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(See #384)

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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In re:	Case No. 96-C-0365-S
HOME CENTER CORPORATION OF AMERICA, Debtor.	RULING
	Bankr. No. 95B-22952 Chapter 11

* *

Before the court is the motion of debtor Home Center Corporation of America and its counsel, McKay, Burton & Thurman (MB&T), for leave to appeal an interlocutory order issued by the bankruptcy court. The motion is unopposed.

BACKGROUND

Debtor initiated a chapter 11 bankruptcy proceeding on June 1, 1995. However, MB&T, counsel selected by debtor, failed to file a motion for its appointment as debtor's counsel and supporting affidavit with the bankruptcy court at that time. MB&T was under the mistaken assumption that its motion had been filed in June and did not discover the error until it prepared an interim fee application in November 1995. MB&T subsequently filed its motion and affidavit on November 23, 1995, nearly six months after debtor's petition.

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MB&T moved the bankruptcy court to approve its appointment retroactively, as of June 1, 1995. All creditors were notified of MB&T's motion and the hearing on the motion before the bankruptcy court. No creditors objected to MB&T's motion. The bankruptcy court denied the motion by its order entitled "Memorandum Decision and Order Denying Motion to Appoint Counsel Retroactive to June 1, 1995" (the Order) dated March 28, 1996. MB&T now seeks leave of this court to appeal the Order.

ANALYSIS

Standards for Interlocutory Appeal

A motion for leave to appeal is governed, in part, by 28 U.S.C. § 158 which provides, with emphasis:

> (a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.
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> . . .
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> (c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeal from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

While neither section 158(a) nor the bankruptcy rules specify the standards for granting leave to appeal, courts have generally applied the standards of 28 U.S.C. § 1292(b)[1], which, by analogy, permits direct appeal from an interlocutory order of the bankruptcy court where the order involves: (1) a controlling question of law, (2) over which there is a substantial basis for disagreement, and (3) for which immediate appeal will materially advance the ultimate termination of the litigation. In re Kruckenberg, 160 B.R. 663, 666 (D. Kan. 1993); In re Twenver, Inc., 127 B.R. 467, 470 (D. Colo. 1991). The burden rests with debtor's counsel to show that the bankruptcy court's order meets these standards. In re Blinder, Robinson & Co., Inc., 135 B.R. 899, 901 (D. Colo. 1992).

Interlocutory appeals should be granted sparingly and are generally discouraged. In re American Freight Sys., Inc., 153 B.R. 316, 321 (D. Kan. 1993) (citing In re Bowers-Siemon Chem. Co., 123 B.R. 821, 825 (N.D. Ill. 1991)); Miami Ctr. Liquidating Trust v. Dade County, Fla., 75 B.R. 61, 64 (S.D. Fla. 1987)). "The fundamental policy supported by the § 1292(b) requirements is that appellate review should be postponed until after the entry of final judgment. Only exceptional circumstances justify the hearing of an appeal before a final judgment is rendered." In re Neshaminy

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[1] 28 U.S.C. § 1292 governs the appealability of U.S. District Court interlocutory decisions to the circuit courts of appeal.

Office Bldg. Assocs., 81 B.R. 301, 302-03 (E.D. Pa. 1987) (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978)).[2]

Issue Presented by Appeal

MB&T's appeal focuses on whether, based upon the circumstances of this case, the bankruptcy court improperly denied MB&T's motion for retroactive appointment and improperly declined to award MB&T fees and costs incurred between June 1, 1995 and November 23, 1995. Applying the standards set forth above, the court will first address whether there is a substantial basis for disagreement over the bankruptcy court's ruling.

The bankruptcy court held the events surrounding MB&T's failure to file its motion for appointment as counsel and supporting affidavit did not rise to the level of "extraordinary circumstances" which would justify nunc pro tunc approval of its

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[2] While the proper standard under § 1292(b) limits interlocutory appeals to "exceptional cases," a practical standard, generally comporting with case law, is to allow appeals for purposes of avoiding harm to litigants or avoiding the wastes in unnecessary or repeated protracted proceedings. See Katz v. Carte Blanche Corp., 496 F.2d 747, 754-56 (3d Cir.), cert. denied, 419 U.S. 885 (1974); see also Hadjipateras v. Pacifica, 290 F.2d 697, 702-03 (5th Cir. 1961) ("[§ 1292(b)] was a judge-sought, judge-made, judge-sponsored enactment. . . . The amendment was to give . . . a considerable flexibility operating under the immediate, sole and broad control of Judges so that within reasonable limits disadvantages of piecemeal and final judgment appeals might both be avoided.").

appointment. In so holding, the bankruptcy court looked to Land v. First Nat'l Bank of Alamoso (In re Land), 943 F.2d 1265 (10th Cir. 1991) and In re Arkansas Co., Inc., 798 F.2d 645 (3d Cir. 1986) cited therein, finding, in particular, the Arkansas decision to be "persuasive and dispositive." Order, p. 7. After reviewing Land and Arkansas and the bankruptcy court's analysis of these cases, the court is of the opinion there is no substantial basis for disagreement over the Order.[3] Rather, the court concludes MB&T's failure to file a prepared motion for appointment due to such problems as a demanding workload, neglect, absence of an employee, or oversight cannot be excused as "extraordinary circumstances" under a straightforward reading of controlling law.

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[3] See also In re Franklin Sav. Corp., 181 B.R. 68 (Bankr. D. Kan. 1995) (reaffirming "extraordinary circumstances" as the proper standard for nunc pro tunc approval of counsel).

CONCLUSION

Although the court sympathizes with MB&T's circumstances, the court finds no substantial basis for disagreement with the Order. Accordingly, the court hereby DENIES the motion for leave to appeal.

It is so ordered.

DATED this 8th day of May, 1996.

BY THE COURT:

David Sam

DAVID SAM
U.S. DISTRICT JUDGE