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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NOT FOR PUBLICATION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.	AZ-07-1143-KDN
)		
JOSEPH G. TRUTWEIN,)	Bk. No.	05-13635
)		
Debtor.)	Adv. No.	05-00896
)		
_____)		
)		
CATHY BLAKE,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
JOSEPH G. TRUTWEIN,)		
)		
Appellee.)		
_____)		

Submitted Without Oral Argument
on October 25, 2007

Filed - November 19, 2007

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

Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding

Before: KLEIN, DUNN, and NEITER**, Bankruptcy Judges.

*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.

**Hon. Richard M. Neiter, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

1 This appeal, from denial of a motion under Federal Rule of
2 Civil Procedure 60(b)(1) seeking to reinstate an adversary
3 proceeding in order to obtain a default judgment, is an artifact
4 of the time bar that applied to 11 U.S.C. § 523(a)(15) until
5 October 17, 2005.

6 The appellant former spouse filed a § 523(a)(15) adversary
7 proceeding to except from discharge a division of retirement
8 assets ordered by a state court in dissolution proceedings
9 between appellant and the chapter 7 debtor. Although the
10 debtor's counsel wrote appellant's counsel that there was no
11 opposition to entry of default and default judgment excepting the
12 debt from discharge, the appellant's counsel neglected to secure
13 a default judgment after default was entered and later ignored a
14 notice that dismissal was being considered due to inactivity.
15 Nor did appellant's counsel appeal the ensuing order that
16 dismissed the adversary proceeding, even though the presence of a
17 filed but unresolved request for entry of default judgment and
18 the omission by the court to have considered less drastic
19 alternatives posed obvious appellate issues.

20 Although appellant's counsel demonstrated a disappointing
21 lack of professional knowledge and diligence, we nevertheless are
22 persuaded that the dismissal constituted clear error; and
23 accordingly, we REVERSE and REMAND.

24
25 FACTS

26 The marriage of appellee debtor Joseph G. Trutwein and
27 appellant Cathy Blake was dissolved by decree of the Maricopa
28 County (Arizona) Superior Court that included a requirement that

1 a particular retirement account controlled by debtor (and later
2 alleged to be worth about \$40,000)¹ be divided.

3 The debtor filed his chapter 7 bankruptcy case on July 28,
4 2005, and eventually received a discharge.

5 Before the Rule 4007 deadline for § 523(c) actions (which
6 included § 523(a)(15) actions until October 17, 2005), appellant
7 commenced an adversary proceeding to except from discharge the
8 debtor's marital dissolution property division obligation
9 ("Retirement Obligations").

10 In a letter to appellant's counsel dated December 13, 2005,
11 debtor's then-counsel advised that debtor did not oppose the
12 relief requested by appellant, as long as appellant did not seek
13 "any further relief as the court deems just and equitable," that
14 was mentioned in the complaint's prayer, including costs or
15 attorneys fees. If additional relief were to be sought, the
16 letter requested notice so that debtor could file an answer.

17 The appellant did not modify the original complaint or
18 amended complaint to address the condition expressed by debtor's
19 counsel for acquiescence in entry of a default judgment against
20 debtor.

21 Rather, appellant proceeded to file an "Application for
22 Entry of Default and Entry of Default Judgment" under Federal
23 Rule of Civil Procedure 55(b)(2), as incorporated by Federal Rule

24
25
26
27 ¹"One-half of the pension in issue was less than \$20,000.00
28 at the time of the divorce trial." (Resp't Father's Bench Mem.
re: Discharge of Obligation to Divide Pension at 2:19.5-20.5.)

1 of Bankruptcy Procedure 7055, on January 23, 2006.² Appellant
2 concurrently filed a proposed "Order Excepting Claims from
3 Discharge."

4 Two days later, the clerk's office issued a deficiency
5 memorandum to appellant stating that the default could not be
6 entered because no affidavit of service of the summons and
7 complaint was on file in compliance with Rule 55(a).³ The
8 deficiency memorandum did not mention a default judgment and
9 stated the requirements for an "entry of default" only.

10 Appellant subsequently filed an affidavit of service of the
11 summons and amended complaint, curing the deficiency.

12 On February 1, 2006, the clerk entered default against
13 debtor. The clerk's entry of default is not the same as a
14 default judgment that must be entered by the court under Rule
15 55(b)(2). No action was taken regarding the request for "Entry
16 of Default Judgment."

17 After the deficiency was cured and the clerk entered default
18 against debtor, appellant did not re-submit a separate document
19 containing the proposed judgment itself to be signed by the
20 court, pursuant to the two-step process of Rule 55(a) and (b)(2)
21 (which requires that there be application to the court for
22 anything other than a judgment for a sum certain).

23
24 ²After entry of default under Rule 55(a), Rule 55(b)(2)
25 provides that judgment by default requires action by the court
26 where the claim is not for a sum certain or for a sum which can
be made certain by computation and where the defendant is neither
an infant nor an incompetent person.

27 ³Pursuant to Rule 55(a), the party seeking default judgment
28 must present an affidavit or make some other showing that the
opposing party has not appeared after having been served, at
which point the clerk's office enters default on the docket.

1 After more than seven months of inactivity, in which no
2 default judgment was entered nor any other action taken in the
3 proceeding, the court issued an order on September 14, 2006,
4 announcing potential dismissal of the adversary proceeding if the
5 parties did not otherwise request a hearing and show good cause
6 why the proceeding should not be dismissed for want of
7 prosecution.

8 No response to the court's notice having been received, the
9 court dismissed the adversary proceeding on October 20, 2006
10 ("Dismissal Order"). The court did not, at that time, consider
11 less drastic alternatives than dismissal.

12 Debtor's then-counsel advised debtor in a letter dated
13 November 6, 2006, that debtor had been discharged of the
14 Retirement Obligations that appellant was seeking from debtor in
15 their post-dissolution proceedings because no judgment had ever
16 been obtained excepting the Retirement Obligations from discharge
17 in the bankruptcy court, and the adversary proceeding had
18 subsequently been dismissed.

19 On January 28, 2007, appellant filed what he styled as a
20 "motion to reopen" the adversary proceeding, in which he
21 indicated a purpose of enforcing the (nonexistent) default
22 judgment. Appellant's counsel argued that he believed a default
23 judgment had been obtained in the adversary proceeding and added
24 that debtor had previously indicated (in the December 13, 2005,
25 letter) to appellant that he would not oppose the relief sought
26 in the amended complaint.

27 Debtor opposed appellant's motion, pointing out that there
28 was no judgment. Debtor argued that appellant gave up the

1 opportunity to litigate the dischargeability issue by inaction,
2 that the order dismissing the adversary proceeding now
3 constituted a final judgment, and Rule 60(b) provided the
4 framework for analysis.

5 Appellant's motion was heard on March 6, 2007, at which Rule
6 60(b) figured in the argument. Focusing on the "excusable
7 neglect" prong of Rule 60(b), on April 2, 2007, the court ruled
8 that the neglect in question was not excusable and denied
9 appellant's motion to reopen the adversary proceeding in its
10 published decision, Blake v. Trutwein (In re Trutwein), 367 B.R.
11 158 (Bankr. D. Ariz. 2007).

12 Appellant timely appealed.

14 JURISDICTION

15 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
16 We have jurisdiction under 28 U.S.C. § 158(a)(1).

18 ISSUE

19 Whether the court abused its discretion in denying
20 appellant's motion seeking to revive the adversary proceeding in
21 order to have entered a default judgment that appellant
22 incorrectly assumed had been entered.

24 STANDARDS OF REVIEW

25 We review a bankruptcy court's ruling on a motion for relief
26 from judgment or order under Rule 60(b) for abuse of discretion.
27 Alonso v. Summerville (In re Summerville), 361 B.R. 133, 139 (9th
28 Cir. BAP 2007).

1 A bankruptcy court abuses its discretion if it bases its
2 decision on an erroneous view of the law or clearly erroneous
3 factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384,
4 405 (1990). Otherwise, we must have a definite and firm
5 conviction that the bankruptcy court committed a clear error of
6 judgment in the conclusion it reached to reverse for abuse of
7 discretion. Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447,
8 1451 (9th Cir. 1994).

9 The trial court has the power sua sponte to dismiss a case
10 involuntarily for lack of prosecution under Rule 41(b).
11 Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986);
12 Abandonato v. Stuart (In re Stuart), 88 B.R. 247, 249 (9th Cir.
13 BAP 1988). We reverse such a dismissal only upon a finding of an
14 abuse of discretion. Stuart, 88 B.R. at 249.

16 DISCUSSION

17 The appellant seeks relief under Rule 60(b)(1) from the
18 dismissal of the adversary proceeding.⁴ Appellant's counsel
19 argues that, because all the requisite documents for a default
20 judgment to be entered had been filed in the proceeding as of
21 February 1, 2006 (date the clerk entered default against the
22 debtor) and the "Application for Entry of Default and Default
23 Judgment" filed in the proceeding had not been rejected after he
24 cured the deficiency regarding notice, he believed that appellant

25
26 ⁴Although styled and decided as a "motion to reopen," such a
27 motion has no procedural significance (other than to allow a
28 party to reopen the case in chief or in rebuttal so as to present
additional evidence at trial). It was treated and argued as a
motion under Rule 60(b)(1). We analyze it as such and regard the
denial of reopening as a denial of Rule 60(b)(1) relief.

1 had received the relief requested from the court via the clerk's
2 form entry of default. Hence, it was contended that the
3 procedural snarl should be corrected.

4 Rule 60(b)(1) provides that the court may relieve a party
5 from a final judgment or order for "mistake, inadvertence,
6 surprise, or excusable neglect," on motion made within one year
7 after the judgment or order was entered. Fed. R. Civ. P.
8 60(b)(1). The appellant has the burden to establish the grounds
9 for the court to set aside or modify its judgment. Martinelli v.
10 Valley Bank of Nevada (In re Martinelli), 96 B.R. 1011, 1013 (9th
11 Cir. BAP 1988).

12 While the circuits are split, the Ninth Circuit also permits
13 Rule 60(b)(1) relief from judgment because of mistake,
14 inadvertence, surprise, or excusable neglect made by the court
15 itself, only if clear legal error exists. See Liberty Mut. Ins.
16 Co. v. EEOC, 691 F.2d 438, 440-441 & n.5 (9th Cir. 1982); contra
17 Silk v. Sandoval, 435 F.2d 1266, 1267-68 (1st Cir. 1971).

18 We first discuss whether the appellant's neglect was
19 excusable under Rule 60(b)(1), then consider whether the court's
20 underlying judgment of dismissal was clearly erroneous.

21
22 I

23 The United States Supreme Court has held that determining
24 whether neglect is "excusable" involves an equitable analysis
25 that considers all relevant circumstances surrounding the party's
26 omission, including the danger of prejudice to the debtor, the
27 length of delay and its potential impact on judicial proceedings,
28 the reason for the delay, including whether it was within the

1 reasonable control of the movant, and whether the movant acted in
2 good faith. Pioneer Inv. Svcs. Co. v. Brunswick Assoc. Ltd.
3 P'ship, 507 U.S. 380, 395 (1993) (Federal Rule of Bankruptcy
4 Procedure 9006).⁵

5 Applying the Pioneer analysis, the court concluded appellant
6 was not entitled to Rule 60(b)(1) relief because of a "pattern of
7 neglect" from the outset of this case, including not timely
8 serving the initial summons, not modifying or amending the
9 original or amended complaint to address debtor's counsel's
10 concerns, not complying with Rule 55(b)(2), and not remedying his
11 error despite notice from the court of potential dismissal
12 without further action.⁶

13 We agree with the bankruptcy court that Rule 60(b)(1)
14 "excusable neglect" was not demonstrated by the appellant.
15 Appellant's counsel himself conceded his knowledge and
16 familiarity at the hearing that a clerk's entry of default and
17 default judgment were not the same. Furthermore, the court
18

19
20 ⁵Although Pioneer interprets "excusable neglect" in the
21 context of Rule 9006 (enlargement of time), the term is analyzed
22 as used in other federal rules, including Rule 60(b)(1), and
23 thus, informs the analysis here.

24 ⁶The court further determined that a judgment otherwise
25 would be prejudicial to the debtor because the underlying
26 complaint requesting relief under § 523(a)(15) was time
27 sensitive, and the debtor had a right to rely on the finality of
28 the dismissal to begin a "fresh start" once the adversary
proceeding was dismissed and his discharge received.

29 However, we note that changes in the Code in October 2005
30 have omitted § 523(a)(15) from the Rule 4007 deadline for
31 § 523(c) actions. Thus, if debtor's bankruptcy had been filed
32 after October 2005, Rule 4007 would not have precluded the
33 appellant from re-filing his § 523(a)(15) action.

1 observed that appellant's counsel was an experienced practitioner
2 who has regularly appeared before that court.

3 In affirming the trial court's decision, we adhere to Ninth
4 Circuit and other precedents, which hold that an attorney's
5 misreading of the rules or mistake of law does not constitute
6 excusable neglect under Rule 60(b). Headlee v. Ferrous Fin.
7 Svcs. (In re Estate of Butler's Tire & Battery Co., Inc.), 592
8 F.2d 1028, 1033 (9th Cir. 1979); Harlan v. Graybar Elec. Co., 442
9 F.2d 425 (9th Cir. 1971) (counsel's misreading of rule does not
10 make the neglect excusable).

11 Unlike the situation in Pioneer, where a due process problem
12 resulting from an inconspicuous and unclear notification affected
13 the outcome, the notices sent to appellant's counsel regarding
14 the clerk's entry of default were not ambiguous. Each notice was
15 clearly titled in bold at the top. See Pioneer, 507 U.S. at
16 1499-1500. Appellant's counsel could not have been misled into
17 complacency.

18 Thus, even on grounds of Rule 60(b)(1) "mistake," which the
19 appellant did not argue or carry the burden to demonstrate, the
20 court did not abuse its discretion in denying the appellant's
21 motion to reopen.

22 II

24 Having concluded that the trial court was correct in
25 determining that the neglect of appellant's counsel was not
26 excusable under Rule 60(b)(1), we now review the underlying
27 judgment to determine whether the court clearly erred in
28 dismissing the adversary proceeding.

1 The law of this circuit is that the denial of a Rule
2 60(b)(1) motion does not entail review of the merits of the
3 underlying judgment, unless the underlying judgment is infected
4 by clear error. McDowell v. Calderon, 197 F.3d 1253, 1255 n.4
5 (9th Cir. 1999) (en banc). The failure of the court to correct
6 clear error by denying a motion to reconsider constitutes an
7 abuse of discretion. Id. (emphasis in original).

8 In the underlying judgment, the court dismissed the
9 adversary proceeding sua sponte for lack of prosecution under
10 Rule 41(b) after having given notice of such intent.⁷

11 The Ninth Circuit requires that the trial court weigh five
12 factors to determine whether to dismiss a case for lack of
13 prosecution:

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

19 Eisen, 31 F.3d at 1451 (bankruptcy case); Henderson, 779 F.2d at
20 1423; Tenorio v. Osinga (In re Osinga), 91 B.R. 893, 894 (9th
21 Cir. BAP 1988).

22 While the trial court is not required to make explicit
23 findings to show that it considered the essential factors, we
24 note that the court did not consider less drastic sanctions

25
26 ⁷Rule 41(b) provides that the effect of an involuntary
27 dismissal for failure of the plaintiff to prosecute operates as
28 an adjudication upon the merits, except for a dismissal for lack
of prosecution, for improper venue, for failure to join a party
under Rule 19, or as otherwise specified by the court.

1 besides dismissal of the action that would be time-barred if
2 refiled. See Henderson, 779 F.2d at 1424.

3 As to the first two factors, deference should be given to
4 the trial court in reviewing whether unreasonable delay existed,
5 since the trial court is in the best position to determine what
6 period of delay can be endured before its docket becomes
7 unmanageable. Osinga, 91 B.R. at 895; Stuart, 88 B.R. at 249.

8 In the present case, we recognize that the court's dismissal
9 of the adversary proceeding after it lay dormant for more than
10 seven months with no action was based on its authority through
11 Link v. Wabash R.R. Co., 370 U.S. 626, 629-30 (1962) (power to
12 invoke sanction of dismissal is necessary to prevent undue delays
13 in disposition of pending cases and to avoid congestion in
14 calendars of district courts); accord Pioneer, 507 U.S. at 396-97
15 (9-0). One cannot argue that the client should not bear
16 responsibility for the mistakes of counsel.

17 The bankruptcy court noted that a Dismissal Order is
18 routinely generated when no activity has occurred in a case for
19 at least six months.

20 However, the docket reveals that the appellant actually did
21 request entry of a default judgment as a part of his request for
22 entry of default. Thus, it was arguably incorrect for the court
23 to disregard that request, which had not been acted upon (even
24 though it had been presented in a procedurally dubious manner),
25 before the court involuntarily dismissed the case.

26 Furthermore, dismissal of the plaintiff's case is incorrect
27 when less drastic alternatives are not considered and where there
28 is no evidence of prejudice to the defendant. Raiford v. Pounds,

1 640 F.2d 944, 945 (9th Cir. 1981); Stuart, 88 B.R. at 250; cf.
2 Henderson, 779 F.2d at 1424 (dismissal within court's discretion
3 after plaintiff received at least three initial warnings of
4 dismissal as well as status conference to try to remedy problem).

5 While the bankruptcy court may have warned of potential
6 dismissal of the adversary proceeding, there is no indication
7 that the court ever considered imposing less drastic alternative
8 sanctions. See Stuart, 88 B.R. at 249. The court need not
9 exhaust every alternative short of dismissal before finally
10 dismissing a case, but, it must explore possible and meaningful
11 alternatives. Henderson, 779 F.2d at 1424.

12 Neither the transcript of the proceeding nor the court's
13 memorandum decision indicates that the court considered
14 alternatives less drastic than dismissal. Except for the final
15 step of ensuring that default judgment was actually entered by
16 the court, the appellant's counsel contends that he did
17 everything else required for entry of default judgment, including
18 submission of a proposed order of default judgment. Although
19 this reflects deficient professional knowledge of applicable
20 rules of procedure, in that counsel was apparently oblivious to
21 the requirements of Rule 55(b)(2) that there must be application
22 to the court for a judgment other than for a sum certain, the
23 court nevertheless was obliged to apply applicable dismissal
24 standards.

25 It is apparent that there would be no prejudice to the
26 debtor who did not oppose a default judgment in the first place.
27 Before dismissal of the adversary proceeding occurred, debtor had
28 indicated that he did not oppose this relief, as long as

1 attorneys fees and costs were not sought. The debtor conceded
2 that the debt is nondischargeable but for the procedural time
3 bar. The time constraint of a § 523(a)(15) action is only
4 currently an issue because the case was filed before October 17,
5 2005; after that date, Rule 4007(c) would not preclude the
6 appellant from refileing an action to except the Retirement
7 Obligations from discharge. It is not prejudicial for the debtor
8 to be required to pay a debt that the Bankruptcy Code excepts
9 from discharge.

10 Consequently, we are convinced that the court committed
11 clear error by not considering a less drastic alternative as
12 mandated by such cases as Henderson, especially when there is no
13 apparent cognizable prejudice to the defendant. By reviving the
14 adversary proceeding to allow the appellant to obtain default
15 judgment in her favor, the court would merely be enforcing what
16 the parties originally intended.

17 In sum, although we agree that counsel's defective
18 professional knowledge of the rules and procedures, inattention
19 to notices from the court including potential dismissal, and
20 neglect to appeal the dismissal order exacerbated the situation
21 and may have warranted disciplinary measures, it was clearly
22 erroneous for the court to dismiss the adversary proceeding and
23 to decline to correct it on the Rule 60(b) motion.

24 25 CONCLUSION

26 The bankruptcy court abused its discretion by dismissing the
27 adversary proceeding for want of prosecution where nothing in the
28 record indicates that the court considered less drastic

1 alternatives or that there would be prejudice to the debtor.
2 Particularly, because the debtor originally had indicated that he
3 did not oppose the appellant's relief, the court should have
4 reinstated the proceeding. Accordingly, we REVERSE and REMAND.

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