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NOT FOR PUBLICATION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

In re:) BAP No. CC-13-1282-TaKuPa
)
 MARCELO BRITTO GOMEZ,) Bk. No. 11-26905-TD
)
 Debtor.) Adv. No. 11-02360-TD
)
)
 CARTER STEPHENS,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 MARCELO BRITTO GOMEZ; UNITED)
 STATES TRUSTEE,**)
)
 Appellees.)
)

Argued and Submitted on February 20, 2014
at Pasadena, California

Filed - March 25, 2014

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Appearances: Appellant Carter Stephens, pro se; Douglas Crowder
of Crowder Law Center for appellee Marcelo Brito
Gomez.

Before: TAYLOR, PAPPAS, and KURTZ, 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.

** The United States Trustee did not file a brief, appear at
argument, or otherwise participate in this appeal.

1 Carter Stephens sought reconsideration of the bankruptcy
2 court's dismissal of his adversary proceeding against Debtor
3 Marcelo Britto Gomez for failure to prosecute. The bankruptcy
4 court denied the motion; Stephens appealed. This Panel vacated
5 the order denying relief and remanded to the bankruptcy court for
6 findings of fact and conclusions of law. See Stephens v. Smith
7 (In re Gomez), 2012 WL 5938722 (9th Cir. BAP Nov. 28, 2012). On
8 remand, the bankruptcy court supported its decision with a
9 nine-page memorandum decision, from which Stephens now appeals.

10 We AFFIRM.

11 **FACTS¹**

12 Stephens retained attorney Lori Smith to represent him in
13 litigation against the Debtor. After the Debtor filed a
14 chapter 7² case, Smith - on Stephens' behalf - filed a
15 § 523(a)(2)(A) and (a)(6) nondischargeability complaint. After
16 filing the adversary complaint, however, Smith's activity in the
17 case was, at best, sporadic.

18 Pursuant to LBR 7016-1(a),³ the bankruptcy court scheduled

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20 ¹ Many of the relevant background facts are detailed in the
21 memorandum decision in the first BAP appeal. See In re Gomez,
2012 WL 5938722, at *1-3.

22 ² Unless otherwise indicated, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
24 All "Bankruptcy Rule" references are to the Federal Rules of
25 Bankruptcy Procedure, all "Civil Rule" references are to the
26 Federal Rules of Civil Procedure, and all "LBR" references are to
the Local Bankruptcy Rules of the United States Bankruptcy Court
for the Central District of California.

27 ³ LBR 7016-1(a) and (a)(2) provide that the bankruptcy clerk
28 issues a summons and notice of the status conference and that the
(continued...)

1 an initial status conference for September 1, 2011.⁴ The Debtor
2 filed an LBR 7016-1 status report prior to hearing; Stephens
3 filed nothing. Similarly, the Debtor and his counsel appeared at
4 the status conference; Smith did not. Neither Smith nor anyone
5 from Smith's office explained her non-attendance to the
6 bankruptcy court (or to Stephens, for that matter). The
7 bankruptcy court continued the status conference to the end of
8 the month.

9 After the bankruptcy court continued the hearing, it learned
10 that Stephens was present. At that time, it explained to
11 Stephens that Smith failed to appear and also failed to file a
12 required pre-hearing status report. Further, it disclosed to
13 Stephens that the Debtor's status report mentioned a possible
14 settlement, which allegedly failed based on Stephens' change of
15 mind. Stephens expressed surprise at this news and indicated
16 that he was unaware of any settlement discussions.

17 He then inquired whether he, in fact, was represented by
18 Smith. In response, the bankruptcy court stated:

19 Well, you have a couple options. You can fire
20 Ms. Smith and hire another lawyer or you can fire
21 Ms. Smith and represent yourself. One way or the
22 other, you have to do something to move this case ahead
23 from your stand point, and one way or another Ms. Smith
24 has some obligations. I would suggest you start by
25 talking to Ms. Smith. If that's a dead end, then why

24 ³(...continued)
25 parties are required to file a joint status report at least
26 14 days prior to each scheduled conference.

27 ⁴ We exercise our discretion to take judicial notice of
28 documents electronically filed in the adversary proceeding. See
Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R.
227, 233 n.9 (9th Cir. BAP 2003).

1 don't you [pick] up the phone and call [Debtor's
2 counsel] and see what you can work out.

3 Hr'g Tr. (Sept. 1, 2011) at 10:10-17.

4 Stephens advised that he had called Smith multiple times, to no
5 avail, and that he did not trust Smith. The bankruptcy court
6 emphasized that Stephens was obligated as the plaintiff to file a
7 status report as required by the local bankruptcy rules,
8 irrespective of Smith's deficient representation.

9 Smith filed a status report two weeks after the initial
10 status conference. Both Smith and Stephens appeared at the
11 continued status conference. The bankruptcy court apparently⁵
12 reemphasized the obligations of the parties in the adversary
13 proceeding; it also set a discovery cutoff deadline and ordered
14 Smith to lodge a proposed scheduling order. Smith, in turn,
15 represented that the parties sought mediation and that a proposed
16 mediation order would be filed. Notwithstanding the bankruptcy
17 court's orders and Smith's representations, Smith filed nothing.
18 Sometime during this time frame, however, Stephens filed a
19 complaint against Smith with the State Bar of California.

20 In anticipation of a continued status conference in February
21 of 2012, Debtor's counsel filed another LBR 7016-1 status report;
22 it was submitted as a unilateral status report.⁶ Neither Smith
23

24 ⁵ A transcript of the September 29, 2011 hearing was not
25 included in the record on appeal and does not otherwise exist on
the adversary proceeding docket.

26 ⁶ LBR 7016-1(a)(3) provides that if a party fails to
27 cooperate in preparing a joint status report and an answer has
28 been filed, the parties must each submit a unilateral status

(continued...)

1 nor Stephens filed a status report.

2 The Debtor next moved to dismiss the adversary proceeding
3 with prejudice pursuant to LBR 7041-1 and Civil Rule 41(b).
4 Among other things, he argued that Stephens' failure to comply
5 with either the discovery deadline or LBR 7016-1 warranted
6 dismissal. The motion to dismiss was scheduled for mid-February.
7 Neither Smith nor Stephens opposed the motion.

8 At the February status conference, the discussion focused on
9 the disintegration of the attorney-client relationship between
10 Stephens and Smith. After hearing from both Stephens and Smith,
11 the bankruptcy court orally dismissed the adversary proceeding
12 based on lack of diligent prosecution. An order confirming the
13 dismissal was entered shortly thereafter.

14 Acting pro se, Stephens moved for reconsideration of the
15 dismissal order. He did not obtain a hearing date and did not
16 properly notice or serve the motion. Two days later, the
17 bankruptcy court denied the reconsideration motion by writing
18 "motion denied" on its face. Stephens appealed the denial to
19 this Panel.

20 A BAP panel vacated the order denying reconsideration and
21 remanded to the bankruptcy court for findings of fact and
22 conclusions of law. On remand, the bankruptcy court prepared a
23 memorandum decision and supported its decision to deny relief
24 from the dismissal order based on both procedural deficiencies
25 and substantive legal grounds. Stephens timely appealed.

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28 ⁶(...continued)
report at least seven days before the scheduled conference.

1 serious procedural defects, including failure to properly serve
2 and notice the motion and a failure to set it for hearing. Memo
3 Dec. at 2-3. Stephens failed to comply with several Bankruptcy
4 Rules and several local bankruptcy rules. On appeal, he attempts
5 to explain his service errors, but his exhibits show service
6 attempts, as evidenced by postal information on the face of the
7 envelopes, only after he filed the reconsideration motion.
8 Stephens fails to even discuss the other procedural defects
9 identified by the bankruptcy court.

10 It is within the bankruptcy court's discretion to enforce
11 the Bankruptcy Rules and local bankruptcy rules. See Price v.
12 Lehtinen (In re Lehtinen), 332 B.R. 404, 412-14 (9th Cir. BAP
13 2005), aff'd, 564 F.3d 1052 (9th Cir. 2009); see also Weil v.
14 Neary, 278 U.S. 160, 169 (1929) (local rules have the force of
15 law) (citations omitted). Under LBR 9013-1(h), the bankruptcy
16 court was entitled to deem Stephens' noncompliance to be a
17 consent to the denial of the reconsideration motion. The
18 bankruptcy court, thus, did not abuse its discretion in denying
19 reconsideration based on Stephens' failure to comply with the
20 local bankruptcy rules and Bankruptcy Rules.

21 **B. The bankruptcy court did not abuse its discretion in denying**
22 **reconsideration under Civil Rule 60(b) on substantive legal**
23 **grounds.**

24 The reconsideration motion did not identify the particular
25 legal rule under which it sought relief. On remand, however, the
26 bankruptcy court applied Civil Rule 60(b) (incorporated into
27 adversary proceedings by Bankruptcy Rule 9024). This was not
28

1 erroneous.⁷ In particular, it referenced the relevant language
2 of Civil Rule 60(b)(1), (b)(2), (b)(3), and (b)(6) in its
3 memorandum decision.

4 Careful review of Stephens' appellate brief as well as the
5 record below, however, reveals that his arguments rest only on
6 Civil Rule 60(b)(6) and, if liberally construed,⁸ the purported
7 existence of "new evidence" under Civil Rule 60(b)(2). Thus, we
8 do not consider Civil Rule 60(b)(1) and (b)(3) in this appeal;
9 Stephens did not raise theories for reconsideration thereunder
10 either below or on appeal.

11 **1. There was no error in denying relief from the dismissal**
12 **order under Civil Rule 60(b)(6).**

13 Civil Rule 60(b)(6) provides for relief from a judgment or
14 order based on "any other reason that justifies relief." This
15 provision serves as an equitable remedy, should be applied
16 sparingly, and is limited to "extraordinary circumstances [that]
17 prevented a party from taking timely action to prevent or correct
18 an erroneous judgment." Zurich Am. Ins. Co. v. Int'l Fibercom,
19 Inc. (In re Int'l Fibercom, Inc.), 503 F.3d 933, 941 (9th Cir.
20 2007) (citation omitted). As a result, the movant "must
21 demonstrate both injury and circumstances beyond his control that
22 prevented him from proceeding with . . . the action in a proper
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24 ⁷ Where a party moves for reconsideration after the time for
25 appeal has passed, the motion is construed as a motion for relief
26 from judgment under Civil Rule 60(b).

27 ⁸ We liberally construe a pro se's brief and documents
28 filed. See Nilsen v. Neilson (In re Cedar Funding, Inc.),
419 B.R. 807, 816 (9th Cir. BAP 2009).

1 fashion." Id. (citation omitted).

2 The Ninth Circuit has held that "an attorney's gross
3 negligence [may] constitute[] an extraordinary circumstance
4 warranting relief from a judgment dismissing the case for failure
5 to prosecute under [Civil] Rule 41(b)." Lal v. Cal., 610 F.3d
6 518, 521 (9th Cir. 2010); see also Cmty. Dental Serv. v Tani,
7 282 F.3d 1164, 1169 (9th Cir. 2002). An attorney's gross
8 negligence, thus, may insulate a client from responsibility for
9 the attorney's actions. See Lal, 610 F.3d at 524 (gross
10 negligence creates an exception to the principle that "[a]n
11 attorney's actions are typically chargeable to his or her
12 client"); Tani, 282 F.3d at 1171 (an attorney's gross negligence
13 "vitiat[es] the agency relationship that underlies our general
14 policy of attributing to the client the acts of his attorney.").

15 An attorney's gross negligence, however, only provides an
16 excuse for a failure to properly prosecute a case to an unknowing
17 client. See Tani, 282 F.3d at 1169 ("[C]ourts have concluded
18 that an **unknowing client** should not be held liable . . . [for] an
19 attorney's grossly negligent conduct, and that in such cases
20 sanctions should be imposed on the lawyer, rather than on the
21 faultless client.") (emphasis added). In Lal, for example, the
22 appellant-plaintiff did not know about problems in the
23 prosecution of her lawsuit until approximately eight months after
24 dismissal of the case. 610 F.3d at 522. During those eight
25 months, plaintiff's attorney fabricated status updates and
26 falsely advised that he was properly handling the case. Id.
27 Similarly, in Tani, the appellant-defendant did not know that his
28 attorneys failed to answer the complaint, to participate in a

1 court-ordered settlement, or to oppose the plaintiff's motion for
2 a default judgment until the defendant received the entered
3 default judgment by mail. 282 F.3d at 1167. As in Lal, the
4 defendant's attorneys provided falsified status updates alleging
5 productive progress in the litigation. Id. Thus, in these
6 cases, the clients were ignorant of the true status of their
7 litigation and the deficient conduct of their counsel until well
8 after case dismissal or adverse judgment.

9 Here, the bankruptcy court found that Smith had been
10 "largely derelict" throughout the adversary proceeding and that
11 Stephens was partly responsible for Smith's inaction. Memo Dec.
12 at 4, 9. Its determination was based on the fact that Stephens
13 was aware of Smith's deficient representation, was warned of his
14 personal responsibility for advancing the litigation and
15 complying with court orders, and, thus, had a full and fair
16 opportunity to avoid the consequences of a failure to properly
17 prosecute his case.

18 Stephens knew about Smith's failure to properly prosecute
19 his case as early as the initial status conference. He expressly
20 stated at that time that he did not trust Smith. He also learned
21 of Smith's involvement in settlement discussions with the Debtor
22 and his counsel - discussions apparently not disclosed to him.
23 These instances were each and in concert red flags as to the
24 problems with Smith's representation.

25 At the initial status conference the bankruptcy court
26 further warned Stephens that even though Smith represented him,
27 he, as the plaintiff, was responsible for complying with the
28 local bankruptcy rules. Stephens also attended the continued
status conference at the end of September 2011; he, thus, was

1 aware of the discovery cutoff deadline and the bankruptcy court's
2 orders regarding the proposed scheduling order and proposed
3 mediation order.

4 Contrary to Stephens' claims at oral argument, the facts in
5 this case do not match the most relevant facts in Lal or Tani.
6 There is no indication that either Lal or Tani attended hearings
7 or was otherwise placed on notice that either could not rely on
8 their attorney's alleged actions and representations before case
9 dismissal or default judgment. In other words, Lal and Tani
10 learned of their attorneys' misdeeds long after the adverse
11 outcomes in their cases. Stephens, on the other hand, was
12 completely and continuously aware of Smith's errors months before
13 the adversary proceeding dismissal.

14 While there is some indication that Stephens sought to
15 retain other counsel, he ultimately failed to do so; and he
16 elected not to proceed pro se. He also suggests that during this
17 time period he received some assurance from Smith that she was
18 protecting his position. But, given Stephens' continuous
19 knowledge of Smith's consistent dereliction of duty, there is no
20 justification for deviating from the general rule that the client
21 is bound by the action or inaction of his attorney. The
22 bankruptcy court did not err in holding Stephens' responsible for
23 Smith's actions and inaction and, thus, it did not abuse its
24 discretion in denying relief under Civil Rule 60(b)(6).⁹ The

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27 ⁹ To be clear, we do not condone Smith's actions, and we
28 take no position as to Stephens' right to claim damages or to
otherwise seek relief as a result of her failures to
appropriately represent him.

1 dismissal here correctly balanced the right of the Debtor to
2 prompt resolution of the adversary proceeding against Stephens'
3 right to prosecute the case.

4 **2. There was no error in denying relief from the dismissal**
5 **order under Civil Rule 60(b)(2).**

6 Civil Rule 60(b)(2) provides relief from a judgment or order
7 based on "newly discovered evidence that, with reasonable
8 diligence, could not have been discovered in time to move for a
9 new trial under Civil Rule 59(b)." In general, the evidence must
10 have existed at the time that the judgment or order was entered.
11 See Fantasyland Video, Inc. v. Cnty. of San Diego, 505 F.3d 996,
12 1005 (9th Cir. 2007); see also Jones v. Aero/Chem Corp., 921 F.2d
13 875, 878 (9th Cir. 1990) (relief under Civil Rule 60(b)(2)
14 requires that "the evidence (1) existed at the time of the trial,
15 (2) could not have been discovered through due diligence, and
16 (3) was of such magnitude that production of it earlier would
17 have been likely to change the disposition of the case.")
18 (citation and quotation marks omitted). In other words, the
19 evidence must be "newly discovered" by the movant rather than
20 simply "new."

21 We interpret Stephens' argument on appeal as being based on
22 the fact that a declaration from Smith dated June 11, 2012; his
23 own declaration; and other disciplinary documents from the State
24 Bar of California relating to his state bar complaint against
25 Smith constitute newly discovered evidence of Smith's gross
26 negligence.

27 None of these documents were before the bankruptcy court at
28 the time that it denied the reconsideration motion. The record

1 shows that Stephens filed both the declarations and the state bar
2 documents in the adversary proceeding on July 20, 2012 - months
3 after the bankruptcy court denied the reconsideration motion. We
4 do not consider any documents that were not presented to the
5 bankruptcy court in the first instance.¹⁰

6 The only document attached to the reconsideration motion was
7 a two-page copy of Smith's attorney record from the state bar's
8 website. Stephens, however, never explains - either below or on
9 appeal - why he could not or did not discover this document
10 sooner and, more importantly, how this document would have aided
11 him in avoiding dismissal.

12 Included in Stephens' appellate excerpts of record are other
13 state bar disciplinary documents that pre-date entry of the
14 orders dismissing the adversary proceeding and denying
15 reconsideration. Stephens fails to advance any argument as to
16 why he could not obtain these documents, many of which are
17 publicly available on the state bar website, previously. And,
18 again, he fails to explain how the introduction of these
19 documents would have changed the outcome in his adversary
20 proceeding.

21 In sum, none of the documents provided by Stephens support
22 Civil Rule 60(b)(2) relief. As a result, the bankruptcy court
23 did not abuse its discretion in denying reconsideration
24 thereunder.

26 ¹⁰ In any event, the pertinent state court documents were
27 apparently entered by the state bar sometime in June of 2012 -
28 once again, several months after the bankruptcy court dismissed
the adversary proceeding and denied reconsideration.

CONCLUSION

For the reasons discussed, we AFFIRM the bankruptcy court's decision denying relief from the order dismissing the adversary proceeding.

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