IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-4808
Summary Calendar

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IN THE MATTER OF: LEONARD NIKOLAI,

Debtor,

LEONARD NIKOLAI,

Appellant,

versus

APRIL GREEN,

Appellee,

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Appeal from the United States District Court for the
Eastern District of Texas
(CA4 91 179)

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(September 27, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.*

PER CURIAM:

Leonard Nikolai (Appellant) appeals the order of the United States District Court for the Eastern District of Texas denying his

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Motion for Extension of Time to File Appellant's Brief and dismissing his appeal, from the bankruptcy court's order denying his requested Rule 60(b) relief from its earlier order dismissing his adversary proceeding counterclaim, for failure to file a brief pursuant to Fed. R. Bankr. P. 8009(a)(1). Finding no abuse of the district court's discretion, we affirm.

Facts and Proceedings Below

Prior to these proceedings, April Green (Appellee) filed an action in Colorado state court for sexual abuse against Appellant, her uncle. On September 17, 1987, Appellant filed for bankruptcy under Chapter Thirteen in the United States Bankruptcy Court for the Eastern District of Texas. On February 1, 1988, Appellee initiated an adversary proceeding to deny discharge of debt in bankruptcy under 11 U.S.C. § 523(a)(6) to preserve any possible recovery from the Colorado litigation. Claiming Appellee's suit was frivolous, Appellant counterclaimed for malicious prosecution and abuse of process. After finding the debt non-dischargeable, the bankruptcy court on February 28, 1991, remanded Appellee's claims to state court in Colorado,[1] dismissed the adversary proceedings, and dismissed Appellant's counterclaim with prejudice. On April 16, 1991, Appellant filed a Motion to Reconsider Order Dismissing Adversary, Vacate Order Dismissing Appellant's Counterclaim, and Reopen Case pursuant to Fed. R. Civ. P 60 and

[1] The Colorado state court dismissed these claims with prejudice after Appellee reached a settlement with Appellant's insurance carrier in which Appellee received $30,000.

Fed. R. Bankr. P. 9024.[2] The Bankrruptcy Court denied this motion by order dated July 31, 1991, and entered August 6, 1991.

On August 14, 1991, Appellant filed notice of appeal from the bankruptcy court's July 31 order to the United States District Court for the Eastern District of Texas. Upon receipt of the record from the bankruptcy court, the district court clerk was to "enter the appeal in the docket and give notice promptly to all parties to the judgment, order, or decree appealed . . .." Fed. R. Bankr. P. 8007(b). The clerk docketed the appeal on September 26, 1991. Appellant alleged that the district court clerk did not adequately give him notice of the docketing of the appeal, but merely sent his attorney a copy of the bankruptcy court's September 25, 1991, cover letter that accompanied the record after stamping the letter "Received" on September 26, 1991, and appending a district court cause number and the name of the Judge of the district court upon the letter by handwritten notation. It is not disputed that Appellant's counsel received this letter within a few days after September 26, 1991. Appellant's counsel, however, assertedly did not recognize this letter as a notice of entry of appeal and, hence, did not file a brief in support of the appeal.

On June 19, 1992, more than ten months after filing the appeal, Appellant realized the appeal had been docketed and filed

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[2] Rule 60 grants the court discretion to "relieve a party or party's representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." Fed.R.Civ.P. 60(b)(1).

a Motion to Extend Time to File Appellant's Brief.[3] The district court denied this motion and dismissed the appeal *sua sponte* based on Appellant's failure to file a brief within fifteen days from the entry of the appeal on the docket as required by Fed. R. Bankr. P. 8009(a)(1).

Appellant now appeals the district court's dismissal of his appeal. He contends the district court abused its discretion by denying his Motion to Extend Time to File Appellant's Brief because his failure to file a brief resulted from insufficient notice of the docketing of the appeal. Finding no abuse of discretion, we affirm.

Discussion

The time limitations imposed by Rule 8009(a)(1) are not jurisdictional, but failure to timely file a brief may result in dismissal depending on the circumstances. *See* Fed. R. Bank. P. 8001(a), 8009(a)(1); *In re Tampa Chain Co.*, 835 F.2d 54, 55 (2nd Cir. 1987). The district court found no indication that the clerk failed to follow proper procedures in giving notice of entry of appeal. We are unable to fault this finding. The notice given by the district clerk provided all the essential information.

When reviewing actions taken by a district court in its appellate function, such as the dismissal of an appeal from a

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[3] Appellant claimed he only learned of the docketing of the appeal when he inquired into the status of the case in June 1992, pursuant to a request for substitution of counsel. Appellant's prior counsel assumed the office of Judge of the County Court at Law on March 4, 1992, and was unable to continue as attorney of record.

bankruptcy court in the present case, "we affirm unless the court has clearly abused its discretion." *Lama Drilling Co. v. Latham Exploration Co.*, 832 F.2d 1391, 1391 (5th Cir. 1987); *In Re Braniff Airways, Inc.*, 774 F.2d 1303, 1305 (5th Cir. 1985) ("*Braniff*"). As we stated in *Braniff*, "having set a standard granting the district courts discretion," we should not "deny in action what we have announced as precept." *Braniff*, 774 F.2d at 1305.

In exercising its discretion, the district court should pay particular attention to "'the prejudicial effect of delay on the appellees and the bona fides of the appellant.'" *Id*. at 1304. However, we afford a high degree of deference to the district court's application of these considerations. *Id*. Appellant's good faith alone does not render dismissal improper. Even the honest oversight of an appellant's attorney is sufficient grounds for dismissing an appeal for failure to timely file a brief. *Id*. In *Braniff*, upon inquiry by the court as to why appellant had not filed a brief more than nineteen months after filing the appeal, appellant's counsel discovered the *undelivered* brief in his own files. *Id*. We found no indication of bad faith on the part of appellant or his counsel, and yet we ruled that dismissing the case for counsel's "failure either to file a brief or to *monitor the case*," was not a clear abuse of discretion. *Id*. (emphasis added).

The district court could easily find prejudice in the present situation because an essential function of the Bankruptcy Rules was

to prevent unnecessary delays of this very sort.[4] While we "'recognize[d] that indiscriminate exercise of the dismissal power for [failure to timely file a brief] may punish the innocent client for the unprofessional conduct of his counsel,'" we approved of the district court's dismissal in *Braniff* because "'time is of the essence' in bankruptcy proceedings." *Id*. For this reason, a delay of several months will almost invariably be prejudicial to an appellee in such circumstances. In the instant case, Appellee would be required to travel from her home in Colorado to appear in the same bankruptcy court in Texas that declared more than two years ago that Appellant's claim was barred. We also note that Appellant similarly delayed in challenging the bankruptcy court's February 28, 1991, order, not seeking to set it aside until April 16, 1991.

Appellant contends the district court may not dismiss an appeal for failure to timely file a brief unless the court finds bad faith, negligence, or indifference. *In Re Beverly Manufacturing*

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[4] Bankruptcy Rule 8009(a)(1) provides that the appellant's brief must be filed within fifteen days after entry of the appeal on the docket, while the analogous Rule of Appellate Procedure, Rule 31(a), requires filing the appellant's brief within forty days after the record is filed. The purpose of this distinction was to create a *shorter* time period in bankruptcy proceedings than was applicable for ordinary appeals "so that bankruptcy appeals may be expedited." 9 Collier on Bankruptcy, § 8009.03, at 8009-4 (Lawrence P. King, ed., 15th ed. 1992); *see also First Nation Bank of Maryland v. Markoff*, 70 B.R. 264, 265 (S.D.N.Y. 1987) ("the public interest in timeliness and finality of bankruptcy proceedings underlies [Rule 8009's] time requirements"). *See also* 9 Collier on Bankruptcy, § 8007.04, at 8007-7 ("While actual transmission [of the record] is the task of the clerk, the task is assigned to the clerk only for the sake of the security of the record.").

Corp., 778 F.2d 666, 667 (11th Cir 1985) ("*Beverly*"). The Fifth Circuit has never expressly adopted this rule. In fact, placing such a restriction on the district court's discretion may be in some tension with the deferential standard we announced in *Braniff*.[5]

In any event, the district court's decision does not amount to a clear abuse of discretion even under the Eleventh Circuit's seemingly less deferential rule. In *Beverly*, the clerk docketed the appeal four months after the appeal had been filed, but the appellant there did not inquire into the status of the appeal until three additional months had passed. *Id*. at 666. He claimed he never received *any* notice that the appeal had been docketed and therefore could not know the deadline for filing. *Id*. at 666-67. The Eleventh Circuit found that if the appellant had indeed failed to receive any notice of entry of appeal, then waiting seven months before first inquiring was reasonable under the circumstances because "the clerk's office of the bankruptcy court advised him at the outset that docketing would be *substantially delayed*." *Id*. at 667 (emphasis added). Contrary to *Beverly*, the Appellant in the

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[5] Appellant relies on a New York District Court decision for the proposition that a good faith and reasonable "reliance on a perceived past practice" of the court will excuse a failure to comply with the time requirements of Rule 8009(a). *See Connelly v. Roach*, 74 B.R. 36, 37 (W.D.N.Y. 1987). The Second Circuit, however, is not quite so lenient. Construing Fed. R. App. P. 31(c), on which Fed. R. Bankr. P. 8009(a) is based, the circuit court stated that motions to extend time to file briefs should be denied unless the movant shows good cause, meaning "something more than the normal (or even the reasonably anticipated but abnormal) vicissitudes inherent in the practice of law." *United States v. Raimondi*, 760 F.2d 460, 462 (2d Cir. 1985).

present case did not believe, nor did he have any reason to believe, the docketing of the appeal would be delayed for an unusual length of time; and, he timely received sufficient notice. Therefore, the failure of Appellant's counsel to inquire as to the status of the appeal for over ten months after filing the appeal could properly be characterized as both negligent and indifferent. The district court was well within its discretion to dismiss the appeal.

Conclusion

The order of the district court dismissing the appeal from the order of the bankruptcy court is accordingly AFFIRMED.