USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: MAR 08 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re Motors Liquidation Company

MEMORANDUM DECISION AND ORDER

16 Civ. 5829 (GBD)

GEORGE B. DANIELS, United States District Judge:

Moving Defendants, an Ad Hoc Group of Term Lenders, move pursuant to 28 U.S.C. § 158(a) and Federal Rule of Bankruptcy Procedure 8004 for leave to appeal the June 30, 2016 Memorandum Opinion and Order of the Bankruptcy Court Denying Motions to Dismiss, for Judgment on the Pleadings, and to Vacate Prior Court Orders. (Mot. for Leave to Appeal ("Mot."), ECF No. 3.) Defendants' motion is DENIED.

I. BACKGROUND AND PROCEDURAL HISTORY

This action arises from an adversary proceeding in the bankruptcy court concerning whether Defendants were entitled to be paid in full and ahead of other creditors as part of the General Motors bankruptcy. (JPMorgan Opp. to Mot. for Leave to Appeal ("Opp."), ECF No. 6, at 1.) With the parties' consent, the Bankruptcy Court bifurcated the adversary proceeding. (*Id.* at 2, 8.) Phase I addressed whether the UCC-1 financing statement filed by JPMorgan, which gave JPMorgan a perfected security interest in certain General Motors assets, was terminated by a subsequently filed UCC-3 termination statement.[1] (*Id.* at 2.) If Plaintiff prevailed, Phase II would address whether the Defendants had a perfected security interest in any other collateral. (*Id.*) In

[1] JPMorgan was the administrative agent and collateral agent under the main loan agreement. (Opp. at 2.)

bifurcating the proceedings, the Bankruptcy Court concluded that in the interest of effective case management, it was appropriate to extend the time for Plaintiff to serve the summons and complaint on over 500 non-JPMorgan Defendants until after Phase I had been litigated. (*Id.* at 2, 8.) JPMorgan notified the other lender Defendants that litigation had commenced and regularly updated them on developments during Phase I. (*Id.* at 2, 7.) At no point did those Defendants seek to participate in Part I of the adversary proceeding. (*Id.*)

In 2015, upon review of the Bankruptcy Court's summary judgment decision in JPMorgan's favor on Phase I of the adversary proceeding, the Second Circuit reversed, concluding that the UCC-1 had been terminated, and entered summary judgment in favor of Plaintiff. (*Id.* at 2, 9.) Plaintiff then filed an amended complaint and commenced service on the non-JPMorgan Defendants. (*Id.* at 3.) Non-JPMorgan Defendants then filed motions to dismiss and motions for judgment on the pleadings arguing, *inter alia*, that they were denied due process rights because they were not given the opportunity to litigate the effectiveness of the UCC-1 at the outset of Phase I. (*Id.*) The Bankruptcy Court denied their motions but ruled "the prior judgment against [JPMorgan] does not have preclusive effect on the Defendants that were not brought into the case until after those court rulings." (*Id.* at 14 (citing June 30 Memorandum and Order, (Adv. Proc. Dkt. No. 643), at 36).)

Moving Defendants here, an Ad Hoc Group of Term Lenders, and sub-set of the non-JPMorgan Defendants, seek leave to appeal the Bankruptcy Court's denial of their motion to dismiss.

II. LEGAL STANDARD FOR OBTAINING INTERLOCUTORY REVIEW

Appeals from interlocutory orders of a bankruptcy court are permitted "with leave of court." 28 U.S.C. § 158(a). District courts may grant leave to appeal an interlocutory bankruptcy court order under 28 U.S.C. § 1292(b) only if the order being appealed (1) "involves a controlling

question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also In re MacInnis*, 235 B.R. 255, 263 (S.D.N.Y. 1998) ("the majority of courts in this district have applied the standard set forth in 28 U.S.C. § 1292(b) in the context of appeals from bankruptcy courts"). Further, "[t]he movant bears the burden of demonstrating that *all three* of the substantive criteria are met." *Al Maya Trading Establishment v. Glob. Exp. Mktg. Co.*, 14-cv-00275, 2014 WL 3507427, at *12 (S.D.N.Y. July 15, 2014) (emphasis added) (quoting *Murray v. UBS Sec., LLC*, 12-cv-05914, 2014 WL 1316472, at *2 (S.D.N.Y. Apr. 1, 2014)). "Even where the three legislative criteria of Section 1292(b) appear to be met, district courts retain unfettered discretion to deny certification if other factors counsel against it." *Id.* (quoting *Murray*, 2014 WL 1316472, at *3) (internal quotation marks omitted).

"It is a basic tenet of federal law to delay appellate review until a final judgment has been entered." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)). "[O]nly exceptional circumstances . . . justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996) (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990)) (internal quotation marks omitted).

III. THE BANKRUPTCY COURT ORDER IS INAPPROPRIATE FOR INTERLOCUTORY REVIEW

The first factor of 28 U.S.C. § 1929(b) requires that the issue being appealed is a "controlling question of law." The issue must refer to a "pure" question of law that the reviewing court can "decide quickly and cleanly without having to study the record." *In re Belton*, 15-cv-1934 (VB), 2016 WL 164620, at *1 (S.D.N.Y. Jan. 12, 2016) (citations omitted). "[Q]uestions regarding application of the appropriate law to the relevant facts are generally not suitable for

certification under § 1292(b)." *In re Residential Capital, LLC*, 14-cv-9711 (RJS), 2015 WL 5729702, at *5 (S.D.N.Y. Sept. 30, 2015) (citations omitted). The question of law must be "controlling" such that reversal of the bankruptcy court's order would "materially affect the outcome of the litigation." *MCI WorldCom Commc'ns v. Commc'ns Network Int'l, Ltd.*, 358 B.R. 76, 79 (S.D.N.Y. 2006).

Defendants argue that their motion for leave to appeal presents a pure question of law, *i.e.*, "whether it is a violation of due process for a bankruptcy court to allow service of named defendant six years after commencement of an action and after a dispositive motion has been decided." (Mot. at 11.) The challenged Bankruptcy Court order, however, included factual findings that were integral to its decision. (*See* Opp. at 17 (citing June 30 Memorandum and Order).) Review of the Bankruptcy Court Order denying Defendants' motion to dismiss would necessarily involve review of, *inter alia*, the propriety of the bifurcated proceedings in light of efficient case management, the propriety of the orders extending time for Plaintiff to begin service of the complaint and summons on numerous non-JPMorgan Defendants, and the communications between JPMorgan and non-JPMorgan Defendants during Phase I of the adversary proceeding. (*Id.*) The "fact-based nature" of the Bankruptcy Court's analysis indicates that this question is inappropriate for interlocutory appeal. *See In re Belton,* 2016 WL 164620, at *1 (denying interlocutory appeal where review required a "particularized inquiry into the nature of the claim and the facts of the specific bankruptcy").

Accordingly, Defendants have failed to meet their burden under 28 U.S.C. § 1292(b) as to the appropriateness of interlocutory review.[2] Ultimately, Defendants have not demonstrated any

[2] Even assuming arguendo that Defendants motion for leave to appeal presented a pure question of law, they still fail to meet their burden under 28 U.S.C. § 1292(b) because they have not shown that the issue on appeal is "controlling" such that reversal would "materially affect the outcome of the litigation." *MCI WorldCom*, 358 B.R. at 79. Even if this Court were to reverse the Bankruptcy Court Order, Phase II of the adversary proceeding—including discovery and trial—will continue with respect to JPMorgan.

"exceptional circumstances" that justify a "departure from the basic policy of postponing appellate review until after the entry of a final judgment." *In re Flor*, 79 F.3d at 284 (2d Cir. 1996) (quoting *Klinghoffer*, 921 F.2d at 25) (internal quotation marks omitted).

IV. CONCLUSION

Defendants' motion for leave to appeal is DENIED.

The Clerk of Court is directed to close the motion at ECF No. 3.

Dated: New York, New York
March ___, 2017

SO ORDERED.

MAR 08 2017

GEORGE B. DANIELS
United States District Judge

Accordingly, Defendants fail to meet their burden under the first and third prongs of 28 U.S.C. § 1292(b) because the issue is not "a controlling question of law," and an immediate appeal from the order will not "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).