Appeal No. 22-3073

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff- Appellee,

v.

KEVIN B. DUFF, RECEIVER,
Court-Appointed Receiver-Appellee,

v.

FEDERAL HOUSING FINANCE AGENCY,
AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC,

Appellant.

Appeal from the United States District Court
for the Northern District of Illinois
Hon. Manish S. Shah
1:18-cv-5587

RECEIVER'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS APPEAL

Having failed to establish jurisdiction with prior appeals under 1292(a)(2), and with certification under Section 1292(b) being unavailable because it would not substantially advance the receivership matter towards resolution, FHFA now resorts to mischaracterizing an interim order relating to the allocation of receiver's fees as an injunction in order to manufacture a basis for jurisdiction where none exists.

FHFA's argument that this Court's jurisdiction arises from a district court order that has "the practical effect of an injunction" is strained. That order rejected FHFA's objection to a motion—that remains pending below—about receivership fee expense allocations from day-to-day receivership activities associated with the operation, maintenance, and disposition of the two properties in which FHFA asserts an interest, as well as the creation and implementation of the process to resolve disputed claims against these and other properties. The only relief FHFA sought by its overruled objection was denial of that motion to the extent it sought to allocate costs and fees to the two properties in which FHFA asserts an interest. (Dkt. 1209 at 15) Taken to its logical conclusion, if this Court were to accept FHFA's argument, it would spawn appellate jurisdiction over practically any district court order overruling an objection to day-to-day receivership matters such as the costs of the receivership, property sales, claims and priority determinations, or other receivership administration activities. This is because any objection to such issues could then be construed as FHFA argues here, namely, as "forbid[ding] a *specific* party from taking *specific* actions in relation to *specific* property in which

[a claimant] holds an interest." (Response at 4) Put another way, under FHFA's construct, every allegedly (but as yet undetermined and unconfirmed) priority secured claimant who raises an objection to action of a receiver or has a position overruled that implicates monies in accounts related to the administration of a receivership will have a jurisdictional basis to seek this Court's review of every order overruling every objection it asserts with respect to its claim for that money. FHFA's artificial and self-serving characterization of the district court order and applicable law is unsupported, as the record and this Court's prior decisions make clear.

FHFA begins by inaccurately arguing that the Receiver did not recognize that FHFA was planting its jurisdictional flag under Section 1292(a)(1). It then speciously asserts that the Receiver "does not dispute that this Court has jurisdiction over the appeal under § 1292(a)(1)." (Response at 14) However, as the motion reflects, the Receiver addressed and refuted these jurisdictional arguments, distinguishing the authorities relied upon by FHFA in its Docketing Statement (for which it is FHFA's burden to support). (Motion at 10) Further, while complaining about the timing of the motion, the Receiver submitted his motion to dismiss shortly after the district court denied FHFA's request for 1292(b) certification (Dkt. 1358), which was after FHFA's requested stay in this Court expired (*see* Appellate Court Order 12/5/22). In any event, FHFA's additional authorities cited in its response brief are also distinguishable.

For example, FHFA asserts that *People ex rel. Hartigan v. Peters*, 861 F.2d 164 (7th Cir. 1988), is of import to the current motion. But it is not. That decision—like many decisions FHFA cites—actually involved an injunction and an appeal for which jurisdiction was beyond question. This Court then used appellate pendant jurisdiction to review the issue of receivership dissolution which, in that case, was the flip side of the same coin. None of those circumstances exist here. The district court's order overruling FHFA's objections was issued in the ordinary course of the receivership and is neither an injunction (nor akin to one) nor related to receivership dissolution.

FHFA's citation to *Gautreaux v. Chicago Housing Authority*, 178 F.3d 951 (7th Cir. 1999), also demonstrates why dismissal is appropriate here. Unlike the EquityBuild action, the *Gautreaux* matter emanated from a 1960s injunction which required certain public housing development and related measures. Many years later, the court-appointed receiver filed a motion related to grant funds to implement certain injunction requirements. After the district court allowed the motion, CHA appealed, with all sides asserting jurisdiction under Section 1292(a)(1). But the Seventh Circuit r*ejected* those jurisdictional presumptions and dismissed the appeal, finding that the district court's order was neither a modification of an injunction nor a fresh injunction. If those actions—considered by both parties to be implementation of an injunction or a new injunction—did not meet the Section 1292(a)(1) threshold, then there is no legal or practical basis for treating the order at bar as doing so. FHFA has not argued, here, that the district

court's order modifies an injunction. Nor is it an injunction. The central issues before the district court, which remain unresolved, are who holds priority secured interests and what amounts should be allocated and distributed for receivership work performed. Neither of these issues nor the district court's order on receivership fee allocations involves injunctive relief (mandatory or otherwise), nor anything akin to such relief.

This point is also supported by another decision FHFA cites, *USA Gymnastics v. Liberty Ins. Underwriters, Inc.,* 27 F.4th 499 (7th Cir. 2022). In that case, this Court noted that issues of legal relief such as "reimburse[ment] . . . for its defense costs and interest" were *not* akin to injunctions. *Id.* at 510. In contrast, the *USA Gymnastics* court found that the district court's order declaring Liberty's duty to defend, and requiring the insurer to provide a complete defense, constituted mandatory injunctive relief which established jurisdiction under Section 1291(a)(1). The issues posed by FHFA, here, which relate to the reimbursement for fees for receivership work performed relative to the operations, maintenance, and disposition of the properties and the development of the related claims process, are like the issues that the *USA Gymnastics* court found are legal issues *not* akin to an injunction. *Id.* (discussing legal remedies such as reimbursement of defense costs). There is no mandatory order here. But even if there were, there is nothing presented by FHFA nor in the record showing that the district court's order here "effectively grant[s] or withhold[s] the relief sought on the merits and affect[s] … [FHFA's] ability to obtain such relief in a way that cannot be rectified by a later

appeal (that is, irreparably)." *Id.* (quoting *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 490 (7th Cir. 2012)).

Ignoring those fundamental distinctions, FHFA clings to language in *USA Gymnastics* stating that "serious financial ... uncertainty" is sufficient to constitute "serious and irreparable harm," which the court noted existed in that case in regards to the duty to defend (*i.e.,* the equitable relief element).[1] However, there is no evidence here of "serious financial … uncertainty" in regards to FHFA's self-proclaimed but unresolved interests.

As an initial matter, putting aside the fact that FHFA's characterization would allow almost any order to be relabeled as one akin to an injunction, the district court has not yet determined that FHFA has *any* interest in the two properties at issue. The priority disputes on those properties are pending. If the district court determines that other claimants have first priority secured interests, then FHFA has no recoverable interest, and *a fortiori,* no objection to adjudicate. (*See also* Dkt. 1031 at 12 n.32 ("[A]s the Court has previously emphasized, the Lenders are not entitled to act as first-secured lienholders before that status has been adjudicated in the summary claim-priority adjudication process.")) And, even if FHFA is found to have priority and a valid interest, the district court has yet to

[1] FHFA's citation to *American Hosp. Supply Corp. v. Hospital Products, Ltd.,* 780 F.2d 589 (7th Cir. 1986), further exemplifies the differences between cases in which this Court has found jurisdiction pursuant to Section 1292(a)(1) and this case. In particular, *American Hospital Supply* involved an appeal from a preliminary injunction. In that context, the court noted the somewhat unremarkable proposition that insolvency is a standard ground for concluding harm if the preliminary injunction is denied, but there is no such insolvency here.

determine the amount of fees to be allocated to the properties against which FHFA has asserted its claims. This point reveals, again, both the hypothetical nature of the issue and the fact that this issue is tied to day-to-day operations of the receivership.

Second, apportioning a fractional amount of receivership fees to two of over 100 properties in the receivership estate is a far cry from the encompassing issues at stake in *USA Gymnastics*. In that case, the plaintiff faced the prospect of bearing all unknown but anticipated high costs of defending itself against potentially devasting liability were the insurer allowed to avoid providing a complete defense to its insured, and where the insurer if correct would have no chance of recovery given the financial condition of USA Gymnastics.

Third, even if the district court allocates fees to those properties, it still may order that such amounts be held back in the corresponding accounts. This would obviate the putative harms advanced by FHFA. Curiously, and significantly, FHFA fails to notify this Court that the district court recently did exactly that, in addressing the Receiver's most recent fee petition. That is, when the court approved the proposed allocation of fees to the two FHFA properties described in the Receiver's seventeenth fee application, it ordered that those amounts be held back in their entirety and not be distributed at this time "to avoid the issues that may arise in unwinding transactions if the FHFA's objection turns out to be

material."[2] (Dkt. 1366 at 2-3) In other words, the district court has already taken steps to avoid a result that could not be rectified. This alone shows there is no injunctive effect from the order at issue. *Contrast USA Gymnastics*, 27 F.4th at 510 (quoting *Jamie S.*, 668 F.3d at 490) (order has injunctive effect when it cannot be rectified). In sum, FHFA's arguments of "serious harm" are hypothetical and inaccurate, and as such cannot serve as a basis for this Court to have jurisdiction under Section 1292(a)(1).[3]

Separately, if FHFA's contrived portrayal of the district court's order provides a basis for jurisdiction here, it would lead to a barrage of other interlocutory orders being similarly characterized to bring overruled objections about receivership administration before this Court. For example, FHFA's

---

[2] In this fashion, the district court provides at least one response to FHFA's statement that "[t]he allocated fee amount would necessarily be different if FHFA's objection had been sustained, yet those funds will soon be distributed out of the accounts controlled by Duff. *See* Dkt. 1330, 1363, 1364." (Response at 16) Additionally, the suggestion of no response from the Receiver on the point is misplaced and misleading. As noted, in regards to the most recently approved fee petition (Dkt. 1366), the district court has ordered that the allocated fees as to the FHFA properties will be held back and not distributed, showing that *those fees* will not be soon distributed out of the property accounts controlled by the Receiver for the two properties at issue. FHFA's argument also overlooks or ignores that many of those allocated fees are property-specific.

[3] FHFA's reliance upon *In re Forty-Eight Insulations,* 115 F.3d 1294 (7th Cir. 1997), is a red herring. That matter involved the denial of a motion to stay pending appeal of issues before the district court that had been appealed from rulings by a bankruptcy court, which was a wholly unique procedural posture from the matter at bar. It is not unusual for a motion to stay to be appealed or otherwise brought in a higher court upon denial. The order that is the subject of this appeal being sought by FHFA is not for a stay pending appeal, but an effort to obtain substantive review over what is an ordinary order in a receivership context.

conservatee's prior appeal of the overruling of its objections to the sale of one of the properties was brought under 1292(a)(2)—and dismissed by this Court—but the next appeal filed by FHFA or its conservatee would surely argue (as they do now) that in fact they are seeking to appeal an injunction because, as FHFA has argued here, the overruling of their objections acts to "forbid[] a specific party [the Receiver] from taking specific actions [the sale] in relation to specific property in which FHFA [or other claimant] holds an interest." (Response at 4) This is especially concerning in receiverships like this one where the estate is comprised of over one hundred properties with hundreds of competing claimed secured interests and a wide chasm between claimants about how the receivership estate ought to be administered and who ought to pay for it. That possibility is precisely what this Court has previously rejected, warning that such orders represent actions "en route to winding up a receivership" and, were appeal allowed, it would "make anything the receiver did appealable immediately." *U.S. v. Antiques P'ship,* 760 F.3d 668 (7th Cir. 2014). In short, this Court is not the place where the day-to-day activities of the Receiver should be subject to supervision and review—that is the role of the district court. *Id.*

Finally, FHFA also mischaracterizes the Receiver's position in regards to Section 1292(a)(2). The Receiver does not and has not argued that there cannot be orders and situations in a receivership that fall under other jurisdictional provisions. The Receiver's position here is that the order which is the subject of *this* appeal is no different from the previous interlocutory orders this Court regarded as

matters of receivership administration, governed by Section 1292(a)(2). The order is neither an injunction nor should FHFA's effort to construe it as one be countenanced to allow FHFA to circumvent Section 1292(a)(2). The order appealed is in the nature of receivership orders governed by Section 1292(a)(2), and therefore this appeal should be dismissed for the same reasons that the prior appeals were dismissed, as explained in the Receiver's motion at bar.

Wherefore, the Receiver respectfully requests that his motion to dismiss the instant appeal be granted.

Dated: January 27, 2023

Respectfully submitted,

Kevin B. Duff, Receiver, *Appellee*

/s/ Michael Rachlis
One of his attorneys

Michael Rachlis
Jodi Rosen Wine
Rachlis Duff & Peel, LLC
542 S. Dearborn St., Suite 900
Chicago, IL 60605
(312) 733-3955
mrachlis@rdaplaw.net
jwine@rdaplaw.net

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2023, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Michael Rachlis