

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

ENTERED
MAR 14 '00
U.S. Bankruptcy Court
Greensboro, NC
CPH

IN RE:)	
)	
Roasters Corporation,)	Case No. 98-80704C-11D
Roasters Franchise)	Case No. 98-81049C-11D
Corporation,)	
)	
Debtors.)	
)	

ORDER

These jointly administrated cases came before the court on February 29, 2000, for hearing upon a motion for extension of time for filing notice of appeal filed by K.C.M. Enterprises, Inc., 21-21 Broadway Enterprises, Inc., and Kevin C. Melilli ("Claimants"). Ronald H. Kauffman appeared on behalf of the Claimants and John A. Northen appeared on behalf of Mark Gillis, Trustee for Roasters Corporation and Roasters Franchise Corporation, the Debtors. Having considered the motion, the affidavit submitted in support of the motion, the response filed on behalf of the Trustee, the matters of record in this case and the arguments of counsel, the court makes the following findings and conclusions pursuant to Rules 9014 and 7052 of the Federal Rules of Bankruptcy Procedure.

1. On July 23, 1998, Claim No. 411 was filed on behalf of the Claimants.

2. Following an objection to the claim being filed by the Debtors, a hearing was held in the bankruptcy court on May 3, 4, and 5, 1999, regarding Claim No. 411.

3. On January 28, 2000, a memorandum opinion was filed and an order was entered which sustained the Debtors' objection and disallowed Claim No. 411.

4. On January 28, 2000, a copy of the memorandum opinion and a copy of the order disallowing Claim No. 411 were served by mail on Claimants' counsel and on counsel for the Trustee.

5. On February 10, 2000, Claimants filed a notice of appeal to the district court with respect to the memorandum opinion and order entered on January 28, 2000, together with the motion for extension of time to file notice of appeal. Claimants assert in their motion that pursuant to Bankruptcy Rule 9006(f) Claimants were permitted an additional three days within which to file notice of appeal and that, therefore, the notice of appeal filed on February 10, 2000, was timely. Nevertheless, "in an abundance of caution" Claimants "request that this Court exercise its discretion under Bankruptcy Rule 8002(c)(2) and extend the time for filing the Notice [of Appeal] based upon the facts alleged within this motion."

6. On February 10, 2000, Claimants also filed a motion for reconsideration.

7. Bankruptcy Rule 8002(a) provides that a notice of appeal "shall be filed with the clerk within ten days of the date of the entry of the judgment, order, or decreed appealed from." As Claimants apparently now concede, Bankruptcy Rule 9006(f) does not operate to extend the time for filing the notice of appeal beyond the ten days specified in Rule 8002(a). See In re McAdams, 999 F.2d 1221, 1225 (8th Cir. 1993); see also, 10 Collier on Bankruptcy, ¶ 9006.2 (15th ed. 1999) ("Although pursuant to Rule 9022(a) the clerk is under a duty to serve a notice of the entry of an order or judgment by mail, the appeal time starts from the entry of the judgment and not from the service of the notice, and the time for appeal is not enlarged by any service by mail. Rule 9006(f) has no application.") Therefore, the last day for filing the notice of appeal was on February 7, 2000, unless the time for filing the notice of appeal was extended by the filing of Claimants' motion for reconsideration.

8. Under Bankruptcy Rule 8002(b), if a timely motion of the types described in that subparagraph is filed, the filing of the motion extends the time for filing notice of appeal until ten days after entry of the order disposing of such motion. The motions

referred to in Rule 8002(b) are timely motions pursuant to Rules 7052, 9023 and 9024. The motion for reconsideration which was filed by Claimants on February 10, 2000, recites that it was filed pursuant to Bankruptcy Rules 3008, 7052, 9023 and 9024, and Rules 52 and 60 of the Federal Rules of Civil Procedure.

9. Bankruptcy Rule 7052 incorporates Rule 52 of the Federal Rules of Civil Procedure. Rule 52(b) requires that a motion under Rule 52 be filed "no later than ten days after entry of judgment" Since the Claimants' motion for reconsideration was not filed within ten days after entry of the order disallowing the claim, the motion was not timely filed to the extent that it was filed pursuant to Rule 52. Therefore, to the extent that the motion was filed as a Rule 52 motion, it did not operate to extend the time for filing notice of appeal.

10. Bankruptcy Rule 9023 incorporates Federal Rule 59 which contains the same time limitation as Rule 52, i.e., the motion must be filed no later than ten days after entry of the judgment. Therefore, to the extent that Claimants' motion for reconsideration is based upon Rule 59, it was not timely and therefore, to the extent that it was a Rule 59 motion, did not operate to extend the time for filing notice of appeal.

11. Bankruptcy Rule 9024 incorporates Rule 60 of the Federal Rules of Civil Procedure with certain exceptions which are not pertinent here. However, under Bankruptcy Rule 8002(b)(4), a motion for relief under Rule 9024 must be filed no later than ten days after the entry of judgment in order for the motion to extend the time for filing notice of appeal. Therefore, to the extent that Claimants' motion for reconsideration was based upon Bankruptcy Rule 9024 or Federal Rule 60, it did not operate to extend the time for filing notice of appeal because it was not filed within ten days after entry of the order denying the claim.

12. Claimants' motion for reconsideration also refers to Bankruptcy Rule 3008. However, Bankruptcy Rule 3008 is not one of the rules referred to in Rule 8002(b) and, therefore, to the extent that the motion was based upon Rule 3008, it did not operate to extend the time for filing notice of appeal in this case.

13. The motion for reconsideration did not operate to extend the time for filing notice of appeal with respect to the order denying Claimants' claim. Therefore, the last day for filing the notice of appeal was February 7, 2000. It follows that the notice of appeal was not timely filed because it was not filed until February 10, 2000, which was three days after the February 7, 2000, deadline.

14. The time for filing the notice of appeal may be extended by the bankruptcy court. However, under Rule 8002(c)(2), a request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than twenty days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. Since Claimants' motion for extension of time was filed after the time for filing notice of appeal had expired, the motion for extension of time may be granted only upon a showing of excusable neglect.

15. In determining whether there has been a showing of excusable neglect in the present case, the court will be guided by the decision of the Supreme Court in Pioneer Inv. Servs. Co. v. Brunswick Associates, Ltd., 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). The Pioneer case involved the issue of whether a late filed proof of claim in a Chapter 11 case should be permitted based upon "excusable neglect" as used in Bankruptcy Rule 9006. Most courts considering the issue, have concluded that the definition of excusable neglect in Pioneer is equally applicable in cases involving the issue of whether late filed notices of appeal should be permitted based upon excusable neglect. See, e.g., Thompson v. E.I. DuPont de Nemours & Co., Inc., 76 F.3d

530, 533 (4th Cir. 1996); Christopher v. Diamond Benefits Life Ins. Co., 35 F.3d 232, 236 (5th Cir. 1994).

16. In Pioneer, the Supreme Court adopted a two-prong test for determining whether time should be extended based upon "excusable neglect." First, the court must determine whether the movant's failure to act constitutes neglect or is the result of neglect. If so, the court must then determine whether the neglect is excusable.

17. The only evidence offered by Claimants in support of their motion for extension of time was the affidavit of Lawrence V. Ashe, one of the attorneys who has appeared in this case on behalf of the Claimants. According to the affidavit, the memorandum opinion and order were received by his law firm on Wednesday, February 2, 2000. At that time, according to the affidavit, Mr. Ashe and Mr. Zarco, the two attorneys who appeared at the hearing on Claim No. 411, were out of the office attending depositions in another state. The affidavit further states that the paralegal responsible for mail intake left the firm on January 28, 2000, and her replacement did not begin work until February 7, 2000. However, the affidavit also states that the firm "has a system for mail intake whereby the partner in the office reviews the mail and determines whether there are any emergencies

or short deadlines." Although the affidavit states that the order denying Claim No. 411 "did not get processed and was not calendared or flagged for a notice of appeal (on short notice)", there is no explanation of why this failure occurred other than stating that it was "[d]ue to this interim period", apparently referring to the absence of the paralegal referred to in the affidavit. However, the affidavit gives no reason or explanation as to why the absence of the paralegal should have prevented the attorneys from reviewing the mail and carrying out their function.

18. Although the affidavit sheds little light on exactly why the order was not processed and calendared, it is sufficient to show that the failure to file a timely notice of appeal was the result of neglect. This leaves the question of whether the affidavit was sufficient to show that the neglect was excusable which, in turn, requires that the court make the equitable determination called for in the Pioneer case, taking into account the relevant circumstances surrounding the untimely filing, including the circumstances referred to in Pioneer.

19. The determination of when neglect is excusable "is at bottom an equitable one, taking account of relevant circumstances surrounding the party's omission." Pioneer, 507 U.S. at 395, 113 S.Ct. at 1498. The circumstances which should be considered in

making such determination include: (a) the danger of prejudice to the debtor; (b) the length of the delay and its potential impact on judicial proceedings; (c) the reason for the delay, including whether it was within the reasonable control of the movant; and (d) whether the movant acted in good faith. Under Pioneer, excusable neglect is an "elastic concept" and is not limited to situations in which the failure to timely file is due to circumstances beyond the control of the filer. However, "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect" 507 U.S. at 392, 113 S.Ct. at 1496. Also, under Pioneer, the client is held accountable for the mistakes or omissions of counsel. 507 U.S. at 396-97, 113 S.Ct. at 1499.

20. A creditor seeking to extend a deadline based upon excusable neglect bears the burden of proving excusable neglect by a preponderance of the evidence. See In re Bulic, 997 F.2d 299, 302 (7th Cir. 1993); In re Houbigant, Inc., 188 B.R. 347, 354 (Bankr. S.D.N.Y. 1995).

21. It weighs in favor of the Claimants that counsel for Claimants has acted in good faith. Also, the length of the delay weighs in favor of Claimants, since the delay in filing the notice of appeal and the motion for extension of time involve only three

days. Further, the record does not show that the Trustee will be prejudiced other than being subjected to an appeal. Of course, such an appeal would result in significant additional expenses for the Trustee, as well as substantial delay in the distribution to creditors who already have waited a long time for the small distribution which will be made in this liquidation case—a distribution which grows smaller as the Trustee's legal expenses increase. The remaining factor mentioned in Pioneer involves the reason for the delay, including whether it was within the reasonable control of the movant. This factor weighs heavily in favor of the Trustee and is decisive in the present case.

22. Although the memorandum opinion and order were not received by Claimants' law firm until February 2, 2000, there was ample time at that point for the attorneys to file a timely notice of appeal or a timely motion for extension of time. Why a notice of appeal or motion was not filed is not clear from the affidavit. Apparently the paralegal in the firm involved with "mail intake" had left the firm the previous week and had not been replaced when the memorandum opinion and order reached the firm on February 2. Presumably, however, the attorneys were aware that the paralegal had left their employment, and could have made alternative arrangements regarding the duties of the paralegal. The law firm

is a ten-attorney firm. Even though Mr. Ashe and Mr. Zarco were not in the office on February 2, there is no suggestion that none of the other attorneys were present when the memorandum opinion and order were received. The system described in the affidavit is one in which the attorneys review the mail and determine whether there are emergencies or short deadlines. Hence, the absence of a single paralegal would not account for a failure to react to an order denying entirely the claim of their clients.

23. The fact that the attorney in the law firm primarily responsible for a matter is out of the office when an order or judgment is received by the law firm does not require a finding of excusable neglect. See Turner v. Ruta, 173 B.R. 165, 168 (C.D. Ill. 1994). This is particularly true where, as in the present case, there are several attorneys in the firm. Moreover, the fact that a single paralegal had left the employ of the law firm carries little weight. As the Court noted in the Pioneer case, "in assessing the culpability of the respondent's counsel, we give little weight to the fact that counsel was experiencing upheaval in his law practice." Thus, even if the absence of a single paralegal could be regarded as upheaval, it adds little to the case for excusable neglect.

24. Nor does difficulty in contacting the client regarding an appeal support a finding of excusable neglect. In such circumstances, two readily available and apparent alternatives are available. The attorney may file a timely motion for extension of time in order to communicate with the client or simply file a protective notice of appeal which can be withdrawn later if the decision is not to appeal. See In re Hess, 209 B.R. 79, 81 (6th Cir. B.A.P. 1997); In re Rhoads Indus., Inc., 163 B.R. 299, 301 (Bankr. N.D. Ohio 1994).

25. Although the memorandum opinion in the present case is somewhat lengthy, the accompanying order is only one page long and makes it unmistakably clear that Claim No. 411 has been denied in its entirety. Thus, without poring over the fifty-page memorandum opinion, it should have been readily apparent that the court had ruled against the Claimants. At that point, ample time remained for the attorneys who remained in the office to communicate with Mr. Ashe or Mr. Zarco or, without doing so, to file a motion for extension of time or protective notice of appeal. Yet, explicably, counsel neglected to take either of these steps in a timely manner. In Thompson v. E.I. DuPont de Nemours & Co., 75 F.3d 530 (4th Cir. 1996), the Court concluded that the most important of the factors identified in Pioneer for determining whether neglect is excusable

is the reason for the failure to make a timely filing and declined to find excusable neglect where "the neglect at issue . . . is nothing more than inexcusable run-of-the-mill inattentiveness by counsel." Id. at 534. In so ruling, the court observed that in view of the ease with which an appeal may be perfected, no reason other than failure to learn of the entry of judgment should ordinarily excuse a party from the requirement that the notice be timely filed. Id. at 534, n 4.

26. To find neglect to be excusable, an explanation for why it occurred is needed. In the present case, if there was any reason for the out of time filing other than inattentiveness, a lack of understanding regarding the rules or misconstruing the rules, such reason was not established by the affidavit offered by the Claimants. Based upon the evidence offered in the present case, in order for the court to find excusable neglect, the court "would be required to remove the term 'excusable' from the equation." See In re Nickles Performance Systems, Inc., 169 B.R. 647, 652 (Bankr. E.D. Tenn. 1994). Such an approach is not required under Pioneer and the court declines to do so in this case. Instead, the court has considered all of the circumstances surrounding the out of time filing and has weighed the equities which favor allowing an extension of time against the equities

which weigh against granting the extension. Having done so, the court has concluded that Claimants have failed to establish that the failure to meet the deadline was the result of excusable neglect. Accordingly, the motion for extension of time will be denied.

IT IS SO ORDERED.

This 14th day of March, 2000.

~~William L. Stocks~~

WILLIAM L. STOCKS
United States Bankruptcy Judge