

Filed at 4 O'clock & 59 min. P.M.
Date: 6-1-90
IN THE UNITED STATES BANKRUPTCY
FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:)	Chapter 11 Case
)	Number <u>85-40555</u>
DONALD E. AUSTIN)	
)	
Debtor)	
)	
DIAMOND MANUFACTURING CO., INC.)	Chapter 7 Case
)	Number <u>85-40555</u>
Debtor)	
)	
ROSE MARINE, INC.)	Chapter 7 Case
)	Number <u>86-40143</u>
Debtor)	

ORDER

Signet Bank, Inc. (hereinafter referred to as "Signet")
filed this motion to compel the trustee to comply with the order
authorizing disbursement of the proceeds derived from the sale of
Barge Number 90-16040 (hereinafter referred to as "the barge")
owned by the debtor, Diamond Manufacturing Company, Inc.¹
After considering the motion, the record, and the arguments of

¹Signet filed this motion in the related cases of Rose Marine, Inc., Ch. 7 Case No. 86-40143, and Donald E. Austin, Ch. 11 Case No. 85-40639. The order approving the sale of the barge and order directing disbursement of the proceeds to Signet, however, was only entered in the case of debtor, Diamond Manufacturing Company, Inc. In order to dispose of this motion in the other cases, all three cases have been referenced in this order.

counsel, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On December 1, 1989, the Chapter 7 trustee in this case, W. Jan Jankowski, filed an application for leave to sell the barge.

2. On January 16, 1990, after notice and hearing, the court entered an order approving the trustee's application to sell the barge. The order approving the application to sell was entered on the docket of this court on January 22, 1990.

3. On January 26, 1990, this court entered an order directing disbursement of the proceeds from the sale of the barge to Signet as Signet held a first priority lien on the barge. The order directing disbursement of the proceeds to Signet was entered on the docket on February 2, 1990.

4. On January 26, 1990, Donald E. Austin, pro se, and allegedly on behalf of debtor, Diamond Manufacturing Company, Inc., filed a motion seeking reconsideration of the order entered on January 16, 1990, and possibly the order of January 26, 1990.

5. This court entered an order denying the motion for reconsideration on February 7, 1990. The order was entered on the docket on February 9, 1990.

6. On February 20, 1990, Austin filed a notice of

appeal "from this court's order dated February 7, 1990 denying the motion

for reconsideration filed by the debtors and also to this court's order entered on January 16, 1990 and/or January 26, 1990."

CONCLUSIONS OF LAW

Signet contends that the notice of appeal did not include the order of this court entered January 26, 1990 directing disbursement of the proceeds to it, and if the notice of appeal did include that order, the appeal is not timely. In either case, Signet maintains that it should be entitled to the sale proceeds and seeks an order directing the trustee to disburse the proceeds.

The court, however, concludes that notice of appeal was intended to encompass the order directing disbursement of the proceeds of the sale of the barge to Signet. The notice of appeal, however, appears to have been filed outside of the time allowed by Bankruptcy Rule 8002. Rule 8002 requires a notice of appeal to "be filed with the clerk within ten (10) days of the date of the entry of the judgment, order, or decree appealed from." Bankruptcy Rule 8002. Assuming that the motion for reconsideration was directed at the order on disbursement of the

proceeds which was entered on the day that the motion for reconsideration was filed, the last day to file a timely notice of appeal would have been February 19, 1990. The determination regarding the timeliness of the appeal, however, is one to be made by the District Court.

"The 10-day provision of Rule 8002(a) is jurisdictional. (footnote omitted). If the notice of appeal is not filed within the appropriate time period, the reviewing court does not have jurisdiction over the appeal." 1 Collier Bankruptcy Manual ¶3.03[2][a][i] (L. King 3rd ed. 1989). See also Robinson v. Robinson, 640 F.2d 737 (5th Cir. March 26, 1981).² In such circumstances, the reviewing court must dismiss the appeal. However, until the District Court rules on the appeal by Austin, this court must treat the appeal as valid.

The trustee has agreed to hold the proceeds of the sale of the barge in a segregated, interest-bearing account until the disposition of the appeal, and is hereby ORDERED to do so until the District Court rules on the appeal. The motion of Signet to compel the trustee to turnover sale proceeds is ORDERED denied.

JOHN S. DALIS

²The Eleventh Circuit Court of Appeals adopted all decisions rendered by the Fifth Circuit on or before the close of business on September 30, 1981, as binding precedent in this circuit. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981).

UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 1st day of June, 1990.