

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-14208

Non-Argument Calendar

DONNAHUE GEORGE,

Plaintiff-Appellant,

versus

KEN GRIFFIN,
CITADEL SECURITIES MARKET MAKER,
CITADEL CONNECT DARK POOL,
CITADEL LLC HEDGE FUND,
SECURITIES EXCHANGE COMMISSION, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:21-cv-61719-KMM

Before JORDAN, BRANCH, and JULIE CARNES, Circuit Judges.

PER CURIAM:

Plaintiff's claims in this *pro se* action arise from investment losses allegedly caused by the January 2021 GameStop short selling incident and other market manipulation schemes he claims were orchestrated by the various individuals, corporate entities, and government agencies named as defendants in the case. The district court dismissed the case without prejudice when the parties failed to submit a joint scheduling report within the time frame required by the pretrial order. Plaintiff appeals the dismissal, and he also appeals the district court's rulings on his related motions to reopen the case, require Defendants to participate in the scheduling process, impose Rule 37 sanctions, and grant preliminary injunctive relief, among other things.

Based on our review of the record, Plaintiff has filed his appeal prematurely and without giving the district court an opportunity to rule on his latest round of pending motions. Accordingly, we do not address the merits of the appeal but rather **REMAND** the case so the district court can make the appropriate rulings. Given our decision to remand instead of addressing the merits of

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the appeal, we **DENY as moot** the motion filed by Defendants to dismiss the appeal for lack of jurisdiction.

BACKGROUND

Plaintiff filed this *pro se* action on August 17, 2021, asserting claims against an individual and several corporate entities involved in the January 2021 GameStop short selling incident and other alleged stock market manipulation schemes. Plaintiff claimed the GameStop incident and other schemes caused him to incur nearly \$2 million in investment losses. In addition to the entities allegedly involved in the scheme, Plaintiff named the Securities Exchange Commission (“SEC”) and various other government agencies and government affiliated entities as defendants in the action, claiming that their failure to properly oversee and regulate the stock market contributed to his losses.

Plaintiff alleged in his initial complaint that Defendants collectively conspired to create an illegal monopoly to “control and manipulate the price” of GameStop and other stock via illegal actions that included counterfeiting and selling fake shares of stock. According to Plaintiff, the SEC and other government agencies turned a blind eye to and were thus complicit in the manipulation. In his initial complaint, Plaintiff asserted breach of contract, federal antitrust, and civil Racketeer Influenced and Corrupt Organizations Act (“RICO”) claims against Defendants.

The district court entered a pretrial order in the case requiring the parties to hold a scheduling conference within twenty days after the first responsive pleading by the last responding defendant

or within sixty days after the filing of the complaint, whichever occurred first. The order advised Plaintiff that if all the named defendants had not been served by the expiration of that deadline, Plaintiff should move for an enlargement of time to perfect service and complete the scheduling process, not to exceed ninety days from the filing of the complaint. The parties were further instructed to file a joint scheduling report within ten days of the scheduling conference and told that failure to comply with that deadline could result in “dismissal, default, and the imposition of other sanctions.” The order outlined various items that should be included in the conference and report, including the procedure for exchanging documents and witness lists and the process for discussing the nature and basis of the claims asserted in the complaint and the possibility for settlement.

Plaintiff subsequently filed an amended complaint, which asserted the same claims as his initial complaint and added allegations related to a Ponzi scheme Defendants allegedly were conducting. Plaintiff attached a statement to the amended complaint indicating that a copy of the complaint and a summons, along with a waiver of service form and a stamped return envelope, had been sent to the following defendants on August 17, 2021: the SEC, Ken Griffin, Citadel Securities Market Maker, Citadel Connect Dark Pool, Citadel LLC Hedge fund, the Financial Industry Regulatory Authority (named in the complaint as “FINRA”), the Depository Trust & Clearing Corporation (“DTCC”), WeBull Financial LLC, and Robinhood Financial LLC. Plaintiff later indicated that the

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Commodity Futures Trading Commission (“CFTC”) had been added as a defendant in the case.

In connection with his amended complaint, Plaintiff filed a motion for a preliminary injunction prohibiting Defendants from continuing to trade in or destroying documents related to the stocks at issue in the case. Plaintiff attached a statement certifying that he had sent a copy of the motion by certified mail to Defendants. The district court stayed briefing on the motion, noting that Defendants had yet to appear in the case and that it was not clear they had been properly served with the motion despite Plaintiff’s statement. The court indicated that it would set a briefing schedule for the preliminary injunction motion upon a showing that Defendants were on notice of the motion or upon their appearance in the case.

Defendants Griffin, Robinhood Financial, and the Citadel entities subsequently waived or provided proof of service. As to the remaining defendants—FINRA, DTCC, CFTC, WeBull, and the SEC—Plaintiff filed a motion for an order authorizing alternative service by email, publication, or certified mail return receipt. In support of the motion, Plaintiff claimed he had made several unsuccessful attempts to perfect service by a professional process server, and he submitted evidence in the form of a certified mail return receipt that all these defendants were aware of the lawsuit. The district court denied the motion, noting that Plaintiff did not reference or appear to have complied with Federal Rule 4(i)(2), which governs service on a federal agency.

Shortly thereafter, defendants FINRA and DTCC submitted a waiver of service, leaving the SEC, WeBull Financial LLC, and CFTC to be served. Upon receiving notice of the FINRA and DTCC waivers, the district court entered an order setting a briefing schedule on Plaintiff's pending motion for a preliminary injunction. The court noted in its order that nearly all the named defendants had filed an appearance or waived service and were on adequate notice of the preliminary injunction motion. Accordingly, the court ordered the defendants who had appeared and/or waived service to respond to the motion within two weeks and set a time for Plaintiff's reply.

On October 29, 2021, while the preliminary injunction motion remained pending, the district court entered a paperless order after undertaking a "*sua sponte* examination of the record." The court noted in its order that, based on the timelines set out in the pretrial order, the deadline for the parties to submit a joint scheduling report was October 27, 2021. Because the deadline had passed and the parties had not yet submitted a report, the court ordered that the case be dismissed without prejudice, and it denied the pending motion for a preliminary injunction as moot. The court instructed the clerk to close the case, but advised the parties that they could move to reopen the matter upon the filing of the required report. The case was closed that same day.

Plaintiff immediately filed a motion to reopen the case and to amend the complaint. However, Plaintiff did not address in his motion the court's rationale for dismissing the case: the failure to

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submit a joint scheduling report. Instead, Plaintiff inexplicably argued that he was unaware of the deadline for filing an amended complaint because he did not receive notice of orders entered in the case until they were mailed to him, and that he recently had to travel to the Dominican Republic to care for his elderly father. Plaintiff stated that his amended complaint was ready to be filed and he urged the court to reopen the case and/or reconsider its order dismissing the case. The court denied Plaintiff's motion in a paperless order, clarifying its reason for dismissing the case and encouraging Plaintiff to review and comply with its instructions for moving to reopen the case upon the filing of a joint scheduling report.

Plaintiff subsequently filed a motion asking the district court to order Defendants to contact him within seven days to hold a scheduling conference. In support of his motion, Plaintiff stated that he was available anytime to participate in a conference and that he had sent Defendants a letter about scheduling but had not heard back from them. The court denied Plaintiff's motion without prejudice, noting that it would be premature to order Defendants to contact Plaintiff without giving them an opportunity to do so of their own accord. The court stated in its order that it expected the parties to use the contact information listed on the docket and in Plaintiff's motion to schedule a conference without a court order to do so. Nevertheless, the court indicated that Plaintiff could refile his motion if Defendants made no attempt to contact him within five days.

Plaintiff subsequently filed a motion titled an “opposition” to the refusal by Defendants to participate in submitting a joint scheduling report. In the motion, Plaintiff advised the court (and provided evidence in the form of an email) that he had told Defendants he was available to confer anytime and provided Defendants a preliminary joint scheduling report for their review. According to Plaintiff, Defendants refused to respond and confirmed in a zoom call that they would not participate in a scheduling conference until all the named defendants were served. Plaintiff provided evidence purporting to show that the SEC had recently been served, and he concluded his motion by asking the court to reopen the case and order Defendants to participate in a scheduling conference within seven days. While this motion was pending, Plaintiff submitted to the court a scheduling report he unilaterally prepared, as well as another motion to reopen the case.

In response to Plaintiff’s opposition motion, Defendants advised the district court that they had conferred with Plaintiff on November 12, 2021, to discuss case management issues and that they had offered to conduct a scheduling conference within seven days of the completion of service on all the named defendants. However, Defendants noted that the SEC was not present at the November 12 conference, that Plaintiff’s purported service on the SEC did not appear to comply with Federal Rule 4(i)(2)¹, and that there

¹ Defendants pointed out that the affidavit of service attested that a process server delivered copies of the summons and complaint to an SEC office, which alone is insufficient to serve a government agency under Rule 4(i)(2).

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was no evidence that WeBull Financial or CFTC had been served. Defendants emphasized that they were willing to hold a scheduling conference within seven days of service on these defendants. Finally, Defendants argued that the proposed scheduling report filed by Plaintiff was a unilateral submission that should be rejected because it did not contain the input of Defendants.

The district court denied Plaintiff's opposition motion and his related motions in another paperless order. The court agreed in its order that Plaintiff's unilaterally-prepared scheduling report did not comply with the pretrial order or with the court's instructions for reopening the case. And it pointed out that Plaintiff had otherwise failed to comply with the pretrial order by not perfecting service on all the named defendants in the case. The court explained that, in its view, Plaintiff was solely responsible for delaying progress in the case while Defendants had made every effort to comply with the court's orders and the federal rules. As such, the court denied Plaintiff's opposition motion and other pending motions, including his motion to reopen the case.

Plaintiff subsequently moved to dismiss WeBull Financial and CFTC from the case pursuant to Federal Rule 4(m), which governs the time limit for service. The district court denied Plaintiff's motion and advised him to pursue dismissal based on the procedures set out in Federal Rule 41(a) pertaining to the voluntary dismissal of a defendant at different stages in litigation. The following day, Plaintiff filed a notice of dismissal under Federal Rule 41(a) as to WeBull Financial and CFTC. Thereafter, Plaintiff filed another

motion requesting the district court to order Defendants to hold a scheduling conference, in which motion he stated that Defendants still were refusing to engage in a scheduling conference despite all the named defendants in the case having been served.

In response to Plaintiff's latest motion, Defendants argued that the SEC still had not appeared in the case, and it explained that Plaintiff's attempted service on the agency did not comply with the requirements of Federal Rule 4(i)(2). Defendants emphasized once again that they were prepared to hold a scheduling conference within seven days of Plaintiff's proper service on the SEC, the last remaining unserved defendant in the case, and they noted that Plaintiff's repeated filings asking a subset of defendants to participate in the scheduling process without perfecting service on all the named defendants was improper and not in compliance with the pretrial order. Defendants advised the court that they had told Plaintiff he did not appear to have properly served the SEC, but that Plaintiff refused to discuss the issue or to describe his interactions—or lack thereof—with the SEC.

Plaintiff did not respond to the above arguments, and he did not wait for the district court to enter a ruling on his latest motion. Instead, he filed a notice of appeal challenging the court's dismissal of the case and its related rulings denying his motions to (1) reopen the case, (2) order Defendants to participate in the scheduling process, and (3) impose Rule 37 sanctions, among other things. Upon receiving notice of Plaintiff's appeal, the district court entered a

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paperless order stating that the appeal divested it of jurisdiction to rule on Plaintiff's latest pending motion.

Defendants moved to dismiss Plaintiff's appeal for lack of jurisdiction, arguing that there was no final, appealable order in the case because the district court dismissed the case without prejudice and with the expectation it would be reopened upon the submission of a joint scheduling order that complied with the pretrial order. We need not rule on the jurisdictional issue raised by the motion to dismiss because we do not reach the merits of the appeal. As discussed below, we conclude that Plaintiff has filed his appeal prematurely and without giving the district court the opportunity to rule on his latest pending motion to reopen the case and/or to order Defendants to participate in the scheduling process. Accordingly, we **DENY as moot** the motion filed by Defendants to dismiss the appeal for lack of jurisdiction, and we **REMAND** the case so the district court can rule on these issues.

DISCUSSION

It is evident from the procedural history of this case described above that Plaintiff has filed the appeal prematurely, and that the case must be remanded to the district court to rule on Plaintiff's pending motions. After the district court closed the case without prejudice on October 29, 2021, Plaintiff filed numerous motions seeking different forms of essentially the same relief: an order reopening the case and requiring Defendants to participate in the scheduling process. In response to these motions, Defendants repeatedly advised the court and explained to Plaintiff that

several of the named defendants had not been served, and that they would hold a scheduling conference within seven days of Plaintiff's perfecting service on those defendants. Plaintiff acknowledged in his fourth (and next to last) motion related to this issue filed on November 15, 2021, that several of the named defendants had not been served. Because of this failure, the district court denied this fourth motion, as it had denied all of Plaintiff's preceding motions, stating: "It remains the case that Plaintiff has failed to comply with the [pretrial order] because not all of [d]efendants have been served in this case."

Plaintiff subsequently took some action to address the service issue. On November 15, 2021, Plaintiff submitted an affidavit of service as to the SEC, although there is a dispute as to whether the affidavit shows that service was perfected in compliance with Federal Rule 4(i)(2), which governs service on a government agency. And on November 29, 2021, Plaintiff voluntarily dismissed two of the remaining unserved defendants, WeBull and CFTC, pursuant to Federal Rule 41(a). Subsequently, on November 30, 2021, Plaintiff filed his final motion asking the district court to reopen the case and order Defendants to participate in the scheduling process. In that motion, Plaintiff advised the court that he had dismissed defendants WeBull and CFTC from the case and that all the remaining named defendants had been served. That information might have resulted in a different ruling than Plaintiff had received from the court on his prior, similar motions. However, Plaintiff did not give the court an opportunity to rule on the matter. Instead, Plaintiff filed a notice of appeal two days after he submitted

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his final motion that divested the district court of jurisdiction as to the issues raised in the motion.

As Defendants point out in their motion to dismiss this appeal for lack of jurisdiction, it is questionable whether this Court has the jurisdiction to consider the merits of this appeal. Nevertheless, and even assuming we have such jurisdiction, the district court should have the opportunity in the first instance to rule on the issues raised in Plaintiff's last motion. Specifically, the district court should have the opportunity to determine (1) whether Plaintiff has properly served the SEC and (2) if so, whether the case should be reopened and Defendants required to participate in the scheduling process given the dismissal of WeBull and CFTC. Accordingly, we remand the case to the district court for that purpose.

CONCLUSION

For the foregoing reasons, we **REMAND** this case to the district court, and we **DENY as moot** the motion filed by Defendants to dismiss the appeal for lack of jurisdiction.