

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 11-4451

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

H. THAYNE DAVIS,)
)
Plaintiff,)
and)
)
H. THOMAS MORAN, II,)
)
Receiver - Appellee,)
)
ERNEST STORMS; JACQUELYN)
STORMS,)
)
Interested Parties - Appellants,)
)
v.)
)
LIFETIME CAPITAL, INC., et al.,)
)
Defendants.)

FILED Sep 12, 2012 DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

ORDER

Before: SILER, MOORE, and McKEAGUE, Circuit Judges.

Ernest and Jacquelyn Storms (“the Stormses”), appellants and interested parties in a receivership action, appeal the order of the district court disallowing their claims to a settlement agreement. This case has been referred to a panel of the court pursuant to Federal Rule of Appellate Procedure 34(a)(2)(C). Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

The business of LifeTime Capital, Inc. (“LifeTime”) was to purchase life insurance policies from terminally-ill policyholders—“viators”—for discounted up-front lump sum payments and to assign the benefits of the policies to LifeTime’s investors. In 2004, H. Thayne Davis, a LifeTime

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investor, filed suit against LifeTime, alleging fraud and breach of contract. Davis requested that a receiver be appointed to take control of LifeTime's assets and to administer them to investors.

The district court subsequently appointed H. Thomas Moran, II, as Receiver. Approximately two weeks before the appointment, one of LifeTime's viators, Mr. Jordan, died. After Moran was appointed, Jordan's insurance company paid the receivership \$6,048,786 in proceeds from Jordan's life insurance policies. Because Jordan's policies matured prior to the receivership, a dispute arose between the Receiver and the investors whose investments had been allocated to the Jordan policies—which included the Stormses—as to whether the receivership or the investors were entitled to the proceeds. The Receiver filed a motion seeking clarification of the status of the proceeds. Numerous interested parties filed responses to the motion; the Stormses did not respond.

The district court ultimately ordered the parties to participate in mediation to determine the status of the proceeds of the Jordan policies. Mediation took place on March 28, 2006, and the parties reached a settlement whereby the Receiver would pay each participating Jordan investor 62.5% of the total amount the investor originally invested in LifeTime and that was allocated to the Jordan policies and, in return, the Jordan investors would release all claims against the Receiver. The district court overruled the Receiver's motion for clarification of the proceeds and, following a fairness hearing, approved the settlement agreement.

As of March 2010, only thirteen Jordan investors had failed to either return a claim form or execute a release. The district court granted a motion by the Receiver authorizing him to send a final notice to each of the remaining investors notifying them that if they did not return a completed claim form within thirty days of the receipt of the letter, the Receiver would move for disallowance of those investors' claims in the settlement agreement. After the issuance of the final notice, the remaining unresolved claims were reduced to five. The Receiver filed a motion to disallow these five remaining Jordan investors from participating in the settlement agreement for their failure to comply with the district court's order. The district court scheduled a fairness hearing on the motion for August 23, 2010. In response to the Receiver's motion to disallow and the notice of hearing, the Stormses sent three letters to the court objecting to the settlement agreement, arguing that the

Receiver was forcing them to accept the settlement agreement or forfeit their claim. They objected to the settlement agreement until the court determined the ownership rights of the remaining Jordan investors, pursuant to *Liberte Capital Grp., LLC v. Capwill*, 421 F.3d 377 (6th Cir. 2005).

Following the fairness hearing, which the Stormses did not attend, the district court concluded that the instant circumstances were distinguishable from those of the interested parties in *Liberte* because the interested parties in *Liberte* intervened in the receivership case by filing suit against the Receiver; in this case, the five remaining Jordan investors never moved to be intervening plaintiffs, never filed a motion disputing ownership of the Jordan policies, and never filed objections to the settlement agreement. The court noted that the five remaining Jordan investors did not have to participate in the settlement agreement, but were free to pursue the legal remedies that remained available to them; however, given that they had not intervened in the receivership action, it would be improper to revisit the issue of the ownership of the Jordan policies that was “effectively resolved after the Court held a hearing and approved the Jordan Settlement.” The district court further determined that the five remaining Jordan investors were afforded due process because they had received notice and were given an opportunity to be heard. The district court allowed the remaining investors thirty days from the date of the order to complete the necessary paperwork and participate in the settlement agreement, should they choose to do so. After the expiration of the thirty days, the Receiver’s motion to disallow claims in the settlement agreement of any remaining Jordan investor who failed to complete the required forms would be granted.

The Stormses filed a timely notice of appeal from the district court’s order. On appeal, they assert that the district court erred in determining that they were required to intervene in the receivership action to assert their interest in the proceeds of the Jordan policies. They also claim that the district court violated due process in disallowing their claims.

In a receivership proceeding, the district court has “broad powers and wide discretion” to craft relief. *S.E.C. v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 668 (6th Cir. 2001). The court “must still provide the claimants with due process,” however. *Id.* We review a district court’s decision relating to a receivership’s distribution plan for an abuse of discretion. *Quilling v. Trade*

Partners, Inc., 572 F.3d 293, 298 (6th Cir. 2009) (citations omitted). Whether procedures used by a district court violate due process is reviewed de novo. See *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 381 (6th Cir. 2001).

The district court did not abuse its discretion in disallowing the Stormses' claim to the settlement for their failure to intervene or otherwise timely assert their interest in the Jordan proceeds. We have explained:

If the matter of ownership [of property] is in doubt, then the party claiming the property should ask to be allowed to intervene in the receivership case and present his claim to the property. The court should accord such claim a proper hearing and all parties in interest should be heard. The third party claiming such property may present his claim by filing with leave of court a dependent or independent suit against the receiver. If the court finds that the property does belong to a third party it may make an order directing the receiver to turn over such property. *Liberte*, 421 F.3d at 384-85.

The issue of the ownership of the Jordan proceeds arose in 2004 and the Receiver filed a motion for clarification of the ownership of the proceeds. Although numerous investors responded to that motion, the Stormses did not. Following extensive briefing, hearings, and court-ordered mediation, the district court overruled the Receiver's motion for clarification of the status of the proceeds as the result of the settlement. On April 4, 2006, following a fairness hearing, the court approved the settlement agreement. Over the next four years, more than two hundred claims to the proceeds of the Jordan policies were distributed. When only thirteen unresolved claims remained, the Receiver sent a final notice to each of the remaining investors giving them thirty days to complete a claim form or the Receiver would move for disallowance of those investors' claims in the settlement agreement. Two more hearings were held and the district court granted the motion. After the requisite thirty days had passed, the Receiver filed a motion to disallow the five claims that remained. The Stormses did not express an interest in the ownership of the Jordan proceeds until they filed letters to the district court in June and July 2010, challenging the settlement agreement and opposing the Receiver's motion to disallow claims. By that time, more than four years had passed since the district court approved the settlement agreement, and the period for objecting to the agreement or appealing the district court's decision had long expired. Because the Stormses did not

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intervene or otherwise attempt to protect their interest in the Jordan proceeds in a timely manner, the district court did not abuse its discretion in disallowing their claim to the settlement agreement.

Nor did the district court deny the Stormses due process. The record demonstrates that they were provided with proper notice and an opportunity to be heard throughout the receivership proceedings. *See Leary v. Daeschner*, 228 F.3d 729, 742 (6th Cir. 2000) (“When a plaintiff has a protected property interest, a predeprivation hearing of some sort is generally required to satisfy the dictates of due process.”). Additionally, the district court considered their objections to the settlement agreement prior to granting the Receiver’s motion to disallow claims, although they were filed several years after the agreement was approved. The record demonstrates that the Stormses were apprised of the receivership proceedings, notified of hearings, and were allowed to make objections which were considered by the district court. Accordingly, they received adequate due process.

Finally, the district court’s decision did not disallow *any* legal interest the Stormses had in the proceeds from the Jordan policies, as they argue. The district court disallowed only their claim to the settlement agreement. The district court’s order states that, in the event the remaining five investors chose not to participate in the settlement agreement after the thirty-day period allowed by the final order, “the Receiver shall disallow the participation or claim of any remaining Jordan Investor *in the settlement agreement approved by this Court on April 4, 2006.*” The district court also noted that its decision would not limit the remaining investors’ right to pursue any independent legal action.

The order of the district court is affirmed. Fed. R. App. P. 34(a)(2)(C).

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah L. Smith", written in a cursive style.

Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Filed: September 12, 2012

Mr. Dewitt Benham Kirk Jr.
Mr. Ernest Storms
Ms. Jacquelyn Storms

Re: Case No. 11-4451, *H. Davis, et al v. Lifetime Capital, Inc.*
Originating Case No. : 3:04-CV-59

Dear Sir or Madam,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Laura A. Jones
Case Manager
Direct Dial No. 513-564-7023

cc: Clerk of the U.S. District Court for the Southern District of Ohio
Mr. Joseph Carl Oehlers

Enclosure

Mandate to issue