

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-3497
Summary Calendar
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IN THE MATTER OF: ERROLL JOSEPH MARTIN
and CAROLYN GRADNEY MARTIN,

Debtors,

ERROLL JOSEPH MARTIN and CAROLYN
GRADNEY MARTIN,

Appellants,

versus

JOHN E. ANGELO and JOHN E. ANGELO,
D.O. A Medical Corporation,

Appellees.

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Appeal from the United States District Court for the
Eastern District of Louisiana
(CA 93 1557 L)

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(January 14, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

PER CURIAM:

Appellants Erroll Joseph Martin and Carolyn Gradney Martin

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(debtors), who are debtors in bankruptcy and defendants to the adversary complaint in bankruptcy of appellees Dr. John E. Angelo and his medical corporation (Angelo), appeal the order of the district court dismissing as untimely their appeal from the bankruptcy court's judgment against them and in favor of Angelo in the adversary proceeding. We reverse and remand because the record plainly reflects that debtors' notice of appeal was timely.

The bankruptcy court judgment in the adversary proceeding was entered on Wednesday, March 3, 1993, and debtors' notice of appeal therefrom to the district court was filed in the bankruptcy court on Monday, March 15, 1993. Under Rule 8002(a) of the Bankruptcy Rules, notice of appeal must be filed with the clerk of the bankruptcy court within ten days of the entry of the judgment appealed from. In computing the ten-day period, the day of the entry of the judgment is not included, but the last day of the ten-day period is included unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday. Bankruptcy Rule 9006(a). Here, the tenth day was Saturday, March 13, 1993, so debtors' notice of appeal filed on Monday, March 15, 1993, was timely.

Angelo's motion in the district court to dismiss the appeal, and the brief in support thereof, erroneously state that the bankruptcy court's judgment was entered *April 3, 1993*, and that the notice of appeal was not filed until Thursday, *April 15, 1993*. However, the copy of the notice of appeal that was attached as an

exhibit to Angelo's motion reflects on its face, by the file stamp thereon, that it was filed in the bankruptcy court on March 15, 1993, and that it is a notice of appeal from the judgment entered March 3, 1993. Moreover, the record before the district court when it granted the motion to dismiss the appeal contained the original notice of appeal itself, which likewise bore the file stamp showing it was filed March 15, 1993, in the bankruptcy court, and stated that it was an appeal from that court's judgment entered March 3, 1993. Further, it would be most unusual to have a bankruptcy court judgment entered on April 3, 1993, as that day was a Saturday.

Angelo does not claim in this Court that the debtors' notice of appeal was in fact untimely, or that it was not filed March 15, 1993, or that the judgment appealed from was not entered March 3, 1993. Angelo's sole argument is that the district court was justified in granting Angelo's motion to dismiss the appeal as untimely because debtors did not file an opposition to the motion to dismiss the appeal, and the district court's Local Rule 2.07E requires that an opposition be filed. Angelo argues that the district court had discretion to dismiss the appeal as a sanction for the debtors' noncompliance with Local Rule 2.07E.

We reject this contention. We note to begin with that the district court, although it observed that no opposition had been filed in accordance with the local rules, did not for that reason dismiss the appeal. The district court's order states:

"No opposition has been filed in accordance with Local Rule 2.07E. Having reviewed the record, the memorandum filed in support of the motion, and the applicable law, the Court finds that the plaintiffs-

appellees have established a prima facie case for granting the motion on its merits."

However, contrary to the statements in the district court's order, the record before it affirmatively and unambiguously reflected that the notice of appeal was timely. We also observe, as we did in the analogous case of *John v. State of Louisiana*, 757 F.2d 698, 707 (5th Cir. 1985), that the local rule "does not explicitly provide a sanction for failing to file a response to an opposed motion." Rather, the purpose of the rule would appear to be, as we observed in *Woodham v. American Cystoscope Co.*, 335 F.2d 551, 556 (5th Cir. 1964), that "should one of the parties be at fault in failing to file his brief and counter-affidavits, the trial judge would be justified in deciding the motion on the papers before him." That is plainly what the district court did here; it decided the motion on the merits, on the basis of the papers before it, and did not dismiss the appeal as a sanction. The difficulty is that the papers before the district court, indeed the exhibit to the motion, affirmatively and unambiguously reflected that the notice of appeal was timely.

Angelo also argues that it was proper to dismiss the appeal because the debtors had been so dilatory and obstructive during the course of the bankruptcy proceedings, and even before then. However, none of such matters was before the district court when it dismissed the appeal, nor was any of same urged as a basis for the motion to dismiss the appeal. Indeed, most of such allegations, though they may ultimately prove correct, are wholly unsupported by the record before us and by the record before the district court.

We also note that debtors timely called the district court's error to its attention by motion for reconsideration. We further note that Angelo has yet to explain how it legitimately could have been represented to the district court that the bankruptcy court judgement was entered April 3, 1993, and that the notice of appeal was filed April 15, 1993.

The notice of appeal was indisputably timely and this was affirmatively reflected by the record. Accordingly, the district court erred in dismissing the appeal on the ground that the notice of appeal was untimely. The district court's judgment is therefore reversed and the cause is remanded for proceedings consistent with this opinion.

REVERSED and REMANDED.