Taking a Voluntary Dismissal: Some Pitfalls

The “savings” provision of North Carolina Rule of Civil Procedure 41(a) can be a lifeline for a plaintiff who, for one reason or another, can’t proceed with its case the first time around. Rule 41(a)(1) allows a plaintiff to voluntarily dismiss its case without prejudice by giving notice of dismissal any time before it rests its case. Plaintiff may file the action again within one year, and the statute of limitations on its claim is extended for that refiling period. Rule 41(a)(1); North Carolina RR Co. v. Ferguson Build. Supp., Inc., 103 N.C. App. 768, 772–73 (1991). As generous as the savings provision is, it can be a tricky business. If done improperly or at the wrong time, a dismissal could doom a case rather than save it. Before giving notice of voluntary dismissal, heed the following reminders:

• **The “two-dismissal” rule.** If a party has voluntarily dismissed once, it may file the case again within the refiling period. If a party has voluntarily dismissed twice—in any state or federal court—a third filing is subject to dismissal. A second voluntary dismissal is an adjudication on the merits of any “action based on or including the same claim.” This restriction applies only to two prior notices of dismissal, and not if one or more of the dismissals was by stipulation or court order. Rule 41(a)(1); Estate of Livesay v. Livesay, 219 N.C. App. 183, 776–77 (2012). Bear in mind that the phrase “action based on or including the same claim” likely includes claims against an entity based on acts of its employees or agents, if an action against the employees or agents themselves is precluded by the two-dismissal rule. *E.g.*, Wrenn v. Maria Parham Hosp., Inc., 135 N.C. App. 672, 680–81 (1999).

• **“Rests his case” includes summary judgment!** If plaintiff has rested its case before its notice of dismissal, the dismissal is deemed with prejudice “entitling [defendant] to a judgment as a matter of law” in a later-filed action based on the claim. Pardue v. Darnell, 148 N.C. App. 152, 157 (2001). If plaintiff has already rested, a voluntary dismissal without prejudice must be by stipulation or court order. Rule 41(a)(1)(ii); 41(a)(2); *Pardue*, 148 N.C. App. at 155. The most obvious interpretation of “rests his case” is resting the case at trial. Our courts, however, have also applied the phrase to summary judgment, holding that that a party may not dismiss after its summary judgment argument before the court rules on the motion. Troy v. Tucker, 126 N.C. App. 213, 215 (1997); Maurice v. Hatterasman Motel Corp., 38 N.C. App. 588, 591–92 (1978). To have “rested” at summary judgment, plaintiff must have had an opportunity to introduce evidence at the hearing and to argue its position, and then must have submitted the matter to the court for determination. Alston v. Duke Univ., 133 N.C. App. 57, 61–62 (1999) (plaintiff did not rest where attorney made clear she did not intend to argue before dismissing); Wesley v. Bland, 92 N.C. App. 513, 514–15 (1988) (plaintiff did not rest where attorney took dismissal in lieu of arguing). Although the law is not well-developed, it seems a party has not “rested” by arguing a dispositive motion relating to something other than the “case-in-chief.” *See, e.g.*, Schnitzlein v. Hardee’s Food Sys, Inc., 134 N.C. App. 153, 156–57 (1999) (no resting for arguing motion to dismiss based on ERISA pre-emption); Lowe v. Bryant, 55 N.C. App. 608, 611 (1982) (no resting for arguing motion to dismiss for failure to pay bond).

• **No dismissal if opposing party seeks affirmative relief.** A plaintiff may not take a voluntary dismissal without prejudice if the defendant has stated a claim for affirmative relief arising out of the same transaction or occurrence. McCarley v. McCarley, 289 N.C. 109, 113 (1976); *see also* Layell v. Baker, 46 N.C. App. 1, 6 (1980) (defendant's negligence counterclaim prevented dismissal of negligence action); Maurice, 38 N.C. App. at 592 (dismissal of quiet title action prohibited due to counterclaim alleging sole ownership). If defendant has requested such relief, defendant's consent is required for plaintiff's voluntary dismissal. *McCarley*, 289 N.C. at 111–12. If, however, defendant's counterclaim is factually independent, plaintiff may proceed with voluntary dismissal. Id. at 112. Affirmative relief is "relief for which defendant might maintain an action independently of plaintiff's claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it." Williams v. Poland, 154 N.C. App. 709, 712 (2002) (motion to dismiss not a request for "affirmative relief"); Kohn v. Mug-a-Bug, 94 N.C. App. 594, 596 (1989) (motions for attorney fees and summary judgment not requests for affirmative relief); Travelers Ins. Co. v. Ryder Truck Rental, Inc., 34 N.C. App. 379, 381 (1977) (indemnification claim contingent on plaintiff's recovery not a request for affirmative relief).

• **Faulty filing of first action.** An action must be properly "commenced" prior to voluntary dismissal in order for Rule 41(a) to extend the limitations period. *See, e.g.*, Sweet v. Boggs, 134 N.C. App. 173, 175 (1999) (complaint not commenced where plaintiff issued summons to personal representative but never alleged claim against him); Collins v. Edwards, 54 N.C. App. 180, 182–83 (1981) (failure to have summons issued under Rule 3(a)(1) prior to voluntary dismissal). In a medical malpractice action, if the Rule 9(j) certification is not made prior to expiration of the limitations period, the claim has not been timely commenced, and a voluntary dismissal under Rule 41(a) will not extend the statute of limitations. Bass v. Durham Cty Hosp. Corp., 358 N.C. 144, 144 (2004); McKoy v. Beasley, 213 N.C. App. 258, 262–64 (2011). The Court of Appeals has also declined to apply the savings provision where an action was filed and immediately dismissed purely to extend the statute of limitations and thus violated Rule 11(a). Estrada v. Burnham, 316 N.C. 318, 325–26 (1986).

• **Faulty service of first action.** Plaintiff cannot invoke Rule 41(a)(1)'s limitations extension in a later-filed action if failure to timely serve the complaint caused the first action to be discontinued after the statute of limitations expired. Lawrence v. Sullivan, 192 N.C. App. 608, 622–23 (2008); Camara v. Gbarbera, 191 N.C. App. 394, 396–97 (2008); Johnson v. City of Raleigh, 98 N.C. App. 147, 150 (1990); Hall v. Lassiter, 44 N.C. App. 23, 26–27 (1979).

• **Only extends statute of limitations on "action based on the same claim."** After voluntary dismissal under 41(a), the one-year savings provision will only extend the limitations period on a "new action based on the same claim." New and independent claims or claims against distinct defendants do not relate back to the date of the first filing, even if they arise from the same events. *See, e.g.*, Williams v. Lynch, 741 S.E.2d 343, 376–77 (N.C. App. 2013) (breach of contract and conversion claims did not relate back to action for negligence); Staley v. Lingerfelt, 134 N.C. App. 294, 299–300 (1999) (assault and battery, false arrest, and trespass claims did not relate back);

Stanford v. Owens, 76 N.C. App. 284, 289 (1985) (fraud claim did not relate back to negligence action); Cherokee Ins. Co. v. R/I, Inc., 97 N.C. App. 295, 296–97 (1990) (claim against separate corporation did not relate back despite sharing officers and address with first defendant).

• **Federal court.** Things can get complicated if a case is going back and forth between North Carolina and federal courts. Federal Rule of Civil Procedure 41 does not provide the same limitations extension as North Carolina's rule. Renegar v. R.J. Reynolds Tobacco Co., 145 N.C. App. 78, 81 (2001). Whether a plaintiff dismissing its state law claims from federal court may take advantage of North Carolina's rule "is governed by how the federal court gained jurisdiction over the state issues." Harter v. Vernon, 139 N.C. App. 85, 92 (2000). In general, when a plaintiff dismisses a case in which the federal court sits in diversity, the plaintiff can invoke the savings provision when refiling in state or federal court. Bockweg v. Anderson, 328 N.C. 436, 441–42 (1991); *Renegar*, 145 N.C. App. at 80; *Harter*, 139 N.C. App. at 93–94. Similarly, when a plaintiff first brings an action in state court, then dismisses and refiles in federal court under diversity, the statute of limitations on the state law claims is extended by the North Carolina rule. Strawbridge v. Sugar Mtn Resort, Inc., 243 F.Supp.2d 472, 477 (W.D.N.C. 2003); Porter v. Groat, 713 F.Supp. 893, 896–97 (M.D.N.C. 1989). By contrast, when the federal court has federal question jurisdiction and is exercising supplemental jurisdiction over the state law claims, North Carolina's rule does not apply to extend the limitations on the state law claims (beyond the 30 days provided by federal law). *Harter*, 139 N.C. App. at 93–94; *Renegar*, 145 N.C. App. at 83. However, for actions where the federal question involves 42 U.S.C. § 1983, the North Carolina rule may apply. *See, e.g.*, Leardini v. Charlotte-Mecklenburg Board of Educ., 2011 WL 1234743 (not reported in F.Supp.) (W.D.N.C. 2011). Advice of counsel well-versed in federal jurisdiction is strongly recommended when considering dismissal of state law claims from federal court.

This post discusses *some* of the main points to remember when taking a voluntary dismissal under Rule 41(a)(1). Every case should, of course, be evaluated on its own facts, and, if possible, in consultation with experienced litigation counsel.