

**DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

JAMES P. CARROLL,	)	
LIQUIDATION TRUSTEE OF THE	)	
LIQUIDATION TRUST FOR THE	)	Bankruptcy No. 3:07-30012
BANKRUPTCY ESTATES OF	)	
INNOVATIVE COMMUNICATION	)	Adv. No. 3:09-3073
COMPANY, LLC, EMERGING	)	
COMMUNICATIONS, INC., AND	)	
INNOVATIVE COMMUNICATION	)	
CORPORATION,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	
	)	Civil No. 2013-67
JOHN TUTEIN,	)	
	)	
Defendant/Appellant.	)	
	)	

ATTORNEYS:

Benjamin A. Currence, Esq.
St. Thomas, VI
For James P. Carroll, Liquidation Trustee.

Jeffrey B.C. Moorhead, Esq.
St. Croix, VI
For John Tutein.

ORDER

GÓMEZ, J.

Before the Court is John Tutein's appeal of the Bankruptcy Division's Order precluding presentation of certain evidence at trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 19, 2009, Stan Springel, Chapter 11 trustee of the bankruptcy estate of Innovative Communication Corporation

Carroll v. Tutein
Civil No. 2013-67
Memorandum Opinion
Page 2

("Innovative"), filed an adversary proceeding in the Bankruptcy Division to recover pre-petition fraudulent transfers and preferential transfers (the "transfers"). The complaint alleges the transfers were made to John Tutein ("Tutein"), a former Virgin Islands senator and vice president of Innovative. The complaint further avers that the aggregate amount of the transfers is \$1,446,750 in Innovative property, made without fair consideration or with the intent to hinder, delay, or defraud a present or future creditor of Innovative. On June 20, 2013, the Bankruptcy Division entered an order precluding Tutein from presenting or admitting evidence, testimony, or documents that should have been disclosed in response to the trustee's First Set of Interrogatories, Requests for Production, and Requests for Admissions (the "discovery noncompliance order").

On July 5, 2013, Tutein filed a notice of appeal of the discovery noncompliance order in this Court (ECF No. 1). On August 30, 2013, James P. Carroll, the Liquidation Trustee of the Liquidation Trust for the Bankruptcy Estates of Innovative, filed a motion to strike the bankruptcy appeal (ECF No. 5.). Carroll moved to strike the appeal on grounds that Tutein failed to move for leave as required to file an appeal of an interlocutory judgment.

Carroll v. Tutein
Civil No. 2013-67
Memorandum Opinion
Page 3

II. DISCUSSION

To determine whether a district court has jurisdiction to hear an appeal of an order from the bankruptcy division, it is important to determine whether the order being appealed is a final or interlocutory. Under 28 U.S.C. § 158,

[t]he district courts of the United States shall have jurisdiction to hear appeals

- (1) from final judgments, orders, and decrees;
- (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
- (3) with leave of the court, from other interlocutory 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.

28 U.S.C. § 158(a). While a district court automatically has jurisdiction to hear appeals from final orders, appeals from interlocutory orders generally require the appellant to obtain leave of the court. See Fed. R. Bankr. P. 8001(b) and 8003 (requiring that a motion for leave to appeal be filed with the clerk of the bankruptcy court for interlocutory appeals).

Unlike a final judgment, which determines the merits of the case, an interlocutory order decides an intervening matter. See *In re Shepherds Hill Dev. Co., LLC*, 316 B.R. 406, 413 (B.A.P.

Carroll v. Tutein
Civil No. 2013-67
Memorandum Opinion
Page 4

1st Cir. 2004); see also *In re Kashani*, 190 B.R. 875, 882 (B.A.P. 9th Cir. 1995); see also *Matter of Kutner*, 656 F.2d 1107, 1111 (5th Cir. 1981).

III. ANALYSIS

Ordinarily, an order is final if it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *In re Shepherds Hill Dev. Co., LLC*, 316 B.R. 406, 413 (B.A.P. 1st Cir. 2004) (internal quotation omitted). For example, orders denying a motion for extension of time to file a notice of appeal or an order denying relief from judgment under Rule 60(b) are generally considered final orders. *Id.* On the other hand, an order setting a deadline within which to refile a motion for leave to sue

is interlocutory in nature, because the order does not finally dispose of the Debtors' cause of action. Instead, the order creates a specific period of time in which the Debtors have been afforded the opportunity to refile their motion for leave to sue, along with their proposed complaint, as required by the bankruptcy judge.

In re Kashani, 190 B.R. 875, 882 (B.A.P. 9th Cir. 1995).

Similarly, an order on a motion to convert proceedings from Chapter 13 to Chapter 7 is an interlocutory order because it is an “incidental procedural matter.” *Matter of Kutner*, 656 F.2d 1107, 1111 (5th Cir. 1981). “[D]iscovery orders are not final decisions within the meaning of 28 U.S.C. § 1291

[D]iscovery sanctions are not immediately appealable under 28

Carroll v. Tutein
Civil No. 2013-67
Memorandum Opinion
Page 5

U.S.C. § 1291, even when appealed by the party against whom the sanctions have been assessed." *Henry v. St. Croix Alumina, LLC*, 416 F. App'x 204, 208 (3d Cir. 2011) (internal citations and quotations omitted); *c.f. Berne Corp. v. Gov't of The Virgin Islands*, 570 F.3d 130, 139 (3d Cir. 2009) ("We have jurisdiction over this appeal under 28 U.S.C. § 1291. Our review of the jurisdictional issue is plenary. Post-judgment orders of contempt are within an appellate court's jurisdiction under 28 U.S.C. § 1291 as final and appealable orders.") (internal citations omitted).

Here, the Bankruptcy Division's Discovery Noncompliance Order sanctions a party for violating a discovery order. The sanction precludes a party from introducing evidence that should have been produced. The Discovery Noncompliance Order does not finally determine the merits of the adversary proceeding; that is, it does not end the litigation on the merits. Like an order modifying a time period in *In re Kashani*, 190 B.R. 875, 882 (B.A.P. 9th Cir. 1995), the Discovery Noncompliance Order is "interlocutory in nature, because the order does not finally dispose of the Debtors' cause of action." *Id.*

Under 28 U.S.C. § 158(a)(3), this Court has jurisdiction to hear appeals from interlocutory orders and decrees of bankruptcy judges only if parties petition for and receive leave of the

Carroll v. Tutein
Civil No. 2013-67
Memorandum Opinion
Page 6

Court. 28 U.S.C. § 158(a). "Absent leave of court, [the district court] lack[s] jurisdiction over [an interlocutory order's] appeal." *In re Eagle*, 373 B.R. 609, 610 (B.A.P. 8th Cir. 2007). Tutein failed to request leave as required. Therefore, this Court lacks jurisdiction over the appeal of the discovery noncompliance order.

The premises considered, it is hereby

ORDERED that the appeal is **DISMISSED WITHOUT PREJUDICE**; it is further

ORDERED that the Clerk of Court shall **CLOSE** this matter.

S_____
Curtis V. Gómez
District Judge