NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-09-1405-KiJuMk
HENRY GALLARDO and ANNETTE M. GALLARDO	Bk. No. 09-8977-JMM
Debtors.	
HENRY GALLARDO; ANNETTE M. GALLARDO	
Appellants.	**M E M O R A N D U M**[1]

Submitted Without Oral Argument on June 18, 2010
at Phoenix, Arizona[2]

Filed - September 17, 2010

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable James M. Marlar, Chief Bankruptcy Judge, Presiding

Before: KIRSCHER, JURY, and MARKELL, Bankruptcy Judges.

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Appellant's counsel did not appear for oral argument as scheduled, so we deemed the matter submitted on the brief.

Chapter 13[3] Debtors-Appellants, Henry and Annette Gallardo ("Gallardos"), appeal an order from the bankruptcy court denying their motion to reconsider an order that denied their application to retain a professional consultant and an expert in an adversary proceeding against the lender of their primary mortgage. As the order denying the retention of the professional consultant and expert is not a final order, we DISMISS the appeal as interlocutory.

I. BACKGROUND

A. Factual Background.

On September 8, 2009, prior to the confirmation of a chapter 13 plan, Gallardos filed an "Application to Approve Employment and Compensation of Professional Mortgage Document Review and Claims Evaluation Expert Including Document Composition, Delivery and Consulting Services" ("Motion"), seeking to employ Foreclosure Defense Group ("FDG"), a mortgage loan audit firm specializing in predatory lending cases and mortgage fraud, to assist them in an adversary proceeding against the primary lender on their residence. The Motion set forth the specifics of FDG's services and further disclosed that Gallardos had paid FDG $839 of its $1,689 fee, leaving a balance of $850 that they requested be paid as an administrative expense. The Motion included a copy of a retainer agreement with FDG and was served on various parties in interest including Wells Fargo, the affected lienholder, and the chapter 13 trustee. No timely objections were filed and no party requested a hearing.

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

On October 29, 2009, the bankruptcy court denied the Motion ("October 29 Order"):

> The debtors have asked to employ a mortgage foreclosure expert. The motion is DENIED. Any fees previously paid to that entity were without court authorization and must be disgorged to the Chapter 13 Trustee within ten days.
>
> The "expertise" sought by the Debtors' counsel is not needed, as it is within the province of a licensed attorney who specializes in consumer work. Such funds are better spent in repayment of creditors.

Thirteen days later on November 11, 2009, the Gallardos filed and served a "Motion for Hearing and Reconsideration" and a "Brief in Support of Motion for Hearing and Reconsideration." In the Motion for Hearing and Reconsideration, Gallardos expanded the content of the Motion by discussing in greater detail the pending litigation and expressing what a significant contribution FDG's extensive knowledge and expert testimony could provide. Gallardos also requested a hearing to further explain why retaining FDG may be the least expensive and most cost effective way to investigate, prepare, and present their case to the court. Finally, Gallardos contended that court approval was not necessary for the retention of expert witnesses or consultants like FDG, that such employment was within their bankruptcy counsel's discretion, and that the Motion was filed only "out of caution and to keep the Court apprised of the largest litigation expense." Alternatively, Gallardos contended, even if the court considered FDG as "special counsel," approval of such professionals is not required in chapter 13. No timely objections were filed, and the bankruptcy court did not grant Gallardos' request for a hearing.

On December 8, 2009, the bankruptcy court entered a three-sentence order denying the Motion for Hearing and Reconsideration ("December 8 Order"):

> "The Debtors have filed a Motion for Hearing and Reconsideration. Good cause not appearing, IT IS HEREBY ORDERED DENYING the motion."

B. Appellate Procedural History.

Gallardos filed their notice of appeal on December 17, 2009. They sought to appeal the October 29 Order denying the Motion and the December 8 Order denying the Motion for Hearing and Reconsideration.

On February 3, 2010, a motions panel entered an Order Defining Scope of Appeal ("Scope Order"), informing Gallardos that their notice of appeal was untimely as to the October 29 Order because the Motion for Hearing and Reconsideration, filed thirteen days afterwards, was untimely and therefore did not toll the time for filing an appeal. Rule 8002; Rule 9023. The motions panel further informed Gallardos that the notice of appeal was timely filed as to the December 8 Order and any review was effective only as to that order, not the merits of the underlying judgment. Browder v. Dir., Dep't of Corrections, 434 U.S. 257, 264 (1978); Slimick v. Silva (In re Slimick), 928 F.2d 304, 306 (9th Cir. 1990)(timely filed notice of appeal is mandatory and jurisdictional). Gallardos were granted an opportunity to file a response explaining how the panel's analysis was in error.

In their response, Gallardos admitted the Motion for Hearing and Reconsideration was filed untimely. However, they contended that it was not really a motion to reconsider the Motion, but

rather it was an entirely "new" motion requesting different relief, despite its title as one for reconsideration and the fact that FDG was the expert in both. Essentially, Gallardos contended their request in the Motion was for court approval to employ a professional and pay FDG's outstanding fees in the chapter 13 plan. But, after pondering the issue further, they determined that request was in error, and what Gallardos really wanted was to retain FDG as an expert witness for the adversary proceeding. Although the Motion and the October 29 Order used the word "expert," Gallardos asserted that a distinction exists between retaining a professional who has expertise and the retention of an expert witness to aid in litigation, neither of which required court approval. Gallardos believed that the bankruptcy court abused its discretion when it refused to consider this "new" request, especially when faced with authority for the first time that court approval was not required for the retention of expert witnesses in any chapter and, particularly, not in a chapter 13 case. Therefore, Gallardos contended, despite the untimeliness of the appeal of the October 29 Order, the denial of the "new" motion was preserved for appeal and argument on the merits.

On March 4, 2010, the motions panel entered an Order Further Refining Scope of Appeal. It concluded that the appeal of the October 29 Order was untimely, but accepted Gallardos' characterization of the Motion for Hearing and Reconsideration as a new motion, and therefore the appeal would be limited to a review of the denial of the new motion. It also noted, however, that the merits panel was free to disregard its ruling and

determine that the Motion for Hearing and Reconsideration was not actually a new request for relief, but rather a motion for relief from the October 29 Order. Wiersma v. O.H. Kruse Grain & Milling (In re Wiersma), 324 B.R. 92, 104 n. 12 (9th Cir. BAP 2005).

II. ISSUE

Does appellate jurisdiction arise "as of right" under 28 U.S.C. § 158(a)(1) over an order denying employment?

III. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 157(b)(2)(A) and 1334. We address our jurisdiction below.

IV. STANDARD OF REVIEW

We raise the question of appellate jurisdiction sua sponte and address it de novo. Belli v. Temkin (In re Belli), 268 B.R. 851, 853-54 (9th Cir. BAP 2001); Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.), 761 F.2d 1374, 1377 (9th Cir. 1985).

V. DISCUSSION

Although not raised as an issue by Gallardos, we must determine if the order on appeal is final or interlocutory so we can determine if we have bankruptcy appellate jurisdiction. Section 158(b)(1) of Title 28 which incorporates section 158(a)(1) requires a final order or leave of court before we have appellate jurisdiction. Giesbrecht v. Fitzgerald (In re Giesbrecht), 429 B.R. 682, 687 (9th Cir. BAP 2010).

The Ninth Circuit in Sec. Pac. Bank Wash. v. Steinberg (In re Westwood Shake & Shingle, Inc.), 971 F.2d 387, 389 (9th Cir. 1992), directs that an order involving appointment of counsel in bankruptcy constitutes an interlocutory order. See

also Official Comm. of Unsecured Creditors v. Anderson Senior Living Prop., LLC (In re Nashville Senior Living, LLC), 426 B.R. 240, 242 (6th Cir. BAP 2010). Although Gallardos may argue the Motion in this appeal involves a professional consultant and expert and not counsel, we do not believe such distinction requires a different result in this instance. We conclude that the October 29 Order is interlocutory, and not final.[4]

We further conclude that the Motion for Hearing and Reconsideration is not actually a new request for relief, but rather a motion for relief from the October 29 Order. It involves the same professional, the same litigation, the same terms of employment, and constitutes an additional attempt by Gallardos to have the trial court reconsider the employment of FDG.

If we consider Gallardos' Motion for Hearing and Reconsideration as a motion under Rule 9023, they did not file such motion within the 10 days required under Rule 9023.[5]

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[4] An appeal from an interlocutory order requires leave of the Panel. 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8001(b). Pursuant to Fed. R. Bankr. P. 8003(c), when a motion for leave to appeal is required but not filed, a timely filed notice of appeal may be considered a motion for leave to appeal. We have also considered Gallardos' Notice of Appeal as if it were a motion for leave to appeal. However, we conclude that Gallardos' appeal should not be heard at this time.

The retention order on appeal does not involve a controlling question of law where a substantial difference of opinion exists; it does not immediately and materially advance the ultimate termination of the litigation as a trial will still need to be conducted and the retention order may be appealed after the trial; and the order involves an issue of judicial discretion. See Travers v. Dragul (In re Travers), 202 B.R. 624, 626 (9th Cir. BAP 1996).

[5] Since December 1, 2009, Rule 9023 provides for 14 days; however, prior to December 1, 2009, the rule provided for 10 days.

Gallardos confirmed in their briefing that they did not timely file the Motion for Hearing and Reconsideration.[6] This untimely Motion for Hearing and Reconsideration did not toll the appeal time pursuant to Rule 8002(b), and the bankruptcy court properly denied the motion under Rule 9023. As no tolling occurred, Gallardos' notice of appeal filed December 17, 2009, is untimely and we have no jurisdiction under 28 U.S.C. § 158(a)(1), as incorporated by 28 U.S.C. § 158(b)(1).

If we consider Gallardos' Motion for Hearing and Reconsideration as a motion under Rule 9024, incorporating FED. R. CIV. P. 60, we conclude that the motion is improper as the October 29 Order is interlocutory and is not final. FED. R. CIV. P. 60(b) applies only to "a final judgment, order or proceeding . . . ." Rule 9024, therefore, does not apply to the interlocutory October 29 Order.[7]

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[6] Prior to December 1, 2009, Rule 8002(a) provided for a 10-day appeal period, which could be tolled by filing one of the types of motions identified in Rule 8002(b). After December 1, 2009, Rule 8002(a) provides for a 14-day appeal period.

[7] Gallardos also request that we "overrule" the portion of bankruptcy court's October 29 Order that ordered FDG to disgorge its fees of $839. This portion of the court's order appears to be final. However, while we may agree with Gallardos that disgorgement was a violation of FDG's due process rights since FDG received no notice or hearing, Gallardos have not established standing to raise this issue. See Popp v. Zimmerman (In re Popp), 323 B.R. 260, 265 (9th Cir. BAP 2005)("To have standing to appeal a decision of the bankruptcy court, an appellant must show that it is a 'person aggrieved' who was 'directly and adversely affected pecuniarily by an order of the bankruptcy court.'"), quoting McClellan Fed. Credit Union v. Parker (In re Parker), 139 F.3d 668, 670 (9th Cir. 1998)(citing Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442-43 (9th Cir. 1983)). Therefore, we do not consider it.

VI. CONCLUSION

We lack jurisdiction under 28 U.S.C. § 158(a)(1), incorporated by 28 U.S.C. § 158(b)(1). Accordingly, the appeal is DISMISSED.[8]

[8] We note that our decision here does not address whether a party must obtain court approval to retain professional consultants or expert witnesses in a chapter 13 case, and we offer no opinion on that issue at this time.