UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In re: GREATER HARTFORD ARCHITECTURE CONSERVANCY, INC. Debtor	[Bankruptcy File No. 00-21425]
MARC J. GLASS Appellant	**CIVIL ACTION NO. 3:04cv97(GLG)**
v.	
GREATER HARTFORD ARCHITECTURE CONSERVANCY, INC., *et al.* Appellees	MAY 26, 2004

APPELLEES' MEMORANDUM IN REPLY TO APPELLANT'S OPPOSITION TO MOTION TO DISMISS

The appellees Nevets, Inc. and Steven C. Brigham ("Appellees") hereby submit, pursuant to Local Rule 7(d), this memorandum in reply to the opposition filed by Appellant Marc J. Glass ("Appellant") to Appellee's motion to dismiss this case.

Summary

On April 27, 2004, Appellees moved to dismiss this bankruptcy appeal for lack of subject matter jurisdiction. In their motion, Appellees asserted that dismissal is mandated because Appellant's notice of appeal was filed outside the time limit prescribed by the Federal Rules of Bankruptcy Procedure. Consistently, that time limit has been held to be both

mandatory and jurisdictional. Accordingly, absent a timely filed notice of appeal a reviewing court is without power to entertain the appeal.

On or about May 19, 2004, Appellant filed his opposition to the motion to dismiss. Essentially, Appellant advanced three arguments as to why the case should not be dismissed. None of Appellant's arguments can save his appeal.

First, Appellant contends (at ¶¶ 1-3 of his opposition papers) that one of the Appellees, Dr. Brigham, lacks standing. Apart from the fact that *the Appellant* actually listed Dr. Brigham as a party to the appeal in his notice of appeal, Appellant does not contest the appellate standing of Nevets, Inc. (the actual buyer of the property at the 11 U.S.C. § 363 sale challenged in this appeal, and a party to the instant motion to dismiss). Nevets' unchallenged standing is sufficient for purposes of Appellee's motion to dismiss.

Second, Appellant engages in 'creative math' in an (ultimately unsuccessful) effort to minimize the lateness of his filing. Appellant acknowledges (at ¶¶ 4-6) that the order appealed from was entered on the Bankruptcy Court docket on Thursday, December 18, 2003, and that no notice of appeal was filed until Thursday, January 8, 2004, some twenty-one (21) days later and well outside the mandate of Bankruptcy Rule 8002(a). Appellant then proposes (at ¶¶ 7-12) a re-computation. Notwithstanding Rule 8002(a)'s clear statement that *entry* of an order is what commences the running of the appellate clock and Rule 9022(a)'s admonition that lack of notice of entry does not affect the time to appeal, Appellant ventures that the time to file a notice of appeal should only begin to run when the clerk's office sends out notice of an order. (Then, despite the fact that the applicable certificates of service filed by the clerk in this case reflect a December 20, 2003 mailing date (see Exhibit A hereto), Appellant takes the liberty

for no apparent reason of advancing that mailing date to December 22, 2003.) Appellant presses into service Bankruptcy Rule 9006(f) --which by its terms applies only to time limits that are measured from the *service* of a paper, not time limits calculated with reference to the *entry* of an order– to add yet another three days (for mail service) to Rule 8002(a)'s 10 day period for filing of the notice of appeal. Appellant's alternative time computation lacks both legal and factual support. But what is even more astonishing is that even if one were to apply Appellant's method here, the absolute latest date the notice of appeal could have been timely filed was Monday, January 5, 2004 (*i.e.*, December 22, 2003, plus ten days (to January 1, 2004), plus three days (to January 4, 2004, a Sunday)). Appellant's second argument is entirely unavailing; indeed, it is frivolous.

Finally, Appellant avers (at ¶¶ 14-26) that the untimeliness of his appeal ought to be excused. However, this case involves an appeal of an order authorizing the sale of property under 11 U.S.C. § 363. For strong policy reasons, Bankruptcy Rule 8002(c)(1)(B) was amended to expressly disable a court from extending the time to appeal a § 363 order beyond the original 10 day period; thus Appellant's plea for relief from the rule is of no utility here. And beyond the express prohibition against extending the time to appeal sale orders, Rule 8002(c)(2) in general restricts extensions of the time to appeal to circumstances not applicable here: the ten day period to file a timely appeal may only be extended by the granting of a motion for enlargement filed either (i) within the initial 10 day period, or (ii) within the 20 days after expiration of the initial 10 day period, upon a showing of excusable neglect. Here Glass did not seek -- within the time period specified by Rule 8002 or at any time thereafter -- any enlargement of the time to file his appeal, nor has he even tried to make the required

evidentiary showing of "excusable neglect." Absent a timely motion for enlargement as contemplated by Rule 8002, a court cannot even entertain considerations of "excusable neglect" in the context of a late-filed notice of appeal. Finally, even if "excusable neglect" or other equities were a permissible consideration, the circumstances of this case simply would not support relief.

In sum, this Court simply has no jurisdiction to entertain this appeal. The case must be dismissed.

Argument

I. Glass's Standing Claim is Immaterial to the Motion to Dismiss [Appellant's Opposition, pp. 1-2]

In his late-filed notice of appeal, Appellant listed several parties in interest, including both Steven C. Brigham and Nevets, Inc. Consequently, the suggestion in Appellant's opposition papers that Brigham lacks standing to seek dismissal of the appeal is, at a minimum, peculiar. Nonetheless, it is beyond question that Nevets, Inc. (the party who actually purchased the property at the § 363 sale which is the subject of this appeal) has a concrete stake in the outcome of the appeal and may permissibly seek its dismissal; Appellant concedes as much. It is therefore immaterial to this Court's consideration of Nevets' motion to dismiss whether Brigham may properly join in that motion. The matter must be decided in all events.

II. Glass' Notice of Appeal was Untimely even under Glass' Erroneous Methodology [Appellant's Opposition, pp. 2-3]

In his opposition papers, Glass observes that notice of the Bankruptcy Court order entered on December 18, 2003 was not served until December 22,[1] and that the notice was served by mail. However, these considerations are not legally germane to determining whether or not the appeal was timely filed. Moreover, even if they were somehow pertinent to computing the deadline to file the notice of appeal, Appellant's notice would still be untimely.

Rule 8002 provides, in relevant part, that "... the notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." Rule 8002(a), Fed. R. Bankr. P. Thus the time for filing an appeal is explicitly linked to entry of an order, and not to any notice thereof. If there were any doubt on that point Bankruptcy Rule 9022(a), which provides for service of a notice of the entry of an order by a bankruptcy judge, dispels it. That rule states expressly that "lack of notice of the entry does not affect the time to appeal or relieve or authorize a court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002." Rule 9022(a), Fed. R. Bankr. P; *Matter of Mullis*, 79 B.R. 26 (D. Nev. 1987)(lack of notice of entry of order immaterial; parties have duty to monitor dockets to inform themselves of entry of orders they may wish to appeal.)

Further contrary to Appellant's assertions, the time to file a notice of appeal specified by Rule 8002(a) is not subject to enlargement by Rule 9006(f), which provides for an additional three days "when there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or

[1] Actually, the clerk's office certified that notices of the order and judgment were served out on December 20, 2003. See Exhibit A. Appellant is simply mistaken about the December 22 service date. As we shall see, that fact turns out to be immaterial.

paper." Rule 9006(f), Fed. R. Bankr. P. "Since the appeal time starts on the entry of the judgment not the service of the notice, the time for appeal is not enlarged by any service by mail." 9 *Collier on Bankruptcy* ¶9006.10 (1982); *Matter of Arbuckle*, 988 F.2d 29, 31-32 (5th Cir. 1993)(holding that entry of order – not notice thereof-- is only relevant event for commencing time to file bankruptcy appeal, and that notice of appeal mailed nine days after entry of order but received by Bankruptcy Court eleven days after entry of order was untimely). Rule 9006(f) therefore cannot extend the appeal period prescribed in Rule 8002(a). *Matter of Arbuckle*, 988 F.2d at 32.

What makes Appellant's argument patently frivolous, however, is the fact that even if one were to employ his 'creative" method to the facts of this case, his notice of appeal would still be untimely. Under Appellant's computation scheme, the absolute latest date his notice of appeal could have been timely filed was Monday, January 5, 2004 -- *i.e.*, December 22, 2003, plus ten days (to January 1, 2004), plus three days (to January 4, 2004, a Sunday, thereby rolling over to Monday the 5th. The notice of appeal was not filed until January 8. Thus even by Appellant's tortured and erroneous measure, it was untimely.

III. Glass' Excuses Provide no Basis for Relief Here. [Appellant's Opposition, pp. 3-6]

Appellant contends that he should be afforded to relief on account of "excusable neglect" and/or other equities. In support, however, all he offers is (i) an intimation that the mails may have been slow during the Christmas/ New Year's holiday season; (ii) admissions that Appellant's counsel failed to check his office mail, failed to check the (readily available) Court docket, failed to check the applicable rules, affirmatively chose not to file a motion to

extend the time to file an appeal, and that counsel purported to speak, at some unspecified time (and quite possibly after the notice was already untimely), with an unspecified court clerk who thought the notice of appeal might not be due until January 8, 2004, and (iii) conclusory statements to the effect that Appellant's neglect was not harmful. Appellant would not be entitled to relief, either as a matter of the law or under these facts.

First and foremost, Appellant fails utterly to deal with the Bankruptcy Rule 8002(c) which provides, in relevant part, that:

> *Extension of time for appeal.*
> *(1) The bankruptcy judge may expand the time for filing the notice of appeal by any party, unless the judgment, order, or decree appealed from:*
>
> *... (B) authorizes the sale or lease of property or the use of cash collateral under section 363...*
>
> *(2) A request to extend time for filing a notice of appeal must be made by written motion filed before the time for filing the notice of appeal has expired, except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect...*

Rule 8002(c), Fed. R. Bankr. P. (emphasis supplied). This case involves an appeal of an order disposing of a bankrupt debtor's property under § 363 of the Bankruptcy Code. As such, it is one of several specific orders that a bankruptcy judge is expressly *disabled* from expanding the time to appeal. See, Rule 8002(c)(1)(B), above (reflecting strong bankruptcy policy in favor of finality of bankruptcy sales).[2] The 10 day deadline to appeal property sales was very much intended as a hard deadline.

[2] The 1997 amendment to subdivision (c) of Rule 8002 prohibits an extension of time to appeal under certain circumstances, including authorizations to sell property pursuant to Section 3683 of the Bankruptcy Code. As stated in the Advisory Committee Note accompanying the amendment, these "orders are often relied upon immediately after they are entered and should not be reviewable on appeal after the expiration of the original

Beyond that, Appellant's reliance on "excusable neglect" cases involving Rule 9006 in the context of late-filed proofs of claim is misplaced in the context of Rule 8002. "Excusable neglect" is a much narrower concept in the context of Rule 8002. In that regard, *In re Bushnell*, 273 B.R. 359, 363 (Bankr. D. Vt. 2001) is particularly instructive. In *Bushnell*, the putative appellant filed his notice of appeal three days outside the ten-day period mandated under Rule 8002 (a). As here, the appellant filed no motion to enlarge the time to file his appeal, either during the initial 10 day period or during the 20 days thereafter. In the context of the September 11, 2001 terrorist attacks, the *Bushnell* appellant sought relief from the mandates of Rule 8002 under theories of excusable neglect, equitable policy considerations, and *force majeure*. The court rejected all three theories, observing that "...it is well settled that a party's failure to file a motion for extension of time within 20 days after the expiration of the time for filing a notice of appeal as provided by Rule 8002(c)(2) is likewise fatal and precludes any consideration of purported excusable neglect." 273 B.R. at 363 (citations omitted). The court also observed that "a notice of appeal filed within thirty days of an appealable order may not be deemed to be a motion for extension of time in order to avoid the strictures of Rule 8002(c)," 273 B.R. at 363, and, further, that "a delay in receiving a notice of entry is not basis for relief from untimely notice of appeal." 273 B.R. at 365. Finally, *Bushnell* reiterated the sound maxim that bankruptcy courts do not have a "roving commission to do equity" and may not therefore modify or re-write the requirements of a clear rule. 273 B.R. at 366.

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appeal period." Prior to the amendment, the subdivision permitted an extension of time to appeal these sorts of orders if the motion to extend was filed within the ten (10) day period, but not if the motion was made after the period had expired, on the basis of excusable neglect. 10 Collier on Bankruptcy, ¶8002.09[2].

And even if this Court were tempted – wrongly, we submit -- to consider "the equities," Appellant could not prevail here. First, Appellant has failed to make an evidentiary showing of his entitlement for relief. *In re Ceresota Mill Limited Partnership*, 211 B.R. 315 (8th Cir. BAP 1997)(evidentiary showing before Bankruptcy Court is required). And Appellant's conclusory statements do not describe the types of situations that could constitute neglect that it remotely 'excusable." It has been held that excusable neglect does not include a mistake of law. *In re Casey*, 198 B.R. 918, 925, 927 (Bankr. S.D. Cal. 1996) ("failure to properly interpret rule is a mistake of law that is not grounds for excusable neglect"; plaintiffs are accountable for the acts of their attorneys). Excusable neglect does not include financial pressures on an attorney in the relocation of his office. *In re Harlow Fay, Inc.*, 993 F.2d 1351 (8th Cir.), *cert. denied*, 510 U.S. 825 (1993). An attorney's crowded calendar will not suffice. *In re Boggs*, 246 B.R. 265, 268 (6th Cir. B.A.P. 2000); *In re Springfield Contracting Corp.*, 156 B.R. 761 (Bankr. E.D. Va. 1993). Disruptions due to the Christmas holiday have also been held not to constitute excusable neglect. *In re Pyramid Energy, Ltd.*, 165 B.R. 249 (Bankr. S.D. Ill. 1994).

In this case, the law overwhelmingly disfavors Appellant. [3] Subject matter jurisdiction is lacking here because Appellant has demonstrably failed to satisfy the mandatory

[3] Further, there is absolutely no reason to be sympathetic to this Appellant. The failure to timely file a notice of appeal, or even to seek an enlargement of time to do so, is attributable to the shortcomings of him and his agents and to no one else. Moreover, he has (and at least until now with impunity) put the Greater Hartford Architecture Conservancy bankruptcy estate and these Appellees through a seemingly endless nightmare of motions, hearings, adversary proceedings, contests, reconsideration motions, and now appeals, frequently playing fast and loose with the rules and (as in this case) and all the while tying up property and forcing his adversaries to waste resources. If this appeal somehow survives the instant motion to dismiss, Appellees have every confidence that they will prevail, among other things, on their standing, statutory mootness, and § 363 arguments. But the point is that they should not have to under these circumstances. Enough is enough!

jurisdictional prerequisite of a timely filed notice of appeal. This Court must therefore dismiss the case.

Conclusion

For all the foregoing reasons, Appellees' Motion to Dismiss for Lack of Jurisdiction must be granted.

NEVETS, INC. and
STEVEN C. BRIGHAM

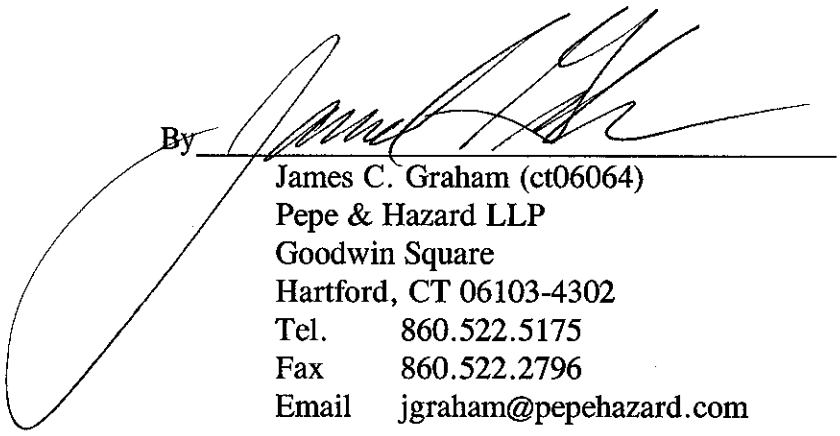
By 

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Exhibit A

BAE SYSTEMS

Enterprise Systems Incorporated
11487 Sunset Hills Road
Reston, Virginia 20190-5234

CERTIFICATE OF SERVICE

District/off: 0205-2 User: bleible Page 1 of 1 Date Rcvd: Dec 18, 2003
Case: 00-21425 Form ID: pdfdoc2 Total Served: 6

The following entities were served by first class mail on Dec 20, 2003.

aty +Alan S. Dambrov, Glass Lebovitz Kasheta & Bren, LLC, P.O. Box 129, 2049 Silas Deane Highway, Rocky Hill, CT 06067-2332
aty Anthony S. Novak, Chorches & Novak, 1260 Silas Deane Highway, Wethersfield, CT 06109
aty James C. Graham, Pepe & Hazard, 225 Asylum Street, Goodwin Square, Hartford, CT 06103
tr John J. O'Neil, 255 Main Street, Hartford, CT 06106
ust U. S. Trustee, One Century Tower, 265 Church Street, Suite 1103, New Haven, CT 06510
ust U. S. Trustee, Office of the U.S. Trustee, One Century Tower, Suite 1103, 265 Church Street, New Haven, CT 06510

The following entities were served by electronic transmission.
NONE. TOTAL: 0

***** BYPASSED RECIPIENTS *****
NONE. TOTAL: 0

Addresses marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP.
USPS regulations require that automation-compatible mail display the correct ZIP.

I, Joseph Speetjens, declare under the penalty of perjury that I have served the attached document on the above listed entities in the manner shown, and prepared the Certificate of Service and that it is true and correct to the best of my information and belief.

First Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Dec 20, 2003 **Signature:** Joseph Speetjens

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:

GREATER HARTFORD ARCHITECTURE CONSERVANCY, INC.	**Chapter 7**
Debtor	**Case No. 00-21425**

JUDGMENT

This action came on for hearing before the Court, Honorable Robert L. Krechevsky, United States Bankruptcy Judge, presiding, and the issues having been duly heard and a ruling having been duly rendered, it is

ORDERED AND ADJUDGED that the motion of Marc J. Glass, entitled "Motion for Reconsideration and to Revoke the Court's Approval of Trustee's Motion to Sell the Real Estate Located at 140 Retreat Avenue," be, and it hereby is, denied.

Dated at Hartford, Connecticut this 18 day of December, 2003.

ROBERT L. KRECHEVSKY
UNITED STATES BANKRUPTCY JUDGE

BAE SYSTEMS
Enterprise Systems Incorporated
11487 Sunset Hills Road
Reston, Virginia 20190-5234

CERTIFICATE OF SERVICE

District/off: 0205-2 User: bleible Page 1 of 1 Date Rcvd: Dec 18, 2003
Case: 00-21425 Form ID: pdfdoc2 Total Served: 3

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ust U. S. Trustee, One Century Tower, 265 Church Street, Suite 1103, New Haven, CT 06510
ust U. S. Trustee, Office of the U.S. Trustee, One Century Tower, Suite 1103, 265 Church Street, New Haven, CT 06510

The following entities were served by electronic transmission.
NONE. TOTAL: 0

***** BYPASSED RECIPIENTS *****
NONE. TOTAL: 0

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Date: Dec 20, 2003 **Signature:** Joseph Speetjens

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:

GREATER HARTFORD ARCHITECTURE CONSERVANCY, INC. — Chapter 7

Debtor — Case No. 00-21425

APPEARANCES:

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Trustee

ORDER DENYING MOTION FOR RECONSIDERATION

KRECHEVSKY, U.S.B.J.

I.

Greater Hartford Architecture Conservancy, Inc. ("the debtor"), on May 22, 2000, filed a Chapter 7 bankruptcy petition and John J. O'Neil, Jr., Esq. became trustee of the debtor's estate ("the trustee"). The court, on May 1, 2003 entered an

order ("the sale order")[1], pursuant to Bankruptcy Code § 363(b)[2], approving the trustee's sale of the estate's interest in 140-144 Retreat Avenue, Hartford, Connecticut ("the property") to Nevets, Inc. ("the purchaser"), and overruling the objections of Marc J. Glass ("Glass"). Glass, on May 6, 2003, filed a motion for reconsideration ("the motion") of the sale order.

The motion, in essence, asserted that the sale order should be reconsidered on the grounds of inadequate notice given by the trustee of the terms of the sale of the property and that the sale of the property was not in the best interest of the estate. (Motion at ¶ 22.)[3] The court held hearings on the motion, on July 24, 2003, August 5, 2003 and August 11, 2003, following which the court ordered Glass and the purchaser to file briefs in support of their positions within two weeks after receipt of the hearing transcripts, i.e., by December 8, 2003.

The purchaser timely filed its brief. Glass has neither filed a brief, nor requested an extension of time for such filing.

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[1] The full title of the sale order is "Order on Objection to Sale of Estate Property Located at 140-144 Retreat Ave., Hartford, CT."

[2] Section 363(b) provides: "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."

[3] The motion, entitled "Motion for Reconsideration and to Revoke the Court's Approval of Trustee's Motion to Sell the Real Estate Located at 140 Retreat Avenue," does not cite the authority under which it was brought.

II.

D.Conn. L.Civ.R. 7(c), made applicable to proceedings in the Bankruptcy Court by D.Conn. LBR 1001-1, states:

> (c) Motions for Reconsideration.
>
> 1. Motions for reconsideration shall be filed and served within ten (10) days of the filing of the decision or order from which such relief is sought, and shall be accompanied by a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court overlooked in the initial decision or order.

Glass did not assert in the motion or in the hearings on the motion any grounds that were not previously raised during the hearing on the sale order, i.e., the adequacy of the trustee's notice of intent to sell the property and the value of the sale to the estate. The purchaser's brief further (1) asserts bases for denying Glass standing to file the motion, and (2) contends that Glass, having failed to pursue his request for a stay of the court's sale order and the sale having been consummated, the motion is moot pursuant to Bankruptcy Code §363(m).

The motion for reconsideration is denied. It is

SO ORDERED.

Dated at Hartford, Connecticut this 18th day of December, 2003.

ROBERT L. KRECHEVSKY
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing reply memorandum was served by U. S. mail, postage prepaid, this 26th day of May 2004 upon each of:

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05/26/04-HRT/