No. 18-4119

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

RAPOWER-3, LLC, ET AL
Defendants-Appellants

On Appeal from the United States District Court for the District of Utah
No. 2:15-cv-00828-DN
The Honorable David Nuffer

DEFENDANTS-APPELLANTS' MOTION TO EXPEDITE PROCEEDING

Pursuant to Rule 2 and Rule 27 of the Federal Rules of Appellate Procedure, Appellants RaPower-3, LLC, International Automated Systems, Inc., LTB1, LLC, R. Gregory Shepard, and Neldon Johnson (collectively "Appellants") move for an expedited briefing schedule in this appeal (18-4119) from the District Court's Order appointing a receiver in this matter (Doc. 491), and respectfully request that the Court schedule oral argument during the next available argument calendar week after the final reply brief on this appeal has been filed.

I. Statement of Grounds and Relief Sought

Good cause to expedite the briefing of this appeal and oral argument includes: (1) under the District Court's Order, Appellants are now suffering immediate harm due to receivership property being used to finance the Receiver's unnecessary management of the Appellants' property; (2) expediting this appeal will not prejudice Plaintiff/Appellee; and (3) Appellants will be prejudiced if this interlocutory appeal is consolidated with Appellants' appeal of the final order and judgment because the scope, breadth, and anticipated briefing schedule would continue unabated the ongoing harm suffered by Appellants each day their property is subject to the authority of the Receiver.

II. Statement of Opposition

The United States opposes an expedited briefing because they prefer the convenience of briefing the issues in this case once to include both appeals rather than brief twice. They prefer to conserve their resources and are indifferent to conserving the Defendants' resources.

III. Procedural Background

On November 17, 2017, Appellees filed its first Motion to Freeze the Assets of Defendants Neldon Johnson, RaPower-3, LLC, and International Automated Systems and Appoint a Receiver. (ECF Doc. 252). On March 2, 2018, the trial court denied Appellee's motion without prejudice. Following the conclusion of the bench

trial, and prior to trial court's final order, Appellee filed a second motion to freeze assets and appoint a receiver, this time including the assets of R. Gregory Shepard. (ECF Doc. 414). The trial court ordered an expedited briefing on the issue. On August 22, 2018, the trial court granted Appellee's second motion to freeze assets and appoint a receiver (ECF Doc. 444). Nearly ten weeks later, while Appellants assets remained subject to the August 22, 2018 asset freeze, the trial court entered an order appointing a receiver on November 1, 2018, appointing Wayne Klein as the receiver and enumerated his authority, and also expanded the scope of the asset freeze to include non-party entities. (ECF Doc. 491). On November 27, 2018, during a mediation conference of the parties, the clerk of this court directed Appellants to file this motion by November 30, 2018, with Appellee's opposition due by December 7, 2018.

IV. Argument

A. **Appellants are prejudiced each day the Receiver remains in place**.

An expedited appeal of the receivership appointment is justified and proper because Appellants' property subject to the asset freeze and control by the Receiver is being dissipated to finance the Receiver's operations. (ECF Doc. 491 at ¶ 72.) Since his appointment, Mr. Klein has filed two motions: (1) to engage an accounting firm to perform forensic accounting and investigative services; and (2) to engage a law firm to act as counsel for the receivership estate. The trial court summarily

granted the motions on November 6, 2018, before the time allowed to oppose the motion and before Defendants were able to file any opposition. (ECF Doc. 500). The longer this appeal is delayed, the more the Receiver and his accountants, experts, and attorneys will dissipate Appellants' assets.[1]

The issue of the appointment of a receiver over Appellants and their property (Docket 18-4119) is separate from the other issues involved in the appeal of the final decision in this case (Docket 18-4150). Appointing a receiver is a drastic measure that is unwarranted in this case and interferes with the Appellants' ability to pursue the appeals. One Appellant is a publicly trading company the receiver is not qualified to manage. There is no proof any Defendant-Appellant dissipated or threatened to dissipate assets once the lower Court ruled. In contrast, there is ongoing waste of the assets by the Receiver and by the Receiver's accountants and lawyers. Anything required to monitor the management of the Appellants' assets can be accomplished by a much less intrusive and expensive Special Master to monitor the activities of the Appellants for far less cost and without the Court losing supervisory oversight.

For these reasons, this appeal by its very nature is subject to expeditious review. It is one of the few orders that a party is entitled to interlocutory review as a

[1] If the Government were to pay all the costs of the Receiver during the pendency of the appeal, and the Receiver did not liquidate the publicly trading company, then some of the dissipation and corresponding prejudice could be avoided.

matter of right. See 28 U.S.C. 1292(a). The statute recognizes the necessity "to permit litigants to effectively challenge interlocutory orders of serious, perhaps irreparable, consequence." *Gardner v. Westinghouse Broad. Co.*, 559 F.2d 209, 212 (3d Cir. 1977) (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181, 99 L. Ed. 233, 75 S. Ct. 249 (1955)). This is because appointing a receiver is a harsh remedy. *United States v. High Plains Livestock*, LLC, 148 F. Supp. 3d 1185, 1204 (D.N.M. 2015). Indeed, "[t]he power to appoint a receiver with authority to take custody and control of property and operate it is as a going concern is a delicate one which is jealously safeguarded, and it should be exerted sparingly." *Skirvin v. Mesta*, 141 F.2d 668, 673 (10th Cir. 1944). A Court should be cautious and circumspect in the exertion of the remedy because perversion or abuse may work great hardship. *Id.* (citing *Kelleam v. Maryland Casualty Co.*, 312 U.S. 377, 61 S.Ct. 595, 85 L.Ed 140). These concerns are even more elevated where the parties' property is being used to finance the affair.

B. Appellees are not prejudiced by an expedited review of the receivership appointment.

Like Appellants, Appellees have nothing to lose if this appeal is expedited. At present, the status quo favors Appellees because there is no stay in place so they do not suffer any current harm. Furthermore, Appellees would benefit from the swift resolution of this appeal if this Court finds that a receiver has been properly appointed. However, if the receiver's appointment was not necessary and

appropriate, Appellees are spared the expense of spending time and resources dealing with the receiver's actions.

C. Consolidating this Matter with the Direct Appeal Would Prejudice Appellants.

Appellants oppose consolidating this matter with Appellants' second appeal because the briefing schedule of a direct appeal would severely delay resolution of the receivership appeal. Additionally, unlike this appeal, Appellants' direct appeal is vast in scope, requiring significant briefing unrelated to the receiver, and consideration of material far greater than involved in this appeal. Consolidating would defeat the purpose of permitting interlocutory review under 28 USC 1292(a) to permit parties immediate review of consequential orders of the trial court.

Furthermore, the issues in the direct appeal are sufficiently distinct from the appeal of the appointment of a receiver that the two appeals should not be consolidated. *See 21 Turtle Creek Square, Ltd. v. N.Y. State Teachers' Ret. Sys.*, 404 F.2d 31, 33 (5th Cir. 1968) cert denied, 491 S Ct 975 ("When a seemingly interlocutory order has been held appealable, it has been on the theory irreparable injury will result from dismissal of the appeal or that the particular narrow issue with which the order was concerned is wholly separable from the remainder of the case and the order terminates the separable issue."). Here, the receivership appeal deals uniquely with whether the appointment of a receiver is necessary and appropriate to enforce the lower Court's decision and whether the facts support the need of a

receiver to assist in the collection of the judgement liabilities or otherwise ensure compliance with the internal revenue laws. (See ECF Doc. 444, p. 14).

The question in the receivership appeal will center on whether the elements of Fed. R. Civ. P. 65 were sufficiently met to justify the appointment of a receiver. In contrast, the issues in the direct appeal will center on the evidence at trial, rulings on evidence, abuse of discretion, inconsistent application of the Rules of Civil Procedure and Rules of Evidence, expert testimony, burdens of proof, imposition of a penalty, right to a jury trial and many other issues well beyond the scope of the appointment of a receiver. If the two matters are consolidated, the issue of the appointment of a receiver becomes moot if the decision below is reversed. In the meantime, the Receiver will have badly harmed, perhaps destroyed, the Appellants' assets.[2]

V. Conclusion

For the reasons stated herein, Appellants respectfully request that this court grant Appellants' motion for expedited briefing and argument on the underlying appeal.

[2] For example, the lower Court has authorized the Receiver to dissolve and liquidate the publicly trading company, International Automated Systems, in ECF Doc. 491, ¶85. Subparagraph 85f prohibits selling the entity and mandates liquidation if International Automated Systems business is exclusively related to solar energy development.

Respectfully submitted this 30th day of November, 2018.

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CERTIFICATE OF SERVICE

I, Steven R. Paul hereby certify that on the 30th day of November, 2018, I served a copy of the foregoing **Motion for Expedited Appeal,** to the following in manner indicated:

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