Docket #1599 Date Filed: 06/21/2024

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	
	§	
TEHUM CARE SERVICES, INC., *et al.*,	§	Civil Case No. 4:24-cv-01607
Debtor.	§	
	§	Bankruptcy Case No. 23-90086
	§	
TEHUM CARE SERVICES, INC., *et al.*,	§	
Appellee.	§	

ORDER

Before the Court is an interlocutory appeal and request from relief from the Official Committee of Tort Claimants (the "TCC") along with some individual Movants (collectively, the "Appellants") that requests leave to appeal certain issues stemming from the Bankruptcy Court's refusal to dismiss the bankruptcy filed by Tehum Care Services. (Doc. No. 24). The Debtor and the Official Committee of Unsecured Creditors ("UCC") oppose the request. (Doc. No. 4). Anant Kumar Tripati, an individual affected by the bankruptcy, also filed a response. (Doc. No. 25). Multiple *amici curiae* have filed a brief in support of the TCC. (Doc. No. 5-1). Both the statement of the *amici curiae* and Anant Kumar Tripati's response support the Appellants' request.

I.

The motion before the Court is titled "Motion of the Official Committee of Tort Claimants, Elizabeth Frederick, Paris Morgan, Aanda Slocum, and Latanda Smith for (I) Leave of the Court to Appeal the Bankruptcy Court's Order Denying the Motion Dismiss and (II) Certification of Direct Appeal to The United States Court of Appeals for the Fifth Circuit." The actual relief sought is:

(i) [A] determination that the order denying the Motion to Dismiss is a final order under 28 U.S.C. § 157(a)(1), or

(ii) in the alternative, leave to appeal the order denying the Motion to Dismiss under 28 U.S.C. § 158(a)(3) and Bankruptcy Rule 8004. Further, the Movants ask that this Court certify the Bankruptcy Court's order for direct appeal to the Fifth Circuit under 28 U.S.C. § 158(d)(2)(A)-(B).

(Doc. No. 24 at 23–24). Thus, while a large portion of the substance of the motion deals with broader topics, the motion (and the relief sought) targets only the Motion to Dismiss.

As noted, the TCC request is positioned as an appeal or request for judicial intervention based upon the Bankruptcy Court's refusal to dismiss this bankruptcy as being pursued in bad faith.

The actual order in question is quoted *in toto* below:

> For the reasons stated on the record at the hearing held on April 11, 2024, the Motion of the Official Committee of Tort Claimants and Certain Tort Claimants for Structured Dismissal of Chapter 11 Case is denied.

(Doc. No. 1506, Bankruptcy Case No. 23-90086) (the "Order Denying Dismissal").

On the record, the Bankruptcy Court outlined its reasoning as to why it did not dismiss the action. In summary, the court found that this matter was not filed in bad faith.

The actual questions posed by the appeal, however, are not necessarily tied to the Order Denying Dismissal. According to the Appellants, the questions on appeal that are quoted verbatim are:

QUESTIONS PRESENTED (FED. R. BANKR. P. 8004(B)(1)(B))

This appeal presents the following questions:

(A) Whether a Bankruptcy Court has the authority under the Bankruptcy Code and the Constitution to discharge a non-debtor of its tort liability.

(B) Whether the tort claims arising from Corizon Health's misconduct, as asserted against YesCare and its non-debtor affiliates and insiders, are the property of Tehum's estate under the Bankruptcy Code, and whether such

a construction of the Bankruptcy Code would violate the Fifth Amendment.

(C) Whether a chapter 11 case filed in an effort to gain control over and settle claims asserted against non-debtor insiders and affiliates is filed in bad faith.

(D) Whether a chapter 11 case filed after a divisional merger that assigns tort liabilities to a non-operational company, with no employees and no assets to sustain a going-concern business, meets the Bankruptcy Code's good-faith requirement.

(E) Whether the Court erred in denying Movant's Motion to Dismiss.

(Doc. No. 24, Civil Case No. 4:24-cv-01607).

Only one of the five questions (question "E") actually concerns the Order Denying Dismissal.

This Court finds that a ruling on a motion to dismiss a bankruptcy is an interlocutory ruling (*i.e.*, not a final order). *See Matter of Phillips*, 844 F.2d 230, 234–35 (5th Cir. 1988); *Matter of Greene County Hospital*, 835 F.2d 589, 590–91 (5th Cir. 1988). As such, it is not immediately reviewable. Moreover, the ruling in this case is based upon the factual findings of the Bankruptcy Court after a lengthy hearing on the topic. Consequently, this appeal concerns what is essentially a question of fact (leading up to the final conclusion quoted-above), not a controlling question of law.

Courts in this Circuit generally apply the criteria set forth in 28 U.S.C. § 1292(b) when evaluating a request for an interlocutory bankruptcy appeal. That statute delineates the requirements for such an appeal: (1) a controlling question of law (2) for which there is a substantial ground for difference of appeal and (3) which materially advances the ultimate resolution of the case. As noted above, the ruling on the motion to dismiss is mired in factual findings—not controlling and controversial questions of law.

The Court notes this deficiency and denies Appellants' request. This Court does find that the other four questions (A–D quoted above) qualify as important/substantial grounds for a difference of opinion. If the Bankruptcy Court had made a clear ruling from which the Fifth Circuit could opine on, then such rulings would materially advance (and make much easier) the ultimate resolution of this case.

The Court, however, notes that the actual order being appealed contains no rulings that address these questions. Given that glaring omission (and given the well-established principle that the Fifth Circuit disfavors interlocutory appeals), the Court denies Appellants' request in its entirety.

II.

The Court would be remiss, however, if it did not note that it understands Appellants' motivation (or at least what the Court presumes to be their motivation) behind this attempt to appeal at this juncture. Many appellants file motions to stay during post-confirmation appeals because they are worried that even a meritorious and timely appeal could be barred by the doctrine of equitable mootness.

Equitable mootness as a concept in bankruptcy law has existed for approximately four decades. Some trace its beginnings back to *In re Roberts Farm, Inc.*, 652 F.2d 793 (9th Cir. 1981). It has "evolved in bankruptcy appeals to constrain appellate review, and potential reversal, of confirming reorganization plans." *In re Pacific Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009). Unlike the "traditional" or "constitutional" concept of mootness whereby a ruling of a court is withheld because it would have little or no effect, in equitable mootness the problem is just the opposite—a court ruling would have too much effect. It is perhaps more accurately described as a doctrine of judicial abstention. It has been implemented in situations where a

successful bankruptcy appeal would "knock the props out from under the authorization for every transaction that has taken place, [and] would do nothing other than create an unmanageable situation for the Bankruptcy Court." *In re Roberts*, 652 F.2d at 797. It has been described as pitting the concepts of finality against appellate rights or as one author describes it, "[p]ragmatism v. [p]rinciple."[1] The rationale behind the doctrine has been described as follows:

> That early history and subsequent interpreting case law helped establish its purpose as a prudential doctrine. Since *Robert Farms*, equitable mootness "has evolved in bankruptcy appeals to constrain appellate review, and potential reversal, of order confirming reorganization plans." It has evolved into a "kind of appellate abstention that favors the finality of reorganizations and protects the interrelated multi-party expectations on which they rest. It is constantly trying to "strik[e] the proper balance between the equitable considerations of finality and good faith reliance on a judgment and competing interests that underlie the right of a party to seek review of a bankruptcy order adversely affecting him." Case law suggests that the "paramount policy concern reflected by equitable mootness is the protection of third parties' interest who are not participating in the bankruptcy appeal." However, equitable mootness also furthers the "importance of finality to bankruptcy proceedings. Finality is vital to restoring third parties' confidence in a debtor and allowing it to successfully emerge from bankruptcy. The greater the chance the transaction will be undone, the less money parties may be willing to pay for the debtor's securities or assets—a knock-on effect with the potential to endanger the viability to the debtor's reorganization."[2]

It has been accepted as a concept in virtually every circuit in the United States[3], yet the very courts that have implemented this concept have cautioned against its widespread use. *See e.g., In re One2One Communications, LLC*, 805 F.3d 428, 438 (3rd Cir. 2015) ("[T]he time has come to reconsider whether [equitable mootness] should exist at all . . . .") (Krause, J., concurring). Somewhat like "he who shall not be named," the Seventh Circuit even strongly discourages the use of the term. *Matter of UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) ("There is a big difference between the inability to alter the outcome (real mootness) and

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[1] Christopher W. Frost, *Pragmatism vs. Principle: Bankruptcy Appeals and Equitable Mootness*, 15 N.Y.U. J.L. & Bus. 477 (2019).
[2] K. Lewis and S. Mattingly, *Recounting the History and Purpose of the Doctrine of Equitable Mootness and Exploring Its Evolving Persona*, 2020 Ann. Surv. of Bankr. Law 8.
[3] *Id.*

unwillingness to alter the outcome (equitable mootness) . . . Accordingly, we banish equitable mootness from the (local) lexicon.").

Regardless of whether it is viewed with favor or disfavor, it has not been found to be inapplicable in the Fifth Circuit. In this Circuit, to establish equitable mootness, a debtor must show: 1) the plan of reorganization has not been stayed; 2) the plan has not been substantially consummated; and 3) the relief requested by the Appellants would either affect the rights of parties not before the Court or the success of Plan. *In re Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 327 (5th Cir. 2013). It is a concept that is looked at with great scrutiny, especially when it involves appeals concerning the rights of secured creditors. *In re Pacific Lumber Co.*, 584 F.3d at 243. In fact, the Fifth Circuit has written that courts in this area should wield it as a "scalpel rather than an axe." *In re Sneed Shipbuilding, Inc.*, 916 F.3d 405, 409 (5th Cir. 2019). "[E]quity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process." *In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008).

Thus, while the Fifth Circuit (and other courts in this circuit) strongly suggests that the concept be used sparingly—especially in Chapter 11 cases dealing with the rights of secured creditors—the concept remains a concern for appellants in bankruptcy appeals.

The Appellants in this case have not directly raised this concern. Nevertheless, whether couched in terms of equitable mootness or under some other doctrine, it is clear from their briefing that they are concerned with the terms of the settlement agreements now pending before the Bankruptcy Court, and how those agreements, if eventually adopted by the Bankruptcy Court in its confirmation order, will affect their ability to pursue their claims of mistreatment against the Debtor, its principals, and the entities associated with it.[4]

[4] The Court in raising the specter of equitable mootness is not proferring an advisory opinion on same, nor is it commenting on the merits of any of the Appellants' claims.

III.

While this Court does not grant Appellants the relief they seek, it does not fault their efforts to obtain answers to these legal questions before it is—or could be—"too late."

The Court hereby denies the Appellants' requests for relief.

SIGNED this 21st day of June 2024.

Andrew S. Hanen
United States District Judge