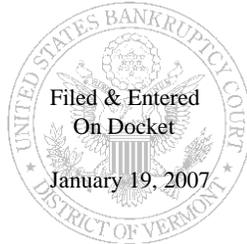


**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:**THEODORE J. MAYO, SR.,
Debtor.**

**Chapter 7 Case
04-11106****ORDER**
DENYING DEBTOR'S MOTION TO EXTEND TIME TO FILE APPEAL

On January 5, 2007, this Court entered a Final Order Establishing Sanctions in this case (doc. # 158). On January 17, 2007, counsel for Debtor filed a "Motion for Enlargement of Time and Notice of Appeal of Final Order Dated January 5, 2007" (doc. # 161) with a supporting affidavit (doc. # 162).¹ In his motion, the Debtor seeks an extension of time to file an appeal from the January 5, 2007 Final Order.

Fed. R. Bank. P. 8002(c)(2) is the salient rule for such relief and provides:

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.

Pursuant to Fed. R. Bank. P. 8002(a), a notice of appeal "shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." Accordingly, the notice of appeal, or the request for an extension of time to file a notice of appeal, must have been filed within ten days of the date of entry of the January 5, 2007 Order, or by January 16, 2007. The Second Circuit has held that the time limit imposed by Rule 8002(a) is jurisdictional, and "in the absence of a timely notice of appeal . . . , the district court is without jurisdiction to consider the appeal, regardless of whether the appellant can demonstrate 'excusable neglect.'" *Siemon v. Emigrant Savings Bank (In re Siemon)*, 421 F.3d 167, 169 (2d Cir. 2005). Because the Debtor's counsel did not file a motion to extend time within the mandatory ten-day period, this Court is without jurisdiction to consider the motion.

Even if the Court were to read Rule 8002(c)(2) to allow a party the opportunity to file a motion to extend time if that motion was filed "not later than 20 days after the expiration of the time for filing a notice of appeal," as occurred here, an extension can be granted only if counsel has shown "excusable neglect" justifying the failure to file the document within the ten-day time frame set by the rule. Debtor's counsel asserts in his affidavit that he reacquired internet access at his office in early January 2007 and he received via the internet a copy of the Final Order on January 11, 2007. By way of further explanation,

¹ Although the Debtor's attorney docketed the motion as a notice of appeal (doc. # 160), the Court treats the document solely as a motion to extend the time to file an appeal, based upon both the caption and content of the motion.

counsel states that January 15, 2007 was a federal holiday during which the Court was closed, and he appeared with the Debtor at an evidentiary hearing on January 16, 2007 that lasted until about 1:00 p.m., after which he spent time “traveling to the law library for research.” He adds that he could not file the motion to extend the time to file the appeal on January 16, 2007 because his computer would not allow him access to the Court’s CM/ECF system.

These reasons do not constitute excusable neglect. The record indicates no reason counsel could not have filed a timely motion to extend the time to file an appeal on January 11, 2007 when he acknowledged receiving a copy of the Final Order. It is not excusable neglect to wait until the last minute to file a time-sensitive motion, and then being prevented from doing so by technical difficulties. See Huennekens v. Marx (In re Springfield Contracting Corp.), 156 B.R. 761, (Bankr. E.D.Va. 1993) (holding that it was not excusable neglect to file late notice of appeal where attorney knew of deadline and simply waited until last minute). Moreover, counsel gave no explanation as to why he was unable to file the motion to extend time to file the appeal on January 16 via fax, electronic mail or hand delivery.

THE COURT FINDS that

- (1) the Debtor failed to file a timely notice of appeal, under Bankruptcy Rule 8002(a);
- (2) the Debtor failed to file a timely motion to extend the time for filing an appeal under Bankruptcy Rule 8002(c)(2); and
- (3) the Debtor failed to show the excusable neglect necessary to warrant an expansion of the ten-day period set by Bankruptcy Rule 8002(c)(2).

Based upon these findings, and the case law cited above, THE COURT FURTHER FINDS that it does not have jurisdiction to address the appeal the Debtor seeks to have adjudicated.

THEREFORE, after due consideration of the record in this case and the motion before it, THE COURT HEREBY ORDERS that the Debtor’s motion to extend the time to file an appeal is denied.

SO ORDERED.

January 18, 2007
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge