

OCT 07 2011

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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NOT FOR PUBLICATION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:)
) BAP No. CC-10-1524-PaMkAl
 AXIUM INTERNATIONAL, INC.,)
) Bk. No. 2:08-10277-BB
 Debtor.)
 _____)
)
 MAHA VISCONTI,)
)
 Appellant,)
)
 v.) **M E M O R A N D U M**¹
)
 HOWARD M. EHRENBURG,)
 Chapter 7 Trustee; FEDERAL)
 INSURANCE COMPANY,)
)
 Appellees.)
 _____)

Argued and Submitted on July 22, 2011,
at Pasadena, California

Filed - October 7, 2011

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

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding

Appearances: _____
 Appellant did not appear. Marsha A. Houston of
 Reed Smith LLP argued for Appellee Howard
 Ehrenberg. Michelle Kisloff, Esq. of Hogan
 Lovells US LLP argued for Appellee Federal
 Insurance Company.

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 Before: PAPPAS, MARKELL and ALLEY,² Bankruptcy Judges.
2

3 Appellant Maha Visconti ("Visconti") appeals the bankruptcy
4 court's order denying her motion for extension of time to file an
5 appeal. We AFFIRM.

6 **FACTS**

7 Debtors Axium International, Inc., and Diversity MSP, Inc.,
8 filed chapter 7³ petitions on January 8 and January 9, 2008,
9 respectively.⁴ Howard M. Ehrenberg ("Trustee") was appointed
10 chapter 7 trustee.

11 On September 24, 2010, Trustee filed a motion to approve a
12 settlement agreement which, in part, authorized the sale of
13 certain insurance policies. Visconti vigorously opposed
14 Trustee's motion. In addition to filing a brief in opposition,
15 both she and her counsel filed declarations and amended
16 declarations opposing the motion, and Visconti also filed a
17 request for judicial notice of certain documents in opposition to
18 the motion. The motion came before the bankruptcy court for a
19 hearing on October 20, 2010, at which Visconti appeared through
20 counsel.

21 _____
22 ² The Honorable Frank R. Alley, Chief United States
23 Bankruptcy Judge for the District of Oregon, sitting by
24 designation.

25 ³ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
28 The Federal Rules of Civil Procedure are referred to as "Civil
Rules."

⁴ The two bankruptcy cases were ordered jointly
administered on January 18, 2008.

1 On October 25, 2010, the bankruptcy court granted Trustee's
2 motion ("Sale Order"). That same day, Visconti filed a pleading
3 which the bankruptcy court treated as a motion to reconsider the
4 order approving the settlement agreement and sale. Visconti's
5 motion to reconsider was denied without a hearing on November 15,
6 2010 in an order (the "Reconsideration Denial Order") which
7 observed:

- 8 (1) the Motion [for Reconsideration] is not supported
9 by a declaration signed under penalty of perjury;
10 (2) the Motion is not based on any new facts or new law
11 not considered by the Court in ruling upon the
12 Trustee's motion for approval of his compromise with
13 Federal Insurance Company (the "Compromise Motion");
14 (3) the Motion fails to provide any showing of cause
15 for the court to reconsider, vacate, modify or evaluate
16 any ruling made in connection with the Compromise
17 Motion[.]

18 The clerk's notice of service attached to the order indicates
19 that it was served on Visconti's counsel by mail.⁵

20 On December 7, 2010, Visconti filed a motion seeking an
21 extension of time to appeal the Reconsideration Denial Order
22 ("Extension Motion"). The Extension Motion states, in its
23 entirety: "Maha Visconti requests an Extension of Time to appeal
24 the Order Entered November 15, 2010 denying Motion of Maha
25 Visconti filed on October 25, 2010. Maha Visconti was not
26 informed of the Ruling and did not become aware of such ruling
27 until November 30, 2010." Trustee filed an opposition to the
28 motion, arguing that it lacked any basis in law or fact.

26 ⁵ Visconti appealed the Reconsideration Denial Order.
27 Another panel ordered that the appeal be suspended pending the
28 outcome of this appeal. BAP Appeal No. CC-10-1492, Order dated
February 18, 2011.

1 Interested party Federal Insurance Company joined in Trustee's
2 opposition. On December 16, 2010, the bankruptcy court entered
3 an order denying the Extension Motion, finding that it was not
4 supported by any evidence that would constitute a showing of
5 excusable neglect as required by the applicable Bankruptcy Rules
6 (the "Extension Denial Order"):

7 The Extension Motion is not supported by a declaration
8 under penalty of perjury and therefore offers no
9 evidence whatsoever that could qualify as a showing of
10 excusable neglect. The motion asserts merely, without
11 any supporting evidence, that "Maha Visconti was not
12 informed of the Ruling and did not become aware of such
13 ruling [i.e., the reconsideration order] until
14 November 30, 2010."

15 The Extension Denial Order also contains an insightful footnote:

16 It is interesting to note that the Extension Motion
17 states merely that Maha Visconti was not informed of
18 the Ruling and did not become aware of it until
19 November 30, 2010. The Extension Motion does not
20 reveal whether Ms. Visconti's attorney of record, Hieu
21 Do, whose name appears on the notice of entry and whose
22 knowledge is imputed to Ms. Visconti, was aware of the
23 ruling before November 30, 2010.

24 On December 28, 2010, Visconti filed a timely appeal of the
25 bankruptcy court's Extension Denial Order.

26 **JURISDICTION**

27 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
28 §§ 1334 and § 157(A) and (O). We have jurisdiction pursuant to
29 28 U.S.C. § 158.

30 **ISSUE**

31 Whether the bankruptcy court abused its discretion in
32 denying Visconti's motion to extend time to appeal.

33 **STANDARD OF REVIEW**

34 A bankruptcy court's denial of a motion for an extension of

1 time in which to file a notice of appeal is reviewed for an abuse
2 of discretion. Nugent v. Betacom of Phoenix, Inc. (In re Betacom
3 of Phoenix, Inc.), 250 B.R. 376, 379 (9th Cir. BAP 2000) (citing
4 Nat'l Indus., Inc. v. Republic Nat'l Life Ins. Co., 677 F.2d
5 1258, 1264 (9th Cir. 1982)).

6 In applying the abuse of discretion standard, we first
7 "determine de novo whether the [bankruptcy] court identified the
8 correct legal rule to apply to the relief requested." United
9 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).
10 If the correct legal rule was applied, we then consider whether
11 its "application of the correct legal standard was (1) illogical,
12 (2) implausible, or (3) without support in inferences that may be
13 drawn from the facts in the record." Id. Only in the event that
14 one of these three apply are we then able to find that the
15 bankruptcy court abused its discretion. Id.

16 DISCUSSION

17 The filing of a timely notice of appeal is mandatory and
18 jurisdictional. Delaney v. Alexander (In re Delaney), 29 F.3d
19 516, 518 (9th Cir. 1994); Key Bar Invs., Inc. v. Cahn
20 (In re Cahn), 188 B.R. 627, 630 (9th Cir. BAP 1995) (citing
21 Browder v. Director, Dep't of Corrections of Ill., 434 U.S. 257,
22 264 (1978)). Rule 8002(a) provides that, in a bankruptcy case, a
23 notice of appeal "shall be filed with the clerk within 14 days of
24 the date of the entry of the judgment, order, or decree appealed
25 from." However, under some circumstances, an extension of that
26 14-day period may be obtained from the bankruptcy court via
27 subsection (c) of Rule 8002, which provides:

28 A request to extend the time for filing a notice of

1 appeal must be made by written motion filed before the
2 time for filing a notice of appeal has expired, except
3 that such a motion filed not later than 21 days after
4 the expiration of the time for filing a notice of
5 appeal may be granted upon a showing of excusable
6 neglect. An extension of time for filing a notice of
7 appeal may not exceed 21 days from the expiration of
8 the time for filing a notice of appeal otherwise
9 prescribed by this rule or 14 days from the date of
10 entry of the order granting the motion, whichever is
11 later.

12 Rule 8002(c)(2) (emphasis added).

13 Visconti has not complied with Rule 8002(c). Under its
14 terms, she either needed to file a notice of appeal within
15 fourteen days of the entry of the Denial Order, or she needed to
16 file a motion to extend time in which to file the appeal within
17 that period. She did neither.

18 Rule 8002(c) does allow a motion to extend time to be filed
19 within the twenty-one days after the initial fourteen-day appeal
20 period has expired. However, the Rule requires that a showing of
21 excusable neglect be made to support the tardy filing. Visconti
22 has made no such showing. Indeed, Visconti's cryptic Extension
23 Motion did not even allege the existence of excusable neglect.
24 That motion instead merely represented that Visconti did not
25 timely appeal because she was not informed of the entry of the
26 bankruptcy court's order until November 30, 2010. The Extension
27 Motion was not accompanied by a sworn declaration. It makes no
28 mention of whether, or when, her attorney became aware of the
Reconsideration Denial Order,⁶ nor does it allege that she or her

⁶ Like the bankruptcy court, the Panel deems it significant
that the Extension Motion makes no reference to when Visconti's
attorney became aware of the Reconsideration Denial Order. Under
Rule 9022(a), notice of entry of an order is served on the

(continued...)

1 attorney were somehow excusably neglectful in their actions or
2 omissions. Therefore, the bankruptcy court did not abuse its
3 discretion in declining to grant Visconti an extension of time to
4 appeal.

5 To determine whether excusable neglect has been shown,
6 courts must examine the factors articulated by the Supreme Court
7 in Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship,
8 507 U.S. 380 (1993). Those factors target: 1) the danger of
9 prejudice to the debtor; 2) the length of delay and its potential

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11 ⁶(...continued)
12 parties in the manner provided in Civil Rule 5(b). Civil
13 Rule 5(b)(1), in turn, provides that "If a party is represented
14 by an attorney, service under this rule must be made on the
15 attorney unless the court orders service on the party." Visconti
16 was represented by counsel and counsel was given notice by
17 U.S. mail of the entry of the Reconsideration Denial Order on
18 November 15, 2010. Proof of that mail service on Visconti's
19 attorney is included in both the docket entry and the excerpts of
20 record. Where there is "proof that mail is properly addressed,
21 stamped and deposited in an appropriate receptacle, it is
22 presumed to have been received by the addressee in the ordinary
23 course of the mails." Herndon v. De la Cruz (In re De la Cruz),
24 176 B.R. 19, 22 (9th Cir. BAP 1994) (quoting Hagner v. United
25 States, 285 U.S. 427, 430 (1932)). Vahan v. Shalala, 30 F.3d
26 102, 103 (9th Cir. 1994) (citing Irwin v. Dept. of Veterans
27 Affairs, 498 U.S. 89, 92 (1990)). Without this legal
28 presumption, our legal system could "unravel" because any
litigant could defeat a claim of service by mail with an
unsubstantiated denial of receipt. Berry v. U.S. Tr.
(In re Sustaita), 438 B.R. 198, 209 (9th Cir. BAP 2010). 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. Bucknam (In re Bucknam), 951 F.2d 204, 207 (9th Cir.
1991). Thus, we agree with the bankruptcy court that the
Extension Motion failed because there was no evidence submitted
to show that Visconti was not aware of the Reconsideration Denial
Order until November 30, 2010, nor to rebut the legal presumption
that her attorney was aware of the entry of that order within the
14-day period, which knowledge is imputed to Visconti.

1 impact on judicial proceedings; 3) the reason for the delay; and
2 4) whether the movant acted in good faith. Pioneer, 507 U.S. at
3 395. The burden to demonstrate excusable neglect in this context
4 falls squarely upon the party seeking to be excused from timely
5 performance, or in this case, on Visconti. In re Cahn, 188 B.R.
6 at 630-31.

7 Visconti contends in her briefing that her delay in learning
8 of the entry of the Reconsideration Denial Order was due to
9 events surrounding the intervening Thanksgiving holiday. But
10 this seems implausible, since that order was entered by the
11 bankruptcy court on November 15, 2010, some ten days before
12 Thanksgiving on November 25, and over two weeks before November
13 30th, the following Tuesday.

14 Moreover, Visconti complains that the bankruptcy court had
15 prohibited her attorney from personally contacting the court's
16 chambers or clerk's office. Visconti's Opening Brief at 7. By
17 bankruptcy court order entered on November 3, 2010, Visconti's
18 counsel and his staff and agents were prohibited from contacting
19 the bankruptcy judge and her staff, as well as the clerk's
20 office, either in person or on the telephone.⁷ But this
21 prohibition is of no help to Visconti under these facts. Even if
22 her attorney was prevented from making direct contact with the
23

24 ⁷ As the basis for taking the extraordinary step of
25 prohibiting the attorney's phone contacts with chambers or the
26 clerk, the bankruptcy court noted that, in his prior contacts,
27 "repeatedly, throughout the course of these conversations, Mr. Do
28 and his assistant, Emily, have been rude and disrespectful and,
on occasion, that they have resorted to screaming rather than
communicating in a civil tone of voice[.]" Order of November 3,
2010 at 1.

1 bankruptcy judge or clerk, nothing prevented Visconti or her
2 counsel from checking on the status of the bankruptcy case via
3 the court's internet electronic docket. In In re Delaney, the
4 Ninth Circuit held that litigants "have an affirmative duty to
5 'monitor the dockets to inform themselves of the entry of orders
6 they may wish to appeal.'" 29 F.3d at 518 (quoting Miyao v. Kuntz
7 (In re Sweet Transfer & Storage, Inc.), 896 F.2d 1189, 1193 (9th
8 Cir. 1990) superseded by Rule on other grounds, In re Arrowhead
9 Estates Dev. Co., 42 F.3d 1306, 1310 (9th Cir. 1995)). Thus,
10 even assuming the mail was delayed, such would not provide a
11 basis for treating Visconti's notice of appeal filed outside the
12 initial fourteen-day window as one timely filed, nor would it
13 amount to a showing of excusable neglect. In re Sweet, 896 F.2d
14 at 1193. Simply put, that Visconti and her counsel both failed
15 to monitor the electronic docket may have been neglectful, but
16 such neglect was not excusable.

17 CONCLUSION

18 Visconti made no showing of excusable neglect sufficient to
19 satisfy the requirements of Rule 8002(c)(2).⁸ Accordingly, the
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21 ⁸ The Panel was handicapped in this appeal by the failure
22 of the attorney for Visconti, Hieu Do, to abide by the Rules.
23 Visconti's brief violated Rule 8010(a) by failing to provide a
24 defensible basis of appellate jurisdiction, any standards of
25 appellate review, or a table of authorities. The latter may
26 perhaps be explained by the complete absence of any citations in
27 the brief to case law, statutes, or other authorities supporting
28 counsel's arguments, thus violating Rule 8010(a)(1)(E). In
violation of Rule 8010(a)(1)(D), the brief makes no precise
references to the record, and Visconti's excerpts of record only
present her position, and do not include appellee's responses to
her pleadings as required by Rule 8009(b)(1) and (6). Fairly

(continued...)

1 bankruptcy court did not abuse its discretion when it denied
2 Visconti's motion for extension of time to appeal the Denial
3 Order. We therefore AFFIRM the bankruptcy court's order denying
4 Visconti's Extension Motion.

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⁸(...continued)
21 read, the brief is a diatribe concerning Visconti's perceived
22 unfair treatment at the hands of her ex-husband, the bankruptcy
23 trustee, and the bankruptcy court. While the brief raises a
24 variety of issues, and asserts numerous facts, wholly irrelevant
25 here, what the brief does not address is the critical issue in
26 this appeal: whether Visconti's failure to meet the deadline to
27 appeal the Reconsideration Denial Order is due to excusable
28 neglect. Finally, we note that Do did not acknowledge receipt of
the hearing notice sent to him by the Panel's clerk, nor did he
appear at the time set for oral argument before this Panel.

Simply put, Do's cavalier approach to complying with the
Rules failed to meet minimum standards for counsel appearing
before this Panel.