UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8127

IN THE MATTER OF: WOOD & LOCKER, INC.,

Debtor.

FRETZ PROPERTIES INCORPORATED,

Appellant,

versus

JOHN W. WOOD, JR.,

Appellee.

Appeal from the United States District Court
for the Western District of Texas
(M0-91-CV-40)

(June 10, 1994)

Before WISDOM and JONES, Circuit Judges, COBB,[*] District Judge.

PER CURIAM:[**]

This is an appeal from a decision of the district court that affirmed the dismissal of Fretz Properties as a plaintiff in an adversary proceeding filed in the Chapter 11 bankruptcy of Wood

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[*] District Judge of the Eastern District of Texas, sitting by designation.

[**] Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

& Locker, Inc. It is undisputed that following the dismissal of Fretz, the adversary proceeding continued with Westar Energy, Inc., the reorganized debtor, as the plaintiff, and Wood, appellee here, as defendant. This court raised sua sponte the issue of jurisdiction over the appeal. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). We conclude that the district court did not have appellate jurisdiction over the bankruptcy court's order. Because the district court's order was an unauthorized interlocutory order, this court also lacks jurisdiction, for our bankruptcy appellate jurisdiction extends only to "final" orders, 28 U.S.C. § 158(d), and to interlocutory orders only under the stringent requirements of 28 U.S.C. § 1292(b). See Connecticut National Bank v. Germain, ___ U.S. ___, 112 S.Ct. 1146 (1992); Bowers v. Connecticut National Bank, 847 F.2d 1019 (2d Cir. 1988); In re Stable Mews Assocs., 778 F.2d 121, 122 (2d Cir. 1985). Accordingly, we must dismiss the appeal.

Why neither of the parties nor the district court appreciated the jurisdictional problem is difficult to discern. The bankruptcy court entered an order determining that Fretz Properties, a shareholder of the reorganized Chapter 11 debtor, was not a proper party to dispute contract rights in bankruptcy court with Wood, a former shareholder of the original debtor. At the same time that the court dismissed Fretz Properties, however, it granted intervention in the adversary proceeding to the reorganized

debtor Westar.[1] The adversary proceeding continued with Westar as the plaintiff. Judgment was eventually entered and appellate proceedings are going forward between Westar and Wood.

Nevertheless, when on January 24, 1991, the bankruptcy court dismissed Fretz as a party in an ongoing adversary proceeding, its order was not a final judgment, order or decree as to which an appeal of right may be taken to the district court. See 28 U.S.C. § 158(a); Bankruptcy Rule 8001(a). A final order is one that "ends the litigation . . . and leaves nothing for the court to do but execute the judgment . . . " Catlin v. United States, 324 U.S. 229, 233 (1945). An order dismissing one party to an ongoing adversary proceeding is simply not a final order. See generally Edith H. Jones, Bankruptcy Appeals, 16 Thur. Marshall L. Rev. 246 (1991).

There are two ways in which an appeal of the bankruptcy court's interlocutory order could have been perfected, but neither of these was utilized by Fretz. First, Fretz could have moved for leave to appeal pursuant to 28 U.S.C. § 158(a), which confers jurisdiction "with leave of the [district] court, from interlocutory orders and decrees, of bankruptcy judges . . . " See also Bankruptcy Rule 8003. Fretz filed a post-argument submission with this court in which it suggests that its notice of appeal from the bankruptcy court to the district court could have sufficed as

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[1] We hesitate to characterize the procedural events in this case too closely; the case reflects a procedural morass, in which the reasons for the courts' many and various rulings do not always seem coherent from this vantage point.

a motion for leave to appeal. See Bankruptcy Rule 8003(c); Escondido Mission Village L.P. v. Best Products Company, Inc., 137 B.R. 114 (S.D.N.Y. 1992). That the district court has the flexibility to handle an interlocutory appeal in this way does not, however, mean that this court should conduct ourselves as if the district court had acted pursuant to Rule 8003 when it did not. The point of requiring a motion for leave to appeal interlocutory bankruptcy orders is to give the district court an opportunity to determine whether the issue demands immediate appellate review. The district court made no such determination in this case. Even if we had the authority, this court is in no position to make that decision on behalf of the district court. Because Rule 8003 was neither expressly nor impliedly complied with, the district court did not have appellate jurisdiction.

Alternatively, Fretz could have asked the bankruptcy court to certify its dismissal as a final order pursuant to Bankruptcy Rule 7054(b), "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fretz did not do so. See Matter of Wood & Locker, Inc., 868 F.2d 139, 144 (5th Cir. 1989) (failure to certify non-final order under Rule 7054(b) requires dismissal of appeal).

Because of these unfortunate missteps, the district court did not have jurisdiction over Fretz's appeal. Its order that purported to affirm the bankruptcy court's dismissal of Fretz -- whether as a matter of abstention, see 28 U.S.C. § 1334(c), or for Fretz's lack of standing, or because of the

bankruptcy court's lack of subject matter jurisdiction -- was at most an interlocutory order over which we also lack appellate jurisdiction.[2]

For these reasons, the appeal must be DISMISSED.[3]

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[2] In dismissing, we note that pursuant to Bankruptcy Rule 8002(a), Fretz's notice of appeal to the district court might be considered a premature notice that was deemed timely filed as of the date final judgment was entered in the underlying adversary proceeding.

[3] Appellee's motion to supplement the record is denied as moot.