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THERE'S NO ESCAPE: THE PLAINTIFF'S RIGHT TO DISMISS AFTER THE SUBMISSION OF A MOTION FOR SUMMARY JUDGMENT OR A MOTION TO DISMISS IN NEBRASKA

By John P. Lenich*

Section 25-601(1) provides that the plaintiff can voluntarily dismiss an action without prejudice anytime before final submission.[1] "Final submission contemplates submission on both the law and the facts when nothing remains to be done in order to render the submission complete."[2] A final submission occurs in a bench trial when the parties finish their closing arguments. A final submission occurs in a jury trial after the parties finish their closing arguments and the jury has been instructed.[3] At that point, the action has been put in the hands of the trier of fact for a decision on the merits.

A final submission can occur on a motion. For example, an action is under final submission when the defendant moves to dismiss the action at the close of the plaintiff's case in a bench trial.[4] An action is also under final submission when the defendant moves for a directed verdict in a jury trial and the parties have made their arguments on the motion.[5] If the court denies the motion, however, the action is no longer under final submission. The court's decision in effect sets aside the submission and allows the action to proceed. The plaintiff can then

* Ross McCollum Professor of Law, University of Nebraska College of Law

[1] NEB. REV. STAT. § 25-601(1) (Reissue 2008). The plaintiff's right to dismiss pursuant to § 25-601 is "a statutory right" rather than "a matter of judicial grace or discretion." Koll v. Stanton-Pilger Drainage Dist., 207 Neb. 425, 426, 299 N.W.2d 435, 436 (1980). *See also* Giesler v. City of Omaha, 175 Neb. 706, 708, 123 N.W.2d 650, 651 (1963) (same); Sutherland v. Shoemaker, 6 Neb. App. 157, 160, 570 N.W.2d 375, 377 (1997) (same). Nevertheless, a court can impose conditions on the plaintiff's right to dismiss or preclude the plaintiff from exercising that right altogether when "justice and equitable principles so require." Holste v. Burlington N. R.R. Co., 256 Neb. 713, 730, 592 N.W.2d 894, 907 (1999). *See also* Kan. Bankers Sur. Co. v. Halford, 263 Neb. 971, 978, 644 N.W.2d 865, 870 (2002) (stating that courts have discretion in deciding whether or not to dismiss an action).

[2] Schroeder v. Schroeder, 223 Neb. 684, 687, 392 N.W.2d 787, 789 (1986). *See Koll*, 207 Neb. at 426, 299 N.W.2d at 436; Miller v. Harris, 195 Neb. 75, 78 236 N.W.2d 828, 830 (1975).

[3] The submission instruction for civil cases can be found at NJI2d Civ. 5.01 (West 2008-09 ed.).

[4] Gydesen v. Gydesen, 188 Neb. 538, 540-41, 198 N.W.2d 67, 68 (1972).

[5] Collection Specialists, Inc. v. Veseley, 238 Neb. 181, 186, 469 N.W.2d 549, 552 (1991). *See* Fronk v. J.H. Evans City Steam Laundry Co., 70 Neb. 75, 77, 96 N.W. 1053, 1054 (1903). If the court requests the parties to file briefs, then final submission occurs when the briefs are filed or, if they were not filed, when the time for filing them expired. Plattsmouth Loan & Bldg. Ass'n v. Sedlak, 128 Neb. 509, 512, 259 N.W. 367, 368-69 (1935).

dismiss the action without prejudice if it so chooses.[6]

It is unclear whether the filing and arguing of a summary judgment motion constitutes a final submission for purposes of § 25-601. It is also unclear whether the filing and arguing of a motion to dismiss for failure to state a claim constitutes a final submission. This commentary argues that the submission of either motion should be treated as a final submission of the action. The plaintiff should not be allowed to avoid a potentially dispositive ruling by dismissing its action without prejudice so that it can bolster its case and refile in a more sympathetic forum.

Summary Judgment

A motion for a directed verdict is treated as final submission "because the court is called upon to determine as a matter of law whether there are any issues arising from the facts submitted which present a jury question."[7] The same is true of a motion for summary judgment. The court is called upon to determine as a matter of law whether there are any issues arising from the facts that present a triable issue.[8] Therefore, the submission of a motion for summary judgment should be treated as a final submission of the action.

The supreme court's decision in *Kansas Bankers Surety Co. v. Halford*,[9] however, could be read as saying that the plaintiff's right to dismiss is unaffected by a pending motion for summary judgment. The plaintiff in *Kansas Bankers* moved to dismiss the action—and the court entered its order dismissing the action—on the same day that the plaintiff's brief in opposition to the defendant's summary judgment motion was due. After the plaintiff dismissed the action, the defendant sought an award of attorney's fees pursuant to § 25-824 on the ground that the plaintiff's action was frivolous. The district court granted the defendant's motion. The plaintiff then appealed.

The supreme court reversed. The court held that the district court lacked jurisdiction to grant the defendant's motion for attorney's fees because the action had already been dismissed when the defendant filed its motion. The court noted that the pendency of a counterclaim will preclude the plaintiff from dismissing an action in its entirety but added that the defendant had not filed a counterclaim.[10] The defendant had instead filed a motion for summary judgment.[11]

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[6] *Miller*, 195 Neb. at 77, 236 N.W.2d at 830.

[7] *Id.* at 78, 236 N.W.2d at 830.

[8] *See, e.g.,* Wolski v. Wandel, 275 Neb. 266, 270-71, 746 N.W.2d 143, 148 (2008) ("Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law."); DeWester v. Watkins, 275 Neb. 173, 176, 745 N.W.2d 330, 333 (2008) (same).

[9] 263 Neb. 971, 644 N.W.2d 865 (2002).

[10] *Id*. at 979, 644 N.W.2d at 871. *See* NEB. REV. STAT. § 25-603 (Reissue 2008) (stating that the defendant can proceed on its counterclaim even if the plaintiff's action has been dismissed).

[11] *Kansas Bankers*, 263 Neb at 979, 644 N.W.2d at 871.

Therefore, the plaintiff had a right to dismiss the action.

Because the court in *Kansas Bankers* concluded that the plaintiff had the right to dismiss the action pursuant to § 25-601, the court must have concluded that the pending summary judgment motion did not constitute a final submission. But the court did not explain why. The most likely reason is that the submission in *Kansas Bankers* was incomplete at the time the plaintiff dismissed the action. Although the summary judgment motion had been filed, not all of the briefs had been filed. The plaintiff obtained an extension to file its brief in opposition to the motion. Instead of filing its brief on the day it was due, however, the plaintiff moved to dismiss the action.[12]

That is significant because the court had previously held that if a motion for a directed verdict is filed and the trial court orders the parties to file briefs within a specified time period, then the action is not deemed to be finally submitted until the briefs are filed or until the time for filing them expires.[13] The time for filing the briefs in *Kansas Bankers* had not expired when the plaintiff dismissed the action. Therefore, the plaintiff was free to dismiss the action under § 25-601 because there had not yet been a final submission.

In short, the court's decision in *Kansas Bankers* does not support the proposition that the plaintiff's right to dismiss is unaffected by a pending motion for summary judgment. The decision instead supports a narrower proposition: the plaintiff's right to dismiss is unaffected by a pending motion for summary judgment that has not been finally submitted. Final submission occurs when the briefs have been filed or the time for filing them expires. If no briefing schedule was set, then final submission occurs when the oral arguments are over.

The plaintiff would be free to dismiss the action without prejudice if the court denies the motion. If the court grants the motion, however, the plaintiff would not be free to dismiss the action. That should be true even if the motion disposes of some but not all of the claims in the action. Although the order granting the motion would not be a final judgment, it would be the product of a final submission.[14] Therefore, the plaintiff would no longer have the right to dismiss the claims without prejudice unless the order was set aside—in other words, unless the final submission was set aside.[15]

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[12] *Id.* at 977, 644 N.W.2d at 870.

[13] Plattsmouth Loan & Bldg. Ass'n v. Sedlak, 128 Neb. 509, 512, 259 N.W. 367, 368-69 (1935).

[14] Section 25-601(1) refers to the dismissal of an action. For purposes of § 25-601(1), the term "action" means a claim. *See* Snyder v. Collier, 85 Neb. 552, 555, 123 N.W. 1023, 1024 (1909) (in action for foreclose of two real estate mortgages, plaintiff had the right to dismiss one of its two causes of action). Therefore, the final submission of a claim is a final submission of the action for purposes of § 25-601(1). If other claims are still pending, the order the court enters as a result of the submission is not necessarily a final judgment. An order that disposes of some but not all of the claims in a case with multiple parties or multiple claims is only a final judgment if the court expressly directs the entry of judgment pursuant to NEB. REV. STAT. § 25-1315(1) (Reissue 2008).

[15] Absent an express direction for the entry of judgment, an order that disposes of some but not all of the claims in a case with multiple parties or multiple claims "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." § 25-1315(1).

Motion to Dismiss for Failure to State a Claim

Although a motion for summary judgment should be treated as a final submission that terminates the plaintiff's right to dismiss, there is some question about whether the same should be true of a motion to dismiss for failure to state a claim upon which relief can be granted. There are two decisions that seem to come to different conclusions.

In *Koll v. Stanton-Pilger Drainage District*,[16] the Nebraska Supreme Court held that the sustaining of a demurrer for failure to state a cause of action is not a final submission. The court emphasized that a demurrer "merely challenges defects shown on the face of the petition" and that the plaintiff should ordinarily be given leave to amend when a demurrer is sustained.[17] The court noted that the plaintiffs in *Koll* received leave to amend but failed to file an amended petition within the allotted time. Their failure did not affect their right to dismiss, however, because the practice would have been to accept an untimely amendment.[18]

The court of appeals came to a different conclusion in *McCroy v. Clarke*.[19] The court held that causes of action that are disposed of by a demurrer have been finally submitted. The court acknowledged that *Koll* held that sustaining a demurrer for failure to state a cause is not a final submission of the action. The court added, however, that *McCroy* was "sufficiently distinct" from *Koll* to warrant a different result.[20] The court, however, did not explain what made the cases distinct.

The distinction seems to be that the demurrer in *Koll* was sustained with leave to amend while the demurrer in *McCroy*—which was directed at some of the causes of the action in the action—was sustained without leave to amend. If a demurrer—or its contemporary counterpart, a motion to dismiss for failure to state a claim—is sustained with leave to amend, then the claims will go forward.[21] The court's decision to grant leave to amend in effect sets aside the submission. If the demurrer (or motion to dismiss) is granted without leave to amend, however, the final submission has not been set aside and the claims will not go forward. In other words, the final submission has resulted in a decision disposing of those claims.[22]

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[16] 207 Neb. 425, 299 N.W.2d 435 (1980).

[17] *Id.* at 426-27, 299 N.W.2d at 436.

[18] *Id.* at 427, 299 N.W.2d at 436-37.

[19] No. A-05-1358, 2008 WL 2010280 (Neb. Ct. App. May 6, 2008).

[20] *Id.* at *7.

[21] *Cf.* Feight v. Mathers, 153 Neb. 839, 842, 46 N.W.2d 492, 494 (1951) (order giving defendants ten days to file amended answer pleading defendants' counterclaims did not result in a final submission of the case).

[22] *Cf.* State *ex rel.* Burlington & Miss. River R.R. Co. v. Scott, 22 Neb. 628, 640, 36 N.W. 121, 126-27 (1888) (plaintiff could not dismiss mandamus action as a matter of right after court sustained demurrer for failure to state a cause of action, apparently without leave to amend, but before court formally dismissed the action). A motion to dismiss for failure to state a claim can be directed at individual claims in a complaint that contains multiple claims. *See* JOHN P. LENICH, NEBRASKA CIVIL PROCEDURE § 11:7, at 437 (West 2008). An order granting a motion to dismiss one or more but not all of the claims is not a final judgment, although it is the product of a final submission. *See supra* note 14 and accompanying text.

The preceding discussion assumes that the submission of a motion to dismiss for failure to state a claim is a final submission of the claims to which the motion is directed. But is it? The answer should be "yes." The motion requires the court to determine as a matter of law whether the facts as pled entitle the plaintiff to relief.[23] In other words, it is a submission of the action on both the law and the facts. The motion is potentially dispositive because the court could dismiss a claim without leave to amend if it concluded that the defect could not be cured.[24] Such a dismissal would be a decision on the merits.[25]

The court could also dismiss the action if the plaintiff failed to file an amended complaint after having been granted leave to do so. In *Koll*, the supreme court indicated that the submission of the defendant's motion to dismiss based on the plaintiffs' failure to file an amended complaint was a final submission of the action.[26] The same should be true of the initial motion to dismiss because, as discussed above, it is a potentially dispositive motion that goes to the merits of the claim.

Dismissal with Leave of Court

The plaintiff's right to dismiss an action without prejudice expires at final submission. To dismiss after final submission, the plaintiff must obtain leave of court. It is unlikely, however, that a court would grant a plaintiff leave to dismiss without prejudice while a motion for summary judgment or a motion to dismiss for failure to state a claim was under submission. In fact, it would be an abuse of discretion for the court to grant the plaintiff leave to dismiss if the plaintiff's reason for dismissing was the fear of an adverse decision.[27]

It is even less likely that a court would grant a plaintiff leave to dismiss without prejudice after the court granted the motion but before the court entered judgment.

> To permit a party to dismiss [without prejudice] under such circumstances is, in substance, to grant him a new trial after he has been fairly defeated and to deprive his adversary of the fruits of a fairly won victory. It is contrary to good sense and sound policy to allow a party to take his case from one court to another until

[23] *See* LENICH, *supra* note 22, § 11:7.

[24] *See id.* at § 15:5.

[25] The dismissal of an action (as opposed to the complaint) for failure to state a claim is a final judgment on the merits. *See id.* at § 8:7.

[26] 207 Neb. 245, 427, 299 N.W.2d 435, 437 (1980). The district court in *Koll* gave the plaintiffs two weeks to file an amended petition. The two weeks passed without the plaintiffs doing so. The defendant subsequently filed a motion to dismiss with prejudice based on the plaintiffs' failure to file an amended petition. The district court never considered the motion, however. The plaintiffs moved to dismiss without prejudice before the district court heard argument on the defendant's motion—in other words, before submission of the defendant's motion.

[27] *See* Collection Specialists, Inc. v. Veseley, 238 Neb. 181, 187-88, 469 N.W.2d 549, 552-53 (1991) (district court abused its discretion in allowing plaintiff to dismiss without prejudice after case had been submitted on motion for directed verdict; plaintiff sought dismissal after it realized that the evidence was insufficient under the original petition or the amendment that plaintiff made while the motion for direct verdict was pending).

> fortune favors him with a judge who is willing to accept his view of the law or his construction of the evidence.[28]

Conclusion

The plaintiff's right to dismiss is an escape hatch that the plaintiff can use when "unforeseen contingencies, accidental omissions, a mistake in procedure or other circumstances unconnected with the merits"[29] undermine the plaintiff's ability to litigate its case. But that hatch should be closed while the court is considering a potentially dispositive motion that targets the merits of the case. A lawsuit is not a trial run. Once the lawsuit has been submitted for decision on the merits, the court should be allowed to make a decision.

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[28] Pettegrew v. Pettegrew, 128 Neb. 783, 789, 260 N.W. 287, 289 (1935).

[29] Plattsmouth Loan & Bldg. Ass'n v. Sedlak, 128 Neb. 509, 511, 259 N.W. 367, 368 (1935).