

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

FILED  
December 23, 1988  
William F. Clayton  
Clerk

CLM

DONALD J. PORTER  
CHIEF JUDGE

413 U.S. COURTHOUSE  
PIERRE, SOUTH DAKOTA 57501

December 23, 1988

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Page 162

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RE: CIVIL NO. 88-3040  
TRAVELERS INSURANCE COMPANY, Plaintiff/Appellant  
vs.  
ZEMAN FARMS, INC., Defendant/Appellee

Dear Counsel:

MEMORANDUM OPINION

Plaintiff/Appellant Travelers Insurance Company (Travelers) challenges in this appeal the bankruptcy court's valuation of certain real estate and personal property of the debtor/defendant/appellant Zeman Farms, Inc. ("Zeman"). The bankruptcy court initially announced its judgment in a letter dated March 18, 1988, and subsequently formalized the valuation on May 11, 1988 by filing an order and accompanying findings of fact. On July 18, 1988, Travelers filed notice of appeal with the clerk of the bankruptcy court. This Court dismisses the appeal for three reasons: 1) Travelers did not timely file the notice of appeal; 2) Travelers was inexcusably dilatory in filing its initial brief; and 3) the appeal lacks merit.

-2-

I. Failure to Timely File Notice of Appeal

Rule 8002(a) of the Bankruptcy Rules states:

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.

Rule 8002(a) is to be strictly followed. In re Souza, 795 F.2d 855, 857 (9th Cir. 1986); see Moore v. Hogan, 851 F.2d 1125 (8th Cir. 1988); Hopewell v. Koser Supply Co., 577 F.2d 461 (8th Cir. 1978). If a notice of appeal is not filed within ten days, this Court lacks jurisdiction to entertain the appeal. In re Abdallah, 778 F.2d 75, 77 (1st Cir. 1985), cert denied, 476 U.S. 1116. Because Rule 8002(a) establishes a jurisdictional limitation, a court may consider whether notice of appeal is timely filed even when the litigants do not raise the issue. See Rodgers v. Watt, 722 F.2d 456, 457-58 (9th Cir. 1983).

The running of the ten day limitation arguably commenced on March 18, 1988 when the bankruptcy court announced its valuation. See In re Souza, 795 F.2d 855 (9th Cir. 1986) (ten day period runs from date of judgment rather than date bankruptcy court entered amended findings). Travelers filed notice of appeal 122 days after the March 18, 1988 judgment. Even giving Travelers the benefit of any doubt and regarding the order issued May 11, 1988 as the judgment triggering the running of the ten day limitation, Travelers still filed a tardy notice of appeal, some 58 days after the deadline set

-3-

by Rule 8002(a). Travelers has presented no explanation for its tardiness, and this Court perceives no circumstances in this case to warrant tolling the ten day limitation.

## II. Tardiness in Filing a Brief

On August 4, 1988, this Court issued an order setting the briefing schedule in this appeal. That order stated:

Appellant shall file a brief and proof of service with the Clerk of this Court at Pierre within 15 days from the date of this order.

On September 6 and again on September 12, this Court sent letters to Travelers to inform it that the Court had not received its brief which was due on August 19, 1988.

On September 26, 1988, Zeman filed a motion to dismiss the appeal because Travelers had still not filed its brief. Finally, on October 3, 1988, Travelers filed its brief, 45 days after the August 19 deadline. At no time did Travelers explain its tardiness or request an extension of the deadline for briefing. Travelers has failed to file a reply brief to Zeman's response brief even though roughly seven weeks have passed since Zeman filed its brief.

## III. Merit of the Appeal

This Court need not even reach the merits in this appeal, but a review of the merits confirms the conclusion that the appeal should be dismissed. Traveler's contention is that Judge Irvin N. Hoyt

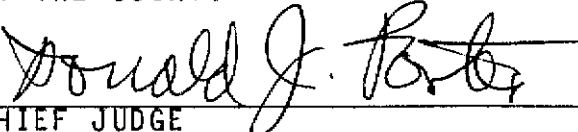
-4-

erred in determining the value of Zeman's property to be \$397,153.44. The appeal presents a question of fact for this Court, so this Court can reverse the bankruptcy court order only if it is clearly erroneous. Wegner v. Grunewaldt, 821 F.2d 1317, 1320 (8th Cir. 1987).

The bankruptcy court held a hearing to determine the value of the Zeman property under 11 U.S.C. § 506(a) on March 3, 1988. At the hearing, the bankruptcy court heard evidence from three different appraisers. The appraiser for Zeman suggested that the Zeman property was worth \$270,000.00, while appraisers for Travelers believed the value of the property to be \$477,000.00 or \$495,045.00. The bankruptcy court found fault with the methodology of the Zeman's appraiser and carefully examined the evidence to reach its own independent valuation. Based on individual valuations for good land under irrigation, marginal land under irrigation, dry land, pasture, tree and building lots, waste land, irrigation equipment, and improvements, the bankruptcy court concluded that \$397,153.44 was the proper valuation of the Zeman property. A review of the file as a whole convinces this Court that the bankruptcy court's valuation was not clearly erroneous.

Because three different grounds support dismissal of this case, Travelers shall pay Zeman's costs incurred in this appeal under Rule 8014 of the Bankruptcy Rules, which taxes costs against the losing party in an appeal.

BY THE COURT:

  
CHIEF JUDGE