



Kimberly-Clark filed a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. As the motion had additional documentation appended to it in the form of complaints and judicial opinions in prior cases filed by Douglas, the Court concluded that the motion to dismiss would be considered as a motion for summary judgment and so advised the parties, granting leave to file additional argument and affidavits. On November 14, 2003, the Court found that the present action raised the same claims as a previous action brought by Douglas against Kimberly-Clark, No. 96-2428, which had been fully litigated by the parties and was, therefore, barred by *res judicata* Id. As a result, the Court entered final judgment against Douglas and in favor of Kimberly-Clark. Reconsideration of the summary judgment order was denied on December 3, 2003, and Douglas filed his notice of appeal on December 11, 2003.

Kimberly-Clark filed its first motion for costs in this case on December 1, 2003. As Douglas had appealed the judgment in this case, the Court denied the motion without prejudice on April 8, 2004, and granted Kimberly-Clark leave to renew its motion once a mandate was issued by the Court of Appeals. Kimberly-Clark prematurely renewed its motion for costs on October 13, 2004. The Court of Appeals returned its mandate in this case on November 15, 2004. On the day after the mandate was issued from the Court of Appeals, Douglas filed an Amended Complaint. This case was reassigned to the undersigned on November 22, 2004. Kimberly-Clark moved to strike the Amended Complaint and for other relief on December 9, 2004.

At the heart of the present dispute is a motions status telephone conference held on October, 28, 2004, before this case was reassigned. It is Douglas' representation that he was

granted leave to amend his complaint during that conference. Kimberly-Clark maintains that the only issue raised during the telephone conference was its renewed motion for attorneys fees and other relief and that the Court never considered any other arguments on possible motions to amend the complaint, reopen the case, or for relief from the judgment. Kimberly-Clark points out that Douglas has never made such a motion to the Court, and that no Order was entered following the telephone conference on October 28, 2004. The minute entry filed by the deputy clerk makes no reference to any ruling made by the Court on any motion.

Regardless of what took place during the October 28, 2004, Douglas has not received leave to amend his complaint in this action. The Court lacked jurisdiction to grant such a request at that time. Jurisdiction in this case was still vested in the Court of Appeals. Any order entered by this Court affecting the substance of the appeal is void. 16A Wright, Miller & Cooper, Federal Practice and Procedure § 3949.1 (2d ed. 1996 & Supp. 2004). It is

“generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdiction[al] significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”

Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982). Furthermore, “[j]ust as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court. Until the mandate issues, the case is ‘in’ the court of appeals and any action taken by the district court is a nullity.” Kusay v. United States, 62 F.3d 192, 194 (7th Cir. 1995).

The powers of the district court in a case on appeal are limited to those functions in aid of the appeal. The district court is permitted to perform certain ministerial functions such

as correcting clerical mistakes in the record, approving appeal bonds, and issuing stays or injunctions pending the appeal. The district court may also enter orders preserving the status quo pending disposition of the appeal. Wright, Miller & Cooper, *supra*. After a timely notice of appeal has been filed in the district court, the powers of the district court do not extend to a motion to amend the complaint. See Davis v. United States, 667 F.2d 822, 824 (9th Cir. 1982).

As jurisdiction did not return to this Court until November 15, 2004, when a mandate issued from the Court of Appeals, any rulings or orders made by the Court in the October 28, 2004 motions status telephone conference are a void. As a result, there was no relief from final judgment, and Douglas' filing of the Amended Complaint was undertaken without leave of court. Therefore, Kimberly-Clark's motion to strike the Amended Complaint will be granted. I take the remainder of Kimberly-Clark's motion under advisement.

An appropriate Order follows.

