NOT FOR PUBLICATION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.

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[*]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.

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

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

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

FACTS

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

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

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

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

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

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

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

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[1] "One-half of the pension in issue was less than $20,000.00 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.)

of Bankruptcy Procedure 7055, on January 23, 2006.[2] Appellant concurrently filed a proposed "Order Excepting Claims from Discharge."

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

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

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

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

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[2]After entry of default under Rule 55(a), Rule 55(b)(2) provides that judgment by default requires action by the court 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.

[3]Pursuant to Rule 55(a), the party seeking default judgment 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.

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

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

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

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

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

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

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

Appellant timely appealed.

JURISDICTION

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

ISSUE

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

STANDARDS OF REVIEW

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

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

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

DISCUSSION

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

[4]Although styled and decided as a "motion to reopen," such a motion has no procedural significance (other than to allow a 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.

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

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

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

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

I

The United States Supreme Court has held that determining whether neglect is "excusable" involves an equitable analysis that considers all relevant circumstances surrounding the party's omission, including the danger of prejudice to the debtor, the length of 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. Pioneer Inv. Svcs. Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380, 395 (1993) (Federal Rule of Bankruptcy Procedure 9006).[5]

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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[7]Rule 41(b) provides that the effect of an involuntary dismissal for failure of the plaintiff to prosecute operates as 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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