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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: MICHAEL NAHASS, Debtor.

MICHAEL NAHASS, Appellant,

v.

BELLAGIO, LLC; MANDALAY CORP., Appellees.

BAP No. CC-11-1033-MkBPa

Bk. No. SA 09-14465-TA

Adv. No. SA 09-01606-TA

MEMORANDUM*

Argued and Submitted on July 21, 2011
at Pasadena, California

Filed – August 22, 2011

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

Honorable Theodor C. Albert, Bankruptcy Judge, Presiding

Appearances: Jose Perez of the Law Offices of Jose Perez argued on behalf of Appellant Michael Nahass; William A. Orzel of Stark & D'Ambrosio, LLP, argued on behalf of Appellees Bellagio, LLC and Mandalay Corp.

Before: MARKELL, BRANDT** and PAPPAS, Bankruptcy Judges.

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*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.

**Hon. Philip H. Brandt, U.S. Bankruptcy Judge for the Western District of Washington, sitting by designation.

INTRODUCTION

Debtor Michael Nahass ("Nahass") appeals the bankruptcy court's denial of his motion for an extension of time to appeal the default judgment that the court entered against him and in favor of the plaintiffs Bellagio, LLC, and Mandalay Corp. (jointly, the "Casinos"). We AFFIRM.

FACTS

Nahass filed his chapter 7[1] bankruptcy in May 2009, and the Casinos filed a nondischargeability complaint ("Complaint") in October 2009.[2] In the Complaint, the Casinos alleged that Nahass's gambling debts owed to the Casinos were nondischargeable under §§ 523(a)(2)(A) and (a)(6) and that he owed them in

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[1]Unless specified otherwise, all chapter and section 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. All "Civil Rule" references are to the Federal Rules of Civil Procedure.

[2]The complaint was untimely filed under Rule 4007(c). The deadline for filing a complaint for nondischargeability was August 21, 2009, and the Casinos did not file a motion to extend the deadline. We obtained this information by reviewing the bankruptcy court's electronic docket and the imaged documents attached thereto. We may take judicial notice of the contents of these items. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v. Chase Manhattan Mrtg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

At oral argument, the Casinos denied that their complaint was untimely. According to the Casinos, an order was entered extending the time to file nondischargeability complaints under § 523. This is incorrect. The only order of this type entered in this case was an order entered on August 18, 2009, extending the deadline for the U.S. Trustee to file a complaint objecting to Nahass's discharge under § 727. In any event, the filing deadline in Rule 4007(c) is not jurisdictional in nature. Schunck v. Santos (In re Santos), 112 B.R. 1001, 1006 (9th Cir. BAP 1990), so it does not affect the outcome of this appeal.

aggregate over $805,000.

When Nahass did not timely respond to the Complaint, the Casinos requested entry of default pursuant to Rule 7055. After the court entered Nahass's default, the Casinos filed a motion for default judgment ("First Default Judgment Motion") under Civil Rule 55(b). While nothing in the record or on the face of the adversary proceeding docket tells us when or how the court disposed of the First Default Judgment Motion, the Casinos have represented that the court denied the First Default Judgment Motion without prejudice.

Meanwhile, Nahass filed a motion to set aside the entry of default on May 3, 2010. Nahass asserted that he had meritorious defenses to the Complaint and that confusion and mis-communication between Nahass and his counsel led to Nahass not filing his answer. The Casinos opposed the motion to set aside. Among other things, the Casinos asserted that Nahass had appeared at a status conference on January 28, 2010, at which he represented that he did not plan to contest the matter.

The bankruptcy court orally denied Nahass's motion to set aside at a hearing held on May 25, 2010 (apparently attended by counsel for both parties), and the court entered an order on August 23, 2010, reflecting its denial.

On August 20, 2010, the Casinos filed a new motion for default judgment ("Second Default Judgment Motion"). Nahass did not file an opposition to the Second Default Judgment Motion, and the court entered a default judgment on October 18, 2010.

Under Rule 8002(a), the deadline for Nahass to appeal the order entered on the Second Default Judgment Motion ran as of

November 1, 2010. Seventeen days later, on November 18, 2010, Nahass filed a motion pursuant to Rule 8002(c)(2) seeking an extension of time to file an appeal from the default judgment ("Extension Motion"). The declaration of Nahass's counsel attached thereto stated that, other than the summons and complaint, he never received any papers regarding this matter from the Casinos, but rather obtained them by examining the court's docket. Counsel particularly noted that he never received the Casinos' Second Default Judgment Motion and that he certainly would have opposed it if he had received it. Counsel also represented that he never received from the court: (1) notice of entry of the August 23, 2010 order denying his motion to set aside, and (2) notice of entry of the default judgment. According to counsel, his email address is joseperezlaw@aol.com, but the court purported to serve these notices of entry to a different email address, opendocbox@yahoo.com.[3]

Nahass's counsel further claimed:

> After May 25, 2010, I maintained a regular review of the Court's docket in order to determine when documents would be filed. However, after nearly three months had passed, my attention to the docket was distracted given the press of other business and the fundamental belief that although the Court had [orally] denied the Motion to Vacate Default [at the May 25, 2010 hearing], that the Answer of Defendant had rendered the Motion moot. As such, I did not learn about entry of the default

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[3]Counsel never has affirmatively specified what email address he gave the court for electronic service of documents. Nor has he explained why the bankruptcy court, to this day, still shows the latter email address on its bankruptcy docket. At oral argument before this panel, counsel admitted that he never has taken any steps towards having the bankruptcy court correct the docket's reference to the allegedly incorrect email address.

judgment, and entry of judgment until November 16, 2010, which caused this present Motion to be filed, together with a Proposed Notice of Appeal.

Motion for Leave to File Late Notice of Appeal (Nov. 18, 2010), at p.15.

The Casinos filed an opposition to the Extension Motion, to which they attached as exhibits proofs of service reflecting service by mail of a number of their documents on Nahass's counsel at his business address. They also attached the declaration of Joanna Ceballos, who served the subject documents on behalf of the Casinos and who gave further information on the circumstances and method by which service was accomplished, all tending to refute Nahass's counsel's claims of non-receipt.

Both parties acknowledged that Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993), applied to Nahass's Extension Motion and both discussed at length how they thought the factors articulated in Pioneer applied to this matter.[4] Nahass focused on the prejudice he would suffer if his Extension Motion were denied and the length of time it took the court and the Casinos to move from oral denial of his motion to set aside to entry of an order denying his motion to set aside. Nahass also focused on his alleged non-receipt of documents, as set forth above.

The Casinos, in turn, claimed that they would be prejudiced if they had to prosecute the merits of their nondischargeability

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[4]Those factors are: "the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Id. at 395.

complaint after having spent a considerable amount of time and effort obtaining a default judgment. They also disputed the merit of any of Nahass's counsel's excuses for not timely filing either an extension motion or a notice of appeal. The Casinos also pointed to the apparent tension between Nahass's counsel's allegation that he was monitoring the docket with his claim that he first learned of the default judgment on November 16, 2010.

The court held a hearing on the Extension Motion on January 13, 2011. We do not have a copy of the transcript from this hearing, but the docket indicates that the Extension Motion was orally denied at the hearing. The bankruptcy court entered its written order denying the Extension Motion on February 22, 2011 ("Extension Motion Denial Order").

The Extension Motion Denial Order concluded that Nahass had not established the necessary excusable neglect to persuade the court to grant the requested extension. The written order did not expressly refer to the Pioneer factors, but the bankruptcy court obviously was aware of the importance of the Pioneer factors because both parties argued the factors at length in their respective papers. And we cannot discern what, if anything, the court said at the actual hearing, due to the fact that neither party designated or produced a copy of the transcript from the January 13, 2011 hearing.

The Extension Motion Denial Order did discuss one of the four Pioneer factors (the cause of the filing delay). In essence, the bankruptcy court found that the cause of the filing delay was Nahass's counsel's failure to adequately monitor the court's docket in order to ascertain when the notice of appeal

was due.[5] Because we do not have the transcript from the January 13, 2011 hearing, we only can speculate regarding the bankruptcy court's findings with respect to the other Pioneer factors.

Nahass timely appealed the Extension Motion Denial Order.[6]

JURISDICTION

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

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[5]The relevant part of the order reads as follows:

> It is well settled that failure to receive notice of entry of judgment or order is not an excuse for untimely appeal because it is the party's affirmative duty to monitor the dockets. In re Cahn, 188 B.R. 627, 632 (9th Cir. BAP 1995). Furthermore, FRBP 9022 provides that lack [of] notice of entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by FRBP 8002. Had Defendant's counsel been monitoring the docket as he asserts he was, he should have found the judgment before November 16, 2010, as it was entered on October 18, 2010. Defendant provides no legal authority to support his contention that it is unreasonable for counsel to have to check the docket regularly while a case is pending.

Extension Motion Denial Order (Feb. 22, 2011), at pp. 1-2.

[6]As permitted by Rule 8002(a), Nahass filed his notice of appeal of the Extension Motion Denial Order on January 20, 2011, after the court orally announced its denial of the Extension Motion but before the court entered the order on February 22, 2011.

ISSUE[7]

Did the bankruptcy court abuse its discretion when it denied Nahass's Extension Motion?

STANDARD OF REVIEW

We review for abuse of discretion the bankruptcy court's denial of the Extension Motion. See Pincay v. Andrews, 389 F.3d 853, 858 (9th Cir. 2004) (en banc).

Under the abuse of discretion standard of review, 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). And if the bankruptcy court identified the correct legal rule, we then determine under the clearly erroneous standard whether its factual findings and its application of the facts to the relevant law were: "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." Id. (internal quotation marks and citation omitted).

DISCUSSION

A. Inadequate Record.

Nahass, as the appellant, was required to provide us with an adequate record on appeal. Kritt v. Kritt (In re Kritt),

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[7]Nahass's notice of appeal referenced both the default judgment and the Extension Motion Denial Order, but the parties only briefed the appeal of the Extension Motion Denial Order. In any event, we lack jurisdiction over the appeal of the default judgment, because that appeal is untimely (and because the bankruptcy court did not grant an extension under Rule 8002(c)(2)). See Browder v. Director, Dep't of Corrections of Ill., 434 U.S. 257, 264 (1978); Slimick v. Silva (In re Slimick), 928 F.2d 304, 306 (9th Cir. 1990). Accordingly, our review is limited to the Extension Motion Denial Order.

190 B.R. 382, 387 (9th Cir. BAP 1995). In his appeal brief, Nahass did not argue that the bankruptcy court selected the wrong legal rule to apply; rather, he focused on all of the factual contentions he made in the bankruptcy court that in his view demonstrate excusable neglect under the Pioneer factors.[8] In other words, Nahass appears to challenge on appeal the bankruptcy court's findings relating to the Pioneer factors. If so, he needed to demonstrate to us how the findings of the bankruptcy court were clearly erroneous and needed to provide us with the bankruptcy court's findings and all evidence upon which those findings were based. Burkhart v. Fed. Dep. Ins. Corp. (In re Burkhart), 84 B.R. 658, 660 (9th Cir. BAP 1988). When the findings of fact and conclusions of law are stated orally on the record, the appellant must include a transcript in the excerpts of record. See McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999). Failure to provide necessary transcripts may be grounds for dismissal or summary affirmance of the appeal. Syncom Capital Corp. v. Wade, 924 F.2d 167, 169 (9th Cir. 1991); Kyle v. Dye (In re Kyle), 317 B.R. 390, 393 (9th Cir. BAP 2004), aff'd, 170 Fed. Appx. 457 (9th Cir. 2006); In re McCarthy, 230 B.R. at 417.

Furthermore, when Nahass filed this appeal, he originally indicated in his notice of transcripts filed in the bankruptcy

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[8]If there were any issue regarding the legal rule that the bankruptcy court selected to apply, Nahass has waived it by not raising and arguing the issue on appeal. See Golden v. Chicago Title Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002); Branam v. Crowder (In re Branam), 226 B.R. 45, 55 (9th Cir. BAP 1998), aff'd, 205 F.3d 1350 (9th Cir. 1999).

court on February 8, 2011, that he intended to obtain the transcript from the January 13, 2011 hearing.[9] But he never did so. On May 20, 2011, even though briefing had been completed, and the transcript from the January 13, 2011 hearing was well past due, the BAP Clerk's Office issued an order pointing out that Nahass never had obtained the transcript from the January 13, 2011 hearing and warning him that failure to do so might result in affirmance or dismissal of his appeal. The May 20, 2011 order gave Nahass until June 10, 2011, to obtain the missing transcript and file a copy of it with the BAP, but Nahass has not complied with the order.

We are entitled to infer that nothing exists in the missing transcript that would help Nahass's position in this appeal. Gionis v. Wayne (In re Gionis), 170 B.R. 675, 680-81 (9th Cir. BAP 1994). In addition, we will infer from the fact that the parties focused on the Pioneer factors in their arguments to the bankruptcy court that the bankruptcy court ruled on those factors when it orally denied Nahass's extension motion.

In sum, Nahass has hamstrung our review by not providing us with the transcript from the January 13, 2011 hearing. Nonetheless, we will exercise our discretion to conduct our appellate review as best we can without that key transcript. See In re Kyle, 317 B.R. at 393.

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[9]He actually listed the hearing date as January 19, 2011, in his transcript order notice, but it is obvious on this record that he meant January 13, 2011, as there were no other hearings in this adversary proceeding in 2011, and no other hearings as material to this appeal as the January 13, 2011 hearing.

B. Merits.

Rule 8002 provides that a notice of appeal must be filed "within 14 days of the date of the entry of the judgment, order, or decree appealed from." Rule 8002(a). A motion to extend this deadline must be filed within this fourteen-day period, "except that such a motion filed not later than 21 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect." Rule 8002(c)(2). Here, Nahass filed his Extension Motion seventeen days after the expiration of the filing deadline. Consequently, unless he showed excusable neglect, the bankruptcy court lacked authority to grant the extension of time.

In Pioneer, 507 U.S. 380, the Supreme Court considered the meaning of excusable neglect in the context of a motion under Rule 9006(b)(1), but Pioneer also applies to motions to extend the time to file notices of appeal under both FRAP 4(a)(5)(A) and Rule 8002(c)(2). Pincay, 389 F.3d at 854-55; Marx v. Loral Corp., 87 F.3d 1049, 1054 (9th Cir. 1996); Warrick v. Birdsell (In re Warrick), 278 B.R. 182, 187 (9th Cir. BAP 2002).

Pioneer identified four factors to be used to determine whether the delay in filing constituted excusable neglect: "the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Pioneer, 507 U.S. at 395. But Pioneer also made clear that its factors were nonexclusive: "the determination is at bottom an equitable one, taking account of all relevant circumstances

surrounding the party's omission." Id.

Following Pioneer's lead, the Ninth Circuit Court of Appeals in Pincay, 389 F.3d 853, emphasized that the trial court is best situated to make the excusable neglect determination:

> . . . the decision whether to grant or deny an extension of time to file a notice of appeal should be entrusted to the discretion of the district court because the district court is in a better position than we are to evaluate factors such as whether the lawyer had otherwise been diligent, the propensity of the other side to capitalize on petty mistakes, the quality of representation of the lawyers . . . and the likelihood of injustice if the appeal was not allowed. Had the district court declined to permit the filing of the notice, we would be hard pressed to find any rationale requiring us to reverse.

Pincay, 389 F.3d at 859. Pincay thus stands for the unremarkable proposition that the trial court enjoys broad discretion in making the excusable neglect determination.

With these standards in mind, we will look at the arguments that Nahass has made on appeal. Nahass primarily argues that the bankruptcy court should have found excusable neglect because of inadequate service. Nahass's counsel asserts that he never received any documents from the Casinos other than their summons and complaint. On this record, however, this argument fails because of the presumption that documents duly served by mail are deemed received. Berry v. U.S. Trustee (In re Sustaita), 438 B.R. 198, 209 (9th Cir. BAP 2010); see also Lewis v. United States, 144 F.3d 1220, 1222 (9th Cir. 1998); Herndon v. De La Cruz (In re De la Cruz), 176 B.R. 19, 22 (9th Cir. BAP 1994). This presumption preserves our system of providing notice to interested parties via service by mail; without this presumption, the system would unravel because every litigant could defeat a

claim of service by mail with an unsubstantiated denial of receipt. In re Sustaita, 438 B.R. at 209 (citing CUNA Mut. Ins. Grp. v. Williams (In re Williams), 185 B.R. 598, 599-600 (9th Cir. BAP 1995)). For this reason, a litigant challenging notice served by mail must show "by clear and convincing evidence that the mailing was not, in fact, accomplished." In re Sustaita, 438 B.R. at 209 (quoting Moody v. Bucknum (In re Bucknum), 951 F.2d 204, 207 (9th Cir. 1991)).

Nahass fails to meet this standard. His only evidence as to lack of notice is his counsel's unsubstantiated denial in a declaration that he did not receive any papers from the Casinos other than their summons and complaint. Based on the authority set forth above, Nahass's evidence in support of this argument was insufficient as a matter of law.

Nahass also argues that his counsel did not receive any notices of entry of orders from the bankruptcy court. However, as the bankruptcy court pointed out, Nahass had an affirmative duty as a matter of law to monitor the docket for entry of such orders. See In re Cahn, 188 B.R. at 632; Rule 9022(a). Alleged non-receipt of notice of entry does not obviate that duty. See Id. Consequently, even if we were to assume that Nahass's counsel did not receive notice of entry, that fact would not tend to show that Nahass's counsel's neglect to adequately monitor the docket was excusable. To hold otherwise would entirely negate Nahass's counsel's duty in the first place. Simply put, Nahass's argument that he did not receive notice of entry can not establish that his neglect was excusable; rather, it suggests he neglected his duties in the first place – an argument which

avails him of nothing.

Nahass next argues that his counsel's neglect was excusable because his counsel's efforts to monitor the docket were hampered by the long time it took the bankruptcy court to enter an order denying his motion to set aside the entry of default. According to Nahass, the eighty-eight days that elapsed between the May 25, 2010 hearing at which the court orally denied his motion and entry of the order denying the motion on August 23, 2010, was simply too long to expect his counsel to maintain his duty to monitor the docket, given the press of other business and his incorrect assumption that the motion to set aside had become moot.

But this argument is a red herring. The August 23, 2010 order denying the motion to set aside was an interlocutory order, and that order merged into the court's October 18, 2010 default judgment. See Baldwin v. Redwood City, 540 F.2d 1360, 1364 (9th Cir. 1976). Thus, the time to appeal began to run from the entry of the default judgment and not from entry of the order denying the motion to set aside. In short, Nahass does not give any viable explanation (nor are we aware of any) why the delay in entry of the order denying his motion to set aside is relevant to his neglect to adequately monitor the docket for entry of the default judgment.

In sum, none of the arguments that Nahass has made on appeal have any merit. Consequently he has not demonstrated that the bankruptcy court's excusable neglect determination under Pioneer was "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record."

Hinkson, 585 F.3d at 1262 (citation omitted). Accordingly, we conclude that the bankruptcy court did not abuse its discretion when it denied Nahass's Extension Motion.

CONCLUSION

For all of the reasons set forth above, the bankruptcy court's Extension Motion Denial Order is AFFIRMED.