

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:
EARTH WASTE SYSTEM, INC.,
Debtor.

Case # 98-11675
Chapter 11 - Jointly Administered

In re:
EWS OF MAINE, INC.,
Debtor.

Case # 98-11676
Chapter 11 - Jointly Administered

Appearances: Marshall Tinkle, Esq.
Portland, ME.
Counsel for KeyBank

Cynthia Dill, Esq.
So. Portland, ME
Counsel for Mistyn Murray

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Office of U.S. Trustee

MEMORANDUM OF DECISION
DISMISSING APPEAL AS UNTIMELY
AND
GRANTING RECONSIDERATION AND VACATUR *SUA SPONTE*
REGARDING CLAIM OF MISTYN MURRAY

On February 4, 2002, this Court *sua sponte* issued an Order to Show Cause why the Notice of Appeal filed by KeyBank National Association (hereafter “KeyBank”) should not be dismissed as untimely pursuant to Bankruptcy Rule 8002. In response, KeyBank filed a Memorandum on Order to Show Cause [Dkt. #667-1] contending that its Notice of Appeal filed on January 8, 2002 was timely. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334 and Vermont Local Bankruptcy Rule 8002¹. For the reasons set forth below, the appeal filed by KeyBank is found to be

¹ These local rules were enacted effective May 1, 1988 and amended May 1, 1992 as Part V of the Local Rules of Procedure for the District Court of Vermont; and are referred to herein at “V.L.B.R.”. According to the Local Rules of the United States District Court for the District of Vermont (“LR”) enacted effective December 1, 2000, these prior local rules apply to all actions pending on the effective date. See LR 1.1(c); see also *In re Greis*, 73 B.R. 197, 205 (W.D.Mo. 1986) (bankruptcy court dismissing untimely appeal as authorized by general order of district court). Hence, the prior local rules, which were in effect when this case was filed, apply to this case which has been pending since 1998.

filed untimely. Additionally, pursuant to 11 U.S.C. §105, this Court grants reconsideration *sua sponte* regarding its Order Confirming Status of Mistyn Murray's Claims dated December 27, 2001, vacates said Order and, as provided hereafter, directs the parties to submit memoranda of law on the merits of the dispute.

On December 27, 2001, this Court entered an Order Confirming Status of Mistyn Murray's Claims whereby Ms. Murray's claim against the debtors in the amount of \$150,000 was allowed and KeyBank's claim in like amount was disallowed. KeyBank submitted its Notice of Appeal by facsimile transmittal to the Clerk of Court on January 7, 2002 after regular business hours; the facsimile timer indicates that it arrived at 5:38 P.M. Under the local rules applicable herein, petitions and all other pleadings are to be filed in the Clerk's Office between 8:00 A.M. and 4:00 P.M. V.L.B.R. 1002(e). The notice was then processed and docketed during regular business hours by the Clerk's Office on the following day, January 8, 2002, twelve days after entry of the Order that is the subject of the appeal.

Pursuant to Federal Rule of Bankruptcy Procedure 8002(a), an appeal from an order of this Court must be filed within ten (10) days of entry. In this instance, the appeal was required to be filed not later than Monday, January 7, 2002. Leave to file an appeal after expiration of the ten (10) day time period may be granted upon the filing of a timely motion for enlargement of time under Federal Rule of Bankruptcy Procedure 8002(c). No request for an enlargement of time was filed by KeyBank. On February 4, 2002 an Order to Show Cause was issued by the Court directing that KeyBank demonstrate why the appeal should not be dismissed as untimely. *See In re Bushnell*, 273 B.R. 359 (Bankr. D. Vt. 2001); *see also In re C.R. Davidson Co., Inc.* 232 B.R. 549, 550 (BAP 2nd Cir. 1999)(lack of appellate jurisdiction due to untimely notice of appeal may be raised *sua sponte*).

In its unverified and unsubstantiated response, KeyBank provides two grounds for this Court

to find the appeal timely. First, KeyBank argues that the doctrine of “unique circumstances” applies and warrants a determination that this appeal was timely filed. The creditor argues KeyBank’s counsel relied upon assurances from some unidentified person in the Clerk’s Office that the notice of appeal submitted by facsimile transmittal, as well as being sent by overnight mail, with the filing fee paid by credit card would be deemed timely. Unique circumstances are allegedly also present based upon the fact that there was a delay in forwarding the underlying Order to KeyBank. Secondly, KeyBank argues that this Court lacks jurisdiction to consider the timeliness of the appeal under the local bankruptcy rules currently in effect in this District. No other party has filed a response to the show cause order and the distribution agent has filed no information as to whether a distribution has been made under the Order entered on December 27, 2002.

DISCUSSION

1. Untimely notice of appeal.

While the Court has considered the merits of the matters raised by KeyBank to justify the timing of its Notice of Appeal, it nonetheless deems the grounds asserted by KeyBank to be legally insufficient and unpersuasive. It should be noted at the outset that although appellant’s counsel claims in his unverified response that his office was advised by the Clerk’s Office that a late submittal by facsimile transmittal would constitute an acceptable filing in this District, there is no information provided regarding the specific content of the communication, the information actually provided to or from the Clerk’s Office, who was involved in the purported conversation, whether a contemplated facsimile filing after regular business hours was discussed and whether the appellant otherwise satisfied the requirements for an “emergency” filing by facsimile transmittal under the

applicable local rules. Nor does the transmittal letter accompanying the notice of appeal make reference to any prior communications with or authorization by the Clerk's Office regarding the prior submittal by facsimile transmittal. Therefore, the explanation for the late filing of the notice of appeal is legally insufficient, and the request to treat the filing as timely based upon this alleged conversation must be denied.

The appellant's reliance upon the unique circumstances doctrine is misplaced. This doctrine is a narrowly construed, judicially created rule that allows an otherwise untimely appeal to be deemed timely under exceptional circumstances not present here. *See In re Mouradick*, 13 F.3d 326, 329 (9th Cir. 1994)(unique circumstances doctrine is limited to circumstances where a judicial officer has affirmatively assured an appellant that its appeal would be deemed timely); *In re Furst*, 206 B.R. 979, 981 (BAP 10th Cir. 1997)(unique circumstances doctrine is disfavored and applied only in carefully limited circumstances); *compare In re Mutual Leasing Corp.*, 424 F.2d 999 (5th Cir. 1970)(public being barred from a fire-gutted and partially destroyed courthouse prevented appellant from complying with filing deadline and appellant otherwise complied timely with instructions to mail the notice of appeal under the circumstances); *Rios v. Hernandez*, 189 F.R.D. 38, 41 (D.P.R. 1999)(acknowledging that although a hurricane may constitute extraordinary circumstances to justify an untimely filing, there must be a showing that it was the cause of the delay).

None of the reasons asserted by KeyBank are legally sufficient to warrant relief under the very narrow doctrine of unique circumstances. KeyBank does not contend that any "judicial officer" authorized a late filing of the notice of appeal and the minimal amount of delay in the transmittal of the subject order is immaterial. *See In re Furst*, 206 B.R. 979, 981 (BAP 10th Cir. 1997)(regarding unique circumstances doctrine, only the trial judge constitutes a "judicial officer" for purposes of justifiable reliance regarding timeliness of an otherwise late appeal and appellant may not justifiably

rely upon erroneous instructions of bankruptcy court clerk's office); *see also* Moore v. So. Carolina Labor Board, 100 F.3d 162, 164 (D.C. Cir. 1996)(doctrine not applicable where district court clerk's office gives appellant incorrect advice regarding time to file notice of appeal). Moreover, the allegation that KeyBank did not receive a copy of the notice of entry promptly is likewise not compelling. *See* Goldstein v. Wolfson, 132 F.2d 624 (2nd Cir. 1943)(appellant's failure to receive a copy of appealable order does not excuse an untimely appeal); Gravel & Shea v. Vermont National Bank, 162 B.R. 969 (D. Vt. 1993)(acknowledging that a lack of notice from the Clerk's office regarding an appealable order does not authorize an untimely appeal); In re Springfield Contracting Corp., 156 B.R. 761 (Bankr. E.D. Vir. 1993)(a delay in receiving an appealable order is not grounds for justifying an untimely notice of appeal); *see also* Bankruptcy Rule 9022(a)(delay or failure to receive appealable order not grounds to delay appeal deadline). It should also be emphasized that KeyBank's counsel was present, albeit by telephone, at the hearing held on December 18, 2001 when this Court announced on the record the ruling that is subject of this appeal. *See* In re Investors & Lenders, Ltd., 169 B.R. 546 (Bankr. D. N.J. 1994)(circumstances to excuse late appeal lacking where party had ample notice prior to entry of appealable order as to the court's decision announced at hearing).

A plain reading and interpretation of the applicable Bankruptcy Rules and Vermont Local Bankruptcy Rules of this Court also support a finding that the subject notice of appeal was not filed in a timely fashion. Local Rule 1002(j) as amended², which governs this matter, states in pertinent

² It should be noted that prior to its amendment, Local Rule 1002(j) had provided:

FAX filings. The Clerk's Office will not accept facsimile filings, except in the event of emergency situations. In such instances, facsimile filings will be permitted; however, the original document, together with a transmittal letter indicating the original is a follow-up to a facsimile filing, as well as the date of the facsimile transmission, must be mailed simultaneously to the Clerk. The Court will determine what types of situations constitute an emergency.

In those instances where facsimile filings are accepted, the filing date will be the date the facsimile

part as follows:

The Clerk's Office will accept facsimile filings of voluntary (bare bones) petitions *in emergency situations*. When filing by fax, the two-page voluntary petition must be accompanied by a separate sheet of paper authorizing the clerk's office to charge the filer's VISA/ MasterCard and stating the card number, expiration date and name as it appears on the card. *The document will be considered filed at the time it is processed by the clerk's office regardless of the time the fax was transmitted.* [emphasis added].

General Order 99-2 (Conrad, J.) dated May 13, 1999.

Furthermore, Vermont Local Bankruptcy Rule 9037 as adopted pursuant to General Order

99-2 provides:

Certain time sensitive documents will be accepted when filed via facsimile machine. These include proofs of claim, adversary proceeding complaints, objections to motions or any other pleading of an emergency nature. Parties filing by this means will be required to attempt service on all parties in interest and the Office of the United States Trustee via fax and simultaneously fax a certificate of service to the court. When a filing fee is required, the document must be accompanied by a separate sheet of paper authorizing the clerk's office to charge the filer's VISA/ MasterCard and stating the card number, expiration date and name as it appears on the card. Exhibits to pleadings filed by fax must be clearly marked as exhibits. *All documents submitted by fax will be considered filed at the time they are processed by clerk's office staff.* [emphasis added].

General Order 99-2³.

copy is received.

VLBR 1002 COMMENT

The purpose of this local rule is to ensure prompt service to the parties the Court serves, and to reduce the Clerk's Office's work load.

Federal Rules of Bankruptcy Procedure Rule 5001 provides that Bankruptcy Courts "shall be deemed always open." The intent of subsection (e) ["Hours/ Place for Filing"] of this Rule is to establish uniform hours for the Office of the Clerk; it does not preclude the exercise of discretion in emergency situations that require attention outside of these hours as contemplated by Federal Rules of Bankruptcy Procedure Rule 5001. See also Fed.R.Civ.P. 6(a).

³ General Order 99-2 (Conrad, J.) states as follows:

This order allows court users greater flexibility in filing time sensitive documents via fax.

On its face, this General Order amended Vermont Local Bankruptcy Rule 1002(j) and adopted Vermont Local Bankruptcy Rule 9037 to clarify which documents are allowed to be filed by facsimile transmittal in “emergency” situations, and that all such documents are considered filed at the time they are processed by the Clerk’s Office, not at the time that they are transmitted. Therefore, a plain reading of the applicable local rules require a finding that the subject notice of appeal is untimely under the particular circumstances presented in this instance.

Lastly, a finding that the notice of appeal is time barred is likewise consistent with the policy of finality and evenhandedness that encourages parties to act timely in accordance with applicable bankruptcy rules in seeking relief. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 42 S.Ct. 1644 (1992) (“[d]eadlines may lead to unwelcome results, but they prompt parties to act and they produce finality”); *see also In re Bushnell*, 273 B.R. 359 (Bankr. D. Vt. 2001)(rejecting untimely appeal and acknowledging that the certainty created by appellate deadlines is essential to expedient resolution of appeals and an even playing field for all parties); *In re Soter*, 31 B.R. 986, 989-90 (D. Vt.

It is **ORDERED** that Vermont Local Bankruptcy Rule 1002(j) is amended to read:
The Clerk’s Office will accept facsimile filings of voluntary (bare bones) petitions in emergency situations. When filing by fax, the two-page voluntary petition must be accompanied by a separate sheet of paper authorizing the clerk’s office to charge the filer’s VISA/ MasterCard and stating the card number, expiration date and name as it appears on the card. The document will be considered filed at the time it is processed by the clerk’s office regardless of the time the fax was transmitted.

It is further **ORDERED** that Vermont Local Bankruptcy Rule 9037 is adopted in the following form:

Certain time sensitive documents will be accepted when filed via facsimile machine. These include proofs of claim, adversary proceeding complaints, objections to motions or any other pleading of an emergency nature. Parties filing by this means will be required to attempt service on all parties in interest and the Office of the United States Trustee via fax and simultaneously fax a certificate of service to the court. When a filing fee is required, the document must be accompanied by a separate sheet of paper authorizing the clerk’s office to charge the filer’s VISA/ MasterCard and stating the card number, expiration date and name as it appears on the card. Exhibits to pleadings filed by fax must be clearly marked as exhibits. All documents submitted by fax will be considered filed at the time they are processed by clerk’s office staff.

1983)(dismissing bankruptcy appeal as untimely, stating that non-compliance with filing deadline is jurisdictional and noting that “[t]he public interest in timeliness and finality of bankruptcy proceedings underlies the rules’ time requirements”).

The remaining grounds raised by KeyBank in support of its untimely filing are rejected as without merit.

Therefore, under the factual circumstances presented herein and pursuant to the applicable case law and a plain reading and consistent application of the local rules relating to fax filings, the Notice of Appeal is found to have been filed after the time for doing so expired. Accordingly, the notice of appeal is dismissed.

2. Reconsideration and Vacating of Prior Order *Sua Sponte*

Under §105(a), a bankruptcy court has the equitable power to correct, modify or vacate its own orders to correct a manifest error of law or fact or to permit it to consider newly discovered evidence. See In re Arms, 238 B.R. 259, 261 (Bankr. D. Vt. 1999); see also In re L.A. Ray Realty, Inc., 1999 WL 671865 (Bankr. D. RI 1999); In re Blutrich Herman & Miller, 227 B.R. 53, 60 (Bankr. S.D.N.Y. 1998); In re Mann, 197 B.R. 634 (Bankr. W.D. Tenn. 1996).

In this instance, KeyBank has raised the issue of whether this Court has either abused its discretion or committed an error of law by abrogating an agreement between KeyBank and Mistyn Murray pertaining to the subject claim. Because KeyBank contends that it was not allowed an adequate opportunity to fully address the dispute regarding the status of Mistyn Murray’s claim, and in light of this Court’s preference to enter rulings based upon the merits and a complete record, this Court has determined to vacate the Order Confirming Status of Mistyn Murray’s Claims [Dkt. #657-1] dated December 27, 2001, to the extent it determines the status of the Mistyn Murray claim.

Mistyn Murray shall be allowed thirty (30) days from the date hereof to serve a memorandum

of law and all exhibits deemed necessary to support allowance of her claim. KeyBank, and any other party interested in responding, shall have twenty (20) days after service of the Murray papers to serve its memorandum of law, along with any applicable exhibits, in response thereto. Mistyn Murray shall have ten (10) days thereafter to serve a reply, if any.

Based upon the foregoing, KeyBank's Notice of Appeal is deemed to be untimely and the Order Confirming Status of Mistyn Murray's Claims dated December 27, 2001 is vacated *sua sponte* and the parties are directed to submit legal briefs in support of their respective positions as set forth herein above.

March 27, 2002
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge