

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

In re:

SCOTT DUANE WYSS and
JOY ANN WYSS,
Debtors.

BREMER BANK, N.A.,
Plaintiff-Respondent, MEMORANDUM AND ORDER

v. 06-C-120-S

SCOTT DUANE WYSS and
JOY ANN WYSS,
Defendants-Appellants.

Defendants-appellants Scott Duane Wyss and Joy Ann Wyss (hereinafter appellants) move the Court pursuant to 28 U.S.C. § 158(a) and Bankruptcy Rule 8003 for leave to appeal an interlocutory order of the Bankruptcy Court denying their motion for summary judgment. Appellants moved for summary judgment asserting plaintiff-respondent Bremer Bank, N.A. (hereinafter respondent) failed to produce any evidence by way of its pleadings, answers to interrogatories or depositions which would preclude discharge of their debt under either 11 U.S.C. § 523 or 11 U.S.C. § 727. Accordingly, appellants argued dismissal of respondent's adversary complaint was appropriate. Respondent asserted genuine issues of material fact remained concerning intent to defraud. On February 8, 2006 the Bankruptcy Court issued an order denying appellants' motion for summary judgment finding disputed issues of

fact remained for trial. On February 21, 2006 appellants filed their motion for leave to appeal with the Bankruptcy Court. Because circumstances clearly do not warrant an interlocutory appeal the Court now denies leave and returns this adversary proceeding to the Bankruptcy Court.

Under 28 U.S.C. § 158(a) a district court may in its discretion hear appeals of the bankruptcy court's interlocutory orders. See In re Jartran, Inc., 886 F.2d 859, 866 (7th Cir. 1989) (*citing* In re Am. Reserve Corp., 840 F.2d 487, 494 (7th Cir. 1988)). A reviewing court may decide to hear an interlocutory appeal if there are "controlling questions of law as to which there is substantial ground for dispute and if an immediate appeal may materially advance the ultimate termination of the litigation." In re Huff, 61 B.R. 678, 682 (N.D.Ill. 1986) (*citing* In re Johns-Manville Corp., 45 B.R. 833, 835 (S.D.N.Y. 1984)).

However, in general interlocutory appeals are looked upon with disfavor because they tend to promote delay and inefficiency. Herdrich v. Pegram, 154 F.3d 362, 367-368 (7th Cir. 1998) *rev'd on other grounds*, Pegram v. Herdrich, 530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000). More often than not a bankruptcy court is correct in its determination. However, even if error exists the issue for which immediate appeal is sought may be mooted by subsequent proceedings. Accordingly, unless exceptional circumstances are present appeals must await final order at which point all issues can be resolved at once. Id. at 368. In other

words, it must be clear that an interlocutory appeal will materially improve efficiency. Appellants failed to establish the presence of any exceptional circumstances which warrant an immediate appeal.

First, appellants assert there are substantial grounds for dispute concerning whether "a plaintiff can avoid summary judgment dismissing its adversary complaint, when it neither pleads nor proves any facts in support of its various claims." However, a controlling question of law means "an abstract legal issue rather than an issue of whether summary judgment should be granted." See Ahrenholz v. Bd. of Tr. of Univ. of Ill., 219 F.2d 674, 677 (7th Cir. 2000). Additionally, denial of summary judgment is a "paradigmatic example of an interlocutory order that normally is not appealable." Id. at 676. Accordingly, because appellants' motion for leave to appeal concerns the Bankruptcy Court's denial of summary judgment it fails to present a controlling question of law for which there is substantial ground for dispute.

Additionally, appellants assert granting leave to appeal will materially advance the ultimate termination of litigation because "an order granting [their] motion for summary judgment would bring this case to an end, and permit [appellants] to have a fresh start." However, appellants' contention while undoubtedly true is not persuasive because were the Court to adopt their argument every summary judgment denial would then be subject to interlocutory appeal. Such a result is certainly not contemplated by 28 U.S.C.

§ 158 and the Court cannot allow such a precedent to be set. Accordingly, appellants' motion for leave to appeal is denied.

ORDER

IT IS ORDERED that appellants motion for leave to appeal is DENIED.

IT IS FURTHER ORDERED that the matter is remanded to the Bankruptcy Court for further proceedings.

Entered this 27th day of April, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge