UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. PR 17-007

Bankruptcy Case No. 14-02965-MCF
Adversary Proceeding No. 15-00273-MCF

CARMEN MILAGROS LUGO RUIZ,
Debtor.

CARMEN MILAGROS LUGO RUIZ,
Plaintiff-Appellee,

v.

FIRSTBANK PUERTO RICO,
Defendant-Appellant.

Feeney, Deasy, and Cary, U.S. Bankruptcy Appellate Panel Judges.

JUDGMENT OF DISMISSAL

FirstBank Puerto Rico ("FirstBank") seeks to appeal from the order granting partial summary judgment to Carmen Milagros Lugo Ruiz (the "Debtor"). For the reasons set forth below, we conclude that the order on appeal is not final and that no exception to the final judgment rule confers appellate jurisdiction on this Panel. Accordingly, this appeal is **DISMISSED**.

BACKGROUND

On April 11, 2014, the Debtor filed for relief under chapter 13. On November 18, 2015, she filed a one-count complaint against FirstBank for "willful violations of the bankruptcy automatic stay pursuant to 11 U.S.C. § 362 and civil contempt." Her prayer for relief contained

eight paragraphs including requests to enjoin any further proceedings and to award damages, fees, and expenses.

Thereafter, the Debtor filed her Motion for Partial Summary Judgment Pursuant to Bankruptcy Rule 7056 and Federal Rule of Civil Procedure 56 and Memorandum of Law in Support Thereof in which she requested that the court find FirstBank willfully violated the automatic stay, grant partial summary judgment, and impose sanctions and/or fees. FirstBank opposed the motion and asked the bankruptcy court to dismiss the complaint. The court conducted a hearing on the motion and opposition, which FirstBank failed to attend, and took the matter under advisement. Despite FirstBank's later request to reschedule the hearing, the court issued its Opinion and Order. Therein, the bankruptcy court ruled FirstBank had willfully violated the automatic stay, granted the motion for partial summary judgment, and ordered an evidentiary hearing be scheduled to consider the Debtor's request for damages, costs, and fees.

FirstBank appealed the Opinion and Order.[1] In its statement of issues, FirstBank asks that this Panel consider whether the bankruptcy court erred in finding FirstBank willfully violated the automatic stay and in considering a deficient summary judgment motion. FirstBank did not include with its appellate pleadings a motion to accept an interlocutory appeal.

DISCUSSION

Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724, 725-26 (B.A.P. 1st Cir.

[1] FirstBank filed both a Notice of Appeal which substantially conformed to Official Form 17A. Therein, FirstBank did not elect to proceed in the district court and therefore, the appeal was transferred to this court. See 28 U.S.C. § 158(c)(1). FirstBank also filed a Motion Informing of Election to Appeal to the Bankruptcy Appellate Panel which motion was unnecessary due to the explicit provisions of the statute.

1998) (citation omitted). The Panel has jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). A decision is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." In re Bank of New Eng. Corp., 218 B.R. at 646 (internal quotations and citations omitted). In contrast, an interlocutory order "only decides some intervening matter pertaining to the cause, and . . . requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." In re Bank of New Eng. Corp., 218 B.R. at 646 (internal quotations and citations omitted).

In a similar case, wherein the bankruptcy court had granted summary judgment as to liability but did not address the damages the debtors had requested in their complaint, the First Circuit ruled that the order granting partial summary judgment was not final. See Vázquez Laboy v. Doral Mortg. Corp. (In re Vázquez Laboy), 647 F.3d 367, 372-3 (1st Cir. 2011) ("It follows that if the issue of damages was still open when the court resolved the Debtors' motion for partial summary judgment then the court's determination was not final.").[2] Pursuant to this authority and the posture of the instant case, we hold that the order on appeal is not a final order.

Notwithstanding this conclusion, we have discretion to treat the notice of appeal as a motion for leave to appeal from an interlocutory order and to grant leave under one of three precepts conferring appellate jurisdiction over interlocutory appeals: the collateral order

[2] Although the matter is decided in this circuit, we note that a bankruptcy court recently explained that "[t]here is disagreement about the circumstances under which an order holding an entity liable for violating the automatic stay while deferring an award of damages under § 362(k) is a final order." In re John Joseph Louis Johnson, 548 B.R. 770, 774 (S.D. Ohio 2016). The court concluded that other than a recent Ninth Circuit case, Eden Place, LLC v. Perl (In re Perl), 811 F.3d 1120, 1132 (9th Cir. 2016), courts generally hold that an order that defers "not only an award of attorneys' fees and expenses, but also the consideration of punitive damages," would not be considered a final order. Id.

doctrine[3]; the application of the criteria governing 28 U.S.C. § 158(a)(3) review of interlocutory orders[4]; and the Forgay-Conrad doctrine.[5] See 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8004(d). As there is nothing in the record to suggest the order on appeal satisfies any of these precepts, we decline to grant leave to appeal.

CONCLUSION

For the reasons set forth above, we **DISMISS** this appeal for lack of jurisdiction.

FOR THE PANEL:

Dated: April 14, 2017 By: /s/ Mary P. Sharon
Mary P. Sharon, Clerk

[cc: Hon. Mildred Cabán, Clerk, U.S. Bankruptcy Court, District of Puerto Rico; and Rafael Gonzalez-Valiente, Esq., Osmarie Navarro Martinez, Esq., Aleida Torres Huertas, Esq.]

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[3] "There exists 'a small class' of decisions, termed 'collateral orders,' 'which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" In re Bank of New Eng. Corp., 218 B.R. at 649 (citations omitted).

[4] "Section 158 provides no express criteria to guide our discretion, but most courts utilize the same standards as govern the propriety of district courts' certification of interlocutory appeals to the circuit courts under § 1292(b)." In re Bank of New Eng. Corp., 218 B.R. at 652 (citations omitted). "Section 1292(b) permits appellate review of 'certain interlocutory orders, decrees and judgments . . . to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties.'" Id. at 652 n.17 (citation omitted). "To ascertain whether we should exercise our discretion . . . , we will consider whether (1) the 'order involves a controlling question of law' (2) 'as to which there is substantial ground for difference of opinion,' and (3) whether 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" Id. at 652 (citations omitted).

[5] "A third concept, labeled the *Forgay-Conrad* doctrine, has been employed to bestow appellate jurisdiction over interlocutory orders when 'irreparable injury' to the aggrieved party may attend delaying appellate review until the litigation is over." In re Bank of New Eng. Corp., 218 B.R. at 649 n.8 (citation omitted).