IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DALE A. THOMAS,	)	CV87-L-577
	)	
Appellant,	)	
	)	MEMORANDUM ON APPELLANT'S
vs.	)	APPEAL AND MOTION FOR
	)	STAY, AND ON APPELLEE'S
MARVIN E. JEWELL & CO.,	)	MOTION FOR LEAVE TO FILE
	)	CROSS-APPEAL AND CROSS-
Appellee.	)	APPEAL

The appellant, Dale Thomas, has moved for a stay pending appeal pursuant to Fed.R.Bankr.P. 8005. He is appealing from the October 5, 1987, order of the bankruptcy court vacating its previous order converting Thomas' Chapter 11 case to a Chapter 13 action. The appeal was taken under Rule 8001(a), which governs appeals as of right. Because the order appealed from is interlocutory, appeal of right is not available. 28 U.S.C. § 158(a). This court may, however, consider an interlocutory appeal improperly filed under Rule 8001(a) to be a motion for leave to appeal under Rule 8001(b) or may direct that a motion for leave to appeal be filed. Rule 8003.

The appellee, Marvin E. Jewell & Co. (Jewell), cross-appeals under Rule 8003(a), asserting that, because Thomas did not qualify as a debtor under Chapter 13, the bankruptcy court did not have jurisdiction to convert the theoretically nonexistent case into a Chapter 11 case and the matter should have been dismissed for lack of subject matter jurisdiction.

"When an order of the bankruptcy court is essentially interlocutory in nature ... the reviewability thereof is a question directed to the sound discretion of the judge. Such review is generally discouraged." In re Radtke, 411 F. Supp. 105 (E.D.Wis. 1976). "Interlocutory bankruptcy appeals should be the exception rather than the rule." In re Wiebold Stores, Inc., 68 B.R. 578, 580 (N.D.Ill. 1986). A district court has the discretion under 28 U.S.C. § 158(a) to hear interlocutory appeals from bankruptcy proceedings. Analogizing to 28 U.S.C. § 1292(b), courts have considered the following questions to guide the exercise of discretion:

> (1) whether the order involves a controlling question of law as to which there is substantial ground for difference of opinion; and (2) whether immediate appeal would materially advance the termination of the litigation.

In re Webb, 53 B.R. 1003, 1006 (D.Md. 1985).

In support of its interlocutory cross-appeal, Jewell relies on In re Wulf, BK85-226 (Bankr. Neb. Apr. 28, 1986), which held that filing under Chapter 13 does not "commence" a bankruptcy case if the person filing is ineligible to proceed under Chapter 13; a bankruptcy court cannot, therefore, convert a nonexistent case to Chapter 11. See also In re Koehler, BK85-225 (Bankr. Neb. Jan. 6, 1986) (dismissing case filed under Chapter 13 because "debtor" ineligible), aff'd, CV86-O-49 (D.Neb. June 18, 1986). The bankruptcy court apparently has not had an opportunity to pass on Jewell's jurisdictional argument. As quoted by the bankruptcy court in Wulf, the district court, upon refusing to hear an interlocutory appeal on a similar jurisdictional matter, "stated that 'the issue of whether the Bankruptcy Court has proper jurisdiction in the Chapter 11 proceedings should first be decided in the Bankruptcy Court'." Wulf, slip op. at 2.

While the Bankruptcy Court should have the first opportunity to consider the issue raised on the cross-appeal, there are several reasons to dispose of it here: (1) remand would only slow and complicate the case, especially given that the merits also are before this court on Thomas' interlocutory appeal; (2) it involves a question of law only; and, (3) the weakness of the argument permits a quick disposition of the cross-appeal.

This action originally was "commenced" under Chapter 11. The cases cited by Jewell are, therefore, not controlling and are easily distinguished: both Wulf and Koehler were commenced under Chapter 13, and the court in each case never had jurisdiction. Jewell's 11 U.S.C. § 348(a) "relation back" argument is without merit. That section provides, in relevant part, that conversion "does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief." Thomas is correct, therefore, that "the conversion has no bearing on the 'commencement' of the case." Appellant's reply brief at 8. This case properly was commenced under Chapter 11. A case may not be converted from Chapter 11 to Chapter 13 unless the debtor is a debtor under Chapter 13, 11 U.S.C. § 1112(f), as the bankruptcy court recognized in its order. The bankruptcy court properly vacated its previous order and retains subject matter jurisdiction of the Chapter 11 proceeding.

The issue raised by Thomas on his interlocutory appeal is whether his appeal of a judgment of the Lancaster County District Court in an equity case to the Nebraska Supreme Court vacated the district court judgment, thus making the debt that was the subject of that action unliquidated and contingent for purposes of determining eligibility to proceed under Chapter 13. The issue involves purely a question of

law, one central to determining Thomas' eligibility to select from among the various rights afforded under the bankruptcy code. Although resolution of the matter now will not "materially advance the termination of the litigation," it could prevent having the case proceed under the wrong chapter only to have the matter later retried under another chapter. I shall consider Thomas' notice of appeal under Rule 8001(a) to be a motion for leave to appeal under Rule 8001(b), and shall grant it.

The bankruptcy court concluded that Thomas' appeal did not vacate the district court's judgment. The result is correct, but it is important here to explain why.

Federal courts must look to state law to determine the effect of state court judgments. See Marrese v. American Academy of Orthopeadic Surgeons, 470 U.S. 373 (1985).

> There have been differences of opinion about whether, or in what circumstances, a judgment can be considered final for purposes of res judicata when proceedings have been taken to reverse or modify it by appeal. The better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo; finality is not affected by the fact that the taking of the appeal operates automatically as a stay or supersedeas of the judgment appealed from that prevents its execution or enforcement, or by the fact that the appellant has actually obtained a stay or supersedeas pending appeal.

Restatement (Second) Judgements § 13 comment f (1982). As suggested by the Restatement, even if an appellant obtains a supersedeas, "it does not annul the judgment or impair its validity or effect." 4A C.J.S. Appeal & Error § 662. A supersedeas merely stays the enforcement of the judgment. Id. § 625.

Illustrative of the "better view" espoused by the Restatement, an appeal from the judgment of a federal court does not suspend the operation of an otherwise final judgment "'unless the appeal moves the entire case to the appellate court and constitutes a proceeding de novo.'" In re Albano, 55 B.R. 363, 369 (N.D.Ill. 1985)(that federal court judgment was being appealed did not make debt unliquidated and contingent for purposes of determining Chapter 13 eligibility), quoting 1B Moore's Federal Practice ¶ 0.416[3] (2d ed. 1984). Trial de novo on appeal occurs in Ohio, for example, and operates to vacate the judgment appealed from. See Lincoln Properties, Inc. v. Goldslager, 18 Ohio St.2d 154, 248 N.E.2d 57 (1969),

Nebraska law is the source for determining whether Thomas' appeal to the Supreme Court vacated the judgment of the district court, thus rendering the disputed claim unliquidated and contingent. "A judgment rendered or final order made by the district court may be reversed, vacated or modified by the Supreme Court for errors appearing on the record." Neb. Rev. Stat. § 25-1911. "No appeal in any case shall operate as a supersedeas, unless the appellant or appellants shall within one month [file a supersedeas bond]..." § 25-1916. In addition to petitions in error to the Nebraska Supreme Court, the Nebraska statutes provide for appeals in equity cases:

> In all appeals from the district court to the Supreme Court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof.

§ 25-1925. Appeals in equity cases are reviewed de novo on the record

> subject to the rules that (1) where credible evidence on material issues is in conflict, [the Nebraska Supreme Court] will consider that the trial court observed the witnesses and accepted one version of the facts over another, and (2) where the trial court has viewed the premises, [the Nebraska Supreme Court] is required to consider any competent and relevant facts revealed by the view and any findings made by the court, provided that the record contains competent evidence to support the findings.

Burgess v. Omahawks Radio Control Org., 219 Neb. 100, 101, 362 N.W.2d 27 (1985).

The parties and the bankruptcy court have examined the practical workings of a "trial de novo" in the Nebraska Supreme Court to determine whether or not it is a bona fide trial de novo. The debate whether "trial" on a record as

opposed to "trial" with live witnesses (or, at least, the option of taking more evidence in some form) is a true trial de novo, see, e.g., Goldslager, 248 N.E.2d at 62-63, is not directly helpful to the issue of what effect Nebraska law gives a district court judgment in an equity case when it is on appeal to the Nebraska Supreme Court.

Perhaps the most pertinent case relied on by Thomas, Riley Bros. Co. v. Melia, 3 Neb. Unof. 666, 92 N.W. 913 (1902), was overruled in 1930 by the case stating the rule used in the authority relied on by Jewell, Kleeb v. Kleeb, 213 Neb. 537, 330 N.W.2d 484 (1983). The case omitted from the parties' discussion, Guaranty Fund Comm'n v. Teichmeier, 119 Neb. 387, 229 N.W. 121 (1930), is probably the most instructive Nebraska case on point.

The issue in Guaranty Fund was "whether a judgment entered in an equity action from which an appeal is taken and a supersedeas bond given, which case under the statutes is to be tried de novo, continues as a lien against the judgment debtor's property." 119 Neb. at 390. The answer, the court said, is yes. Id. at 390-91. "If the case is affirmed, it is a lien [with priority from the date of entry of the district court judgment], and if the case is reversed, it is not a lien." Id. at 391. Thus, although enforcement of the judgment lien was suspended (because of the supersedeas) during the pendency of the appeal "de novo," it was not vacated.

The court "expressly overruled" Riley Bros. "[i]n so far as the language ... seems to hold that the filing of a supersedeas vacates the judgment of the trial court, which is afterward affirmed by this court...." Id. at 390-91. Accord Kleeb, 213 Neb. at 539-41 (even the filing of a supersedeas bond in a "de novo" equity appeal does not vacate the order appealed from).

"There is a distinction between appeals from the county and justice courts to the district court and appeals from the district court to the supreme court." Guaranty Fund at 391. "The docketing of the cause in the district court [does] not merely arrest the execution of [the] judgment...." Jenkins v. Nebraska, 60 Neb. 205, 206, 82 N.W. 622 (1900). "[T]he effect of an appeal to the district court is to blot out the judgment or order appealed from...." 60 Neb. at 207. Accord In re Estate of Marsh, 145 Neb. 559, 563, 17 N.W.2d 471 (1945). The cases Thomas cites dealing with appeals to the district court therefore are not relevant to the effect of an equity appeal to the Nebraska Supreme Court.

One final matter is the effect of Wilcox v. Saunders, 4 Neb. 569 (1876). Thomas argues that it stands for the theory that appeal de novo in an equity case vacates the district court judgment; Jewell argues that the case is old. Wilcox

appears to suggest the theory argued by Thomas, but it is in dicta, as the opinions in that case did not need to reach the issue of the effect of an appeal de novo in an equity case because there was no right to appeal the judgment at issue. Even Riley Bros., which incorrectly quoted cases involving appeals to the district court for the proposition that appeals to the Nebraska Supreme Court vacate the judgments appealed from, did not quote Wilcox for the theory urged by Thomas. 92 N.W. at 915. Riley Bros., like several other post-Wilcox cases discussing the statutory right to appeal in equity cases under the old wording of the statute, which did not expressly state that the appeal was de novo, cited Wilcox for the proposition that "an appeal in equity ... brings the case to the appellate court for trial de novo." Id. Accord Troup v. Horbach, 62 Neb. 564, 87 N.W. 316 (1901). Wilcox also is cited for the proposition that the right of appeal (as distinguished from a writ of error) is statutory. See, e.g., Nebraska Loan & Trust Co. v. Lincoln & Black Hills R.R. Co., 53 Neb. 246, 73 N.W. 546 (1897); State ex rel. Skirving v. Bethea, 43 Neb. 451, 61 N.W. 578 (1895).

Guaranty Fund and Kleeb are controlling case authority for the conclusion that district court judgments are not vacated when appeal de novo of equity cases is taken to the Nebraska Supreme Court. The dicta in Wilcox have not been used by the Nebraska Supreme Court to suggest a contrary theory. The decision of the Bankruptcy Court shall be affirmed for the reasons just discussed.

Dated April __, 1988.

BY THE COURT

United States District Judge