

**FILED**

**JUN 16 2004**

*[Signature]*  
CLERK

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
NORTHERN DIVISION

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FIRST DAKOTA NATIONAL BANK,	*	CIV 04-1010
	*	
Appellant,	*	
	*	
-vs-	*	ORDER
	*	
NORTH CENTRAL CONSTRUCTION,	*	
INC., et al.,	*	
	*	
Appellees.	*	
	*	

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U.S. BANKRUPTCY COURT  
DIST. OF SOUTH DAKOTA

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First Dakota National Bank ("First Dakota") has served and filed a notice of appeal (Doc. 1), seeking to appeal from what is only in essence a memorandum decision (Doc. 98 from the bankruptcy court) of the bankruptcy court. No mention is made, in the notice of appeal, of the actual order (Doc. 99) of the bankruptcy court which orders that (a) First Dakota's motion for partial summary judgment is denied and (b) plaintiff's (North Central Construction, Inc.) cross-motion for partial summary judgment is granted based upon a determination that certain lien waivers are waivers only to the extent of claims that were actually paid and a determination that certain lien waivers did not alter the dates the lien waivers attached under SDCL 44-9-7. It is improper procedure to fail to appeal from the actual order or judgment. The notice of appeal makes no reference to document numbers.

The notice of appeal (Doc. 101) states the appeal is taken pursuant to 28 U.S.C. §158(a) or (b). The signature page includes a reference to a Bankruptcy Appellate Panel Service and states that each party has a right to have the appeal heard by the district court. This is surplusage since, in the District of South Dakota, there is no appeal to a BAP. The only possible appeal is to the district court. Thus, no appeal is possible under 28 U.S.C. §158(b).

The notice of appeal does not specify whether the appeal is filed under (1), (2), or (3) of 28 U.S.C. §158(a). No leave of this court has been sought by First Dakota. Nor would it be

granted under the circumstances of this case. What was done by the bankruptcy court is clearly not a final judgment, order, or decree. It is interlocutory. Nor has the bankruptcy court certified or directed that the order is a final order and that there is no just reason for delay. The order clearly adjudicates fewer than all the claims or the rights and liabilities of the parties. The order is clearly subject to revision by the bankruptcy court at any time before final judgment.

Appellee North Central Construction, Inc. has served and filed a motion to dismiss this interlocutory appeal (Doc. 6) with the required memorandum of law (Doc. 7). Prior to looking at such motion, this court had already decided to *sua sponte* dismiss this appeal. It is proper practice and a common practice for the district court to immediately examine each appeal and filing to be sure that jurisdiction exists. No party (and there are a multitude of parties involved in the bankruptcy proceeding) should be put to the additional expense of briefing and arguing the question of dismissal in this case. Such motion should be denied as moot and this appeal should be dismissed.

Now, therefore,

IT IS ORDERED, as follows:

- 1) The motion of North Central Construction, Inc. (Doc. 6) is denied as moot.
- 2) *Sua sponte*, this appeal is dismissed for lack of jurisdiction.
- 3) Leave to appeal has not been sought and would not be granted, in any event.

Dated this 15th day of June, 2004.

BY THE COURT:



CHARLES B. KORNMANN  
United States District Judge

ATTEST:

JOSEPH HAAS, CLERK

BY:



DEPUTY

(SEAL)