

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: LEONARD PELULLO, DEBTOR

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND, et al.
Plaintiffs

v.

PELULLO
Defendant/Third Party Plaintiff

v.

ENVIROSOURCE, INC., F/K/N
IU INTERNATIONAL, INC.
Third Party Defendant

CIVIL ACTION
98-6177

Bankruptcy 95-22430
Adversary 96-2188

M E M O R A N D U M

Broderick, J.

March 22, 1999

Presently before the Court is a request on the part of the Appellant for additional time in which to file his initial brief in the above-captioned appeal. This is the third such request by the Appellant since filing his notice of appeal on October 29, 1998. The Appellee has filed a memorandum of law objecting to this request, and has moved the Court to dismiss the appeal.

For the reasons stated below, this Court will deny the Appellant's request for a third extension of time in which to file his initial brief on appeal. Furthermore, this Court will dismiss this appeal for failure to prosecute under Bankruptcy Rule 8009.

In November 1995, Leonard Pelullo ("Pelullo") filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Pennsylvania. On July 2, 1996, Central States, Southeast and Southwest Areas Health and Welfare Fund, et al. ("Central States") brought an adversary proceeding (the "Adversary Proceeding") against Pelullo in the Bankruptcy Court, objecting to the discharge of Pelullo's debt, and alleging that Pelullo's debt to Central States, which was alleged to be \$45,906,929.64, is not dischargeable. On October 15, 1996, Pelullo filed a third-party complaint against Envirosource, Inc., f/k/a I.U. International, Inc. ("Envirosource"). The third-party complaint alleged that Envirosource was in fact responsible for the liability which Central States claimed against Pelullo.

Envirosource filed a motion to dismiss Pelullo's third-party complaint on March 6, 1997. Pelullo received one extension of time in which to respond to the motion to dismiss until July 25, 1997, but before that deadline had passed, his bankruptcy was converted to a Chapter 7 proceeding. David A. Eisenberg, Esquire, was appointed as trustee for Pelullo's bankruptcy estate (the "Trustee"), and he was substituted as the third-party plaintiff in the Adversary Proceeding. See 11 U.S.C. § 323 (trustee is representative of estate and has capacity to sue and be sued.) The Trustee received an extension of time in which to

respond to Envirosource's motion to dismiss until October 10, 1997, but the Trustee failed to respond to the motion by that time. Nineteen days later, on October 29, 1997, the Trustee filed a Notice of Abandonment of the Third Party Complaint, but then subsequently withdrew the Notice and proceeded with the third-party action, having retained the law firm of Calo Agostino as special litigation counsel. Calo Agostino thereafter represented the Trustee in the Adversary Proceeding in the Bankruptcy Court.

On December 4, 1997, the Trustee asked for additional time to respond to Envirosource's motion to dismiss, which was granted, and the new deadline was set for January 15, 1998. The Trustee also missed this deadline, and finally filed and served a brief in opposition to the motion to dismiss on February 9, 1998. Envirosource promptly filed a reply, and the Trustee was permitted a surreply. On August 30, 1998, oral argument was heard, and the Bankruptcy Court granted the motion to dismiss, adopting all of Envirosource's arguments and dismissing the third-party complaint with prejudice.

On October 29, 1998, the Trustee filed a notice of appeal with this Court, and on November 24, 1998, the Clerk of the Court issued a briefing schedule in this appeal. On December 7, 1998, at the request of the Trustee and with the consent of Envirosource, this Court extended the briefing schedule to allow the Trustee to file his initial brief on appeal on or before

December 30, 1998.

On December 28, 1998, two days before the extended deadline, this Court received a motion from the law firm of Calo Agostino, requesting to be released as counsel in this appeal. On January 13, 1999, Allen B. Dubroff, newly of the law firm of Frank & Rosen, filed a Substitution of Counsel in which he agreed to substitute as counsel of record for the Trustee in this matter. On January 21, 1999, Envirosource filed a motion to dismiss the Trustee's appeal for failure to file an appellate brief. However, before the Court received that motion, it issued an order dated January 21, 1999, granting the motion of Calo Agostino to withdraw as counsel for the Trustee and substituting Allen B. Dubroff as the counsel for the Trustee. The January 21, 1999 order also set out yet another briefing schedule, whereby the Trustee was required to file his initial brief on or before Monday, February 22, 1999.

On February 18, 1999, two business days before his initial brief on appeal was due, the Trustee filed a motion requesting another thirty days in which to file his initial brief. Because no courtesy copy of the Trustee's motion was provided to the Court, the Court did not receive the Trustee's motion from the Clerk's Office until after the deadline had passed.

Bankruptcy Rule 8009(a) requires:

Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:

(1) The appellant shall serve and file a brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007.

As heretofore discussed, this Court has twice specified different time limits for the filing of the Appellant's brief. The Trustee now requests yet a third extension of time, on the grounds that 1) Mr. Dubroff was "out of the country" and not due back until the deadline of Monday, February 22, 1999; and 2) Mr. Dubroff had only recently entered an appearance in this case and needed more time to receive the pleadings from the Trustee's former attorneys, and to review the file.

In response to these claims, Lynn A. Collins, attorney for Envirosource, has filed an affidavit, the contents of which are not contested. In her affidavit, Ms. Collins asserts that she was informed by Mr. Dubroff's secretary that Mr. Dubroff was out of the country on vacation during the time immediately preceding the February 22, 1999 deadline. Furthermore, she asserts, and the record below confirms, that Mr. Dubroff is already quite familiar with this case. Indeed, Mr. Dubroff was the attorney who signed the third-party complaint on behalf of the Debtor and who filed it with the bankruptcy court. Furthermore, Ms. Collins asserts that since March of 1998, she has personally served Mr. Dubroff with all pleadings in the third-party action which is the subject of this appeal. Finally, the docket sheet in the bankruptcy proceeding indicates that Mr. Dubroff has been served

with copies of all court orders in this third-party proceeding and has represented the Pelullo, the debtor in this bankruptcy, since at least as early as 1996.

Neither a personal vacation of the Trustee's attorney, nor his less than candid suggestion that he is unfamiliar with this case, provide grounds for a third extension of time in which to file the Trustee's initial brief on appeal. See Lawless v. Central Production Credit Association, 81 B.R. 475, 476 (S.D.Ill.1987). Therefore, the Trustee's request for an additional extension of time will be denied.

The Third Circuit has held that dismissal of a bankruptcy appeal for failure to prosecute under Rule 8009 is in the discretion of the district court, requiring only that the district court consider less severe sanctions. Jewelcor Inc. v. Asia Commercial Co., Ltd., 11 F.3d 394, 397 (3rd Cir. 1993). Because the Court has refused to grant the Trustee's request for an extension, and the Trustee did not file a brief by February 22, 1999, the Trustee's brief is now overdue in violation of Rule 8009.

As a consequence of the Trustee's failure to timely file his initial brief on appeal, this Court has concluded that no adequate sanction exists other than dismissal. The Trustee has repeatedly failed, here and below, to meet filing deadlines. In addition, the Trustee has already been granted two extensions of

time in which to file his initial brief on appeal. Moreover, the Trustee's latest request for additional time was less than candid, and came on the eve of the deadline it sought to extend. The apparently endless delays sought by the Trustee have prejudiced the Defendants in this case, who must continue to litigate a successful motion to dismiss which they filed over two years ago. Clearly, under these circumstances, there is no meaningful sanction other than dismissal of the Trustee's appeal.

For the reasons stated above, the Trustee's third request (two previous requests having been granted) for additional time in which to file his initial brief on appeal will be denied, and the Trustee's appeal will be dismissed for failure to prosecute pursuant to Bankruptcy Rule 8009.

An appropriate Order follows.

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| Third Party Defendant | | |

O R D E R

AND NOW, this 22nd day of March, 1999; for the reasons stated in the Court's accompanying Memorandum of this date;

IT IS ORDERED: The Trustee's request for additional time in

which to file his opening brief on appeal is **DENIED**;

IT IS FURTHER ORDERED: The Trustee's appeal in the above-captioned case is **DISMISSED** for failure to prosecute pursuant to Bankruptcy Rule 8009.

RAYMOND J. BRODERICK, J.