

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

Nos. 93-2058, 93-2384, & 93-2443
Summary Calendar

LAWRENCE P. MILES,

Plaintiff-Appellant,

VERSUS

SUNBELT NATIONAL BANK, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas
(H-92-CV-1246)

(August 10, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Lawrence P. Miles sued Sunbelt National Bank (Sunbelt); Lauren I. Schverak, executive vice-president and loan officer of Sunbelt; and Michael B. Massey, an attorney for Sunbelt, alleging breach of contract, fraud, usury and racketeering. Jurisdiction was based on diversity, and the Seventh Amendment to the U.S. Constitution.

The action arose out of a verbal agreement with Sunbelt to

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

lend Miles 80% of the appraised value of certain properties² located in Houston, Texas. Miles alleged that Sunbelt falsely represented its intention to lend him the money and caused him to refinance his business; purchase distressed property; cross-collateralize the two properties, waive a long-standing business homestead, and sign unfair promissory notes, deeds of trust, and security agreements. Miles further alleged that the bank lent "unlawful money" at interest rates 20 times higher than the agreed rate and that the defendants induced him to sign assignments and waivers that permitted Sunbelt to take possession of the properties when he defaulted on the loan.

Sunbelt moved for a preliminary injunction alleging that, after Miles and his wife, Patricia, defaulted on the loan, and title to the property passed to Sunbelt, Miles continued to make demands on the tenants of the property to pay the rent to him. Because Miles had recently filed for bankruptcy and Sunbelt believed that Miles could not compensate it for any losses, Sunbelt sought to enjoin Miles from communicating with the tenants. The district court ordered Miles to file an amended complaint, and advised that a temporary restraining order was not necessary because Miles had agreed not to contact the tenants.

Miles filed a second amended complaint and a motion to proceed in forma pauperis (IFP). The district court granted the motion to proceed IFP, denied the defendants' motions to dismiss, and granted the defendants' motion for a preliminary injunction.

² Sunbelt issued checks totaling \$215,325.

Miles moved for partial summary judgment on his claim of illegal foreclosure. He alleged that any foreclosure action was automatically stayed because he filed for bankruptcy protection. Massey opposed the motion because Miles had not presented competent summary judgment evidence, the claim of illegal foreclosure was raised in the second amended complaint which had been stricken,³ and the foreclosure occurred three days prior to Miles's filing for bankruptcy. Massey also filed a cross-motion for partial summary judgment on the issue of illegal foreclosure. Sunbelt filed a counter-claim and a third-party complaint against Patricia Miles to recover the unpaid amounts due under the loans. Miles moved for modification or stay of the district court's order granting the preliminary injunction, and the district court denied the motion. Miles appealed this denial in Cause No. 93-2058.

Miles filed a second motion for partial summary judgment on the issue of illegal foreclosure. The district court denied Miles's motion and granted the cross-motion for partial summary judgment, finding that the foreclosures were valid, the transfer of title to the properties effected by the trustee's deeds were not avoidable by Miles's filing the bankruptcy petition, and the automatic stay provisions were not violated.

Miles filed notice that he and his wife had sought protection under Chapter 13 of the Bankruptcy Code.⁴ He asked that the

³ The district court subsequently granted Miles motion to file a second amended complaint. R. 5, 518; see R. 5, 519-42.

⁴ The petition was converted to a Chapter 11 petition.

district court "give full faith and credit to the Atomic [sic] Stay by enjoining any further prosecution of the Defendants['] Counter suit against [him and Patricia]." Id. The Miles moved to halt all proceedings against them pursuant to 11 U.S.C. § 362 and for a continuance to obtain counsel.

The district court convened for trial, granted the motion to dismiss Massey, denied Miles's motion for a continuance, and dismissed the remaining claims without prejudice for want of prosecution and failure to cooperate in the trial of the case. In a written order, the district court stated that the Miles's failed to state a cause of action in fraud, tort, or contract. The district court also stayed the defendants' cross-claim for the unpaid amounts due on the loan pending the resolution of the bankruptcy proceeding. Miles filed a notice of appeal in this Court and a motion to consolidate his appeals.⁵ This Court consolidated Cause Nos. 93-2058, 93-2442, and 93-2384.

Miles has also moved for a writ of mandamus and to expedite his appeals and his mandamus request. We dismiss the appeals and deny the motions.

DISCUSSION

ISSUE 1: Nos. 93-2384 and 92-2442⁶

⁵ This Court denied Miles' motion to consolidate Nos. 93-2058 and 93-2248 and granted the appellees' motion to dismiss No. 93-2248. Miles filed a motion to amend appeal No. 93-2384 (emergency motion for writ of mandamus, which was denied, R. 1, 1348) to include a demand for a transcript of the hearing. R. 1, 1345. The transcript is part of the record on appeal. See R. 8.

⁶ Cause No. 92-2058 is an appeal from the entry of a preliminary injunction and the district court's refusal to stay

Miles seeks to appeal of the district court dismissal without prejudice of his claim that he was fraudulently induced to enter into a financial arrangement with Sunbelt and partial summary judgment in favor of the defendants on the claim of illegal foreclosure. See Blue brief, B-1, 18-20.

We first address the question of our jurisdiction. See Thompson v. Betts, 754 F.2d 1243, 1245 (5th Cir. 1985). "Federal appellate courts have jurisdiction over appeals only from (1) a final decision under 28 U.S.C. § 1291; (2) a decision that is deemed final due to jurisprudential exception or that has been properly certified as final pursuant to Fed. R. Civ. P. 54(b); and (3) interlocutory orders that fall into specific classes, 28 U.S.C. § 1292(a), or that have been properly certified for appeal by the district court, 28 U.S.C. § 1292(b)." Askanase v. Livingwell, Inc., 981 F.2d 807, 809-10 (5th Cir. 1993).

The district court dismissed Miles's claims but stayed Sunbelt's counterclaim to recover the unpaid amount on the loan pending the resolution of the bankruptcy proceeding. 11 U.S.C. § 362. Therefore, the litigation is not final as to all of the parties. Nor is the challenge to the judgment an interlocutory order under § 1292. The question before the Court then narrows to whether the district court directed the entry of judgment

or modify the preliminary injunction. Cause No. 93-2384 is an emergency motion for a writ of mandamus to provide a transcript of the hearing and an appeal from the district court's orders dismissing the case, granting partial summary judgment for illegal foreclosure, and enjoining Miles from contacting the tenants. Cause No. 92-2442 is an appeal from the orders dismissing the case and granting partial summary judgment.

pursuant to Rule 54(b).

In Kelly v. Lee's Old Fashioned Hamburgers, Inc., 908 F.2d 1218, 1220 (5th Cir. 1990) (en banc), we held that an order is appealable if "language in the order either independently or together with related parts of the record reflects the trial judge's clear intent to enter a partial final judgment under Rule 54(b). . . ." In Kelly, the Court held that the requirements of 54(b) were satisfied and partial final judgment was appropriate because the record contained "a minute entry directing the prevailing defendant to prepare and submit 54(b) judgment to the Court." Id. at 1221-22 (internal quotation omitted). In contrast, the Court overruled Mills v. Zapata Drilling Co., Inc., 722 F.2d 1170 (5th Cir. 1983) because "[n]either the order appealed from nor related pleadings in the record recited Rule 54(b)." Id. at 1221.

Although the district court advised Miles at the preliminary hearing that he could go home and start his appeal, R. 8, 61, and then entered what is termed a "FINAL JUDGMENT," R. 1, 1289, the record contains neither a motion requesting entry of judgment under Rule 54(b) nor an express reference in the order to indicate that the judgment has been certified as final pursuant to Rule 54(b). See Kelly, 908 F.2d at 1220-21. Under the holding of Kelly, we do not have appellate jurisdiction, and the appeal must be dismissed. See Askanase, 981 F.2d at 810.

ISSUE 2: No. 92-2058

Miles seeks to appeal the district court's order granting a

preliminary injunction prohibiting Miles from communicating with the tenants of the property and the order refusing to stay or modify the injunction. Blue brief C-1, 7-8; see R. 6, 313-14.

"Section 1292(a)(1) authorizes appeals from interlocutory orders that grant or deny an injunction. This statutory provision, however, does not authorize appeals from orders that compel or restrain conduct pursuant to the court's authority to control proceedings before it, even if the order is cast in injunctive terms." Hamilton v. Robertson, 854 F.2d 740, 741 (5th Cir. 1988) (internal quotation and citation omitted).

The injunction prohibiting contact with the tenants is more in the nature of a protective order, even though it is labeled a preliminary injunction. Prior to the order, Miles agreed not to contact the tenants at the property. R. 6, 258. Therefore, the order served only to maintain the status quo and did not pertain to the merits of Miles's suit. See Siebert v. Great N. Dev. Co., 494 F.2d 510, 511 (5th Cir. 1974). Accordingly, the orders granting and refusing to modify or stay the preliminary injunction are not "appealable order[s] of the sort contemplated by Section 1292(a)." Id. The appeal from the orders must be dismissed.

Motions DENIED; appeals DISMISSED.