

APR 02 2012

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No. EC-10-1511-DMkPa
7	JIMMIE EARL STEPHEN,)	Bk. No. 10-50583
8	Debtor.)	
9	_____)	
10	JIMMIE EARL STEPHEN,)	
11	Appellant,)	
12	v.)	MEMORANDUM¹
13	ALAN S. FUKUSHIMA, Trustee;)	
14	UNITED STATES TRUSTEE,)	
15	Appellees.)	
16	_____)	

Submitted Without Oral Argument
on March 22, 2012

Filed - April 2, 2012

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

Honorable Robert S. Bardwil, Bankruptcy Judge, Presiding

Appearances: Appellant Jimmie Earl Stephen, pro se, on brief;
neither appellee filed a brief.

Before: DUNN, MARKELL and PAPPAS, 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 The debtor, Jimmie Earl Stephen ("Mr. Stephen"), appeals the
2 bankruptcy court's order dismissing his chapter 7² bankruptcy
3 case for failing to file certain documents identified in the
4 bankruptcy court's deficiency order. We AFFIRM.

5 Factual Background

6 The relevant facts in this appeal are limited and
7 straightforward. Mr. Stephen filed a chapter 7 bankruptcy
8 petition on November 19, 2010. Apparently, at the time of his
9 bankruptcy filing, Mr. Stephen was incarcerated. On the same
10 date, the bankruptcy court entered a deficiency order
11 ("Deficiency Order"), noting that Mr. Stephen's bankruptcy filing
12 was incomplete and requiring that the following documents be
13 filed by the designated deadlines, as follows:

<u>Document</u>	<u>Deadline Date</u>
Verification and Master Address List	11/29/10
Schedule A - Real Property	12/3/10
Schedule C - Exempt Property	12/3/10
Schedule D - Secured Creditors	12/3/10
Schedule H - Codebtors	12/3/10

14
15
16
17
18
19 On November 19, 2010, Mr. Stephen also filed an application
20 for waiver of the bankruptcy filing fee. His application was
21 denied by order of the bankruptcy court entered on November 23,
22 2010.³

23
24 ² Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
26 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

27 ³ Mr. Stephen's notice of appeal sought review of that
28 order in addition to the Dismissal Order, but his appeal of the
(continued...)

1 Mr. Stephen did not file the required Verification and
2 Master Address List by the November 29, 2010 deadline. There is
3 no evidence in the record that Mr. Stephen ever tendered either
4 the Verification and Master Address List or any of the missing
5 schedules to the bankruptcy court for filing at any time.

6 On November 30, 2010, the bankruptcy court entered an order
7 ("Dismissal Order"), dismissing Mr. Stephen's bankruptcy case for
8 failure to file missing documents. Mr. Stephen argues that he
9 did not receive a copy of the Deficiency Order until November 30,
10 2010, the date that the Dismissal Order was entered.

11 Mr. Stephen did not file a motion to vacate the Dismissal
12 Order. Likewise, he did not file a motion for relief from the
13 Dismissal Order based on mistake or excusable neglect. There is
14 no evidence in the record that Mr. Stephen filed a subsequent
15 petition to initiate a new bankruptcy case. However, he did file
16 a timely notice of appeal of the Dismissal Order.

17 Jurisdiction

18 The bankruptcy court had jurisdiction under 28 U.S.C.
19 §§ 1334 and 157(b)(1) and (b)(2)(A). We have jurisdiction under
20 28 U.S.C. § 158.

21 Issue

22 Did the bankruptcy court err in dismissing Mr. Stephen's
23 bankruptcy case? In particular, were Mr. Stephen's due process
24 rights violated by the bankruptcy court's entry of the Dismissal
25

26 ³(...continued)
27 denial of his fee waiver application was untimely. Accordingly,
28 we do not consider the denial of Mr. Stephen's application for
waiver of the filing fee in this appeal.

1 Order sua sponte?

2 Standards of Review

3 We review issues of statutory construction de novo. B-Real,
4 LLC v. Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP
5 2008).

6 Orders dismissing bankruptcy cases generally are reviewed
7 for an abuse of discretion. Leavitt v. Soto (In re Leavitt),
8 171 F.3d 1219, 1223 (9th Cir. 1999); Guastella v. Hampton
9 (In re Guastella), 341 B.R. 908, 915 (9th Cir. BAP 2006).

10 However, we review questions regarding due process de novo.
11 Molski v. Gleich, 318 F.3d 937, 951 (9th Cir. 2003); In re
12 Brooks-Hamilton, 400 B.R. 238, 245 (9th Cir. BAP 2009).

13 De novo review requires that we consider a matter anew, as
14 if it had not been heard previously. United States v. Silverman,
15 861 F.2d 571, 576 (9th Cir. 1988).

16 We apply a two-part test to determine whether the bankruptcy
17 court abused its discretion. United States v. Hinkson, 585 F.3d
18 1247, 1261-62 (9th Cir. 2009) (en banc). First, we consider de
19 novo whether the bankruptcy court applied the correct legal
20 standard to the relief requested. Id. Then, we review the
21 bankruptcy court's fact findings for clear error. Id. at 1262 &
22 n.20. We must affirm the bankruptcy court's fact findings unless
23 we conclude that they are "(1) 'illogical,' (2) 'implausible,' or
24 (3) without 'support in inferences that may be drawn from the
25 facts in the record.'" Id. at 1262.

26 We may affirm on any ground supported by the record. Shanks
27 v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

1 California, Local Rule 1007-1(b) ("Local Rule 1007-1(b)")
2 requires as follows:

3 Master Address List. With every petition for relief
4 under the Bankruptcy Code presented for filing, there
5 shall be submitted concurrently a Master Address List
6 which includes the name, address, and zip code of all
7 of the debtor's known creditors. To accommodate modern
8 technology, the Master Address List shall be prepared
9 in strict compliance with instructions of the Clerk in
10 a format approved by the Court.

11 Since Mr. Stephen did not file his Master Address List with
12 his petition, the Deficiency Order gave him a grace period of ten
13 days thereafter, by November 29, 2010, to provide the missing
14 Master Address List. When he did not file the Master Address
15 List by the deadline, his bankruptcy case was dismissed. Based
16 on the record before us, Mr. Stephen never tendered a Master
17 Address List to the bankruptcy court for filing. He never filed
18 a motion to vacate the Dismissal Order, and he never requested
19 relief from the Dismissal Order based on a claim of mistake or
20 excusable neglect.

21 His sole relevant argument on appeal is that he did not
22 receive a copy of the Deficiency Order, setting the November 29,
23 2010 deadline for submission of his Verification and Master
24 Address List, until November 30, 2010, the date that his case was
25 dismissed, and consequently, his due process rights under the
26 Constitution were violated. He has produced no evidence in
27 support of his argument.

28 Section 707(a)(3) provides that:

The court may dismiss a case under [chapter 7] only
after notice and a hearing and only for cause,
including -

(3) failure of the debtor in a voluntary case to file,

1 within fifteen days or such additional time as the
2 court may allow after the filing of the petition
3 commencing such case, the information required by
paragraph 1 of section 521(a), but only on a motion by
the United States Trustee.

4 By its terms, § 707(a)(3) appears to require "notice and a
5 hearing" prior to dismissal based on a motion filed by the United
6 States Trustee. However, this Panel has held in considering the
7 comparable limiting restrictions of § 1307(c)(9) with respect to
8 dismissing chapter 13 cases, that those restrictions must be
9 considered in light of the provisions of § 105(a). See Tennant
10 v. Rojas (In re Tennant), 318 B.R. 860, 869 (9th Cir. BAP 2004).

11 Section 105(a) provides that:

12 The court may issue any order, process, or judgment
13 that is necessary or appropriate to carry out the
14 provisions of this title. No provision of this title
15 providing for the raising of an issue by a party in
16 interest shall be construed to preclude the court from,
sua sponte, taking any action or making any
determination necessary or appropriate to enforce or
implement court orders or rules, or to prevent an abuse
of process. (Emphasis added.)

17 In In re Tennant, this Panel affirmed the bankruptcy court's
18 decision denying the debtor's motion to vacate an order
19 dismissing his chapter 13 case based on his failure to file a
20 Statement of Financial Affairs within fifteen days following the
21 filing of his bankruptcy petition, consistent with the
22 requirements of Rule 1007(c). Id. at 869, 871. The United
23 States Trustee had not moved to dismiss the debtor's case, but
24 this Panel concluded that such a motion was not required
25 procedurally in light of the revised provisions of § 105(a):

26 The language of Section 105(a) is unambiguous. The
27 statute was revised in 1986 to overrule prior decisions
28 prohibiting a court from acting sua sponte when the
statute authorized only a party in interest to act. [In
re Greene], 127 B.R. at 808; Swift v. Bellucci (In re

1 Bellucci), 119 B.R. 763, 779 (Bankr. E.D. Cal. 1990).
2 This compels the conclusion that the requirement "only
3 on request of the United States trustee" in Section
4 1307(c)(9) does not preclude the court from acting sua
sponte. The section is intended to restrict any other
party in interest, but not the court.

5 Id. at 869-70. (Emphasis in original.)

6 The Deficiency Order notified Mr. Stephen that the
7 bankruptcy court "without further notice, may dismiss this case"
8 if Mr. Stephen did not file the required documents by the
9 specified deadlines or file either a motion for extension of time
10 or a notice of hearing on the bankruptcy court's notice of intent
11 to dismiss. Mr. Stephen argues that he was denied due process
12 when the bankruptcy court dismissed his case the same day that he
13 received the Deficiency Order. The debtor in In re Tennant
14 raised a similar due process argument.

15 We recognize, as the Panel recognized in In re Tennant, that
16 procedural due process requires notice and an opportunity to be
17 heard. Id. at 870, citing Muessel v. Pappalardo (In re Muessel),
18 292 B.R. 712, 717 (1st Cir. BAP 2003). In the Bankruptcy Code,
19 the terms "after notice and a hearing" are defined in § 102(1):

20 (1) "after notice and a hearing" . . .
21 (A) means after such notice as is appropriate in the
22 particular circumstances, and such opportunity for a
23 hearing as is appropriate in the particular
24 circumstances; but
25 (B) authorizes an act without an actual hearing if such
26 notice is given properly and if -
27 (I) such a hearing is not requested timely by a
28 party in interest; or
(ii) there is insufficient time for a hearing to
be commenced before such act must be done, and the
court authorizes such act

27 Accordingly, notice and a hearing in bankruptcy are flexible
28 concepts, depending on what is appropriate in given

1 circumstances. In re Tennant, 318 B.R. at 870 (citing Great Pac.
2 Money Markets, Inc. v. Krueger (In re Krueger), 88 B.R. 238, 241
3 (9th Cir. BAP 1988)). “[I]f a case involves only very narrow
4 procedural aspects, a court can dismiss a [bankruptcy] case
5 without further notice and a hearing if the debtor was provided
6 ‘with notice of the requirements to be met.’” In re Tennant,
7 318 B.R. at 870 (citing In re Meints, 222 B.R. 870, 872 (D. Neb.
8 1998)).

9 The debtor in In re Tennant did not file his Statement of
10 Financial Affairs by the required deadline, fundamentally a
11 procedural matter. In re Tennant, 318 B.R. at 871.

12 Debtor was notified that another failure to file the
13 missing documents would lead to a dismissal without a
14 further notice and that he must file a motion to
15 receive an extension of time. The initial error was
16 Debtor’s incomplete filing, . . . Here Debtor was
17 offered an opportunity to request an extension of time
18 if necessary. The Statement of Financial Affairs was
19 already required simultaneously with the filing of the
20 petition or within 15 days. See 11 U.S.C. § 521(1) and
21 Rule 1007(c). No more warnings were needed and
22 Debtor’s due process rights were not violated.

23 Id.

24 In this case, Mr. Stephen’s Master Address List was required
25 to be filed with his bankruptcy petition. He did not meet that
26 requirement. The Deficiency Order gave him ten additional days
27 to file the Master Address List. He did not meet that deadline.
28 He argues that he did not receive the Deficiency Order before the
date that his case was dismissed. However, here he runs up
against the presumption of the “mailbox rule.”

The record reflects that the Deficiency order was mailed to
Mr. Stephen by first class mail to the address he specified in
his bankruptcy petition on November 24, 2010. “Mailing a timely

1 notice by first class mail to a party's last known address is
2 sufficient to satisfy due process." La Sierra Fin. Servs., Inc.
3 v. Mozsqai (In re La Sierra Fin. Servs., Inc.), 290 B.R. 718, 733
4 (9th Cir. BAP 2002) (citing DeVore v. Marshack (In re DeVore),
5 223 B.R. 193, 196 (9th Cir. BAP 1998)). Mr. Stephen's due
6 process argument "implicates the mailbox rule, a long-established
7 principle which presumes that, upon a showing of predicate facts
8 that a communication was sent, the communication reached its
9 destination in regular time." Payan v. Aramark Mgmt. Servs. Ltd.
10 P'ship, 495 F.3d 1119, 1124 n.4 (9th Cir. 2007) (citing Rosenthal
11 v. Walker, 111 U.S. 185 (1884)). Mr. Stephen has presented no
12 evidence in support of his argument to overcome the mailbox rule
13 presumption.

14 However, even assuming that Mr. Stephen could present some
15 evidence to support his argument that he did not receive the
16 Deficiency Order in time to respond before his bankruptcy case
17 was dismissed, he never took any action to remedy the situation
18 with the bankruptcy court. He never tendered a Master Address
19 List that would have allowed the bankruptcy court to notify his
20 creditors that he had filed. Once his case was dismissed, he did
21 not request any relief from the bankruptcy court to vacate the
22 Dismissal Order in light of his alleged late receipt of the
23 Deficiency Order. His application for waiver of the filing fee
24 had been denied, but he had not paid any portion of the
25 bankruptcy filing fee at the time that his case was dismissed.
26 Accordingly, he was not out of pocket for the filing fee or any
27 other fee or cost as far as we can tell. Nothing prevented
28 Mr. Stephen from filing a new bankruptcy petition with the

1 required supporting documents, but we have nothing in the record
2 indicating that he has initiated a new bankruptcy filing. His
3 only subsequent action was to appeal the Dismissal Order.

4 Based on our consideration of the limited record in this
5 appeal and applicable law, we conclude that the Dismissal Order
6 was entered consistent with applicable provisions of the
7 Bankruptcy Code and Rules and did not violate Mr. Stephen's
8 procedural due process rights. The bankruptcy court did not err
9 in dismissing Mr. Stephen's chapter 7 case.

10 Conclusion

11 For the foregoing reasons, we AFFIRM.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28