

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of:	:	Chapter 7
	:	
DWIGHT C. McDOWELL,	:	
	:	
Debtor	:	Case No. 98-54657 RFH
_____	:	
	:	
J. COLEMAN TIDWELL, TRUSTEE,	:	
	:	
Plaintiff	:	
	:	
vs.	:	
	:	
CHARLES ROBERT HENDRICKS,	:	
	:	
Defendant	:	Adversary Proceeding No. 99-5113
_____	:	
	:	
J. COLEMAN TIDWELL, TRUSTEE,	:	
	:	
Plaintiff	:	
	:	
vs.	:	
	:	
PEACH PROPERTIES, LLP, and its	:	
general partners, DWIGHT C.	:	
McDOWELL and MARILYN G.	:	
McDOWELL,	:	
	:	
Defendants	:	Adversary Proceeding No. 00-5088
_____	:	

J. COLEMAN TIDWELL, TRUSTEE,	:	
	:	
Plaintiff	:	
	:	
vs.	:	
	:	
KATZ, FLATAU, POPSON &	:	
BOYER, LLP, by and through its	:	
partners: RICHARD M. KATZ,	:	
WILLIAM M. FLATAU, SANDRA J.	:	
POPSON, WESLEY J. BOYER, and	:	
BARBARA S. BOYER; and	:	
DWIGHT C. McDOWELL,	:	
	:	Adversary Proceeding
Defendants	:	No. 01-5078

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For J. Coleman Tidwell

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For Marilyn G. McDowell;
Charles Robert Hendricks;
Peach Properties, LLP

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MEMORANDUM OPINION

Carolyn McDowell, Movant, filed on July 3, 2002, a Motion and Citation of Authority to Enlarge Time to File Notice of Appeal. J. Coleman Tidwell, Plaintiff/Respondent filed a response on July 11, 2002.¹ The Court, having considered the motion and arguments of counsel, now publishes this memorandum opinion.

The Court entered on June 19, 2002, an order granting Plaintiff/Respondent's motion for approval to settle and compromise certain claims. The order also overruled Movant's objection to the compromise and settlement.

The last date that Movant could file a timely notice of appeal was July 1, 2002.² Movant did not file a timely notice of appeal. Movant filed this motion to extend the time for filing an appeal on July 3, 2002. Thus, Movant's motion was filed after the time for filing a notice of appeal had expired.

¹ Identical motions and responses were filed in each of the three adversary proceedings.

² Fed. R. Bankr. P. 8002(a) (notice of appeal shall be filed within 10 days of entry of order); 9006(a) (computation of time excludes intermediate Saturdays and Sundays if period of time is less than 8 days; if last day is a Saturday or a Sunday, time period runs until end of the next day); 9006(b)(3) (court may enlarge time for taking action under Rule 8002 only to extent and under conditions stated in the rule).

Federal Rules of Bankruptcy Procedure 8002(c)(2) provides, in part, as

follows:

Rule 8002. Time for Filing Notice of Appeal

.....

(c) Extension of time for appeal

.....

(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect.

Fed. R. Bankr. P. 8002(c)(2).

Movant’s motion was filed after the time for filing a notice of appeal had expired. Thus, Movant must show “excusable neglect.”

Movant’s counsel mistakenly believed that the ten-day period for filing a notice of appeal excluded Saturdays and Sundays. Movant mistakenly relied upon Federal Rules of Civil Procedure 6(a)³ rather than upon Federal Rules of Bankruptcy

³ Fed. R. Civ. P. 6(a) (intermediate Saturdays and Sundays are excluded when the time period is less than 11 days).

Procedure 9006(a).⁴ Simply stated, Movant’s counsel mistakenly relied upon the wrong rule.

“[A]s a matter of law, . . . an attorney’s misunderstanding of the plain language of a rule cannot constitute excusable neglect such that a party is relieved of the consequences of failing to comply with a statutory deadline.” Advanced Estimating System, Inc. v. Riney, 130 F.3d 996, 998 (11th Cir. 1997).

Counsel’s mistake in calculating the time to file a notice of appeal under Rule 6(a) rather than under Rule 9006(a) is not excusable neglect. Hartford Casualty Insurance Co. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.), 214 B.R. 197 (8th BAP 1997).

The Court is persuaded that counsel’s mistake in relying upon the wrong rule is not excusable neglect.

Counsel also notes that Movant has been under a great deal of stress due to the recent murder of her son and that Movant asked counsel to allow her time to evaluate the decision of whether to appeal this Court’s order. The Court is sympathetic with this tragic event. Still, the Court notes that Movant’s counsel could have filed a motion to extend the time prior to the deadline for filing a notice of

⁴ Fed. R. Civ. P. 9006(a) (intermediate Saturdays and Sundays are excluded when the time period is less than 8 days).

appeal.⁵ The Court is persuaded that the failure to file a timely notice of appeal or motion to extend the time was because Movant's counsel relied upon the wrong rule.

An order in accordance with this memorandum opinion will be entered this date.

DATED the 19th day of July, 2002.

ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court

⁵ Fed. R. Bankr. P. 8002(c)(2).