

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FILED
DEC 7 1992
William F. Clayton
CLERK

MINN-KOTA FARM AGENCY, INC.,)	CIV. 92-1037
)	
Appellant,)	
)	MEMORANDUM OPINION
vs.)	AND ORDER
)	DISMISSING CASE
HOME FEDERAL SAVINGS & LOAN)	FOR LACK OF
ASSOCIATION,)	JURISDICTION
)	
Appellee.)	

PROCEDURAL HISTORY

On March 27, 1992, the United States Bankruptcy Court for the District of South Dakota, Northern Division,¹ entered a memorandum decision and judgment denying the request of appellant Minn-Kota Farm Agency, Inc. (Minn-Kota), to order Home Federal Savings & Loan Association (Home Federal) to over rent proceeds to Minn-Kota pursuant to section 542 of the Bankruptcy Code. The details of that decision and the underlying facts upon which it is based are unimportant to this Court's decision.

Eighteen days later, on May 14, 1992, Minn-Kota filed a motion with the bankruptcy court for extension of time to file a notice of appeal, the ten-day period for filing such a notice prescribed by Bankruptcy Rule 8002(a) having expired. The bankruptcy court denied plaintiff's motion because the motion itself was not filed within the time prescribed by Bankruptcy Rule 8002(c).

¹The Honorable Irvin N. Hoyt, Chief Bankruptcy Judge

On July 27, 1992, Minn-Kota filed with the district court² a motion for enlargement of time in which to file a notice of appeal of the bankruptcy court's decision. This motion was filed ex parte and a copy was not served on Home Federal. On July 30, 1992, the district court granted Minn-Kota's motion for enlargement of time.³ On August 4, 1992, Minn-Kota filed a notice of appeal.

Home Federal has made a motion to dismiss Minn-Kota's appeal, arguing that this Court lacks jurisdiction to decide the appeal.⁴ Home Federal argues that compliance with Bankruptcy Rule 8002 is a jurisdictional prerequisite, that the district court was without jurisdiction to grant Minn-Kota's request for extension of time to file a notice of appeal, and that, therefore, Minn-Kota has not complied with Rule 8002.

If Minn-Kota has not complied with Rule 8002, then Home Federal is correct in asserting that this Court lacks jurisdiction to hear Minn-Kota's appeal. See Jacobson v. Nielsen, 932 F.2d 1272, 1272-73 (8th Cir. 1991). See also Deyhimy v. Rupp (In re Herwit), 970 F.2d 709, 710 (10th Cir. 1992); In re Universal

²The Honorable Donald J. Porter, United States District Judge for the District of South Dakota, Central Division.

³Although a copy of this order is not part of the record below, the docket sheet transmitted from the bankruptcy court verifies that this order was entered on July 30, 1992. See Bankruptcy Court Docket Sheet, Item No. 29.

⁴Home Federal's motion was made on November 5, 1992. Under local rules, Minn-Kota had until November 25, 1992, to file a response to that motion. As of the writing of this opinion, Minn-Kota has still not filed a response to the motion. Nonetheless, this decision is being made on the merits of the arguments raised by the Home Federal motion rather than on a default basis.

Minerals, Inc., 755 F.2d 309, 312 (3d Cir. 1985); Walker v. Bank of Cadiz (In re LBL Sports Ctr., Inc.), 684 F.2d 410, 411-12 (6th Cir. 1982); and Robinson v. Robinson (In re Robinson), 640 F.2d 737, 738 (5th Cir. 1981).⁵ It is undisputed that Minn-Kota did receive an extension of time to file a notice of appeal from the district court. Therefore, the sole issue presented for resolution is whether the district court had the authority to grant Minn-Kota an extension of time to file its notice of appeal. If the district court acted properly, then Minn-Kota has complied with Rule 8002 and satisfied the jurisdictional prerequisite. If the district court lacked the authority to grant Minn-Kota an extension, then Minn-Kota has not complied with Rule 8002 and this Court lacks jurisdiction to hear Minn-Kota's appeal.⁶

⁵See also 9 Collier on Bankruptcy ¶ 8002.03[02] (stating that "[a] multitude of cases hold that unless an appeal is timely taken, the reviewing court lacks jurisdiction to hear it. The necessity for providing a precisely ascertainable point at which litigation comes to a end strongly militates against an expansive reading of Rule 8002(a); the courts have been loathe to read it in any fashion other than strictly. Cases interpreting Rule 8002 and its predecessor . . . have uniformly held that the sine qua non of a bankruptcy appeal is a timely filed notice of appeal.").

⁶There could also have been a second potential issue. A party may file a motion for extension of time in which to file a notice of appeal within **20 days** from the date of entry of the order which is being appealed if:

1. the appealing party makes a showing of excusable neglect, explaining why the party failed to file its notice of appeal or its motion for extension of time within ten days following entry of the order; **and**
2. the judgment being appealed from does not:
 - a. authorize the sale of property,
 - b. authorize the obtaining of credit or the incurring of a debt under § 364 of the Bankruptcy Code,

DISCUSSION

Section 158 of Title 28 of the United States Code governs appeals of a bankruptcy court's decision to a district court.

Section 158 provides in pertinent part:

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. . . .

* * *

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

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- c. approve or order disclosure,
 - d. confirm a bankruptcy plan,
 - e. dismiss a debtor's petition in bankruptcy, or
 - f. convert a petition in bankruptcy filed under one chapter of the Code to a petition filed under another chapter of the Code.

Bankruptcy Rule 8002(c). Jacobson v. Nielsen, 932 F.2d 1272, 1272-73 (8th Cir. 1991) (stating that an appellant must demonstrate excusable neglect to avail himself of the 20-day period in which to seek an extension of time under Rule 8002(c)).

In this case, Minn-Kota filed its first motion for extension of time to file a notice of appeal within 18 days of the date of entry of the bankruptcy court's order. However, the record of the proceedings before the bankruptcy court is devoid of any allegation of excusable neglect and Minn-Kota does not allege excusable neglect in this appeal. This Court cannot speculate on the existence of facts supporting a claim of excusable neglect. Accordingly, this Court will not address the issue of whether Minn-Kota was entitled to have the bankruptcy court grant its original motion for extension of time to file a notice of appeal under the 20-day provision of Bankruptcy Rule 8002(c). This is in accord with the policy of strictly construing Rule 8002, as described supra at note 5.

28 U.S.C. § 158(a), (c). Section 158(c) makes reference to two bodies of law: (1) Bankruptcy Rule 8002, and (2) the rules which are generally applicable when a civil case is appealed from a district court to a court of appeals. Section 158(c) provides that appeals from a bankruptcy court to a district court are governed by both bodies of law. Therefore, in order to determine whether the district court's grant of Minn-Kota's request for an extension was proper, both bodies of law referred to in section 158(c) must be consulted.

Bankruptcy Rule 8002 provides in pertinent part as follows:

(a) Ten-Day Period. The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

* * *

(c) Extension of Time for Appeal. The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364

of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

Bankruptcy Rule 8002(a), (c).

The above rule makes clear that it is **with the bankruptcy judge** that a notice of appeal must be filed. The rule also makes clear that it is **the bankruptcy judge** to whom a request for extension of time for filing a notice of appeal must be made. See In re LBL Sports Ctr., Inc. (Walker v. Bank of Cadiz), 684 F.2d 410, 412 (6th Cir. 1982) (holding that only the bankruptcy court can grant an extension of time to file a notice of appeal); and 9 Collier on Bankruptcy, ¶ 8002.07[01] at 8002-22 (stating that "[o]nly the bankruptcy court, and not the district court or the bankruptcy appellate panel, may extend the time for filing the notice of appeal."). Bankruptcy Rule 8002, therefore, supports the conclusion that the district court had no jurisdiction to grant Minn-Kota's request for an extension.

This conclusion is supported by the other body of law to which section 158(c) makes reference: the general rules for pursuing an appeal of a civil case from a district court to an appellate court. In this regard, Rule 26 of the Federal Rules of Appellate Procedure is enlightening. Rule 26 provides in pertinent part as follows:

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; **but the court may not enlarge the time for filing a notice of appeal**, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or

a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

Fed. R. App. P. 26(b) (emphasis supplied). Under Rule 26, an appellate court lacks jurisdiction to decide an appeal if a notice of appeal is not timely filed. Needham v. White Laboratories, Inc., 639 F.2d 394 (7th Cir.), cert. denied, 454 U.S. 927, 102 S. Ct. 427, 70 L. Ed. 2d 237 (1981). Furthermore, an appellate court cannot extend the time limitation for filing such a notice. Fed. R. App. P. 26(b).

Section 158(c) makes rule 26(b) applicable when a party seeks to appeal a decision of a bankruptcy court to a district court. In that situation, the relationship between the district court and the bankruptcy court is the same as between an appellate court and a district court. Therefore, the plain language of Bankruptcy Rule 8002(c), coupled with the prohibition outlined in Appellate Rule 26(b), command the conclusion that a district court is without jurisdiction to enlarge the time during which a party may file a notice of appeal from a decision of a bankruptcy court.

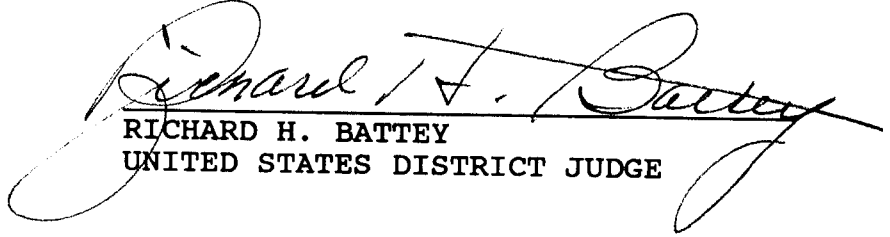
It follows, then, that the district court in this case improperly granted Minn-Kota's motion for an extension of time in which to file its notice of appeal. Because Minn-Kota did not file a notice of appeal within the original ten-day time limit, and because Minn-Kota did not obtain an extension of time to file its notice of appeal **from the bankruptcy court**, Minn-Kota has not properly and timely filed a notice of appeal. Thus, this Court lacks jurisdiction to hear Minn-Kota's appeal.

Good cause appearing, it is hereby

ORDERED that Home Federal's motion to dismiss Minn-Kota's appeal for lack of jurisdiction (Docket No. 6) is granted.


Dated this 7th day of December, 1992.

BY THE COURT:


RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

By: 
Deputy Clerk

(SEAL)