

Mar 25 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NOT FOR PUBLICATION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

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.	)	<b>MEMORANDUM*</b>	
	)		
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 **FACTS<sup>1</sup>**

12 Stephens retained attorney Lori Smith to represent him in  
13 litigation against the Debtor. After the Debtor filed a  
14 chapter 7<sup>2</sup> 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),<sup>3</sup> the bankruptcy court scheduled

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20 <sup>1</sup> 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 <sup>2</sup> 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 <sup>3</sup> 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.<sup>4</sup> 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

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

27 <sup>4</sup> 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 apparently<sup>5</sup>  
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.<sup>6</sup> Neither Smith  
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24 <sup>5</sup> 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 <sup>6</sup> 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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27 \_\_\_\_\_  
28 <sup>6</sup>(...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  
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1 erroneous.<sup>7</sup> 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,<sup>8</sup> 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 <sup>7</sup> 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 <sup>8</sup> 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).<sup>9</sup> The

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26  
27 <sup>9</sup> 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.<sup>10</sup>

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.

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26 <sup>10</sup> 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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