IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

09-16466-GG

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

HOME ASSURE, LLC., et al.,
Defendants,

MICHAEL TRIMARCO and NICOLAS MOLINA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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No. 09-16466-GG

Federal Trade Commission v. Home Assure, LLC, *et al.*

Pursuant to Circuit Rules 26.1-1 and 27-1(9), this is to certify that the following is a complete list of all attorneys, persons, and entities known to have an interest in the outcome of this appeal:

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STATEMENT OF ORAL ARGUMENT

The Federal Trade Commission does not believe that oral argument will assist the Court in resolving the issues presented in this appeal.

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STATEMENT OF JURISDICTION

The Federal Trade Commission, an independent agency of the United States, brought an action in the United States District Court for the Middle District of Florida, pursuant to Sections 5 and 13(b) of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 53(b), seeking a permanent injunction against defendants' deceptive sale of foreclosure rescue services and equitable monetary relief for injured consumers. The Commission also sought interim relief, including a preliminary injunction and an asset freeze. The district court's jurisdiction is derived from 28 U.S.C. §§ 1331, 1337(a), 1345, and 15 U.S.C. § 53(b).

After appellants filed a notice of appeal from an interlocutory order freezing their assets, they filed before the district court a "Renewed Motion for a 'Nexus' Hearing and to Modify and/or Dissolve the Asset Freeze" ("Renewed Motion"). Doc. 133. On October 27, 2009, the district court entered an order denying defendants' motion, holding that, in view of the pending appeal of the interim freeze, it lacked authority to grant the requested relief under Fed. R. Civ. P. 62(c). Doc. 136, RE Tab 136. On December 23, 2009, appellants filed a notice of appeal of the district court's ruling denying their "Renewed Motion." Doc. 145. This Court has jurisdiction over the instant appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE PRESENTED

Whether the district court properly held that it lacked jurisdiction to entertain appellants' "renewed" motion to dissolve or modify a previously-entered preliminary injunction, where the injunction they sought to modify was already the subject of an interlocutory appeal to this Court, and the relief requested could not be characterized as preserving the status

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[1] Page references in documents in the district court record conform to the pagination in the headers in the Official Court Electronic Filing System. However, citations to pages in documents that are not available electronically on PACER, or that are cited in appellants' brief, are to the document's internal pagination. Also, to avoid confusion, exhibits are cited as "Exh. __," while documents appended to exhibits are cited as "Att. __."

[2] Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts or practices."

[3] The second proviso of Section 13(b)(2) of the FTC Act, 15 U.S.C. § 53(b)(2), vests the district courts with authority to grant a permanent injunction and other equitable relief with respect to violations of any provision of law enforced by the FTC.

53(b)(2), seeking a permanent injunction against appellants' deceptive practices in the sale of mortgage foreclosure rescue services. The Commission also seeks monetary equitable relief for consumers who, despite the defendants' touted money back and service guarantees, in many or most cases paid for services they never received.

1. The Defendants and Their Operations

[4] Doc. 5, Exh. 1 at 2, 4-5, 7, 12 & Atts. A.1, A.9, D, Q, T; Doc. 61-9 at 2.

contact and mortgage-related financial information.[5] Reiterating bold print guarantees from the company's website, sales representatives told consumers that they would be entitled to a "full refund" of their fees if Home Assure were unsuccessful in stopping foreclosure.[6]

[5] Doc. 5, Exh. 4 at 1, Exh. 5 at 2, Exh. 6 at 2, Exh. 7 at 1, Exh. 8 at 1, Exh. 9 at 1, Exh. 10 at 1, Exh. 11 at 1-2, Exh. 12 at 1, Exh. 13 at 1, Exh. 14 at 1, Exh. 15 at 1, Exh. 16 at 1.

[6] Doc. 5, Exh. 1 at 10-11 & Att. M at 20-21, Exh. 7 at 1, Exh. 9 at 2, Exh. 11 at 2, Exh. 12 at 1, Exh. 14 at 2; Doc. 61-4 at 3.

[7] *See* Doc. 5, Exh. 4 at 2, Exh. 5 at 4-5, Exh. 8 at 3, Exh. 12 at 3, Exh. 15 at 6.

[8] Blanchard was not a member of Home Assure after November 2008, and formally resigned as manager on January 6, 2009. Doc. 38-5 at 3; Doc. 5, Exh. 1 at 4 & Att. A.8.

2. Proceedings Below

(a) *Home Assure I*

On March 24, 2009, the Commission, having "reason to believe" that the defendants had engaged, or were engaging in, violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), filed a complaint in the United States District Court for the Middle District of Florida pursuant to the permanent injunction proviso of Section 13(b) of the Act, 15 U.S.C. § 53(b). The complaint alleged that the defendants were engaging in deceptive acts or practices in violation of Section 5(a) by (1) misrepresenting they would stop consumers' foreclosures in all or virtually all instances; and (2) failing in most cases to honor their refund policy when foreclosure was not stopped. Doc. 1 at 9-10, RE Tab 1 at 9-10. The complaint sought a permanent injunction and multiple forms of monetary equitable relief, "including, but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies * * *." Doc. 1 at 11, RE Tab 1 at 11. Contemporaneously with the filing of its complaint, the Commission asked the district court to enter an *ex parte* temporary restraining order ("TRO") and asset freeze and an order appointing a temporary receiver. Docs. 4-9.

On March 26, 2009, the district court (per Hon. Steven Merryday) entered a

TRO, finding that the lTrTC had demonstrated a likelihood of success onhe lTmeritsTRand goo

unauthorized prejudgment attachment and must be dissolved or modified.[10] Doc. 23. The district court did not reach the merits of that motion, but on April 3, 2009, in opposing the Commission's motion for a preliminary injunction, appellants again asserted that monetary equitable relief must be limited to "property in [their] possession that could 'clearly be traced' to money or property belonging in good conscience to the plaintiff." Doc. 38 at 20-21.

The district court referred the Commission's request for a preliminary injunction to Magistrate Judge Thomas B. McCoun III for preparation of a report and recommendation. Doc. 40. After considering the record and hearing oral argument, Magistrate Judge McCoun concluded that there was a "substantial likelihood" that, even taking into account some "evidence of customer satisfaction," the Commission would prevail in establishing that the defendants had made material misrepresentations to consumers that Home Assure would stop foreclosure of consumers' homes and that, in the event that foreclosure could not be stopped, Home Assure would return their service fees. Doc. 54 at 10, RE Tab 54 at 10.

As for the individual defendants, appellants Trimarco and Molina, Magistrate Judge McCoun found that "their involvement in the formation and

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[10] The district court subsequently denied the motion as moot because the TRO expired by its terms on April 8, 2009.

initial development of the company, including its financing, IT structure, business, and marketing strategies," and "[their] authority within the corporate structure" demonstrated that they knew about Home Assure's practices, including enforcement actions in which two states had alleged their practices violated state law. Doc. 54 at 11, RE Tab 54 at 11. Accordingly, applying established standards for finding individuals liable for violations of the FTC Act, the Magistrate Judge concluded that "the evidence [was] adequate to demonstrate the likelihood of success on this element of the FTC's proof as against these individuals." *Id*.

Magistrate Judge McCoun concluded that it was a "close issue" whether the equities weighed in favor of issuing a preliminary injunction against appellants' conduct. *Id*. He noted that Home Assure had wound down its business and that the FTC had not shown that the business history of the individual defendants was "contrary to that represented in their affidavits." Doc. 54 at 11-12, RE Tab 54 at 11-12.[11] Based on these findings, Magistrate Judge McCoun found there was "no clear showing that [the defendants] intend to re-enter this type business" and, accordingly, concluded that, with respect to an injunction against conduct, a balancing of the equities "[did] not favor the FTC * * *." Doc. 54 at 12, 13, RE

[11] Also, he noted, the individual defendants "appear[ed] to be sophisticated businessmen" who, in opposing the FTC's motion, attempted to establish they had suffered "a sizable loss on their investment." Doc. 54 at 12, RE Tab 54 at 12.

Tab 54 at 12, 13. He reasoned that "a preliminary injunction [against conduct] can not properly issue [when] the FTC is unable to demonstrate that [the defendants] are currently violating, or are apt to violate, any provision of law enforced by the FTC." Doc. 54 at 13, RE Tab 54 at 13. Based on this analysis, Magistrate Judge McCoun recommended to the district court that it deny the Commission's motion to the extent it requested a preliminary injunction against continuation of the alleged practices. But, in view of the Commission's likelihood of success on the merits of its allegations of deceptive acts and practices, he also recommended that the court grant the requested interim freeze, pursuant to its inherent equitable authority. Doc. 54 at 15, RE Tab 54 at 15.

Both parties filed objections to Magistrate Judge McCoun's report and Recommendation. Docs. 61-62. The Commission objected to the report and recommendation to the extent it recommended denying a preliminary injunction as to Expert Foreclosure and Home Assure, who had not appeared or opposed the Commission's motion. Doc. 61 at 4-9. The Commission also objected that, given the individual defendants' refusal to comply with the disclosure provisions of the TRO,[12] the pervasive nature of their deceptive practices, and the ease of their re-entry into the mortgage modification business, a preliminary injunction against the

[12] Appellants complied with these requirements after the district court issued a preliminary injunction.

individuals' alleged practices was warranted. Doc. 61 at 10-18. Appellants, for their part, reiterated that there must be a demonstrable nexus between the frozen

Magistrate Judge McCoun that, under Section 13(b), the district courts are authorized to grant the full range of equitable remedies, including a stand-alone asset freeze. Doc. 65 at 4-5, RE Tab 65 at 4-5.

As for the *scope* of the freeze, the court agreed with the Magistrate Judge that it "depends on the equitable relief *ultimately* available if the FTC prevails on the merits." *Id.* (emphasis added). Doc. 65 at 4, RE Tab 65 at 4. The district court then rejected appellants' contention that, at most, final relief must be limited to Home Assure's net profit, or the individual defendants' salaries. Doc. 65 at 4-5, RE Tab 65 at 4-5. The court also rejected appellants' contention that such a limitation was compelled by this Court's decision in *CFTC v. Wilshire Inv. Management Corp*., 531 F.3d 1339, 1345 (11th Cir. 2008). The district court distinguished Section 13(b) of the FTC Act, noting that, in an action under Section 13(b) of the FTC Act, "'the amount that [the defendants] wrongfully gained' *may equal* the amount consumers paid the defendants." Doc. 65 at 6, RE Tab 65 at 6 (emphasis added). Thus, by contrast to *Wilshire*, the court concluded that final relief "may include a refund to the consumer of the full amount paid by the consumer to the defendants." Doc. 65 at 5, RE Tab 65 at 5.

As for appellants' notion that monetary equitable relief must take into account defendants' expenditures for marketing and labor, the district court

concluded that such offsets would undermine the deterrent purpose of Section 13(b). Doc. 65 at 7-8, RE Tab 65 at 7-8. Finally, the court rejected appellants' argument that the Supreme Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002) – a private action involving a company's contractual subrogation rights under the Employee Retirement Income Security Act ("ERISA") – imposed a requirement, in a public enforcement action, that the FTC trace the individuals' assets directly back to the alleged violations before it may obtain an interim asset freeze. Doc. 65 at 8-9, RE Tab 65 at 8-9. The district court explained that it should not be assumed that *Great-West* fundamentally altered federal equity jurisprudence in statutory enforcement actions involving the public interest, as established years earlier in *Porter v. Warner Holding Co*., 328 U.S. 395, 66 S. Ct. 1086 (1946). *Id*. Furthermore, the court held, appellants' tracing argument "ignore[d] the availability of individual liability for corporate violations of the FTC Act * * *." Doc. 65 at 8, RE Tab 65 at 8.

Based on this analysis, the district court entered an order preliminarily freezing appellants' assets to the extent of $3.7 million each[13] – an amount the

[13] If the court finds that the individuals participated in, or, alternatively, both controlled and had knowledge of Home Assure's alleged practices, they are jointly and severally liable under governing law. *See, e.g., FTC v. Gem Merchandising Corp*., 87 F.3d 466, 470 (11th Cir. 1996); *FTC v. Amy Travel Service, Inc*., 875

F.2d 564, 573-74 (7th Cir. 1989). Hence, to ensure that consumers would be fullypro2t0eefTDd

(b) Continued efforts to obtain a "nexus" hearing

Not content to await this Court's ruling in *Home Assure I*, appellants persisted in efforts to obtain a "nexus" hearing in the district court. On October 5, 2009 – nearly four months after taking an appeal from the asset freeze order – appellants filed a "Renewed Motion for a 'Nexus' Hearing and to Modify and/or Dissolve the Asset Freeze" before the district court. Doc. 133. Appellants' motion was premised on the same proposition that the district court had considered and rejected earlier – namely, that a district court is not authorized to enter an interim freeze without, after first conducting an evidentiary hearing, finding a demonstrable "nexus" between the Commission's claims and the frozen assets. Doc. 133 at 4-7, 8-9.

The district court denied the "Renewed Motion" on October 27, 2009, concluding that, in light of the pending appeal from the asset freeze, it lacked jurisdiction to entertain the motion. Doc. 136, RE Tab 136. Given that the Renewed Motion raised the same issues that appellants have raised in their appeal in *Home Assure I*, the district court concluded that "an adjudication of each issue presented in the defendants' renewed motion would moot the defendants' appeal and divest the appellate court of jurisdiction." Doc. 136 at 2-3, RE Tab 136 at 2-3.

The court specifically noted that Fed. R. Civ. P. 62(c) allows modification of an injunction that is pending appeal. It recognized, however, that such a modification is allowed only to the extent that the requested modification does not modify the status quo. Doc. 136 at 2; RE Tab 136 at 2. Because, the court reasoned, it was apparent that "an adjudication of each issue presented in the defendants' renewed motion would moot [appellants'] appeal and divest the appellate court of jurisdiction," it concluded that it lacked jurisdiction to entertain the motion. Doc. 136 at 2-3, RE Tab 136 at 2-3.

(c)

The instant appeal is a continuation of appellants' eff

ARGUMENT

I. The District Court Did Not Err in Declining to Entertain Appellants' Renewed Motion

A. Standard of Review

A district court's determination of its jurisdiction is reviewed by this Court *de novo*. *See, e.g.*, *United States v. McPhee*, 336 F.3d 1269, 1271 (11th Cir. 2003) ("[W]e review de novo the district court's interpretation and application of the statutory provisions concerning the court's subject matter jurisdiction * * *."); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 577 (5th Cir. 1996) (same).

B. The District Court Was Divested of Jurisdiction by the Pending Appeal

The instant appeal involves a single issue – namely, whether the district court erred in concluding that it was divested of jurisdiction to entertain appellants' Renewed Motion for a "Nexus" Hearing and to Modify and/or Dissolve the Asset Freeze ("Renewed Motion") by virtue of the pending appeal from the freeze order. The district court concluded properly that, as a consequence of the pending appeal, it lacked jurisdiction to entertain the motion.

1. A notice of appeal divests the district court of jurisdiction to relitigate issues that have been raised on appeal

As this Court has explained, the general rule is "the filing of a timely and sufficient notice of appeal acts to divest the trial court of jurisdiction over the matters at issue in the appeal, except to the extent that the trial court must act in aid of the appeal." *Shewchun v. United States*, 797 F.2d 941, 942 (11th Cir. 1986) (per curiam); *accord, Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982) (per curiam); *Pacific Ins. Co. v. General Development Corp*., 28 F.3d 1093, 1096 n.7 (11th Cir. 1994). The purpose of the rule is to promote judicial economy and avoid the confusion and inefficiency that would result from two courts considering the same issues at the same time. *See* 20 J. Moore *et al*., Moore's Federal Practice § 303.32[1] (3d ed. 2009).

Fed. R. Civ. P. 62(c) codifies this rule. *See*, *e.g*., *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982). Under Rule 62(c), while an appeal is pending, a district court may in its discretion "suspend, modify, restore, or grant an injunction on terms for bond or other terms" as circumstances and justice may require. Rule 62(c), however, is not a source of authority for a district court to change the status quo before an appellate

court has reached a decision.[17] *See, e.g., Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989); *accord, Baum v. Blue Moon Ventures, LLC,* 513 F.3d 181, 190 n.2 (5th Cir. 2008); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co*., 73 F.3d 546, 578 (5th Cir. 1996). Appellants' Renewed Motion does not satisfy these standards. Rather, it is a thinly veiled attempt to relitigate issues they presented to the district court repeatedly, and that the district court addressed and resolved in ruling on the Commission's motion for a preliminary injunction.[18]

2. Appellants' distinction between "core" and "noncore" issues is specious

Appellants contend, in the alternative, that the "core issue" in the pending appeal in *Home Assure I* is whether the asset freeze comported with the requirements of Fed. R. Civ. P. 65, while the question whether a "nexus" hearing is

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[17] Rule 62(c) provides in pertinent part as follows:

> While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

[18] By contrast, the purpose of a motion under Fed. R. Civ. P. 59(e) is to relitigate issues. A motion for reconsideration under the aegis of former Rule 59(e) was due no later than 10 days after entry of the judgment. Appellants, however, did not seek reconsideration of the asset freeze order at all. Instead, they filed a notice of appeal. Doc. 103.

Contrary to appellants' contention (App. Br. at 25, 27-28), nothing in the Ninth Circuit's decision in *Natural Res. Def. Council v. Southwest Marine, Inc.*, 242 F.3d 1163 (9th Cir. 2001) supports the proposition that the question under Rule 62(c) "boils down to whether the modification 'materially alters' the status of the appeal or leaves 'unchanged the core questions before the appellate panel.'" App. Br. at 25. The decision in that case addressed an unusual situation in which the "district court's post-judgment modifications to the injunction were minor adjustments in text that effectuated the underlying purposes of the original requirements." *Southwest Marine*, 242 F.3d at 1167. Specifically, the injunction had required Southwest Marine to conduct water column testing "at the surface" to measure pollution contribution levels in the San Diego Bay. *Id.* But because the phrase 'at the surface' was too vague to provide any assurance that testing would accomplish the intended purpose – *i.e.*, "finding the source of the degraded condition around the piers" (*id.*) – the district court modified the injunction by replacing the term "at the surface" with a more precise term, "surface microlayer." *Id.* Thus, the requested modification merely "effectuated the underlying purposes of the original requirements." *Id.* at 1167; *accord*, *Sierra Club, Lone Star Chapter*, 73 F.3d at 579 ("[A] court should only modify an injunction to achieve the original purposes of the injunction, if those purposes have not been fully achieved.").

[21] Thus, had appellants made such requests, the district court would have been able to entertain them without

RE Tab 65 at 9 (citing Doc. 61 at 21).[22] But the district court plainly did not contemplate that the asset freeze would remain in place only until the FTC, once it obtained completed financial statements, "could perform its tracing obligations." App. Br. at 27. Indeed, in the same order in which the district court ordered appellants to produce "sworn personal financial statements" (Doc. 65 at 11, RE Tab 65 at 11), the court also held that appellants' "nexus" argument had "fail[ed] to persuade." Doc. 65 at 8, RE Tab 65 at 8. Thus, this is not a case in which the requested relief, because it "effectuated the underlying purposes of the original requirements" (*Southwest Marine*, 242 F.3d at 1167), would have the effect of maintaining the status quo during the pendency of the appeal. Given this circumstance, the district court was correct in declining to entertain the motion.

[22] In granting appellants leave to apply for release of "exempt assets," the district court relied on the Commission's frank acknowledgement that, without more information from appellants about the nature of their personal assets, it was possible that the freeze included assets that otherwise would be exempt. *See* Doc. 61 at 21. For example, some assets are "exempt" from collection – primarily pursuant to state statutory and constitutional provisions that allow a debtor to keep property that otherwise would be subject to sale to satisfy his obligations. *See, e.g.*, *In re Hodes*, 308 B.R. 61, 65 (10th Cir. 2004).

CONCLUSION

For all the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

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April 28, 2010

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). It is proportionally spaced and contains 6,296 words, as counted by the WordPerfect word processing program.

April 28, 2010 /s/ Leslie Rice Melman
Leslie Rice Melman

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2010, I electronically filed the foregoing Brief for Plaintiff-Appellee Federal Trade Commission at the EDF website for the United States Court of Appeals for the Eleventh Circuit. Also on this day, an original and six paper copies were sent by overnight delivery to the Court and, using the same manner of service, two paper copies were sent to the following individuals:

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