

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In re:

Jerry Clark Vincent,  
a/k/a J.C. Vincent Distributing,

Debtor.

BKY 96-46368

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Dwight R.J. Lindquist, Trustee,

ADV 97-4181

Plaintiff,

v. ORDER DENYING EXTENSION OF  
TIME TO FILE NOTICE OF APPEAL

City Meat Market of St. Paul,  
Inc.,

Defendant.

At Minneapolis, Minnesota, April 9, 1998.

This adversary proceeding came on for hearing on the motion of the defendant pursuant to Fed. R. Bankr. P. 8002(c) to extend the time for filing a notice of appeal. Mark D. Luther appeared for the defendant and Randall L. Seaver appeared for the plaintiff.

The defendant's notice of appeal was filed one day late. This motion was filed twenty days after the expiration of the time for filing a notice of appeal and therefore may be granted only upon a showing of excusable neglect. The Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993) established a more flexible four-part test for determining excusable neglect. While the Supreme Court was interpreting the phrase "excusable neglect" in Fed. R. Bankr. P. 9006, the analysis applies equally here. In *Pioneer*, the Supreme Court listed a nonexclusive list of four factors that could be considered, including: (1) the danger of prejudice to the debtor (here, the plaintiff); (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith.

While the first, second, and fourth factor do not weigh against the defendant, the third, as interpreted by the Eighth Circuit since *Pioneer*, compels me to deny the motion. Clearly, the late filing was within the defendant's control. The defendant claimed at oral argument that the notice

of appeal was mailed on a Friday, assuming that it would arrive at the bankruptcy court the following Monday, which was the tenth and last day for timely filing a notice of appeal.(1) The defendant's attorney also conceded at oral argument that the envelope in which he claims to have mailed the notice of appeal had the wrong zip code for the clerk's office. Neither the defendant nor its attorney checked with the clerk's office the following Monday to see whether or not the notice of appeal arrived as anticipated.

In *Fink v. Union Central Life Insurance Co.*, 65 F.3d 722 (8th Cir. 1995), a post-Pioneer case, the Eighth Circuit recognized the change in excusable neglect law, but at the same time, reaffirmed "some factors with respect to mailing that remain relevant in an excusable neglect analysis." That discussion was found in its earlier opinion in *Vogelsang v. Patterson Dental Co.*, 904 F.2d 427 (8th Cir. 1990), where it quoted the Supreme Court in discussing the filing of notices of appeal by mail, saying that if appellants "choose to use the mail, they can at least place the notice directly into the hands of the United States Postal Service (or a private express carrier); and they can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it." Quoting from the Supreme Court opinion in *Houston v. Lack*, 487 U.S. 266, 272 (1988) (emphasis in 8th Circuit opinion not the original).

I glean from this language and its reaffirmance by the Eighth Circuit after Pioneer, that an appellant (other than a pro se appellant) who entrusts a notice of appeal to the mail and does not follow up by checking for its timely arrival, is guilty of neglect, but the neglect is not excusable. The defendant here should have checked with the clerk on the tenth day and if it had done so, it would have discovered that no notice of appeal had been filed and could have prepared and personally filed one on time. Therefore, I find that the defendant's failure to file a timely notice of appeal was not the result of excusable neglect.

THEREFORE, IT IS ORDERED: The motion of the defendant to extend the time for it to file a notice of appeal is denied.

ROBERT J. KRESSEL  
UNITED STATES BANKRUPTCY JUDGE

(1). The record does not indicate an actual mailing,

but only a claim by the defendant that its attorney had purchased postage at the Hopkins branch post office late Friday afternoon. Nothing in the record indicates what the last time for pickup of mail on that Friday evening was or whether or not mail was picked up on Saturday or Sunday. If the notice of appeal was in fact mailed late Friday afternoon, it is entirely possible that it sat in a mailbox until Monday morning.