

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re:

Chapter 11

Spiegel, Inc. et al.,

Case No.: 03-11540

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APPEARANCES:

LAW OFFICES OF JAMES P. CONNORS

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Before: Burton R. Lifland
United States Bankruptcy Judge

**DECISION DENYING MOTION FOR ENLARGEMENT OF TIME IN WHICH TO FILE
NOTICE OF APPEAL**

Creditors Alfred R. Johnson and Clarence R. Morris (the “Movants”) move for leave to file an appeal or alternatively an enlargement of the time in which to file a notice of appeal (the “Appeal Motion”) of this Court’s decision denying the Movants’ Motion for Reconsideration relating to expungement of claims. On September 8, 2005, this Court denied the Motion for Reconsideration. On September 21, 2005, one day after the appeal period expired, the Movants filed a notice of appeal and

the Appeal Motion.

Background

In 2003, Spiegel Inc. and its affiliated entities (collectively the “Debtors”) filed a petition for relief under chapter 11 of the United States Bankruptcy Code (the “Code”). The Movants filed a proof of claim in the Debtors’ case but attached to the claim form was a judgment against a non-debtor entity, Spiegel Management Group. On March 2, 2005, the Debtors filed an objection to the Movants’ claims. The deadline for filing responses to the objection was April 14, 2005. No response was filed and the claims were expunged on April 19, 2005. On August 8, 2005, the Movants filed the Motion for Reconsideration, requesting that the Court reinstate their claims. The Spiegel Creditor Trust (the “Trust”) opposed the Motion. At the hearing on September 8, 2005, this Court heard oral arguments, denied the Motion for Reconsideration, so ordered the record and entered on the docket a Minutes of Proceeding Order stating the decision of the Court.

The Movants concede that the Appeal Motion may have been filed late, but any lateness was due to confusion with respect to the order denying the Motion for Reconsideration and request that this confusion be considered by the Court to be excusable neglect.

Discussion

Rule 8001 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) provides that an appeal from an order of a bankruptcy court must be made within the time allowed by Bankruptcy Rule 8002. FED. R. BANKR. P. 8001. Under Bankruptcy Rule 8002, a notice of appeal must be filed within 10 days of the date of the entry of the judgment, order or decree appealed from. FED. R. BANKR. P. 8002. If a notice of appeal is not filed timely, the appellate court is void of jurisdiction to consider the matter. *In re Simeon*, 421 F.3d 467 (2d Cir. 2005).

If the time for filing a notice of appeal has expired, a court may consider a motion to extend the time to file if the motion is made, “before the time for filing a notice of appeal has expired,” except that if a motion is filed within 20 days after the time to file a notice of appeal has expired, the motion to extend time to file may be granted upon a showing of excusable neglect. FED. R. BANKR. P. 8002(c)(2). The burden of proving excusable neglect lies with claimant filing late. *Midland Cogeneration Venture Limited Partnership v. Enron Corp.* (In re Enron Corp.), 419 F.3d 115, 121 (2d Cir. 2005).

The United States Supreme Court in *Pioneer Investment Services Company v. Brunswick Associates L.P.*, 507 U.S. 380 (1993) set forth a four factor test for determining whether excusable neglect has been established. The factors include (i) the length of the delay; (ii) the danger of prejudice; (iii) the movant's good faith; and (iv) the reason for the late filing, including a consideration of whether the circumstances were beyond the control of the late filer. *Id.* at 395. In *Silivanch v. Celebrity Cruises*, 333 F.3d 355 (2d Cir. 2003), the Second Circuit noted that it takes a “hard line” relating to excusable neglect. *Id.* at 368, *see also Midland Cogeneration Venture Limited Partnership*, 419 F.3d at 122. The court noted that the most significant factor is typically the movant’s reason for the late filing and whether the reason for delay was within the control of the movant. *Id.* at 366, *see also Midland Cogeneration Venture Limited Partnership*, 419 F.3d at 122. In *Silivanch*, the Second Circuit noted that the excusable neglect standard is not established due to an “inability or refusal to read and comprehend the plain language of federal rules.” *Silivanch*, 333 F.3d at 368. Movants have failed to demonstrate a sufficient reason for their failure to appeal timely or that the failure to appeal timely was beyond their control. Movants have not met their burden in establishing that any of the remaining factors weigh in their favor.

At the conclusion of the hearing, the attorneys for the Trust chose to have the record “so

ordered” and the attorney for the Movants agreed. I so ordered the record and following the hearing a Minutes of Proceeding was entered on the docket ordering that the motion was denied. The Movants’ subsequent failure to appeal within the appropriate time frame was inexcusable.

In light of my ruling on the record and the subsequent docketing of an order, I deny Movants’ motion for leave to appeal and I find that the Movants have not demonstrated excusable neglect and therefore their application for extended time to appeal is denied. Moreover, given the history of motion practice in this case, this effort to further draw out litigation will not be countenanced by this Court.

Dated: New York, New York
 October 31, 2005

/s/ Burton R. Lifland
United States Bankruptcy Judge