IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

222

VALUE OIL, INC., Plaintiff-Appellant, vs. GREEN RIVER DEVELOPMENT ASSOCIATES, INC., and WILLIAM GREAVES, et al., Defendants-Appellees.	MEMORANDUM OPINION AND ORDER Bankruptcy No. 85-0200 Civil No. C-86-0677J

The debtor and appellant, Value Oil Inc. (Value Oil), originally filed an adversary proceeding in bankruptcy court on January 17, 1984. Value Oil, Inc. v. Green River Development Assoc., Inc. and William Greaves, Bankr. No. 84-0042. That action was dismissed with prejudice on November 26, 1984, because plaintiff's counsel failed to file a pre-trial order. On March 18, 1985, Value Oil commenced a second action, Bankr. No. 85-0200, asserting new causes of action against Green River and adding Metro Oil Products, Inc. as a defendant.

The scheduling order entered in this latter case required Value Oil to submit a proposed pre-trial order to the bankruptcy court on June 17, 1986. Plaintiff's counsel prepared the pre-trial order and sent a courier to deliver it to the bankruptcy court. The courier, apparently accustomed to the district court's 5:00 p.m. closing time, arrived at the bankruptcy court

after 4:30 p.m., the time that the bankruptcy court clerk's office closes. The courier returned the afternoon of the following day, June 18, 1986, and filed the proposed pre-trial order.

On June 18, 1986, before the pre-trial order was filed, the bankruptcy court deputy clerk, in accordance with that court's procedures, entered an order of dismissal with prejudice for failure to file the proposed order in accordance with the scheduling order. The judge's signature was affixed by the clerk by stamp and initialed by the clerk.[1]

Upon receipt of the order of dismissal, plaintiff filed an Objection to Order and Motion to Set Aside Order. The bankruptcy court heard these motions on July 22, 1986. After hearing counsel's arguments, the court, ruling from the bench, upheld the order of dismissal and denied plaintiff's motion to set aside. A minute entry was entered on July 29, 1986 and defendants were directed to prepare a proposed form of order. On August 4, 1986, prior to the entry of a written order, plaintiff filed a notice of appeal. This court heard arguments on appeal on January 6 and January 9, 1987, and took the matter under advisement.

Plaintiff's counsel originally asserted that he was appealing the June 18 order of dismissal. Counsel argued that the appeal was timely, relying on rule 4(a)(4) of the Federal

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1. On the same day, defendants filed a Motion to Dismiss and/or Motion for Sanctions for failure to file the pre-trial order on time.

Rules of Appellate Procedure. Rule 4(a) provides that notice of appeal must be filed within thirty days of the entry of judgment or order appealed. However, the bankruptcy rules, not the federal appellate rules, control the time for filing notice of an appeal. Under bankruptcy rule 8002, a notice of appeal must be filed within ten days of the entry of judgment, order or decree appealed. Accordingly, a notice of appeal from the June 18 order had to be filed by June 30. Bankr. R. 8002 & 9006. However, in oral argument, counsel characterized his motion to set aside the order as a motion to alter or amend judgment, which he asserted tolled the time for filing a notice of appeal.[2]

Under the bankruptcy rules, the time to file a notice of appeal is tolled by a motion under rule 9023 to alter or amend the judgment or a rule 9023 motion for a new trial. Plaintiff's motion to set aside the order, however, is not a motion to alter or amend judgment or for a new trial under rule 9023. Counsel's motion to set aside can only be read as a bankruptcy rule 9024 motion because it specifically seeks relief for "excusable neglect." Bankruptcy rule 9024 incorporates rule 60(b) of the Federal Rules of Civil Procedure, which allows a court to relieve

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2. The time for bringing an appeal is tolled under both the appellate rules and the bankruptcy rules by a motion for a new trial or a motion to alter or amend judgment. Under the Rules of Civil Procedure, this is a rule 59 motion. Under the bankruptcy rules, this is a rule 9023 motion. Bankruptcy rule 9023 is essentially the same as rule 59 of the Federal Rules of Civil Procedure.

a party from an order for excusable neglect. Bankr. R. 9024; Fasson v. Magouirk (In re Magouirk), 693 F.2d 948, 951 (9th Cir. 1982). However, "[t]he authorities now generally hold that the filing of a motion under Rule 60(b) does not toll the time in which an appeal may be taken from a judgment." Barta v. Long, 670 F.2d 907, 909 (10th Cir. 1982). Thus the plaintiff's appeal of the June 18 dismissal order was not timely filed.

After a lengthy discussion during oral argument before this court, counsel agreed that he could not now appeal the June 18 order. However, a court's denial of a motion to set aside a judgment for excusable neglect also is an appealable order.

As noted, the time for filing a notice of appeal begins to run only upon "entry" of the judgment or order. Bankr. R. 8002. Bankruptcy rule 9021, similar to rule 58 of the Federal Rules of Civil Procedure, defines "entry" of judgment. Entry of judgment occurs only when the order or judgment is set forth in a separate document and when the substance of this separate document is appropriately noted on the docket sheet in the clerk's office. Bankr. R. 9021 & 5003; Fed. R. Civ. P. 58 & 79. The purpose of the rule is to eliminate confusion about when a purported judgment effectively starts the running of the time for appeal. United States v. City of Kansas City, Kan., 761 F.2d 605, 606 (10th Cir. 1985). The Supreme Court has indicated that the separate document rule must be mechanically applied. United States v. Indrelenus, 411 U.S. 216, 221-222 (1973); see also

Herrera v. First N. Savings & Loan Ass'n, 805 F.2d 896, 899 (10th Cir. 1986); Kansas City, 761 F.2d at 607.

In this case, the bankruptcy judge ruled from the bench and denied plaintiff's motion to set aside. The judge then directed defendants, the prevailing party, to submit a proposed form of order. See Local Bankr. R. 13. A minute entry was docketed on July 29, noting the judge's ruling from the bench. On August 4, prior to the submittal of the proposed order, plaintiff filed this appeal. The proposed form of order was not submitted until October 23, 1986, and the judge declined to sign it because it did not comply with local rule 13(h).[3] Minute entries, Bankr. No. 85PA-0200 (Oct. 23 & Nov. 5, 1987). Thus there is no order signed by the judge and docketed by the clerk as required by bankruptcy rule 9021.

Although technical application of the separate document rule is necessary to avoid uncertainties of when an appeal must be brought, such application does not prevent the parties from waiving the separate document requirement when one has accidentally not been entered. Bankers Trust Co. v. Mallis, 435

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3. The bankruptcy court's local rule 13(h) requires the party submitting the proposed form of order to submit copies for each person entitled to recieve it together with pre-addressed, postage-paid envelopes and a mailing certificate ready for signature. Presumably one of these items was not included with the proposed form of order in this case.

U.S. 381, 386 (1978).[4] In this case, the defendants specifically asserted that this court lacked jurisdiction because no final order had been entered. Thus the parties have not waived the separate document requirement. The court therefore lacks jurisdiction to hear the appeal, and it must be dismissed.[5]

In dismissing the appeal, however, the court notes that the proposed order was not submitted to the bankruptcy court for three months after the hearing on plaintiff's motion to set aside. Defendants' counsel's filing of this order was no more prompt than plaintiff's counsel's filing of the pre-trial order. In general, the history of this case demonstrates a lack of response to the court's orders by counsel on both sides.

APPEAL DISMISSED.

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4. A liberal interpretion of the rule to allow the parties to waive the separate document rule, however, should only be applied to preserve a parties right to appeal; it should not be applied to allow a party to lose its appeal. Bankers Trust Co. v. Mallis, 435 U.S. 381, 386 (1978). Except for the fact that appellees specifically asserted that this court lacked jurisdiction, there arguably would be a reasonable basis for concluding that the parties here waived the separate document rule and were appealing the court's ruling from the bench as docketed on July 29, thus preserving Value Oil's appeal.

5. Once a signed order is filed and docketed by the bankruptcy clerk, Value Oil will have ten days to appeal the bankruptcy court's denial of his motion to set aside.

C-86-0677J

So ordered.

Dated this 18 day of March, 1987.

BY THE COURT

Bruce S. Jenkins, Chief Judge
United States District Court

[redacted]mailed to counsel 3/18/87: mw
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