

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE WILLIAM C. MILLER,
Debtor.

BAP No. UT-04-030

WILLIAM C. MILLER,
Appellant,

Bankr. No. 02C-23053
Chapter 7

v.

ORDER DENYING MOTION

DAVID L. MILLER, Trustee, J.
VINCENT CAMERON, Trustee,
UNITED STATES TRUSTEE,
ROBERT CUMMINGS, RANDY
SUGIHARA, CRAIG BUTTERS, TOM
GORMLEY, MILLER AMERICA,
INC., SPS AMERICAN CAR CARE
CENTER, FRANK L. ALLRED,
INSTANT CASH PAWN & LOAN, SS
AUTO BROKERS, INC., and COREY
L. ERICKSEN,

June 4, 2004

Appellees.

Before McFEELEY, Chief Judge, MICHAEL, and NUGENT, Bankruptcy Judges.

The matter before this Court is the Emergency Motion for Order Granting Reinstatement or Reopening of Appeal (“Emergency Motion”), filed June 3, 2004, by the Appellant. The Appellees have not had an opportunity to respond to the Emergency Motion. For the reasons set forth below, the Court will deny the Emergency Motion.

Background

This appeal was filed on March 16, 2004. The Appellant did not pay the required filing and docketing fees at the time he filed his notice of appeal, despite this Court’s February 9, 2004, Order entered in UT-04-001, which prohibited the

Appellant from seeking an extension of time to pay filing and docketing fees in any future appeal filed with this Court.

On March 17, 2004, this Court issued a Notice of Deficiency and Order to Show Cause, noting the failure to pay the filing and docketing fees and stating that the deficiency must be cured within 10 days or the appeal would be dismissed for failure to prosecute. The Appellant paid the fee on March 26, 2004.

Also on March 17, 2004, this Court issued a Notice That Appeal Has Been Docketed, setting forth applicable deadlines for prosecuting the appeal. As provided in the Notice, the Appellant's Statement of Interested Parties (10th Cir. BAP L.R. 8018-3) and Designation of Record and Statement of Issues (Fed. R. Bankr. P. 8006; 10th Cir. BAP L.R. 8006-1(b)) were due March 29, 2004. The Appellant's opening brief and appendix were due May 3, 2004.

The Appellant did not timely file the Statement of Interested Parties, Designation of Record, or Statement of Issues. On April 2, 2004, this Court issued another Notice of Deficiency and Order to Show Cause, noting the Appellant's failure to timely file the required papers and requiring that the deficiencies be cured within 10 days. The Appellant filed the papers on April 13, 2004.

The Appellant did not timely file his brief. On May 7, 2004, this Court issued its third Notice of Deficiency and Order to Show Cause in this case ("Third NOD"). The language of the Third NOD mirrored that used in the previous notices of deficiencies and orders to show cause. The Third NOD provided:

The Appellant must file a response to this Notice and Order within ten (10) days of the date shown above. A response is filed only when it has been received by this Court. Fed. R. Bankr. P. 8008(a).

A review of the documents in this appeal reveals a deficiency that could result in dismissal. This appeal appears to be defective due to lack of prosecution by the Appellant (Fed. R. Bankr. P. 8001(a); 10th Cir. BAP L.R. 8018-4(b)). It appears that the Appellant has not complied with the following rules:

An Appellant must file the Appellant's Opening Brief (Fed. R. Bankr. P. 8009(a)(1)), together with an appendix containing excerpts of record (Fed. R. Bankr. P. 8009(b)).

For the foregoing reasons it is HEREBY ORDERED that this appeal will be dismissed unless, within ten (10) days from the date of this Notice, the Appellant cures the deficiency described above.

Third NOD, entered May 7, 2004.

On May 10, 2004, in case numbers UT-04-043 and UT-04-044, this Court entered an order documenting the Appellant's repeated violations of the letter and spirit of this Court's rules allowing filings by fax and by e-mail ("May 10 Order"). The May 10 Order prohibited the Appellant from filing any paper in those and any other pending or future appeals by fax or by e-mail. The May 10 Order was served on the Appellant by fax and by mail. The Court takes judicial notice of the fax confirmation printout, which shows the fax was received by the Appellant on May 10.¹

On May 18, 2004, the Court entered an order dismissing this appeal for failure to prosecute, because the Appellant had not responded to the Third NOD.

On May 19, 2004, the Appellant filed a Motion for Order Granting Extension of Time to File Brief ("Extension Motion"). The Extension Motion was dated May 17, 2004. The Extension Motion represented that the Appellant needed an additional 30 days to prepare his brief and appendix.

Because the appeal had been dismissed, the Court construed the Extension Motion as including a Motion to Reopen the Appeal. The Court determined that the Extension Motion did not present sufficient justification for an extension of time to file the brief. By order entered May 21, 2004, the Court denied the

¹ The Court also takes notice that on May 11, in case UT-04-044, the Appellant sent this Court an e-mail that referenced the fax-filing restrictions. The e-mail was struck pursuant to the May 10 Order; the Court notes the e-mail only as additional proof that the Appellant received the May 10 Order on May 10.

Extension Motion and the Motion to Reopen the Appeal (“Order Denying Motions”). The Order Denying Motions provided in part:

The Appellant’s brief was due May 3, 2004. At no point before May 3, 2004, did the Appellant seek an extension of time to file his brief. On May 7, 2004, this Court issued a notice of deficiency (NOD) because the Appellant had failed to file his brief. The NOD provided: “The Appellant must file a response to this Notice and Order within ten (10) days of the date shown above. A response is filed only when it has been received by this Court. Fed. R. Bankr. P. 8008(a).” The Appellant did not file a response to the NOD. When the time expired, this appeal was dismissed on May 18, 2004, for failure to prosecute.

The Court notes that the Appellant has filed with this Court eleven appeals and one petition for writ of mandamus.² In every case, the Appellant has failed to timely prosecute the case. Eight of the appeals have been dismissed for failure to prosecute.³ This Court will not continue to tolerate the Appellant’s disregard of applicable rules and deadlines. The Appellant is proceeding pro se; however, “an appellant’s pro se status does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of [Bankruptcy] and Appellate Procedure.” *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994); *see, e.g., Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (affirming district court’s dismissal of pro se bankruptcy appeal for failure to file timely brief). The Court will not reopen this appeal.

Order Denying Motions, entered May 21, 2004. The Order Denying Motions also provided that the Court’s mandate would issue forthwith, and the mandate issued May 21.

On June 1, 2004, this Court received the Appellant’s brief and appendix.

On June 3, 2004, this Court received the Emergency Motion.

Discussion

In the Emergency Motion, the Appellant argues that this appeal should be reopened because the brief and appendix have now been filed. He claims that he has been treated unfairly in three aspects: the May 10 Order prevented him from

² See BAP case numbers UT-02-064; UT-02-082; UT-03-023; UT-03-090; UT-03-098; UT-04-001; UT-04-011; UT-04-030 (instant appeal); UT-04-041; UT-04-043; UT-04-044; UT-04-047.

³ See BAP case numbers UT-02-064; UT-03-023; UT-03-090; UT-03-098; UT-04-001; UT-04-011; UT-04-030 (instant appeal); UT-04-044.

filing any papers by fax or e-mail; his Extension Motion was construed as including a Motion to Reopen; and the Court's mandate issued May 21. Each will be discussed in turn.

First, the Appellant claims that he was prejudiced by the May 10 Order because he was unable to fax in a motion for extension of time to file his brief. This argument is without merit. The May 10 Order did not prohibit the Appellant from faxing in a motion for extension of time at any time before his brief was due – May 3. Nor did the May 10 Order prevent the Appellant from filing a motion for extension of time by the May 17 deadline to respond to the Third NOD. The Appellant received the May 10 Order on May 10, seven days before a response to the Third NOD was due. Nothing prevented the Appellant from mailing in a timely response to the Third NOD. The Extension Motion is dated May 17, 2004, and was apparently mailed on that date, which was the date that the response to the Third NOD should have been **received** by this Court. The Appellant's delay shows a continued disregard for this Court's rules.

Second, the Appellant claims that he was prejudiced because his Extension Motion was construed as including a Motion to Reopen. This argument also fails. Without a motion to reopen, this Court would not have considered the Extension Motion at all. The appeal would have remained closed, and this Court's mandate would have issued. The Appellant would be in the same position he is now.

Third, the Appellant claims that he was prejudiced because the mandate issued too early. He refers to this Court's practice that when an appeal is dismissed for failure to prosecute, and the deficiency is cured within 10 days of the dismissal, the curing of the deficiency is construed as a timely motion for rehearing under Fed. R. Bankr. P. 8015, and is granted, and the appeal is automatically reopened. That practice is not applicable here. The appeal was dismissed for failure to prosecute on May 18, 2004. Ten days after the dismissal,

May 28, 2004, no timely motion for rehearing had been filed. The deficiency had not been cured, and there was nothing that could have been construed as a timely motion for rehearing. Had the mandate not already issued, it would have issued then, and the Appellant would be in the same position he is now, filing an untimely motion for rehearing after the mandate issued.

This Court's mandate has issued. It can be recalled only upon the showing of "extraordinary circumstances." *Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales, Inc.)*, 222 B.R. 914, 917-18 (10th Cir. BAP 1998), *aff'd*, 195 F.3d 568 (10th Cir. 1999). The Emergency Motion makes no such showing. As the Order Denying Motions made clear, this Court will not continue to tolerate the Appellant's disregard of applicable rules and deadlines. As that Order stated:

The Appellant is proceeding pro se; however, "an appellant's pro se status does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of [Bankruptcy] and Appellate Procedure." *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994); *see, e.g., Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (affirming district court's dismissal of pro se bankruptcy appeal for failure to file timely brief).

Order Denying Motions, entered May 21, 2004. The Court will not recall its mandate or reopen this appeal.

Conclusion

Accordingly, it is HEREBY ORDERED that the Emergency Motion is DENIED.

For the Panel:

Barbara A. Schermerhorn, Clerk of Court

By: 
Deputy Clerk