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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	
RESIDENTIAL CAPITAL, LLC, *et al.*,	Case No. 12-12020 (MG)
	Chapter 11
	Jointly Administered
Debtors.	
JENNIFER L. WILSON	
	Adv. Proc. 12-01936 (MG)
Plaintiff,	
v.	
RESIDENTIAL CAPITAL, LLC, et al.	
Defendants.	

OBJECTION OF THE RESCAP LIQUIDATING TRUST TO JENNIFER L. WILSON'S MOTION FOR LEAVE TO APPEAL PURSUANT TO BANKRUPTCY RULE 8003; AND TITLE 28 U.S.C. § 158(a)(3)

The ResCap Liquidating Trust (the "Liquidating Trust"), successor in interest to Debtors/Appellees Residential Capital, LLC ("ResCap") and Residential Funding Company, LLC ("RFC") in the above-captioned adversary proceeding respectfully submit this objection

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(the "Objection") to *Plaintiff's Motion for Leave to Appeal Pursuant to Bankruptcy Rule 8003 and Title 28 U.S.C. § 158(a)(3)*, dated July 19, 2014 [Docket No. 64] (the "Motion for Leave").

PRELIMINARY STATEMENT

1. Plaintiff's Motion for Leave should be denied because Plaintiff has not demonstrated that there is any controlling question of law at issue as to which there is substantial ground for difference of opinion. Moreover, Plaintiff's requested interlocutory appeal would not materially advance the ultimate termination of the litigation. Plaintiff's mere claim that the Bankruptcy Court reached an improper conclusion does not constitute an "exceptional circumstance" warranting this Court's review of an interlocutory order.

BACKGROUND

A. Relationship Between the Parties

2. On January 18, 2007, Plaintiff executed a note in favor of SunTrust Mortgage, Inc. d/b/a Sun America Mortgage ("SunTrust") in the amount of $296,000.00. The note was secured by real property located at 7801 Pinecroft Court, Harrisburg, North Carolina pursuant to a deed of trust recorded in book 7295, pages 122-140 of the Cabarrus County Registry, executed contemporaneously with the Note. *See Declaration of Lauren Graham Delehey in Support of the Debtors' Motion for Dismissal of Adversary Proceeding Pursuant to Bankruptcy Rule 7012(b) and FRCP 12(b)(1) and 12(b)(6) or, In the Alternative, Permissive Abstention Pursuant to 28 U.S.C. §1334(c)(1)* [Case No. 12-01936; Docket No. 55], at ¶¶ 6-7 (the "Delehey Declaration").

3. SunTrust acted as the sub-servicer of Plaintiff's mortgage loan, and Debtor RFC was the master servicer for Plaintiff's mortgage loan. *See* Delehey Declaration, at ¶¶ 10-11.

4. In June 2009, Plaintiff ceased making any payments on the loan. *See* Delehey Declaration, at ¶ 17.

5. On November 30, 2010, the Report of Foreclosure Sale was filed in the General Court of Justice, Cabarrus County. *See* Delehey Declaration, at ¶ 13**.**

6. Additional details regarding the foreclosure, Plaintiff's bankruptcy case, Plaintiff's action in the District Court for the Western District of North Carolina, and Plaintiff's action in the Middle District of North Carolina, as well as her contemporaneous allegations of fraud on the court made to the North Carolina Commissioner of Banks[1] can be found in various pleadings in the adversary proceeding.

B. ResCap's Chapter 11 Cases

7. On May 14, 2012, each of the Debtors filed a voluntary petition in this Court for relief under Chapter 11 of the Bankruptcy Code. These Chapter 11 Cases are being jointly administered pursuant to Bankruptcy Rule 1015(b). On November 7, 2012, the Court entered an order setting the deadline for general creditors to file proofs of claim in the Debtors' bankruptcy cases of November 16, 2012. [Case No. 12-12020, ECF No. 2093].

8. On December 11, 2013, the Court entered the Order Confirming Second Amended Joint Chapter 11 Plan Proposed by Residential Capital, LLC et al. and the Official Committee of Unsecured Creditors (the "Confirmation Order") approving the terms of the Chapter 11 plan, as amended (the "Plan"), filed in these Chapter 11 Cases [Docket No. 6065]. On December 17, 2013, the Effective Date (as such term is defined in the Plan) of the Plan

[1] These allegations of fraud are discussed in footnote 7 to the Reply (defined below). Plaintiff therefore had ample time to bring a motion under Fed. R. Civ. P. 60(b) to set aside the judgment that she now claims was fraud on the court giving rise to a claim under North Carolina law.

occurred, and, among other things, the Liquidating Trust was established [Docket No. 6137]. The Plan provides for the creation and implementation of the Liquidating Trust.[2]

C. The Adversary Proceeding

9. Plaintiff has never filed a proof of claim.. However, on November 9, 2012, Plaintiff filed a complaint initiating the adversary proceeding [Case No. 12-01936; Docket No. 1] (the "Complaint"), alleging three counts for breach of contract and one count for violation of North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"). (Complaint ¶¶ 65-99.)

10. On January 7, 2013, the Debtors filed the *Debtors' Motion for Dismissal of Adversary Proceeding Pursuant to Bankruptcy Rule 7012(b) and FRCP 12(b)(1) and 12(b)(6) or, In the Alternative, Permissive Abstention Pursuant to 28 U.S.C. §1334(c)(1)* [Case No. 12-01936; Docket No. 4] (the "Motion to Dismiss").

11. On March 14, 2013, Plaintiff filed an opposition to the Motion to Dismiss and an objection to the declaration submitted by the Debtors in support of the Motion to Dismiss [Case No. 12-01936; Docket Nos. 14-17].

12. On April 2, 2013, the Debtors filed the *Notice of Applicability of the Order Approving Mandatory Supplemental AP Procedures* [Case No. 12-01936; Docket No. 21], which required the parties to meet and confer in an effort to consensually resolve the adversary proceeding. The parties subsequently engaged in settlement discussions but were unable to reach a resolution.

[2] The Liquidating Trust is, among other things, responsible for the wind down of the affairs of the Debtors' estates. *See* Plan, Art. VI.A-D; *see also* Confirmation Order ¶ 22. The Plan also provided for the creation of the ResCap Borrower Claims Trust, established for the purpose of administering and making distributions to holders of Allowed Borrower Claims (as such term is defined in the Plan). *See* Plan, Art. IV.F.

13. On March 7, 2014, the Liquidating Trust (as successor in interest to the Debtor defendants) filed a reply in support of the Debtors' Motion to Dismiss [Case No. 12-01936; Docket No. 38] (the "Reply").

14. The Court heard the Motion to Dismiss on May 1, 2014, at which time Plaintiff alleged misconduct arising during the North Carolina state court foreclosure proceeding—claims that were not alleged in her Complaint. (Opinion (defined below) at 1-2.) At the hearing, the Court directed the parties to file supplemental briefs.

15. The Liquidating Trust filed its supplemental brief on May 29, 2014 [Case No. 12-01936; Docket No. 56] and Plaintiff filed her supplemental brief on June 20, 2014 [Case No. 12-01936; Docket No. 59-60].

16. On July 7, 2014, the Bankruptcy Court entered the *Memorandum Opinion Granting Motion to Dismiss in Part with Prejudice and in Part Without Prejudice* [Case No. 12-01936; Docket No. 62] (the "Opinion"). In the Opinion, the Court (i) dismissed Plaintiff's three breach of contract claims with prejudice and (ii) dismissed Plaintiff's UDTPA claim without prejudice to amend the complaint and add allegations regarding SunTrust's and SunTrust Bank's submissions during the Foreclosure Action. (Opinion at 27.)

D. The Appeal

17. On July 22, 2014, Plaintiff filed the *Notice of Appeal Pursuant to Bankruptcy Rule 8001(a), 8003; and Title 28 U.S.C. § 158(a)(3)*, dated July 19, 2014 (the "Notice of Appeal") [Case No. 12-01936, Docket No. 63].

18. On July 27, 2014, Plaintiff served Morrison & Foerster LLP with the Notice of Errata on the Concurrent Filing of the Motion for Leave to Appeal and Service of Same Upon Opposing Counsel ("Notice of Errata") and the Motion for Leave.

OBJECTION

19. There is no dispute that the Opinion constitutes an interlocutory order. (*See* Opinion at n.1; Notice of Appeal.) Under section 158(a)(3) of title 28, interlocutory appeals may be made only with "leave of the court," thus leaving in place the gate-keeping function of this District Court to assure that leave to appeal the Bankruptcy Court's interlocutory orders is not granted where improperly sought.

20. In determining whether to grant an interlocutory appeal under Section 158(a)(3), district courts apply the analogous standard set forth in 28 U.S.C. § 1292(b) ("Section 1292(b)"), which governs interlocutory appeals from orders of the district court. *See, e.g., Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (In re Coudert Bros. LLP Law Firm Adversary Proceedings)*, 447 B.R. 706, 711 (S.D.N.Y. 2011); *In re Calpine Corp.*, 356 B.R. 585, 592-93 (S.D.N.Y. 2007); *MCI Worldcom Commc'ns v. Commc'ns Network Int'l, Ltd. (In re Worldcom, Inc.)*, No. 02-13533 (AJG), 2006 WL3592954 (S.D.N.Y. Dec. 7, 2006). Section 1292(b) provides that leave should only be granted 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). "[A] bare claim that a bankruptcy court's ruling was incorrect is not sufficient to satisfy the Section 1292(b) standard." *Cadles of Grassy Meadows II, LLC v. St. Clair (In re St. Clair)*, No. 13-mc-1057 (SJF), 2014 U.S. Dist. LEXIS 8615, at *14 (E.D.N.Y. Jan. 21, 2014) (citation omitted); *see also Analect LLC v. Fifth Third Bancorp*, No. 06-cv-891 (JFB), 2009 WL 2568540, at *5 (E.D.N.Y. Aug. 19, 2009) ("Therefore, plaintiff's 'mere claim that [the] district court's decision was incorrect' does not provide 'substantial ground for [a] difference of opinion,' as set forth in 28 U.S.C. § 1292."). All three elements set forth in Section 1292(b) must be met for a court to grant leave to appeal. *Id*.

21. "[I]nterlocutory appeals from bankruptcy courts' decisions are disfavored in the Second Circuit." *In re Lyondell Chem. Co.*, No. 11-MC-387 (JPO), 2012 WL 163192, at *4 (S.D.N.Y. Jan. 18, 2012) (citations omitted); *Cadles of Grassy Meadows II, LLC v. St. Clair (In re St. Clair)*, 2014 U.S. Dist. LEXIS 8615, at *9-11. "Because an interlocutory appeal represents a deviation from the basic judicial policy of deferring review until the entry of a final judgement [sic], the party seeking leave to appeal an interlocutory order must also demonstrate that exceptional circumstances exist." *Luke Oil Co. v. SemCrude, L.P. (In re SemCrude, L.P.)*, 407 B.R. 553, 557 (D. Del. 2009) (citations omitted). *See also Law Debenture Trust Co. of NY v. Calpine Corp. (In re Calpine Corp.)*, 356 B.R. 585, 593 (S.D.N.Y. 2007) ("Under section 1292(b), only exceptional circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.") (quotations and citations omitted).

22. This Court should deny Plaintiff's Motion for Leave. As an initial matter, Plaintiff failed to properly request leave to appeal the Opinion. The Motion for Leave was not timely filed, and in fact, may not have been filed at all but for the Liquidating Trust's counsel requesting a copy directly from Plaintiff. *See* Notice of Errata. Further, in the Motion for Leave, Plaintiff failed to identify the standard applicable to interlocutory appeals and further failed to provide any legitimate reason why the Motion for Leave should be granted. *See* Motion for Leave. Indeed, a brief review of the Opinion reflects that the standard set forth for granting an interlocutory appeal under Section 1292(b) has not been met.

23. In this case, the Bankruptcy Court dismissed the three breach of contract claims because Plaintiff conceded that she was not a party to a contract with either of the Defendants. While Plaintiff nevertheless now argues for the first time in the Motion for Leave that RFC is

party to an "implied contract" or "quasi-contract" with Plaintiff, that argument does not relate to a pure "question of law" as there are many facts that would need to be examined even were the Bankruptcy Court to conduct such an inquiry on this new, belated contention that conflicts with the Plaintiff's admission that she was *not* a party to any contract with the Defendants. Thus, if any ground for "difference of opinion" exists here, it relates at most to the application of the law to the facts of this particular case, if not to pure questions of fact. These types of questions are not suitable for interlocutory appeal. *See e.g.*, *Krys v. Aaron (In re Refco Secs. Litig.)*, No. 07-MDL-1902 (JSR), 2014 U.S. Dist. LEXIS 45634, at *25 (S.D.N.Y. Mar. 19, 2014) ("The questions proposed are mixed questions of law and fact, which depend heavily on the circumstances of this case, and are not the types of questions that are suited for interlocutory appeal, which is generally disfavored."); *In re Worldcom, Inc.*, 2006 WL3592954, at *3 (holding that "a mixed question of law and fact [is] not generally suitable for interlocutory appeal."); *Cadles of Grassy Meadows II, LLC v. St. Clair (In re St. Clair)*, 2014 U.S. Dist. LEXIS 8615, at *12-13 ("Additionally, the question of law must refer to a pure question of law that the reviewing court could decide quickly and cleanly without having to study the record. Mixed questions of law and fact are not generally suitable for interlocutory appeal.") (quotations and citations omitted).

24. Further, the majority of district courts have determined that allowing an interlocutory appeal under Section 1292 "will materially advance the ultimate termination of the litigation ***when reversal would end the litigation***." *See Analect LLC v. Fifth Third Bancorp*, 2009 WL 2568540 (emphasis added) (citation omitted). Here, the Bankruptcy Court granted the Motion to Dismiss in part with prejudice, thereby ending the litigation with respect to those issues. Appellate review of that decision and a determination in Plaintiff's favor would have

quite the opposite effect—litigation relating to those counts would begin again, likely leading to further appeals instead of one consolidated appeal upon a final judgment. Thus, a ruling on the merits of this proposed interlocutory appeal will not terminate the case or even substantially narrow it. At best, it will leave the case with its present scope; at worst, it will broaden the case again.

25. Thus, the Motion for Leave should be denied because there is no "controlling question of law" at issue here "as to which there is substantial ground for difference of opinion", and an interlocutory appeal would not "materially advance the ultimate termination of the litigation" because there would still remain factual issues that would need to be resolved at trial.

CONCLUSION

WHEREFORE, the Liquidating Trust respectfully requests that the Court deny the Motion for Leave.

Dated: August 14, 2014
New York, New York

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