

In re Sanders, Case No. 397-33882  
Appellate No. Dt. Ct. # CV 04-1675-BR

2/23/05

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Debtor filed untimely notice of appeal from bankruptcy court's order denying his motion for a determination that an unsecured debt owed to Harco National Insurance Co. had been discharged in this bankruptcy proceeding. Harco moved to dismiss the appeal as untimely and filed an election to have the appeal heard by the district court. The debtor responded with a motion in the bankruptcy court for an extension of time within which to file his notice of appeal as well as an objection in the district court to Harco's election to have this appeal heard by the district court.

The bankruptcy court denied the debtor's motion for an extension of time within which to file his notice of appeal. In doing so, it relied on Fed. R. Bankr. P. 8002(c)(2) which provides, generally, that a request to extend the time for filing a notice of appeal must be filed before the time for filing a notice of appeal has expired but allows a court to grant "such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal . . . upon a showing of excusable neglect" and Fed. R. Bankr. P. 9006(b) which provides that the court may enlarge the time for taking action under rule 8002 "only to the extent and under the conditions" stated in that rule. The court, relying on Crawford v. Educational Credit Mgt., 2003 WL 21360433 (S.D. Cal. 2003), rejected the debtor's argument that, despite the limitation of Fed. Bankr. R. 8002 and Fed. Bankr. R. 9006, it could nonetheless grant his request for an extension of time where his failure to file an notice of appeal was the result of excusable neglect.

Following denial of the debtor's motion for extension of time to file his notice of appeal the district court ruled on Harco's motion to dismiss the debtor's appeal as untimely and the debtor's objection to Harco's election to have the appeal heard by the district court. It found, for the reasons stated in the bankruptcy court's opinion, that the debtor's appeal was untimely and granted Harco's motion to dismiss. It overruled the debtor's objection to Harco's notice of election to have the appeal heard by the district court, holding that the matter was moot, given the dismissal of the appeal, and that, in any event, the election to have the matter heard by the district court was timely filed.



IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF OREGON

CLERK, U.S. BANKRUPTCY COURT  
 DISTRICT OF OREGON

FEB 23 2005

LODGED \_\_\_\_\_ REC'D \_\_\_\_\_  
 PAID \_\_\_\_\_ BOCKETED \_\_\_\_\_

In re

JAMES H. SANDERS,

Appellant/Debtor,

v.

HARCO NATIONAL INSURANCE CO.,

Appellee/Creditor.

CV 04-1675-BR

(Bankr. No. 97-33882-tmb7)

OPINION AND ORDER

JAMES H. SANDERS  
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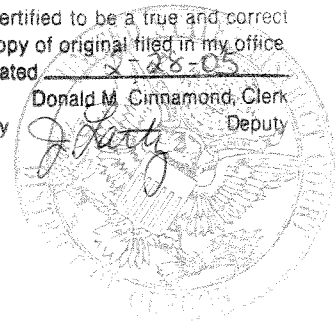
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Certified to be a true and correct  
 copy of original filed in my office  
 Dated 2-23-05

By Donald M. Cinnamond, Clerk  
[Signature], Deputy



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**BROWN, Judge.**

This matter comes before the Court on Appellee Harco National Insurance Co.'s Motion to Dismiss Debtor's Notice of Appeal (#57), Appellant James H. Sanders's Motion to Dismiss Harco National Insurance Company's "Motion to Dismiss Debtor's Notice of Appeal" as Moot (#60),<sup>1</sup> and Sanders's Motion (A) for Dismissal of the Captioned Appeal Before This Court to Facilitate Transfer Back to the Bankruptcy Appellate Panel Due to Creditor's Untimely Election of This Forum; or in the Alternative (B) For a Stay of Further Proceedings Before This Court Pending a Ruling by the Bankruptcy Court Regarding Said Transfer Accordingly (#76) (hereafter "Motion to Facilitate Transfer").

For the reasons that follow, the Court **GRANTS** Harco's Motion and **DENIES** Sanders's Motions.

**MOTION TO DISMISS DEBTOR'S NOTICE OF APPEAL**

Harco moves to dismiss Sanders's Notice of Appeal as untimely filed.

The Bankruptcy Court Order from which Sanders appeals was entered on August 19, 2004. Fed. Bankr. R. 8002(a) requires a notice of appeal to be filed "with the clerk within 10 days of the date of entry of the judgment, order, or decree appealed

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<sup>1</sup> The Court construes Appellee's Motion to Dismiss as a Response to Appellee Harco's Motion to Dismiss Debtor's Notice of Appeal.

from." The appeal period expired on August 30, 2004, because August 29, 2004, was a Sunday. Sanders's Notice of Appeal was filed on September 13, 2004, more than ten days after the Order was entered. Sanders's Notice of Appeal, therefore, was untimely.

Sanders admitted his Notice of Appeal was not timely filed and sought an extension of time from the Bankruptcy Court. On November 12, 2004, the Bankruptcy Court denied that Motion by letter opinion. For the well-stated reasons set forth in the Bankruptcy Court's opinion, this Court also finds Sanders's appeal to be untimely. Accordingly, the Court grants Harco's Motion.

#### MOTION TO FACILITATE TRANSFER


Sanders asserts Harco did not timely file its notice of election to have this appeal heard by the District Court rather than by the Bankruptcy Appellate Panel. The Court concludes Sanders's Motion to Facilitate Transfer is moot because Sanders's appeal must be dismissed as untimely. In any event, for the reasons set forth in Harco's response to Sanders's Motion, the Court finds Harco's Election to Have United States District Court Determine Appeal and Objection to Bankruptcy Appellate Panel to Determine Appeal was filed timely.

CONCLUSION

For these reasons, the Court **GRANTS** Appellee Harco National Insurance Co.'s Motion to Dismiss Debtor's Notice of Appeal (#57), **DENIES** Appellant James H. Sanders's Motion to Dismiss Harco National Insurance Company's "Motion to Dismiss Debtor's Notice of Appeal" as Moot (#60),<sup>2</sup> and **DENIES** Sanders's Motion (A) for Dismissal of the Captioned Appeal Before This Court to Facilitate Transfer Back to the Bankruptcy Appellate Panel Due to Creditor's Untimely Election of This Forum; or in the Alternative (B) For a Stay of Further Proceedings Before This Court Pending a Ruling by the Bankruptcy Court Regarding Said Transfer Accordingly (#76).

IT IS SO ORDERED.

DATED this 22nd day of February, 2005.



ANNA J. BROWN  
United States District Judge

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<sup>2</sup> As noted, however, the Court construes Appellee's Motion to Dismiss as a Response to Harco's Motion to Dismiss Debtor's Notice of Appeal.