

JUN 08 2005

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | | |
|--------------------------------|---|--------------------|-----------------|
| In re: |) | BAP Nos. | OR-04-1474-KMoR |
| |) | | OR-04-1475-KMoR |
| U.S. FOREST INDUSTRIES, INC., |) | | OR-04-1476-KMoR |
| |) | | OR-04-1477-KMoR |
| |) | | OR-05-1007-KMoR |
| Debtor. |) | | |
| _____ |) | Bk. No. | 00-67584 |
| |) | | |
| U.S. FOREST INDUSTRIES, INC., |) | Adv Nos. | 02-06435 |
| |) | | 02-06433 |
| Appellant, |) | | 02-06426 |
| |) | | 02-06418 |
| v. |) | | 02-06448 |
| |) | | |
| HIGHCREST WOOD PRODUCTS, INC., |) | | |
| |) | | |
| Appellee. |) | | |
| _____ |) | | |
| |) | | |
| U.S. FOREST INDUSTRIES, INC., |) | | |
| |) | | |
| Appellant, |) | | |
| |) | | |
| v. |) | MEMORANDUM* | |
| |) | | |
| SPAR-TEK INDUSTRIES, INC., |) | | |
| |) | | |
| Appellee. |) | | |
| _____ |) | | |
| |) | | |
| U.S. FOREST INDUSTRIES, INC., |) | | |
| |) | | |
| Appellant, |) | | |
| |) | | |
| v. |) | | |
| |) | | |
| NESTE RESINS CORPORATION, |) | | |
| |) | | |
| Appellee. |) | | |
| _____ |) | | |

*This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 U.S. FOREST INDUSTRIES, INC.,)
2 Appellant,)
3 v.)
4 SUN VENEER,)
5 Appellee.)
6 _____)
7 U.S. FOREST INDUSTRIES, INC.,)
8 Appellant,)
9 v.)
10 DYN0 OVERLAYS, INC.,)
11 Appellee.)
12 _____)

12 Argued and Submitted on May 20, 2005
13 at Eugene, Oregon

14 Filed - June 8, 2005

15 Appeal from the United States Bankruptcy Court
16 for the District of Oregon

17 Honorable Frank R. Alley, III, Bankruptcy Judge, Presiding

18 _____
19 Before: KLEIN, MONTALI, and RIEGLE,** Bankruptcy Judges.
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**Hon. Linda B. Riegler, United States Bankruptcy Judge for
the District of Nevada, sitting by designation.

1 In all but one of the adversary proceedings at issue on
2 appeal, the bankruptcy court entered a scheduling order that
3 required the parties to file a pretrial order by a set date.

4 On August 11, 2003, while the adversary proceedings were
5 still pending, the debtor filed a separate chapter 7 case. A
6 chapter 7 trustee was appointed and determined that the estate
7 had no assets for distribution to creditors. On November 26,
8 2003, the chapter 7 case was dismissed.

9 On January 13, 2004, the bankruptcy court held a hearing in
10 the chapter 11 case to discuss the remaining preferential
11 transfer adversary proceedings. The court ordered the debtor to
12 file a written status report regarding the remaining pending
13 adversary proceedings. The court stated it would set status
14 conferences in the matters after the status report was filed.

15 On January 22, 2004, Douglas Pahl (one of the debtor's
16 attorneys) sent a letter to the bankruptcy court that described
17 the status of the pending adversary proceedings. Pahl stated
18 that settlement negotiations were being discussed in each case at
19 issue on appeal.

20 The court set no status conference after January 13, 2004.
21 Rather, on April 16, 2004, the court entered an "Order Re:
22 Dismissal or Other Final Disposition" ("Dismissal Orders") in
23 each case. In the Highcrest Wood Products, Sun Veneer, and Dyno
24 Overlays cases, the Dismissal Orders stated:

25 The parties failed to timely file a proposed pre-trial
26 order, and therefore,

27 IT IS ORDERED that this proceeding will be dismissed
28 for lack of prosecution, without further Court order,
unless the appropriate proposed pre-trial order is
filed with the Clerk of Court within 13 days of this

1 order's "FILED" date. Any subsequent motion required
2 to reopen the proceeding shall be accompanied by BOTH:
3 (1) an affidavit averring substantial reasons why this
proceeding should be reopened, AND (2) a \$150.00
reopening fee.

4 In the Spar-Tek and Neste Resins cases, the Dismissal Orders
5 stated:

6 The interested parties have failed to timely prosecute
7 this matter, and therefore,

8 IT IS ORDERED that this proceeding will be dismissed
9 for lack of prosecution, without further Court order,
10 unless appropriate action is taken to bring this
11 proceeding to issue or trial within 20 days of this
12 order's "FILED" date. Any subsequent motion required
to reopen the proceeding shall be accompanied by BOTH:
(1) an affidavit averring substantial reasons why this
proceeding should be reopened, AND (2) a \$150.00
reopening fee.

13 Each of the Dismissal Orders were addressed and mailed to
14 Douglas Bosley, the attorney listed on the court records as the
15 lead attorney for the debtor. During this time, however, the
16 responsibility for handling the debtor's case was being
17 transferred from Bosley to Pahl. Bosley and Pahl are both
18 attorneys in the same large law firm. Notice of this internal
19 change was not formally submitted to the court.

20 _____ Neither Bosley nor Pahl saw the Dismissal Orders when they
21 were delivered to the firm. According to the debtor, the firm's
22 general procedure for handling the mail is that the mail is first
23 routed to the assistant for the addressee of the letter. That
24 assistant opens the mail, date stamps it as received, docketing it
25 if necessary, and then gives it to the addressee for review.
26 After the addressee reviews it, the documents are routed to the
27 mail file room and placed in the firm's central files.

1 According to the debtor, in these five cases on appeal, the
2 normal mail procedure was not followed and all five Dismissal
3 Orders ended up in the firm's central files without a date stamp
4 and without being initialed as docketed.

5 Unaware of the Dismissal Orders, Pahl took no action on the
6 matters, and the Dismissal Orders became effective. On May 3,
7 2004, and May 4, 2004, each of the adversary proceedings were
8 closed.

9 By July 21, 2004, after learning that the cases had been
10 dismissed and closed, the debtor filed Motions to Reopen Case in
11 all five dismissed adversary proceedings. Highcrest Wood
12 Products, Neste Resins, and Sun Veneer filed objections to the
13 motions. The debtor filed a reply to each objection arguing that
14 the court should set aside the Dismissal Orders pursuant to
15 Federal Rule of Civil Procedure 60(b)(1) because of excusable
16 neglect.

17 On August 5, 2004, the court held a hearing on all five
18 Motions to Reopen. At the hearing, the court denied all five
19 motions stating findings on the record. The court focused its
20 ruling on Rule 60(b)(1) and found that excusable neglect had not
21 been established on the record before the court. The court
22 stated:

23 This is not, you know, I emphasize, a finding of
24 culpability or willful mishandling of the case.
25 Something went wrong, I think because either inadequate
26 controls were in place; or, much more likely, Mr. Pahl,
27 I think that adequate controls just didn't happen to
28 work on this occasion. Either way, the burden is a
high one and it's on the movant to demonstrate that
circumstances beyond its control led to its
misplacement of the files and it's failure to meet the
Court's deadlines. I don't find that to be the case.

1 On August 9, 2004, the court entered identical orders in
2 each adversary proceeding denying the Motions to Reopen.

3 These timely appeals ensued.

4
5 JURISDICTION

6 The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334
7 and 157(b) (1). We have jurisdiction under 28 U.S.C. § 158(a) (1).

8
9 ISSUE

10 Whether the court abused its discretion when it denied the
11 debtor's Motions to Reopen after finding that the debtor had not
12 met its burden of establishing excusable neglect under Rule
13 60(b) (1).

14
15 STANDARD OF REVIEW

16 A court's denial of a Rule 60(b) motion is reviewed for an
17 abuse of discretion. Bateman v. U.S. Postal Serv., 231 F.3d
18 1220, 1223 (9th Cir. 2000). It is an abuse of discretion to
19 apply an incorrect legal standard. Arden v. Motel Partners (In
20 re Arden), 176 F.3d 1226, 1228 (9th Cir. 1999).

21
22 DISCUSSION

23 Under Rule 60(b) (1), as incorporated by Federal Rule of
24 Bankruptcy Procedure 9024, a court may relieve a party from a
25 final order upon a finding of excusable neglect. FED. R. CIV. P.
26 60(b) (1). In Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.
27 P'Ship, 507 U.S. 380 (1993), the Court held that excusable
28 neglect, for purposes of Federal Rule of Civil Procedure

1 9006(b)(1), encompasses an attorney's negligence. Pioneer, 507
2 U.S. at 395.

3 The Pioneer court articulated an equitable test to determine
4 whether the attorney's "neglect" is "excusable." Id. The
5 equitable factors a court must consider are: 1) the danger of
6 prejudice to the opposing party; 2) the length of the delay and
7 its potential impact on the proceedings; 3) the reason for the
8 delay; and 4) whether the movant acted in good faith. Bateman,
9 231 F.3d at 1223-24 citing Pioneer, 507 U.S. at 395.

10 The Ninth Circuit adopted the Pioneer test for Rule 60(b)(1)
11 cases in Briones v. Riviera Hotel & Casino, 116 F.3d 379, 381
12 (9th Cir. 1997). See Pincay v. Andrews, 389 F.3d 853, 856-57
13 (9th Cir. 2004) (en banc). The four Pioneer factors are not
14 exclusive, rather they provide a framework for evaluating whether
15 excusable neglect has been established. Bateman, 231 F.3d at
16 1224.

17 In Pincay, the Ninth Circuit recently held that the weighing
18 of Pioneer's equitable factors is left "to the discretion of the
19 district court in every case." Pincay, 389 F.3d at 860. Thus,
20 our review of a court's findings of each factor is highly
21 deferential assuming, of course, that the court engaged in the
22 appropriate analysis.

23 Here, the court did not apply the Pioneer factors in
24 reaching its decision. Rather, it described why it believed that
25 the misplaced dismissal orders were not due to circumstances
26 beyond the debtor's control. It was erroneous for the court to
27 focus on whether the circumstances were beyond the movant's
28 control in isolation of the four Pioneer factors. See Pioneer,

1 507 U.S. at 392.

2 The appellees argue that the court did engage in a Pioneer-
3 type equitable analysis that was sufficient to support a finding
4 of excusable neglect. We disagree. The court does not state the
5 name of any case that governs the analysis, nor does it expressly
6 enumerate any of the Pioneer factors or clearly state its
7 findings on each one. The Ninth Circuit's en banc decision in
8 Pincay persuades us that the court must specifically address the
9 Pioneer factors in the course of making its decision.

10 Accordingly, an incorrect legal standard was applied, which
11 constitutes an abuse of discretion.

12 Therefore, we reverse and remand to the bankruptcy court for
13 it to apply and make findings on each Pioneer factor when
14 deciding whether to set aside the dismissal orders.

15
16 CONCLUSION

17 The court did not engage in the Pioneer equitable analysis
18 sufficient to satisfy the Ninth Circuit's mandate for evaluating
19 Rule 60(b)(1) excusable neglect cases. REVERSED and REMANDED.
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