



ORDERED in the Southern District of Florida on April 13, 2011.

**Erik P. Kimball, Judge
United States Bankruptcy Court**

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

In re:

CASE NO.:10-37469-EPK

PATSY LOU CAMPBELL,

CHAPTER 7

Debtor.
_____ /

ORDER

THIS MATTER came before the Court for hearing on April 12, 2011 upon the *Emergency Motion for Stay Pending Appeal; Request for Waiver of Posting Bond* [DE 50] (the “Motion for Stay”). At the hearing, the Court stated as follows:

This is the court’s ruling on two motions filed by Ms. Patsy Lou Campbell in her closed chapter 7 case. They are a motion for reconsideration of an order dismissing an appeal, filed at ECF 49, and a motion for stay pending appeal, filed at ECF 50. The motion for stay pending appeal is ripe only if the court vacates the order dismissing the appeal.

These motions stem from an earlier motion filed by Ms. Campbell, at ECF 19, requesting that this court reopen her chapter 7 case. That motion was filed on an emergency basis and the court set a hearing on it. The clerk issued the usual

preliminary hearing notice. Ms. Campbell provided telephonic and mail notice of that hearing to counsel for Commercial Services, a creditor prosecuting a state court, *in rem* foreclosure action on her home.

On February 10, 2011, the court held a hearing on Ms. Campbell's motion to reopen her chapter 7 case. Ms. Campbell was present at the hearing. Commercial Services was represented by counsel. In the motions before the court today, Ms. Campbell expresses surprise that Commercial Services was at the hearing and was allowed to present argument. Given Ms. Campbell's apparently long experience with litigation, and the fact that she provided to Commercial Services both telephonic and written notice of the hearing, it is hard to imagine why she should be surprised that Commercial Services' counsel attended the hearing and presented argument.

Ms. Campbell also argues that Commercial Services lacked standing to appear and be heard at the hearing on her motion to reopen her chapter 7 case. The motion to reopen was directed specifically at Commercial Services. Ms. Campbell was requesting that the court reopen her chapter 7 case to allow her to prosecute certain claims against Commercial Services. Commercial Services was directly affected by the requested relief. There is no question that Commercial Services had standing to appear and be heard at the hearing on Ms. Campbell's motion to reopen her chapter 7 case.

Ms. Campbell's motion to reopen her chapter 7 case was without merit. I reviewed the docket in Ms. Campbell's chapter 7 case, including her schedules, prior to the hearing. Taking the allegations in her motion and her presentation at the hearing in the light most favorable to her, I determined that the motion was to be denied. I would have denied Ms. Campbell's motion even if there had been no objection. Because I determined that the requested relief was not warranted under the circumstances presented in the motion, there was no need for an additional, evidentiary hearing. I made a complete ruling on the record, and that ruling was incorporated by reference in a written order. The order denying Ms. Campbell's motion to reopen her chapter 7 case was docketed on February 14, 2011.

In the motions before the court today, Ms. Campbell suggests that it is not appropriate for the court to make an oral ruling on the record followed by a written order incorporating that ruling. There is nothing unusual about this practice, which is relied on by many federal and state courts. As I stated during the hearing on February 10, I ordered a transcript of the February 10 oral ruling. Ms. Campbell suggests that there is no order in the docket showing this, but no order is required. The transcript of the oral ruling ordered by the court was docketed on February 22nd.

I ordered the transcript of the February 10 oral ruling as a courtesy to Ms. Campbell, because she is not represented, so that the transcript would be available to her as quickly as possible. Transcripts entered in the docket are not publicly

accessible for a period of time. I entered an order on February 23 directing the clerk to make the transcript immediately available to the public, again as a courtesy to Ms. Campbell. This is not the norm. When the court makes an oral ruling later incorporated in a written order, typically the parties are required to order the transcript.

Importantly, the availability of a transcript of an oral ruling later incorporated into a written order has no impact on the enforceability of the written order. The order is an order of the court when entered on the docket, and is appealable as of that date.

Ms. Campbell ordered a transcript of the February 10 hearing. According to her motion for stay pending appeal, at paragraph 13, she received a copy of the transcript from the court reporter via e-mail on February 22nd. Ms. Campbell had a copy of the hearing transcript, including the court's oral ruling, six days prior to the deadline for filing a notice of appeal.

Because the order denying Ms. Campbell's motion to reopen her chapter 7 case was docketed on February 14, the notice of appeal was due to be filed no later than February 28, 2011 - 14 days later under Bankruptcy Rule 8002. Ms. Campbell filed a timely notice of appeal on February 22nd.

Ms. Campbell's notice of appeal was captioned as a notice of appeal to the 11th Circuit Court of Appeals. However, because it did not include the required official form for direct appeal to the circuit court of appeals, it was treated by the clerk of this court as an appeal to the district court. The deputy in charge telephoned Ms. Campbell on February 28 and informed her that if she did not file the official form for direct appeal to the circuit court of appeals, the appeal would proceed as an appeal to the district court. This is noted as a remark entry in the docket.

On February 22nd, with her notice of appeal, Ms. Campbell filed a motion to defer the filing of a motion for stay pending appeal. Ms. Campbell mistakenly believed that there was a deadline to file a motion for stay pending appeal and requested an extension of that deadline. On March 8, the court entered an order denying this motion, pointing out that there is no deadline for the filing of a motion for stay pending appeal. The court also stated that a stay of an order denying a motion to reopen a chapter 7 case would have no legal impact, as the chapter 7 case would remain closed. Ms. Campbell's motion to defer did not address any potential motion for leave to appeal.

Under Bankruptcy Rule 8006, Ms. Campbell was required to file a statement of issues on appeal and a designation of the record on appeal no later than March 8. Under District Court Local Rule 87.4(b), this court has authority to dismiss bankruptcy appeals for failure to comply with certain requirements of the

Bankruptcy Rules, including failure to file documents required under Bankruptcy Rule 8006 in a timely manner.

Ms. Campbell failed to file a statement of issues on appeal or a designation of the record on appeal by the deadline in this case. On March 17, nine days after the deadline, the court entered an order dismissing Ms. Campbell's appeal.

Ms. Campbell argues that her notice of appeal should have been considered as a motion for leave to appeal under Bankruptcy Rule 8003(c), and should have been forwarded to the district court for consideration as such. She argues that she was not required to comply with Bankruptcy Rule 8006, that is to file her statement of issues and designation of the record, because Rule 8006 provides that such filings are not required until 14 days after entry of an order granting leave to appeal. She argues that because her notice of appeal was not forwarded to the district court so that the district court could consider the notice of appeal as a motion for leave to appeal, and because no order has been entered on such motion for leave to appeal, the deadline under Bankruptcy Rule 8006 has not arrived.

This is a very creative argument, but it is not a reasonable argument in light of the other provisions of the Bankruptcy Rules and the nature of the order appealed from here.

The February 14 order of this court under appeal is a final order. It disposed of the only pending matter before this court, a motion to reopen a chapter 7 case. There was no other litigation in this case of any kind. Indeed, the case was closed. This court's order denying Ms. Campbell's motion to reopen her case was not an interlocutory order. As a result, Bankruptcy Rule 8003 does not apply to this appeal.

Bankruptcy Rule 8003(c) includes a savings provision for notices of appeal from interlocutory orders presented to the district court without a motion for leave to appeal. This provision requires that the district court consider the notice of appeal as a motion for leave to appeal. But Bankruptcy Rule 8003(c) applies only where the appeal in question was properly lodged with the district court in the first place. This happens when the appellant has in fact timely filed the documents required under Rule 8006 and the clerk of the bankruptcy court has transmitted the record to the district court for docketing under Rule 8007. Rule 8003(c) does not require that every notice of appeal be automatically sent to the district court so the district court can first determine whether the notice of appeal should be treated as a motion for leave to appeal.

This argument provides no basis for the court to vacate the order denying Ms. Campbell's appeal.

Ms. Campbell next points to certain case law in this circuit addressing the standard for dismissal of an appeal when the appellant has failed to file an appeal

brief or take other action, typically after the appeal is lodged in the appeals court. The 11th Circuit Court of Appeals has held that an appeal should not be dismissed solely for failure of the appellant to file a timely brief unless it is shown that such failure was as a result of the appellant's bad faith, negligence, or indifference. This case law is potentially distinguishable from the situation here. In most reported cases, the appellant's failure to take action occurred well after the subject appeal was lodged in the appeal's court. These decisions contrast with others refusing to soften the deadline for filing a notice of appeal under Bankruptcy Rule 8002. The failure to file a statement of issues and a designation of the record falls somewhere between the failure to file the notice of appeal itself and the failure to file an appeal brief. Here, the appeal is not yet lodged with the district court, yet the failure falls after the filing of the notice of appeal. It is unclear from the case law whether the proper standard here is the bad faith, negligence or indifference standard, as Ms. Campbell argues.

For purposes of this decision, I will assume without deciding that the proper standard is whether Ms. Campbell's failure to timely file documents under Rule 8006 was on account of bad faith, negligence or indifference. I need ask why Ms. Campbell did not timely file those documents. Both bad faith and indifference seem unlikely under the circumstances. But the standard is stated in the alternative. Any one of these factors - bad faith, negligence, or indifference - would be sufficient to rule against the appellant.

Negligence is a standard well known to the court. To be negligent, one must have a duty of care, have breached that duty, and the breach must have caused harm.

As an appellant, Ms. Campbell has a duty of care to monitor the docket, to see that her notice of appeal is filed, and to calculate the number of days to the deadline for filing under Rule 8006. Ms. Campbell is an able legal researcher. She is knowledgeable of the provisions of the Bankruptcy Rules and this court's local rules, citing them regularly in motions filed in this case. Ms. Campbell either knew of the provisions of Rule 8006 or should have known of those provisions. She had a duty to comply with the filing deadline.

Ms. Campbell breached her duty by failing to file the required documents on time. Rule 8006 is clear. The deadline to file the statement of issues and designation of the record is measured from the filing of the notice of appeal, an act completely within the appellant's control. By contrast, the deadline to file an appeal brief is determined with regard to the docketing of the appeal in the district court, an act outside the control of the appellant. Here, Ms. Campbell needed to look to no one other than herself and the Bankruptcy Rules to determine the deadline under Rule 8006. The order dismissing her appeal was entered 9 days after the deadline under Rule 8006. Ms. Campbell had an additional 8 days, on top of the original 14 days, to get these documents filed and failed to do so.

Ms. Campbell's breach of duty is the cause of her harm. Ms. Campbell was indeed negligent in failing to timely file her statement of issues on appeal and designation of the record. Under this analysis, it appears that Ms. Campbell's motion is to be denied.

But this is an unduly harsh result. I believe it is appropriate to take into account all of the circumstances of the case in determining whether the appellant was negligent - interpreting the word negligence for this purpose in a more colloquial sense. There is no good reason for Ms. Campbell to have failed to file these documents in a timely manner. She gains nothing. I see no untoward motive in her failure to satisfy the requirements of Rule 8006 by the deadline. The present motion to reconsider was filed 11 days after entry of the order dismissing her appeal. Consequently, I believe it is appropriate to provide Ms. Campbell with additional time to file the required documents.

I will enter an order granting the motion to reconsider the order dismissing the appeal, vacating the dismissal order, and directing Ms. Campbell to file all documents required under Bankruptcy Rule 8006 no later than 4:30 p.m. on April 19, 2011.

Next I will address the motion for stay pending appeal. Under Bankruptcy Rule 8005, Ms. Campbell requests a stay of this court's February 14, 2011 order denying her motion to reopen her chapter 7 case. A stay temporarily negates the impact of an order, to preserve the *status quo* during an appeal. The effect of such a stay, if granted, is as if the order appealed from was not entered.

Ms. Campbell properly sets out the four factors to be considered by the court.

First, I consider Ms. Campbell's likelihood of success on the merits of her appeal. The court's February 10 oral ruling as incorporated into the February 14 written order is clear. The ruling is based on certain basic tenets of bankruptcy law. The issues addressed are well developed in the Bankruptcy Code and the case law over a period of decades. It is very unlikely that Ms. Campbell's appeal will be successful on the merits. This factor weighs heavily against granting a stay pending appeal.

Second, I consider whether Ms. Campbell will suffer irreparable harm if the February 14 order is not stayed. If I grant Ms. Campbell's motion for stay pending appeal, it is as though I did not enter the February 14 order. Such a stay would re-impose the status of her case as of the time immediately prior to that order. In such a circumstance, Ms. Campbell's chapter 7 case would remain closed. To put it another way, granting a stay pending appeal under Rule 8005 does not result in re-opening of Ms. Campbell's chapter 7 case. The denial of this motion will result in no harm to Ms. Campbell. This weighs against granting a stay pending appeal.

It is possible that Ms. Campbell confuses a stay under Rule 8005 with the automatic stay that arises when a bankruptcy case is filed. An order staying the court's February 14 order will not have the effect of re-imposing the automatic stay under Bankruptcy Code section 362. Indeed, even if the chapter 7 case was re-opened, there would be no automatic stay as to the real property because it was abandoned as a result of the trustee's election not to administer it and the case was closed. There would be no automatic stay of actions against Ms. Campbell, to the extent not inconsistent with section 524, because she has already received her discharge. The reopening of a chapter 7 case does not re-impose the automatic stay and has no impact on property abandoned during the case prior to closing.

If Ms. Campbell is somehow requesting that this court stay the state court litigation itself, there is no basis for such an injunction here. Indeed, there is no action pending before this court that would provide this court jurisdiction or power to enter such an order.

Third, I consider whether a stay of the February 14 order will be harmful to other parties. Because a stay of the February 14 order would have no legal or practical import, this factor has no impact on the decision here.

Finally, I consider whether the public interest would be affected by the requested stay. Again, because a stay of the February 14 order is a non-event, this factor has no impact on the court's decision.

I am concerned that if this court were to enter an order staying the February 14 order, this may create confusion in the state court. Ms. Campbell's chapter 7 case remains closed. A stay pending appeal under Rule 8005 does not change this. If this court were to enter such a nonsensical order, it may be construed in a way not intended by the court.

For these reasons, the motion for stay pending appeal will be denied.

Ms. Campbell, if you wish to seek a stay pending appeal from the district court, you must file a separate motion with the district court. Please note that Bankruptcy Rule 8005 requires that if you do so you must explain to the district court why the stay was not granted here.

I will enter orders on the motion to reconsider the order dismissing appeal and the motion for stay pending appeal incorporating this oral ruling. Among other things, Ms. Campbell, you will be directed to comply with Bankruptcy Rule 8006 no later than 4:30 p.m. on April 19, 2011. If you fail to file the required documents by that date and time, the appeal will again be dismissed and it will not be reinstated.

There is also on the docket for hearing today a motion for leave to appeal. It is captioned for the district court but was filed here. It is not necessary to seek leave

to appeal as the order in question is clearly a final order. In addition, Ms. Campbell, you filed a timely notice of appeal. Unless you tell me now, Ms. Campbell, that there is some reason that this motion should be forwarded to the district court for review, it will be deemed withdrawn and an order entered to that effect.

With the Court having considered the record and being otherwise fully advised in the premises, and for the foregoing reasons as stated on the record at the April 12, 2011 hearing, it is

ORDERED AND ADJUDGED that that the Motion for Stay [DE 50] is DENIED.

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Copies Furnished To:

All parties of record by the Clerk.