

# In the United States Bankruptcy Court

## for the Northern District of Iowa

LYLE R. FLETCHALL  
DORIS L. FLETCHALL

Bankruptcy No. L90-01910W

*Debtor(s).*

Chapter 7

LYLE R. FLETCHALL  
DORIS L. FLETCHALL

Adversary No. 93-6165KW

*Plaintiff(s)*

vs.

THE STATE OF IOWA  
IOWA DEPARTMENT OF REVENUE  
AND FINANCE

*Defendant(s)*

### ORDER RE: MOTION TO DISMISS APPEAL

This matter is before the Court on the Motion to Dismiss Appeal filed by State of Iowa. Debtors Lyle and Doris Fletchall object to the motion.

Debtors have appealed the Court's order dated June 17, 1994. The order was docketed and judgment was entered on June 20, 1994. Debtors filed a "Motion for New Trial and/or Amendment of Judgment" on July 5, 1994. The Court filed an Order denying that motion on July 6, 1994. The State's resistance to the Motion to New Trial was filed July 7, 1994. Debtors filed their notice of appeal of the June 17, 1994 order on July 13, 1994.

The State moves to dismiss the appeal on the grounds that Debtors' Motion for New Trial and/or Amendment of Judgment was untimely under Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59(b), resulting in the notice of appeal being untimely under Fed. R. Bankr. P. 8002(a). Debtors assert that the motion for new trial was timely, citing the mailbox rule which extends time periods by three days when service is made by mail.

A notice of appeal must be filed within 10 days of the entry of the judgment or order appealed from. Fed. R. Bankr. P. 8002(a). If a timely motion for new trial is filed under Rule 9023, the time for appeal runs from the entry of the order denying the new trial. Fed. R. Bankr. P. 8002(b). Under Rule 9023, which adopts Fed. R. Civ. P. 59(b), a motion for a new trial shall be served not later than 10 days after the entry of the judgment.

The Court has no power to extend the time limit applicable to Rule 9023 motions. In re B.J. McAdams, Inc., 999 F.2d 1221, 1224 (8th Cir. 1993). Late Rule 9023 motions do not toll the time for filing a notice of appeal. Id. at 1225. Further, the mailbox rule found in Rule 9006(f), allowing an

extra three days after service by mail, does not apply to extend the time within which a Rule 9023 motion must be served. Id.; In re Sanders, 59 B.R. 414, 416 (D. Montana 1986).

A court's consideration of an untimely Rule 9023 motion does not toll the running of the appeal period. Whitemere Dev. Corp. v. Township, 786 F.2d 185, 187 (3d Cir. 1986). The time requirements for Rule 9023 motions are jurisdictional and cannot be extended in the discretion of the court. In re Antell, 155 B.R. 921, 925 (Bankr. E.D. Pa. 1992). The trial court does not have jurisdiction to hear and pass on reasons for new trial not served within the required 10 days. In re West Coast Development Corp., 89 B.R. 993, 994 (Bankr. S.D. Fla. 1988).

The Court shall consider Monday, June 20, 1994 as the date of the entry of the order or judgment appealed from as that was the date the order was docketed and the judgment was filed. The tenth day after that date is Thursday, June 30, 1994. Bankruptcy Rule 9006(a) controls the computation of the time period. In re Miramar, Inc., 70 B.R. 32, 33 (Bankr. E.D. Mich. 1987). Because the relevant time period is more than 8 days, the intermediate Saturday and Sunday are not excluded from the computation under Rule 9006(a). The extra three days provided in Rule 9006(f) after service by mail are not applicable to the time period for serving a Rule 9023 motion which begins with entry of the judgment or order.

Debtors filed their Motion for New Trial on July 5, 1994 with a certificate of service stating that service was made on July 2, 1994. Because service was not made within the 10-day period, i.e. by June 30, 1994, the Motion for New Trial is untimely. Untimely Rule 9023 motions do not toll the time for filing a notice of appeal. Therefore, the Notice of Appeal filed July 13, 1994 is also untimely. The Court's consideration of and ruling on the Motion for New Trial does not rescue Debtors' appeal because the time limits of Rule 9023 are jurisdictional and cannot be extended by Court action.

The parties have requested telephonic hearing on this matter. However, in the interests of economy, the Court denies such request. Neither the significant dates nor the law are in controversy. Further hearing is unnecessary.

**WHEREFORE**, the Motion to Dismiss Appeal filed by the State of Iowa is GRANTED.

**FURTHER**, Debtors' appeal is DISMISSED.

**SO ORDERED** this 26th day of July, 1994.

Paul J. Kilburg  
U.S. Bankruptcy Judge