

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

RALPH B. EDWARDS and)	
H. CARROLL BAYLER,)	
)	
Appellants,)	
)	
vs.)	CIVIL NO. 87-4358
)	
DON HOAGLAND and)	Chapter 7 Proceedings
ST. PIERRE OIL COMPANY,)	No. BK-85-30508
)	Adversaries No. 87-0121
Appellees.)	and 87-0157
)	<u>On Appeal</u>

MEMORANDUM AND ORDER

FOREMAN, Chief Judge:

This matter is before the Court on appellees' Motion to Dismiss a bankruptcy appeal on the grounds that the order appealed from is not a final order under 28 U.S.C. § 158(a) and that the appeal is moot because the compromise appellants were enjoined from interfering with has been completed.

Appellants' response to the motion to dismiss states that the basis of the appeal is a mandatory injunction granted by the bankruptcy court on October 29, 1987. The bankruptcy court enjoined appellants from objecting to the substitution of Don Hoagland, Trustee, in the place of Ralph H. Edwards, one of the appellants, in a state court case and from interfering with a compromise agreement in said case that had been approved by the bankruptcy court and affirmed on appeal by the Honorable William L. Beatty. Thus, the issue of the approval of the compromise has been fully litigated and appellant has never appealed the district court's affirmance of the compromise on April 30, 1987.

The jurisdiction of the federal district courts to review orders of the bankruptcy courts is governed by 28 U.S.C. § 158(a):

(a) The district courts of the United States all have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title.

Appellants must seek leave of court to appeal an interlocutory order such as the mandatory injunction issued by the bankruptcy court. Appellants neglected to seek leave to appeal. Nonetheless, if this Court determines that the appealed order is interlocutory, which it is, the Court may treat the notice of appeal as a motion for leave to appeal, and rule on it accordingly. Bankruptcy Rule 8003(c).

Under 28 U.S.C. § 158(a), the district court has discretion as to whether to entertain interlocutory appeals from bankruptcy proceedings. Unfortunately, § 158 provides no guidance as to how a court should exercise this discretion. Most courts have applied the standards provided in 28 U.S.C. § 1292(b), which governs discretionary appeals of interlocutory orders in non-bankruptcy litigation. If a bankruptcy judge's decision involves a "controlling question of law as to which there is substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation," an interlocutory appeal is justified by analogy to 28 U.S.C. § 1292(b). In re Hebb, 53 B.R. 1003 (D.C. Md. 1985); In re Manville Forest Products Corp., 31 B.R. 991 (S.D.N.Y. 1983); In re Don-Col Cartage a Distribution, Inc., 20 B.R. 645 (D.C. Colo. 1982). See also Collier on Bankruptcy para. 3.03(7)(d)(v) at 3-

304-3-306 (15th ad. 1981). This Court agrees that interlocutory appeals should be allowed only in exceptional cases. See In re Wieboldt Stores, Inc., 68 B.R. 578, 580 (N.D. Ill. 1986); In re Huff, 61 B.R. 678, 682 (N.D. Ill. 1986).

Applying the standards of § 1292(b), this Court holds that appellate review of the bankruptcy court's order of October 29, 1987, is not warranted. The basis of the bankruptcy court's decision was not a controlling question of law as to which there is substantial ground for difference of opinion. The mandatory injunction merely prevented the appellants from interfering with the trustee effectuating a compromise approved by the bankruptcy court and affirmed by Judge Beatty on appeal. As the bankruptcy court noted, the bankruptcy code provides that property of the estate includes "all legal or equitable interests of the debtor . . . as of commencement of the case." 11 U.S.C. § 541(a)(1). The trustee has an obligation to "collect and reduce to money the property of the estate" 11 U.S.C. § 704(1). The Illinois Code of Civil Procedure states that if bankruptcy causes a transmission of interest, "the proper parties may be substituted by motion. Ill. Rev. Stat. ch. 110, ¶ 2-1008(a). The bankruptcy court's ruling merely facilitated the enforcement of the compromise it and the district court had approved. If appellants were dissatisfied with the district court's affirmance, they should have appealed it.

Appellants also have not met the second part of the § 1292(b) test. Because the compromise has been completed by the Trustee, this court's review of Judge Meyers' order would not materially advance the

ultimate termination of the case. In essence, this appeal is moot. A party who chooses to appeal but who fails to obtain a stay pending appeal risks losing its ability to realize the benefit of a successful appeal. In re Vetter Corp., 724 F.2d 52, 55 (7th Cir. 1983); Fink v. Continental Foundry & Mach. Co., 240 F.2d 369 (7th Cir.), cert. denied, 354 U.S. 938 (1957); C. Wright & A. Miller, Federal Practice & Procedure § 2904 (1973). Appellants neglected to seek a stay; thus their appeal must be dismissed as moot. See e.g., In re Vetter, 724 F.2d at 555; Fink, 240 F.2d at 374.

Appellants' notice of appeal, filed on November 3, 1987 in the bankruptcy court, is converted to an application for leave to appeal to this Court, pursuant to Bankruptcy Rule 8003(3).

It is ORDERED that application for leave to appeal is DENIED and appellees' Motion to Dismiss (Document No. 6) is hereby GRANTED.

IT IS SO ORDERED.

DATED: February 19, 1988

/s/ Barry Foreman
CHIEF JUDGE