

**United States Court of Appeals
for the Ninth Circuit**

ARC MUSIC, INC., a California
corporation,

Plaintiff-Appellee,

v.

WAYNE HENDERSON, SR., an
individual,

Defendant-Appellant.

Ninth Circuit Docket No.:
10-55644

District Court Docket No.:
09-CV-07967 DSF (CWx)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Honorable Dale S. Fischer

**APPELLEE ARC MUSIC, INC.'S
MOTION TO DISMISS APPEAL
FOR LACK OF JURISDICTION**

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I

RELIEF SOUGHT

Pursuant to Federal Rule of Appellate Procedure 27, appellant Arc Music, Inc. (“Arc”) hereby moves the Court of Appeals for the Ninth Circuit to dismiss this appeal, on the grounds that appellant Wayne Henderson, Sr. (“Henderson”) has improperly filed an appeal from a non-appealable, non-final order of the district court.

II

PROCEDURAL HISTORY

On October 30, 2009, in response to Henderson’s threat of suit, Arc (under its former name, Third Story Music, Inc.) instituted an action for declaratory relief that Henderson’s claim for copyright infringement was time-barred, and also included a claim for breach of contract. On January 11, 2009, Henderson filed an answer, in which he admitted that he had indeed been aware of the claim since at least August 10, 2006. Henderson’s answer also included counterclaims against Arc. Henderson filed amended pleadings on February 1, 2010. The amended pleading named an additional twenty-one (21) parties as counterdefendants. and included fourteen claims for relief.

Arc filed a motion to dismiss and a motion to strike attacking the Henderson’s counterclaims, and moved for summary adjudication on the issue of liability on the first claim for relief on its complaint against Henderson.

On March 22, 2010, the district court issued an order and memorandum on each of Arc’s three motions. The district court granted the motion for summary

adjudication. It granted the motion to dismiss in part, dismissing the sixth, tenth, and fourteen claims for relief; as to the tenth and fourteenth claims, the dismissal was without prejudice. Because the issue at the heart of the sixth claim for relief was the same as raised in Arc's motion for summary adjudication, the motion for summary adjudication served as the basis for granting the motion to dismiss as well. The court also granted Henderson leave to amend seventh, ninth, eleventh, twelfth, and thirteenth claims for relief. Although the district court's ruling on the motion to dismiss made Arc's motion to strike largely moot, the court granted it in part and denied it in part. The district court ordered Henderson to file and serve any amended counterclaims no later than May 31, 2010.

III ARGUMENT

Despite the statements made by appellant Henderson on his notice of appeal and on his docketing statement, the orders issued by the district court on March 22, 2010 are not a "final decision of the district court," nor did the district court render an "interlocutory decision appealable as of right."

Rather, the district court merely issued an order granting a "partial summary judgment." Absent certain circumstances, an order disposing only of certain claims or defenses is not an appealable order. *Frank Briscoe Co., Inc. v. Morrison-Knudsen Co., Inc.*, 776 F.2d 1414 (9th Cir. 1985). "A district court order dismissing some but not all of the claims is not a 'final judgment' appealable under 28 U.S.C. § 1291." *Pratt v. Banks*, 53 F.3d 339 (9th Cir. 1995). There would be

an exception if the district court certified the case for interlocutory appeal under Federal Rule of Civil Procedure 54(b), but that did not happen here; Henderson did not even request such a certification.

The case is still pending in the district court. Arc still has other claims against Henderson, and Henderson is in the process of amending his counterclaim against Arc and other parties. Therefore, there is no basis for appeal at this time, and this court has no jurisdiction to entertain an appeal.

IV CONCLUSION

Because the orders appealed from are not appealable, the Court should dismiss this appeal for lack of appellate jurisdiction.

Dated: April 28, 2010

Respectfully submitted,

COHEN AND COHEN

By: /s/
EVAN S. COHEN
Attorneys for Appellant ARC
MUSIC, INC.

PROOF OF SERVICE

State of California }
County of Los Angeles }

I, S. Martin Keleti, am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is: 8340 Melrose Avenue, Los Angeles, California 90069-5420.

On April 28, 2010, I served the foregoing **APPELLEE ARC MUSIC, INC.'S MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION** on all interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

Michael B. Ackerman, Esq.
6401 La Punta Drive
Los Angeles, California 90068-2827

Alan S. Gutman, Esq.
9401 Wilshire Boulevard #575
Beverly Hills, California 90212-2918

I am readily familiar with the business's practice for the collection and processing of correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business. On this date, the above referenced correspondence was placed for deposit at Los Angeles, California and placed for collection and mailing following ordinary business practices.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 28, 2010.

/s/

S. MARTIN KELETI