

September 15, 2009

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

ANN MARILYN LEMBERG, a/k/a Anna
Baranovka,

Petitioner,

v.

MUTUAL OF OMAHA,

Respondent.

No. 09-503
(U.S. Bankruptcy Court No. 08-24668)
(D. Colo.)

ORDER

Before **TACHA, LUCERO**, and **TYMKOVICH**, Circuit Judges.

Ann Marilyn Lemberg has filed a petition seeking authorization to bring a direct appeal from a decision of the U.S. Bankruptcy Court for the District of Colorado to the U.S. Court of Appeals for the Tenth Circuit.

In response to the petition, the court issued a show cause order directing the parties to address whether this court has jurisdiction to consider the application. The petitioner responded with a “Memorandum in Response to Order” and the respondent, Mutual of Omaha Bank, responded with a “Memorandum Brief Re Jurisdiction.”

The procedures for seeking direct review by a circuit court from a decision of a bankruptcy court are found in 28 U.S.C. § 158(d)(2) and Bankruptcy Rules 8001 and 8002.

In order for this court to consider whether it will exercise its discretion to authorize a direct appeal from a bankruptcy court, the governing statute requires certification of the items enumerated under 28 U.S.C. § 158(d)(2)(A)(i), (ii), and (iii). Certification can be accomplished by the bankruptcy court, district court, or a bankruptcy appellate panel acting on its own or at the request of a party to the judgment, or by the parties acting jointly. 28 U.S.C. § 158(d)(2)(A); *see also* Bankruptcy Rule 8001(f). In this instance, the required statutory certification has not occurred.

The bankruptcy court expressly denied a request for certification in an order dated August 25, 2009 and there is no suggestion that a district court or bankruptcy appellate panel has issued a certification order, nor any indication the respondent has agreed to jointly certify a direct appeal. Accordingly, the statutory prerequisites to this court exercising jurisdiction have not been met.

In addition, Bankruptcy Rule 8002(a) states that a notice of appeal must be filed within ten days of the date of the entry of judgment. In this case, judgment was entered on July 22, 2009. A notice of appeal was not filed until August 21, 2009, which is well over ten days from the date of judgment. An untimely notice of appeal from a decision of a bankruptcy court is a jurisdictional defect. *In re Herwit*, 970 F.2d 709, 710 (10th Cir. 1992).

These jurisdictional impediments were brought to petitioner's attention in the court's show cause order. The only response that petitioner makes is that an employee of the bankruptcy appellate panel verbally told her that the time limit for filing a notice of

appeal was 30 days. Petitioner states she relied on this information in filing the notice of appeal after 30 days, rather than 10 days.

Without deciding but nevertheless assuming petitioner's representation is true, the court cannot know what question was posed to which the employee responded that a notice of appeal was due within 30 days. That answer would be generally correct if the employee understood the question to relate to appeals from bankruptcy appellate panel decisions. But regardless of the question posed or any misunderstanding arising therefrom, the court is unaware of any case holding that a jurisdictional deadline established by rule or statute can be changed by a verbal statement from a court employee. Further, while we liberally construe pro se pleadings, persons proceeding without counsel must nevertheless comply with the fundamental requirements of court rules and statutes. Ogden v. San Juan County, 32 F.3d 452, 455 (10th Cir. 1994).

For the foregoing reasons, the petition seeking authorization to bring a direct appeal to this court from the U.S. Bankruptcy Court for the District of Colorado is dismissed.

Entered for the Court
ELISABETH A. SHUMAKER
Clerk of Court



by:
Douglas E. Cressler
Chief Deputy Clerk