UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

DOW CORNING CORPORATION,

Debtor.

Case No. 01-CV-71680-DT
Case No. 01-CV-71843-DT

HON. DENISE PAGE HOOD

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MEMORANDUM OPINION AND ORDER
RE DEBTOR'S MOTION TO DISMISS APPEALS AND
APPELLANT'S MOTION TO CONSOLIDATE APPEALS
AND
NOTICE OF HEARING

BACKGROUND

The Debtor Dow Corning Corporation filed bankruptcy on May 15, 1995. On November 30, 1999, the Bankruptcy Court entered an Order Confirming the Amended Joint Plan of Reorganization submitted by the Debtor and the Official Committee of Tort Claimants. The Bankruptcy Court issued an opinion on December 1, 1999 which addressed certain aspects of the Amended Plan relating to the Class 4 Creditors. On April 19, 2001, the Bankruptcy Court announced a ruling on the record regarding the Class 4 Creditors. The Appellants filed a Joint Notice of Appeal from the oral ruling on April 30, 2001. The Bankruptcy Court entered its Order Denying Motions for Partial Summary Judgment on May 3, 2001. The Appellants filed a second joint Notice of Appeal from the Bankruptcy Court's Order on May 14, 2001.

On May 23, 2001, the Debtor filed Motions to Dismiss the Appeals claiming that the first appeal should be dismissed because an oral opinion is not an order, judgment or decree that is within this Court's appellate jurisdiction and that the second appeal involves an interlocutory order as to which leave to appeal has not been requested before the Bankruptcy Court nor this Court.

MOTION TO DISMISS APPEALS

A. First Appeal/ Motion to Consolidate Appeals

The Debtor argues that the first appeal should be dismissed because the appeal is based on

an oral opinion and is not an order, judgment or decree. In their Motion to Consolidate the Appeals, the Appellants argue that because the two appeals are virtually identical, consolidation is in order. Appellants do not respond to the Debtor's argument that because the first appeal is based on an oral ruling, and not from an order, the Court has no jurisdiction over that appeal.

This Court has jurisdiction to hear appeals "from final judgments, orders and decrees" entered by bankruptcy courts. 28 U.S.C. § 158(a). A court officially speaks only through its orders. *United States v. Martin*, 913 F.2d 1172, 1175 (6th Cir. 1990). Because there was no order entered in the first appeal, this Court is without jurisdiction to consider the appeal. There is no prejudice to Appellants since they filed a second notice of appeal within the required 10 days after the Bankruptcy Court entered its May 3, 2001 Order. There is also no requirement to consolidate the two appeals since both appeals are identical. The Appellants' Motion to Consolidate the Appeals is denied and the Appellants' Appeal in Case No. 01-CV-71680-DT is dismissed.

B. Second Appeal

The Debtor claims that the second appeal should be dismissed because it is untimely filed. The Debtor argues that Appellants, Class 4 Creditors, should have filed their appeal after the Bankruptcy Court entered its November 30, 1999 Confirmation Order. The Debtor argues that the Bankruptcy Court's May 3, 2001 Order denied the Appellants' motion for *partial* summary judgment, therefore, the order was not a final order subject to appeal. The Debtor next argues that because the order is an interlocutory order, the Court should deny leave to appeal since the Appellants did not first seek leave to appeal the order before the Bankruptcy Court nor before this Court. In addition, there are further issues regarding the Class 4 claims which the Bankruptcy Court has not resolved. The Debtor also argues that the Order does not alter or modify the Plan or the Confirmation Order.

In response, the Appellants claim that the appeal is from the Confirmation Order and admits that it was filed beyond the ordinary time to appeal. The Appellants argue that prior to April 19, 2001, the parties did not know that the Bankruptcy Court would modify the Plan and Confirmation

Order to bar Class 4 claimants from recovering post-petition interest at contractually-specified default rates, compounded in accordance with specific contractual provisions or otherwise applicable law, and to render wholly unrecoverable the class 4 creditors' entitlements to contractually-specified fees, costs and expenses. The Appellants claim that neither the Plan nor the Confirmation Order barred Class 4 creditors from recovering pendency interest at contractual default rates compounded in accordance with the terms of the contracts which the Bankruptcy Court held that the Plan did not so provide.

The Appellants further argue that the Bankruptcy Court's December 1, 1999 Opinion expressly noted that Class 4 creditors were entitled, as a matter of law, to receive the full benefits of their contractual bargains from the solvent Debtor. *In re Dow Corning Corp.*, 244 B.R. 678, 696 (Bankr. E.D. Mich. 1999). On its face, the Appellants claim that the December 1, 1999 Opinion vindicated the Class 4 Objections to the Plan. The Appellants argue that based on the December 1, 1999 Opinion, they could not have appealed the Bankruptcy Court's Confirmation Order.

The issue in this matter involves the Objections to disallow the Class 4 Creditors' claims regarding the contract rate to the extent they sought: a) pendency interest at contractual default rates; b) compound interest; and 3) attorney's fees and other similar costs or expenses. In March 2001, the Appellants filed the Motions for Partial Summary Judgment on the Objections on the following issues:

> 1) whether under the Plan, Class 4 Claimants are entitled to pendency interest at contractual default rates;
> 2) whether, under the Plan, Class 4 claimants are entitled to compound interest under their contracts, or, alternatively, whether Class 4 claimants are entitled to compound interest as a matter of equity; and
> 3) whether, as a matter of bankruptcy law, Class 4 claimants are entitled to recover fees, costs, and expenses.

The Bankruptcy Court heard oral arguments on the Motions on April 19, 2001. That same day, the Bankruptcy Court announced on the record and delivered an oral opinion explaining its reasons, concluding that the contract rates in effect on the Petition Date should be used to calculate pendency interest. On May 3, 2001, the Bankruptcy Court issued its order denying the motions for

partial summary judgment for the reasons set forth on the record.

The district court has jurisdiction over appeals from final orders of the bankruptcy court in core proceedings. 28 U.S.C. §§ 157(b)(1) and 158(a)(1). The confirmation of a plan is a core proceeding. 28 U.S.C. § 157(b)(2)(L). A bankruptcy court's findings of fact are reviewed under a clearly erroneous standard, while its conclusions of law are reviewed *de novo*. *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 476-77 (6th Cir. 1996); Bankr. R. 8013. Where a bankruptcy court's determination involves a mixed question of fact and law, the district court "must break it down into its constituent parts and apply the appropriate standard of review for each part." *Wesbanco Bank Barnesville v. Rafoth (In re Baker & Getty Fin. Servs., Inc.)*, 106 F.3d 1255, 1259 (6th Cir. 1997)(quoting *Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 88 (6th Cir. 1993)).

Bankruptcy Rule 8002(a) provides that a "notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." Generally, a bankruptcy judge may extend the time for filing the notice of appeal if the request is made by a written motion and filed before the time for filing a notice of appeal has expired. Bankr. R. 8002(c)(1) and (2). However, the bankruptcy judge cannot extend the time for filing a notice of appeal if the order confirms a plan. Bankr. R. 8002(c)(1)(F). The 10 day period of time begins to run the day after the entry of the order and includes intermediate weekends and legal holidays. Bankr. R. 9006(a). The last day of the period is also included, unless it is a weekend day or a legal holiday. *Id.* As the rule is jurisdictional, failure to file a timely notice requires an appeal be dismissed for lack of jurisdiction. *Walker v. Bank of Cadiz (In re LBL Sports Ctr., Inc.)*, 684 F.2d 410, 412 (6th Cir. 1982). The rule has been strictly construed, requiring strict compliance with its terms. *Hotel Syracuse, Inc. v. City of Syracuse Indus. Dev. Agency (In re Hotel Syracuse, Inc.)*, 154 B.R. 13, 15 (N.D. N.Y. 1993). The notice of appeal itself is not a request for an extension under Rule 8002 since a request must be made by motion. *See Pryor v. Marshall*, 711 F.2d 63, 64-65 (6th Cir. 1983)(holding Fed.R.App.P. 4(a)(5) requires an appellant to file a timely motion requesting an

extension of time).

There is no dispute that the instant appeal was filed beyond the 10 days from the date the Confirmation Order was entered. The question is whether the May 3, 2001 Order satisfies the requirement for a final judgment as outlined in 28 U.S.C. § 158(a). The Court finds the May 3, 2001 Order is a final order and this Court has jurisdiction to hear the Proponents and Shareholders' appeal pursuant to Bankruptcy Rule 8002 and 28 U.S.C. § 158(a).

The Supreme Court has promulgated a test for determining when parties should be allowed to appeal an order entered subsequent to a court's final judgment. The Supreme Court wrote:

> [T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952). The Supreme Court also indicated that the question of whether the time for petitioning for appeal should be enlarged "cannot turn on the adjective which the court below chose to use in the caption of its second judgment." *Id.* at 212.

This test was adopted by the Sixth Circuit in *Green v. Nevers*, 196 F.3d 627 (6th Cir. 1999) and *Cuyahoga Valley Railway Company v. Tracy*, 6 F.3d 389 (6th Cir. 1993). In *Green,* a plaintiff attempted to appeal an order that was entered subsequent to a court's final decree. The Sixth Circuit reasoned that the second order merely amended the first order by correcting "a minor technical error" and therefore did not toll the time for filing a notice of appeal. *Green*, 196 F.3d at 631. In accordance with the *Minneapolis-Honeywell* case, the Sixth Circuit concluded that because there were no substantive changes or resolution of genuine ambiguity, the second order did not restart the time for appeal. *Id*.

Similarly in *Tracy*, the Sixth Circuit determined that the defendants' attempt to appeal from

a subsequent order which it contended modified certain aspects of the original order was untimely. The defendants argued that because the second order modified certain aspects of the court's first order, every item in the first order was subject to appeal. The issue that the defendants sought for review was not altered or even mentioned in the second court order. The *Tracy* court held that "the relevant case law in no way suggests that once one issue has been modified, all of the issues from the original order are fair game for appeal." *Tracy*, 6 F.3d at 395. The district court's later modification of the first order was completely unrelated to the issue the defendants disputed and therefore did not alter the state of repose. *Id.* The Ninth Circuit has also determined that "[A] decision is final for purposes of appeal if an appeal is the only method of obtaining review." *United States v. Lee*, 786 F.2d 951 (9th Cir. 1986).

A cursory review of the Bankruptcy Court's oral ruling on April 19, 2001 indicates that its ruling changed the Confirmation Order in a material way. The Confirmation Order did not address the issues on appeal in this instance nor did the December 1, 1999 Opinion regarding the Class 4 creditors address the issue. The Bankruptcy Court simply stated that "the Plan, including its attached and incorporated separate agreements, compromises, settlements, and assumptions and rejections of executory contracts and unexpired leases [was] confirmed." *November 30, 1999 Confirmation Order,* p.1.

Although the May 3, 2001 Order was an order partially denying summary judgment, the April 19, 2001 oral ruling was essentially a ruling on the interest rate at issue. There is nothing more for the Bankruptcy Court to decide on the interest rate issue. A final order is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Whittington v. Milby*, 928 F.2d 188, 191 (6th Cir. 1991). The May 3, 2001 Order, incorporating the Bankruptcy Court's April 19, 2001 oral ruling, effectively determined the Class 4 creditors' rights to default interest, compounding, fees, costs and expenses, which now leaves no questions unanswered.

In cases of marginal finality, the Sixth Circuit has adopted what has become known as the

*Gillespi*e doctrine. *Vause v. Capital Polybag, Inc*., 886 F.2d 794, 797 (6th Cir. 1989). In certain close cases where finality cannot be conclusively resolved, the court has determined that the "danger of denying justice by delay outweighs the inconvenience and costs of piecemeal review, particularly when the questions on appeal are fundamental to the further outcome of the case." *Id.* (quoting *Gillespie v. United States Steel Corp*., 379 U.S. 148 (1964)). The *Gillespie* doctrine, therefore, "permits the courts of appeals to decide the merits in cases of marginal finality where the course of litigation would be impeded, rather than advanced, by dismissing the appeal." *Id*.

CONCLUSION

For the reasons stated,

IT IS ORDERED that the Debtor's Motion to Dismiss **(in Case No. 01-CV-71680-DT, Docket No. 6, filed May 23, 2001)** is GRANTED.

IT IS FURTHER ORDERED that the **Appeal in Case No. 01-CV-71680-DT is DISMISSED without prejudice**, the Court finding that it was prematurely filed and the Court has no jurisdiction over the appeal.

IT IS FURTHER ORDERED that Appellants' Motion to Consolidate Appeals **(in Case No. 01-CV-71680-DT, Docket No. 7, filed June 7, 2001)** is DENIED.

IT IS FURTHER ORDERED that the Debtor's Motion to Dismiss **(in Case No. 01-CV-71843-DT, Docket No. 4, filed May 23, 2001)** is DENIED.

IT IS FURTHER ORDERED that Appellants' Motion to Consolidate Appeals **(in Case No. 01-CV-71843-DT, Docket No. 5, filed June 7, 2001)** is DENIED.

IT IS FURTHER ORDERED that the Appeal continues in Case No. 01-CV-71843-DT. **A hearing on the appeal is scheduled for Thursday, May 2, 2002, 9:00 a.m.**

/s/
DENISE PAGE HOOD
United States District Judge

DATED: March 29, 2002