No. 11-10289

In the United States Court of Appeals for the Fifth Circuit

NETSPHERE, INC., ET AL,
Plaintiffs

v.

JEFFREY BARON,
Defendant- Appellant

v.

DANIEL J SHERMAN,
Appellee

Interlocutory Appeal of Orders
Adding Receivership Parties and
Disposing of Receivership RES

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

RESPONSE AND MOTION FOR RELIEF WITH RESPECT TO SHERMAN MOTION TO DISMISS, SUBSTITUTE APPELLEES, AND EXTEND BRIEFING DEADLINES

TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

COMES NOW Appellant Jeff Baron and makes this response, objection and motion for relief with respect to two motions filed by Sherman, being: (1) 8-30-11 OPPOSED MOTION filed by Appellee Mr. Daniel J. Sherman: Trustee's Motion to Dismiss, or in the Alternative for Designation of Appellee and to Extend Briefing Deadline to dismiss the appeal [6893047-2] ("Motion 1"); and (2) 7-06-11 OPPOSED MOTION filed by Sherman for Other Relief and to expedite briefing filed in case 10-11202 as Document number 00511531893) ("Motion 2").

I. RESPONSIVE ARGUMENT AND AUTHORITY

Sherman's Request to be Removed as Appellee

In Motion 1 Sherman argues that he has no interest in the instant appeal and should be removed as Appellee. At the same time, in Motion 2 (at page 7) Sherman argues the opposite— that he has an interest in all of the appeals and therefore has standing to seek relief with respect to the appeals, including the instant appeal. Previously, Sherman argued that because Sherman had moved for the receivership against Baron, Sherman was the proper appellee and thus Sherman should be substituted in as the sole appellee in case 11-10113 in place of Vogel. (Page 3 of Document 00511504433 filed 6/09/2011 in case 11-10113). Now Sherman argues the opposite— that he has no interest in the instant appeal and should be removed as Appellee and that Vogel should be inserted in his place, even though Sherman moved for the receivership against Baron and, as discussed above, claims an interest in all of the appeals including the instant appeal.

The notice of appeal in the instant appeal was filed on March 3, 2011. Sherman waited half a year and until *after* the Appellant had filed his principal briefing, before asserting that he has no interest in the appeal and should be removed as Appellee. In conjunction with his delayed motion to be removed as Appellee, in Motion 1 Sherman seeks a delay in his briefing deadlines. At the same time, in Motion 2, Sherman argues the opposite, and moves for an expedited appeal of the instant case. (Motion 2 at page 9-11).[1]

Sherman has offered no authority for his request to be removed as Appellee. Rather, Sherman has expressly admitted that he has an interest in this appeal. (Motion 2 at page 7).[2] As an underlying issue of law, where party has an interest in the appeal he is a proper appellee. *Legault v. Zambarano*, 105 F.3d 24, 26 (1st Cir. 1997). Additionally, Sherman has acted as an Appellee in moving to dismiss this appeal and has objected to being the Appellee only after the Appellant's principal brief was filed. *See Terry v. Sparrow,* 328 BR 450, 453 fn 1 (M.D.N.C. 2005) (Trustee's motion to dismiss appeal was factor in determining that the Trustee was the proper appellee). Accordingly, in light of (1) his admission that he is an interested party in this appeal; (2) his affirmative requests for relief filed as the Appellee in this appeal; and (3) the timing of Sherman's raising of the issue; Sherman's requests to be removed as Appellee and to delay the briefing schedule should be denied.

[1] Pages are cited herein based on the PACER pagination. Accordingly, Motion 2 printed page 7 corresponds to page 11 as referenced in this response.

[2] Printed page 3 of Motion 2.

Sherman Mootness Motion is Legally Frivolous, His Certificate of Conference to the Court is False, and Sherman Should Be Sanctioned

Sherman's Mootness Argument

Sherman offers no precedential authority in support of his mootness argument. Instead, Sherman cites an unpublished case[3] (that pursuant to the express rules of this Honorable Court is not precedent) holding that where a party does not seek to stay the sale of property that is sold to good faith purchasers, an appeal of that sale is moot. Notably, good faith purchasers are afforded special protection under the law. The importance of securing the rights of good faith purchasers is so fundamental that the Supreme Court explained almost 200 years ago: "Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser, who has put himself in peril by purchasing a title, and paying a valuable consideration, without notice of any defect in it, or adverse claim to it." *Boone v. Chiles*, 35 U.S. 177, 210 (1836). Accordingly, with few exceptions, as a special rule, good faith purchaser status trumps a challenge to an order confirming the sale of property. *See generally In re Bleaufontaine, Inc.*, 634 F.2d 1383, 1388 n.7 (5th Cir. 1981). No order on appeal involves property that has been sold to a good faith purchaser and the rule has no application in this appeal.

The good faith purchaser exception does not apply to the payment of money. As a well established express principle of long standing and fundamental law, even after money is paid an appellate court is fully empowered to reverse the order to pay the money, and if reversed, the aggrieved party can recover his money back.

[3] *S.E.C. v. Janvey*, 404 Fed.Appx. 912, 916, (5th Cir. 2010).

Eg., *Dakota County v. Glidden*, 113 U.S. 222, 224 (1885). A case is only moot when the parties lack "a legally cognizable interest in the outcome". *E.g.*, *Powell v. McCormack*, 395 U.S. 486, 496 (1969). As a matter of well-established law a case is justiciable when the court can order "specific relief through a decree of a conclusive character". *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). This Honorable Court can issue a decree of conclusive character with respect to each of the matters involved in the instant appeal.

Specific Orders on Appeal

Sherman argues that District Court Docket No.s 274, 275, 276, 278, 279, 283, 284, 292, 295, 297, each of which ordered the disbursement of receivership funds are moot because the payments ordered have already been made. As discussed above, a matter of well-established and fundamental law, even after money is paid an appellate court is fully empowered to reverse an order for the payment of money. *Dakota*, 113 U.S. at 224. This Court can clearly give effective relief by reversing the District Court's orders to pay money, and Sherman has offered no authority to the contrary.

Sherman argues that District Court Docket No. 285 is moot because part of the relief denied by the Order is moot. Contrary to Sherman's representation the controversy involves more than server fees. Baron moved for an order for his life's work (computer code on a computer hard disk that was threatened with deletion) to be backed up. The District Court failed to allow Baron to reply to Sherman's response to his motion, and denied the motion without allowing Baron

the procedural due process required by the Federal Rules of Procedure and Local Rules of the Northern District of Texas. The underlying substance of the denied relief was the preservation of Baron's assets, an express purpose of the *ex parte* receivership imposed upon Baron. The dispute is live, and the matter is not moot.

Sherman argues, without citation to any authority, that where an emergency hearing is requested upon a motion for relief, the relief requested is automatically mooted by the failure to grant the relief on an emergency basis. Where a motion is made for distribution or disposal of receivership assets for a certain purpose, so long as the distribution or disposal has been declined by the District Court the controversy is live and the matter is not moot. For example, Baron's need for a heated apartment (refused him by the receiver) was acute in the freezing weather of February. The matter is not moot, however, as in the next 90 or 120 days the weather again will be cold and while the District Court has awarded a million dollars of Baron's life savings to the receiver and his law partners as 'fees', Baron is still locked by the receiver in an apartment without heating or air conditioning.

Sherman argues that the injunction ordered in District Court Docket No. 318 is moot because it was vacated by the District Court after the order was appealed. As a preliminary matter the District Court is without jurisdiction to vacate the order after it was appealed and thus has no jurisdictional authority to moot a matter on appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989); *Dayton Indep. School Dist. v. US Mineral Prods. Co.*, 906 F.2d 1059, 1065 (5th Cir. 1990).

Perhaps more relevantly, counsel for the Appellant, Baron, sought in writing conference with Sherman to reduce the amount of issues and orders taken up in this appeal. Appellant's counsel requested that Sherman's counsel agree to stipulate that as many orders as possible were moot and thus eliminate the necessity of including the orders in this appeal. Appellant's counsel specifically and expressly requested that Sherman's counsel agree that Doc 318 was moot. Sherman's counsel, however refused, explaining that it was his position that Baron had violated the injunction ordered in Doc 318, and thus the matter was not moot. See Exhibit A. **Thus, directly contrary to the certification of conference presented by Sherman, counsel for Appellant *did* attempt to reach agreement to avoid including orders in this appeal expressly on the basis of mootness, and it was Sherman's counsel who refused.** After rejecting the offer to voluntarily agree that orders expressly including Doc 318 were moot, Sherman now seeks to have the order declared moot and has in all essence falsely certified to the Court that Baron's counsel refused agreement as to removing the order from this appeal. It is obviously a waste of this Court's resources, and the efforts of the Appellant's counsel to brief orders that both sides can agree are moot. Sherman refused to reach agreement with Appellant's counsel as to the mootness of **any** order (which is Sherman's absolute right).[4] However, Sherman then falsely represented to this Court that it was Appellant's counsel that refused agreement.

[4] Notably, the orders such as Doc 318 are not moot but can easily be made so by the agreement of counsel. However, if Sherman insists, for example, that Baron may have violated an order, then Sherman can force the appeal of the order by creating a controversy involving the order.

The District Court in Docket No. 288 gave the receiver a blank check to dispose of essentially any and all of the receivership assets of the receivership estates of Novo Point, LLC, and Quantec, LLC, (in order to pay alleged debts of Jeff Baron) without the requirement of any further order by the District Court. Sherman argues, with no supporting legal authority, that because after that order was appealed and the District Court entered subsequent orders and was stayed pending appeal, the status of the case has changed and the order is no longer ripe for appeal. As discussed above, once the order was appealed the District Court was divested of jurisdiction over the matter and was without power to alter the status of the order on appeal. *Dayton*, 906 F.2d at 1063 ("A district court does not have the power to 'alter the status of the case as it rests before the Court of Appeals'."). Moreover, it is axiomatic that stay pending appeal does not moot the order then on appeal because it has been stayed.

Sanctions Against Sherman Are Appropriate

As discussed above, Sherman offered no legal precedent for his mootness argument. His argument ignores fundamental and long-established principles of law. For example, Sherman argues that an order to pay money cannot be appealed after if the money has been paid. Such an argument can be described no other way than frivolous. This Honorable Court has issued an order in relationship to appeal from the case below expressly warning against the filing of frivolous motions. Sherman clearly did not heed this Court's warnings. Moreover, Sherman has engaged in the worst sort of gamesmanship, waiting months to file his motion,

taking completely inconsistent positions in different motions pending before the Court of Appeals at the same time, and refusing to reach agreement to limit the orders included in this appeal and then falsely representing that Counsel for the Appellant opposed agreement to moot various orders that clearly can be mooted by agreement of the parties and do not need to be a live controversy, for example, Doc 318.[5] In light of the foregoing, appropriate sanctions should be imposed against Sherman.

Sherman's Appealability Argument

Sherman offers the argument that the District Court Orders placing a dozen new receivership parties and estates under receivership are non-appealable. Contrary to the assertions of Sherman, the appealed from orders (District Court Docket Numbers 272, 287) make no finding that any company is owned or controlled by Baron.[6] Rather, more than a dozen independent entities were simply ordered (without service of process or hearing) placed under the District Court's receivership, and one entity was ordered removed. Sherman ignores that the entities were placed into receivership and were made subject to a long series of injunctions and argues instead that there was merely a turnover over. The challenged orders are clear: The entities were made receivership parties. As there was also an injunction imposed upon the entities by virtue of the appealed from

[5] As shown by Sherman's unusual certificate of conference, Sherman's counsel were well aware of the intense work load placed upon the undersigned with respect to the mass of motions filed by Sherman and Vogel, and Sherman filed his motion willfully and intended that the motion would require a substantial time commitment to respond.

[6] SR. v2 pp365,405.

orders, the orders clearly fall within the scope of §1292(a).

Sherman's argument also lacks a logical footing. To Sherman's argument, entities which are not parties to a lawsuit and have not been served with process, can be placed into receivership *ex parte* without even being named in the receivership order. After the 'blank' receivership order can no longer be appealed, those companies can then be identified and included in the receivership, but the companies have no right to appeal. To Sherman's view, the statutory right to interlocutory appeal pursuant to 28 U.S.C.§1292(a) when a receivership is imposed can be abrogated by entering a receivership order without naming receivership parties, and then later, after the time for appeal of that order has lapsed, entering an order reciting the names of the included parties. However, as an established principle of law, an independent right to appeal extends to orders modifying or amending previous orders. *E.g.,, Taylor v. Sterrett*, 640 F.2d 663, 666-667 (5th Cir. 1981). Accordingly, an order which "clarifies" a previous order to place new parties into receivership, is clearly an appealable order pursuant to 28 U.S.C.§1292.

Even if Sherman's argument were logically valid and were supported by some authority, the appeals should still be considered pursuant to the doctrine of pendent appellate jurisdiction. A refusal to allow the appeal would defeat the principal purpose of allowing an immediate appeal of a receivership order. *See e.g., Morin v. Caire,* 77 F.3d 116, 119-120 (5th Cir. 1996). The claims on appeal of these orders are clearly closely related to the other issues before the Court in this appeal.

Specifically, a core issue raised in the instant appeal is whether the District Court is divested of jurisdiction over the matter appealed by an interlocutory appeal. The Appellants argue in this appeal that the District Court was divested of jurisdiction over the matters on appeal and therefore lacked authority over the matter other than to maintain the status quo as of the filing of the notice of appeal. *See e.g.*, *Griggs*, 459 U.S. at 58*; Coastal Corp.*, 869 F.2d at 820. The same facts and legal issue apply to the orders objected to by Sherman. It materially serves the interest of judicial economy to review orders expanding the jurisdictional authority of a receiver (while the receivership was on appeal) at the same time the Court takes up the issue of the effect of filing an appeal on the District Court's jurisdiction.

The District Court's authority, if challenged on appeal, is best challenged before the District Court takes action based on that asserted authority, and not after. For that reason receivership orders are allowed interlocutory review. Post-appeal orders of the District Court to carry out the purposes of the receivership, which have jurisdictional impact and will necessarily impact the validity of numerous future orders of the court,[7] should be allowed interlocutory review as a matter of fundamental judicial economy.

[7] Administrative actions such as ordering the turnover of stocks or other similar property do not impact a District Court's underlying jurisdiction and authority. Accordingly, such actions are not afforded interlocutory review. By contrast, the validity of orders placing new parties into receivership and orders expanding the territorial authority of a receiver directly impact the validity of all future orders based on the jurisdiction of the District Court asserted by virtue of those orders.

WHEREFORE, the Appellants respectfully move this Honorable Court to deny Sherman's motions and consider imposing sanctions against Sherman, including sanctions to compensate Appellant's counsel for the costs of responding to the motions.

Respectfully submitted,

/s/ Gary N. Schepps

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AUTHORITIES CITED

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CERTIFICATE OF SERVICE

This is to certify that this filing 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
COUNSEL FOR APPELLANT

CERTIFICATE OF CONFERENCE

Counsel for Sherman have stated they oppose, and counsel for Vogel have not stated whether they oppose.

CERTIFIED BY: /s/ Gary N. Schepps
Gary N. Schepps
COUNSEL FOR APPELLANT