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United States Court of Appeals
Tenth Circuit

October 6, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

YOU "ROLAND" LI, individually and derivatively on behalf of AKIRIX L.L.C., a Utah limited liability company; LARRY LEWIS, an individual; AKIRIX L.L.C., a Utah limited liability company; OCP, a Utah limited liability company; KURIOUS, L.L.C., a Utah limited liability company; LLC INVESTMENT HOLDINGS, L.L.C., a Utah limited liability company,

Plaintiffs - Appellees,

v.

JACK LEWIS, an individual,

Defendant - Appellant,

v.

MIDNIGHT MANAGEMENT SERVICES GROUP, LLC, a Wyoming limited liability company; ED CAMERON; NADA LEWIS; MOUNTAIN AMERICA FEDERAL CREDIT UNION,

Third-Party Defendants - Appellees,

and

INTERNAL REVENUE SERVICE, a Bureau of the DEPARTMENT OF TREASURY; UNITED STATES OF AMERICA, a necessary party,

Interested Parties - Appellees.

No. 20-4089
(D.C. No. 1:20-CV-00012-TS-JCB)
(D. Utah)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BRISCOE**, and **MURPHY**, Circuit Judges.

Defendant-Appellant Jack Lewis appeals five interlocutory orders from the United States District Court for the District of Utah. We have pendent jurisdiction under 28 U.S.C. § 1291(a)(1) over one Order and AFFIRM. We lack pendent jurisdiction over the remaining four Orders and DISMISS these appeals.

I.

A. Factual Background

This case arises out of Defendant-Appellant Jack Lewis's ("Jack") scheme with his brother, Plaintiff-Appellee Larry Lewis ("Larry"), to defraud the IRS. Under the brothers' "Nominee Agreement," Larry transferred various assets to Jack, including Larry's ownership interest in Akirix, a company that assists international companies in conducting secured transactions across the internet. In exchange, Jack accepted ten percent of Larry's earnings. By doing so, Larry hoped to hide his ownership in Akirix from the IRS, allowing him to build Akirix without paying pre-existing tax claims. Under Akirix's "Operating Agreement" (the "OA"), eighty-six percent of Akirix's membership units were issued to Jack, fourteen percent of the membership units were issued to Plaintiff-Appellee You "Roland" Li, and zero

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

percent to Larry. The OA also included an integration clause, stating that the OA "supersedes the [sic] any prior agreements or understandings with respect to the Company." *See* Jack App. at 34.

Between 2004 and 2007, Larry accrued unpaid taxes, penalties, and interest of over six million dollars. By late 2010, around the time of the Nominee Agreement, Larry was aware that the IRS asserted debts against him in excess of one million dollars.

Larry and Roland initially filed their complaint against Jack in Utah state court, interpleading the IRS because of its tax lien on Akirix. Larry and Roland brought several claims, including a request for declaratory judgment that Jack is a "mere nominee for Larry Lewis and that Jack Lewis is not an actual member or manager of Akirix." At the time the case was pending in state court, the state court entered a preliminary injunction prohibiting either party from "accessing any of Akirix's funds until ownership is established." *Id.* at 117. The IRS later removed this case to federal district court.

B. Procedural Background

The district court issued a number of orders, with six being relevant to this appeal. Jack appeals only five of those Orders. All six Orders are outlined below.

1. The May 4 Summary Judgment Order

On May 4, 2020, the district court ruled on Jack and Larry's cross-motions for summary judgment ("May 4 Order"). Jack asserted that he was the named owner under the OA. Larry asserted that the Nominee Agreement was void as a matter of

law because it was used to defraud the IRS, and that the OA was similarly void as a matter of law because it was the fruit of the illegal Nominee Agreement. The district court noted that "Jack [did] not challenge the authenticity of [Larry's] allegations regarding the Nominee Agreement or that Akirix's OA was executed, in part, to defraud the IRS." *Id.* at 38. Rather than dispute the veracity of those allegations, Jack only disputed the materiality of his knowledge of fraud. The district court granted in part Jack's motion for summary judgment, holding that Larry's claims were unenforceable because both the Nominee Agreement and the OA were part of a fraudulent scheme. Accordingly, the district court declined to enforce either agreement, found that "both parties are before the court with unclean hands," and left both parties "where their fraudulent undertaking placed them." *Id.* at 41.

Jack does not appeal the May 4 Order.

2. July 8 Order Denying Motion to Enforce the OA

On July 8, 2020, the district court re-affirmed its May 4 Order granting Jack partial summary judgment against Larry's claims ("July 8 Order"). Although submitted as a single filing and decided in a single Order, Jack really brought two separate motions. First, Jack filed a motion to enforce the OA; second, Jack filed a motion to dissolve the injunction entered by the Utah state court.

In his motion to enforce the OA, Jack asserted that the May 4 Order indicated that the OA was an enforceable contract, and that under the OA Jack had an eighty-six percent ownership in Akirix. *See id.* at 852. In his reply in support of that first

motion, Jack also asserted that the district court erred in treating summary judgment facts as undisputed in its May 4 Order. *See id.* at 869.

The district court construed Jack's motion to enforce the OA as a motion to reconsider, although it noted it could also construe the motion as one for summary judgment. It then found that Jack's motion and reply brief "present[ed] no evidence to support his claim that he did not plan, participate in, or benefit from the fraudulent tax scheme." *Id.* at 60. The district court denied Jack's "motion to reconsider" without prejudice, leaving him "free to contest these facts [found in the May 4 Order] in further proceedings." *Id.* at 59.

In his motion to dissolve, Jack asked the district court to dissolve the Utah state court's injunction. The district court concluded that "[w]ith respect to Jack's request to dissolve the Injunction and Orders, the Court will defer ruling on those until Jack proves his hands are clean." *Id.* at 60. The district court then went on to say "[u]ntil Jack can persuade the Court that his hands are clean and that the May 4 Decision should be reconsidered, the Court declines to dissolve the Injunction and Orders." *Id.*

Jack appeals this Order.

3. July 17 Order Denying Leave to Amend

On July 17, 2020, the district court denied Jack's motion to amend his answer and add counterclaims ("July 17 Order"). Jack sought to add various counterclaim-Defendants, including Akirix's new CEO, Larry's wife, and Mountain America Federal Credit Union ("MAFCU"). The district court concluded that any amendment

would be futile because Jack's counterclaims were premised on the enforceability of the OA, but the OA was unenforceable because Jack's hands were unclean. *See id.* at 66. The district court reiterated that Jack "is not foreclosed" from producing evidence that his hands were clean. *Id.*

Jack appeals this Order.

4. July 29 Summary Judgment Order

On July 29, 2020, the district court granted summary judgment in favor of the IRS ("July 29 Order"). The IRS sought "a declaratory judgment that it has valid and subsisting tax liens against Larry for unpaid federal income taxes, and these liens attach to Larry's property interest in Akirix." *Id.* at 71. The district court noted that "[n]o party has opposed the [IRS's] Motion and the deadline for doing so passed on July 6, 2020." *Id.* The district court recognized that "it is improper for the court to grant summary judgment simply because it is unopposed." *Id.* at 72. The district court found that it was undisputed that Jack and Larry entered into the Nominee Agreement to defraud the IRS. Accordingly, Larry's transfer of his ownership interest in Akirix to Jack could not be used to shield that interest from the IRS. Additionally, the district court found that because both brothers were engaged in a fraudulent scheme, "[w]ere Jack permitted to retain title to Akrix's [sic] ownership, he would be unjustly enriched." *Id.* at 76.

Jack appeals this Order.

5. *August 7, 2020 Order Denying Motion to Set Aside*

On August 7, 2020, the district court denied Jack's motion to set aside the district court's July 29 Order pursuant to Federal Rule of Civil Procedure 60(b)(1) and (b)(6). Jack asserted that he failed to timely oppose the IRS's motion for summary judgment because he had requested an extension from the IRS, and the IRS had indicated it would not oppose an extension. Jack did not request an extension from the district court; nor did he inform the district court of the IRS's consent to an extension. The district court thus concluded "that Jack waived his right to file a responsive motion by not complying with the Court's filing times." *Id.* at 83. The district court also recognized that it could grant an extension if Jack demonstrated "excusable neglect," and that "danger of prejudice to the nonmoving party, the length of delay, and good faith" all favored granting an extension. *Id.*

Notably, in asserting prejudice, Jack for the first time produced evidence that he did not enter into the Nominee Agreement or OA to defraud the IRS. *See id.* at 1255 (Jack's declaration asserting "I made clear to Larry that I would not participate in any wrongdoing with Larry with any person or entity including the Internal Revenue Service and his behavior had to be wholly lawful at all times"). The district court denied the untimely extension, however, because "Jack's reason for delay is that Jack's counsel and the United States mutually agreed to extend Jack's filing deadline but did not make this known to the Court." *Id.* The district court found this was an insufficient reason for delay.

Jack appeals this Order.

6. August 21 Order Denying Extension of Time

On August 21, 2020, the district court, through a docket text order, denied Jack's motion for extension of time to oppose the IRS's motion for summary judgment. The district court did not provide any explanation for its Order in its docketing statement.

Jack appeals this Order.

On August 25, 2020, Jack filed a notice of appeal, identifying five Orders at issue: (1) the July 8 Order denying Jack's motion to enforce the OA; (2) the July 17 Order denying Jack leave to amend; (3) the July 29 Order granting summary judgment to the IRS; (4) the August 7 Order denying Jack's motion to set aside the July 29 Order; and (5) the August 21 Docket Text Order denying Jack's motion for extension of time. This court ordered the parties to submit briefs addressing this court's jurisdiction. The jurisdictional issues were then referred to the merits panel.

II.

All federal courts are courts of limited jurisdiction. Federal appellate courts are further limited: "As a general rule, only final decisions of the district court are appealable." 28 U.S.C.§ 1291; *Utah v. Norton*, 396 F.3d 1281, 1286 (10th Cir. 2005). But § 1291(a) creates an exception for "appeals from . . . [the] granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1291(a)(1).

Moreover, our jurisdiction to review interlocutory orders is limited. In *Swint v. Chambers County Commission*, 514 U.S. 35, 45–51 (1995), the Supreme Court held that

federal courts of appeal have pendent appellate jurisdiction only to review those issues which are related to issues properly within the court's statutory grant of jurisdiction. This court has interpreted *Swint* to mean that pendent jurisdiction may be granted only if an unrelated issue is "inextricably intertwined with the appealable decision" or where its review is "necessary to ensure meaningful review of the appealable [decision]." *Cummings v. Dean*, 913 F.3d 1227, 1235 (10th Cir. 2019) (citations omitted).

An order is inextricably intertwined with an appealable decision when the "appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1221 (10th Cir. 2019) (citing *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995) (emphasis in original)). A pendent claim cannot have "legal or factual matters distinct from those raised by the claims over which [the court] unquestionably has jurisdiction." *Malik v. Arapaho Cnty. Dept. of Soc. Servs.*, 191 F.3d 1306, 1317 (10th Cir. 1999).

These exceptions, which permit the exercise of pendent jurisdiction, are disfavored and narrowly construed. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). This court invokes pendent jurisdiction only "sparingly." *Cox v. Glanz*, 800 F.3d 1231, 1255–56 (10th Cir. 2015). Indeed, pendent jurisdiction is limited to those circumstances where the effective challenge to an interlocutory order would prevent "serious, perhaps irreparable, consequences." *Hatten-Gonzales v. Hyde*, 579 F.3d 1159, 1165 (10th Cir. 2009) (citing *Carson* 450 U.S. at 84).

A. We only have jurisdiction over the July 8 Order.

The parties dispute whether the July 8 Order falls under § 1291(a)(1). Jack argues the district court, by its July 8 Order, refused to dissolve the state court injunction, which would place the district court's ruling well within § 1291(a)(1). Larry asserts the district court merely deferred ruling on the motion until Jack could show clean hands. But Larry's argument does not reflect what the district court did. Denying an order without prejudice could be construed as a deferral in that Jack could again file his motion when he can show clean hands, but the district court did more—it dismissed Jack's motion without prejudice.

Reviewing the language of the July 8 Order, the district court clearly states it declines to dissolve the state court injunction. This language both falls within the statute and supports our jurisdiction to review the July 8 Order. But, under § 1291, our jurisdiction is limited to only that part of the Order pertaining to the refusal to modify the injunction. Any discussion of the merits is reached only through pendent jurisdiction. *See Merrell-National Labs., Inc. v. Zenith Labs., Inc.*, 579 F.2d 786, 791 (3d Cir. 1978) (preventing an interlocutory appeal of an order denying modification of a preliminary injunction "to circumvent the time bar to appeal from the underlying preliminary injunction").

In determining whether to reach the merits of the July 8 Order under our discretionary pendent jurisdiction, we look to the steps set forth in *Moore v. City of Wynnewood*, 57 F.3d 924, 929 (10th Cir. 1995). "In exercising [discretionary pendent jurisdiction], we have considered whether (1) an adequate record has been

developed for review; (2) the pendent appeal involves questions of fact and law that are closely related to an appealable issue; and (3) exercising pendent jurisdiction would promote judicial economy." *Moore*, 57 F.3d at 929. "The doctrine is discretionary, and the exercise of pendent appellate jurisdiction is generally disfavored." *Cox*, 800 F.3d at 1255 (internal quotations omitted).

Here, the record has not been well developed for review. Although fact discovery has closed, Jack has not clearly presented evidence showing his hands are clean, and the district court therefore has not had an opportunity to review any such evidence. Additionally, before this court, Jack focuses solely on the pendent (merit) issues, and so has waived any argument immediately available under § 1292(a)(1). Thus, on the record presented, it would be imprudent to conclusively decide the merits of the case.

Second, the pendent appeal involves questions of law and fact related to the district court's decision on May 4 when it discussed the issue of Jack's unclean hands. The district court did not go into a detailed analysis on the issue; thus, the question is not especially related to the issue on appeal.

Finally, judicial economy does not favor pendent jurisdiction. Indeed, judicial economy would be better served by dismissing the appeal and addressing the merits following a final judgment, rather than taking interlocutory appeals in piecemeal fashion.

We decline to address the merits of the July 8 Order under our discretionary pendent jurisdiction.

After reviewing the district court's denial of Jack's motion to revoke the state court's preliminary injunction in the July 8 Order, we conclude Jack cannot prevail. By failing to raise any arguments under § 1291(a)(1), Jack has waived any arguments he may have on the issue. Indeed, Jack concedes that he failed to "expressly" challenge the district court's refusal to dissolve the state court injunction. Jack's Reply Br. at 6. Further, even had Jack expressly challenged the July 8 Order denying his motion to dissolve, his arguments focus solely on the clean-hands issue. As discussed above, whether Jack's hands are clean is a merits issue we can only reach by exercising *pendent* jurisdiction. Jack never directly addresses whether the state court injunction remains viable following the district court's May 4 summary judgment Order.

B. We do not have pendent jurisdiction over the remaining four Orders.

Jack also appeals four other Orders. None of these Orders directly involve the district court's refusal to dissolve an injunction and therefore fall outside of the limitations set by § 1291.

We decline to extend pendent jurisdiction to any of the four Orders. All four were issued after the July 8 Order. They are not necessary to ensure meaningful review of the July 8 Order that denies Jack's request to modify the state court injunction. Nor are any of them inextricably intertwined with the July 8 Order refusing to dissolve the state court injunction.

The July 17 Order is not inextricably intertwined because we will not reach the merits of whether Jack has clean hands. That was the crux of the district court's denial.

Because our answer here will not change the outcome of the July 17 Order, pendent jurisdiction is lacking.

The final three Orders Jack appeals all relate to the IRS's motion for summary judgment. The July 29 Order grants summary judgment based on Larry's fraudulent intent. Thus, even if we would decide whether Jack has clean hands, the IRS may still be entitled to summary judgment based on the district court's analysis. Both the August 7 Order and the August 21 Order relate to the July 29 Order and neither rest on whether Jack has clean hands. Indeed, the district court ruled on these Orders based on procedural matters alone. Thus, we decline to exercise pendent jurisdiction.

III.

We AFFIRM the district court's July 8 Order denying Jack's motion to dissolve the state court injunction, and we DISMISS Jack's appeals from the remaining four Orders.

Entered for the Court

Mary Beck Briscoe
Circuit Judge