

In the United States Bankruptcy Court

for the Northern District of Iowa

ERIK T. BEIWEL
Debtor(s).

Bankruptcy No. 00-00112-W
Chapter 7

ERIK T. BEIWEL
Plaintiff(s)

Adversary No. 00-9085-W

vs.

SALLIE MAE SERVICING and
OKLAHOMA STATE REGENTS
Defendant(s)

ORDER RE MOTION TO DISMISS APPEAL

This matter came before the undersigned on May 25, 2001 to determine the timeliness of Debtor's Notice of Appeal. Debtor/Plaintiff Erik T. Beiwel appeared pro se. Attorney David Harting appeared for Defendants Sallie Mae Servicing Corp. and Oklahoma State Regents for Higher Education. After hearing arguments of the parties, the Court took the matter under advisement.

STATEMENT OF THE CASE

On April 18, 2001, this Court entered an "Order re Complaint to Determine Dischargeability" making a final disposition in this case. The Court found that Debtor failed to prove his student loan obligations owed to Defendants should be discharged under §523(a)(8) as imposing an undue hardship on Debtor. On May 11, 2001, Debtor, pro se, filed a Notice of Appeal of this Order. The Court sua sponte set a hearing regarding the timeliness of the appeal. Defendants filed a Motion to Dismiss Plaintiff's Appeal as Untimely on May 18, 2001.

Debtor asserts he followed the protocol for filing his notice of appeal to the best of his ability. He claims he had no direction from his attorney and assumed he had 30 days to appeal. When he learned differently, he states he immediately filed a notice of appeal. He alleges inability to pay for attorney representation on appeal.

Debtor argues his notice of appeal can be considered a motion for extension of time to appeal which was timely under Bankruptcy Rule 8002(c)(2). He urges that his failure to file a timely appeal is the result of excusable neglect. Debtor asserts his notice of appeal was filed within reasonable limits and within the 20-day period allowed in Rule 8002(c)(2).

Defendants assert the deadline to file a notice of appeal was April 30, 2001. They question whether the notice of appeal can be considered a timely motion for request for extension of time under Rule

8002(c)(2). If the Court accepts it as such, Defendants argue Debtor has failed to prove excusable neglect under the Rules.

CONCLUSIONS OF LAW

Pursuant to Federal Rule of Bankruptcy Procedure 8002(a), a notice of appeal must be filed within 10 days of the date of the entry of the order appealed. In general, a party's failure to file a timely notice of appeal from a bankruptcy court's order deprives the district court or bankruptcy appellate panel of jurisdiction to review the order. Veltman v. Whetzal, 93 F.3d 517, 520 (8th Cir. 1996). The time limit for filing a notice of appeal is mandatory and jurisdictional. In re Danzig, 233 B.R. 85, 91 (B.A.P. 8th Cir. 1999), aff'd 217 F.3d 620 (8th Cir. 2000).

Rule 8002(c) allows a party to request an extension of the time for filing a notice of appeal up to 20 days after the initial 10-day deadline for filing the notice. Fed. R. Bankr. P. 8002(c)(2). Such request for extension must be made by written motion and may be granted upon a showing of excusable neglect. Id. Generally, courts refuse to treat a late notice of appeal as a motion for extension of time to file a notice of appeal. In re Williams, 216 F.3d 1295, 1297 (11th Cir. 2000). Strictly construing Rule 8002, a notice of appeal itself is not a request for extension which must be made by motion. In re Dow Corning Corp., 255 B.R. 445, 465 (E.D. Mich. 2000). A motion for extension is needed above and beyond the late-filed notice of appeal. In re R.H. Macy & Co., 173 B.R. 301, 302 (S.D.N.Y. 1994).

A party's pro se status does not exempt it from complying with the rules. Dow Corning, 255 B.R. at 466. The Supreme Court has stated that "we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." McNeil v. United States, 508 U.S. 106, 113 (1993) (distinguishing pro se prisoner appeals). In In re Furst, 206 B.R. 979, 981 (B.A.P. 10th Cir. 1997), the court stated that although the appealing party did not have advice of counsel, the party was not relieved from the responsibility to follow the rules setting out the deadline for filing a notice of appeal. This is the risk a party assumes when it opts to proceed pro se. Id.

Even if this Court were to treat Debtor's untimely notice of appeal as a timely motion for extension of time to file a notice of appeal, Debtor must convince the Court that his failure to abide by the 10-day deadline was the result of excusable neglect. In re Food Barn Stores, Inc., 214 B.R. 197, 200 (B.A.P. 8th Cir. 1997). In such circumstances, courts apply the factors set out by the Supreme Court in Pioneer Inv. Servs. Co. v. Brunswick Assocs., 507 U.S. 380, 395 (1993). See In re Van Houweling, 258 B.R. 173, 176 (B.A.P. 8th Cir. 2001) (applying Pioneer factors to consider excusable neglect under Rule 8002(c)).

The determination of what sorts of neglect will be considered excusable is an equitable determination, taking account of all relevant circumstances including:

1. danger of prejudice to the debtor,
2. the length of the delay and its potential impact on judicial proceedings,
3. the reason for the delay, including whether it was within the reasonable control of the movant, and
4. whether the movant acted in good faith.

Van Houweling, 258 B.R. at 176, citing Pioneer, 507 U.S. at 395. These four factors are not equal in weight; the excuse given for the late filing must have the greatest import. Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 460 (8th Cir.), cert. denied, 121 S. Ct. 309 (2000).

Inadvertence, ignorance of the rules or mistakes in construing the rules do not usually constitute excusable neglect. In re HML II, Inc., 234 B.R. 67, 72 (B.A.P. 6th Cir. 1999) (refusing to excuse lawyer's application of Civil Rules of Procedure, rather than Bankruptcy Rules). In Food Barn, an attorney made a mistake in calculating the appeal period, applying Rule 6(a) rather than Bankruptcy Rule 9006(a). 214 B.R. at 199. The court concluded this ignorance or misreading of the rules is not excusable neglect. Id. at 200. The appellant was responsible for reviewing the rules and ascertaining the correct date. Id.; see also In re Henry Bros. Partnership, 214 B.R. 192, 196 (B.A.P. 8th Cir. 1997) (stating party has the independent obligation to monitor the developments of a case to determine the appeal deadline).

Debtor failed to file his Notice of Appeal within the 10-day period set out in Rule 8002(a). Thus, the district court or bankruptcy appellate panel is without jurisdiction to consider the appeal. The Court declines to interpret the notice of appeal as a motion for extension of time to appeal under Rule 8002 (c)(2). Even if it did, the Court concludes Debtor has failed to demonstrate his failure to file a timely notice of appeal is the result of excusable neglect.

Although Debtor was not represented by counsel in filing his appeal, he had the responsibility to ascertain the deadline for the appeal period. As evidenced by Debtor's astute interpretation of Rule 8002(c) at the hearing, he is obviously capable of understanding the requirements of the Bankruptcy Rules regarding appeals. Debtor assumed the risk of overshooting the appeal deadline when he decided to proceed pro se without familiarizing himself with the Rules in time to file a timely notice of appeal.

Debtor's neglect of the appeal deadline is not excusable under the standards set out in Pioneer. Ignorance of the deadline for appeals is not a ground for finding excusable neglect. Based on the Court's ruling in this case and the legal standards for finding undue hardship for student loan discharge, it is this Court's opinion that Debtor's chances for success on appeal are remote. There is little prejudice to Debtor in dismissing this appeal for untimeliness. Although Debtor missed the deadline for filing the notice of appeal by less than two weeks, finality is important to Defendants. As they pointed out, student loans such as Debtor's are regularly sold on a secondary market and final dispositions on dischargeability are important to repurchase agreements. Debtor was solely in control of the time for filing his notice of appeal and was not misled or misinformed at any stage. It was his duty to inform himself of the appeal deadline and his failure to timely do so is not excusable.

WHEREFORE, Defendants' Motion to Dismiss Plaintiff's Appeal as Untimely is GRANTED.

FURTHER, Debtor's Notice of Appeal is untimely and this appeal is DISMISSED.

SO ORDERED this 12 day of June, 2001.

Paul J. Kilburg
Chief Bankruptcy Judge