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

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-11-1140-PaMkH
)		
JOSE J. VIDALES,)	Bk. No.	10-11195-EC
)		
Debtor.)	Adv. No.	10-01260-MW
_____)		
)		
CLAUDE GAYER,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
JOSE J. VIDALES,)		
)		
Appellee.)		
_____)		

Argued and Submitted on November 16, 2011
at Pasadena, California

Filed - December 9, 2011

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

Honorable Ellen Carroll and Honorable Mark S. Wallace,
Bankruptcy Judges, Presiding

Appearances: John D. Ott appeared for appellant Claude Gayer.

Before: PAPPAS, HOLLOWELL and MARKELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Appellant Claude Gayer appeals the bankruptcy court's orders
2 dismissing for lack of prosecution his adversary proceeding
3 seeking an exception to discharge and denying his motion to
4 reconsider and vacate that dismissal. Because, based on the
5 record before us, we cannot say that the bankruptcy court abused
6 its discretion in either dismissing the adversary proceeding or in
7 denying the motion to reconsider the dismissal, we AFFIRM.

8 **FACTS**

9 Appellee Jose J. Vidales ("Vidales") filed a chapter 7²
10 bankruptcy petition on January 15, 2010. On April 1, 2010,
11 Appellant commenced an adversary proceeding against Vidales to
12 determine that a debt represented by a state court default
13 judgment he held against Vidales was excepted from discharge.³
14 Vidales had until May 6, 2010, to file a response to the adversary
15 complaint.

16 The bankruptcy court issued a "Scheduling Order" on April 6,
17 2010, which was sent, via U.S. mail, to John D. Ott ("Ott"),
18 Appellant's counsel. Included in the order were the dates set by

19 _____
20 ² Unless otherwise indicated, all chapter, section and rule
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 and
22 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
The Federal Rules of Civil Procedure are referred to as "Civil
Rules."

23 ³ The default judgment awarded Appellant \$2,195,000 in
24 compensatory damages, \$3,000,000 in punitive damages, and
25 \$1,730,270 in attorneys' fees and costs against Vidales and three
26 other defendants. The default judgment resulted from a home
27 invasion robbery during which Appellant was bound and badly
28 beaten. While the complaint alleges that Vidales conspired and
aided in the commission of the robbery and battery, through
planning, acquiring tools, recruiting additional participants, and
"providing 'look-out' services and driving the 'get-away' car,"
there are no allegations that Vidales unlawfully entered
Appellant's home, or that he committed the battery against
Appellant.

1 the bankruptcy court for several future hearings, notably a
2 "Status Conference" to take place on June 23, 2010, and a
3 "Pretrial Conference" scheduled to occur on January 26, 2011. The
4 Scheduling Order warned:

5 Failure to appear at a status conference or a pretrial
6 conference may be considered an abandonment or failure
7 to prosecute or defend diligently, and the adversary
proceeding may be dismissed or judgment may be entered
against the defaulting party.

8 Adv. Proc. dkt. no. 3 at 1.

9 When Vidales did not timely respond to the complaint,
10 Appellant requested entry of a default, completing the paperwork
11 to do so on June 1. However, before the request was considered by
12 the bankruptcy court, the June 23, 2010, Status Conference
13 occurred. Vidales appeared in person at the Status Conference;
14 Ott did not. Because Ott did not appear, the bankruptcy court
15 entered an "Order Dismissing [the] Adversary Proceeding for Lack
16 of Prosecution" on June 29, 2010 (the "First Dismissal").

17 Appellant promptly filed a motion asking the bankruptcy court
18 to reconsider and vacate the First Dismissal (the "First Motion to
19 Vacate"). Vidales objected to this request, and a hearing was
20 held on August 12, 2010, at which the Honorable Thomas B. Donovan
21 presided. Both Vidales and Ott appeared. During the hearing, Ott
22 explained that he did not attend the June 23, 2010 Status
23 Conference because he had mistakenly calendared the hearing for
24 July 23, 2010. Hr'g Tr. 2:21-24, Aug. 12, 2010. The bankruptcy
25 court found that "[Ott's] neglect . . . to properly calendar" the
26 June 23 hearing was "not a sufficient basis to end the lawsuit,
27 under the circumstances." Id. at 3:7-11. The court, therefore,
28 granted Appellant's First Motion to Vacate, and reinstated the

1 adversary proceeding.

2 Appellant continued to pursue his request for entry of a
3 default against Vidales. The bankruptcy court scheduled a hearing
4 to consider the request on December 8, 2010, primarily to give
5 Vidales, who had appeared and objected to the First Motion to
6 Vacate, the opportunity to respond. When Vidales did not attend
7 the December 8 hearing, the bankruptcy court agreed to enter a
8 default. The court issued a notice, on January 7, 2011,
9 indicating a default had been entered.⁴

10 Appellant next filed a motion for entry of default judgment
11 on January 18, 2011. Eight days later, the bankruptcy court
12 convened the previously scheduled Pretrial Conference. Neither
13 Ott nor Vidales appeared. As a result, the bankruptcy court, on
14 February 2, 2011, entered an order dismissing the adversary
15 proceeding a second time (the "Second Dismissal") "for the reasons
16 set forth on the record during the [Pretrial Conference] hearing."
17 Dkt. no. 22 at 1.⁵

18 Meanwhile, in the interim between the Pretrial Conference and
19 the Second Dismissal, the adversary proceeding was reassigned to
20 the Honorable Mark S. Wallace.

21 On February 11, 2011, Appellant filed a second motion to
22 reconsider and vacate the Second Dismissal pursuant to Civil
23 Rule 60(b) alleging the dismissal occurred due to Ott's mistake,
24 inadvertence, and excusable neglect (the "Second Motion to

25 ⁴ This was the second notice issued by the Court; the first,
26 issued on December 29, 2010, incorrectly indicated that a default
had not been entered.

27 ⁵ As we discuss below, without adequate explanation from
28 Ott, Appellant did not include the transcript of the Pretrial
Conference hearing in the excerpts on appeal.

1 Vacate"). Vidales objected, and the bankruptcy court held a
2 hearing on the Second Motion to Vacate on March 17, 2011.

3 At that hearing, Ott explained his reason for not appearing
4 at the January 26, 2011 Pretrial Conference as follows:

5 I believed at that time there was not going to be a
6 joint pretrial order. There wasn't going to be a trial.
7 Default was entered. And based on a prior conversation
8 with the clerk earlier in 2010, that the Court would
9 either enter the judgment, or the Court would set a
10 hearing on the motion for default judgment.

11 At that time I was in the throws (sic) of other cases,
12 and working 12-hour days. It didn't occur to me, and I
13 was negligent in not getting to the pretrial conference
14 order, since no judgment was entered, your Honor. And
15 that's my fault.

16 Hr'g Tr. 4:2-12, March 17, 2011. Despite missing a second
17 hearing, Ott maintained that he had diligently prosecuted the
18 adversary proceeding. The bankruptcy court responded:

19 There have been two dismissals for failure to appear. I
20 don't think that's diligence. That's severe breach of
21 the rules, twice, twice.

22 Id. at 4:16-18.

23 Vidales, for his part, explained to the bankruptcy court that
24 it was a financial and time burden on him to travel to court
25 hearings, including hearings at which Ott did not appear.
26 Summarizing his position, he observed:

27 Well, I - this case was completely discharged on my
28 bankruptcy, and then I got some paperwork again by the
29 attorney, and I had to come to Court. That's when he
30 never showed up. I mean, I can't afford to come over
31 here. I don't have a job right now. He wants
32 \$7,000,000. I don't know - I don't own any assets. I
33 mean, I don't know where he wants to get with this. I'm
34 not working right now. I have - my friend has to bring
35 me all the way over here, two-and-a-half-hour drive.
36 And I can't afford to come here. I believe this case
37 should just remain dismissed.

38 Id. at 6:5-15.

1 The bankruptcy court then made the following findings:

2 The Court has reviewed the pleadings. And the
3 applicable rule here is the excusable neglect standard
4 in the Pioneer case. And that decision sets forth four
5 factors. The first factor is the prejudice to the
6 Movant, and the Court would – you know, initially, the
Court's reaction was that that factor cut in your favor,
Mr. Ott. But, you know, having heard about
Mr. Vidales's travel to the Court, not absolutely clear
it's completely in your favor.

7 The second factor, the danger – the impact of the
8 negligent action on the judicial proceeding. Here we've
9 had two failures to appear. You know, this has really
lengthened the proceeding considerably.

10 The third, the reason why the negligent action occurred.
11 You know, again, two failures to appear. The Court
12 would heavily weight that factor. Whether the Movant
acted in good faith, I think there's no reason to doubt
your good faith.

13 But applying all those factors, and weighting the third
14 factor the most heavily, in view of not one, but two
15 failures to appear and two dismissals, the Court will
deny this motion with prejudice. So this action is
dismissed and will stay dismissed.

16 Id. at 6:16–7:13.

17 In response, Ott urged the bankruptcy court to consider
18 imposing a less drastic sanction than dismissal, to which the
19 court replied:

20 Mr. Ott, the – again, this is a case of not one failure
21 to appear, but two, not one dismissal, but two
22 dismissals, compounded by the fact that a pleading was
23 filed that has false statements made to the Court. I
just see no reason to do anything other than dismiss
this case with prejudice. And that's the Court's
ruling. This is dismissed with prejudice.

24 Id. at 8:10–16.

25 The bankruptcy court entered the order denying the Second
26 Motion to Vacate on March 17, 2011. Appellant timely appealed
27 both the Second Dismissal and the denial of the Second Motion to
28 Vacate.

1 DISCUSSION

2 I. There is an insufficient record for us to determine that
3 the court abused its discretion in dismissing Appellant's
4 adversary proceeding.

5 A bankruptcy court may dismiss an adversary proceeding sua
6 sponte for lack of prosecution under Civil Rule 41(b), applicable
7 in bankruptcy proceedings by Rule 7041. Tenorio v. Osinga
8 (In re Osinga), 91 B.R. 893, 894 (9th Cir. BAP 1988). In doing
9 so, the court should consider five factors: (1) the public's
10 interest in expeditious resolution of litigation; (2) the court's
11 need to manage its docket; (3) the risk of prejudice to the
12 defendant; (4) the public policy favoring disposition of cases on
13 their merits; and (5) the availability of less drastic sanctions.
14 Moneymaker v. CoBEN (In re Eisen), 31 F.3d 1447, 1451 (9th Cir.
15 1994). A reviewing court should particularly focus on whether the
16 trial court considered less drastic sanctions and whether it
17 warned of imminent dismissal when the trial court dismissed the
18 case sua sponte. In re Oliva, 958 F.2d at 274.

19 Where a trial court has not made specific findings on each
20 factor, a reviewing court is to independently consider the record
21 to determine whether the trial court abused its discretion.
22 Eisen, 31 F.3d at 1451. Of course, the reviewing court must have
23 those portions of the record before it that are necessary to make
24 such a determination. See BAP Rule 8006-1 ("The excerpts of the
25 record shall include the transcripts necessary for adequate review
26 in light of the standard of review to be applied to the issues
27 before the Panel."); McCarthy v. Prince (In re McCarthy),
28 230 B.R. 414, 416-17 (9th Cir. BAP 1999).

The burden of providing an adequate record on review rests

1 upon the appellant. In re McCarthy, 230 B.R. at 417. Here,
2 Appellant did not provide the Panel with a transcript of the
3 January 26, 2011, Pretrial Conference hearing at which the
4 bankruptcy court apparently decided to dismiss the adversary
5 proceeding for a second time.⁶ This omission is significant
6 because the bankruptcy court's order on the Second Dismissal
7 recites that the action was dismissed "for the reasons set forth
8 on the record during the [Pretrial Conference] hearing." Dkt.
9 no. 22 at 1. Simply put, without a transcript of this hearing,
10 the Panel cannot review whether the bankruptcy court appropriately
11 considered the imposition of less drastic sanctions, or any of the
12 other dismissal factors, for that matter, prior to dismissal.⁷

13 Where the inadequacy of the record provided to the Panel
14 affords little choice but to summarily affirm, we may do so.
15 Ehrenberg v. Cal. State Univ., Fullerton Found. (In re Beachport
16 Entm't), 396 F.3d 1083, 1087-88 (9th Cir. 2005). Because the lack
17 of the Pretrial Conference hearing transcript prevents us from
18 reviewing the bankruptcy court's reasons for the Second Dismissal,
19 we cannot say that the bankruptcy court abused its discretion in

20 ⁶ And as noted above, at oral argument before the Panel, Ott
21 was unable to explain his failure to submit this critical
22 transcript. In addition, the transcript is not available in the
23 dockets of the adversary proceeding or bankruptcy case. It would
24 appear, no transcript was ever requested by Appellant, nor
25 prepared.

26 ⁷ At the same time, in considering the Second Motion to
27 Vacate, the court weighed the impact of Ott's non-appearance on
28 the timely resolution of judicial proceedings, prejudice to
29 Vidales, and the availability of lesser sanctions. Hr'g Tr. 6:16
30 -8:16, March 17, 2011. None of those factors, as applied in the
31 context of reconsidering the Second Dismissal, indicate an abuse
32 of discretion. Assuming the court considered the factors
33 similarly in determining the Second Dismissal, the Panel would
34 likely also not find an abuse of discretion, as to those factors,
35 in that instance.

1 entering the order. We therefore AFFIRM the Second Dismissal.

2 **II. The Court did not abuse its discretion in denying**
3 **Appellant's motion to vacate the Second Dismissal.**

4 A trial court may relieve a party from a final order for,
5 among other reasons, mistake, inadvertence, surprise, or excusable
6 neglect. See Civil Rule 60(b)(1) (applicable here through
7 Rule 9024). Appellant asserts the bankruptcy court should have
8 vacated the Second Dismissal because Ott's conduct in prosecuting
9 the case was, at worst, excusable neglect.

10 Ott is correct that the concept of excusable neglect embodied
11 in Civil Rule 60(b)(1) is broad enough to include the negligence
12 of counsel for a party. See Pioneer Inv. Servs. Co. v. Brunswick
13 Assocs. Ltd. P'ship, 507 U.S. 380, 394-96 (1993). To determine
14 whether counsel's neglect is excusable, however, a court must
15 consider: "[(1)] the danger of prejudice to the [opposing party],
16 [(2)] the length of the delay and its potential impact on judicial
17 proceedings, [(3)] the reason for the delay, including whether it
18 was within the reasonable control of the movant, and [(4)] whether
19 the movant acted in good faith." Id. at 395. The bankruptcy
20 court considered each of those four factors in determining to deny
21 the Second Motion to Vacate.

22 First, the bankruptcy court found that, based on information
23 regarding the burden that travel to hearings imposed on Vidales,
24 the "danger of prejudice" factor did not favor vacating the
25 dismissal. Vidales explained that he lived several hours from the
26 courthouse, was unemployed, and had to rely on a friend for
27 transportation to hearings. Considering that explanation, the
28 bankruptcy court was apparently persuaded that Ott's non-

1 appearance at hearings was prejudicial to Vidales. That
2 determination was not illogical, implausible, or without support
3 in inferences that may be drawn from the facts in the record.

4 The bankruptcy court also found that Ott's neglect had
5 "considerably" lengthened the adversary proceeding. Prior to the
6 First Dismissal, Appellant had requested entry of a default.
7 Partly because of the delay caused by the First Dismissal, and the
8 subsequent First Motion to Vacate, that request was not heard by
9 the bankruptcy court until nearly six months later. The Second
10 Dismissal also contributed to delay of the judicial proceedings in
11 this case. The bankruptcy court found that two dismissals for
12 counsel's failure to appear at scheduled hearings demonstrated a
13 lack of diligence. It was not an abuse its discretion for the
14 bankruptcy court to determine that Ott's neglect lengthened the
15 adversary proceeding.

16 The third factor in the analysis, "the reason for the delay,"
17 was significant in persuading the bankruptcy court to deny the
18 Second Motion to Vacate because Ott controlled the circumstances
19 causing Ott to miss both scheduled hearings. First, he
20 incorrectly calendared the June 23, 2010, Status Conference.
21 Second, Ott simply explained that he was busy, and it "didn't
22 occur to [him]" that his attendance was required at the
23 January 26, 2011 Pretrial Conference. Because the reasons for the
24 delay in this case were both within Ott's control, and because
25 there were multiple delays, the bankruptcy court's determination
26 to weigh the "reason for the delay" factor against Appellant was
27 not an abuse of discretion.

28 While the reasons for Ott's missing the two scheduled

1 conferences were entirely within his control, the bankruptcy court
2 found that Ott did not act in bad faith. In totality, however,
3 applying all of the factors, and weighing the third factor most
4 heavily due to the multiple instances of delay, the bankruptcy
5 court denied the Second Motion to Vacate with prejudice. That
6 result is not illogical, implausible, or without support in
7 inferences that may be drawn from the facts in the record, and the
8 bankruptcy court did not abuse its discretion in denying that
9 motion.

10 **CONCLUSION**

11 Because the record before us is inadequate, we cannot
12 determine that the bankruptcy court abused its discretion in
13 entering the Second Dismissal. On the other hand, the record
14 demonstrates that the bankruptcy court did not abuse its
15 discretion in denying Appellant's Second Motion to Vacate due to
16 counsel's excusable neglect.

17 We AFFIRM the orders of the bankruptcy court.
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