UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1599
Summary Calendar

IN THE MATTER OF: JOHN R. SULLIVAN,

DEBTOR.

JOHN R. SULLIVAN,

Appellant,

versus

A. M. MANCUSO, Trustee, ET AL.,

Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-1631-X)

(March 25, 1994)

Before HIGGINBOTHAM, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

The debtor, John R. Sullivan, has appealed from the district court's affirmance of the bankruptcy court's "Rescheduling Order on Hearing as to Continued Hearing on Show Cause as to Conversion to Chapter 7, Evidentiary Hearing as to Releases for Implementation of the Plan". Because the order is not a final order, and the

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

district court did not certify it for an interlocutory appeal, we do not have jurisdiction. The appeal is, therefore, **DISMISSED**.

I.

Sullivan filed a voluntary petition under Chapter 11 of the Bankruptcy Code on February 1, 1991. In March 1992, the bankruptcy court entered an order confirming the Trustee's modified second amended plan of reorganization. The Sullivan Plan Committee (appellee) is the representative of the Class 5 Creditors under the Plan. Those creditors are lenders against whom Sullivan had initiated litigation which was pending at the time of the filing of the petition.

The Plan provided, in pertinent part, for the dismissal of Sullivan's claims against the Class 5 Creditors, and for a release in favor of the Class 5 Creditors from the Trustee, the bankruptcy estate, the Debtor, and other entities. After the Trustee and the Class 5 Creditors negotiated a release, the Trustee submitted it to Sullivan for execution; but Sullivan objected to its form.

In May 1992, the Trustee filed an amended motion to authorize and compel execution of the settlement documents. After conducting two hearings on this motion, the bankruptcy court entered an order on May 29, directing all interested parties to appear before it on June 17, 1992, and show cause why the case should not be converted to one under Chapter 7.

At the conclusion of that show cause hearing, the bankruptcy court entered the rescheduling order. In it, the bankruptcy court, *inter alia*, stated that, in a prior hearing on June 1, it had found

and concluded that the Plan was not ambiguous; that the Plan provided for Sullivan and the Trustee to release claims "against certain parties" on behalf of entities owned or controlled by Sullivan; that there would not be releases of the Class 5 creditors' claims against Sullivan "under certain conditions depending on what happens in litigation as to the discharge of [Sullivan]; and that an evidentiary hearing would be necessary if there were issues of fact as to whether any entities were owned or controlled by Sullivan.

The bankruptcy court ordered the parties to file a pre-trial order, including a list of the entities which they agreed that Sullivan owned or controlled, and a list of the entities as to which they disagreed;[2] cautioned the attorneys and parties that it would impose monetary sanctions if there was "any game playing"; stated that, as to the form of the Release, it would "apply the language of the Plan"; continued the show cause hearing on whether the case should be converted; extended the effective date of the plan; and established deadlines for filing pleadings and motions in connection with the matters addressed in the Rescheduling Order. Sullivan did not object to the entry of the order and did not seek a stay, but appealed instead to the district court. The district court affirmed.

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[2] As noted, the bankruptcy court stated that it would convene an evidentiary hearing with regard to the entities as to which the parties disagreed as to Sullivan's ownership or control, to ascertain whether a release should be signed by Sullivan or the Trustee.

II.

Sullivan contends that, in the rescheduling order, the bankruptcy court erroneously concluded that the Plan was unambiguous, erroneously interpreted the Plan, and erred in various evidentiary rulings.

The Plan Committee contends that the rescheduling order is not a final order from which an appeal may be prosecuted without leave of court (which Sullivan neither sought nor obtained), because the order did not determine or decide any substantive issue, but merely set forth the future hearings to be held, pleadings to be filed, and the deadlines to be met by the parties. Its motion to dismiss the appeal was carried with the case.[3]

"The courts of appeals shall have jurisdiction of appeals from all *final* decisions, judgments, orders, and decrees" entered by district courts acting as appellate courts in bankruptcy cases. 28 U.S.C. § 158(d) (emphasis added); *see also* 28 U.S.C. § 158(a). We do not have appellate jurisdiction to review interlocutory orders of the bankruptcy court unless the district court: (1) "cures" the nonfinality of the bankruptcy court order (for example, by reversing a bankruptcy court order that had denied a motion to dismiss an adversary complaint), *see* ***Ichinose v. Homer Nat'l Bank***

[3] Sullivan asserts that we should not consider the motion to dismiss, because it should have been filed earlier. Of course, neither untimely action nor inaction by the parties can confer appellate jurisdiction. Even if the Plan Committee had not filed a motion, we nevertheless would have a duty, *sua sponte*, to examine our own jurisdiction. *See, e.g.*, ***Matter of Phillips***, 844 F.2d at 231 ("A federal appellate court must satisfy itself of its own jurisdiction, even if the parties have failed to raise the issue on appeal").

(Matter of Ichinose), 946 F.2d 1169, 1177 (5th Cir. 1991); or (2) certifies, pursuant to 28 U.S.C. § 1292(b), that its order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation", and we exercise our discretion to permit the appeal. 28 U.S.C. § 1292(b); *see* ***Connecticut Nat'l Bank v. Germain***, ___ U.S. ___, 112 S. Ct. 1146 (1992).

"The concept of finality employed to determine appealability under the Bankruptcy Code is open to a more liberal interpretation than that applicable to civil litigation governed by 28 U.S.C. § 1291, but this liberality stems from practicality, and is limited by it in turn". ***Calcasieu Marine Nat'l Bank v. Morrell (Matter of Morrell)***, 880 F.2d 855, 856 (5th Cir. 1989) (internal quotation marks and citation omitted). Nevertheless, it is well-established that "bankruptcy court orders that constitute only a preliminary step in some phase of the bankruptcy proceeding and that do not directly affect the disposition of the estate's assets" are interlocutory and thus not appealable under § 158(d). ***Promenade Nat'l Bank v. Phillips (Matter of Phillips)***, 844 F.2d 230, 235 (5th Cir. 1988).

Sullivan contends that the rescheduling order is final because it is "in the nature of a declaratory judgment" that the Plan called for his claims against the lenders to be dismissed with prejudice and for claims against him to be dismissed without prejudice, and that this ruling "became the law of the case as to

what the contents and operative effect of the releases must be". We disagree. The order did not conclusively determine what kind of release would be executed or the terms on which the litigation was to be dismissed. The order contemplates further proceedings before such matters could be conclusively determined: as discussed, the bankruptcy court ordered the parties to file a pre-trial order listing the entities on behalf of which Sullivan and the Trustee were to execute releases, and stated that it would convene an evidentiary hearing to resolve any disputes regarding such entities. Although the order has some aspects of finality, it is still interlocutory, to include scheduling further proceedings and establishing deadlines for conducting them.[4]

In sum, the order from which Sullivan appeals is an interlocutory one; the district court's affirmance did not in any way "cure" the lack of finality. Accordingly, we have no appellate jurisdiction under § 158(d). Nor do we have jurisdiction under § 1292(b), because the district court did not certify its decision in accordance with that section.[5]

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[4] Apparently, after the entry of the order, further hearings were conducted on the trustee's motion to compel execution of the settlement documents and on whether the case should be converted. In its motion to dismiss, the Plan Committee asserted that, on July 9, 1992, Sullivan executed a release which provided that his claims against the Class 5 Creditors would be dismissed with prejudice. Attached to the motion to dismiss are copies of orders of dismissal entered in those cases.

[5] The Plan Committee's motion to strike Sullivan's brief, which also was carried with the case, is denied as moot.

III.

For the foregoing reasons, the appeal is **DISMISSED**.