

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF IDAHO**

<b>IN RE</b>	)	
	)	<b>Case No. 09-03594-TLM</b>
<b>ANNA JUDENE WESTING and</b>	)	
<b>JOHN HENRY WESTING,</b>	)	
	)	<b>Chapter 13</b>
<b>Debtors.</b>	)	
_____	)	
	)	
<b>RENTRAK CORPORATION,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Adv. No. 10-06016-TLM</b>
	)	
<b>ANNA JUDENE WESTING and,</b>	)	<b>Appeal Case No. 11-00037-EJL</b>
<b>JOHN HENRY WESTING</b>	)	
	)	
<b>Defendants.</b>	)	
_____	)	

**SUMMARY ORDER**

On March 16, 2011, John and Anna Westing (Appellants) filed – in this adversary proceeding – a motion for extension of time to file Appellants’ designation of record, statement of issues and opening brief in the appeal pending before the District Court. *See* Adv. Doc. No. 40 (“Extension Motion”).<sup>1</sup>

<sup>1</sup> This District’s Third Amended General Order 38 at 2.03(c) states:

(continued...)

Appellants base their Extension Motion on Rentrak Corporation's pending motion for attorneys' fees before this Court.<sup>2</sup> They argue that such an attorney fee request is tantamount to a Rule 9023 motion to alter or amend the judgment and, under Federal Rule of Bankruptcy Procedure 8006, tolls the time in which Appellants are required to file their designation of record.

Rule 8006 requires an appellant to file a designation of record "within 14 days after filing the notice of appeal as provided by Rule 8001(a) . . . or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later[.]" A motion for attorneys fees is not a motion listed in Rule 8002(b). While not specifically referenced in 8002(b), Appellants argue that such a motion falls with Rule 8002(b)'s reference to motions to alter or amend judgments under Rule 9023 due to the "substantial" nature of the fee request. The Court disagrees.

In 1988 the United States Supreme Court ruled that "a claim for attorney's

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<sup>1</sup>(...continued)

Extensions. Unless reference of the case or proceedings underlying the appeal has been withdrawn, all motions for extension of time period relating to appellate procedures, up to, through, and including the time to file briefs, shall be filed with the bankruptcy court clerk and determined by a Bankruptcy Judge.

Therefore, Appellants correctly filed their Extension Motion with this Court notwithstanding the District Court's entry of a Briefing Schedule Order on February 4, 2011. Case No. 11-00037-EJL at Doc. No. 2

<sup>2</sup> The attorney's fee motion was taken under advisement following a March 14, 2011 hearing.

fees is not part of the merits of the action to which the fees pertain” and adopted “a uniform rule that an unresolved issue of attorney’s fees for the litigation in question does not prevent judgment on the merits from being final.” *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199-200 (1988); *see also Hatch Jacobs, LLC v. Kingsley Capital, Inc. (In re Kingsley Capital, Inc.)*, 423 B.R. 344, 347-48 (10th Cir. BAP 2010); *Dimeff v. Good (In re Good)*, 281 B.R. 689, 694-95 (10th Cir. BAP 2002); *United States v. RG & B Contractors, Inc.*, 21 F.3d 95, 955 (9th Cir. 1994) (holding that “attorney’s fees are collateral [issues] whether they are authorized by law or by some other source”). Thus a motion for attorney’s fees is not a motion to alter or amend a judgment such that the time to appeal is tolled under Rule 8002(b).

Appellants filed their notice of appeal on January 30, 2011. Pursuant to Rule 8006, their designation of record was due February 14, 2011. Appellants did not file their Extension Motion until well past the February 14, 2011 deadline. Under Rule 9006(b)(1), this Court may enlarge the time provided on a motion made after the expiration of a deadline only where the failure to act was the result of excusable neglect. Appellants have not alleged or shown excusable neglect.<sup>3</sup>

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<sup>3</sup> Appellants’ argument about the nature of the fee motion was not supported by any cited authority and, indeed, directly contradicted by Supreme Court and other authority. This would be another consideration as to whether any neglect was “excusable.” *See also* Fed. R. Bankr. P. 9011(b)(2).

As such, their Extension Motion will be and the same hereby is DENIED.<sup>4</sup>

DATED: March 22, 2011



A handwritten signature in black ink, appearing to read "Terry L. Myers".

TERRY L. MYERS  
CHIEF U. S. BANKRUPTCY JUDGE

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<sup>4</sup> While this Court will not grant Appellant's Extension Motion, the ramifications of Appellants' failure to timely file their designation of record and opening brief are up to the District Court. *See* Rule 8001(a) ("An appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal.").

**CERTIFICATE OF SERVICE**

A “notice of entry” of this Order has been served on Registered Participants as reflected by the Notice of Electronic Filing. A copy of the Order has also been provided to non-registered participants by hand delivery to:

Honorable Edward J Lodge  
U.S. District Court  
550 W. Fort St.  
Boise, ID 83724

Case No. 10-06016-TLM

Dated: March 22, 2011

\_\_\_\_\_/s/\_\_\_\_\_  
Suzanne Hickok  
Law Clerk to Chief Judge Myers