

JUN 20 2005

NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP No.	CC-04-1182-KMoB
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PAUL MICHAEL GURROLA,)	Bk. No.	LA 96-31858-ER
)		
Debtor.)	Adv. No.	LA 03-01257-ER
)		
_____)		
)		
PAUL MICHAEL GURROLA,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
LONE STAR SECURITY & VIDEO,)		
INC.,)		
)		
Appellee.)		
_____)		

Argued and Submitted on November 17, 2004
at Pasadena, California

Filed - June 20, 2005

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Ernest M. Robles, Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI, and BRANDT, Bankruptcy Judges.

* This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 This appeal by the debtor questions whether the bankruptcy
2 court correctly concluded that excusable neglect existed so as to
3 permit a timely notice of appeal under the terms of Federal Rule
4 of Bankruptcy Procedure 8002(c)(2). We conclude that the
5 bankruptcy court did not abuse its discretion in that respect and
6 AFFIRM.

7
8 FACTS

9 The appellant, Paul Gurrola and appellee, Lone Star Security
10 and Video, Inc., ("Lone Star") have engaged in protracted
11 litigation over whether Lone Star's postpetition judgment on a
12 prepetition judgment can be enforced notwithstanding the
13 bankruptcy discharge.

14 After a false start that we sent back to the bankruptcy
15 court as procedurally incorrect, Lone Star Sec. & Video, Inc. v.
16 Gurrola, CC-02-1313-KBaP (9th Cir. BAP December 20, 2002), Lone
17 Star filed an adversary proceeding seeking to block enforcement
18 of Gurrola's discharge.

19 After trial, the bankruptcy court ruled that Gurrola was not
20 estopped from relying on his discharge. A memorandum decision
21 was entered February 12, 2004, followed by a judgment entered on
22 February 13, 2004.

23 Although Lone Star received the memorandum decision in the
24 mail on February 18, 2004, the judgment did not arrive until
25 February 25, 2004, two days after the 10-day appeal deadline.

26 On February 28, 2004, Lone Star filed a Motion to Extend
27 Time to Appeal pursuant to Federal Rule of Bankruptcy Procedure
28 8002(c)(1), in which it argued excusable neglect based on the

1 belated mail delivery. The motion was granted over Gurrola's
2 opposition.

3 This timely appeal ensued.¹

4
5 JURISDICTION

6 The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334
7 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).
8

9 ISSUE

10 Whether excusable neglect warranted extending the time in
11 which to appeal.
12

13 STANDARD OF REVIEW

14 We review orders under Federal Rule of Bankruptcy Procedure
15 8002(c)(2) retroactively extending the time to file a notice of
16 appeal for abuse of discretion. Marx v. Loral Corp., 87 F.3d
17 1049, 1053 (9th Cir. 1996). To reverse, we must have a "definite
18 and firm conviction" that the court "committed a clear error of
19 judgment in the conclusion it reached upon a weighing of the
20 relevant factors." Id., at 1054.
21

22 DISCUSSION

23 Under Federal Rule of Bankruptcy Procedure 8002(a), a notice
24 of appeal must be filed within ten days of the date of the entry
25 of the order appealed from. Fed. R. Bankr. P. 8002(a). "The
26 timely filing of a notice of appeal is mandatory and
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28 ¹ Although the two appeals were argued in tandem, we are resolving Lone Star's appeal, our No. CC-04-1143, in a separate opinion.

1 jurisdictional.” Key Bar Invs., Inc. v. Cahn (In re Cahn), 188
2 B.R. 627, 630 (9th Cir. BAP 1995), citing Browder v. Dir., Dept.
3 of Corr. of Ill., 434 U.S. 257, 264 (1978), and Slimick v. Silva
4 (In re Slimick), 928 F.2d 304, 306 (9th Cir. 1990).

5 Federal Rule of Bankruptcy Procedure 8002(c)(2), however,
6 gives the bankruptcy court the discretion to extend the time in
7 which to file a notice of appeal. Fed. R. Bankr. P. 8002(c)(2).
8 The motion to extend must be in writing and must be filed no
9 “later than 20 days after the expiration of the time for filing a
10 notice of appeal.” Id. The standard the bankruptcy court must
11 apply in making its decision to extend time is excusable neglect.
12 Id.

13 Gurrola argues that the bankruptcy court had no discretion
14 to grant an extension of time under Rule 8002(c)(2) because Lone
15 Star’s explanation for not meeting the ten day filing deadline
16 - i.e., lack of notice of entry of order - cannot be the basis
17 for granting such relief. Gurrola contends that Federal Rule of
18 Bankruptcy Procedure 9022(a) specifically removes such an excuse
19 from the court’s consideration. Rule 9022(a) provides, in part:

20 Lack of notice of the entry does not affect the time to
21 appeal or relieve or authorize the court to relieve a
22 party for failure to appeal within the time allowed,
except as permitted in Rule 8002.

23 Fed. R. Bankr. P. 9022(a) (emphasis added).

24 According to Gurrola, an absence of notice will never
25 constitute a form of excusable neglect for purposes of extending
26 time under Rule 8002(c)(2).

27 Lone Star argues that Gurrola’s reading of Rule 9022(a) is
28 unduly restrictive. It argues that the plain language of Rule

1 9022(a)'s final clause indicates that in some circumstances, an
2 absence of notice will be a permissible reason for extending time
3 to appeal under Rule 8002(c)(2). We agree with Lone Star.

4 Rule 8002 authorizes two methods for determining the length
5 of time in which to file a notice of appeal. The first method is
6 strict: the notice of appeal must be filed within ten days of
7 entry of the order. Fed. R. Bankr. P. 8002(a). The second
8 method is permissive: it gives the court the discretion to
9 determine if the strict ten-day deadline should be extended, so
10 long as a written motion to extend is filed no later than twenty
11 days after that initial ten day period expired.² Fed. R. Bankr.
12 P. 8002(c)(2).

13 Rule 8002(a) specifically excepts from its purview
14 situations that the bankruptcy court determines, in its
15 discretion, are appropriate for extending time. Here, the
16 bankruptcy court acted within its authority and determined that
17 Lone Star met its burden of proving excusable neglect and
18 extended the time in which to file a notice of appeal.

19 Gurrola also argues that regardless of whether Rule 9022(a)
20 prevented the court from extending time to appeal, the facts of
21 this case do not constitute excusable neglect. Gurrola relies on
22 Warrick v. Birdsell (In re Warrick), 278 B.R. 182 (9th Cir. BAP
23 2002), and contends that Lone Star's failure to follow
24 unambiguous rules should not be considered excusable neglect.

25 In Warrick, a case where the bankruptcy court denied a
26 motion to extend time, we stated that a party has an affirmative

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28 ² Federal Rule of Bankruptcy Procedure 8002(c)(1)
enumerates six categories of orders or judgments in which an
extension of time is never allowed. This case does not involve
one of those enumerated orders.

1 duty to monitor the dockets and that "it is well settled that
2 failure to receive notice of entry of judgment or order is not an
3 excuse for an untimely appeal." Warrick, 278 B.R. at 187,
4 quoting Cahn, 188 B.R. at 632.

5 Gurrola further argues that despite Lone Star's affirmative
6 duty to monitor the dockets, it had sufficient notice of the
7 bankruptcy court's decision on February 13, 2004, when the court
8 issued its Memorandum of Decision After Trial.

9 In deciding to grant Lone Star's motion for extension of
10 time, the court relied on Pioneer Inv. Servs., Co. v. Brunswick
11 Assoc. Ltd. P'ship, 507 U.S. 380 (1993), and stated that it must
12 analyze what is "fair under the circumstances."

13 The neglect that Lone Star admits occurred was that its
14 counsel did not scrupulously monitor the court's docket to
15 determine when the court entered the judgment. It, instead,
16 relied upon the postal system for notice. The court took that
17 admission into account and decided, in its discretion, that the
18 Pioneer factors weighed in favor of leniency and in favor of
19 granting the extension.

20 To reverse, we must have a "definite and firm conviction"
21 that the court "committed a clear error of judgment in the
22 conclusion it reached upon a weighing of the relevant factors."
23 Marx, 87 F.3d at 1054.

24 The Ninth Circuit recently held that the weighing of
25 Pioneer's equitable factors is left "to the discretion of the
26 district court in every case." Pincay v. Andrews, 389 F.3d 853,
27 860 (9th Cir. 2004) (en banc). The court specifically refused to
28 create or adopt any rigid per se "legal rule against late filings

1 attributable to any particular type of negligence." Id.

2 Gurrola sustained no perceived prejudice because the length
3 of the delay was minimal and Lone Star promptly sought relief
4 once it discovered it had missed the ten-day deadline. See
5 Warrick, 278 B.R. at 188 (Klein, J. dissenting).

6 Thus, under our highly deferential standard of review -
7 abuse of discretion - we are not convinced that the bankruptcy
8 court committed a clear error of judgment.

9

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CONCLUSION

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There having been no abuse of discretion in concluding that
the motion under Rule 8002(c)(2) to extend time in which to
appeal should be granted, we AFFIRM.

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