

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

In Re:	)	
	)	Chapter 11
KOUTOUFARIS,	)	
	)	Bankruptcy Case 95-204 (JKF)
Debtor.	)	
_____	)	
JOHN KOUTOUFARIS, et al.,	)	
	)	C.A. No. 02-278
Appellants,	)	
	)	Adversary No. 96-180
v.	)	
	)	
MORRIS, JAMES, HITCHENS &	)	
WILLIAMS et al.,	)	
	)	
Appellees.	)	

**MEMORANDUM ORDER**

**I. INTRODUCTION**

On October 7, 1996, the appellants, John Koutoufaris, Marlene Koutoufaris, and the Estate of Ernest V. Keith (collectively “the appellants”), filed the above-captioned adversary proceeding alleging legal malpractice.<sup>1</sup> The Bankruptcy Court granted summary judgment in favor of Morris, James, Hitchens and Williams (“the appellees”) because the appellants suffered no legally cognizable injury and the remaining claims were barred by collateral estoppel. The Clerk of the District Court docketed the appellants’ appeal on April 18, 2002.

Presently before the court is the appellee’s motion to dismiss for failure to prosecute. For

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<sup>1</sup>The instant appeal is closely related to another appeal pending before the court captioned *BCI Pancake House v. Morris, James et al.*, C.A. No. 02-97-GMS (“the BCI appeal”). Two of the plaintiffs in the instant case, John and Marlene Koutoufaris, are the sole stockholders, officers, and directors of the appellants in the BCI appeal. Furthermore, counsel for the appellants are the same in both cases, the appellees in both cases are essentially the same, and the claims in both cases relate to the same failed loan transaction.

the following reasons, the court will grant this motion.

## II. DISCUSSION

Pursuant to Bankruptcy Rule 8009(a)(1), an appellant must file its opening brief within fifteen days of the date the appeal was docketed. Should the appellant fail to do so, the court has the discretion to dismiss the appeal for failure to prosecute. *See Jewelcor, Inc. v. Asia Commercial Co.*, 11 F.3d 394, 397 (3d Cir. 1993). The Third Circuit requires only that the district court consider less severe sanctions before dismissing the appeal. *See id.*

In the present case, the Clerk of the District Court docketed the appeal on April 18, 2002. On that date, he also notified the parties that the appeal had been docketed. Thus, under Bankruptcy Rule 8009, the appellants' opening brief was due on May 3, 2002. Notwithstanding that requirement, however, the appellants have never filed their brief. Nor did they file a timely motion for an enlargement of time in which to do so.

Indeed, rather than adhering to the unambiguous Bankruptcy Rule, the appellants instead waited for the appellee's May 23, 2002 motion to dismiss for failure to prosecute before contacting the court. On June 3, 2002, the appellants responded to the pending motion to dismiss by adopting the May 29, 2002 Declaration of Gregory Sioris ("Sioris"), which was filed in the BCI appeal. In that declaration, Sioris states that the attorney of record, Henry Heiman ("Heiman"), was "indisposed" due to a medical condition. Sioris claims that he was unable to prosecute this appeal without Heiman's aid.<sup>2</sup> Sioris further states that, had the court entered a scheduling order, he would have moved for an adjournment based on Heiman's condition. In their opposition to the present

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<sup>2</sup>However, Sioris fails to address why he, as lead counsel, was unable to contact the court regarding an enlargement of time in which to file the opening brief.

motion, the appellants also note that John and Marlene Koutoufaris filed a Notice of Conversion to Chapter 7 on May 30, 2002. Based on this conversion, they maintain that any decisions concerning the appeal rest with the Chapter 7 Trustee.

The court dismissed the BCI appeal for failure to prosecute due to Heiman's and Sioris' utter disregard for the court's time and docket management concerns. The court concludes that the same result applies to the present case. Although the appellants filed a timely opposition to the motion to dismiss, the court finds their failure to comply with Rule 8009 to be inexcusable neglect. Regardless of Heiman's illness, the appellants had the affirmative duty to either file their brief, or to file a motion for enlargement of time. The appellants unilaterally chose to do neither, and in the process, burdened the court with an inactive appeal. Moreover, Sioris' suggestion that he only had a duty to contact the court regarding Heiman's illness if the court had entered a scheduling order clearly runs afoul of Rule 8009's requirements.

Additionally, the court is troubled by Heiman's and Sioris' history of failing to prosecute both this appeal and the related BCI appeal. The procedural default at issue here is clearly not an isolated incident. Indeed, as the court noted in its June 3, 2002 order dismissing the BCI appeal, their dilatory tactics were also evident during that proceeding, as well as during the bankruptcy proceedings below.

Finally, the court finds it irrelevant that John and Marlene Koutoufaris have filed a Notice of Conversion to Chapter 7. The appellants have failed to cite to any authority for the proposition that such a notice effectively resets the filing clock for Rule 8009 purposes.<sup>3</sup> Nor is the court aware

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<sup>3</sup>The court notes that the appellants have failed to address how the Koutoufaris' conversion to Chapter 7 would affect their co-appellant, the Estate of Keith, which is not in bankruptcy.

of any such authority.

### **III. CONCLUSION**

It is uncontested that the appellants have failed to adhere to Rule 8009's unambiguous mandate. This fact, coupled with counsel's pattern of disregarding the court's scarce resources and docket management concerns, warrants dismissal.

For these reasons, IT IS HEREBY ORDERED that:

1. The Appellee's motion to dismiss for failure to prosecute (D.I. 6) is GRANTED.

Date: July 18, 2002

Gregory M. Sleet  
UNITED STATES DISTRICT COURT