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Declined to Follow by Sheresky v. Sheresky Aronson Mayefsky & Sloan, LLP, N.Y.Sup., September 13, 2011

447 B.R. 706
United States District Court,
S.D. New York.

In re COUDERT BROTHERS LLP LAW FIRM ADVERSARY PROCEEDINGS.
In re Coudert Brothers LLP, Debtor.
Development Specialists, Inc., Plaintiff,
v.
Akin Gump Strauss Hauer & Feld, LLP, Defendant.
Development Specialists, Inc., Plaintiff,
v.
Arent Fox LLP, Defendant.
Development Specialists, Inc., Plaintiff,
v.
Dorsey & Whitney LLP, Defendant.
Development Specialists, Inc., Plaintiff,
v.
Duane Morris, LLP, Defendant.
Development Specialists, Inc., Plaintiff,
v.
Jones Day, Defendant.
Development Specialists, Inc., Plaintiff,
v.
Jones Day and Scott Jones, Defendants.
Development Specialists, Inc., Plaintiff,
v.
Jones Day and Geoffroy De Foestraets, Defendants.
Development Specialists, Inc., Plaintiff,
v.
Jones Day and Jingzhou Tao, Defendants.
Development Specialists, Inc., Plaintiff,
v.
K & L Gates LLP, Defendant.
Development Specialists, Inc., Plaintiff,
v.
Morrison & Foerster LLP, Defendant.
Development Specialists, Inc., Plaintiff,
v.
Sheppard Mullin Richter & Hampton LLP, Defendant.
Development Specialists, Inc., Plaintiff,
v.
DLA Piper (US) LLP, Defendant.
Development Specialists, Inc., Plaintiff,
v.
Dechert LLP, Defendant.

No. 10 Civ. 9334 (VM).
|
Bankruptcy No. 06–12226 (RDD).
|
Adversary Nos. 08–1490 (RDD), 08–1491 (RDD), 08–1492 (RDD), 08–1493 (RDD), 08–1494 (RDD), 08–1446, 08–1433 (RDD), 08–1486 (RDD), 08–1495 (RDD), 08–1496 (RDD), 08–1500 (RDD), 09–1148 (RDD), 09–1149 (RDD).
|
March 22, 2011.

Synopsis

Background: Plan administrator for Chapter 11 estate of dissolved law firm brought adversary proceeding against other law firms for which members of the dissolved firm had gone to work, seeking to recover for fees that these new firms earned on account of hourly fee matters that former members of debtor had brought with them to their new law firms. Firms moved to dismiss on theory that New York courts would not apply "unfinished business" doctrine to hourly fee matters, but would limit its application to contingent fee context. The Bankruptcy Court denied dismissal motion, and firms moved for leave to appeal.

[Holding:] The District Court, Victor Marrero, J., held that district court would not allow interlocutory appeal from nonfinal order of bankruptcy court denying law firms' motion to dismiss.

Motions denied.

West Headnotes (7)

[1] **Bankruptcy**
Interlocutory orders;collateral order doctrine
Bankruptcy

Petition for leave;appeal as of right; certification

In deciding whether to grant leave to appeal interlocutory order of bankruptcy court, district courts apply the standard articulated in statute governing interlocutory appeals to the Court of Appeals from orders of district court. 28 U.S.C.A. § 1292(b).

5 Cases that cite this headnote

[2] **Bankruptcy**
Interlocutory orders;collateral order doctrine

Bankruptcy
Petition for leave;appeal as of right; certification

Three requirements must all be met for allowance of interlocutory appeal from nonfinal order: (1) order involves controlling question of law; (2) immediate appeal from order may materially advance ultimate termination of litigation; and (3) there is substantial ground for difference of opinion on that question. 28 U.S.C.A. § 1292(b).

9 Cases that cite this headnote

[3] **Bankruptcy**
Interlocutory orders;collateral order doctrine

Bankruptcy
Petition for leave;appeal as of right; certification

Party seeking leave to appeal non-final order must demonstrate exceptional circumstances to overcome general aversion to piecemeal litigation and to justify departure from basic policy of postponing appellate review until after entry of final judgment.

5 Cases that cite this headnote

[4] **Bankruptcy**
Interlocutory orders;collateral order doctrine

Bankruptcy
Petition for leave;appeal as of right; certification

District court would not allow interlocutory appeal from nonfinal order of bankruptcy court denying law firms' motion to dismiss adversary proceeding brought by plan administrator for dissolved law firm seeking to recover from these other firms based on fees which they had earned on legal matters brought to them by former members of dissolved firm; even assuming that bankruptcy court had erred when it predicted, as matter of first impression under New York law, that New York courts would apply "unfinished business" doctrine to hourly fee matters brought by lawyers departing the debtor law partnership to their new firms, issue was not a "controlling" one, as it would not resolve plan administrator's fraudulent transfer claims, nor was it a legal question on which there was "substantial ground for difference of opinion," given utter lack of any case law from other jurisdictions limiting "unfinished business" doctrine to contingency fee matters.

4 Cases that cite this headnote

[5] **Bankruptcy**
Interlocutory orders;collateral order doctrine

Bankruptcy
Petition for leave;appeal as of right; certification

Nonfinal order involves "controlling" question of law, as required for appellate court to allow interlocutory appeal therefrom, if reversal on that ground would terminate action or, at minimum, would materially affect litigation's outcome. 28 U.S.C.A. § 1292(b).

3 Cases that cite this headnote

[6] **Bankruptcy**
Interlocutory orders;collateral order doctrine

Bankruptcy

Petition for leave;appeal as of right; certification

"Substantial ground for difference of opinion" exists as to propriety of lower court's order, as required for appellate court to allow interlocutory appeal therefrom, where (1) there is conflicting authority on issue, or (2) issue is particularly difficult and of first impression; mere presence of question of first impression, unless that question is also a particularly difficult one, does not satisfy requirement for interlocutory appeal.

5 Cases that cite this headnote

[7] **Bankruptcy**
Interlocutory orders;collateral order doctrine

Bankruptcy
Petition for leave;appeal as of right; certification

In deciding whether to allow immediate appeal from interlocutory order of bankruptcy court, district court must weigh the competing arguments to determine whether there is substantial ground for dispute as to propriety of that order.

1 Cases that cite this headnote

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DECISION AND ORDER

VICTOR MARRERO, District Judge.

Appellants Akin Gump Strauss Hauer & Feld LLP, Arent Fox LLP, Dorsey & Whitney LLP, Duane Morris LLP, Jones Day,[1] K & L Gates LLP, Morrison & Foerster LLP, Sheppard Mullin Richter & Hamilton LLP, DLA Piper (US) LLP and Dechert LLP (collectively, "Law Firms") move pursuant to 28 U.S.C. § 158(a)(3) and Federal Rule of Bankruptcy Procedure 8003(a) for leave to appeal the orders of the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court") denying the Law Firms' motions to dismiss certain claims against them in adversary proceedings before the Bankruptcy Court ("Adversary Proceedings"). For the reasons listed below, the Court DENIES the request for leave to appeal.

I. *BACKGROUND*[2]

This case arises out of the Chapter 11 bankruptcy of Coudert Brothers LLP ("Coudert"), the New York law firm. In 2006, Coudert's equity partners voted to ***711** dissolve the firm. The former Coudert partners joined various other firms, including the Law Firms, to which they brought pending matters they had handled at Coudert.

Development Specialists, Inc. ("DSI"), in its capacity as Plan Administrator for Coudert, filed the underlying Adversary Proceedings against the Law Firms seeking, among other things, hourly fees paid to the Law Firms for work performed on former Coudert matters. The Law Firms moved to dismiss DSI's "unfinished business" claims on the theory that (1) the unfinished business doctrine does not apply to New York partnerships such as Coudert, or (2) to the extent that the unfinished business doctrine applies, it does so only to contingency fee matters and not to hourly fee matters.

In a modified bench ruling, the Bankruptcy Court denied the motions to dismiss. First, the Bankruptcy Court found that, while the New York Court of Appeals had not addressed the unfinished business doctrine, several decisions of New York's Appellate Division, as well as a decision of the United States Court of Appeals for the Second Circuit, uniformly hold that the unfinished business doctrine applies to New York partnerships. Second, the Bankruptcy Court rejected the Law Firms' theory that the unfinished business doctrine applies only to contingency fee matters and not to hourly fee matters. Although it could find no New York decision that addressed the distinction, the Bankruptcy Court found persuasive authority from other jurisdictions that approved the application of the unfinished business doctrine to hourly fee matters. The Court noted that those authorities were decided under the Uniform Partnership Act, which New York has adopted.

The Bankruptcy Court issued orders denying the motions to dismiss on November 18, 2009, and January 19, 2010

("Orders"), and it denied the Law Firms' motions to certify the Orders pursuant to 28 U.S.C. § 158(d)(2)(B) for direct review by the United States Court of Appeals for the Second Circuit. The Law Firms now seek leave to appeal these non-final Orders.

II. *LEGAL STANDARD*

[1] Parties have a limited right to appeal non-final orders of the Bankruptcy Court under 28 U.S.C. § 158(a)(3) ("§ 158(a)(3)"). *See Enron Corp. v. Springfield Assocs., L.L.C. (In re Enron Corp.),* No. 01 Civ. 16034, 2006 WL 2548592, at *3 (S.D.N.Y. Sept.5, 2006). In determining whether to grant an interlocutory appeal under § 158(a)(3), district courts apply the standard articulated in 28 U.S.C. § 1292(b) ("§ 1292(b)"), which governs interlocutory appeals from orders of the district court. *See id.*

[2] A district court may permit an interlocutory appeal under § 1292(b) if (1) the "order involves a controlling question of law"; (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation"; and (3) "there is a substantial ground for difference of opinion" on that question. § 1292(b); *see also Enron,* 2006 WL 2548592, at *3. "[A]ll three requirements set forth in section 1292(b) must be met for a Court to grant leave to appeal." *Thaler v. Estate of Arbore (In re Poseidon Pool & Spa Recreational, Inc.),* 443 B.R. 271, 275 (Bankr.E.D.N.Y.2010).

[3] In addition, a party seeking leave to appeal a non-final order must demonstrate "exceptional circumstances to overcome the general aversion to piecemeal litigation and to justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Enron,* 2006 WL 2548592, at *3 ***712** (internal quotation marks and citations omitted).

III. *DISCUSSION*

[4] The Court finds that leave to file an interlocutory appeal is not warranted here because none of the statutory requirements are met. The Court is not persuaded that the Orders present a controlling issue of law, that an interlocutory appeal would terminate the Adversary Proceedings or advance their termination, or that there is substantial ground for difference of opinion on the questions presented. Moreover, even if the Law Firms could satisfy § 1292(b), the Court would exercise its discretion to deny leave to appeal because, in the Court's view of the record, this case does not present exceptional circumstances to depart from the final judgment rule.

[5] A question of law is "controlling" if reversal on that ground "would terminate the action, or at a minimum ... would materially affect the litigation's outcome." *Enron,* 2006 WL 2548592, at *4. Here, the parties do not dispute that at least four of the Adversary Proceedings involve causes of action, including breach of contract and fraudulent conveyance, which are distinct from the unfinished business claims. (*See* Law Firms' Mem. at 8; DSI Mem. at 5; Reply Mem. at 3–4.) Those actions will proceed in the bankruptcy proceedings regardless of the resolution of DSI's unfinished business claims. Under these circumstances, the unfinished business claims do not present a controlling question of law.

For the same reason, an interlocutory appeal would be unlikely to advance the termination of the Adversary Proceedings. *See* § 1292(b). An appeal from the non-final Orders of the bankruptcy Court here would create additional delay and "would only serve to prolong the liquidation proceedings." [3] *Sec. Investor Prot. Corp. v. Bernard Madoff Inv. Sec. LLC (In re Madoff),* SIPA Liquidation No. 08–1789, 2010 WL 3260074, at *5 (S.D.N.Y. Aug.6, 2010).

Finally, the Court finds that there is no substantial ground for difference of opinion as to whether the unfinished business doctrine applies to New York partnerships. That was the question presented in *Santalucia v. Sebright Transportation, Inc.*, in which the Second Circuit held that "under New York law, when a professional corporation of lawyers dissolves and a lawyer leaves with a contingent fee case, ... that case remains a firm asset." 232 F.3d 293, 300–01 (2d Cir.2000). Numerous decisions of the New York Appellate Division are in accord. *See id.* at 298 (collecting cases); *see, e.g., Shandell v. Katz,* 217 A.D.2d 472, 629 N.Y.S.2d 437 (App.Div.1st Dep't 1995).

[6] **[7]** The Law Firms do not dispute that *Santalucia* remains good law, but they insist that there is substantial ground for difference of opinion as to whether the unfinished business doctrine applies to hourly fee matters because the New York courts have not decided the issue. Substantial ground for difference of opinion exists where

"(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit." *Enron,* 2006 WL 2548592, at *4. "The mere presence of ... a question of first impression" does not satisfy the requirements of § 1292(b). *Id.* The Court must weigh the competing arguments to determine "whether there is *substantial* ground for dispute." *Id.*

Although the application of the unfinished business doctrine to hourly fee matters ***713** is a matter of first impression in New York, that alone does not mean that the question is a "difficult" one. *See id.* The Law Firms have not cited any authority, and the Court is aware of none, that conflicts with the decision of the Bankruptcy Court. Rather, authorities in other jurisdictions uniformly hold that the unfinished business doctrine applies to hourly fee matters as well as contingency fee matters. *See, e.g., Robinson v. Nussbaum,* 11 F.Supp.2d 1 (D.D.C.1997); *Greenspan v. Orrick, Herrington & Sutcliffe LLP (In re Brobeck, Phleger & Harrison LLP),* 408 B.R. 318 (Bankr.N.D.Cal.2009); *Official Comm. of Unsecured Creditors v. Ashdale (In re Labrum & Doak, LLP),* 227 B.R. 391 (Bankr.E.D.Pa.1998). The lack of any authority to support the Law Firms' contention regarding hourly fee matters defeats the Law Firms' position that there is substantial basis for dispute. That alone is sufficient to deny the Law Firms leave to appeal. *See, e.g., Sec. & Exch. Comm'n v. Syndicated Food Servs. Int'l, Inc.,* No. 04 Civ. 1303, 2010 WL 5173267 (E.D.N.Y. Dec. 14, 2010). However, even if there were substantial ground for difference of opinion on this issue, the Court would deny leave to appeal because, as discussed above, the remaining requirements of § 1292(b) are not met. *See Thaler,* 443 B.R. 271, 275.

Finally, the Court finds that the Law Firms have not demonstrated "exceptional circumstances," *Enron,* 2006 WL 2548592, at *3, to depart from the general rule of finality embodied in 28 U.S.C. § 1291. *See Blue Water Yacht Club Ass'n v. N.H. Ins. Co.,* 355 F.3d 139, 141 (2d Cir.2004) (per curiam). For these reasons, the Court denies the motions for leave to appeal.

IV. *ORDER*

For the reasons stated above, it is hereby

ORDERED that the motions of Akin Gump Strauss Hauer & Feld LLP, Arent Fox LLP, Dorsey & Whitney LLP, Duane Morris LLP, Jones Day, K & L Gates LLP, Morrison & Foerster LLP, Sheppard Mullin Richter & Hamilton LLP, DLA Piper (US) LLP and Dechert LLP (collectively, "Law Firms") (Docket Nos. 2–11) for leave to appeal the November 18, 2009, and January 19, 2010, orders of the United States Bankruptcy Court for the Southern District of New York denying the Law Firms' motions to dismiss are DENIED.

The Clerk of Court is directed to terminate any pending motions and to close this case.

SO ORDERED.

All Citations

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Footnotes

1 Jones Day moves together with its partners Scott Jones, Geoffroy De Foestraets and Jingzhou Tao.

2 The factual summary below is derived from the Bankruptcy Court's modified bench ruling, dated August 7, 2009, and from the following submissions of the parties: Memorandum of Law in Support of Law Firm Defendants' Motion for Leave to Appeal Unfinished Business Doctrine Decision ("Law Firms' Mem."), dated December 17, 2010 (Docket No. 12); Memorandum of Law of Development Specialists, Inc. in Opposition to Law Firm Defendants' Motion for Leave to Appeal Unfinished Business Doctrine Decision ("DSI Mem."), dated February 6, 2011 (Docket No. 25); and Reply Memorandum of Law in Further Support of Law Firm Defendants' Motion for Leave to Appeal Unfinished Business Doctrine Decision ("Reply Mem."), dated March 18, 2011 (Docket No. 31). The Court will make no further citations to these sources unless otherwise specified.

3 The Court is mindful that the Law Firms' motions for leave to appeal apparently Languished for nearly a year because of misfiling of the motions and other clerical errors.

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