

659 F.3d 1276, 80 Fed.R.Serv.3d 1283  
(Cite as: **659 F.3d 1276**)

**H**

United States Court of Appeals,  
Tenth Circuit.  
Ferdinand DE LEON, Plaintiff–Appellant,  
v.  
Imelda R. MARCOS; Ferdinand R. Marcos; Denman Investment Corporation, Inc., Defend-  
ants–Appellees.

No. 10–1578.  
Oct. 31, 2011.

**Background:** Representative of class of over 9500 people who had brought human rights claims against former Philippines President brought action to enforce Illinois judgment registered in the District of Colorado against real property in Colorado. The United States District Court for the District of Colorado, [742 F.Supp.2d 1168](#), granted defendant's motion to dismiss on the merits after the parties had already executed a settlement agreement and filed a stipulation of dismissal, and class representative appealed.

**Holdings:** The Court of Appeals, [Tymkovich](#), Circuit Judge, held that:

- (1) district court's acknowledgment of appellant's withdrawal of motion to vacate or modify the merits decision was a sufficient disposition of the motion for purposes of enabling appellant to benefit from provision tolling time to file an appeal, and
- (2) district court's order granting defendant's motion to dismiss on the merits was void because it was issued after the stipulation was filed and therefore in the absence of jurisdiction.

Vacated and remanded.

West Headnotes

[\[1\]](#) **Federal Courts 170B** ↪ **670**

[170B](#) Federal Courts

[170BVIII](#) Courts of Appeals

[170BVIII\(E\)](#) Proceedings for Transfer of Case

[170Bk665](#) Notice, Writ of Error or Citation

[170Bk670](#) k. Effect of delay. [Most Cited Cases](#)

Timely filing of a notice of appeal in a civil case is a jurisdictional requirement.

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

Reprinted from Westlaw with permission of Thomson Reuters.

If you wish to check the currency of this case, you may do so using KeyCite on Westlaw by visiting <http://www.westlaw.com/>.

659 F.3d 1276, 80 Fed.R.Serv.3d 1283  
(Cite as: 659 F.3d 1276)

**[2] Federal Courts 170B ↪669**

[170B](#) Federal Courts

[170BVIII](#) Courts of Appeals

[170BVIII\(E\)](#) Proceedings for Transfer of Case

[170Bk665](#) Notice, Writ of Error or Citation

[170Bk669](#) k. Commencement and running of time for filing; extension of time. [Most Cited Cases](#)

District court's acknowledgment of appellant's withdrawal of motion to vacate or modify merits decision was a sufficient disposition of the motion for purposes of enabling appellant to benefit from provision tolling time to file an appeal; withdrawn motion was not treated as though it had never been made, and notice of appeal ripened upon the district court's order acknowledging the withdrawal of motion to vacate. [F.R.A.P.Rule 4\(a\)\(4\)\(A\), \(a\)\(4\)\(B\)\(i\), 28 U.S.C.A.](#)

**[3] Federal Courts 170B ↪776**

[170B](#) Federal Courts

[170BVIII](#) Courts of Appeals

[170BVIII\(K\)](#) Scope, Standards, and Extent

[170BVIII\(K\)1](#) In General

[170Bk776](#) k. Trial de novo. [Most Cited Cases](#)

District court's interpretation of stipulation of dismissal was subject to de novo review.

**[4] Federal Civil Procedure 170A ↪1706**

[170A](#) Federal Civil Procedure

[170AXI](#) Dismissal

[170AXI\(A\)](#) Voluntary Dismissal

[170Ak1706](#) k. Stipulations. [Most Cited Cases](#)

Document styled as a stipulation of dismissal, which was signed by both parties, could not be treated as a unilateral voluntary dismissal. [Fed.Rules Civ.Proc.Rule 41\(a\)\(1\)\(A\)\(ii\), 28 U.S.C.A.](#)

**[5] Federal Civil Procedure 170A ↪1706**

[170A](#) Federal Civil Procedure

[170AXI](#) Dismissal

[170AXI\(A\)](#) Voluntary Dismissal

[170Ak1706](#) k. Stipulations. [Most Cited Cases](#)

659 F.3d 1276, 80 Fed.R.Serv.3d 1283  
(Cite as: **659 F.3d 1276**)

Since agreement styled as a stipulation of dismissal, which was signed by both parties, was not rescinded and no further motion was necessary, the district court should have treated the stipulation as a self-executing dismissal; accordingly, district court's order granting defendant's motion to dismiss on the merits was void because it was issued after the stipulation was filed and therefore in the absence of jurisdiction. [Fed.Rules Civ.Proc.Rule 41\(a\)\(1\)\(A\)\(ii\), 28 U.S.C.A.](#)

\***1277** Submitted on the briefs: [FN\\*](#)

[FN\\*](#) After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See [Fed. R.App. P. 34\(a\)\(2\)](#); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[Robert A. Swift](#), Kohn, Swift & Graf, P.C., Philadelphia, PA ([Richard G. \(Chip\) Sander](#), Sander Ingebretsen & Wake, P.C., Denver, CO, with him on the brief), for Plaintiff–Appellant.

Before [LUCERO](#), [BALDOCK](#), and [TYMKOVICH](#), Circuit Judges.

[TYMKOVICH](#), Circuit Judge.

Ferdinand De Leon appeals from the district court's entry of judgment in favor of defendant Denman Investment Corporation, Inc. The district court granted Denman's motion to dismiss on the merits after the parties had already executed a settlement agreement and filed a stipulation of dismissal. As explained below, we have jurisdiction under [28 U.S.C. § 1291](#), and conclude that the stipulation of dismissal was a self-executing dismissal under [Federal Rule of Civil Procedure 41\(a\)\(1\)\(A\)\(ii\)](#). We therefore vacate the district court's judgment and remand for the entry of an order stating that, by stipulation of the parties, the action is dismissed with prejudice.

### I. Procedural Background

De Leon represents a class of over 9500 people who brought human rights claims against former Philippines President Ferdinand **Marcos**. In 1995, the class obtained a judgment of nearly \$2 billion in the United States District Court for the District of Hawaii. In 1997, the class registered the Hawaii judgment in the United States District Court for the Northern District of Illinois pursuant to the enforcement provisions of [28 U.S.C. § 1963](#). The registered judgment became dormant seven years later, but was revived in 2008 and will remain effective until 2017 under Illinois law. De Leon registered the revived Illinois federal judgment in the United States District Court for the District of Colorado in 2008.

Meanwhile, in 2005, the class filed an action in the United States District Court for the Northern District of Texas, seeking to enforce the Hawaii judgment against real property in Texas allegedly owned by the **Marcos** estate (the [Del Prado](#) case). After the Texas district court determined that the Hawaii judgment had expired under Hawaii state law before the [Del Prado](#) plaintiffs filed their complaint, the class obtained an extension of the judgment from the Hawaii district court in 2006. However, the extension was reversed on appeal. See [Hilao v. Estate of Marcos, 536](#)

659 F.3d 1276, 80 Fed.R.Serv.3d 1283  
(Cite as: **659 F.3d 1276**)

[F.3d 980, 982 \(9th Cir.2008\)](#). The *Del Prado* plaintiffs then registered the revived Illinois federal judgment in the Northern District of Texas and amended the complaint to rely on that judgment. The Texas district court ruled that the Illinois judgment could not be registered in other states, but the Fifth Circuit reversed in April 2010, concluding that the Illinois judgment could be registered in other jurisdictions. See *Del Prado v. B.N. Dev. Co.*, [602 F.3d 660, 662 \(5th Cir.2010\)](#).

While the *Del Prado* case was proceeding, De Leon filed this putative class action in September 2009, seeking to enforce the Illinois judgment he had registered in the District of Colorado <sup>FN1</sup> against real property \*1278 in Colorado that the class asserted was owned nominally by Denman but beneficially by the **Marcos** estate. Denman filed a motion to dismiss in October 2009, contending that, among other things, the Illinois judgment was not enforceable in Colorado. <sup>FN2</sup> On June 25, 2010, the Colorado district court held argument on Denman's motion to dismiss, denied a motion to certify the class, and dismissed the sole claim against the **Marcoses**.

<sup>FN1</sup>. Although De Leon also relied on a registration of the Illinois federal judgment in an Illinois state court, there appears to be no reason to discuss the registered state judgment separately. Therefore, we refer only to the singular federal judgment.

<sup>FN2</sup>. Denman also argued that the complaint failed to allege sufficient facts that the real property at issue was owned by the **Marcos** estate, that the claims were barred by issue preclusion based on the district court's decision in *Del Prado* that the Illinois judgment could not be registered in other states, and that the district court should stay this case until the Fifth Circuit ruled on the appeal from the district court's decision in *Del Prado*.

In July 2010, while Denman's motion to dismiss was still under consideration, De Leon filed an Advice of Settlement indicating that the parties had reached a settlement in principle of both this action and *Del Prado*. On August 13, 2010, the parties executed a settlement agreement (Agreement) and filed it four days later in *Del Prado*. Among other things, the Agreement provided:

Within ten (10) business days after the Execution Date, Plaintiff shall submit to the United States District Court for the District of Colorado a motion requesting entry of an order, in the forms attached hereto as Exhibit E, providing that the Colorado Actions are dismissed without prejudice upon entry of the Order and that the dismissals shall become with prejudice as to Denman only on the Effective Date. <sup>FN3</sup>

<sup>FN3</sup>. Ultimately, the settlement agreement's "Effective Date" occurred on December 17, 2010, thirty days after the Texas court granted final approval of the Agreement.

Aplt.App. at 30, ¶ 27. <sup>FN4</sup> The Agreement also provided that if it was rescinded for any reason, De Leon reserved the right to withdraw the dismissal of the Colorado actions.

<sup>FN4</sup>. The plural reference to "Colorado Actions" in this provision of the Agreement in-

659 F.3d 1276, 80 Fed.R.Serv.3d 1283  
(Cite as: **659 F.3d 1276**)

cludes the instant action as well as a related action, *135 Randomly Selected Class Claimants v. Denman Investment Corp.*, No. 05-cv-702-MSK-MEH (D.Colo. filed Apr. 15, 2005). See Aplt.App. at 26 ¶ 7.

On August 19, 2010, De Leon filed the stipulations that were attached to the Agreement in the Colorado district court. The stipulation as to Denman contained three “whereas” clauses, two of which are relevant. The first provides: “WHEREAS, the Agreement requires Plaintiff, within 10 business days of August 13, 2010, to move this Court for an Order dismissing without prejudice the above-captioned action as to Defendant Denman and providing that the dismissal shall become with prejudice on the ‘Effective Date (as defined in the Agreement).’ ” ECF No. 88 at 1. <sup>FNS</sup> The other relevant “whereas” clause states: “WHEREAS, the plaintiff and Denman agree that, in the event the Settlement is rescinded, the Plaintiff may withdraw the dismissal and reinstate the ... action.” *Id.* After the “whereas” clauses, the stipulation provided:

<sup>FNS</sup>. De Leon did not provide certain documents in his appendix relevant to the jurisdictional and procedural questions in this appeal. Consequently, we cite to the Electronic Case Filing (ECF) docket number for those documents.

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between counsel in the above-captioned action that this action be dismissed without prejudice pursuant to [Federal Rule of Civil Procedure 41\(a\)\(2\)](#), each party to bear its own costs. Plaintiff’s counsel \*1279 shall promptly notify the Court of the Effective Date after it occurs.

*Id.* at 2. The stipulation was signed by counsel for De Leon and Denman. Below these signatures, the stipulation reads:

SO ORDERED:

BY THE COURT:

\_\_\_\_\_

Marcia S. Krieger

United States District Judge

*Id.*

On September 23, 2010, the district court entered three orders. In the first order, the court granted Denman’s motion to dismiss on the merits. In the second order, the court withdrew its merits decision in a text-only docket entry. The court stated the following with regard to the stipulation:

[I]n issuing the Order [granting Denman’s motion to dismiss], the Court overlooked the parties’

659 F.3d 1276, 80 Fed.R.Serv.3d 1283  
(Cite as: **659 F.3d 1276**)

prior Stipulation of Dismissal.... However, having reviewed that stipulation, the Court notes that it is conditional in nature, anticipating that the parties would file a motion to dismiss within 10 days of August 13, 2010. No such motion was filed, and thus, the Court assumes the parties have rescinded the settlement as set forth in the Stipulation.

ECF No. 90. In its third order, the district court issued a corrected merits decision, holding that a judgment created by registration under [28 U.S.C. § 1963](#) is enforceable only in the jurisdiction where it is registered and cannot be later re-registered in another jurisdiction. [De Leon v. Marcos, 742 F.Supp.2d 1168, 1176–79 \(D.Colo.2010\)](#). Thus, the judgment created by registration in the Northern District of Illinois could not be re-registered in Colorado to support the action, the court held, and therefore De Leon lacked standing. [Id. at 1179](#).

On September 27, 2010, the district court issued a separate judgment in favor of Denman. On September 30, De Leon filed a motion to vacate or modify the merits decision, invoking [Rules 59](#) and [60 of the Federal Rules of Civil Procedure](#). De Leon argued that the parties' stipulated dismissal stripped the district court of jurisdiction over the merits.<sup>FN6</sup> While the [Rule 59](#) motion was pending, De Leon filed a petition for a writ of mandamus in this court seeking an order compelling the district court to vacate its merits ruling. On December 3, 2010, this court denied the petition, explaining that De Leon had not shown an indisputable right to the requested relief and also had adequate alternative remedies in the form of the pending [Rule 59](#) motion and a direct appeal. *See In re De Leon*, No. 10–1488 (10th Cir. Dec. 3, 2010) (order denying petition for writ of mandamus).

<sup>FN6</sup> De Leon invoked both [Rule 59](#) and [Rule 60](#), and the motion was timely as to each rule. Because there is no material difference in our ensuing appellate jurisdictional analysis for timely motions filed under either rule, we will refer to the motion as a [Rule 59](#) motion.

On December 29, 2010, De Leon filed in the district court a “Notice of Withdrawal” of the [Rule 59](#) motion and a notice of appeal to this court. On January 5, 2011, the clerk of this court ordered briefs on whether this court should summarily dismiss the appeal for lack of jurisdiction. The order framed the issue as follows:

Whether this court has jurisdiction where the notice of appeal was filed more than 30 days after entry of final judgment on September 27, 2010, and where the appellant withdrew his motion to vacate? *See* [28 U.S.C. § 2107\(a\)](#); [Fed. R.App. P. 4\(a\)\(1\)\(A\)](#); [Bowles v. Russell, 551 U.S. 205, 127 S.Ct. \[sic\] 2360, 2366 \[168 L.Ed.2d 96\] \(2007\)](#) (“Today\***1280** we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement.”). *See also* [Vanderwerf v. Smithkline \[sic\] Beecham Corp., 603 F.3d 842 \(10th Cir.2010\)](#) (holding that where the appealing party withdraws its post-judgment motion and the district court does not issue an order on the motion or the withdrawal, the time to appeal begins to run from the entry of final judgment).

*De Leon v. Marcos*, No. 10–1578 (10th Cir. Jan. 5, 2011) (clerk's briefing order).

659 F.3d 1276, 80 Fed.R.Serv.3d 1283  
(Cite as: **659 F.3d 1276**)

Two days after the clerk issued the briefing order, De Leon returned to the district court to file a “Motion for Entry of Order Terminating Action Based on Withdrawal of Motion.” ECF No. 108. In relevant part, the motion read:

In order that [De Leon] may perfect his Notice of Appeal, he requests that this Court enter an order terminating this proceeding based on the Notice of Withdrawal of his Rule 59/60 Motion. (ECF # 102[.] ) An order from this Court disposing of the Motion would satisfy both [FRAP Rule 4\(a\)](#) and the Tenth Circuit's ruling in [Vanderwerf v. Smithkline \[sic\] Beecham Corp., 603 F.3d 842 \(10th Cir.2010\)](#).

*Id.* In a text-only docket entry, the district court ruled on De Leon's Motion for Entry of Order: IT IS HEREBY ORDER[E]D: Plaintiff's 108 Motion to Dismiss is granted in part and denied in part. The motion is granted insofar as the Court deems the Plaintiff to withdraw its 94 Motion to Vacate, which is thus deemed withdrawn and rendered moot. The Motion to Dismiss is denied insofar as it requests “an order terminating the proceeding,” as the case has already been terminated by entry of Judgment on September 27, 2010.

ECF No. 110. De Leon subsequently filed his jurisdictional brief. Denman filed a notice of its intent not to participate in this appeal, stating that it had settled all claims with the class members.

## II. Analysis

### A. Appellate Jurisdiction

[1] “[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement.” [Bowles, 551 U.S. at 214, 127 S.Ct. 2360](#). With certain exceptions not relevant here, a notice of appeal in a civil action “must be filed ... within 30 days after the judgment or order appealed from is entered.” [Fed. R.App. P. 4\(a\)\(1\)\(A\)](#).

The first jurisdictional issue in this appeal is whether De Leon is entitled to the tolling provisions of [Federal Rule of Appellate Procedure 4\(a\)\(4\)\(A\)\(iv\)](#) by virtue of his [Fed.R.Civ.P. 59](#) motion. [Appellate Rule 4\(a\)\(4\)\(A\)](#) provides that “[i]f a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the *order disposing of* the last such remaining motion.” (Emphasis added.) Motions under [Fed.R.Civ.P. 59](#) are included under [Fed. R.App. P. 4\(a\)\(4\)\(A\)\(iv\)](#).

We have interpreted [Rule 4\(a\)\(4\)\(A\)](#) to require an order disposing of the tolling motion in order for the appealing party to benefit from the tolling provision. In [Vanderwerf v. SmithKline Beecham Corp.](#), the district court entered summary judgment in favor of the defendant, and the Vanderwerfs filed a timely [Rule 59\(e\)](#) motion. [603 F.3d at 845](#). When the district court did not rule on the motion for seven months, the Vanderwerfs withdrew it and, on the same day, filed a notice of appeal. *Id.* We explained that the withdrawal of the [Rule 59](#) motion

\*1281 without the entry of an order by the district court left the [merits] order as the order being appealed. Because that order was seven months old, the time for filing a notice of appeal expired

659 F.3d 1276, 80 Fed.R.Serv.3d 1283  
(Cite as: 659 F.3d 1276)

approximately six months before.... [Federal Rule of Appellate Procedure 4](#) requires entry of an order disposing of the [Rule 59](#) motion to give the appealing party the benefit of [Rule 4\(a\)\(4\)\(A\)\(iv\)](#). The Vanderwerfs' withdrawal of their [Rule 59](#) motion leaves the record as if they had never filed the motion in the first place.

[Vanderwerf](#), 603 F.3d at 846 (brackets omitted) (internal quotation marks omitted). In further support, we pointed to [56 Am.Jur.2d Motions, Rules and Orders § 32 \(2009\)](#): “ ‘The effect of a withdrawal of a motion is to leave the record as it stood prior to filing as though the motion had never been made.’ ” [Vanderwerf](#), 603 F.3d at 846. But we also noted, “it seems the best option [for the Vanderwerfs] may be for the Vanderwerfs to have moved to withdraw the motion [for [Rule 59](#) relief] ... thereby triggering a 30–day period for the filing of a timely appeal.” *Id.* at 848.

En route to rejecting the Vanderwerfs' contention that the filing and later withdrawal of the [Rule 59\(e\)](#) motion tolled the thirty-day filing period of [Rule 4\(a\)\(1\)\(A\)](#), we distinguished several cases, one of which is relevant to this case. In [United States v. Rodriguez](#), 892 F.2d 233 (2d Cir.1989), “the government filed a [Rule 59](#) motion, and then sent a letter withdrawing it. Eleven days later, the district court acknowledged the letter in a ruling stating ‘motion denied as withdrawn,’ which the Second Circuit construed as ‘a denial of the government's [[Rule 59](#)] motion.’ ” [Vanderwerf](#), 603 F.3d at 847 (brackets in [Vanderwerf](#) ) (quoting [Rodriguez](#), 892 F.2d at 234). Under these circumstances, the Second Circuit held that the time limitation for filing a notice of appeal was tolled. [Rodriguez](#), 892 F.2d at 236. We distinguished the Vanderwerfs' situation by noting that they “did not wait until the district court had the opportunity to rule [on the [Rule 59\(e\)](#) motion], and thus we have no order disposing of the [Rule 59\(e\)](#) motion to restart the clock.” [Vanderwerf](#), 603 F.3d at 847 (citing [Brae Transp. v. Coopers & Lybrand](#), 790 F.2d 1439, 1442 (9th Cir.1986), for the principle that “the clock began ticking for the filing of the notice of appeal when the ‘order was issued disposing of the [Rule 59](#) motion,’ not when the [Rule 59](#) order [sic] was withdrawn”).

[2] De Leon's case is analogous to [Rodriguez](#) rather than [Vanderwerf](#), and therefore we conclude that De Leon is entitled to tolling. As in [Rodriguez](#), there is a district court order acknowledging the withdrawal—the order granting in part De Leon's “Motion for Entry of Order Terminating Action Based on Withdrawal of Motion.” See ECF No. 110 (“granting [in part] the motion insofar as the Court deems the Plaintiff to withdraw [his] Motion to Vacate, which is thus deemed withdrawn and rendered moot”). Although, like the Vanderwerfs, De Leon “did not wait” to file his notice of appeal until the district court could rule on the [Rule 59](#) motion, [Vanderwerf](#), 603 F.3d at 847, the district court's order acknowledging the withdrawal of De Leon's [Rule 59](#) motion is sufficient for purposes of [Rule 4\(a\)\(4\)\(A\)](#). See [Rodriguez](#), 892 F.2d at 236; 20 James Wm. Moore et al., *Moore's Federal Practice* § 304.13[1] (3d ed.2011) (“A timely post-decisional motion does not defer the start of the appeal period if the motion is withdrawn without an order of the district court either disposing of the motion or *acknowledging withdrawal of the motion*.” (emphasis added)). There was no analogous order in [Vanderwerf](#), but De Leon's filings are akin to the very type of action \*1282 we considered a “best option” in [Vanderwerf](#), namely, to move “to withdraw the motion [for [Rule 59](#) relief] ... thereby triggering the 30–day period for the filing of a timely



659 F.3d 1276, 80 Fed.R.Serv.3d 1283  
(Cite as: 659 F.3d 1276)

appeal.” [Vanderwerf](#), 603 F.3d at 848.

The sequence of events in the district court also implicates another of [Rule 4\(a\)\(4\)](#)'s tolling provisions, [Rule 4\(a\)\(4\)\(B\)\(i\)](#), which provides:

If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in [Rule 4\(a\)\(4\)\(A\)](#)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

De Leon's notice of appeal was premature because he filed it after the district court entered judgment but before the court disposed of the [Rule 59](#) motion. However, under [Rule 4\(a\)\(4\)\(B\)\(i\)](#), the notice of appeal ripened upon the district court's order acknowledging the withdrawal of the [Rule 59](#) motion. This case is distinguishable from [Copar Pumice Co. v. Morris](#), 639 F.3d 1025 (10th Cir.2011). In [Copar Pumice](#), appellants filed a notice of appeal after they filed a Rule 50(b) motion, which also tolls the time for filing a notice of appeal under [Rule 4\(a\)\(4\)\(A\)\(i\)](#), and before the district court ruled on the Rule 50(b) motion. Citing [Vanderwerf](#), the panel stated that “a withdrawn [Rule 50(b) ] motion is treated as though the motion had never been made for purposes of [Rule 4](#),” and therefore “appellants' withdrawal of their Rule 50(b) motion renders [Rule 4\(a\)\(4\)\(B\)](#) [ (the ripening provision) ] inapplicable.” *Id.* at 1030 (citation omitted) (internal quotation marks omitted). But because the appellants had also filed a notice of appeal within thirty days of the judgment, the appeal was timely under [Rule 4\(a\)\(1\)](#). *Id.*

Significantly, it does not appear the district court in [Copar Pumice](#) entered any order acknowledging the withdrawal, as is the case here. Thus, given our view that the district court's acknowledgment of De Leon's withdrawal was a sufficient disposition of the [Rule 59](#) motion for purposes of [Rule 4\(a\)\(4\)\(A\)\(iv\)](#), the withdrawn [Rule 59](#) motion is not treated as though it had never been made, and the ripening provisions of [Rule 4\(a\)\(4\)\(B\)](#) apply.

## **B. The Stipulation of Dismissal**

Having established our appellate jurisdiction, the next question is whether the district court erred in interpreting the stipulation of dismissal. De Leon argues that the stipulation was self-executing as a stipulation under [Fed.R.Civ.P. 41\(a\)\(1\)\(A\)\(i\) or \(ii\)](#). In the alternative, he argues that if a court order was required under [Fed.R.Civ.P. 41\(a\)\(2\)](#), the district court abused its discretion in failing to approve the stipulation.

### **1. Standard of review**

[3] De Leon's arguments call for evaluation of the district court's interpretation of the stipulation. We have found no Tenth Circuit law directly on point regarding what standard of review applies in this circumstance. But guidance can be drawn from [United States v. Garcia-Zambrano](#), 530 F.3d 1249 (10th Cir.2008). In that case, lacking any precedent directly addressing the standard of review applicable to a district court's interpretation of an affidavit, we applied the standards of review applicable to a district court's interpretation of a written contract, noting that this court is

659 F.3d 1276, 80 Fed.R.Serv.3d 1283  
(Cite as: **659 F.3d 1276**)

“in as good a position as the trial court to interpret a written document.” *Id.* at 1256 (internal quotation marks omitted). We explained that our level of review is based on whether the district court uses extrinsic evidence. *Id.* \*1283 “[W]hen the trial court resorts to extrinsic testimony to ascertain the meaning of the contractual terms, the interpretation is factual,” and therefore “we will reject the court's interpretation only if clearly erroneous.” *Id.* But if the court bases its interpretation “solely on the court's reading of the written words in the affidavit,” the interpretation is a matter of law, and de novo review applies. *See id.*

The district court appears to have based its interpretation of the stipulation solely on its reading of the written words of the stipulation. Again, the court stated in its text-only order that

having reviewed [the] stipulation, the Court notes that it is conditional in nature, anticipating that the parties would file a motion to dismiss within 10 days of August 13, 2010. No such motion was filed, and thus, the Court assumes that the parties have rescinded the settlement agreement as set forth in the Stipulation.

ECF No. 90. Therefore, under *Garcia-Zambrano*, we review the district court's interpretation of the stipulation de novo.

## 2. Dismissal under [Fed.R.Civ.P. 41\(a\)\(1\)](#)

Under [Rule 41\(a\)\(1\)\(A\)\(i\)](#), a plaintiff can voluntarily dismiss a case “by filing ... a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment.” Under [Rule 41\(a\)\(1\)\(A\)\(ii\)](#), a plaintiff can voluntarily dismiss a case “by filing ... a stipulation of dismissal signed by all parties who have appeared.” A stipulation of dismissal filed under [Rule 41\(a\)\(1\)\(A\)\(i\) or \(ii\)](#) is self-executing and immediately strips the district court of jurisdiction over the merits. *See Janssen v. Harris*, 321 F.3d 998, 1000 (10th Cir.2003) (stating that under [Rule 41\(a\)\(1\)\(A\)\(i\)](#), a “voluntary dismissal is self-executing, i.e., it is effective at the moment the notice is filed with the clerk and no judicial approval is required”) (internal quotation marks omitted); *Smith v. Phillips*, 881 F.2d 902, 904 (10th Cir.1989) (stating that a [Rule 41\(a\)\(1\)\(A\)\(ii\)](#) stipulation “cannot be conditioned by the court, and does not call for the exercise of any discretion on the part of the court. Once the stipulation is filed, the action on the merits is at an end.”) (footnote omitted) (citations omitted).<sup>FN7</sup>

<sup>FN7</sup> *Janssen* and *Smith* both cite to [Rule 41\(a\)\(1\)\(A\)\(i\) or \(ii\)](#) rather than 41(a)(1)(A)(i) or (ii) because they predate the restyling of the Civil Rules in 2007 that resulted in the creation of subparagraph (A). *See Lorillard Tobacco Co. v. Engida*, 611 F.3d 1209, 1212 n. 2 (10th Cir.2010). Because the change was not substantive, we have referred to the current format of [Rule 41\(a\)\(1\)](#).

[4] Here, Denman was the only defendant to appear, and it filed a motion to dismiss, not an answer or a motion for summary judgment. Thus, De Leon could have dismissed the case unilaterally under [Rule 41\(a\)\(1\)\(A\)\(i\)](#). But this portion of [Rule 41](#) contemplates a notice of dismissal filed by the plaintiff alone. Here, both parties signed a document styled as a stipulation of dis-

659 F.3d 1276, 80 Fed.R.Serv.3d 1283  
(Cite as: 659 F.3d 1276)

missal. Thus, we do not construe the stipulation as a [Rule 41\(a\)\(1\)\(A\)\(i\)](#) notice of dismissal. Consequently, we see no error in the district court's failure to treat it as such.

As to [Rule 41\(a\)\(1\)\(A\)\(ii\)](#), both De Leon and Denman signed the stipulation, as required by that portion of [Rule 41\(a\)\(1\)\(A\)](#). Unfortunately, two ambiguities are raised by the stipulation of dismissal. First, it invokes [Rule 41\(a\)\(2\)](#), but that rule contemplates a motion to dismiss filed by the plaintiff in situations other than those set out in [Rule 41\(a\)\(1\)](#), not a jointly signed stipulation. Under [Rule 41\(a\)\(2\)](#), the parties must obtain a court order:

**\*1284 (2) By Court Order; Effect.** Except as provided in [Rule 41\(a\)\(1\)](#), an action may be dismissed *at the plaintiff's request* only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with *the plaintiff's motion to dismiss*, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

[Fed.R.Civ.P. 41\(a\)\(2\)](#) (emphasis added). As discussed above, the procedural posture of the case was such that the parties could have invoked the exception to [Rule 41\(a\)\(2\)](#), i.e., [Rule 41\(a\)\(1\)](#), and the stipulation was not styled as plaintiff's motion. The second ambiguity is that the stipulation provides a space for the district judge's signature but does not expressly ask the district court to approve the dismissal; in other words, it is not a motion to dismiss as contemplated by [Rule 41\(a\)\(2\)](#).

Despite these ambiguities, it appears that neither of them affected the district court's interpretation of the stipulation. Instead, the court read the stipulation as conditioned on the filing of a motion to dismiss and assumed that the parties had rescinded the Agreement. Again, the first relevant "whereas" clause of the Agreement provides: "WHEREAS the Agreement requires Plaintiff, within 10 business days of August 13, 2010, to move this Court for an Order dismissing without prejudice the above-captioned action as to Defendant Denman and providing that the dismissal shall become with prejudice on the 'Effective Date (as defined in the Agreement).'" ECF No. 88 at 1. Because this information is contained in a "whereas" clause, we view the stipulation itself as the "motion" referred to in that clause. The district court's conclusion that a separate motion was required was therefore incorrect. Read as a whole, the stipulation must mean the parties intended to stipulate to a [Rule 41\(a\)\(1\)\(A\)\(ii\)](#) dismissal even though they cited, apparently in error, to [Rule 41\(a\)\(2\)](#).

[5] Further, there is no reason to assume the parties rescinded the Agreement. The second relevant "whereas" clause stated that De Leon "may withdraw the dismissal" if "the Settlement is rescinded." ECF No. 88 at 1 (emphasis added). Thus, even if the parties rescinded the Agreement, De Leon was not required to withdraw the dismissal. Since it is clear that the Agreement was not rescinded and that no further motion was necessary, the district court should have treated the stipulation as a self-executing dismissal under [Rule 41\(a\)\(1\)\(A\)\(ii\)](#). Accordingly, the district court's order granting Denman's motion to dismiss on the merits is void because it was issued after

659 F.3d 1276, 80 Fed.R.Serv.3d 1283  
(Cite as: **659 F.3d 1276**)

the stipulation was filed and therefore in the absence of jurisdiction. See [Smith, 881 F.2d at 904](#) (explaining that “[o]nce the stipulation is filed, the action on the merits is at an end”).

### **III. Conclusion**

For the foregoing reasons, the judgment of the district court is VACATED, and this matter is REMANDED to the district court with instructions to enter an order stating that, by stipulation of the parties, the action is dismissed with prejudice.

C.A.10 (Colo.),2011.  
De Leon v. Marcos  
659 F.3d 1276, 80 Fed.R.Serv.3d 1283

END OF DOCUMENT