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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	NC-07-1295-JuMkK
)		
7	ALEXANDRU POLINSKI,)	Bk. No.	07-10102
)		
8)	Adv. No.	07-01037
	Debtor,)		
9)		
10	DAVID LIPSKY,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM¹	
)		
13	ALEXANDRU POLINSKI,)		
)		
14	Appellee.)		
)		

Argued and Submitted on January 24, 2008
at San Francisco, California

Filed - February 19, 2008

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

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Before: JURY, MARKELL and KLEIN, Bankruptcy Judges.

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.

1 **I. INTRODUCTION**

2 Creditor-Appellant, David Lipsky ("Appellant" or "Lipsky")
3 appeals the bankruptcy court's order dismissing his late-filed
4 nondischargeability adversary complaint. For the reasons below,
5 we AFFIRM.

6 **II. FACTS**

7 Alexandru Polinsky ("Polinski" or "debtor") was a jewelry
8 designer and dealer. Lipsky took a diamond necklace to debtor to
9 reset its 2.75 carat diamond into a gold ring, that Lipsky also
10 provided. Debtor did not perform the services. After months of
11 delay, Lipsky was unsuccessful in getting the diamond or ring
12 back from debtor, despite demands.

13 On January 31, 2007, debtor filed his voluntary chapter 7
14 petition.² Lipsky was listed as an unsecured creditor on
15 Schedule F with a \$25,000 undisputed debt. Debtor incorrectly
16 listed Lipsky's address as 153 Koch Road, Corte Madera,
17 California, 94925. Lipsky had moved from that address
18 approximately five years earlier to 34 Madera Del Presidio, Corte
19 Madera, California 94925.

20 The bankruptcy court issued a notice to all interested
21 parties of a creditors' meeting to be held March 6, 2007. The
22 notice established May 7, 2007 as the deadline for the filing of
23 complaints objecting to the discharge of Polinski's debts (the
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25 ² Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
28 enacted and promulgated on the effective date of the Bankruptcy
Abuse Prevention and Consumer Protection Act of 2005, Pub. L.
109-8, 119 Stat. 23 (generally October 17, 2005).

1 "Discharge Bar Date"). The clerk mailed the notice to Lipsky at
2 the 153 Koch Road address on February 1, 2007.

3 According to the declaration of Barbara R. McEntyre,
4 debtor's former attorney, she received a telephone call from
5 Lipsky about a week after debtor's petition was filed. She
6 declared that Lipsky knew about the bankruptcy, but he had not
7 received notice of the case. She took Lipsky's correct address
8 and mailed him a copy of the notice on or about February 7, 2007.
9 She also stated that she believed she had entered a change of
10 address for Lipsky in the case at the same time.

11 On March 6, 2007, Lipsky filed a proof of claim which stated
12 his correct address. Lipsky was also elected to the unsecured
13 creditors' committee at the § 341(a) meeting. The U.S. Trustee's
14 account of the election stated Lipsky's correct address.

15 Lipsky personally questioned debtor about the diamond at the
16 creditors' meeting. Debtor admitted that he had sold the stone,
17 but could not remember to whom or for how much.³ At the
18 meeting, debtor's attorney handed Lipsky the gold ring without
19 the diamond.

20 Lipsky met his attorney, Lawrence Alioto ("Alioto"), at the
21 creditors' meeting. Alioto agreed to prepare a
22 nondischargeability complaint for Lipsky. On April 19, 2007,
23 well before the May 7, 2007 Discharge Bar Date, Alioto sent a
24 copy of the complaint, coversheet and summons form which he had
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26 ³ Although the § 341(a) transcript is not included in the
27 appellate record, debtor's alleged testimony is consistent with
28 his Schedule F which lists Lipsky as a creditor holding an
undisputed claim in the amount of \$25,000.

1 prepared to Lipsky. Alioto admits that he inadvertently sent
2 these documents to the Koch Road address which was listed on
3 debtor's petition rather than Lipsky's correct address which he
4 had put on the complaint and cover sheet.

5 When the May 7, 2007 deadline passed, Alioto assumed that
6 Lipsky had changed his mind about filing the complaint. On May
7 8, 2007, Lipsky called Alioto and asked where the complaint was.
8 At that time, they both discovered the complaint was mailed to
9 the wrong address.

10 Lipsky filed his nondischargeability complaint on May 9,
11 2007, two days after the deadline. Debtor moved under Federal
12 Rule Civil Procedure 12(b) to dismiss Lipsky's late-filed
13 complaint. At the hearing, the bankruptcy court dismissed
14 Lipsky's complaint pursuant to Jones v. Hill (In re Hill), 811
15 F.2d 484, 486-87 (9th Cir. 1987), which holds that a court has no
16 discretion to enlarge the time period under Rule 4007(c) on the
17 basis of excusable neglect.

18 Lipsky timely appealed.

19 **III. ISSUE**

20 Whether the bankruptcy court abused its discretion in
21 dismissing Appellant's late-filed nondischargeability complaint.

22 **IV. JURISDICTION**

23 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
24 §§ 1334 and 157(b)(1) and (2)(I). We have jurisdiction under 28
25 U.S.C. § 158.

26 **V. STANDARDS OF REVIEW**

27 The interpretation of Rule 4007(c) is a question of law to
28 be reviewed de novo. Wilzig v. Lopez (In re Lopez), 192 B.R.

1 539, 543 (9th Cir. BAP 1996). Whether circumstances justify a
2 trial court granting relief from the bar date is reviewed under
3 an abuse of discretion standard. Id. "A bankruptcy court would
4 necessarily abuse its discretion if it bases its ruling upon an
5 erroneous view of the law or a clearly erroneous assessment of
6 the evidence." Id. (citation omitted).

7 **VI. DISCUSSION**

8 Lipsky and Alioto acknowledge that Alioto was arguably
9 negligent. However, Lipsky contends that debtor must share some
10 responsibility for Lipsky's late-filed complaint. Lipsky
11 maintains that there is a "causal link" between his late-filed
12 complaint and debtor's failure to list Lipsky's correct address
13 in his schedules. Lipsky argues that debtor failed to use
14 diligence in scheduling him as a creditor because debtor used an
15 address that Lipsky had moved from in January 2002, five years
16 before debtor's filing.

17 In opposition, debtor argues it is undisputed that Lipsky
18 and Alioto had notice of the Discharge Bar Date. Debtor also
19 contends that Alioto could have looked numerous places for
20 Lipsky's correct address. For example, the complaint Alioto
21 prepared for filing, the U.S. Trustee's summary of the creditors'
22 committee election and the proof of claim filed by Lipsky all
23 contained his correct address.⁴ Instead, debtor argues, against
24 "all odds", Alioto used the incorrect address that was listed in
25 debtor's schedules. Debtor also points out that Lipsky could

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27 ⁴ Furthermore, common sense dictates that any attorney opens
28 a client file with a current address, so Alioto must have had
personal knowledge of his client's address.

1 have called Alioto or Alioto could have called Lipsky prior to
2 the deadline. Debtor maintains that he cannot be held
3 responsible for their actions.

4 **A. The Standards For Enlarging the Time to File a Complaint**
5 **Under Bankruptcy Rule 4007(c)**

6 Section 523 applies to individual debtors and specifies
7 which of the debtor's debts are not discharged in a bankruptcy
8 case. The section sets forth certain effectuating procedures.
9 Section 523(c)(1) provides that, notwithstanding subsection (a),
10 debts of a kind specified in paragraphs (2), (4), or (6) of
11 § 523(a) will be automatically discharged, unless the creditor to
12 whom such debt is owed initiates proceedings in the bankruptcy
13 court to obtain a determination that the debt is
14 nondischargeable. Subsection (c)(1) therefore creates
15 substantive rights both in the debtor (the automatic discharge of
16 otherwise nondischargeable debts) and creditors (the right to
17 object). However, it does not contain any directive regarding
18 the time period in which the creditor must take such action.

19 Rule 4007(c) implements § 523(c) by requiring that a party
20 must either file a complaint objecting to discharge not later
21 than sixty days following the first date set for the meeting of
22 creditors held pursuant to § 341(a) or file a motion for an
23 extension within that period. See Fed. R. Bankr. P. 4007(c).
24 The primary purpose underlying this time limitation is the
25 granting of the debtor's fresh start in a timely and expeditious
26 manner. Schunck v. Santos (In re Santos), 112 B.R. 1001, 1006
27 (9th Cir. BAP 1990) (stating that the purpose of Rule 4007(c) is
28 to further the prompt administration of bankruptcy estates and

1 the fresh start goals of bankruptcy relief).

2 The short time limitation in which to file a
3 nondischargeability complaint favors debtors, who can feel secure
4 their creditor slate has been wiped clean and they can get on
5 with their lives. Yet, as the Bankruptcy Code and the policies
6 underlying the debtor's discharge make clear, the fresh start is
7 reserved for the honest but unfortunate debtor. Thus, there are
8 competing interests at stake. However, if the time deadline for
9 filing a dischargeability complaint against a dishonest debtor is
10 missed, in the majority of instances, the debt at issue is
11 discharged and even the dishonest debtor may walk away with a
12 clean slate.

13 Nevertheless, Rule 4007(c) is a claim-processing rule
14 creating a deadline that does not affect subject-matter
15 jurisdiction, the benefit of which rule can "be forfeited if the
16 party asserting the rule waits too long to raise the point."
17 Kontrick v. Ryan, 540 U.S. 443, 454 (2004); see also Santos, 112
18 B.R. at 1006. Moreover, equitable principles may apply to permit
19 extension of the Rule 4007(c) deadline. Young v. United States,
20 535 U.S. 43, 49-51; Santos, 112 B.R. at 1006. Consequently,
21 situations where equitable relief is available are limited.

22 **B. Excusable Neglect Cannot Be Used to Enlarge the Time**

23 In essence, and as recognized by the bankruptcy court,
24 Lipsky is arguing excusable neglect as a basis for authorizing
25 his late-filed complaint. The difficulty, however, is that Rules
26 4007(c) and 9006(b)(3) combine to prohibit retroactive extensions
27 of the deadline based on excusable neglect. Fed. R. Bankr. P.
28 4007(c) & 9006(b)(3). Indeed, it was the similar effect of Rule

1 9006(b) (3) on the discharge objection deadline created by Rule
2 4004(a) and (b) that led the Supreme Court in Kontrick to use the
3 term "inflexible claim-processing rule." Kontrick, 540 U.S. at
4 456. Thus, rule 4007(c) is an inflexible claim-processing rule
5 as to which the court has no discretion.

6 The court therefore has no discretion to enlarge the time
7 period under Rule 4007(c) on the basis of excusable neglect.
8 Santos, 112 B.R. at 1008 citing Hill, 811 F.2d at 486 (noting
9 that Rule 9006(b) (3) authorizes the court to enlarge the time for
10 taking action under Rule 4007(c) only when a motion for such an
11 extension is made before the time has expired). Therefore, the
12 bankruptcy court applied the proper law.

13 Even if excusable neglect could be used to extend the time
14 for filing a nondischargeability complaint, the bankruptcy court
15 found that while there was neglect, it was not excusable under
16 the circumstances of this case. We agree. The Supreme Court
17 held in Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship,
18 507 U.S. 380, 395 (1993), that the determination of what kind of
19 neglect will be considered "excusable" is an equitable one,
20 taking account of all relevant circumstances. "These include the
21 danger of prejudice to the debtor, the length of the delay and
22 its impact on judicial proceedings, the reason for the delay,
23 including whether it was in the reasonable control of the movant,
24 and whether the movant acted in good faith." Id. In Pioneer,
25 the notice regarding the claims bar date was outside the ordinary
26 course and there was no prejudice to the debtor or to the
27 interests of efficient judicial administration. Id. at 398.
28 Thus, the late-filed claim was allowed.

1 None of the criteria set forth in Pioneer are applicable
2 here. The bankruptcy court's notice of the creditors' meeting
3 and Discharge Bar Date was in the ordinary course. Lipsky and
4 his attorney had actual and timely notice of the bankruptcy and
5 Discharge Bar Date to meet the May 7, 2007 deadline. Not only
6 did they both appear at the creditors' meeting, but Alioto
7 prepared and mailed the complaint to Lipsky several weeks ahead
8 of the deadline. Amazingly, neither one called the other until
9 the date came and went. The delay in the timely filing of the
10 complaint was within the reasonable control of Lipsky and his
11 attorney. Moreover, granting equitable relief by extending the
12 Discharge Bar Date would prejudice debtor's fresh start and
13 impact the prompt administration of his estate. In short, even
14 if the excusable neglect doctrine could be used to afford Lipsky
15 relief, the circumstances in this case add up to neglect which is
16 not excusable.

17 **C. Other Equitable Doctrines Are Inapplicable**

18 Lipsky argues for "equity" without referring to any
19 particular equitable doctrine. While we may affirm the
20 bankruptcy court's decision on any ground supported by the
21 record, even if it differs from the reasoning of the court,
22 Grzybowski v. Aquaslide 'N' Dive Corp. (In re Aquaslide 'N' Dive
23 Corp.), 85 B.R. 545, 549-50 (9th Cir. BAP 1987), no equitable
24 doctrines fit the circumstances of this case.

25 Lipsky is not eligible for the benefit of the doctrine of
26 equitable tolling under the present circumstances. He had notice
27 of the filing of the chapter 7 case, and of the Rule 4007(c)
28 deadline, in time to file a timely complaint. A miscommunication

1 or clerical error on the part of his counsel does not warrant
2 such equitable relief.

3 Further, the doctrine of equitable estoppel requires
4 reasonable reliance on debtor's words or conduct within the
5 applicable limitations period. Santos, 112 B.R. at 1007.
6 Missing from the record is evidence of reasonable reliance.
7 Alioto could not reasonably rely on debtor's schedules for
8 Lipsky's address when he had put Lipsky's correct address on the
9 complaint that he prepared for filing. Accordingly, we perceive
10 no equitable doctrine that applies under the circumstances here.

11 **D. Lipsky and His Attorney Had Ample Notice of the Discharge**
12 **Bar Date**

13 Lipsky's reliance on Mfr. Hanover v. Dewalt (In re Dewalt),
14 961 F.2d 848 (9th Cir. 1992) is misplaced.⁵ In Dewalt, the
15 debtor listed the creditor with an inaccurate address. As a
16 result, the creditor received no initial notice of the bankruptcy
17 or the § 341(a) creditors' meeting.

18 Subsequently, the creditor received actual notice of the
19 debtor's bankruptcy filing seven days prior to the discharge bar
20 date, but it did not file a timely complaint. The creditor later
21 filed a complaint contending it fell within the scope of
22 §523(a) (3) (B)⁶ because it was unscheduled and did not have enough

24 ⁵ Alioto wrote a letter to the trial judge on July 12, 2007
25 asking him to consider Dewalt before ruling on the debtor's
26 motion to dismiss. At the hearing, the trial judge commented
27 that he didn't read letters. However, the court was familiar
28 with Dewalt.

⁶ This section provides that a debt of the kind listed in
§ 523(a) (2), (4) or (6) is not discharged if the creditor who is

(continued...)

1 bankruptcy court did not base its ruling upon either an erroneous
2 view of the law or a clearly erroneous assessment of the
3 evidence. Finding no abuse of discretion in the court's
4 dismissal of Lipsky's late-filed complaint, we AFFIRM.

5 While this appeal was pending, the bankruptcy court entered
6 a judgment denying the debtor's discharge under § 727, which
7 judgment the debtor appealed on February 1, 2008. If, as a
8 result of the denial of the debtor's § 727 discharge, Appellant
9 pursues debtor in state court, our affirming the dismissal of the
10 nondischargeability complaint on a bankruptcy-specific theory
11 should have no preclusive effect in the state court on the
12 underlying substantive claims. See RESTATEMENT (SECOND) OF JUDGMENTS
13 § 26(f) (1982). Here, the dismissal involved only the procedural
14 aspect of filing a timely complaint and did not concern the
15 underlying merits of Appellant's claims. Hence, neither issue
16 nor claim preclusion should prevent such state court action.

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