

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 93-1454  
Summary Calendar

---

IN THE MATTER OF: TRINITY BEND JOINT VENTURE,

Debtor,

FIRST HEIGHTS BANK, FSB, Successor  
by Merger to Heights of Texas, FSB,

Appellee,

versus

HAL R. PETTIGREW and  
CALIFORNIA-TEXAS PROPERTIES, INC.,

Appellants.

---

Appeal from the United States District Court  
for the Northern District of Texas  
(4:89-CV-410-E)

---

(January 26, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:<sup>1</sup>

Hal R. Pettigrew and California-Texas Properties, Inc. (Cal-Tex), appeal from an order of the district court which reversed an order of the bankruptcy court. Because we lack jurisdiction, we **DISMISS** the appeal.

---

<sup>1</sup> Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Pettigrew and Cal-Tex (Guarantors) guaranteed a secured debt owed by Trinity Bend Joint Venture, a/k/a and d/b/a Mohammed Safdar, Trustee (the Debtor), to Champion Savings, the predecessor in interest of the appellee, First Heights Bank, F.S.B. After the bankruptcy court entered an order granting the Guarantors' motion for relief from the automatic stay, Heights appealed to the district court, which reversed the order and remanded the case for further proceedings. The Guarantors appeal from the district court's ruling.

II.

Of course, although both parties state that we have jurisdiction, "this court has the duty to examine the basis of its jurisdiction, and on its own motion if necessary". **Fitzpatrick v. Texas Water Comm'n**, 803 F.2d 1375, 1376 (5th Cir. 1986). "Rule 4(a) of the Federal Rules of Appellate Procedure ... requires that a notice of appeal be filed with the clerk of the district court within *thirty days* after the date of entry of judgment". **Matter of Eichelberger**, 943 F.2d 536, 540 (5th Cir. 1991) (emphasis in original). "Rule 4(a)'s provisions are mandatory and jurisdictional". **Id.**

The district court entered judgment on February 11, 1993. On February 26, the Guarantors filed a motion to alter or amend that judgment. The order denying that motion was entered on April 9; and the notice of appeal was filed on May 7.

Because the district court was sitting as an appellate court in a bankruptcy case, Fed. R. Civ. P. 59(e) (which provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment") does not apply to the Guarantors' motion to alter or amend. **Matter of Butler, Inc.**, 2 F.3d 154, 155 (5th Cir. 1993) ("Bankruptcy Rule 9023, which adopts Fed.R.Civ.P. 59, applies only to appeals from the bankruptcy court to the district court, and not to appeals from the district court to the court of appeals".). Instead, "Bankruptcy Rule 8015 provides the *sole* mechanism for filing a motion for rehearing". **Id.** (emphasis added). Accordingly, despite its title, the Guarantors' motion was a motion for rehearing under Bankruptcy Rule 8015, which provides that such a motion may be *filed* within ten days of entry of the judgment. *Cf.* Fed. R. Civ. P. 59(e) (providing for *service* within ten days). An untimely motion for rehearing does not toll the time for filing a notice of appeal. Fed. R. App. P. 6(b)(2)(i); **Eichelberger**, 943 F.2d at 537.

Bankruptcy Rule 9006(a), rather than Fed. R. Civ. P. 6, governs time computations for motions for rehearing when the district court is acting as an appellate court in a bankruptcy case. **Eichelberger**, 943 F.2d at 539-40. Rule 9006(a) provides that the first day of the period shall be excluded, and the last day shall be included, unless it is a Saturday, Sunday, or legal holiday. Bankruptcy Rule 9006(a). When the time prescribed is less than *eight* days (as compared to 11 days in Fed. R. Civ. P. 6), intermediate Saturdays, Sundays, and legal holidays are excluded in

calculating the deadline. Because the period provided for filing a motion for rehearing under Rule 8015 is *greater* than eight days, Rule 9006(a) requires that intermediate Saturdays, Sundays, and legal holidays be *included* in determining whether the Guarantors' motion was timely filed.

Judgment was entered on Thursday, February 11, 1993; accordingly, the motion for rehearing was to be filed no later than February 22. (The tenth day was Sunday, February 21, which is excluded. See Bankruptcy Rule 9006(a).) It was not filed, however, until February 26.<sup>2</sup> Because the motion for rehearing was not timely filed, it did not toll the period for filing a notice of appeal. Fed. R. App. P. 6(b)(2)(i).<sup>3</sup> Accordingly, the 30-day period within which the Guarantors could appeal from the judgment commenced on February 12, 1993, the day after entry of judgment.<sup>4</sup>

---

<sup>2</sup> If Fed. R. Civ. P. 6 and 59 had been applicable, the motion would have been timely, because Saturdays, Sundays, and the President's Day holiday would have been excluded from the ten-day period.

<sup>3</sup> Our conclusion would be the same under the amended version of Fed. R. App. P. 6(b)(2)(i), which applies to appellate cases commenced on or after December 1, 1993; that rule continues to provide that only a timely motion for rehearing under Rule 8015 tolls the time for filing a notice of appeal. See **Butler**, 2 F.3d at 157 n.3 (quoting 61 U.S.L.W. 4395, 4398 (Apr. 27, 1993)). Bankruptcy Rules 8015 and 9006 were not affected by the recent amendments to the Federal Rules of Bankruptcy Procedure. See 61 U.S.L.W. 4415-4420 (Apr. 27, 1993).

<sup>4</sup> The docket sheet does not reflect, nor do the Guarantors claim, that they filed a motion pursuant to Fed. R. App. P. 4(a)(5) for excusable neglect or good cause to extend the time for filing a notice of appeal, nor is there any indication that they sought, or were granted, any extension of time to file the motion for rehearing in the district court. See **Eichelberger**, 943 F.2d at 540-41.

The notice of appeal was not filed until May 7, 1993, long after the 30-day period prescribed by Fed. R. App. P. 4(a) had expired.<sup>5</sup> We therefore lack jurisdiction.

III.

For the foregoing reasons, the appeal is

**DISMISSED.**

---

<sup>5</sup> Although the notice of appeal was filed within 30 days of the entry of the order denying the motion for rehearing, it designates only "the Memorandum Opinion and Order signed February 9, 1993" as the ruling from which an appeal is taken. See Fed. R. App. P. 3(c) ("The notice of appeal ... shall designate the judgment, order or part thereof appealed from..."); see also *Eichelberger*, 943 F.2d at 537, 540-41 (although notice of appeal was filed within 30 days of denial of motion for rehearing, court did not construe notice of appeal from underlying judgment as an appeal from the denial of rehearing).