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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
October 15, 2013
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE ROBERT NORTON LOOMAS, JR., also known as Bob R. Loomas, Jr., former officer, director, shareholder of RNL Consulting, Debtor.	BAP No. CO-13-017
MARCIA FREEMAN, formerly known as Marcia Loomas, Plaintiff – Appellee, v. ROBERT NORTON LOOMAS, JR., Defendant – Appellant.	Bankr. No. 12-11898 Adv. No. 12-01282 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before THURMAN, Chief Judge, CORNISH, and KARLIN, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

The Chapter 7 debtor appeals the bankruptcy court's order denying his motion for an extension of time to file a notice of appeal. The underlying order debtor seeks to appeal is the bankruptcy court's summary judgment in favor of his

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

former wife finding certain debts to be nondischargeable.[1] Having reviewed the record on appeal and applicable law, we AFFIRM the bankruptcy court's order denying debtor's motion for extension of time.

I. BACKGROUND AND BANKRUPTCY PROCEEDINGS

Debtor Robert Norton Loomas, Jr. ("Loomas") and Marcia Freeman ("Freeman") dissolved their marriage in 2008. Post-divorce decree litigation resulted in nine different orders and judgments being entered by the state district court directing Loomas to pay for Freeman's attorney fees and costs of the proceedings. The fees and costs totaled approximately $35,780, which Freeman paid in full to her legal counsel.[2]

Loomas filed for Chapter 7 relief on February 6, 2012. Freeman filed this adversary proceeding on April 25, 2012 seeking a determination that the attorney fees and costs Loomas had been ordered to pay were nondischargeable debts. On January 4, 2013, the bankruptcy court entered an order granting Freeman's motion for summary judgment ("Summary Judgment"), concluding that the fees and costs were domestic support obligations pursuant to 11 U.S.C. § 523(a)(5), and alternatively, debts arising out of a domestic court order pursuant to 11 U.S.C. § 523(a)(15), and therefore nondischargeable.[3]

Loomas filed his Request for Extension of Time to File a Notice of Appeal and Notice of Appeal (collectively "Motion for Extension") on February 7, 2013,

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[1] As discussed in more detail below, the clerk of this Court opened BAP Appeal No. CO-13-008 with respect to the summary judgment (hereafter "Summary Judgment Appeal"). But because Loomas failed to respond to an order to show cause with respect to timeliness, the Summary Judgment Appeal was subsequently dismissed for failure to prosecute.

[2] *Order on Plaintiff's Motion for Summary Judgment* at 2-3, Docket No. 1-2 in Summary Judgment Appeal.

[3] *Id.* at 7-8.

or 34 days after entry of the Summary Judgment.[4] According to Loomas, he did not receive notice of the Summary Judgment "until AFTER the expiration of the period for Appeal by Right."[5] However, the bankruptcy court's docket sheet shows a Certificate of Notice filed by the Bankruptcy Noticing Center certifying that copies of the order and judgment were sent to Loomas by first class mail at his correct address on January 6, 2013, or 12 days before expiration of the appeal period.[6] The bankruptcy court denied Loomas' Motion for Extension by order dated February 22, 2013 ("Order Denying Extension").[7] Loomas timely appealed the Order Denying Extension to this Court on March 4, 2013.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from final orders, final collateral orders, and, with leave of court, interlocutory orders of Bankruptcy Courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[8] Neither party elected to have these appeals heard by the United States District Court for the District of Colorado. The parties have therefore consented to appellate review by this Court.

A decision is considered final "if it 'ends the litigation on the merits and

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[4] *Motion for Extension*, *in* Loomas' Appendix ("App.") at 12. The filing dates of these documents are as they appear on the bankruptcy court docket. The filing dates on these documents which are included in the App. appear different.

[5] *Id.*

[6] *See Docket Nos. 54 and 55* of Adversary Proceeding 12-01282-HRT Docket Sheet (hereafter "Adversary Docket"). We note that the App. does not include the "relevant entries in the bankruptcy docket" as required by Federal Rule of Bankruptcy Procedure 8009(b)(8). The portion of the Adversary Docket provided in the App. starts with Docket No. 62, the Notice of Appeal. *See* App. at 3-4.

[7] *Order on Motion for Extension of Time to File Notice of Appeal*, *in* App. at 8.

[8] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

leaves nothing for the court to do but execute the judgment.'"[9] A bankruptcy court's order denying a motion for extension of time to file a notice of appeal is final for purposes of appellate review.[10]

III. ISSUES ON APPEAL AND STANDARD OF REVIEW

On appeal, Loomas first argues the bankruptcy court erred in denying his Motion for Extension because failure of the U.S. Postal Service to timely deliver notice of the Summary Judgment supports his defense of excusable neglect. Federal Rule of Bankruptcy Procedure 8002(a) provides that a "notice of appeal shall be filed with the [bankruptcy court] clerk within 14 days of the date of the entry of the judgment, order, or decree appealed from."[11] However, with certain exceptions not relevant here, Rule 8002(c)(1) provides that "[t]he bankruptcy judge ***may*** extend the time for filing the notice of appeal by any party."[12] Use of the word "may" in Rule 8002 indicates that an action is permissive or discretionary, rather than mandatory.[13] Further, when a motion for extension is filed after the 14-day appeal period has run, as is the case here, Rule 8002(c)(2) conditions relief upon the movant's demonstration of excusable neglect.[14]

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[9] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

[10] *In re Higgins*, 220 B.R. 1022, 1025 (10th Cir. BAP 1998) (citing *Vogelsang v. Patterson Dental Co.*, 904 F.2d 427, 431 (8th Cir. 1990) (*overruled by Pioneer Inv. Servs., supra*); *Belfance v. Black River Petroleum, Inc. (In re Hess)*, 209 B.R. 79, 80 (6th Cir. BAP 1997)).

[11] Fed. R. Bankr. P. 8002 (a). Unless otherwise indicated, all future references to "Rule" in text are to the Federal Rules of Bankruptcy Procedure.

[12] Fed. R. Bankr. P. 8002 (c)(1) (emphasis added).

[13] *Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't*, 533 F.3d 1183, 1186 (10th Cir. 2008) (citing *United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion.")).

[14] Fed. R. Bankr. P. 8002 (c)(2); *In re Food Barn Stores, Inc.*, 214 B.R. 197, 200 (8th Cir. BAP 1997). Rule 8002(c) provides in part as follows:

(continued...)

Therefore, a bankruptcy court's interpretation of Rule 8002 is reviewed *de novo*, but we defer to its denial of an extension of time to appeal unless there has been an abuse of discretion.[15]

"Under the abuse of discretion standard: 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[16] A trial court abuses its discretion when it makes "'an arbitrary, capricious, whimsical, or manifestly unreasonable judgement.'"[17] In exercising discretion, the bankruptcy court is entitled to "consider[ ] the motion in light of the specific circumstances of each case."[18]

Loomas also argues, without any supporting evidence, that the bankruptcy

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[14] (...continued)
(c) Extension of time for appeal

> (1) The bankruptcy judge may extend the time for filing the notice of appeal by any party . . . ;
>
> (2) A request to extend the 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 21 days after the expiration of the time for filing a notice of appeal ***may be granted upon a showing of excusable neglect***. An extension of time for filing a notice of appeal may not exceed 21 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 14 days from the date of entry of the order granting the motion, whichever is later.

Fed. R. Bankr. P. 8002 (c) (emphasis added).

[15] *Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc,* 270 F.3d 1, 3-4 (1st Cir. 2001); *Rayner v. Reeves (In re Reeves)*, 502 F. App'x 776 (10th Cir. 2012); *In re Higgins*, 220 B.R. at 1024 (citing *Key Bar Invs. v. Cahn (In re Cahn)*, 188 B.R. 627 (9th Cir. BAP 1995)).

[16] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)).

[17] *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994) (quoting *United States v. Hernandez-Herrera*, 952 F.2d 342, 343 (10th Cir. 1991)).

[18] *In re Higgins*, 220 B.R. at 1025.

court further compounded its error when it "deliberately, intentionally and with malice of forethought [sic] delayed [its] posting of the order (dated February 22, 2013) to the docket until March 5, 2013 thereby denying [him] sufficient time to comply with the Appellate Court's Order to Show Cause."[19] No order to show cause was ever issued in this appeal. However, in the Summary Judgment Appeal this Court entered an order to show cause regarding lack of jurisdiction due to Loomas' untimely filing. The Summary Judgment Appeal was ultimately dismissed for Loomas' failure to respond to the show cause order.[20] Therefore, it appears Loomas fails to comprehend that there are two separate and distinct appeals here– one from the grant of Summary Judgment, and one from the Order Denying Extension. As the Tenth Circuit has explained, "[g]enerally, a ruling on a post-judgment motion is subject to independent appeal separate from the underlying judgment, and this is true of proceedings on motions for extension of time."[21]

Loomas' second assertion of error is not germane to this appeal, because "[a]n unsuccessful motion to cure an untimely appeal cannot itself be the vehicle for review of the matter not timely appealed."[22] Therefore, the scope of this

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[19] Appellant's Opening Brief at 2.

[20] *See Summary Judgment Appeal Docket No. 19 (Dismissal Order*, dated March 13, 2013), and *Docket No. 23 (Order Denying Motion for Extension of Time to Respond [to this Court's Feb. 28, 2013, Order to Show Cause Why Appeal Should Not be Dismissed as Untimely*, entered March 22, 2013).

[21] *Lang v. Lang*, 414 F.3d 1191, 1196 (10th Cir. 2005), *aff'g* 305 B.R. 905 (10th Cir. BAP 2004).

[22] *Id.* Even if this argument were somehow relevant, Loomas' allegation that the bankruptcy court delayed posting its Order Denying Extension until March 5, 2013, is simply untrue. The bankruptcy court's docket indicates that the Order Denying Extension was entered on February 22, 2013. *See Adversary Docket No. 60.* The Summary Judgment Appeal docket indicates that the bankruptcy court transmitted the order to this Court on the same day. *See Summary Judgment Appeal Docket No. 14*. Additionally, Loomas filed this appeal of the Order Denying Extension on March 4, 2013, or a day before he claims the bankruptcy

(continued...)

appeal is restricted to the questions properly raised by the post-judgment motion and does not revive lost opportunities to appeal the underlying Summary Judgment.[23] In sum, our task here is to determine whether the bankruptcy court abused its discretion when it denied Loomas' Motion for Extension for failure to demonstrate excusable neglect. If the bankruptcy court did not abuse its discretion, then we are without jurisdiction to review the Summary Judgment because a timely filed notice of appeal is both mandatory and jurisdictional.[24]

IV. ANALYSIS

In the Motion for Extension he presented to the bankruptcy court, Loomas asserted only the following:

> Defendant files this Notice of Appeal pursuant to Rule 8002(c)(2) and respectfully requests [an] extension of time to file his Appeal. Although the judgment was issued on the 4th day of January 2013, it was not received by Defendant until AFTER the expiration of the period for Appeal by Right. Defendant files this Request for Extension of Time to File a Notice of Appeal [ ] within 21 days from the expiration of the original deadline to file such Appeal.[25]

Rule 8002(a) provides for a 14-day appeal period, meaning the notice of appeal should have been filed on or before January 18, 2013. Thus Loomas allegedly received notice of the Summary Judgment sometime after January 18, 2013, but declined to tell the court the day he actually claims to have received it. Further, though Loomas' Motion for Extension referenced Rule 8002(c)(2), it did not specifically plead excusable neglect,[26] or offer any explanation, other than

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22 (...continued)
court posted it to the Adversary Docket.

23 *Lang*, 414 F.3d at 1196.

24 *Emann v. Latture (In re Latture)*, 605 F.3d 830, 832 (10th Cir. 2010).

25 *Motion for Extension*, *in* App. at 12.

26 We are aware of our obligation to construe *pro se* pleadings liberally. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, Loomas' *pro se* status does not relieve his obligation to comply with fundamental procedural
(continued...)

delayed receipt of the Summary Judgment, for why he did not file his Motion for Extension until February 7, 2013. Nor did Loomas ask the bankruptcy court to set his motion for hearing. The bankruptcy court denied Loomas' Motion for Extension, concluding that "nothing appearing in the Defendant's Motion provides a ground for a finding of excusable neglect."[27] We agree with the bankruptcy court's conclusion.

When an extension of time to appeal is requested after the 14-day appeal period has run, Rule 8002(c)(2) permits a bankruptcy court to grant relief only upon a movant's showing of excusable neglect.[28] In many instances, whether there has been excusable neglect is an equitable determination by the bankruptcy court based on factors such as "the danger of prejudice to the debtor, 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."[29] And although "excusable neglect" has been described as a somewhat "elastic concept,"[30] a party requesting extended time to appeal has a fairly substantial burden to meet.[31]

Excusable neglect is not strictly limited to circumstances beyond the

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[26] (...continued)
requirements. *See Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994). And as stated above, the timely filing of a notice of appeal is a jurisdictional prerequisite.

[27] *Order Denying Extension* at 1, *in* App. at 8.

[28] Fed. R. Bankr. P. 8002 (c)(2).

[29] *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (discussing issue of excusable neglect in context of filing of proof of claim under Fed. R. Bankr. P. 9006(b)(1)).

[30] *Pioneer*, 507 U.S. at 392 (internal quotation marks omitted).

[31] *In re Van Houweling*, 258 B.R. 173, 177 (8th Cir. BAP 2001) (citing *In re Food Barn Stores, Inc.*, 214 B.R. 197, 200 (8th Cir. BAP 1997) (burden of demonstrating to the bankruptcy court that excusable neglect exists is on the movant)).

movant's control, but "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect."[32] Additionally, litigants are generally "held accountable for the acts and omissions of their attorneys."[33] As one circuit court of appeals has opined, a determination that excusable neglect exists when a "failure to comply with a rule that is 'mandatory and jurisdictional' was the result of ignorance of the law and inattention to detail [] would only serve to condone and encourage carelessness and inattention in practice before the federal courts, and render the filing deadline . . . a nullity."[34]

But here, we need not delve into the precise confines of excusable neglect. Contrary to Loomas' argument, failure to receive notice of the entry of judgment does not, in and of itself, excuse an untimely appeal.[35] Rule 9022(a) provides that "[l]ack of notice of the entry [of a judgment] does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002."[36] In other words, when a motion for extension is filed after the 14-day appeal period, the bankruptcy court's

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[32] *Pioneer*, 507 U.S. at 391-92. *See also In re Colo. Energy Supply, Inc.*, 728 F.2d 1283 (10th Cir. 1984).

[33] *Pioneer*, 507 U.S. at 396-97. *See also Belfance v. Black River Petroleum, Inc. (In re Hess)*, 209 B.R. 79, 83 (6th Cir. BAP 1997).

[34] *Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc,* 270 F.3d 1, 8 (1st Cir. 2001) (citations omitted).

[35] *In re Cray Computer Corp.*, 97-1185, 1998 WL 229677, at *1 (10th Cir. May 7, 1998) (citing *Key Bar Invs., Inc. v. Cahn (In re Cahn)*, 188 B.R. 627, 632 (9th Cir. BAP 1995)); *In re Kloza*, 222 F. App'x 547, 549-50 (9th Cir. 2007); *In re Delaney*, 29 F.3d 516, 518 (9th Cir. 1994); *In re Richardson Indus. Contractors, Inc.*, 190 F. App'x 128, 130 (3d Cir. 2006); *In re Warrick*, 278 B.R. 182, 185 (9th Cir. BAP 2002).

[36] Fed. R. Bankr. P. 9022.

discretion is circumscribed.[37] Time to appeal may be extended only when the movant demonstrates excusable neglect, and equating lack of notice (or delayed notice) with excusable neglect would render Rule 9022(a) meaningless.[38] Therefore, courts have held that lack of notice or delayed notice alone does not constitute excusable neglect.[39]

In addition to Rule 9022, courts have repeatedly held that failure to receive notice of the entry of a judgment is not a defense to an untimely appeal because litigants "have an affirmative duty to monitor the dockets to keep apprised of the entry of orders that they may wish to appeal."[40] In his Motion for Extension, Loomas did not provide the bankruptcy court with the specific date he received

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[37] *Bowles v. Russell*, 551 U.S. 205, 214 (2007) (courts have no authority to create equitable exceptions to jurisdictional requirements); *Commc'ns Network Int'l, Ltd. v. MCI WorldCom Commc'ns, Inc. (In re WorldCom, Inc.)*, 708 F.3d 327, 329 (2d Cir. 2013) ("court's latitude to relieve litigants of the consequences of failures to file timely notices of appeal is not boundless").

[38] Even in absence of the Rule 9022(a) provision, Loomas' Motion for Extension would face significant hurdles. In disputes over missed filing or response deadlines due to lack of notice, mere allegations of untimely receipt are insufficient and require credible evidence. *See In re Axium Int'l, Inc.*, CC-10-1524, 2011 WL 6934432, at *1 (9th Cir. BAP Oct. 7, 2011) (extension motion should be supported by a declaration under penalty of perjury as evidence for lack of notice). And as the bankruptcy court correctly pointed out, evidence of proper mailing raises a rebuttable presumption of delivery. *Laouini v. CLM Freight Lines, Inc.*, 586 F.3d 473, 476 (7th Cir. 2009) (citing *Vincent v. City Colls. of Chi.*, 485 F.3d 919, 922-23 (7th Cir. 2007)); *Witt v. Roadway Express*, 136 F.3d 1424, 1429-30 (10th Cir. 1998); *Nikwei v. Ross School of Aviation, Inc.*, 822 F.2d 939, 941 (10th Cir. 1987); *In re Schicke*, 290 B.R. 792, 801 n.20 (10th Cir. BAP 2003), *aff'd*, 97 F. App'x 249 (10th Cir. 2004). Further, mere denial of receipt alone does not rebut the presumption that the mailed item was received. *See Bosiger v. U.S. Airways*, 510 F.3d 442, 452 (4th Cir. 2007).

[39] *In re Cruey*, 93-2594, 1994 WL 567918, at *2 (4th Cir. Oct. 18, 1994) (citing *Miyao v. Kuntz (In re Sweet Transfer & Storage, Inc.)*, 896 F.2d 1189, 1193 (9th Cir. 1990), *superseded on other grounds by amendment to Rule*).

[40] *Yeschick v. Mineta*, 675 F.3d 622, 629 (6th Cir. 2012) (citing *Kuhn v. Sulzer Orthopedics, Inc.*, 498 F.3d 365, 370-71 (6th Cir. 2007), *Reinhart v. U.S. Dep't of Agric.*, 39 F. App'x 954, 956-57 (6th Cir. 2002)). *See also In re WorldCom, Inc.*, 708 F.3d at 329; *In re Barbel*, 212 F. App'x 87 (3d Cir. 2006); *In re Delaney*, 29 F.3d at 518; *In re Food Barn Stores, Inc.*, 214 B.R. 197, 200 (8th Cir. BAP 1997).

notice of the Summary Judgment. But in his opening brief on appeal, Loomas states that he "received the order of January 4, 2013 on or about January 18, 2013 after the closing of normal business hours and after the end of the period of time Appellant was to file his Notice of Appeal."[41] Even if Loomas were able to provide evidence to support his belated receipt of the Summary Judgment on January 18, 2013,[42] he failed to explain to the bankruptcy court the ***additional 20-day delay*** in filing his Motion for Extension on February 7, 2013, or any justification for failing to monitor his case docket.

Proceeding as a pro se party after the bankruptcy court permitted his pro bono counsel to withdraw from representation on November 6, 2012,[43] Loomas did not receive electronic notification of the entry of the Summary Judgment. And at oral argument, Loomas, a self-described IT professional, alleged he did not have access to PACER. He did, however, acknowledge that he had access to his case docket via a public terminal at the bankruptcy court, and additionally that he had used the public terminal in the past.

The only explanation Loomas gave at oral argument for the additional 20-day delay in filing his Motion for Extension after receipt of the Summary Judgment was that he needed to do some research and consult with the attorney whom he alleges the bankruptcy court prejudicially permitted to withdraw from representation. But he did not present these facts to the bankruptcy court in his Motion for Extension, and absent extraordinary circumstances, we do not consider

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41 Appellant's Opening Brief at 2.

42 Again, the docket sheet reflects Certificates of Notice filed by the Bankruptcy Noticing Center certifying that copies of the Order on Motion for Summary Judgment and Summary Judgment were sent to Loomas by first class mail at his correct address on January 6, 2013, or 12 days before expiration of the appeal period. Moreover, as previously stated, Loomas did not provide these relevant bankruptcy docket entries in his Appendix.

43 *See Adversary Docket Nos. 28, 40, & 41.*

matters that have not been passed upon by the bankruptcy court below.[44] Like the bankruptcy court, we conclude that Loomas did not demonstrate excusable neglect in failing to monitor his case docket for entry of judgments that he might wish to appeal, or for not filing his Motion for Extension until 20 days after receipt of the Summary Judgment.

V. CONCLUSION

Loomas demonstrated no excusable neglect in failing to timely file his notice of appeal. In absence of a showing of excusable neglect under Rule 8002(c), Rule 9022(a) applies here to prevent the bankruptcy court from relieving Loomas of the consequences of an untimely filed notice of appeal. The bankruptcy court did not err, and therefore its Order Denying Extension is hereby AFFIRMED.

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[44] *In re C.W. Mining Co.*, 625 F.3d 1240, 1246 (10th Cir. 2010) (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)).