United States Court of Appeals
For the First Circuit

No. 24-9004

IN RE: WESTBOROUGH SPE LLC,

Debtor,

LOLONYON Y. AKOUETE,

Appellant,

v.

NATHANSON & GOLDBERG, P.C.; THE MOBILESTREET TRUST; TOWN OF WESTBOROUGH; JONATHAN R. GOLDSMITH, Chapter 7 Trustee,

Appellees.

Before

Montecalvo, Kayatta and Rikelman,
Circuit Judges.

JUDGMENT

Entered: December 13, 2024

Plaintiff-Appellant Lolonyon Akouete (Appellant) has appealed from the Bankruptcy Appellate Panel's (BAP) dismissal of his appeal from the bankruptcy court's denial of his motion for an interim distribution in Chapter 7 proceedings. The BAP determined that the order denying an interim distribution did not constitute a final decision for purposes of 28 U.S.C. § 158(a)(1) and (c), declined to exercise its discretion to conduct review under § 158(a)(3) and (c), and dismissed the intermediate appeal. Appellant seeks review of that dismissal and also of the BAP's denial of his motion seeking reconsideration.

In this court, Appellant has filed, inter alia, a motion to expedite and a motion to proceed in forma pauperis (IFP). He previously filed IFP motions with the BAP, but the BAP denied relief because it determined and certified that this appeal was not being taken in good faith. See Fed. R. App. P. 24(a)(3)-(5) (if lower court "certifies that the appeal is not taken in good faith," appellant

may only proceed IFP on appeal if he files a motion to proceed IFP with court of appeals and that motion is granted). Defendant-Appellant Nathanson & Goldberg, P.C., has filed an objection to both of the above-described motions, which the Trustee has joined. Defendant-Appellant The Town of Westborough, which has a tax judgment against real property in the bankruptcy estate, has filed an objection to expediting resolution and a motion for summary disposition.

For the reasons that follow, we conclude that Appellant's IFP motion should be denied and that the appeal should be summarily dismissed for lack of finality. As the BAP explained when dismissing the underlying intermediate appeal, "[i]t is black-letter law that a federal court has an obligation to inquire sua sponte into its own subject matter jurisdiction." McCulloch v. Vélez, 364 F.3d 1, 5 (1st Cir. 2004). Per 28 U.S.C. § 158(d), this court "ha[s] jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of [§ 158]," which means the court has jurisdiction to entertain appeals from final decisions, etc., made by the district court or the BAP sitting as an intermediate court of appeals. However, in this context, the court will only regard a district court or BAP order as being sufficiently final "if the underlying bankruptcy court order is in fact final." In re Watson, 403 F.3d 1, 4 (1st Cir. 2005); see also In re Bullard, 752 F.3d 483, 485 (1st Cir. 2014) ("We have noted that an order of the BAP cannot be final unless the underlying bankruptcy court order is final."), aff'd sub nom. Bullard v. Blue Hills Bank, 575 U.S. 496 (2015).

With the IFP motion filed in this court, Appellant attempts to address the matter of finality but ultimately offers no argument legitimately suggesting that the rulings designated for appeal are immediately reviewable. The BAP collected lower court decisions holding that rulings on motions for interim distributions are not immediately appealable, and Appellant has not identified any precedent to the contrary. See Woo v. Spackman, 988 F.3d 47, 53 (1st Cir. 2021) (reminding "that the burden of establishing jurisdiction must fall to the party who asserts it"); see also In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, 52 F.4th 465, 477 (1st Cir. 2022) ("And when appellate jurisdiction has been called into question . . . this court will generally consider only the rationales offered by the party invoking the court's jurisdiction."); In re Perry, 391 F.3d 282, 285 (1st Cir. 2004) ("To be final, a bankruptcy order need not resolve all of the issues in the proceeding, but it must finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding.").

Instead of pointing to precedent treating the denial of an interim distribution as final, Appellant argues that the relevant ruling is immediately reviewable under the so-called Forgay-Conrad doctrine, an argument he pursued before the BAP by way of his motion seeking reconsideration. However, in denying Appellant's motion, the BAP explained why Appellant could not rely on the Forgay-Conrad doctrine to garner immediate review of the relevant bankruptcy court order, and Appellant's attempts to wield the doctrine in his IFP motion fail to convince that the BAP arrived at an incorrect conclusion. See In re Insurers Syndicate for Joint Underwriting of Medico-Hosp. Pro. Liab. Ins., 864 F.2d 208, 210 n.4 (1st Cir. 1988) (discussing Forgay v. Conrad, 47 U.S. (6 How.) 201, 204 (1848), and rejecting attempted reliance on doctrine because case at bar "involve[d] neither title to property nor its immediate disposition and delivery") (internal quotation marks omitted).

Appellant also argues in his IFP motion that the order denying an interim distribution is immediately reviewable by way of the "marginal finality doctrine" discussed by the Supreme Court

in Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964). Appellant first presented this argument to the BAP in his post-dismissal motion to proceed IFP on appeal; the BAP noted the untimely presentation of the argument but ultimately rejected the argument on the merits, explaining that subsequent decisions have limited the reach of Gillespie. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.30 (1978) ("If Gillespie were extended beyond the unique facts of that case, § 1291 would be stripped of all significance."). With his discussion of the "marginal finality doctrine" in his IFP motion filed in this court, Appellant has failed to call the BAP's reasoning into question.

As noted at the outset, Appellant also seeks review of the BAP's denial of his motion seeking reconsideration. That fact does not meaningfully alter the finality analysis. See In re Balser, No. CIV.A. 11-12203-RWZ, 2012 WL 4888530, at *2 n.2 (D. Mass. Oct. 15, 2012) ("But a court's denial of a motion to reconsider an interlocutory, nonappealable order is, by logical extension, also interlocutory and nonappealable.") (typographical error corrected) (citing Bridges v. Department of Maryland State Police, 441 F.3d 197, 207 (4th Cir. 2006) ("The denial of reconsideration of a nonappealable order is not a final order.")).

In accordance with the foregoing, this appeal is **DISMISSED**. See Local R. 27.0(c). To the extent not mooted by the foregoing, any remaining pending motions are denied.

By the Court:

Anastasia Dubrovsky, Clerk

cc:
Lolonyon Y. Akouete
Jose Couto Centeio
Stephen F. Gordon
Todd B. Gordon
Brian Walter Riley
Jeffrey T. Blake
Roger L. Smerage
Christine E. Devine
Jonathan R. Goldsmith
Richard King
Westborough SPE LLC

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MW 24-016

Bankruptcy Case No. 23-40709-CJP

WESTBOROUGH SPE LLC,
Debtor.

LOLONYON AKOUETE,
Appellant,

v.

NATHANSON & GOLDBERG, P.C.; MOBILESTREET TRUST;
TOWN OF WESTBOROUGH; and
JONATHAN R. GOLDSMITH, Chapter 7 Trustee,
Appellees.

Finkle, Chief U.S. Bankruptcy Appellate Panel Judge;
Lamoutte and Cabán, U.S. Bankruptcy Appellate Panel Judges.

JUDGMENT OF DISMISSAL

Lolonyon Akouete (the "Appellant") appeals from the bankruptcy court's July 25, 2024 order denying his Motion for Interim Distribution (the "Order"). For the reasons set forth below, we conclude the Order is interlocutory and, therefore, not appealable as of right. Additionally, we decline to exercise our discretionary authority to hear this appeal. Accordingly, the appeal is **DISMISSED** for lack of jurisdiction.

BACKGROUND

I. Commencement of the Bankruptcy Case

In August 2023, Nathanson & Goldberg, P.C., and MobileStreet Trust (collectively, the "Petitioning Creditors") filed an involuntary chapter 7 petition against Westborough SPE LLC

(the "Debtor"). On its bankruptcy schedules, the Debtor listed assets totaling over $9 million, consisting of the Debtor's interest in real property located at 231 Turnpike Road, Westborough, Massachusetts (the "Property") and about $1.2 million in funds held by the California State Controller's Office.

The bankruptcy court entered an order for relief on October 11, 2023, and Jonathan R. Goldsmith (the "Trustee") was appointed chapter 7 trustee. A Notice of Chapter 7 Bankruptcy Case was issued on October 12, 2023, informing creditors that the deadline to file proofs of claim was January 9, 2024.

In December 2023, the Appellant—who purports to be the "manager" of the Debtor—filed a proof of claim, asserting an unsecured claim of about $625,000. He amended his proof of claim on June 23, 2024, to increase the amount to about $1,250,000. He identified the basis of his amended claim as: "Services performed (Management and Asset Recovery)."

II. Town of Westborough's Motion for Relief from Stay and Motion to Dismiss

On October 3, 2023, the Town of Westborough (the "Town") filed a motion for relief from the automatic stay to continue a tax foreclosure action against the Property in the Massachusetts Land Court (the "Tax Foreclosure Action"). The Town asserted that a tax foreclosure judgment had been entered against the Debtor in January 2022, and the Debtor was seeking to vacate that judgment. On the eve of an evidentiary hearing in the Land Court on the motion to vacate, the Petitioning Creditors filed the involuntary petition against the Debtor, thereby staying the Tax Foreclosure Action. Therefore, the Town sought stay relief so the Land Court could adjudicate the motion to vacate and conclude the Tax Foreclosure Action.

Thereafter, on January 16, 2024, the Town moved to dismiss the bankruptcy case for cause, asserting that the involuntary petition was "an abuse and manipulation of the Bankruptcy

Code designed solely to hinder final resolution of the Tax Foreclosure Action." According to the Town, the involuntary petition against the Debtor was filed by the Debtor's own counsel as "a strategic maneuver to frustrate the Land Court's adjudication of the Tax Foreclosure Action" and the Town's "disposition of real property that the Town acquired through the Tax Foreclosure Action." The Trustee, the Petitioning Creditors (collectively), and Nathanson & Goldberg, P.C. (individually) filed objections to the motion to dismiss.

The next day, the Trustee removed the Tax Foreclosure Action to the bankruptcy court. The Town then moved for the bankruptcy court to either remand the action to the Land Court or abstain from hearing it, arguing that the Property was not property of the bankruptcy estate. See Adv. Pro. No. 24-04006. Subsequently, the Trustee, the Town, and certain other creditors, including the Petitioning Creditors, commenced negotiations to resolve all disputes between them and all issues concerning the Property as part of the administration of the bankruptcy estate. While settlement negotiations were ongoing, hearings on the Town's motions were continued numerous times.

III. Appellant's First Motion for Interim Distribution

On February 11, 2024, the Appellant filed a Motion for Interim Distribution (the "First Motion for Interim Distribution"). Citing Fed. R. Bankr. P. 3009 and emphasizing that the claims bar date had passed, the Appellant requested an order authorizing interim distributions of almost $1 million to seven creditors, including $250,000 to the Appellant and about $468,000 to the Petitioning Creditors. The Appellant argued that interim distributions were "necessary to address the critical financial obligations of the Debtor and to provide some relief to creditors." He further contended that "[t]he funds currently available in the estate [about $1.2 million],

along with the potential for further recovery [from the sale of the Property], justify the proposed interim distribution plan."

The Petitioning Creditors, the Trustee, and the Town filed objections to the First Motion for Interim Distribution. The Trustee argued that an interim distribution would be "premature" as he was finalizing his review of the proofs of claim filed and intended to object to some of them. The Petitioning Creditors "adopt[ed]" the Trustee's objection and further stated that a partial interim distribution would "only serve to delay the ultimate recovery in full of creditors . . . ." The Town objected on the following grounds: (1) the Appellant lacked authority to act as a manager for the Debtor; and (2) the Appellant's motions were intended to interfere with the Town's disposition of the Property, which was once owned by the Debtor but title to which was now "vested in the Town pursuant to a pre-petition tax title foreclosure judgment."

On March 19, 2024, the bankruptcy court, without a hearing, entered an order denying the Appellant's motion as "premature." The bankruptcy court did not elaborate further on the basis for its ruling.

IV. Appellant's Second Motion for Interim Distribution

Three months later, on June 19, 2024, the Appellant filed another Motion for Interim Distribution ("Second Motion for Interim Distribution"), stating:

> [T]he bankruptcy estate has been open for over nine months, and more than five months have elapsed since the deadline for filing proofs of claim. This significant passage of time highlights that an interim distribution is no longer premature. The funds currently available in the estate, totaling over $1.29 million, combined with the anticipated proceeds from the sale of the 231 Turnpike Road property, provide ample liquidity to support an interim distribution. The real delay in this case stems from the settlement proposal that the Town of Westborough and the Trustee have been negotiating for over seven months. This settlement proposal involves key parties such as LAX Media, Nathanson and Goldberg, Mobile Street Trust, Ferris Development Group, the Town of Westborough, the Chapter 7 Trustee, and the debtor.

> The primary term of the settlement is the sale of the property at 231 Turnpike Road to either LAX Media or Ferris Development, with a structured financial distribution from the sale proceeds. . . .
>
> . . . .
>
> Given the complexity and duration of [the settlement] negotiations, it is clear that the settlement proposal will take a significant amount of time to resolve fully. The settlement should not hold up all creditors indefinitely. It should only affect those who are part of it, especially when the bankruptcy estate has sufficient funds to pay creditors who are not included in the settlement. The Trustee should be ordered to evaluate the claims of creditors who are not part of the settlement and make payments based on the available funds in the bankruptcy estate.

Again, the Petitioning Creditors, the Trustee, and the Town objected. The Trustee reasserted his argument that interim distributions would be "premature" because he intended to object to several claims, including the amended claim filed by the Appellant. The Town contended that its original grounds for objecting to the Appellant's First Motion for Interim Distribution remained unchanged and that the Appellant's newly asserted complaints of delay caused by settlement negotiations between the Trustee and the Town did not entitle the Appellant to an interim distribution. The Petitioning Creditors opposed the motion on the ground that "any interim distribution at this point (especially given [the Appellant]'s recent motion to significantly increase the amount of his claim through an amendment to his existing Proof of Claim) would impede the orderly administration of th[e] bankruptcy case and result in unforeseeable, unintended and potentially negative consequences to the estate and its creditors."

V. Motion to Approve Settlement Agreement

On July 8, 2024, the Trustee filed a motion seeking court approval of a "global" settlement agreement between the Trustee and certain creditors (including the Town and the Petitioning Creditors, but not the Appellant) which would "finally resolve all of the contested issues between and among the Parties surrounding [the Property]," including whether the Property was an asset of the Debtor's bankruptcy estate. The Appellant objected to the motion

arguing, among other things, that the settlement "does not serve the best interests of the creditors or the bankruptcy estate" as it "undervalues the Debtor's primary asset, fails to maximize the return for creditors, and improperly grants an exclusive sale period to a lower bidder."

VI. Order Denying Second Motion for Interim Distribution

Two weeks later, on July 25, 2024, the bankruptcy court, again without a hearing and without elaboration, entered the Order denying the Second Motion for Interim Distribution "as premature." This appeal followed.

APPELLATE JURISDICTION

"It is black-letter law that a federal court has an obligation to inquire sua sponte into its own subject matter jurisdiction." McCulloch v. Vélez, 364 F.3d 1, 5 (1st Cir. 2004) (citations omitted). Therefore, "we must assay our jurisdiction before proceeding on the merits." Haddock Rivera v. ASUME (In re Haddock Rivera), 486 B.R. 574, 576 (B.A.P. 1st Cir. 2013).

I. Final Orders: Appealable as of Right

We have jurisdiction to hear appeals from: (1) final judgments, orders, and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a)-(c); see also Ritzen Grp., Inc. v. Jackson Masonry, LLC, 589 U.S. 35, 39 (2020). "A decision is final if it ends the li[ti]gation on the merits and leaves nothing for the court to do but execute the judgment." Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 646 (B.A.P. 1st Cir. 1998) (citations and internal quotation marks omitted). In contrast, 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. (citations and internal quotation marks omitted). Here, the Order denying the Second Motion for Interim Distribution is interlocutory. The bankruptcy court denied the motion as "premature," meaning

the motion was filed "before the proper, usual, or intended time." Merriam-Webster's Dictionary Online, https://www.merriam-webster.com/dictionary/premature (last visited Aug. 14, 2024). Clearly, the court's ruling contemplates that more proceedings need to occur before the motion is ripe for disposition. Further, courts have ruled that orders awarding "interim distributions are interlocutory in nature," as they are subject to subsequent adjustment. See, e.g., In re Partial Hosp. Inst. of Am., 281 B.R. 728, 734 (Bankr. S.D. Ala. 2001); see also Kingdom Fresh Produce, Inc. v. Stokes Law Office, L.L.P. (In re Delta Produce, L.P.), 845 F.3d 609, 617 (5th Cir. 2016) (stating, in the context of an interim fee award, that "the very term interim denotes that such an award is not the end of the fee dispute"); Livecchi v. Gordon, 541 B.R. 545, 547 (W.D.N.Y. 2014) (also discussing interlocutory nature of interim fee awards); United States v. Vickers (In re Fortier), 315 B.R. 829, 833 (W.D. Mich. 2004) (recognizing that interim distributions under § 726 are interlocutory). It follows, therefore, that an order *denying* a request for an interim distribution is also interlocutory. See In re Copeland, No. 1:93-CV-422, 1993 U.S. Dist. LEXIS 13894 (W.D. Mich. Sep. 10, 1993) (ruling that order denying interim compensation was interlocutory)

Accordingly, we conclude that the Order is not a final order immediately appealable as of right.

II. Interlocutory Orders: Appealable with Leave

We also decline to exercise our discretion to hear this interlocutory appeal under 28 U.S.C. § 158(a)(3).[1] In determining whether to hear an interlocutory appeal from a bankruptcy

[1] Although the Appellant has not filed a motion seeking leave to appeal as set forth in Fed. R. Bankr. P. 8004(a)(2) (providing that an appellant seeking leave to appeal an interlocutory order "must" file a motion for leave contemporaneously with the notice of appeal), we may "treat the notice of appeal as a motion for leave and either grant or deny it." Fed. R. Bankr. P. 8004(d); see also Simon v. Amir (In re Amir), 436 B.R. 1, 8 (B.A.P. 6th Cir. 2010). We will consider whether to grant leave "based on the

court order under 28 U.S.C. § 158(a)(3), appellate courts in this circuit, including the Panel, typically apply the factors set forth in 28 U.S.C. § 1292(b), which governs interlocutory appeals to the courts of appeals. See, e.g., Canadian Pac. Ry. Co. v. Keach, No. 1:17-cv-00278-JDL, 2017 WL 4845733, at *3 (D. Me. Oct. 26, 2017) (citing In re Bank of New Eng. Corp., 218 B.R. at 652); see also Oliver C & I Corp. v. Carolina Devs. S. en C. por A., S.E., No. 20-1188 (FAB), 2020 WL 6386816, at *3 (D.P.R. Oct. 30, 2020); Me. Dep't of Health & Human Servs. v. Getchell Agency, No. 1:17-cv-00252-JAW, 2018 WL 1831412, at *3 (D. Me. Apr. 17, 2018); Nickless v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (In re Advanced RISC Corp.), 317 B.R. 455, 456 (D. Mass. 2004) (same). "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." In re Bank of New Eng. Corp., 218 B.R. at 652 n.17 (citation and internal quotation marks omitted). The First Circuit has cautioned, however, that leave to appeal "should be used sparingly and only in exceptional circumstances . . . ." In re San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1010 n.1 (1st Cir. 1988) (citation and internal quotation marks omitted).

We consider the following § 1292(b) factors when determining whether to review an interlocutory appeal: (1) whether 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 might materially advance the ultimate termination of the litigation. See In re Advanced RISC Corp., 317 B.R. at 456; see also In re Bank of New Eng. Corp., 218 B.R. at 652. The party seeking interlocutory review—here the Appellant—must establish all three elements. WM Cap. Partners 53, LLC v. Allied Fin., Inc., No. 17-2015 (ADC), 2018 WL 1704474, at *2 (D.P.R.

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papers already on file," rather than order the Appellant to file a motion for leave. See In re Lane, 591 B.R. 298, 306 (B.A.P. 6th Cir. 2018).

Mar. 30, 2018) (stating that the appellant has the burden of satisfying the three § 1292(b) factors).

Having failed to file a motion for leave to appeal, the Appellant has not attempted to satisfy the § 1292(b) test. See Fed. R. Bankr. P. 8004(a)(2) & (b)(1) (providing that an appellant seeking leave to appeal an interlocutory order "must" file a motion which sets forth, among other things, "the reasons why leave to appeal should be granted"). Based on our own analysis, we conclude the statutory test for interlocutory review is not satisfied on this record. Most critical here, the Order does not involve a "controlling question of law." A "controlling question of law" is "an abstract legal issue or what might be called one of pure law, matters the [appellate courts] can decide quickly and cleanly without having to study the record." McFarlin v. Conseco Servs., LLC, 381 F.3d 1251, 1258 (11th Cir. 2004) (citation and internal quotation marks omitted). Here, the Appellant challenges the bankruptcy court's denial of his request for an order authorizing interim distributions to creditors, a matter which was in the bankruptcy court's discretion. See, e.g., Summit Inv. Mgmt. LLC v. Connolly (In re Fog Cap Retail Inv'rs LLC), No. 22-1297, 2024 WL 659559, at *7 (10th Cir. Feb. 16, 2024) (recognizing the bankruptcy court had discretion in determining whether to approve interim distributions); Saba v. Cory (In re Flamingo 55, Inc.), No. 2:05-cv-01521-RLH-GWF, 2006 WL 2432764, at *3 (D. Nev. Aug. 21, 2006) (determining whether bankruptcy court abused its discretion in authorizing the interim distribution of the estate's funds to unsecured creditors). A matter within the bankruptcy court's discretion generally does not involve a controlling question of law. See In re Diamond Trucking, Inc., No. 3:18-CV-140 JD, 2019 WL 316711, at *4 (N.D. Ind. Jan. 24, 2019) (ruling that orders involving matters within the bankruptcy court's discretion do not involve controlling questions of law); Am. Specialty Cars Holdings, LLC v. Official Committee of Unsecured Creditors (In re

ASC Inc.), 386 B.R. 187, 196 (E.D. Mich. 2008) ("A legal question of the type envisioned in § 1292(b) . . . generally does not include matters within the discretion of the trial court") (citation omitted); In re Auto. Prof'ls, Inc., 379 B.R. 746, 760 (N.D. Ill. 2007) (declining appellate review of issue that "[did] not clearly present a controlling and contestable issue of law (but instead a matter within the bankruptcy court's discretion)").

Because the first element of the analysis under § 1292(b) is not satisfied, we need not consider the remaining two elements. See Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff), No. 17-CV-2959 (VEC), 2017 WL 4417701, at *3 n.5 (S.D.N.Y. Oct. 3, 2017) (stating that because the § 1292(b) factors are "conjunctive," where one factor is not satisfied, the court did not need to address the other factors); Kore Holdings, Inc. v. Rosen (In re Rood), 426 B.R. 538, 549 (D. Md. 2010) (stating that where "the first element of the analysis [under § 1292(b)] is not present, the remaining two are essentially moot"). Consequently, we will not exercise our discretion to hear this interlocutory appeal.[2] See In re San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d at 1010 n.1.

[2] We also decline to exercise jurisdiction under either the Forgay-Conrad doctrine or the collateral order doctrine. The Forgay-Conrad doctrine "bestow[s] appellate jurisdiction over interlocutory orders when 'irreparable injury' to the aggrieved party may attend delaying appellate review until the litigation is over." In re Bank of New Eng. Corp., 218 B.R. at 649 n.8 (citation omitted). To be appealable under the collateral order doctrine, the order must have: "(1) conclusively determine[d] the disputed question, (2) resolve[d] an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." U.S. Fid. & Guar. Co. v. Arch Ins. Co., 578 F.3d 45, 55 (1st Cir. 2009) (quoting Will v. Hallock, 546 U.S. 345, 349 (2006)). Having failed to file a motion for leave to appeal, the Appellant has not advocated for our review of the Order under either of these doctrines and the record does not support such interlocutory review.

CONCLUSION

Because the Order is interlocutory and does not satisfy the requirements for discretionary interlocutory review, we **DISMISS** this appeal for lack of jurisdiction.

FOR THE PANEL:

Dated: August 29, 2024

By: /s/ Leslie C. Storm
Leslie C. Storm, Clerk

cc:
By U.S. Mail: Westborough SPE LLC
By U.S. Mail and email: Lolonyon Akouete; Jeffrey T. Blake, Esq.; Jose Couto Centeio, Esq.; Brian W. Riley, Esq.
By CM/ECF: Stephen F. Gordon, Esq.; Roger L. Smerage, Esq.; Jonathan R. Goldsmith, Esq.

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JONATHAN R. GOLDSMITH, Chapter 7 Trustee,
Appellees.

Finkle, Chief U.S. Bankruptcy Appellate Panel Judge;
Lamoutte and Cabán, U.S. Bankruptcy Appellate Panel Judges.

ORDER DENYING MOTION FOR RECONSIDERATION

Before us is a Motion for Reconsideration filed by the pro se appellant, Lolonyon Akouete (the "Appellant"), on September 2, 2024. The Appellant seeks reconsideration of the Panel's Judgment of Dismissal entered on August 29, 2024, wherein we determined that the order on appeal was interlocutory and did not meet the criteria for interlocutory review. For the reasons set forth below, the Motion for Reconsideration is **DENIED**.

BACKGROUND

We need not recount the relevant procedural history of the bankruptcy case, as it is set forth in the Judgment of Dismissal, which is incorporated herein by reference. See Akouete v.

Nathanson & Goldberg, P.C. (In re Westborough SPE LLC), BAP No. MW 24-016, slip op. (B.A.P. 1st Cir. Aug. 29, 2024).

The Appellant filed a notice of appeal with respect to the bankruptcy court's July 25, 2024 order (the "Order") denying his second Motion for Interim Distribution as "premature" because the chapter 7 trustee had not completed his review of claims in connection with the administration of the estate. On August 29, 2024, we entered a Judgment of Dismissal, dismissing the appeal for lack of jurisdiction. We determined that the Order was not a final order and, therefore, not appealable as of right. We further concluded that the Order did not satisfy the requirements for discretionary review under any of the three precepts for conferring appellate jurisdiction over interlocutory appeals: the application of the criteria governing 28 U.S.C. § 158(a)(3) review of interlocutory orders; the collateral order doctrine; or the Forgay-Conrad doctrine.[1]

On September 2, 2024, the Appellant filed the subject Motion for Reconsideration. Citing In re Wedgestone Financial, 142 B.R. 7, 8 (Bankr. D. Mass. 1992), the Appellant asserts that reconsideration is warranted when there is "newly discovered evidence or a manifest error of fact or law." He does not specifically identify any error of fact or law by the Panel in dismissing the interlocutory appeal. Rather, he contends that reconsideration is warranted as there is "newly discovered evidence that significantly impacts the merits of the case" which "was not available at the time of the original proceedings." The Appellant also asks us to exercise jurisdiction over this appeal under the collateral order and the Forgay-Conrad doctrines.

[1] Although we elaborated only as to the first of these precepts—the 28 U.S.C. § 1292(b) criteria governing 28 U.S.C. § 158(a)(3) review—we specifically concluded that, based on the record, interlocutory review was not warranted under any of the three precepts.

The Town of Westborough (the "Town") objects to the Motion for Reconsideration, arguing it should be denied as the Appellant has not demonstrated an error of law in the Judgment of Dismissal or presented any new evidence discovered after the Judgment of Dismissal was entered.

APPELLATE JURISDICTION

I. Standard Governing Motions for Reconsideration

Although the Appellant denominates the motion before the Panel as one for "reconsideration," it is well established that Bankruptcy Rule 8022—entitled "Motion for Rehearing"—is "the exclusive avenue for post-judgment petitions . . . during a bankruptcy appeal[.]"[2] Chase Monarch Int'l Inc. v. Medawar (In re Chase Monarch Int'l Inc.), 453 F. Supp. 3d 484, 485 (D.P.R. 2020) (citation omitted); see also Reynolds v. Maryland, No. ELH-17-3158, 2018 WL 5045192, at *1 (D. Md. Oct. 16, 2018) ("Bankruptcy Rule 8022 'provides the sole mechanism for filing a motion for rehearing' from a final order of . . . a bankruptcy appellate court") (citations omitted). Bankruptcy Rule 8022 requires a party seeking rehearing to "state with particularity each point of law or fact that the movant believes the . . . BAP has overlooked or misapprehended . . . ." Fed. R. Bankr. P. 8022(a)(2). Application of Bankruptcy Rule 8022 is "strict," as "the sole purpose of rehearing is to direct the court's attention to a material matter of law or fact which it has overlooked in deciding the case, and which, had it been given consideration, would probably have brought about a different result." Am. First Fed., Inc. v. Theodore, 584 B.R. 627, 632 (D. Vt. 2018) (citation omitted).

When determining whether to grant relief under Bankruptcy Rule 8022, courts have employed the same standard as for a motion to alter or amend a judgment under Rule 59(e).

[2] All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure, and references to "Rule" are to the Federal Rules of Civil Procedure.

See, e.g., ColFin Bulls Funding A, LLC v. Paloian (In re Dvorkin Holdings, LLC), No. 15cv3118, 2016 WL 1644323, at *2 (N.D. Ill. Apr. 25, 2016) (stating that Bankruptcy Rule 8022 "is the bankruptcy counterpart" to Rule 59, which "exists to permit the court to correct manifest errors of law or misapprehensions of fact") (citation omitted). To prevail under Rule 59(e), "the moving party must 'either clearly establish a manifest error of law or must present newly discovered evidence.'" Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 7 n.2 (1st Cir. 2005)).

II. Applying the Standard

In the Motion for Reconsideration, the Appellant does not argue that we erred in determining that the Order was interlocutory and did not meet the criteria for discretionary review under 28 U.S.C. § 158(a)(3). Instead, he argues that reconsideration is warranted because: (1) there is "newly discovered evidence" which "significantly impacts the merits of the case"; and (2) the Order meets the criteria for interlocutory review under the collateral order and Forgay-Conrad doctrines. We discuss each of these asserted grounds for reconsideration in turn.

A. Newly Discovered Evidence

Through his Motion for Reconsideration, the Appellant offers seven emails between various individuals, spanning from 2017 to mid-2024, which purportedly demonstrate fraud in the tax foreclosure action, collusion in the settlement negotiations between the chapter 7 trustee and the Town, and a "coordinated effort" by various parties to prevent the Appellant from accessing "unclaimed funds [of the Debtor] to prevent adequate legal representation and challenge to the foreclosure."[3] The Appellant contends this evidence is "crucial" to the

[3] The Town's claim arises from a tax foreclosure judgment, which the Debtor seeks to vacate. After the Town sought stay relief to conclude the tax foreclosure action and dismissal of the involuntary petition on the grounds that it was "designed solely to hinder final resolution" of the tax foreclosure action, the chapter 7 trustee and the Town reached a settlement agreement resolving their disputes, which has been submitted to the bankruptcy court for approval.

bankruptcy proceedings "as it directly impacts the fairness and legality of the foreclosure proceedings and the subsequent handling of the [D]ebtor's assets."

We are not persuaded to reconsider our dismissal of this appeal for lack of jurisdiction based on the Debtor's late presentation of this series of emails. First, the Appellant has not established that this evidence was "newly discovered." The Appellant asserts that he obtained this evidence through "recent discovery, which was not available during the original [bankruptcy] proceedings." He has not demonstrated, however, that he did not obtain the evidence until after entry of the *Judgment of Dismissal*—the relevant judgment here—or that the evidence was not reasonably discoverable earlier through due diligence. See City of Mia. Fire Fighters' & Police Officers' Ret. Tr. v. CVS Health Corp., 46 F.4th 22, 36 (1st Cir. 2022) (stating that movant must show evidence was not obtained until after judgment entered and that movant "could not in the exercise of reasonable diligence have obtained [the] new evidence earlier"). If the evidence was not discovered until after the Judgment of Dismissal was entered, it cannot justify reconsideration of the Judgment of Dismissal. See Trout v. Organización Mundial de Boxeo, Inc., 965 F.3d 71, 77 (1st Cir. 2020) (stating that motion for reconsideration "does not allow a party to introduce new evidence . . . that could and should have been presented to the . . . court prior to the judgment").

Second, the Appellant has not explained how these emails would have altered our analysis of whether the Order satisfied the criteria for interlocutory review. See Am. First Fed., Inc., 584 B.R. at 632 (stating that purpose of rehearing is "to direct the court's attention to a material matter of law or fact . . . which, had it been given consideration, would probably have brought about a different result"). Nor could he as our jurisdictional analysis does not turn on the validity of the tax foreclosure proceedings or whether the settlement is in the best interest of creditors. To the extent the Appellant is arguing that this new evidence would have altered the

bankruptcy court's determination of whether his motion for interim distribution was premature, that question is not properly before us in a motion seeking reconsideration of our dismissal of the appeal on jurisdictional grounds. See Canning v. Beneficial Me., Inc. (In re Canning), 706 F.3d 64, 72 n.10 (1st Cir. 2013) ("[E]vidence cannot be submitted for the first time on appeal.") (quoting United States v. Rosario-Peralta, 175 F.3d 48, 56 (1st Cir. 1999)).

For these reasons, we decline to reconsider the Judgment of Dismissal on the basis of "newly discovered evidence."

B. Manifest Error of Law

In invoking the collateral order and Forgay-Conrad doctrines after we already summarily rejected them in the Judgment of Dismissal, the Appellant also implicitly argues that we committed a manifest error of law by not exercising jurisdiction over this appeal under these doctrines.

Under the collateral order doctrine, an order "though not yet final, may be appealed immediately if it 'finally determine[s] 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.'" U.S. Fid. & Guar. Co. v. Arch Ins. Co., 578 F.3d 45, 54-55 (1st Cir. 2009) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)). In the First Circuit, to qualify as a reviewable collateral order, the order must have: "(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." Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 649 (B.A.P. 1st Cir. 1998) (citations omitted).

The Order does not satisfy any of these criteria. See BancBoston Real Estate Cap. Corp. v. JBI Assocs. Ltd. P'ship (In re Jackson Brook Inst., Inc.), 227 B.R. 569, 577 (D. Me. 1998) (discussing elements of collateral order doctrine). The Order, which simply denied the Appellant's motion as "premature" and involved a discretionary decision of the court, did not "conclusively" determine any issue, let alone an "important legal question." See id. Additionally, as the Order relates to the distribution of estate assets, it is inherently connected to the administration of the bankruptcy case and, as such, it is not "completely separate from the merits" of the main dispute. See id. And finally, the Appellant has not established that denial of an immediate appeal renders the Order "effectively unreviewable" from a final claim allowance order. See id.

The Appellant has also failed to establish that interlocutory review is warranted under the Forgay-Conrad doctrine, which "bestow[s] appellate jurisdiction over interlocutory orders when 'irreparable injury' to the aggrieved party may attend delaying appellate review until the litigation is over." In re Bank of New Eng. Corp., 218 B.R. at 649 n.8 (citation omitted). "Irreparable injury is that which is substantial and not compensable by monetary damages or other legal remedies." Gonzalez v. Recht Fam. P'ship, 51 F. Supp. 3d 989, 992 (S.D. Cal. 2014) (citation omitted). "Usually this will involve a court order which, although interlocutory, orders the immediate disposition and delivery of property." In re Am. Colonial Broad. Corp., 758 F.2d 794, 803 (1st Cir. 1985) (citation omitted).

Here, the Appellant does not argue, and the record does not suggest, that the Order determined any rights to property or that it authorized an immediate disposition and delivery of estate assets. See id. On the contrary, the Order delays, rather than directs, any distributions from the bankruptcy estate. Although the Appellant argues that "denial of interim distribution causes [him] immediate financial harm by preventing access to funds that are essential for legal

representation" to contest the settlement agreement and the sale of the Debtor's property, the asserted harm is not the kind of irreparable injury contemplated by the Forgay-Conrad doctrine. See Insurers Syndicate for Joint Underwriting of Medico-Hosp. Prof'l Liab. Ins. v. Corporacion Insular de Seguros v. Garcia (In re Insurers Syndicate for Joint Underwriting of Medico-Hosp. Prof'l Liab. Ins.), 864 F.2d 208, 210, n.4 (1st Cir. 1988) (refusing to apply Forgay-Conrad doctrine where order on appeal "involve[d] neither title to property nor its 'immediate disposition and delivery' . . . in the requisite proprietary sense") (citation omitted); see also Cummins v. EG & G Sealol, Inc., 697 F. Supp. 64, 67 (D.R.I. 1988) ("The Forgay exception is very narrow and applies only when a trial court has ordered a party to act and the order will result in an irremediable change in the positions of the parties."). Accordingly, the Forgay-Conrad doctrine does not operate to bestow appellate jurisdiction in this instance.

For these reasons, we conclude there was no manifest error of law in our determination that immediate review was not warranted under either the collateral order doctrine or the Forgay-Conrad doctrine.

CONCLUSION

For the reasons discussed above, the Motion for Reconsideration is **DENIED**.

FOR THE PANEL:

Dated: September 26, 2024

By: /s/ Leslie C. Storm
Leslie C. Storm, Clerk

cc:
By U.S. Mail: Westborough SPE LLC
By U.S. Mail and email: Lolonyon Akouete; Jeffrey T. Blake, Esq.; Jose Couto Centeio, Esq.; Brian W. Riley, Esq.
By CM/ECF: Stephen F. Gordon, Esq.; Roger L. Smerage, Esq.; Jonathan R. Goldsmith, Esq.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re: Westborough SPE LLC, Debtor(s)	Chapter 7 23-40709-CJP

ORDER

MATTER:
#180 Motion filed by Creditor Lolonyon Akouete for Interim Distribution and Request for Expedited Determination and
#181 Motion filed by Creditor Lolonyon Akouete with certificate of service to Shorten Time for Objections and Opposition Re: 180 Motion for Interim Distribution.

REQUEST FOR EXPEDITED DETERMINATION [DKT. NO. 181] OF THE SECOND MOTION FOR INTERIM DISTRIBUTION FILED BY LOLONYON AKOUETE [DKT. NO. 180] (THE "SECOND MOTION") IS DENIED. UPON CONSIDERATION OF THE SECOND MOTION, THE OBJECTIONS OF THE CHAPTER 7 TRUSTEE [DKT. NO. 185], THE PETITIONING CREDITOR [DKT. NO. 184], AND THE TOWN OF WESTBOROUGH [DKT. NO. 183], THE REPLY OF MR. AKOUETE [DKT. NO. 186], AND THE RECORD OF THIS CASE, THE SECOND MOTION IS DENIED AS PREMATURE.

Dated: 07/25/2024

By the Court,

Christopher J. Panos
United States Bankruptcy Judge