

JUL 12 2007

HAROLD S. MARENUS, CLERK
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NOT FOR PUBLICATION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-06-1370-BMoH
)	
GERALDINE KAY SMITH,)	Bk. No. 97-62183
)	
Debtor.)	Adv. No. 05-07043
)	
GERALDINE KAY SMITH,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM ¹
)	
JOHN RUSH,)	
)	
Appellee.)	
)	

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 The bankruptcy court denied debtor's motion for a second extension
2 of time to prosecute a nine-month-old adversary proceeding and dismissed
3 the case. Debtor moved for reconsideration, which the bankruptcy court
4 also denied. Debtor timely appealed, but only identified a previously
5 dismissed defendant as an appellee. We AFFIRM.

6
7 **I. FACTS**

8 Geraldine Smith filed a chapter 13³ petition on 16 April 1997; the
9 case was converted to chapter 7 on 12 November 1999, and she received her
10 discharge on 26 October 2000. In July 2005 the chapter 7 trustee noticed
11 an intent to pay a judgment lien against estate assets. Smith objected,
12 and the bankruptcy court abated the matter and gave her the opportunity
13 to file an adversary proceeding to deal with the disputed lien.

14 On 22 November 2005 (after having requested and received an
15 extension from the original 8 November deadline) Smith filed an adversary
16 proceeding against John Rush and several other named and unnamed
17 defendants.⁴ The judgment at issue, in the amount of \$1204.10, was
18 entered in 1992 by the Oregon Supreme Court against Smith and in favor

19
20 ³ Absent contrary indication, all "Code," chapter and section
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
22 its amendment by the Bankruptcy Abuse Prevention and Consumer
Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from
which this appeal arises was filed before its effective date
(generally 17 October 2005).

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

25 ⁴ The other named defendants are Judy Rush, Gary Wilhoft,
26 Brenda Wilhoft, John Reslock, Judith Reslock, Roy Reslock, and
27 Millette Reslock. None of these parties were named as appellees, nor
is there any indication they have notice of this appeal. The
28 bankruptcy court found they had never been properly served in the
adversary proceeding, and denied Smith's motion to enter defaults
against them.

1 of Judy Rush and Richard Barron, a Curry County Circuit Court judge, who
2 was not named as a defendant in the adversary proceeding. The judgment
3 was for attorney's fees and costs incurred on appeal.

4 On 31 January 2006 Smith filed a certificate of service indicating
5 the adversary summons and complaint had been served on attorney James
6 Gardner. After the bankruptcy court denied John and Judy Rush's motion
7 to dismiss and for a more definite statement, they filed an answer.
8 Shortly thereafter John Rush moved to amend the pleadings to reflect that
9 Judy Rush had been inadvertently named, and that John Rush's counsel
10 (Keith Boyd of Muhlheim, Boyd) did not represent Judy Rush. At a
11 subsequent pre-trial conference, John Rush was dismissed from the
12 proceeding on his representation that he had no claim or lien against the
13 estate. The order dismissing Rush without prejudice was entered 4 May
14 2006. The same day the bankruptcy court denied Smith's motion for entry
15 of default against the remaining defendants, ruling that service on
16 attorney Gardner did not suffice as service on them under Rule 7004.

17 After no action in the adversary proceeding for 47 days, the
18 bankruptcy court entered an order on 20 June 2006 giving notice of its
19 intent to dismiss for lack of prosecution unless appropriate action were
20 taken within 20 days. On 10 July 2007 Smith moved for a 30-day extension
21 of time, explaining that she had attempted to contact Judge Barron, the
22 Curry County Circuit Court, and Judy Rush, regarding the lien, but had
23 been unsuccessful. She indicated she was waiting for Judge Barron to
24 return on 24 July 2006.

25 The court granted the motion, setting 9 August 2006 as the deadline
26 for further action. On 9 August Smith moved for a further 30-day
27 extension, explaining that she "has been diligent but she has been unable
28 to reach the people with whom she needed to communicate[] within the

1 previously requested extention [sic] time period due to vacations and
2 time out of the office."

3 The bankruptcy court denied the motion, finding in a letter ruling
4 docketed 29 August 2006 that Smith had not shown "cause" under Rule
5 9006(b)(1) for a further extension, and that she had failed to prosecute
6 within the meaning of FRCP 41(b), applicable via Rule 7041. The
7 bankruptcy court entered an order dismissing the adversary proceeding
8 with prejudice, and an order in the main case overruling Smith's
9 objection to the trustee's notice of intent to pay judgment lien and
10 authorizing the trustee to take any actions consistent with that notice.

11 Smith timely moved for reconsideration, which the bankruptcy court
12 also denied, entering its letter ruling and order 14 September 2006.
13 Smith timely appealed.

14

15

II. JURISDICTION

16 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
17 § 157(b)(1) and (b)(2)(K), and we do under 28 U.S.C. § 158(c).

18 //

19 //

20 //

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1 A bankruptcy court necessarily abuses its discretion if it bases its
2 decision on an erroneous view of the law or clearly erroneous factual
3 findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).
4 We may reverse for abuse of discretion only when we have a definite and
5 firm conviction that the bankruptcy court committed a clear error of
6 judgment in the conclusion it reached. S.E.C. v. Coldicutt, 258 F.3d
7 939, 941 (9th Cir. 2001); In re Black, 222 B.R. 896, 899 (9th Cir. BAP
8 1998).

9 10 V. DISCUSSION

11 A. Requests for Judicial Notice

12 In her opening brief, Smith requests we take judicial notice of the
13 entire bankruptcy court file, and of a state court matter she brought
14 against Brookings Smuggler's Cove Homeowner's Association. Further, on
15 18 June 2007, two days before argument in this appeal, she requested we
16 take judicial notice of a letter dated 3 January 2006 which she contends
17 establishes that James Gardner is the agent for John and Judy Rush.

18 And although this appeal was submitted at the conclusion of argument
19 on 20 June 2007, Smith filed a Correction of Statement at Hearing and
20 Request for Judicial Notice on 3 July 2007. This latest request is that
21 we take judicial notice of a 12 December 2006 letter from Mr. Gardner to
22 John Rush, and its enclosure, a check from the trustee payable to Judy
23 Rush, which Smith avers she obtained in discovery on 25 June 2007.

24 While we may take judicial notice of bankruptcy court files, In re
25 E.R. Fegert, Inc., 887 F.2d 955, 957-58 (9th Cir. 1985), we see no reason
26 to look beyond the excerpts provided by the parties, and Smith has not
27 articulated one. The state court action is irrelevant to the issues in
28 this appeal, which are procedural only. Neither the 3 January 2006

1 letter nor that of 12 December 2006 was before the bankruptcy court, and
2 in any event, they do not establish any facts relevant to dismissal,
3 extension of time, or reconsideration. The requests are denied.

4
5 **B. Denial of Motion for Extension/Dismissal for Lack of Prosecution**

6 Rule 9006(b) provides, in relevant part:

7 [W]hen an act is required or allowed to be done at or within
8 a specified period by these rules or by a notice given
9 thereunder or by order of court, the court for cause shown may
10 at any time in its discretion (1) with or without motion or
11 notice order the period enlarged if the request therefor is
12 made before the expiration of the period originally prescribed
13 or as extended by a previous order

14 The bankruptcy court found that Smith had not shown "cause" under
15 Rule 9006(b) for another extension:

16 This case is now 9 months old. It has been over 5 months
17 since Ms. Smith was put on notice that the Muhlheim firm did
18 not represent Judy Rush. It has been 3 and ½ months since I
19 ruled that Ms. Smith's attempted service (back in December
20 2005) did not comply with FRBP 7004. It has been 7 weeks
21 since her first motion for extension was granted. All this,
22 and yet Ms. Smith has not attained good service on any of the
23 remaining defendants. Her present motion and declaration
24 again outlines unsuccessful attempts to communicate with Judge
25 Barron's chambers, as well as the State Court Administrator
26 regarding the disputed judgment lien. However, Judge Barron
27 has not been named as a party defendant. She does not mention
28 any effort to gain service on any of the remaining defendants.

Letter Ruling, 28 August 2006, pages 2-3 (emphasis in original). Given
the numerous delays in this case and the previous extensions granted by
the bankruptcy court, it is difficult to see how denial of this one
constituted abuse of discretion.

The bankruptcy court dismissed the case for delay based on Smith's
failure to effectuate proper service. FRCP 41(b) authorizes involuntary
dismissal for failure to prosecute, and a bankruptcy court may act sua
sponte under this rule. See McKeever v. Block, 932 F.2d 795, 797 (9th
Cir. 1991). The rule provides:

1 For failure of the plaintiff to prosecute or to comply with
2 these rules or any order of court, a defendant may move for
3 dismissal of an action or of any claim against the defendant.
4 Unless the court in its order for dismissal otherwise
5 specifies, a dismissal under this subdivision and any
dismissal not provided for in this rule, other than a
dismissal for lack of jurisdiction, for improper venue, or for
failure to join a party under Rule 19, operates as an
adjudication upon the merits.

6 FRCP 41(b). The failure to prosecute must be unreasonable. McKeever,
7 932 F.2d at 797. Failure to effectuate proper service is "a particularly
8 serious failure to prosecute" Anderson, 542 F.2d at 525. The
9 bankruptcy court correctly noted that Gardner's prior representation of
10 the defendants in state court does not equate to his accepting service
11 on their behalf in the adversary proceeding, or being their agent for
12 service. In re Villar, 317 B.R. 88, 93-94 (9th Cir. BAP 2004); but see
13 In re Focus Media Inc., 387 F.3d 1077, 1083 (9th Cir. 2004) (implied
14 agency existed where attorney had been "extensively involved" in the
15 underlying bankruptcy proceeding).

16 In determining whether dismissal is appropriate, the bankruptcy
17 court must consider:

18 (1) the public's interest in expeditious resolution of
19 litigation; (2) the court's need to manage its docket; (3) the
20 risk of prejudice to the defendants; (4) the public policy
favoring disposition of cases on their merits and (5) the
availability of less drastic sanctions.

21 Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986) (citation
22 omitted). But the bankruptcy court is not required to make specific
23 findings on these factors, and no finding of prejudice to defendants is
24 required, as it is presumed. Anderson, 542 F.2d at 524; Al-Torki v.
25 Kaempfen, 78 F.3d 1381, 1384 (9th Cir. 1996).

26 In the bankruptcy court's words:

27 I have carefully considered the factors required under FRCP
28 41(b) for dismissal. I find the delay here unreasonable. I
also find this case is delaying closure of Ms. Smith's main

1 bankruptcy, which is now over 9 years old. I find no good
2 rationale or excuse given for Ms. Smith's dilatory conduct.
3 Although she is acting pro se, she is an experienced litigant,
4 who should not be given any more favorable treatment than a
5 represented party. The court on two specific occasions . . .
6 has given Ms. Smith an opportunity to avoid dismissal. At
7 this point, dismissal with prejudice under Rule 41(b) is
8 warranted.

9 Letter Ruling, 28 August 2006, page 3 (footnotes omitted).

10 The bankruptcy court also cited FRCP 4(m), applicable via Rule
11 7004(a)(1), as an alternative ground for dismissal. That Rule sets a
12 120-day limit for serving the summons and complaint, and provides:

13 If service of the summons and complaint is not made upon a
14 defendant within 120 days after the filing of the complaint,
15 the court, upon motion or on its own initiative after notice
16 to the plaintiff, shall dismiss the action without prejudice
17 as to that defendant or direct that service be effected within
18 a specified time; provided that if the plaintiff shows good
19 cause for the failure, the court shall extend the time for
20 service for an appropriate period. This subdivision does not
21 apply to service in a foreign country pursuant to subdivision
22 (f) or (j)(1).

23 The bankruptcy court noted that, although dismissal under FRCP 4(m)
24 is without prejudice, in this instance the dismissal would effectively
25 be with prejudice because the bankruptcy court's deadline for filing the
26 complaint had passed. Although the bankruptcy court apparently never
27 entered a written order setting a deadline, Smith does not dispute that
28 one was set, and the bankruptcy court has the inherent power to manage
its own docket. Landis v. North American Co., 299 U.S. 248, 254 (1936);
Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962). And in any event, the
dismissal for failure to prosecute under FRCP 41(b) was with prejudice.
In re Jee, 799 F.2d 532, 534 n.2 (9th Cir. 1986).

Given the history of this adversary proceeding, the dismissal was
not an abuse of the bankruptcy court's discretion. The court gave Smith
ample opportunity to pursue the matter, and correctly concluded that her

1 pro se status did not excuse her from compliance with the rules. King
2 v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987).

3 On appeal, Smith insists upon arguing about the validity of the lien
4 and without citation to authority, that service on Gardner was good
5 service on the defendants, that default should be entered against the
6 Rushes, and that the bankruptcy court's order denying her motion for
7 default against them is not a separate document and thus not an effective
8 order. Even if these contentions were correct, they do not pertain to
9 the order on appeal.

10 She argues that she did not act in bad faith and that the delay in
11 removing Judge Barron from the judgment was not her fault. But the
12 bankruptcy court did not find any bad faith and none is required.
13 Finally, she accuses the bankruptcy judge of misconduct and of engaging
14 in ex parte contacts, but points to nothing in the record to support
15 these assertions.

16

17 **C. Reconsideration**

18 Smith timely moved for reconsideration of the order of dismissal and
19 the order overruling her objection to the trustee's notice of intent,
20 arguing that there were changed circumstances, in that Judge Barron's
21 name had been removed from the judgment. She also argued that: (1)
22 James Gardner was in fact the agent for the Rushes and their partners
23 (based on his 26 February 2004 letter to the trustee stating that he had
24 been the attorney for John Rush and other plaintiffs in a state court
25 lawsuit against Smith), and thus service on him was sufficient to give
26 notice to his clients; (2) since he had not objected to service he had
27 waived any objection; and (3) the Rushes had actual notice because they
28 made an appearance in the proceeding. Nevertheless she requested the

1 court allow her to serve Judy Rush by publication. She argued that
2 dismissal was prejudicial to her, but that defendants had not made a
3 showing of prejudice.

4 A motion for reconsideration filed within ten days of entry of the
5 underlying order is treated as a motion to alter or amend judgment or for
6 a new trial under FRCP 59(e), applicable via Rule 9023. American
7 Ironworks & Erectors, Inc. v. North Am. Const. Corp., 248 F.3d 892, 898-
8 99 (9th Cir. 2001). Reconsideration under that rule is appropriate only
9 if the moving party demonstrates (1) manifest error of fact; (2) manifest
10 error of law; or (3) newly discovered evidence. In re Basham, 208 B.R.
11 926, 934 (9th Cir. BAP 1997).

12 The bankruptcy denied the motion, noting that removal of Judge
13 Barron from the judgment had no bearing on the issues. Moreover, any
14 arguments regarding the efficacy of service should have been made in her
15 motion for entry of default, the denial of which Smith neither appealed
16 nor identified as an issue in this appeal. Nor, as indicated in footnote
17 4, are the would-be defendants parties to this appeal.

18 Smith has articulated no basis on which we could conclude that the
19 bankruptcy court abused its discretion: she presented nothing in support
20 of reconsideration which could not have been presented at the time of the
21 original motion. A motion to reconsider may not be used to present new
22 legal arguments or to rehash prior arguments. In re JSJF Corp., 344 B.R.
23 94, 103 (9th Cir. BAP 2006).

24

25

VI. CONCLUSION

26 We deny Smith's requests for judicial notice; the subject documents
27 are not relevant to the issues in this appeal.

28

1 Smith has shown no abuse of discretion in the denial of her motion
2 for extension or in dismissing her adversary proceeding against Rush,
3 et al. Nor has she shown any abuse of discretion in the bankruptcy
4 court's denial of her motion for reconsideration.

5 Accordingly, we AFFIRM.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28