IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
ZENITH ELECTRONICS CORPORATION,	)	Case No. 99-2911 (MFW)
Debtor.	)	
ZENITH ELECTRONICS CORPORATION,	)	
Appellant,	)	
v.	)	Civil Action No. 99-746 GMS
THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS,	)	
Appellee.	)	
PATRICIA A. STAIANO, UNITED STATES TRUSTEE, et al.	)	
Appellants,	)	Civil Action No. 99-747 GMS Civil Action No. 00-399 GMS
v.	)	(Consolidated under 99-747)
THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, *et al*.	)	
Appellee.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On August 23, 1999, the debtor, Zenith Electronics Corporation ("Zenith"), filed a voluntary petition for bankruptcy under Chapter 11. On August 26, 1999, the Unofficial Committee of Equity

Security Holders filed an emergency motion to appoint an official committee of equity securities holders. The Bankruptcy Court for the District of Delaware, by the Honorable Mary F. Walrath, granted the motion over the objection of the United States Trustee ("Trustee"). Judge Walrath ordered the Trustee to appoint an official committee of equity securities holders. The Trustee did so on September 8, 1999.

The plan was confirmed on November 5, 1999. Subsequent to the confirmation, counsel for the Equity Committee applied for fees. Judge Walrath granted the fee applications on February 7, 2000.

Presently before the court are the appeals of the Trustee and the Debtor. In her first appeal (case no. 99-747), the Trustee argues that the Bankruptcy Court erred in ordering the appointment of an equity committee. The debtor's appeal (case no. 99-746) raises the same argument. The trustee's second appeal (case no. 00-399) contends that the Bankruptcy Court's order of fees to the professionals representing the Equity Committee was improper, and should be reversed.

The Equity Committee has filed motions to dismiss each of the above appeals. The Equity Committee argues that appeals 99-747 and 99-746 ("The Committee Appeals") are moot because the action complained of has already occurred, and thus no relief can be granted. The Equity Committee further maintains that appeal 00-399 ("The Fee Appeal") should be dismissed as equitably moot because although relief is possible, it would not be equitable at this time. The court agrees with the Equity Committee and will, therefore, dismiss the above named appeals. The court will now set forth the reasons for its decision.[1]

---

[1] The court is resolving these cases simultaneously for the following reasons. First, cases 99-747 and 00-399 have been consolidated. Second, although not consolidated, the briefs on mootness for appeal 99-747 and 99-746 are identical. Third, the appeals raise similar legal issues. Therefore, in the interest of judicial economy, the court will resolve all three appeals at once.

II. FACTS

On August 23, 1999, Zenith filed a voluntary petition for bankruptcy under Chapter 11. On August 26, 1999, the Unofficial Committee of Equity Security Holders filed an emergency motion to appoint an official committee of equity securities holders. On August 27, the Trustee objected to the order. On August 27, 1999, the Bankruptcy Court (Judge Walrath) held a hearing on the motion. Judge Walrath granted the motion and ordered the Trustee to appoint an official committee of equity securities holders. The Trustee filed a notice of appeal on August 31, 1999. Rather than briefing, the Trustee filed a petition for an emergency stay pending appeal with the Honorable Judge Joseph Farnan of this court on September 8, 1999. The Trustee also appointed the Equity Committee on September 8, 1999.

Judge Farnan denied the stay on September 13, 1999. The Equity Committee, therefore, remained in place. On November 2, 1999, Judge Walrath wrote an opinion approving of the disclosure statement and plan of reorganization. The plan contained a provision stating that "[o]n the Effective Date, the Committee(s) [including the Equity Committee] shall dissolve and members shall be released and discharged from all rights and duties arising from, or related to, the Prepackaged Chapter 11 Case." She signed an order effectuating the plan on November 5, 1999. On the Effective Date, November 9, 1999, the Equity Committee was dissolved.

Despite its dissolution, the Equity Committee, through its counsel, filed its final application for fees on November 19, 1999. Several professional advisors to the Equity Committee, including its attorneys and financial advisors, also filed applications for fee reimbursement. Judge Walrath held a fee hearing on January 27, 2000. She granted the fee applications on February 7, 2000. The Trustee then appealed that order, but did not seek a stay.

III. DISCUSSION

The Equity Committee raises two separate mootness arguments - constitutional mootness and equitable mootness. The court will consider each doctrine in turn.

A. The Committee Appeals are Constitutionally Moot

Constitutional mootness refers to Article III's requirement that a federal court can only exercise jurisdiction over a "case or controversy." U.S. CONST. art.III. If an action is moot, however, there is no case or controversy. *See In re Continental Airlines*, 91 F.3d 553, 558 (3d Cir. 1996) (noting that mootness implicates the case or controversy requirement). An action is moot where "events have taken place during the pendency of the appeal that make it impossible for the court to grant 'any effectual relief whatever'" *Id.* (citations omitted). However, an appeal is not moot where the court can fashion "'some form of meaningful relief.'" *Id.*

The Committee Appeals are constitutionally moot. As the Equity Committee has pointed out, "where an act or event sought to be enjoined has been performed or has occurred [pending appeal], an appeal from the [act or event] will be dismissed as moot." *See In re Cantwell*, 639 F.2d 1050, 1054 (3d Cir. 1981). In the *Cantwell* case, the discharge for which the appellants sought a stay had previously been granted. *See id*. The court reasoned that even if it granted the relief appellants requested, it would not change the fact that the act the appellants sought to have stayed had occurred. *See id*. Thus, the court concluded that there was no effective legal relief available. *See id*. The Trustee seeks the reversal of the Bankruptcy Court's order directing her to appoint an equity committee. If the Equity Committee were still operating in any meaningful sense, or if Judge Farnan had granted the stay, the court might be able to

fashion an order changing the Committee's composition or disbanding it. However, as in *Cantwell*, the event the appellants seek to reverse - the appointment of an equity committee - has already occurred. In fact, not only has the Equity Committee been appointed, it has served its function and was dissolved on November 9, 1999. Thus, the committee at issue has completed its work and no longer exists. Since the committee no longer exists and the stay was denied, the only way to grant meaningful relief would be to return back to the time before its appointment and prevent it. Merely reversing the order as appellants urge will not turn back the hands of time. Although the Trustee and the debtor argue that reversal will permit some relief, neither the Trustee nor the debtor have cited any authority to this court that would enable it to agree with that argument. The court, therefore, finds that there is no effective legal relief it can grant at this time. Thus, the Committee Appeals are constitutionally moot.

B. The Fee Order Appeal is Equitably Moot

Although related to constitutional mootness, equitable mootness is a broader concept. *See Continental*, 91 F.3d at 558. Under the equitable mootness doctrine, an appeal can be dismissed as moot "when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *Id.* at 559. When considering equitable mootness, a court must consider: "(1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments." *See id.* at 560. The court will now consider each of these five factors in turn.

1. Substantial Consummation of the Plan

It is clear that the debtor's plan has been substantially consummated. In a previous opinion regarding this debtor, the court described in great detail why the plan has been substantially consummated. *See In re Zenith Electronics Corp.*, 250 B.R. 207, 213 (D. Del. 2000). To reiterate, however, the Effective Date of the debtor's plan was November 9, 1999. By that date, most of the relevant transactions had been completed. *See id.* Moreover, the Bankruptcy Court's order indicated that the plan would be considered substantially consummated on its effective date. *See id.* (citing bankruptcy order). Since no new facts on this point have been presented, the court will again find that the plan has been substantially consummated.

2. Obtaining a Stay

Normally, the failure to obtain a stay favors dismissal for equitable mootness. *See Continental*, 91 F.3d at 562. Indeed, "the party who appeals without seeking to avail himself of th[e] protection [of a stay] does so at his own risk." *Id.* The Trustee did seek a stay of this action regarding the equity committee order issued on August 27, 1999. However, the Trustee did *not* seek a stay regarding the Fee Order. The Trustee does not dispute that no stay was sought. The court must therefore conclude that no stay was sought and that this fact weighs in favor of dismissal on equitable grounds.

3. Parties Not Before the Court

The Trustee correctly asserts that no third parties will be affected by the determination here. Despite its attempts to fashion an argument to the contrary, it is clear that the only parties who will be affected are the professionals representing the Equity Committee, and they are present before the court. The Equity Committee admits as much in its opening brief. *See* D.I. 16 at 6 ("[T]he members of the Equity Committee and the Professionals . . . are the only parties who have a compelling economic stake in the disposition of the [Trustee's] appeal of the Fee Order and accordingly are the only parties who would be affected (either postiviely or negatively) by such disposition."). Given this admission, the court must conclude that no third party interests are implicated.

4. The Success of the Plan

The Trustee is also correct that the relief sought will probably not affect the success of the plan. The Trustee cites, and the court is persuaded by, the Third Circuit's statement in *In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000). In *PWS*, the Third Circuit focused on whether the requested relief had an "integral nexus" with the reorganization plan such that it would cause the "reversal or unraveling" of the organization plan. *See id*. at 236. As the Trustee points out, the relief sought here can be granted without disrupting the entire reorganization plan. Indeed, courts have held that ordering the remittance of fees has a minimal effect on the reorganization plan. *See In re S.S. Retail Stores*, 216 F.3d 882, 884 (9th Cir. 2000) (noting that disgorgement of fees does not require a bankruptcy court "to unravel a complicated bankruptcy plan"). Thus, the court finds that the plan will be minimally affected by the disgorgement of fees.

5. Finality

Finality weighs in favor of dismissing the appeal. Parties should be allowed to rely on the orders of the bankruptcy court. Moreover, this court should only reverse the bankruptcy court's fee order for abuse of discretion. *See In re Federated Department Stores*, 44 F.3d 1310, 1315 (6th Cir. 1995). Thus, the court should not lightly disturb the findings of the bankruptcy court.

6. Other Factors

It can be seen above that of the five equitable mootness factors, only two (substantial consummation and failure to obtain a stay) weigh heavily in favor of dismissal, two weigh against dismissal (effect on the plan and third parties) and one (finality) is arguably neutral. However, where some, but not all, equitable mootness factors are present, courts have nevertheless exercised discretion to dismiss the appeal on equitable grounds. *See S.S. Retail*, 216 F.3d at 885 ("[E]ven if an appeal is not equitably moot, a court may still hold that the equities weigh in favor of dismissing the appeal.") (citing *Federated Dep't Stores*, 44 F.3d at 1320). The court will exercise its discretion to dismiss the appeal here for similar reasons.

First, the court finds that although only two factors - substantial consummation and failure to obtain a stay - weigh in favor of dismissal, these factors are given great weight by the courts. *See Continental*, 91 F.3d at 561-562 (noting that substantial consummation is given "foremost consideration" and providing lengthy discussion of stay procedures). Second, although the Trustee objects, as the Equity Committee points out, no other interested party has appealed the fee order. Third, significantly, the Equity Committee

reports that it has attempted to resolve this matter by negotiating a stipulation with the Trustee. The Equity Committee also reports that the Trustee has rejected these attempts. The Trustee does not dispute these allegations in her brief. The court is not as troubled by the fact that the Trustee has rejected these attempts as it is by the lack of any proffered explanation for the rejection. If it is possible for a matter to be resolved without expending valuable judicial resources, the parties should attempt to do so. The Trustee's failure to participate in that process places the equities against her. Finally, other courts have held that even where equitable mootness is inapplicable, fairness may dictate the payment of fees. *See S.S. Retail*, 216 F.3d at 885 (noting that it would be inequitable to order disgorgement of attorney fees). The Trustee has provided no indication that these professionals acted to the detriment of the estate or that they otherwise acted inappropriately. *See id.* (noting no allegations of impropriety). This fact, coupled with the absence of other appeals, indicates that it would not be unfair for the court to allow the professionals to retain their fees.

Thus, although the court concludes that quantitatively, the equitable mootness factors may weigh against dismissal, qualitatively, those that weigh in favor of dismissing the appeal outweigh those that do not. Taken together with the other equitable considerations discussed above, the court concludes that equity dictates the dismissal of this appeal.

IV. CONCLUSION

For the foregoing reasons, the court will grant the appellee's motion to dismiss the Committee Appeals as moot. Moreover, the court will dismiss the Fee Order Appeal on equitable grounds. All of the above-captioned appeals are, therefore, dismissed.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Appellee's Motion to Dismiss (Case No. 99-747 - D.I. 10) is GRANTED;

2. The Appellee's Motion to Dismiss (Case No. 99-746 - D.I. 10) is GRANTED;

3. The Appellee's Motion to Dismiss (Case No. 00-399 - D.I. 16) is GRANTED;

4. The Appellant's Motion for Default (Case No. 99-747 - D.I. 14) is DISMISSED as MOOT;

5. The Appellee's Motion for Hearing (Case No. 99-747 - D.I. 19) is DISMISSED as MOOT; and

6. The Clerk shall close cases 99-746, 99-747, and 00-399

Dated: February 11, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE