IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3537

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

UNITED FRUIT COMPANY,

Defendant,

HERBERT D. BERKSON,

Movant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 93-30 "D" (1))

(May 13, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Herbert D. Berkson filed a petition for a writ of mandamus. The district court dismissed Berkson's suit. Berkson appeals. We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On July 2, 1954, the United States initiated a proceeding in Louisiana federal district court charging United Fruit Company with violations of §§ 1 and 2 of the Sherman Act. The parties eventually agreed to a consent decree which was entered as a final judgment. Pursuant to the consent decree, United Fruit Company was required to divest itself of a portion of its Central American banana properties. United Fruit Company eventually decided to divest itself of a portion of its Guatemalan banana properties; Del Monte and Berkson's Pan Tropic Fruit Company submitted bids on the Guatemalan properties. In 1972, the Guatemalan government approved the sale of the Guatemalan properties to Del Monte.

The district court then held a hearing to consider the proposed sale. At the hearing, Berkson appeared as amicus curiae and argued that the court should not approve the sale to Del Monte. The district court approved the sale which was finalized on December 14, 1972.

In 1978, upon motion of the parties, the district court modified the consent decree. The modified consent decree provided that judgment would remain in effect "until ten years after the divestiture by [United Fruit Company] of its Bananera Guatemala plantations to Del Monte Corporation, which was consummated on December 14, 1972. This Modified Final Judgment shall thereafter be of no force or effect."

Del Monte's purchase of United Fruit Company's Guatemalan properties has led Berkson to pursue a relentless course of litigation seeking to void the sale of the Guatemalan properties to Del Monte. In 1979, Berkson filed an antitrust complaint in a Massachusetts federal district court against United BrandsSQUnited Fruit Company's successorSQand Del Monte alleging that the companies had conspired to exclude other companies from purchasing the Guatemalan properties. The district court granted summary judgment on the ground that the action was time barred. The First Circuit upheld the district court's determination. Berkson v. Del Monte Corp., 743 F.2d 53 (1st Cir. 1984), cert. denied, 470 U.S. 1056 (1985).

Since Berkson's first suit seeking to void the sale of the Guatemalan properties to Del Monte, he has apparently brought three other suits in Massachusetts federal district court concerning the sale of the Guatemalan properties. All of these suits were ultimately dismissed and affirmed by the First Circuit. The present suit represents Berkson's latest attempt to void the sale of the Guatemalan properties.

In the instant case, Berkson filed a petition for writ of mandamus in Louisiana federal district court, the court which originally entered the consent decree in 1958. In his petition for mandamus, Berkson asked that "the plaintiff, the United States of America, be compelled to uphold the terms of the Final Judgment and enforce the violations thereof and hold said defendant in contempt of the decree." Berkson alleged that the

district court had jurisdiction over the case pursuant to 28 U.S.C. § 1361.

The government filed a motion to dismiss Berkson's petition for writ of mandamus. The district court granted the government's motion. The district court determined that because the decision to enforce the terms of a consent decree is a discretionary governmental action, Berkson did not have standing to compel the United States to enforce the consent decree. The district court further determined that it did not have subject matter jurisdiction over a suit in which the United States is the plaintiff unless the suit is brought by the attorney general. Berkson then filed a motion for reconsideration. The district court stated that as of the filing of the notice of appeal it did not have jurisdiction over the case, and that even if it did decide to reach the merits of Berkson's motion to reconsider, it would deny the motion.[1]

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[1] The district court's judgment was entered on July 12, 1993, and Berkson's supplemental memorandum to his motion to reconsider was served on July 20, 1993. Even though the district court declined to enter Berkson's original motion to reconsider into the record because of deficiencies, the supplemental motion to reconsider was entered into the record. Because Berkson has not appealed the district court's ruling on his motion to reconsider, we do not address the propriety of the district court's decision that the notice of appeal filed in the case divested that court of jurisdiction. See FED. R. APP. P. 4(a)(4)(f) (stating that "[a]ppellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal"). Furthermore, once Berkson's supplemental motion to reconsider was ruled upon, his previously filed notice of appeal was sufficient to place jurisdiction with this court. FED. R. APP. P. 4(a)(4); see also Burt v. Ware, 14 F.3d 256 (5th Cir. 1994).

II.

Berkson argues on appeal that the district court erred in dismissing his petition for writ of mandamus because even though the government may have discretion as to what actions it may bring, it does not have discretion as to whether it can refuse to enforce the consent decree. Specifically, Berkson argues that

> this discretion does not apply, nor are there any authorities known to [Berkson] to support the Department of Justice's position that even though an action which has been commenced by them and gone to judgment, the Department of Justice can, at that juncture, refuse to enforce the decree by bringing to the attention of the Court a fraud practiced on the Court, which fraud vitiates the Judgment and the decree and order thereon. To allow this position to stand would violate the Constitution and provisions of separation of the Executive and Judicial Branches of the United States government, in that, as in this case, the Executive would not be required to carry out and enforce the decrees and orders as set forth by the Judiciary.

We note initially that in his petition for writ of mandamus Berkson clearly requested the district court to enforce the consent decree. However, it is well settled "that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975). Berkson has not pointed us to any provision of the consent decree or the modified decree which grants a non-party such as Berkson standing to enforce its provisions, and we have not found any. Accordingly, Berkson did not have standing to enforce the consent decree.

Berkson's argument on appeal is further eroded by his attempt to bring a mandamus action. Berkson's petition for

mandamus was an attempt to require the United States to enforce the consent decree. Berkson asserted that the district court had the power to grant his requested relief pursuant to § 1361 which provides that the "[d]istrict courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." However, § 1361 confers jurisdiction on a district court only when the official or agency owes a specific duty to the party seeking mandamus relief. Kirkland Masonry, Inc. v. Commissioner, 614 F.2d 532, 533-34 (5th Cir. 1980). The duty must be "'clear, ministerial and non-discretionary.'" Id. at 534 (quoting Mattern v. Weinberger, 519 F.2d 150, 156 (3d Cir. 1975)). "Because there is no presumption in favor of federal court jurisdiction and that jurisdiction is limited, the basis for jurisdiction must be affirmatively shown." Id. at 533. Berkson has not alleged what duty was created in his favor such that he could compel the government to enforce the consent decree, and we have not found one. Because Berkson has failed to establish that the government owed him a duty which may be enforced by a writ of mandamus, and because he has failed to establish any other basis for the district court to assume jurisdiction over this case, the judgment of the district court dismissing for lack of subject matter jurisdiction is affirmed.

III.

The government requests that this court impose sanctions against Berkson in the amount of $1,600, pursuant to Federal Rule

of Appellate Procedure 38, for filing a frivolous appeal. "An appeal is frivolous if the result is obvious or the arguments of error are wholly without merit." Coghlan v. Starkey, 852 F.2d 806, 811 (5th Cir. 1988). We are particularly cautious in awarding sanctions against pro se litigants. However, even pro se litigants are not allowed to bring a frivolous appeal.

Berkson has filed numerous lawsuits attempting to void the sale of the Guatemalan properties to Del Monte. This lawsuit was merely another attempt to void the sale. In addition to the fact that the district court lacked subject matter jurisdiction, it is unlikely that Berkson's suit was viable because the First Circuit already determined that the allegations of fraud which he raised in this case were barred by the statute of limitations. Further, because the consent decree as modified appears to have expired in 1982, it does not appear that there is anything for anyone to enforce. The fact that this suit is merely an attempt to make an end run around the unfavorable decisions reached in Berkson's earlier suits is clearly evidenced by his reply brief in this court in which he spends most of his argument attacking the earlier decision of the First Circuit, which dismissed his antitrust suit. Therefore, we conclude that Berkson's appeal of the district court's decision is frivolous, and we award $1,600 as a sanction.

IV.

For the foregoing reasons, the judgment of the district court is AFFIRMED. Further, because the appeal is frivolous, we assess $1,600 in sanctions against the appellant.