

MAR 7 2014

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. NC-13-1181-JuKiD
6	JOHN ANTHONY SALOMON,)	Bk. No. 10-59862-CDN
7	Debtor.)	Adv. No. 10-05416
8	_____)	
9	MATTHEW TYE,)	
10	Appellant,)	
11	v.)	M E M O R A N D U M *
12	JOHN ANTHONY SALOMON,)	
13	Appellee.)	
	_____)	

Submitted Without Oral Argument
on February 20, 2014

Filed - March 7, 2014

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

Honorable Charles D. Novack, Bankruptcy Judge, Presiding

Appearances: Appellant Matthew Tye, pro se, on brief; Fred W. Schwinn and Raeon R. Roulston of Consumer Law Center, Inc., on brief for appellee John Anthony Salomon.

Before: JURY, KIRSCHER, and DUNN, Bankruptcy Judges.

* 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 Matthew Tye appeals from the bankruptcy court's
2 order denying his motion to extend the time to appeal under
3 Rule¹ 8002(c)(2). In deciding the motion, the bankruptcy court
4 correctly applied the legal standards for excusable neglect
5 articulated in Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.
6 P'ship, 507 U.S. 380 (1993), to the facts. Therefore, we find
7 no abuse of discretion and we AFFIRM.

8 **I. FACTS**

9 Debtor John Anthony Salomon filed for chapter 7 relief on
10 September 22, 2010.² Tye filed an adversary proceeding to
11 determine dischargeability of a debt on December 27, 2010.
12 After a trial on November 20, 2012, the bankruptcy court issued
13 a memorandum decision in favor of Salomon on January 29, 2013,
14 and entered judgment on February 8, 2013.

15 On February 26, 2013, four days after the expiration of the
16 period to appeal under Rule 8002(a), Tye filed an untimely
17 notice of appeal and, concurrently, a motion for extension of
18 time to appeal (Motion). Tye argued that his failure to file
19 the Motion within the requisite time period resulted from the
20 lack of notice by mail of the entry of both the memorandum

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22 ¹ Unless otherwise indicated, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
24 "Rule" references are to the Federal Rules of Bankruptcy
25 Procedure and "FRAP" references are to the Federal Rules of
26 Appellate Procedure.

27 ² We exercise our discretion to take judicial notice of
28 documents electronically filed in the underlying bankruptcy case
and adversary proceeding. 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 Mortg. Co. (In re Atwood), 293 B.R.
227, 233 n.9 (9th Cir. BAP 2003).

1 decision and the judgment. Tye listed the address of his former
2 residence, 49 Lehigh Aisle, as his mailing address with the
3 bankruptcy court, relying on the United States Postal Service
4 (Postal Service) to forward any mail addressed to 49 Lehigh
5 Aisle to a post office box.

6 At the March 27, 2013 hearing on the matter, Tye indicated
7 that he had not resided at 49 Lehigh Aisle for approximately a
8 year. He believed problems with his mail had arisen "recently,"
9 at which time Tye attempted to extend the "forwarding service."

10 However, the record shows that difficulties with receiving
11 court documents had been brought to the attention of the
12 bankruptcy court much earlier at a case management conference on
13 May 5, 2012, during which Tye complained that he had not
14 received Salomon's initial disclosures. The bankruptcy court
15 verified Tye's mailing address of record as 49 Lehigh Aisle and
16 Salomon's counsel informed the bankruptcy court that the initial
17 disclosures mailed to 49 Lehigh Aisle were returned as
18 undeliverable. Tye acknowledged that the Postal Service
19 irregularly forwarded his mail from the 49 Lehigh Aisle address
20 and reassured the bankruptcy court that the matter had been
21 resolved.

22 On November 5, 2012, Tye again complained of not receiving
23 discovery responses and the issue was addressed in open court.
24 Tye admitted to his continued reliance on the Postal Service's
25 "forwarding service" and his failure to file a change of
26 address.

27 Throughout this time Tye did not file a change of address
28 with the bankruptcy court. Yet, at the hearing on the Motion,

1 Tye alleged once again that he did not receive notice of the
2 entry of judgment and stated that if he had received notice by
3 mail during the appeal period he would have been able to file a
4 timely notice of appeal. He further maintained that he only
5 became aware of the entry of judgment after checking the docket
6 on February 26, 2013, at which time he immediately filed a
7 notice of appeal and the Motion. To explain why he did not
8 check the docket during the two week appeal period, Tye stated
9 that he was preoccupied caring for a loved one, who was
10 recovering from surgery, and, subsequently, fell ill himself.

11 The bankruptcy court found Tye's reliance on the Postal
12 Service to forward his professional correspondence from a former
13 residence to his current post office box for over a year was
14 inexcusable. Given that Tye was already made aware of two
15 instances in which he had difficulties with his mail, resulting
16 in his not receiving court documents, the bankruptcy court found
17 that Tye's reason for delay implicated bad faith. The
18 bankruptcy court denied Tye's Motion by order entered April 9,
19 2013. Tye timely appealed.

20 **II. JURISDICTION**

21 The bankruptcy court had jurisdiction over this proceeding
22 under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction
23 under 28 U.S.C. § 158.

24 **III. ISSUE**

25 Whether the bankruptcy court abused its discretion in
26 denying Tye's motion to extend the time to appeal under
27 Rule 8002(c)(2).
28

1 **IV. STANDARD OF REVIEW**

2 The bankruptcy court's denial of a motion to extend the
3 time to file a notice of appeal is reviewed for abuse of
4 discretion. Pincay v. Andrews, 389 F.3d 853, 858-59 (9th Cir.
5 2004) (en banc). The bankruptcy court abuses its discretion
6 when it applied the incorrect legal rule or when its application
7 of the law to the facts was: (1) illogical; (2) implausible; or
8 (3) without support in inferences that may be drawn from the
9 facts in the record. United States v. Hinkson, 585 F.3d 1247,
10 1263 (9th Cir. 2009) (en banc).

11 **V. DISCUSSION**

12 Upon entry of a judgment, order, or decree by a bankruptcy
13 court, a party has fourteen days to file a notice of appeal.
14 Rule 8002(a). If unable to meet that deadline, a party may move
15 for an extension of time to file the notice of appeal.
16 Rule 8002(c). While the deadline for filing a request to extend
17 the appeal time is also fourteen days from the entry of the
18 order to be appealed, the Rules contain a limited, twenty-one
19 day window during which the bankruptcy court may grant a
20 late-filed motion to extend time, provided the moving party
21 demonstrates that its neglect in not filing a timely motion was
22 "excusable." Rule 8002(c)(2). Tye, as the party requesting an
23 extension of time, bears the burden of proving the existence of
24 excusable neglect. Key Bar Invs., Inc. v. Cahn (In re Cahn),
25 188 B.R. 627, 631 (9th Cir. BAP 1995).

26 **A. The Excusable Neglect Standard Under Rule 8002(c)**

27 The Supreme Court articulated a four-factor balancing test
28 as the standard for excusable neglect in the context of

1 Rule 9006(b)(1) in Pioneer. Subsequently, the Ninth Circuit
2 held that the Pioneer analysis applies to FRAP 4(a)(4).
3 Arrowhead Estates Dev. Co. v. U.S. Tr. (In re Arrowhead Estates
4 Dev. Co.), 42 F.3d 1306 (9th Cir. 1994). Because amendments to
5 Rule 8002 track any modifications to FRAP 4(a), the Ninth
6 Circuit interprets the two rules consistently. Id. at 1311
7 (applying the same standards to Rule 8002(b) as FRAP 4(a)(4)
8 upon acknowledging that the amendment made to Rule 8002(b)
9 adopted FRAP 4(a)(4)). Since the amendment to Rule 8002(c)
10 corresponds with FRAP 4(a)(5) and the Ninth Circuit has applied
11 the Pioneer analysis to FRAP 4(a)(5) in Pincay, the reasoning in
12 Arrowhead indicates the proper legal standard for construing
13 "excusable neglect" under Rule 8002(c) is the Pioneer analysis.
14 Warrick v. Birdsell (In re Warrick), 278 B.R. 182, 185-86 (9th
15 Cir. BAP 2002) (citing In re Cahn, 188 B.R. at 631-32); see also
16 Rettig v. Peters (In re Peters), 191 B.R. 411, 418 (9th Cir. BAP
17 1996)("Arrowhead militates in favor of interpreting Rule 8002(c)
18 to correspond to FRAP 4(a)(5) even before amendment.").

19 Under Pioneer, in considering whether the moving party has
20 shown excusable neglect, the court considers: (1) the danger of
21 prejudice to the other party; (2) the length of the delay caused
22 by the neglect, and its potential impact on judicial
23 proceedings; (3) the reason for the delay, including whether it
24 was within the movant's reasonable control; and (4) whether the
25 movant acted in good faith. Pioneer Inv. Servs. Co., 507 U.S.
26 at 395. At the same time, courts are to "equitably consider all
27 relevant circumstances surrounding a party's (or its lawyer's),
28 errors or omissions." Pincay, 389 F.3d at 856, 860.

1 In an en banc hearing, the Ninth Circuit in Pincay provided
2 clarity to the Pioneer analysis by holding that per se rules are
3 never permissible under the Pioneer analysis. Id. In Pincay,
4 the district court applied the Pioneer analysis and granted
5 defendant's motion for an extension of time to file the notice
6 of appeal under FRAP 4(a)(5). On appeal, a majority of a three-
7 judge panel held that the reason for delay, the attorney's
8 reliance on a paralegal, was inexcusable as a matter of law, and
9 the panel thereby created a per se rule in the context of
10 excusable neglect under Pioneer. Pincay, 351 F.3d 947 (9th Cir.
11 2003), on reh'g en banc, 389 F.3d 853 (9th Cir. 2004). After
12 hearing en banc, the Ninth Circuit upheld the district court's
13 discretion in granting the motion to extend time, despite
14 recognizing that attorney's reason for delay was "one of the
15 least compelling excuses." Pincay, 389 F.3d at 859. In doing
16 so, the Ninth Circuit reinforced the principle behind Pioneer:
17 that excusable neglect is to be determined within the context of
18 the particular facts of a case by the district court, which is
19 in a better position to evaluate the factors. Id.

20 This is not to say that a trial court's decision is
21 paramount and free from review. A trial court abuses its
22 discretion in the context of excusable neglect when it fails to
23 articulate and apply all four factors of the Pioneer analysis.
24 Laurino v. Syringa Gen. Hosp., 279 F.3d 750, 753-54 (9th Cir.
25 2002) (finding abuse of discretion when district court did not
26 address the good faith factor under Pioneer); Bateman v. U.S.
27 Postal Serv., 231 F.3d 1220, 1224 (9th Cir. 2000) (district
28 court abused its discretion where it considered only one of the

1 Pioneer factors).

2 **B. Analysis**

3 Here, the bankruptcy court aptly applied the four factors
4 of the Pioneer analysis. Because Tye's notice of appeal was
5 untimely by four days the bankruptcy court recognized that the
6 delay was minimal and Salomon suffered little to no prejudice.
7 The bankruptcy court therefore found that the first two factors
8 did not justify denial of the motion. Rather, the bankruptcy
9 court's decision to deny turned upon finding that the reason for
10 delay was caused by Tye and insinuated bad faith.

11 Tye's primary reason stated for his untimeliness was that
12 he never received notice by mail of both the entry of judgment
13 and the memorandum of decision. Tye, who is a practicing
14 attorney, relied on the Postal Service to forward his
15 professional correspondence from his former residence to his
16 current post office box for more than a year. In addition, the
17 bankruptcy court noted that Tye had been forewarned in May and
18 November 2012 that his system of receiving mail prevented
19 receipt of important court pleadings. Even after assurances
20 that the issues with his mail had been resolved and subsequent
21 notification that mail sent to his former address was not being
22 delivered, Tye never filed a change of address with the
23 bankruptcy court. Because Tye's failure to receive notice was
24 the result of a process that Tye himself had engineered, the
25 bankruptcy court addressed the third prong of the Pioneer
26 analysis by finding Tye's reason for the delay to be
27 disingenuous. Moreover, Tye's knowledge of the insufficiency of
28 his mail service, his reliance on the Postal Service to forward

1 his professional correspondence for over a year, and his refusal
2 to properly notify the bankruptcy court and Salomon of the
3 change of address adequately support the bankruptcy court's
4 finding that Tye acted in bad faith by perpetuating his reason
5 for delay in filing the Motion.

6 With respect to Tye's representation that he was taking
7 care of a loved one and, subsequently, fell ill during the
8 fourteen-day appeal period, the bankruptcy court was within its
9 discretion to disregard these reasons in its analysis. Under
10 inquiry from the bankruptcy court at the hearing, Tye admitted
11 he would have filed a notice of appeal regardless of his health
12 concerns had he received notice of the judgment's entry.
13 Accordingly, based on his admitted statements, Tye's
14 preoccupation with his illness or the recovery of a loved one
15 was irrelevant to the untimely Motion.

16 In the end, on this record we are unable to find that the
17 bankruptcy court's application of the Pioneer analysis to the
18 facts was an abuse of discretion. Considerable deference is
19 given to the trial court's discretion: determination of whether
20 or not a particular action constitutes excusable neglect is an
21 analysis nuanced by the trial court's ability to judge
22 credibility and character. Pincay, 389 F.3d at 859-60 (leaving
23 the weighing of Pioneer's equitable factors to the discretion of
24 the district court in every case). The bankruptcy court
25 experienced, first hand, the timing and form of Tye's multiple
26 complaints about court documents which were not received. Thus,
27 the court was in the best position to determine whether Tye was
28 genuinely concerned by his mail issues, or was cavalierly

1 nonchalant. Its finding of the latter, that Tye's reason for
2 delay implicated bad faith, deserves our deference.

3 **VI. CONCLUSION**

4 As Tye did not meet his burden of proving excusable
5 neglect, the bankruptcy court properly denied his motion to
6 extend the time for filing an appeal. Accordingly, we AFFIRM.

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