

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
Central Division

In re:	)	Bankr. No. 97-30004
	)	
KIRWAN RANCH, a South Dakota Partnership	)	
Debtor.	)	Chapter 7
	)	
JOHN LOVALD	)	Adv. No. 99-3001
Plaintiff,	)	
	)	
-vs-	)	DECISION RE: DEFENDANTS'
	)	MOTION TO EXTEND THE TIME
GERALD R. KIRWAN, JR. and	)	TO FILE A NOTICE OF APPEAL
LEONA J. KIRWAN	)	
	)	
Defendants.	)	

The matter before the Court is the Motion for Extension of Time to File an Appeal and supporting brief and affidavit of counsel filed by Defendants and the brief in resistance filed by Plaintiff. This is a core proceeding under 28 U.S.C. § 157(b) (2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that Defendants' Motion for Extension of Time must be denied.

I.

Following a trial, the Court entered its Decision in this adversary proceeding, regarding the fraudulent transfer of estate real property to Defendants, on June 19, 2000. The Court's Order and the Judgment were entered June 21, 2000. Defendants timely appealed to the United States District Court for the District of South Dakota on June 28, 2000. A stay pending appeal was entered. Following a motion by Plaintiff, the District Court remanded the proceeding back to this Court with instructions on November 17, 2000. The District Court directed the Bankruptcy Court to consider

new evidence regarding the value of the subject real property and to reassess the amount of the judgment that needed to be protected upon a stay pending further appeal. In its remand order, the District Court also advised the parties that they should re-file any appeal once the Bankruptcy Court entered its supplemental findings and conclusions.

A continued trial upon remand was held December 4, 2000. The Bankruptcy Court also received additional evidence thereafter when it was discovered that a major creditor had erred in preparing an amended proof of claim that was part of the evidence received on December 4, 2000. The Bankruptcy Court entered its Supplemental Findings and Conclusions Upon Remand on December 19, 2000. Therein, the Court stated:

The District Court, in its November 17, 2000 Order, directed this Court to enter this supplemental decision. The District Court also advised the parties that they would have to thereafter re-file any appeal. If an appeal is renewed by Defendants and if Defendants again seek a stay pending appeal, Defendants' counsel shall submit with the motion for stay pending appeal a proposed order granting the motion. The proposed order shall be approved by Plaintiff's counsel and shall reflect the parties' agreed terms regarding the escrow of sale proceeds or an increased letter of credit by Gerald and Leona Kirwan so that \$765,382.00 of the amended judgment of \$793,144.52 for Trustee Lovald is secured pending resolution of the appeal.

An Amended Order After Remand and an Amended Judgment were entered December 26, 2000. On January 3, 2001, Defendants and Plaintiff jointly submitted a Supersedeas Bond and Defendants submitted a Motion for Stay of the Judgment Pending Appeal and for Approval of the Defendant[s'] Supersedes [sic] Bond. At the Court's direction the Clerk's office advised Defendants' counsel from the December 4,

2000 trial, A. Russell Janklow, that the Motion for Stay and Supersedeas Bond would be docketed once the notice of appeal was received (to reflect the order contemplated by the Supplemental Findings and Conclusions). The Clerk's office held the Motion for Stay and the Supersedeas Bond until Thursday, January 4, 2001, when it again informed the Court that a notice of appeal had not been received from Defendants. At the Court's direction, the Judge's law clerk called Attorney Janklow on the afternoon of January 4, 2001 to remind him that the notice of appeal was still needed and that the appeal deadline was January 5, 2001.

Defendants filed their Notice of Appeal on January 8, 2001. The Clerk's office then also docketed the corresponding Motion for Stay and the Supersedeas Bond.

On January 10, 2001, the Bankruptcy Court, noting that Defendants' appeal was untimely, granted Defendants' Motion for Stay pending resolution of any timely motion under Fed.R.Bankr.P. 8002(c) to extend the time to file an appeal based on excusable neglect.<sup>1</sup> The agreed terms under the parties' jointly filed Supersedeas Bond were also approved pending a final disposition.

Defendants filed their Motion for Extension of Time to File an Appeal under Rule 8002(c)(2) and a supporting brief on January 12, 2001. The Motion and brief were accompanied by an affidavit from another one of Defendants' counsel, Nora M. Kane. She stated that she thought the appeal deadline was January 10, 2001 based on

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<sup>1</sup> The Order also provided that the stay would continue if the time to appeal was extended and a timely appeal was thereafter filed.



Fed.R.Civ.P. 6(a), which excludes legal holidays and weekends when the period of time proscribed by a rule is less than eleven days. She said that it was not until after the Court's January 10, 2001 Order that she learned the ten-day notice of appeal time from a Bankruptcy Court decision is governed by Fed.R.Bankr.P. 9006, which excludes legal holidays and weekends when a period of time proscribed by the Bankruptcy Rules is less than eight days. Attorney Kane argued that her miscalculation constituted excusable neglect as interpreted in *Feeder Line Towing Service, Inc. v. Toledo, Peoria & Western Railroad Co.*, 539 F.2d 1107, 1009 (7th Cir. 1976).

Plaintiff responded to Defendants' Motion for Extension of Time with a brief filed January 17, 2001. Plaintiff, citing *Hartford Casualty Ins. Co. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 214 B.R. 197 (B.A.P. 8th Cir. 1997), which relied on *Pioneer Investment Services Co. v. Brunswick Assoc. LTD. Partnership*, 507 U.S.C. 380 (1993), argued that excusable neglect does not encompass attorney error.

Defendants filed a reply brief on January 22, 2001. They reviewed factors discussed in *Pioneer Investments* and made their arguments why those factors weighed in their favor.

## II.

Rule 8002(c)(2) of the Federal Rules of Bankruptcy Procedure provides that within twenty days after the time for filing an appeal expires, a party may request an extension of time to file an

appeal on the grounds of excusable neglect. Excusable neglect is not defined by the Rules, but has been extensively discussed in case law. One recent discussion in this Circuit is in *Ceridian Corp. v. SCSC Corp.*, 212 F.3d 398 (8th Cir. 2000). The facts in *Ceridian Corp.* are similar to those presented here. Ceridian Corporation admitted, due to a confusion about which of two state statutes applied, that it had failed to timely file a motion that would have precluded a discharge of two garnishees by operation of law. Ceridian Corporation was unsuccessful in its attempt through subsequent motions to reinstate the garnishment proceeding.

On appeal, the Court of Appeals discussed the application of excusable neglect as provided under Fed.R.Civ.P. 60(b)(1). Quoting *Pioneer Investment Services* therein, it said excusable neglect may encompass situations in which a party's failure to comply with a filing deadline is attributable to negligence. *Ceridian Corp.*, 212 F.3d at 403. Further,

[w]hether a party's neglect of a deadline may be excused is an equitable decision turning on "all relevant circumstances surrounding the party's omission." [*Pioneer Investment Services*, 507 U.S.] at 395, 113 S.Ct. 1489 (citations and footnotes omitted). "Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect, it is clear that excusable neglect ... is a somewhat elastic concept and is not limited strictly to omissions caused by circumstances beyond control of the movant." *Id.* at 392, 113 S.Ct. 1489 (internal quotations and footnote omitted). The factors to be weighed include "the danger of prejudice to the [other party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within reasonable control of the movant, and whether the movant acted in good faith." *Id.* at 395, 113 S.Ct. 1489.

*Id.* at 403. However, the Court went on to say, *Pioneer Investment* "did not alter the traditional rule that mistakes of law do not constitute excusable neglect." *Id.* At 404. The Court further explained, "[N]o circuit that has considered the issue after *Pioneer* has held that an attorney's failure to grasp the relevant procedural law is 'excusable neglect.'" *Id.* (quoting *Advanced Estimating Systems, Inc., v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997)).

The one exception to this general rule is where the language of the rule is ambiguous or susceptible to multiple interpretations or where an apparent conflict exists between two rules. *Id.* at 404 (quoting therein *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 250 (2nd Cir. 1997)). Excusable neglect, however, does not cover a party's "'failure to follow the clear dictates of a court rule.'" *Id.* (quoting *Canfield*, 127 F.3d at 250).

### III.

Of the four factors set forth in *Pioneer Investments*, the key one in this case is the reason for the delay since it was within Defendants' control. See *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 462-64 (8th Cir. 2000); *Food Barn Stores, Inc.*, 214 B.R. at 200. It is dispositive here.

Rule 9006(a) of the Federal Rules of Bankruptcy Procedure is not unclear. It describes when weekends and legal holidays are excluded from a computation of a time period. It also clearly states that it applies to all time periods "proscribed or allowed"



by the Federal Rules of Bankruptcy Procedure. Since the ten-day window for filing a notice of an appeal from a decision of this Bankruptcy Court to the District Court is established by Fed.R.Bankr.P. 8002(a), Rule 9006(a) governs how that ten days is computed. Thus, Defendants' attorneys' error in using Fed.R.Civ.P. 6(a) to compute the ten-day appeal period was a mistake of law, not of fact. *Ceridian Corp.*, 212 F.3d at 403-05; *Lowry*, 211 F.3d at 464. Since this mistake of law does not constitute excusable neglect as defined by *Pioneer Investments*, 507 U.S. at 395, Defendants' Motion for Extension of Time must be denied. An appropriate order will be entered.

The untimely notice of appeal is still of record. Plaintiff will have to seek dismissal of it from the District Court. This Court does not have jurisdiction to do address a motion to dismiss. Fed.R.Bankr.P. 8011.

Dated this 23 day of January, 2001.

BY THE COURT:



Irvin N. Hoyt  
Bankruptcy Judge

ATTEST:  
Charles L. Nail, Jr., Clerk

By:   
Deputy Clerk



**NOTICE OF ENTRY**  
Under F.R. Bankr.P. 9022(a)  
Entered

**JAN 23 2001**

**Charles L. Nail, Jr., Clerk**  
**U.S. Bankruptcy Court**  
**District of South Dakota**

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

**JAN 23 2001**

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court, District of South Dakota

By: 

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Total notices mailed: 10

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