



Dated: April 16, 2021
The following is ORDERED:

Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
CHANDRA LYNETTE BERRY,
Debtor.

Case No. 11-28881-L
Chapter 7

ORDER GRANTING EXTENSION OF TIME TO FILE NOTICE OF APPEAL

The Motion of Fay Servicing, LLC (“Fay”) for Extension of Time to File Notice of Appeal (the “Motion for Extension” or “Motion”) came on for hearing by teleconference on April 15, 2021. Fay was represented by Attorney Alex McFall and the Debtor appeared on her own behalf in opposition to the Motion. The Motion recites that the court entered an order on March 9, 2021, ECF No. 100, from which the Debtor filed a timely Notice of Appeal and Statement of Election on March 18, 2021, ECF No. 106. In the March 9 order, Fay was ordered to pay the Debtor \$10,749.72 in actual and punitive damages. The Motion for Extension further states that Ms. McFall suffered a medical emergency and was hospitalized on the morning of April 1, 2021 and filed the Motion for Extension of time on that day. The Motion asks that the time for filing a notice of appeal be extended by five days to enable Ms. McFall to recover from her hospitalization. Fay

did in fact file its Notice of Cross-Appeal on April 6, 2021, within the five-day extension requested, ECF No. 121, and Fay filed its Statement of Issues and Designation of Record on Appeal on April 13, 2021, ECF No.130.

Although Gene Bell appears as attorney of record for the Debtor in this case, the Debtor filed a pro se objection on April 5, 2021, ECF No. 119, and an amended objection later that day, ECF No. 120. The Debtor appeared on her own behalf at the hearing on the Motion for Extension. The Debtor argues that the Motion was untimely; that Fay has not shown excusable neglect for its late filing; and that an extension “will cause undue delay and prejudice to [her].”

Federal Rule of Bankruptcy Procedure (Rule) 8002(a)(1) provides a fourteen-day period for filing notices of appeal. Rule 8002(a)(3) provides that when a notice of appeal is timely filed any other party to the appeal may file a separate notice of appeal within 14 days after the date when the first notice was filed. The fourteenth day after the entry of the March 9 order was March 23. The Debtor’s Notice of Appeal was timely filed on March 18, 2021. The fourteenth day after March 18 was April 1, which fell on a Sunday. Rule 9006(a)(1)(C) provides that when calculating a period of days, if the last day falls on a Saturday, Sunday, or legal holiday, the period continues to run until the next day that is not a Saturday, Sunday, or legal holiday. Pursuant to Rule 8002(a)(3), the time for other parties to file notices of appeal following the filing of the Debtor’s initial Notice of Appeal ended on April 2, 2021.

Federal Rule of Bankruptcy Procedure 8002(d) provides for the extension of the period for filing a notice of appeal:

- (1) When the Time May be Extended. Except as provided in subdivision (d)(2), the bankruptcy court may extend the time to file a notice of appeal upon a party’s motion that is filed:
 - (A) within the time prescribed by this rule; or
 - (B) within 21 days after that time, if the party shows excusable neglect.

Fed. R. Bankr. P. 8002(d)(1). Fay timely filed its Motion for Extension of time on April 1, 2021. Because the Motion was timely filed, Fay need not show excusable neglect for the late filing of its motion. Its Motion was not late. Fay proceeds under Rule 8002(d)(1)(A), which permits the court to extend the time to file a notice of appeal within the discretion of the bankruptcy court. *See Nugent v. Betacom of Phoenix, Inc. (In re Betacom of Phoenix, Inc.)*, 250 B.R. 376, 379-80 (B.A.P. 9th Cir. 2000) (“[U]se of the word “may” rather than “shall” indicates that the bankruptcy court has discretion in granting such motions.”). Upon review of an exercise of discretion, “[t]he question is not how the reviewing court would have ruled, but rather whether a reasonable person could agree with the bankruptcy court’s decision; if reasonable persons could differ as to the issue, then there is no abuse of discretion.” *Allied Domecq Retailing USA v. Schultz (In re Schultz)*, 254 B.R. 149, 151 (6th Cir. B.A.P. 2000), quoting *Barlow v. M.J. Waterman & Assocs., Inc. (In re M.J. Waterman & Assocs., Inc.)*, 227 F.3d 604, 608 (6th Cir. 2000). Beyond this reasonable person standard for exercise of discretion, the Sixth Circuit has not set forth a specific standard for granting a timely motion for extension of time to file a notice of appeal. None is provided by the Bankruptcy Code. The leading bankruptcy treatise notes that “[t]he absence of a standard to govern the decision of the bankruptcy court if the request for an extension of time is made prior to the expiration of the periods described in Rule 8002(a) and (b) suggests that, with [certain] exceptions . . . , the extension should usually be granted.” 10 Collier on Bankruptcy ¶ 8002.12 (16th ed. 2021). The “exceptions” or instances when the time to appeal may not be extended are specified at Rule 8002(d)(2). None of them is present here.

Rule 8002(d)(3) strictly limits the extensions that may be granted under Rule 8002(d)(1): “No extension of time may exceed 21 days after the time prescribed by this rule, or 14 days after the order granting the motion to extend time is entered, whichever is later.” Fed. R. Bankr. P.

8002(d)(3). These time periods may not be enlarged. *See* Fed. R. Bankr. P. 9006(b)(3) (“The court may enlarge the time for taking action under Rule[] ... 8002 ... only to the extent and under the conditions stated under [that] rule.”). The five-day extension requested by Fay complies with these limitations.

Although the Sixth Circuit has not adopted a standard for considering motions to extend under Rule 8002(d)(1)(A), the *Schultz* decision quoted above is instructive because it was decided under the more stringent excusable neglect standard of Rule 8002(d)(1)(B). In that case, the debtor’s attorney filed a late motion for extension of time to file a notice of appeal because his wife was unexpectedly hospitalized as the result of severe side effects from chemotherapy. The bankruptcy court did not excuse the attorney’s failure to timely file a motion for extension under those circumstances, but the Bankruptcy Appellate Panel reversed, finding that those particular circumstances – serious illness of the spouse of the debtor’s attorney, who was her primary caregiver – supported a finding that the attorney’s negligence in not filing a timely motion for extension was excusable. Rule 8002(d)(1)(A) requires no showing of excusable neglect to support a motion for extension of time to file a notice of appeal. Under the lessened standard of Rule 8001(d)(1)(A), the hospitalization of counsel is more than adequate to support a short extension of time to file a notice of appeal. In fact, the panel in *Schultz* specifically distinguished “office upheaval” cases from those involving sudden death, disability or illness of counsel or the party, which do support a finding of excusable neglect. *Id.* at 154. Again, excusable neglect is *not* the standard to be applied in this case. The court points to the decision in *Schultz* to illustrate that serious illness of counsel would satisfy that more stringent standard and thus easily satisfies the less stringent standard of Rule 8002(d)(1)(A).

The Bankruptcy Appellate Panel for the Ninth Circuit has rejected the suggestion that any “special circumstances” must be shown to support a timely-filed motion for extension. *See In re Betacom of Phoenix*, 250 B.R. at 382. In vacating an order of the bankruptcy court based upon that incorrect standard, it directed consideration of the following four factors: “(1) whether the appellant is seeking the extension for a proper purpose; (2) the likelihood that the need for an extension will be met if the motion is granted; (3) the extent to which granting the extension would inconvenience the court and the appellee or unduly delay the administration of the bankruptcy case; and (4) the extent to which the appellant would be harmed if the motion were denied.” *Id.* It is not at all clear that the Sixth Circuit would adopt this four-part test for a relatively straightforward and routine request for extension, but the court has considered it and finds that the request in the present case satisfies all four factors.

First, there is no suggestion that Fay’s request for extension of time to file its notice of appeal was made for an improper purpose. As discussed above, it resulted from the unanticipated hospitalization of counsel.

Second, the need for the extension has in fact already been met. Fay has filed its Notice of Cross-Appeal.

Third, the short five-day extension requested by Fay neither inconvenienced the court nor unduly delayed the administration of the bankruptcy case. As noted, Fay’s Notice of Cross-Appeal has already been filed. Moreover, Fay has already filed its Statement of Issues on Appeal and Designation of Record on Appeal. Rule 8009(a)(1) and (2) require a cross appellant to file a statement of issues on appeal and a designation of additional items to be included in the record within fourteen days after the filing of its notice of appeal. Fay filed its Statement of Issues and Designation of Record on Appeal on April 13, 2021, within fourteen days of the original April 2

deadline for filing its notice of appeal. In other words, despite the five-day delay in filing its notice of appeal, Fay's diligence has resulted in no delay in the overall prosecution of the appeal.

Fourth, the harm to Fay if the motion were denied is manifest. It has raised only one issue in its cross-appeal: "Whether the Bankruptcy Court erred in imposing monetary sanctions against Fay." ECF 130. In the March 9 order, Fay was ordered to pay the Debtor \$10,749.72 in actual and punitive damages. Fay's only avenue for avoiding the sanction imposed by this court is its cross-appeal, which would be lost if its Motion for Extension were not granted.

I asked the Debtor what harm she had suffered from the short delay in filing Fay's notice of appeal. The Debtor said that she was harmed by the delay itself and the requirement for additional briefing. As noted above, the extension requested was so short that the Motion for Extension could not be scheduled for hearing before the requested period of extension had expired. The Motion has resulted in no delay to the Debtor. Further, since briefing has not even begun, it is impossible for the court to gauge what, if any, additional briefing will be required of the Debtor as a result of Fay's cross-appeal. The Debtor's arguments against the granting of the Motion are simply not persuasive.

For the foregoing reasons, Fay's Motion for Extension of Time to File Notice of Appeal is **GRANTED**. The deadline for filing its notice of appeal is extended to April 6, 2021.