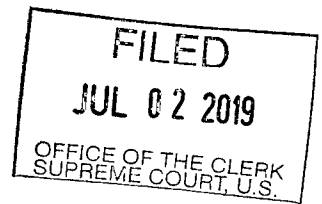


No. 19-5109

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



WAYNE. ENGLISH – PETITIONER

vs.

ROADHOUSE HOLDING INC., et al, - RESPONDENTS

.....

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

.....

PETITION FOR WRIT OF CERTIORARI

.....

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QUESTIONS PRESENTED

Thousands of individuals, both debtors and creditors, are having their due process rights violated by the Delaware Bankruptcy Court. The Court, without notice, public disclosure, or declaration, does not allow the United States Postal Service ("USPS"), to deliver first class mail directly to the court's physical address. Rather, the Delaware Bankruptcy Court intercepts all first class mail, stops physical delivery of the mail, and redirects the mail to the court's "corporate mail receptacle" for eventual pickup and delivery by the court's courier service. All USPS first class mailings experience substantial and significant delays in the timely filing of court documents. Other third party mail carriers, including both FedEx and UPS, do not have their mail intercepted or redirected and experience no such delays in the filing of court documents.

The questions presented are:

1. Whether the actions of the Bankruptcy Court in intercepting and redirecting only USPS mail delivery prevents litigants from the timely filing of their notice of appeal within the 14 day window allowed under Federal Rules of Bankruptcy Procedure 8002(a)(1).
2. Whether the Bankruptcy Court's policy that allows delivery of mail by FedEx and UPS to the Bankruptcy Court's physical address while preventing physical delivery of the mail by the United States Postal Service violates the Constitution's Fifth Amendment for due process.
3. Whether the Bankruptcy Clerk's late docketing of a party's notice of appeal met the requirements of due process in restricting and intercepting delivery of only first class USPS mail without notice, public disclosure, or declaration, while not restricting or delaying the delivery of the mail from FedEx, UPS, or any other third party mail carriers.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Roadhouse Holding Inc.

LRI Holdings Inc.

Logans Roadhouse Inc.

Logans Roadhouse of Kansas Inc.

Logans Roadhouse of Texas Inc.

Roadhouse Midco Inc.

Roadhouse Intermediate Inc.

Roadhouse Parent Inc.

RELATED CASES

There are no known related cases.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

Petitioner believes none of the opinions are published. The opinion and order of the United States Court of Appeals for the Third Circuit appears at Appendix A to the petition. The court of appeals denial of the motion to rehearing appears at Appendix C. The District Court's Order (D. Del. No. 1-17-cv-00731), appears at Appendix B. The Bankruptcy Court's Order is available at Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 2019. (Pet. App. A). A timely petition for rehearing was denied by the United States Court of Appeals on April 4, 2019. (Pet. App. C.). The jurisdiction of this Court is invoked under 28 U.S.C. #1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Bankruptcy Procedure, Rule 8002(a)(1);

(1). Fourteen Day Period. Except as provided in subdivisions (b) and (c), a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.

STATEMENT OF THE CASE

In late 2016, Roadhouse Holding Inc., (“Roadhouse” or “Respondent”) filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Wayne English (“English” or the “Petitioner”), timely filed a proof of claim based on his ownership of the debtors’ senior secured notes. Roadhouse objected to English’s claim and on March 22, 2017, the Bankruptcy Court entered an order sustaining the Objection. (Pet. App. D). On May 25, 2017, the Bankruptcy Court entered a Memorandum Order denying English’s Motion for New Trial. The deadline for filing the appeal was June 8, 2017. See Fed. R. Bankr. P. 8002(a)(1).

English drafted and mailed his Notice of Appeal to the bankruptcy court on June 3, 2017, by certified mail, tracking number 9507100018997154000109. (Pet. App. E & F). The bankruptcy clerk did not docket the notice of appeal until June 12, 2017. (Pet. App. E). Roadhouse filed their Motion to Dismiss Appeal for Lack of Jurisdiction. The Motion to Dismiss argued that the Court lacked appellate jurisdiction to consider the appeal because English failed to file the notice of appeal within the 14-day period prescribed by Rule 8002(a) of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”). English responded that pursuant to the United States Postal Service (“USPS”) tracking report, his first class certified letter containing the notice of appeal was received on June 8, 2017, in Wilmington, Delaware. (Pet. App. F). Additionally, English presented his sworn affidavit, a copy of the USPS Tracking Report, and copies of emails from the postal service that provided the delay in docketing the notice of appeal was the direct result of the

actions and instructions of the bankruptcy court. “A litigant’s rights cannot be injuriously affected by the failure or neglect of the clerk to do his duty”. *Brady v. J. B. McCray Co.*, 244 F. 602, 605 (S.D. Fla. 1917).

After contacting the bankruptcy clerk, the postal service, and the postmasters in Wilmington, Delaware, and in Dallas, Texas, English discovered that the bankruptcy court does not accept first class mail delivery to their physical address. The Delaware bankruptcy clerk has instructed the postal service to redirect first class mail to the court’s “corporate mail receptacle” for eventual collection by the court’s courier service. (Pet. App. F- USPS tracking report).

An inspection of the tracking report shows that: (1) the notice of appeal is never delivered to the bankruptcy court’s physical address; (2) the notice of appeal, after arriving in Wilmington, Delaware, on June 8th, 2017, takes an additional 31 hours to be placed in the court’s “corporate mail receptacle”; and, (3) that the notice experienced another 64 hour delay before the court’s courier service retrieved and delivered the notice to the clerk in which it was stamped received on June 12, 2017. (Pet. App. F). Third party mail carriers, including FedEx and UPS, experience no delays, their parcels are not intercepted or restricted, and their packages are delivered directly to the court’s physical address. The bankruptcy court has not issued any notice, public disclosure, or declaration that a litigant’s time sensitive court document sent through the United States Postal Service experience substantial and significant delays.

After discovering that his notice of appeal was never delivered to the bankruptcy court's physical address, English began making inquiries concerning the delivery of his certified letter. Over the course of six weeks, English discovered through emails, phone calls, and his investigation that the Bankruptcy Clerk does not accept physical delivery of first class mail, that the court's courier service can further delay delivery of mail sent through the United States Postal Service, and that by redirecting the mail to the "corporate mail receptacle", additional delays are experienced by parties using the United States Postal Service. Additionally, English discovered that individuals using other third party carriers, including Federal Express ("FedEx") and United Parcel Service ("UPS"), experience no such delay and enjoy an unfair advantage over individuals using the United States Postal Service in the timely filing of time sensitive court documents.

It is shocking that the Bankruptcy Court has not issued any public notice of possible delays in the delivery of first class mail. The Fifth Amendment of the U.S. Constitution, which applies to the federal courts, guarantees that a party will receive a fundamentally fair, orderly, and just judicial proceeding. This procedural due process ensures fundamental fairness by guaranteeing a party the right to be heard, ensuring that the parties receive proper notification throughout the litigation, and that the adjudicating court's actions do not benefit one litigant over another.

REASONS FOR GRANTING THE PETITION

The Delaware Bankruptcy Court's has instituted a policy to intercept and redirect only incoming USPS mail. This action by the court directed at first class mail delivery creates additional delays in the filing of time sensitive court documents. The mailings of all other third party carriers, including FedEx and UPS, are not intercepted and experience no delays. The bankruptcy court has not provided to the public any notice or disclosure of its policy and the potential for significant delays resulting from a parties' method of mailing. This arbitrary policy instituted by the court violates the Fifth Amendment and conflicts with numerous court rulings that provide a litigant's rights cannot be affected by the actions or lack of actions of the clerk. See Brady, *supra*.

The USPS tracking report provided by English and attached as Appendix F, establishes the timeline of the delay experienced by his notice of appeal. The bankruptcy court denied English's motion for new trial on May 25, 2017. The notice of appeal, pursuant to rule 8002 of the Bankruptcy Code, was due in 14 days, on June 8th, 2017. See Fed. R. Bankr. P. 8002(a)(1). English mailed his notice of appeal on June 3rd, 2017, by certified first class mail, five days prior to the deadline. (Pet. App. E & F). The USPS tracking report shows that the notice arrived in Wilmington, Delaware, at 8 A.M. on June 8th. It is clear from the tracking report that the notice is never delivered to the court's physical address; rather, the notice, which incurred a 31 hour delay, is place in the court's mail receptacle on Friday June 9th. The court's courier service did not retrieve the notice until Monday,

June 12th. The clerk filed the notice at 10:39 A.M. on June 12th, four days after it arrived in Wilmington, Delaware, and nine days after it was mailed. (Pet. App. E).

FIFTH AMENDMENT VIOLATIONS

The bankruptcy court has created two classes of parties in filing time sensitive court documents: (1) parties transmitting documents via the United States Postal Service; and, (2) all other third party mail carriers. The Bankruptcy Court's policy prevents litigants from a timely delivery of their time sensitive court documents. The bankruptcy clerk, under the auspices of the court's policy, directs the Wilmington, Delaware, post office to intercept and redirect all incoming USPS first class mail to the court's mail receptacle instead of a continuation of the delivery arranged by the parties to the court's physical address. This prevents litigants, who submit documents through the United States Postal Service, a timely and uninterrupted delivery and is both a violation of the equal protection clause and discriminatory. This restriction does not comply with the equal protection clause within the Fifth Amendment because it applies unequally upon both classes and is in no way relevant to the 14 day deadline established within bankruptcy rule 8002(a)(1). See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (Though the Fifth Amendment does not contain an equal protection clause, as does the Fourteenth Amendment, which applies only to the states, the concepts of equal protection and due process are not mutually exclusive.).

Parties should not receive different treatment and restrictions under a bankruptcy policy because of differences unrelated to the court's intended purpose.

The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference in the delivery of court documents between those utilizing first class U. S. mail and the individuals employing other third party carriers. The Supreme Court has often announced the principle that any differentiation must have an appropriate relation to the object of the legislation or ordinance. See, for example, *Mayflower Farms v. Ten Eyck*, 297 U.S. 266, 56 S.Ct. 457, 80 L.Ed. 675; *Smith v. Cahoon*, 283 U.S. 553, 567, 51 S.Ct. 582, 587, 75 L.Ed. 1264 (a motor vehicle regulation was struck down upon citation of many authorities because 'such a classification is not based on anything having relation to the purpose for which it is made.').

The bankruptcy court's policy violates the due process clause and equal protection clause of the Fifth Amendment under *Bolling*. *Bolling, supra*. The policy is arbitrary without any grounds for the distinction of penalizing parties based on their method of mailing. USPS mailings are intercepted, restricted, and delayed, while UPS, FedEx and all other carriers are not. The court at a minimum should implement one of the following: (1) intercept, restrict, and delay all incoming mail to the court's corporate mail receptacle before filing; (2) stop immediately all interception of incoming USPS mail; or, (3) issue a policy that all intercepted mail is considered docketed and filed at the time of interception.

THE CLERK'S ACTIONS DO NOT AFFECT THE RIGHTS OF LITIGANTS

When the bankruptcy clerk intercepted the mail to redirect delivery, the court had constructive possession of the notice of appeal. Once the court is

managing and directing the mail, the package is in the custody and control of the bankruptcy clerk. Most courts have ruled that a bankruptcy filing is completed when it is first placed in the actual or constructive possession of the clerk of the bankruptcy court. See *Wood v Godfrey* (in re Godfrey), 102 B.R. 769, 771 (9th Cir. BAP1989) (holding that bankruptcy petition was filed when placed in bankruptcy clerk's possession, rather than when stamped "filed"); *In re Brown* 311 B.R. 721, 725 (Bankr. W.D. Pa. 2004) (holding that if the time of the constructive filing and the time of the formal filing are different, the time of the constructive filing is dispositive determining when a bankruptcy filing has occurred).

The same standard applies in determining when a complaint is filed in a civil action. Rule 3 of the Federal Rules of Civil Procedure states that a civil action is commenced by filing a complaint with the court. Fed. R. Civ. P. 3. Federal circuit courts have held that a complaint in a civil action is filed when it is first placed in the clerk's custody. See, e.g., *McClellon v. Lone Star Gas Co.*, 66 F. 3d 98, 101 (5th Cir. 1995); *In re Toler*, 999 F.2d 140, 142 (6th Cir. 1993).

The receipt of a notice of appeal by the clerk of the district court suffices to meet the "filing" requirement under Rules 3 and 4 even though the notice has not been formally "filed" by the clerk of the court. *Parissi v. Telechron, Inc.*, 349 U.S. 46, 47 (1955); see also, e.g., *Deloney v. Estelle*, 661 F.2d 1061-63 (CA5 1981) (Because an appellant has no control over delays between receipt and filing, a notice of appeal is timely filed if received by the district court within the applicable period specified); *Ward v. Atlantic Coastline Railroad Company*, 265 F.2d 75 (5th Cir. 1959)

("Being in the custody of the clerk, it met the requirements that it {was} "actually" received in the clerk's office within the thirty-day period.")Fed. R. App. P. 3 & 4.

The Court's instructions require the postal service to redirect the mail back to the post office to place the package in the court's mail receptacle for eventual pick-up and delivery by their courier. The postmaster must identify the package, stop delivery to the physical address, arrange the new delivery, and schedule transport. All changes place an added burden on the postal service and create further delays in delivery. Once the postal service is following the Clerk's mailing instructions, custody of the parcel has transferred over to the court. English's notice of appeal was in the custody of the bankruptcy clerk on June 8, 2017. This met the 14 day deadline under Rule 8002 of the Federal Rules of Bankruptcy Procedure.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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July 1, 2019