

JUL 12 2007

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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NOT FOR PUBLICATION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

In re:) BAP No. OR-06-1190-BMoH
)
 GERALDINE KAY SMITH,) Bk. No. 97-62183
)
 Debtor.)
 _____)
)
 GERALDINE KAY SMITH,)
)
 Appellant,)
)
 v.) **M E M O R A N D U M**¹
)
 FRANK WEBRE and MARA WEBRE,)
)
 Appellees.)
 _____)

Argued and Submitted on June 20, 2007
at Pasadena, California

Filed - July 12, 2007

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Albert E. Radcliffe, Bankruptcy Judge, Presiding

Before: BRANDT, MONTALI, and HOLLOWELL,² 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.

² Hon. Eileen W. Hollowell, U.S. Bankruptcy Judge for the District of Arizona, sitting by designation.

1 After the bankruptcy court overruled her objection to
2 reclassification of a creditor's claim, debtor timely moved for
3 reconsideration, which the bankruptcy court denied. She then filed a
4 second reconsideration motion, which was also denied. Eighteen days
5 later, and 38 days after entry of the order denying the first
6 reconsideration motion, debtor moved to extend the time to appeal the
7 underlying order and filed a notice of appeal. The bankruptcy court
8 denied the motion; debtor moved for reconsideration of that order, which
9 the bankruptcy court also denied. Debtor amended her notice of appeal
10 to include the latter order. Only the last order is before us in this
11 appeal. We AFFIRM.

12
13 **I. FACTS**

14 Geraldine Smith filed a chapter 13³ petition on 16 April 1997; the
15 case was converted to chapter 7 on 12 November 1999. Frank (now
16 deceased) and Marie Webre filed a proof of claim, which was allowed in
17 the chapter 13 in the amounts of \$15,000 secured and \$1352 unsecured.
18 The \$15,000 obligation was secured by a junior deed of trust on a
19 condominium unit in Brookings, Oregon. In 2002 Webres amended their
20 claim, adding interest and correcting what they asserted was a
21 typographical error, increasing the total amount due to \$20,898, and
22 changing the status of the secured portion of the claim to unsecured.

23
24 ³ Absent contrary indication, all "Code," chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
26 its amendment by the Bankruptcy Abuse Prevention and Consumer
27 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from
28 which this appeal arises was filed before its effective date
(generally 17 October 2005).

27 All "Rule" references are to the Federal Rules of Bankruptcy
28 Procedure, and all "FRCP" references are to the Federal Rules of Civil
Procedure.

1 The bankruptcy court disallowed the adjustment in amount but allowed the
2 reclassification of the claim without prejudice by order entered 4 March
3 2004.

4 Thereafter Smith objected to the reclassification. The bankruptcy
5 court overruled her objection, entering a letter ruling and order on
6 19 September 2005. Smith timely moved for reconsideration on
7 29 September 2005. The bankruptcy court denied this motion, entering a
8 letter ruling and order on 10 March 2006. Ten days later, Smith moved
9 for reconsideration of the 10 March order, which motion the bankruptcy
10 court denied by order entered 29 March 2006.

11 On 17 April 2006 Smith moved for an extension of time to appeal the
12 19 September 2005 order, arguing that she had not received a copy of the
13 29 March order denying her second motion for reconsideration, and had not
14 learned of its entry until she called the court on 11 April 2006. She
15 concurrently filed a notice of appeal of the 19 September 2005 order.
16 The bankruptcy court denied Smith's motion as untimely, entering its
17 letter ruling and order on 9 May 2006. In its ruling, the bankruptcy
18 court noted that the second motion for reconsideration did not toll the
19 time to appeal the 19 September 2005 order, citing Wages v. IRS, 915 F.2d
20 1230, 1234 n.3 (9th Cir. 1990) and In re Brewster, 243 B.R. 51, 54-56
21 (9th Cir. BAP 1999).

22 On 19 May 2006 Smith moved for reconsideration of the 9 May order
23 under FRCP 60(b)(1) and (6) and the First and Ninth Amendments to the
24 Constitution. In her motion, Smith explained that she had mistakenly
25 requested an extension of time to appeal the 19 September 2005 order when
26 she should have requested an extension to appeal the 29 March order. She
27 indicated her belief that appeal of the 29 March order would enable her
28 to obtain review of the 19 September 2005 order. She again argued that

1 she did not timely appeal the 29 March order because she did not receive
2 a copy of it until after the appeal deadline had passed.

3 The bankruptcy court denied the motion, with a letter ruling and
4 order on 29 June 2006. On 10 July 2006 Smith filed an amended notice of
5 appeal to include the 29 June order. In the meantime, our clerk had
6 dismissed the appeal as untimely. On Smith's motion, we reinstated the
7 appeal, but limited its scope to review of the 29 June order denying
8 Smith's FRCP 60(b) motion.

9
10 **II. JURISDICTION**

11 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
12 § 157(b) (1) and (b) (2) (A) and (O), and we do under 28 U.S.C. § 158(c).

13
14 **III. ISSUES**

15 A. Whether we should grant Smith's request for judicial notice, and
16 consider the supplemental excerpts filed with her reply brief; and

17 B. Whether the bankruptcy court abused its discretion in denying
18 Smith's FRCP 60(b) motion.

19
20 **IV. STANDARD OF REVIEW**

21 We review the bankruptcy court's denial of a motion for
22 reconsideration for abuse of discretion. In re Negrete, 183 B.R. 195,
23 197 (9th Cir. BAP 1995), aff'd, 103 F.3d 139 (9th Cir. 1996) (table).

24 A bankruptcy court necessarily abuses its discretion if it bases its
25 decision on an erroneous view of the law or clearly erroneous factual
26 findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).
27 We reverse for abuse of discretion only when we have a definite and firm
28 conviction that the bankruptcy court committed a clear error of judgment

1 in the conclusion it reached. S.E.C. v. Coldicutt, 258 F.3d 939, 941
2 (9th Cir. 2001); In re Black, 222 B.R. 896, 899 (9th Cir. BAP 1998).

3
4 **V. DISCUSSION**

5 **A. Request for Judicial Notice/Supplemental Excerpts**

6 In her opening brief, Smith requests us to take judicial notice of
7 the entire bankruptcy court file, and of a state court action she brought
8 against Brookings Smuggler's Cove Homeowner's Association. She did not
9 provide all of the case file in her excerpts of record. She submitted
10 with her reply brief a copy of an order entered by the bankruptcy court
11 on 15 July 2005 regarding the payment of \$1352 of the Webre claim
12 (\$1352). The order provides that it does not resolve the allowance of
13 the remaining \$15,000 as an unsecured claim. Presumably Smith requests
14 us to consider the order as well.

15 We deny these requests. Although we may take judicial notice of
16 bankruptcy court files, In re E.R. Fegert, Inc., 887 F.2d 955, 957-58
17 (9th Cir. 1985), we see no reason to look beyond the excerpts provided
18 by the parties, and Smith has not articulated one. The state court
19 action is irrelevant to the issues in this appeal. Nor does the 15 July
20 2005 order have any bearing on the last reconsideration motion here on
21 appeal. Even if we were reviewing the underlying order, the 15 July
22 order expressly reserved the question of the allowance of the remaining
23 \$15,000 as unsecured and is thus irrelevant here.

24
25 **B. Post-argument "correction"**

26 Although this appeal was submitted at the conclusion of argument
27 on 20 June 2007, Smith filed shortly thereafter a Correction of
28 Statement at Hearing and Request for Judicial Notice in both this

1 appeal(06-1190) and in appeal no. 06-1370. However, the "correction"
2 only deals with the order entered 19 September 2005 in the main case,
3 out of which this appeal arises, rather than something in the
4 adversary proceeding out of which appeal no. 06-1370 comes. Indeed,
5 in her "declaration of service" attached to her correction filed in
6 this appeal on 11 July 2007, Smith acknowledges that she meant to file
7 the correction only in this appeal, and not in appeal no. 06-1370.

8 Furthermore, as noted, this appeal is limited to the denial of
9 her second motion for reconsideration of a later order, and not the
10 19 September 2005 order overruling her objection to reclassification
11 of the Webre claim.

12 Her correction is, in essence, a post-argument brief, not
13 authorized by the Rules, and we neither requested further briefing nor
14 granted leave. Even if it were timely, Smith is simply wrong: first,
15 the 19 September order does satisfy the "separate document"
16 requirement of FRCP 58, applicable via Rule 9021 – the order does not
17 contain the court's findings and conclusions, which were in a
18 separately-docketed letter ruling. See Corrigan v. Bargala, 140 F.3d
19 815, 818 (9th Cir. 1998). Smith cites no authority for her premise
20 that references to other orders somehow violate the requirement, and
21 we know of none. And even if the requirement had been violated,
22 Smith's appeal would still be untimely – FRCP 58, as amended in 2002,
23 deems an order not set forth in a separate document final after 150
24 days. See In re Garland, 295 B.R. 347, 353 (9th Cir. BAP 2003), which
25 period expired approximately two months before her 17 April 2006
26 notice of appeal.

27
28

1 Next, Rule 5003(a) does not require that the bankruptcy court's
2 docket indicate "who won," and again, Smith cites no authority for her
3 assertion that the docket entry is inadequate.

4 As it is untimely and unauthorized, we decline to consider the
5 "correction"; to the extent it might be construed as a motion to
6 reconsider this panel's prior order limiting the scope of this appeal
7 to the 29 June 2006 order, it is DENIED.

8
9 **C. Merits**

10 FRCP 60(b), applicable via Rule 9024, provides in relevant part:

11 On motion and upon such terms as are just, the court
12 may relieve a party or a party's legal representative from a
13 final judgment, order, or proceeding for the following
14 reasons: (1) mistake, inadvertence, surprise, or excusable
neglect; . . . or (6) any other reason justifying relief
from the operation of the judgment. . . .

15 **1. Excusable Neglect**

16 "Neglect" includes "negligence, inadvertence, mistake, or
17 carelessness, as well as . . . intervening circumstances beyond the
18 party's control." Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.
19 P'ship, 507 U.S. 380, 388 (1993). The determination of whether the
20 neglect was excusable

21 is at bottom an equitable one, taking account of all
22 relevant circumstances surrounding the party's omission.
23 These include . . . the danger of prejudice to the debtor,
24 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.

25 Id. at 395 (citations and footnotes omitted).

26 The bankruptcy court found that Smith was neither mistaken nor
27 neglectful in seeking an extension of time to appeal the 29 September
28 2005 order, as she was seeking review of that order. The court

1 pointed out that the mistake was not in her original motion for
2 extension but in her "current belief that review of the March 29, 2006
3 order is necessary to obtain review of the underlying order." Letter
4 Ruling, 29 June 2006, page 2 (emphasis in original).

5 The court further concluded that Smith did not meet the Pioneer
6 standard for excusable neglect, giving "considerable weight" to the
7 reason for Smith's delay. Noting that "ignorance of the rules or
8 mistakes construing the rules do not usually constitute 'excusable'
9 neglect[,] "Pioneer, 507 U.S. at 392, the court observed that Smith
10 made a conscious decision to appeal the 29 September 2005 order, which
11 was "totally within her control." Letter Ruling, page 2.

12 The court expressed skepticism regarding Smith's good faith,
13 noting that her four previous appeals of orders with intervening
14 tolling motions indicated that she knew that underlying orders are
15 themselves appealable, and knew the effect of a tolling motion on the
16 time to appeal. Id. at 3. The court concluded:

17 [o]ur system of jurisprudence should not be a never-ending
18 battle, where if a litigant misses the mark after conscious
19 deliberation, she should easily be given license to reload
20 and fire again. On balance, even if there was neglect in
21 appealing the underlying order instead of the March 29, 2006
22 order, I do not find it "excusable."

23 Id.

24 Smith asserts in her reply brief that she acted in good faith,
25 and offers to take a lie detector test to prove this. But the time to
26 make this argument, or offer evidence of good faith, has passed.
27 Arguments not raised in the bankruptcy court or in appellant's opening
28 brief are deemed waived. U.S. v. Carlson, 900 F.2d 1346, 1349 (9th
Cir. 1990); Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999).

1 **2. Any Other Reason Justifying Relief**

2 To obtain relief from judgment under FRCP 60(b)(6) for "any other
3 reason justifying relief," the moving party must establish that
4 exceptional or extraordinary circumstances prevented her from
5 prosecuting her case. Community Dental Servs. v. Tani, 282 F.3d 1164,
6 1168 (9th Cir. 2002); see also In re Negrete, 183 B.R. 195, 197 (9th
7 Cir. BAP 1995), aff'd, 103 F.3d 139 (9th Cir. 1996) (table). "The
8 party must demonstrate both injury and circumstance beyond his control
9 that prevented him from proceeding with the prosecution or defense of
10 the action in a proper fashion." Community Dental, 282 F.3d at 1168
11 (citation omitted). The bankruptcy court found that Smith had not
12 established exceptional circumstances, because her choice to appeal
13 the 29 September 2005 order and her failure to monitor the docket were
14 within her control. Letter Ruling, page 5. This finding is not
15 clearly erroneous.

16
17 **3. Rule 8002(c)(2)**

18 The bankruptcy court went on to rule that even if it were to
19 reconsider the motion to extend, it would not find excusable neglect
20 under Rule 8002(c)(2). That rule provides in relevant part:

21 A request to extend the time for filing a notice of appeal
22 must be made by written motion filed before the time for
23 filing a notice of appeal has expired, except that such a
24 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. . . .

25 Smith filed her extension motion on 17 April 2006, more than ten
26 days but less than 20 days after entry of the order denying her second
27 motion for reconsideration on 29 March 2006. The motion could be
28 granted on a showing of excusable neglect under Rule 8002(c)(2), but

1 Smith's reason for missing the appeal deadline was that she did not
2 receive a copy of the order in time. As pointed out by the bankruptcy
3 court, this is not excusable neglect – a party has an affirmative duty
4 to monitor the docket. In re Warrick, 278 B.R. 182, 187 (9th Cir. BAP
5 2002).

6 Smith's only relevant argument on appeal is her contention that
7 she did not fail to monitor the case, but missed the appeal because
8 she was busy litigating in state court and did not have access to
9 PACER. The bankruptcy court correctly ruled that this circumstance
10 was not excusable neglect, and that Smith had not shown any other
11 exceptional or extraordinary circumstances justifying relief from
12 judgment.

13

14 **4. Other Arguments**

15 Smith's other arguments are, for the most part, irrelevant and/or
16 unsupported by the record. Her opening brief sets forth her disputes
17 with her condominium's homeowner's association and relating to the
18 Webres' claim. She accuses the bankruptcy court of bias and of
19 misconduct in engaging in ex parte contacts with a state
20 representative whom she alleges is supporting the interests of the
21 homeowners' association. She points to no evidence to support these
22 allegations.

23 She also complains about the reclassification because Webres
24 never moved for reconsideration under Rule 3008, and argues that she
25 did not receive due process because there was never an evidentiary
26 hearing on the issue of reclassification of Webres' claim. She does
27 not identify any specific instance in which she was denied a fair
28 hearing. The bankruptcy court initially reclassified the claim

1 without prejudice to give parties an opportunity to object. Smith did
2 so, and the bankruptcy court considered her objection before making a
3 final ruling.

4 She further argues that (1) the statute of limitations has
5 expired on Webres' claim; (2) she cannot be held personally liable on
6 the claim because she received a discharge; and (3) that the 19
7 September 2005 order was never effective or final. She contends it
8 was incorrectly docketed because it did not indicate "who won." Smith
9 cites no authority and offers no coherent analysis of any of these
10 contentions.

11 Smith contends that Webres lacked standing to reclassify their
12 claim because they assigned their rights in the deed of trust in 1996.
13 She raised standing arguments in her motion for reconsideration filed
14 29 September 2005, and the bankruptcy court rejected them because that
15 issue had previously been decided against Smith.

16 Nor does she articulate any connection between any of these
17 arguments and the order on appeal. Finally, Smith has made no
18 coherent arguments respecting the First or Ninth Amendments to the
19 Constitution, or any possible violations of them. We need not
20 consider these issues. In re Jodoin, 209 B.R. 132, 143 (9th Cir. BAP
21 1997).

22 23 **VI. CONCLUSION**

24 We deny Smith's requests for judicial notice, and disregard the
25 supplemental excerpt submitted with her reply brief and her post-
26 argument "correction."

1 The bankruptcy court did not abuse its discretion in denying
2 Smith's second motion for reconsideration on 29 June 2006, which is
3 the only order before us in this appeal. Accordingly, we AFFIRM.

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