11-1831

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA; CESAR RUIZ,

Plaintiffs-Appellees,

v.

VILLAGE OF PORT CHESTER,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District of New York
Honorable Paul G. Gardephe
Case No. 06 Civ. 15173 (PGG)

RESPONSE TO GOVERNMENT'S MOTION TO DISMISS

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INTRODUCTION

Port Chester seeks to challenge on appeal the District Court's finding that Port Chester's at-large voting system for electing its Board of Trustees violated Section 2 of the Voting Rights Act. At the request of all parties, the District Court entered final judgment below on April 21, 2011, and Port Chester filed a timely appeal from this judgment.[1]

The Government nonetheless argues that Port Chester waived its right to appeal the District Court's liability finding underlying this final judgment because, unbeknownst to all parties and the District Court itself, final judgment had purportedly been *sub silentio* entered *over two years ago* when, pursuant to the District Court's mandate, Port Chester entered into a Consent Decree detailing the voter education provisions for the novel "cumulative voting" remedy.

[1] Port Chester's May 3, 2011 Notice of Appeal is clearly timely because a judgment that satisfies the separate-document requirement was not filed until April 21, 2011. Under this requirement, "[t]he time for appeal does not start running until a separate document labeled judgment [is] filed." *Cooper v. Town of E. Hampton*, 83 F.3d 31, 33 (2d Cir. 1996) (citing Fed. R. Civ. P. 58). "The reason for adhering to the formalism of the separate document requirement is to avoid confusion as to when the clock starts for the purpose of an appeal." *Id.* The April 1, 2010 Opinion and Order did not satisfy this requirement because the Court did not file a separate document labeled judgment at this time. *See* Dkt. 124 (Ex 2). Because the first and only time a separate document labeled judgment was filed was on April 21, 2011, *see* Dkt. 151 (Ex B), the time for appeal began to run on this date. And because Port Chester filed its Notice of Appeal on May 3, Dkt. 152, well within the sixty day time-limit, *see* Fed. R. App. P. 4, Port Chester's appeal is timely. For these reasons, the Response of Plaintiff-Appellee Cesar Ruiz is completely without merit.

Specifically, the Government relies on a line of cases setting forth the obvious proposition that, if parties consent to a *final* order or judgment, they cannot contest liability on appeal (absent an express reservation of appellate rights). This is because a final order, of course, resolves "the litigation *on the merits*," *Nelson v. Unum Life Ins. Co. of Am.*, 468 F.3d 117, 119 (2d Cir. 2006) (per curiam) (emphasis added), and, absent extraordinary circumstances (*see* 28 U.S.C. § 1292), is the only order that can be appealed to contest liability. Accordingly, if parties consent to a final judgment, they waive the right to contest the liability determinations supporting that final remedial order. Just as the failure to timely *appeal* a final judgment waives a party's right to challenge the liability determination underlying that judgment, acquiescence in such judgments waives the right to contest liability. But acquiescence in an interim, *non-final* (and therefore non-appealable) order does not waive any right to challenge the underlying liability finding, just as the "failure" to appeal such interim orders does not waive the right to subsequently challenge liability when the final order is entered.

In short, an interim, non-final remedial order does not even *implicate* the appellate right to challenge liability. Since it is not a final order *triggering* the right to appeal liability determinations, acquiescence in non-final orders cannot possibly be a *waiver* of that non-extant right. The right to appeal liability under 28

U.S.C. § 1291 is *triggered* by final orders, so only acquiescence in such final orders can possibly be deemed a *waiver* of that right. Acquiescence in anything prior to a final order cannot affect the right to appeal liability, since the right to appeal liability has not matured at that stage. The only thing waived in acquiescing to a pre-final order is the specifics of the "order to which it agreed." *Tel-phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992). Thus, here, in agreeing to the Consent Decree, Port Chester waived its right to challenge cumulative voting and voter education as an improper remedy, *if* liability is established. It manifestly did not waive the right to argue on appeal that Port Chester's prior voting system complied with the Voting Rights Act and that, therefore, *any* judicial remedy is improper and unauthorized.

These basic truisms are confirmed by binding precedent of this Court. *See United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 172 F.3d 217, 222 (2d Cir. 1999). And, needless to say, no case anywhere has held that entering into a consent decree somehow waived the right to contest underlying liability when, as here, the consent decree was *followed* by *both* a final "order" and a final "judgment."

Here then, the only issue is whether the Consent Decree was a final order or judgment, definitively resolving the merits. The plain language of the Consent Decree itself, as well as contemporaneous judicial orders, establish beyond any

rational dispute that the Consent Decree was not a final order resolving the merits. First, the text of the Consent Decree itself specifically states that "judgment" could not be entered for at least eight months after the Consent Decree was entered. Dkt. 119 ¶ 20 (Ex A). Second, all the circumstances surrounding the formation of the Consent Decree confirm that the Consent Decree was merely an interim order that did not waive the parties' appellate rights. Most obviously, the District Court did enter a final order, Dkt. 124 (Ex 2), and (pursuant to a new judge), a final judgment, Dkt. 151 (Ex B), *after* the non-final Consent Decree was ordered into effect. Moreover, the District Court directly confirmed the obvious point that entering into this Consent Decree had no effect on appellate rights. In a hearing shortly before the Court entered the Consent Decree, counsel for Port Chester explained on the record that "all three parties have agreed that nothing that is contained in this consent decree is designed or intended to limit anybody's appellate rights, whatever they may be." 12/17/09 Hr'g Tr. at 27–28 (Ex C). Judge Stephen Robinson responded, "Absolutely," *id.* at 28, and opposing counsel did not dispute this characterization, *id.*[2] Only after a new judge was assigned to the case did Plaintiffs disingenuously argue that Port Chester waived its right to appeal the judgment. *See* 4/14/11 Hr'g Tr. at 8–13.

[2] As demonstrated by the record, the Government inaccurately characterizes Port Chester's counsel's statements as "unilateral." DOJ Mot. at 17.

Finally, and in any event, even if the Consent Decree was somehow a *final* order, Port Chester did not waive its right to appeal liability. It is obvious and established that a *consent* decree cannot waive appellate rights if the parties did not *consent* to it voluntarily. Here, the Court *ordered* the parties to enter into this Consent Decree, and said it would impose its own plan if the parties failed to comply.

BACKGROUND

After a six-day trial, the District Court issued a December 2008 Decision and Order, finding that Port Chester's at-large system for electing its Board of Trustees violated Section 2 of the Voting Rights Act. Dkt. 85. The Court then ordered the parties to submit proposed remedial plans. *Id.* at 56. In response, Plaintiffs proposed a districting plan, Dkt. 87, while Port Chester proposed a cumulative voting plan, Dkt. 91. In November 2009, the Court issued a Summary Order adopting Port Chester's plan. Dkt. 115 at 4–5 (Ex 1). The Court also "order[ed] the parties" to "draft a Consent Decree that details all of the important elements of the implementation, including but not limited to: the form, format, and schedule for providing voter education; bilingual poll workers; Spanish-language materials; practice voting; and the duration of such outreach efforts." *Id.* at 5. The Court explained that if the parties did not comply with this order, the Court would impose its own plan. *Id.* at 7.

In a hearing where the near-final version of the Consent Decree was discussed, the parties and the Court confirmed that this Consent Decree would not impair the parties' right to appeal the Court's judgment. 12/17/09 Hr'g Tr. at 27–28 (Ex C). Port Chester's counsel explained, "all three parties have agreed that nothing that is contained in this consent decree is designed or intended to limit anybody's appellate rights, whatever they may be." *Id.* Judge Stephen Robinson responded, "Absolutely." *Id.* at 28. Opposing counsel did not dispute this characterization. *See id.* At the hearing, the Court also confirmed that the Consent Decree should be "consistent with [the Court's] previous rulings and holdings." *Id.* at 3 (emphasis added).

Five days later, the Court entered the Consent Decree into the docket. Dkt. 119 (Ex A). The Decree confirms that the parties entered into this agreement pursuant to the Court's Summary Order: "[T]he Court in its [Summary] Order *directed* the parties to submit a plan . . . .'" *Id.* at 2 (emphasis added). As directed by the Court, the plan details the voter education plan. And consistent with the Court's previous rulings and holdings, the Decree includes an injunction barring Port Chester from holding elections under the traditional winner-take-all at-large method. *Id.* ¶ 3. The Decree also states that judgment will be entered at a later date. *Id.* ¶ 11 ("Judgment shall not be entered in this case prior to August 15,

2010.”). Nowhere in the Consent Decree do the parties state that they consented to the Court’s prior findings on liability.

Over three months later, the Court issued an Order and Opinion that explained, “This opinion combines the Court’s findings in both the liability and remedial phase of the litigation and is the *final order* in this matter.” Dkt. 124 at 1 (emphasis added) (Ex 2). In this opinion, the Court again confirmed that “the Court *ordered*” the parties to enter into a Consent Decree. *Id.* at 68 (emphasis added). Nowhere in the opinion does the Court state that the parties had consented to the District Court’s liability finding. Moreover, the Consent Decree was amended twice, *see* Dkt. 122, 125, and the Court held a hearing in July 2010 regarding the judgment, 7/22/10 Hr’g Tr. at 9–12 (Ex D). During this hearing, the District Court also praised Port Chester’s implementation of the voter education plan, stating “[t]he town had to spend a lot of time and money and energy and thought making this work . . . . . I want to personally thank you for that.” *Id.* at 5.

In September 2010, the case was adjourned pending reassignment, Dkt. 140, and in November 2010 the case was reassigned to Judge Paul Gardephe, Dkt. 142. The parties then submitted proposed judgments to the Court, and the Court held two more hearings on the judgment. Taking advantage of the fact that a new judge was assigned to the case, Plaintiffs argued for the first time before the Court that

Port Chester waived its right to appeal the judgment by entering into the Consent Decree. *See* 4/14/11 Hr'g Tr. at 8–13.

The Court entered judgment on April 21, 2011, and issued an order agreeing with Plaintiffs' interpretation of the Consent Decree. Dkt. 151 (Ex B). On May 3, 2011, Port Chester filed a timely Notice of Appeal. Dkt. 152.

ARGUMENT

This Court is not bound by the District Court's erroneous interpretation of the Consent Decree because the Court "review[s] the district court's interpretation of a consent decree de novo." *United States v. Broadcast Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001).

I. Because The Consent Decree Is An Interim Order, It Could Not Have Waived Port Chester's Right To Appeal The Judgment

The Government claims this Consent Decree "settled this case" and "therefore [Port Chester] waived any right to appeal." DOJ Mot. at 11. While it is quite true that Port Chester would have waived its appellate rights if it had "settled this case" by consenting to a final order or judgment, *see, e.g.*, *LaForest v. Honeywell Int'l Inc.*, 569 F.3d 69, 73–74 (2d Cir. 2009); *Doyle v. Kamenkowitz*, 114 F.3d 371, 374–75 (2d Cir. 1997), it clearly did no such thing.

A final order "is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Nelson*, 468 F.3d at 119. Absent extraordinary circumstances, 28 US.C. § 1292, parties may only appeal final orders

to contest liability. *S.E.C. v. Rajaratnam*, 622 F.3d 159, 167 (2d Cir. 2010). Accordingly, if parties consent to final judgment, they waive the right to contest the liability determinations supporting the final remedial order. *See Doyle*, 114 F.3d at 374. But, as this Court has clearly held, where "there was no [such final] settlement," the right to appeal liability is not waived. *See, e.g., Int'l Bhd. of Teamsters*, 172 F.3d at 222. In *Teamsters*, when the union agreed to a timetable for a rerun election in a court approved order, it did not waive its right to appeal the court's order on the government's liability for the costs of the rerun election. 172 F.3d at 221–22. This is because agreeing to an interim, non-final remedial order does not implicate the appellate right to challenge liability. Since such orders are not final orders *triggering* the right to appeal liability determinations, acquiescence in such non-final orders cannot waive that non-extant right.

Here, the Consent Decree cannot possibly be a final judgment "end[ing] the litigation on the merits," *Nelson*, 468 F.3d at 119, because it plainly anticipates that judgment will be entered at least eight months later. *See* Dkt. 119 ¶ 11 (Ex A) ("Judgment shall not be entered in this case prior to August 15, 2010"). Moreover, as even the Government concedes, the Consent Decree left the issue of remedy unresolved. DOJ Mot. at 8–9. Rather, the parties opposing cumulative voting were expressly permitted to vacate the Consent Decree, even through 2016, if they moved to do so within sixty days of any Trustee election. *See* Dkt. 119 ¶ 10 (Ex

A). And just as an order that leaves remedy unresolved is not a final appealable order, *see LeBoeuf, Lamb, Greene & MacRae, LLP v. Worsham*, 185 F.3d 61, 64 (2d Cir. 1999), a consent decree that leaves remedy unresolved is not a final order. Because this Consent Decree is merely an interim order, it does not waive Port Chester's appellate rights.

Moreover, all of the parties and Court understood that the Consent Decree was an interim order. Prior to entry of the Consent Decree, the Court issued a Summary Order briefly explaining its decision on remedy, and further stating that it "will issue a full opinion shortly." Dkt. 115 at 7 (Ex 1). As promised, three months *after* the entry of the Consent Decree, the Court issued a comprehensive opinion and order, denominated "final order," detailing the Court's findings on liability and remedy. Dkt. 124 at 1 (Ex 2).[3] If the December 2009 Consent Decree actually resolved all issues of liability and remedy as the Government suggests, then the final order subsequently issued by the Court would have been inexplicable and absurd.

Furthermore, all the parties, including the Government, repeatedly sought a

[3] The District Court, in its April 2011 Order on the appealability of the judgment, stated that the April 1, 2010 "final order" "merely reiterates Judge Robinson's earlier decisions." Dkt. 151 at 2 (Ex B). This does not change the fact that all understood that the Consent Decree was merely implementing a summary, non-final order, to be later followed by a final appealable order and judgment. And, of course, at the time the Consent Decree was entered, the parties did not know whether the subsequent final order would contain new findings and analysis, or would be identical to prior court orders.

final judgment after the final order, which was finally entered in April 2011. Dkt. 151 (Ex B). This effort was, of course, utterly purposeless if the Consent Decree was a final judgment deciding the merits.

Moreover, the Court *ordered* the parties to consent to the Consent Decree. *See* Dkt. 115 at 5 (Ex 1) ("[T]he Court *orders* the parties to come to an agreement on how to best implement the new system. The parties *shall* draft a Consent Decree. . . ." (emphasis added)). The Court would not *order* the parties to acquiesce to a remedy that extinguishes their right to appeal. This fact makes it clear that the Consent Decree is a non-final order.

The circumstances surrounding the formation of the Consent Decree also confirm that the parties understood that this interim order did not waive Port Chester's right to appeal liability. In fact, in a hearing shortly before the Court entered the Consent Decree, counsel for Port Chester explained that "all three parties have agreed that nothing that is contained in this consent decree is designed or intended to limit anybody's appellate rights, whatever they may be." 12/17/09 Hr'g Tr. at 27–28 (Ex C). Judge Stephen Robinson responded, "Absolutely," *id.* at 28, and opposing counsel did not dispute this characterization, *id.* Only after a new judge was assigned to the case did Plaintiffs argue that Port Chester waived its right to appeal liability when it entered into this agreement. *See* 4/14/11 Hr'g Tr. at 8–13.

The Government and the District Court nonetheless assert that the Court should ignore the context of the Consent Decree because "the intent of the parties must be gleaned from within the four corners of the [consent decree], and not from extrinsic evidence." DOJ Mot. at 18 (internal quotation marks omitted); *see also* Dkt. 151 at 3–4 (Ex B) (April 2011 Order on appealability). But the foregoing statements and orders are not offered as extrinsic evidence of the parties' intent, but are simply the normal procedural history establishing that the Consent Decree was not a final order. This Court obviously is allowed (indeed, obliged) to consider the District Court's contemporaneous statements and orders when determining whether a Consent Decree is a final order that resolves all remaining issues. Without considering what came before and after the Consent Decree, it is impossible to determine whether "[a]ll disputes regarding the underlying merits of the action have been rendered moot by the" Consent Decree. *LaForest*, 569 F.3d at 74. Even the Government describes orders and statements preceding and post-dating the Consent Decree, to provide the Court context. *See* DOJ Mot. at 3–10.

In any event, it is well-established that "'reliance upon certain aids to construction is proper, as with any other contract.'" *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985) (quoting *United States v. ITT Continental Banking Co.*, 420 U.S. 223, 238 (1975)). "Such aids include the circumstances surrounding the formation of the consent order . . . . Such reliance does not in any way depart from

the 'four corners' rule." *Id.* Moreover, "where . . . a term of a consent decree is ambiguous, a court may consider extrinsic evidence to ascertain the parties' intent." *Broadcast Musi*c, 275 F.3d at 175. At best, the meaning of the Consent Decree is ambiguous under the Government's interpretation, and therefore this Court may consider extrinsic evidence to clarify this ambiguity.

Moreover, contrary to the Government's assertions otherwise, the existence of an integration clause does not preclude this Court's reliance on extrinsic evidence to clarify the meaning of the Consent Decree. *See, e.g.*, *Telecom Int'l Am., Ltd. v. AT & T Corp.*, 280 F.3d 175, 191 (2d Cir. 2001). "Integration and ambiguity are not mutually exclusive." *U.S. Fire Ins. Co. v. Gen. Reinsurance Corp.*, 949 F.2d 569, 571 (2d Cir. 1991). "[E]ven where there is a complete integration, the rule will not rise up to bar" the consideration of extrinsic evidence. *Id.* (internal quotation marks omitted).[4]

To be clear, we agree that acquiescence in a non-final order does waive the right to challenge the specifics of the order, but it cannot waive the right to

[4] The Government also argues "[t]he effect of th[e] integration clause [contained in paragraph 18 of the Consent Decree] is to 'preclude the incorporation into the contract of implied terms that are inconsistent with the contract.'" DOJ Mot. at 19 (quoting *Bozetarnik v. Mahland*, 195 F.3d 77, 83 (2d Cir. 1999) & citing *Scanlon v. M.V. Super Servant 3*, 429 F.3d 6, 10 (1st Cir. 2005); *ACORN v. Edgar*, 99 F.3d 261, 262 (7th Cir. 1996)). But unlike the appellants in *Bozetarnik*, *Scanlon*, and *ACORN*, Port Chester is not arguing that the Consent Decree contains an implied reservation of rights. Port Chester is simply demonstrating that the Consent Decree was not a final order.

challenge liability since only final orders resolve liability in a manner suitable for appellate review. Thus, Port Chester cannot challenge the remedial propriety of the voter education program contained in the Consent Decree. "A party will not be heard to appeal the propriety of an order which it agreed." *Tel-phonic Servs.*, 975 F.2d at 1137; *Thonen v. Jenkins*, 455 F.2d 977, 977 (4th Cir. 1972) (per curiam). But as this Court's decision in *International Brotherhood of Teamsters* confirms, only matters within the scope of a non-final consent order are waived on appeal; unlike a final order, an interim order does not waive all issues of liability. 172 F.3d at 221–22. None of the cases cited by the Government hint at a contrary rule. And, needless to say, no case anywhere has held that a consent decree was a final judgment waiving the right to contest underlying liability when the consent decree was followed by both a final order and a final judgment.

Here, the Consent Decree at most reflects an interim agreement on remedy, not liability. As directed by the Court, Dkt. 115 at 5 (Ex 1), the Consent Decree describes a voter education program Dkt. 119 (Ex A), which the Court deemed "essential" to "achiev[ing] an effective and non-discriminatory implementation" of cumulative voting. Dkt. 115 at 5 (Ex 1). Also as ordered by the Court, the Consent Decree contains provisions "consistent with [the Court's] previous rulings and holdings." 12/17/09 Hr'g Tr. at 3 (Judge Robinson) (Ex C). Thus, the Consent Decree includes an interim injunction enjoining Port Chester's at-large

election system until a final order is issued. *See* Dkt. 119 ¶ 3 (Ex A). The Government's characterization of this injunction as "permanent" is inaccurate because, as discussed above, the text of the Consent Decree and the circumstances surrounding its formation confirm that the Decree is an interim agreement.

And most importantly, the Consent Decree plainly does not address liability; nowhere in the Consent Decree do the parties reach an agreement on this issue. And, unlike acquiescence in a *final* consent judgment, it is not automatically inferred that liability challenges are being waived. Again, since final judgments inherently resolve the merits of the case, acquiescence in such litigation-ending orders inherently is acquiescence in the merits determination. In contrast, since interim orders do not finally resolve, or authorize appeal of, the district court's merits determinations, agreeing to such orders does not waive the parties' ability to appeal such merits determination when they are finalized.

Finally, even if, as the Government argues, Port Chester was subject to an express waiver rule, the Consent Decree's statement that a judgment cannot be entered for at least eight months *is* an express reservation of appellate rights, because only final orders trigger an entitlement to appellate rights.

II. Port Chester Did Not Voluntarily Enter Into The Consent Decree

Even if the Consent Decree constituted a final order, Port Chester did not waive its right to appeal liability because it did not voluntarily consent to this agreement.

"When a case is settled, the losing party has *voluntarily* forfeited his legal remedy by the ordinary processes of appeal." *LaForest*, 569 F.3d at 73 (emphasis added). Thus, an "[a]ppeal from a *consent* judgment is generally unavailable." *Id.* (internal quotation marks omitted and emphasis added). But "where the party did not actually consent," an appeal is permitted. *White v. Comm'r*, 776 F.2d 976, 977 (11th Cir. 1985) (per curiam).

Here, the District Court specifically *ordered* the parties to enter into the Consent Decree. Prior to entry of the Decree, the Court issued a Summary Order, stating "the Court *orders* the parties to come to an agreement on how to best implement the new system. The parties *shall* draft a Consent Decree that details all of the important elements of the implementation." Dkt. 115 at 5 (Ex 1) (emphasis added). The Court explained that it ordered this Consent Decree because it "strongly believes that both parties need to explicitly articulate the critical factors for non-discriminatory implementation." *Id.* And the Court emphasized that if the parties did not enter into the Consent Decree, the Court would impose its own plan. *Id.* at 7 ("If the parties cannot agree on a Consent Decree detailing a plan to

implement a cumulative voting system, each party will submit their plan and the court will, within 14 days, enter an order detailing an implementation plan.").

The Consent Decree itself confirms that the parties were directed to enter into this agreement. *See* Dkt. 119 at 2 (Ex A) ("[T]he Court in its [Summary] Order *directed* the parties to submit a plan . . . .) (emphasis added). And in the "final order," entered three months after the Consent Decree, the Court reiterated that it had ordered the parties to enter this agreement. *See* Dkt. 124 at 68 (Ex 2) ("[T]he Court *ordered* both parties to determine the necessary conditions for the non-discriminatory implementation of cumulative voting."). Thus, because Port Chester did not voluntarily consent to the Decree, it could not have waived any appellate rights.

CONCLUSION

For the foregoing reasons, this Court should DENY the Government's motion.

Respectfully submitted,

Dated: June 17, 2011

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CERTIFICATE OF SERVICE

I hereby certify on this 17th day of June 2011, I electronically filed with the Clerk's Office of the United States Court of Appeals for the Second Circuit the foregoing Response to Government's Motion to Dismiss, using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 17th day of June 2011, I filed with the Clerk's Office of the United States Court of Appeals for the Second Circuit three copies of this Response to Government's Motion to Dismiss via Federal Express and sent via Federal Express copies of the Response to the aforementioned registered CM/ECF users.

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