NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. EC-07-1120-MoJuNa
	EC-07-1121-MoJuNa
KAREN CHRISTIANSEN,	
	Bk. No. 05-20050
Debtor.	
	Adv. Nos. 05-02152
	05-02187
KAREN CHRISTIANSEN,	
Appellant,	
v.	**M E M O R A N D U M**[1]
VERN WEBER,	
Appellee.	
KAREN CHRISTIANSEN,	
Appellant,	
v.	
GORDON HUMPHREY and JOHN RIEKE,	
Appellees.	

Argued and Submitted on October 26, 2007
at Sacramento, California

Filed - November 5, 2007

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

Honorable Thomas C. Holman, Bankruptcy Judge, Presiding

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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.

Before: MONTALI, JURY and NAUGLE,[2] Bankruptcy Judges.

After the time for filing notices of appeal had expired, the debtor filed motions for extension of time to appeal orders in two separate adversary proceedings. The bankruptcy court held that the debtor had not demonstrated "excusable neglect," and denied the motions. We AFFIRM.

I. FACTS

Appellant Karen Christiansen ("Debtor") filed a chapter 13[3] petition on January 3, 2005; the case was converted to chapter 7 in March 2005. Debtor's counsel in her bankruptcy case was Eric J. Schwab ("Schwab"); the fee agreement between Debtor and Schwab provided that Schwab was not obligated to represent her in any adversary proceedings.

On April 19, 2005, Vern Weber ("Weber") filed a complaint for denial of Debtor's discharge (the "Weber Adversary"). Weber served the complaint and summons on Debtor and on Schwab. Debtor filed a pro se answer on May 19, 2005.

Debtor did not attend the Weber Adversary status conference scheduled for June 2, 2005; the court entered a default and struck Debtor's answer. Schwab was present in court for another matter and informed the court at the status conference that he

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[2]Hon. David N. Naugle, United States Bankruptcy Judge for the Central District of California, sitting by designation.

[3]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

had not been retained to represent Debtor in the Weber Adversary Proceeding. On June 14, Weber filed an application for judgment by default which he served on Debtor. On June 20, 2005, the court entered a default judgment denying Debtor's discharge.

On May 16, 2005, appellee Gordon Humphrey ("Humphrey") and co-plaintiff John Rieke ("Rieke") filed a section 523 nondischargeability complaint (the "Humphrey Adversary") against Debtor. The complaint and summons were served by first class mail on May 19 on Debtor and Schwab. Debtor filed no answer, so Humphrey and Rieke filed a request for entry of default on June 21 and served it on Debtor and Schwab. The court entered a default in the Humphrey Adversary on July 7, 2005.

Debtor did not appear at a status conference set in the Humphrey Adversary for July 22, 2005; because of the pending default, the court continued the hearing until September 8. Around July 25, 2005, Humphrey's counsel served a notice of the continued status conference on Debtor and Schwab. Appellant's Opening Brief at 10.

On August 8, 2005, Humphrey and Rieke filed an application for a default judgment, which they served (with supporting documentation) on Debtor and Schwab. The court entered a default judgment in the Humphrey Adversary on August 15, 2007.[4]

On December 9, 2005, Debtor retained William K. Brewer ("Brewer") to represent her in vacating the default judgments.

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[4]In her petition to set aside defaults, Debtor stated that "I cannot recall when I actually learned of the default and default judgments, however, it was round the time my mother died." In her Opening Brief (at page 10), Debtor states that her mother died on September 22, 2005.

Six months later, and 364 days after entry of the judgment in the Weber Adversary, Debtor filed a joint petition to set aside the defaults (the "joint petition") in the Weber Adversary and the Humphrey Adversary. Debtor did not disclose in the joint petition that she had retained Brewer in December 2005; rather, she emphasized that she had difficulty retaining counsel after Schwab had "abandoned" her with respect to the adversary proceedings.[5]

Debtor's counsel did not attempt to set a hearing on the joint petition when it was filed. Instead, almost two months later (on August 16), Debtor filed a notice in the Weber Adversary setting a hearing for September 12, 2006. Debtor's counsel learned on September 11 "that the matter was inadvertently omitted" from the September 12 calendar, and reset the hearing for October 24, 2006. At the October 24 hearing, the court requested further briefing and the filing of Debtor's employment agreement with Schwab and continued the hearing to December 12, 2006.

At the December 12 hearing, the court announced that it would issue a disposition after oral argument. Two days later, the court entered Civil Minutes in each adversary proceeding

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[5]In support of her allegation of "abandonment" by Schwab in representing her in the adversary proceedings, Debtor stated in her joint petition that "Schwab did nothing to answer the complaint, although he was [Debtor's] attorney of record and had contracted in his retainer agreement to represent [Debtor] in the bankruptcy proceedings which included adversary proceedings." After Appellees challenged this assertion and requested a copy of the retainer agreement, Debtor's counsel conceded at a hearing in October that Schwab was not obligated to represent Debtor in any adversary proceeding.

indicating that the joint petition would be denied and that a minute order would be entered. On December 19, 2006, the court entered a separate order in each adversary proceeding denying the joint petition; however, each order was designated on the docket of the respective adversary proceedings as an order denying a motion for reconsideration.

On December 21, 2006, Laura Blevins ("Blevins"), a legal secretary/paralegal employed by Brewer, attempted to log in to the court's electronic docket to ascertain the status of any order on the joint petition. The system "indicated something to the effect that there was a high volume of inquiries and to try again later." Blevins did not attempt to check the docket again until December 27, 2006.[6] At that time, she was able to open a docket entry for one of the orders denying a motion for reconsideration[7] and determined that the court had entered an

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[6]Brewer's law firm was closed at noon on December 22, 2006, and was to reopen on January 2, 2007. Id.

[7]Debtor complains in her Opening Brief that the docket entries in the adversary proceedings referred to a motion for reconsideration instead of the joint petition. In both adversary proceedings, the joint petition (to set aside default judgments) was docketed as a "motion/application to reconsider." The adversary proceedings did not involve multiple defendants, nor did they involve multiple motions to set aside or reconsider judgments. While the docket entries for the joint petition and orders may not have been precise, an attorney for the only party who had moved for relief from a judgment should have been placed on notice that the order pertained to the petition to set aside defaults.

In fact, Blevins did open this order and did determine on December 27 that the order denied Debtor's joint petition. Thus, Brewer's office had actual knowledge of entry of the order before the deadline for filing an appeal expired.

order denying Debtor's joint petition on December 19. The docket entry for the order in both adversary proceedings clearly indicated that the order was entered on December 19. Blevins contacted Brewer by telephone on the same day, and he instructed her to get the file ready in the event Debtor wanted to appeal.[8]

Blevins checked the internet and determined that the filing deadline for the notice of appeal was ten days. Erroneously believing that the ten days meant ten court days and not ten calendar days, she calendared the deadline incorrectly. On January 4, 2007, an attorney at Brewer's firm discovered that ten day filing period had expired on December 29, 2006. On January 8, 2007, Brewer's firm filed motions for extension of time to file notices of appeal in both the Weber Adversary and the Humphrey Adversary. Both Weber and Humphrey opposed the motions for extension of time to file notices of appeal.

The bankruptcy court held two hearings on the motions. At the second hearing on March 6, 2007, Brewer asserted for the first time that he assumed that the orders had been entered on December 27, 2006, the date that Blevins informed him about the orders. The court queried whether he had asked Blevins about the date of entry, which was set forth on the docket sheet, and he admitted that he had not.[9]

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[8]On December 28, 2006 (one day before the deadline for filing a notice of appeal), Brewer's office received by mail a hard copy of the notice of the entry of the orders denying the joint petition.

[9]Even though Brewer did not file his own declaration in support of the motions, he contended at oral argument before us that his incorrect assumption about the date of the entry of the orders led to the late filing of the notice of appeals and

(continued...)

On March 16, 2007, the bankruptcy court entered civil minute orders in the Weber Adversary and in the Humphrey Adversary denying the motions for orders extending time for filing appeal. The orders referred to the findings of fact and conclusions of law appended to the civil minutes. In these civil minutes, the bankruptcy court assessed and weighed the factors set forth by the Supreme Court in Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993) for determining whether excusable neglect existed to justify granting an extension of time to appeal. The court found that Debtor had not demonstrated excusable neglect and denied the motions. On March 20, 2007, Debtor timely appealed the orders denying the motions for extension of time to appeal.[10]

II. ISSUE

Did the bankruptcy court abuse its discretion in denying the motions for extension of time in which to appeal?

III. STANDARD OF REVIEW

We review for abuse of discretion a bankruptcy court's decision to grant or deny a motion for an extension of time to

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[9](...continued)
constituted "excusable neglect." Given his admission on the record that he did not even inquire about the date of the entry of the order, we find no error by the bankruptcy court in disregarding any similar argument before it.

[10]In addition to filing the motions for extension of time to appeal the denial of the joint petition, Debtor filed untimely notices of appeal of the orders denying the petition as well (EC-07-1018 and EC-07-1020). On April 13, 2007, we entered orders dismissing those appeals, stating that they were "DISMISSED for lack of jurisdiction, without prejudice to reinstatement in the event that a merits panel reverses the bankruptcy court's order denying the motion for extension of time."

file a notice of appeal. Pincay v. Andrews, 389 F.3d 853, 858 (9th Cir. 2004). "We must therefore affirm unless we are left with the definite and firm conviction that the lower court committed a clear error of judgment in the conclusion it reached after weighing the relevant factors." Id.

"Normally, the decision of a trial court is reversed under the abuse of discretion standard only when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." Harman v. Apfel, 211 F.3d 1172, 1174 (9th Cir. 2000). We cannot simply substitute our judgment for that of the trial court. Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc., 840 F.2d 1394, 1408 (9th Cir. 1987).

IV. DISCUSSION

Rule 8002 states that a notice of appeal "shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." Fed. R. Bankr. P. 8002(a). A request to extend the time for filing a notice of appeal must be filed within this ten-day period, "except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect." Fed. R. Bankr. P. 8002(c)(2). Here, Debtor filed her motions for extension of time ten days after the expiration of the time for filing the notice of appeal and twenty days after entry of the orders denying the joint petition. Therefore, she had to demonstrate "excusable neglect" to obtain the extension of time.

While "excusable neglect" is not defined in the Bankruptcy Rules, the Supreme Court has held that "the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." Pioneer, 507 U.S. at 395. The Supreme Court identified four factors relevant to this equitable inquiry: "the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Id.

In this case, the bankruptcy court carefully and thoroughly considered each of the factors identified in Pioneer, finding that the first two factors (prejudice to the nonmovants and length of delay) weighed in favor of Debtor while the third and fourth factors (reason for delay and bad/good faith of movant) weighed in favor of Appellees. Debtor argues that the bankruptcy court placed too much weight on the third and fourth factors and erred by not placing equal weight on each factor. We disagree.

In Pincay, the Ninth Circuit stated that it leaves the weighing of Pioneer's equitable factors to the trial court "in every case." Pincay, 389 F.3d at 860. "[T]he trial court has wide discretion as to whether to excuse the lapse." Id. at 859 (emphasis added). In other words, a trial court should consider these nonexclusive factors but can weigh the importance of each factor as it deems appropriate in each case. "Balancing these factors is not a mathematical test, and the court is not obligated to give equal weight to them." In re Pacific Gas &

Elec. Co., 331 B.R. 915, 919 (Bankr. N.D. Cal. 2005) (describing the Pioneer factors as nonexclusive); see also Graves v. Rebel Rents, Inc. (In re Rebel Rents, Inc.), 326 B.R. 791, 803 (Bankr. C.D. Cal. 2005) ("Pioneer mandated a balancing test for divining excusable neglect, but Pioneer did not assign the weight to be accorded by the court to each of its nonexclusive factors in making an equitable determination.") (emphasis added).[11] Therefore, to the extent that the bankruptcy court placed greater weight on particular factors, it did not abuse its discretion.

Debtor further argues that the bankruptcy court abused its discretion in determining that the third (reason for delay) and fourth (bad faith) factors weighed in favor of Humphrey and Weber (collectively, the "Appellees"). We do not agree. The record supports these findings and we are not left with a "definite and firm conviction" that the bankruptcy court "committed a clear error of judgment" in weighing these factors in favor of Appellees. Pincay, 389 F.3d at 858, 859.

A. Reason for Delay

The bankruptcy court, in its extremely detailed findings and conclusions, found that the actions of Debtor's counsel led to

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[11]In Pioneer, the Supreme Court itself indicated that some factors may be more important than others (in particular, prejudice to the nonmovant or bad faith) in determining excusable neglect: "To be sure, were there any evidence of prejudice to petitioner or to judicial administration in this case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be 'excusable.'" Pioneer, 507 U.S. at 398-99. The Eighth Circuit has held that the four Pioneer factors do not carry equal weight and that the nature of the late filing must be given the greatest import. Gibbons v. U.S., 317 F.3d 852, 854 (8th Cir. 2003).

the failure to file a timely notice of appeal, even though the ability to comply with the deadline was within the reasonable control of Brewer's firm. The firm did not check the court's electronic docket for the status of the matter taken under submission on December 12 until December 21.[12] The record indicates that after encountering difficulties in accessing the electronic docket on December 21, representatives of Brewer's office did not try again until December 27. On December 27, Brewer and his staff learned about the order that had been entered on December 19. Instead of filing an immediate motion for extension of time or a notice of appeal, Blevins incorrectly calculated the ten-day deadline, assuming that the ten-day period included only court days. No attorney was consulted about the calculation; the attorney delegated the legal task of determining appellate deadlines to the paralegal. In other words, counsel's inability or unwillingness to check the docket diligently and to know and understand the rules regarding the appellate deadline[13] led to the failure to file a timely notice of appeal.

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[12]The minutes containing the long and detailed findings against Debtor were docketed on December 14. Thus a review of the docket as early as December 14 would have placed Debtor's counsel on notice of the negative ruling.

[13]Interestingly, Debtor's counsel stated in the memorandum in support of the motions for extension of time to file appeal that "it would not be an understatement that most attorneys, including experienced bankruptcy counsel[,] would scoff at a suggestion that a notice of appeal from a final order of the bankruptcy court is 10 calendar days from the date the order is entered on the court's docket." At oral argument before us, Brewer stated that he was aware of the 10-day deadline.

In Pioneer, the Supreme Court stated that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable neglect.'" Pioneer, 507 U.S. at 392. The Ninth Circuit acknowledged in Pincay "that a lawyer's failure to read an applicable rule is one of the least compelling excuses that can be offered . . ." Pincay, 389 at 859. Nonetheless, in Pincay, the Ninth Circuit affirmed the decision of the district court to grant an extension of time to appeal to an attorney who had delegated to a paralegal the responsibility to calendar an appeal deadline; the paralegal incorrectly calculated the deadline and did not file a timely notice of appeal. Debtor argues that the facts here are similar to those presented in Pincay and thus Pincay dictates reversal here.

We disagree. Pincay teaches us that a trial court has wide discretion in weighing and applying the nonexclusive factors of Pioneer. If the district court in Pincay had denied the motion to extend the appeal deadline, the Ninth Circuit would have likely affirmed. "Had the district court declined to permit the filing of the notice, we would be hard pressed to find any rationale requiring us to reverse." Pincay, 389 F.3d at 859 (emphasis added).

Pincay stands for the proposition that courts should not apply any rigid or per se rule as to the nature of excusable neglect; instead, the trial courts are vested with "wide discretion" in applying the Pioneer factors and in deciding whether to excuse the "lapse." Id. at 859. Rather than creating any rigid rule (such as one that would automatically treat the failure to read a procedural rule correctly as "excusable

neglect"),

> the decision whether to grant or deny an extension of time to file a notice of appeal should be entrusted to the discretion of the [bankruptcy] court because the [bankruptcy] court is in a better position than we are to evaluate factors such as whether the lawyer had otherwise been diligent, the propensity of the other side to capitalize on petty mistakes, the quality of representation of the lawyers . . ., and the likelihood of injustice if the appeal was not allowed.

Id. Here, the bankruptcy court found that the conduct of Debtor's counsel led to the lapse in filing a timely appeal. The record supports this finding; it is not clearly erroneous. Given the bankruptcy court's wide discretion in weighing and applying this factor, we -- like the Ninth Circuit would have been in Pincay if the district court had denied the extension of time to appeal -- are "hard pressed to find any rationale requiring us to reverse" the court's weighing of the third factor. Id.

B. Good Faith of Debtor

The bankruptcy court found that the fourth factor, whether the movant's conduct has been in good faith, weighed against a finding of excusable neglect. In Pincay, the Ninth Circuit emphasized that the trial court -- with its knowledge of the parties, counsel and litigation history -- should be vested with the discretion to grant or deny extensions of time to appeal. In particular, the court noted that the trial court was in a better position to evaluate the movant's diligence in other matters and the quality of representation over the history (there, fifteen years) of the litigation. Here, the bankruptcy court considered the conduct of Debtor and her counsel over the course of both adversary proceedings and concluded that they had been dilatory and not forthcoming about important details in their dealings

with the court.[14] The court therefore held that Debtor had not acted in good faith. The record supports these findings, and the bankruptcy court did not abuse its discretion in weighing this factor.

V. CONCLUSION

The bankruptcy court did not abuse its "wide" discretion in determining that Debtor had not demonstrated "excusable neglect." The court therefore did not err in denying the motions to extend the time for appeal and we AFFIRM.

[14]The court made note of Debtor's initial failure to disclose that she had retained counsel six months prior to filing her joint petition which was filed only one day prior to the running of the one-year deadline of Federal Rule of Civil Procedure 60(b). The court alluded to, but did not specify, Debtor's misleading declaration stating that her fee agreement with Schwab required him to represent her in the adversary proceedings.