

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-10623  
Summary Calendar  
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IN THE MATTER OF: AEGIS SPECIALTY MARKETING, INC.  
OF DELAWARE, ET AL.

Debtor.

DONALD N. FERLITA,

Appellant,

versus

AEGIS SPECIALTY MARKETING, INC.  
OF DELAWARE, ET AL.,

Appellees.

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Appeal from the United States District Court for the  
Northern District of Texas  
(4:94-CV-246 A)  
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(December 27, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.\*

PER CURIAM:

Appellant Donald N. Ferlita (Ferlita) appeals an order of the district court dismissing his appeal from the bankruptcy court's

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

order confirming the plan of reorganization of appellees Aegis Specialty Marketing, Inc., et al. (Aegis). We find that the dismissal was an abuse of the district court's discretion and therefore reverse and remand.

### **Facts and Proceedings Below**

This case involves Ferlita's appeal of the bankruptcy court's January 31, 1994, order confirming a plan of reorganization for Aegis.<sup>1</sup> Notice of appeal was timely filed on February 11, 1994. On April 13, the record on appeal was transmitted to the district court; however, Ferlita had failed to include a statement of issues as required by Bankruptcy Rule 8006. Although the transmittal sheet from the bankruptcy clerk includes the notation "Letter of Deficiency," Ferlita contends that he received no such letter specifying the way or ways in which the record was deficient, and none is included in the record before us. The docket entry that corresponds to the transmission of the record states "Record is deficient: *Appellee* did not file a designation of record on appeal." (Emphasis added).

Meanwhile, Ferlita requested and was granted an extension of time in which to file his appellate brief. The district court's order granting that motion gave Ferlita "until 4:30 p.m. on May 16, 1994, in which to file his appeal brief in this action." Ferlita's counsel mailed the brief on May 16 from Florida. That same day,

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<sup>1</sup> The plan of reorganization encompassed four separate cases that had been previously consolidated by court order. The debtors in those cases are collectively referred to herein as "Aegis."

Aegis filed its motion to dismiss the appeal based on Ferlita's failure to file a statement of the issues.

The district court granted Aegis's motion and dismissed the appeal. It found that Ferlita had been on notice that the record was deficient since April 14, the date of the bankruptcy clerk's letter regarding transmission of the record. It further found that Ferlita had failed to timely file his brief on appeal, that brief having been due in chambers on May 16, 1994, as per the court's order. Ferlita's timely motion for rehearing, to which he attached a statement of the issues, was denied without explanation. Ferlita now appeals the district court's order.

#### **Discussion**

The bankruptcy rules give the district court discretion in dealing with circumstances such as are involved in this case:

"Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal." BANKR. R. 8001(a).

There can be no doubt, and Ferlita does not deny, that the record failed to include a designation of the issues to be considered on appeal. The district court therefore had the discretion to dismiss the appeal. On the other hand, the district court also has the discretion to permit late filings that are found to result from excusable neglect. BANKR. R. 9006(b)(1); see *Pioneer Investment Services Co. v. Brunswick Associates*, 113 S.Ct. 1489, 1495-96 (1993) (defining the scope of excusable neglect under the

bankruptcy rules).<sup>2</sup> Given all the circumstances, we cannot say that Ferlita's omissions in this case indicate the type of bad faith conduct, dilatory tactics, or gross lack of diligence that would warrant a dismissal of the appeal.

The district court based its decision on two omissions by Ferlita: the failure to file a statement of issues and the untimely filing of the appellant's brief. The statement of issues is not a jurisdictional prerequisite. *In re Tampa Chain Co.*, 835 F.2d 54, 55 (2d Cir. 1987); *In re Beverly Manufacturing Corp.*, 778 F.2d 666, 667 (11th Cir. 1985). Nevertheless, we have affirmed dismissals of bankruptcy appeals in other cases to which the district court cited in support of its order. *See Matter of Braniff Airways, Inc.*, 774 F.2d 1303 (5th Cir. 1985); *Pyramid Mobile Homes, Inc. v. Speake*, 531 F.2d 743 (5th Cir. 1976). However, the bad faith and deliberate indifference in complying with the bankruptcy rules evidenced in those cases is far removed from the facts presented here.<sup>3</sup>

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<sup>2</sup> *See Matter of Christopher*, 35 F.3d 232 (5th Cir. 1994), in which we remanded for reconsideration of whether the failure to timely file notice of appeal constituted excusable neglect. *Id.* at 235-36. We there held that the standard enunciated in *Pioneer Investment Services* was equally applicable to appeals from the bankruptcy court and that therefore the district court erred in "appl[ying] a very high standard of excusable neglect, rejecting any negligence by the attorney as an excuse." *Id.* at 236.

<sup>3</sup> In *Pyramid Mobile Homes*, the district court dismissed the appeal after the appellant, despite several extensions of time and adequate warning of the possibility of dismissal, failed to file a transcript of the bankruptcy proceeding within six months of filing its notice of appeal; ultimately, the transcript was not filed until almost a year after appeal was taken. 531 F.2d at 744-45. We noted the appellant's "gross lack of diligence" and "dilatory maneuvering" in holding that the district court had not abused its

Although the district court assumed that the April 14 transmittal letter put Ferlita on notice of the deficiency, that letter did not specify the nature of the deficiency; indeed, the corresponding docket entry states that the deficiency is attributable to *Aegis*.<sup>4</sup> Nor does *Aegis* specify how the particular omission in this case caused it prejudice.<sup>5</sup> See *Pyramid Mobile Homes*, 531 F.2d at 746 (noting that discretion to dismiss should be exercised "in light of the prejudicial effect of delay on the appellee and the bona fides of the appellant"). It is possible

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discretion in dismissing the appeal. *Id.* at 745. In *Braniff Airways*, the appellant had failed to file or serve on opposing counsel his brief on appeal nineteen and a half months after appeal was taken. 774 F.2d at 1304. Although we there found "no issue concerning the good faith of either the appellant or its counsel," *id.*, we noted that "[b]ankruptcy appeals have frequently been dismissed for the appellant's failure to comply with the duty of diligent prosecution," *id.* at 1305 (footnote omitted), and therefore affirmed. *Id.*

<sup>4</sup> Ferlita does not argue that he actually saw this docket entry before appeal to this Court was taken. Moreover, as *Aegis* notes in its brief, the stated deficiency "Appellee did not file a designation of record on appeal" is nonsensical because the bankruptcy rules do not require the appellee to make such a designation. See BANKR. R. 8006 ("Within seven days after the service of the statement of the appellant the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal . . .") (emphasis added). Nonetheless, had it been reviewed, such an entry would seem to place the burden of inquiry on *Aegis*, not Ferlita.

<sup>5</sup> *Aegis* does cite this Court's opinion in *Pyramid Mobile Homes, Inc. v. Speake*, 531 F.2d 743 (5th Cir. 1976), in which we stated, "[T]ime is the essence of prejudice to creditors." *Id.* at 746 (emphasis added). *Aegis* fails to demonstrate how Ferlita's omissions have prejudiced its other creditors or why it, as the bankrupt, should be permitted to rely on prejudice to its creditors as a ground for dismissing this appeal. Nor is there any showing that Ferlita's failure to timely file the statement of issues was actually likely to cause (or did in fact cause) any delay in the ultimate disposition of the appeal by the district court.

that the failure to provide a statement of issues may prejudice an appellee by preventing it from ordering other parts of the record in order to respond to the issues presented, but Aegis does not make such an argument here. Finally, Ferlita soon rectified his omission by attaching a statement of issues to his timely motion for rehearing. Given all the circumstances, we cannot say that the failure to supply the statement of issues was so egregious as to warrant a dismissal of the appeal. See *Pioneer Investment Services*, 113 S.Ct. at 1500 ("To be sure, were there any evidence of prejudice to petitioner or to judicial administration in this case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be 'excusable.'").

As to whether Ferlita's brief was timely filed, this too is a close issue. The district court was justified in inferring that its order granting the extension of time required the brief to be in its chambers by the specified hour. Such an alteration of the generally applicable mailbox rule is clearly within the district court's power. BANKR. R. 8009(a) (different time limits for filing of briefs may be specified by local rule or district court order). However, although the order supports the inference, it does not compel it. We do not think the order is so clear as to override the general rule in bankruptcy proceedings that briefs are deemed filed when mailed. See BANKR. R. 8008(a).

Lastly, the district court dismissed Ferlita's appeal without giving him an opportunity to respond to the motion. The bankruptcy

rules provide parties seven days from the date of service in which to respond to any motion, unless the district court orders otherwise. BANKR. R. 8011(a). Aegis's motion to dismiss was served on Ferlita on May 13, 1994; the district court entered its order granting the motion on May 18, 1994. The record discloses no order of the district court abridging the time for Ferlita to respond.

#### **Conclusion**

For the foregoing reasons, we conclude that the district court abused its discretion in dismissing the appeal. Accordingly, the judgment of the district court dismissing the appeal is REVERSED and the cause is REMANDED for further proceedings.