IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2704

Summary Calendar

MUTUAL FIRE INSURANCE and
MARINE AND INLAND INSURANCE COMPANY
OF PHILADELPHIA, PENNSYLVANIA,

Plaintiffs-Appellees,

v.

GERALD BOOTH, Et Al.,

Defendants,

ALVIN E. HARRIS, FRANK SHATTUCK,
MERLIN W. SANT, GEORGE R. SANT,
ROBERT E. HOWELL and VINCENT R. LONNQUIST,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-86-1935)

(May 24, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

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*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Defendants in the district court appeal from an order of the court striking their demand for a jury trial. Because this order is an unappealable interlocutory order, we dismiss the appeal.

I.

In May 1986, Mutual Fire, Marine and Inland Insurance Co. (Mutual Fire) filed suit in the United States District Court for the Southern District of Texas against twenty individual defendants--including Alvin E. Harris, Frank Shattuck, Merlin W. Sant, George R. Sant, Robert E. Howell, and Vincent R. Lonnquist, who are the appellants in the instant matter. Mutual Fire alleged breach and anticipatory breach of an indemnity agreement. In their answers, none of the defendants demanded a jury trial.

From October 1987 until January 1993, the case was stayed pursuant to the automatic stay provision of the Bankruptcy Code. After the stay was lifted, Mutual Fire filed its first amended complaint on March 15, 1993, in which it dropped (1) the claim for anticipatory breach in its entirety and (2) the claim for breach against five of the original defendants, none of whom are involved in this appeal. The certificate of service reflects that the amended complaint was served on all defendants by mail on March 12, 1993.

On April 6, 1993, defendants Harris, Shattuck, and Merlin Sant filed a joint answer to the first amended complaint in which they demanded a jury trial. The certificate of service indicates that this answer was served on Mutual Fire by mail on April 2,

1993. On September 1, 1993, defendants Howell, Lonnquist, and George Sant filed their answers to the first amended complaint in which they also demanded a jury trial. The certificate of service for each answer reflects that each was served on Mutual Fire by mail on August 30, 1993.

The district court struck these defendants' jury demand by an order issued on September 10, 1993, scheduling the case for the non-jury calendar. Although the defendants did not request certification of the order for an interlocutory appeal under 28 U.S.C. § 1292(b), they now appeal the district court's order.

II.

This court has jurisdiction over appeals from final decisions of the district court. See 28 U.S.C. § 1291. Although the defendants concede that the district court's order striking their jury demand is an interlocutory order, they contend that this order is appealable under the collateral order exception to § 1291. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Campanioni v. Barr, 962 F.2d 461, 463 (5th Cir. 1992). We disagree. An order denying a demand for a civil jury trial does not fall within the narrow confines of the collateral order doctrine. Howard v. Parisian, Inc., 807 F.2d 1560, 1566 (11th Cir. 1987); see Akin v. Pafec Ltd., 991 F.2d 1550, 1563 & n.17 (11th Cir. 1993); see also 9 CHARLES A. WRIGHT & KENNETH A. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 2322 (1971) ("An order striking a demand for a jury trial and transferring the case to the

nonjury calendar is not a final judgment and is ordinarily not appealable."); cf. In re American Marine Holding Co., 14 F.3d 276, 277 (5th Cir. 1994) (determining that the question of whether the district court erred in refusing a jury demand on the issue of arbitrability may be raised for appellate review after the arbitration is completed and the district court enters a final judgment confirming such arbitration and that the only alternative route for relief might be a writ of mandamus); In re Jensen, 946 F.2d 369, 371 (5th Cir. 1991) ("[A] writ of mandamus is an appropriate remedy to protect the valued right of trial by jury and to avoid costly, multiple trials.").

The defendants have also urged us to treat this appeal, in the alternative, as a petition for a writ of mandamus. Despite the fact that "it is fairly common practice for an appellant to file an appeal and, in the alternative, a petition for a writ of mandamus," the defendants' position is that they--who have been represented by competent legal counsel throughout the course of this litigation--"should be able to petition for a writ of mandamus without writing any petition, without serving anything even arguably construable as such on the district court (the nominal defendant in a mandamus action), and without paying any attention at all to the directly applicable federal rule of appellate procedure." See EEOC v. Neches Butane Prods., Inc., 704 F.2d 144, 152 (5th Cir. 1983) (emphasis added). Again, we disagree. Under circumstances such as those present in the instant case, which do not approach the extraordinary, a mandamus

petitioner may not fail to comply with Federal Rule of Appellate Procedure 21 without providing an adequate excuse.[1] See id. We thus believe that it would be improper to consider whether we would grant a petition for a writ of mandamus when no petition has been presented to us.

III.

For the foregoing reasons, we DISMISS the appeal.

[1] We note that the defendants in the instant case did not demand a jury trial within the prescribed ten-day period after the service of the original complaint or after the service of the amended complaint. See FED. R. CIV. P. 38(b). Although they argue that their amended answers raise new issues so as to revive their right to request a jury trial, their original answers are not a part of the record on appeal, and we thus have no way to determine if, indeed, new issues were raised. Moreover, the record indicates that the defendants requested no relief from the district court, e.g., a motion to reconsider or a motion pursuant to Federal Rule of Civil Procedure 39(b), concerning the district court's denial of their jury demand.