

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SAMUEL K. LIPARI,)
)
 Appellant,)
)
 v.) Case No. 08-3428
)
 U.S. BANCORP and U.S. BANK)
 NATIONAL ASSOCIATION,)
)
 Appellees.)

APPELLEES' MOTION TO DISMISS

Appellant's second notice of appeal in this case is equally as meritless as the first one this Court dismissed on October 9, 2008. As a result, appellees U.S. Bancorp and U.S. Bank National Association, pursuant to Fed. R. App. P. 27 and Eight Circuit Local Rule 47(A), move to dismiss the appellant's successive appeal. As grounds for this motion, appellees state:

1. On September 5, 2008, appellant filed his first notice of appeal from the Western District of Missouri in this matter. Specifically, appellant appealed from the District Court's April 4, 2007 interim order denying appellant's motion for remand and transferring this case to the District of Kansas. This Court dismissed the appeal on October 9, 2008. (Exhibit A.) Appellant filed a second notice of appeal on October 16, 2008. (Exhibit B.)

2. This Court still does not have jurisdiction to decide this appeal. Nothing has changed since October 9, 2008 that permits an appeal to this Court. This matter has been pending in the United States District Court for the District of Kansas since its transfer from the Western District of Missouri on April 9, 2007 and receipt in the District of Kansas April 10, 2007. (Exhibit C (Missouri docket sheet) and Exhibit D (Kansas docket sheet) hereto reflecting physical transfer of files.) As a result, this case has not been pending within the district courts of the Eighth Circuit for more than 18 months.

3. The District Court for the Western District of Missouri did not certify any order for immediate interlocutory appeal under 28 U.S.c. § 1292(b). Appellant did not file a writ request in this Court asking that the District Court be prohibited from accomplishing the transfer set forth in its April 4, 2007 order. Nor is the order one of the types that is immediately appealable under 28 U.S.C. § 1292(a).

4. This Court does not have jurisdiction to decide the appeal because there is no final judgment disposing of all claims. On September 4, 2008, the United States District Court for the District of Kansas entered its Memorandum and Order dismissing all but one of the plaintiff's claims. *Lipari v. U.S. Bancorp*, 2008 WL 4190784 (D. Kan., Sept. 4, 2008). Although appellant recently filed a pleading purporting to voluntarily dismiss his claim for misappropriation of trade secrets, no final judgment has been entered. Thus, there is no appealable order or judgment. But when a final judgment is entered, it will be executed in the District of Kansas, not the Western District of Missouri.

5. Accordingly, because the Court lacks jurisdiction to hear this appeal, it should be dismissed.

BACKGROUND

The appellant's litigation with these defendants has consumed nearly six years and is reflected in several orders and decisions. *See Medical Supply Chain, Inc. v. US Bancorp. et al.*, 2003 WL 21479192 (D. Kan., June 16, 2003), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004) (unpublished) (Exhibit E); *Medical Supply Chain, Inc. v. Novation, et al.*, 419 F. Supp.2d 1316 (D. Kan. 2006), *appeal dismissed* 508 F.3d 572 (10th Cir. 2007); *see also Lipari v. U.S. Bancorp*, 2008 WL 4190784 (D. Kan. Sept. 4, 2008). The suit pertinent to this appeal was filed in 2006, removed to federal court and transferred to the United States District Court for the District of Kansas. (Exhibits C, D); *Lipari*, 2008 WL 4190784.

BASIS FOR DISMISSAL

An appeal should be dismissed when this Court lacks jurisdiction to hear it. This matter is a prime example. Mr. Lipari's claims have been pending in the United States District Court for the District of Kansas since April 2007. (Exhibits C, D; *Lipari, supra.*) This second, successive notice of appeal purports once again to challenge interim orders of the United States District Court for the Western District of Missouri, namely its decisions denying remand and ordering transfer. (Exhibit F.) However, there is not an appealable order of the Western District of Missouri from which the appellant may seek this Court's review. *See Midwest Motor Express, Inc. v. Central States Southeast and Southwest Pension Fund*, 70 F.3d 1014, 1016 (8th Cir. 1996)(transfer orders generally not immediately reviewable); *Saab v. Home Depot U.S.A.*, 469 F.3d 758, 759 (8th Cir. 2006)(orders denying remand ordinarily not immediately appealable).¹ Even if appellant could have sought review of the Missouri federal court order denying remand and transferring this matter to the District of Kansas, either by interlocutory appeal or extraordinary writ,² his notice of appeal to this Court now-more than 18 months after the case has been transferred to and litigated in the Kansas federal court-is untimely and without merit. *See Integrated Health Servs. of Cliff Manor, Inc. v. THCI Company, LLC*, 417 F.3d 953, 957 (8th Cir. 2005). While Mr. Lipari may choose to take an appeal to the Tenth Circuit Court of Appeals;³ there is no absolute right for him to file an appeal in any court of his choosing and at any time he chooses. He is too late to seek relief here.

An equally compelling reason to dismiss this appeal is that the matter pending in the United States District Court for the District of Kansas has not been fully terminated. No final

¹ The district court did not certify the order for appeal under 28 U.S.C. § 1292(b) and the order is not otherwise immediately appealable under 28 U.S.C. § 1292(a).

² While these procedures may have been available to Mr. Lipari at the time the case was pending in the Western District of Missouri, *see Koehler v. Green*, 370 F. Supp.2d 904, 906 n.1 (E.D. Mo. 2005), he cannot rely upon them now.

³ His Tenth Circuit appeal is docketed as Case No. 08-3287. *See* Exhibit G hereto.

judgment has been entered. While the court recently dismissed four of the five counts in plaintiffs complaint, *Lipari, supra*, and plaintiff has filed a unilateral "stipulation" to dismiss his last remaining cause of action, there is not a final district court judgment disposing of all claims. Accordingly, appellant's notice of appeal is premature. *See Action Electric, Inc. v. Local 292, Int'l B'hood of Elec. Workers*, 818 F.2d 15, 16 (8th Cir. 1987). Even when a judgment is entered, it will be from the District of Kansas; no appeal is available to this Court.

THIS APPEAL IS FRIVOLOUS

Appellant's filing of successive frivolous appeal notices is wholly improper. The Court has already dismissed this case once. There is no authority for appellant's second appeal. It is clear that Mr. Lipari cannot seek relief in this Court where the Missouri federal court had lost its jurisdiction a year and a half ago. *See Integrated Health Servs. of Cliff Manor, Inc.*, 417 F.3d at 957; *Midwest Motor Express, Inc.*, 70 F.3d at 1016; *In re Nine Mile Ltd.*, 673 F.2d 242,243 (8th Cir. 1982). Having no legal or factual basis, the appeal is frivolous.

WHEREFORE, appellees U.S. Bancorp and U.S. Bank National Association request that this Court dismiss appellant's appeal and for such other relief as the Court deems just and proper.

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ATTORNEYS FOR APPELLEES U.S. BANCORP
AND U.S. BANK NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the above and foregoing was delivered via United States mail, postage prepaid, this 24th day of October, 2008, to:

Mr. Samuel K. Lipari
3520 NE Akin Boulevard
Suite 918
Lee's Summit, MO 64064

Appellant

Isi Mark A. Olthoff
Attorney for Appellees U.S. Bancorp and U.S. Bank
National Association

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/s/ Mark A. Olthoff

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AND U.S. BANK NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the above and foregoing was delivered via United States mail, postage prepaid, this 24th day of October, 2008, to:

Mr. Samuel K. Lipari
3520 NE Akin Boulevard
Suite 918
Lee's Summit, MO 64064

Appellant

/s/ Mark A. Olthoff
Attorney for Appellees U.S. Bancorp and U.S. Bank
National Association