E-FILED on 6/21/04

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In Re:
THE LEISURE CORPORATION,
Debtor.

GEORGE DRUCKER, an individual; THE LEISURE CORPORATION, a Virginia Corp.,

Appellant(s),

v.

KENNETH H. PROCHNOW; LAW OFFICES OF KENNETH H. PROCHNOW; KENNETH J. CAMPEAU; CAMPEAU & THOMAS, A Law Corp.; CAMPEAU GOODSELL DIEMER; and DOES 1 through 100, inclusive,

Appellee(s).

Case No. 03-03012 RMW

Bankr. Case No. SJ 96-56324 ASW
Adv. No. 01-5315 ASW

ORDER DENYING MOTION TO DISMISS NOTICE OF APPEAL

Appellant The Leisure Corporation ("TLC") has filed a Notice of Appeal from the United States Bankruptcy Court for the Northern District of California ("Bankruptcy court"). Appellees Kenneth Prochnow and the Law Offices of Kenneth Prochnow (collectively "Prochnow") seek dismissal of TLC's appeal and request sanctions. The matter is submitted without oral argument. For the reasons set forth below, the court denies Prochnow's Motion to Dismiss TLC's appeal and denies the request for sanctions.

I. BACKGROUND

In August 1996, TLC, represented by the Campeau defendants, petitioned the Bankruptcy Court for relief under Chapter 11 of the Bankruptcy Code. Thereafter, TLC retained Prochnow on a related bankruptcy matter. In December 2000, the Bankruptcy Court held a hearing on Prochnow's application for attorney's fees, in which TLC apparently had the opportunity to challenge Prochnow's fee request. After approving Prochnow's fee request, the Bankruptcy Court dismissed TLC's Chapter 11 proceeding in February 2001.

In August 2001, TLC initiated the underlying proceeding in Santa Clara Superior Court against both Prochnow and Campeau. The complaint alleged a separate cause of action against each defendant for legal malpractice in connection with TLC's Chapter 11 proceedings and alleged other causes of action against "all defendants." (Appellant's Req. Jud. Not. Exh. A.) Prochnow and Campeau independently filed notices of removal (Appellant's Req. Jud. Not. Exhs. B-C), resulting in two actions - the Campeau action (01-5315) and the Prochnow action (01-5316) in the Bankruptcy Court. (Appellant's Req. Jud. Not. Exhs. D-E.) Following removal, the Bankruptcy Court consolidated the actions on December 7, 2001. (Appellant's Req. Jud. Not. Exh. E at 8).

On June 20, 2003 TLC filed the present Notice of Appeal seeking review of two orders of the Bankruptcy Court. First, on June 27, 2002 the Bankruptcy Court entered an order denying TLC's request for a jury trial, finding that TLC's claims were "core" matters for which no Seventh Amendment right to a jury trial exists. (See 6/27/02 Order.) After this ruling at the hearing, but prior to the Bankruptcy court's entering of the order, TLC served a motion for leave to appeal on June 3, 2002. (Ferguson Decl. in Supp. Appellee's Motion ("Ferguson Decl.") at 12:9-10, Exh. C.) However, TLC subsequently withdrew the June 3, 2002 motion. (Ferguson Decl. Exh. A at 2.)

Second, on May 23, 2003 the Bankruptcy Court entered an order dismissing TLC's Amended Complaint against Prochnow without leave to amend. (See 5/23/03 Order.) The underlying action continues against the Campeau defendants.

Appellee Prochnow moves this court for an order dismissing TLC's appeal on the grounds that: (a) this court lacks subject matter jurisdiction because the appeal is untimely under Fed. R. Bank. P. 8001 and 8002; (b) the appeal lacks merit. Prochnow points out that the Bankruptcy Court has not granted leave to

appeal either order. (Ferguson Decl. at 12:14-15.) In addition, Prochnow seeks sanctions against TLC, pursuant to Fed. R. Bank. P. 8020, for filing a "frivolous" appeal.

Appellant TLC opposes the motion to dismiss and submits: (a) the appeal from the June 27, 2002 order denying TLC's request for a jury trial is timely; (b) the May 23, 2003 order dismissing TLC's complaint against Prochnow without leave to amend is a final order determining all the claims of all the parties to the underlying adversary proceeding.[1] In addition, TLC opposes Prochnow's request for sanctions by arguing: (a) the request does not comply with Fed. R. Bank. P. 8020 as it is not submitted in a separately filed motion; and (b) sanctions are not warranted.

The primary issues before this court are whether it has subject matter jurisdiction over the appeal of the Bankruptcy court's June 27, 2002 and May 23, 2003 orders, and if so, whether the appeal should be dismissed.

II. ANALYSIS

A. Jurisdiction

District court jurisdiction over appeals from bankruptcy court orders is derived from 28 U.S.C. §158(a), which provides:

> The district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees [of the bankruptcy court]; (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 . . . and (3) with leave of the court, from other interlocutory orders and decrees.

Id.

1. Timeliness

Federal Rule of Bankruptcy Procedure 8002(a) provides in part:

> [t]he notice of appeal shall be filed . . . within 10 days of the date of entry of the . . . order . . . appealed from . . . . A notice of appeal filed after the announcement of a decision or order but before entry of the . . . order shall be treated as filed after such entry and on the day thereof.

Id. The time provisions of Fed. R. Bank. P. 8002 are strictly enforced. See Preblich v. Battley, 181 F.3d 1048, 1056 (9th Cir. 1999). Failure to file within the time limit divests the court of jurisdiction. In re Souza, 795 F.2d 855, 857 (9th Cir. 1986).

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[1] The "proceeding" referred to is Prochnow's removed case docketed as Adv. No. 01-5316.

Prochnow maintains that this court lacks jurisdiction over the appeal of the June 27, 2002 order because the notice of appeal was filed on June 20, 2003, way beyond the limit of ten days after the order was entered. The June 27, 2002 order was interlocutory, and no leave to appeal has been granted by the Bankruptcy Court. Since the original notice of appeal regarding the June 27, 2002 order was withdrawn, the only way the June 30, 2003 notice of appeal can include an appeal of the June 27, 2002 order is if the June 27, 2002 appeal can be deemed part of an appeal of a final order. TLC contends that the court has jurisdiction over the appeal from the June 27, 2002 order because the May 23, 2003 order dismissing all claims against Prochnow is a final order, and therefore the June 27, 2002 interlocutory order became appealable after entry of that final order. The court finds that the TLC's notice of appeal of the May 23, 2003 order filed on June 20, 2003 was timely.[2] Since, as discussed below, the May 23, 2003 order is a final order, the notice of appeal as to that order is timely and includes TLC's challenge of the May 27, 2002 order. Therefore, the court has jursidiction to review the Bankruptcy Court's order of June 27, 2002 and May 23, 2003.

2. Finality of the May 23, 2003 Order

Prochnow argues that the May 23, 2003 order is not a final appealable order under Fed. R. Civ. P. 54(b), because it does not dispose of all of the interests of the parties to the appeal. Prochnow reasons that the consolidation of the removed Campeau and Prochnow actions resulted in a single merged action, and, therefore, the order dismissing only Prochnow is not a final appealable order because the underlying proceeding continues against the Campeau defendants. Further, the bankruptcy court did not enter a final judgment against Prochnow under Rule 54(b). Thus, Prochnow argues that since the May 23, 2003 order dismissing the claims against him did not dispose of the claims against "all the defendants," it is not a final appealable order, and any appeal is premature absent Fed. R. Civ. P. 54(b) certification.

The Ninth Circuit holds that where an order disposes of only one of two or more consolidated cases at the district court level (in an ordinary civil proceeding), such order is not appealable under 28 U.S.C. §1291 absent Fed.R.Civ.Pro. 54(b) certification. Huene v. United States, 743 F.2d 703, 704-05 (1984). However, the question of finality in the bankruptcy context is not necessarily affected by the fact

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[2] TLC states (and Prochnow does not dispute) that the Bankruptcy court granted TLC's Fed. R. Bank. Pro. 8002(c) motion to extend the filing time (presumably by 20 days) to appeal the May 23, 2003 order. (Appellant's Opp. p.6 fn.4).

that removed actions are consolidated. Rather, due to the "unique nature" of bankruptcy proceedings, the Ninth Circuit has taken a "pragmatic approach" in determining whether an order is "final" in bankruptcy cases. See In re Mason, 709 F.2d 1313, 1318 (9th Cir. 1983).

Under the pragmatic approach, a disposition is final if it contains a "complete act of adjudication," that is, a full adjudication of the issues at bar. In re Slimick, 928 F.2d 304, 307 (9th Cir. 1990) (citing United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 234 (1958)). Although in a civil case a complete act of adjudication "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," in a bankruptcy case "a complete act of adjudication need not end the entire case, but need only end any of the interim disputes from which appeal would lie." Id. at 307, fn.1. Finality in bankruptcy is determined this way because "certain proceedings in a bankruptcy case are so distinctive and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right." In re Bonham, 229 F.3d 750, 761 (9th Cir. 2000) (internal quotations omitted) (citing In re Frontier Properties, Inc., 979 F.2d 1358, 1363 (9th Cir. 1992)). Furthermore, an order entered by a bankruptcy court is final when it "finally determines the discrete matter to which it was addressed" as well as "determines and seriously affects substantial rights [which] can cause irreparable harm if the losing party must wait until bankruptcy proceedings terminate before appealing." In re Allen, 896 F.2d 416, 418 (9th Cir. 1990).

The May 23, 2003 order granting Prochnow's motion to dismiss TLC's complaint without leave to amend finally determined a discrete part of the adversary proceeding. Prochnow fails to show how the scope of the May 23, 2003 order dismissing TLC's complaint will be affected by the ongoing proceeding against the Campeau defendants. Accordingly, this court finds that the May 23, 2003 order dismissing all claims against Prochnow is a final order, and as such, appealable as of right under 28 U.S.C. §158(a)(1). TLC's may include in the appeal of that final order an appeal of the June 27, 2002 interlocutory order. Even if the appeal of the May 23, 2003 order were deemed interlocutory, the court would grant leave to appeal. See Fed. R. Bank. P. 8001(b); 28 U.S.C. § 158(a)(3).

Prochnow argues in the alternative that TLC's appeal lacks merit. However, Prochnow

does not offer any authority that the district court can dismiss an appeal that lack merit prior to briefing on the merits. Therefore, the court will not dismiss TLC's motion for leave to appeal on the basis that it lacks merit.

B. Sanctions under Fed. R. Bank. P. 8020

Prochnow seeks an award of sanctions against TLC in the amount of $1,500.00, to recover costs associated with TLC's allegedly "frivolous" appeal. In his brief, Prochnow asserts that the "appeal" is frivolous by reason of TLC's failure to obtain leave to appeal either order. (Appellee's Motion p.10:3-10; Ferguson Decl. p.12:12-15). However, Fed. R. Bank. P. 8020 requires "[a] request for sanctions in an appellee's brief is procedurally improper . . . ." In re Marino, 234 B.R. 767, 770 (9th Cir. BAP 1999). Instead, a request for sanctions must be set forth in a separately filed motion. See In re Tanzi, 297 B.R. 607, 613 (9th Cir BAP 2003). This requirement is strictly construed. See id. Prochnow has failed to comply with this requirement. Moreover, the court has not yet found the appeal to be without merit. Consequently, the court does not award sanctions at this time.

III. ORDER

Based on the foregoing, the court denies Prochnow's Motion to Dismiss TLC's appeal because the Bankruptcy Court's May 23, 2003 order is a final order appealable as of right. Such an appeal can consider the propriety of earlier interlocutory orders such as the July 27, 2002 order denying the alleged right to a jury trial. Prochnow's request for sanctions is denied.

DATED: 6/17/04

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

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