

Bankr. R. 8002(c)

Excusable Neglect

Franzwa v. Nichols Adv. Pro. 89-3237-S
In re Development Systems, Inc. Case no. 388-02705-S7

6/25/90 DDS Unpublished

The court denied the defendant's request for an extension of time to file an appeal. The request was filed more than 10 days but less than 30 days after the court entered an order denying the defendant's motion for additional findings. BR 8002(c) permits the court to grant an extension requested during the time frame at issue upon a showing of excusable neglect.

A strict standard is applied to find excusable neglect under these circumstances. The defendant did not meet either a strict or liberal standard of excusable neglect. He was present for the court's oral ruling, was sent a copy of the judgment promptly after it was entered, and the only excuse provided was that he was looking for an attorney to represent him on appeal.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 388-02705-S7
DEVELOPMENT SYSTEMS, INC.,)
)
Debtor,) Adversary Proceeding No.
) 89-3237-S
)
JOHN B. FRANZWA, INC., an) MEMORANDUM DENYING DEFENDANT
Oregon corporation, Trustee) NICHOL'S MOTION FOR EXTENSION
for Development Systems,) OF TIME TO FILE APPEAL
Inc.,)
)
Plaintiff,)
)
v.)
)
PAUL DEAN NICHOLS, CHARLES)
ALTIG, CASH FLOW INVESTORS,)
INC., SEVERIN, INC., JER-)
MAR ENTERPRISES, INC., and)
COLLINS PROPERTY PORTFOLIO,)
INC.,)
)
Defendants.)

Defendant Nichols requested an extension of time to file an appeal from the judgment entered against him in this case. For the reasons set forth below, his motion should be denied.

After five days of trial and argument, the Court issued oral findings on March 8, 1990, and entered judgment in accordance with the oral findings on March 16, 1990. On March 22, 1990, defendant Nichols filed a letter which the Court reviewed as a possible motion to amend findings. The motion was denied by an order entered March 23, 1990. On April 16, 1990, defendant Nichols filed a letter with the Court which requested an extension of time to file an appeal because he thought he could develop new evidence to change the Court's findings with the assistance of an attorney.

Mr. Nichols represented himself during the trial despite the Court's repeated admonitions that he should seek counsel. Mr. Nichols decided not to hire an attorney, and failed to present exhibits or testimony which were adequate to rebut the trustee's case.

The request for an extension of time to file an appeal is governed by Bankr. R. 8002(c). A bankruptcy judge may extend the time for filing the notice of appeal for a period not to exceed 20 days from the expiration of the time otherwise prescribed by Rule 8002. 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 for a judgment of this type.

To be timely, the notice of appeal must be filed within 10 days of the date the judgment was entered.

Bankr. R. 8002(a). If a party files a timely motion to amend or make additional findings of fact, or to alter or amend the judgment, the time for appeal runs from the entry of the order granting or denying the motion. Bankr. R. 8002(b).

Defendant Nichols filed his request for an extension of time to appeal more than 10 days but less than 30 days after the order denying his motion for additional findings. To grant the motion, Mr. Nichols must establish excusable neglect for his failure to timely file the notice of appeal.

The advisory committee note to Bankr. R. 8002 states that the rule is an adaptation of Rule 4(a) F. R. App. P. The cases interpreting the applicable standard under F. R. App. P. 4(a) are useful in construing Bankr. R. 8002. Matter of Estate of Butler's Tire & Battery Co., Inc., 592 F.2d 1028, 1034 (9th Cir. 1979) (interpreting Bankr. R. 802, the predecessor to Bankr. R. 8002).

A strict construction is applied when a notice of appeal has not been filed within the 10 day deadline. In re Magouirk, 693 F.2d 948, 950 (9th Cir. 1982), Redfield v. Continental Casualty Corp., 818 F.2d 596, 601 and 604 (7th Cir. 1987), Matter of Dayton Circuit Courts #2, 85 Bankr. 51,

54 (Bankr. S. D. Oh. 1988).

The more liberal standard urged by defendant Nichols is used when the Court is reviewing facts for excusable neglect under F. R. Civ. P. 60(b). The liberal standard of excusable neglect is not applicable when the party seeking an extension has made the request within the deadlines imposed by Bankr. R. 8002(c). To fall within the Rule 60(b) category, the party seeking to appeal must show that the clerk did not send notice of the judgment as required by Bankr. R. 9022, plus additional equitable factors such as the party's attempts to learn of the date of the decision or extraordinary circumstances where injustice would result if the untimely appeal were not heard. Butler, 592 F.2d at 1034, Rogers v. Watt, 722 F.2d 456, 459-60 (9th Cir. 1983).

Defendant Nichols has not met either standard for excusable neglect. He participated in the hearing at which the Court issued its oral ruling on March 8, 1990. The clerk mailed him copies of the judgment and the order denying his motion for additional findings shortly after each was entered, and Mr. Nicholas has not asserted that he did not receive the notice of the entry of these orders. The excuse he relies on is that he was seeking counsel, and the only attorney who would advise him said that he thought the 30 day appeal period was applicable. Mr. Nichols does not state

when this advice was given; it could have been outside the 10 day deadline to file the appeal. He could easily have requested an extension in a timely fashion on the grounds that he was in the process of seeking counsel. The late filing is not excused merely because the defendant was representing himself. In re Ghosh, 47 Bankr. 374 (D.E.D.N.Y. 1984).

Defendant Nichols has not established excusable neglect, and his motion for an extension of time to file an appeal should be denied. A separate order will be entered.

DATED this _____ day of June, 1990.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Daniel F. Vidas
J. Bradford Shiley
Paul D. Nichols
Roger Tilbury