

MAR 07 2007

NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP No.	CC-06-1236-PaMaB
)		
CABALAR ENTERPRISES, INC.,)	Bk. No.	LA 06-12383-EC
)		
Debtor.)		
)		
_____)		
CABALAR ENTERPRISES, INC.,)		
)		
Appellant.)		
_____)		

M E M O R A N D U M¹

Submitted Without Oral Argument
on February 22, 2007

Filed - March 7, 2007

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

Honorable Ellen Carroll, Bankruptcy Judge, Presiding.

Before: PAPPAS, MARLAR² and BRANDT, 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 The Honorable James M. Marlar, United States Bankruptcy Judge for the District of Arizona, sitting by designation.

1 This is an appeal from an order dismissing the chapter 11³
2 bankruptcy case filed by debtor Cabalar Enterprises, Inc. d/b/a
3 Suneyewear, a California corporation ("Cabalar") on the ground
4 that Cabalar "lacked counsel." We REVERSE the dismissal order and
5 REMAND the case to the bankruptcy court.

6
7 **FACTS**

8 Cabalar filed a voluntary petition for relief under chapter
9 11 of the Bankruptcy Code on June 5, 2006. The petition was
10 executed by its President, Melchor Cabalar, and also by its
11 attorney, Esperanza V. Bada ("Bada"), on June 2, 2006. Bada also
12 filed two somewhat contradictory statements with the petition. In
13 one, the Disclosure of Compensation of Attorney for Debtor, Bada
14 indicated that she had agreed to represent Cabalar for \$3,000, but
15 that fee did not include services for representation of Cabalar at
16 the meeting of creditors, confirmation hearing, adversary
17 proceedings and contested bankruptcy matters. In the other, a
18 Declaration re: Limited Scope of Appearance Pursuant to Local
19 Bankruptcy Rule 2090-1, Bada indicated that, for the agreed fee,
20 she would provide only certain legal services: she would prepare
21 and file the petition and schedules, and represent the debtor at
22 the § 341(a) hearing.

23 On June 8, 2006, a creditor, Plaza West Covina, LP, filed a
24 notice of motion and motion for relief from the automatic stay in
25 Cabalar's case. A hearing was set for the motion on shortened
26 notice for June 21, 2006, at 10:00 a.m. On June 16, 2006, Bada

27
28 ³ Unless otherwise indicated, all chapter, section and rule
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 responded to the motion on behalf of Cabalar, and moved to
2 continue the hearing. Attached to the motion for continuance was
3 Bada's Memorandum of Points and Authorities/Statement of Facts, in
4 which Bada declared that she and Cabalar were scheduled to meet
5 with the U.S. Trustee on June 21 at 10:30 a.m. at a distant
6 location from the courthouse where the stay motion hearing was
7 scheduled to be heard. She noted that because timely compliance
8 with the requirements of the U.S. Trustee was required under Local
9 Bankruptcy Rule 2015-2(2), if Cabalar failed to attend the
10 interview, the U.S. Trustee might seek dismissal of the case.
11 Bada suggested that the stay relief hearing be reset for July 7,
12 2006, a date which the clerk had apparently indicated to her was
13 available.

14 On June 7, 2006, the bankruptcy court, acting sua sponte,
15 issued an Order to Show Cause re: Dismissal ("OSC") in Cabalar's
16 case. The order set a hearing on June 14, 2006, and required
17 Cabalar to show cause why the chapter 11 case should not be
18 dismissed due to the "debtor's lack of counsel as required by Rule
19 2090-1-(g)(1)" of the Local Bankruptcy Rules. The OSC cautioned
20 that Cabalar's failure to attend the hearing may result in
21 dismissal of the case. The certificate of mailing executed by the
22 clerk attached to the OSC indicated that, although the OSC was
23 signed on June 7, 2006, it was not entered until June 8, 2006, and
24 that it was not mailed to the parties, including Cabalar and Bada,
25 until June 9, 2006, a Friday. The certificate also indicated that
26 the OSC had been mailed to Bada as "debtor's attorney."

27 The record is unclear when the OSC reached Bada's office.
28 However, Bada attached a declaration to Cabalar's Opening Brief,

1 in which she states under penalty of perjury that:

- 2 • She is the attorney for Cabalar in the bankruptcy case.
- 3 • She signed the chapter 11 petition as Cabalar's attorney of
4 record.
- 5 • On June 14, 2006, at approximately 2:15 p.m., her secretary
6 gave her a copy of the OSC which had arrived in her office
7 mail between 1:00 and 2:00 p.m. that day.
- 8 • The postmark on the envelope containing the OSC was June 12,
9 2006 in the afternoon.
- 10 • Bada indicates that a copy of the envelope was attached to
11 the Declaration. However, it was not attached.⁴

12 The hearing on the OSC occurred as scheduled on Wednesday,
13 June 14. Bada did not appear at the hearing. An order dismissing
14 the bankruptcy case was signed by the bankruptcy judge on June 16,
15 2006, entered on June 19, 2006, mailed to Bada, again as debtor's
16 attorney, on June 21, 2006, and received on June 23, 2006.

17 Cabalar filed a timely appeal of the dismissal order on June
18 29, 2006.⁵

19

20 JURISDICTION

21 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
22 §§ 1334 and 158(b)(1). We have jurisdiction pursuant to 28 U.S.C.
23 § 158(b).

24

25 ⁴ The Clerk of the Panel contacted Bada's office staff in
26 hopes that the record could be supplemented with a copy of the
27 envelope. Ultimately, the Clerk was informed that the envelope
28 could not be located.

29 ⁵ We note that no party appeared to represent the interests
of any appellee. Therefore, we have only the brief and excerpts
of record supplied by Cabalar.

1 **ISSUES**

2 Whether the bankruptcy court abused its discretion in
3 dismissing the chapter 11 case because Cabalar "lacked counsel."

4 Whether the bankruptcy court provided Cabalar and its
5 attorney with adequate notice of the hearing on the OSC.

6
7 **STANDARDS OF REVIEW**

8 We review orders of dismissal for abuse of discretion.

9 Guastella v. Hampton (In re Guastella), 341 B.R. 908, 915 (9th
10 Cir. BAP 2006). A bankruptcy court abuses its discretion if it
11 bases its decision on a clearly erroneous view of the facts.

12 Khachikyan v. Hahn (In re Khachikyan), 335 B.R. 121, 125 (9th Cir.
13 BAP 2005).

14 Whether a particular procedure comports with due process is a
15 legal question that we review de novo. Beneficial Cal., Inc. v.
16 Villar (In re Villar), 317 B.R. 88, 92 (9th Cir. BAP 2004).

17 **DISCUSSION**

18 A.

19 The bankruptcy court abused its discretion in dismissing
20 Cabalar's chapter 11 case "due to lack of counsel."

21 The bankruptcy court's OSC directed Cabalar "to show cause
22 why this chapter 11 case should not be dismissed due to the
23 debtor's lack of counsel as required by Rule 2090-1(g) (1) of the
24 Local Rules of the United States Bankruptcy Court, Central
25 District of California." (Emphasis added.)⁶

26
27 ⁶ The Rule provides that "[a] corporation, partnership or
28 unincorporated association may not file a petition or otherwise
appear without counsel in any case or proceeding. . . ." Bankr.
C.D. Cal. LBR 2090-1(g) (1).

1 Following the hearing on the OSC, on June 16, 2006, the court
2 entered an order dismissing Cabalar's chapter 11 case which reads
3 as follows:

4 This court's order to show cause and explain
5 why this Chapter 11 case should not be
6 dismissed due to the debtor's lack of counsel
7 as required by Rule 2090-1(g)(1) of the Local
8 Rules of the United States Bankruptcy Court,
9 Central District of California came on for
hearing on June 14, 2006. There was no
appearance by the debtor. For the reasons set
forth on the record at the hearing, and good
cause appearing, IT IS HEREBY ORDERED that
this Chapter 11 case is dismissed.

10 (Emphasis added.)

11 Both the OSC and the order dismissing the case indicate that
12 the court dismissed the case because Cabalar was not represented
13 by counsel. In so doing, the bankruptcy court abused its
14 discretion by committing plain error. A court commits plain error
15 when it forms a judgment "that is clearly against the logic and
16 effect of the facts." International Jensen, Inc. v. Metrosound
17 U.S.A., Inc., 4 F.3d 819, 822 (9th Cir. 1993).

18 Cabalar did not lack counsel in the bankruptcy case. The
19 petition commencing the bankruptcy case was signed by Bada as
20 attorney for Cabalar, as were two additional statements which
21 accompanied the petition. Indeed, the clerk of the court sent
22 three different notices to Bada as attorney for Cabalar: the Order
23 Scheduling Case Management Conference on June 7, 2006; the OSC;
24 and the Order Dismissing Case. Between the time of the OSC
25 hearing on June 14, and entry of the dismissal order by the clerk
26 on June 19, Bada also filed a motion for continuance of a hearing
27 on the motion for relief from stay, together with a Memorandum of
28 Points and Authorities, in which Bada indicated that she was, in

1 her role as Cabalar's attorney, preparing to meet with the U.S.
2 Trustee. In short, prior to dismissal of the case, the bankruptcy
3 court's record contained numerous documents, all of which showed
4 that Bada had appeared and was actively engaged as attorney for
5 Cabalar.

6 We conclude that the bankruptcy court committed plain error
7 in dismissing the chapter 11 case "due to lack of counsel." A
8 clear error in judgment requires reversal under the abuse of
9 discretion standard. Lundell v. Ulrich (In re Ulrich), 236 B.R.
10 720, 723 (9th Cir. BAP 1999) (appeals court cannot reverse under
11 abuse of discretion standard unless it has a definite and firm
12 conviction that the bankruptcy court committed a clear error of
13 judgment). The bankruptcy court's decision to dismiss Cabalar's
14 chapter 11 case was based upon a clearly erroneous view of the
15 facts, that Cabalar lacked counsel in the bankruptcy case, and
16 must be reversed.⁷

17 //

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21 ⁷ As opposed to Cabalar's "lack of counsel," we surmise that
22 it was the bankruptcy court's concern with Bada's attempt to limit
23 her role in representing Cabalar that motivated it to issue the
24 OSC and ultimately dismiss the case. While in its Order
25 Dismissing Case, the bankruptcy court indicates that the reasons
26 for dismissing the case were "set forth on the record at the [OSC]
27 hearing", we were not given a transcript of that hearing.
28 However, we decline to speculate whether the court's reasons for
dismissal included cause other than "debtor's lack of counsel."
The dismissal order is clear on its face that the dismissal is
based upon Cabalar's failure to appear at the OSC hearing, and the
sole ground referenced in the OSC for possible dismissal is
Cabalar's lack of counsel. Under these circumstances, we must
take the bankruptcy court at its word that "lack of counsel" was
the sole basis for the court's decision.

1 B.

2 Cabalar and its attorney were not given
3 adequate notice of the hearing on the OSC.

4 On June 7, 2006, two days after Cabalar, acting through its
5 attorney, Bada, filed the chapter 11 petition, the bankruptcy
6 judge signed the OSC directing Cabalar to show cause why the case
7 should not be dismissed. The OSC was not entered until June 8,
8 and set the hearing on the OSC to occur on June 14, 2006.

9 According to the clerk's certificate, the order was not mailed to
10 Cabalar and Bada until Friday, June 9, 2006.

11 Bada asserts in a sworn declaration that she was unaware of
12 the OSC until a copy of it was given to her at 2:15 p.m. on
13 Wednesday, June 14, 2006, or, in other words, 45 minutes after the
14 hearing was scheduled to occur. Bada further represents that the
15 OSC arrived at her office between 1:00 p.m. and 2:00 p.m. that
16 same day in an envelope bearing a postmark of Monday, June 12,
17 2006. Bada argues that, given these facts, she and Cabalar were
18 given insufficient notice of the hearing on the OSC which
19 precluded her from responding to the OSC and attending the
20 hearing. As a result, Bada urges, her client was unduly
21 prejudiced by the insufficient notice, in that the chapter 11 case
22 was dismissed.

23 We find it odd that the OSC, mailed by the clerk of the
24 bankruptcy court on Friday, June 9, did not find its way to Bada's
25 office until the following Wednesday, June 14. Even so, Bada's
26 declaration is unchallenged, and other than the clerk's
27 certificate, there is no reason to suspect that the facts as
28 represented by Bada are incorrect. But even assuming the ordinary

1 course of the mails prevailed, we are comfortable in assuming that
2 the OSC would not have arrived at Bada's office prior to Monday,
3 June 12. Indeed, Rule 9006(f) requires that assumption.

4 But whether the OSC was delivered to Bada on Monday or
5 Wednesday is of no moment. Under either scenario, Cabalar and
6 Bada were given insufficient notice of the OSC hearing so as to
7 allow them to appear and effectively participate in the
8 proceedings. As a result, Cabalar's due process rights were
9 compromised.

10 The fundamental component of the right to due process is the
11 right to be heard. Mullane v. Cent. Hanover Bnk. & Trust Co., 339
12 U.S. 306, 314 (1950). Attendant to this right is the right to
13 sufficient notice of any proceeding which may affect one's rights.

14 An elementary and fundamental requirement of
15 due process in any proceeding which is to be
16 accorded finality is notice reasonably
17 calculated, under all circumstances, to
18 apprise interested parties of the pendency of
19 the action and afford them an opportunity to
20 present their objections.

21 Id.

22 Courts have a heightened responsibility to assure that due
23 process rights are respected when a hearing may result in
24 dismissal of the bankruptcy case. "Dismissal is a harsh penalty
25 and is to be imposed only in extreme circumstances." Allen v.
26 Bayer Corp., 460 F.3d 1217, 1226 (9th Cir. 2006); In re Bettelman,
27 107 B.R. 230, 232 (9th Cir. BAP 1988). Although the bankruptcy
28 court's internal regulations and processes may be taken into
consideration, due process considerations concerning dismissal
proceedings are paramount. "There are constitutional limitations
upon the power of courts, even in aid of their own valid

1 processes, to dismiss an action without affording a party the
2 opportunity for a hearing on the merits of his cause." Société
3 Int'l v. Rogers, 357 U.S. 197, 203 (1958).

4 Under § 105(a),⁸ the bankruptcy court undoubtedly had the
5 power, acting sua sponte, to dismiss Cabalar's chapter 11 case for
6 failure to comply with the court's local rules. However, "[e]ven
7 though the court [may dismiss a case] through its general powers
8 under Section 105(a), the concept of procedural due process
9 requires notice and an opportunity to be heard." Tennant v. Rojas
10 (In re Tennant), 318 B.R. 860, 870 (9th Cir. BAP 2004) (affirming
11 the bankruptcy court's dismissal of chapter 13 case for failure to
12 timely file the statement of financial affairs) citing Muessel v.
13 Pappalardo (In re Muessel), 292 B.R. 712, 717 (1st Cir. BAP 2003).

14 By analogy, if instead of through the bankruptcy court's OSC
15 the dismissal of the bankruptcy case had been requested by motion
16 of an interested party for "cause" under § 1112(b), Cabalar would
17 have been entitled to "notice and a hearing."⁹ As a contested
18 matter,¹⁰ Rule 9014(a) would require that Cabalar and Bada be
19 afforded "reasonable notice and opportunity for hearing"
20 More particularly, under Rule 2002(a)(4), Cabalar (and all other
21

22 ⁸ This provision makes clear that a bankruptcy court is not
23 precluded "from, sua sponte, taking any action or making any
24 determination necessary or appropriate to enforce or implement
25 court orders or rules, or to prevent an abuse of process."
26 § 105(a).

27 ⁹ Under § 102(1)(A), this phrase means "such notice as is
28 appropriate in the circumstances, and such opportunity for a
hearing as is appropriate in the particular circumstances"

¹⁰ Rule 1017(f)(1) prescribes that Rule 9014 ("Contested
Matters") governs a request to dismiss a chapter 11 case under
§ 1112(b).

1 interested parties in the case) would have been entitled to twenty
2 days' notice of the hearing on any dismissal motion. This
3 extended time for notice of a motion to dismiss, as opposed to
4 other types of motions, see Rule 9006(d) (prescribing at least
5 five days notice of a motion hearing), evidences the drafters'
6 intent that dismissal proceedings take place only after ample
7 advance notice is given to those potentially effected.

8 We do not suggest that the bankruptcy court, acting pursuant
9 to its general powers to enforce its rules, was required to
10 observe the same procedural requirements as would a party seeking
11 the involuntary dismissal of Cabalar's chapter 11 case. See In re
12 Tennant, 318 B.R. at 870 (holding that bankruptcy court was not
13 required to comply with Rule 1017(c) in dismissing, sua sponte, a
14 chapter 13 case). However, the procedural standards established
15 by the Code and Rules support the notion that, when it comes to
16 dismissal of bankruptcy cases, due process demands adequate notice
17 and opportunity to be heard.

18 Bada declares that the OSC was not received in her office
19 until after the hearing occurred. If Bada received the OSC after
20 the hearing, there was an unquestionable failure of due process.
21 But even assuming the OSC was received by Bada some time prior to
22 the date of the hearing, Cabalar and Bada were given less than
23 three business days' notice of the OSC hearing. Since all of this
24 occurred just a few days after commencement of the chapter 11
25 case, we do not think Bada and Cabalar should have anticipated
26 that the bankruptcy court would, sua sponte, suggest that the case
27 be dismissed for "lack of counsel." Under these circumstances, we
28 conclude that Bada and Cabalar received insufficient notice of the

1 hearing on the OSC to prepare for, attend, and participate at the
2 hearing, thus depriving Cabalar of its right to due process.

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CONCLUSION

We REVERSE the order dismissing the chapter 11 case and
REMAND the case to the bankruptcy court.