

FEB 19 2008

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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NOT FOR PUBLICATION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.	)	<b>MEMORANDUM<sup>1</sup></b>	
		)		
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.

<sup>1</sup> 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.<sup>2</sup> 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 <sup>2</sup> 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.<sup>3</sup> 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 <sup>3</sup> 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.<sup>4</sup> 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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26  
27 <sup>4</sup> 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.<sup>5</sup> 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)<sup>6</sup> because it was unsecured and did not have enough

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24 <sup>5</sup> 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.

<sup>6</sup> 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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