540 U.S. 940 (2003).

The district court denied plaintiffs' first Rule 60(b) motion to set aside judgment. Chilton Decl., Ex. D, #70. This Court affirmed. 9th Cir. No. 03-56580; Chilton Decl., Ex. D, #89. The Supreme Court denied review. *Hollis-Arrington v. Cendant Mortg. Corp*., 543 U.S. 918 (2004).

This appeal arises from the denial of plaintiffs' second Rule 60(b) motion to set aside the judgment. On this appeal, this Court has twice determined that the district court did not abuse its discretion in denying that motion. *Lightfoot,* 465 Fed.Appx. at 669, 769 F.3d at 690.

When the Court views the issue of federal jurisdiction after 15 years of litigation in the federal court system, the notice of removal's allegations are no longer of controlling importance—because, as already pointed out, to remand the case now, "would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 77 (1996).

Again, the only case that plaintiffs cite does not support their contrary argument. *See* Opp. 12 (*citing Gavin v. AT & T Corp.*, 464 F.3d 634, 640-41 (7th Cir. 2006)). In *Gavin*, the Seventh Circuit *chose* not to save from remand on a ground of federal jurisdiction not raised in the notice of removal, but it neither said nor implied that it could or would not have chosen otherwise had circumstances been different.[3]

The Seventh Circuit's later decision in *Hukic v. Aurora Loan Servs.*, 588 F.3d 420, 427-30 (7th Cir. 2009) illustrates that very point, upholding federal jurisdiction on federal question grounds even though diversity was the only ground of federal jurisdiction alleged in the notice of removal.[4]

If the Court is inclined to follow Seventh Circuit precedent on this issue, it should follow *Hukic*, not *Gavin*, since the facts of this case more nearly resemble *Hukic* and the result in that case is in keeping with the Supreme Court's admonition to

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[3] Among other things, *Gavin* chose not to recognize diversity jurisdiction because the removing defendant said it had consciously decided not to invoke that ground for removal, being "certain there was jurisdiction under SLUSA" but doubtful that the plaintiff's complaint satisfied the requirement that the amount in controversy exceed $75,000." *Gavin*, 464 F.3d at 640-41. Also, removal under SLUSA resulted in automatic dismissal without a review of the suit's merits. *Id.* at 636. Had jurisdiction been retained on diversity grounds, the case would have begun anew in federal court anyway, so no greater judicial inefficiency was created by remanding the case to state court.

[4] Unlike *Gavin*, *Hukic* was an appeal after the district court had disposed of some of plaintiff's claims on a motion to dismiss and others on a summary judgment motion. So remand would have created judicial inefficiency. Also, while the notice of removal did not raise federal question as a jurisdictional basis for removal, it did show that the plaintiff's state-court complaint alleged a claim under federal law.

avoid needless remands of cases in which the federal court system has already invested considerable resources and reached a judgment on the merits.

B. The Artful Pleading Doctrine Is Alive And Well

Ultramar was based on the artful pleading doctrine. "An artfully pleaded claim is one that in reality arises under federal law and thus must be recharacterized as such despite the fact that it purports to rely solely on state law." *Ultramar Am. Ltd. v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir. 1990).

An exception to the well-pleaded complaint rule, the artful pleading doctrine prevents a plaintiff from "avoid[ing] federal jurisdiction simply by omitting from the complaint federal law essential to his claim, or by casting in state law terms a claim that can be made only under federal law." *Harper v. San Diego Transit Corp.*, 764 F.2d 663, 666 (9th Cir. 1985).

Ultramar involved what it conceded was a "unique" and "extraordinary" application of the artful pleading doctrine to permit removal of a state law suit stating state law claims that in effect would be the same federal claim previously adjudicated against the plaintiff in federal court. *Ultramar Am. Ltd.*, 900 F.2d at 1415-17.

Plaintiffs argue that the Supreme Court overruled *Ultramar* in *Rivet v. Regions Bank*, 522 U.S. 470, 476-77 (1998). *See* Opp., 13-14. *Rivet* did eliminate the "unique" and "extraordinary" application of the artful pleading doctrine to state court suits filed to circumvent a prior federal judgment. As the Supreme Court explained,

"The prior federal judgment does not transform the plaintiff's state-law claims into federal claims but rather extinguishes them altogether. … Under the well-pleaded complaint rule, preclusion thus remains a defensive plea involving no recasting of the plaintiff's complaint, and is therefore not a proper basis for removal." *Id.* On the other hand, *Rivet* did not purport to eliminate the artful pleading doctrine or its normal application to complaints that seek to avoid federal jurisdiction by concealing federal law essential to the plaintiff's claim.

The panel was surely well aware of *Rivet* when it entered its now-withdrawn initial opinion in this case. In citing *Ultramar* as a basis for federal jurisdiction of this case, the panel properly relied on the general artful pleading doctrine that survived *Rivet* rather than the "unique" and "extraordinary" application which did not.

The removed complaint in this case, like the second amended complaint in Hollis-Arrington's second federal suit, is laced with, and dependent on, allegations about the invalidity of a foreclosure sale held on September 18, 2000 and later rescinded on February 5, 2001. *See* Chilton Decl., Ex. C, ¶¶ 33, 34, 39-43, 48, 62-66, 80-88; Ex. E ¶¶ 18-20, 25, 38, 63, 68, 80. Both complaints claim that the sale and its rescission were invalid because they violated the automatic stay in bankruptcy triggered by Lightfoot's September 11, 2000 Chapter 13 petition. *Id.*

The Bankruptcy Code provides federal remedies for violation of the automatic stay. *See* 11 U.S.C. §§ 105(a), 362(k). As this Court has held, "a mere browse

through the complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code ... demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike." *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1996). "[T]he unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws is another indication that Congress wished to leave the regulation of parties before the bankruptcy court in the hands of the federal courts alone." *Id.*, at 915.

Thus, this Court held that the Bankruptcy Code completely preempts any state law malicious prosecution claim based on the filing of pleadings in bankruptcy court. *Id*. at 912, 916. Indeed, this Court has held that the preemptive force and exclusivity of the Bankruptcy Code is so strong that it prevents bankrupts from bypassing the Code's remedial scheme by invoking other federal statutes, such as the Fair Debt Collection Practices Act, to redress violations of the Bankruptcy Code's debtor protections. *See Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510-11 (9th Cir. 2002).

Plaintiffs' state court complaint attempted just such an end-run around the exclusively federal jurisdiction of the bankruptcy courts, artfully pleading state law claims that the Bankruptcy Code completely preempts. Thus, the withdrawn panel decision correctly invoked the artful pleading doctrine to find federal jurisdiction of

this case. That general doctrine survives *Rivet's* overruling of *Ultramar's* "unique" and "extraordinary" application of that doctrine. The general doctrine, rather than its overruled unique application, supports federal jurisdiction of this case.

C. Waiver Is No Reason To Jettison 15 Years Of Federal Courts' Work

Plaintiffs' penultimate argument is that the Court should not consider jurisdiction under *Ultramar* because Fannie Mae did not press that issue in response to the Court's request for supplemental briefing on the issue of whether the district court had subject matter jurisdiction based on Fannie Mae's charter. *See* Opp. 15 & Exs. G, I.

To support the argument, plaintiffs rely on two cases that cite the general rule that appellate courts do not consider for the first time on appeal arguments that were not presented in the district court. Opp. 15. That rule does not fit this case because plaintiffs urge waiver by silence in this Court, not by failure to raise the issue in the district court.

Moreover, even if plaintiffs' general rule applied here, this Court would have discretion to disregard it. *Carrillo v. Cty. of Los Angeles*, 798 F.3d 1210, 1223 (9th Cir. 2015). That discretion is appropriately exercised to entertain the *Ultramar* argument now to avoid a needless remand and loss of 15 years of effort by the federal judiciary in this case.

As the issue of subject matter jurisdiction in the district court is never waived, new jurisdictional arguments are properly considered on appeal. See *Price v. U.S.*

Gen. Servs. Admin., 894 F.2d 323, 324 n. 2 (9th Cir. 1990); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 n. 2 (9th Cir. 1988). Here, the new argument is also properly considered under the recognized exceptions to the general rule for cases in which a new issue has become relevant while the appeal was pending because of a change in the law or in which the new argument presents an issue purely of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court. *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1293 (9th Cir. 2015). The Supreme Court's decision in this case has changed the law, suddenly making the *Ultramar* issue relevant for the first time. Also, *Ultramar* involves only an issue of law, and plaintiffs do not and could not claim they are prejudiced by Fannie Mae's failure to rely on it earlier.

D. Public Policy Requires A Careful Search For A Way To Preserve A Decade And A Half Of Federal Courts' Efforts

Plaintiffs' final argument is that though it strongly favors preserving federal jurisdiction in a case in which the federal judiciary has already invested so much effort and reached (many times over) a decision on the merits, public policy has its limits. If, at the end of the day, the federal courts lack subject matter jurisdiction, the judgment cannot stand, and the case must be remanded. Opp. 15-16 (*quoting Caterpillar Inc.*, 519 U.S. at 76-77).

That much is certainly true. Even an "overwhelming" public policy, such as the one recognized in *Caterpillar* and advanced by defendants here, goes only so far. It cannot overrule a statute or create subject matter jurisdiction where there is none.

However, before conceding loss of jurisdiction in a case like this one, the "overwhelming" public policy, recognized in *Caterpillar*, requires this Court to bend every effort to find a viable basis for preserving the federal court's subject matter jurisdiction in a case in which they have invested so much time and expense.

That is all that defendants ask of this Court now, and all that it need do in order to find an alternative basis for federal jurisdiction in this case, and thus to its affirmance of the appealed order for the third time.

IV.

CONCLUSION

For the reasons stated above, the Court should determine that there is federal subject matter jurisdiction of this case and affirm the appealed judgment and order denying plaintiffs' second Rule 60(b) motion.

DATED: March __, 2017

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9th Circuit Case Number(s) 10-56068

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