

FILED & ENTERED

JUL 02 2013

CLERK U.S. BANKRUPTCY COURT
Central District of California
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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re

**MARTIN PEMSTEIN and DIANA
PEMSTEIN,**
Debtors.

Case No. 2:12-bk-15900-RK

Chapter 11

Adv No. 2:12-ap-02467-RK

**ORDER GRANTING MOTION FOR
EXTENSION OF TIME TO FILE A
NOTICE OF APPEAL**

MARTIN PEMSTEIN,
Plaintiff,

Hearing Date: July 2, 2013

Time: 2:00 p.m.

Courtroom: 1675

vs.

HAROLD PEMSTEIN,
Defendant.

On June 27, 2013, Plaintiff Martin Pemstein ("debtor") filed a motion for extension of time to file a notice of appeal of this court's order dismissing debtor's complaint in this adversary proceeding, entered on May 30, 2013 (the "Motion"). The court granted debtor's separate application for order shortening time, setting the Motion for hearing on

1 July 2, 2013 at 2:00 p.m. On July 1, 2013, the Defendant filed an Opposition to the
2 Motion. After carefully considering the moving and opposing papers, the court takes the
3 Motion under submission, takes the hearing off calendar, and grants the Motion based on
4 debtor's showing of excusable neglect pursuant to Federal Rule of Bankruptcy Procedure
5 (FRBP) 8002(c)(2).

6 Pursuant to FRBP 8002(a), debtor had 14 days to file a notice of appeal of the
7 dismissal order entered on May 30, 2013, or until June 13, 2013. Debtor did not file a
8 timely notice of appeal by the expiration date of June 13, 2013 for filing a timely notice of
9 appeal.

10 Debtor filed a motion to extend time to file a notice of appeal pursuant to FRBP
11 8002(c)(2), which provides: "A request to extend the time for filing a notice of appeal must
12 be filed before the time for filing a notice of appeal has expired, except that such a motion
13 filed not later than 21 days after the expiration of the time for filing a notice of appeal may
14 be granted upon a showing of excusable neglect." Although debtor did not file the
15 motion to extend time to appeal by the expiration date for filing a notice of appeal, on
16 June 27, 2013, he filed a timely motion to extend time to appeal based on excusable
17 neglect since the motion was filed within 21 days of the expiration of the normal appeal
18 period, or July 4, 2013.

19 The issue before the court is whether debtor has shown excusable neglect for not
20 filing a timely notice of appeal under the normal 21-day deadline under FRBP 8002(b).
21 FRBP 8002(c)(2); 10 Resnick and Sommer, *Collier on Bankruptcy*, ¶ 8002.10.2[2] at
22 8002-16 – 8002-17 (16th ed. 2012), citing *Pioneer Investment Services Co. v. Brunswick*
23 *Associates Limited Partnership*, 507 U.S. 380, 395 (1993). In *Pioneer*, the Supreme
24 Court held that the determination of whether neglect is "excusable" is "at bottom an
25 equitable one, taking account of all relevant circumstances surrounding the party's
26 omission" and stated that a court should consider such circumstances, including: (1) the
27 danger of prejudice to the opposing party, (2) the length of the delay and its potential
28 impact on the proceedings, (3) the reason for the delay, and (4) whether the movant

1 acted in good faith. 507 U.S. at 395. While *Pioneer* addressed excusable neglect for
2 enlargement of time under the FRBP in general pursuant to FRBP 9006(b)(1), *Collier on*
3 *Bankruptcy* suggests that there is no good reason why the rationale in *Pioneer* should not
4 apply to FRBP 8002(c)(2) governing time to extend time to appeal. 10 Resnick and
5 Sommer, *Collier on Bankruptcy*, ¶ 8002.10.2[2] at 8002-17, citing *Pioneer Investment*
6 *Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. at 395.

7 As attested to by debtor in his declaration in support of the motion, debtor as a
8 layperson in this adversary proceeding did not receive notice of the court's dismissal
9 order in time to file a timely notice of appeal because of the sale of his residence (2516
10 Vista Baya, Newport Beach, CA 92660-3636) and his moving to a new address, which
11 was his mother-in-law's address (38 Calle Aragon, Unit F, Laguna Woods, CA 92637).
12 According to the debtor (in the points and authorities for the motion, but not in his
13 declaration in the motion), he was in the process of moving when the court entered its
14 dismissal order on or about May 23, 2013, and that the United States Postal Service put
15 a hold on mail sent to the old address on or about May 27, 2013 with a 15-day lead time
16 before forwarding mail to a new address. Thus, according to debtor, he only received a
17 copy of the dismissal order on June 12, 2013 forwarded by USPS from the old address,
18 which did not give him sufficient time to file a timely notice of appeal, and no copy of the
19 dismissal order was directly delivered to him at the new address.

20 The notice of entered order and service list for the dismissal order indicated both
21 debtor's old and new addresses, but the certificate of notice of mailing of the dismissal
22 order issued for the court by the Bankruptcy Noticing Center filed on June 1, 2013
23 (Docket No. 40) indicates that debtor was only served at the old address and not at the
24 new address.

25 It appears that debtor may have neglected to notify the court of his new address
26 by formal notice of change of address, thinking that listing his new address on his
27 subsequent pleadings was sufficient, which is not (see FRBP 4002(a)(5)), and thus, it
28 further appears that the Bankruptcy Noticing Center only mailed a copy of the dismissal

1 order to debtor at the old address. This fact corroborates debtor's factual contentions
2 that no copy of the dismissal order was directly mailed to him at the new address, but that
3 the only copy of the dismissal order mailed to him was substantially delayed because it
4 was sent to the old address with a USPS forwarding hold.

5 Debtor said that he learned about the dismissal order when he logged onto the
6 court's tentative ruling calendar on June 11, 2013 for June 12, 2013 and saw that the
7 status conference on June 12 was vacated due to the dismissal, but did not receive an
8 actual copy of the dismissal order until it was forwarded to the new address and delivered
9 on June 12. (However, the court does not agree with debtor's contention that no
10 hearings were conducted on the merits of the motion to dismiss, which contention is not
11 supported by the record of the hearing on April 23, 2013, at which hearing the merits of
12 the motion were extensively argued, and not just on bankruptcy court jurisdiction.).

13 These circumstances show excusable neglect because the debtor did not actually
14 receive a copy of the dismissal order until the day before the time to appeal expired and
15 had insufficient time to file a timely notice of appeal (the court notes that debtor does not
16 explicitly argue that receiving an actual copy of the dismissal order the day before the
17 appeal expiration date was insufficient, but this is implicit from the motion in general).
18 These facts indicate the reason for debtor's delay in filing a notice of appeal and his
19 acting in good faith regarding filing a notice of appeal, which are two of the four *Pioneer*
20 factors. The other two *Pioneer* factors of the danger of prejudice to the opposing party
21 and the length of the delay and its potential impact on the proceedings do not negate
22 excusable neglect in this court's view. There is no prejudice to the defendant as the
23 opposing party because the delay of debtor in filing a notice of appeal is not more than a
24 few weeks, and given the debtor's vigorous opposition to the motion to dismiss,
25 defendant expected and knew or should have reasonably expected and known that
26 debtor would take an appeal of the dismissal order. For the foregoing reasons, the court
27 in considering the *Pioneer* factors finds that debtor has shown excusable neglect to
28

1 warrant granting of his motion to extend time to file a notice of appeal pursuant to FRBP
2 8002(c)(2).

3 IT IS HEREBY ORDERED that the Motion is granted.

4 IT IS FURTHER ORDERED that debtor shall have until **July 16, 2013** to file a
5 notice of appeal of the order dismissing debtor's complaint.

6 IT IS FURTHER ORDERED that the hearing scheduled for July 2, 2013 at
7 2:00 p.m. is vacated and no appearances are required.

8 IT IS SO ORDERED.

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24 Date: July 2, 2013



Robert Kwan
United States Bankruptcy Judge

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of **July 2, 2013**, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below:

Christopher L Blank clblank@pacbell.net
Alan W Forsley awf@fl-lawyers.net, awf@fklawfirm.com, addy@fl-lawyers.net, lc@fl-lawyers.net, awf@fl-lawyers.net
United States Trustee (SA) ustpregion16.sa.ecf@usdoj.gov

☐ Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Martin Pemstein
2516 Vista Baya
Newport Beach, CA 92660

Martin Pemstein
38 Calle Aragon #F
Laguna Woods, CA 92637

☐ Service information continued on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below:

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