FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NOS. PR 15-046, PR 15-048

Bankruptcy Case No. 08-07752-BKT
Adversary Proceeding No. 09-00258-BKT

INDUSTRIAS VASSALLO, INC.,
Debtor.

UNITED SURETY & INDEMNITY COMPANY,
Plaintiff-Appellant / Cross-Appellee,

v.

PUERTO RICO ELECTRIC POWER AUTHORITY,
Defendant-Appellee / Cross-Appellant.

BAP NO. PR 15-054

Bankruptcy Case No. 08-07752-BKT
Adversary Proceeding No. 09-00258-BKT

INDUSTRIAS VASSALLO, INC.,
Debtor.

UNITED SURETY & INDEMNITY COMPANY,
Plaintiff-Appellant,

v.

PUERTO RICO ELECTRIC POWER AUTHORITY,
Defendant-Appellee.

BAP NO. PR 15-055

Bankruptcy Case No. 08-07752-BKT
Adversary Proceeding No. 09-00258-BKT

INDUSTRIAS VASSALLO, INC.,
Debtor.

UNITED SURETY & INDEMNITY COMPANY,
Plaintiff-Appellant,

v.

PUERTO RICO ELECTRIC POWER AUTHORITY,
Defendant-Appellee.

Appeals from the United States Bankruptcy Court
for the District of Puerto Rico
(Hon. Brian K. Tester, U.S. Bankruptcy Judge)

Before
Bailey, Finkle, and Fagone,
United States Bankruptcy Appellate Panel Judges.

Héctor Saldaña Egozcue, Esq., Carlos Lugo Fiol, Esq., and Jose A. Sánchez Girona, Esq., on brief for Plaintiff-Appellant/Cross-Appellee.

Eduardo J. Corretjer Reyes, Esq., on brief for Defendant-Appellee/Cross-Appellant.

August 5, 2016

Fagone, U.S. Bankruptcy Appellate Panel Judge.

United Surety & Indemnity Company ("USIC") appeals from a bankruptcy court judgment dismissing an adversary proceeding (the "Judgment of Dismissal") brought by Industrias Vassallo, Inc. (the "Debtor") against one of its suppliers, Puerto Rico Electric Power Authority ("PREPA"). USIC also appeals from nine other orders (collectively, the "Interlocutory Orders"), including an order "denying" USIC's amended complaint in intervention and an order denying a request for reconsideration.[1] PREPA cross-appeals from the Judgment of Dismissal.

We **AFFIRM** the Judgment of Dismissal and decline to consider USIC's appeals from the Interlocutory Orders. We lack jurisdiction to hear PREPA's cross-appeal and so that cross-appeal is **DISMISSED**.

---

[1] The Interlocutory Orders are: (1) the December 19, 2013 Opinion and Order granting the motions for summary judgment filed by PREPA and dismissing USIC's Complaint in Intervention ("the December 2013 Partial Summary Judgment Order"); (2) the April 7, 2014 Opinion and Order denying USIC's motion for reconsideration of the December 2013 Partial Summary Judgment Order (the "First Denial of Reconsideration"); (3) the October 2, 2014 Opinion and Order declining to award PREPA interest and denying USIC's second request for reconsideration of the December 2013 Partial Summary Judgment Order (the "Second Denial of Reconsideration"); (4) the October 2, 2014 Judgment (the "October 2014 Judgment") memorializing the denial of PREPA's request for interest and the denial of USIC's second request for reconsideration of the December 2013 Partial Summary Judgment Order; (5) the December 11, 2014 Partial Judgment (the "December 2014 Partial Judgment"); (6) the December 30, 2014 Amended Partial Summary Judgment (the "December 2014 Amended Partial Judgment"); (7) the June 2, 2015 order granting a motion for voluntary dismissal (the "Voluntary Dismissal Order"); (8) the June 2, 2015 order "denying" USIC's Amended Complaint in Intervention (the "Disallowance of Amended Complaint in Intervention"); and (9) the July 31, 2015 Opinion and Order denying USIC's motion to reconsider the Disallowance of Amended Complaint in Intervention (the "Denial of Reconsideration of Amended Complaint in Intervention").

BACKGROUND

The procedural history is lengthy and somewhat complex. A methodical description of that history informs our decision.[2]

I. Prepetition Events

PREPA supplied electricity to the Debtor. In 1996, USIC issued a bond (the "Bond") guarantying the Debtor's payments to PREPA for electricity and equipment. The Bond was originally for $250,000, but was later increased to $450,000. USIC cancelled the Bond effective August 17, 2008, and, about three months later, the Debtor filed a petition under chapter 11.

---

[2] Before we provide that description, however, two matters deserve early but brief mention. First, USIC's single notice of appeal identified ten judgments or orders. USIC's appeal was later separated into three distinct appeals, each with its own docket number. PREPA's cross-appeal was also assigned its own docket number. Given the extensive procedural history of the adversary proceeding and the nexus between the issues raised in the four appeals, this opinion addresses all of them. Second, we considered certain provisions of the recently-enacted Puerto Rico Oversight, Management, and Economic Stability Act, S. Res. 2328, Pub. L. No. 114-187 (2016) ("PROMESA"). Assuming arguendo that PREPA is a territorial instrumentality of the Commonwealth of Puerto Rico, see PROMESA, § 5(11) and (19) (defining "Government of Puerto Rico" to include the territorial instrumentalities of the Commonwealth of Puerto Rico and defining "territorial instrumentalit[ies]" to include public corporations of a territory), PROMESA's stay provisions are not implicated in these appeals because the adversary proceeding against PREPA and all of these appeals were commenced long before December 18, 2015. See PROMESA, § 405(c) (providing the "establishment of an Oversight Board for Puerto Rico in accordance with section 101 [of PROMESA] does not operate as a stay . . . of a judicial, administrative, or other action or proceeding against the Government of Puerto Rico that was commenced on or before December 18, 2015"). Accordingly, PROMESA creates no impediment to the issuance of our decision in these appeals.

II. Postpetition Events

Two weeks after the chapter 11 filing, PREPA notified USIC that the Debtor owed $2.4 million for prepetition electrical services, and made a demand under the Bond.[3] The next day, PREPA filed a proof of claim for that amount.

Months passed without a response from USIC. PREPA again demanded payment under the Bond. USIC finally acknowledged receipt of PREPA's demand in September 2009, and asked the Debtor to furnish information regarding its defenses to the claim. The Debtor replied that it had a setoff defense based on a $3.4 million breach of contract claim against PREPA.

III. The Pleadings in the Adversary Proceeding

In December 2009, the Debtor commenced an adversary proceeding against PREPA with a single-count complaint, asserting that PREPA owed $3.4 million for damages resulting from interruptions and/or fluctuations in the delivery of electrical service to the Debtor's manufacturing plant. Accordingly, the Debtor asked the bankruptcy court to disallow PREPA's claim and to enter a judgment against PREPA in the amount of $1.0 million.

USIC promptly moved to intervene. In its accompanying complaint in intervention (the "Complaint in Intervention"), USIC alleged that it was not liable under the Bond because PREPA's liability to the Debtor exceeded the Debtor's liability to PREPA. In its prayer for relief, USIC sought only a declaratory judgment that it had no liability to PREPA under the Bond. The bankruptcy court granted USIC's motion to intervene.

PREPA answered the Complaint in Intervention, and asserted a counterclaim against USIC. PREPA's counterclaim sought $450,000, plus interest, costs, and attorneys' fees.

---

[3] Dollar amounts have been rounded, as specific amounts are not required to explain our decision.

PREPA alleged, inter alia, that USIC had "acted obstinately or frivolously in denying PREPA's claim and in failing to respond to PREPA's claim within the shortest period possible . . . ."

In September 2012—almost three years after commencing the adversary proceeding—the Debtor obtained leave to amend its complaint by reducing the amount of its claim against PREPA from $3.4 million to $1.1 million. Accordingly, in its prayer for relief of the amended complaint (the "Amended Complaint"), the Debtor asked the bankruptcy court to reduce PREPA's proof of claim to $1.3 million. PREPA answered the Amended Complaint, alleging that the Debtor owed it at least $2.4 million in prepetition charges and requesting the dismissal of the Amended Complaint, plus costs and attorneys' fees.

IV. The Motions for Summary Judgment

PREPA then filed two summary judgment motions. In October 2012, PREPA filed its first motion for partial summary judgment on its counterclaim against USIC, on the theory that the Debtor had admitted in the Amended Complaint that it owed PREPA over $1.0 million more than the amount PREPA allegedly owed to the Debtor. Two months later, PREPA filed a second motion for partial summary judgment, this time asking the bankruptcy court to enter summary judgment in its favor on the Complaint in Intervention and to dismiss that complaint. PREPA argued that USIC's claim was premised on the Debtor's "admittedly non-existent" setoff right. USIC opposed both summary judgment requests, contending that the Debtor had miscalculated its own damages, which, according to USIC, exceeded $2.4 million. In other words, according to USIC, the Debtor had a complete offset and thus owed nothing to PREPA.

Thereafter, the bankruptcy court entered the December 2013 Partial Summary Judgment Order, granting PREPA's motions for partial summary judgment against USIC, dismissing the Complaint in Intervention, awarding PREPA the amount of the Bond, and denying, without

prejudice, PREPA's request for interest and attorneys' fees. The court reasoned, in relevant part:

> There is no dispute that the USIC bond is valued at $450,000.00. Such amount will need to be paid since according to the [Debtor's] Amended Complaint the damages they sustained total $1,053,036.87. Thus, [the Debtor] would still owe PREPA at least $1,382,216.61 and USIC would be liable to PREPA for the full $450,000 under the Bond.
>
> . . .
>
> This Court recognizes that PREPA also requests damages in the form of interest and attorneys['] fees. Although there are some contentions between the parties to this point, this Court cannot address this instant issue because of the lack of evidence demonstrating PREPA is entitled to such an award. The parties are therefore ordered to simultaneously brief the court on this issue thirty (30) days from the date of this Opinion and Order.

USIC requested reconsideration of the December 2013 Partial Summary Judgment Order. In response, the bankruptcy court entered the First Denial of Reconsideration concluding that USIC had failed to establish a manifest error of law. PREPA and USIC then briefed their positions regarding PREPA's request for interest and attorneys' fees and, in its brief, USIC again requested reconsideration of the December 2013 Partial Summary Judgment Order.

In October 2014, the bankruptcy court entered the Second Denial of Reconsideration, in which it denied: (1) PREPA's request for prejudgment and postjudgment interest as well as its request for attorneys' fees; and (2) USIC's renewed request for reconsideration of the December 2013 Partial Summary Judgment Order. The bankruptcy court concurrently entered the October 2014 Judgment, in which it memorialized the rulings of the Second Denial of Reconsideration as follows:

> [I]t is now ADJUDGED and DECREED that PREPA's Motion for Summary Judgment against Intervenor USIC is DENIED as to the awarding of pre-judgment interest, attorney's fees and post[-]judgment interest. Furthermore, USIC's request to reconsider the court's Opinion and Order of December 2013 . . . is DENIED.

In an effort to create finality for appeal purposes, USIC filed a motion for the entry of final judgment. With PREPA's consent, the bankruptcy court entered the December 2014 Partial Judgment, stating, in pertinent part:

> PREPA's Motions for Partial Summary Judgment Against United Surety & Indemnity Company [Dkt. No.'s 138, 150 & 149] are GRANTED as to the counterclaim and the dismissal of USIC's [C]omplaint in [I]ntervention, and DENIED IN PART, without prejudice, as to the additional interest and the requested attorneys['] fees.

The December 2014 Partial Judgment determined only that USIC owed the penal sum of the Bond; it did not rule on PREPA's requests for interest or attorneys' fees.

USIC then asked the bankruptcy court to amend the December 2014 Partial Judgment, for the purpose of clarifying that there was no just reason for delay in the entry of final judgment on PREPA's counterclaim and on USIC's Complaint in Intervention. The bankruptcy court responded by entering the December 2014 Amended Partial Judgment, which included a certification under Rule 54(b) that there was "no just reason for further delay" in the entry of final judgment.[4]

On January 9, 2015, USIC appealed from the December 2014 Amended Partial Judgment, as well as the December 2013 Partial Summary Judgment Order, the First Denial of Reconsideration, the Second Denial of Reconsideration, the October 2014 Judgment, and the December 2014 Partial Judgment. PREPA challenged the finality of those orders. Suspecting a lack of finality, the Panel issued an order to show cause (the "Order to Show Cause"), directing

---

[4] All references to a "Rule" are to the Federal Rules of Civil Procedure.

USIC to demonstrate why its appeal should not be dismissed for lack of jurisdiction. It indicated that the bankruptcy court might have issued the Rule 54(b) certification improvidently, thus implicating the scope of its appellate jurisdiction. The Panel reasoned, in pertinent part:

> The proceedings to resolve the dispute between PREPA and the Debtor remain pending in the bankruptcy court, and the bankruptcy court has not explicitly precluded the reassertion of either the Complaint in Intervention or PREPA's request for attorneys' fees and interest.
>
> . . .
>
> The fact that the bankruptcy court issued a Rule 54(b) statement does not automatically render the Amended Partial Judgment final and appealable. As the First Circuit instructed, "[d]espite the district court's Rule 54(b) certification . . . , we cannot accept jurisdiction . . . unless we are satisfied that the court's order is properly before us." [N.C. Nat'l Bank v.] Montilla, 600 F.2d [333,] 334 [(1st Cir. 1979)]; see also Nieman v. Grange Mut. Ins., Co., No. 12-3250, 2013 WL 632252, at *2 (C.D. Ill. Feb. 20, 2013) (stating Rule 54(b) "is not meant to provide district courts with the option of certifying issues for interlocutory review"). Although no party has challenged the Rule 54(b) certification in this case, we are "duty bound to take the matter up *sua sponte*," as "it implicates the scope of our appellate jurisdiction." Spiegel v. Trs. of Smith Coll., 843 F.2d 38, 43 (1st Cir. 1988). "The required jurisdictional analysis comprises two steps." Credit Francais Int'l, S.A. v. Bio-Vita, Ltd., 78 F.3d 698, 706 (1st Cir. 1996). "First, we inquire whether the trial court action underlying the judgment disposed of all the rights and liabilities of at least one party as to at least one claim." Id. (citations omitted). As discussed above, it appears that USIC may assert its claim which was the subject of the Complaint in Intervention at any time until the adjudication of the Amended Complaint is concluded.

United Sur. & Indem. Co. v. P.R. Electric Power Auth. (In re Industrias Vassallo, Inc.), BAP No. PR 15-002 (B.A.P. 1st Cir. Feb. 20, 2015) (footnote omitted).

Unpersuaded by USIC's response to the Order to Show Cause, the Panel dismissed the appeal, ruling that the record "provide[d] no clear reason why the partial, final judgment should have issued. To the contrary, it appears that there are significant shared issues of fact between

the claim adjudicated on summary judgment and the claims left pending in the bankruptcy court."[5]

V. The Dismissal of the Adversary Proceeding

Nearly six years after commencing the adversary proceeding, the Debtor moved for a voluntary dismissal pursuant to Rule 41(a) (the "Voluntary Dismissal Motion") on May 22, 2015. The Debtor's justification was brief:

> After extensive discovery and analysis, [the Debtor] has realized that the objective of the complaint will not be attained as the disallowance of [PREPA's] proof of claim . . . is not achievable and will not obtain any monetary redress. Therefore, the action pursued by [the Debtor] is moot. It is in the best interest of the parties and this Court that the case be dismissed pursuant to [Bankruptcy] Rule 7041.

Within hours after the Debtor's filing of the Voluntary Dismissal Motion—but almost a year and a half after the dismissal of its Complaint in Intervention—USIC filed an amended complaint in intervention (the "Amended Complaint in Intervention"), alleging that PREPA was liable to indemnify the Debtor for $4.9 million in damages. USIC did not seek or obtain leave to file the Amended Complaint in Intervention; it simply filed the amended pleading. The prayer for relief requested only a declaratory judgment regarding USIC's liability (or lack thereof) under the Bond. USIC simultaneously filed an "Informative Motion," stating it was "well within its rights" to file the Amended Complaint in Intervention. In support, USIC relied exclusively on its interpretation of the Order to Show Cause as authorization for it to "reassert its Complaint in Intervention at any time until the adjudication of the Amended Complaint . . . ."

---

[5] This was not the first appeal dismissed by the Panel on finality grounds in this case. Two previous appeals by USIC and one by PREPA were dismissed due to the absence of final orders. The current set of appeals marks the fifth attempt to obtain appellate review of various decisions of the bankruptcy court in this case.

Thereafter, PREPA represented that it did not object to the voluntary dismissal of the Amended Complaint and asked the bankruptcy court to adjourn an upcoming status conference. USIC, in turn, urged the court to proceed with the status conference, arguing that a scheduling order was necessary "to put the case back on track." USIC did not, however, object to the Voluntary Dismissal Motion.

On June 2, 2015, the bankruptcy court entered three orders. First, it entered the Voluntary Dismissal Order. Second, it entered the Disallowance of Amended Complaint in Intervention, whereby it "den[ied the Amended Complaint in Intervention] due to the voluntary dismissal of the adversary proceeding." In the third order, the bankruptcy court adjourned the status conference.

On June 4, 2015, USIC filed a motion for reconsideration of the Disallowance of Amended Complaint in Intervention. Without citing any legal authority for the requested relief, USIC simply reiterated its contention that the Order to Show Cause permitted it to "reassert" its Complaint in Intervention at any time until the adjudication of the Amended Complaint. Under this theory, USIC maintained that it had until June 2, 2015, the date of the Voluntary Dismissal Order, "to reassert its Complaint in Intervention." Thus, according to USIC, the filing of the Amended Complaint in Intervention on May 22 was timely and permissible.

On July 31, 2015, the bankruptcy court entered the Denial of Reconsideration of Amended Complaint in Intervention, explaining:

> Given the fact that [the Debtor] voluntarily dismissed its complaint against PREPA, along with the fact that USIC's complaint in intervention against PREPA does not pertain to [the Debtor], nor would USIC's complaint in intervention have any conceivable effect on [the Debtor's] bankruptcy estate, this Court finds that it lacks jurisdiction to entertain USIC's complaint in intervention. The bankruptcy court is not the correct forum for a proceeding between two non-debtor parties which does not affect the bankruptcy estate.

Also on July 31, 2015, the bankruptcy court entered the Judgment of Dismissal, dismissing the adversary proceeding. The Judgment of Dismissal was predicated on the Voluntary Dismissal Order entered in the prior month. These appeals followed.

POSITIONS OF THE PARTIES

I. USIC

USIC maintains that when the bankruptcy court dismissed the adversary proceeding, it erred by failing to consider USIC's rights and interests, and, more particularly, the pendency of the Amended Complaint in Intervention. USIC contends that the dismissal unfairly deprived it of its only defense against PREPA's claim—the right of setoff. USIC also persists in its interpretation of the Order to Show Cause as unconditional license to amend the Complaint in Intervention.

II. PREPA

According to PREPA, the Amended Complaint in Intervention "was a nullity and of no legal effect" as it was filed without leave, and the bankruptcy court lacked jurisdiction to consider it. PREPA also rejects USIC's argument, premised on the Order to Show Cause, that it could reassert the Complaint in Intervention at any time prior to the entry of a final judgment.

JURISDICTION

Our first task is determining whether we have jurisdiction over these appeals. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724, 725-26 (B.A.P. 1st Cir. 1998) (citation omitted). For the reasons set forth below, we conclude that we have jurisdiction over USIC's appeals, but not PREPA's cross-appeal.

I. The Appeals by USIC

"We may consider appeals from final orders." Hunnicutt v. Green (In re Green), BAP No. MB 13-061, 2014 WL 3953470, at *4 (B.A.P. 1st Cir. Aug. 6, 2014) (citing 28 U.S.C. § 158(a)(1)). An order dismissing an adversary proceeding is a final, appealable order. Id.; see also Gonsalves v. Belice (In re Belice), 480 B.R. 199, 203 (B.A.P. 1st Cir. 2012) (citations omitted); Kasparian v. Conley (In re Conley), 369 B.R. 67, 70 (B.A.P. 1st Cir. 2007) (citation omitted). Thus, the Judgment of Dismissal is a final order. And because the Judgment of Dismissal is a final order, it subsumes all interlocutory rulings producing the judgment. See Diaz-Santos v. Dep't of Educ. of Commonwealth of P.R., 108 Fed. App'x 638, 641 (1st Cir. 2004) (interlocutory orders merge in the final judgment) (citation omitted); Wiscovitch-Rentas v. Villa Blanca VB Plaza LLC (In re PMC Mktg. Corp.), 543 B.R. 345, 354 n.7 (B.A.P. 1st Cir. 2016) (citing Boyd v. Kmart Corp., No. 96-7065, 1997 WL 158183, at *6 (10th Cir. Apr. 2, 1997)). Accordingly, we also have jurisdiction over USIC's appeals from the Interlocutory Orders.[6]

---

[6] Like the bankruptcy court, we are perplexed by USIC's filing of the Amended Complaint in Intervention without leave of court under Rule 15. We have treated the Disallowance of Amended Complaint in Intervention as analogous to an order denying a motion for leave to amend under Rule 15. And, as such, it is likely an interlocutory order. Kartell v. Blue Shield of Mass., Inc., 687 F.2d 543, 551 (1st Cir. 1982) (citation omitted). Alternatively, the Disallowance of Amended Complaint in Intervention could be treated much the same as an order dismissing a complaint, and as such it would be a final order, completely resolving the discrete question of whether USIC's claims against PREPA would be determined in the bankruptcy court. See Scotiabank de P.R. v. Brito (In re Plaza Resort at Palmas, Inc.), 469 B.R. 398, 404 (B.A.P. 1st Cir. 2012) (noting "[t]he First Circuit has held that a final, appealable judgment results whenever a district court dismisses a complaint without expressly granting the plaintiff leave to amend the complaint") (citations omitted) (internal quotations omitted). Even if we were to treat the Disallowance of Amended Complaint in Intervention as a final order in this manner, we would, for the reasons described below, find no error in the issuance of that order, or in the entry of the Denial of Reconsideration of Amended Complaint in Intervention; nor would such treatment alter the outcome of

II. The Cross-Appeal by PREPA

On the other hand, PREPA's cross-appeal faces an insurmountable hurdle. In this circuit, a threshold question is whether we have jurisdiction to hear an appeal brought by a party who "has consented to the very judgment from which it then appeals." Scanlon v. M.V. Super Servant 3, 429 F.3d 6, 8 (1st Cir. 2005). The First Circuit "generally holds a party who consents to a judgment to have waived the right of appeal . . . ." Id. (citation omitted). Several other circuits similarly refuse appellate jurisdiction in such cases. See, e.g., Tel-Phonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1137 (5th Cir. 1992) ("A party will not be heard to appeal the propriety of an order to which it agreed."); Stewart v. Lincoln-Douglas Hotel Corp., 208 F.2d 379, 381 (7th Cir. 1953) ("It is a generally accepted rule of long standing that a party who agrees or consents to the entry of an order or judgment thereby waives his right to claim that the trial court committed error in the entry of the order.") (citations omitted); Marks v. Leo Feist, Inc., 8 F.2d 460, 462 (2d Cir. 1925) ("So far as this record shows, the complaint was dismissed on the plaintiff's motion, and the decree entered was in effect a decree by consent. And from such a decree the plaintiff cannot appeal.") (citations omitted).

The First Circuit allows a limited exception to this rule: "'it is possible for a party to consent to a judgment and still preserve [its] right to appeal' a previous ruling on a contested matter in the case, as long as it 'reserve[s] that right unequivocally.'" BIW Deceived v. Local S6, Indus. Union of Marine & Shipbuilding Workers of Am., 132 F.3d 824, 828 (1st Cir. 1997) (quoting Coughlin v. Regan, 768 F.2d 468, 470 (1st Cir. 1985)); see also John's Insulation, Inc.

---

our review of the Judgment of Dismissal. That said, as noted below, we do not address the merits of USIC's appeal from any of the Interlocutory Orders.

v. L. Addison & Assocs., 156 F.3d 101, 107 (1st Cir. 1998) (stating the proper course for obtaining review of interlocutory orders is "to file a motion for voluntary dismissal with prejudice, stating explicitly that the purpose is to seek immediate review of the interlocutory order in question"); accord Laczay v. Ross Adhesives, 855 F.2d 351, 354 (6th Cir. 1988) (stating "one who seeks to come within an exception to th[e] rule [of non-appealability after a voluntary dismissal] should make his or her intention known to the court and opposing parties"). Dubbed the "'unequivocal intention' standard," this rule requires not only that the expression of the intent to appeal be unequivocal, but also that it be made "concurrently with the motion for dismissal." Scanlon, 429 F.3d at 9.

PREPA did not meet the Scanlon requirements here. We discern no attempt by PREPA—or any other party—to express any intention to take an appeal of either the Judgment of Dismissal or, at the time the Judgment of Dismissal was entered, any of the Interlocutory Orders. At the time of the Voluntary Dismissal Motion, PREPA reported only that it had no objection to the granting of that motion. PREPA's earlier attempts to appeal some of the Interlocutory Orders are of no consequence. As the Scanlon court ruled, "[i]t is insufficient that plaintiffs at one point in the course of the proceedings expressed a desire to appeal." Id. Thus, consistent with Scanlon, we are without jurisdiction to hear PREPA's cross-appeal and it is, therefore, **DISMISSED**.

This leaves us with USIC's appeals. We turn to them next.

DISCUSSION

A decision to grant a motion for voluntary dismissal is reviewable for abuse of discretion. See JRA Architects & Project Managers, P.S.C. v. First Fin. Grp., Inc., 375 Fed. App'x 42, 43 (1st Cir. 2010) (citation omitted); P.R. Mar. Shipping Auth. v. Leith, 668 F.2d 46, 49 (1st Cir.

1981) (citation omitted). "Abuse of discretion occurs when a relevant factor deserving of significant weight is overlooked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decisional scales." United States v. Jiménez, 419 F.3d 34, 43 (1st Cir. 2005) (citation omitted) (internal quotations omitted).

I. USIC's Appeal of the Judgment of Dismissal

As noted, USIC asserts that the bankruptcy court abused its discretion when it entered the Judgment of Dismissal. This argument is unpersuasive, however, because USIC did not object to the Voluntary Dismissal Motion. USIC's admitted failure to object to the motion in the trial court is fatal to its effort to challenge the resulting order on appeal. See Hoover v. Harrington (In re Hoover), No. 15-2383, 2016 WL 3606918, at *4 (1st Cir. July 5, 2016) (ruling that argument not made to the bankruptcy court was waived on appeal) (citation omitted); Patriot Portfolio, LLC v. Weinstein (In re Weinstein), 164 F.3d 677, 685 (1st Cir. 1999) (expressing the general rule "that issues raised for the first time on appeal are waived") (citation omitted). Because USIC did not object to the voluntary dismissal of the adversary proceeding or otherwise alert the court to the possibility of prejudice to its interests as a result of such dismissal, USIC waived any right to appeal the Judgment of Dismissal. See, e.g., In re Weinstein, 164 F.3d at 685. Accordingly, we do not consider the merits of its appeal of the Judgment of Dismissal.

Even if we looked past USIC's waiver, its appeal would still fail as we would not be persuaded that the bankruptcy court abused its discretion by dismissing the adversary proceeding on the Debtor's request. When the Debtor requested the dismissal, the only other party in the adversary proceeding, PREPA, indicated its lack of objection. We know of no reason why the

bankruptcy court was required, in these circumstances, to deny the requested relief. See Fed. R. Civ. P. 41(a)(2) (noting that, with exceptions not applicable here, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper").

For several reasons, we reject USIC's argument that the filing of the Amended Complaint in Intervention precluded dismissal of the adversary proceeding. To begin with, USIC was not entitled to file the Amended Complaint in Intervention. See Fed. R. Civ. P. 15(a). Rule 15(a)(1) provides:

> A party may amend its pleading once as a matter of course within:
>
> (A) 21 days after serving it, or
>
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

See Fed. R. Civ. P. 15(a)(1). Here, USIC filed the Amended Complaint in Intervention more than five years after the filing of PREPA's answer to the original complaint, so it does not fall within the purview of Rule 15(a)(1). Indeed, the Amended Complaint in Intervention was filed long after the entry of the December 2013 Partial Summary Judgment Order (which, by its terms, dismissed the original Complaint in Intervention). Therefore, USIC was not entitled to amend its pleading as a matter of course. See id.

Thus, the attempted amendment would have to fall under Rule 15(a)(2), which states that "the court's leave" or the opponent's "written consent" is required "[i]n all other cases" before amending a pleading. See Fed. R. Civ. P. 15(a)(2). USIC obtained neither leave of court nor PREPA's consent to file the Amended Complaint in Intervention. USIC did not even request leave under Rule 15(a)(2), instead choosing to file a motion to inform the court of its intention to file the Amended Complaint in Intervention.

Even construing the Informative Motion as a request under Rule 15(a)(2), USIC's effort to amend the Complaint in Intervention would nonetheless fail for two reasons. First, USIC failed to move to set aside the December 2013 Partial Summary Judgment Order which dismissed the Complaint in Intervention. This failure resulted in a jurisdictional impediment to the amendment: "[O]nce judgment has been entered, the district court is without power to entertain any amendments unless the judgment is set aside." Deka Int'l S.A. v. Genzyme Corp. (In re Genzyme Corp. Sec. Litig.), 754 F.3d 31, 46 (1st Cir. 2014) (citation omitted); Fisher v. Kadant, Inc., 589 F.3d 505, 509 (1st Cir. 2009) (stating "once judgment has entered, the case is a dead letter, and the [trial] court is without power to allow an amendment to the complaint because there is no complaint left to amend") (citation omitted); M2Multihull, LLC v. West (In re West), A.P. No. 11-01021, 2013 WL 4852283, at *1 n.1 (Bankr. D.R.I. Sept. 10, 2013) (stating "for leave to be given to amend a complaint [under Fed. R. Bankr. P. 7015] there must be a complaint pending to amend"). Consequently, there was no complaint in intervention to amend.

Second, beyond the jurisdictional issue, there is the timing factor to consider. "'[U]ndue delay' in filing the motion and 'undue prejudice to the opposing party'" warrant disallowance of a proposed amendment. Acosta-Mestre v. Hilton Int'l of P.R., Inc., 156 F.3d 49, 51 (1st Cir. 1998) (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)). "It is black-letter law that [r]egardless of the context, the longer a plaintiff delays, the more likely [a] motion to amend will be denied, as protracted delay, with its attendant burdens on the opponent and the court, is itself a

sufficient reason for the court to withhold permission to amend." ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 57 (1st Cir. 2008) (citations omitted) (internal quotations omitted).

Here, USIC waited five years from the date of filing the original Complaint in Intervention to attempt to amend that pleading. Additionally, USIC delayed nearly three years from the filing of the Debtor's Amended Complaint to file its Amended Complaint in Intervention, notwithstanding that the Debtor's revised demand against PREPA alerted, or should have alerted, USIC to the fact that the Debtor was no longer asserting a complete offset to PREPA's claim. Thus, even if we were to conclude that the bankruptcy court had subject matter jurisdiction to consider the Amended Complaint in Intervention (a rather dubious conclusion at best), this record would still present a case of undue delay and prejudice in proffering the amendment.[7]

Given the absence of a motion to set aside the judgment or authorization to amend the Complaint in Intervention, it appears that USIC viewed the attempted amendment as something akin to an amendment as of right, purportedly authorized by the Panel in the Order to Show Cause. Contrary to USIC's assertion, the Panel did not sua sponte authorize a late-stage amendment to the dismissed Complaint in Intervention, nor would it, as a reviewing court, have authority to do so.[8] For these reasons, even if we overlooked USIC's waiver, we would

---

[7] Although PREPA filed a proof of claim, USIC did not. And, we do not read either of USIC's pleadings as seeking an affirmative recovery from PREPA on behalf of the Debtor or its estate. Therefore, we are hard-pressed to discern any conceivable effect on the estate from the claim that USIC sought to assert in the Amended Complaint in Intervention. In those circumstances, the bankruptcy court would not have jurisdiction over that claim. See 28 U.S.C. § 1334(b); In re G.S.F. Corp., 938 F.2d 1467, 1475 (1st Cir. 1991) (citing Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).

[8] As noted previously, when it filed the Amended Complaint in Intervention, USIC relied exclusively on the following language, extracted out of context from the Order to Show Cause: "[I]t appears that USIC may assert its claim which was the subject of the Complaint in Intervention at any time until the

conclude that USIC had no right to file the Amended Complaint in Intervention and, given that, the bankruptcy court did not abuse its discretion by dismissing the adversary proceeding.

II. USIC's Appeal of the Interlocutory Orders

Only a single issue remains: the effect of our affirmance of the Judgment of Dismissal on USIC's appeal of the Interlocutory Orders. Mindful that there must be a case or controversy to support jurisdiction, we conclude that our affirmance of the Judgment of Dismissal renders the issues raised by USIC's appeal of the Interlocutory Orders moot. See Kay v. Online Vacation Ctr. Holdings Corp., 539 F. Supp. 2d 1372, 1375 (S.D. Fla. 2008) (denying pending motions as moot following dismissal, reasoning there was no live case or controversy and that the case could not "simply be brought back to life upon the presentation of another potential plaintiff") (citing Clinton v. City of N.Y., 524 U.S. 417, 429 (1998) ("Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies.")); Day v. Colbry, No. 10-13856, 2012 WL 219501, at *3 (E.D. Mich. Jan. 23, 2012) (ruling dismissal with prejudice under Rule 41(a) moots request for summary judgment); see also Sepulveda Soto v. Doral Bank (In re Sepulveda Soto), No. PR 12-053, 2013 WL 1932118, at *1 (B.A.P. 1st Cir. May 8, 2013) (ruling appeal of order granting relief from stay moot following dismissal of underlying

---

adjudication of the Amended Complaint is concluded." Far from constituting license for USIC to file a late amendment to its dismissed Complaint in Intervention, this language was merely a recognition of the lack of finality that rendered the December 2014 Amended Partial Judgment unappealable when it was entered. USIC's persistence in the assertion that the Panel somehow authorized the amendment in its Order to Show Cause borders on specious. Further, USIC's claim during oral argument that the quoted language in the Order to Show Cause amounted to the "law of the case," was not only unpersuasive, but was also raised for the first time on appeal and therefore waived. See Hoover and Patriot Portfolio, supra.

bankruptcy case, because Panel could not fashion meaningful relief) (citation omitted). With no adversary proceeding, there is no vehicle for us to grant relief even if we were persuaded that there was reversible error in any of the Interlocutory Orders.[9]

Even if the Interlocutory Orders were not moot, they would nonetheless remain beyond the scope of our review. USIC's silence regarding the voluntary dismissal of the adversary proceeding has far-ranging consequences that extend beyond the loss of its right to appeal the Judgment of Dismissal. The First Circuit has expressed a reluctance to review interlocutory orders when a party, by its own inaction, has suffered a dismissal. See, e.g., John's Insulation, 156 F.3d at 107 (declining to review interlocutory rulings, reasoning "if a complaint was correctly dismissed for failure to prosecute, the fact that earlier interlocutory rulings may have been erroneous is irrelevant") (citation omitted); see also Al-Torki v. Kaempen, 78 F.3d 1381, 1386 (9th Cir. 1996)) (holding, in the context of involuntary dismissal, "[t]here is no good reason to allow [a] plaintiff to revive his case in the appellate court after letting it die in the trial court").

At the critical juncture, USIC, although long-embattled, permitted the voluntary dismissal to occur without protest sufficient to alert the court and the other parties of its concerns. While this case is not identical to John's Insulation, the reasoning of that case applies with equal force here, as both cases involved a dismissal that was the product of the plaintiff's inaction. Like the plaintiff in John's Insulation, USIC allowed the adversary proceeding to be dismissed without any mention, let alone unequivocal expression, of its desire to preserve its right to appeal the Interlocutory Orders. Accordingly, as in John's Insulation, we confine our review to the final

---

[9] We express no opinion on whether there was reversible error in any of the Interlocutory Orders. Similarly, we express no opinion on whether any of the rulings made by the bankruptcy court in the Interlocutory Orders would have binding or preclusive effect in any subsequent litigation involving USIC and PREPA. That question is for another court if such litigation ensues.

order, and forego any review of interlocutory orders. Given USIC's waiver of the right to appeal a final judgment (here, the Judgment of Dismissal), it would be anomalous to consider its appeal from interlocutory orders subsumed within that final judgment. Doing so would turn sound principles of appellate jurisprudence on their heads. See Scanlon, 429 F.3d at 9 (stating "[t]he general principle that a party cannot appeal from a judgment to which he has consented finds roots in some of the fundamental public policy priorities of the federal judiciary: conserving judicial resources and avoiding delay"). We see no reason to consider the Interlocutory Orders after USIC permitted the adversary proceeding to die in the bankruptcy court.

CONCLUSION

For the reasons set forth above, with respect to USIC's appeals, we **AFFIRM** the Judgment of Dismissal, and we decline to review the Interlocutory Orders. PREPA's cross-appeal is **DISMISSED**.