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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

CANDIE JILL NELSON,

No. 02-12379

Debtor(s).

Memorandum on Motion to Allow Late Appeal

This Chapter 7 case was commenced by an involuntary petition filed against the debtor on October 1, 2002. On October 8, 2002, the debtor filed a voluntary Chapter 7 petition in another division of this court. She then sought dismissal of this case. The debtor's motives are transparent. In the first few days of October, 2001, she made transfers of real property. Those transfers are within the one-year avoidance period of § 547(b)(4)(B) and § 548(a)(1) of the Bankruptcy Code in the involuntary case but not the second case.

On February 6, 2003, the court issued an order denying the debtor's motion to dismiss the involuntary petition. The order further provided:

The debtor shall file and serve an answer to the involuntary petition on or before February 20, 2003. If she fails to do so, an order for relief shall be entered against her pursuant to § 303(h) of the Code.

The debtor did not file an answer by February 20, 2003. Instead, she filed a second motion to dismiss. The court entered an order for relief against her. The debtor now seeks leave to file a late notice of appeal from the order for relief.

1 The order for relief was mandated by both the Bankruptcy Code and the Federal Rules of
2 Bankruptcy Procedure. Section 303 (h) of the Code requires the court to order relief against the debtor if
3 the petition is not timely controverted. FRBP 1011(c) provides that when the debtor files a motion
4 instead of an answer, the answer is due (pursuant to FRCP 12(a)(4)(A)) 10 days after notice of the denial
5 of the motion. The debtor violated both the express terms of the court's order and the Federal Rules by
6 not filing a timely answer, and an order for relief was mandated by the Code.

7 The debtor, through attorney John Findley, sought leave to file a late appeal on grounds of his
8 excusable neglect. The court denied the motion on grounds that Findley was not the attorney of record so
9 that the issue was the debtor's neglect, not his. The debtor has renewed her motion, including her
10 declaration that she was ill during the time to file an appeal.

11 Most tellingly, the debtor's brief makes the astounding argument that the debtor is paying her
12 debts as they become due because "[t]he reason for the bankruptcy filing by Debtor is due to an inability
13 to pay past obligations, and not those currently becoming due." It is clear from is admission and the
14 games the debtor is playing that she is properly in Chapter 7 and that her only motivation in contesting the
15 order for relief is her desire to cheat her creditors out of the proceeds of avoidable transfers.

16 Nelson has not established excusable neglect for her late notice of appeal. Even if she had,
17 however, the court would not grant the motion. Merely establishing excusable neglect does not entitle
18 one to relief from a late notice of appeal. *Thompson v. E. I. DuPont de Nemours & Co., Inc.*, 76 F.3d
19 530, 532n2 (4th Cir. 1996); 2A Fed.Proc.L.Ed., Appeal, Certiorari, and Review § 3:593, p. 333. The
20 decision to grant leave to prosecute a late appeal is essentially equitable, and depends on the good faith
21 of the party seeking to appeal. *In re Schafler*, 263 B.R. 296, 301 (N.D.Cal. 2001).

22 Nelson has the worst of motivations for seeking leave to appeal. She has admitted that grounds
23 exist for an involuntary order for relief. Her only motivation is to keep the bankruptcy trustee from
24 recovering preferential, and perhaps fraudulent, transfers. This is not good faith. Her motion will
25 accordingly be denied. Counsel for the trustee shall submit an appropriate form of order.

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Dated: May 20, 2003



Alan Jaroslovsky
U.S. Bankruptcy Judge