SECOND CIRCUIT REJECTS USE OF RULE 67 TO MOOT CLASS REPRESENTATIVE'S CLAIMS

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In *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.,*[1] the Second Circuit declined to allow the defendant-appellee to moot a putative class action by depositing $20,000—in full settlement of the plaintiff-appellant's *individual* claims—in the district court registry under Federal Rule of Civil Procedure 67. The 2018 appeal represents the second time the Second Circuit rejected a mootness claim in the case.

By way of background, the plaintiff alleged that it received unsolicited faxes from the defendant in violation of the Telephone Consumer Protection Act (the "Act"), sought monetary and injunctive relief under the Act, and moved for class certification. [2] The defendant made a settlement offer under Federal Rule of Civil Procedure 68, but the plaintiff rejected it. [3]

After the plaintiff rejected the defendant's offer under Rule 68, the district court held that the plaintiff's claims were moot and dismissed the case for lack of subject-matter jurisdiction. *Id.* at *2. On appeal, the Second Circuit vacated the district court's order and remanded the case in light of the Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, [4] which held that an unaccepted settlement offer under Rule 68 to the named plaintiff in a putative class action did not moot the plaintiff's claims. [5]

On remand, the defendant once more attempted to moot the plaintiff's claims, this time under Rule 67, which allows a party to deposit money into the court's registry when part of the relief sought is a money judgment. [6] The defendant deposited $20,000 in the court's registry—which represented the maximum possible damages on the plaintiff's *individual* claims—and also "submitted itself" to the plaintiff's requested injunctive relief. [7] On this basis, the district court once more held that the plaintiff's claims were moot, and it entered judgment for the plaintiff and dismissed what remained of the plaintiff's action. [8]

In vacating the district court's holding and remanding the case once more, the Second Circuit grappled with a hypothetical situation posited by the Supreme Court's opinion in *Campbell-Ewald*. [9] Despite holding that an unaccepted Rule-68 settlement offer did not moot a plaintiff's claims, the Supreme Court hypothetically questioned whether a defendant could moot a plaintiff's claims by depositing "the full amount of the plaintiff's individual claim in an account payable to the plaintiff." [10] However, the Court reserved that question for a case actually presenting those facts. [11]

While addressing and distinguishing the Supreme Court's hypothetical from the plaintiff's case, the Second Circuit focused on two principal points: (1) the defendant's depositing money in the district court registry under Rule 67 did not constitute money deposited in "an account payable to plaintiff"; and (2) "mootness" is not the correct legal concept to describe the effect of the defendant's depositing money in a court account under Rule 67—particularly when the plaintiff seeks to represent a class on behalf of others. [12]

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In holding that the defendant could not moot the plaintiff's claim by depositing money in the court's registry under Rule 67, the Second Circuit relied on a fundamental principle of contract law also relied on by the Supreme Court in *Campbell-Ewald*: an unaccepted offer is not binding on the offeree. [13] While *Campbell-Ewald* dealt with settlement offers under Rule 68 and not deposits made to the court's registry under Rule 67, the Second Circuit aligned itself with the Seventh Circuit and held that there is "no material difference between a plaintiff rejecting a tender of payment (pursuant to Rule 67) and an *offer* of payment (pursuant to Rule 68)." [14] Just as a defendant cannot moot a plaintiff's claim under Rule 68 by making an offer of payment under *Campbell-Ewald*, a defendant cannot moot a plaintiff's claim under Rule 67 by placing a tender of payment in the court's registry.

Additionally, the Second Circuit treated the court's registry as an escrow agent under Rule 67 rather than as a bank account in the plaintiff's name. This allowed the court to distinguish this case from the hypothetical question presented in the Supreme Court's *Campbell-Ewald* opinion. Unlike in the Supreme Court's hypothetical, the defendant's placement of funds in the court's registry under Rule 67 did not entitle any specific party to collect those funds and, thus, the defendant did not deposit "the full amount of the plaintiff's individual claim *in an account payable to the plaintiff*."

The Second Circuit also reasoned that "mootness"—a jurisdictional concept that implicates a federal court's constitutional power to rule on the merits of a case—was not the correct legal framework to apply when analyzing the effect of the defendant's Rule-67 deposit. Placing funds in the court's registry under Rule 67 does not strip the court of the power to rule on the merits of the case or enter a judgment, the panel held. [17] The court analogized the Rule-67 deposit to the affirmative defense of accord and satisfaction, rather than to the jurisdictional concept of mootness. [18]

In summary, the Second Circuit explained that a plaintiff's claims become moot *after* a defendant surrenders to "complete relief" in satisfaction of the plaintiff's claims and the district court enters judgment against the defendant. [19] However, because the plaintiff here attempted to exercise its right to sue on behalf of others, the Second Circuit reasoned that the defendant cannot afford the plaintiff "complete relief" by offering to surrender to plaintiff's individual claims—for the plaintiff, this case was about more than its individual damages. [20]

Thus, the Second Circuit held that the district court *must* resolve the pending motion for class certification *before* entering judgment and declaring the action moot based "solely" on relief offered to the plaintiff for its individual claims. [21] Otherwise, defendants could use "tactical procedural maneuvers"—as the defendant here has twice attempted—to thwart class litigation at will, frustrating the objectives of class actions. [22]

NOTES

[1] No. 17-2692, 2018 WL 6175291 (2d Cir. Nov. 27, 2018).

[2] *Id.* at *1–2.

[3] *Id.* at *2.

[4] 136 S. Ct. 663 (2016).

[5] *Radha Geismann, M.D.*, 2018 WL 6175291, at *2.

[6] *Id.* at *3.

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[7] *Id.* at *3, 5.

[8] *Id.* at *4.

[9] *Id.*

[10] *Campbell-Ewald,* 136 S. Ct. at 672.

[11] *Id.*

[12] *Radha Geismann, M.D*., 2018 WL 6175291, at *5–6.

[13] *Id.* at *4.

[14] *Id.* (emphasis in original).

[15] *Id.* at *5.

[16] *Campbell-Ewald*, 136 S. Ct. at 672 (emphasis added).

[17] *Radha Geismann, M.D*., 2018 WL 6175291, at *5–6.

[18] *Radha Geismann, M.D*., 2018 WL 6175291, at *5 n.6.

[19] *Id.* at *6.

[20] *Id.*

[21] *Id.*

[22] *Id.*

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