No. 22-1753

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 14, 2022
DEBORAH S. HUNT, Clerk

In re: SETTLEMENT FACILITY DOW CORNING TRUST,

Debtor.

KOREAN CLAIMANTS,

Interested Party-Appellant,

v.

DOW SILICONES CORPORATION, et al.,

Interested Parties-Appellees,

FINANCE COMMITTEE,

Movant-Appellee.

O R D E R

Before: SUTTON, Chief Judge; GUY and SILER, Circuit Judges.

Korean Claimants—individuals from South Korea who settled claims against Dow Corning alleging injuries caused by breast implants that Dow Corning manufactured—appeal from the district court's Closing Order 5, relating to the distribution of funds put in trust following Dow Corning's bankruptcy reorganization. Korean Claimants move to stay the order pending appeal. Appellees Dow Silicones Corporation, the Debtor's Representatives, the Claimants' Advisory Committee, and the Finance Committee jointly respond. Korean Claimants also move for leave to file a reply and have tendered that reply.

A stay pending appeal is "an exercise of judicial discretion." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672–73 (1926)). Four factors guide this discretion: (1) whether the stay applicant is likely to succeed on the merits; (2) whether the stay applicant will suffer irreparable injury absent a stay; (3) whether a stay would substantially harm other interested parties; and (4) whether a stay would serve the public interest. *Id.* at 434. "The first two factors . . . are the most critical." *Id.* Here, because the Korean Claimants are unlikely to succeed on the merits of their appeal, we deny their motion for a stay.

The Korean Claimants are unlikely to succeed on the merits because their appeal is not timely. A notice of appeal in a civil case must be filed within thirty days after the entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1)(A). The Korean Claimants, however, filed their notice of appeal seventy-three days after the district court entered Closing Order 5. And they can no longer move the district court to extend or reopen the time to appeal. Fed. R. App. P. 4(a)(5). As a result, their appeal is untimely and faces dismissal.

One caveat merits discussion. Ordinarily, Rule 4's thirty-day requirement is a statutory jurisdictional prerequisite that we must enforce, such that the "late filing of the appeal notice necessitates dismissal of the appeal." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 16, 20 (2017) (citing *Bowles v. Russell*, 551 U.S. 205, 210–213 (2007)); *see* 28 U.S.C. § 2107(a). Here, however, the Korean Claimants' appeal arises under the Bankruptcy Code. *See Browning v. Levy*, 283 F.3d 761, 773 (6th Cir. 2002) (explaining that, for purposes of bankruptcy jurisdiction, a proceeding arises under the Bankruptcy Code when it "invoke[s] a substantive right created by federal bankruptcy law or . . . could not exist outside of [a] bankruptcy"). And while the Appellate Rules treat appeals from district courts exercising their original bankruptcy jurisdiction the same as all other appeals, *see* Fed. R. App. P. 6(a), Congress excluded bankruptcy matters from 28

U.S.C. § 2107's statutory deadline. *See* 28 U.S.C. § 2107(d) ("This section shall not apply to bankruptcy matters or other proceedings under Title 11."). Because only Congress can limit the jurisdiction of the federal courts, *Gunter v. Bemis Co., Inc.*, 906 F.3d 484, 492 (6th Cir. 2018), it follows that Appellate Rule 4 is not jurisdictional as applied in this case. *See In re Indu Craft, Inc.*, 749 F.3d 107, 114 (2d Cir. 2014) (reasoning similarly). Rather, it amounts at most to a mandatory claims-processing rule. *See Hamer*, 138 S. Ct. at 17; *Gunter*, 906 F.3d at 492.

This caveat, however, does not make a practical difference today. To be sure, unlike jurisdictional rules, mandatory claims-processing rules can be waived or forfeited. *Gunter*, 906 F.3d at 492. Here, however, Dow's response emphasizes that the Korean Claimants' appeal was untimely. As a result, Dow has neither waived nor forfeited its timeliness arguments. Although Dow thought that the timeliness issue here was jurisdictional, that slip is not so glaring that it amounts to waiver or forfeiture.

Likewise, the Supreme Court has "reserved whether mandatory claims-processing rules may be subject to equitable exceptions." *Hamer*, 138 S. Ct. at 18 n.3. But even if Rule 4 were amenable to equitable exceptions in principle, no such exception would apply in this case. The Korean Claimants say that they did not discover Closing Order 5 until well after it was posted on the district court's electronic docket. That oversight, however, is not the kind of unavoidable delay that could justify tolling an otherwise mandatory deadline. *E.g.*, *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560–61 (6th Cir. 2000) ("Typically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control.").

All this means that Korean Claimants' appeal is likely to fail on the merits. Meanwhile, none of the other discretionary factors cut in favor of a stay. The Korean Claimants have not

shown irreparable injury, since immediate entry of Closing Order 5 would not close Dow's trust or otherwise leave it bereft of funds. A stay would harm Dow by disrupting trust operations. And we see no reason why staying Closing Order 5 would further the public interest.

Accordingly, the motion to stay is **DENIED**. The motion for leave to reply is **GRANTED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk