

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMP CAPITAL INVESTORS LIMITED, et
al.,

Objectors-Appellants,

CHARLES N. DORNFEST,

Plaintiff-Appellant,

-against-

PUBLIC PENSION FUNDS, et al.,

Plaintiffs-Appellees,

BANK OF AMERICA CORP., et al.,

Defendants-Appellees.

Docket Nos. 13-1573-cv and
13-1677-cv

Appeal from the United States
District Court for the Southern
District of New York

09 Md. 2058 (PKC)
10 Civ. 275 (PKC)

**REPLY IN SUPPORT OF MOTION TO DISMISS THE APPEAL OF PLAINTIFF-
APPELLANT CHARLES N. DORNFEST FOR LACK OF APPELLATE JURISDICTION
OR, IN THE ALTERNATIVE, TO DE-CONSOLIDATE THIS APPEAL FROM OTHERS**

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The Bank Defendants¹ respectfully submit this reply in further support of their motion to dismiss the appeal filed by Plaintiff-Appellant Charles N. Dornfest for lack of appellate jurisdiction.²

PRELIMINARY STATEMENT

Mr. Dornfest maintains that there is appellate jurisdiction here because the action he filed – on behalf of himself and a purported class – was dismissed as a result of the approval of a settlement by the District Court. He describes as “side issues irrelevant to [his] right to appeal” the following facts: the settlement was between the Bank Defendants and a class of which Mr. Dornfest was not a member; the settlement consideration was only to be paid to holders of common stock and a specific option that Mr. Dornfest did not purport to own; and the Judgment specifically provided that “no claims are being released with respect to securities not covered by the Court-certified Class definition.” A1643. Nor, apparently, does it matter that all parties to the settlement, the Bank Defendants

¹ Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Bank Defendants’ Motion to Dismiss the Appeal of Plaintiff-Appellant Charles N. Dornfest for Lack of Appellate Jurisdiction (“Bank Br.”).

² In his Opposition to Motion to Dismiss the Appeal of Plaintiff-Appellant Charles N. Dornfest for Lack of Appellate Jurisdiction (“Dornfest Opp.”), Mr. Dornfest states (at 1) that he consents to the Bank Defendants’ alternative request for relief that his appeal be de-consolidated from the appeals with which it is currently consolidated.

and the Lead Plaintiffs, agree that “there is no colorable argument that [Dornfest’s] case was dismissed by the Judgment.” See Lead Plaintiffs’ Response Br. at 2.

While most litigants who thought their case had been dismissed would welcome learning that it had not been, Mr. Dornfest surprisingly resists that conclusion. Rather, he now asserts that he does not want to prosecute his case unless he can do so on behalf of a class; his \$400,000 “individual claim” is too insubstantial to litigate. Dornfest Opp. at 4. (That was not always his view. In his application to serve as a lead plaintiff Mr. Dornfest represented that “[d]ue to his significant financial stake” in the outcome of the litigation he is highly motivated to “vigorously prosecute” his claims.³ A824.) So, all of the foregoing notwithstanding, Mr. Dornfest insists on a very literal reading of the Judgment that he claims would allow him to have a final order – even though he has no quarrel with the Judgment whatsoever, and seeks no relief in his appeal with respect to any of the Judgment’s terms.

But even a literal reading of the Judgment is consistent with the practical realities of the settlement it embraced, the relief it conferred and the result one would expect from a determination that explicitly provided, “[f]or the sake of clarity,” that it did not prejudice claims with respect to securities that were not

³ Moreover, in his merits brief (at 25 n.8) Mr. Dornfest notes that he can prosecute his claims by relying on what the Lead Plaintiffs have already done, and therefore requires “little, if any, additional discovery.”

included within the certified class – e.g., Mr. Dornfest’s claims. That is because the Judgment dismissed the “Action,” a term defined in the Judgment to include all actions consolidated pursuant to “the Court’s Consolidation Order” – another defined term – and Mr. Dornfest’s class claims were not consolidated into the Action pursuant to that order. Indeed, Mr. Dornfest’s action was not filed until months after the Court’s Consolidation Order was issued, and his class claims were consolidated into the Action pursuant to a separate order. So, even disregarding all of the “side issues” that make clear that the Judgment did not, and was not intended to, dismiss Mr. Dornfest’s case, the literal reading of the Judgment Mr. Dornfest demands also reaches the same result.

ARGUMENT

I. MR. DORNFEST’S INDIVIDUAL CLAIMS WERE NEVER DISMISSED

Mr. Dornfest does not contest that his complaint asserted claims both on behalf of a putative class of investors who purchased Bank options and on an individual basis. A619. The record is clear that Mr. Dornfest’s attempt to prosecute class claims was unsuccessful. And there is also no dispute that both Judge Chin and Judge Castel issued orders to the effect that the Lead Plaintiffs in the Consolidated Securities Class Action, not Mr. Dornfest, had the authority to decide whether and how to prosecute the class claims Mr. Dornfest and his counsel wanted to control.

As a result of those orders, Mr. Dornfest was not permitted to pursue the class claims asserted in his complaint, which became part of the Consolidated Securities Class Action. While Mr. Dornfest maintains that in certain letters the Bank Defendants contended that his “complaint,” rather than just the class claims asserted, had been consolidated, he does not acknowledge, much less deny, that every order issued in response to those letters, and indeed every order issued in the District Court pertaining to Mr. Dornfest, emphasized that he remains free to pursue those individual claims. Bank Br. at 5-9.⁴ Nor does he offer any explanation for how those repeated admonitions – that Mr. Dornfest was “free to pursue [his] claims” on an individual basis, A974, and “remain[ed] free to pursue his claims individually,” A1492, A1617 – or the order entered by Judge Chin providing that, even if consolidation were granted, Mr. Dornfest would be free thereafter to amend his complaint, A807-08, can be reconciled with the argument that his case had been dismissed.

Indeed, Mr. Dornfest also does not claim that any of the orders issued in the District Court dismissed his complaint. Rather, his position is that the

⁴ Similarly, each of the letters from which Mr. Dornfest quotes also noted that Mr. Dornfest was free to pursue his claims on an individual basis. A989; A1193; A1286. Moreover, Mr. Dornfest himself wrote to the District Court and acknowledged that these orders provided that he “could pursue individual claims, but not class claims.” A1228.

Judgment dismissing the Consolidated Securities Class Action also had the effect of dismissing both the claims he brought on behalf of a putative class of options holders, and the claims he brought individually arising out of his purchase of options. And through silence he concedes that (1) he was not a party to the Judgment, A2010-11; (2) he was not named as being among the persons and entities over which the Court had jurisdiction when it rendered the Judgment, A2012; (3) the Judgment pertained to a negotiated settlement between the Bank Defendants and the Lead Plaintiffs, individually and on behalf of a Court-certified class, A2010-11, of which Mr. Dornfest was not a member, A2009-10; and (4) the Judgment only released claims on behalf of members of that class, and specifically stated that it had no impact on claims arising out of securities not included in the class definition. A2013-14; A1643.

If Mr. Dornfest were correct, then the Judgment would have had the effect of dismissing with prejudice claims that were not part of the certified class, held by parties who were not before the Court, and who received nothing in the settlement. It is not surprising that both the Bank Defendants and Lead Plaintiffs agree that the Judgment was not intended to, and did not, have the effect of dismissing or releasing Dornfest's options claims. Lead Plaintiffs' Br. at 2. Mr. Dornfest himself also never objected to the Judgment. And, there is no suggestion

that Judge Castel thought the Judgment would have the effect of dismissing Mr. Dornfest's case.

Mr. Dornfest is thus left to argue (Dornfest Opp. at 1, 2) that the Judgment dismissed his complaint because it dismissed the "Action" with prejudice, and because "Action" is defined in the November 2012 Stipulation of Settlement as "the consolidated securities action in the matter styled In re Bank of America Corp. Securities, Derivative and Employee Retirement Income Security Act(ERISA) Litigation, No. 09 MDL 2058 (PKC) (S.D.N.Y.), and includes all actions consolidated therein pursuant to the Court's Consolidation Order." A1633.

But even Mr. Dornfest's reading of the Judgment and the documents incorporated therein do not support his position. He is correct that the definition of the "Action" dismissed by the Judgment is provided in the November 2012 Stipulation of Settlement, and includes all actions consolidated into the Consolidated Securities Class Action pursuant to the Court's "Consolidation Order." But Mr. Dornfest ends the analysis too soon: "Consolidation Order" is also a term defined as the Memorandum Opinion and Order dated June 30, 2009, whereby Judge Chin consolidated certain federal securities actions and appointed Lead Plaintiffs. A1621. That Order preceded the filing of Mr. Dornfest's complaint, A618, and his case was not among the actions that it consolidated. Rather, Mr. Dornfest's claims were consolidated into the Consolidated Securities

Class Action by a consolidation order entered almost a year after the one specified in the Stipulation of Settlement – Judge Chin’s April 9, 2010 Order. A974.⁵

Accordingly, even under Mr. Dornfest’s literal reading, his case is not included in the definition of “Action,” so the language in the Judgment indicating that it dismissed the “Action” in its entirety does nothing to support the contention that it dismissed Mr. Dornfest’s case.

CONCLUSION

For the foregoing reasons, Mr. Dornfest’s appeal should be dismissed for lack of jurisdiction. In the alternative, all parties agree that his appeal should be de-consolidated from the associated cases with which it is currently consolidated.

⁵ The June 30, 2009 Consolidation Order also appointed Lead Plaintiffs and Lead Counsel, A446, and called for an implementing order setting forth the details of the consolidation. That implementing order, entered July 29, 2009, provided that it would apply to future cases arising out of the same subject matter as the Consolidated Securities Class Action “unless a party [to such a future case timely] objects.” A463. Mr. Dornfest did object, and moved to have himself appointed as the lead plaintiff for a class of options holders. A813. The Lead Plaintiffs Judge Chin appointed in the Consolidation Order opposed Mr. Dornfest’s motion, A949, as did the Bank Defendants. A846. Judge Chin resolved the dispute in the April 9, 2010 Order, in which he ordered that Mr. Dornfest’s claims were consolidated into the Consolidated Securities Class Action.

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