

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 1, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 19-4066

NELDON P. JOHNSON,

Defendant - Appellant,

and

INTERNATIONAL AUTOMATED
SYSTEMS, et al.,

Defendants.

ORDER

This matter is before the court *sua sponte* following the opening of this pro se appeal. We have identified a possible jurisdictional defect. Consequently, we are considering this appeal for summary disposition. 10th Cir. R. 27.3(B).

One defendant appeals two orders entered by the district court. The first denied his motion to dismiss. (Dist. Ct. Docket No. 624.) The second is a minute order that, among other things, took certain motions under advisement and ordered discovery to continue including the deposition of this defendant. (*Id.* No. 619.) The receivership put in place after entry of final judgment has not concluded. Proceedings remain ongoing with respect to collection and distribution of assets by the receiver. And as noted, the district court has

not finally decided some of the motions addressed in the minute order. In short, there is no sign that the district court has disassociated itself from the case. *See Mohawk Ind., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009).

This court ordinarily has jurisdiction to review only “final decisions.” 28 U.S.C. § 1291; *New Mexico v. Trujillo*, 813 F.3d 1308, 1316 (10th Cir. 2016). “A final decision must dispose of all claims by all parties.” *Trujillo*, 813 F.3d at 1316. A final decision “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Cunningham v. Hamilton Cnty., Ohio*, 527 U.S. 198, 204 (1999) (internal quotation marks omitted).

It does not appear that any exceptions to the final decision rule apply here. The appellant has not sought certification of the orders under Federal Rule of Civil Procedure 54(b). And the statute addressing interlocutory appeals in receiverships only allows immediate appeal for certain types of actions but does not permit appellate challenge to every event in the context of the receivership. *See* 28 U.S.C. § 1292(a)(2); *F.T.C. v. Peterson*, 3 F. App’x 780, 782 (10th Cir. Jan. 22, 2001) (unpublished) (receivership statute “says nothing about appellate review with respect to *steps actually taken* – and, given the enormous potential for disruptive piecemeal appeals in this context, it seems reasonable for Congress to have granted a right of immediate review when there has been a complete failure to act in furtherance of the receivership, but not to have burdened the appellate courts with ongoing supervision of every action a receiver might be ordered to take” (emphasis in original).)

Further, this court has previously considered appeals from orders like those being appealed here. The denial of a motion to dismiss in general is not immediately appealable. *See Dababneh v. FDIC*, 971 F.2d 428, 432 n.6 (10th Cir. 1992). Similarly, discovery orders are not usually considered final decisions for purposes of § 1291. *See Boughton v. Cotter Corp.*, 10 F.3d 746, 748-50 (10th Cir. 1993).

In sum, because the receivership has not been terminated and there appear to be no exceptions to the rule of finality, this appeal seems to be subject to dismissal for lack of appellate jurisdiction.

Within 21 days of the date of this order, the pro se appellant shall file a memorandum brief addressing the legal issue of whether this court has jurisdiction to consider his interlocutory appeal now. Requirements for memorandum briefs on potentially dispositive issues can be found at Tenth Circuit Rule 27.3(B). Alternatively, the appellant may move to dismiss this appeal voluntarily, Fed. R. App. P. 42(b), or elect not to respond to this order, after which the court would dismiss the appeal for lack of prosecution, 10th Cir. R. 42.1.

Finally, briefing on the merits is tolled pending further order of this court. 10th Cir. R. 27.3(C).

Entered for the Court
ELISABETH A. SHUMAKER, Clerk



by: Lara Smith
Counsel to the Clerk