FILED
United States Court of Appeals
Tenth Circuit

March 31, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FEDERAL TRADE COMMISSION; UTAH DIVISION OF CONSUMER PROTECTION,

Plaintiffs,

v.

ZURIXX, LLC; CARLSON DEVELOPMENT GROUP UTAH; CJ SEMINAR HOLDINGS; ZURIXX FINANCIAL UTAH; CHRISTOPHER A. CANNON; JAMES M. CARLSON; JEFFREY D. SPANGLER; BRAND MANAGEMENT HOLDINGS; CAC INVESTMENT VENTURES; CARLSON DEVELOPMENT GROUP PUERTO RICO; DORADO MARKETING AND MANAGEMENT; JSS INVESTMENT VENTURES; JSS TRUST; ZURIXX FINANCIAL PUERTO RICO; GERALD D. SPANGLER,

Defendants.

DAVID K. BROADBENT,

Receiver - Appellee,

v.

DAVID EFRON; EFRON DORADO SE,

Interested Parties - Appellants.

No. 22-4042
(D.C. No. 2:19-CV-00713-DAK-DAO)
(D. Utah)

ORDER AND JUDGMENT[*]

Before **MORITZ**, **EID**, and **ROSSMAN**, Circuit Judges.

David Efron and Efron Dorado S.E. (collectively, Appellants) appeal from the district court's judgment holding them in contempt of court and awarding $67,824.25 in fees and costs to David K. Broadbent (the Receiver). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

In September 2019, the Federal Trade Commission (FTC) and the Utah Division of Consumer Protection brought an enforcement action against Zurixx, LLC and other entities. On November 1, the parties entered into a stipulated preliminary injunction (the Injunction). Among other provisions, the Injunction appointed the Receiver, froze the defendants' assets, and directed the holders of those assets to cooperate with the Receiver's taking possession and control of them. The Injunction also prohibited third parties "from taking action that would interfere with the exclusive jurisdiction of [the district] Court over the Assets or Documents of Receivership Entities," including commencing judicial actions, enforcing liens,

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[*] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

attempting to take possession of assets, or attempting to foreclose or terminate the defendants' interests in assets. Aplee. Supp. App. Vol. I at 129.

Efron Dorado, a Puerto Rico special partnership, leased to Zurixx an office in Dorado, Puerto Rico. The record indicates that Mr. Efron, who is an attorney, is a partner in Efron Dorado.[1] In November 2019, the Receiver notified Mr. Efron of the Injunction and filed a copy of the complaint against Zurixx and the Injunction in the federal district court in Puerto Rico. Although the Receiver and Mr. Efron engaged in discussions about the premises and the property that Zurixx had in Puerto Rico, they came to no resolution.

On February 3, 2020, Efron Dorado filed an eviction proceeding against Zurixx in a Puerto Rico court. Near the end of February, the Receiver's agents visited the premises to assess Zurixx's property. The next day, Mr. Efron informed one of the agents that he had taken possession of the office and Zurixx's property and had initiated the eviction suit against Zurixx. He allowed the Receiver's agents access to the office to remove certain electronic and paper records, but he prevented the removal of the remaining property.

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[1] Mr. Efron represents himself in this appeal, but we do not liberally construe his filings because he is an attorney and not a pro se litigant. *See Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001) ("While we are generally obliged to construe pro se filings liberally, we decline to do so here because [the appellant] is a licensed attorney." (citation omitted)).

On March 11, the Receiver moved to hold Appellants in contempt of court for violating the Injunction. Mr. Efron responded in opposition,[2] complaining that the Receiver had not paid the rent for the premises. He asserted due to the default, Zurixx's property belonged to Efron Dorado under the terms of the lease, and Efron Dorado had given the Receiver more access than he was entitled to. He admitted Efron Dorado had filed eviction proceedings in Puerto Rico and stated the premises would be rented with the furniture, fixtures, and improvements because they belonged to Efron Dorado.

On July 27, the district court found Appellants in contempt of court for violating the Injunction. It found the Receiver gave Mr. Efron actual notice of the Injunction and properly filed it in the federal district court in Puerto Rico. But, Appellants prevented the Receiver from taking control of Zurixx's assets. The court rejected the argument that the property reverted to the landlord under the lease, stating, "[o]nce the Receiver was appointed, the Court took exclusive jurisdiction over Zurixx's assets and any contingencies created by the lease agreement were prohibited under the injunction." Aplee. Supp. App. Vol. I at 258. The court gave Appellants the choice to allow the Receiver to take possession of Zurixx's property or to compensate the Receiver for the value of the property they took, and gave them

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[2] Although Mr. Efron signed filings for himself and Efron Dorado, the district court considered them to be made solely on his own behalf because he was not admitted to practice before the district court and did not move to appear *pro hac vice* so he could represent Efron Dorado.

30 days to comply. Appellants moved for reconsideration, which the district court denied. They also filed a notice of appeal (No. 20-4090).

Notwithstanding the district court's contempt order, the situation remained unresolved. On January 26, 2021, the Receiver moved again to hold Appellants in contempt of court, this time for violating both the Injunction and the contempt order. The Receiver informed the district court that after it issued the first contempt order, "Mr. Efron ha[d] prevented and hindered the Receiver's efforts to retrieve the Zurixx property" by failing to timely respond to the Receiver's communications in December 2020 and then refusing to allow an auctioneer and prospective buyers to access the premises in January 2021. Aplt. App. Vol. 1 at 70. Mr. Efron told the Receiver's agent he preferred to wait and see what happened in the Puerto Rico eviction proceeding, which had a hearing scheduled for the end of January. The Receiver complained Appellants' conduct was causing him to incur unnecessary expenses, including attorneys' fees.

Mr. Efron responded in opposition, primarily asserting that the district court could not hear the motion because appeal No. 20-4090 then was pending in this court. Mr. Efron later filed a second response arguing the Supreme Court's recent decision in *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021), warranted modifying the Injunction because "the majority of the provisions in that order are now unnecessary and unlawful," Aplt. App. Vol. 1 at 88. Under *AMG Capital*, he asserted, the FTC could not seek, and the court could not award,

equitable monetary relief under § 13(b) of the FTC Act. *See AMG Capital*, 141 S. Ct. at 1352.

In reply, the Receiver informed the court that in May 2021 he sold Zurixx's property, after incurring "considerable delay and expense" from Appellants' conduct. Aplt. App. Vol. 1 at 93. He denied *AMG Capital* affected his appointment "because the parties in this case agreed to the Injunction under other federal and state statutes." *Id.* at 92. But even if it had, the Receiver asserted, that did not excuse Appellants' earlier contempt of the court's orders.

On November 8, 2021, the district court found Appellants had violated the Injunction and the first contempt order, stating:

> Their conduct . . . caused considerable delays over the course of eighteen months and tens of thousands of dollars in unwarranted expenses to the receivership. What should have been a straight-forward exercise of obtaining and selling office equipment turned into several lawsuits, motions, and appeals. Meanwhile, the funds used for those expenses should have been available for consumer redress in this enforcement action.

Id. at 219. After rejecting the arguments that it lacked jurisdiction to enter a second contempt order while appeal No. 20-4090 was pending and that *AMG Capital* excused the contempt, the district court awarded the Receiver "reasonable attorney's fees and costs incurred in this contempt litigation and the unnecessary cases in Puerto Rico, including the Receiver's fees." *Id.* It directed the Receiver to file "documents demonstrating those fees and costs" within 30 days. *Id.* Appellants filed a notice of appeal from the November 8, 2021, order (No. 21-4141).

On December 8, the Receiver filed his statement of fees and costs with supporting documentation. A week later, on December 15, the parties to the enforcement proceeding stipulated to staying the case for 60 days to allow time for the FTC's Commissioners to consider a proposed settlement. The district court stayed "[t]his case and all applicable deadlines set forth in the Amended Scheduling Order." *Id.* Vol. 2 at 272.

Appellants did not respond to the Receiver's December 8 submission. On December 27, the Receiver filed a request to submit for decision his statement of fees and costs. Again, Appellants did not respond. On January 7, 2022, the magistrate judge granted and approved the Receiver's statement of fees and costs, assessing fees of $67,615.85 and costs of $208.40 against Appellants. On January 19, the Receiver requested entry of a Federal Rule of Civil Procedure 58 judgment in his favor.

On January 26, Mr. Efron filed a "Motion for Stay Pending Appeal and in Opposition to Award of Attorney's Fees and Costs and to Hold Any Judgment in Abeyance." *Id.* at 276 (all-capitalization omitted). Indicating surprise at the grant of fees, he observed the court stayed the enforcement action after the Receiver filed his December 8 statement. He generally objected to the award of fees and costs, averring the claimed rates and hours expended were unreasonable. He reiterated the district court lacked jurisdiction to consider the second motion for contempt and enter the fee award while the appeals were pending. And he requested a stay pending appeal. The Receiver opposed the motion and renewed his request for the district court to enter a Rule 58 judgment.

The district court found Mr. Efron's opposition to be untimely. Holding it retained jurisdiction to conduct the contempt proceedings while the appeals were pending, it stated Mr. Efron should not have been surprised when the Receiver followed the explicit direction in the court's November 8 order to file a statement of fees and costs within 30 days. Mr. Efron's response came too late:

> The deadline for Efron to object to the submitted fees and costs was December 22, 2021, fourteen days after the Receiver filed his statement of fees and costs. The Receiver did not file his Request to Submit the matter until December 27, 2021, and the court did not rule on the matter until January 7, 2022. Efron had ample opportunity to file an opposition to the requested fees and costs prior to the court's ruling.

Id. at 298. The district court determined "the Magistrate Judge reviewed the fees and costs and found them to be reasonable and related to the contempt," and Mr. Efron did not timely object to the magistrate judge's order. *Id.* Nevertheless, the court reviewed the statement of fees and costs de novo and reached the same conclusion as the magistrate judge. The district court also rejected Mr. Efron's reliance on the stipulated stay of the enforcement action, finding he was not a party to the stay and the stay did not apply to the contempt proceedings. "If Efron thought the contempt proceedings were stayed in connection with the rest of the case, he should have timely filed a response to the Receiver's December 27, 2021 Request to Submit or a timely objection to the Magistrate Judge's Order. He filed neither." *Id.* at 299. Finally, the district court denied a stay pending appeal and granted the Receiver's request for the entry of a Rule 58 judgment.

This timely appeal followed.

JURISDICTION

This is the third appeal about the district court's contempt orders. This court dismissed both Nos. 20-4090 and 21-4141 for lack of jurisdiction because the contempt orders were not then final and appealable. *See FTC v. Zurixx* (*Zurixx I*), 26 F.4th 1172, 1178 (10th Cir. 2022); *FTC v. Zurixx* (*Zurixx II*), No. 21-4141, 2022 WL 2346726, at *2-3 (10th Cir. June 29, 2022) (unpublished). Now the district court has both made a finding of contempt and imposed a sanction.

The second contempt order is a final and appealable decision. *See Zurixx I*, 26 F.4th at 1178 ("Once the district court makes a finding of contempt and imposes a sanction, a nonparty has an unquestionable right to appeal."). The district court never imposed a sanction as to the first contempt order, so that order arguably remains non-final. To the extent that Appellants' arguments relate also to the first contempt order, however, we apply the rule that non-final decisions merge into a final judgment. *See McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1104 (10th Cir. 2002) ("[A] notice of appeal which names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment. . . . [I]t is a general rule that all earlier interlocutory orders merge into final orders and judgments except when the final order is a dismissal for failure to prosecute.").

STANDARDS OF REVIEW AND SCOPE OF APPEAL

"We review a district court's determination of civil contempt for abuse of discretion." *FTC v. Kuykendall*, 371 F.3d 745, 756 (10th Cir. 2004). In making that assessment, however, "[w]e review questions of law de novo." *Scalia v. Paragon*

Contractors Corp., 957 F.3d 1156, 1160 (10th Cir. 2020). And we review factual findings and the amount of a compensatory sanction for clear error. *See id.* at 1160-61. "A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made." *Id.* at 1161.

Appellants attempt to adopt by reference the arguments they made in their opening briefs in *Zurixx I* and *Zurixx II*. But "we have disapproved of parties adopting their previous filings in lieu of fully setting forth their argument before this court." *In re Antrobus*, 563 F.3d 1092, 1097 (10th Cir. 2009); *see also* 10th Cir. R. 28.3(B) (disapproving incorporation by reference in briefs). We therefore confine our review to the arguments Appellants make in the Argument section of their opening brief in *this* appeal.[3]

APPELLANT EFRON DORADO

The Receiver argues Mr. Efron is the only appellant properly before this court. Recognizing that Mr. Efron could not represent Efron Dorado in the district court because he was not admitted to practice there and did not follow the district court's *pro hac vice* rules, the Receiver suggests the notice of appeal signed by Mr. Efron is invalid as to Efron Dorado. We disagree.

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[3] To the extent Appellants intended assertions in the Statement of the Case section to be legal arguments, Appellants waived them through inadequate briefing. *See Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2019) ("[A]n appellant may waive an issue by inadequately briefing it. . . . Cursory statements, without supporting analysis and case law are inadequate to preserve an issue." (internal quotation marks omitted)); *Reedy v. Werholtz*, 660 F.3d 1270, 1275 (10th Cir. 2011) ("The argument section of Plaintiffs' opening brief does not challenge the court's reasoning . . . . We therefore do not address the matter.").

An entity need not have an attorney sign a notice of appeal. *See Harrison v. Wahatoyas, L.L.C.*, 253 F.3d 552, 557 (10th Cir. 2001). Because the record indicates Mr. Efron is a partner of Efron Dorado, we consider the notice of appeal he signed to be valid for both parties. *See id.* (accepting a notice of appeal filed by a non-attorney on behalf of a limited liability company). And as a member of this court's bar, Mr. Efron may represent both himself and Efron Dorado in this appeal.

However, because Efron Dorado was not represented in district court, it made no arguments there. Generally we do not entertain arguments made for the first time on appeal unless a party establishes plain error. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011). But Appellants make no attempt to show plain error. We therefore affirm the district court's judgment against Efron Dorado. *See id.* at 1131 ("[T]he failure to argue for plain error and its application on appeal . . . surely marks the end of the road for an argument for reversal not first presented to the district court.").

APPELLANT DAVID EFRON

I. The District Court Retained Jurisdiction While *Zurixx I* Was Pending

Mr. Efron first argues the district court erred in ruling on the Receiver's second motion for contempt while *Zurixx I* was pending. Once Appellants filed their notice of appeal in *Zurixx I*, he asserts, jurisdiction over the contempt proceedings was vested in this court rather than the district court. We disagree.

This court dismissed *Zurixx I* for lack of jurisdiction because the first contempt order was not a final, appealable order. *See Zurixx I*, 26 F.4th at 1178. It is

well-established in this circuit "[i]f the notice of appeal is deficient by reason of untimeliness, lack of essential recitals, *reference to a non-appealable order*, or otherwise, the district court may ignore it and proceed with the case." *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 340–41 (10th Cir. 1976) (emphasis added). Because "a party can't strip the district court of jurisdiction by prematurely appealing," we recently held that "under *Arthur Andersen*, the district court did not err by proceeding" in the face of an appeal of a non-appealable order. *Kellogg v. Watts Guerra LLP*, 41 F.4th 1246, 1259 (10th Cir. 2022), *cert. denied*, 2023 WL 2563324 (U.S. Mar. 20, 2023) (No. 22-651). Accordingly, the district court did not lose jurisdiction over the contempt proceedings while *Zurixx I* was pending.

Mr. Efron also suggests the Receiver's second contempt motion was "incongruous with the spirit of Fed. R. Civ. P. 62.1(a), since it would all be superfluous and moot if this Honorable Court reverses the District Court's orders of contempt." Aplt. Opening Br. at 19. Rule 62.1(a) gives the district court alternatives for handling "a timely motion . . . for relief that the court lacks authority to grant," which the Receiver duly noted in the second contempt motion. As stated, however, the district court did not lack authority to consider the second contempt motion, and therefore Rule 62.1(a) was inapplicable.

Finally, Mr. Efron points out that before the district court issued the second contempt order, Appellants had moved for a stay pending appeal in this court in *Zurixx I*. But this court did not grant the motion for stay, so the district court was not prohibited from proceeding on that ground.

II. *AMG Capital* Did Not Excuse Mr. Efron's Contempt

Mr. Efron next argues the district court's contempt orders conflict with the Supreme Court's April 22, 2021, decision in *AMG Capital.* In *AMG Capital*, the Supreme Court held § 13(b) of the Federal Trade Commission Act authorizes the FTC to obtain injunctions, but it does not authorize the district court to award "equitable monetary relief such as restitution or disgorgement." 141 S. Ct. at 1344. Here, the district court noted it had modified the Injunction based on *AMG Capital*, but stated *AMG Capital* did "not impact the Receiver's contempt motion against Efron and Efron Dorado or excuse Efron or Efron Dorado's conduct." Aplt. App. Vol. 1 at 218.

Mr. Efron asserts *AMG Capital* "necessarily impacts the Receiver's requests for relief under the *PRELIMINARY INJUNCTION* which they contend EFRON DORADO was in contempt of. . . . The Supreme Court limited the scope of the FTC's disgorgement authority which eliminates most of the relief sought by the FTC in the present case related to EFRON DORADO." Aplt. Opening Br. at 23-24. But *AMG Capital* was decided several months *after* Appellants violated the Injunction and the Receiver filed his second contempt motion. The district court correctly held that *AMG Capital* did not excuse Appellants' violation of the Injunction.[4]

[4] Mr. Efron would not have been justified in violating the Injunction even if, as he asserts, *AMG Capital* established the Injunction rested on an incorrect assessment of the FTC's authority. Parties are required to obey injunctions while they are in effect. *See Maness v. Meyers*, 419 U.S. 449, 459 (1975) ("The orderly and expeditious administration of justice by the courts requires that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the

III. The Firm Waiver Rule Bars Review of the Fee Award

Mr. Efron's third argument raises several challenges to the district court's award of fees and costs. In response, however, the Receiver argues we should apply our firm waiver rule because Mr. Efron failed to timely object to the magistrate judge's order. Mr. Efron filed no reply brief.

"This court has adopted a firm waiver rule under which a party who fails to make a timely objection to the magistrate judge's findings and recommendations waives appellate review of both factual and legal questions." *Morales-Fernandez v. INS*, 418 F.3d 1116, 1119 (10th Cir. 2005). We do not apply this rule "when (1) a *pro se* litigant has not been informed of the time period for objecting and the consequences of failing to object, or when (2) the interests of justice require review." *Id.* (internal quotation marks omitted).

Mr. Efron had 14 days (until January 21, 2022) to object to the magistrate judge's order awarding fees. *See* Fed. R. Civ. P. 72. His January 26 filing therefore was untimely. Moreover, before this court, Mr. Efron has not argued why we should apply an exception to the firm waiver rule.[5] We therefore apply the firm waiver rule and decline to consider the challenges to the fee award.

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parties until it is reversed by orderly and proper proceedings." (internal quotation marks omitted)).

[5] Even if we addressed the exceptions, neither would be satisfied. As an attorney, Mr. Efron is not entitled to the benefit of the notice rule, and nothing in the record indicates the interests of justice require review.

CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Veronica S. Rossman
Circuit Judge