UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
GORDON PROPERTIES, LLC	)	**Case No. 09-18086-RGM**
CONDOMINIUM SERVICES, INC.	)	**(Jointly Administered)**
	)	
Debtors.	)	
	)	
	)	
HOWARD SOBEL, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Adv. Proc. No. 12-1562-RGM**
	)	
BRYAN SELLS, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANT FIRST OWNERS ASSOCIATION'S ANSWER
TO THE MOTION FOR LEAVE TO FILE AN APPEAL

On January 29, 2012, the Bankruptcy Court disqualified Reed Smith LLP from any further representation of the plaintiffs in this adversary proceeding, granting a motion that had been filed by defendant First Owners Association of Forty Six Hundred Condominium, Inc. ("FOA"), Reed Smith's former client. The plaintiffs seek leave to pursue an immediate appeal of that disqualification order ("the January 29 Order"). The District Court should deny the plaintiffs' motion because the January 29 Order is not a collateral order under *Cohen v. Beneficial Industrial Loan* nor does it satisfy the requirements for interlocutory review under 28 U.S.C. § 158(a)(3).

THE FACTS

Reed Smith previously represented FOA in the following actions: [1] *Gordon Properties, LLC v. First Owners' Association of Forty Six Hundred Condominium, Inc., et al.,* Civil Case No. CL 08-1432 (Va. Cir. 2009); [2] *First Owner's Association of Forty Six Hundred Condominium, Inc. v. Gordon Properties, LLC,* 1:10-cv-00872 (E.D. Va.); [3] *Condominium Services, LLC v. First Owners' Association of Forty Six Hundred Condominium, Inc.,* 281 Va. 561; 709 S.E.2d 163 (2011); [4] *First Owners' Association of Forty Six Hundred Condominium, Inc. v. Gordon Properties, LLC,* 1:11-cv-00255 (E.D. Va.); [5] *First Owners' Association of Forty Six Hundred Condominium, Inc. v. Gordon Properties, LLC et al,* 1:12-cv-00394 (E.D. Va.); [6] *Gordon Properties, LLC v. First Owners' Association of Forty Six Hundred Condominium, Inc.,* 1:11-cv-00905 (E.D. Va.); [7] *First Owners Association of Forty Six Hundred v. Gordon Properties, LLC,* Civil Action No. 1:11-cv-01060 (E.D. Va.); [8] *First Owners Association of Forty Six Hundred Condominium, Inc., v. Gordon Properties, LLC,* Civil Action No. 1:12-cv-00953 (E.D. Va.); [9] *First Owner's Association v. Gordon Properties, LLC,* Case No. 10-1994 (4th Cir 2011); and [10] as a creditor in this bankruptcy case, *In re: Gordon Properties, LLC,* Case No. 09-18086 (Bankr. E.D. Va.) and in various related adversary proceedings. Each of these actions involved some facet of the long-running dispute between FOA and Gordon Properties and Condominium Services.

Reed Smith represented FOA throughout these cases in connection with FOA's efforts to collect money from Gordon Properties and FOA's corresponding

efforts to avoid paying money to Gordon Properties. The monetary demands of the antagonists now take the form of judgments, assessments, claims and awards of fees and costs. When accomplishment of the goals of collecting and of avoiding judgments came to involve issues of control over FOA – given Gordon Properties' voting interests in FOA – Reed Smith represented FOA in efforts to keep the principals of Gordon Properties off of FOA's board of directors.

Reed Smith was discharged by FOA in 2012, a decision that still clearly smarts. This suit was filed by Reed Smith on behalf of the plaintiffs in Alexandria Circuit Court on November 29, 2012. Along with the complaint, the plaintiffs filed an Emergency Motion for Preliminary Injunction. They wanted the Circuit Court to enjoin FOA's Special Litigation Committee ("SLC") – which was in the process of negotiating a settlement with Gordon Properties – from acting on behalf of FOA. In substance, the plaintiffs wanted the Circuit Court immediately to strip the SLC of any authority to continue settlement negotiations. The plaintiffs needed emergency relief, they said, because they feared that a settlement was imminent and that, if the SLC "comes to an agreement, the Plaintiffs and FOA will be irreparably harmed because, among other things, it will be difficult to unwind a settlement …." Emergency Motion for Preliminary Injunction, ¶ 7. The case was removed to the Bankruptcy Court on December 6, 2012, by defendant Lindsay Wilson before a hearing was held in Circuit Court.

On behalf of the plaintiffs, Reed Smith wants to stop the settlement. The statements in the plaintiffs' motion that "the State Court Action does not attack the settlement agreement" and that "the State Court Action is directed solely at the propriety under state corporate law of the procedure" by which the SLC was appointed, Plaintiffs' Motion at 7, are misleading, to say the least. The plaintiffs want to leave the impression that they are indifferent to the terms of the settlement agreement and that they are only concerned about the process. That is simply not true.

The State Court Action, which is now this adversary proceeding, did not attack the settlement agreement; its object was even more fundamental – the plaintiffs wanted to prevent the settlement agreement from coming into existence in the first place. The complaint filed by Reed Smith on behalf of the plaintiffs is directed at the propriety of the procedure used to appoint the SLC because the plaintiffs want the Court to conclude that correct procedures were not followed and therefore the settlement agreement must be voided. Despite the plaintiffs' claim to the contrary, this adversary proceeding is all, and only, about the settlement agreement. They try to couch their objections as procedural but their motion makes clear that they do not like the substantive terms of the settlement. Indeed, if the plaintiffs approved the settlement terms, there would be no sensible reason for them to argue over the procedure that achieved them.

The Bankruptcy Court had to decide whether Reed Smith's representation of the plaintiffs violated the Rules of Professional Conduct. The applicable rule is Rule 1.9(a), which provides that:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

After reviewing the facts of Reed Smith's representation of FOA over the years, the Court concluded that the matter as to which Reed Smith represented FOA was the collection of money from Gordon Properties and Condominium Services. That matter was played out over numerous cases and appeals, but collection of money for FOA was the heart of it. Given that the basic purpose of a bankruptcy court is to administer the disposition of assets of the debtor and the payment of money to creditors, the Court's conclusion is almost inescapable.

A lawyer cannot represent a client in a matter and then, when the client decides to settle that matter on terms with which the lawyer disagrees, turn on the client and try to stop the settlement. That is why the Bankruptcy Court disqualified Reed Smith from representing the plaintiffs in this adversary proceeding. Reed Smith had previously represented FOA in a matter and now wanted to represent the plaintiffs adversely to FOA in that same matter. The Bankruptcy Court's decision was based on a careful analysis of the facts and the law. Under settled precedent, this Court should not accept an appeal from that interlocutory order.

I. THE JANUARY 29 ORDER IS NOT APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE

Whether orders deciding motions to disqualify counsel in civil cases are immediately appealable as a collateral order pursuant to the rule articulated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) was the subject of a wave of appellate litigation which finally subsided in 1985. In that year, the Supreme Court decided *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) in which it stated:

> We hold that orders disqualifying counsel in civil cases, like orders disqualifying counsel in criminal cases and orders denying a motion to disqualify in civil cases, are not collateral orders subject to appeal as "final judgments" within the meaning of 28 U.S.C. § 1291.

472 U.S. at 440. To ensure that frustrated litigants did not continue to argue that their individual cases deserved different treatment, the Court "expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal" and made clear that "orders disqualifying counsel in civil cases, **as a class,** are not sufficiently separable from the merits to qualify for interlocutory appeal." 472 U.S. at 439, 440 (emphasis added). Even under the more pragmatic and less technical approach to finality in bankruptcy cases, the Supreme Court's ruling is clear. As an order disqualifying counsel in a civil case, the January 29 Order cannot be appealed as a collateral order.

II. THE JANUARY 29 ORDER IS ALSO NOT SUBJECT TO INTERLOCUTORY REVIEW UNDER 28 U.S.C. § 158(a)(3)

There is no appeal as of right from an interlocutory order, but an appeal may be permitted with leave of court in certain circumstances pursuant to 28 U.S.C. § 158(a)(3). Section 158(a)(3) offers no guidance concerning the circumstances under which a District Court should grant such leave, but it is reasonably well–settled that District Courts should look by analogy to the standards of 28 U.S.C. § 1292(b), which governs interlocutory appeals in non-bankruptcy cases. *See, e.g., First Owners' Association of Forty Six Hundred v. Gordon Properties, LLC,* 470 B.R. 364, 371 (E.D. Va. 2012); *Atlantic Textile Group, Inc. v. Neal*, 191 B.R. 652, 653 (E.D. Va. 1996).

Under section 1292(b), leave to file an interlocutory appeal can be granted only where (i) the order involves a controlling question of law, (ii) as to which there is substantial ground for difference of opinion, and (iii) immediate appeal would materially advance the termination of the litigation. Because section 1292(b) is contrary to the general rule that appeals may be had only after a final judgment, it should be used sparingly and strictly construed. *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (recognizing that use of section 1292(b) is reserved for "exceptional circumstances [that] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment" (internal quotation marks omitted)); *United States v. Nixon,* 418 U.S. 683, 690 (1974) (noting that "[t]he finality requirement of 28 U.S.C. § 1291

embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals").

Even if the question is certified, the appellate court may still deny leave to appeal at its sole discretion. *President and Directors of Georgetown v. Madden,* 660 F.2d 91, 97 (4th Cir. 1981). In the exercise of its discretion, the court should "protect the integrity of the congressional policy against piecemeal appeals." *Switzerland Cheese Association v. Horne's Market, Inc.,* 385 U.S. 23, 25 (1966). Interlocutory appeals should only be allowed "in exceptional situations in which [doing so] would avoid protracted and expensive litigation." *In re Cement Antitrust Litigation,* 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd sub nom., Arizona v. Ash Grove Cement Co.,* 459 U.S. 1190 (1983). As will be shown below, the January 29 Order does not satisfy any of the prerequisites for an interlocutory appeal.

A. <u>The January 29 Order does not involve a controlling issue of law.</u> The Fourth Circuit has interpreted a "controlling question of law" to mean "a narrow question of pure law whose resolution will be completely dispositive of the litigation, either as a legal or practical matter, whichever way it goes." *Fannin v. CSX Transp., Inc.*, 1989 U.S. App. LEXIS 20859, *16 (4th Cir. Apr. 26, 1989). Other circuit courts have also interpreted section 1292(b) to apply only to "pure" questions of law, whose resolution does not require determination of issues of fact. *See McFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1260 (11th Cir. 2004); *Ahrenholz v. Board of Trustees*, 219 F.3d 674, 676-77 (7th Cir.

2000). "The antithesis of a proper § 1292(b) appeal is one that turns on whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts and evidence of a particular case." *McFarlin*, 381 F.3d at 1259.

With regard to the disqualification of counsel, the Supreme Court noted long ago that:

> **The decision whether to disqualify an attorney ordinarily turns on the particular factual situation of the case then at hand,** and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits.

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 377 (1981) (emphasis added); *see also Brooks v. Farm Fresh, Inc.*, 759 F. Supp. 1185, 1198 (E.D. Va. 1991) (holding that question of whether plaintiffs' attorneys had a conflict of interest that warranted disqualification was fact-dependent and not appropriate for interlocutory appeal pursuant to § 1292(b)), *vacated on other grounds*, 966 F.2d 142 (4th Cir. 1992). This case is no different. The January 29 Order is not dispositive of this case. Additionally, the Bankruptcy Court went through a detailed analysis of the facts as they pertained to the motion to disqualify before it reached a decision. In no sense does the January 29 Order involve a "pure" issue of law.

B. <u>The analysis underlying the January 29 Order is not subject to a substantial difference of opinion.</u> It is clear that the plaintiffs strongly disagree with the January 29 Order but "mere disagreement, even if vehement, with a court's ruling does not establish a substantial ground for difference of

opinion sufficient to satisfy the statutory requirements for an interlocutory appeal." *Judicial Watch, Inc. v. National Energy Policy Development Group*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002)((internal citations omitted). "[A]n interlocutory appeal will lie only if a difference of opinion exists **between courts** on a given controlling question of law, creating the need for an interlocutory appeal to resolve the split or clarify the law." *KPMG Peat Marwick, L.L.P. v. Estate of Nelco*, 250 B.R. 74, 82 (E.D. Va. 2000) (emphasis in original); *see also Oyster v. Johns-Manville Corp.*, 568 F. Supp. 83, 86 (E.D. Pa. 1983) (noting that whether a substantial ground for a difference of opinion exists "may be demonstrated by adducing 'conflicting and contradictory opinions' of courts which have ruled on the issue."). Here, the plaintiffs simply argue that the Bankruptcy Court's decision conflicts with their view of the facts and law. That is not a "substantial ground for difference of opinion" within the meaning of section 1292(b).

The plaintiffs also suggest that they should be allowed to appeal now because the law needs clarification, stating that "the law in this area is still evolving." Plaintiffs' Motion at 12. They offer no support for that assertion, likely because "[t]he law regarding disqualification of counsel is settled law…." *Brooks v. Farm Fresh, Inc.*, 759 F. Supp. at 1198. The plaintiffs' assertion concerning the alleged continuing evolution of the law seems to be a mere parroting of one of the cases they cite, *In re Sharpe*, 98 B.R. 337 (N.D. Ill. 1989). In that opinion from over twenty years ago, the court noted that "although the Seventh Circuit has issued a number of opinions in recent years

clarifying the rules for attorney disqualification, the law in this area is still evolving." *Id.*, at 340. The plaintiffs disagree with the way in which the Bankruptcy Court applied the Rules of Professional Conduct to the facts, but those rules are not new nor is their interpretation in a state of flux in the courts of either the Commonwealth of Virginia or the Fourth Circuit.

C. Permitting an immediate appeal of the January 29 Order will not materially advance this litigation. This requirement of section 1292(b) has been interpreted to mean "that resolution of a controlling question of law would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin v. Conseco Services,* 381 F.3d at 1259. The plaintiffs have not articulated any reasons why allowing immediate appeal of the January 29 Order will shorten this litigation. The pace of proceedings in this adversary proceeding in Bankruptcy Court has not been affected by the disqualification of Reed Smith.

If the plaintiffs are hard-pressed to fund this litigation now that Reed Smith has been disqualified, they merely face the dilemma that virtually all civil litigants face – whether the relief they seek is worth the cost. That concern does not lead to the conclusion that an immediate appeal would advance the ultimate termination of this litigation. *Brooks v. Farm Fresh, Inc.*, 759 F. Supp. at 1198.

Likewise, the mere fact that a review of the January 29 Order now by the District Court may save effort and expense in the future is not determinative; that is true of any interlocutory appeal of virtually any order. *Palandjian v.*

Pahlavi, 782 F.2d 313, 314 (1st Cir. 1986). The plaintiffs need to advance a more persuasive reason to warrant an extraordinary interlocutory review.

The opinions in *In re Sharpe*, 98 B.R. 337 (N.D. Ill. 1989) and *In re Capen Wholesale, Inc.*, 184 B.R. 547 (N.D. Ill. 1995) do not lead to a different result. In the first case, the court accepted the appeal based on, *inter alia*, its desire to "contribute to the development of the law" and the failure of the opposing party to object. 98 B.R. at 340. In the second case, the court acknowledged that the disqualification order was not a controlling issue of law but accepted the appeal anyway based largely on considerations of "judicial economy and efficiency" and the fact that the underlying case was "all but concluded." 184 B.R. 549. None of those factors are relevant here, even if their consideration was appropriate.

Moreover, FOA respectfully submits that both of these opinions represent an *ad hoc* approach to appellate jurisdiction which exceeds even the pragmatic approach permissible in the bankruptcy context. *See A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir. 1986). As was noted in an earlier attempt to appeal:

> [A]n order in a bankruptcy case is considered final and, as a result, immediately appealable, if it finally disposes of a discrete dispute within the larger case. In this respect, each adversary proceeding is considered a discrete dispute, and thus, finality in an adversary proceeding is typically contingent upon a proceeding coming to a close.

First Owners' Association of Forty Six Hundred v. Gordon Properties, LLC, 470 B.R. at 369 (citations omitted). This adversary proceeding has not come to a

close. This January 29 Order is no different from a disqualification order in a case initially filed in the District Court. It is simply not final or appealable.

D. There has been no ruling on the plaintiffs' motion to remand and hence no order or decree from which to take an interlocutory appeal, even if the requirements of 28 U.S.C. § 158(a)(3) could be satisfied. That statute provides that "The district courts of the United States shall have jurisdiction to hear appeals … with leave of court, from other interlocutory **orders** and **decrees**." (emphasis added). The plaintiffs argue at length that whether this case was properly removed from Circuit Court is a controlling question of law. *See* Plaintiffs' Motion at 10-11. They lament that the bankruptcy court has not ruled on their motion to remand, but that means that there is no order or decree from which to appeal. Accordingly, the provisions of section 158(a)(3) cannot be invoked. Again looking by analogy to 28 U.S.C. § 1292(b):

> Section 1292(b) was not designed to bring up the merits without prior adjudication in the trial court; the section allows interlocutory appeal of orders – not interlocutory appeal of issues. Consequently, there has to be an order to appeal from that decides the merits of the "controlling question" certified.

New York City Health & Hospitals Corp. v. Blum, 678 F.2d 392, 396-97 (2nd Cir. 1982). Without an order resolving the motion to remand, there is nothing from which to appeal.

The plaintiffs disagree with the Bankruptcy Court's decision to decide whether Reed Smith could properly represent them before addressing their motion to remand. They think that the Court was obligated to rule on the

motion to remand filed by Reed Smith and presumably even let Reed Smith's attorneys argue the motion, even if the firm had a disqualifying conflict from the start. The effect of that argument is that, according to the plaintiffs, if removal was improper, the Bankruptcy Court has no authority to ensure that the Rules of Professional Conduct are followed by the attorneys who appear before it in this case. The Court is not that powerless; it can regulate the conduct of attorneys who practice before it, even when they appear to contest subject matter jurisdiction on behalf of a client.

The Supreme Court has held that "[A] district court has discretion to adopt local rules that are necessary to carry out the conduct of its business. *See* 28 U.S.C. §§ 1654, 2071; Fed. Rule Civ. Proc. 83. This authority includes the regulation of admissions to its own bar." *Frazier v. Heebe*, 482 U.S. 641, 645 (1987). The Bankruptcy Court has the same authority. *See* 28 U.S.C. §§ 1654, 2075; Fed. Rule Bankr. P. 9029.

In this Court, Local Bankruptcy Rule 2090-1(F) provides that "All counsel making an appearance or presenting papers, suits or pleadings for filing other than a request for notices under FRBP 2002(g), must be members in good standing of the Bar of this Court…." Section (I) of that same rule provides that "The ethical standards relating to the practice of law in this Court shall be the Virginia Rules of Professional Conduct now in force and as hereafter modified or supplemented." Thus, any attorney who files a motion, even a jurisdictional one, must be a member of the bar of the Court and must comply with the Rules of Professional Conduct.

Beyond those specific statutory grants of authority, it is also settled that courts have the inherent power to supervise those who appear before it:

> Courts have long recognized an inherent authority to suspend or disbar lawyers. This inherent power derives from the lawyer's role as an officer of the court which granted admission.

In re Snyder, 472 U.S. 634, 643 (1985) (citations omitted). It cannot be legitimately doubted that the Bankruptcy Court has the authority to regulate the conduct of those who appear before it, whatever the nature of the pending proceeding. Compliance with the Court's rules is not waived for attorneys who file motions to dismiss based on an alleged lack of subject matter jurisdiction.

In *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999), the Supreme Court held that "in cases removed from state court to federal court, as in cases originating in federal court, there is no unyielding jurisdictional hierarchy." In that case, the Court affirmed the District Court's decision to dismiss the case on personal jurisdiction grounds before addressing the issue of subject matter jurisdiction. Thus, there are situations in which the issue of subject matter jurisdiction can properly wait.

The Bankruptcy Court has the power and the duty to regulate the conduct of the attorneys who appear before it. That is all that happened here. Counsel is not entitled to ignore the Rules of Professional Conduct even if they think, no matter how sincerely, that removal was improper.

Conclusion. The plaintiffs' motion for leave to appeal the January 29 Order should be denied. To the extent the plaintiffs are also trying to bring before the Court issues raised by their motion to remand before that motion

has been decided by the Bankruptcy Court, they should await the entry of an order.

Dated: February 25, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2013, I filed the foregoing using the Clerk's CM/ECF system, which will provide notice to all counsel of record.

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