UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MAURIKIA LYDA, JOHN SMITH, NICOLE HILL, ROSALYN WALKER, ANNETTE PARHAM, JANICE WARD, SYLVIA TAYLOR, SCOTT EUBANK, JOANN JACKSON, TAMMIKA R. WILLIAMS, Individually and on behalf of all other similarly situated, and MICHIGAN WELFARE RIGHTS ORGANIZATION, PEOPLES WATER BOARD, NATIONAL ACTION NETWORK-MICHIGAN CHAPTER, and MORATORIUM NOW!,	]	Case No. 2:15-cv-10038-BAF-RSW Hon. Bernard A. Friedman Magistrate Judge R. Steven Whalen Adv. Proc. No. 14-04732 Bankruptcy Case Number 13-53846 Honorable Steven W. Rhodes Chapter 9

Plaintiffs-Appellants,

CITY OF DETROIT, a Municipal Corporation, through the Detroit Water and Sewerage Department, its Agent,

Defendant-Appellee.

PLAINTIFFS-APPELLANTS' REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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Appellants request that this Court permit them to address the Court in oral argument in support of their appeal.

JURISDICTION AND STANDARD OF REVIEW

A. *De Novo* Standard Of Review Applies To Non-Core Issues

The Appellee indicates its confusion as to the applicable standard of review for appeals to the District Court of a ruling by a bankruptcy judge on a non-core issue (DKT #20, Appellee's Brief on Appeal, p. 8 of 38). A series of well-known Supreme Court opinions and one Sixth Circuit decision would help bring order out of any confusion.[1] These cases construe Article III of the U.S. Constitution, defining the scope of federal judicial power . In *Northern Pipeline Construction v. Marathon Pipe Line Co*., 458 U.S. 50 (1982), five justices agreed bankruptcy judges could not exercise the full powers of Article III judges, because the former were not appointed for life nor enjoy other protections given Article III judges. In *Granfinanciera S.A. v. Nordberg,* 492 U.S. 33 (1989) the Court held when the Seventh Amendment guarantees a trial by jury, the bankruptcy court lacks jurisdiction to take it away. In *Stern v. Marshall*, 564 U.S. 2 (2011) a majority of the Court endorsed the precedential value of *Northern Pipeline*, holding Congress could not constitutionally empower a non-Article III bankruptcy judge to enter a

[1] See DKT #20, Appellee City of Detroit's Brief on Appeal, p. 26, fn 2.

final judgment on a state law counterclaim that is not resolved in the process of adjudicating a creditor's proof of claim. *In Executive Benefits v. Arkinson (Bellingham)*, 573 U.S. ___(June 9, 2014), the Court held as a matter of constitutional law, any judicial determination by a bankruptcy judge on a *Stern*-type issue must be reviewed *de novo* on the facts and the law by the District Court. In the Sixth Circuit, parties are not permitted to consent to jurisdiction for the bankruptcy judge to make a final decision over non-core issues. See *Waldman v. Stone*, 698 F. 3d 910 (6th Cir. 2012), *cert den*. No. 12-933 (10/26/2012).

In summary, where an issue is non-core, the standard of review is *de novo* for both facts and the law. In the Sixth Circuit, this standard of review may not be waived by consenting to bankruptcy court jurisdiction.

This case was filed as a putative class action; however the case was dismissed before the deadline to file an application for certification. The complaint focuses on events which occurred after the filing of the Chapter 9 Bankruptcy (July 18, 2013). The mass water shutoffs began in earnest in March, 2014. Plaintiffs filed in the Bankruptcy Court because of the wide compass being extended to the stay. See DKT ## 166 and 167.

B. Review Of The Denial Of Injunctive Relief in The Alternative Following Dismissal is Permitted.

Under 28 U.S.C. §158, "[p]arties in a bankruptcy action may appeal a final order as a matter of right but may only appeal interlocutory orders with the leave of

the court . . . ." *In re Ragle*, 395 B.R. 387, 392 (E.D. Ky. 2008) (citing 28 U.S.C. §158(a)(1)). "A final order 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *In re Greektown Holdings*, LLC, No. 14-14271, 2015 WL 300366, at *2 (E.D. Mich. Jan. 22, 2015)(internal citations omitted). Or in other words, "[a] final judgment gives one party what they want – the plaintiff the relief sought or the defendant receives a judgment ending the controversy." *Id.* (quoting *In re Saber*, 264 F.3d 1317, 1324 (11 th Cir. 2001).[2]

As the Appellee acknowledges, dismissal of an adversary proceeding is a final order that is appealable as of right. *See* DKT #20 at 9; *In re Hamilton*, 399 B.R. 717, 720 (1st Cir. BAP 2009) ("An order dismissing an adversary proceeding is a final order as it ends the litigation on the merits of the complaint."); *In re John Hicks Oldsmobile-GMC Truck, Inc.*, 192 B.R. 911, 912 (E.D. Tenn. 1996). The bankruptcy court explained in its oral ruling dismissing the adversary proceeding that such dismissal "renders the plaintiffs' motion for preliminary injunction

[2] Notwithstanding these definitions, the Sixth Circuit has observed that the "finality requirement is considered 'in a more pragmatic and less technical way in bankruptcy cases than in other situations.'" *In re Dow Corning Corp*., 86 F.3d 482, 488 (6th Cir. 1996) (internal citations omitted). As a result, "there is a more relaxed rule of appealability in bankruptcy cases" and "courts have permitted appellate review of orders that in other contexts might be considered interlocutory." *Id.* (citing *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir. 1986)).

moot." *See* DKT #92 at 16 (Hearing Transcript). This decision is a final appealable order because it gave the Appellee exactly what it wanted – an order ending the litigation. *See In re Greektown Holdings*, LLC, 2015 WL 300366, at *2. It is immaterial that the bankruptcy court's oral decision also discussed alternative reasons for denying Appellants' requested preliminary injunction and temporary restraining order. In a similar circumstance, the Fifth Circuit aptly noted, "[b]ecause the bankruptcy court dismissed the complaint in its entirety, the fact that part of the relief sought was a preliminary injunction does not the render the bankruptcy court's order interlocutory, for it also had the effect of denying all other relief sought, including final injunction . . . ." *In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1396 n. 7 (1987). This rationale applies equally here. [3]

Even if denial of Appellants' motion for preliminary injunction is somehow deemed an interlocutory order, leave to appeal should be granted. It is undisputed that Appellants timely filed a notice of appeal. Under Fed.R.Bankr. Pro. 8003(c), a timely notice of appeal may be construed as a motion for leave to appeal. *In re*

[3] This rationale was reiterated in the bankruptcy court's order denying Appellants' motion for reconsideration, wherein the Court stated "[b]ecause the Court finds that the case was properly dismissed, the Court also denies the plaintiffs' motion for reconsideration of the Court's denial of the plaintiffs' motion for a temporary restraining order." *See* DKT #107 at 2 (Order Denying Plaintiffs' Motion for Reconsideration).

Eggleston Works Loudspeaker Co., 253 B.R. 519, 521 (6th Cir. BAP 2000) (citing Fed. R. Bankr. P. 8003(c)). To determine whether leave to appeal should be granted, the court considers:

> Whether the order on appeal involves a controlling question of law as to which there is a substantial ground for difference of opinion; whether an immediate appeal may materially advance the ultimate termination of the litigation; and whether denying leave would result in wasted litigation and expense.

Id. All three factors are met here. The bankruptcy court's jurisdictional authority to grant Appellants' the relief requested in the complaint, including injunctive relief, is a controlling question of law in these proceedings because it "materially affect[s] the outcome of the case." *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002).[4] Moreover, a substantial ground for difference of opinion is established where "the case is difficult and of first impression" as is the case here. *U.S. ex rel. Elliott v. Brickman Group Ltd, LLC*, 845 F. Supp. 2d 858, 866 (S.D. Ohio 2012).

With respect to the second factor, an immediate finding by this court that the bankruptcy court has jurisdiction to award the injunctive relief requested will undoubtedly advance the ultimate termination of this litigation as it will allow the

[4] Mixed questions of law and fact are deemed questions of law for an interlocutory appeal. *See Newsome v. Young Supply Co.*, 873 F. Supp. 2d 872, 875 (E.D. Mich. 2012)

Appellants to accomplish a primary purpose of this suit. Finally, to deny leave to appeal the bankruptcy court's preliminary injunction decision while simultaneously considering the dismissal of Appellants' complaint, decisions that were rendered on the same day and as part of the same proceedings, will be a waste of litigant and judicial resources as it would require both the parties and this court to unnecessarily review the same issues twice.

In sum, this court has jurisdiction over the denial of Appellants' motion for preliminary injunction because the denial is subsumed in the order dismissing Appellants' complaint which Appellants can appeal by right under 28 U.S.C. 158(a)(1). In the alternative, the court should exercise its discretion to grant leave to appeal in order to promote judicial economy and resolve a question of law that is material to the outcome of these proceedings.

ARGUMENT

I. APPELLANTS' FIRST AMENDED COMPLAINT SHOULD BE REINSTATED

A. The Due Process Claim Is Misconstrued By The Court and Appellee.

Appellee, like the Bankruptcy Court, misconstrues the essence or "crux" of Appellants' procedural due process argument as a claim for "a constitutional right to water service at a price they can afford to pay". Appellee's Brf at 19. They then target this straw argument for the force of their response that "no such right

exists and Michigan law does not permit a municipality to base its water rates on ability to pay. Suppl. Op. at 15 (citing M.C.L. Section 141.121)." *Id*.

Appellants never claimed a right to water rates based on ability to pay. They simply demanded that which basic procedural due process require Appellee to follow in its own published rules governing the provision and termination of water service for residential customers. See Plaintiffs' Brf at 12-14. See also *U.S. v Nixon*, 418 U.S. 683 91974); *Hicks v Oklahoma*, 447 U.S. 343 (1980); *Logan v Zimmerman Brush Co*., 455 U.S. 422 (1982).

These rules, *inter alia*, require that water service payment agreements for delinquent accounts must be 'reasonable". Rule 27(7) For purposes of determining "reasonableness" the rules require that plans must be based on "ability to pay" as well as the "amount due" and "other factors which may be relevant" (Rule 16 (2)). It is clear from the Complaint that the payment plans for nearly every individually named Appellant were not based on ability to pay. Instead, they were entirely based on the amount due which determined the down payment requirements (as a percentage of the debt) and monthly payments which were also based on the remaining debt. The plans also require that in addition to the monthly delinquency payments, Appellants must fully pay their current bills as they came due over the term of the plan, which Appellants alleged they could not afford.

Appellants never insisted they had a right to pay a different or affordable rate for water, and agreed that all customers pay rates based upon the cost of delivering the service. However, they claimed that DWSD was constitutionally obligated to follow its own published collection practices and procedures which required it to offer payment plans which are "reasonable" which was defined as "based on ability to pay" as well as the "amount due". Plans which bore no relation whatsoever to income, but were entirely based on the amount due, were not reasonable pursuant to the written policies of the Appellee. As a result, although all water customers in the same class (eg., residential) would be required to pay the same amount or rate for water based on the cost of service and amount of water used, any of these customers who could not pay the resulting bill would be entitled under Appellee's published rules, to a reasonable payment plan by definition based on income (as one of the elements of the definition of "reasonable"). Therefore a low income household would pay the same amount for water as any other residential customer, but over a longer period of time in affordable monthly payments based on income as required by Appellee's rules. As Appellants point out these policies actually required the lower income family to pay more for water service over time, based on the delinquent interest rate charges. Nonetheless, with affordable monthly payments under these reasonable plans, Appellants could continue to receive life sustaining water service. However when

the Appellee decided to ignore its own rules and develop payment plans which bore no relation to incomes, not only had it violated procedural due process, but they guaranteed the result that the court noted and deplored: "it is less clear that the 10 Point Plan will be of any long term benefit to customers in the third group—those with insufficient income. Because the poverty rate in the City is about 40%, this is likely to be a large group." (ADR 30, DKT #109 at 20). In fact, as of the date of the hearing, September 23, 2014, water service to 19,500 households had been terminated in 2014. DKT # 92.

The Appellee does not address this basic procedural due process argument (i.e., that the city failed to comply with its own written rules), preferring instead to argue that Appellants' failed to take aim at the content of the city's billing notices and written procedures which Appellee argues were constitutionally sufficient. (Appellee's Brf at 18). In a footnote in the Supplemental Opinion, the court observes that "The evidence establishes that in one respect, the City no longer follows the procedures that it publishes on its website. It no longer makes personal visits to customers who are in shut-off status. The DWSD now considers this unnecessary and imprudent for its employees. As a result, the DWSD is preparing revised rules and procedures" (DKT # 107 at 20, fn 6). However, the court finds that because the Appellants do not allege that these visits are constitutionally required, the court "cannot conclude that the City's failure to amend its published

rules on its website to conform to its actual practice violates the plaintiff's due process rights". *Id*. Except for noting the woeful insufficiency of the new 10 point plan payment agreements to meet the needs of Detroit's 40% poverty population, the court never addressed the failure of these plans to meet the "reasonable payments based on income" requirement in the published but ignored rules, an issue directly addressed in the Complaint. DKT # 33. See paragraph 124 j citing this provision in the rules and Paragraphs 37,39,40,55,57,50-51,53,55 discussing various payment plans provided to the individually named Appellants which they could not afford and which were not based on income. Instead, with respect to this issue, both the bankruptcy court and Appellee prefer to characterize it as an illegal demand for affordable water rates, rather than a claim for compliance with Defendant's own published rules and procedures.

B. Equal Protection Was Sufficiently Pled With the Claim That The Disparate Treatment of Water Customers Was Without Reason.

In relying on *Heller v. Doe*, 509 U.S. 312 (1993), Appellee implies that when using the rational relationship standard, a court can engage in boundless, freewheeling speculation. However even when applying a deferential standard such as the rational relationship test, a court's consideration of the possible purposes of a classification does not extend to frivolous or ludicrous possibilities. As the Appellants pointed out in their Brief, the Supreme Court "…insist[s] on knowing the relation between the classification adopted and the object to be

attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). In any case, whatever information the bankruptcy court may have obtained from any source about water connections was not properly considered, because review of a a12(b)(6) motion is limited to the four corners of the pleadings.

Thus, the question in this case, where responsive pleadings have yet to be filed, is not whether Appellants have "made their case" by explaining away every imaginable basis for the Appellee's classifications, but rather, whether the Appellants have plead sufficient facts to warrant further litigation proceedings. The Appellants' Brief explains why there is an affirmative answer to that question. But in response to the Appellee's specific argument that the Appellants must "negative every conceivable" basis for the classification, such is not necessary when the court and Appellee have identified what both regard as the "legitimate governmental purpose."

The Appellee remains essentially silent about its reason[s] for the different classifications of its customers. However, the court below took it upon itself to speculate that the reason for disparate treatment of commercial and residential customers is that "…[s]ome commercial customers have more complex service connections and, therefore, more complex disconnection procedures." The Appellants' Brief explains why this finding of fact without expert testimony, a record and evidence of any kind regarding the presumed complexity of commercial

service connections was entirely improper. Of special significance however is the fact that in its Brief, the Appellee essentially adopted this supposed explanation by the Bankruptcy Court as at least one basis for its disparate treatment of water customers.

Because the Appellee and the court have, in response to the Appellants' complaint identified what both agree to be a legitimate governmental purpose for the classifications, they have simultaneously raised at least the possibility that there are no other such purposes worthy of the court's consideration in this case. This is certainly not dispositive of the merits of the Appellants' equal protection claim, but it is significant for a 12(b)(6) motion. The Appellee's adoption of the court's presumption about the basis for the classification along with the Appellants' challenge to the propriety of such baseless speculation by the court demonstrates a live controversy that warrants and deserves further litigation.

As this case moves forward, the Appellee may, through its pleadings or evidence, prompt the court to conclude that the reasons for disparate treatment extend beyond the complexity of residential and commercial water connections. This may also mean that for the Appellants to "make their case" they will be required to negate other possible reasons for the classifications. But for now, there is only one acknowledged purpose for the classifications, and it was improperly used as a basis for the trial court's ruling. The Appellants' pleadings for their

equal protection claim were in every way adequate, and the trial court's ruling should be reversed.

II. THE BANKRUPTCY COURT IMPROPERLY DENIED APPELLANTS' REQUEST FOR PERMISSION TO FILE A SECOND AMENDED COMPLAINT

The Appellee argues that the Bankruptcy Court properly denied Appellants' request to amend their complaint as untimely. However, the Sixth Circuit has permitted amended complaints post judgment where it does not appear that the opposing party would be prejudiced since the proposed amendments would be designed to meet deficiencies in the complaint identified by the court and would not add new substantive claims or overhaul Appellants' theory of the case. *Morse v McWhorter,* 290 F.3d 795 (2002). In *Morse v McWhorter,* the court noted that plaintiffs were not required to formally seek leave to file a second amended complaint when they were objecting to the magistrate's recommendation prior to the district court review. The court further observed "plaintiff's request in their recommendations to the magistrate's report put Columbia [defendants] on notice that Plaintiffs would seek to amend their complaint." 290 F 2d 801. Also the court took into consideration the fact the case was filed as a putative class and the court was reluctant to penalize the class without precedent notifying plaintiffs that merely submitting the request in objections to the magistrate's report was inadequate. In these respects, the status of the request in the *Morse* case was very

similar to the procedural posture of Appellants' request here. The request to amend occurred in the context of a response to the City's dismissal motion for failure to state sufficient claims in the bankruptcy adversary putative class proceeding, presented as an alternative to dismissal, prior to review by the District Court. The decision in *Morse* in 2002 follows the case cited by the Appellee, *Begala v PNC Bank*, 214 F.3d 776 (6th Cir. 2000). The more recent case of *Kuyat v Biomimetic Therapeutics, Inc*., 747 F.3d 435, 444 (6th Cir. 2013), also cited by Appellee is distinguishable, since the request to amend in that case was at the district court level and not at the level of a magistrate or bankruptcy court recommended ruling.

CONCLUSION

For the above reasons, Appellants' Complaint should be reinstated and their request for temporary injunctive relief granted. First, Appellants state valid due process claims, based on Appellee's admitted failure to comply with its own published rules governing collection practices. In particular, the Appellee fails to provide for "reasonable payment plans" which must be income based by definition as described in these rules. See Rules 27(7) and 16(2). The failure to abide by the published rules for households with delinquent accounts, amounts to arbitrary behavior violative of procedural due process. Secondly, Appellants' equal protection claims were sufficiently pled since Appellants were not required to

guess at and allege every possible motive for Appellee's disparate treatment of commercial and residential accounts in order to divine a rational basis therefore. Appellee's decision to allow wealthy collectable commercial customers to accrue millions of dollars in water and sewer debt over many months without shut-offs while terminating service to poor uncollectable residential customers who owed as little as $150 or even less if the bills were more than two months old, was patently illogical. Appellants were merely required to alleged disparate impact without a rational basis, leaving Defendant to respond with a purported reason which could be tested for rationality. In any event, Appellants should have been permitted to amend their putative class complaint upon their request, prior to the 12(b)(6) dismissal by the bankruptcy court. Moreover, this Court should review the bankruptcy recommended decision concerning remaining non-core issues presented in this case (estoppel, public trust, and violation of international human rights) *de novo* as to fact and law. Finally, the court's alternative ruling on the request for injunctive relief in the context of the dismissal is reviewable of right as a final order; or the appeal claim should be treated as a leave application and granted.

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DATED: February 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was filed electronically on February 23, 2015 using the CM/ECF system, which will give notice of such filing to counsel for defense at their registered electronic mail address.

/s/ alice bonita Jennings