UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Niemi v. Burgess

Niemi · No. 12-1233 · Decided September 6, 2013

SUMMARY

This published per curiam Tenth Circuit opinion addresses an interlocutory appeal from a preliminary injunction freezing defendants' assets worldwide in litigation arising from an alleged real estate financing fraud. The court rejects mootness and fugitive-disentitlement arguments, but concludes that the individual plaintiffs lacked statutory standing to pursue RICO and Colorado Organized Crime Control Act claims based on injuries derivative of corporate losses. The document includes a September 10, 2013 order correcting clerical errors and reissuing the opinion nunc pro tunc to September 6, 2013.

CASE DETAILS

COURT	United States Court of Appeals for the Tenth Circuit
WRITING FOR THE COURT	Neil M. Gorsuch; Timothy M. Tymkovich; Paul J. Holmes III
JURISDICTION	Federal
DECIDED	September 6, 2013
DOCKET	12-1233
DISPOSITION	vacated
PROCEDURAL POSTURE	Interlocutory appeal under 28 U.S.C. § 1292(a)(1) from a preliminary injunction freezing the assets of the defendants and requiring a $2.18 million escrow deposit.
STANDARD OF REVIEW	The court addressed statutory standing and the availability of appellate disentitlement; it stated that even under plain-error review the standing issue would produce the same result.
PRECEDENTIAL VALUE	Published precedential opinion
PARTIES	Erwin Lasshofer, Innovatis GmbH, Innovatis Immobilien GmbH, Innovatis Asset Management SA v. John Niemi, Robert Naegele, III, Jesper Parnevik

TOPICS

interlocutory appeal · standing · injunctions · writ of certiorari · appellate procedure

PRACTICE AREAS

appellate procedure · civil procedure · remedies · commercial litigation · real estate · statutory interpretation

QUESTIONS PRESENTED

1. Whether the appeal from the June 2012 preliminary injunction was moot because the district court later entered another injunction.
2. Whether the fugitive disentitlement doctrine barred civil defendants who allegedly violated a preliminary injunction from pursuing an interlocutory appeal.
3. Whether the district court had authority under Colorado law and federal diversity jurisdiction to issue a worldwide asset-freezing preliminary injunction in an action seeking damages.
4. Whether the individual plaintiffs had statutory standing under COCCA to assert injuries that were allegedly derivative of injuries suffered by Mesatex and its subsidiaries.
5. Whether the plaintiffs could introduce forfeiture and other new statutory-standing arguments through post-argument Rule 28(j) letters.

HOLDINGS

1. The appeal was not moot because the June 2012 injunction continued to have independent legal effect and was materially broader than the October 2012 injunction.
2. The fugitive disentitlement doctrine did not bar the appeal because the defendants were civil litigants who were not charged with or convicted of crimes and were not fugitives hiding from the law.
3. The plaintiffs failed to establish statutory standing to pursue COCCA claims because the alleged losses were derivative of losses suffered by Mesatex and its subsidiaries, and the plaintiffs did not demonstrate a direct and personal injury.
4. The court declined to consider the plaintiffs' newly raised nonjurisdictional forfeiture and related arguments presented after briefing and oral argument in Rule 28(j) letters.

KEY QUOTATIONS

> *“Courts have adopted this rule in order to avoid turning trials and appeals into unenforceable farces.”* (at 7-8)

> *“But it’s long settled law that a shareholder or guarantor lacks standing to assert RICO claims when their losses are only derivative of a corporation’s — when the individuals’ losses come about only because of the firm’s loss.”* (at 18)

> *“The proper function of Rule 28(j) letters, after all, is to advise the court of “new authorities” a party has learned of after oral argument, not to interject a long available but previously unmentioned issue for decision.”* (at 20-21)

FACTUAL BACKGROUND

Mesatex and related companies sought financing to complete a luxury condominium project in Breckenridge. After paying a $180,000 commitment fee and providing $2 million as collateral for a promised $250 million loan, the loan never materialized, and the companies allegedly suffered business losses and foreclosure-related damages. The individual plaintiffs were investors, creditors, and guarantors of the companies, but neither Mesatex nor its subsidiaries—the entities that entered the loan arrangements and allegedly suffered the losses—was named as a plaintiff.

PROCEDURAL HISTORY

The District of Colorado entered a June 2012 preliminary injunction freezing virtually all worldwide assets of Lasshofer and the corporate defendants and requiring them to deposit $2.18 million in escrow. The plaintiffs argued that the appeal was moot because of a later injunction and that the defendants should be disentitled from appealing because they had violated the injunction. The Tenth Circuit rejected those arguments, held that the plaintiffs had not established statutory standing to pursue their COCCA claims, vacated the June 2012 injunction, and remanded for further proceedings.

DISPOSITION

vacated

REMAND INSTRUCTIONS

The June 2012 preliminary injunction is vacated, and the case is remanded for further proceedings consistent with the opinion.

CASES CITED

- Wyoming v. U.S. Department of the Interior, 587 F.3d 1245, 1250 (10th Cir. 2009)
- United States v. Hall, 198 F.2d 726, 727-28 (2d Cir. 1952)
- Crosby v. United States, 506 U.S. 255, 262 (1993)
- Allen v. Georgia, 166 U.S. 138, 141 (1897)
- United Electrical, Radio & Machine Workers of America v. 163 Pleasant Street Corp., 960 F.2d 1080, 1097 (1st Cir. 1992)
- Ortega-Rodriguez v. United States, 507 U.S. 234, 240 (1993)
- Bonahan v. Nebraska, 125 U.S. 692 (1887)
- Smith v. United States, 94 U.S. 97 (1876)
- Martin v. Mukasey, 517 F.3d 1201, 1204-05 (10th Cir. 2008)
- Sapoundjiev v. Ashcroft, 376 F.3d 727, 729-30 (7th Cir. 2004)
- Degen v. United States, 517 U.S. 820, 823-27 (1996)
- United States v. Timbers Preserve, 999 F.2d 452, 455 (10th Cir. 1993)
- Hovey v. Elliott, 167 U.S. 409, 411-14 (1897)
- United States v. Copar Pumice Co., 714 F.3d 1197, 1206-07 (10th Cir. 2013)

- Chambers v. NASCO, Inc., 501 U.S. 32, 46-47 (1991)
- Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 310, 318 n.3, 325-26, 333 (1999)
- FDIC v. Antonio, 843 F.2d 1311, 1312-14 (10th Cir. 1988)
- Guaranty Trust Co. v. York, 326 U.S. 99, 105 (1945)
- Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 90, 94 (1998)
- Sinochem International Co. v. Malaysia International Shipping Corp., 549 U.S. 422, 431, 436 (2007)
- Bixler v. Foster, 596 F.3d 751, 758-59 (10th Cir. 2010)
- Sparling v. Hoffman Construction Co., Inc., 864 F.2d 635, 640-41 (9th Cir. 1988)
- Floyd v. Coors Brewing Co., 952 P.2d 797, 803 (Colo. App. 1997)
- Coors Brewing Co. v. Floyd, 978 P.2d 663 (Colo. 1999)
- Utah v. Babbitt, 137 F.3d 1193, 1203, 1216 (10th Cir. 1998)
- Kansas v. United States, 249 F.3d 1213, 1221-23 (10th Cir. 2001)
- Franchise Tax Board of California v. Alcan Aluminium Ltd., 493 U.S. 331, 336 (1990)
- Heart of America Grain Inspection Services, Inc. v. Missouri Department of Agriculture, 123 F.3d 1098, 1102 (8th Cir. 1997)
- Cooper v. McBeath, 11 F.3d 547, 551 (5th Cir. 1994)
- Hobby Lobby, 2013 WL 3216103, at *34 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring)
- Kaplan v. First Options of Chicago (In re Kaplan), 143 F.3d 807, 812 (3d Cir. 1998)
- American Capital Corp. v. FDIC, 472 F.3d 859, 866-67 (Fed. Cir. 2006)
- Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 180 (2000)
- Utah Association of Counties v. Bush, 455 F.3d 1094, 1099 (10th Cir. 2006)
- Hill v. Kemp, 478 F.3d 1236, 1250-51 (10th Cir. 2007)
- Headrick v. Rockwell International Corp., 24 F.3d 1272, 1277-78 (10th Cir. 1994)
- Colorado v. Idarado Mining Co., 916 F.2d 1486, 1490 n.2 (10th Cir. 1990)
- Richison v. Ernest Group, Inc., 634 F.3d 1123, 1128 (10th Cir. 2010)