NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

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In re:

ANTHONY and NANCY M. TRIMBLE,

Debtors.

Chapter 7
Case No. 06-22616 (RTL)

- -X
THEODORE LISCINSKI, JR., Trustee,

Plaintiff,

v.

CAMBRIDGE MANAGEMENT GROUP,

Defendant.

Adversary Proceeding
Case No. 07-2115 (RTL)

- -X

OPINION

APPEARANCES:

Theodore Liscinski, Jr., Esq.
Theodore Liscinski, Jr. LLC
(Attorneys for Chapter 7 Trustee, Theodore Liscinski, Jr.)

Raul J. Sloezen, Esq.
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(Attorneys for Defendant, Cambridge Management Group)

RAYMOND T. LYONS, U.S.B.J.

INTRODUCTION

The defendant, Cambridge Management Group ("CMG"),[1] seeks to appeal this court's denial of its motion to dismiss or to stay the proceedings pending arbitration. The court must determine if this appeal divests it of jurisdiction over the proceeding. The court finds the appeal is interlocutory in nature and requires a grant of leave by the district court in order to be heard. Since such leave has not been granted, this court retains jurisdiction over the proceeding. However, policy warrants staying all proceedings pending a decision by the district court on CMG's motion for leave to appeal. Thus, CMG's motion to stay the proceedings in the bankruptcy court is granted.

JURISDICTION

This court has jurisdiction under 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a), and the Standing Order of Reference by the United States District Court for the District of New Jersey dated July 23, 1984, referring all proceedings arising under title 11 of the United States Code to the bankruptcy court. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) since an appeal from a denial of a motion to dismiss or to stay proceedings pending arbitration concerns the administration of the estate.

FINDINGS OF FACT AND PROCEDURAL HISTORY

Anthony Trimble, one of the debtors in this case, filed a personal injury lawsuit in the Superior Court of New Jersey. After filing suit, Mr. Trimble sought a cash advance on his claim

[1] Pleadings submitted by CMG's attorney indicate the defendant, Cambridge Management Group, LLC, was improperly plead as Cambridge Management Group. However, the court's docket and the original complaint list the defendant as Cambridge Management Group.

from CMG.

CMG is a legal finance company that specializes in non-recourse pre-settlement funding.[2] Mr. Trimble and CMG entered into an agreement on January 1, 2006, which set forth the details of the arrangement and contained a mandatory arbitration clause. Mr. Trimble eventually settled his personal injury case, and two payments were made to CMG pursuant to the terms of the agreement.

On December 15, 2006, approximately eleven months after entering into the contract, Mr. Trimble filed a voluntary chapter 7 bankruptcy petition. After Mr. Trimble obtained a discharge, the Trustee filed an adversary proceeding against CMG. The Trustee claimed the payments made to CMG were preferences. CMG moved to dismiss the adversary complaint, or, alternatively, to stay the proceeding pending arbitration. The Trustee opposed these motions. A hearing was held, and the court denied both motions. CMG then filed a motion with this court for leave to appeal or, alternatively, to stay proceedings pending appeal. The Trustee again opposed the motions.

DISCUSSION

In support of its motion, CMG argues it has satisfied the criteria to file an interlocutory appeal pursuant to *Federal Rules of Bankruptcy Procedure* 8001(b)[3] and 8005,[4] as well as 9

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[2] CMG is organized to advance money to individuals involved in various types of litigation. In exchange for advancing money, CMG is assigned a portion of the *potential* proceeds of the litigation. Thus, CMG is paid when a successful settlement, judgment, or verdict is obtained by a plaintiff. If no settlement is reached and the plaintiff is unsuccessful in litigation, the plaintiff is not obligated to repay CMG.

[3] *Federal Rule of Bankruptcy Procedure* 8001(b) states:

> An appeal from an interlocutory judgment, order, or decree of a bankruptcy judge as permitted by 28 U.S.C. § 158(a)(3) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule,

U.S.C. § 16(a)(1)(A).[5] Additionally, CMG contends its application satisfies *Federal Rule of Bankruptcy Procedure* 8003.[6] Therefore, CMG claims its motions should be granted.

The Trustee opposes the motion to stay proceedings stating that CMG's actions are frivolous. The Trustee argues that an arbitration panel not authorized by statute to hear a federal bankruptcy matter cannot render a decision based on the law with no facts being at issue. Therefore, since the Trustee does not believe facts are at issue, he plans to move for summary judgment.

In order to determine whether CMG's motion should be granted, this court must decide

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> accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

FED. R. BANKR. P. 8001(b).

[4] *Federal Rule of Bankruptcy Procedure* 8005 states:

> A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. . . . [T]he bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.

FED. R. BANKR. P. 8005.

[5] Section 16 of the Federal Arbitration Act governs appeals. Section 16(a)(1)(A) provides: "An appeal may be taken from an order refusing a stay of any action under section 3 of this title." 9 U.S.C. § 16(a)(1)(A) (2000).

[6] *Federal Rule of Bankruptcy Procedure* 8003 sets out the requirements for a motion for leave to appeal under 28 U.S.C. § 158(a):

> (1) a statement of the facts necessary to an understanding of the questions to be presented by the appeal; (2) a statement of those questions and of the relief sought; (3) a statement of the reasons why an appeal should be granted; and (4) a copy of the judgment, order, or decree complained of and of any opinion or memorandum relating thereto.

FED. R. BANKR. P. 8003(a).

whether it retains jurisdiction over this matter after CMG's filing of an appeal.

Generally, "the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal." *Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985).[7] "The divestiture rule applies to appeals of bankruptcy proceedings." *Bauer v. Chatterton (In re Bauer)*, 305 B.R. 468, 470-71 (W.D. Wis. 2002).[8] " "Divest" means what it says – the power to act, in all but a limited number of circumstances, has been taken away and placed elsewhere." *Venen*, 758 F.2d at 120-21. The basic purpose behind this rule is "preventing the confusion and inefficiency which would of necessity result were two courts to be considering the same issue or issues simultaneously." *Id.* at 121.[9]

The application of this principle arises from 28 U.S.C. § 158(a), which provides the statutory authority for the district court to hear bankruptcy appeals. It states:

> The district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees; (2) from interlocutory orders and decrees issued under section 1121(d) of title 11

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[7] *See also Whispering Pines Estates, Inc. v. Flash Island, Inc. (Whispering Pines Estates, Inc.)*, 369 B.R. 752, 757 (B.A.P. 1st Cir. 2007) ("It is well established that the filing of a notice of appeal is an event of jurisdictional significance in which a lower court loses jurisdiction over the subject matter involved in the appeal."); *Savage & Assocs., P.C. v. Mandl (In re Teligent, Inc.)*, 346 B.R. 73, 76 n.2 (Bankr. S.D.N.Y. 2006) ("A notice of appeal divests the lower court of jurisdiction over those aspects of the case that are involved in the appeal.").

[8] *See also Hagel v. Drummond (In re Hagel)*, 184 B.R. 793, 798 (B.A.P. 9th Cir. 1995) ("A pending appeal, however, divests a bankruptcy court of jurisdiction.").

[9] *See also Whispering Pines Estates, Inc.*, 369 B.R. at 757 ("The purpose of the general rule is to avoid the confusion of placing the same matter before two courts at the same time and preserve the integrity of the appeal process."); *Hagel*, 184 B.R. at 798 ("Underlying this principle is a concern for ensuring the integrity of the appellate process. . . . To this end, a trial court may not interfere with the appeal process or with the jurisdiction of the appellate court.").

> increasing or reducing the time periods referred to in section 1121 of such title; and (3) with leave of the court, from other interlocutory orders and decrees; of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title.

28 U.S.C. § 158(a) (2000). This provision implicates the final judgement rule. "Ordinarily in civil litigation only those orders that dispose of all issues as to all parties to the case are considered final." *Prof'l Ins. Mgmt. v. Ohio Cas. Group of Ins. Cos. (In re Prof'l Ins. Mgmt.)*, 285 F.3d 268, 279 (3d Cir. 2002).[10] However, because of the unique nature of bankruptcy appeals, courts have "construe[d] finality in a more pragmatic, functional sense than with the typical appeal. . . . This relaxed sense of "practical finality" is not without limitation. It must be balanced against our traditional antipathy toward piecemeal appeals." *Id.*

Interlocutory appeals exist as an exception to the final judgment rule. *Keene Corp. v. Coleman (In re Keene Corp.)*, 166 B.R. 31, 33 (Bankr. S.D.N.Y. 1994). "By definition . . . [an] interlocutory order does not completely dispose of the entire matter."[11] *Id.* Bankruptcy courts have found that when an interlocutory appeal is taken they retain jurisdiction as to matters

[10] When an appeal arises in an adversary proceeding "the same concepts of appealability as those used in general civil litigation" apply. *Natale v. French & Pickering Creeks Conservation Trust, Inc. (In re Natale)*, 295 F.3d 375, 379 (3d Cir. 2002) (quoting *White Beauty View, Inc. v. First State Bank (In re White Beauty View, Inc.)*, 841 F.2d 524, 526 (3d Cir. 1988)). Thus, "an order in an individual adversary proceeding is not final unless it 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.' " *Truong v. Kartzmen (In re Truong)*, 513 F.3d 91, 94 (3d Cir. 2008) (quoting *Bethel v. McAllister Bros., Inc.*, 81 F.3d 376, 381 (3d Cir. 1996)).

[11] *Black's Law Dictionary* defines interlocutory as: "Provisional; interim; temporary; not final." BLACK'S LAW DICTIONARY 815 (6th ed. 1990). Interlocutory appeal is defined as: "An appeal of a matter which is not determinable of the controversy, but which is necessary for a suitable adjudication on the merits." *Id.*

unrelated to the appeal.[12] *Whispering Pines Estates, Inc.*, 369 B.R. at 758. The rationale behind this exception is that due to the "myriad of issues" arising in a bankruptcy case the application of the general rule "has the potential to severely hamper a bankruptcy court's ability to administer its cases in a timely manner." *Id.*

"The jurisdictional bifurcation caused by interlocutory appeals does not, however, extend to unauthorized appeals, i.e., appeals from non-appealable interlocutory orders." *Keene Corp.*, 166 B.R. at 33.[13] Such an appeal is considered a nullity, and the lower court retains jurisdiction over the matter. *Venen*, 758 F.2d at 121. The rationale behind this rule is that "[i]f an aggrieved litigant could stop or hinder lower court proceedings simply by filing an unauthorized notice of appeal, he could interrupt the progress of the proceeding at will." *Keene Corp.*, 166 B.R. at 33.

In this case, CMG appeals from a denial of its motion to dismiss or, alternatively, to stay proceedings pending arbitration. This appeal is interlocutory in nature and cannot be construed as an appeal from a final order or judgment. "[O]rders in bankruptcy cases finally disposing of discrete disputes within larger cases may be immediately appealed." *Prof'l Ins. Mgmt.*, 285 F.3d at 280-81. Thus, the granting of a motion to dismiss in an adversary proceeding would be final

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[12] In determining whether an appeal is related or unrelated, the court is tasked with deciding whether the appeal and other pending matters are "so closely related" that retention of jurisdiction by the lower court on the matter would "impermissibly interfere[] with the [party's] rights in its appeal." *Whispering Pines Estates, Inc.*, 369 B.R. at 759. Such an exception is not at issue in this case. CMG's appeal is from a denial of a motion to dismiss and to stay proceedings pending arbitration. Both causes of action wholly implicate the remaining issues in the case; therefore, the court could not find such issues unrelated to the appeal.

[13] *See also Venen*, 758 F.2d at 121 (quoting *Plant Econ., Inc. v. Mirror Insulation Co.*, 308 F.2d 275, 277 n.7 (3d Cir. 1962), overruled on other grounds by *Torockio v. Chamberlain Mfg. Co.*, 456 F.2d 1084, 1087 (3d Cir. 1972)) (" '[T]he jurisdiction of the lower court to proceed in a cause of action is not lost by the taking of an appeal from an order or judgment which is not appealable.' ").

and immediately appealable because it disposes of the entire case or issue thereby satisfying the final judgment rule. However, generally, a denial of a motion to dismiss or motion for summary judgment is not immediately appealable. *See generally Venen*, 758 F.2d at 121. Such a denial is interlocutory in nature because it "merely preserves the status quo in the case." *Smith v. First Nat'l Bank of Albany (In re Smith)*, 735 F.2d 459, 461 (11th Cir. 1984). In this circumstance, a judge concludes that "the moving party has not presented a sufficient case to win outright at that point" but does not make a final determination. *Id.* Therefore, the denial of CMG's motion to dismiss is interlocutory.

Likewise, the denial of the motion to stay is interlocutory. The Third Circuit, in *Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc.*, 247 F.3d 44 (3d. 2001), addressed the finality of a motion to stay pending arbitration. *Id.* at 51-52. In the context of its discussion of the grant of authority to appeal under the Federal Arbitration Act ("FAA") and 28 U.S.C. § 1295(a), which outlines the jurisdiction of the Court of Appeals for the Federal Circuit, the Third Circuit found such an "appeal [was] not from a "final decision." " *Id.* at 52. The court explained that "rather than ending the litigation on the merits . . . '[such an] order ensure[s] that the litigation will continue . . . .' " *Id.* (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988)). The court also found "no reason to regard the order as final under the collateral order doctrine [because] even if it were not appealable under [the FAA], it effectively could be reviewed after entry of a final judgment in the [lower] court." *Id.* Such rationale is equally applicable in this case; therefore, the motion to stay is interlocutory.

Since the appeal is interlocutory, compliance with 28 U.S.C. § 158(a)(3) is necessary in order for the district court to have jurisdiction. Technically, no appeal exists at this time

because, pursuant to 28 U.S.C. § 158(a)(3), an interlocutory appeal can only be granted on leave of the district court. At the time this motion was heard, CMG failed to seek and obtain such leave; therefore, this court has not been divested of jurisdiction because CMG's appeal is a nullity.

However, subsequent to the hearing, CMG sought leave to appeal through the district court. This court will stay the adversary proceeding until the district court has determined whether it will grant CMG's leave to appeal. Such an action is consistent with the policies of preventing piecemeal litigation and promoting judicial efficiency.

Additional support for staying the proceeding can be found in the FAA. 9 U.S.C. §§ 1–307 (2000). In its brief, CMG points to § 16(a)(1)(A) as support for staying the proceeding. This provision provides that "an appeal may be taken from an order refusing a stay of any action under section 3 of this title".[14] *Id.* § 16(a)(1)(A). "Section 16(a)(1)(A) confers appellate jurisdiction to review a denial of a motion for a stay pending arbitration which alleges a prima facie case of entitlement thereto under Section 3 of the FAA." *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 213 (3d Cir. 2007).

In determining its jurisdiction to hear such an appeal, the Third Circuit stated: "In no uncertain terms, Section 16 'makes clear that any order favoring litigation over arbitration is

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[14] Section 3 of the FAA states:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (2000).

immediately appealable and any order favoring arbitration over litigation is not.' " *Id.* at 214 (quoting *Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d 729, 732 (3d Cir. 1989)). The court went on to say:

> [W]e believe the FAA's strong policy favoring arbitration will still be best served, at least in cases where the appeal is *not frivolous or forfeited*, by allowing the party to obtain a definitive ruling on the denial of its Section 3 motion by way of interlocutory appeal to this Court, rather than requiring it to continue litigating the case to final judgment before obtaining a full round of appellate review on the waiver issue.

Id. at 214-15 (emphasis added). While no allegations of forfeiture were made, this court declines to determine whether the appeal is frivolous. Such a determination is not necessary at this juncture; however, it should be noted that in its previous decision the court found the Trustee was not bound by the arbitration clause.[15] Regardless, the law of the Third Circuit and the strong policy favoring arbitration[16] provide additional support for this court's decision to stay the proceedings.

CONCLUSION

CMG's appeal is interlocutory in nature; therefore, it requires leave of the district court in order to be heard. Such leave has not been granted; thus, this court retains jurisdiction over the proceeding. However, in order to promote judicial efficiency and avoid piecemeal litigation, the proceeding will be stayed pending a determination by the district court as to CMG's leave to

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[15] In denying CMG's motion to stay proceedings pending arbitration the court found the Trustee's preference action was on behalf of the creditors of the bankruptcy. Thus, it was a non-debtor-derivative suit and not subject to arbitration because the cause of action to avoid the transfers did not belong to Mr. Trimble, a party to the contract, but to the Trustee. *See Liscinski v. CMG*, Jan. 17, 2008, Docket No. 07-2115-RTL, Doc. 13.

[16] *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Mintze v. Am. Gen. Fin. Servs., Inc. (In re Mintze*), 434 F.3d 222, 229 (3d Cir. 2006).

appeal. The court does not believe any hardship will result from staying the proceedings, and the Trustee may move to dissolve the stay if he believes it is necessary to proceed with the underlying adversary proceeding prior to a ruling by the district court. Thus, CMG's motion to stay the proceedings pending appeal is granted.

Dated: March 18, 2008

/S/Raymond T. Lyons
United States Bankruptcy Judge