

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____	X	
Yoel Weisshaus	:	Case: 11-4934-cv
	:	
vs.	:	On Appeal from SDNY:
Port Authority of New York and New Jersey et al,	:	11-6616-cv (LAP)
_____	X	

AFFIRMATION IN OPPOSITION TO STRIKE APPENDIX

State of New Jersey
§
County of Bergen

Appellee Port Authority of New York and New Jersey (“Port Authority” herein after) filed a motion June 27, 2012 to strike portions of Appellant’s appendix and brief. I affirm in its opposition for the following reasons:

1. I am Yoel Weisshaus (“Weisshaus”), *pro se* appellant in this action.
2. Per Local Rule 32.2, I disclose that this document was drafted entirely by me.
3. This appeal situates by Appellant-Weisshaus for an opportunity to amend his complaint to cure its deficiencies, something that the district court did not consider.
4. The Port Authority takes the position that it wants to strike portions of appellant’s appendix in retaliation to “Pursuant to the Court’s June 27, 2012

Order,” limiting the Port Authority not to include “with its brief any documents that were not before the District Court.” (*See* declaration ¶11)

5. At first, the Port Authority filed a motion to file an appellee appendix, but did not identify which documents it sought to submit with such appendix. (*Docket entry* 65)

6. There was no attempt by the Port Authority to receive from Weisshaus consent for an appellee appendix.

7. Because the Port Authority did not identify which documents it seeks to submit as an appellee appendix, Weisshaus was forced to file an opposition. (*Docket entry* 68). This Court properly considered that Port Authority did not identify which documents it seeks to submit and therefore, limited an appellee appendix to those contents that were part of the record in the district court. Nevertheless,

8. On June 27, 2012, Weisshaus spoke to Edward Schroll Esq., the attorney for the Port Authority who handles this case internally, and offered that if the documents the Port Authority wishes to submit are identified; he may consent to accept them as an appellee appendix.

9. Mr. Schroll returned the phone call and replied that the Port Authority does not want to identify these documents to Weisshaus and will proceed by motion to strike.

10. Fed. R. App. P. 30(b) (1) provides that “The parties are encouraged to agree on the contents of the appendix.” In this case,

11. Prior to Weisshaus filing his brief and the joint appendix, Port Authority notified the Court on December 19, 2011 that they are not going to file an appellee brief and therefore will take no position on this appeal. (See *docket entries* 14, 47, and 53) ¹

12. Appellant-Weisshaus’ brief with the joint appendix was accepted as filed on March 29, 2012. (*Docket entry* 40)²

13. On April 16, 2012, Port Authority changed its position, wanting to file an appellee brief. (*Docket entries* 55, 59, and 64)

14. The Port Authority now argues that it wants to strike appellant appendix because “Pursuant to the Court's June 27, 2012 Order, the Port Authority is unable to include with its brief any documents that were not before the District Court.”

¹ It is a common practice before this Court that appellees do not participate on appeal from threshold *sua sponte* dismissals. See Gardner v. McArdle, 461 F. App'x 64 (2d Cir. 2012) and Robles v. Evans, 10-2343-PR, 2012 WL 1654951 (2d Cir. May 11, 2012)(summary orders). Weisshaus had no reason to expect otherwise when the Port Authority and the State of New York stated in their appearance notices that it would not participate in this appeal.

² We have also found that “good cause” for consulting evidence outside the administrative record existed where an insurer's claimed reason for denying a claim was not stated in its notices to the claimant, Juliano v. Health Maint. Org. of New Jersey, Inc., 221 F.3d 279, 289 (2d Cir. 2000). Locher v. Unum Life Ins. Co. of Am., 389 F.3d 288, 295 (2d Cir. 2004). In this case, the district court did not consider whether amending his complaint would be fruitful or futile.

15. Notwithstanding, Fed. R. App. P. 30(b) provides that the parties should communicate about the appendix and there were efforts by Appellant-Weisshaus to work with Port Authority over the content of the appendix. The Port Authority files this motion in retaliation to the Court order limiting the scope of Port Authority’s intent to file an appellee appendix without any consideration to the appellant.

16. The Port Authority files a motion to strike notwithstanding that the appellee brief filed along with this motion relies heavily on the joint appendix filed by Weisshaus and the pages it seeks to strike. For instance,

17. Port Authority seeks to eliminate from the appendix exhibits “J” through “CC,” which run as page numbered from 56 through 274. However,

18. The Port Authority’s brief relies heavily on Weisshaus’ appendix, especially-including on parts it seeks to strike, such as:

Appendix Relied on By Port Authority as the text reads:	Cited in Port Authority’s Brief on Pages:
Port Authority claims that Weisshaus attempted “to litigate this case in the press” <i>citing</i> Joint Appendix 84 through 89	Page 1
“Weisshaus heard about the proposed toll increases on August 5, 2011, the day of the Port Authority’s initial press release	Page 3

Appendix Relied on By Port Authority as the text reads:	Cited in Port Authority's Brief on Pages:
announcing the proposed increases, while sitting in his car at a tollbooth" <i>citing</i> Joint Appendix 85.	
The same is following to the end of the paragraph etc.	
"the Port Authority announced in a press release a proposed toll increase on its tunnels and bridges and a fare increase for the PATH train" <i>citing</i> Joint Appendix 90-92.	Page 5
"In fact, it cited several projects that are contingent upon the toll and fare increases (including replacing the suspender cables on the George Washington Bridge, replacement of the Lincoln Tunnel Helix, and raising the Bayonne Bridge) and the WTC was not one of them" <i>citing</i> Joint Appendix 90 - 91	Page 5
The same is in the following paragraph etc.	
"The <i>AAA</i> action claims violations of the dormant Commerce Clause of the United States Constitution and the Surface Transportation and Uniform Relocation Assistance Act of 1987	Page 7

Appendix Relied on By Port Authority as the text reads:	Cited in Port Authority's Brief on Pages:
("Highway Act")(33 U.S.C. § 508)" <i>citing</i> Joint Appendix 102	
"It should be noted that Cardozo School of Law Professor Lucille Roussin helped Weisshaus prepare his Complaint" <i>citing</i> joint appendix 84.	Page 8
"the toll structure "focuses the greatest increase on cash users and trucks that cause the most traffic congestion and wear and tear," as well as the personnel costs of staffing toll collectors" <i>citing</i> Joint Appendix page 90.	Page 17

19. These documents were not available to Weisshaus at the time of filing his complaint. Under the normal course of litigation, these documents would have been acquired in due course. Nevertheless, the district court's issuance of *sua sponte* dismissal prevented Weisshaus from acquiring them in due course and submitting them into the record. However,

20. There are extraordinary circumstances warranting their inclusion in to the record because the district court did not allow Weisshaus to establish a record in support of his complaint.

21. The evidence submitted in the appendix are there for the persuasion of the Court that Weisshaus can plea a proper claim if he is given the opportunity to do so. Consistent with Fed. R. App. P. 30(a) (2), these documents have an independent relevance in this appeal and are necessary because they further support the actual controversy presented by Weisshaus.

22. The Federal Rules of Appellate Procedure also allow submitting documents if they are necessary or have an independent relevance to the record on appeal as well, if the parties wish to direct the Court's attention for review.

23. The documents that Weisshaus entered into the appendix prior to the participation of the Port Authority in this appeal, all have an independent relevance to the record on appeal and are even part of the record on appeal for a number of reasons. For instance,

24. Exhibits J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y Z, AA, and CC are documents that are necessary to preserve on the record if Weisshaus will be given the opportunity to amend his complaint. Since a party on appeal must raise all the issues they want to preserve on appeal for remand, they are necessary for the appellant to raise them here.

25. This case was dismissed incorrectly *sua sponte* by the district court without providing Weisshaus an opportunity to amend the complaint to cure its deficiencies. As briefed, all of these documents establish that Weisshaus can state

a claim if he is given leave to amend his complaint to cure its deficiencies. (That particular point of providing Weisshaus no opportunity to cure the deficiencies in his complaint is a point presented in Weisshaus' brief for the panel to review.)³

26. Exhibits J, K, L, V, W, X, and Z were submitted by the parties to the district court in AAA v. Port Auth. of New York & New Jersey, 11 CIV. 6746 RJH, 2012. *See* the PACER stamp in the caption of some of these documents. The case of AAA is part of the record on appeal, *See* the Civil Appeal Pre-Argument Statement (Form C), and the briefs submitted by the parties.

27. Exhibits J, K, L, M, N, S, T, U, V, W, X, AA, and CC are documents that Weisshaus had prepared to submit in his motion for reconsideration, had he been given leave to file one by November 28, 2011.⁴

³ As this Court held that: If the district court fails to give notice before *sua sponte* granting summary judgment and the moving party was, as a result, procedurally prejudiced, we must reverse. A party is procedurally prejudiced if it is surprised by the district court's action and that surprise results in the party's failure to present evidence in support of its position. Global Aerospace, Inc. v. Hartford Fire Ins. Co., 354 F. App'x 501, 503 (2d Cir. 2009)(emphasis added).

Where, after rendition of a judgment sought to be reversed, it has been compromised, evidence outside the record may be admitted to prove the compromise. Dakota County v. Glidden, 113 U.S. 222 (1885) When Weisshaus filed his complaint, the clerk for the district court ordered Weisshaus not to submit any filings or evidence until further notice. *See* Weisshaus v. The Port Authority of New York and New Jersey., 11-6616-cv entry 3. Thus, that limited Weisshaus' ability to file anything with the district court before the issuance of dismissal, including the filing of evidence to support his complaint.

⁴ Local Rule for the Southern District of New York provides that Rule 6.3 provide that a motion for reconsideration must be made within 14-days of such judgment; Weisshaus sought by letter, leave to extend that 14-day deadline from the judgment of October 24, 2011 to November 28. The district court issued an order denying a motion for reconsideration, without identifying

28. This case stems from a threshold dismissal where the district court ordered “No further filings will be accepted in this case except those directed to the United States Court of Appeals for the Second Circuit.” *See* Joint Appendix p 53. Thus, had Weisshaus been allowed to file for reconsideration, documents of appendix J, K, L, M, N, S, T, U, V, W, X, AA, and CC he would have included to support the argument for an opportunity to amend his complaint. (This is another point presented and heavily argued by the parties in their briefs.)

29. Exhibits M through BB are all points of facts related to this case that occurred between the time the district court issued its *sua sponte* order and the filing of this brief.

30. Exhibits M, N, O, P, Q, and R also have an independent relevance on appeal because they support the relief sought in the complaint of legislature approval before the enactment of an increase in toll prices. “The Court of Appeals was correct to take note of the legislative history when construing the statute.” Boumediene v. Bush, 553 U.S. 723, 738 (2008)

31. Exhibits J and K have independent relevance to the record on appeal because “J” outlines the toll schedules of the Port Authority for the past 30-years;

if, when, and how such motion was filed. The district court misconstrued Weisshaus’ request for an extended deadline to file such motion as the actual motion, when it was not.

moreover, they present the geographical map between New Jersey and Southern New York and what a person is charged, which is the precise issue in this case.

32. Exhibit L has an independent relevance to the record on appeal, being the only document made public by the Port Authority that contains both the public statement and board resolution setting forth the toll prices, which is the controversy herein.

33. Further, exhibits M, N, O, P, Q, R, S, T, and U support a fact stated in Weisshaus' brief that toll hikes have sparked public and legislative outrage. They are part of the historical procedure of this case and this point is necessary to preserve on remand from appeal to the district court.

34. Exhibits U, V, W, and X are documents that were revealed after filing the complaint and support that Weisshaus' complaint does state a claim that the toll prices were increased in lack of public notice. Those documents further support that Weisshaus' complaint stated a valid claim of lack of public notice.

35. The Port Authority also revealed Exhibit Y as part of a continuation of the toll price increases after this appeal started. This document further supports that Weisshaus can state a valid claim of differential treatment based on residency and should be given an opportunity to amend his complaint.

36. Exhibits Z and BB are also appropriate according to Fed. R. App. P. 32.1(a) because "it is persuasive and aids us in the correct determination of this

case.” United States v. Roberts, 624 F.3d 241, 251 (5th Cir. 2010)“The Tenth Circuit permits citation of unpublished decisions for their persuasive value.” United States v. Stella, 591 F.3d 23, 29 (1st Cir. 2009).

37. Exhibit BB was attached as required by Fed. R. App. P. 32.1(b) that when citing summary orders and opinions not published, they should be attached with the brief.

38. Exhibit CC is necessary to support that the toll price differential between cash and E-ZPass do not have *prima facie* defense of cost savings analysis, further supporting that Weisshaus should be able to amend his complaint to cure its deficiencies in the allegations of economic discrimination.

39. Weisshaus has a right on appeal to bring forth to the Court’s attention valid support to show that there is legal basis to his claims, and *sua sponte* dismissal without an opportunity to amend the complaint is an error. Thus, valid support is warranted to show that a claim can properly be stated with an opportunity to amend his complaint.⁵

40. WHEREBY, where there is an allegation in Weisshaus under the same facts creating the AAA cause of action alleging that the use of toll revenue to

⁵ Materials submitted to Court of Appeals after district court had dismissed complaint for failure to state claim, although not part of official record and having no standing as evidence, were usable to show how the accident might have happened, in effort to show that the complaint should not have been dismissed on its face, provided that material was not inconsistent with allegations of complaint. Orthmann v. Apple River Campground, Inc., 757 F.2d 909 (7th Cir. 1985). Fed. R. App. P. 10

rebuild the World Trade Center is prohibited. AAA was filed nine days after Weisshaus, and was not dismissed *sua sponte* as failure to state, frivolous, or sovereign immunity. Indeed, the case has been submitted to discovery. The appellant makes the foregoing affirmation in opposition to appellee's attempt to strike the appendix. These documents have an independent relevance on the record on appeal and are necessary to aide the Court in seeing the nexus between the two cases and that district court treated a *pro se* plaintiff differently than a party represented by counsel under the same facts creating the cause of action in both cases.

WHEREBY, where the Port Authority does not state why the documents it wishes to remove from the appendix are unnecessary. The appellant makes the foregoing affirmation in opposition to appellee's attempt to strike the appendix, because these records are necessary to aide the Court's persuasion that Weisshaus should get an opportunity to amend his complaint to cure its deficiencies.

WHEREBY, where the Appellee Port Authority seeks to alter the appendix in retaliation to the Court order limiting an appellee appendix to the record on appeal because the Port Authority did not identify which documents it seeks to submit to the appendix; the appellant is forced to make the foregoing affirmation in opposition to appellee's motion.

WHEREBY, where the Appellee Port Authority seeks to alter the joint appendix without communicating with the appellant; even though they stated they would not participate in this appeal and later changed its position after the appellant filed the appendix. The appellant makes the foregoing affirmation in opposition to appellee's attempt to alter the appendix without communicating with the appellant over the context of the appendix.

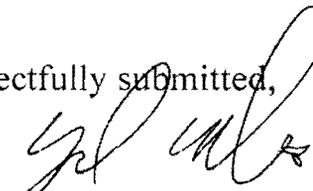
WHEREBY, where the appellee did not identify which documents in the appendix might cause to them prejudice, appellant makes the foregoing affirmation in opposition to appellee's request because the appellant has shown extraordinary circumstances to warrant preserving the appendix.

WHEREFORE for the foregoing reasons the appellant respectfully requests that the Court deny the appellee-defendant's motion to strike parts of the appendix and the brief. Appellant requests further relief as the Court deems right and justified under the circumstances and facts of this motion.

I affirm the foregoing is true and correct to the best of my knowledge.

Dated: June 28, 2012

Respectfully submitted,



Yoel Weisshaus, Appellant
516 River Road 6
New Milford NJ, 07646

Please time stamp below.

**U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT
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**4:30 P.M. - 8:30 A.M. EACH BUSINESS DAY
24 HOURS ON SATURDAYS, SUNDAYS & HOLIDAYS**

INSTRUCTIONS

1. For all appeals commenced on or after January 1, 2010, a counseled party may submit only briefs and appendices in the night depository. This submission does not substitute for CM/ECF filing. Motions may be filed in the night depository only in pre-2010 appeals.
2. Complete the case title and identify the submitted documents.
3. Stamp 1 copy of the brief and appendix or the original motion.
4. Stamp this completed form and affix it to the entire package submitted.
5. Documents are deemed filed on the business day they are date/time stamped or on the next business day if date/time stamped on a Saturday, Sunday or Federal Holiday.
6. Documents date/time stamped after the date they are due must be accompanied by a motion for permission to file out of time.
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Please complete the following information

Case Title (short title) Wissbury v. Port Case Number: 11-4934

Documents Included

- Briefs
- Appendices/Transcript Volumes
- Motions (T-1080 form + affidavit)
- Other (Please identify):
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