No. 20-3114

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

U.S. SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

and

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 U.S. District Court for the
Northern District of Illinois
Hon. John Z. Lee
1:18-cv-5587

SECURITIES AND EXCHANGE COMMISSION'S JOINDER OF RECEIVER'S MOTION TO DISMISS

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INTRODUCTION

The United States Securities and Exchange Commission (the "SEC" or the "Commission"), by and through counsel, hereby joins Receiver-Appellee Kevin B. Duff's Motion to Dismiss for Lack of Jurisdiction (the "Receiver's Motion").

Appellants Fannie Mae and Citibank appeal an interlocutory order by the District Court approving the Receiver's proposed sale of two properties that are part of the Receivership Estate. Appellants assert that this Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(2), which allows immediate appeal of interlocutory orders "appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property."

The Commission agrees with the Receiver that Section 1292(a)(2) does not provide jurisdiction over this appeal, based on the plain language of the statute and controlling authority in the Seventh Circuit.

BACKGROUND

The underlying action in this matter is an SEC civil enforcement case against Jerome and Shawn Cohen as owners and operators of

EquityBuild, Inc., EquityBuild Finance, LLC (collectively, "EquityBuild") and several affiliated entities which owned and operated real estate holdings, primarily properties on Chicago's South Side. Docket No. 1, at 1. The Commission filed a complaint against EquityBuild and the Cohens on August 15, 2018, alleging multiple violations of the federal securities laws, and the Cohens entered into a consent judgment shortly thereafter. *Id.* at 3; Docket No. 40. The SEC sought appointment of a receiver to assume control of EquityBuild's and the Cohens' business and assets (the "Receivership Estate"), and the District Court appointed Receiver Kevin Duff. Docket No. 16.

As alleged in the Complaint, the Cohens solicited loans and investments by promising substantial returns to investors through the Cohens' identification of and investment in undervalued property. In fact, the Cohens were operating a fraudulent scheme by, among other things, overstating property values, creating multiple secured interests in the same properties, and making payments to existing lenders and investors using funds received from new lenders and investors. *Id.* The scheme often resulted in competing secured or purportedly secured claims asserted by both investor and institutional lender claimants

against properties in the estate. *See* Docket No. 757, Exhibit 8 (Master List of Claims); *see also* Docket No. 693, Exhibit 1 (List of Claims organized by property).

Since his appointment, the Receiver has focused on maintenance, preservation, and disposition of the properties controlled by the Receivership Estate. *See, e.g.,* Status Reports, Docket Nos. 107, 258, 348, 467, 567, 624, 698, 757, 839. With the District Court's approval, the Receiver has developed and followed a plan to market and sell the properties. Docket No. 166 (Liquidation Plan); Docket No. 228 (Motion for Court Approval of Sale Process); *see also* Motions to Approve Property Sales, Docket Nos. 230, 524, 579, 583, 649, 690, 712, 749, 809. As explained in the Motion to Dismiss, the COVID-19 Pandemic has complicated this effort, and has further motivated the Receiver to sell properties as expeditiously as possible in order to limit risk to the Receivership Estate. *See, e.g.,* Docket No. 699, at 4.

The District Court has held that all claims related to properties that are sold will be addressed and resolved through a claims process administered by the Receiver and reviewed by the Court. *See* Docket No. 241 (Receiver's Motion to Approve Claims Process); Docket No. 349

(Minute Entry granting Motion to Approve Claims Process); Docket No. 825, at 5 (explaining that "an orderly claims process is the most efficient and equitable method to resolve competing claims of investors and institutional lenders"). The two properties at issue on this appeal are the subject of competing claims from institutional lenders Fannie Mae and Citibank and investor claimants. *See* Docket No. 757, Exhibit 8; *see also* Docket No. 693, Exhibit 1.

On October 26, 2020, the District Court granted the Receiver's Ninth's Motion for Approval of Sale of these two properties. Docket No. 825, at 4-6.[1] On October 27, 2020, Appellants filed a notice of appeal, asserting Section 1292(a)(2) as the jurisdictional basis for this Court's review of the District Court's interlocutory order. Docket No. 831.

The Receiver has moved to dismiss the appeal because the order at issue is not an interlocutory order within the purview of Section 1292(a)(2), which encompasses orders "appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property."

[1] The proceeds of both sales would be held in escrow pending completion of the claims process approved by the District Court.

ARGUMENT

"In analyzing its appellate jurisdiction, an appellate court looks first to the final judgment rule. Then, if the appealed order does not qualify as a final decision, the court must determine whether any statutory exceptions or other bases of jurisdiction support appellate jurisdiction." *Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 661 (7th Cir. 1998). Here, there is no final judgment, and the sole inquiry is whether there is a statutory basis for appellate jurisdiction.

Appellants Fannie Mae and Citibank assert that 28 U.S.C. § 1292(a)(2) provides the basis for this Court's jurisdiction, but Section 1292(a) provides for appellate jurisdiction of appeals only from interlocutory orders "appointing receivers, or *refusing* orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property . . . ." 28 U.S.C. § 1292(a)(2) (emphasis added).

Here, Appellants claim that the Receiver's planned sale of the two properties at issue, and the District Court's Order approving the sales, constitute a refusal to wind up the receivership or to take the steps necessary to do so. *See* Appeal Docket No. 2, at 4. In fact, the Receiver's

proposed sale of the two properties, and the District Court's approval of the proposed sale, are necessary steps towards winding up the Receivership.

The Seventh Circuit has interpreted Section 1292(a)(2) narrowly, holding that it does not provide jurisdiction to review an interlocutory order allowing the sale of receivership property. In *U.S. v. Antiques Ltd. P'ship,* 760 F.3d 668 (7th Cir. 2014), 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 that a different approach would both strain the language of Section 1292(a)(2) and result in a flood of interlocutory appeals related to receiverships:

> 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. Here, mischaracterizing the District Court's order approving the sale of two properties as a refusal to take the steps necessary to wind up a receivership would similarly strain the language of Section 1292(a)(2), and would effectively make any action by the Receiver immediately appealable. *See id.* at 672.

In *Antiques*, this Court also recognized that other circuits have adopted the same reading of Section 1292(a)(2), and have rejected the sort of expansive jurisdiction over interlocutory orders in receivership matters proposed by Appellants here. *Id. (*citing *State Street Bank & Trust Co. v. Brockrim, Inc.,* 87 F.3d 1487, 1490-91 (1st Cir. 1996) (explaining that because an order approving a 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"); *Commodity Futures Trading Comm'n v. Walsh,* 618 F.3d 218, 225 n.3

(2d Cir. 2010); *SEC v. Black,* 163 F.3d 188, 195 (3d Cir. 1998); *Plata v. Schwarzenegger,* 603 F.3d 1088, 1099 (9th Cir. 2010) (explaining that "the district court's refusal to block the Receiver's construction plan . . . 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") (citing *SEC v. Am. Principals Holdings, Inc.,* 817 F.2d 1349, 1350-51 (9th Cir. 1987) (interpreting § 1292(a)(2) to apply only to orders *refusing* to take steps to wind up a receivership) (emphasis added)); *see also Netsphere, Inc. v. Baron*, 799 F.3d 327, 331-32 (5th Cir. 2015) (similar analysis citing, *inter alia*, *Antiques*).[2]

Applying the logic of *Antiques* to the facts and circumstances here, Appellants' attempt to invoke Section 1292(a)(2) by mischaracterizing a necessary step to wind up the receivership as an order *refusing* to do so is unavailing.

[2] Appellants' reliance on *SEC v. Janvey*, 404 F. App'x 912 (5th Cir. 2010), does nothing to change this analysis. First, *Janvey* is inconsistent with controlling Seventh Circuit authority. Second, *Janvey* is inconsistent with the Fifth Circuit's subsequent published decision in *Netsphere*, where the Fifth Circuit expressly embraced the Seventh Circuit's decision in *Antiques* and comparable decisions in other circuits. 799 F.3d at 332-33 & nn. 19-20, 22, 25, 28-29.

Further, Appellants' argument largely ignores the record below, which shows the Receiver taking active steps, with the District Court's approval, to wind up the Receivership by disposing of properties within the Receivership Estate and resolving claims related to such properties. The District Court is in the midst of implementing a comprehensive process for addressing and resolving competing claims related to individual properties (including priority between claimants). *See, e.g.*, Docket No. 825, at 5; Docket No. 806, at 4, 7/15/2020 Tr., at 45:8-13) (quoting District Court statement that "all issues with regard to a property should be resolved during the claims process"); *see also* Orders Regarding Claims Process, Docket Nos. 349, 574, 652, 726, 745. Appellants are aware of the claims process approved by the District Court and have submitted claims to the Receiver. *See* Docket No. 757, Exhibit 8; *see also* Docket No. 693, Exhibit 1.

The relief the Appellants ultimately seek–a judicial determination of the validity, priority and amount of their claims–will be obtained through the claims process proposed by the Receiver and approved by the District Court. As a result, their appeal is premature.

CONCLUSION

For the foregoing reasons, the Receiver's Motion to Dismiss should be granted, and the appeal should be dismissed.

Respectfully submitted,

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November 27, 2020

CERTIFICATE OF SERVICE

I certify that on November 27, 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 Court's CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ John J. Bowers
JOHN J. BOWERS