IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	CIVIL ACTION
	:	
A.S.K. PLASTICS, INC., et al.	:	
	:	
Debtors	:	
	:	NO. 04-2701

MEMORANDUM

Diamond, J.

Debtors, A.S.K. Plastics, Inc., Jamison Plastic Corp., and 9800 Ashton Road, L.P.'s have moved to dismiss the appeal of SummitBridge National Investments LLC from the Order of the United States Bankruptcy Court for the Eastern District of Pennsylvania conditionally granting the Debtors' request for substantive consolidation. I grant the Motion and dismiss the appeal.

Background

Debtors each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on October 6, 2003. Debtors filed their Joint Plan of Reorganization and their Proposed Disclosure Statement on January 30, 2004. They amended the Joint Plan and, on March 5, 2004, moved for the Entry of an Order Substantively Consolidating the Bankruptcy Estates. See 11 U.S.C. § 105(a). Over SummitBridge's objections, on May 21, 2004 the Bankruptcy Court entered the Order granting the substantive consolidation of all three Debtors subject to and conditioned upon the confirmation of a Chapter 11 reorganization plan. On May 24, 2004, SummitBridge filed its Notice of Appeal of the Order.

It is undisputed that the Debtors' financial affairs are entwined. 9800 Ashton Road owns commercial real estate that is leased to A.S.K. Plastics for use as a warehouse for staging raw

materials, work in process, and finished goods. There exist parent and intercorporate loan guarantees, and the companies' internal financial statements are fully consolidated. Further, each company is owned and controlled by one individual, Andrew Vartanian, and the Debtors operate and appear to be a single, integrated unit. N.T., April 26, 2004 21:1-22:7, 42:18-42:20.

Pursuant to various loan agreements, SummitBridge is a creditor of the Debtors with a total claim of approximately $6.7 million. SummitBridge holds a mortgage lien against the commercial real estate owned by 9800 Ashton Road, as well as liens against the real property, machinery, equipment, inventory, and accounts receivable of A.S.K. Plastics and Jamison. The value of 9800's commercial real estate is $775,000, less than thirteen percent of the total value of SummitBridge's collateral of $6,069,533. It is clear, and the parties agree, that Debtors are working on thin margins and are trying through reorganization to save the companies and the approximately 100 jobs they provide. Debtors believe that substantive consolidation will eliminate intercompany debt, ensure A.S.K. Plastics' continued use of 9800 Ashton Road's warehouse, improve the chances of the companies' survival, and make more likely confirmation of any reorganization plan. Indeed, the Debtors believe that reorganization cannot be achieved without consolidation. N.T., April 26, 2004, at 68:20-68:22.

From the outset, SummitBridge has objected to the bulk of Debtors' proposals, including the use of cash collateral, requests to employ numerous professionals, Debtors' procedures for interim compensation, Debtors' request for approval of a lease of nonresidential property, Debtors' request for approval of its stipulation with PECO Energy Company, Debtors' request for approval of a form of ballot and proposed solicitation procedures, and Debtors' proposed and amended disclosure statements. SummitBridge has sought a protective order, relief from the automatic stay, and moved

to compel the Debtors to permit access to Debtors' employees, documents, and premises. Following the conditional grant of substantive consolidation, SummitBridge, having filed the instant Appeal, unsuccessfully sought a stay of all reorganization proceedings pending that Appeal. See June 11, 2004 Order of Rufe, J. Denying SummitBridge's Emergency Motion to Stay. The Bankruptcy Court has observed that SummitBridge's litigation tactics "have certainly increased the cost and difficulty of this proceeding." Memorandum Opinion at 10.

Discussion

SummitBridge argues that under 28 U.S.C. § 158, it may appeal the Order. That statute provides:

> (a) The District Court 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 court, from other interlocutory orders and decrees of bankruptcy judges entered in cases and proceedings referred to bankruptcy judges under section 157 of this title.
>
> 28 U.S.C. § 158(a).

It is apparent that SummitBridge is incorrect. The Bankruptcy Court's Order is interlocutory, and under § 158(a), the Court does not have jurisdiction to hear this Appeal.

The Third Circuit has cautioned that in bankruptcy matters District Courts are obligated to balance traditional interpretations of finality with the need to "effectuate a practical termination of the matter." Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp., 920 F.2d 1127, 1132 (3d Cir. 1990) (internal citations omitted). The Third Circuit has been equally emphatic, however, in discouraging piecemeal litigation, even in bankruptcy matters. See In re White Beauty View, Inc., 841 F.2d 524, 526 (3d Cir. 1988) (noting that "inefficient use of judicial resources is as objectionable

in bankruptcy appeals as in other fields").

Under no reasonable construction of the law could the Order's *conditional* consolidation be viewed as effectuating a "practical termination" of anything. The Order expressly provides that it is contingent upon the confirmation of a Chapter 11 reorganization plan that contains an approved form of substantive consolidation. This is a classic interlocutory decree: it is conditioned upon a future occurrence. See In re American Colonial Broadcasting Corp., 758 F.2d 794, 801 (1st Cir. 1985). Should the Bankruptcy Court reject the reorganization plan, that will necessarily dispose of SummitBridge's objections to Debtors' consolidation.

SummitBridge's contention that "the Order is [the Bankruptcy Court's] 'final act' with respect to the issue of substantive consolidation" is, again, incorrect. See SummitBridge's Brief in Response to Debtors' Motion to Dismiss the Appeal at 6, n. 7. The Bankruptcy Court has emphasized the conditional nature of its Order. N.T., May 24, 2004 at 8:10. When a final reorganization plan is submitted to the Bankruptcy Court, SummitBridge is free to object to consolidation. Should the Bankruptcy Court confirm the plan and any consolidation provision in the plan, SummitBridge may appeal that order because it will be a final order. 28 U.S.C. § 158(a).

That the May 21st Order allows SummitBridge to object to the plan of all the Debtors--and not a plan for 9800 alone-- hardly results in any cognizable "prejudice" to Summitbridge warranting immediate appellate review. This is especially so because, as SummitBridge conceded before the Bankruptcy Court, its lien on the 9800 Ashton Road property continues after consolidation, should the Bankruptcy Court allow consolidation. Thus, as the only secured creditor of 9800, SummitBridge agrees that it will recover the full value of its secured interest, regardless of whether or not the Debtors' estates are consolidated. See N.T., April 26, 2004, at 19:15-19:17, 54:20-55:8.

SummitBridge also asks this Court to treat the Notice of Appeal as a motion seeking leave to appeal pursuant to Rule 8003(c) of the Federal Rules of Bankruptcy Procedure. In this circumstance, I am obligated to apply the standards enumerated in 28 U.S.C. § 1292(b) governing interlocutory appeals to the Courts of Appeal from District Court orders. In re Marvel Entertainment Group, Inc., 209 B.R. 832, 837 (Bankr. D. Del. 1997) (citing In re Bertoli, 812 F.2d 136, 139 (3d Cir. 1987)). A party may appeal an interlocutory order if the District Court certifies that

> (1) the order from which the appeal is taken involves a controlling question of law; (2) there is substantial ground for difference of opinion as to the controlling question of law; and (3) an immediate appeal may materially advance the ultimate determination of the litigation.
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> 29 U.S.C. § 1292(b).

Further, an appellant must demonstrate "exceptional circumstances [to] justify the hearing of an appeal before a final judgment is rendered." In re Neshaminy Office Building Associates, 81 B.R. 301, 303 (E.D. Pa. 1987).

Here, I could not possibly certify that an immediate appeal would materially advance the ultimate determination of this litigation. On the contrary, the piecemeal litigation SummitBridge has pursued would only delay such a determination. Further, there is no controlling legal question as to which there is a substantial ground for difference of opinion. SummitBridge relies here on a Ninth Circuit holding that *unconditional* substantive consolidation is a final, appealable order. See In re Bonham, 229 F.3d 750 (9th Cir. 2000). Again, the Order at issue here is explicitly conditional. Should the Bankruptcy Court issue a final order that includes substantive consolidation, that will create a controlling legal question that SummitBridge may challenge. In addition, although the

Debtors' finances are not as entangled as those of some entities whose consolidation has been allowed in other cases, I cannot conclude that allowing conditional consolidation here creates "exceptional circumstances" and a "substantial ground for difference of opinion." See, e.g., Nesbit v. Gears Unlimited, Inc., 347 F.3d 72 (3d Cir. 2003); Eastgroup Properties v. Southern Motel Assoc. Ltd., 935 F.2d 245 (11th Cir. 1991).

Finally, Debtors have suggested that SummitBridge seeks only to encumber this Chapter 11 reorganization and force the Debtors into Chapter 7 liquidation where SummitBridge, as 9800's only secured creditor, could possibly expedite its recovery. N.T., April 26, 2004, at 70:2-70:5. Liquidation of the Debtors--along with the 100 jobs they provide--ultimately may or may not be avoidable here. Any proposed reorganization plan should not, however, die a death from a thousand cuts suffered through endless motions, objections, and the like intended primarily to create delay and expense. Should the Bankruptcy Court determine that any party is litigating abusively or in bad faith, that Court has appropriate sanctions available to it. See, e.g., FED. R. BANKR. P. 9011; 28 U.S.C. § 1927.

An appropriate order follows.

BY THE COURT:

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PAUL S. DIAMOND, J.

Dated: August 24, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	CIVIL ACTION
	:	
A.S.K. PLASTICS, INC., et al.	:	
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Debtors	:	
	:	NO. 04-2701

O R D E R

AND NOW, this 24th day of August, upon consideration of the Debtors' Joint Motion to Dismiss the Appeal of SummitBridge National Investments LLC, SummitBridge's Response, and all related submissions, it is hereby **ORDERED** that the Motion to Dismiss the Appeal is **GRANTED**.

The Clerk of Court shall close this matter for statistical purposes.

PAUL S. DIAMOND, J.