NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-09-1335-HPD
HERAYER SAFARIAN and ANAHID NAZARIAN SAFARIAN,	Bk. No. SV 09-14688 MT
Debtors.	
CAROLE JOHNSON,	
Appellant,	**M E M O R A N D U M**[1]
v.	
HERAYER SAFARIAN; ANAHID NAZARIAN SAFARIAN,	
Appellees.	

Argued by Telephone Conference
and Submitted on March 19, 2010

Filed - April 13, 2010

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Maureen A. Tighe, Bankruptcy Judge, Presiding.

Before: HOLLOWELL, PERRIS[2] and DUNN, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Elizabeth L. Perris, Chief Bankruptcy Judge for the District of Oregon, sitting by designation.

The bankruptcy court denied a pro se creditor's motions to reopen a chapter 7 case and for Rule 60(b)[3] relief to set aside an order where the court denied the creditor's untimely motion for an additional extension of time to file a nondischargeability complaint. Finding no abuse of discretion, we AFFIRM.[4]

I. FACTS

Herayer Safarian and Anahid Nazarian Safarian ("Debtors") filed a no-asset chapter 7 petition on April 24, 2009.

Carole Johnson ("Johnson") was a creditor who had obtained a state court default judgment against Debtors based on a loan debt secured by a junior deed of trust on Debtors' residence. Johnson's address was incorrectly listed on the master mailing list.

The first meeting of creditors was scheduled for May 28, 2009, and the court fixed July 27, 2009 as the last day for filing complaints under § 523 to determine the dischargeability of debts and under § 727 to object to discharge.

Johnson did not receive the notice of Debtors' bankruptcy

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[3] Unless specified otherwise, all chapter and code references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. The Federal Rules of Bankruptcy Procedure, Rules 1001-9037, are identified in this Memorandum as "Bankruptcy Rules," while the Federal Rules of Civil Procedure, which are made applicable by the Bankruptcy Rules, are identified as "Rules."

[4] Debtors/Appellees neither responded to Johnson's motions in bankruptcy court nor appeared in this appeal. Nevertheless, there is no evidence that Debtors stipulated to the relief or waived any defenses vis-a-vis the complaint. Thus, the panel is not compelled to grant the appellant the relief she seeks based on Debtors' failure to oppose or appear. Teamsters, Chauffeurs, Warehousemen Helpers Local/Union 524 v. Billington, 402 F.2d 510, 511 (9th Cir. 1968); In re Saylor, 178 B.R. 209, 212 (9th Cir. BAP 1994), aff'd, 108 F.3d 219 (9th Cir. 1997).

from the court due to the incorrectly listed address, but she received actual notice of the bankruptcy in mid-July 2009 from a private investigator she had retained and learned of the dischargeability filing deadline from the court clerk.

On July 15, 2009, 12 days before the filing deadline, Johnson filed a motion to waive the filing fee and to extend the deadline for filing an adversary complaint to determine the non-dischargeability of a debt pursuant to § 523(a)(2)-(6), due to lack of notice. She provided her correct address to the court on that motion.

Johnson's motion was heard the same day. In regards to the motion to waive the filing fee, the court asked about Johnson's income. Johnson explained that she had applied for disability benefits, and mentioned that she had been treated at the Olive View Medical Center and was on dialysis.

Johnson had already prepared a § 523 complaint, which she brought to the hearing. While declining to look at the complaint, the court asked about the factual allegations to ensure that there was a "colorable cause of action" for waiver of the filing fee. Tr. of Proceedings (July 15, 2009), pp. 1:17-20 and 10:3-5.

Johnson alleged that the loan had been procured through fraud, and that Debtors intentionally concealed their bankruptcy from her by listing a "fake" address for her. Id. at 6:8. She also alleged that Debtors had improperly scheduled her debt and concealed assets. The court determined that both § 523 and § 727 might be implicated on the facts as represented by Johnson, and told Johnson to "think before you file the complaint whether you want to file under 727 as well as 523. You can list both. You

need to give me as much detail as possible." Id. at 8:5-8. The court recommended that Johnson "do a more detailed complaint . . . first." Id. at 9:23-24. To this end, the court suggested that Johnson read the bankruptcy statutes at the court's self-help clinic. That part of the discussion concluded as follows:

> MS. JOHNSON: So, the criteria for nondischargeability is located where?
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> THE COURT: 523 and 727.
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> MS. JOHNSON: And it will say what the criteria is for nondischargeability.
>
> THE COURT: Yes.
>
> MS. JOHNSON: Okay, thank you very, very, very much.

Id. at 18:18-25.

A lengthy discussion ensued concerning the deadline for filing the complaint, pertinent parts of which follow:

> THE COURT: You can talk to the clinic people tomorrow to see --
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> MS. JOHNSON: I did contact - I wanted to do this by the 27th [of July]. I did contact their attorney.
>
> THE COURT: Well you have to file it by the 27th [of July] if that's the deadline. Where did you learn that that's the deadline?
>
> MS. JOHNSON: From the clerk . . . .
>
> . . . .
>
> MS. JOHNSON: Do I have beyond the 27th [of July] being that I did give notice to the attorney or not?
>
> THE COURT: No because you have enough information to get it filed now.
>
> MS. JOHNSON: Really?
>
> THE COURT: If you find out about it before the deadline, you [need] to do the deadline. Why do you need an extension? Do you want to find an attorney?

MS. JOHNSON: Well, no, I just want to make sure this isn't wrong and it doesn't get dismissed.

THE COURT: Well, try to file it by that deadline.

MS. JOHNSON: Okay.

THE COURT: I'll give you a 30-day extension.

MS. JOHNSON: Okay. . . .

Id. at 11:15-21; 14:17-25 to 15:1-5 (alterations added).

The court entered an order on July 16, 2009, which waived the adversary filing fee and extended the deadline for both § 523 and § 727 complaints for 30 days, until August 26, 2009. A copy of the order was mailed to Johnson at her correct address,[5] and Johnson conceded, at oral argument before the panel, that she had received it.

Debtors were discharged on August 14, 2009.[6] The notice of discharge was sent to Johnson at the incorrect address, and she did not receive it.

Despite the 30-day extension, Johnson failed to either file a complaint or move for a further extension before the expiration of the August 26th deadline. On September 2, 2009, Johnson filed a "Re-application" for waiver of the complaint filing fee and request for an additional extension of the filing deadline

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[5] See Appellant's Ex. B (Request for Change of Address) and Case No. 1:09-bk-14688 Dkt. No. 20 (notice of service). We may take judicial notice of the electronic docket. See In re Commercial Money Center, Inc., 392 B.R. 814, 824 n.21 (9th Cir. BAP 2008) (citing In re Atwood, 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003)).

[6] The discharge order explained, on p. 2, that "debts which are not discharged" include those "that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged." Case No. 1:09-bk-14688 Dkt. No. 21.

("Extension Motion"). Johnson explained her noncompliance as follows:

> My recollection was asking for and being given a late September date not August as I had a matter with these same debtors August 27th 8:30 [at] VN Superior Court which I had requested July 06, 2009.

Id. at 1:27-28 and 2:1.

She stated that she had been having "numerous difficulties" and that her failure to file the complaint was "reasonably excusable." Id. at 2. She attached only one document to the Extension Motion--the state court's order for debtor Herayer Safarian to appear for an examination on August 27, 2009.

The bankruptcy court denied Johnson's request for further waiver[7] and extension, on September 9, 2009 ("Order Denying Extension"), stating:

> Creditor Johnson claims that she did not realize that she only had until August 26, 2009, to file an adversary proceeding. Because the court already waived the filing fee, extended the deadline and mailed Creditor Johnson a copy of its order; IT IS HEREBY ORDERED that Creditor Johnson's request for a further extension is DENIED.

The case was closed on September 11, 2009.

Johnson alleged that on September 18, 2009, within 10 days of entry of the Order Denying Extension, she had submitted a post-judgment motion and adversary complaint to the bankruptcy court, but the papers were returned because the case had been closed.

On September 30, 2009, Johnson filed two motions: a "Motion

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[7] The bankruptcy court did not identify its authority for waiving the fee. That issue was not raised before the bankruptcy court or on appeal. Therefore, we do not address it. See United Student Aid Funds, Inc. v. Espinosa, ___ U.S. ___, ___, 2010 WL 1027825 at *6 n.9 (March 23, 2010) (the Court need not settle a question that the parties did not raise in the courts below.)

to Reopen" the case and a "Motion for Relief" from the Order Denying Extension for a § 523(a)(2) and § 727 complaint.[8]

She maintained that the complaint had not been timely filed due to "mistake, inadvertence, surprise or excusable neglect" pursuant to Rule 60(b)(1). The "mistake" was that Johnson was "confused by the similarity of the dates" for the complaint deadline (August 26th) and the state court hearing (August 27th). Motion for Relief (September 30, 2009), p. 6:13. The "inadvertence or excusable neglect" was alleged to be a combination of chronic health issues, which had flared up, and a personal computer, which had broken down, during August.

Johnson explained that she has Lupus, a chronic disease which can flare up when she is under stress. She declared that she had experienced a respiratory infection and distress in the last half of August, could not think clearly, and spent numerous days in the hospital. Johnson attached only one item of medical documentation[9] - a "Medical Walk-In After Care Instructions" sheet from the Olive View Medical Center, dated August 20, 2009, which contained the diagnosis of "acute upper respiratory infections of unspecified site."

To document her computer problems, Johnson attached invoices

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[8] Johnson has waived the § 727 and Bankruptcy Rule 4004 issues by failing to discuss them in her opening brief. See In re Sedona Inst., 220 B.R. 74, 76 (9th Cir. BAP 1998) (issue not briefed is deemed waived).

[9] The appendix contains a psychologist's letter from the Los Angeles County Department of Mental Health. (Ex. G.5) The letter is dated November 3, 2009, and could not have been before the bankruptcy court. Therefore, the panel will not consider this document. In re Yepremian, 116 F.3d 1295, 1297 (9th Cir. 1997).

for computer repairs dated August 3, 2009 and August 31, 2009.

She also moved for relief under Rule 60(b)(3), based on Debtors' alleged fraud, misrepresentation or misconduct.

On October 9, 2009, the bankruptcy court entered its order denying Johnson's motions ("Order on Appeal"). The court found that Johnson "again presented evidence that she was confused about the extended date," along with evidence of medical and technical issues that was available at the time of her Extension Motion, and that the court had "already considered" an extension. This timely appeal followed.[10]

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. § 1334 and § 157(b)(1), (b)(2)(A), (I) and (O). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

The issues raised are whether the bankruptcy court abused its discretion in refusing to reopen the case and in denying relief, pursuant to Rule 60(b), from the Order Denying Extension of time to file a § 523 complaint.

IV. STANDARDS OF REVIEW

The bankruptcy court's decision whether or not to reopen a bankruptcy case under § 350 is reviewed for an abuse of discretion. In re Cisneros, 994 F.2d 1462, 1464-65 (9th Cir. 1993). The bankruptcy court's denial of a Rule 60(b) motion is

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[10] The panel hereby denies Johnson's motions to expedite our decision, to rule on the merits of the adversary complaint, and to supplement the appellate record. With these motions, Johnson has also attempted to include documents that were not before the bankruptcy court and, therefore, cannot be considered in our review. See Yepremian, 116 F.3d at 1297.

also reviewed for abuse of discretion. In re Cossio, 163 B.R. 150, 153 (9th Cir. BAP 1994), aff'd, 56 F.3d 70 (9th Cir. 1995).

We apply a two-part test to determine whether the bankruptcy court abused its discretion: (1) we review de novo whether the bankruptcy court "identified the correct legal rule to apply to the relief requested" and (2) if it did, whether the bankruptcy court's application of the legal standard was illogical, implausible or "without support in inferences that may be drawn from the facts in the record." United States v. Hinkson, 585 F.3d 1247, 1261-63 (9th Cir. 2009).

Unless the underlying judgment is infected by clear error, the denial of a Rule 60(b) motion does not entail a review of the merits of the underlying judgment. See McDowell v. Calderon, 197 F.3d 1253, 1255 n.4 (9th Cir. 1999).

V. DISCUSSION

A bankruptcy court has authority to reopen a closed case under § 350. In re Beezley, 994 F.2d 1433 (9th Cir. 1993). The court may reopen a closed case "to administer assets, to accord relief to the debtor, or for other cause." In re Wilborn, 205 B.R. 202, 209 (9th Cir. BAP 1996); see also Bankr. C.D. Cal. L.R. 5010-1(a).

The Ninth Circuit has ruled that in a no-asset, chapter 7 case, debts that have already been discharged are not affected by re-opening the case. Beezley, 994 F.2d at 1434. Because Johnson challenged the court's denial of her request for an additional extension of time in which to file a § 523 complaint, so that her debt might still be determined to be nondischargeable, her

complaint fell under § 523(c).[11]

Section 523(c)(1) allows creditors to request determinations regarding the dischargeability of certain debts of the kind alleged by Johnson. It provides:

> Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

11 U.S.C. § 523(c)(1).

Bankruptcy Rule 4007 controls the timing of § 523(c) dischargeability complaints, and provides:

> (c) Time for Filing Complaint under § 523(c) in a Chapter 7 Liquidation . . . ; Notice of Time Fixed.
>
> Except as otherwise provided in subdivision (d), a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. <u>On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired</u>.

Bankruptcy Rule 4007(c) (emphasis added).

Bankruptcy Rule 4007(c) applies to initial and subsequent

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[11] Since Johnson was given an extended deadline, her debt was discharged absent a further extension and a resolution of the § 523 complaint in her favor. There is an exception to this time restriction for creditors who do not have notice or actual knowledge of the bankruptcy in time to file a timely nondischargeability complaint. Such creditors may file a complaint under § 523(a)(3)(B) at any time because their debts are not discharged. <u>In re Staffer</u>, 306 F.3d 967, 971-72 (9th Cir. 2002) (citing Bankruptcy Rule 4007(b)).

requests to extend the complaint deadline. See In re Albert, 113 B.R. 617, 618-19 (9th Cir. BAP 1990); Bankruptcy Rule 9006(b)(3) (the court may enlarge the time for taking action under Bankruptcy Rule 4007(c) only to the extent and under the conditions stated in that rule).

Decisions in the Ninth Circuit have strictly construed Bankruptcy Rule 4007. See, e.g., In re Halstead, 158 B.R. 485, 487 (9th Cir. BAP 1993), aff'd & adopted, 53 F.3d 253 (9th Cir. 1995). Consequently, requests to enlarge the deadline generally must be made before the deadline expires, or they are untimely. See In re Ricketts, 80 B.R. 495, 496 (9th Cir. BAP 1987); accord 9 Collier on Bankruptcy ¶ 4007.04 [1][a], p. 4007-10 (15th ed. rev. 2010) ("The better view is that Rule 4007(c) provides the only circumstances in which the deadline can be extended."). Compliance with the deadline, however, is not a jurisdictional prerequisite but is in the nature of a statute of limitations that may be subject to equitable doctrines. See Kontrick v. Ryan, 540 U.S. 443, 456-57, 124 S. Ct. 906, 916-17, 157 L. Ed. 2d 867 (2004) (but not reaching question "[w]hether the Rules, despite their strict limitations, could be softened on equitable grounds").

In the Ninth Circuit, only in very limited circumstances may a court apply equitable doctrines to relieve a party from a failure to comply with the time limits of Bankruptcy Rule 4007. See Halstead, 158 B.R. at 487 (citing In re Santos, 112 B.R. 1001 (9th Cir. BAP 1990)); In re Anwiler, 958 F.2d 925, 927-28 (9th Cir.), cert. denied, 506 U.S. 882, 113 S. Ct. 236, 121 L. Ed. 2d 171 (1992)).

Johnson moved for relief from the court's Order Denying

Extension under Rule 60(b), which is incorporated by Bankruptcy Rule 9024. Under Rule 60(b) a court may grant a motion for relief from a final judgment or order "only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief." Fuller v. M.G. Jewelry, 950 F.2d 1437, 1442 (9th Cir. 1991) (quoting Rule 60(b) and Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985)).

Johnson maintains that the bankruptcy court erred in failing to set aside the Order Denying Extension, pursuant to Rule 60(b)(1), (b)(2), (b)(3), and (b)(6), as well as Rule 60(d). Johnson variously cites these subsections but does not argue all of them with specificity. Instead she includes a narrative of events, which she believes justifies an extension of the August 26th deadline. These subsections[12] will be discussed in turn, in an attempt to shape the discussion to the grounds presented and with a view to harmonize them with Bankruptcy Rule 4007.

A. Rule 60(b)(1) - Mistake or Excusable Neglect

Johnson contends that her second extension request should not have been denied, due to the existence of circumstances constituting "excusable neglect."

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[12] While Johnson also cited Rule 60(b)(5) in her Motion for Relief, she has waived that section by failing to address it in her opening brief. In re Sedona Inst., 220 B.R. at 76 (issue not briefed is deemed waived). Moreover, it is inapplicable to the facts of this case. Likewise, Rule 60(d)(2) was cited in the opening brief but was not addressed as to its applicability. This section is also inapplicable and is deemed abandoned. In re Green, 198 B.R. 564, 566 (9th Cir. BAP 1997) (issues identified in appellate brief but not addressed by argument in the brief are deemed abandoned).

The framework for considering whether a party should be relieved from the effects of an order on the equitable ground of "excusable neglect" was set forth in Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). The Ninth Circuit has held that the Pioneer analytical framework applies in considering "excusable neglect" in the context of Rule 60(b)(1). Briones v. Riviera Hotel & Casino, 116 F.3d 379, 382 (9th Cir. 1997).

Pioneer interpreted the meaning of excusable neglect under Bankruptcy Rule 9006(b)(1), which allows enlargement of time for excusable neglect "[e]xcept as provided in paragraphs (2) and (3) of this subdivision." Bankruptcy Rule 4007 is provided for in paragraph 3, which provides, "[t]he court may enlarge the time for taking action under [Rule] . . . 4007(c) . . . only to the extent and under the conditions stated in [that] rule . . . ." Bankruptcy Rule 4007(c) provides, in turn, that any motion for extension of time "shall be made before the time has expired."

The flaw in Johnson's argument is that prior decisions of this panel consistently have determined that Rule 60(b)(1) is inapplicable to untimely Bankruptcy Rule 4007 extension requests. See In re De La Cruz, 176 B.R. 19, 24 (9th Cir. BAP 1994); Santos, 112 B.R. at 1008; In re Burke, 95 B.R. 716, 718 n.1 (9th Cir. BAP 1989); Ricketts, 80 B.R. at 496; In re Rhodes, 71 B.R. 206, 207-08 (9th Cir. BAP 1987).

Johnson, like the appellant in Santos, relied upon the concurring opinion in Rhodes, which stated that excusable neglect under Rule 60(b) may provide a basis for granting a request to file an untimely complaint to determine dischargeability. Rhodes,

71 B.R. at 208. The Santos panel held that "excusable neglect cannot justify the untimeliness of [an] appellant's complaint." Santos, 112 B.R. at 1008 (alteration added). Nor is Johnson's reliance on In re Magouirk, 693 F.2d 948, 950 (9th Cir. 1982), persuasive. That case was decided under formerly applicable Bankruptcy Rules and does not apply to the current version of Bankruptcy Rule 4007.[13] See De La Cruz, 176 B.R. at 24; Rhodes, 71 B.R. at 208. Johnson has cited no contrary recent opinions.

Johnson alleged "mistake," in addition to excusable neglect, as a ground to set aside the Order Denying Extension under Rule 60(b)(1). The "mistake" was her alleged confusion over the August 26th deadline and the August 27th state court debtor examination date. Even if considered separately, this argument is not persuasive. Johnson's confusion did not reasonably prevent her from filing a complaint or motion for further extension on or before August 26th. She received a copy of the court's order specifying the August 26th date, and she had ample time over the preceding 30 days, to relieve any confusion by filing a motion with the court. The bankruptcy court found to that effect in its underlying Order Denying Extension.

B. Rule 60(b)(2) Newly-Discovered Evidence

Johnson maintains that the court disregarded the evidence submitted with the Motion for Relief and therefore the court's

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[13] The Magouirk court utilized Former Bankruptcy Rule 404 for its analysis of excusable neglect in discharge of debt motions. Magouirk, 693 F.2d at 950. In contrast to current Bankruptcy Rule 4007(c), Former Bankruptcy Rule 404(c) provided: "The court may for cause, on its own initiative or on application of any party in interest, extend the time for filing a complaint objecting to discharge." Magouirk, 693 F.2d at 950.

decision was "arbitrary and capricious." Her argument is a prayer for relief pursuant to Rule 60(b)(2) on the ground of "newly discovered evidence, that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 60(b)(2).

Evidence is newly discovered within the meaning of Rule 60(b)(2) if: (1) the moving party can show the evidence relied on in fact constitutes "newly discovered evidence" within the meaning of Rule 60(b); (2) the moving party exercised due diligence to discover this evidence; and (3) the newly discovered evidence must be of "such magnitude that production of it earlier would have been likely to change the disposition of the case." Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003) (citation omitted). "[T]he evidence must have become available only after judgment (with the exercise of due diligence), and be both admissible and probative." 12 James Wm. Moore, et al., MOORE'S FEDERAL PRACTICE § 59.30[5][a][iii] (2010).

The bankruptcy court found, in its Order on Appeal, that the evidence was available at the time Johnson's Extension Motion was filed, on September 2, 2009. We agree.

The documents to which Johnson refers include her declaration regarding medical and technical problems in August, the Medical Clinic report concerning her acute respiratory problem dated August 20, 2009, and the computer repair invoices dated August 3 and 31, 2009. The bankruptcy court did not err in its finding because this evidence predated the Extension Motion. Therefore, the court neither abused its discretion in finding that Johnson did not present any newly discovered evidence nor in failing to

consider the evidence that she presented.

C. Rule 60(b)(3) Fraud and Rule 60(d)(3) Independent Action

Rule 60(b)(3) allows the court to relieve a party from a final judgment for fraud, misrepresentation, or misconduct by an opposing party. Rule 60(b)(3). Defendants must prove by clear and convincing evidence that the judgment was "obtained through fraud, misrepresentation, or other misconduct." Casey v. Albertson's Inc., 362 F.3d 1254, 1260 (9th Cir. 2004) (internal citations and quotations omitted).

Fraud upon the court can be the basis for an independent action by the court using its inherent authority, which power is not limited by Rule 60(b). See Rule 60(d)(3). "Fraud upon the court" is "read narrowly, in the interest of preserving the finality of judgments." In re Levander, 180 F.3d 1114, 1119 (9th Cir. 1999). Generally, perjury or nondisclosure are not "fraud upon the court," when they can be challenged in court. Id. at 1120. Furthermore, an independent action is available only "to prevent a grave miscarriage of justice." United States v. Beggerly, 524 U.S. 38, 47, 118 S. Ct. 1862, 1868, 141 L. Ed. 2d 32 (1998).

Johnson's arguments focus on Debtors' improper scheduling of her debt, alleged concealment of assets, and falsification of her address to prevent her from learning of the bankruptcy and filing a timely nondischargeability complaint. These arguments were made to the bankruptcy court in the first motion for an extension, in July of 2009. The court agreed that Johnson had inadequate notice of the deadline and granted an extension. However, the alleged fraud had no impact on Johnson's ability to file a complaint

within the extended 30-day period.

Such arguments are also foreclosed by Bankruptcy Rule 4007. Generally, defenses of equitable tolling and equitable estoppel arise where one party reasonably relies on another's conduct or omission, in forbearing to take necessary action, while the wrongdoer reaps a windfall. See In re Gardenhire, 209 F.3d 1145, 1150 (9th Cir. 2000); In re Gurrola, 328 B.R. 158, 172 (9th Cir. BAP 2005); Santos, 112 B.R. at 1006-1007. This panel, in Santos, held that the plain language of Bankruptcy Rule 4007 precludes application of these doctrines. Id. Bankruptcy Rule 4007 allowed Johnson the opportunity to obtain an extension in which to file her complaint, and she did obtain an extension despite Debtors' conduct and omissions.[14]

Johnson's own authority, In re Price, 79 B.R. 888 (9th Cir. BAP), aff'd, 871 F.2d 97 (9th Cir. 1989), supports the conclusion that she had constitutionally sufficient notice of the extended filing deadline. See Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). In Price, the Ninth Circuit concluded that, because "[c]ounsel for the [creditor] . .

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[14] We apply the holding in Santos narrowly to these facts, where the opportunity to file was present. Compare In re Maughan, 340 F.3d 337, 344 (6th Cir. 2003), where the Bankruptcy Rule 4007(c) deadline was equitably tolled because the debtor caused the creditor to be late in filing the complaint.

. was given actual notice of the bankruptcy proceedings in time to file a complaint, or at least to file a timely motion for an extension of time," the debt had been discharged. In re Price, 871 F.2d 97, 99 (9th Cir. 1989) (emphasis added).

Johnson counters that her rights were prejudiced by Debtors' fraud because the notice she received, combined with the actual notice, was only five weeks (35 days), whereas the properly scheduled creditors received 60 days after the date of the first creditor's meeting.

In the Ninth Circuit a 30-day notice of a deadline is the accepted minimum required notice under Bankruptcy Rule 4007(c). In re Gordon, 988 F.2d 1000, 1001 (9th Cir. 1000); Halstead, 158 B.R. at 488; In re Dewalt, 961 F.2d 848, 851 (9th Cir. 1992). In Dewalt a creditor did not receive adequate notice of the claims bar date because the debtor listed an incorrect address for the creditor. The Ninth Circuit looked to the 30-day notice requirement of Bankruptcy Rule 4007(c) as a "guide to the minimum time within which it is reasonable to expect a creditor to act at penalty of default." Id. at 851. It concluded that notice was insufficient where creditor's counsel received actual notice of the bankruptcy only seven days before the claims bar date. Id.

The Ninth Circuit opined that circumstances could dictate a longer or shorter period than 30 days:

> Even 30 days notice may not be enough if truly extraordinary circumstances are presented, as when an unsophisticated creditor, not represented by counsel, receives only the most sketchy notice that a bankruptcy has been filed. On the other hand, a somewhat lesser period may be sufficient where there is clear evidence the creditor has enough advance knowledge of the bar date to file the complaint or request an extension and has purposefully chosen to lie in wait rather than present its

claim.

Id.

Neither extreme situation is present here. While Johnson appeared pro se, she had a complaint in hand, in July 2009, at which time the court suggested that she review the statutes and visit the self-help clinic before filing it. Thirty additional days was more than enough time in which to either file the complaint or seek further extension. Multiple extensions are possible under the rule, as long as they are timely requested. See Albert, 113 B.R. at 618-19 (circumstances may make more than one timely extension appropriate); In re Weinberg, 337 B.R. 65, 69 (E.D. Pa. 2005), aff'd, 197 F. App'x 182 (3d Cir. 2006) (denying second request for extension because it was untimely under Bankruptcy Rule 4007).

Therefore, Johnson produced no grounds under Rule 60(b)(3) or (d)(3) to set aside the Order Denying Extension because Johnson had the opportunity to fully and fairly present her complaint.

D. Rule 60(b)(6) - "Catch-All" and (d)(1) Independent Action

Rule 60(b)(6) is a catchall that allows a court to set aside a final judgment for "any other reason that justifies relief." (Emphasis supplied.) This rule is "used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." Latshaw v. Trainer Wortham & Co., 452 F.3d 1097, 1103 (9th Cir. 2006) (internal quotations omitted). Johnson must demonstrate both injury and circumstances beyond her control which prevented her from proceeding with the action in a proper fashion. Id.

Rule 60(b)(6) encompasses any equitable defenses to Bankruptcy Rule 4007's time limitations. See, e.g., In re Nation, 352 B.R. 656, 671 (Bankr. E.D. Tenn. 2006) (Rule 60(b)(6) encompasses the theory of equitable tolling). Like Rule 60(b)(6), Bankruptcy Rule 4007(c) has been interpreted in the Ninth Circuit to preclude untimely requested extensions of the complaint deadline except in "unique" or "extraordinary circumstances." Generally, relief is "limited to situations where a court explicitly misleads a party." In re Kennerly, 995 F.2d 145, 147-48 (9th Cir. 1993); see also Anwiler, 958 F.2d at 929 (court sent conflicting second notice). In other words, the court retains inherent power to correct its own mistakes, pursuant to § 105(a), and Rule 60(a), which compliments this equitable authority. Rule 60(d)(1) further provides that Rule 60(b) "does not limit a court's power to . . . entertain an independent action to relieve a party from a judgment, order, or proceeding." However, a bankruptcy court may not use its equitable power to circumvent any section of the bankruptcy code or rules. See Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 108 S. Ct. 963, 969, 99 L. Ed. 2d 169 (1988). An independent action requires a "grave miscarriage of justice." Beggerly, 524 U.S. at 47.

In addition, only matters that do not fit within one of the other subsections can be raised in a Rule 60(b)(6) motion. Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1338 (9th Cir. 1986). For that reason, Johnson's issues concerning excusable neglect, new evidence and Debtors' alleged fraudulent conduct are not considered in a Rule 60(b)(6) analysis.

In this appeal Johnson maintains that the bankruptcy court's ruling was unjust because her illnesses and technical problems, during August, made it impossible to prepare and file the complaint timely. We disagree. The evidence indicated that Johnson had ongoing medical problems and treatments associated with Lupus. She asserts that the disease caused mental confusion. Nevertheless, the record establishes that during the months that she endured illnesses and treatments, Johnson was able to prepare a complaint, file multiple pleadings with the court, visit the self-help clinic, monitor the state court proceedings, and attend a court hearing. The evidence of a walk-in visit to the Olive View Medical Center for a respiratory infection in August neither established nor confirmed a medical emergency that would prevent her from contacting the court. Therefore, the bankruptcy court did not err in determining that Johnson was capable of meeting the August 26th deadline to file the complaint or request an extension.

Likewise, evidence of computer repairs dated August 3 and August 31, did not necessarily indicate an inability to file a complaint by August 26th. If Johnson believed these technical problems were significant, she had at least 30 days in which to ask the court for a further extension.

Johnson further blames the bankruptcy court for causing her to miss the August 26th deadline because the court "erroneously" advised that her complaint should contain both § 727 and § 523 claims for relief and told her not to file the complaint which she brought to the July 15, 2009 hearing.

The transcript reveals that Johnson clearly understood the

court's main points: that Johnson had all the facts she needed in order to proceed; that she should get help from the self-help clinic to read the statutes and write down in the complaint all of the facts and allegations; and that she should file the complaint on time. The court's instructions were not "erroneous."[15]

Similarly, Johnson asserts the court's failure to send the notice of entry of Debtors' discharge to her correct address caused her to delay filing the complaint. This claim is irrelevant in light of her knowledge of the August 26th deadline.

Based on the foregoing analysis, there is no court error or extraordinary circumstances, which would permit an equitable exception to Bankruptcy Rule 4007 under Ninth Circuit law.[16]

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[15] Johnson's suggestion that she was experiencing "legal difficulties," (Motion to Reopen, p. 2.), is disingenuous. She did not ask for further time to do discovery or specifically to find an attorney, despite being asked by the court whether she wanted more time to find an attorney.

In addition, Johnson blames the Clerk's office for advising her not to file too much information along with her Motion for Relief, as if that had prevented her from presenting all of her medical evidence. (Appellate Brief at 18.) Pro se litigants "must follow the same rules of procedure that govern other litigants," King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987), and they "should not be treated more favorably than parties with attorneys of record." Jacobsen v. Filler, 790 F.2d 1362, 1364 (9th Cir. 1986). Johnson had the opportunity to present whatever evidence she desired, within the bounds of applicable Federal and Bankruptcy Rules.

[16] To the extent that the bankruptcy court may have treated the Motion for Relief as a Rule 59 motion (because Johnson arguably submitted the motion on September 18, 2009, within 10 days following entry of the Order Denying Extension), it did not abuse its discretion in denying relief. See Demos v. Brown (In re Graves), 279 B.R. 266, 275 (9th Cir. BAP 2002).

Reconsideration under Rule 59 is appropriate if the bankruptcy court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law, and there may also be "other, highly unusual, circumstances

(continued...)

VI. CONCLUSION

The bankruptcy court did not abuse its discretion in denying Johnson's Motion for Relief, nor had it committed clear error in denying Johnson's untimely motion for an extension of the Bankruptcy Rule 4007 deadline for filing a § 523(c) complaint. Johnson's debt was discharged. Accordingly, the bankruptcy court's order denying the Motion to Reopen the case was not an abuse of discretion. AFFIRMED.

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[16](...continued)
warranting reconsideration." School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). As with Rule 60(b)(2), "newly discovered evidence" does not exist where the party merely failed to file available documents in the original motion. Id. at 1263. These grounds were considered and properly rejected by the bankruptcy court.