IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11165
Summary Calendar

John H. Cloud,

Plaintiff-Appellant,

versus

United States of America,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:94-CV-2224-T)

(July 11, 1995)

Before JOHNSON, JOLLY and DAVIS, Circuit Judges.[*]

PER CURIAM:

Plaintiff appeals from two interlocutory orders. Concluding that this Court lacks jurisdiction, we DISMISS the appeal.

I. FACTS AND PROCEDURAL HISTORY

John Cloud filed a Federal Tort Claims Act (FTCA) action against the United States alleging that a pharmacist at the Veterans' Hospital in Dallas, Texas, negligently dispensed the drug Roxicet instead of the drug Tylenol #3, which had been prescribed for him. Before the government made an appearance,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Cloud filed a document styled "Motion to Clarify, Request for Emergency Hearing and Emergency Order." Cloud apparently sought by this document to prompt the district court to issue an opinion as to the legal conclusion in the Veterans' Administration's letter denying his administrative claim and to issue some kind of order to protect him from the administrative decision.

The district court denied this order and warned Cloud against filing frivolous motions. Cloud then filed a motion for reconsideration which the court also denied. Subsequently, Cloud filed a notice of appeal referencing these two orders.

II. DISCUSSION

Federal appellate courts have jurisdiction over appeals only from 1) final orders under 28 U.S.C. § 1291; 2) certain specific types of interlocutory appeals, such as those where injunctive relief is involved, pursuant to 28 U.S.C. § 1292(a); and 3) interlocutory orders that have been properly certified by the district court as final for appeal pursuant to Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1292(b). *Dardar v. Lafourche Realty Co., Inc.*, 849 F.2d 955, 957 (5th Cir. 1988). As discussed below, Cloud's appeal does not come within any of these three sections.

First, we note that the two orders appealed from are not final and appealable orders for purposes of section 1291. A decision is final under section 1291 when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S.Ct. 2454, 2457 (1978) (quoting *Catlin v. United States*, 324

U.S. 229, 233, 65 S.Ct. 631, 633 (1945)). The litigation in the district court has not ended, but rather the FTCA action continues. Accordingly, these orders are interlocutory and not final and appealable under section 1291.

Next, Cloud's appeal does not come within the exception set out in section 1292(a) for certain interlocutory orders. The only part of this section even conceivably relevant is section 1292(a)(1) which provides for appellate jurisdiction over interlocutory orders of the district courts "granting, continuing, modifying, refusing or dissolving injunctions. . ." However, this exception to the final order rule is "available only in circumstances where an appeal will further the statutory purpose of `permit[ing] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.'" *Carson v. American Brands, Inc.*, 450 U.S. 79, 84, 101 S.Ct. 993, 996 (1981) (internal quotation and citation omitted). Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence," and that the order can only be effectively challenged by immediate appeal, the general policy against piecemeal review will prevent interlocutory appeal. *Id.* at 997.

Although Cloud sought some kind of "emergency order" protecting him from the effect of the Veterans' Administration's administrative decision, he makes no attempt to show on appeal that the denial of that motion had the effect of denying injunctive relief concerning serious, perhaps irreparable

consequence. *Id.* at 996; *see Roberts v. St. Regis Paper Co.*, 653 F.2d 166, 170 (5th Cir. 1981). He has also failed to show that the interlocutory order denying his motion for reconsideration is of serious, perhaps irreparable, consequence under section 1292(a)(1). Thus, the general policy against piecemeal appeals prevents any interlocutory appeal under section 1292(a) in this case. *Carson*, 101 S.Ct. at 997.

Finally, Cloud did not seek an order from the district court certifying that these interlocutory orders are appealable under section 1292(b).[1] Hence, jurisdiction cannot be sustained under section 1292(b).

III. CONCLUSION

As the orders appealed from are not final orders under section 1291, nor appealable interlocutory orders under section 1292(a), nor certified as final and appealable under section 1292(b), this Court lacks jurisdiction over this appeal. For this reason, this appeal is DISMISSED.[2]

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[1] Also, an appeal under section 1292(b) requires not only certification by the district court but also application within ten days to the Court of Appeals and that court's grant, in its discretion, of permission to appeal under Fed. R. App. 5. *Pemberton v. States Farm Mutual Auto Ins. Co.*, 996 F.2d 789, 791 (5th Cir. 1993). Cloud has made no such application.

[2] Cloud also filed a motion to supplement the record which this Court carried along with the appeal. In light of this disposition, said motion is DENIED.