

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF FLORIDA

In Re

JUAN F. EVANS

Case No. 04-31769

Debtor

JUAN F. EVANS

Plaintiff

vs.

Adv. No. 05-03017

CODILIS & STAWIARSKI, P.A.,  
WELLS FARGO BANK MINNESOTA, N.A.  
as trustee for Option One Mortgage Corporation,  
and OPTION ONE MORTGAGE CORPORATION

Defendants

**ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT  
AND GRANTING PLAINTIFF'S MOTION FOR EXTENSION OF TIME**

Juan F. Evans, pro se, Plaintiff, Mary Esther, Florida  
Joseph J. Circelli, Codilis & Stawiarski, P.A., Attorney for Defendants, Tampa, Florida

This case is before the court on the motions of the plaintiff, Juan Evans, for relief from judgment and for extension of time. This court has jurisdiction to hear these motions pursuant to 28 U.S.C. § § 157 and 1334 and the Order of Reference of the District Court. These matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2) and the court has authority to enter a final order. For the reasons indicated below, the court is denying the motion for relief from judgment and is granting the motion for extension of time.

## FACTS

On December 21, 2005, this Court entered an order denying the plaintiff's motion for summary judgment.<sup>1</sup> Following the Court's denial of summary judgment, Evans filed a notice of appeal on December 27, 2005.<sup>2</sup> On December 28, 2005, this Court entered (and served) a Notice of Filing Notice of Appeal and notified Evans that he must file certain items with the court within 10 days of December 27, 2005. On January 3, 2006, Evans filed a motion for relief from judgment with the U.S. District Court for the Northern District of Florida. On January 4, 2006, that motion for relief from judgment was filed with this Court. Then on January 9, 2006, Evans filed a motion for extension of time. The extension motion essentially requests that the time Evans has to file the necessary appeal documents be tolled while his motion for relief from judgment is pending. The motion for relief from judgment alleges that the Court's December 21, 2005 order denying summary judgment is void.

## LAW

Both motions pending before the Court were filed by Evans after he filed a notice of appeal of the Court's December 21, 2005 order. In most instances when a notice of appeal is filed, the trial court is divested of jurisdiction and jurisdiction is conferred upon the appellate court. *See Griggs v. Provident Consumer Co.*, 459 U.S. 56, 58 (1982). But Federal Rule of Bankruptcy Procedure 8002(b) makes some exceptions to the general rule. Rule 8002(b) states,

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<sup>1</sup>That denial order laid out the factual background of this case and thus the Court will not recite those facts again, but incorporates those facts by reference in this order.

<sup>2</sup> The denial of a motion for summary judgment is typically not appealed because an order denying summary judgment is not a judgment, and does not foreclose trial on the issue on which summary judgment was sought.

in pertinent part:

If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion:

....

(4) for relief under Rule 9024 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. . . .

Fed.R.Bankr.P. 8002(b). The advisory committee notes to Rule 8002(b) make it clear that the notice of appeal is suspended until the postjudgment motion is disposed of, even if the notice of appeal is filed before the postjudgment motion. *See* Fed.R.Bankr.P. 8002(b) advisory committee notes; *see also Burt v. Ware*, 14 F.3d 256, 258 (5th Cir. 1994) (When a postjudgment motion listed in Rule 8002(b) is filed after the notice of appeal has been filed, the appellate court is divested of jurisdiction and the previously filed notice of appeal is “dormant” until the postjudgment motion is adjudicated.). Additionally, since the motion for relief from order filed by Evans is one of the motions listed in Rule 8002(b), the Bankruptcy Court retains jurisdiction over the motion if it was timely filed. Fed.R.Bankr.P. 8002(b).

Under Rule 8002(b), a motion for relief from order under Rule 9024 suspends a notice of appeal, if the motion for relief was filed within 10 days of the entry of the order. Fed.R.Bankr.P. 8002(b). The manner of computing this period of time is set forth in Rule 9006. Fed.R.Bankr.P. 9006. Under Rule 9006, the day of the act from which the time period begins shall not be included in the computation, but the last day of the time period is included, unless the last day

falls on Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is not one of the aforementioned days. *Id.* In this case, the time period for timely filing the motion for relief began on December 21, 2005, the day this Court entered its order denying summary judgment. Per Rule 9006, that day begins the time period, so it is not included in the computation. *Id.* Thus the first day counted is December 22, 2005. Beginning on December 22<sup>nd</sup> and counting forward, the tenth day fell on December 31, 2005, which was a Saturday, so the time period could not end on that date. *See id.* So the period ran until the end of the next day which was not a Saturday, Sunday, or legal holiday. *Id.* Because the following day was Sunday January 1, 2006, and the next day, January 2, 2006, was a federal holiday in observance of New Year's, the applicable time period ran until the end of the day of January 3, 2006. *Id.* On January 3, 2006, Evans filed his motion for relief from judgment, which was within the applicable time. However, Evans filed the motion in the U.S. District Court for the Northern District of Florida, because he believed that was the proper place because of his previously filed notice of appeal to the District Court. Thereafter, either the District Court refiled the motion in the Bankruptcy Court or instructed Evans to do so. Nevertheless, the motion for relief was actually filed with the Bankruptcy Court on January 4, 2006, one day after the time period had run. *See id.* However, because Evans is pro se and because he filed the motion in good faith at the District Court within the applicable time frame, this Court will deem the motion for relief to have been timely filed under Rule 8002(b).<sup>3</sup> Therefore, because the motion was

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<sup>3</sup> Rule 8002(a) gives support to this conclusion by how it deals with a notice of appeal mistakenly filed in the district court instead of the bankruptcy court. Rule 8002(a) states that if a notice of appeal is mistakenly filed with the district court, the clerk of the district court shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk of on the date so noted. Given the similar situation here, where Evans mistakenly

timely filed under Rule 8002, the motion suspends the notice of appeal until this motion has been resolved. Fed.R.Bankr.P. 8002(b). Because the motion for relief from order suspended the notice of appeal until the motion is resolved, the time period for Evans to comply with the Court's December 28, 2005 order is also suspended. Therefore, Evans motion for extension of time was not necessary, but for clarity of record, the Court will grant the motion for extension.

As for the merits of the motion for relief from judgment, the Court is not persuaded by Evans' motion. The motion asserts that the Court's December 21, 2005 order "is void as a matter of law because [the] court lacks jurisdiction to violate state and federal law as well as the Rules promulgated by the U.S. Supreme Court, and the court did the same when it denied plaintiff's motion for summary [judgment]." This assertion is incorrect. The Court's order denying Evans summary judgment is valid. For all the reasons indicated in the Court's December 21, 2005 order, Evans' motion for summary judgment was properly denied. Therefore, the motion of the plaintiff for relief from the order will be denied.

The motion for relief is now fully adjudicated. Accordingly, the previously filed notice of appeal, which had been suspended pending resolution of the motion, has ripened into an effective appeal and effectively places jurisdiction of the appeal with the U.S. District Court for the Northern District of Florida. *See* Fed.R.Bankr.P. 8002(b). The District Court will now handle the appeal as it sees fit.

THEREFORE IT IS ORDERED:

1. The plaintiff's motion for extension of time is GRANTED.

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filed his motion for relief from order with the district court, the court will apply the same reasoning and deem the motion filed on January 3, 2006.

2. Plaintiff has 10 days from the date of this order to file the necessary items listed in the Court's December 28, 2005 order.
3. The plaintiff's motion for relief from judgment or order is DENIED.
4. The U.S. District Court for the Northern District of Florida now has jurisdiction of the plaintiff's notice of appeal and will rule on the appeal as it deems appropriate.

Dated: January 27, 2006

  
MARGARET A. MAHONEY  
U.S. BANKRUPTCY JUDGE