IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
ONDOVA LIMITED COMPANY	§	
	§	**CASE NO. 3:13-cv-1294L**
	§	
Jeffrey Baron **Appellant**	§	
	§	
vs	§	
	§	
Daniel Sherman and Peter S. Vogel	§	
Appellee	§	
	§	

MOTION FOR RECONSIDERATION

Appellant Jeffrey Baron , respectfully moves for reconsideration of the Court's order dismissing this case [Doc. 8] on the basis that counsel for Appellant did, in fact, diligently pursue the appeal in this case and that the factual basis for key findings are not supported in the record.

While there were some technical or procedural errors attributable to counsel, the facts in this case do not rise to the level requiring dismissal. As a threshold matter, it is important to correct whatever misimpressions the Court may have as to the facts. The Court expressed concern that Pronske had not been served with the Notice of Appeal, and had not had an opportunity to designate items to be included in the record. [Doc. 8 at 4]. Pronske & Patel, P.C. were named and served with a Notice of Appeal and obviously understood that they were parties to the appeal because they filed Appellee's Designation of the Record, Appellee's Amended Designation of the Record, received Appellant's Statement of Issues on Appeal, and were well

aware that the appeal was docketed by the Court. Counsel for Appellant made several assumptions and mistakes that have contributed to what became a problem, but mistakes were not the product of "obstinately dilatory conduct."

Chief among these mistakes is that counsel was unaware of, and did not realize or appreciate that either the bankruptcy appeals clerk or the district court clerk did not routinely take the list of all parties named in the Notice Of Appeal and designate the names of all parties on the CM/ECF automatic filing system for automatic service. This apparently is done only if the parties are named in the caption. See R. 001-003. Thus, parties who are identified for purposes of appeal are not automatically served once the case is docketed in the district court. Regardless, Appellee has not suffered any prejudice as a result of the delay in filing his brief. As set out below, Appellant should not be deprived of his right of appeal due to the inadvertent errors of his attorney and the appeal should be reinstated.

I. The Standard for Sanctions on Appeal

The standard for bankruptcy appeals to the district courts regarding sanctions for violations of bankrutpcy procedures was enunciated the Fifth Circuit in *CPDC, Inc. v. Zer-Ilan*, 221 F.3d 693 (5th Cir. 2000). In that case, the Fifth Circuit reversed and remanded because the sanction of dismissal was inappropriately severe. In that case, appellant's counsel neglected to file their statement of issues on appeal prior to docketing the appeal with the district court, there were lengthy delays in preparing the record and for other violations of bankruptcy procedure and counsel for appellee filed a motion to dismiss.

In *CPDC*, the Court noted that the court must exercise discretion and consider what sanctions are appropriate. Dismissal is a harsh and drastic sanction that is not appropriate in all

cases although it lies within the district court's discretion. In addition, when, as here, a dismissal of the appeal because of an attorney's error, the client is unduly punished for his attorney's mistakes." *Id.* at 699.

In the instant case,, counsel for Appellant filed a motion to re-designate the parties after counsel for the Chapter 11 Trustee, Ray Urbanik brought the matter to his attention. While the Fifth Circuit has not established a determinative set of factors that guide discretion under these circumstances, the CPDC court did state that it has upheld the district court's dismissal of cases only where appellee has shown prejudice from the delay and when appellant has exhibited "obstinately dilatory conduct." *CPDC* at 699 (citing *In re Brannif*, 744 F.2d 1303, 1304 (5th Cir. 1985); *In re Pyramid*, 531 F.2d 743 , 744 (5th Cir. 1976).

II. Pronske & Patel, P.C. Was Listed as a Party Under Rule 8001(a)

In its ruling, the district court held that counsel failed to comply with Rule 8001(a) of the Federal Rules of Bankruptcy Procedure by failing to list Pronske & Patel, P. C. ("Pronske") as a party to the judgment, order or decree appealed from. [1] Dkt. 8 at 4. The Court also concluded that no brief was filed by Pronske "nor have any items been designated to be included in the record. Consequently, the appellate record is incomplete, even though this bankruptcy appeal was initiated nine months ago." Dkt. 8 at 4. In fact, Pronske was listed as an "Interested Party", got the Notice of Appeal, and did, in fact, file designations in the record on appeal and received all filings until the record was transmitted to the court.. Pronske also got the same notice of transmission of the record and docketing from the Bankruptcy Court as Appellant and was aware

that a brief would be filed with the district court. Dkt. 1096, 1098, 1099, *In re Ondova*, No. 09-34784.[1] Appellant respectfully submits that the record before this Court is complete.

Rule 8001(a) (2) provides, in pertinent part, that: the notice of appeal shall contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys. Rule 8001(a)(2) states: "the names of all parties to the order, or decree appealed from and the names, addresses and telephone numbers of their respective attorneys are as follows:" (emphasis supplied). The Notice of Appeal filed by Jeff Baron lists Mssrs.. Sherman, his lawyer, Ray Urbanik, Jeffrey Fine, a lawyer for the Receiver, and then lists other parties under a section called "Interested Parties", including Pronske. The rules do not differentiate as between "parties" and "interested parties." The caption was erroneous, but the issue is one of *form* rather than *substance*, as the rule requires only that the parties be listed in the Notice of Appeal. Because Pronske is listed as a party in the Notice of Appeal, he is a party to the appeal and may be designated on the caption. R.003-4.[2] Rule 8004 requires the Court to serve the Notice of Appeal on all parties to the judgment, or order.

III. Appellant Did Not Engage in "Obstinately Dilatory Conduct."

There was no evil intent or bad faith in seeking substitution of the parties. Appellant wanted to obtain a ruling from this court on the merits of the case and timely filed his brief. Counsel concedes that he made an honest mistake in failing to specifically identify Pronske. in the caption of the appeal, although Pronske clearly had notice of the appeal and participated at

[1] That is not to imply that Pronske should have been aware that Appellant's brief was filed or that he had a filing deadline where, as here, counsel was unaware that Pronske was not automatically served through the Court's CM/ECF system.

[2] The bankruptcy Rules do not appear to differentiate between "party" and "interested party." Filing of a Notice of Appeal listing Pronske as a "Interested Party" satisfies Rule 8001(a).

every stage of the appeal until the case was docketed. Pronske provided Appellee's Designation of the Record [Bankruptcy Docket 1068] and later filed an Amended Designation of the Record [1070]. At the time of filing this appeal, counsel was not experienced in filing bankruptcy appeals. In fact, this was one of the first, if not *the* first bankruptcy appeal prepared and filed by undersigned case in a bankruptcy case. [¶6, Exhibit A, Affidavit of Counsel].[3]

Counsel mistakenly believed that all parties listed on the Notice of Appeal filed by Appellant continued to get notice of pleadings after the case was docketed on appeal. [¶ 8, Exhibit A, Affidavit of Counsel]. While this appeared to be logical, counsel did not review the Pacer docket to determine who got served and who did not until the issue was raised by this Mr. Urbanik and the Court. While some delay in the briefing has occurred due to counsel 's error, Pronske & Patel, P.C. have not suffered prejudice because they participated fully in designating the record and got notice of all pleadings until the appeal was formally docketed with this Court.

Counsel did not understand that there was a procedural issue until learning from Mr. Urbanik that he needed to file a motion to address the issue. If a party received notice of an appeal, and then filed designation of the record and the record is complete, it is difficult to imagine that they would have any *principled* objection to being designated as the *real party in interest* because they cannot demonstrate that they were prejudiced by a mistake in the caption of the complaint. The Court noted that, because Pronske was not a party to this appeal, the court "cannot order it to file a response to this appeal." [Dkt. 8 at 4]. In hindsight, Counsel should have sought the concurrence of Pronske & Patel, P.C. before filing the motion (if only to

[3] The Court also observed that Appellant, in footnote in his principal brief, inaccurately stated that: "The case caption assigned by the Court designates Daniel Sherman [as Appellee]. However, the interested party [Appellee] is Pronske & Patel, P.C.". [Dkt. 8 at 2]. Counsel apologizes for this inaccurate statement which should have been picked up and modified or deleted during the drafting and proofreading process prior to filing.

expedite the issues), but counsel believed that he needed to get Pronske into the case, at which time, Pronske could raise any issues that he deemed appropriate. [¶ 10, Exhibit A, Affidavit of Counsel].

The time elapsed since filing of the Notice of Appeal does not appear excessive given the issues. On March 28, 2013, the record was transmitted to the Court. On April 10, 2013, Appellant filed his brief. Dkt. 4. At that point, Appellant had not realized that there was a procedural problem with the designation of parties. Counsel did not appreciate problems with designation of the parties until being requested by Ray Urbanik to effect a substitution of parties on the caption of the complaint. Regardless, the sanction of dismissal is not warranted where no prejudice has been suffered and the conduct was part of a long line of procedural deficiencies. As set out above, amendment of the caption, or substitution of parties after the record is complete, on the court's docket and where, as here, Appellant's brief timely filed does not support the kind of "obstinate dilatory conduct" that warrants dismissal with prejudice. Indeed, the only remaining potential milestones in this appeal include filing of Appellee's brief; an opportunity for Appellant to file a reply brief, oral argument (if requested) and this Court's decision.

The Court found that the procedural errors warranted dismissal based on *In re McDonald*, 327 Fed. Appx. 491 (5th Cir. 2009); *In re Braniff Airways, Inc.* and *Pyramid Mobile Homes, Inc. v. Speake*, 531 F.2d 743 (5th Cir. 1976). *McDonald* involved a case where appellant failed to file a brief for nine months and failed to seek leave to file. Thus, the district court dismissed the case *sua sponte.* In *Braniff*, the Court dismissed the case where appellant totally failed to file his brief in support of his appeal. Finally, in *Pyramid*, the Court held that an appellant's intentional delay and failure to promptly order a transcription of the appellate record warranted dismissal. In *Pyramid*, the district court issued an order that apparently gave appellant an additional six weeks

months to have the record transcribed, but only received one-third of the transcript, which was never provided to the Court until months later when the case was pending before the Fifth Circuit Court of Appeals. *Id.* at 745. The facts in this case do not remotely resemble the facts in *McDonald, Braniff* or *Pyramid.* Rather, this Court should look to *CPDC* for guidance in this case.

IV. A Death Penalty Sanction Should Not be Imposed.

Counsel apologizes for any confusion caused by his mistakes. However, the record in this case is complete and briefing has been partially completed. The remainder of the briefing may be completed within month or so of this Court's ruling on reinstatement.

As set out above, counsel for Appellant timely appealed the order and identified Pronske as a party to the order being appealed. This satisfied the notice requirement under the Rules. While Pronske was not specficially listed on the caption of the appeal, he was listed as a party on the notice of appeal, served with the Notice of Appeal and filed Appellee's Designation of Record. There was a "disconnect" and misunderstanding by counsel for Appellant, who mistakenly believed that Prosnke was given notice of the district court appellate filings and that Pronske was aware that he had a brief to file. While counsel may be criticized for not following up with and conferring with Pronske prior to filing his motion to formally change the caption to substitute Pronske as appellee, Pronske knew it was the appellee well before the motion was filed, as evidenced by their designations of the record. Counsel believed that any concern or objection by Pronske to the substitution would be addressed when he was substituted into the caption of the case and served with the pleadings.

As set out in CPDC, the Court should not impose a death penalty sanction where, as here, the delay was not due to conduct by the client nor where the attorney did not intentionally engage in "obstinate dilatory conduct." Indeed, appellant's counsel thought the appeal was on track and filed his brief expecting that the case would proceed to conclusion and had no motive or reason, after putting g substantial time and effort into filing the appellate brief, to delay the time for Pronske to file his brief. The Court should not penalize Baron for the confusion surrounding the appeal of this case. As in *CPDC, Inc*. the Court should reinstate the appeal.

WHEREFORE, Appellant requests this Honorable Court reconsider and vacate its Memorandum Opinion and Order, reinstate Appellant's appeal and grant Appellant's Motion to Re-Designate Parties.

Very respectfully,

/s/ Stephen R. Cochell
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CERTIFICATE OF SERVICE

On this date I electronically submitted the foregoing document with the Clerk for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties who receive notification through the electronic filing system. Counsel has also provided notice to Geritt Pronske, Pronske & Patel, P.C. Pronske, Goolsby & Kathman, 220 0 Ross Ave #5350, Dallas, Texas 75201 by sending the Motion for Reconsideration to Gerrit Pronskey by facsimile transmission.

/s/ Stephen R. Cochell
Stephen R. Cochell