

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

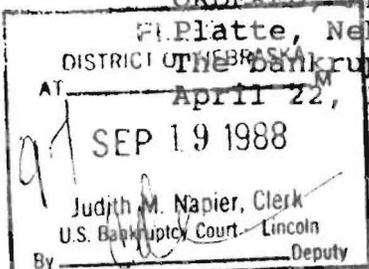
RODNEY ERICKSON, et al.,)	CV88-L-286
)	
Plaintiffs,)	BK 87-254
)	
vs.)	MEMORANDUM ON APPELLEE'S
)	MOTION TO DISMISS
)	
FEDERAL LAND BANK OF OMAHA,)	
)	
Defendant.)	

Rodney and Vera Erickson, debtors, filed a notice of appeal pursuant to Rule 8001 in the belief that the bankruptcy court's order of March 9, 1988, was a final order. In the March 9th order, the bankruptcy judge sustained a motion by the Federal Land Bank of Omaha ("FLB") to excuse the receiver from turning over the debtors' property, and he sustained, in part, a motion to permit sequestration of rents and profits. The FLB has moved to dismiss the Ericksons' appeal claiming that the district court lacks jurisdiction over the appeal because the appeal was not timely filed, and claiming that the appeal is interlocutory in nature and is of a type that should not be considered by the district court.

The parties agree in their briefs that the order from which the debtors appeal was entered by the bankruptcy court on March 9, 1988. The FLB argues in the first instance that the Ericksons' filing of the notice of appeal, even if considered by the court to be a motion for leave to file an appeal which is permissible under Rule 8003(c), was untimely. The notice of appeal was filed in the bankruptcy court on May 6, 1988, clearly not within the 10 days provided by Rule 8002(a).

The Ericksons argue, however, that their motion to vacate the March 9th order, which they filed in the bankruptcy court on April 4, 1988, constitutes a motion under Rule 9023, either to alter or amend the judgment, or for a new trial. These types of motions toll the 10-day filing period. See Rule 8002(b)(3), (4). The FLB contends that the Ericksons' motion to vacate does not qualify as a motion under Rules 8002(b) and, therefore, did not toll the 10-day filing period.

The motion to vacate asked the bankruptcy court judge to set aside his order of March 9, 1988, for the reasons that no receiver ever had been appointed for the debtors' property. Filed with the motion in the bankruptcy court was a document captioned "Order" that states at page two: "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Agri-Affiliates, Inc. of North Platte, Nebraska, should be and hereby is appointed as Receiver." The bankruptcy judge overruled the Ericksons' motion to vacate on April 22, 1988, finding that the motion was "frivolous."



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Even if I assume, for the purposes of this motion to dismiss the appeal only, that the Ericksons' motion to vacate is of the kind that would effectuate a tolling of the 10-day filing period under Rule 8002(b), I still am bound to dismiss the appeal because the motion to vacate was not filed within 10 days following the entry of the March 9, 1988, bankruptcy court order. Rule 9023 is taken from Fed.R.Civ.P. 59 that states, at subsection (e), that the motions filed pursuant to that rule must be filed within 10 days after the entry of judgment.

Likewise, I conclude that a motion filed pursuant to rule 8002(b) must be filed within 10 days of the date of the order from which the appeal is taken, in order to toll the 10-day filing period for filing a notice of appeal. Whitemere Development Corp. v. Township of Cherry Hill, 786 F.2d 185, 187 (3rd Cir. 1986). The Ericksons filed their motion to vacate on April 4, 1988, several days later than the date that would have made the filing timely. Because Ericksons' appeal was not filed in a timely manner, this court lacks jurisdiction to consider the merits of the appeal. In re Universal Minerals, Inc. 755 F.2d 309, 312 (3rd Cir. 1985); Union Trust and Savings Bank v. Jaspersen, 37 B.R. 956, 957 (N.D.Iowa 1984).

IT IS ORDERED that the appellee's motion to dismiss, filing 4, is granted, and the appellants' notice of appeal is dismissed based upon the court's lack of jurisdiction.

Dated September 16, 1988.

BY THE COURT


United States District Judge

ENTERED
ON THE DOCKET

SEP 19 1988

WILLIAM L. OLSON, Clerk
BY C.C. Brian
Dep. Clerk

FILED	
DISTRICT OF NEBRASKA	
AT _____	M _____
SEP 16 1988	
William L. Olson, Clerk	
By _____	Deputy _____