

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Elmer Richard Rice,)	Civil Action No. 9:09-2052-SB-BM
)	
Appellant,)	
)	
vs.)	
)	REPORT AND RECOMMENDATION
James M. Wyman)	
)	
Appellee.)	
_____)	

The pro se Appellant has appealed the Bankruptcy Court’s Order dismissing his bankruptcy case to the United States District Court. In a Notice of Filing and Briefing filed August 4, 2009, Appellant was advised that, pursuant to Rule 8007, Fed.R.Bankr.P., he was required to serve and file his brief within fifteen (15) days. See Rule 8009, Fed.R.Bankr.P. This period of time has now expired, with Appellant having failed to file his brief as required.

Pursuant to Rule 8001(a), Fed.R.Bankr.P., the District Court may in its discretion dismiss an appeal for failure of the Appellant to comply with the briefing requirements. However, in light of Appellant’s pro se status, and in consideration of the severe nature of the sanction of dismissal and the possibility of available alternatives, the undersigned finds that Appellant should be given another opportunity to file his brief and to advise the Court that he wishes to proceed with this appeal prior to any dismissal of his appeal. Cf. In re SPR Corp., 45 F.3d 70, 72 (4th Cir. 1995); In re Serra Builders, Inc., 970 F.2d 1309, 1311 (4th Cir. 1992).

Appellant is therefore instructed to notify the Court that he wishes to proceed with this appeal and to file his brief within the time period set forth for filing objections to this Report and Recommendation.

If Appellant so notifies the Court and files his brief, the Clerk is directed to vacate this Report and Recommendation and return the file to the undersigned for further handling. However, in the event Appellant fails to comply with the instruction(s) set forth herein, then at the conclusion of the time period for filing objections to this Report and Recommendation the Clerk shall forward the file to a District Judge for disposition of the appeal, with a recommendation from the undersigned that the appeal be dismissed with prejudice for failure to prosecute. In re McDonald, 327 Fed.Appx. 491, 492 (5th Cir. May 13, 2009)[Dismissing action for failure to file initial brief].

The parties are referred to the notice page attachment hereto.



Bristow Marchant
United States Magistrate Judge

October 13, 2009

Charleston, South Carolina



Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Court Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. In the absence of a timely filed objection, a district court need not conduct a Defendants' Exhibit novo review, but instead must "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005).

Specific written objections must be filed within ten (10) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three (3) days for filing by mail. Fed. R. Civ. P. 6(a) & (e). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
P.O. Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985).