

James William Hubel
Mt. McGregor Correctional Facility
1000 Mt. McGregor Road - Box 2071
Wilton, New York 12831

Pro Se

Gregory G. Harris, Esq.
Harris, Balzer & Conway, PLLC
The Patroon Building
5 Clinton Square
Albany, New York 12207

Chapter 7 Trustee

Kim F. Lefebvre, Esq.
United States Trustee
74 Chapel Street
Suite 200
Albany, New York 12207

Re: JAMES WILLIAM HUBEL

CASE NO. 05-20260

LETTER DECISION AND ORDER

Before the court is the motion to extend the time to appeal the court's Letter Decision and Order dated and entered January 3, 2006, filed by James William Hubel (the "Debtor") pursuant to Federal Rule of Bankruptcy Procedure (FRBP) 8002(c)(2)¹ (the "Motion"). The court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. §157(a), (b)(1), (b)(2)(A), and 1334.

The Debtor is a prisoner under the jurisdiction of the New York State Department of

¹ FRPB 8002 is entitled "Time for filing Notice of Appeal" and states in relevant part: **(a) TEN-DAY PERIOD.** 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.

....
(c) EXTENSION OF TIME FOR APPEAL
....

(2) A request to extend time for filing a notice of appeal must be made by written motion filed before the time for filing a 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.

Correctional Services, and he resides at Mt. McGregor Correctional Facility (“Mt. McGregor”). On January 3, 2006, an order was entered striking the Debtor’s case for his noncompliance with 11 U.S.C. § 109(h)(1) (the “January 3, 2006 Order”).² The Debtor filed the Motion on January 26, 2006. A hearing was scheduled for March 1, 2006. The Debtor submitted a letter requesting an order from the court directing that he be produced for the hearing on the Motion. (No. 30.) In response, the court entered an order on February 17, 2006, ruling the matter would be considered fully submitted as of March 1, 2006, and advising the parties that neither an appearance nor oral argument would be required. (No. 31.)

Prior to the court ruling on the Motion, the Debtor filed his notice of appeal³ and application to proceed in forma pauperis with the United States Court of Appeals for the Second Circuit on February 9, 2006. The notice of appeal was subsequently forwarded to the Clerk of the District Court on March 9, 2006 and then forwarded to the Clerk of the Bankruptcy Court where it

²Section 109(h)(1) is entitled “Who may be a debtor” and states in relevant part: (h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

....
(4)The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone.

³ Generally, the filing of a notice of appeal divests the bankruptcy court with respect to any matter involved in the appeal. *In re Bialac* 694 F. 2d 625 (9th Cir. 1982). However, the bankruptcy court retains jurisdiction to proceed with matters that are in aid of the appeal. *In re Hess*, 56 F.3d 64 (Table), 1995 WL 325703 (6th Cir. May 30, 1995).

was received on March 15, 2006 and docketed on February 9, 2006.⁴ A notice of deficiency on his appeal was mailed to the Debtor on March 16, 2006. (No. 40.) On March 21, 2006, the Clerk of the Bankruptcy Court transmitted the record of appeal to the U.S. District Court (No. 44.), with a certificate of non-compliance for failure to comply with FRBP 8001(a) (failure to remit the required fee),⁵ FRBP 8002(a) (untimely), and FRBP 8006 (failure to file a designation of items to be included in the record on appeal).

The Debtor sets forth in the Motion that he received the January 3, 2006 Order, “late in the day” on January 6, 2006. (*See* Motion ¶ 3.) The Debtor alleges he “immediately completed” a form requesting access to the law library “as soon as possible,” which was not delivered to the law library administrator until the next day, January 7, 2006. *Id.* Due to “a backlog of prisoners awaiting access to the law library,” the Debtor was not given access until January 18, 2006. *Id.* The Debtor notes it took him two days of research to uncover “rules pertaining to bankruptcy appeals.” *Id.* Based upon these facts, the Debtor argues he should be granted an extension to file a notice of appeal. He alleges the facts in the Motion establish a showing of excusable neglect. The Debtor also cites the decision of *Houston v. Lack*, 487 U.S. 266 (1988) for the premise that there is a federal court policy to allow leniency to prisoners.

The order the Debtor seeks to appeal was entered on January 3, 2006. Thus, the time to file

⁴ Because the appeal is deemed filed as of the date it was received by the Court of Appeals, the Bankruptcy Clerk’s Office reflects a filing date for the appeal on its docket of February 9, 2006. *See* FRBP 8002(a).

⁵ On April 10th, an amended certification of noncompliance was forwarded to the U.S.D.C. removing the 8001(a) basis from the certificate. The Debtor was granted pauper status on October 27, 2005 and pursuant to local procedure, this pauper status should have passed through to the appeal at issue.

a notice of appeal expired January 13, 2006.⁶ The Debtor's motion to extend time was dated January 20, 2006, and was received and filed by the clerk's office on January 26, 2006, well within the twenty days referenced in FRBP 8002(c)(2), thus his deadline to file a notice of appeal may be extended if he can establish a showing of excusable neglect. The burden of proving the existence of excusable neglect rests with the movant. *In re XO Communications, Inc.* 301 B.R. 782, 795 (Bankr. S.D.N.Y. 2003).

The U.S. Supreme Court addressed the issue of excusable neglect in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), in a case focusing on FRBP 9006(b)(1) and the enlargement of time for filing a late proof of claim under FRBP 3003(c). The Supreme Court stated that ignorance of the rules does not usually constitute excusable neglect. *Id.* at 392. The Court then observed that the concept of excusable neglect is an elastic one and outlined certain factors needed to demonstrate neglect that is "excusable" and concluded "the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.* at 392, 395.

The factors enumerated by the Court include the danger of prejudice to the adverse party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Id.* Regarding the application of the *Pioneer* factors, each one need "not be unmet in order to find no excusable neglect." *In re Agway, Inc.* 313 B.R. 22, 27 (Bankr. N.D.N.Y. 2003) (quoting *In re O.W. Hubbell & Sons, Inc.*, 180 B.R. 31, 36 (N.D.N.Y. 1995), *aff'g*, No. 90-

⁶ See *supra* note 1.

02053, slip op. (Bankr. N.D.N.Y. Sept. 2, 1994)); *see also Keene Corp.*, 188 B.R. 903, 909 (Bankr. S.D.N.Y. 1995) (“an approach that considers all the relevant factors, but recognizes that they all need not point in the same direction, is the correct one”).

No party, including the court, questions the good faith of the Debtor in filing the motion. Additionally, in the Debtor’s favor, there will be no impact on the judicial proceeding in the bankruptcy court because the Debtor’s Chapter 7 case has been stricken of record⁷ and there will be no adverse impact on any other party. However, in the most important of the *Pioneer* factors, the Debtor has failed to show the reason for his delay was beyond his reasonable control. The Debtor states in the Motion that he requested access to the law library “as soon as possible.” Yet the Debtor acknowledges he received the January 3, 2006 Order on January 6, 2006, when there were still seven days remaining to prepare and file a simple notice of appeal. “The requirements for filing a notice of appeal from a bankruptcy judgment are clear under the statute and bankruptcy rules, and no sophisticated legal interpretation is necessary in order to understand that such an appeal must be filed within 10 days of the date of the order.” *In re Shewchun*, 959 F.2d 236 (Table), 1992 WL 58966 (6th Cir. March 26, 1992).

The pro se status of the Debtor does not constitute excusable neglect. *Matter of Ghosh*, 47 B.R. 374 (E.D.N.Y. 1984). *See also In Re Belcher*, 293 B.R. 265, 268 (Bankr. N.D. Ga. 2001). (A pro se debtor’s argument that she “misunderstood the amount of time permitted for filing the notice of appeal” and that she was not experienced in bankruptcy law did not constitute excusable neglect.) *In re Warrick*, 278 B.R. 182, 187 (9th Cir. BAP 2002), citing, *Briones v. Riviera Hotel and Casino*, 116 F. 3d 379, 382 (9th Cir. 1997) (the debtor’s “status as a pro se litigant does not

⁷ The court’s action in striking the chapter 7 is the subject of the appeal at issue.

excuse [his] failure to understand and follow court rules.”) This court takes judicial notice that the Debtor has filed two joint chapter 7 cases in which he successfully received a discharge: Case No. 99-14223, filed July 15, 1999 and discharged December 2, 1999 and Case No. 91-14430, filed November 7, 1991 and discharged February 20, 1992. Thus, the Debtor is not a stranger to the bankruptcy process.

Shortly after *Pioneer*, Chief Judge Stephen D. Gerling reviewed the standard of excusable neglect as it applies to FRBP 8002(c) in the case, *In re Mowers*, 160 B.R. 720 (Bankr. N.D.N.Y. 1993). Judge Gerling opined there was no clear indication that the Supreme Court in *Pioneer* intended to use its interpretation of excusable neglect as applied to the Federal Rules of Appellate Procedure 4 (a)(5) to also apply to a wholly unrelated rule of bankruptcy procedure. *Id.* at 724. Judge Gerling looked to the opinion of *In re Dix*, 95 B.R. 134 (9th Cir. BAP 1988), which was credited as the source for the five factors outlined by the Sixth Circuit Court of Appeals in *Pioneer* for guidance. “Where, however, the purpose of the extension sought is to review the propriety of a decision on the merits, such as in the context of a late filed notice of appeal, the term excusable neglect must be strictly interpreted.” *In re Mowers, supra*, 160 B.R. at 724 (citing *In re Dix, supra*, 95 B.R. at 137-138). Judge Gerling found that excusable neglect must be strictly and narrowly applied, based on either acts of someone other than the appellant or his or her counsel, or some extraordinary event. *Mowers, supra*, 160 B.R. at 725. Under *Mowers*, the Debtor does not make the case that either the acts of an individual at Mt. McGregor or an extraordinary event prevented him from filing a notice of appeal.

The Debtor’s citation to *Houston v. Lack*, is misplaced. In *Lack*, the Supreme Court concluded that the notices of appeal filed by a pro se prisoner petitioner were filed at the time the

prisoner delivered the notice of appeal to prison authorities for forwarding to the district court. *Lack, supra*, 487 U.S. at 276. The Supreme Court however, did not discuss the issue of an untimely appeal handed to prison authorities. The Second Circuit has gone further stating, “*Lack* speaks to when the petition is considered delivered to the clerk; it does not extend the time for filing an appeal.” *Stajic v. Immigration and Naturalization Service*, 961 F. 2d 403, 405 (2d Cir. 1992).

In conclusion, whether applying the stricter standard under *Mowers* or the more liberal test under *Pioneer*, the Debtor has failed to meet his burden of establishing the existence of excusable neglect.

Based on the foregoing, the Debtor’s Motion for Extension of Time for Appeal pursuant to FRBP 8002(c)(2) is DENIED.

IT IS SO ORDERED.

Dated: 4/11/06

/s/ Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge