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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BRIANHEAD ROYALE DEVELOPMENT CORPORATION Appellant, vs. DESERET FEDERAL SAVINGS & LOAN ASSOCIATION, Appellee.	)	MEMORANDUM DECISION AND ORDER 86A-04412 Civil No. C-88-187W 87PA-0063

This matter is before the court on Appellee's motion to dismiss appeal. A hearing was held on this motion on October 12, 1988. Brianhead Royale Development Corporation ("BRDC") was represented by David D. Loreman. Robert and Barbara Bush were represented by Lowell V. Summerhays. Deseret Federal Savings & Loan Association ("DFS") was represented by James C. Swindler. Prior to the hearing, the court had reviewed carefully the memoranda submitted by the parties and the Bushes. After taking the matter under advisement, the court has further considered the law and the facts and now renders the following memorandum decision and order.

Appellee DFS has moved to dismiss this appeal on three grounds: 1) that BRDC does not have standing to bring the appeal; 2) that BRDC did not obtain the necessary leave to appeal from an

interlocutory order; and 3) that the Bushes are not proper parties to this appeal because the notice of appeal fails to designate them as appellants and the January 20, 1988 judgment as one from which they are appealing.

Because this court finds that only the February 22, 1988 partial summary judgment is involved in this appeal and that it is an interlocutory order from which leave to appeal cannot be properly granted, only the issues related to that finding need be addressed.

Proper Order on Appeal

In determining whether this appeal may properly be entertained, this court must preliminarily decide from which order the appeal is being taken, a matter of some dispute between the parties. DFS alleges that only the portion of the February 22, 1988 order partially granting summary judgment is involved. BRDC and the Bushes assert that the portion of the February 22, 1988 order denying new trial and the January 20, 1988 summary judgment rendered against the Bushes are also involved.

The March 2, 1988 notice of appeal was filed by Lowell V. Summerhays, "Attorney for Debtor," and states:

> Brianhead Royale Corporation, a Utah Corporation, Defendant herein, hereby appeals to the District Court from the final granting of Summary Judgment against Brianhead Royale of the Bankruptcy Court entered in this Adversary Proceeding on the 22nd day of February, 1988. The parties to the judgment appealed from and the name and address of their attorney are as follows:

Brianhead Royale Corporation, Robert D. Bush and Barbara A. Bush represented by Lowell V. Summerhays, counsel of record, located at the address of P. O. Box 1355, Sandy, Utah 84091-1355.

In contrast to the description of the order in the notice of appeal, the actual February 22, 1988 order is captioned "Order Denying Motion for New Trial and Partially Granting Deseret Federal's First Motion for Partial Summary Judgment." As this caption indicates, the February 22, 1988 order addresses two motions: one concerning the Bushes' liability as guarantors on the BRDC/DFS loan,[1] and one concerning BRDC's liability as obligor on the same loan. The notice of appeal, however, makes no mention of the order denying "new trial" on the Bushes motion. Further, cnly BRDC is designated as the appellant, and counsel's indication of his capacity on the motion is as "Attorney for Debtor," not "Attorney for Debtor and Guarantors."

It is clear that the notice of appeal filed on March 2, 1988 cannot concern the January 20, 1988 summary judgment. Notices of appeal must be filed within ten days of the entry of the order, Bankr. R. 8001(a). A twenty day extension is available if requested before the initial ten days have expired. Bankr. R. 8001(c). If a timely notice of appeal is not filed,

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[1] Counsel improperly captioned this motion as "Motion for New Trial." In substance, however, the Bushes were moving to set aside a partial summary judgment granted against them.

the appeal is barred. Bankr. R. 8001 advisory committee's note. Neither a notice of appeal nor a request for extension to file was filed within ten days of the January 20, 1988 order. Therefore, appeal rights from that order expired on January 30, 1988. The March 2, 1988 notice of appeal only designates the February 22, 1988 order and could not operate as a notice of appeal from the earlier judgment, even if that judgment had been expressly designated in the notice.

Having resolved that only the February 22, 1988 order is involved here, the court must now determine which parts of that order are being appealed. The determination begins with a look at Bankruptcy Rule 8001. Rule 8001(a) requires that the notice of appeal "conform substantially to Official Form No. 35," which requires the appellant to clearly identify himself, the court to which he is appealing, the order from which he is appealing, including a description of it, and its entry date.[2] This rule is similar to Rule 3 of the Rules of Appellate

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[2] The language of Form 35 reads:

> . . . , the plaintiff [or defendant or other party] appeals to the district court [or the bankruptcy appellate panel], from the final judgment [or final order or final decree (describe it)] of the bankruptcy court entered in this adversary proceeding on the . . . day of . . . .

Procedure, both in the substance of its official form[3] and in its function: it begins the appeal process; it gives the higher court jurisdiction; and it advises all parties involved who is appealing from what. Accordingly, case law developed pursuant to Rule 3 of the Appellate Rules is relevant here.

A federal appellate court gains jurisdiction over an appeal only when the notice of appeal is timely filed in accordance with Rule 3 of the Rules of Appellate Procedure. See United States v. Robinson, 361 U.S. 220, 224, 80 S.Ct. 282, 285 (1960). To be in compliance with Rule 3, the appellant must file the functional equivalent of what the rule requires, see Torres v. Oakland Scavenger Co., et al., ____ U.S. ____, 108 S.Ct. 2405, 2409 (1988). While the court can construe the rules liberally in determining compliance, it cannot waive a jurisdictional requirement in any way. The appellant's failure to comply with such a requirement is fatal to his appeal.

It is now clear that properly designating the appellant is a substantive jurisdictional requirement of Rule 3. See Torres, 108 S.Ct. at 2409. Once the period for leave to amend has lapsed, a party not designated as an appellant in the notice

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[3] Form 1, Appendix of Forms. This form is substantively the same as Form 35, with the minor exception that the Bankruptcy form requires a listing of all the addresses of the parties and their attorneys involved in the order or judgment appealed from. This requirement, given the number of individuals typically involved in a bankruptcy proceeding, can be seen as purely one for clerical convenience.

of appeal is barred from appealing. This is true even if his interests are identical with those of other listed appellants. Id. In light of Torres, this court must find that because the Bushes were not listed as appellants in the notice of appeal,[4] their rights to appeal have been forfeited. BRDC is the only appellant over whom the court has jurisdiction on this appeal.

The Supreme Court has not yet ruled whether the specific designation of the order or judgment appealed from is also a jurisdictional requirement of Rule 3. It is clear, however, that the notice must be the functional equivalent of what Rule 3 required - that at the very minimum the notice of appeal and the circumstances surrounding its filing must make obvious the order from which the appellant intends to appeal. See Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962).[5]

In Foman, the petitioner filed a notice of appeal to the circuit court from a district court judgment. Thereafter, the district court denied motions to vacate that judgment. The

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[4] Listing the Bushes as "parties to the judgment appealed from" is not the same thing as listing the Bushes as appellants. For every judgment there may be many parties involved - only one or less than all of those parties may appeal. This sole evidence of "intent" of the Bushes to appeal is much weaker than the evidence that only BRDC was intended at the time the notice was filed.

[5] In Torres, 108 S.Ct. at 2408, the Supreme Court characterized Foman as a case in which the Court "did not address whether [the judgment designation] was jurisdictional in nature; rather the Court simply concluded that in light of all the circumstances, [Rule 3] had been complied with."

petitioner then filed a second notice of appeal which designated only the denial of the motions to vacate as the order appealed from, rather than the motions and the underlying judgment. The circuit court found the first appeal to be premature, and then ruled that because the second notice of appeal did not mention the underlying judgment, the court was without enough information about the basis of the motions to rule on an appeal. Therefore, the second appeal was also dismissed. On appeal from that dismissal, the Supreme Court reversed, stating that

> the defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated. Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest.

Foman, 371 U.S. 181 (emphasis added).

Unlike the petitioner's notice in Foman, BRDC's notice of appeal and surrounding circumstances do not clearly manifest an intention to appeal from both the denial of the motion for new trial and the partial summary judgment. The notice does not mention the order denying "new trial," nor does it refer to the Bushes as parties against whom summary judgment was granted. The notice says only "summary judgment against Brianhead Royale."

Further, the "Ex Parte Motion for an Extension of Time Within Which to File Brief on Appeal" was filed by Lowell Summerhays on July 5, 1988 as "Attorney for Debtor" and referred to the "appellant" in the singular tense. As late as July 31, 1988, the appeal papers show only BRDC as the intended appellant, and the partial summary judgment against BRDC the only intended order on appeal. The time of the filing of the notice of appeal being the crucial time, the court cannot find a manifest intent to appeal anything other than the February 22, 1988 partial summary judgment against BRDC.

Finally, it should be mentioned that this court's determination that the Bushes are not proper parties to this appeal, supra, also appears to foreclose any appeal of the "new trial" order. The summary judgment underlying the "new trial" motion appears to involve only the Bushes, raising doubt as to BRDC's standing to appeal from that order.[6]

Interlocutory Orders

Having determined that only the partial summary

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[6] See supra n.4. Contrary to DFS's "debtor in possession" approach to standing, the proper rule of appellate standing in bankruptcy litigation is the "person aggrieved" test originally derived from Section 39(c) of the Bankruptcy Act of 1898. Although Section 39(c) has no counterpart in the current Bankruptcy Code, the "person aggrieved" test remains useful and has been applied by several federal courts to appeals under the Code. See Matter of Fondiller, 707 F.2d 441, 443 (9th Cir. 1983); In re Goodwin's Discount Furniture, Inc., 16 B.R. 885, 888-89 (Bkrtcy. 1st Cir. 1982); In re Jewel Terrace Corp., 10 B.R. 1008, 1011 n.3 (EDNY 1981).

judgment entered on February 22, 1988 is before the court, the court must now determine whether appeal from that judgment was properly taken. DFS asserts that BRDC has appealed from an interlocutory order without leave, and requests the court to dismiss on that ground. BRDC does not seriously contest the characterization of the order as interlocutory, but argues that if the order is interlocutory this court should treat its notice of appeal as a motion for leave to appeal, and grant the motion.

The partial summary judgment rendered against BRDC on February 22, 1988 is in fact an interlocutory order. It does not finally resolve all issues concerning Brianhead, does not expressly direct entry of a final judgment, and is in fact incorporated into the final judgment rendered in the bankruptcy case.

Under Bankruptcy Rule 8001(b) an appeal from an interlocutory judgment "shall be taken by filing a notice of appeal . . . accompanied by a motion for leave to appeal . . . ." 8001(b) (emphasis added). Failure to file a motion for leave to appeal, however, is not fatal. If the notice of appeal is timely filed, the court may grant leave to appeal, direct that a motion for leave to appeal be filed, or deny leave to appeal, treating the notice of appeal itself as a motion for leave to appeal. 8003(c).

Because nothing will be gained by requiring the appellant to now file a motion for leave to appeal, this court will treat the March 3, 1988 notice as a motion for leave to appeal. The court has before it the information necessary to rule on such a motion.

Granting leave to appeal from an interlocutory order is governed by 28 U.S.C. § 1292(b).[7] Accord e.g. First Interstate Bank of Denver, N.A. v. Werth, 58 B.R. 146, 148 (D. Colo. 1986). That section provides a three factor test: 1) Does the bankruptcy order involve a controlling question of law? 2) Is there substantial ground for a difference of opinion as to that question? 3) Would an immediate appeal from the bankruptcy order materially advance the ultimate termination of the bankruptcy litigation? If any one of these factors is not met, leave to appeal should not be granted.

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[7] That section reads:

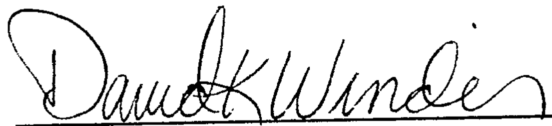
> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b).

This court finds that neither of the last two factors has been met in this case. Leave to appeal must be denied. First, a review of the record on appeal raises serious doubts in the court's mind as to whether any ground for a difference of opinion exists. If grounds do exist, this court does not feel they are "substantial." Second, an appeal from the February 22, 1988 partial summary judgment obviously will not materially advance the bankruptcy litigation now,[8] nor would it have advanced it at the time the notice of appeal was filed. As a result, BRDC's motion for leave to file appeal is denied.

ACCORDINGLY, DFS's motion to dismiss this appeal as improperly brought is GRANTED. This case is hereby dismissed. This will suffice as the court's order on these motions and no further order need be prepared by counsel.

Dated this 29th day of November, 1988.



David K. Winder
United States District Judge

[8] The bankruptcy case was officially closed on August 23, 1988. Although a motion to reopen the case and abandon the assets of the debtor is pending before the bankruptcy court, such an order would not appear to reopen or affect the issues involved on this appeal in any way.