

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

In re:

GARRETT GEIGER,

Debtor.

GARRETT GEIGER,

Plaintiff-Appellant,

v.

RICHARD VOSEPKA,

Defendant-Appellee.

MEMORANDUM AND ORDER

05-C-0704-S

Plaintiff-appellant Garrett Geiger (hereinafter plaintiff) moves the Court for leave to appeal an interlocutory order of the bankruptcy court denying his motion to dismiss the adversary complaint filed by defendant-appellee Richard Vosepka (hereinafter defendant). Plaintiff moved to dismiss defendant's complaint pursuant to Federal Rule of Bankruptcy Procedure 4007(c) for defendant's failure to file his complaint within the time period established by the rule. In an amended memorandum decision the bankruptcy court found defendant "had no control over the delay between the court's receipt of his complaint and formally stamping it 'filed'." Accordingly, the bankruptcy court found defendant filed his complaint in a timely manner and it denied plaintiff's motion to dismiss. Jurisdiction is based on 28 U.S.C. § 158.

Also before the Court is defendant's motion to strike plaintiff's motion for leave to appeal and his motion to dismiss plaintiff's appeal because of his failure to serve defendant with: (1) his motion for leave to appeal; (2) a designation of record; and (3) a statement of issues in violation of Federal Rule of Civil Procedure 5(a) and Federal Rules of Bankruptcy Procedure 8008(b) and 8006. Defendant also seeks an award of costs and fees associated with plaintiff's appeal. The following facts relevant to plaintiff's motion to dismiss are undisputed.

BACKGROUND

On March 4, 2005 plaintiff filed for relief under Chapter 7 of the United States Bankruptcy Code. Defendant was a potential creditor of plaintiff. Accordingly, he received a notice entitled Notice of Chapter Seven Bankruptcy Case, Meeting of Creditors and Deadlines. The notice instructed defendant that his deadline to file a complaint objecting to plaintiff's discharge was June 3, 2005. Additionally, the notice stated that "papers must be received by the bankruptcy clerk's office" by the deadline.

On June 3, 2005 the clerk's office for the United States Bankruptcy Court (hereinafter clerk's office) marked as received defendant's complaint objecting to discharge of a debt owed by plaintiff. On June 3, 2005 the clerk's office also received a personal check from defendant in the amount of \$150.00 which he submitted as payment for his filing fee. The clerk's office

endorsed defendant's check on June 3, 2005. However, on June 8, 2005 defendant received a return of his endorsed check with a note indicating a personal check was not acceptable payment. Accordingly, defendant obtained a bank check and submitted it to the clerk's office. The clerk's office stamped defendant's complaint filed on June 13, 2005.

On September 2, 2005 plaintiff filed a motion to dismiss defendant's adversary complaint. He argued defendant failed to comply with the time limits set forth in the Notice of Chapter Seven Bankruptcy Case, Meeting of Creditors and Deadlines because he filed his adversary complaint on June 13, 2005 and the deadline for filing complaints was June 3, 2005. Accordingly, he argued defendant's complaint was time barred pursuant to Federal Rule of Bankruptcy Procedure 4007.

On September 26, 2005 the bankruptcy court conducted a hearing regarding plaintiff's motion to dismiss defendant's complaint and took the matter under advisement. On November 7, 2005 the bankruptcy court issued a memorandum decision and order denying plaintiff's motion to dismiss. However, the memorandum decision improperly identified defendant as the debtor. Accordingly, on November 9, 2005 the bankruptcy court issued an amended memorandum decision and order which properly identified defendant as the plaintiff/creditor in the adversary proceeding and it reaffirmed the denial of plaintiff's motion to dismiss.

In its November 9, 2005 amended memorandum decision the bankruptcy court found:

[t]he United States Bankruptcy Court's "Guide to Judiciary Policies and Procedures" disallows payment of filing fees by the personal check of a debtor, but says nothing about method of payment for a creditor....there is no authority for disallowing payment by personal check of a non-debtor, therefore, the creditor's payment by personal check was proper.

Additionally, the bankruptcy court found:

[s]ince the plaintiff tendered proper payment with his complaint on June 3, 2005, the plaintiff did in fact file within the time period allowed by Rule 4007. The Court's mistake in not marking the complaint "filed" until June 13, 2005 does not change the fact that Mr. Vosepka's complaint was timely filed....Mr. Vosepka had no control over the delay between the court's receipt of his complaint and formally stamping it "filed." Since Mr. Vosepka did in fact timely file his complaint, the complaint should not be dismissed.

On November 21, 2005 plaintiff filed his motion for leave to appeal the bankruptcy court's order. Plaintiff conceded his appeal was an interlocutory appeal. He argued because the bankruptcy court's order was dispositive in nature his appeal should be heard before the bankruptcy court issued a final order. However, on December 2, 2005 the bankruptcy court conducted a trial on the issue of dischargeability. As a result of trial the bankruptcy court held plaintiff's debt was non-dischargeable. On December 13, 2005 judgment was entered accordingly.

MEMORANDUM

Plaintiff argues the bankruptcy court erred when it denied his motion to dismiss defendant's complaint because the time limits established in Federal Rule of Bankruptcy Procedure 4007(c) are strictly construed. Additionally, he asserts defendant's complaint was time barred because it was not accepted for filing until June 13, 2005. Accordingly, plaintiff argues the complaint should have been dismissed by the bankruptcy court.

Defendant argues the bankruptcy court's order should be affirmed because he timely submitted his complaint as well as a valid check for payment of filing fees on June 3, 2005. Accordingly, he asserts the delay between the court's receipt of his complaint on June 3, 2005 and formally stamping it filed on June 13, 2005 was beyond his control. Additionally, defendant argues plaintiff's motion for leave to appeal should be stricken and his appeal should be dismissed because plaintiff failed to serve him with: (1) his motion for leave to appeal; (2) a designation of record; and (3) a statement of issues. Defendant argues plaintiff violated Federal Rule of Civil Procedure 5(a) and Federal Rules of Bankruptcy Procedure 8006 and 8008(b) when he failed to serve said items and dismissal of the appeal as well as an award of fees and costs are appropriate remedies.

As a preliminary matter the Court has before it defendant's motion to strike plaintiff's motion for leave to appeal

and his motion to dismiss plaintiff's appeal because of plaintiff's failure to serve him with: (1) his motion for leave to appeal; (2) a designation of record; and (3) a statement of issues. He argues such failures violate Federal Rules of Bankruptcy Procedure 8006 and 8008 as well as Federal Rule of Civil Procedure 5(a). Defendant asserts he was prejudiced by plaintiff's failure to serve him with said items because he was forced to duplicate work and incur extra costs.

In determining whether to dismiss an appeal for failure to comply with Federal Bankruptcy Rules such as Rules 8006 and 8008 the Court determines whether the violation resulted in any apparent prejudice to the non-moving party. See In re CAC Serv., Inc., 2003 WL 22508175, at 2 (N.D.Ill. November 4, 2003) (*citing In re Winters*, No. 93 C 7381, 1994 WL 397939, at 3 (N.D.Ill. July 15, 1994)). Defendant responded to plaintiff's motion in a timely manner. Additionally, defendant addressed the precise issue plaintiff raised on appeal in his response brief. Accordingly, defendant has failed to adequately demonstrate how he suffered any apparent prejudice and the Court denies his motion to strike plaintiff's motion for leave to appeal and his motion to dismiss plaintiff's appeal.

The next issue the Court must address is the nature of plaintiff's appeal. Generally, a denial of a motion to dismiss is not a final order even in the bankruptcy context. In re Jartran,

Inc., 886 F.2d 859, 864 (7th Cir. 1989) (*citing In re Cash Currency*, 762 F.2d 542, 546 (7th Cir. 1985)). In his motion for leave to appeal plaintiff concedes the bankruptcy court's order denying his motion to dismiss was an interlocutory order. Accordingly, plaintiff may appeal this interlocutory order only if leave is obtained from the Court. Id. at 866; 28 U.S.C. § 158(a). The Court has discretion in determining whether to allow the appeal. Id. (*citing In re Am. Reserve Corp.*, 840 F.2d 487, 494 (7th Cir. 1988)). Additionally, interlocutory appeals should be the exception rather than the rule. In re Huff, 61 B.R. 678, 682 (N.D.Ill. 1986).

A reviewing court may decide to hear an interlocutory appeal if there are "controlling questions of law as to which there is substantial ground for dispute and if an immediate appeal may materially advance the ultimate termination of the litigation." Id. (*citing In re Johns-Manville Corp.*, 45 B.R. 833, 835 (S.D.N.Y. 1984)). Granting leave to appeal this issue will not materially advance the ultimate termination of litigation because the litigation is complete. On December 2, 2005 the bankruptcy court conducted a trial on the issue of dischargeability and it held plaintiff's debt was non-dischargeable. Additionally, judgment was entered in the matter on December 13, 2005. Accordingly, an interlocutory appeal is not appropriate. However, because of the unique procedural posture of this case the Court will treat

plaintiff's appeal as one from a final order and will proceed to address the merits. 28 U.S.C. § 158(a).

Findings of fact entered by the bankruptcy court are reviewed only for clear error. In re Scott, 172 F.3d 959, 966 (7th Cir. 1999) (*citing* In re Crosswhite, 148 F.3d 879, 881 (7th Cir. 1998)). However, a district court reviews the legal interpretations of the bankruptcy court de novo. Id. Additionally, the bankruptcy court's construction of a bankruptcy statute is a legal conclusion subject to de novo review. See Meyer v. Rigdon, 36 F.3d 1375, 1378 (7th Cir. 1994) (*citing* Oviawe v. I.N.S., 853 F.2d 1428, 1431 (7th Cir 1988)).

Federal Rule of Bankruptcy Procedure 4007(c) states in relevant part:

[a] complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)....On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

The purpose of Rule 4007(c) is to encourage creditors to file their complaints "speedily or yield them forever." In re Meyer, 120 F.3d 66, 69 (7th Cir. 1997) (*citing* In re Ichinose, 946 F.2d 1169, 1172-1173 (5th Cir. 1991)). The Rule guarantees a debtor a fresh start because it defines a time certain when creditors can no longer claim a debt is non-dischargeable. Id. at 68. Additionally, the sixty day deadline imposed by Rule 4007(c) is a firm deadline and

"tardiness is otherwise fatal." Id. Accordingly, plaintiff is correct in his assertion that if defendant failed to file his complaint within the sixty days allowed by Rule 4007 such a failure would have been fatal. However, the bankruptcy court found defendant filed his complaint within the sixty day deadline imposed by Rule 4007(c).

In its amended memorandum decision the bankruptcy court found "plaintiff tendered proper payment with his complaint on June 3, 2005." Accordingly, the court found "plaintiff did in fact file within the time period allowed by Rule 4007." In support of its findings the bankruptcy court relied upon the holding in Aldabe v. Aldabe, 616 F.2d 1089 (9th Cir. 1980). In Aldabe the court entered judgment on May 12, 1977. Id. at 1091. The district court clerk received notice of appeal on June 13, 1977. Id. However, the clerk formally filed the appeal on June 28, 1977. Id. The court in Aldabe held "an appellant has no control over delays between receipt and filing, a notice of appeal is timely filed if *received* by the district court within the applicable period." Id. (emphasis added).

Just as the court in Aldabe held the appellant had no control over internal delays the bankruptcy court found defendant had "no control over the delay between the court's receipt of his complaint and formally stamping it 'filed.'" Accordingly, the bankruptcy court determined defendant filed his complaint in a

timely fashion and denied plaintiff's motion to dismiss. The Court affirms the decision of the bankruptcy court.

Aldabe concerned an appeal from a dismissal of an appellant's pro se civil rights complaint in federal district court. Accordingly, it is inapposite in the sense that it did not concern a bankruptcy proceeding. However, its holding is persuasive authority regarding when an action is commenced because it is in accordance with decisions arising from the bankruptcy context. Decisions in bankruptcy indicate a complaint is filed and an action is commenced whenever a complaint is received by a clerk of court. In re Horob, 54 B.R. 693, 696 (Bankr. D.N.D. 1985). See also Am. Express Travel Related Serv. Co., Inc. v. Farley, 146 B.R. 82, 82 (S.D.N.Y. 1992); Cosper v. Frederick, 73 B.R. 636, 638 (Bankr. N.D. Fla. 1986); In re Fontaine, 10 B.R. 175, 177 (Bankr. D.R.I. 1981). Accordingly, defendant's complaint was filed when it was first received by the bankruptcy clerk. The bankruptcy clerk first received defendant's complaint on June 3, 2005. Accordingly, the bankruptcy court's finding that defendant's complaint was filed in compliance with the time limit established in Rule 4007(c) was correct.

Plaintiff argues defendant's complaint was not filed until June 13, 2005 when he proffered the correct form of payment to the bankruptcy clerk. However, the bankruptcy court found plaintiff did submit proper payment to the clerk on June 3, 2005.

Such a finding is not clearly erroneous considering the United States Bankruptcy Court's "Guide to Judiciary Policies and Procedures" is silent on the issue. Additionally, there is no express code provision or rule which requires that a complaint be accompanied by a filing fee before a clerk can accept it for filing. Further, decisions in bankruptcy indicate a mere failure to pay a filing fee does not foreclose a plaintiff from proceeding to the merits of his or her claim. See Cosper, at 637-638; In re Horob, at 696. Accordingly, even if defendant failed to tender payment of a filing fee when he filed his complaint on June 3, 2005 his mere failure to do so would not have foreclosed his action. The bankruptcy court's order denying plaintiff's motion to dismiss defendant's adversary complaint is affirmed.

Finally, defendant seeks an award of costs and fees associated with plaintiff's appeal. The Court does not find a basis for an award of fees. Defendant chose to represent himself in this action. Accordingly, there are no fees to award. Additionally, there is no basis for an award of costs because plaintiff's appeal of the bankruptcy court's order denying his motion to dismiss is appeal from a final order. Plaintiff is allowed such an appeal as a matter of right pursuant to 28 U.S.C. § 158. Accordingly, defendant's request for costs and fees is denied.

ORDER

IT IS ORDERED that defendant-appellee's motion to strike plaintiff-appellant's motion for leave to appeal is DENIED.

IT IS FURTHER ORDERED that defendant-appellee's motion to dismiss plaintiff-appellant's appeal is DENIED.

IT IS FURTHER ORDERED that defendant-appellee's request for costs and fees is DENIED.

IT IS FURTHER ORDERED that plaintiff-appellant's motion for leave to appeal is DENIED.

IT IS FURTHER ORDERED that plaintiff-appellant's appeal of the bankruptcy court's order denying his motion to dismiss defendant-appellee's adversary complaint is an appeal from a final order and said order of the bankruptcy court is AFFIRMED.

Entered this 24th day of January, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge