

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

In re:

GARRETT GEIGER,

Debtor.

GARRETT GEIGER,

Appellant,

MEMORANDUM AND ORDER

v.

05-C-0704-S

RICHARD VOSEPKA and
MICHAEL VADNIE,

Appellees.

Creditors-appellees commenced adversary proceedings to declare debts owed them by plaintiff-appellant non-dischargeable. On December 14, 2005 the Bankruptcy Court entered a final order granting appellees' claims and holding the debts non-dischargeable. A notice of appeal from this order, dated December 22, 2006, was filed in the bankruptcy court on January 3, 2006. On January 13, 2006 appellees moved the bankruptcy court to dismiss the appeal and award costs on the basis that it was untimely.

On February 6, 2006 the Bankruptcy Court held a hearing on the motion. On March 3, 2006 the Court entered an order granting the motion which included the following findings:

... Concerning defendant's Notice of Appeal, untimely filed on January 3, 2006, Defendant [Appellant] did not claim excusable neglect.

The Court finds no credible evidence from any source that any extraordinary or mitigating circumstances existed that prevented Defendant from timely filing his Notice of Appeal or timely filing a request for extension of time to file a notice of appeal.

On March 13, appellant filed a notice of appeal from this order.

MEMORANDUM

Appellant contends that his appeal from the December 14, 2006 order was timely because it was received in the bankruptcy court on or before December 27, 2006. He further argues that the Bankruptcy Court was without jurisdiction to consider the motion to strike the notice of appeal as untimely. Appellees argue that the Bankruptcy Court's rulings were correct in all respects.

The Bankruptcy Court had jurisdiction to consider the timeliness of the notice of appeal. Appellant correctly points out that a notice of appeal from a final order generally deprives a lower court of jurisdiction over the merits of the matter subject to appeal. 10 Collier on Bankruptcy ¶ 8001.04 (Alan N. Resnick and Henry J. Sommer, eds., 15th ed. 2006). However, the bankruptcy court retains certain authority concerning the timeliness of the appeal including, for example, the authority to extend the period of time for filing a notice of appeal pursuant to Bankruptcy Rule 8002(c). The Seventh Circuit has implicitly endorsed a motion to dismiss an appeal for untimeliness before the bankruptcy court.

See Stelpflug v. Federal Land Bank of St. Paul, 790 F.2d 47, 49 (1986) (reviewing without adverse comment an appeal from the bankruptcy court determination that an appeal be dismissed as untimely). In any event, such a procedure does not have the effect of usurping any of the district court's authority over the appeal since the order holding the appeal untimely is itself subject to review.

Turning to the issue of the timeliness of the first notice of appeal, it is apparent that the Bankruptcy Court was correct as a matter of law in its determination that the notice of appeal was untimely as a matter of law. There is no dispute that the order finding the debts non-dischargeable was entered on December 14, 2005 and therefore under applicable Bankruptcy Rules the last day for filing a timely notice of appeal was December 27, 2005. A timely notice of appeal is a jurisdiction prerequisite designed to work in mechanical fashion. Stelpflug, 790 F.2d at 49. The time of filing of the notice is measured not from mailing, but from actual receipt by the bankruptcy clerk. Matter of Maurice, 69 F.3d 830, 832 (7th Cir. 1995); Bankruptcy Rule 8002(a).

The bankruptcy clerk entered the notice as filed on January 3, 2006, a full week past the deadline. It would seem extremely unlikely that the notice was received in the clerk's office, but not filed for a week. Against this persuasive evidence that the filing was late, appellant offers the argument that the notice was

mailed on December 22 and could be presumed to reach the clerk by December 27. However, appellant offers no affidavit or testimony to establish that the notice was in fact mailed on December 22. Although his reply brief references "a statement of mailing circumstances" attached as "Exhibit A" there is no such attachment to the brief. The transcript of the hearing before the Bankruptcy Court has not been included in the record so if appellant testified as to the mailing circumstances, that testimony is unavailable on review.

The following statement in appellant's reply brief casts further doubt on the December 22 mailing theory: "Here, delivery of the notice of appeal was mailed from Edgerton or Fort Atkinson Wisconsin on December 22, and it had to be received by the end of business on December 24." It is apparent that appellant lacks personal knowledge of the mailing since he proposes two possible cities from which it might have been mailed. Furthermore, the second premise of the argument, that a letter sent by mail on December 22 would necessarily be received on Christmas eve day, is far from certain. There is simply nothing in the record that would permit the Court to conclude that the notice of appeal was received in the bankruptcy court on or before December 27, 2005.

Appellant argues for the first time in his reply brief that his late filing was the result of "excusable neglect." Demonstrating excusable neglect might have permitted appellant

additional time to file his appeal pursuant to Bankruptcy Rule 8003(c)(2), but only if he had filed a timely motion for extension within 20 days after the December 27 deadline. There is nothing to suggest that he filed such a motion. In fact, the Bankruptcy Court noted in its order that no such motion had been filed and no such claim was made before it.

Accordingly, this Court lacks jurisdiction over the appeal from the Bankruptcy Court's order holding the debts non-dischargeable. It follows that the Bankruptcy Court's decision to strike the untimely notice of appeal must be affirmed. Finally, in view of the Bankruptcy Court's opportunity to observe the conduct of the parties throughout the proceedings, there is no basis to overturn its assessment of costs for the late filed appeal.

ORDER

IT IS ORDERED that order of the Bankruptcy Court finding the initial appeal untimely and awarding costs is AFFIRMED.

IT IS FURTHER ORDERED that the appeal from the Bankruptcy Court's order finding appellees' debts non-dischargeable is DISMISSED for lack of jurisdiction.

Entered this 12th day of June, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge