NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. CC-04-1390-MaMoP
	CC-04-1391-MaMoP
HOOVER WSCR ASSOCIATES LIMITED,	(related appeals)
Debtor.	Bk. No. SA 98-24411-JB
	Adv. No. SA 99-01718-JB
HOWARD M. EHRENBERG, Chapter 7 Trustee,	
Appellant,	
v.	**M E M O R A N D U M**[1]
WSCR, INC., aka RELIASTAR INVESTMENT RESEARCH, INC.,	
Appellee.	
WSCR, INC., aka RELIASTAR INVESTMENT RESEARCH, INC.,	
Appellant,	
v.	
HOWARD M. EHRENBERG, Chapter 7 Trustee; UNITED STATES TRUSTEE,	
Appellees.	

Argued and Submitted on
March 23, 2005 at Pasadena, California

Filed - May 31, 2005

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

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

Honorable James N. Barr, Bankruptcy Judge, Presiding.

Before: MARLAR, MONTALI and PERRIS, Bankruptcy Judges.

INTRODUCTION

The debtor is a limited partnership. In an adversary proceeding, the chapter 7[2] trustee ("Trustee") sought to recover from the debtor's general partner a deficiency in the bankruptcy estate, pursuant to § 723(a). The deficiency resulted from an unpaid civil judgment against the debtor. However, there was no separate judgment against the general partner and such an action on the claim was time-barred under California law.

Upon cross-motions for summary judgment, the bankruptcy court entered judgment in favor of the general partner and against Trustee. In a matter of first impression, the bankruptcy court concluded that the judgment claim was not the general partner's "personal liability," as that phrase is used in § 723(a). Its decision was published at Ehrenberg v. WSCR, Inc. (In re Hoover WSCR Assocs. Ltd.), 268 B.R. 227 (Bankr. C.D. Cal. 2001).

Trustee filed an untimely appeal of the order granting summary judgment, and after some proceedings, his motion for an extension of time to file a new notice of appeal was granted on

---

[2] Unless otherwise indicated, chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and rule references are to the Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr. P."), Rules 1001-9036.

the grounds of excusable neglect. The general partner then appealed the bankruptcy court's order granting the extension. Both appeals are before us.

We conclude that the bankruptcy court did not abuse its wide discretion to determine excusable neglect and grant Trustee's extension motion. On the merits of the summary judgment, we agree with and adopt the bankruptcy court's well-reasoned opinion and find Trustee's new arguments unavailing. Both orders are therefore AFFIRMED.

FACTS

Hoover-WSCR Associates Limited Partnership ("Debtor") is a California limited partnership whose general partner is WSCR, Inc., nka Reliastar Investment Research, Inc. ("WSCR").

Prepetition, Chris and Ann Koukladas (the "Koukladases") sued Debtor and other defendants, but not WSCR individually, for breach of contract and obtained a judgment for $256,167.54. WSCR later assigned its interest in Debtor to third parties, but conceded that it was the general partner at the time the claim arose.

In 1998, Chris Koukladas filed an involuntary chapter 7 petition against Debtor. He then filed a proof of claim for $256,167.54 ("Koukladas Claim"). There were no assets in Debtor's estate to satisfy the Koukladas Claim. Therefore, Trustee filed a § 723(a) adversary proceeding to recover from WSCR the deficiency plus Trustee's administrative claim for attorney's fees and costs.

Cross-Motions for Summary Judgment

Both parties filed motions for summary judgment in the adversary proceeding. WSCR asserted that California law required the Koukladases to obtain a separate judgment against WSCR in order to establish its liability to Trustee. Since it was undisputed that the statute of limitations had expired prepetition on any individual breach of contract action against WSCR, WSCR argued that it was entitled to summary judgment on the complaint.

Trustee countered that WSCR was jointly and severally liable for the limited partnership debts under California law and that a § 723 action is based on such liability. Therefore, he argued that, since he was asserting a federal cause of action, the statute of limitations defense was inapplicable, and the estate was entitled to sue WSCR for the deficiency.

On August 6, 2001, the court entered its order granting WSCR's motion for summary judgment and denying Trustee's motion. In its published opinion, the bankruptcy court noted there was no definition of the words: ". . . . a deficiency . . . with respect to which a general partner of the partnership is personally liable . . . ." in § 723(a). Consequently, it extensively analyzed the statute's legislative history, California statutory law, and federal case law. See Hoover WSCR Assocs. Ltd., supra.

The bankruptcy court interpreted the California statute making partners liable for partnership debts as merely providing a basis for liability that may be limited by other statutes. Id. at 235 (citing California Corporations Code ("CAL. CORP. CODE") § 16306(a)). Such limiting statutes applicable to this case were:

CAL. CORP. CODE § 16307(c) (statute insulating a partner's assets from claims of partnership creditors unless there is a judgment against said partner); California Civil Procedure Code ("CAL. CIV. PROC. CODE") § 369.5 (procedure for initiating suit against a partner requiring individualized service of process); and the applicable statute of limitations which indisputably barred any action on the claim against WSCR. The bankruptcy court concluded that WSCR's assets were insulated from the Koukladas Claim, and therefore not recoverable under § 723 without a judgment against WSCR personally. Id. The bankruptcy court further held, in dictum, that Trustee's administrative expense claims were not part of the "deficiency" for which a partner is liable. Id. at 235-36.

Also on August 6th, a "Notice of Entry of Judgment or Order and Certificate of Mailing" was entered, which indicated that the memorandum decision and order were mailed on that date to Trustee's attorneys Joel Goldman ("Goldman") and Karen Rinehart ("Rinehart"). Nevertheless, Trustee failed to file a timely notice of appeal within ten days, pursuant to Rule 8002(a).

Motion to Extend Time to Appeal

On September 5, 2001, the 29th day after entry of the order on summary judgment, Trustee filed a motion for an extension of time to appeal the order.

Associate Attorney Franklin Kang ("Kang") and Trustee's lead attorney, Goldman, filed their declarations. Both attorneys averred that they did not receive written notice of entry of judgment nor did they learn of it until September 4, 2001,

following their firm's search of the docket.[3] Trustee then filed his extension motion only one day thereafter. Kang averred that he had notified the firm personnel to be alert for the notice of final order and to inform the proper attorney.[4] Goldman declared that he had been out of town for the latter part of August, 2001.[5]

On hearing the matter, the bankruptcy court found that Trustee had failed in his responsibility to monitor the docket, that such excuse was insufficient to establish excusable neglect, and denied his motion. Trustee appealed to the district court, which vacated the order and remanded with instructions that the bankruptcy court should articulate its reasons for finding a lack of excusable neglect on the part of Trustee or his counsel in light of all of the factors enunciated in Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993).

On remand, the bankruptcy court requested supplemental briefing and held two additional hearings on the extension motion. Trustee argued that an equally-weighted, four-factor analysis was "law of the case" pursuant to the district court's remand order. WSCR argued, to the contrary, that the bankruptcy court's prior

---

[3] Although WSCR filed evidentiary objections to these declarations, it did not challenge the portions cited. Nor has WSCR renewed its objections on appeal, and therefore it has waived them.

[4] Appellate attorney Barbara Bacon ("Bacon") was assigned to the appeal in July, 2001. However her declaration was not presented. Nor was Attorney Rinehart's declaration filed, even though the court records indicated that she had also been served with the notice of entry of judgment.

[5] Counsel for WSCR sent Goldman two email messages, on August 22 and 24, 2001, respectively. Goldman stated that he did not receive them until he returned from a business trip.

ruling giving more weight to the reason for the delay was correct. WSCR also presented two subsequent Ninth Circuit opinions which underscored the appellant's responsibility to monitor the docket.

The bankruptcy court issued its order reversing itself, and granting the motion on July 28, 2004. In it, it articulated its approach and reasons for its ruling. First, the court explained its prior denial:

> In my initial ruling, I was persuaded that when applying Rule 8002(c)(2), I should deny the motion if the movant did not prove "excuse" for failing to monitor the trial court docket, for that factor alone seemed the only one relevant to the question of whether the time to appeal should be extended in the case before me. Given the time frame within which all relevant activity occurred, other excusable neglect factors seemed far less significant -- if significant at all.

Order Extending Time (July 28, 2004), p. 3:7-12.

The bankruptcy court stated that the district court mandate required it to "more closely consider each of the Pioneer factors." In doing so, it then determined that three of the four factors were either neutral or in Trustee's favor, whereas the "reason for delay" factor still weighed heavily against Trustee. Because it believed that each factor must be given some weight, the bankruptcy court determined that the neglect of Trustee's counsel in failing to file a timely notice of appeal was excusable.

The bankruptcy court gave Trustee 10 days in which to file his appeal of the summary judgment order, which he did. That appeal was designated BAP No. CC-04-1390. WSCR then timely appealed the extension order, which appeal was designated BAP No. CC-04-1391. Both appeals were set for joint oral argument, and they will be considered in reverse order.

ISSUES

1. Whether the bankruptcy court abused its discretion in granting Trustee's motion to extend time to appeal the summary judgment order.

2. Whether WSCR can be "personally liable" for a § 723(a) deficiency as to the Koukladas Claim against the Debtor if there can be no individual judgment rendered against it on the claim under California law.[6]

STANDARDS OF REVIEW

We review for an abuse of discretion the bankruptcy court's decision to grant a motion for an extension of time to file a notice of appeal on the grounds of excusable neglect. Pincay v. Andrews, 389 F.3d 853, 858 (9th Cir. 2004), cert. denied, 125 S.Ct. 1726 (2005). Under this standard, we may reverse only if we are left with the definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached after weighing the relevant factors. Id. Moreover, use of an incorrect legal standard is, per se, an abuse of discretion. Dawson v. Wash. Mut. Bank, F.A. (In re Dawson), 390 F.3d 1139, 1151 (9th Cir. 2004).

We review the bankruptcy court's decision to grant a motion

[6] Based on our ultimate disposition, in favor of WSCR, we do not reach the third issue raised, which was dictum in the bankruptcy court's opinion: whether a trustee's deficiency claim under § 723(a) includes Trustee's administrative expense claim.

for summary judgment, as well as the bankruptcy court's statutory interpretation, de novo. Beeler v. Jewell (In re Stanton), 303 F.3d 939, 941 (9th Cir. 2002) (summary judgment); Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman), 325 F.3d 1168, 1172 (9th Cir. 2003) (statutory interpretation). Viewing the evidence in the light most favorable to the nonmoving party, we determine whether there are any genuine issues of material fact and whether the trial court correctly applied the relevant substantive law. Captain Blythers, Inc. v. Thompson (In re Captain Blythers, Inc.), 311 B.R. 530, 534 (9th Cir. BAP 2004).

DISCUSSION

A. Rule 8002(c) - Motion to Extend Time to Appeal

A notice of appeal must be filed within ten days of entry of the order appealed from. Fed. R. Bankr. P. 8002(a). A timely appeal is mandatory and jurisdictional. Browder v. Dir., Dept. of Corr., 434 U.S. 257, 264 (1978); Slimick v. Silva (In re Slimick), 928 F.2d 304, 306 (9th Cir. 1990).

All is not lost for the appellant who fails to file a notice of appeal in the 10-day period. A bankruptcy court may extend the time for filing the notice of appeal, so long as the moving party files a written motion within the original 10-day period. Another exception allows for the filing of a late notice of appeal if a motion is filed not later than 20 days after the initial 10-day period. However, the court must be convinced that there has been a showing of "excusable neglect." Fed. R. Bankr. P. 8002(c).

Here, Trustee filed his motion on the 19th day of the 20-day extended period.

Rule 8002(c) is the only avenue of relief in bankruptcy court and is more circumspect than the federal appellate rules.[7] Nonetheless, the bankruptcy rules are generally construed in the same manner as the federal appellate rules. See Key Bar Inv., Inc. v. Cahn (In re Cahn), 188 B.R. 627, 632 (9th Cir. BAP 1995). These differences, combined with a similar lenient construction policy, "warrants a generous construction of excusable neglect" in bankruptcy appeals based on an analysis that is "relative and contextual." Warrick v. Birdsell (In re Warrick), 278 B.R. 182, 188 (9th Cir. BAP 2002)(Klein, J., dissenting).

(1) The "Excusable Neglect" Standard

In Pioneer, the Supreme Court proposed a "flexible" standard for determining "excusable neglect" to encompass "situations in which the failure to comply with a filing deadline is attributable to negligence." Id., 507 U.S. at 394. This definition permits courts, "where appropriate, to accept late filings caused by

---

[7] Rule 8002(c) is modeled after Federal Rule of Appellate Procedure ("Fed. R. App. P." or "FRAP") 4(a)(5), which provides that the initial 30-day appeal period in district court may be extended an additional 30 days by a motion made after expiration of the deadline upon a showing of either "excusable neglect" or "good cause." Fed. R. App. P. 4(a)(5)(A). In addition, the federal civil rules provide that if a moving party did not receive notice of entry of the judgment or order to which such party was entitled, and the other party would not be prejudiced, the moving party may file a motion to reopen the time to file an appeal within the earlier of 180 days after the judgment or order is entered or 7 days after receipt of notice of the entry. Fed. R. App. P. 4(a)(6).

inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Id. at 388. Pioneer involved a late-filed proof of claim, not a notice of appeal, but the "excusable neglect" analysis applies with equal force. The burden of proving facts sufficient to establish excusable neglect is on the moving party. Cahn, 188 B.R. at 631.

The test for determining "excusable neglect" is well established: it is "at bottom, an equitable one, taking account of all relevant circumstances surrounding the party's omission." Pioneer, 507 U.S. at 395. Such an analysis requires the weighing or balancing of relevant factors, including the following four:

(1) the danger of prejudice to the debtor,

(2) the length of the delay and its potential impact on judicial proceedings,

(3) the reason for the delay, including whether it was within the reasonable control of the movant, and

(4) whether the movant acted in good faith.

Id. at 395 (numbers inserted); Pincay, 389 F.3d at 855.

The Pioneer Court found that all four factors were favorable to a finding of excusable neglect for the movant, including the third factor--delay due to an ambiguous bar date notice. See Pioneer, 507 U.S. at 397-98. Usually, the Court opined, "ignorance of the rules, or mistakes construing the rules" do not constitute excusable neglect. Id. at 392.

Some courts in the Ninth Circuit, including the Circuit itself, in attempting to adhere to Pioneer, developed a guiding principle that a mistake of law or a failure to follow unambiguous rules is not the type of neglect that is excusable. See Speiser, Krause & Madole P.C. v. Ortiz, 271 F.3d 884, 889-90 (9th Cir.

2001) (attorney's failure to read and understand a procedural rule); Kyle v. Campbell Soup, 28 F.3d 928, 931 (9th Cir. 1994) (counsel's mistake in interpreting and applying unambiguous rules); Warrick, 278 B.R. at 187 (pro se litigant's failure to monitor the docket was solely a failure to follow unambiguous rules); Cahn, 188 B.R. at 632-33 (even though notice of entry of judgment was not given, counsel neglected his affirmative duty to monitor the docket).

This line of cases contrasted with those where such mistake or failure was not per se inexcusable unless it was coupled with something more. See Bateman v. United States Postal Serv., 231 F.3d 1220 (9th Cir. 2000) (counsel missed deadline due to a family emergency that took him out of the country); Briones v. Riviera Hotel & Casino, 116 F.3d 379, 382 (9th Cir. 1997) (a pro se plaintiff, who was not proficient in the English language, missed a deadline because of communication problems with his translator and typist); TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 699 (9th Cir. 2001) (defendant's failure to answer complaint was excusable neglect because she was unfamiliar with the legal system and was experiencing extreme personal difficulty).

Recently, the Ninth Circuit Court of Appeals put to rest the use of any per se rule in determining excusable neglect. In Pincay, 389 F.3d 853, the defendants' attorney delegated to a paralegal the calendaring of a filing deadline to appeal a district court decision in a civil matter. The paralegal then mistakenly advised the attorney that the appeal needed to be filed within 60 days instead of 30. When the deadline passed and after the mistake was discovered, the attorney filed a timely motion for

an extension under FRAP 4(a)(5)(A), which was granted by the district court on the grounds of excusable neglect.

On appeal to the Ninth Circuit, a majority of the three-judge panel concluded that ignorance of the rules that was compounded by the attorney's reliance on a paralegal was inexcusable as a matter of law and did not constitute excusable neglect, and it reversed the district court's ruling. Pincay v. Andrews, 351 F.3d 947, 952 (9th Cir. 2003).

The Ninth Circuit then voted to hear the case en banc to consider whether a per se rule involving missed deadlines was inconsistent with Pioneer. It held that under Pioneer there can never be a per se legal rule "attributable to any particular type of negligence." Pincay, 389 F.3d at 860. The "real question" is "whether there [is] enough in the context of [the] case to bring a determination of excusable neglect within the district court's discretion." Id. at 859.

The Ninth Circuit acknowledged that "a lawyer's failure to read an applicable rule is one of the least compelling excuses that can be offered . . ." but deferred to the judgment of the district court which had found that the misreading of the unambiguous rule by the paralegal was excusable neglect. Id. It stated that it would have affirmed even if the district court had ruled the other way: "Had the district court declined to permit the filing of the notice, we would be hard pressed to find any rationale requiring us to reverse." Id. It concluded:

> The decision whether to grant or deny an extension of time to file a notice of appeal should be entrusted to the discretion of the district court because the district court is in a better position than we are to evaluate factors such as whether the lawyer had otherwise been

> diligent, the propensity of the other side to capitalize on petty mistakes, the quality of representation of the lawyers (in this litigation over its 15-year history), and the likelihood of injustice if the appeal was not allowed.

Id.

Thus, an appellate court must "leave the weighing of Pioneer's equitable factors to the discretion of the district [or bankruptcy] court in every case." Id. at 860.

From the following review, we hold that the bankruptcy court did not abuse its discretion in this case.

(2) Application of Law to Our Facts

The sole reason given for Trustee's neglect in filing a timely notice of appeal was his or his attorneys' failure to monitor the docket in order to learn about the entry of judgment.

The appellant has an affirmative legal duty to monitor the docket to determine when the order or judgment is entered. See Miyao v. Kuntz (In re Sweet Transfer & Storage, Inc.), 896 F.2d 1189, 1193 (9th Cir. 1990). This duty may be relieved in the case of excusable neglect. See Fed. R. Bankr. P. 9022 (providing that while the court clerk is required to serve the notice of entry of a judgment or order upon the parties, lack of such notice "does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, *except as permitted in Rule 8002*.") (Emphasis added.)

Based on an appellant's duty to monitor the docket, WSCR contends that the bankruptcy court applied the incorrect legal standard and should have given more weight to the third factor

(reasonable delay and reasonable control).[8] This argument has been foreclosed by Pincay. Under this standard, it is clear that a trial court need not give greater weight to the third factor in balancing the equities.[9]

In its decision, the bankruptcy court found that the third factor was unfavorable to Trustee, but that the other three factors were either favorable to Trustee or neutral. Thus, the bankruptcy court balanced all of the factors, determined that the equities weighed in favor of Trustee and granted the extension. The court therefore applied the correct legal standard, even without the benefit of Pincay.

WSCR also contends that the bankruptcy court erred in finding that it was not prejudiced by the late-filed appeal. The fact that WSCR must litigate the merits does not amount to legal prejudice. See Bateman, 231 F.3d at 1225 (loss of a quick victory

---

[8] The bankruptcy court's first order denying Trustee's motion to extend because he failed in his affirmative duty to monitor the docket was not an abuse of discretion in light of Kyle, Warrick, and Cahn. Pincay was not decided until after the proceedings in bankruptcy court. However, the bankruptcy court's initial order was appealed to the district court, and on remand, the bankruptcy court changed its ruling.

Trustee argues on appeal that the district court's remand order was law of the case. WSCR contends that the bankruptcy court erred as a matter of law in its interpretation of the remand order. These issues are irrelevant because we are not reviewing the bankruptcy court's motivation for changing its mind or its interpretation of the district court's order for the purpose of resurrecting its initial order. That initial order has been superseded by the July 28, 2004 Order Extending Time, which is the only order before us.

[9] A three-judge dissent disagreed with the majority's decision because "[f]actors one, two and four will almost always cut one way: Delays are seldom long, so prejudice is typically minimal. Bad-faith delay is rare, given that we're only dealing with 'neglect,' not deliberate flouting of the rules . . . . Most of the work, then, is done by factor three, the most important one . . . ." Pincay, 389 F.3d at 861. (dissenting op.).

is not prejudice). Moreover, the delay itself is measured from the time of the missed 10-day deadline to the time the motion for an extension was filed, which is necessarily within 20 additional days. See Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 366 (2d Cir. 2003); Fed. R. Bankr. P. 8002(a). Here, Trustee filed the motion for an extension on the 19th day of the 20-day extended period; therefore the delay was minimal. This factor weighed in favor of Trustee.

Finally, WSCR maintains that the bankruptcy court erred in finding that Trustee's counsel did not receive the notice of entry of judgment. It presented a copy of such notice along with a proof of service upon Trustee's counsel and argued that the "mailbox rule" governs. See Woody v. Bucknum (In re Bucknum), 951 F.2d 204, 207 (9th Cir. 1991) ("Mail that is properly addressed, stamped and deposited into the mails is presumed to be received by the addressee.").

Under the "mailbox rule," the opposing party who contests notice must present something more than "self-serving allegations, especially when they are wholly insubstantial and contradicted by the record." Laurino v. Syringa Gen. Hosp., 279 F.3d 750, 753 (9th Cir. 2002). WSCR maintains that its proof of service eviscerated Trustee's sole excuse for the untimely filing--that counsel did not know that a judgment had been entered.

We disagree with WSCR's assessment. Even if attorneys Goldman and Rinehart, to whom the Notice of Entry was addressed, were presumed to have received it, the information either was not communicated to attorney Kang or appellate counsel Bacon or was not acted upon due to inadvertence or negligence, as there was no

evidence in the record of bad faith. Therefore, the notice or lack thereof was just one more factor added to the mix in the court's equitable decision.[10]

Moreover, the court's finding of nonreceipt is supported by the law and the evidence. Trustee urges us to consider the mailbox rule as applied to Rule 8002(a) in light of Nunley v. City of Los Angeles, 52 F.3d 792 (9th Cir. 1995). In Nunley, the movant filed an affidavit which merely denied receipt and argued that it was sufficient evidence to rebut the presumption of receipt. On appeal to the Ninth Circuit, the court agreed with the movant, based on (1) the difficulty in demonstrating nonreceipt conclusively, and (2) the liberal policy behind the appellate rules to permit late appeals. Id.

When a court uses its discretion to determine the equities of the case under Rule 8002(c), it does not abuse its discretion by giving the specific factual denial a "generous construction." See Warrick, 278 B.R. at 188 (dissenting op.). In addition, there is legal support that a simple denial of receipt would be sufficient to rebut the presumption under the "bursting bubble" approach of Federal Rule of Evidence 301. See Nunley, 53 F.3d at 796 (citing 10 Moore's Fed. Prac. § 301.04[2] (2d ed.)).

Therefore, in considering all of the equities of the case,

---

[10] "[T]he court may take into account, as one of the factors affecting its decision [to grant an extension of time to appeal under FRCP 73(a), now FRAP (4)(a)], whether the clerk failed to give notice as provided in Rule 77(d) or the party failed to receive the clerk's notice." Fed. R. Civ. P. 77(d), Advisory Committee Note to the 1948 amendment. Rule 77(d) is the counterpart to Bankruptcy Rule 9022 (Notice of Judgment or Order), which provides that lack of notice of the entry does not relieve a party for failure to appeal within the time allowed, except for excusable neglect as permitted in Rule 8002.

and, although reasonable persons could differ with the weighing of the factors including alleged nonreceipt of the notice of entry of judgment, we conclude that the bankruptcy court did not abuse its discretion in determining that the untimely notice of appeal was due to the excusable neglect of Trustee's counsel and in granting him an extension of time to appeal. We therefore AFFIRM the bankruptcy court's decision to allow the late filing of the notice of appeal.

B. § 723(a) Deficiency Claim

Trustee filed a complaint for a deficiency judgment against WSCR pursuant to § 723(a). This section provides:

> (a) If there is a deficiency of property of the estate to pay in full all claims which are allowed in a case under this chapter concerning a partnership and with respect to which a general partner of the partnership is personally liable, the trustee shall have a claim against such general partner to the extent that under applicable nonbankruptcy law such general partner is personally liable for such deficiency.

11 U.S.C. § 723(a).

Both parties agree that California law is the "applicable nonbankruptcy law." Under this section, a chapter 7 trustee has a claim against the general partner similar to the partnership's entitlement to contribution under state law. See 6 Collier on Bankruptcy ¶ 723.02[1], p. 723-5 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004); CAL. CORP. CODE § 16807. Such trustee's claim is dependent, however, upon the extent to which the general partner is "personally liable for the underlying claims of the partnership" under California law. 6 Collier on

Bankruptcy, supra, ¶ 723.02[2].

WSCR contends that California law required the Koukladases to obtain an individual judgment against WSCR in order to establish its personal liability for a deficiency on that claim under § 723. Since it was undisputed that the statute of limitations had run on any individual breach of contract cause of action against WSCR four years before the involuntary petition was filed, all agree that it would be impossible to obtain such judgment. Therefore, WSCR contends that summary judgment was properly entered in its favor.

Trustee counters that California law makes WSCR jointly and severally liable for the Partnership debts and it is that liability which is tapped in § 723(a). He contends that the statute of limitations defense is inapplicable because Trustee has an independent federal action against WSCR which is not time-barred.

The bankruptcy court's comprehensive published opinion was in favor of WSCR and against Trustee. The court concluded that a trustee's right to a deficiency under § 723(a) is tied to a creditor's rights under state law.[11] It held that

---

[11] The bankruptcy court rejected case law suggesting that the source of trustee's authority under § 723(a) is the strong-arm power of § 544, under which a trustee steps into the shoes of a creditor and exercises the creditor's rights. See Hoover WSCR Assocs. Ltd., 268 B.R. at 233-34. We agree with the weight of authority that these provisions are parallel, but separate. See 6 Collier on Bankruptcy, supra, ¶ 723.02[1], p. 723-6 and 723.02[3][c], p. 723-10 (any impression that the trustee's rights under § 723(a) derive from the rights possessed by the trustee under § 544(a), rather that directly from § 723, is "mistaken"). Therefore, Collier has corrected its former analysis, which we had relied upon in dictum in Andrew v. Coopersmith (In re Downtown

(continued...)

> a trustee is entitled to judgment against partners under § 723(a) **only to the extent that partnership creditors have recovered or could recover judgment** against those partners under nonbankruptcy law.
>
> It is clear from the legislative history of § 723(a), that in enacting that section Congress did not intend to thereby create new liabilities for partners of a partnership in bankruptcy, and it is also clear that the existence and extent of a partner's liability for partnership debts under § 723(a) is limited by applicable state law. In this case, both parties agree that WSCR is liable to the trustee only to the extent it is "personally liable" for the Koukladas claim against the bankruptcy estate under California law.

Hoover WSCR Assocs. Ltd., 268 B.R. at 234 (emphasis added).

Since the state statute of limitations had run, prepetition, on an action to hold WSCR liable on the Koukladas Claim, the court concluded that WSCR was not "personally liable" for the estate's deficiency on such claim.

Both state and federal law require that an inquiry begin with the language of the statute itself: where such language is plain and unambiguous, "the sole function of the courts is to enforce it according to its terms." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240 (1989); Viceroy Gold Corp. v. Aubry, 75 F.3d 482, 490 (9th Cir. 1996) ("Under California law, statutory construction begins with the language of the statute.") Where, as here, the Code does not define or interpret the words "claims . . . with respect to which a general partner of the partnership is personally liable," we may look to legislative history to

---

[11](...continued)
Inv. Club III), 89 B.R. 59, 65 (9th Cir. BAP 1988) (citing Collier for the proposition that a § 723(a) action is asserted under § 544(a)), but which is no longer good law. If the Koukladases could have pursued WSCR directly they would not have needed to file the involuntary petition against Debtor, as they are its only prepetition creditors.

determine congressional intent. 11 U.S.C. § 723(a); Dewsnup v. Timm, 502 U.S. 410, 418-19 (1992).

The history of § 723(a) shows an aggressive policy to limit liability in accordance with state law. In 1978, § 723(a) read: "If there is a deficiency of property of the estate to pay in full **all claims allowed in a case under this title concerning a partnership, then each general partner in such partnership is liable to the trustee** for the full amount of such deficiency." Pub. L. No. 95-598 (1978)(emphasis added).

The section was amended in 1984 to add the "personally liable" language: "If there is a deficiency of property of the estate to pay in full all claims **which are allowed in a case under this chapter concerning a partnership and with respect to which a general partner of the partnership is personally liable, the trustee shall have a claim against such general partner** for the full amount of the deficiency." Pub. L. No. 98-353, Sec. 476(a) (1984) (emphasis added).

It was then amended in 1994 to add, at the end: ". . . the trustee shall have a claim against such general partner **to the extent that under applicable nonbankruptcy law such general partner is personally liable for such deficiency**." Pub. L. No. 103-394, sec. 212 (1994) (emphasis added).

The 1994 amendment clarified that "[i]f a general partner has no liability under state law for the obligations of the partnership, section 723(a) will not impose such liability." 6 Collier on Bankruptcy, supra, ¶ 723.02[1][b], p. 723-6; 723.02[2], pp. 723-7 to 723-8. One concern of the drafters was to "'preclude the trustee from seeking recourse against a partner with respect

to nonrecourse claims.'" Miller v. Spitz (In re CS Assocs.), 160 B.R. 899 (Bankr. E.D. Pa. 1993) (citation omitted), aff'd, 167 B.R. 368 (E.D. Pa. 1994).

Section 723(a) does not contain a statute of limitations for the trustee's action. We hold that its plain language as well as its legislative history supports the application of the state limitations period if the limitations period has expired prior to bankruptcy.[12]

California partnership law[13] provides that a general partner in a limited partnership has the same liabilities of a general partner in a general partnership. See CAL. CORP. CODE § 15643.

With some inapplicable exceptions, "all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." CAL. CORP. CODE § 16306(a).

"[O]therwise . . . provided by law" refers, in this case, to CAL. CORP. CODE § 16307(c). This section provides, in relevant part:

> **Actions against partnership; judgments**
>
> (a) A partnership may sue and be sued in the name of the partnership.

---

[12] Our decision is limited to these facts. Therefore, we do not decide what would happen in a case where the state statute of limitations has not run prior to bankruptcy, and whether the limitations period would be tolled.

We disagree with those courts which have rejected applicable nonbankruptcy law statutes of limitation. See CS Assocs., 160 B.R. at 908; see generally J. Brighton & D. Sklar, "What is the Appropriate Statute of Limitations to be Applied to a Trustee's Cause of Action Under Section 723(A) of the Bankruptcy Code?" 104 COM. L. J. 286 (Fall 1999).

[13] California's partnership law is contained in the California Uniform Partnership Act of 1994 ("UPA '94") under CAL. CORP. CODE §§ 16100-16962. UPA '94 governs the Debtor partnership and the Koukladases' action against Debtor, which was filed in 1997. See CAL. CORP. CODE §§ 16111, 16112.

> (b) [A]n action may be brought against the partnership and any or all of the partners in the same action or in separate actions.
>
> (c) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner.

CAL. CORP. CODE § 16307.

In accordance with § 16307(c), California gives due process to individual partners under CAL. CIV. PROC. CODE § 369.5(b). This statute provides:

> **Partnerships, unincorporated associations; joinder of individual members**
>
> (a) A partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known.
>
> (b) A member of the partnership or other unincorporated association may be joined as a party in an action against the unincorporated association. If service of process is made on the member as an individual, whether or not the member is also served as a person upon whom service is made on behalf of the unincorporated association, a judgment against the member based on the member's personal liability may be obtained in the action, whether the liability is joint, joint and several, or several.

CAL. CIV. PROC. CODE § 369.5.

Section 369.5 is a procedural statute to effectuate enforcement of judgments in cases where, under existing substantive law, a partner is already liable. Orser v. Vierra, 252 Cal. App. 2d 660, 670, 60 Cal. Rptr. 708, 715 (Ct. App. 1967). This provision facilitates "concurrent enforcement of claims against individual property of partners joined as defendants." Fazzi v. Peters, 68 Cal. 2d 590, 595, 68 Cal. Rptr. 170, 174, 440 P.2d 242, 246 (1968) (construing former statute with same intent).

Accord, Barr v. United Methodist Church, 90 Cal. App. 3d 259, 272, 153 Cal. Rptr. 322, 331 (Ct. App. 1979). Whereas, CAL. CORP. CODE § 16307 plainly provides the substantive law for the principle of individual liability apart from the entity's liability.

According to this scheme, therefore, although each partner is jointly and severally liable to the partnership creditors, there is a "collection procedure limitation": "[c]reditors may not automatically collect partnership debts from a general partner; the creditors must first obtain a judgment against the partner individually, holding the partner liable for the partnership's debt." A. Ahart, Calif. Prac. Guide: Enforcing Judgments and Debts, Ch. 3-A, ¶ 3:34 (The Rutter Group 2005).

Section 723, therefore, gives the trustee a right of action subject to state partnership law defenses.

We hereby adopt and incorporate the bankruptcy court's well-reasoned and exhaustive opinion, which comports with this enforcement limitation on Trustee's ability to pursue an action to recover the deficiency from WSCR because there was no separate judgment against WSCR, nor can there be.

Trustee maintains that a Supreme Court decision, which was published after the proceedings in bankruptcy court, supports his position that the bankruptcy court erred.

In United States v. Galletti, 541 U.S. 114, 124 S.Ct. 1548, 158 L.Ed.2d 279 (2004), a partnership had been assessed for taxes. The partners filed bankruptcy, and the IRS filed proofs of claim seeking to establish the partners' personal liability for the partnership tax debt. Under the Internal Revenue Code ("IRC"), the time for an action against the partners, as individual

taxpayers, had expired because they had not been assessed, but it had not expired for an action under the partnership assessment. Id., 541 U.S. at 116.

The bankruptcy court disallowed the IRS claims and the district court affirmed. The Ninth Circuit also affirmed, reasoning that under California law "a creditor may not automatically collect from a general partner a debt that the partnership owes to the creditor. To the contrary, the creditor must first obtain a judgment against the partner holding the partner liable for the partnership's debt." United States v. Galletti, 314 F.3d 336, 344 (9th Cir. 2002) (citing CAL. CORP. CODE § 16307(c)).

The Supreme Court reversed, focusing, instead, on the meaning of "assessment." It held that the IRC requires only one assessment for any tax liability. The same assessment was applicable to the partnership and the partners who were secondarily liable. Galletti, 541 U.S. at 121-24. Therefore, the same statute of limitations applied to the partnership and the partners. Id. Consequently, the partners' tax liability could still be adjudicated in the claims allowance proceeding in bankruptcy court, and such judgment would satisfy CAL. CORP. CODE § 16307(c) for a "judgment against a partner." Id. at 124 n.5.

Galletti is consistent with California law which provides that a separate judgment is required against the general partner in order to determine that partner's personal liability on a claim against the partnership. See id. at 121 (discussing separate entity theory). The Supreme Court simply held that such separate judgment could be rendered in bankruptcy court and was not time-

barred under the IRC.[14] In contrast, in our case the state statute of limitations applied to bar the suit against WSCR. Therefore, Galletti actually supports WSCR's position that it was not personally liable for the partnership debt.

Trustee also cites case law that was rejected by the bankruptcy court. In CS Assocs., 160 B.R. 899, the bankruptcy court concluded that the partner was liable for partnership debts for which the creditor could not have obtained judgment directly against the partner. Id. at 908. While the facts of CS Assocs. are similar to our case, there is one significant difference: the applicable Pennsylvania statute[15] governing partners' joint and several liability does not contain the caveat "all partners are liable jointly and severally for all obligations of the partnership *unless otherwise . . . provided by law.*" CAL. CORP. CODE § 16306(a) (emphasis added). In California, the other statutes which address individual judgments against partners limit such joint and several liability.

CS Assocs. was followed in Liebmann v. Brown (In re Bonded Jewelry Center), 206 B.R. 381 (Bankr. D. Md. 1997), in which the

---

[14] In Galletti, the partners abandoned their state statute of limitations defense. See id. at 120 n.2.

[15] The Pennsylvania statute provides, in pertinent part:

> All partners are liable:
>
> . . . .
>
> (2) Jointly for all other debts and obligations of the partnership but any partner may enter into a separate obligation to perform a partnership contract.

15 PA. CONS. STAT. ANN. § 8327 (West 1995).

Maryland and Pennsylvania statutes were identical.[16]

It was also cited in Mills v. Grotewohl (In re Super 8 Florida III, Ltd.), 211 B.R. 764 (Bankr. M.D. Fla. 1996) for the proposition that "[a] partner's liability in bankruptcy is the same as it would be under state law outside of bankruptcy." Id. at 765. Since material legal and factual disputes existed concerning such liability under a Florida statute, which was identical to the California statute in its exception--"unless otherwise . . . provided by law," summary judgment was denied in that case. Id. See FLA. STAT. ANN. § 620.8306(1) (West 2001).

The result in CS Assocs. is therefore inconsistent with California law. We hold that a trustee's § 723(a) claim is dependent upon a general partner's liability for partnership debts, which further requires that the creditor whose claim remains unpaid either hold or have the ability to obtain a personal judgment against the general partner. See CAL. CORP. CODE § 16307(c) and CAL. CIV. PROC. CODE § 369.5; see also Galletti, supra. In this case, the bankruptcy court correctly concluded that a § 723(a) action would improperly create a new liability for WSCR apart from state law, and therefore we affirm its decision to grant summary judgment in favor of WSCR.

---

[16] See former MD. CODE ANN., CORPS. & ASS'NS § 9-307. This statute was repealed in 1998 and replaced by § 9A-306, which now resembles California law and provides, in pertinent part:

> (a) Except as otherwise provided in subsections (b) and (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

MD. CODE ANN., CORPS. & ASS'NS § 9A-306(a)(West WESTLAW through May 10, 2005 legislation).

CONCLUSION

The bankruptcy court applied the correct legal standard in determining excusable neglect under Rule 8002(c)(2), and its determination was not an abuse of discretion. Therefore, we **AFFIRM** the order granting Trustee's motion for an extension of time in which to file the notice of appeal.

On the merits, we adopt the bankruptcy court's opinion and conclude that Trustee's § 723(a) action against WSCR was limited by applicable state law, which required an individualized judgment determining WSCR's liability on the claim. Here, such judgment neither existed nor could it be attained by the Koukladases due to the expiration of the California statute of limitations prior to the bankruptcy. Consequently, Trustee could not establish WSCR's personal liability for the estate's deficiency on the claim in Debtor's bankruptcy case. Therefore, we **AFFIRM** the bankruptcy court's order granting summary judgment in favor of WSCR and against Trustee.