IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20203
Summary Calendar

RICHARD H. KAPLAN and DOREEN A. KAPLAN,

Plaintiffs-Appellants,

versus

FIRST CITY, TEXAS-HOUSTON, N.A., SIDNEY M. DEAN, and FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
(CA-H-92-1837)

(February 15, 1995)

Before REAVLEY, DAVIS and DeMOSS, Circuit Judges.

REAVLEY, Circuit Judge:[*]

Appellants Richard and Doreen Kaplan complain that the district court erred in denying their motion to reinstate their case after it had been stayed. We affirm in part and reverse and remand in part.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

In May of 1992 Richard and Doreen Kaplan filed this suit in state court against First City, Texas-Houston, N.A. (the Bank) and one of its officers, Sidney Dean. Asserting federal and state law causes of action, the Kaplans alleged that they ran a catering business and that the Bank and Dean had allowed a bookkeeper for the business to embezzle funds from their accounts. The defendants removed the case to federal court based on the federal causes of action. The Bank was declared insolvent in October of 1992 and the FDIC was appointed receiver. As receiver the FDIC intervened in the case. In December of 1992 the Kaplans amended their complaint and asserted claims against the FDIC as successor in interest to the Bank. In May of 1993 the FDIC moved to dismiss the case on grounds that the Kaplans had not alleged that they had exhausted their administrative remedies under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 83 Stat. 183 (1989).[1] In July of 1993 the court entered an order staying and "administratively closing" the case pending the outcome of the administrative claims process.

In September of 1993 the Kaplans filed a motion to reinstate the case, on grounds that they had exhausted their administrative claims. In January of 1994 the district court denied the motion to reinstate, concluding that the Kaplans' failure to timely file an administrative claim divested them of a remedy in federal

[1] *See* 12 U.S.C. § 1821(d).

court. The order states that "Courts have regularly ruled that a receiver's decision to disallow a late claim is final and not subject to administrative or judicial review, and that the district court therefore lacks subject matter jurisdiction." In March of 1994 the Kaplans filed a notice of appeal of the order denying the motion to reinstate.

DISCUSSION

At the outset we address our jurisdiction to hear this appeal. The district court's order denying the motion to reinstate is not a typical final judgment captioned as such. It is, however, a "final decision" from which an appeal will lie under 28 U.S.C. § 1291(a). In another case involving an order denying a motion to reinstate, we explained that such an order was a final decision because its effect "was to bring [plaintiff's] claim to an abrupt end. The order put [plaintiff] `out of federal court, leaving [her] no option to continue in that forum, . . . it was not `tentative, informal or incomplete.'" *Frizzell v. Sullivan*, 937 F.2d 254, 255 (5th Cir. 1991) (citations omitted). The order in our case had the same effect.[2]

As to the claims against the FDIC, the district court followed a procedure we have endorsed. In *Carney v. Resolution*

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[2] We also note that the notice of appeal, filed 60 days after the entry of the order, was timely, since FED. R. APP. P. 4(a)(1) gives all parties 60 days to file a notice of appeal in cases where the United States or an officer or agency thereof is a party. For purposes of this Rule, the FDIC is treated as an agency of the United States. *Diaz v. McAllen State Bank*, 975 F.2d 1145, 1147 (5th Cir. 1992).

Trust Corp., 19 F.3d 950 (5th Cir. 1994), we held that when the FDIC is appointed receiver of a failed depository institution after the filing of a claim against that institution in district court, the court does not lose jurisdiction over the claim, but should stay the court proceeding pending exhaustion of administrative remedies under FIRREA[3]. *Id*. at 956. On appeal, the Kaplans do not dispute (1) that exhaustion of administrative remedies was required, (2) that the stay pending exhaustion was properly ordered, or (3) that the district court properly dismissed the FDIC because the Kaplans made an untimely administrative claim.[4] Accordingly we affirm the order insofar as it dismissed the FDIC.

The Kaplans do complain, however, that the district court erred in dismissing their claims against Dean. We agree. As explained above, *Carney* holds that the court never lost jurisdiction of the case by virtue of the FIRREA exhaustion requirements. Even if it had for some reason lost jurisdiction over the claims against the FDIC, it never lost jurisdiction over the claims against Dean. Dean in fact agrees that the district

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[3] *See Meliezer v. Resolution Trust Co.*, 952 F.2d 879 (5th Cir. 1992) (providing general discussion of FIRREA exhaustion requirements).

[4] *See Marquis v. FDIC*, 965 F.2d 1148, 1152 (1st Cir. 1992) (holding that where a claimant has received proper notification, and fails to initiate an administrative claim within the FIRREA filing period, the claimant forfeits any right to pursue his claim in any court).

court erred in refusing to reinstate the case against him,[5] and only disagrees that the court must remand to the state court. The parties cite no authority, nor can we find any, suggesting that FIRREA's exhaustion requirements apply to Dean individually or that FIRREA otherwise bars claims against him.

The district court may conclude that the Kaplans have failed to state a claim against Dean, or that Dean is entitled to a judgment in his favor for some other reason. The district court did not, however, reach these issues, and instead dismissed the whole case because it erroneously concluded that it lacked subject matter jurisdiction.

The Kaplans are incorrect in arguing the case should be remanded to state court under 28 U.S.C. § 1447(c) because the court has "lost" jurisdiction over the case. The court has not lost jurisdiction. Even if all the federal claims, including those apparently lodged against Dean,[6] are dismissed, the court would continue to have jurisdiction over the state claims against

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[5] In his appellate brief Dean states: "While the Kaplans' failure to file a timely proof of claim with the FDIC may have deprived the court of subject matter jurisdiction over their claims against the FDIC, it did not affect the court's continued subject matter jurisdiction over the federal claims asserted against Dean. Thus, the district court erred as a matter of law in refusing to reinstate a properly removed suit alleging federal causes of action."

[6] The complaint alleges that the Bank and Dean violated the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693 *et seq.*, and the Federal Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.*

Dean.[7] We express no opinion as to whether there might be some other ground for remand.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

[7] *See Brown v. Southwestern Bell Tel. Co.*, 901 F.2d 1250, 1254 (5th Cir. 1990) ("[W]hen there is a subsequent narrowing of the issues such that the federal claims are eliminated and only pendent state claims remain, federal jurisdiction is not extinguished."); *In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980) ("It is a fundamental principle of law that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed. . . . Indeed, it has often been stated that the plaintiff cannot rob the district court of subject matter jurisdiction by electing to amend away the grounds for federal jurisdiction."), *cert. denied*, 450 S. Ct. 949 (1981).