NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-10-1497-KiMyD
CHRISTINE ELLIS and EDDIE ELLIS,	Bk. No. 09-25232-RJH
Debtors.	Adv. No. 10-00063-RJH
JACKSON PEAK; VIOLA PEAK,	
Appellants,	
v.	**M E M O R A N D U M**[1]
CHRISTINE ELLIS; EDDIE ELLIS,	
Appellees.	

Argued and Submitted on July 22, 2011,
at Phoenix, Arizona

Filed - August 1, 2011

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

Appearances: Michael J. Gordon of Gordon & Gordon, P.L.L.C. argued for Appellants Jackson and Viola Peak; Mark B. Pyper of Owens & Pyper PLC argued for Appellees Christine and Eddie Ellis

Before: KIRSCHER, MYERS[2] and DUNN, 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.

[2] Hon. Terry L. Myers, Chief Bankruptcy Judge for the District of Idaho, sitting by designation.

Appellants, Jackson and Viola Peak ("Peaks"), appeal an order from the bankruptcy court dismissing their adversary proceeding against appellees, chapter 7[3] debtors Christine and Eddie Ellis ("Ellises"), for failure to prosecute ("Dismissal Order"). Peaks also appeal the bankruptcy court's order denying their motion to reconsider the Dismissal Order ("Reconsideration Order"). We AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

Ellises are licensed real estate brokers in Arizona. Peaks are their former clients. Ellises filed a chapter 7 petition for relief on October 7, 2009. They identified Peaks as a secured creditor in their Schedule D holding a deed of trust for $150,000, and they listed Peaks as an unsecured creditor in their Schedule F holding a deed of trust for $282,000. Nowhere in either Schedule did Ellises provide a proper address for Peaks.

Peaks eventually found out about Ellises's bankruptcy, but only days before the deadline to file objections to discharge. On January 11, 2010, Peaks filed a complaint against Ellises seeking to except their debt from discharge under sections 523(a)(2), (a)(4), and (a)(6), and seeking to deny Ellises's discharge under section 727(a)(5).

In their complaint, Peaks alleged the following. In 2007, Peaks approached Ellises about selling their property located on Portland Street in Phoenix, Arizona (the "Portland Property").

---

[3] Unless specified otherwise, all chapter and code references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all Rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "FRCP."

Ellises agreed to list and sell the Portland Property. Rather than showing the Portland Property, however, Ellises directed potential buyers towards property owned by Ellises. Further, the MLS listing of the Portland Property was so substandard (containing multiple misspellings and incorrect or inadequate descriptions) as to be intentionally defective when compared to the listing of Ellises's own property.

Ellises subsequently offered to buy the Portland Property if Peaks would loan Ellises $230,000 so they could renovate it and resell it. To obtain the loan, Ellises represented that their properties had more than adequate equity and that they would provide Peaks with liens on those properties to secure the loan. Peaks agreed to lend the $230,000 to Ellises, and the parties executed a promissory note on July 16, 2007.

Peaks later discovered that Ellises were not paying the mortgages on their other properties, which were being foreclosed. In June 2009, about four months before filing bankruptcy, Ellises told Peaks they had sold the Portland Property for $460,000; in December 2008, Ellises had told Peaks they owed approximately $340,000 on the Portland Property. After the June sale, Ellises purported to have $30,000 in proceeds from the sale and offered this amount to "settle" the $230,000 obligation to Peaks. Peaks rejected the offer. Although Ellises continued to represent to Peaks that they would repay the loan once their other properties sold within a year, Ellises failed to pay. Peaks alleged that although a transfer of the Portland Property occurred within one year of bankruptcy, Ellises failed to disclose it in their Statement of Financial Affairs. Ellises also failed to account

for the $30,000 proceeds. Finally, Peaks alleged that Ellises misrepresented their gross income on the means test.

Copies of the complaint were served on Ellises and their counsel, Mark Pyper ("Pyper"), via mail. When no response was filed, Peaks moved for a default. At that point, Pyper contacted Lonnie McDowell ("McDowell"), counsel for Peaks, indicating that neither he nor Ellises received the complaint, and he asked McDowell to stipulate to vacate the default. McDowell agreed to do so based on Pyper's representation that the mailed complaints were never received. Shortly thereafter, Ellises filed an answer on August 10, 2010, admitting to the loan, but denying Peaks's allegations under sections 523 and 727. In the meantime, on July 22, 2010, the bankruptcy court had issued an "Order Re: Potential Dismissal." It states, in relevant part:

> There have been no proceedings for 6 or more months in the above captioned adversary proceeding. IT IS ORDERED that the parties to this action file a request for a status hearing at which good cause must be shown why this adversary proceeding should not be dismissed for want of prosecution. Bankruptcy Rule 7041(b). Any request for a status hearing shall be filed no later than 21 days from the date of this order. If no such request is timely filed, this proceeding shall be dismissed for want of prosecution.

Although no request for a status hearing was filed, the bankruptcy court did not dismiss the proceeding.

On August 16, 2010, the bankruptcy court issued an Order Setting Pre-Trial Status Conference. The parties were ordered to appear for a status hearing on September 22, 2010. They were also ordered to meet to develop a proposed discovery plan no later than 14 days prior to the status hearing, and to file a joint report no later than 10 days after the meeting. The parties did not meet to develop a discovery plan, did not file a joint report, and neither

party appeared at the September 22 status hearing.

On September 22, 2010, the bankruptcy court issued a minute entry order continuing the status hearing "one time" to October 20, 2010. The court further ordered the parties to file their Rule 7026 disclosure statement by October 8, to meet and confer and agree on a discovery plan by October 15, and to file the discovery plan by October 18. Notably, the September 22 order warned: "Any failure of the parties to abide by those deadlines or any failure of plaintiff to appear on October 20, 2010 at 10:00 AM. may result in dismissal of this complaint at that time for failure to prosecute."

McDowell failed to appear at the October 20 status hearing, but Pyper did appear. Pyper contended that his office had sent McDowell a proposed discovery plan but they never heard from him. In fact, contended Pyper, they had not heard anything from McDowell or Peaks since the commencement of the proceeding. Pyper then offered to provide the court with a dismissal order. The court noted that none of the deadlines set forth in the September 22 order were met, and that the order specifically noted failing to abide by those deadlines or to appear at the October 20 hearing would result in dismissal. Therefore, based on Peaks's nonappearance and their failure to comply with the September 22 order, the court dismissed the proceeding for failure to prosecute. It entered the Dismissal Order on October 21, 2010.

Peaks then filed a motion to reconsider the Dismissal Order pursuant to FRCP 60(b), made applicable to this proceeding by Rule 9024 ("Motion to Reconsider"). McDowell admitted to receiving the court's September 22 order, but due to excusable neglect the

disclosure deadline dates and October 20 hearing date did not get calendared on his office's electronic calendaring system. McDowell denied receiving the discovery plan allegedly sent by Pyper's office, and stated that no other correspondence, disclosure, or discovery was ever received from Ellises. He contended that had Pyper complied with the September 22 order by sending Ellises's own disclosure, or a letter, or an email, or had Pyper phoned McDowell, it would have alerted him that the disclosure and discovery plan deadlines had not been calendared. Thus, plaintiffs were not the only party at fault. Peaks further contended that the court also erred by never considering a lesser sanction. As such, dismissal was not warranted in this case. Notably, Peaks offered no explanation as to why they or McDowell also failed to attend the September 22 status hearing, which was set in the August 16 order.

Ellises opposed the Motion to Reconsider, contending that good cause existed to deny it. First, Peaks had failed to timely serve their adversary complaint in January 2010, and nothing happened until August 2010 when Peaks moved for default in response to the court's July 22 order warning of dismissal. Then, after the default was set aside, Peaks disappeared again; they failed to appear at two hearings and entirely ignored all deadlines. Second, Peaks had failed to respond to the proposed discovery plan sent by Pyper's office. Finally, contended Ellises, Peaks offered no grounds for excusable neglect.

In their reply, Peaks noted that Ellises's opposition failed to address how reinstating the case would prejudice them, or refute how public policy favors disposition of cases on their

merits, or discuss any lesser sanctions. They also noted that Ellises failed to explain why they too did not comply with the court's deadlines.

The bankruptcy court held a hearing on the Motion to Reconsider on November 30, 2010. The court noted that the motion failed to address why McDowell did not appear at the September 22 status hearing or comply with any of deadlines set forth in the August 16 order. McDowell explained that although his office received the court's notices, none of the deadlines or hearing dates set forth in the August 16 or September 22 orders were entered into his office's calendaring system, and that he took full responsibility for the error. The court then raised a fact not previously raised by either party; McDowell had failed to serve Ellises a summons with the complaint, and he failed to file a return of service. However, the court noted that such errors might be waived because Ellises filed an answer without objecting to lack of service. Nonetheless, the court opined that the service error was something it could consider in determining what is an appropriate remedy for Peaks' failure to prosecute.[4]

---

[4] Ellises likely waived the service error. Peaks contend on appeal that the bankruptcy court erred by considering McDowell's failure to serve the summons as an additional ground to dismiss the adversary proceeding. We disagree. Rule 7004 sets forth the procedure for serving a summons in an adversary proceeding. "[S]erving a summons . . . is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code." Rule 7004(f). Rule 7004(e) provides that service "shall be by delivery of the summons and complaint within 14 days after the summons is issued." FRCP 4(m), which has been incorporated into Rule 7004(a), requires that service be made within 120 days of filing a complaint:

> If a defendant is not served within 120 days after the

(continued...)

McDowell then asked the court for 10 days in which to confer with Pyper, propose and submit a discovery plan. After hearing further argument from the parties, the court denied the Motion to Reconsider:

> Well, primarily because this is not an isolated instance of the Plaintiff failing to comply with Court rules and deadlines. And indeed the order setting the second status conference at which Plaintiff did not appear, specifically noted that failure of the Plaintiff to appear on October 20 may result in dismissal of the complaint at that time for failure to prosecute. In light of such language, I cannot understand failure to docket and make sure that you appear at that hearing when you've been specifically advised that failure to appear may result in dismissal. That combined with the earlier default, plus the failure ever to serve the summons when the case was initiated, it's ordered denying the motion to vacate the order dismissing the case.

Hr'g Tr. (Nov. 30, 2010) at 8:24-9:11. The bankruptcy court entered the Reconsideration Order on November 30, 2010. This timely appeal followed.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(1) and (b)(2)(I). We have jurisdiction pursuant to 28 U.S.C. § 158.

III. ISSUES

1. Did the bankruptcy court abuse its discretion when it

---

[4](...continued)
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 . . . . (emphasis added).

Because McDowell failed to serve the summons within 120 days, the bankruptcy court could have dismissed the adversary proceeding on that basis alone, and it would not have abused its discretion in doing so. Accordingly, the court was free to find the service error an additional basis for dismissal.

dismissed the adversary proceeding for failure to prosecute?

2. Did the bankruptcy court abuse its discretion in denying the Motion to Reconsider the Dismissal Order?

IV. STANDARDS OF REVIEW

The bankruptcy court's sua sponte dismissal of an action for lack of prosecution is reviewed for an abuse of discretion. Oliva v. Sullivan, 958 F.2d 272, 274 (9th Cir. 1992). We also review a bankruptcy court's ruling on a motion for relief from judgment or order under FRCP 60(b) for abuse of discretion. Alonso v. Summerville (In re Summerville), 361 B.R. 133, 139 (9th Cir. BAP 2007); 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)(en banc). 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

A. The bankruptcy court did not abuse its discretion when it dismissed the adversary proceeding for failure to prosecute.

1. Dismissal Under Rule 7041.

Although Ellises agreed with the bankruptcy court's decision to dismiss the adversary proceeding for failure to prosecute, the court actually dismissed the matter sua sponte. The bankruptcy court has inherent authority to sua sponte dismiss a case for want of prosecution. Tenorio v. Osinga (In re Osinga), 91 B.R. 893, 894 (9th Cir. BAP 1988)(citing Henderson v. Duncan, 779 F.2d 1421 (9th Cir. 1986)).

In deciding whether to dismiss an action for lack of prosecution under FRCP 41(b), made applicable here by Rule 7041, the court must weigh five factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendant; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. Moneymaker v. CoBEN (In re Eisen), 31 F.3d 1447, 1451 (9th Cir. 1994); Osinga, 91 B.R. at 894. Each factor need not be present before the court may dismiss a case for failure to prosecute. Henderson, 779 F.2d at 1425.

A sua sponte dismissal further requires the court to provide notice giving a warning that dismissal is imminent. Oliva, 958 F.2d at 274; Hamilton v. Neptune Orient Lines, Ltd., 811 F.2d 498, 500 (9th Cir. 1987). In the case of sua sponte dismissal of an action, rather than dismissal following a noticed motion under FRCP 41(b), a closer focus is required on whether the trial court

considered less drastic sanctions and whether it warned of imminent dismissal. Oliva, 958 F.2d at 274.

Although beneficial to the reviewing court, a trial court is not required to make specific findings on each of the essential factors. Eisen, 31 F.3d at 1451 (citing Henderson, 779 F.2d at 1424). If a trial court does not make explicit findings, we "review the record independently to determine whether the court abused its discretion." Id. Here, the bankruptcy court did not make explicit findings on each factor. Therefore, we review the record, as well as what findings the court did make, to determine whether its decision to dismiss is supported.

2. Dismissal Factors.

a. Expeditious resolution of litigation.

In dismissing a case for lack of prosecution, the court must find unreasonable delay. Eisen, 31 F.3d at 1451 (citing Henderson, 779 F.2d at 1423). We give deference to the trial court to decide what is unreasonable "'because it is in the best position to determine what period of delay can be endured before its docket becomes unmanageable.'" Id. (quoting Henderson, 779 F.2d at 1423); Osinga, 91 B.R. at 895.

At the October 20 hearing, the bankruptcy court noted that Peaks had failed to appear at the September 22 hearing, and that they had failed to abide by the discovery deadlines imposed in the August 16 order. Peaks had also failed to comply with the discovery deadlines set forth in the September 22 order or appear at the October 20 hearing. Therefore, based on their nonappearance at two hearings and their failures to comply with any of the court's deadlines set forth in the August 16 and

September 22 orders, the court dismissed the proceeding for failure to prosecute. We further note that Peaks also failed to comply with the July 22 order, which informed them that nothing had occurred in the case since its filing six months prior, directed them to file a request for a status hearing, and provided them with their first warning of dismissal.

Peaks admit that this factor seems to favor dismissal. Nonetheless, they contend that Ellises had only filed their answer just two months before the bankruptcy court dismissed the case, thus any delay in this case was relatively minimal given that the pleadings had just recently been completed. While we appreciate Peaks's admissions here, we must reject their argument. The case was commenced on January 11, 2010. As of October 20, 2010, over 10 months later, nothing had happened in the case other than the filing of Ellises's answer. Peaks had not made any efforts to comply with any of the discovery deadlines set forth in the court's orders. The court also wasted its time and resources issuing three orders that Peaks ignored, and preparing for and attending two hearings at which Peaks failed to show. Although we recognize that Ellises were nearly as dilatory in their conduct, which also contributed to the delay, "[i]t is a well established rule that the duty to move a case is on the plaintiff and not on the defendant or the court." Osinga, 91 B.R. at 896 (quoting Fid. Phila. Trust Co. v. Pioche Mines Consol., Inc., 587 F.2d 27, 29 (9th Cir. 1978)). "It is the plaintiff's duty to expedite his case to its final determination, and if he allows delays by the defendant, he cannot complain of them." Id. (citing Boudreau v. United States, 250 F.2d 209, 211 (9th Cir. 1957)). While perhaps

this is not the most egregious case we have encountered, this factor weighs in favor of dismissal.

b. The court's need to manage its docket.

This factor is generally reviewed in conjunction with the public's interest in expeditious resolution of litigation to determine if unreasonable delay exists. We also give deference to the trial court on this factor since it knows when its docket may become unmanageable. Eisen, 31 F.3d at 1452 (citing Henderson, 779 F.2d at 1423).

Peaks also admit that this factor weighs in favor of dismissal, however, they contend that their failure to comply with two orders over the course of 60 days resulted only in a modest delay to the proceedings.

As we noted above, Peaks failed to comply with three orders, not two. Further, the adversary proceeding had been pending for over 10 months and seemed to be going nowhere. The bankruptcy court spent time out of its extremely busy docket to hold two status conference hearings at which Peaks failed to appear. Finally, the court decided to control its docket and dismiss the case. "Counsel for litigants . . . cannot decide when they wish to appear, or when they will file those papers required in a lawsuit. Chaos would result . . . . There must be some obedience to the rules of the court; and some respect shown to the convenience and rights of other counsel, litigants, and the court itself." Smith v. Stone, 308 F.2d 15, 18 (9th Cir. 1962). Accordingly, this factor weighs in favor of dismissal.

c. Risk of prejudice to the defendant.

The law presumes injury to the defendant from unreasonable

delay. Osinga, 91 B.R. at 895. However, the presumption of prejudice is a rebuttable one. Eisen, 31 F.3d at 1452. "In determining whether a defendant has been prejudiced, an appellate court is to consider whether plaintiff's actions impair defendant's ability to go to trial or threaten the rightful decision of the case." Osinga, 91 B.R. at 895.

Peaks argue that this factor cuts against dismissal because little if any prejudice occurred to Ellises, but the prejudice to be suffered by Peaks is severe if their nondischargeability action is dismissed. We agree.

We recognize that chapter 7 debtors like Ellises seek bankruptcy for the benefit of immediate relief from oppressive economic circumstances and a fresh start, and that creditors seeking to except their debts from a debtor's discharge should litigate their claims with reasonable promptitude. Id. However, we also recognize that the risk of prejudice by Peaks's actions of failing to attend both hearings or comply with the ordered discovery deadlines was negated by Ellises's failure to attend the September 22 hearing or comply with the ordered deadlines, and did not necessarily impair Ellises's ability to go to trial. As such, we believe this factor does not weigh in favor of dismissal.

d. Disposition of cases on their merits.

Courts weigh this factor against the plaintiff's delay and the prejudice suffered by the defendant. Eisen, 31 F.3d at 1454. Although, public policy favors resolution of cases on their merits and allowing plaintiffs to have their day in court, "it is the responsibility of the moving party to move towards that disposition at a reasonable pace . . . ." Id.

Peaks argue that this factor strongly weighs against dismissal. We disagree. As plaintiffs, Peaks were ultimately responsible for keeping the case moving and they failed to do so. Thus, public policy favoring the resolution of disputes on their merits does not outweigh what the bankruptcy court determined was unreasonable delay by plaintiff.

e. The availability of less drastic sanctions and warning of dismissal.

Not every conceivable sanction need be examined by the trial court, but meaningful alternatives must be explored. Hamilton, 811 F.2d at 500. In evaluating whether the trial court considered alternatives to dismissal, the reviewing court should consider the following factors: (1) Did the court explicitly discuss the feasibility of less drastic sanctions and explain why alternative sanctions would be inadequate? (2) Did the court implement alternative methods of sanctioning or curing the malfeasance before ordering dismissal? (3) Did the court warn plaintiff of the possibility of dismissal before actually ordering dismissal? Malone v. U.S.P.S., 833 F.2d 128, 132 (9th Cir. 1987).

Because we are faced with a sua sponte dismissal, we must focus on whether the bankruptcy court considered less drastic sanctions and whether it warned of imminent dismissal. While Peaks do not deny they were warned about dismissal, they contend nothing in the record indicates that the bankruptcy court ever considered the imposition of less drastic sanctions, such as monetary fines or disciplinary action against McDowell. Peaks argue that the default was due to McDowell's conduct, not their own, and equity and fairness required the bankruptcy court to

consider lesser sanctions than dismissal. While we agree that the bankruptcy court never explicitly discussed the feasibility of lesser sanctions, we disagree that it did not consider them.

On no less than two occasions - the July 22 order and the September 22 order - the bankruptcy court warned Peaks that their case may be dismissed for failure to prosecute. It finally dismissed the case after the second warning went unheeded. The court did consider and employed alternative methods of curing the malfeasance: it twice continued the status conference hearing and set new discovery deadlines, and it allowed the case to proceed despite warnings of dismissal if Peaks failed to comply with the court's mandates. Judging from their conduct, the alternative methods clearly were not effective. Even when faced with the ultimate sanction of dismissal, Peaks still failed to respond, thus making it difficult to imagine that a lesser sanction would have prompted them to improve their industriousness.

3. Disposition.

Overall, the Eisen factors weigh in favor of dismissal, particularly since the bankruptcy court considered and imposed other alternative methods to no avail, and provided Peaks with at least two warnings that dismissal was imminent. Accordingly, we cannot conclude on this record that the bankruptcy court abused its discretion in dismissing the adversary proceeding for failure to prosecute.

B. The bankruptcy court did not abuse its discretion when it denied the Motion to Reconsider the Dismissal Order.

Peaks contend the bankruptcy court abused its discretion in denying their Motion to Reconsider because it clearly erred by not

considering less drastic sanctions, citing FRCP 60(b)(1). While the circuits are split, the Ninth Circuit permits FRCP 60(b)(1) relief from judgment because of mistake, inadvertence, surprise, or excusable neglect made by the court itself, only if clear legal error exists. See Liberty Mut. Ins. Co. v. EEOC, 691 F.2d 438, 440–41 & n.5 (9th Cir. 1982); contra Silk v. Sandoval, 435 F.2d 1266, 1267–68 (1st Cir. 1971).

Because we have already determined that the bankruptcy court did consider, and actually imposed, lesser sanctions, we see no abuse of discretion here.

VI. CONCLUSION

For the reasons stated above, we AFFIRM.