

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT’S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION “SUMMARY ORDER”). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 9th day of April, two thousand eighteen.

Present: ROSEMARY S. POOLER,
REENA RAGGI,
CHRISTOPHER F. DRONEY,
Circuit Judges.

GILBERTO FRANCO, ON BEHALF OF HIMSELF AND ALL
OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

15-4003; 17-1134

ALLIED INTERSTATE LLC, FKA ALLIED INTERSTATE, INC.,

Defendant-Appellee.

Appearing for Appellant: Adina Hyman Rosenbaum, Public Citizen Litigation Group,
Washington, D.C.

Andrew T. Thomasson, Philip D. Stern, Stern Thomasson LLP,
Springfield, N.J. (*on the brief*).

1 Appearing for Appellee: Casey Devin Laffey, Reed Smith LLP (Nana Japaridze, *on the*
2 *brief*) New York, N.Y.

3
4 Appeal from the United States District Court for the Southern District of New York (Forrest, J.).
5

6 **ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED,**
7 **AND DECREED** that the judgment of said District Court be and it hereby is **VACATED** and
8 **REMANDED**.
9

10 Plaintiff-Appellant Gilberto Franco appeals from the November 30, 2015 judgment of the
11 District Court for the Southern District of New York (Forrest, J.), following a rejected Federal
12 Rule of Civil Procedure 68 offer on his individual claim in his putative class action suit regarding
13 Defendant-Appellee Allied Interstate’s debt collection practices. This is the second appeal in this
14 matter. *See Franco v. Allied Interstate LLC*, 602 F. App’x 40 (2d Cir. 2015) (summary order)
15 (“*Franco I*”). In *Franco I*, we held that an unaccepted Rule 68 offer could not moot a claim in
16 the absence of judgment. On remand, the district court entered judgment in favor of the plaintiff.
17 This appeal followed. We again remand, as an unaccepted Rule 68 offer is a legal nullity and
18 therefore provides no basis for the entry of judgment. We assume the parties’ familiarity with the
19 underlying facts, procedural history, and specification of issues for review.
20

21 “We review *de novo* the district court’s conclusion that [a plaintiff’s] claims are moot.”
22 *Cty. of Suffolk v. Sebelius*, 605 F.3d 135, 139 (2d Cir. 2010). “We review a district court’s denial
23 of class certification for abuse of discretion.” *Sergeants Benevolent Ass’n Health & Welfare*
24 *Fund v. Sanofi-Aventis U.S. LLP*, 806 F.3d 71, 86 (2d Cir. 2015). To the extent that the district
25 court’s decision “was based on conclusions of law, we review such conclusions *de novo*, and to
26 the extent that its decision was based on findings of fact, we review such findings for clear
27 error.” *Id.*
28

29 During the pendency of this appeal, multiple decisions have issued, which control the
30 outcome of this case. Consistent with our own precedent, the Supreme Court has now ruled that
31 an unaccepted Rule 68 offer of judgment will not moot a claim. As the Supreme Court explained,
32

33 When a plaintiff rejects such an offer—however good the terms—her interest in the
34 lawsuit remains just what it was before. And so too does the court’s ability to grant her
35 relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal
36 nullity, with no operative effect.
37

38 *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 670 (2016) (quoting *Genesis Healthcare Corp. v.*
39 *Symczyk*, 569 U.S. 66, 81 (2013) (Kagan, J., dissenting)).
40

41 Subsequently, in *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 850 F.3d 507, 513 (2d
42 Cir. 2017), we went a step beyond *Campbell-Ewald*, and held that an unaccepted Rule 68 offer
43 does not moot a claim even where, as here, the district court subsequently enters judgment in
44 favor of the plaintiff, and the defendant attempts to tender judgment. Allied Interstate’s attempts
45 to circumvent this clear precedent are unavailing. We see no meritorious grounds for
46 distinguishing *Geismann*.

1 Allied Interstate also asserts that the district court denied class certification in its initial
2 2014 ruling, which was the subject of *Franco I*, and that this suit should now be treated as an
3 individual claim rather than a putative class action. This is incorrect. The district court's initial
4 2014 decision found that Franco's individual claim was mooted by the Rule 68 offer, and denied
5 class certification in the absence of a named plaintiff. The district court clearly explained that the
6 denial of class certification was a mere byproduct of the mootness of the individual claim,
7 writing, "[i]n the absence of a claim against defendant, plaintiff cannot adequately represent the
8 purported class." *Franco v. Allied Interstate LLC*, No. 13-cv-4053, 2014 WL 1329168, at *5
9 (S.D.N.Y. Apr. 2, 2014), *vacated and remanded*, 602 F. App'x 40 (2d Cir. 2015). In *Franco I*,
10 we vacated and remanded, finding that the individual claim was not moot. Thus the sole ground
11 for the denial of class certification was vacated by our decision. As the district court recognized
12 in the decision underlying the instant appeal, the effect of *Franco I* was to revive the class
13 certification motion on remand. *See Franco v. Allied Interstate LLC*, No. 13-cv-4053, 2015 WL
14 7758534, at *4 (S.D.N.Y. Nov. 30, 2015) (addressing viability of class claims). Since we again
15 hold that the individual claim is not moot, the class certification motion will again be open on
16 remand. Accordingly, the district court may consider whether Franco is entitled to a "fair
17 opportunity to show that certification is warranted" before rendering judgment on his claim.
18 *Campbell-Ewald Co.*, 136 S. Ct. at 672.

19
20 In light of our decision today, the funds deposited by Allied Interstate with the clerk of
21 the court in satisfaction of the judgment should be returned.

22
23 The judgment of the district court hereby is VACATED and REMANDED for further
24 proceedings not inconsistent with this order.

25
26 FOR THE COURT:
27 Catherine O'Hagan Wolfe, Clerk
28

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal. The seal is divided into two horizontal sections: the top half is red with the words "UNITED STATES" in white, and the bottom half is blue with the words "SECOND CIRCUIT" in white. There are small white stars on either side of the text in the blue section. The signature is written in a cursive style, with the first name "Catherine" being more legible than the last name "Wolfe".

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

Date: April 09, 2018
Docket #: 15-4003, 17-1134
Short Title: Franco v. Allied Interstate LLC

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 13-cv-4053
DC Court: SDNY (NEW YORK CITY)
DC Docket #: 13-cv-4053
DC Court: SDNY (NEW YORK CITY)
DC Judge: Forrest

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

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DC Court: SDNY (NEW YORK CITY)
DC Judge: Forrest

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature