Appeal No. 22-3073

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 HOUSING FINANCE AGENCY,
AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC

Appellant

Appeal from the United States District Court
for the Northern District of Illinois
Hon. Manish S. Shah
1:18-cv-5587

RECEIVER'S MOTION TO DISMISS APPEAL

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INTRODUCTION

Receiver-Appellee Kevin B. Duff, by and through his attorneys, hereby moves to dismiss this appeal for lack of jurisdiction. The Appellant, Federal Housing Finance Agency ("FHFA"), is the conservator over two claimants in a federal receivership (Fannie Mae and Freddie Mac). FHFA appeals an interlocutory decision of the District Court sustaining Magistrate Judge Young Kim's overruling of the FHFA's objection to the Receiver's motion to allocate, pursuant to the District Court's earlier approval of a receiver's lien, a portion of the Receiver's fees and costs to monies held in escrow from the sale of two of 108 properties in the receivership estate.

There is no final judgment from which to appeal. Magistrate Judge Kim has neither ruled on the referred allocation motion nor made an award approving the interim payment of fees with these escrowed funds. Further, the Appellants and other lender claimants have submitted competing, purportedly secured claims relative to these two properties. The claims process to adjudicate these competing claims is under consideration by the District Court and has not yet been completed. The two properties at issue have not yet come before the District Court pursuant to the court's approved dispute claims process.

The Appellants allege that jurisdiction for this interlocutory appeal exists under 28 U.S.C. § 1292(a)(1) on the basis that the District Court's overruling the FHFA's objection to the yet-to-be-ruled-upon allocation motion is the equivalent of an injunction. However, Section 1292(a)(1) does not provide jurisdiction to this Court over this appeal. Controlling authority from the Seventh Circuit and the language of

the statute show that this is an improper appeal from an interlocutory order which arises from a receivership setting and is governed by Section 1292(a)(2). Such law provides that the overruling of an objection is not appealable under Section 1292(a)(2), nor is it appealable as an injunction or the equivalent of an injunction under Section 1292(a)(1). For these reasons, those set forth herein, and those reflected in the record, the Receiver now moves for dismissal of this appeal.

BACKGROUND AND PROCEDURAL HISTORY

A. The Ponzi Scheme.

Father and son, Jerome Cohen and Shaun Cohen, were the owners and operators of EquityBuild, Inc., EquityBuild Finance, LLC, and numerous affiliated entities which owned and operated various real estate holdings, principally on the southside of Chicago. (Dkt. 1, at 1) The Cohens claimed that they had a method to locate undervalued property and solicited loans and investments with promises of large returns. (*Id.* at 1-2) But the business was a massive fraud. (*Id.*) The Cohens were operating a Ponzi scheme and violating federal securities laws which involved, *inter alia,* over-inflating the values of properties to make them attractive to lenders and investors, creating multiple secured interests in the same properties, and taking various other actions to ensure they received fresh monies to pay the obligations to various lenders and investors needed to keep the scheme alive. (*Id.*)

The United States Securities and Exchange Commission commenced this action on August 15, 2018 to stop the Defendants' scheme and securities violations. (*Id.* at 3) A consent judgment was entered a short time thereafter. (Dkt. 40) The SEC

sought and the District Court appointed the Receiver-Appellee to take charge of EquityBuild's business and assets. (Dkt. 16)

The receivership is complex and substantial, involving 108 real estate properties,[1] more than 1,600 units, over 2,000 claims submitted by about 900 claimants, and in excess of $100,000,000 received by the Cohens. (*See, e.g.,* Dkt. 638, at 8, 18-20; Dkt. 720, at 1; Dkt. 107, at 10) Maintenance, preservation, and orderly disposition of the properties has been a primary and substantial focus of the Receiver. (*See, e.g.,* Status Reports, Dkt. 107, 258, 348, 467, 567, 624, 698, 757, 839) Most of the properties were multi-family residential buildings in various states of disrepair. (*See, e.g.,* Dkt. 107, at 21-22; Dkt. 348, at 9-12; Dkt. 638, at 3) The COVID-19 pandemic and its impact on the economy in general, and rental income and risk to the real estate market in particular, heightened the challenges of maintaining, preserving, and selling these properties. (*See, e.g.,* Dkt. 699, at 4)

EquityBuild's records, debts, and the assertions of its lienholders have shown that central to the Cohens' fraud was purposeful confusion and obfuscation of secured interests and the use of inflated property values. (*See, e.g.,* Dkt. 348, at 19; Dkt. 720, at 1; Dkt. 749, at 3) The Cohens would, for example, offer the same lending opportunity twice, telling each lender they were in first position. (*E.g.,* Dkt. 638, at 4) The Cohens' scheme resulted in mortgages on properties that in the aggregate were sometimes multiples of the actual value of the properties. (*Id.*) The Cohens created a

[1] When certain adjacent properties are counted separately, the number of properties is 116.

labyrinthian network of over 158 separate corporate entities as cover for their activities. (*See* Dkt. 241, at 3) And at the heart of this complexity are competing, purportedly secured claims asserted by both institutional lender claimants and individual investor lender claimants against properties in the estate. (*See* Dkt. 757, Exhibit 8; *see also* Dkt. 693, Exhibit 1 (claims organized by property))

The Receiver followed a deliberate and orderly plan to market and sell the properties, consistently approved by the District Court. (Dkt. 166; *see also* Dkt. 790, at 11 (and record citations therein)) The Receiver also requested and the District Court has ordered that the proceeds from the sales of properties with competing liens be segregated in separate accounts, with liens attaching to the proceeds in the same priority as existed against the property, until distribution of the proceeds can be determined. (Dkt. 749, at 41-42)

In addition, since early 2019, the Receiver has sought to implement a claims process, which includes resolution of completing claims for the two properties upon which FHFA has asserted an interest. The amended claims bar date was December 31, 2019. (Dkt. 574) The District Court has not yet fully resolved all matters relating to the claims process, but has said that all issues with regard to each of the properties will be addressed and adjudicated during the claims process. (Dkt. 863 (identifying remaining issues to be resolved); Dkt. 825, at 5; Dkt. 806, at 2-4, 7/15/2020 Tr., at 45:8-13)

B. The Involvement of Fannie Mae, Freddie Mac, and FHFA.

FHFA has acted as "conservator" over Freddie Mac and Fannie Mae since 2008. (Dkt. 1209 at 3) That is relevant here because both Fannie Mae and Freddie Mac have been involved in the underlying SEC action virtually from the inception of this Receivership.[2] (*See* Dkt. 35, 61, 2018 appearances on behalf of both Fannie Mae and Freddie Mac) So, not later than September 2018, FHFA had notice of the Receivership and the Receiver's duties and responsibilities regarding the maintenance and disposition in an orderly fashion of properties in the Receivership.

Indeed, since 2018, Fannie Mae and Freddie Mac have claimed secured interests in two properties sold by the Receiver in December 2020 and April 2021, respectively, one at 1131-41 E 79th Place and one at 7024 S Paxton. (*E.g.,* Dkt. 241, 638) Put differently, the enterprises for which FHFA concedes it was responsible were actively engaged in this Receivership for *more than two* years prior to those sales. Further, both of the properties were sold with notice (including by publication) and the Court's approval. And, on the occasion of both of these property sales, the Court specifically found "that the Receiver has given fair, adequate, and sufficient notice to *all interested parties, including all mortgagees and other encumbrancers affected by the Motion*." (Dkt. 910 for 1131 E 79th; Dkt. 966 for 7024 S Paxton) (emphasis added)

[2] In fact, the docket reflects that Fannie, Freddie, and their counsel were among the leaders of the institutional lenders who have been actively involved in this Receivership from the outset.

At no time was any issue raised regarding FHFA's belated claim of interference with its statutory duties and functions, either before or while Receivership resources and monies were used to preserve and maintain the properties until sold – to pay for insurance, address taxes, and the like – and to market and sell the properties, all of which involved time spent by the Receiver and his professionals relative to the preservation, maintenance, and disposition of the properties.

C. The Receiver's Lien and the Court's Overruling of FHFA's Objections.

Pursuant to the District Court's grant of a receiver's lien and further direction from the court (*e.g.,* Dkt. 1030 at 16), the Receiver filed a motion for allocation of fees to properties for payment pursuant to the receiver's lien. (Dkt. 1107) Only then did FHFA appear in these proceedings to object to the Receiver's Allocation Motion. (Dkt. 1209)

Although the FHFA's objection was overruled by Magistrate Judge Kim (Dkt. 1258), appealed to the District Court (Dkt. 1266), briefed (Dkt. 1275, 1279), and again sustained by the District Court (Dkt. 1325),[3] the fact is that the subject matter

[3] The Receiver notes that Fannie Mae and Freddie Mac did not timely object to the Magistrate Judge's decision but rather only filed a joinder to FHFA's objection (Dkt. 1269), which was rejected as untimely by the District Court. *See* Dkt. 1335-1, 10/17/2022 Hearing Tr. at 28 ("The joinder by the entities under conservatorship was an untimely objection. It came a couple days late, as I calculate it. So I am not — I am rejecting that joinder."); *Crabtree v. Experian Information Solutions, Inc.*, No. 16-cv-10706, 2017 WL 11473925 (N.D. Ill. Sept. 6, 2017) ("failure to file objections with the district judge within the specified time period will waive the right to appeal all findings, both factual and legal, made by the magistrate court in a report and recommendation") (citing *Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538, 539 (7th Cir. 1986)).

associated with FHFA's position and any allocation associated with the properties remain largely unresolved. The allocation motion remains pending, as Judge Kim is devoting meaningful time and energies in the efforts to settle matters associated with various properties. Notably, Judge Kim has stated that "as to the issue of whether the allocations are reasonable—if the Institutional Lenders object and the court agrees, the court would allow the Receiver to re-do the allocations so that his reimbursements are paid out of the correct funds." (Dkt. 1184) As such, there is not an even an allocation that has been made or approved with respect to the properties as to which FHFA has asserted an interest that would be subject to review. And, both properties also involve claimant priority disputes, which have not yet been addressed through the disputed claims process.

The Appellants' docketing statement identifies Section 1292(a)(1) as the jurisdictional basis for this appeal. Inconsistently, FHFA filed a motion for certification under Section 1292(b) which allows for certification of non-final orders under certain circumstances. The District Court denied that request ruling that certification would not materially advance the termination of the litigation. (Dkt. 1358)

ARGUMENT

The Receiver moves to dismiss this appeal on the ground there is no jurisdiction. To that point, on no less than three earlier occasions over the last two years, the Seventh Circuit has dismissed every appeal arising from this receivership

as non-final and not falling under any jurisdictional exception, including an appeal by an entity for which FHFA acts as conservator.

Specifically, and while not included in the docketing statement provided by the Appellant, the Receiver notes that claimant Fannie Mae – for which appellant FHFA acts as conservator – filed an appeal on October 28, 2020 regarding its asserted interest in 1131-41 E 79th Street, one of the two properties that FHFA's present motion addresses. *See SEC, et al., v. Federal National Mortgage Association, et al.,* Appeal No. 20-3114. That appeal was dismissed for lack of jurisdiction on December 11, 2020.

Another appellant (a non-claimant) filed two notices of appeal from rulings in the same matter from which this appeal arises. *See SEC, et al., v. Ventus Holdings, LLC, et al.*, Appeal No. 20-3155 (filed November 2, 2020); *SEC, et al., v. Ventus Holdings, LLC, et al.*, Appeal No. 21-2664 (filed September 10, 2021). These appeals were also dismissed by the Seventh Circuit for lack of jurisdiction. The same result is required here.

"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 (7th Cir. 1998). Here, there is no final judgment; nor do the Appellants suggest otherwise. Thus, the sole inquiry is whether there is a statutory basis for appellate jurisdiction. The Appellant's assertion of 28 U.S.C. § 1292(a)(1) as the basis for this

Court's jurisdiction over their appeal of an interlocutory order of the District Court is an apparent effort to avoid the actual section governing the appeal and this Court's prior application of that rule in dismissing the three other appeals.[4]

Appellant's effort fails, however, because on its face, the order at issue does not grant or deny an injunction. And courts have expressly rejected the type of strategic repackaging at play here where litigants have attempted to take an order emanating from a receivership and claim it falls under Section 1292(a)(1):

> § 1292(a)(1) provides for interlocutory appeals of orders involving injunctions, § 1292(a)(2) allows for interlocutory appeals of "orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof...." If orders dissolving receiverships were considered to be orders modifying injunctions, then the separate treatment of receiverships in § 1292(a)(2) would be superfluous. Indeed, in *Warren v. Bergeron,* the Fifth Circuit pointed out that "[i]f the appointment of receivers were a species of injunction, § 1292(a)(2) would be redundant." *Warren,* 831 F.2d at 103. By distinguishing between injunctions in § 1292(a)(1) and receiverships in § 1292(a)(2), ***Congress expressed its desire to treat orders relevant to receiverships differently than orders relevant to injunctions.*** In short, the order dissolving the receivership is not appealable as an order modifying an injunction.

In re Saffady, 524 F.3d 799, 804 (6th Cir. 2008) (dismissing appeal and rejecting effort by appellant to characterize order vacating receivership as an appealable order modifying an injunction under 1292(a)(1)) (emphasis supplied). *See also Yusuf v. Hamed,* 2015 WL 877879, at *2-3 (V.I. Feb. 27, 2015) (dismissing appeal for lack of

[4] As conservator for Fannie Mae, which had its previous interlocutory appeal dismissed, FHFA cannot tiptoe around the fact that it is attempting again to bring an interlocutory appeal when this Court has previously made clear that it lacks jurisdiction over such appeals.

jurisdiction on the basis that the appellant was "only challenging various matters that fall within the administration of winding up the partnership, over which the Superior Court possesses considerable discretion and which are not immediately appealable," and applying *Antiques* and *Saffady*).

The cases cited by FHFA for support are inapposite, and if anything, emphasize the impropriety of jurisdiction here. *Jones-El v. Berge,* 374 F.3d 541 (7th Cir. 2004), involved the failure of the defendant to abide by terms of a consent decree after a preliminary injunction was issued to address violations of the prisoner's Eighth Amendment rights which irreparably harmed the inmates. The decision in *Jaime S. v. Milwaukee Public Schools,* 668 F.3d 481 (7th Cir. 2012), is also inapposite, dealing with the implementation of reform of the special education system in Milwaukee. Unlike here, both *Jones-El* and *Jaime S.* involved injunctions and did not involve receiverships. (See discussion of *Antiques* and *Saffady*, *infra*, at 9-10) Further, if anything, *Jaime S.* actually further establishes why the FHFA's jurisdictional argument is wrong, as in that case the court dismissed the plaintiff's effort to convert an order in that matter into an injunction under 1292(a)(1). *See Jaime S.,* 668 F.3d at 491 ("They appealed the August 19 orders appointing the independent monitor and approving the class notice, insisting that *these* orders are the 'injunction' for purposes of § 1292(a)(1). They are not. … They do not require the parties to do or refrain from doing anything *at all*.").

Section 1292(a), on the other hand, provides federal appellate courts with limited jurisdiction over certain interlocutory orders related to receiverships.

Specifically, Section 1292(a)(2) provides for appellate jurisdiction of appeals from "[i]nterlocutory 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). The district court order appealed from here, however, is not within this Court's jurisdiction.

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 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 so as avoid the reach of Section 1292(a)(2) "strain[s] the statutory language and [would] make anything the receiver did appealable immediately." *Antiques*, 760 F.3d at 672. Should the Court find jurisdiction in a situation like this one, the Court will open itself to a flood of appeals from these and other claimants on the basis that the District Court is refusing to rule their way and/or provide them immediate relief. There are nearly 900 claimants in this action alone. This Court's narrow and careful interpretation of Section 1292(a)(2) reflects the conclusion that Congress did not want to burden the U.S. Courts of Appeal with ongoing supervision of every action a district court or receiver might take. But that is precisely what the Appellants seek here through their effort to avoid Section 1292(a)(2).

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). These courts have made clear that the type of order that the FHFA is seeking to appeal is non-appealable for both statutory and public policy reasons:

> [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.*

Netsphere, Inc. v. Baron, 799 F.3d at 332-33 (footnotes omitted) (emphasis added).

WHEREFORE, the Receiver respectfully requests that this motion to dismiss be granted.

Dated: January 4, 2023

Respectfully submitted,

Kevin B. Duff, Receiver, *Appellee*

/s/ Michael Rachlis
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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2023, 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