NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-10-1353-KiDMk
WILLIAM ERNESTO REYES,	Bk. No. LA 08-18248-BB
Debtor.	Adv. No. LA 08-01732-BB
FIRST NATIONAL BANK OF OMAHA,	
Appellant,	
v.	**M E M O R A N D U M**[1]
WILLIAM ERNESTO REYES,	
Appellee.	

Submitted Without Oral Argument
on June 13, 2011[2]

Filed - July 14, 2011

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

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding

Appearance: Dennis Winters, Esq. on brief for Appellant

Before: KIRSCHER, 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.

[2] On June 13, 2011, we issued an order granting appellant's request to waive oral argument and submit this appeal on the brief and appellate record. Appellee has never appeared in this appeal.

Appellant, First National Bank of Omaha ("First National"), appeals two orders from the bankruptcy court: one dismissing its adversary proceeding against chapter 7[3] debtor, William Ernesto Reyes ("Reyes"), for failure to prosecute ("Dismissal Order"), and the other denying First National's motion to reconsider the Dismissal Order ("Reconsideration Order"). We AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

Reyes filed a voluntary chapter 7 petition for relief on June 10, 2008. On September 8, 2008, the last day for filing an exception to discharge complaint, First National filed a complaint against Reyes seeking to except from discharge an approximately $9,000 credit card debt under section 523(a)(2)(A). First National contended that Reyes had obtained money by false pretenses, false representation, or actual fraud. Reyes failed to file an answer, so First National requested an entry of default.

Thereafter, on January 20, 2009, First National moved for a default judgment against Reyes. Reyes finally appeared and opposed the default judgment and moved to set aside the default. On May 15, 2009, the bankruptcy court denied First National's motion for default judgment and granted Reyes's motion to set aside the default. Reyes then filed an answer to First National's complaint on June 3, 2009. Reyes denied even having a credit card with First National, that he had made any charges on such card, or that he had defrauded First National.

In July 2009, the parties submitted respective status

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

reports. Reyes expressed an interest in mediating the matter; First National did not wish to mediate. The bankruptcy court held a status conference on July 14, 2009. The court ordered that a joint status report be filed by October 20, 2009. The status hearing was continued to November 3, 2009.

On November 10, 2009, the bankruptcy court issued an order imposing sanctions of $150.00 against Dennis Winters, Esq. ("Winters"), counsel for First National, for failing to appear at the continued status conference on November 3, and for failing to participate in the preparation of a joint status report. The sanction order also set a pretrial conference for December 15, 2009, and directed the parties to file a pretrial order by December 1, 2009. The parties were also to lodge an order appointing a mediator by November 23, 2009, and to complete one day of mediation by December 15, 2009.

No order appointing a mediator was lodged by November 23 as ordered. No pretrial order was filed by December 1 as ordered. However, on December 8, 2009, Winters untimely filed a Declaration re Unilateral Pre-Trial Order in which he stated that on December 3, 2009, he sent a fax to Reyes's counsel, Diane Carey, Esq. ("Carey"), but that as of December 8 he had not yet heard from her. Nonetheless, Winters stated that he would continue his efforts to contact Carey in order to cause a joint pretrial order to be filed, but, in the meantime, he was submitting a proposed unilateral pretrial order.

The bankruptcy court held the continued status conference on December 15, 2009. The court's tentative ruling on that date states: "Dismiss action for failure to prosecute." According to

the docket minutes, the court ordered that a joint pretrial order be filed by February 16, 2010, that an order appointing a mediator be filed by December 30, 2009, and that the parties complete one day of mediation by March 2, 2010. The status conference was continued to March 2, 2010, and was later continued to April 6, 2010. The court's tentative ruling dated March 2, 2010, states: "If this matter has not been settled, issue OSC why action should not be dismissed for failure to prosecute."

An order appointing a mediator was timely filed on December 29, 2009. However, on March 22, 2010, the mediator filed a notice of non-compliance with the mediation program stating that Winters had failed to appear at the scheduled mediation. After the continued status conference hearing on April 6, the bankruptcy court issued an order on April 9, 2010, imposing sanctions of $150.00 on Winters for failing to appear at the mediation without any satisfactory explanation. A continued status conference was set for May 25, 2010. The parties were ordered to file a joint pretrial order by May 11, 2010, and to complete at least one day of mediation by May 25, 2010.

No mediation occurred, and no joint pretrial order was filed by May 11, 2010. However, on May 21, 2010, Winters untimely filed another Declaration re Pre-Trial Order. Winters stated that, as ordered by the court at the last hearing, he attempted to contact Carey on several occasions to create a joint pretrial order but she was unresponsive. Winters had also proposed several dates for mediation to Carey, but the dates had passed without him receiving any response from her.

The continued status conference took place on May 25, 2010.

The bankruptcy court noted that the parties failed to lodge a pretrial order by May 11, 2010. As a result, it again continued the status conference to June 8, 2010.

According to the bankruptcy court's tentative and final rulings dated June 8, 2010, Winters appeared for the June 8 continued status conference but Carey did not. Specifically, the June 8 final ruling stated:

> Parties will lodge a joint pretrial order by June 15. If for any reason they are unable to agree on the form of a joint pretrial order, plaintiff shall lodge a unilateral pretrial order and file a declaration attesting to efforts to agree upon form of joint order.

Its tentative ruling for that date states: "Dismiss adversary proceeding for failure to prosecute." The bankruptcy court again continued the status conference to June 29, 2010.

No pretrial order was filed by June 15. On June 23, 2010, First National untimely filed Plaintiff's Proposed Pre-Trial Statement and Declaration re Pre-Trial Order. Winters stated in his declaration that he had made numerous phone calls and sent numerous emails and faxes to Carey regarding a joint pretrial order but got no reply. As a result, he was unsuccessful in getting Carey to agree to a joint pretrial order, so he did as the court ordered and filed a unilateral pretrial order.

The continued status conference hearing went as scheduled on June 29, 2010. The bankruptcy court, sua sponte, dismissed the adversary proceeding for failure to prosecute. The bankruptcy court's tentative ruling from that date states:

> As of June 18, 2010, the docket does not reflect the filing of a declaration or a notice of continuance and no joint or unilateral pretrial has been lodged. Dismiss case for failure to prosecute.

The bankruptcy court entered the Dismissal Order on July 2, 2010.

On July 12, 2010, First National timely moved to reconsider the Dismissal Order pursuant to FRCP 60(b)(1), made applicable here by Rule 9024, on the grounds of mistake or excusable neglect ("Motion to Reconsider"). First National contended that Winters did not have the correct deadline date for filing a unilateral pretrial order, thus explaining why it was untimely. However, contended First National, it was now ready to proceed with setting a trial date, there was no prejudice to Reyes, and even the court acknowledged that Carey was partially at fault for the delays in the proceeding. Moreover, according to Winters's declaration, Carey had now agreed to changes contemplated in the previously filed unilateral pretrial order. Therefore, contended First National, dismissal was too harsh a sanction and the Dismissal Order should be set aside.

The bankruptcy court held a hearing on First National's Motion to Reconsider on August 10, 2010. Winters admitted to the late filings in this case, but he contended that any delay was the fault of Carey. The court recognized that Carey had been uncooperative, but, in that event, First National should have filed a unilateral pretrial order as ordered:

> [T]here's just sanction after sanction for different things that weren't done in this case, and I've been growing increasingly frustrated until finally we got to the last hearing for the umpty-ninth time when I didn't have a document in the form that I wanted it, and I was pretty - - pretty direct about it that this is it, last try. You know, get [Carey's] cooperation if you can. If you can't, file [a pretrial order] by June 15, and it didn't happen by that date . . . .
>
> So that's why I did what I did, and I -- I know that's very harsh . . . but this case has been perhaps the worst example that I've had in practice . . . it's been like trying to pull

> teeth to get this case to move forward, and I really just eventually lost patience . . . and so I went ahead and dismissed it, and I'm not inclined to reverse that here.

Hr'g Tr. (Aug. 10, 2010) at 2:16-3:9.

The bankruptcy court entered the Reconsideration Order denying First National's Motion to Reconsider on September 1, 2010. First National timely appealed both the Dismissal Order and the Reconsideration Order on September 13, 2010. See Rule 8002(b)(4)(timely Rule 9024 motion tolls appeal time of the underlying judgment or order).

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 dismissed First National's adversary proceeding for failure to prosecute?

2. Did the bankruptcy court abuse its discretion in denying First National's 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).

To determine whether the bankruptcy court abused its discretion, we conduct a two-step inquiry: (1) we review de novo whether the bankruptcy court "identified the correct legal rule to apply to the relief requested" and (2) if it did, whether the bankruptcy court's application of the legal standard was illogical, implausible or "without support in inferences that may be drawn from the facts in the record." United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009).

V. DISCUSSION

A. The bankruptcy court did not abuse its discretion when it dismissed First National's adversary proceeding for failure to prosecute.

We start our discussion by noting that appellant has the burden of providing an adequate record on review. See Kritt v. Kritt (In re Kritt), 190 B.R. 382, 387 (9th Cir. BAP 1995). According to the Dismissal Order, the bankruptcy court set forth its finding and conclusions for dismissal at the June 29 hearing. First National failed to provide a copy of the transcript from that hearing. On May 19, 2011, we ordered First National to file the June 29 transcript by June 3, 2011. On June 1, Winters, counsel for First National, filed a copy of the August 10, 2010 transcript already submitted. On June 3, 2011, Winters filed a response stating that he had ordered the June 29 transcript, but was advised "there was no record of a recording for that hearing date." Actually, there was a recording, but Winters had ordered a transcript from June 29, 2009, not 2010, so, technically, no recording of the hearing did exist for June 29, 2009. Fortunately, we were able to obtain an audio recording of the June 29, 2010 hearing, so we can proceed to review this appeal.

First National contends that the bankruptcy court erred when it dismissed the adversary proceeding based only on its failure to file a pretrial order by June 15, 2010. Specifically, First National contends that the bankruptcy court erred by: (1) refusing to consider lesser sanctions; (2) failing to give proper pre-dismissal warning; (3) failing to consider the lack of prejudice to Reyes; and (4) failing to consider that Carey was equally or more culpable for any delay. We reject all of First National's arguments.

1. Dismissal Under Rule 7041.

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 to the subject proceeding 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), there is a closer focus 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.

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.

By contending that the bankruptcy court erroneously dismissed the adversary proceeding based only its failure to timely file a pretrial order, First National fails to tell the full story. Not only did the bankruptcy court express its frustration about the unreasonable delay in this case at the August 10 hearing on the Motion to Reconsider, it expressed it at the hearing on June 29 when it dismissed the case:

> I'm going to dismiss this action for failure to prosecute. I really had it on this. The parties have both been -- dilatory, but you're the plaintiff. And I was pretty specific last time and the fact that you didn't write it down, I don't have to tell you, but I was very specific, enough already, we're gonna do this one more time, and I want either -- a joint [pretrial order] or I want your unilateral one, and I want it by the 15th . . . .

Hr'g at 1:52-2:14, June 29, 2010. When Winters contended that a one-week delay in filing the pretrial order was not grounds for dismissal, the court replied:

> Yeah, and I wouldn't have done it if it was just the one late filing, it's that I've got all the way back to March 2nd the parties haven't lodged a joint pretrial order, and back then and maybe even sooner, let's see -- back in December no pretrial order -- no but my point is, there was a pattern of this . . . .

Id. at 2:56-3:10. When Winters argued that he had filed three declarations articulating his attempts to reach Carey to draft a joint pretrial order, the court noted that none of them had been timely filed.

Although Carey contributed to the delays with her seemingly uncooperative behavior, "[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)). Therefore, considering the deference we must afford the bankruptcy court to determine what it concludes is unreasonable delay, this factor clearly 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).

Here, the adversary proceeding had been pending for almost two years and still seemed to be going nowhere. The bankruptcy court spent a great deal of time out of its extremely busy docket to hold numerous status conference hearings at which either counsel for First National or Reyes failed to appear. No pretrial order was ever filed timely and/or the orders filed failed to comply with the bankruptcy court's mandate, which too wasted precious judicial resources. Finally, the court decided "enough is enough on this one." 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.

We recognize that chapter 7 debtors such as Reyes 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 debtor's discharge should litigate their claims with reasonable promptitude. Id. However, we also recognize that the risk of prejudice by Winters's actions of failing to attend a mediation or filing timely pretrial orders were arguably negated to some degree by Carey's behavior, and did not necessarily impair Reyes's ability to go to trial. Although a more difficult call, 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. This factor weighs in favor of dismissal even though the factor of risk of prejudice to Reyes may not. First National was ultimately responsible for keeping the case moving and it failed to do so. Thus, public policy favoring the resolution of disputes on their merits does not outweigh what the bankruptcy court determined was significant delay by plaintiff. Therefore, this factor weighs in favor of dismissal.

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).

The bankruptcy court issued monetary sanctions against Winters on two occasions prior to dismissal - once on November 10, 2009, for failing to appear at the continued status conference on November 3, 2009, and for failing to participate in the preparation of a joint status report, and a second time on April 9, 2010, for failing to appear at a mediation without any reasonable explanation. Despite the sanctions, however, Winters continued to miss deadline after deadline for filing a pretrial order. Finally, after missing yet another deadline on June 15, 2010, the bankruptcy court dismissed the adversary proceeding. Clearly, and even the bankruptcy court acknowledged, any less drastic sanctions were not, and likely would not have been, effective.

Moreover, First National unconvincingly contends that the bankruptcy court failed to give any warning prior to dismissal. The court provided First National with at least three warnings of imminent dismissal of the adversary proceeding in its tentative rulings of December 15, 2009, March 2, 2010, and June 8, 2010. Furthermore, based on its statements at the June 29 and August 10 hearings, the bankruptcy court had warned Winters at the June 8 hearing that the case would be dismissed if he did not comply with

the June 15 deadline.

3. Disposition.

Overall, the Eisen factors weigh in favor of dismissal of First National's adversary proceeding, particularly since the bankruptcy court considered and imposed less drastic sanctions to no avail, and provided First National with at least three warnings (that we know of) that dismissal was imminent. Accordingly, we cannot conclude on this record that the bankruptcy court abused its discretion in dismissing First National's adversary proceeding for failure to prosecute.

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

First National contends the bankruptcy court erred in denying its Motion to Reconsider because it showed excusable neglect and mistake in that Winters had written down the incorrect deadline date for the pretrial order and no written order existed setting forth the June 15 deadline. First National also contends that denying its Motion to Reconsider was error because, subsequent to dismissal, the parties agreed to a joint pretrial order.

FRCP 60(b), made applicable here by Rule 9024, provides in relevant part that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons . . . (1) mistake, inadvertence, surprise, or excusable neglect." The moving party has the burden to establish the grounds for the court to set aside or modify its judgment. Martinelli v. Valley Bank of Nev. (In re Martinelli), 96 B.R. 1011, 1013 (9th Cir. BAP 1988). The United States Supreme Court held in Pioneer Inv. Servs. Co. v. Brunswick

Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993), that "excusable neglect" covers negligence on the part of counsel. The determination of whether neglect is excusable is an equitable one that depends on at least four factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. Id.

We disagree that First National showed excusable neglect or mistake under Rule 9024. At the beginning of the June 29 hearing, when the court asked Winters why he had not filed the pretrial order by June 15th, he stated: "I did not write that [date] down. There was an indication on the docket that you said the 15th." Hr'g at :20-:23. By his own admission, Winters was aware of the June 15 deadline and that it was posted on the tentative/final rulings calendar. The court's tentative/final ruling from June 8, 2010, clearly states that the parties were to file a joint pretrial order by June 15, and, if that was not possible, then First National was to file a unilateral pretrial order by June 15.

Even if Winters did not see the court's June 8 ruling setting forth the June 15 deadline until after the 15th, which caused the late filing on June 23, that does not negate the many other times First National failed to comply with the bankruptcy court's deadlines for filing a pretrial order, or that Winters failed to attend mediation without excuse. Moreover, and it seems odd that after dismissal Carey would be more cooperative, Carey's alleged willingness to enter now into a joint pretrial order is too little too late for First National.

Accordingly, we cannot conclude that the bankruptcy court

abused its discretion in denying First National's Motion to Reconsider.

VI. CONCLUSION

Because the bankruptcy court did not abuse its discretion when it dismissed First National's adversary proceeding for failure to prosecute, or abuse its discretion when it denied First National's Motion to Reconsider, we AFFIRM.