UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EUGENE MARTIN LAVERGNE, *et al.*, *Plaintiffs*, v. UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*, *Defendants*.	Civil Action No. 17-793-CKK-CP-RDM

FEDERAL DEFENDANTS' OPPOSITION TO
PLAINTIFF EUGENE LAVERGNE'S MOTION TO RECONSIDER

Contrary to Plaintiff Eugene Martin LaVergne's conclusory assertion, the Court did not lose jurisdiction over Defendants' pending motions to dismiss when he filed an improper notice of direct appeal to the Supreme Court. By way of relevant background, Mr. LaVergne brought this case on April 28, 2017, ECF No. 1, and amended it on May 9, 2017, ECF No. 4. As amended, Mr. LaVergne and four co-plaintiffs allege—contrary to any accepted account of history—that since 1791 there has been a provision in the United States Constitution called "Article the Frist," which requires the U.S. House of Representatives to be apportioned such that there be at least one representative for every 50,000 persons in the United States, which, by their math, requires that the House contain at least 6,230 members as of the last census. *See* Am. Compl. at 19 ¶ 1, ECF No. 4. For a House that size to achieve a quorum, 3,116 members would have to be present. *Id.* at 20 ¶ 1. Because the House of the 115th Congress contains only 435 members, Plaintiffs say, each and every action taken by that House—and presumably that of every other Congress in recent history—lacked a quorum and must be declared illegal and void *ab initio*. *Id.* at 67 ¶ J.

On October 6, 2017, the Court set a telephone conference for October 20, 2017, to schedule further proceedings. ECF No. 38. In filings submitted in anticipation of that conference, defendants noted that one of the bases under which they would seek dismissal was that Mr. LaVergne was

collaterally estopped from pursuing his claims, having unsuccessfully litigated the same issue in federal court in New Jersey in 2011. ECF No. 45. At the conference, the Court directed the federal and state defendants to brief collateral estoppel as a threshold issue before addressing their other bases for dismissal, and it set a schedule for them to do so. ECF No. 51. On the morning of the conference, apparently, Mr. LaVergne sent to the Court a motion for summary judgment, which was docketed later that day. ECF No. 34. The federal and state defendants moved to stay or hold that motion in abeyance pending resolution of their motions to dismiss. ECF Nos. 60, 61. Mr. LaVergne did not oppose those motions. *Id.* On December 21, 2017, the Court denied Mr. LaVergne's motion for summary judgment "without prejudice to it being refiled at a later date and when this case proceeds to a point where the Court considers the merits of Plaintiffs' claims." ECF No. 80.[1]

Five months later, on May 31, 2018, while Defendants' motions to dismiss were pending, Mr. LaVergne filed a motion for reconsideration, requesting that the Court vacate its prior order and reinstate his summary judgment motion. ECF No. 123. On June 6, 2018, the Court denied that motion, noting that "Plaintiff's summary judgment motion was denied without prejudice because, in an exercise of its discretion, the three-judge panel determined that it would be more efficient to consider that motion at a later stage of this case after certain threshold, dispositive legal issues were resolved." ECF No. 124. On June 11, 2018, Mr. LaVergne filed a notice of direct appeal to the Supreme Court, seeking review of the order denying his motion for reconsideration. ECF No. 126.

[1] Though the Court referred to the motion for summary judgment as "Plaintiffs'" motion, only Mr. LaVergne moved for summary judgment.

On September 6, 2018, the Court granted Defendants' motion to dismiss, concluding that Mr. LaVergne is barred by collateral estoppel from relitigating his Article the First claims. ECF No. 127. Mr. LaVergne has moved to reconsider that order, contending that his direct appeal of the Court's order denying his request to reconsider the order denying his summary judgment motion without prejudice divested the Court of jurisdiction to decide the pending motions to dismiss. ECF No. 133. Mr. LaVergne cites no specific legal authority for this point. Instead, he contends that his "preliminary research" indicates "*at the very least* a factual and legal presumption" that the notice transferred jurisdiction to the Supreme Court and that the burden is therefore "***NOT*** on [Mr. LaVergne] . . . but rather the burden is on the Three Judge District Court to explain the claimed basis of retained jurisdiction and authority to act." ECF No. 133-1 at 7 (emphases in original).

Contrary to Mr. LaVergne's assertion, "[t]he party seeking relief under Rule 60(b) bears the burden of showing that he or she is entitled to the relief." *Jarvis v. Parker*, 13 F. Supp. 3d 74, 77 (D.D.C. 2014). By any measure, Mr. LaVergne's "preliminary research" and asserted "factual and legal presumption" fall far short of meeting that burden.

In any event, the law is clear that Mr. LaVergne's notice of appeal did not deprive the Court of jurisdiction to decide the motion to dismiss. It is true, generally, that "[t]he filing of a notice of appeal . . . 'confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal.'" *United States v. DeFries*, 129 F.3d 1293, 1302 (D.C. Cir. 1997) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (*per curiam*)). Courts, however, have "carved out a few narrow exceptions to this rule, such as where [a party] frivolously appeals . . . or takes an interlocutory appeal from a non-appealable order." *Id.* at 1302–03 (internal citations omitted); *see also McKesson HBOC, Inc. v. Islamic Republic of Iran*, 315 F.Supp.2d 63, 66 (D.D.C. 2004) ("[A] notice of appeal from an unappealable

order does not divest the district court of jurisdiction."). "Instead of allowing [a party] to willy-nilly deprive [a] Court of jurisdiction, thus bringing . . . proceedings to a standstill while a non-appealable ruling wends its way through the appellate process, the Court [may] disregard the notice of appeal from a non-appealable order and proceed with the case." *Hammon v. Barry*, 752 F. Supp. 1087, 1092 (D.D.C. 1990) (internal citations and quotation marks omitted); *see also Ruby v. Sec'y of the United States Navy*, 365 F.2d 385, 389 (9th Cir. 1966) ("Where the deficiency in a notice of appeal, by reason of untimeliness, lack of essential recitals, or reference to a non-appealable order, is clear to the district court, it may disregard the purported notice of appeal and proceed with the case, knowing that it has not been deprived of jurisdiction.").

The order denying Mr. LaVergne's motion for reconsideration of the order denying without prejudice his motion for summary judgment was not appealable, and Mr. LaVergne's improper notice of direct appeal had no effect on this Court's jurisdiction. Mr. LaVergne's notice of direct appeal invoked 28 U.S.C. § 1253, which states

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Mr. LaVergne contends that his summary judgment motion sought permanent injunctive relief, thereby making the denial of the motion to reconsider the denial without prejudice of that motion immediately appealable. ECF No. 133-1 at 4. Mr. LaVergne ignores clear and binding precedent to the contrary. In *Goldstein v. Cox*, the Supreme Court noted that its jurisdiction under § 1253 is "narrowly construed" so as to prevent piece-meal appellate review and to limit the review of interlocutory orders in the Supreme Court. 396 U.S. 471, 478 (1970). The Court therefore held in no uncertain terms that "the only interlocutory orders that we have power to review under [§ 1253] are orders granting or denying preliminary injunctions." *Id.* at 475. The Court therefore concluded

that it lacked jurisdiction to review an order denying a motion for summary judgment. *Id.* at 475–76. Under this precedent, Mr. LaVergne's June 11, 2018, notice of appeal sought review of an unappealable order—namely, the denial of a motion for reconsideration of a denial without prejudice of a motion for summary judgment. That notice therefore had no effect on this Court's jurisdiction to resolve Defendants' motion to dismiss. *See DeFries*, 129 F.3d at 1302–03.

For this reason, Mr. LaVergne's motion for reconsideration should be denied.

Respectfully submitted,

JESSIE K. LIU, D.C. Bar #472845
United States Attorney

DANIEL F. VAN HORN, D.C. Bar #924092
Chief, Civil Division

By: /s/ Johnny Walker
JOHNNY H. WALKER, D.C. Bar #991325
Assistant United States Attorney
555 4th Street, N.W.
Washington, District of Columbia 20530
Telephone: 202 252 2575
johnny.walker@usdoj.gov

Counsel for the Federal Defendants