

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

**In re ERIC E. POWELL,
Debtor**

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**CIVIL ACTION
NO. 06-4085**

ORDER AND MEMORANDUM

ORDER

AND NOW this 2nd day of November, 2006, upon consideration of the Motion for Leave to Appeal Bankruptcy Court Order (Doc. No. 50, filed August 31, 2006) and Plaintiff's Response to Defendant's Motion for Leave to Appeal Interlocutory Order (Doc. No. 57, filed September 6, 2006), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that the Motion for Leave to Appeal Bankruptcy Court Order is **DENIED**.

MEMORANDUM

I. BACKGROUND

On February 3, 2005, Chapter 13 debtor, Eric Powell, filed a complaint in the Bankruptcy Court for the Eastern District of Pennsylvania. Debtor asked the Bankruptcy Court to quiet title to a property located in Brooklyn, New York ("the New York property") in debtor. According to the Complaint, debtor's father ("father") and mother ("mother") purchased the New York property in 1987. On April 29, 1998, father and mother executed a Special Power of Attorney, authorizing debtor to execute legal instruments on their behalf.¹ On March 22, 2001, father signed a trust agreement, transferring title of the New York property to defendant, Jay Best, as trustee, for the benefit of Nina and Mendel Cohen, debtor's sister and brother-in-law. In October of 2001, father

¹ Mother died in December of 1998.

died. Father's will of November 28, 1995 named debtor as sole heir.² Father's will was admitted to probate on July 25, 2003.

Debtor asked the Bankruptcy Court to invalidate father's trust agreement on the ground that Nina and Mendel Cohen fraudulently induced father to deed the property to Best when father lacked the mental and legal capacity to do so. Defendant, Best, moved for summary judgment, alleging that debtor's claim falls within the probate exception to federal jurisdiction.

II. THE DECISION OF THE BANKRUPTCY COURT

In Marshall v. Marshall, 126 S.Ct. 1735 (2006), the Supreme Court revisited the probate exception, which the Court characterized as a "narrow exception" to federal jurisdiction. Marshall, 126 S.Ct. at 1744. Recognizing that "[l]ower federal courts have puzzled" over the doctrine, the Supreme Court explained:

[T]he probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

Marshall, 126 S.Ct. at 1748.

Applying Marshall to this case, the Bankruptcy Court denied defendant's motion for summary judgment in a Memorandum and Order dated August 18, 2006. Bankruptcy Judge Jean K. Fitzsimon ruled that the Bankruptcy Court had jurisdiction to determine whether father's trust was valid for two reasons. First, Bankruptcy Judge Fitzsimon concluded that the disputed trust was an

² Debtor was named sole heir in the event that father's wife predeceased father.

inter vivos trust, and not a will substitute. Second, Bankruptcy Judge Fitzsimon concluded that a judgment on the validity of the trust would not interfere with probate proceedings because the New York property was not part of father's estate.³ As a final point, Bankruptcy Judge Fitzsimon concluded that state legislation, 20 Pa.C.S.A. § 711, did not divest the Bankruptcy Court of jurisdiction.

The question before this Court is whether to grant an interlocutory appeal of the decision of the Bankruptcy Court to deny the motion for summary judgment.

III. THE LEGAL STANDARD

Pursuant to 28 U.S.C. § 158(a), this Court has jurisdiction to hear appeals from orders of the Bankruptcy Court. Interlocutory appeals from Bankruptcy Court decisions are permitted only with leave from this Court. 28 U.S.C. § 158(a)(3).

Neither § 158 nor the Bankruptcy Rules provide criteria to determine whether to grant leave to file an interlocutory appeal. Courts faced with this question have applied 28 U.S.C. § 1292(b), which sets forth the requirements for interlocutory appeals from district courts to the courts of appeals. See, e.g., In re Sandenhill, Inc., 304 B.R. 692, 694 (E.D. Pa. 2004); In re Lavelle Aircraft Co., 1995 WL 334325, *2 (E.D. Pa. June 2, 1995); Sterling Supply Corp. v. Mullinax, 154 B.R. 660, 662 (E.D. Pa. 1993).

Under § 1292(b), a court should grant leave to file an interlocutory appeal where three

³ See Marshall, 126 S.Ct. at 1749 (interpreting the bar on 'interference' with probate proceedings as "the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*.") (quoting Markahm v. Allen, 326 U.S. 490 (1946)); see also Abercrombie v. Andrew College, 438 F. Supp. 2d 243, 256 (S.D.N.Y. 2006) (finding the probate exception inapplicable where claim did not require federal court to distribute assets of decedent's estate, but only to determine whether additional assets should be added to the estate).

requirements are met: (1) the decision involves a controlling question of law; (2) there is a substantial ground for difference of opinion; and (3) immediate appeal may materially advance the ultimate termination of the litigation. Sterling Supply Corp. v. Mullinax, 154 B.R. 660, 662 (E.D. Pa. 1993) (citing In re School Asbestos Litigation, 977 F.2d 764, 777 (3d Cir. 1992)). Moreover, an interlocutory appeal is appropriate only in exceptional circumstances. See, e.g., Milbert v. Bison Laboratories, Inc., 260 F.2d 431, 433 (3d Cir. 1958); Johnson v. Columbia Casualty Co., 2006 WL 1805979, *1 (E.D. Pa. June 29, 2006); In re Resource America Securities Litigation, 2000 WL 1053861, *10 (E.D. Pa. July 26, 2000).

IV. DISCUSSION

With respect to the first factor, the Third Circuit has defined a ‘controlling question of law’ to ‘encompass at the very least every order which, if erroneous, would be reversible error on final appeal.’” Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3d Cir. 1974). Defendant clearly satisfies this requirement. If erroneous, the decision of the Bankruptcy Court to deny summary judgment would be reversible error. Nevertheless, the Court concludes that defendant does not satisfy the remaining requirements of § 1292(b).

Mere disagreement with a ruling does not constitute a substantial ground for difference of opinion, as required under the second factor for interlocutory appeal. Cardona v. General Motors Corporation, 939 F. Supp. 351, 353 (D.N.J. 1996). Nor is a void or absence of judicial opinion sufficient to satisfy this requirement. In re Magic Restaurants, Inc., 202 B.R. 24, 26 (D. Del. 1996); Max Daetwyler Corp. v. R. Meyer, 575 F. Supp. 280, 283 (E.D. Pa. 1983). Instead, a substantial ground for difference of opinion “must arise out of genuine doubt as to the correct legal standard.” P. Schoenfeld Asset Management LLC v. Cendant Corp., 161 F. Supp. 2d 355, 358 (D.N.J. 2001); Cardona, 939 F. Supp. at 353.

In this case, defendant agrees with the Bankruptcy Court that Marshall is the controlling authority. Moreover, defendant has not identified any case, post-Marshall, that suggests that a federal court may not determine whether an *inter vivos* trust is valid where the *res* of the trust is not part of a decedent's estate. The Court concludes, therefore, that defendant has not established a substantial ground for difference of opinion as required for interlocutory appeal.

To satisfy the third requirement of § 1292(b) a moving party must also demonstrate that interlocutory appeal will materially advance the termination of the litigation. Singh v. Dailmer-Benz, 800 F.Supp. 260, 263 (E.D. Pa. 1992). Defendant has not even attempted to persuade the Court of this point. On this issue the Court cannot conclude on the present state of the record that an interlocutory appeal will expedite the termination of the litigation. Thus, the Court concludes that defendant has not fulfilled this requirement.

Finally, the Court recognizes that leave to file an interlocutory appeal should be granted sparingly. See In re Magic Restaurants, Inc., 202 B.R. at 26-27. Defendant has not established that the circumstances of this case are so extraordinary as to overcome the presumption against piecemeal litigation.

V. CONCLUSION

Defendant has not established that there is substantial ground for difference of opinion, or that immediate appeal will advance this litigation. Nor has defendant demonstrated exceptional circumstances that warrant interlocutory appeal. Accordingly, the Court denies the Motion for Leave to Appeal Bankruptcy Court Order pursuant to 28 U.S.C. §§ 158(a)(3) and 1292(b).

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.