NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-04-1084-MoBD
FRANK and JUANITA SANDWELL,	Bk. No. RS 03-17401-DN
Debtors.	Adv. No. RS 03-01529-DN
SHONG-CHING TONG,	
Appellant,	
v.	**MEMORANDUM**[1]
FRANK and JUANITA SANDWELL,	
Appellees.	

Argued and Submitted on
May 12, 2005, at Pasadena, California

Filed - June 13, 2005

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

Honorable David N. Naugle, Bankruptcy Judge, Presiding

Before: MONTALI, BRANDT and DUNN[2], Bankruptcy Judges

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

[2] Hon. Randall L. Dunn, Bankruptcy Judge for the District of Oregon, sitting by designation.

This appeal arises from two orders of the bankruptcy court. The first order (the "Dismissal Order") dismissed, for failure to prosecute, the adversary proceeding filed by Shong-Ching Tong ("Mr. Tong") to seek a determination that the debt of Frank H. Sandwell ("Mr. Sandwell") and Juanita C. Sandwell ("Ms. Sandwell") (collectively the "Sandwells") to Mr. Tong is nondischargeable, and that the Sandwells are not entitled to a chapter 7 discharge of any of their debts. The second order denied Mr. Tong's motion to vacate the Dismissal Order. We REMAND.

FACTS

The Sandwells filed a voluntary chapter 7 petition on May 13, 2003.[3] On August 14, 2003, Mr. Tong, acting pro se, timely filed an adversary proceeding seeking a judgment that an alleged debt owed by the Sandwells to Mr. Tong[4] in the amount of at least $4,000 was non-dischargeable pursuant to sections 523(a)(2)(B), (a)(6), and (a)(10).

The summons issued August 14, 2003, set September 15, 2003, as the deadline for filing responses to the complaint. The summons also set a status conference hearing to be held at 9:00 a.m. on October 30, 2003 (the "October 30 Status Conference").

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[3] Unless otherwise indicated, all section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

[4] In their opening brief, the Sandwells, in effect, assert that Mr. Tong is not the real party-in-interest with respect to the claims alleged in the complaint. In his reply brief, Mr. Tong contests this assertion. Because this issue was not raised before or considered by the bankruptcy court, it cannot be considered on appeal.

On September 15, 2003, Mr. Sandwell, acting pro se, filed an answer ("Answer") to the complaint in letter form. The Answer was signed only by Mr. Sandwell, and does not appear to have been served on Mr. Tong. On September 17, 2003, Mr. Tong filed a Request for Entry of Default, in which Mr. Tong alleged that no answer or other response had been "filed or served" by the Sandwells. Mr. Tong did not serve the Request for Entry of Default on the Sandwells. Default was not entered by the clerk.

On October 29, 2003, Mr. Tong filed his "Declaration of Shong-Ching Tong re Unilateral Status Report" ("Tong Declaration"). Mr. Tong correctly noted the hearing date of October 30, 2003, but incorrectly noted the hearing time as 10:30 a.m. rather than 9:00 a.m. Paragraph 7 of the Tong Declaration states: "Plaintiff hereby requests that this Court continues [sic] the Status Conference to late December 2003 or later Juanuary [sic], 2004 so that plaintiff would have enough time to find out the true amount of debts owed by defendants."

Mr. Tong did not attend the October 30 Status Conference, either at 9:00 or at 10:30. Michael Goudie, as assignee of Mr. Tong's judgments, apparently went to the hearing and missed the calendar call. The record further reflects that Mr. Sandwell did appear at the October 30 Status Conference.

On December 16, 2003, the Court entered its Order for and Notice of Status Conference (the "December 16 Order") which recited that there had been no appearance by or on behalf of Mr. Tong at the October 30 Status Conference, and which set a new status conference

for January 6, 2004 at 9:00 a.m. ("January 6 Status Conference"). Mr. Tong did not provide a copy of the December 16 Order in his record on appeal, but a copy is attached to Appellee's Opening Brief.[5] The December 16 Order states explicitly: "Failure to appear may result in dismissal of the adversary proceeding for failure to prosecute."

Mr. Sandwell appeared at the January 6 Status Conference, but Mr. Tong did not. By order entered on January 6, 2004 (the "Dismissal Order"), the bankruptcy court dismissed the adversary proceeding for failure to prosecute.

On January 16, 2004, Mr. Tong filed a Notice and Motion for Order Vacating the Order Dismissing the Adversary Proceeding; Memorandum of Points and Authorities and Declaration of Shong-Ching Tong in Support Thereof ("Motion to Vacate"). Mr. Tong asserts in his Motion to Vacate that he arrived at the January 6 Status Conference twenty minutes late, while the bankruptcy court was still in session, that he was late because of his age and ill health and because of car problems, and that granting the Motion to Vacate would not prejudice the Sandwells. The Sandwells did not file an opposition to the Motion to Vacate, even though the local rules for

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[5] Of the documents attached to Appellees' Opening Brief, only the December 16 Order and the Dismissal Order are appropriately considered on appeal. The other documents relate to the underlying dispute, and do not appear to have been made part of the record before the bankruptcy court. Similarly, none of the documents attached to the Appellant's Reply Brief appear to have been made part of the record before the bankruptcy court and will not be considered on this appeal.

the bankruptcy court require written oppositions.[6]

The hearing on the Motion to Vacate was held February 10, 2004 ("February 10 Hearing"). A transcript of the February 10 Hearing is in the record. Both Mr. Tong and Mr. Sandwell appeared. At the start of the hearing Mr. Tong told the court that he had not received any opposition to the Motion to Vacate. Mr. Tong then explained briefly that he had arrived late at the January 6 Status Conference because he had been sick.

The court then permitted Mr. Sandwell to present an argument, even though he had not filed any opposition to the Motion to Vacate. Mr. Sandwell asserted that Mr. Tong had been found to be a vexatious litigant, that Mr. Tong repeatedly filed frivolous litigation for which he failed to appear, and that the Sandwells would be prejudiced if the Motion to Vacate were granted when Mr. Sandwell had made appearances as scheduled in the adversary proceeding but Mr. Tong had not. Mr. Sandwell also presented documents to support his allegations, although the record is not clear whether the court considered those documents. When the court instructed Mr. Tong to respond, he complained about Mr. Sandwell's lack of opposition and lack of proof.

After hearing from the parties, the court granted the Motion to Vacate *conditioned* upon

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[6] Local Bankruptcy Rule 9013-1(a)(7) of the United States Bankruptcy Court for the Central District of California requires a party opposing a motion to file a written opposition setting forth all reasons for the opposition as well as copies of all evidence upon which the opponent intends to rely no later than fourteen days prior to the hearing date.

> "the payment of fifteen hundred dollars ($1,500) in sanctions...to be paid within ten days...in the form of postal money order made payable to Mr. and Mrs. Sandwell...."

(Transcript p. 5, l. 21-23.)

The Sandwells had not requested monetary sanctions of any amount, and the court did not state any authority under which it was imposing such a condition to granting the Motion To Vacate. Mr. Tong objected to the condition and stated he did not have the money to pay. The court then denied the Motion to Vacate on the record.

On February 12, 2004, Mr. Tong promptly filed his Notice of Appeal, without waiting for entry of an order denying the Motion to Vacate. The court entered its Order Denying the Motion to Vacate on September 9, 2004.

ISSUES

1. Whether the bankruptcy court erred in failing to enter default against the Sandwells for their failure to serve Mr. Tong with the Answer.

2. Whether the bankruptcy court erred in dismissing the adversary proceeding.

3. Whether the bankruptcy court erred in denying the Motion to Vacate.

STANDARD OF REVIEW

The panel reviews a bankruptcy court's dismissal for failure to prosecute for abuse of discretion. Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447 (9th Cir. 1994); Tenorio v. Osinga (In re Osinga), 91 B.R. 893, 894 (9th Cir. BAP 1988). The panel will reverse the bankruptcy court only if it is convinced that a mistake

was made. Osinga at 894.

The panel reviews a bankruptcy court's denial of a motion for relief from an order for abuse of discretion. Fernandez v. G.E. Capital Mortgage Services, Inc. (In re Fernandez), 227 B.R. 174, 177 (9th Cir. BAP 1998). Absent a definite and firm conviction that the bankruptcy court committed a clear error of judgment in weighing the factors relevant to the decision, the panel will not disturb the decision. Id.

DISCUSSION

1. The Bankruptcy Court Did Not Err When It Failed to Enter Default Against the Sandwells.

Mr. Tong contends that the bankruptcy court erred in allowing Mr. Sandwell to appear in the proceedings, because (1) the Answer filed was not a "pleading," and (2) Mr. Sandwell did not serve the Answer on Mr. Tong. Mr. Tong appears to be operating under the misapprehension that the filing of his Request for Entry of Default constituted the actual entry of default by the clerk.[7]

Fed. R. Civ. P. 55(a), applicable to bankruptcy adversary proceedings pursuant to Rule 7055, provides: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the

[7] The bankruptcy court's local form (F9021-1.2) contains a signature box in the lower left-hand corner which states: "Default entered on (*specify date*):" and which sets forth the Clerk's name and the name of a deputy clerk simulating a signature. However, no date was ever entered in this box, and no default was ever entered on the docket by the clerk.

party's default." The clerk appropriately did not enter default against the Sandwells where an answer had been timely filed. In entering default pursuant to Fed. R. Civ. P. 55(a), "[t]he clerk's function is not perfunctory. Before entering a default, the clerk must examine the affidavits filed and find that they meet the requirements of Rule 55(a)." Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2682, p. 19.

When the clerk failed to enter default, Mr. Tong was not without further recourse if he believed entry of default against the Sandwells was appropriate. To challenge the sufficiency of the answer, either with respect to its form or the adequacy of its service, Mr. Tong could have filed a motion to strike, a motion to compel the clerk to enter default, or a motion for entry of a default by the bankruptcy court, any one of which would have allowed the Sandwells to defend the sufficiency of the Answer, or to amend the Answer to the extent allowed by the bankruptcy court. Mr. Tong filed no such motion. As a result, his allegations regarding the sufficiency of the Answer were never presented to the bankruptcy court for adjudication and will not be considered on this appeal.

2. The Bankruptcy Court Did Not Err in Dismissing the Adversary Proceeding for Failure to Prosecute.

In determining whether to dismiss an adversary proceeding for failure to prosecute, the bankruptcy court must consider the public's interest in expeditious resolution of litigation, the court's need to manage its docket, the risk of prejudice to defendants, the public policy favoring disposition of cases on their

merits, and the availability of less drastic sanctions. Eisen, 31 F.3d at 1451; Osinga, 91 B.R. at 894. When, as in this case, the bankruptcy court does not explicitly consider the foregoing five factors, the panel reviews the record independently. Eisen at 1451.

A. The Record Before the Bankruptcy Court at the Time of Dismissal.

At the time the bankruptcy court dismissed the adversary proceeding, the record before the bankruptcy court consisted of the following documents and facts:

- Mr. Tong's complaint
- The summons and notice of the October 30 Status Conference
- The Sandwells' Answer
- Mr. Tong's request for entry of default (which contained the factually erroneous representation that no answer had been filed)
- The Tong Declaration, which contained the request for a continuance of the October 30 Status Conference
- Mr. Tong's failure to appear at the October 30 Status Conference
- The December 16 Order setting the January 6 Status Conference
- Mr. Tong's failure to appear at the January 6 Status Conference

Applying the five factors to consider concerning a dismissal for failure to prosecute to this record, the panel cannot conclude that the bankruptcy court abused its discretion in dismissing the

adversary proceeding for failure to prosecute.

B. Application of the Five Factors to the Record.

(i) *The public interest in expeditious resolution of litigation and the policy favoring disposition of cases on their merits.*

Two of the factors reflect policy considerations. The public's interest in expeditious resolution of litigation generally provides support for dismissal where any unwarranted delay is present. On the other hand, the policy favoring disposition of cases on their merits cautions against premature dismissal. To find the balance between these policies in a given case, the bankruptcy court is to weigh the remaining factors.

(ii) *The court's need to manage its docket.*

To ensure the prompt administration of its caseload, the bankruptcy court cannot congest its calendar with cases that are not being or will not be prosecuted. To manage its docket in this case, the bankruptcy court, upon Mr. Tong's failure to appear at the October 30 Status Conference, issued the December 16 Order setting the January 6 Status Conference and providing notice to Mr. Tong that the consequence of a failure to appear could be dismissal of the adversary proceeding. When Mr. Tong, after having been warned of the potential dismissal, did not appear when the January 6 Status Conference was called, the bankruptcy court had two choices: (1) reset yet another status conference, provide another warning of possible dismissal, and wait to see whether Mr. Tong appeared for the third setting; or (2) dismiss the adversary proceeding. In this case, the bankruptcy court dismissed the adversary proceeding.

Each status conference requires the expenditure of sometimes limited judicial resources, both administratively (calendaring and noticing the hearing) and judicially (preparing for the hearing). The panel is to give deference to the bankruptcy court in the determination of what constitutes an unreasonable delay in prosecution of a case, since the bankruptcy court "knows when its docket may become unmanageable." Moneymaker v. CoBen, 31 F.3d at 1452.

(iii) *The risk of prejudice to the Sandwells.*

Mr. Tong's failure to prosecute resulted in prejudice to the Sandwells on two levels. First, Mr. Sandwell appeared at both the October 30 Status Conference and the January 6 Status Conference. Appearing at a court proceeding which does not go forward is not only inconvenient, it easily can cause economic hardship (transportation costs, parking costs, potential lost income), particularly to parties whose limited financial resources have led to the filing of a bankruptcy petition. Second, the mere filing of an adversary proceeding has the effect of delaying and potentially withholding from the debtor the fresh start benefit of bankruptcy. Mr. Tong had objected to the Sandwells' discharge and sought a determination of nondischargeability of his claim. The longer the delay in resolution of the claims in an adversary complaint, the longer access to the fresh start is withheld. For this reason, "[p]arties seeking to except their debts from the operation of a discharge should litigate their claims with reasonable promptitude." Osinga at 895. The need for diligent prosecution is even more

pressing when the general discharge of the debtor is at issue.

(iv) *The availability of less drastic sanctions*.

On the record before the bankruptcy court, imposition of a sanction less dramatic than dismissal of the adversary proceeding for Mr. Tong's failure to appear on two occasions was not practicable.

Applying the five factors to consider a dismissal for failure to prosecute on this record, the panel cannot conclude that the bankruptcy court abused its discretion in dismissing the adversary proceeding for failure to prosecute.

3. The Bankruptcy Court Erred in Denying the Motion to Vacate.

Even though the bankruptcy court did not err in initially dismissing the adversary proceeding for failure to prosecute, it did so in denying the Motion to Vacate. It appears that the bankruptcy court may have been influenced by the arguments made by Mr. Sandwell at the hearing on the Motion to Vacate, even though such arguments were not supported by evidence and had little or nothing to do with the merits of the Motion to Vacate. Moreover, the record does not reflect that the bankruptcy court addressed the standards for granting relief for excusable neglect, in circumstances where all the factual contentions advanced by Mr. Tong - only twenty minutes late for a hearing; illness; age; car trouble - were uncontested. Accordingly, we will remand so that the bankruptcy court can apply the standards of excusable neglect based on arguments supported by admissible evidence.

The Motion to Vacate should be construed as a motion for relief from the dismissal order based on excusable neglect made pursuant to Fed. R. Civ. P. 60(b)(1), which is applicable in the adversary proceeding by Fed. R. Bankr. P. 9024. Fed. R. Civ. P. 60(b)(1) provides:

> On motion and upon such terms as are just, the court may relieve a party...from a final...order for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect...
>
> ...The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more that one year after the...order..., was entered or taken.

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 Investment Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993). 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; Pincay v. Andrews, 389 F.3d 853, 855 (9th Cir. 2004). The non-exclusive factors discussed in the above quotation provide a framework for determining whether Mr. Tong has demonstrated "excusable neglect" in this case.

In the Ninth Circuit, "excusable neglect" is construed liberally under Fed. R. Civ. P. 60(b). Fasson v. Magourik (In re Magourik), 693 F.2d 948 (9th Cir. 1982). In Pincay, an en banc panel of the Ninth Circuit rejected the concept that certain types of culpable conduct (such as an attorney relying on a paralegal to interpret and abide by a court rule instead of reading and complying with the rule himself) are "per se" not excusable neglect. In so holding, the panel noted that the "real question" is "whether there [is] enough in the context of [the] case to bring a determination of excusable neglect within the [trial] court's discretion." Pincay, 389 F.3d at 859.

Here, there is nothing in the record indicating that the bankruptcy court applied the factors of Pioneer in determining whether the Motion to Vacate should be granted on the grounds of excusable neglect. More importantly, the record does not contain any statement by the bankruptcy court that it was disregarding the arguments of Mr. Sandwell that were not supported by evidence and plainly not relevant to the Motion to Vacate. Once the bankruptcy court makes the Pioneer analysis and identifies the facts supporting its decision, an appellate court will grant great deference to its decision:

> 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 [trial] court because the [trial] court is in a better position than we are to evaluate factors such as whether the lawyer [or pro se litigant] 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.

We are mindful of our duty to respect the bankruptcy court's exercise of discretion, and cautiously proceed, recognizing that it is not an abuse of discretion when a bankruptcy court does something in a way we as members of the appellate panel may not have done. But that being said, the record presented to us is one of contentious and acrimonious litigation among two pro se litigants and an apparent ignorance or disregard of procedure and rules of evidence by those litigants. Further, on a procedural motion such as the Motion to Vacate, both sides spent most of their time before the bankruptcy court, and on this appeal, addressing their own views of the merits of the dispute between them. Based upon a reading of the transcript of the colloquy of the court, Mr. Sandwell, and Mr. Tong, and the continuation of the colloquy between the litigants at oral argument before us, we cannot help but sense that the court may have been influenced in deciding whether to grant the Motion to Vacate by its view of the relative merits of Mr. Tong's case (or Mr. Tong himself) as against Mr. Sandwell's case. This is all the more troublesome because the court permitted Mr. Sandwell to speak despite his failure to file a written opposition to the Motion to Vacate and Mr. Tong's complaint about the lack of opposition to the motion. The court's decision was inappropriate in light of its duty to weigh the Pioneer factors going to "excusable neglect."

On top of that, the Sandwells made no attempt to recover any

monetary reimbursement from Mr. Tong, and the court did not make it clear whether it was imposing sanctions under section 105 or some other rule,[8] or why a $1,500 cost to reinstate a case involving a dispute of less than $5,000 was justified. A sanction of that size to reinstate the adversary proceeding seems overly harsh. Accordingly, we believe the proper disposition of this matter is to ask the bankruptcy court on remand to reconsider its balancing of the equities on the Motion to Vacate based on arguments supported by admissible evidence. Further, if some monetary charge is appropriate as a condition for Mr. Tong's reinstatement of his lawsuit, we suggest a more modest amount, payable to the clerk of the court absent some specific evidence that it should be paid to the Sandwells.

When dismissing for failure to prosecute or considering a motion to vacate a dismissal, a court is required to consider less drastic measures. Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir. 1986). In Henderson, the court of appeals held that the trial court need not exhaust every sanction short of dismissal before finally dismissing a case, but must explore possible and meaningful alternatives. Id., citing Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 674 (9th Cir. 1981). The bankruptcy court could actually have proposed far less drastic measures than granting the Motion to Vacate conditioned on the payment by Mr. Tong of $1,500 as sanctions to the Sandwells.

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[8] See Miller v. Cardinale (In re DeVille), 361 F.3d 539 (9th Cir. 2004) (discussing bankruptcy court's power to impose sanctions under Rule 9011 or pursuant to its inherent powers under section 105).

CONCLUSION

The bankruptcy court did not err when it did not enter default against the Sandwells.

The bankruptcy court did not abuse its discretion in dismissing the adversary proceeding for failure to prosecute.

The bankruptcy court may have abused its discretion in denying Mr. Tong's Motion to Vacate.

For the foregoing reasons we REMAND for the bankruptcy court to reconsider its decision on the Motion to Vacate.