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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No. CC-10-1013-HDMk
7	JOE SOTO GUZMAN,)	Bk. No. 09-12699
8	Debtor.)	Adv. No. 09-01549
9	_____)	
10	MICHAEL HERRERO; PATRICIA HERRERO,)	M E M O R A N D U M¹
11	Appellants,)	
12	v.)	
13	JOE SOTO GUZMAN; UNITED STATES TRUSTEE, LOS ANGELES,)	
14	Appellees.)	
15	_____)	

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.

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.

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

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

13 I. FACTS

14 The Appellants and the Debtor are relatives. In late 2005
15 or early 2006, the Appellants hired the Debtor to make
16 renovations to their home. A dispute ensued regarding the
17 timeliness and quality of the work performed. On March 19, 2008,
18 the Appellants filed a complaint in state court to recover
19 damages for breach of contract, negligence, fraud, and violations
20 of the Business and Professional Code. Trial was scheduled for
21 February 9, 2009. On February 8, 2009, the Debtor filed for
22 chapter 7² bankruptcy.

23 The bankruptcy court set May 11, 2009, as the last day to
24 file nondischargeability complaints. That day, the Appellants
25

26 ² Unless otherwise indicated, all chapter and section
27 references in the text are to the Bankruptcy Code, 11 U.S.C.
28 §§ 101-1532. All "Rule" references are to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037.

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

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

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

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

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

3 On September 1, 2009, the bankruptcy court held a hearing on
4 the Motion to Dismiss. Because the hearing was scheduled a week
5 before the time by which the Appellants had to serve the Debtor
6 under FRCP 4(m), the bankruptcy court refused to rule on the
7 Motion to Dismiss, but continued the hearing until October 13,
8 2009, well after FRCP 4(m)'s 120-day time period would have
9 passed. At the hearing, the Appellants gave no explanation for
10 not remedying service to the Debtor's counsel after receiving the
11 Motion to Dismiss, but stated they would "effectuate proper
12 service by a week from today well ahead" of the next hearing
13 date.

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

18 On September 29, 2009, the Appellants sent a letter to the
19 Debtor's counsel requesting to meet and confer regarding the
20 adversary proceeding as required by FRCP 26(f). On September 30,
21 2009, the Debtor's counsel replied, asserting that the bankruptcy
22 court had no personal jurisdiction over the Debtor because
23 service had not been properly effected. Additionally, the Debtor
24 filed with the bankruptcy court, that same day, a supplemental
25 brief to his Motion to Dismiss contending that the photocopy of
26 the expired Alias Summons sent to the Debtor's counsel did not
27 constitute effective service. In his supplemental brief, the
28

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

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

11 On October 13, 2009, after issuing a tentative ruling³ for
12 the Debtor, the bankruptcy court held the continued hearing on
13 the Motion to Dismiss. At the hearing, the Appellants' counsel
14 appeared:

15 THE COURT: You wish to be heard on this?

16 APPELLANT'S: Clarification as to the Court's ruling.
17 COUNSEL: It's granting - - is that granting of
18 the Debtor's motion to quash, or the
19 motion to dismiss?

19 THE COURT: The motion to dismiss.

20 APPELLANT'S: Okay. We have nothing to say at this
21 COUNSEL: point, your Honor.

22 THE COURT: Very well. The motion to dismiss is
23 granted.

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

25

26

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

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

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

13 In support of their Reconsideration Motion, the Appellants
14 provided a declaration from their counsel incorporating: (1) the
15 case summary from their state court case; (2) correspondence with
16 the clerk's office requesting the Alias Summons; (3) the proof of
17 service of the Alias Summons on the Debtor; (4) the declaration
18 of the Appellants' counsel that was submitted with the opposition
19 to the Motion to Dismiss; (5) a proof of service dated September
20 4, 2009, indicating service was made to the Debtor's counsel;
21 (6) the docket report of the adversary proceeding; and,
22 (7) status reports dated August 18, 2009, and September 30, 2009,
23 which included the Debtor's contention that service had not been
24 properly effected.

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

27
28 ⁴ The separate order was entered November 9, 2009.

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

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

7 Well, I think three different mistakes here is enough.
8 The tentative ruling⁵ will stand. The motion is
9 denied, but the grounds are changed. The grounds are
10 that there were three different mistakes that counsel
11 made. None of them appears to be - - well, maybe at
12 most one of them is excusable, but certainly not all
13 three. And it takes all three to get - - to support
14 the motion to reconsider.

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

20 **II. JURISDICTION**

21 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
22 § 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.⁶
23

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

28 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).

1 establish personal jurisdiction over the person of any defendant
2 with respect to a case under the Code." Fed. R. Bankr. P.

3 7004(f). Service of the summons may be made by first class mail
4 pursuant to Rule 7004(b). Rule 7004(e) provides that service:

5 shall be by delivery of the summons and complaint within 10
6 days⁸ after the summons is issued. . . . If a summons is not
7 timely delivered or mailed, another summons shall be issued
and served.

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

11 Fed. R. Bankr. P. 7004(g).

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

15 FRCP 4(m) provides:

16 If a defendant is not served within 120 days after the
17 complaint is filed, the court - on motion or on its own
18 after notice to the plaintiff - must dismiss the action
19 without prejudice against that defendant or order that
20 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.

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

22 Additionally, Rule 9006(b) may be used to enlarge the
23 120-day time period prescribed by FRCP 4(m). In re Sheehan,
24 253 F.3d at 512. Under Rule 9006(b), "the court for cause shown
25 may at any time in its discretion before the expiration of the
26

27 _____
28 ⁸ The 10-day time periods in Rule 7004 were amended
December 1, 2009, to 14-day periods.

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

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

14 The Ninth Circuit established a "two step analysis" for
15 determining whether to extend the time for service under FRCP
16 4(m):

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

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

22 Thus, if the Appellants had demonstrated good cause, the
23 bankruptcy court was required to extend the time for service.
24 The party responsible for service has the burden of demonstrating
25 good cause. Wei v. Hawaii, 763 F.2d 370, 372 (9th Cir. 1985);
26 Artificial Intelligence Corp. v. Casey (In re Casey), 193 B.R.
27 942, 946 (Bankr. S.D. Cal. 1996). The Appellants did not meet
28 their burden.

1 The Appellants did not address the error in service even
2 though they had the opportunity to do so. The Appellants argued
3 that service should be considered valid because the Debtor had
4 actual notice of the Complaint. They offered no explanation for
5 the error of serving a photocopy of the expired Alias Summons on
6 the Debtor's counsel in the Appellants' third attempt at service,
7 even though they were on notice at least as of September 30,
8 2009, when the Debtor submitted his supplemental brief, nearly
9 two weeks before the final hearing on the Motion to Dismiss, that
10 the Debtor did not consider service of the expired Alias Summons
11 effective. The Appellants did not make any arguments at the
12 October 13, 2009 hearing. As a result, the Appellants did not
13 establish that good cause existed to require an extension of time
14 to effect service. Accordingly, the bankruptcy court did not
15 abuse its discretion in entering the Dismissal Order.

16 In their motion for reconsideration and on appeal, the
17 Appellants argue that the bankruptcy court should have extended
18 time under FRCP 4(m) because they are now time-barred from
19 refiling their Complaint. However, the meaning of good cause
20 under FRCP 4(m) is not altered by the intervention of a time bar
21 that precludes refiling. Stinnett v. Wilson (In re Wilson),
22 96 B.R. 301, 303 (Bankr. E.D. Cal. 1989) (citing Townsel v.
23 County of Contra Costa, 820 F.2d 319, 320 (9th Cir. 1987)).

24 This is because "Congress balanced the possible hardship of
25 dismissal without possibility of re-filing against the policy of
26 moving cases promptly through the courts" when it provided for
27 the time limit of FRCP 4(m) and its liberal extension. In re
28

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

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

11 B. Reconsideration Order

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

16 On motion and just terms, the court may relieve a party
17 . . . from a final judgment, order, or proceeding for
18 the following reasons:

18 (1) mistake, inadvertence, surprise, or excusable
19 neglect;

19 . . .

20 (6) any other reason that justifies relief.

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

22 The moving party bears the burden of establishing that he is
23 entitled to relief under one of these grounds. In re Wylie,
24 349 B.R. at 209; Kriston v. Peroulis, 2010 WL 1610419 *3 (D. Nev.
25 2010).

26 1. Excusable Neglect

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

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

8 Moreover, the Ninth Circuit has consistently declined to
9 relieve a client under FRCP 60(b)(1) when a final judgment has
10 been entered against him as the result of the mistake of his
11 attorney or by reason of the attorney's ignorance of the law or
12 other rules of the court. Engleson v. Burlington N. R.R. Co.,
13 972 F.2d 1038, 1043 (9th Cir. 1992) (collecting cases).

14 However, the Supreme Court has held that although
15 "inadvertence, ignorance of the rules, or mistakes construing the
16 rules do not usually constitute 'excusable' neglect," the
17 possibility is not foreclosed. Pioneer, 507 U.S. at 392; Briones
18 v. Riviera Hotel & Casino, 116 F.3d at 382. Pioneer dealt with a
19 motion for extension of time to file a proof of claim brought
20 under Rule 9006(b). The Supreme Court recognized that the
21 concept of excusable neglect was "not limited strictly to
22 omissions caused by circumstances beyond the control of the
23 movant" and could include situations in which the failure to
24 comply with a filing deadline is attributable to negligence.
25 507 U.S. at 392.

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

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

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

16 In cases where the neglect at issue is purely a failure to
17 follow unambiguous rules, the Ninth Circuit has held that the
18 Pioneer analysis does not apply. See Kyle v Campbell Soup Co.,
19 28 F.3d 928, 931-32 (9th Cir. 1994). However, when it is not
20 entirely clear that a plaintiff's neglect is the sole result of a
21 failure to read and interpret a legal rule or standard, the Ninth
22 Circuit has held that it is error to not conduct the analysis set
23 forth in Pioneer to determine whether the neglect is excusable.
24 Briones v. Riviera Hotel & Casino, 116 F.3d at 382 (Pioneer
25 analysis necessary when pro se, non-English-speaking plaintiff's
26 lack of response to a motion to dismiss may have been due to a
27 communication problem rather than simple failure to follow a
28 court rule).

1 In Speiser, Krause & Madole P.C. v. Ortiz, 271 F.3d 884, 886
2 (9th Cir. 2001), the plaintiff sought to set aside a default
3 judgment entered when he failed to timely file an answer to a
4 complaint. The plaintiff argued his neglect was excusable
5 because he did not understand the rules regarding the time to
6 answer a complaint in a removed case. The Ninth Circuit held:

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

11 Id. (internal citation omitted).

12 The Ninth Circuit has similarly found that attorney
13 inexperience, poor litigation decisions, mistakes of law, or
14 alleged malpractice are not encompassed under Pioneer's excusable
15 neglect analysis. Allmerica Fin. Life Ins. & Annuity Co. v.
16 Llewellyn, 139 F.3d 664, 666 (9th Cir. 1998) (no excusable
17 neglect where attorney failed to plead an affirmative defense);
18 Casey v. Albertson's Inc., 362 F.3d 1254, 1260 (9th Cir. 2004)
19 (no excusable neglect where attorney was inexperienced and failed
20 to respond to requests for admission or attend a summary judgment
21 hearing); Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d at
22 1101 (determining that mistakes or misconduct of a plaintiff or
23 his counsel are "more appropriately addressed through malpractice
24 claims" than under FRCP 60(b)(1)); see also Warrick v. Birdsell
25 (In re Warrick), 278 B.R. 182, 186-87 (9th Cir. BAP 2002) (no
26 excusable neglect where attorney failed to understand and apply
27 nonambiguous rules regarding time to file an appeal).

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

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

15 Id. at 1194.

16 In this case, the bankruptcy court did not enunciate the
17 Pioneer standard, it simply determined that the Appellants'
18 mistakes in service were not excusable. Indeed, it is clear that
19 the Appellants failed, without explanation, to comply with the
20 unambiguous requirements of Rule 7004.⁹

21 However, even if the bankruptcy court was required to
22 undertake a Pioneer analysis, we may still affirm the bankruptcy
23 court if the record supports findings consistent with its
24 decision. Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1225 n.3
25 (9th Cir. 2000). "[W]here the record is sufficiently complete
26 for us to conduct the [Pioneer] analysis ourselves, it would be
27 inefficient to remand the issue to the [trial court]. Better to

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

1 put this matter aside and let the parties get on with the case.”

2 Id.

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

9 Prejudice is assumed absent a non-frivolous explanation.
10 Laurino, M.D. v. Syringa Gen. Hosp., 279 F.3d 750, 753 (9th Cir.
11 2002); Hernandez v. City of El Monte, 138 F.3d 393, 400-01
12 (9th Cir. 1998). Here, the Appellants cannot rebut a presumption
13 of prejudice. Even though they were aware of the possible
14 dismissal, the Appellants offered no explanation for the failure
15 to obtain a second alias summons as mandated by Rule 7004(e).

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

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

1 rectifiable. Appellants had ample time and opportunity to review
2 the Rules, remedy their error in service, or at least to argue
3 that their error of law in serving the expired Alias Summons
4 amounted to good cause or excusable neglect sufficient to garner
5 an extension of the time for service under FRCP 4(m) or Rule
6 9006(b). Instead, the Appellants' simply contend that the
7 Debtor's constructive notice of the Complaint is sufficient.
8 Essentially, the Appellants argue that they do not have to follow
9 the rules. However, without compliance with the service rules,
10 the bankruptcy court has no jurisdiction over the Debtor in the
11 adversary proceeding. Fed. R. Bankr. P. 7004(f).

12 The Appellants argue that they are the prejudiced party in
13 this case; however, the Appellants' unexplained failure to
14 properly effect service is prejudicial to the Debtor and his
15 ability to obtain a fresh start. See Tenorio v. Osinga (In re
16 Osinga), 91 B.R. 893, 895 (9th Cir. BAP 1988).

17 (nondischargeability complaints should be litigated with
18 reasonable promptitude so as not to prejudice the debtor's fresh
19 start); Barr v. Barr (In re Barr), 217 B.R. 626, 630 (Bankr. W.D.
20 Wash. 1998).

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

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

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

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

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

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

5 2. FRCP 60(b)(6)

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

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

22 An attorney's actions are chargeable to his or her client
23 and ordinarily do not constitute extraordinary circumstances to
24 warrant relief under FRCP 60(b)(6). An exception to this rule is
25 created only where an attorney's negligence is "so gross that it
26 is inexcusable," resulting in a "virtual abandonment" of the
27 client. Cnty. Dental Servs. v. Tani, 282 F.3d 1164, 1170-71
28 (9th Cir. 2002) (attorney disregarded court orders to proceed

1 with client's defense); Lal v. Calif., 610 F.3d 518 (9th Cir.
2 2010) (attorney deliberately misled clients and failed to proceed
3 with client's case despite court orders to do so).

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

14 **CONCLUSION**

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