NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-10-1013-HDMk
JOE SOTO GUZMAN,	Bk. No. 09-12699
Debtor.	Adv. No. 09-01549
MICHAEL HERRERO; PATRICIA HERRERO,	**M E M O R A N D U M**[1]
Appellants,	
v.	
JOE SOTO GUZMAN; UNITED STATES TRUSTEE, LOS ANGELES,	
Appellees.	

Argued and Submitted on July 23, 2010
at Pasadena, California

Filed - September 20, 2010

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

Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding

Before: HOLLOWELL, DUNN and MARKELL, Bankruptcy Judges.

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[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.

Michael and Patricia Herrero (the Appellants) filed a nondischargeability complaint against Joe Soto Guzman (the Debtor) but failed to properly effect service. The bankruptcy court dismissed their complaint without prejudice; however, because the bar date for such complaints had passed, the Appellants were unable to proceed.

They sought reconsideration of the dismissal on the basis that the actions of their counsel, although present at the hearings that led to the dismissal, constituted excusable neglect. The bankruptcy court determined that the Appellants' counsel made unexcusable mistakes and denied the Appellants' reconsideration motion. We **AFFIRM** in all respects.

I. FACTS

The Appellants and the Debtor are relatives. In late 2005 or early 2006, the Appellants hired the Debtor to make renovations to their home. A dispute ensued regarding the timeliness and quality of the work performed. On March 19, 2008, the Appellants filed a complaint in state court to recover damages for breach of contract, negligence, fraud, and violations of the Business and Professional Code. Trial was scheduled for February 9, 2009. On February 8, 2009, the Debtor filed for chapter 7[2] bankruptcy.

The bankruptcy court set May 11, 2009, as the last day to file nondischargeability complaints. That day, the Appellants

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[2] Unless otherwise indicated, all chapter and section references in the text are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

commenced an adversary proceeding by filing a complaint pursuant to §§ 523(a)(2)(A) and (a)(6) alleging $174,460.21 in damages (the Complaint). Under Federal Rule of Civil Procedure (FRCP) 4(m), the Appellants had until September 8, 2009, to effect service of the Complaint.

A summons issued on May 14, 2009. The summons was returned unserved to the court on June 25, 2009. On July 7, 2009, upon discovering that the summons was not served, the Appellants obtained an alias summons (Alias Summons) from the clerk's office. On July 13, 2009, they served the Alias Summons and the Complaint on the Debtor. The Debtor's counsel was not served.

On August 7, 2009, the Debtor filed a Motion to Quash Service and Dismiss the Complaint, contending the Complaint was not properly served pursuant to Rule 7004(g) (the Motion to Dismiss).

On August 18, 2009, the Appellants filed an opposition to the Motion to Dismiss asserting that despite their failure to serve the Debtor's counsel, the Debtor was not prejudiced by that failure because the Debtor had received actual notice of the Complaint. The Appellants' counsel submitted a declaration explaining that after reviewing the case file a few days after the time an answer was due, it was discovered that service of the original summons had been delegated to a former employee who had left the firm without serving the summons. As to the error of not serving the Debtor's counsel with the Alias Summons, the Appellants' counsel explained that he did not convey that requirement "in a concise enough manner to [his] assistant" and did not notice the omission until the Motion to Dismiss had been

filed. The Appellants did not, however, obtain another alias summons to serve on the Debtor's counsel.

On September 1, 2009, the bankruptcy court held a hearing on the Motion to Dismiss. Because the hearing was scheduled a week before the time by which the Appellants had to serve the Debtor under FRCP 4(m), the bankruptcy court refused to rule on the Motion to Dismiss, but continued the hearing until October 13, 2009, well after FRCP 4(m)'s 120-day time period would have passed. At the hearing, the Appellants gave no explanation for not remedying service to the Debtor's counsel after receiving the Motion to Dismiss, but stated they would "effectuate proper service by a week from today well ahead" of the next hearing date.

After the hearing, on September 4, 2009, the Appellants served a photocopy of the Alias Summons on the Debtor's counsel. That summons gave August 7, 2009, as the date by which a reply to the Complaint was due.

On September 29, 2009, the Appellants sent a letter to the Debtor's counsel requesting to meet and confer regarding the adversary proceeding as required by FRCP 26(f). On September 30, 2009, the Debtor's counsel replied, asserting that the bankruptcy court had no personal jurisdiction over the Debtor because service had not been properly effected. Additionally, the Debtor filed with the bankruptcy court, that same day, a supplemental brief to his Motion to Dismiss contending that the photocopy of the expired Alias Summons sent to the Debtor's counsel did not constitute effective service. In his supplemental brief, the

Debtor urged the case be dismissed for the Appellants' failure to comply with Rule 7004 and FRCP 4(m).

Also on September 30, 2009, the Appellants filed a Unilateral Status Report acknowledging that the Debtor had declined to meet and confer regarding the adversary proceeding based on the contention that there was a lack of personal jurisdiction, but they did not respond to the Debtor's supplemental brief or submit documentation that explained why they believed serving a photocopy of the expired Alias Summons constituted proper service.

On October 13, 2009, after issuing a tentative ruling[3] for the Debtor, the bankruptcy court held the continued hearing on the Motion to Dismiss. At the hearing, the Appellants' counsel appeared:

THE COURT:	You wish to be heard on this?
APPELLANT'S COUNSEL:	Clarification as to the Court's ruling. It's granting - - is that granting of the Debtor's motion to quash, or the motion to dismiss?
THE COURT:	The motion to dismiss.
APPELLANT'S COUNSEL:	Okay. We have nothing to say at this point, your Honor.
THE COURT:	Very well. The motion to dismiss is granted.

Hr'g Tr. at 1:7-16, Oct. 13, 2009.

[3] The tentative ruling was not provided in the excerpts of record, nor is it available on the bankruptcy court's docket or its electronic calendar.

On October 23, 2009, within 10 days of the oral ruling granting the Debtor's Motion to Dismiss on the basis that no good cause existed to extend the service time of FRCP 4(m) (the Dismissal Order),[4] the Appellants filed a motion for reconsideration (the Reconsideration Motion).

In their Reconsideration Motion, the Appellants argued that to allow the Dismissal Order to stand would greatly prejudice the Appellants because the bar date had passed to file nondischargeability actions. The Appellants contended that relief from the Dismissal Order was warranted based on the inadvertence and excusable neglect of their counsel in properly effecting service.

In support of their Reconsideration Motion, the Appellants provided a declaration from their counsel incorporating: (1) the case summary from their state court case; (2) correspondence with the clerk's office requesting the Alias Summons; (3) the proof of service of the Alias Summons on the Debtor; (4) the declaration of the Appellants' counsel that was submitted with the opposition to the Motion to Dismiss; (5) a proof of service dated September 4, 2009, indicating service was made to the Debtor's counsel; (6) the docket report of the adversary proceeding; and, (7) status reports dated August 18, 2009, and September 30, 2009, which included the Debtor's contention that service had not been properly effected.

There was no evidence or argument submitted with the Reconsideration Motion that explained why the Appellants

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[4] The separate order was entered November 9, 2009.

neglected to serve the Debtor's counsel with a new alias summons or why they neglected to request an extension of time to effect service.

On November 3, 2009, the Debtor filed an opposition to the Reconsideration Motion. On November 17, 2009, the bankruptcy court held a hearing on the matter and concluded:

> Well, I think three different mistakes here is enough. The tentative ruling[5] will stand. The motion is denied, but the grounds are changed. The grounds are that there were three different mistakes that counsel made. None of them appears to be - - well, maybe at most one of them is excusable, but certainly not all three. And it takes all three to get - - to support the motion to reconsider.

Hr'g Tr. at 11:25-12:7, Nov. 17, 2009. On December 10, 2009, the bankruptcy court entered its order denying the Reconsideration Motion (the Reconsideration Order). On December 18, 2009, the Appellants appealed both the Dismissal Order and the Reconsideration Order.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.[6]

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[5] The tentative ruling on the Reconsideration Motion was also not provided in the excerpts of record on appeal, nor is it available on the bankruptcy court docket or its electronic calendar.

[6] The Dismissal Order, which dismissed the Complaint without prejudice was a final order, not an interlocutory order. An order granting dismissal is final and appealable "if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter." Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co., 117 F.3d 432, 433 (9th Cir. 1997) (internal citation omitted).

III. ISSUES

(1) Did the bankruptcy court abuse its discretion when it dismissed the Complaint due to the Appellants' failure to properly effect service within the time prescribed by FRCP 4(m)?

(2) Did the bankruptcy court abuse its discretion when it denied the Appellants' Reconsideration Motion?

IV. STANDARDS OF REVIEW

We review a bankruptcy court's dismissal pursuant to FRCP 4(m) for an abuse of discretion. Oyama v. Sheehan (In re Sheehan), 253 F.3d 507, 511 (9th Cir. 2001). We also review for an abuse of discretion a bankruptcy court's denial of a FRCP 60(b) motion for reconsideration. Briones v. Riviera Hotel & Casino, 116 F.3d 379, 380 (9th Cir. 1997).

In determining whether the bankruptcy court abused its discretion, we first "determine de novo whether the [bankruptcy] court identified the correct legal rule to apply to the relief requested." United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009). If the bankruptcy court identified the correct legal rule, we then determine whether its "application of the correct legal standard [to the facts] was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." Id. (internal quotation marks omitted). Therefore, if the bankruptcy court did not identify the correct legal rule, or its application of the correct legal standard to the facts was illogical, implausible, or without support in inferences that may be drawn from the facts in the record, then the bankruptcy court has abused its discretion. Id.

V. DISCUSSION

The Appellants make two arguments on appeal: (1) the bankruptcy court should have granted their Reconsideration Motion because of the inadvertence or excusable neglect of the Appellants' counsel; and, (2) the bankruptcy court should have granted their Reconsideration Motion because the dismissal was prejudicial to the Appellants. Significantly, the Appellants do not articulate any argument as to how the bankruptcy court abused its discretion in entering the Dismissal Order in the first instance.

Even though the Appellants brought their Reconsideration Motion under FRCP 60(b), it was filed within 10 days of the Dismissal Order. Therefore, we treat it as a FRCP 59(e) motion such that it tolled the time within which to file a notice of appeal regarding the Dismissal Order until the Reconsideration Order was entered.[7] Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp., 248 F.3d 892, 898-99 (9th Cir. 2001). Additionally, because we treat the FRCP 60(b) motion as a FRCP 59(e) motion, we have jurisdiction to review the merits of both the Dismissal Order and the Reconsideration Order. See United Student Funds, Inc. v. Wylie (In re Wylie), 349 B.R. 204, 209 (9th Cir. BAP 2006).

A. Dismissal Order

Rule 7004 sets out the procedure for serving a summons in an adversary proceeding. "[S]erving a summons . . . is effective to

[7] Rule 9023 was amended December 1, 2009, to enlarge the time in which to file a motion to alter or amend a judgment to 14 days, consistent with amended Rule 8002 (notice of appeal deadline).

establish personal jurisdiction over the person of any defendant with respect to a case under the Code." Fed. R. Bankr. P. 7004(f). Service of the summons may be made by first class mail pursuant to Rule 7004(b). Rule 7004(e) provides that service:

> shall be by delivery of the summons and complaint within 10 days[8] after the summons is issued. . . . If a summons is not timely delivered or mailed, another summons shall be issued and served.

Fed. R. Bankr. P. 7004(e) (emphasis added). If a debtor is represented by an attorney, whenever service is made upon the debtor, service must also be made upon the debtor's attorney. Fed. R. Bankr. P. 7004(g).

Additionally, Rule 7004(a) incorporates FRCP(4)(m), which requires that service be made within 120 days of filing a complaint but allows for an extension of that time if warranted. FRCP 4(m) provides:

> If a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m).

Additionally, Rule 9006(b) may be used to enlarge the 120-day time period prescribed by FRCP 4(m). In re Sheehan, 253 F.3d at 512. Under Rule 9006(b), "the court for cause shown may at any time in its discretion before the expiration of the

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[8] The 10-day time periods in Rule 7004 were amended December 1, 2009, to 14-day periods.

period originally prescribed . . . or on motion made after the expiration of the specified time period permit the act to be done when the failure to act was the result of excusable neglect." Fed. R. Bankr. P. 9006(b).

It is undisputed that the Appellants did not serve on the Debtor's counsel the Alias Summons within 10 days of its issuance as required by Rule 7004(e). It is also undisputed that the Appellants did not obtain a second alias summons to serve on the Debtor's counsel as required by Rule 7004(e) and (g). The bankruptcy court determined that the Appellants did not demonstrate that cause existed for the non-compliance. It declined to extend FRCP 4(m)'s service time and dismissed the Complaint without prejudice.

The Ninth Circuit established a "two step analysis" for determining whether to extend the time for service under FRCP 4(m):

> First, upon a showing of good cause for the defective service, the court must extend the time period. Second, if there is no good cause, the court has the discretion to dismiss without prejudice or to extend the time period.

In re Sheehan, 253 F.3d at 512 (emphasis added).

Thus, if the Appellants had demonstrated good cause, the bankruptcy court was required to extend the time for service. The party responsible for service has the burden of demonstrating good cause. Wei v. Hawaii, 763 F.2d 370, 372 (9th Cir. 1985); Artificial Intelligence Corp. v. Casey (In re Casey), 193 B.R. 942, 946 (Bankr. S.D. Cal. 1996). The Appellants did not meet their burden.

The Appellants did not address the error in service even though they had the opportunity to do so. The Appellants argued that service should be considered valid because the Debtor had actual notice of the Complaint. They offered no explanation for the error of serving a photocopy of the expired Alias Summons on the Debtor's counsel in the Appellants' third attempt at service, even though they were on notice at least as of September 30, 2009, when the Debtor submitted his supplemental brief, nearly two weeks before the final hearing on the Motion to Dismiss, that the Debtor did not consider service of the expired Alias Summons effective. The Appellants did not make any arguments at the October 13, 2009 hearing. As a result, the Appellants did not establish that good cause existed to require an extension of time to effect service. Accordingly, the bankruptcy court did not abuse its discretion in entering the Dismissal Order.

In their motion for reconsideration and on appeal, the Appellants argue that the bankruptcy court should have extended time under FRCP 4(m) because they are now time-barred from refiling their Complaint. However, the meaning of good cause under FRCP 4(m) is not altered by the intervention of a time bar that precludes refiling. Stinnett v. Wilson (In re Wilson), 96 B.R. 301, 303 (Bankr. E.D. Cal. 1989) (citing Townsel v. County of Contra Costa, 820 F.2d 319, 320 (9th Cir. 1987)).

This is because "Congress balanced the possible hardship of dismissal without possibility of re-filing against the policy of moving cases promptly through the courts" when it provided for the time limit of FRCP 4(m) and its liberal extension. In re

Casey, 193 B.R. at 948; Wei v. Hawaii, 763 F.2d at 372 (FRCP 4(m) promotes prompt movement of actions through the court).

While a statute of limitations issue could be a factor for the court to consider in exercising its discretion to extend the service time under FRCP 4(m) absent good cause (see, e.g., Efaw v. Williams, 473 F.3d 1038, 1041 (9th Cir. 2007)), the Appellants did not raise the issue of prejudice before the bankruptcy court in opposing the Motion to Dismiss, and more importantly, never requested an extension of the service time to preserve their Complaint.

B. Reconsideration Order

The Appellants seek relief from the Dismissal Order pursuant to FRCP 60(b), applicable in contested matters under Rule 9024. Specifically, the Appellants rely on the following provisions of FRCP 60(b):

> On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> . . .
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

The moving party bears the burden of establishing that he is entitled to relief under one of these grounds. In re Wylie, 349 B.R. at 209; Kriston v. Peroulis, 2010 WL 1610419 *3 (D. Nev. 2010).

1. Excusable Neglect

FRCP 60(b)(1) permits relief from judgment for "mistake, inadvertence, surprise, or excusable neglect." Appellants assert that they should not be deprived of the ability to proceed with

the Complaint simply because their counsel neglected to properly serve it. However, the Supreme Court has held that "clients must be held accountable for the acts and omissions of their attorneys." Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 396-97 (1993) (Pioneer) (citing Link v. Wabash R.R. Co., 370 U.S. 626, 633 (1962)); United States v. Boyle, 469 U.S. 241 (1985).

Moreover, the Ninth Circuit has consistently declined to relieve a client under FRCP 60(b)(1) when a final judgment has been entered against him as the result of the mistake of his attorney or by reason of the attorney's ignorance of the law or other rules of the court. Engleson v. Burlington N. R.R. Co., 972 F.2d 1038, 1043 (9th Cir. 1992) (collecting cases).

However, the Supreme Court has held that although "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect," the possibility is not foreclosed. Pioneer, 507 U.S. at 392; Briones v. Riviera Hotel & Casino, 116 F.3d at 382. Pioneer dealt with a motion for extension of time to file a proof of claim brought under Rule 9006(b). The Supreme Court recognized that the concept of excusable neglect was "not limited strictly to omissions caused by circumstances beyond the control of the movant" and could include situations in which the failure to comply with a filing deadline is attributable to negligence. 507 U.S. at 392.

Pioneer sets an equitable standard for determining whether negligence amounts to "excusable neglect," that takes into account the circumstances surrounding the neglect, including

(1) the danger of prejudice to the parties, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, and (4) whether the party seeking to be excused from neglect acted in good faith. Id. at 395; Briones v. Riviera Hotel & Casino, 116 F.3d at 381-82 (Pioneer's excusable neglect formulation held applicable to FRCP 60(b)(1) analysis).

Although the Ninth Circuit has adopted Pioneer's analysis to determine whether a plaintiff's or his attorney's neglect is excusable, it is unclear whether Pioneer applies in situations where there has been a mistake of law. Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d 1097, 1100 (9th Cir. 2006) ("Our court has not yet determined whether such attorney error can provide grounds to vacate a judgment under the mistake ground of [FRCP]60(b)(1). We have, however, declined similar requests for relief put forth as 'excusable neglect.'").

In cases where the neglect at issue is purely a failure to follow unambiguous rules, the Ninth Circuit has held that the Pioneer analysis does not apply. See Kyle v Campbell Soup Co., 28 F.3d 928, 931-32 (9th Cir. 1994). However, when it is not entirely clear that a plaintiff's neglect is the sole result of a failure to read and interpret a legal rule or standard, the Ninth Circuit has held that it is error to not conduct the analysis set forth in Pioneer to determine whether the neglect is excusable. Briones v. Riviera Hotel & Casino, 116 F.3d at 382 (Pioneer analysis necessary when pro se, non-English-speaking plaintiff's lack of response to a motion to dismiss may have been due to a communication problem rather than simple failure to follow a court rule).

In Speiser, Krause & Madole P.C. v. Ortiz, 271 F.3d 884, 886 (9th Cir. 2001), the plaintiff sought to set aside a default judgment entered when he failed to timely file an answer to a complaint. The plaintiff argued his neglect was excusable because he did not understand the rules regarding the time to answer a complaint in a removed case. The Ninth Circuit held:

> As we have said in a similar situation, counsel has not presented a persuasive justification for his misconstruction of nonambiguous rules. Accordingly, there is no basis for deviating from the general rule that a mistake of law does not constitute excusable neglect.

Id. (internal citation omitted).

The Ninth Circuit has similarly found that attorney inexperience, poor litigation decisions, mistakes of law, or alleged malpractice are not encompassed under Pioneer's excusable neglect analysis. Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn, 139 F.3d 664, 666 (9th Cir. 1998) (no excusable neglect where attorney failed to plead an affirmative defense); Casey v. Albertson's Inc., 362 F.3d 1254, 1260 (9th Cir. 2004) (no excusable neglect where attorney was inexperienced and failed to respond to requests for admission or attend a summary judgment hearing); Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d at 1101 (determining that mistakes or misconduct of a plaintiff or his counsel are "more appropriately addressed through malpractice claims" than under FRCP 60(b)(1)); see also Warrick v. Birdsell (In re Warrick), 278 B.R. 182, 186-87 (9th Cir. BAP 2002) (no excusable neglect where attorney failed to understand and apply nonambiguous rules regarding time to file an appeal).

Although such cases appear to qualify the Pioneer approach, the Ninth Circuit has, recently, in Lemoge v. United States, 587 F.3d 1188, 1193 (9th Cir. 2009), held that when the issue of excusable neglect is raised, a court's failure to apply Pioneer's full equitable analysis results in an abuse of discretion under the first prong of the standard of review set out in United States v. Hinkson, 585 F.3d at 1262:

> Because the standard under [FRCP] 60(b) is an equitable standard, it may follow that in some circumstances a [court] may satisfy the standard even though omitting to discuss some specified factor. However, we conclude that it will always be a better practice for the [court] to touch upon and analyze at least all four of the explicit [Pioneer] factors.

Id. at 1194.

In this case, the bankruptcy court did not enunciate the Pioneer standard, it simply determined that the Appellants' mistakes in service were not excusable. Indeed, it is clear that the Appellants failed, without explanation, to comply with the unambiguous requirements of Rule 7004.[9]

However, even if the bankruptcy court was required to undertake a Pioneer analysis, we may still affirm the bankruptcy court if the record supports findings consistent with its decision. Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1225 n.3 (9th Cir. 2000). "[W]here the record is sufficiently complete for us to conduct the [Pioneer] analysis ourselves, it would be inefficient to remand the issue to the [trial court]. Better to

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[9] The Appellant's counsel conceded at the appellate oral argument that a complete failure to follow the Rules is not excusable neglect.

put this matter aside and let the parties get on with the case." Id.

Because the parties presented their arguments using the Pioneer factors, the record provides sufficient evidence for us to evaluate whether relief from the Dismissal Order would prejudice the Debtor, whether the Appellants' delay would adversely impact the proceedings, the reasons for the Appellants' delay, and whether the Appellants acted in good faith. See Id.

Prejudice is assumed absent a non-frivolous explanation. Laurino, M.D. v. Syringa Gen. Hosp., 279 F.3d 750, 753 (9th Cir. 2002); Hernandez v. City of El Monte, 138 F.3d 393, 400-01 (9th Cir. 1998). Here, the Appellants cannot rebut a presumption of prejudice. Even though they were aware of the possible dismissal, the Appellants offered no explanation for the failure to obtain a second alias summons as mandated by Rule 7004(e).

At the hearing on the Reconsideration Motion, the only reason presented for the lack of proper service was counsel for the Appellants' argument that he did not understand the seriousness of the matter until the case was dismissed. At the same time, the Appellants' counsel acknowledged that he was aware of the importance of proper service and the impact of defective service because he had attended an educational seminar on the issue, had met with his staff on the issue, and he considered himself to be a "certified specialist in bankruptcy law." Hr'g Tr. at 5-6, Nov. 17, 2009.

Notwithstanding a letter and supplemental briefing from the Debtor alerting the Appellants to a defect in service, the Appellants did nothing to correct it. The error was easily

rectifiable. Appellants had ample time and opportunity to review the Rules, remedy their error in service, or at least to argue that their error of law in serving the expired Alias Summons amounted to good cause or excusable neglect sufficient to garner an extension of the time for service under FRCP 4(m) or Rule 9006(b). Instead, the Appellants' simply contend that the Debtor's constructive notice of the Complaint is sufficient. Essentially, the Appellants argue that they do not have to follow the rules. However, without compliance with the service rules, the bankruptcy court has no jurisdiction over the Debtor in the adversary proceeding. Fed. R. Bankr. P. 7004(f).

The Appellants argue that they are the prejudiced party in this case; however, the Appellants' unexplained failure to properly effect service is prejudicial to the Debtor and his ability to obtain a fresh start. See Tenorio v. Osinga (In re Osinga), 91 B.R. 893, 895 (9th Cir. BAP 1988). (nondischargeability complaints should be litigated with reasonable promptitude so as not to prejudice the debtor's fresh start); Barr v. Barr (In re Barr), 217 B.R. 626, 630 (Bankr. W.D. Wash. 1998).

Typically, the "delay" that is analyzed is the plaintiff's delay in seeking relief from the judgment. There was no delay on the part of the Appellants in moving for reconsideration after the Complaint was dismissed. Here, the delay at issue is the delay in service, which ultimately resulted in dismissal of the Complaint.

The Appellants argue there was no delay in serving the Debtor after the original summons was returned unserved, but

merely serving the Debtor did not complete service. The Debtor's counsel has never been properly served. The Appellants waited until the hearing on the Reconsideration Motion to argue that the third failed attempt at service, mailing the Debtor's counsel the expired Alias Summons, should be considered adequate service. However, they provided no authority to support their claim that service of an expired summons constitutes effective service under Rule 7004. Improper service does not cure anything, and certainly does not demonstrate that the Appellants did not delay in effecting service.

No obstacles are identified in the record that would have prevented the Appellants from rectifying a simple error, especially after the issue of defective service was raised in the Debtor's August 27, 2009 brief, at the September 1, 2009 hearing where the bankruptcy court deferred ruling on the Motion to Dismiss, and again before the final hearing on the Motion to Dismiss held on October 13, 2009.

The Appellants assert they have acted in good faith to address the service issues. However, a lack of good faith can be inferred from a plaintiff's failure to take adequate steps to prosecute litigation. See, e.g., CKS Eng'rs, Inc. v. White Mtn. Gypsum Co., 726 F.2d 1202, 1208 (7th Cir. 1984). The Appellants here were put on notice early and often that there were defects in service and that dismissal could result. Nevertheless, the Appellants disregarded the service rules, failed to seek an extension of time to effect proper service to preserve their Complaint, and offer no adequate explanation or excuse for their repeated failure to effect service properly.

Accordingly, even if the Pioneer factors are mandatory in the analysis of whether a mistake of law constitutes excusable neglect, based on this record, it was not an abuse of discretion for the bankruptcy court to deny the Reconsideration Motion.

2. FRCP 60(b)(6)

FRCP 60(b) offers relief to a party from a judgment for "any other reason that justifies relief." The "any other reason" language of FRCP 60(b)(6) requires that the relief be based on some ground not already enumerated in subsections (1)-(5). See Lyon v. Agusta S.P.A., 252 F.3d 1078, 1088 (9th Cir. 2001). In seeking relief from the Dismissal Order, the Appellants re-asserted their argument that relief should be granted based on the neglect of the Appellants' counsel. They argued that relief under FRCP 60(b)(6) was appropriate to relieve a plaintiff from his attorney's gross negligence or abandonment.

FRCP 60(b)(6) is reserved for "extraordinary circumstances." Delay v. Gordon, 475 F.3d 1039, 1044 (9th Cir. 2007). Seeking relief under FRCP 60(b)(6) usually requires a showing of actual injury and the presence of circumstances beyond the movant's control that prevented timely action to preserve his or her interests. Id. at 1044.

An attorney's actions are chargeable to his or her client and ordinarily do not constitute extraordinary circumstances to warrant relief under FRCP 60(b)(6). An exception to this rule is created only where an attorney's negligence is "so gross that it is inexcusable," resulting in a "virtual abandonment" of the client. Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1170-71 (9th Cir. 2002) (attorney disregarded court orders to proceed

with client's defense); Lal v. Calif., 610 F.3d 518 (9th Cir. 2010) (attorney deliberately misled clients and failed to proceed with client's case despite court orders to do so).

The negligence in this case is not so extraordinary to rise to the level of virtual abandonment warranting the exception. Therefore, because the Appellants concede that their neglect led to the entry of the Dismissal Order, relief must be sought under FRCP 60(b)(1) and must be excusable, making the Appellants' asserted basis for relief under FRCP 60(b)(6) the same as under FRCP 60(b)(1). Because we have determined that the Appellants are not entitled to relief under FRCP 60(b)(1), we conclude that the bankruptcy court did not abuse its discretion in denying the Reconsideration Motion pursuant to FRCP 60(b)(6).

CONCLUSION

For the foregoing reasons, we AFFIRM the bankruptcy court's entry of the Dismissal Order and the Reconsideration Order.