IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30034

IN RE: GRAND JURY PROCEEDINGS.

Appeal from the United States District Court
For the Eastern District of Louisiana
(MISC. 93-3843-E-1)

(September 6, 1994)

Before WIENER, EMILIO M. GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Appellant John A. Mmahat appeals from the district court's denial of his motion for return of documents. The documents were the subject of a grand jury subpoena, and, although owned by Mmahat, were submitted to the court by a third party in possession of the documents, New England Insurance Co., for in-camera inspection in light of Mmahat's asserted attorney-client and work product privileges in those documents. Subsequently, the grand jury returned an indictment[1] against Mmahat without having seen

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]The government explains that the return of the indictment in the Eastern District of Louisiana caused the random allotment of the case to a district judge for trial, and that the criminal

those documents, and the term of the grand jury expired. Mmahat moved for return of the documents, which almost immediately thereafter became the subject of a trial subpoena, and the district court denied his motion. Mmahat argues that the district court illegally retained possession of the documents after the grand jury returned an indictment against him, terminating the grand jury subpoena ipso facto, particularly given the intervening expiration of the grand jury's term. As the order denying Mmahat's motion for return of documents is not a final appealable order, or an interlocutory order from which appeal is permitted, we dismiss the appeal for lack of appellate jurisdiction.

I

FACTS AND PROCEEDINGS

John A. Mmahat is an attorney and former chairman of the board of directors of Gulf Federal Savings Bank in Metairie, Louisiana. Gulf Federal failed in November 1986. A civil lawsuit was filed by the Federal Savings & Loan Insurance Corporation (FSLIC) against Mmahat, his law firm, and others. The suit alleged negligence on Mmahat's part as an officer and director of Gulf Federal and included allegations of legal malpractice against him and his law firm. New England Insurance Company, Mmahat's legal malpractice carrier, was also named a defendant. The law firm of Hammett & Baus represented New England in the civil proceeding.

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case against Mmahat was allotted, successively, to Judge Patrick Carr, Judge Charles Schwartz, Jr., Judge Marcel Livaudais, Jr., Judge Edith Brown Clement, and Judge Ginger Berrigan. When this appeal was filed, the trial date was set for June 20, 1994. The trial is now set for October 1994.

In February 1992, a grand jury for the Eastern District of Louisiana issued a subpoena duces tecum to Mmahat. In March, Mmahat appeared before the grand jury, produced records, and testified that he had produced all records in his possession responsive to the subpoena. He also testified that some of the records he was producing had been stored at a warehouse, but no additional records called for by the subpoena were located at the warehouse.

In October 1993, the grand jury learned that Mmahat had given documents to New England in June or July 1993.[2] According to Hammett & Baus witnesses, the documents given New England by Mmahat had been retrieved from the same warehouse from which Mmahat had produced documents in response to the February 1992 grand jury subpoena. The grand jury then issued a subpoena to New England through its attorneys, Hammett & Baus, for documents that Mmahat had turned over to New England. Those documents were contained in seventeen boxes and three folders.[3] Mmahat moved in the district court to quash the subpoena as to three of the seventeen boxes, asserting that he was the owner of the records subpoenaed and that they were protected from disclosure by attorney-client and work product privileges.

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[2]In June 1993, Hammett and Baus requested access to the records of Mmahat and the law firm, which were in storage. Mmahat granted the law firm unrestricted access to these files. Hammett & Baus then transported these files to its office. These are the files that were subpoenaed by the grand jury.

[3]By the time of the grand jury subpoena, the civil litigation against Mmahat had concluded, resulting in a $35 million judgment against Mmahat.

The district court accepted the documents from representatives of Hammett & Baus for an in camera examination agreed to by counsel for Mmahat and the United States Attorney's Office (the government). The court then granted Mmahat's motion to quash in part and denied the motion to quash in part: The subpoena was quashed with respect to some of the documents in Box 1 based on Mmahat's assertion of the attorney-client privilege, but was not quashed with respect to documents in Box 2 or Box 3. Mmahat appealed the court's denial of the motion to quash with respect to Box 2 and Box 3. While the appeal was pending, the district court continued to retain the documents at issue in its chambers.

Three events took place on December 16, 1993 (in the following order): First, we heard oral argument on Mmahat's appeal, and took the matter under advisement. Next, the grand jury returned a ten-count indictment against Mmahat charging him with various banking crimes. Finally, just after the return of the indictment, we affirmed the district court's denial of Mmahat's motion to quash with respect to Boxes 1 and 2, but reversed the district court's ruling as to Box 3 on grounds that the work product privilege had not been waived.

As the indictment had already been returned, the contested boxes of documents were never delivered to the grand jury. The term of the grand jury that had issued the subpoena expired the following day, December 17, 1993. That same day, counsel for Mmahat wrote a letter to the court advising of his intention to pick up the documents which had been submitted to the judge for in

camera examination. He asserted that, as the motion to quash had been granted with respect to some of the documents in Box 1, Mmahat was entitled to obtain those documents. Counsel also requested the return of the contents of Box 3, which we had held were protected by the work product privilege. Counsel stated that the grand jury subpoena had been rendered moot by the expiration of the grand jury's term, and requested permission to pick up the contents of Box 2 as well. Counsel represented that New England and Hammett & Baus, from whom the documents had been subpoenaed, had no further interest in the return of the documents. He stated in the letter that he was notifying Mr. Baus of Hammett & Baus to confirm his representation of New England's position.

Box 3, which was no longer the subject of any controversy, was returned to Mmahat. The government continued its objection to the return of the other documents to Mmahat, i.e., Boxes 1 and 2, without))contends Mmahat))asserting a basis for such objection. The court did not respond to the letter from Mmahat.

Eleven days later, on December 28, Mmahat filed a motion seeking return of the documents on the same bases asserted in his letter request. He also moved for an expedited hearing, noting that he wished to raise the same arguments in his petition for rehearing in the first appeal concerning the motion to quash.

By this time, the trial date had been set for the criminal case against Mmahat. On December 29, one day after Mmahat's motion for return of documents was filed, the government issued a trial subpoena for the production of documents in Boxes 1 and 2 that we

had held were not protected by privilege. The subpoena was not served on the court, which had the documents, but on New England through Hammett & Baus, as New England had produced the documents for the district court's in camera examination.

In response to the trial subpoena, John Baus of Hammett & Baus wrote a letter))directed to the government, not the court)) acknowledging that Hammett & Baus had received the subpoena, but informing the government that the documents were in the possession of the district court. Baus represented that the firm had no further interest in the documents, particularly because it had obtained a summary judgment (although it was on appeal), and that the government and Mmahat's attorney, Richard Simmons, who had various interests in the documents subject to this court's ruling, should work it out as to what each would receive.

On December 30, an expedited hearing was conducted on Mmahat's motion. The government asserted that it no longer sought the production of the documents pursuant to the grand jury subpoena, but had issued a trial subpoena for the documents and had moved for an order requiring early production of the material.[4] Mmahat stated his intent to challenge the trial subpoena before the district judge to whom the case would eventually be allotted for trial, and his intent to petition for rehearing of this court's order of December 16, 1993 on grounds that the appeal should have

[4]That same day, the government had filed a motion for an expedited hearing and a motion for an order requiring pretrial production of material subpoenaed for trial pursuant to Federal Rule of Criminal Procedure 17(c). Those proceedings have been delayed in light of this appeal.

been dismissed as moot once the indictment was returned.

The court denied the motion for return of documents without explaining the basis of its decision, but the government asserts that the motion was denied pending the outcome of (1) the petition for rehearing on the motion to quash in the first appeal and (2) proceedings concerning the trial subpoena. Mmahat does not contest this assertion.

Mmahat filed his petition for rehearing, raising the issues now presented in this appeal. Mmahat's petition was denied January 28, 1994. On January 7, Mmahat had filed his notice of appeal of the court's denial of access to the records in dispute (portions of Box 1 and all of Box 2). Mmahat relies on the December 29 letter from John Baus to the government, which was obviously written after the trial subpoena was issued, to support his assertion that as early as December 17 New England and Hammett & Baus had no further interest in the documents. Mmahat complains that, even though he assured the district court that the documents would be maintained in their present condition, that court refused to allow Mmahat to obtain custody of the documents. Mmahat contends that the government and the court have abused grand jury and trial subpoenas to "deny a defendant access to his own documents." The government controverts Mmahat's position, asserting that the district court stated that, upon request, it would grant Mmahat and his attorneys access to the documents to prepare for trial))albeit no such requests were ever made.

II

ANALYSIS

A. ORDER IS INTERLOCUTORY AND NONAPPEALABLE

The government has moved to dismiss for lack of appellate jurisdiction, arguing that the denial of Mmahat's motion for return of documents is not a final, appealable order. It asserts that the order appealed from is analogous to the denial of a Federal Rule of Criminal Procedure 41(e) motion for return of documents, which is considered interlocutory and nonappealable.[5] Mmahat counters that the order is reviewable under the collateral order doctrine, asserting that the order is collateral to the grand jury proceedings. We agree with the government that the order denying the motion for return of documents is not a final, appealable order. Neither is it reviewable under the collateral order doctrine.

1. Final Order?

An order is final only when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[6] Mmahat's motion for return of documents is analogous to Rule 41(e) motions for return of property, which are interlocutory and thus not appealable.

Mmahat raises his Fourth Amendment right "to be secure in [his] papers against unreasonable search and seizure." Rule 41(e)

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[5]DiBella v. United States, 369 U.S. 121, 131-32 (1962); In re Grand Jury Proceedings, 724 F.2d 1157, 1159-60 (5th Cir. 1984).

[6]Catlin v. United States, 324 U.S. 229, 233 (1945).

provides that a person aggrieved by an unlawful search and seizure or by the lawful deprivation of property may move for the return of property on grounds that such person is entitled to lawful possession of the property. If such motion is made or comes on for hearing after an indictment or information is filed, it is also to be treated as a motion to suppress under Rule 12.

In DiBella v. United States,[7] the Supreme Court stated that an order denying a motion under Rule 41(e) for return of property can be regarded as independent, and appealable, "only if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse [i.e., an indictment has been returned,] against the movant . . . ."[8] This court interprets DiBella "broadly, holding that only if the motion is `a collateral attempt to retrieve property and not an effort to suppress evidence in related criminal proceedings is it appealable.'"[9] As Mmahat's motion for return of documents is based on "unlawful seizure," Mmahat's motion may be construed as a Rule 41(e) motion. Mmahat apparently hopes to regain possession of the documents to reassert privileges in the documents in response to the trial subpoena)) clearly in an attempt to prevent use of the documents in his criminal trial.

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[7]369 U.S. 121 (1962).

[8]369 U.S. at 131-32; United States v. Glassman, 533 F.2d 262 (5th Cir. 1976).

[9]In re Grand Jury Proceedings, 724 F.2d 1157, 1159 (5th Cir. 1984) (quoting Simons v. United States, 592 F.2d 251, 252 (5th Cir.) (quoting Glassman, 533 F.2d 262), cert. denied, 444 U.S. 835 (1979)).

Rule 41(e) anticipates, however, that the party possessing the property is the government))not a court. Although Mmahat's motion is not governed directly by the extensive authority holding that a Rule 41(e) motion for return of property is interlocutory and not appealable, our decision is guided by these highly instructional cases.

Appeal is generally precluded because Rule 41(e) motions are treated as a step in the criminal case preliminary to trial, decided many times on a summary hearing, and district courts may wish to reserve final ruling until trial when all evidence has come to light. Such a motion would be considered interlocutory and nonappealable.[10] Likewise, in this case, even if we decide the question whether the district court did or did not abuse its discretion in retaining possession of the documents pending the outcome of the petition for rehearing in the first appeal and Mmahat's challenge to the trial subpoena, Mmahat's entitlement to possession of the documents and the validity of the trial subpoena will still be at issue in the court below. Thus it is apparent that the court's order denying the motion for return of documents is interlocutory, not final.

2. Collateral Order Doctrine

Mmahat maintains that, even if the order is interlocutory, it is appealable under the collateral order doctrine. The doctrine

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[10] Cf. id. at 1159-60.

The fact that the judge who denied the motion for return of documents will not govern the criminal trial, i.e., will issue no further orders in the case, does not make the order independent and final and thus appealable. See DiBella, 369 U.S. at 132.

permits appellate review of nonfinal orders if four conditions are met:

> 1) the order must finally dispose of a matter so that the district court's decision may not be characterizable as tentative, informal or incomplete; 2) the question presented must be serious and unsettled; 3) the order must be separable from, and collateral to, rights asserted in the principal suit; and 4) there should generally be a risk of important and probably irreparable loss if an immediate appeal is not heard.[11]

The order denying Mmahat's motion for return of documents fails even the first requirement to be deemed collateral: The order did not conclusively determine the right of possession of the documents. It simply attempted to maintain the status quo pending the outcome of (1) the petition for rehearing in the first appeal and (2) the anticipated motion to quash, which Mmahat asserted his intention to file in response to the trial subpoena. The district court judge who will conduct the criminal case will still have to decide whether Mmahat should be deprived of possession of the documents for reasons other than those asserted in this appeal. A hearing on the motion to quash the trial subpoena, which will almost certainly follow this appeal, will address that same question. Thus the order is not appealable under the collateral order doctrine.

Given our obvious lack of appellate jurisdiction, Mmahat's appeal from the order denying his motion for return of documents is DISMISSED.

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[11] EEOC v. Kerrville Bus Co., 925 F.2d 129, 134 (5th Cir. 1991) (citing Acosta v. Tenneco Oil Co., 913 F.2d 205, 207-08 (5th Cir. 1990)).