Appeal History:

denied and dismissed, No. Misc. 89-0010 (N. D. of Iowa March 30, 1990) (Hansen, J.)

In the United States Bankruptcy Court

for the Northern District of Iowa

DENNIS DEAN WORKMAN *Debtor(s).*	Bankruptcy No. L-87-00401C Chapter 7
RADIO DENVER CORPORATION *Plaintiff(s)* vs. DENNIS DEAN WORKMAN *Defendant(s)*	Adversary No. X87-0167C

ORDER RE: DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT OR REQUEST FOR A NEW TRIAL

A memorandum of decision and order was entered in this case on March 8, 1989 denying debtor's discharge. Judgment also was entered.

Defendant-debtor, Dennis Workman, moves for alteration or amendment of judgment or a new trial. Hearing was held in Waterloo, Iowa on June 12, 1989.

Debtor essentially argues that the evidence does not support the court's judgment denying debtor discharge under 11 U.S.C. § 727(a)(2)(B). More particularly, debtor argues that there was no evidence to support a finding that the settlement stipulation entered into by Workman was a transfer which depleted or injured Workman's bankruptcy estate. Debtor argues there is no evidence that the estate or trustee or any creditor was hindered, delayed or defrauded by Workman's execution of the stipulation.

Second, Workman requests a new trial in order to introduce into evidence testimony and exhibits regarding attorney Terpstra's testimony that he did not advise Workman that he could enter into the Colorado stipulation.

At the hearing, Workman testified and offered exhibits in support of the motion for new trial. The plaintiff objected to the introduction of any evidence. While affidavits may have been more appropriate in support of the motion, the court will consider the testimony of Workman and the exhibits admitted into evidence in determining whether a new trial should be granted. Bankr. R. 9023, incorporating Fed. R.Civ. P. 59(c).

In its memorandum of decision, the court found that attorney Terpstra had not advised Workman that he could enter into the Colorado stipulation. This finding was based on Terpstra's testimony and was contrary to Workman's testimony that the advice had been given. Workman seeks a new trial so he can introduce into evidence testimony and exhibits which would impeach Terpstra's testimony by showing he had an incorrect recollection of other matters to which he testified.

In order to obtain a new trial on the basis of newly discovered evidence, Workman must show that (1) the evidence was discovered after the trial, (2) that he had exercised diligence in obtaining the evidence before trial, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material, and (5) the evidence is such that a new trial probably would produce a different result. *See* E.E.O.C.v. Rath Packing Company, 787 F.2d 318, 331 (8th Cir. 1986).

Workman argues that he was unable to obtain the evidence he now wishes to introduce because the court failed to give him a continuance at trial to introduce such evidence. Workman says he could not have reasonably anticipated the necessity for such evidence prior to trial because he was not aware that Terpstra would testify or about what he would testify.

Having considered the arguments of Workman, the court believes that the motion for a new trial to introduce further testimony of Workman and attorney Arthur Lindquist-Kleissler and to offer certain documentary evidence should not be granted.

First, it appears that the debtor wishes only to impeach Terpstra's testimony on collateral matters in order to undermine Terpstra's testimony that he did not advise Workman he could sign the stipulation. Even were Workman to show that Terpstra incorrectly recalls other matters including certain contacts with the debtor, it would not change this court's opinion of the reliability and credibility of Terpstra as to whether he advised Workman he could enter into the stipulation. The court has observed Terpstra, heard his testimony and believes from his testimony that he did not give that advice. Therefore, even were the proffered evidence introduced, it would not change the result with regard to the court's finding.

Workman has also requested that the court alter the judgment to allow discharge, arguing that there was no evidence of particular property transferred as a result of the stipulation or of injury to the estate. This argument by Workman is not persuasive. Lack of injury to creditors is irrelevant in determining a denial of discharge. In re Adeeb, 787 F.2d 1339, 1343 (9th Cir. 1986). Further, it has been held that "once it is established that a transfer was fraudulent, it is not necessary to establish the precise value of what the estate lost." First Commercial Bank v. Locke (In re Locke), 50 B.R. 443, 452 (Bankr. E.D. Ark. 1985). Citing Williams v. Riddle (In re Riddle), 8 B.R. 797, 799 (Bankr. S.D. Fla. 1980).

While it may be true that no particular item of personal property was valued or determined to have been transferred as a result of the stipulation, this court has determined that with fraudulent intent, Workman transferred property of the estate.

As a result of the stipulation and as part of it, Workman agreed "to release and relinquish all claims of ownership or other interest in properties, real or personal, which may be located at the physical sites of radio stations KSHR-KBEY in Oregon, KBBL in Colorado, and WBTY in Georgia. By this stipulation, Workman hereby acknowledges that any and all such claims are hereby released and forever waived." In exchange for this release and other agreements made by Workman as part of the stipulation, Workman received consideration.

Under the foregoing authorities, this court does not believe it is necessary in order to deny discharge, for this court to value the claims released or the particular assets as to which Workman released claims upon. While value may be, and often is, relevant to the issue of intent, this court believes that the debtor had the intent prohibited by 11 U.S.C. § 727(a)(2)(B) without the necessity of the valuation of the property or claims released.

For the foregoing reason, the court concludes that the defendant's motion for a new trial or alteration of judgment should be denied.

SO ORDERED ON THIS 21st DAY OF JUNE, 1989.

William L. Edmonds
Chief Bankruptcy Judge

In The United States District Court

For the Northern District of Iowa

Cedar Rapids Division

IN RE:

DENNIS DEAN WORKMAN,
Bankruptcy No. L-87-00401C

Adversary No. X-87-167C
Debtor.

RADIO DENVER CORPORATION,

Plaintiff/
Appellee,[1]

vs.

ORDER

DENNIS DEAN WORKMAN,

Defendant/
Appellant.

No. Misc. 89-0010

This matter is before the court on appellant's resisted motion for consideration of appeal under the unique circumstances doctrine, filed January 19, 1990.

On October 23, 1989, this court remanded this matter to the Honorable William L. Edmonds, United States Bankruptcy Judge, for findings of facts and conclusions of law regarding the timeliness of appellant's notice of appeal. On January 8, 1990, Judge Edmonds entered his order. The basic facts of this matter are set forth in detail in this court's order of October 23, 1989, and Judge Edmonds' order of January 8, 1990. Judge Edmonds found that appellant's notice of appeal did not constitute a request pursuant to Bankr. R. 8002(c) for an extension of time in which to file an appeal. As a consequence, appellant's appeal cannot be deemed timely. Judge Edmonds did find that "Workman's failure to file notice of appeal within the time limits prescribed in Bankr. R. 8002(a) was the result of excusable neglect." Judge Edmonds' order at 15. Judge Edmonds further suggested that the unique circumstances doctrine might be applicable to this matter but found that application of this doctrine is the prerogative of this court rather than the bankruptcy court. Judge Edmonds' order at 13-14. As a consequence, appellant brings the pending motion.

A district court lacks jurisdiction over an appeal from a decision of the bankruptcy court if the notice of appeal is not timely filed. *See, e.g.*, In the Matter of Texas Extrusion Corp., 844 F.2d 1142, 1154 (5th Cir.), *cert. denied*, 109 S. Ct. 311 (1988); In re Universal Minerals, Inc.,

755 F.2d 309, 310-311 (3d Cir. 1985). *See also* Browder v. Director, Ill. Dep't of Corrections, 434 U.S. 257, 264 (1978) (Under Fed. R. App. P. 4(a), the time limit for filing a notice of appeal is "mandatory and jurisdictional."); Spinar v. South Dakota Bd. of Regents, 796 F.2d 1060, 1062 (8th Cir. 1986) (same). However, a district court does have jurisdiction to consider the appellant's arguments that unique circumstances for failure to file a timely notice of appeal exist and that the appeal should be allowed to proceed. *In re* Provan, 74 B.R. 717, 719 (9th Cir. BAP 1987), *aff'd sub nom*. Provan v. Federated Fin. Universal Corp., 862 F.2d 318 (9th Cir. 1988). Provan found that the district court is the appropriate forum to hear a unique circumstances doctrine. Provan, 74 B.R. at 720. If necessary, the district court may remand the matter to the bankruptcy court in order to resolve disputed factual issues. *Id*. There appears to be no unresolved factual issues in dispute, and thus the motion is ready for decision by this court.

The unique circumstances doctrine arises from three United States Supreme Court cases decided in the mid-1960's. *See* Wolfsohn v. Hankin, 376 U.S. 203 (1964) (per curiam); Thompson v. INS, 375 U.S. 384 (1964) (per curiam); Harris Truck Lines v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) (per curiam). The doctrine has been stated as follows.

> A party's reasonable reliance on the erroneous action of a district court which causes the party to file an untimely notice of appeal will justify an enlargement of the time period for filing an appeal.

Insurance Co. of N. Am. v. Bay, 784 F.2d 869, 872 (8th Cir. 1986) (Fed. R. App. P. 4(a)[(2)]). *See also* McKee v. Bi-State Dev. Agency, 801 F.2d 1014, 1018 (8th Cir. 1986).

> Courts will permit an appellant to maintain an otherwise untimely appeal in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion of his right to appeal would be timely, so long as the judicial action occurred prior to the expiration of the official time period such that the appellant could have given timely notice had he not been lulled into inactivity.

United Artists Corp. v. La Cage Aux Folles, Inc., 771 F.2d 1265, 1268 (9th Cir. 1985) (quoting Willis v. Newsome, 747 F.2d 605, 606 (11th Cir. 1984) (per curiam), *cert. denied*, 475 U.S. 1050 (1986)). The continued validity of the unique circumstances doctrine has been questioned. *See* Houston v.

Lack, 487 U.S. 266,___, 108 S. Ct. 1389, 2388 (1988) (Justice Scalia dissenting) (citing United States v. Locke, 471 U.S. 84, 100-101 (1985); Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 61 (1982); Browder, 434 U.S. 257); Parke-Chapley Const. Co. v. Cherrington, 865 F.2d 907, 913 n.6 (7th Cir. 1989); Kropinski v. World Plan Executive Council-US, 853 F.2d 948, 951-52 (D.C. Cir. 1988). For the purposes of this order, the court will assume the continued validity of the unique circumstances doctrine as the court finds that the facts of this matter do not fit into the doctrine as it is formulated by the above cases. The court makes no statement as to whether the unique circumstances doctrine is still valid.

Appellee argues that the unique circumstances doctrine does not apply here as there was no "judicial action" which caused the untimely notice of appeal. The primary cause of the untimely notice was the advice of appellant's former attorney that appellant had thirty days, rather than the ten days prescribed by Bankr. R. 8002(a), in which to file his notice of appeal. Appellant appears to adopt Judge Edmonds' suggestion that the "judicial action" in this matter is the failure of the bankruptcy court clerk's office to inform appellant that his notice of appeal was untimely filed and to advise him that a motion for extension of time in which to file the notice of appeal could be made. However, the cases cited above, except for Provan, all involve some sort of affirmative action or advice by a judicial officer that ultimately turns out to be incorrect. In Provan, the unique circumstances doctrine was found not to apply where the bankruptcy clerk's office accepted the parties' designation of the record and did not inform Provan that no notice of appeal had been filed. Provan, 74 B.R. at 720-21. In other words, inaction was found insufficient to invoke the unique circumstances doctrine. This holding of Provan was followed in In re Stagecoach Utilities, 86 B.R. 229, 230 (9th Cir. BAP 1988) ("In the absence of an affirmative misleading act the unique circumstances doctrine does not allow consideration of an untimely appeal. The cases enunciating the doctrine involve trial court's positive acts on which an appellant has a right to rely."). *See also* Marane, Inc. v. McDonald's Corp., 755 F.2d 106, 111 n.2 (7th Cir. 1985) ("Reliance on some such district court action is a prerequisite for application of the doctrine."). This court holds that the inaction by the bankruptcy clerk's office alleged in this case is not a basis for invoking the unique circumstances doctrine.

The court has also considered whether the clerk's office was under a duty to act, the violation of which might allow the application of the unique circumstances doctrine. Judge Edmonds found that Workman was not a pro se litigant and was thus not within the scope of the directive of Campbell v. White, 721 F.2d 644, 647 (8th Cir. 1983), that "court clerks' offices screen notices of appeal for timeliness and advise pro se litigants of the appropriateness of an extension motion." Appellant does not dispute this finding and the court agrees with Judge Edmonds on this point.

The court finds that this matter does not fall within the unique circumstances doctrine. No action of the bankruptcy court or the bankruptcy clerk's office caused the untimeliness of appellant's notice of appeal.

ORDER:

Accordingly, It Is Ordered:

1. Appellant's motion for consideration of appeal under the unique circumstances doctrine, filed January 19, 1990, is denied.

2. This matter is dismissed.

Done and Ordered this 30th day of March, 1990.

David R. Hansen
Judge

UNITED STATES DISTRICT COURT

1. The court will use the terms appellant and appellee for the parties although these terms are technically incorrect as defendant Workman has not filed a timely notice of appeal.

2. Bankr. R. 8002(c) is an adaptation of Fed. R. App. P. 4(a). Advisory Committee Note to Bankr. R. 8002(c). Consequently, decisions under Rule 4(a) are generally applicable to Rule 8002(c).

To the Top