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 REPLY TO APPELLANT'S RESPONSE TO MOTION DISMISS APPEAL FOR LACK OF JURISDICTION

EVAN S. COHEN (State Bar No. 119601)
e-mail: ecohen@manifesto.com
S. MARTIN KELETI (State Bar No. 144208)
e-mail: keleti@manifesto.com
SOMMER A. ISSAQ (State Bar # 259081)
e-mail sissaq@cohenmusiclaw.com
COHEN AND COHEN
8340 Melrose Avenue
Los Angeles, California 90069-5420
(323) 655-4444 Telephone
(323) 655-3333 Facsimile

I

INTRODUCTION

Appellant Wayne Henderson, Sr. ("Henderson") has improperly appealed a non-appealable order, namely, the order granting the motion by appellee Arc Music Inc. ("Arc") for summary adjudication, affecting at most two or three claims of Henderson's original 14. As many as 13 of Henderson's claims, at least five of which are copyright claims, could remain in the district court, with a trial date set for January 4, 2011. This court should dismiss Henderson's appeal immediately, because it unquestionably violates "a strong congressional policy against piecemeal review, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *United States v. Nixon*, 418 U.S. 683, 690 (1974). The instant appeal constitutes just such an ill-advised attempt at a piecemeal review.

Henderson's lengthy, rambling brief is replete with accusations of wrongdoing and unfairness. But the central thrust of his brief amounts to no more than a circular argument, namely, that the dismissal of his time-barred copyright infringement claim (and the granting of Arc's corresponding declaratory relief claim) regarding *one* song (among several counterclaims that he has brought in the action implicating *more than 200 additional songs*) is in effect a denial of an injunction relating to the continuing exploitation for that one song, and, therefore, the district court's order is appealable under 28 U.S.C. §1292(a)(1). But this is just a circuitous way of arguing that Henderson's infringement claim was not time-barred, that is, that the district court should not have granted Arc's motion, either because Henderson's claim was timely filed or because the court should have

permitted him further discovery. The net effect is the same, with Henderson simply re-arguing the merits of copyright claim in a premature appeal, in which there is no final judgment. But the law dictates that these issues must be argued in an appeal when the case has concluded and there is a final judgment, and no sooner.

This is a perfect example of the reason why the "final judgment rule" embodied in 28 U.S.C. § 1291 exists. If litigants were allowed to bounce back and forth between the district court and the court of appeals, re-litigating decisions or issues, the orderly administration of cases by the district court would be impossible. Despite all of Henderson's strained arguments, there are no facts here which would take this case out of the rule that 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).

II

FACTUAL SUMMARY

Arc sets forth the following brief summary of the facts, limited to those facts pertinent to this motion: On August 10, 2006, Henderson first accused Arc and its predecessor (both of whom are music publishers) of copyright infringement with regard to a musical work entitled "The Loneliest Man in Town" (the "Song"), based upon the release of an allegedly infringing musical work (the "New Song") in May 2006. Years passed, but during that time Henderson failed to sue Arc or its predecessor for damages for infringement or for an injunction, even though he had full knowledge of the claim. Finally, on October 30, 2009, more than three years after Arc's predecessor granted the license which allegedly infringed the Song, Arc

sued for declaratory relief that Henderson's purported infringement claim was time-barred. In response, on January 10, 2010, Henderson filed an answer, together with a lengthy counterclaim against Arc which brought in a half-dozen additional counterdefendants, although he still failed to move the court for any preliminary injunctive relief. On February 1, 2010, Henderson filed an even lengthier amended counterclaim, this time with 14 claims—six of which allegedly arose under the Copyright Act, either for declaratory relief or for infringement— and increasing the number of counterdefendants to nearly two dozen, but again not seeking any preliminary injunctive relief. The fifth counterclaim alleges Arc of infringing no fewer than 241 copyrights other than the one for the Song.

On February 8, 2010, Arc brought a motion for summary adjudication and a motion to dismiss with regard to the alleged infringement of the Song. The district court granted Arc's motion for summary adjudication with respect to its claim for declaratory relief and granted Arc's motion to dismiss—with prejudice—Henderson's sixth counterclaim, in which he alleged Arc's infringement of the Song. Four of Henderson's federal claims were not involved in either of Arc's two motions,[1] and remain in the case. The district court granted Henderson leave to amend his other counterclaims by May 31, 2010. Henderson has not yet done so. The district court set January 4, 2011 as the trial date.

---

[1] Henderson's first four copyright claims also were the subject of Arc's motion to strike (filed with the Arc's two other motions) on the grounds that two of those claims were redundant, but the district court largely denied that motion.

III

THE TWO ORDERS OF THE DISTRICT COURT DO NOT AMOUNT TO A DENIAL OF AN INJUNCTION

A. HENDERSON DID NOT ARGUE THIS ISSUE IN THE CONTEXT OF THE MOTIONS.

Henderson's whole "denial of an injunction" argument is a sham. It is a last-minute result of a desperate search for a reason for this appeal to have any proper basis, apparently considered only *after* Arc moved to dismiss Henderson's appeal.[2]

But Henderson is not appealing the denial of an injunction. The issue of whether or not the district court should grant or deny an injunction, or even whether a ruling against Henderson might even have the *effect* of denying Henderson injunctive relief, was simply not part of the motions that were argued. In the three lengthy briefs (amounting to approximately fifty pages in total) that Henderson filed, not once did he ever raise any such argument.

B. HENDERSON'S CLAIM THAT HE WOULD BE ENTITLED TO AN INJUNCTION IS YEARS TOO LATE.

The reason that there is an exception to the final judgment rule for injunctions is because there is a recognition that requests for injunctive relief often involve matters of some urgency or timeliness, in which courts are asked to act quickly to protect a litigant's rights, and that some irreparable harm would occur

---

[2] The evidence on this point is rather conclusive. When Henderson filed this appeal on April 23, 2010, his docketing statement made no mention of the basis of this appeal being "the denial of an injunction." In fact, the box corresponding to the reason "Injunctions: Denied" is ***unchecked***.

if action is not taken.

However, there is no such urgency here. As is set forth in the district court's order on Arc's motion for partial summary judgment, Henderson brought his infringement claim approximately three and one-half years after he learned of the alleged infringement of the composition at issue. Henderson admitted these facts, and there were no genuine issues. Henderson's claim was thus dismissed because it was time-barred, and Arc's motion for summary adjudication was granted for that same reason. During the more than three years that he knew about the claim, Henderson apparently did not think that the matter was serious enough to either sue on the matter, let alone seek an injunction. In fact, he did nothing *at all* for *years*, until presented with the declaratory relief action in October 2009. And, even then, he did not move for an injunction.

Now suddenly, more than *four years* after the initial release of the New Song in May 2006, Henderson invents the concept that he would be irreparably harmed by the fact that he now cannot get an injunction; an injunction that he never sought in the first place, and failed to seek even after he was dragged into court.[3]

Moreover, it is hard to take any of Henderson's argument about his need for injunctive relief (or the alleged harm from the deprivation thereof) seriously, because, by his own admission, he waited three and one-half years to bring suit. Those who seek injunctive relief must do so within a reasonable time, and six

---

[3] Henderson also fails to explain why an injunction, at this time (or, for that matter, at trial), would be advisable or have any utility, when the remedy of damages, albeit for an exceedingly small amount, would be available (that is, if his claim were not time-barred), and the allegedly infringing release has been out for years.

months *past* the three-year statute of limitations is objectively unreasonable. Indeed, based upon his own papers, Henderson admitted that approximately 95% of sales of the allegedly infringing work occurred *outside* of the three-year statutory period, leaving approximately $1800 in damages that would actually be at issue, if the whole claim were not time-barred. One of the requirements for injunctive relief is irreparable harm, and an inordinate delay undermines the argument that the harm is irreparable.

C. INJUNCTIVE RELIEF IS NOT AVAILABLE AS A REMEDY FOR CLAIMS THAT ARE TIME-BARRED.

Nor does the "effect" of the two orders serve to deny Henderson some form of injunctive relief that he might have asked for at some future time, because the district court ruled on the merits of the claim, and found that the claim was without basis. It would seem axiomatic to state that party has little or no chance to obtain an injunction with regard to a claim of copyright infringement of a claim that is time-barred.

The statute and caselaw dictate that the time for Henderson to argue that the district court's granting of summary judgment was "reversible error" is after final judgment has been rendered in the case. Ignoring the law, what Henderson is really arguing in this premature appeal is that the district court should not have dismissed one of this copyright claims. He can raise such matters on an appeal only after the case is over.

IV

MANY OF HENDERSON'S CLAIMS REMAIN TO BE ADJUDICATED, INCLUDING AT LEAST FIVE FEDERAL CLAIMS

Henderson also argues that the district court's order "effectively knocks Henderson out of district court because Henderson's remaining claims are state law claims, thereby terminating the action because Henderson would lack the requisite claim(s) to invoke federal jurisdiction." This is simply not true, and Henderson has either forgotten about his other five federal claims, or is being disingenuous.[4]

Henderson's first claim is for declaratory relief that he is the sole owner of a list of 26 songs, and he invokes federal jurisdiction under the Copyright Act, as he does with all five claims discussed here. Henderson's second claim is for declaratory relief that the license granted by Arc's predecessor with regard to the New Song is invalid, and that Arc does not own any part of the New Song. Henderson's third claim is much like the first claim, and Henderson seeks a declaratory judgment that that he is the sole owner of a list of the same 26 songs, and, in addition, a further list of 48 songs, and yet another list of 42 songs. Henderson's fourth claim seeks a declaration that Henderson is the sole owner of a list of songs that is not attached to the counterclaim, but which Henderson calls the "Published Co-Written Songs," and with regard to which Henderson alleges that Arc "continue[s] to assert rights to over sixty-three (63)" of those songs.

---

[4] Henderson has also apparently forgotten that he is the counterclaimant, so that to the extent that his counterclaims are compulsory, even if he were, as he now argues, left with only state-law claims against Arc, he would not be "knocked out of court" if Arc's complaint properly invokes federal jurisdiction.

Finally, Henderson's fifth claim is for copyright infringement, in which Henderson alleges that Arc and its predecessor have infringed all of the aforementioned compositions, which are either 179 or 241 in number, depending on how one interprets the rather vague allegations of the counterclaim.

None of Arc's motions even addressed the first four counterclaims, although it could be argued that the second counterclaim is no longer viable because the district court ruled that Henderson's claim that granting a license for the New Song infringed the Song is time-barred. Further, it also could be strongly argued that the fifth counterclaim is also time-barred because all of the allegations therein (with regard to the 179 or 241 songs) deal merely with the "erroneous collection of money," which the district court has ruled does not constitute copyright infringement. However, even if Henderson wisely omits the second and fifth counterclaims from his Second Amended Counterclaim, that still leaves substantial federal claims in what are now the first, second, and fourth counterclaims.[5]

It is unclear, therefore, how Henderson could seriously argue that all of his remaining claims "are state law claims." Even if they were, the district court would still have subject matter jurisdiction to the extent they are sufficiently related to Arc's claims against Henderson.

---

[5] Because Henderson has not yet filed his amended pleading (and has until May 31, 2010 to do so, if at all), Arc is not yet aware of how Henderson will choose to amend these claims, or even if he will choose to amend them at all. With regard to the time-barred claim, however, the district court cautioned Henderson to "review Rule 11 before proceeding against" the "21 parties that Henderson claims violated his copyright in the Song." There will no doubt be further motion practice with regard to any amended pleading; this is another justification to adherence to the final judgment rule.

V

THE RULINGS OF THE DISTRICT COURT ARE NOT SUBJECT TO THE COLLATERAL ORDER RULE

The orders of the district court do not fall under the "collateral order rule." The issue of whether or not the claim for infringement of the Song was time-barred goes *directly* to the merits, and was not "completely separate from the merits of the action," such as an order dealing with the disputed disclosure of confidential information in discovery. Nor is the matter of the claim for infringement "effectively unreviewable on appeal from a final judgment." These rulings most certainly *are* appealable, but at the end of the case; if Henderson so chooses, he can appeal the holding by the district court that his claim is time-barred. He can appeal the denial of his request for further discovery under Rule 56(f). He can appeal the ruling that the mere collection of royalties is not copyright infringement. All of these holdings may be appealable, but not at this time.

VI

THERE IS NO APPELLATE JURISDICTION OVER THIS CASE WITHOUT A FINAL ORDER FROM THE DISTRICT COURT

As a final point, Henderson argues that the orders of the district court should be appealable because, among other factors, they "disposed of 'an unsettled issue of national significance'," and because "judicial economy would not be served by remand." Neither of these factors could be farther from the situation here.

First, there is no "issue of national significance" because a district court correctly dismissed a claim that an author apparently cared so little about that he

waited three and one-half years to bring to court, and, only then because he was sued first for declaratory relief. If anything, the public policy should be in favor of the dismissal of stale, *de minimis* claims.[6] And, if the issues decided in the district court's orders were of such "national significance" to copyright owners, why did Henderson not seek certification of such issues, pursuant to Rule 54(b)?

Second, there is no judicial economy in having piecemeal appeals of the dismissal of one or two claims out of 14, especially when they are obviously time-barred. The district court cannot effectively administer the rest of the case with a trial date approaching, while this court would be adjudicating or reviewing the interlocutory orders of the district court at the same time. This is one of the basic reasons behind the final judgment rule and 28 U.S.C. § 1291.

VII

CONCLUSION

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

Respectfully submitted,

Dated: May 13, 2010

COHEN AND COHEN

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

---

[6] The claim regarding the Song involves minor amounts of money, as Henderson conceded in the district court. Henderson's own documents, consisting of unauthenticated sales reports, confirmed that 95% of sales were outside of the limitations period.