No. 11-10501

In the United States Court of Appeals for the Fifth Circuit

NETSPHERE, INC. ET AL,
Plaintiffs

v.

JEFFREY BARON,
Defendant – Appellant

v.

QUANTEC L.L.C.; NOVO POINT L.L.C.,
Appellants

v.

ONDOVA LIMITED COMPANY,
Defendant – Appellee

v.

PETER S. VOGEL,
Appellee

Interlocutory Appeal of Receivership Orders

From the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3-09CV0988-F

RESPONSE TO NON-PARTY MOTION TO DISMISS

TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

COME NOW Jeff Baron, NovoPoint, LLC., and Quantec, LLC, who make the following response to Carrington, Coleman, Sloman & Blumenthal, L.L.P,'s NON-PARTY CREDITOR'S MOTION TO DISMISS IN PART AND TO LIFT STAY, OR TO ABATE:

I. BACKGROUND

Post-appeal, a non-party, Carrington, Coleman, Sloman & Blumenthal, L.L.P, ("Carrington"), has filed a motion for reconsideration of one of the District Court's orders on appeal and seeks to have rule 4(a)(4) apply. Carrington made no motion to intervene in the lawsuit below, and made no motion for affirmative relief in the District Court prior to its motion for reconsideration of the appealed order.[1] In fact, no party had previously made any motion seeking relief on behalf of Carrington.

Carrington envisions a system of law whereby when a citizen is *accused* of owing money to various lawyers, there is no necessity of (1) the filing of lawsuits, (2) subject matter jurisdiction over the claim by the District Court, (3) the right to trial by jury, (4) a finding of liability by the jury, (5) entry of judgment, or (6) the opportunity to post bond and have the proceedings reviewed on appeal, etc.

[1] Carrington is non-diverse from Baron and accordingly, the District Court would have no subject matter jurisdiction over its claim had Carrington sought to intervene. Additionally, most of the alleged debt claimed by Carrington is over four years old and is therefore barred by the applicable statute of limitations pursuant to Texas law.

Rather, to Carrington's view, a District Court may simply enter an *ex parte* order seizing all of the citizen's assets, and then without allowing discovery or trial, simply distribute the citizen's property to 'claimants' based on the District Court's subjective sense of 'equity and justice'. Carrington complains that if Baron's assets (and those of Novo Point, and Quantec) are freely distributed by the District Court to other 'claimants' without lawsuits or trials, then Carrington should be allowed the same 'right'.[2]

II. CORE LEGAL ISSUES PRESENTED

1. Does Rule 4(A)(4) Apply to a Non-Party that Has Not Sought to Intervene in the Lawsuit ?

The Fifth Ciruit in *Lauderdale School Dist. v. Enterprise School Dist.*, 24 F.3d 671, 681 (5th Cir. 1994) held that:

[2] The very unusual context of the "Receiver's Motion to Pay Attorney Fee Claimants" (that Carrington wants to be included in) is itself notable. According to the receiver, "The Receiver did not collect or offer evidence to controvert the Former Attorney Claims". SR. v7 p202. The receiver apparently understood the Court's order for the receiver "prepare a full report, assessment report" (SR. v4 p1224) as meaning to prepare a one-sided report ignoring all the evidence that controverted the Attorney's claims. Notably the receiver solicited these one-sided claims against Baron. E.g., SR. v8 p1242-43. Baron had a million dollars in savings, but those were taken by the receiver as "fees". SR. v8 pp 989, 990-992,1007. The Receiver has been given permission to liquidate the assets of Novo Point, LLC., and Quantec LLC., (neither of which is owned by Baron) to pay these debts. Accordingly, the receivership is being used as a vehicle by which millions of dollars in assets of NovoPoint & Quantec are to be sold to pay 'claims' asserted against Baron and approved by the District Court based on a one-sided report of the claims that ignores all of the evidence controverting those claims. SR. v7 p202. Moreover, if the 'claims' themselves are examined, a *prima facie* case is made that the solicited 'claims' are **absolutely groundless**. SR. v8 p 1197-1201, 1212- 1243.

"[R]ule 4(a)(4) applies only if a '*party* makes a timely motion of a type specified immediately below' (emphasis added), it would seem that a motion by a non-party would not defer the thirty-day window."

The outer boundary between party and non-party, was set by the Fifth Circuit in *Thurman v. Federal Deposit Ins. Corp.*, 889 F.2d 1441, 1448 (5th Cir. 1989) to be delineated at litigants seeking party status through a motion to intervene. In *Thurman*, the Court held that a timely motion for a new trial was sufficient under Appellate Rule 4(a)(4) to stop the running of the appeal period if filed by a person later determined to have been improperly denied party status. *Id.* Accordingly, rule 4(a)(4) applies to currently named parties and litigants formally seeking party status by a motion to intervene, but does not apply non-parties. The Fifth Circuit's drawing the line between party and non-party based on a litigant's seeking intervention is consistent with the distinctions recognized by the Supreme Court. The Supreme Court has recognized the fundamental distinction in status between one who has sought intervention and one who has the opportunity to intervene but does not. *E.g.*, *Martin v. Wilks*, 490 U.S. 755 , 765 (1989) (Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree).

Accordingly, since Carrington chose not to intervene in the lawsuit below, and therefore not to be bound by the District Court's decisions, Carrington is not a "party" and rule 4(a)(4) does not apply to its motion for reconsideration filed in the District Court. *Lauderdale*, 24 F.3d at 681.

2. Did the Appeal of the Receivership Order in 2010 Divest the District Court of Jurisdiction over the Matter on Appeal ?

Baron filed a notice of appeal from the receivership order on December 2, 2010. R. 1699. The filing of a notice of appeal is an event of jurisdictional significance– it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). The divesture of jurisdiction of the trial court involves all those aspects of the case appealed. *Id*. As a matter of well-established law, the district court loses jurisdiction over all matters which are validly on appeal. *Dayton Indep. School Dist. v. US Mineral Prods. Co.*, 906 F.2d 1059, 1065 (5th Cir. 1990) ("rule which we follow rigorously"). The *sole* authority of a district court with respect to a matter on interlocutory appeal is to maintain the status quo of the case as it rests before the court of appeals. *E.g.*, *Coastal Corp. v. Texas Eastern Corp*., 869 F.2d 817, 820 (5th Cir. 1989); *Dayton* at 1063.

As an well-established principle of law, the effect of an appeal of a receivership is that the appellate court is vested with jurisdiction over the

receivership res. *E.g.*, *Palmer v. Texas*, 212 U.S. 118, 126 (1909). The Supreme Court held in *Palmer* "[**T]he effect of the appeal was simply ... that the appellate court still had jurisdiction over the res the same as the trial court had**". *Id.* The Supreme Court explained this rule in Palmer, holding:

> **"If a court of competent jurisdiction, Federal or state, has ... obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty"**
>
> ***Id.* at 125.**

Once the matter was placed before the Court of Appeals, the property was in the possession of the Court of Appeals, and "[T]hat possession carried with it the exclusive jurisdiction to determine all judicial questions concerning the property." *Wabash R. Co. v. Adelbert College of Western Reserve Univ.*, 208 U.S. 38, 46 (1908). As a well-established principle of law and comity, two courts should not attempt to assert jurisdiction over the same matter simultaneously. *Griggs* at 58; *Dayton* at 1063. Accordingly, the District Court is without authority to issues orders to disburse the receivership res to 'claimants'. *Id.* This is because the validity of the receivership order should be resolved on appeal *before* the District Court should be allowed to distribute and disburse the property of a party which was seized by the District Court's receivership order. Otherwise, the District Court

can effectively bypass review by the Court of Appeals by *de facto* distribution of the receivership res before the validity of the receivership has been resolved on appeal.

Therefore, the stay imposed on the District Court below should be spring from the original appeal from the receivership order in 2010 (which divested the District Court of jurisdiction over the matter), and should not be dependent upon the appeal of subsequent orders of the District Court with respect to the receivership while the matter is on appeal.

3. Is The May 18, 2011 Order Appealable ?

Carrington relies primarily on a partial quote from a string cite from *Citibank, N.A. v. Data Lease Fin. Corp.*, 645 F.2d 333, 337-38 (5th Cir. 1981) to argue erroneously that the Mary 18 order is not appealable. As a matter of long established law, relied upon by *Citibank*, the test of finality of an order is whether "further order or decree" is necessary before action on the order can be taken. *Burlington, CR & NR Co. v. Simmons*, 123 U.S. 52, 54 (1887). Because the May 18 Order "determined the amount of the debt" (*Citibank*, at 337), and authorized payment by the receiver from cash in the receiver's possession, no further order of the District Court was necessary for the receiver to pay out money pursuant to the May 18th Order. The receiver clearly has cash in its possession, and nothing is stopping the receiver from immediately paying that cash to the 'claimants' other

than the appeal of the order and the stay imposed upon the District Court. SR. v8 pp1017-1022.

Accordingly, the May 18 order of the District Court directing the receiver to pay 'claimants' out of any cash in the receiver's possession, is not depended upon any further order or decree to be acted upon, and is properly appealable pursuant to 28 U.S.C. §1292(a)(2) as an order to take steps to accomplish the purposes of the receivership such as directing the disposal of property of the receivership.

III. ADDITIONAL CONSIDERATIONS

The entire structure of proceedings below should raise a red flag. The receiver is an organ of the court itself. *E.g., Taylor v. Sternberg*, 293 U.S. 470, 472 (1935). As a very real matter the District Court set itself up as an inquisitor to investigate and prosecute claims against a defendant (through its receiver), and to then 'adjudicate' those claims based on a one-side report the District Court (through its receiver) made to itself that expressly ignored all of the exculpatory evidence. It is not rhetoric to note that proceedings of this sort have not been seen since the fall of the Soviet Union. In the proceedings below the District Court (1) seized all of a citizen's property *ex parte*, (2) prohibited the citizen from retaining experienced Federal trial counsel to represent him and prohibited the citizen from being represented by any paid counsel what-so-ever, (3) acted through the District Court's own receiver as a one-sided investigator and prosecutor,

(4) adjudicated claims without trial based on a report where the exculpatory evidence was withheld by the District Court itself (through its receiver), and (5) seized without service of process, pleadings, or hearing, the assets of unrelated companies to pay the 'adjudicated' liability of another.

WHEREFORE, the stay imposed upon the District Court should not be reduced in scope, but should be expanded to entirely stay the underlying receivership order and thereby, for example, permit Novo Point, LLC., and Quantec, LLC., to control and defend their own assets, and to allow Baron to work, earn money, and retain paid counsel of his choice to represent him.

Respectfully submitted,

/s/ Gary N. Schepps
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IV. INDEX OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

V. CERTIFICATE OF SERVICE

This is to certify that this brief was served this day on all parties who receive notification through the Court's electronic filing system.

CERTIFIED BY: /s/ Gary N. Schepps
Gary N. Schepps