Appeal No. 20-3114

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff- Appellee

v.

KEVIN B. DUFF, RECEIVER
Court-Appointed Receiver-Appellee

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION and CITIBANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF WELLS FARGO COMMERCIAL MORTGAGE SECURITIES, INC., MULTIFAMILY MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2018-SB48
Appellants

Appeal from the United States District Court
for the Northern District of Illinois
Hon. John Z. Lee
1:18-cv-5587

SEVENTH CIRCUIT RULE 3(c) DOCKETING STATEMENT OF APPELLEE

Appellee Kevin B. Duff, Receiver (the "Receiver"), by and through his counsel submits the following Docketing Statement which corrects certain errors in the docketing statement submitted by Appellants Federal National Mortgage Association ("Fannie Mae") and Citibank, N.A., as Trustee for the registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48 ("Citibank as Trustee").

I. DISTRICT COURT JURISDICTION.

The Receiver states that the United States District Court for the Northern District of Illinois ("District Court") has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 77v and 15 U.S.C. § 78aa.

II. APPELLATE COURT JURISDICTION.

Appellants docketing statement incorrectly states this Court has jurisdiction over the appeal, citing to 28 U.S.C. §1292(a)(2). That is incorrect. Consistent with the express language of Section 1292(a)(2) as well as direct and applicable authority from this Court and decisions from several other circuits, there is no appellate jurisdiction over the interlocutory order that is the subject of this appeal.

In *U.S. v. Antiques Ltd. P'ship,* 760 F.3d 668 (7th Cir. 2014), a receiver was appointed by the district court. The actions of the receiver and related court orders led to numerous appeals being filed, including an appeal from an order of the district court approving of certain property sales. The Seventh Circuit held that an "appeal … challenging the district court's approval of property sales by the receiver … is not within our jurisdiction" despite the fact that "an interlocutory order appointing a

receiver is appealable, as is an interlocutory order 'refusing to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property.'" *Antiques,* 760 F.3d at 671 (citing 28 U.S.C. § 1292(a)(2)). The Court explained:

> Parties in other cases have argued that this additional statutory language authorizes appeals from orders en route to winding up the receivership, which could include the sale order in the collection phase of this case. But that would both strain the statutory language and make anything the receiver did appealable immediately, which could flood the courts of appeals with interlocutory appeals. We therefore agree with the courts that have held that appellate jurisdiction over interlocutory orders involving receivers is limited to the three types of order specified in section 1292(a)(2): orders appointing a receiver, orders refusing to wind up a receivership, and orders refusing to take steps to accomplish the purposes for winding up a receivership.

Antiques, 760 F.3d at 671-72.

The Court's analysis and reasoning in *Antiques* is equally applicable here. Relabeling the District Court's order approving the sale of properties as an order refusing to wind up a receivership "strain[s] the statutory language and [would] make anything the receiver did appealable immediately." *Antiques*, 760 F.3d at 672. This Court's narrow and careful interpretation of Section 1292(a)(2) reflects the conclusion that Congress did not want to burden the appellate court with ongoing supervision of every action a District Court or receiver might take. Other circuits considering the scope of Section 1292(a)(2) have also narrowly interpreted the statute and "restrict[ed] it to orders *refusing* to direct actions." *SEC v. Am. Principals Holdings, Inc.,* 817 F.2d 1349, 1350 (9th Cir. 1987) (emphasis supplied).

A narrow reading of Section 1292(a)(2) in the context of federal equity receiverships is consistent with a district court's broad judicial discretion to manage a complex receivership and determine the appropriate path to take in addressing and resolving claims against the assets of the estate, in accordance with due process and judicial economy. *See, e.g., SEC v. Wealth Mgmt. LLC*, 628 F.3d 323, 332-33 (7th Cir. 2010); *SEC v. Enterprise Trust Co.*, 559 F.3d 649, 652 (7th Cir. 2009); *SEC v. Huber*, 702 F.3d 903, 908 (7th Cir. 2012); *Duff v. Central Sleep Diagnostics, LLC*, 801 F.3d 833, 841 (7th Cir. 2015)*; SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986) ("[A] district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad."); *SEC v. Quan*, 870 F.3d 754, 760 (8th Cir. 2017) (noting the "broad discretionary power" of a district court overseeing a receivership).

This Court's *Antiques* decision also recognized that other circuits follow the same interpretation and reject the type of expansive jurisdictional argument advanced here by the Appellants. *See, e.g., State Street Bank & Trust Co. v. Brockrim, Inc.,* 87 F.3d 1487, 1490-91 (1st Cir. 1996); *Commodity Futures Trading Comm'n v. Walsh,* 618 F.3d 218, 225 n.3 (2d Cir. 2010); *SEC v. Black,* 163 F.3d 188, 194-95 (3d Cir. 1998); *Netsphere, Inc. v. Baron*, 799 F.3d 327 (5th Cir. 2015); *Plata v. Schwarzenegger,* 603 F.3d 1088, 1099 (9th Cir. 2010).

For example, a similar analysis was utilized by the First Circuit facing an assertion of jurisdiction on an appeal arising from the district court's approval of the sale of certain properties, which the First Circuit recognized did not fall within

Section 1292(a)(2). The First Circuit, like this Court, noted that the such an order approving the sale "in no way represents a refusal to wind up the receivership or to take steps to accomplish the purposes thereof, § 1292(a)(2) does not apply." *State Street Bank & Trust Co. v. Brockrim, Inc.,* 87 F.3d 1487, 1490-91 (1st Cir. 1996)).

Similarly, in *Plata v. Schwarzenegger,* the district court appointed a receiver over the California Department of Corrections and Rehabilitation to improve prisoner health care. The Receiver created a construction plan for additional hospital beds (a plan that would cost 8 billion dollars over time). The state of California filed a motion terminate the plan, which the district court denied. An appeal was taken under Section 1292(a)(2), but the Ninth Circuit found it lacked jurisdiction, stating that "the district court's refusal to block the Receiver's construction plan (or to deny the Receiver the power to plan, as the State now presents it) is not a refusal to terminate the receivership, nor is it a refusal to take a step to accomplish the winding up of the receivership. *Plata*, 603 F.3d at 1099 (citing *SEC v. Am. Principals Holdings, Inc.,* 817 F.2d 1349, 1350-51 (9th Cir. 1987) (interpreting § 1292(a)(2)'s "take steps to accomplish the purposes thereof" to apply only to orders refusing to take steps to wind up a receivership)).

While not addressing jurisdiction under Section 1292(a)(2), the Tenth Circuit also has noted that a party's perfected security interests are not impacted or invalidated where the receiver was authorized to sell property with liens attaching to the proceeds and determinations as to validity and priority were to occur at a later date. *See SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010).

The Appellants' reliance upon *SEC v. Janvey*, 404 F. App'x 912 (5th Cir. 2010) is of no moment. As an initial matter, *Janvey* cannot supplant controlling Seventh Circuit authority. But *Janvey* is not even persuasive because it provides no substantive analysis of the issue. It only accepted that it had jurisdiction on the basis of *United States v. "A" Mfg. Co.*, 541 F.2d 504, 506 (5th Cir. 1976), a decision which is also relied upon by Appellants here (Dkt. No. 832, at 3). But *"A" Mfg.* is not controlling authority in the Fifth Circuit and is viewed as an aberration outside the Fifth Circuit, as show below. Nor has *Janvey* been cited by any other court for the point the Appellants offer it here. But even if *Janvey* had weight when it was issued (it does not), the Fifth Circuit's subsequent *published* decision in *Netsphere, Inc. v. Baron*, 799 F.3d 327 (5th Cir. 2015) expressly rejected *"A" Mfg.* as binding precedent on the reach of Section 1292(a)(2). In *Netsphere*, the Fifth Circuit expressly embraced contrary authority in its own and sister circuits, including the Seventh Circuit's decision in *Antiques*. *Id.* at 332-33 & nn. 19-20, 25, 22, 28-29.

The *Netsphere* court first found that the "*A" Mfg.* court's entire treatment of Section 1292(a)(2) was non-precedential dicta. *Id.* at 333. The Fifth Circuit explained that the decision in *"A" Mfg.* was "relying more on cases interpreting the final-judgment doctrine" (which the Appellants' have not invoked here) in addressing "the question of whether an order by a receiver confirming a sale after the fact is appealable under section 1292(a)(2)." *Id.* at 333. Because the *"A" Mfg.* court's holding was based on a different jurisprudential line, "[its] discussion of Section 1292(a)(2) could be removed without hindering the analytical basis of its conclusion." *Id.* at 333-

34. The *Netsphere* court went on to find that, even assuming *"A" Mfg.'s* treatment of section 1292(a)(2) was a holding, and not *dicta*, that holding conflicted with an earlier line of Fifth Circuit precedent finding that interlocutory orders which take steps to accomplish the purpose of receiverships are *not* appealable under section 1292(a)(2), and thus the *Netsphere* court was bound to follow the previous precedent and not *"A" Mfg*. *Id.* at 334.

Accordingly, *Netsphere* confirmed that the Fifth Circuit has "refused to find jurisdiction over other orders issued in the course of a receivership, such as authorizing the execution of a lease by a receiver. So have our sister circuits." *Id.* at 332. The court explained:

> [A]s a matter of policy, this interpretation makes good sense. As we recognized in *Warren v. Bergeron*, the imposition of a receivership visits significant consequences: "To put a corporation or other entity into receivership is to wrest management and control from those entrusted by the owners, replacing them with a court-appointed trustee under court supervision. Because this action may cause great harm, Congress decided to make interlocutory orders appointing receivers appealable." *Orders entered in the normal course of a receivership do not visit such consequences. Moreover, to conclude otherwise would mean that "virtually any order of the receiver within the scope of its jurisdiction would be potentially appealable." Such a piecemeal approach to the appellate process would be disruptive and costly, both to the parties and the courts.*

Id. at 332-33 (footnotes omitted) (emphasis added).

The Receiver is submitting a motion to dismiss the appeal.

III. PRIOR OR RELATED APPELLATE PROCEEDINGS.

The Receiver notes that a different appellant (a non-claimant) filed a notice of appeal from a different ruling in the same matter from which this appeal arises. *See*

SEC v. Ventus Holdings, LLC, Appeal No. 20-3155 (filed November 2, 2020). The Receiver notes that a motion to dismiss will also be filed in regards to that appeal.

IV. ADDITIONAL REQUIREMENTS OF CIRCUIT RULE 3(C)(1).

This is a civil case that does not involve any criminal convictions nor is it a collateral attack on a criminal conviction. Kevin B. Duff appears in his capacity as the Receiver for EquityBuild, Inc., EquityBuild Finance, LLC, and affiliates, and the affiliate entities of Defendants Jerome Cohen and Shaun Cohen.

Dated: November 16, 2020

Respectfully submitted,

Kevin B. Duff, Receiver, *Appellee*

/s/ Michael Rachlis
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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2020, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Michael Rachlis