

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

PRO PAGE PARTNERS, LLC,  
  
Debtor.

No. 00-22856  
Chapter 7

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MARY FOIL RUSSELL, Trustee,  
  
Plaintiff,

vs.

CARLETON A. JONES III,  
  
Defendant.

Adv. Pro. No. 01-2036

O R D E R

This adversary proceeding came before the court for hearing on January 27, 2004, upon the defendant's motion filed January 9, 2004, to permit tardily filed notice of cross-appeal and the plaintiff's response in opposition thereto and motion to dismiss cross-appeal filed January 20, 2004. As the basis for the defendant's request that he be permitted to file his cross-appeal after the expiration of the time period for doing so, the defendant asserts that he was unaware that the plaintiff had filed an appeal until January 5, 2004, when his counsel received the designation of the record on appeal and statement of issues

from plaintiff's counsel.

The docket in this case indicates that the plaintiff filed on November 26, 2003, a notice of appeal as to this court's November 20, 2003 order. Under Fed. R. Bankr. P. 8002(a), a notice of cross-appeal must be filed within ten days of the filing of the notice of appeal. Rule 8002 does permit the bankruptcy judge to extend the time for filing the notice of appeal by any party, but the request must be made before the time for filing the notice has expired, "except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect." Fed. R. Bankr. P. 8002(c)(2). Fed. R. Bankr. P. 9006(b)(3) provides that the court may enlarge the time for taking action under Rule 8002 "only to the extent and under the conditions stated in those rules." The defendant's motion for late filing was filed on January 9, 2004, 44 days after the plaintiff filed her notice of appeal, a delay which exceeds not only the initial 10-day requirement but also the 20-day period thereafter during which the court enlarge the time for excusable neglect. Because the motion was filed after the 20-day excusable neglect period, this court is prohibited by the interplay of Rules 8002(c) and 9006(b)(3) from granting the motion, even if excusable neglect were established. See, e.g.,

*Moore v. Hogan*, 851 F.2d 1125 (8th Cir. 1988); *McLeod v. Diversified Collection Services (In re McLeod)*, 1996 WL 627747, \*\*2 (6th Cir. October 29, 1996) ("Unless the motion [for extension of time to file appeal] is filed within thirty days of entry of the judgment, jurisdiction does not exist and irrespective of excusable neglect, the appellate court cannot hear the appeal.").

Furthermore, it is questionable whether the facts of this case establish excusable neglect, notwithstanding the assertion of the defendant's counsel that she did not have notice of the filing of the appeal. Attached to the notice of appeal filed by the plaintiff on November 26, 2003, is her counsel's certificate of service indicating that a copy of the notice was served on defendant's counsel. Similarly, the letter transmitting the notice to the clerk reflects that a copy was sent to defendant's counsel. Plaintiff's counsel states in his affidavit that the "Notice of Appeal was placed in the mail to Ms. Fugate [defendant's counsel] on November 26, 2003 with sufficient postage to reach its destination." In addition, the court file evidences that upon the filing of the notice of appeal, a deputy clerk of the court mailed defendant's counsel a filed-stamped copy of the notice of appeal. Based on all of the foregoing, the court denies the defendant's motion filed January 9, 2004,

to permit tardily filed notice of cross-appeal.

When the defendant filed his motion for late filing of his cross-appeal, he also filed a notice of cross-appeal. The plaintiff requests that this court dismiss this cross-appeal. Although there is some authority for the proposition that this court has the jurisdiction to do so, see *In re Bushnell*, 273 B.R. 359 (Bankr. D. Vt. 2001); this court respectfully finds such authority questionable. See, e.g., *Rivermeadows Assocs., Ltd. v. Falcey (In re Rivermeadows Assocs., Ltd.)*, 205 B.R. 264 (B.A.P. 10th Cir. 1997) ("A bankruptcy court generally loses jurisdiction over issues appealed to the district court or the Bankruptcy Appellate Panel and may not enter an order dismissing an appeal ...."). Because a motion to dismiss an appeal should be made to the district court, see Fed. R. Bankr. P. 8011(a) ("A request for an order or other relief [upon appeal] shall be made by filing with the clerk of the district court ... a motion for such order or relief ...."); this court hereby denies the plaintiff's motion to dismiss cross-appeal, without prejudice to the plaintiff's refileing of the motion with the district court.

SO ORDERED.

ENTER: February 5, 2004

BY THE COURT

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MARCIA PHILLIPS PARSONS  
UNITED STATES BANKRUPTCY JUDGE