NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 04-002

Bankruptcy Case No. 03-11854-CJK

AMERIQUEST MORTGAGE COMPANY,
Appellant,

v.

ROBERT J. PINGARO,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Carol J. Kenner, U.S. Bankruptcy Judge)

Before
LAMOUTTE, HAINES, KORNREICH,
U.S. Bankruptcy Appellate Panel Judges.

Alexander L. Cataldo, Esq.,
on brief for Appellant.

Robert J. Pingaro, *pro se*,
on brief for Appellee.

June 7, 2004

Kornreich, U.S. Bankruptcy Appellate Panel Judge.

Ameriquest Mortgage Company appeals a Bankruptcy Court order overruling its objection to confirmation of the Debtor's Chapter 13 plan. Because the order did not confirm the Debtor's plan, it is not a final order from which appeal may be taken as of right. The appeal is therefore interlocutory. We conclude that the order does not meet the criteria of any of the three precepts conferring discretionary authority for this Panel to exercise appellate jurisdiction over interlocutory appeals. Accordingly, the appeal is **DISMISSED** for lack of jurisdiction.

BACKGROUND

The Debtor and his wife own a multi-family dwelling located in Saugus, Massachusetts (the "Property"), which is their principal residence. In 1999, the Pingaros executed in favor of Ameriquest a promissory note and a mortgage on the Property. The loan application disclosed $2,445 per month in gross rental income, and the appraisal on which Ameriquest relied in making the loan disclosed that the Property contained apartments.[1] The Property is zoned as a three-family residence. However, the loan application was made as a residential loan, and the mortgage does not contain an assignment of rent clause or a one-to-four family rider.

On March 7, 2003, the Debtor filed a voluntary Chapter 13 petition; shortly thereafter, he filed his schedules and Chapter 13 plan. In September, the Debtor filed an amended Chapter 13 plan. The amended plan sought to cram down Ameriquest's interest in the Property to $16,000.00. Ameriquest filed a limited objection to confirmation of the amended plan, asserting that the amended plan failed to account for the entire amount of pre-petition arrears, that no

[1]The facts regarding the loan application, appraisal, and zoning of the Property are not contested by the parties. The Bankruptcy Court summarized these facts at the December 11, 2003 hearing, and both parties agreed that the summary was fair. See Transcript at 25-26.

hearing had been held on the determination of value for purposes of establishing the secured status of a creditor as required under 11 U.S.C. § 506(a), and that the loan cannot be subject to a § 1322 "cram down" because the Property "has been held out to Ameriquest as being a single-family dwelling and has no indicia of a commercial loan." Lastly, Ameriquest asserted that if the Debtor were to claim that the loan falls outside the anti-modification provisions of § 1322, Ameriquest would challenge such a claim under 11 U.S.C. § 523 for fraud.

The Debtor filed an objection to Ameriqest's objection. Ameriquest filed a response to the Debtor's objection, arguing that the Debtor had provided no evidence that Ameriquest's secured interest in the Property may be modified. More specifically, Ameriquest asserted that the Debtor had failed to properly introduce evidence that the Property was income producing, that the Property is a legal multi-family residence, or the value of the Property as it relates to the feasibility of the plan. Ameriquest further argued that the Debtor is collaterally estopped from attempting to modify Ameriquest's secured interest as the matter had been previously decided in another court. Lastly, Ameriquest argued that the Debtor is unable to discharge Ameriquest's debt pursuant to § 727, as this is the Debtor's eighth bankruptcy filing.

The Bankruptcy Court held a hearing on the matter, found that the loan is modifiable under § 1322 and overruled Ameriquest's objection to confirmation of the Debtor's plan. The order did not confirm the Debtor's plan. This appeal followed.

JURISDICTION

A bankruptcy appellate panel may hear appeals from "final judgments, order and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and

decrees [pursuant to 28 U.S.C. § 158 (a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646 (citations omitted). An interlocutory order "'only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.'" Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). A bankruptcy appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. See In re Georg E. Bumpus, Jr. Constr. Co., 226 B.R. 724 (B.A.P. 1st Cir. 1998).

DISCUSSION

The appeal is taken from the Bankruptcy Court's order overruling Ameriquest's objection to the Debtor's Chapter 13 plan. An order overruling an objection to a Chapter 13 plan is not a final order where the Chapter 13 plan is not confirmed. McDonald v. Sperna (In re Sperna), 173 B.R. 654, 657 (B.A.P. 9th Cir. 1994). Here, the order overruling Ameriquest's objection to confirmation of the Debtor's Chapter 13 plan did not confirm the Debtor's plan. Indeed, at oral argument the parties indicated that the Debtor's plan remains unconfirmed. Thus, the order did not end the ligation on the merits of confirmation. See Bank of New England, 218 B.R. at 646. Instead, the order is an interlocutory order that only decided an intervening matter pertaining to confirmation. Further steps are required in order to enable the bankruptcy court to adjudicate the matter of confirmation. See id. The order is thus an interlocutory order from which there is no appeal as of right. Id.

The Panel does, however, have discretionary authority to grant leave to appeal from interlocutory orders under one of three precepts conferring appellate jurisdiction over interlocutory appeals: the collateral order doctrine; the application of the criteria governing § 158(a)(3) review of interlocutory orders; or the Forgay-Conrad doctrine. See 28 U.S.C. § 158(a)(3).

The collateral order doctrine refers to "'a small class' of decisions, termed 'collateral orders,' 'which finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" Bank of New England, 218 B.R. at 649 (citations omitted). A reviewable collateral order is an order that has: "(1) conclusively determined, (2) an important legal question, (3) completely separate from the merits of the primary action, and (4) be effectively unreviewable on appeal from a final judgment on the remaining counts." Id.

Application of § 158(a)(3) review of interlocutory orders mirrors application of § 1292(b). Id. at 652. "Section 158 provides no express criteria to guide our discretion, but most courts utilize the same standards as govern the propriety of district courts' certification of interlocutory appeals to the circuit courts under § 1292(b)." Id. (citations omitted). "Section 1292(b) permits appellate review of 'certain interlocutory orders, decrees and judgments . . . to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties.'" Id. at 652 n.17. "To ascertain whether we should exercise our discretion . . . we will consider whether (1) the 'order involves a controlling question of law' (2) 'as to which there is substantial ground for difference of opinion,' and (3) whether 'an

immediate appeal from the order may materially advance the ultimate termination of the litigation.'" Id. at 652.

The Forgay-Conrad doctrine "has been employed to bestow appellate jurisdiction over interlocutory orders when 'irreparable injury' to the aggrieved party may attend delaying appellate review until the litigation is over." Id. at 649 n.8 (citing In re American Colonial Broad. Corp., 758 F.2d at 803).

We conclude that appellate review of the order is not warranted under any of the aforementioned criteria. The order does not conclusively determine an important legal question that is completely separate from the merits of the action, and is not effectively unreviewable on appeal from a final judgment. See id. at 649. The order does not involve a controlling question of law of which there is substantial ground for difference of opinion, and immediate appeal of the order will not materially advance the ultimate termination of the litigation. See id. at 652. Lastly, Ameriquest has not established irreparable harm. See id. at 649 n.8.

CONCLUSION

Because it did not confirm the Debtor's plan, the Bankruptcy Court order overruling Ameriquest's objection to the Debtor's Chapter 13 plan is not a final order. Moreover, the order does not meet the criteria for any of the three precepts under which this Panel may exercise its discretion to hear an interlocutory appeal. Accordingly, the appeal is **DISMISSED** for lack of jurisdiction.