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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. AZ-09-1405-KiJuMk
)	
HENRY GALLARDO and)	Bk. No. 09-8977-JMM
ANNETTE M. GALLARDO)	
)	
Debtors.)	
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)	
HENRY GALLARDO;)	
ANNETTE M. GALLARDO)	
)	
Appellants.)	

M E M O R A N D U M¹

Submitted Without Oral Argument on June 18, 2010
at Phoenix, Arizona²

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.

1 Chapter 13³ Debtors-Appellants, Henry and Annette Gallardo
2 ("Gallardos"), appeal an order from the bankruptcy court denying
3 their motion to reconsider an order that denied their application
4 to retain a professional consultant and an expert in an adversary
5 proceeding against the lender of their primary mortgage. As the
6 order denying the retention of the professional consultant and
7 expert is not a final order, we DISMISS the appeal as
8 interlocutory.

9 I. BACKGROUND

10 A. Factual Background.

11 On September 8, 2009, prior to the confirmation of a chapter
12 13 plan, Gallardos filed an "Application to Approve Employment
13 and Compensation of Professional Mortgage Document Review and
14 Claims Evaluation Expert Including Document Composition, Delivery
15 and Consulting Services" ("Motion"), seeking to employ
16 Foreclosure Defense Group ("FDG"), a mortgage loan audit firm
17 specializing in predatory lending cases and mortgage fraud, to
18 assist them in an adversary proceeding against the primary lender
19 on their residence. The Motion set forth the specifics of FDG's
20 services and further disclosed that Gallardos had paid FDG \$839
21 of its \$1,689 fee, leaving a balance of \$850 that they requested
22 be paid as an administrative expense. The Motion included a copy
23 of a retainer agreement with FDG and was served on various
24 parties in interest including Wells Fargo, the affected
25 lienholder, and the chapter 13 trustee. No timely objections
26 were filed and no party requested a hearing.

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

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

3 The debtors have asked to employ a mortgage foreclosure
4 expert. The motion is DENIED. Any fees previously
5 paid to that entity were without court authorization
6 and must be disgorged to the Chapter 13 Trustee within
7 ten days.

8 The "expertise" sought by the Debtors' counsel is not
9 needed, as it is within the province of a licensed
10 attorney who specializes in consumer work. Such funds
11 are better spent in repayment of creditors.

12 Thirteen days later on November 11, 2009, the Gallardos
13 filed and served a "Motion for Hearing and Reconsideration" and a
14 "Brief in Support of Motion for Hearing and Reconsideration." In
15 the Motion for Hearing and Reconsideration, Gallardos expanded
16 the content of the Motion by discussing in greater detail the
17 pending litigation and expressing what a significant contribution
18 FDG's extensive knowledge and expert testimony could provide.
19 Gallardos also requested a hearing to further explain why
20 retaining FDG may be the least expensive and most cost effective
21 way to investigate, prepare, and present their case to the court.
22 Finally, Gallardos contended that court approval was not
23 necessary for the retention of expert witnesses or consultants
24 like FDG, that such employment was within their bankruptcy
25 counsel's discretion, and that the Motion was filed only "out of
26 caution and to keep the Court apprised of the largest litigation
27 expense." Alternatively, Gallardos contended, even if the court
28 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.

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

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

7 **B. Appellate Procedural History.**

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

12 On February 3, 2010, a motions panel entered an Order
13 Defining Scope of Appeal ("Scope Order"), informing Gallardos
14 that their notice of appeal was untimely as to the October 29
15 Order because the Motion for Hearing and Reconsideration, filed
16 thirteen days afterwards, was untimely and therefore did not toll
17 the time for filing an appeal. Rule 8002; Rule 9023. The
18 motions panel further informed Gallardos that the notice of
19 appeal was timely filed as to the December 8 Order and any review
20 was effective only as to that order, not the merits of the
21 underlying judgment. Browder v. Dir., Dep't of Corrections,
22 434 U.S. 257, 264 (1978); Slimick v. Silva (In re Slimick),
23 928 F.2d 304, 306 (9th Cir. 1990)(timely filed notice of appeal
24 is mandatory and jurisdictional). Gallardos were granted an
25 opportunity to file a response explaining how the panel's
26 analysis was in error.

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

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

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

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

5 **II. ISSUE**

6 Does appellate jurisdiction arise "as of right" under
7 28 U.S.C. § 158(a)(1) over an order denying employment?

8 **III. JURISDICTION**

9 The bankruptcy court had jurisdiction under 28 U.S.C.
10 §§ 157(b)(2)(A) and 1334. We address our jurisdiction below.

11 **IV. STANDARD OF REVIEW**

12 We raise the question of appellate jurisdiction sua sponte
13 and address it de novo. Belli v. Temkin (In re Belli), 268 B.R.
14 851, 853-54 (9th Cir. BAP 2001); Pizza of Haw., Inc. v. Shakey's,
15 Inc. (In re Pizza of Haw., Inc.), 761 F.2d 1374, 1377 (9th Cir.
16 1985).

17 **V. DISCUSSION**

18 Although not raised as an issue by Gallardos, we must
19 determine if the order on appeal is final or interlocutory so we
20 can determine if we have bankruptcy appellate jurisdiction.
21 Section 158(b)(1) of Title 28 which incorporates section
22 158(a)(1) requires a final order or leave of court before we have
23 appellate jurisdiction. Giesbrecht v. Fitzgerald (In re
24 Giesbrecht), 429 B.R. 682, 687 (9th Cir. BAP 2010).

25 The Ninth Circuit in Sec. Pac. Bank Wash. v. Steinberg
26 (In re Westwood Shake & Shingle, Inc.), 971 F.2d 387, 389
27 (9th Cir. 1992), directs that an order involving appointment of
28 counsel in bankruptcy constitutes an interlocutory order. See

1 also Official Comm. of Unsecured Creditors v. Anderson Senior
2 Living Prop., LLC (In re Nashville Senior Living, LLC), 426 B.R.
3 240, 242 (6th Cir. BAP 2010). Although Gallardos may argue the
4 Motion in this appeal involves a professional consultant and
5 expert and not counsel, we do not believe such distinction
6 requires a different result in this instance. We conclude that
7 the October 29 Order is interlocutory, and not final.⁴

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

15 If we consider Gallardos' Motion for Hearing and
16 Reconsideration as a motion under Rule 9023, they did not file
17 such motion within the 10 days required under Rule 9023.⁵

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

27 The retention order on appeal does not involve a controlling
28 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.

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

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

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

21 ⁷ Gallardos also request that we "overrule" the portion of
22 bankruptcy court's October 29 Order that ordered FDG to disgorge
23 its fees of \$839. This portion of the court's order appears to
24 be final. However, while we may agree with Gallardos that
25 disgorgement was a violation of FDG's due process rights since
26 FDG received no notice or hearing, Gallardos have not established
27 standing to raise this issue. See Popp v. Zimmerman (In re
28 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

1 We lack jurisdiction under 28 U.S.C. § 158(a)(1),
2 incorporated by 28 U.S.C. § 158(b)(1). Accordingly, the appeal
3 is DISMISSED.⁸
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26 ⁸ We note that our decision here does not address whether a
27 party must obtain court approval to retain professional
28 consultants or expert witnesses in a chapter 13 case, and we
offer no opinion on that issue at this time.