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NOT FOR PUBLICATION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. SC-13-1185-PaJuKu
)	
JUVELYN SMITH,)	Bankr. No. 08-09001-LT
)	
Debtor.)	Adv. No. 09-90177-LT
)	
_____)	
MICHAEL SMITH,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM ¹
)	
JUVELYN SMITH,)	
)	
Appellee.)	
_____)	

Submitted Without Oral Argument²

Filed - April 4, 2014

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

Honorable Laura S. Taylor, Chief Bankruptcy Judge, Presiding

Appearances: Appellant Michael Smith, pro se, on the brief.

Before: PAPPAS, JURY, and KURTZ, 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.

² After notice to the parties, in an order entered on December 10, 2013, the Panel unanimously determined this appeal was suitable for submission on the briefs and record without oral argument, pursuant to Fed. R. Bankr. P. 8012.

1 Michael Smith ("Appellant") appeals the bankruptcy court's
2 order denying his motion for an extension of time to file an
3 appeal. We AFFIRM.

4 **FACTS AND PROCEDURAL HISTORY**

5 Chapter 7³ Debtor Juvelyn Smith ("Debtor") and Appellant
6 were once husband and wife. The termination of that relationship
7 spawned over a decade of contentious litigation.

8 On September 15, 2008, Debtor filed a bankruptcy petition.
9 The case proceeded unremarkably, a discharge was entered in
10 Debtor's favor and, on December 19, 2008, the case was closed.
11 On February 23, 2009, Appellant filed a motion to reopen the
12 bankruptcy case so that he could commence an adversary proceeding
13 against Debtor to contest the dischargeability of a debt he
14 alleged was owed to him. His motion was granted, and the
15 bankruptcy case was reopened on March 17, 2009.

16 On April 28, 2009, Appellant filed an adversary complaint;
17 he amended it on July 26, 2010. In the amended complaint,
18 Appellant alleged four claims for relief against Debtor which, he
19 asserted, gave rise to nondischargeable debts: 1) intentional
20 tort (generally, tortious interference with his parent/child
21 relationship); 2) willful and malicious injury; 3) conspiracy;
22 and 4) immigration fraud. Debtor filed an answer on
23 September 28, 2010, followed by a motion to dismiss on January 3,
24

25
26 ³ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
28 Rule references are to the Federal Rules of Bankruptcy Procedure,
Rules 1001-9037, and all Civil Rule references are to the Federal
Rules of Civil Procedure 1-86.

1 2011. Because the motion asked the bankruptcy court to consider
2 matters outside of the pleadings, the bankruptcy court treated it
3 as a motion for summary judgment. Following a hearing on the
4 motion, the bankruptcy court granted summary judgment to Debtor
5 on the fourth claim alleged in Appellant's amended complaint.
6 After providing Appellant a further opportunity to present
7 evidence regarding the other three claims, the bankruptcy court
8 on January 26, 2012, denied Debtor's motion for summary judgment
9 on the first three claims to the extent that those claims arose
10 between March 21, 2002, and March 21, 2003, or that they were
11 based on Debtor's alleged statements regarding child abuse by
12 Appellant. Proceedings would continue as to the first three
13 claims not based on those excluded issues.

14 Appellant filed his own motion for summary judgment on
15 September 16, 2011. The bankruptcy court denied the motion as to
16 all counts in the complaint and granted summary judgment in favor
17 of Debtor as to the fourth count in an order entered on
18 October 27, 2011. All of Appellant's remaining claims were then
19 set for trial. After hundreds of pages of documents were
20 submitted by Appellant, and numerous extensions of time were
21 granted, the bankruptcy court ultimately ruled without a hearing
22 that summary judgment should be granted in favor of Debtor on the
23 remaining counts. Subsequent to entry of the order, Appellant
24 was given an additional ten days to request oral argument, which
25 he did. Following oral argument, a judgment dismissing the
26 adversary proceeding was entered on February 22, 2013.

27 Appellant filed a notice of appeal concerning the judgment
28 on March 18, 2013 (the "SJ Appeal"). After notice to Appellant,

1 the Panel dismissed the appeal as untimely on May 6, 2013.

2 On the same date as the SJ Appeal notice of appeal was
3 filed, Appellant also filed a motion to extend time to file the
4 appeal.⁴ On April 3, 2013, the bankruptcy court entered an order
5 denying the motion. Appellant filed the notice commencing this
6 appeal on April 17, 2013.⁵

7 **JURISDICTION**

8 The bankruptcy court had jurisdiction under 28 U.S.C.
9 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
10 § 158(a)(1).

11 **ISSUE**

12 Whether the bankruptcy court abused its discretion in
13 denying Appellant's motion for extension of time to file a notice
14

15 ⁴ In the order dismissing the SJ Appeal, the Panel
16 acknowledged that Appellant had filed a motion for extension of
17 time in which to file the SJ Appeal, that the motion had been
18 denied by the bankruptcy court, and that he had filed this
19 current appeal. The Panel noted that "[i]f the order denying the
20 extension motion is reversed on appeal, the dismissal of BAP
21 Appeal No. SC-13-1122 will be vacated and BAP Appeal No.
22 SC-13-1122 will be reinstated." Order of Dismissal, BAP Case
23 No. 13-1122, May 6, 2013, at 2 n.1.

24 ⁵ On January 28, 2014, Appellant filed a request asking
25 that the Panel take judicial notice of (1) a book written by
26 Stephen Baskerville, *TAKEN INTO CUSTODY: THE WAR AGAINST FATHERS,*
27 *MARRIAGE AND THE FAMILY* (Cumberland House, 2007), and (2) pleadings
28 from a lawsuit filed by attorney Cole Stuart in the U.S. District
Court in San Diego. Appellant asserts that these documents
"address the operation of the state family/juvenile courts and
[are] applicable to this court for an understanding of what
happened in the underlying juvenile court case." Request for
Judicial Notice, at 2. These materials are not relevant to
issues in this appeal, and Appellant's request for judicial
notice is DENIED.

1 of appeal.

2 **STANDARD OF REVIEW**

3 We review a bankruptcy court's denial of a motion for an
4 extension of time to file a notice of appeal for abuse of
5 discretion. Warrick v. Birdsell (In re Warrick), 278 B.R. 182,
6 184 (9th Cir. BAP 2002) (citing Nugent v. Betacom of Phoenix,
7 Inc. (In re Betacom of Phoenix, Inc.), 250 B.R. 376, 379 (9th
8 Cir. BAP 2000)). This standard has two parts. First, we
9 consider whether the bankruptcy court applied the correct legal
10 standard; and second, we must decide whether the court's factual
11 findings supporting the legal analysis were clearly erroneous.
12 Alakozai v. Citizens Equity First Credit Union (In re Alakozai),
13 499 B.R. 698 (9th Cir. BAP 2013) (citing United States v.
14 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc)).

15 **DISCUSSION**

16 **A.**

17 We begin by acknowledging the arguments made by Appellant in
18 his briefs. Generally speaking, those arguments focus, not on
19 whether the bankruptcy court erred by denying his request for an
20 extension of time to appeal, but instead, on the merits of the
21 allegations contained in his adversary complaint, as well as his
22 contentions that the bankruptcy court erred in depriving him of a
23 trial concerning those issues. Of course, the proper forum for
24 exploration of those issues was in the SJ Appeal which, as noted
25 above, was ultimately dismissed as untimely.

26 We decline to consider Appellant's arguments or to express
27 any opinion concerning those issues. The only question that this
28 Panel may properly address is whether the bankruptcy court erred

1 when it denied Appellant's request for an extension of time in
2 order to file the SJ Appeal.

3 **B.**

4 To be timely, a notice of appeal must be filed within
5 fourteen days of entry of the bankruptcy court's judgment or
6 order. Rule 8002(a). "The timely filing of a notice of appeal
7 is mandatory and jurisdictional." Key Bar Invs., Inc. v. Cahn
8 (In re Cahn), 188 B.R. 627, 630 (9th Cir. BAP 1995) (citing
9 Browder v. Dir., Dep't of Corr. of Ill., 434 U.S. 257, 264 (1978)
10 and Slimick v. Silva (In re Slimick), 928 F.2d 304, 306 (9th
11 Cir.1990)). Hence, "[f]ailure to file [a notice of appeal]
12 within the time limit divests the appellate court of
13 jurisdiction." Preblich v. Battley, 181 F.3d 1048, 1056 (9th
14 Cir. 1999).

15 A bankruptcy court may extend the time for filing the notice
16 of appeal, provided the party requesting the extension files a
17 motion to do so "before the time for filing a notice of appeal
18 has expired, except that such a motion filed not later than 21
19 days after the expiration of the time for filing a notice of
20 appeal may be granted upon a showing of excusable neglect."
21 Rule 8002(c)(2).⁶

22
23 ⁶ The full text of Rule 8002(c)(2) reads:

24 (c) Extension of Time for Appeal. . . . (2) A request
25 to extend the time for filing a notice of appeal must
26 be made by written motion filed before the time for
27 filing a notice of appeal has expired, except that such
28 a motion filed not later than 21 days after the
expiration of the time for filing a notice of appeal

continue...

1 In this case, the judgment Appellant sought to appeal was
2 entered on February 22, 2013. As such, the deadline by which he
3 needed to file a notice of appeal was March 8, 2013.
4 Rule 8002(a). Having missed that deadline, Appellant timely
5 sought an extension of time in which to file a notice of appeal.
6 According to Rule 8002(c)(2), the bankruptcy court could grant
7 Appellant an extension of the usual fourteen-day appeal time only
8 if he demonstrated to the court that his delayed filing was the
9 result of excusable neglect.

10 The term "excusable neglect" was definitively interpreted by
11 the United States Supreme Court in Pioneer Inv. Servs. Co. v.
12 Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993). In that
13 case, a creditor failed to file a proof of claim before the
14 court-ordered bar date in a chapter 11 bankruptcy case. When the
15 late-filed claim was challenged, the Court held that "excusable
16 neglect," as provided under Rule 9006(b)(1),⁷ is not limited to
17 situations where the delay in filing is caused by circumstances
18 beyond the control of the party filing the claim. The Court
19 looked to the dictionary definition of "neglect" and reasoned
20 that:

21 _____
22 ⁶...continue
23 may be granted upon a showing of excusable neglect.

24 ⁷ Rule 9006 governs computing and extending time limits
25 under the Bankruptcy Rules in general, and Rule 9006(b)(1)
26 controls the bankruptcy court's general power to enlarge those
27 limits, including where a party seeks an extension of a
28 "specified period . . . where the failure to act was the result
of excusable neglect." As discussed below, the Supreme Court's
analysis of the meaning of the term "excusable neglect" in
Pioneer is therefore applicable here.

1 Congress plainly contemplated that the courts would be
2 permitted, where appropriate, to accept late filings caused
3 by inadvertence, mistake, or carelessness, as well as by
4 intervening circumstances beyond the party's control.

5 Id. at 388. Moreover:

6 Because Congress has provided no other guidelines for
7 determining what sorts of neglect will be considered
8 "excusable," we conclude that the determination is at
9 bottom an equitable one, taking account of all relevant
10 circumstances surrounding the party's omission.

11 Id. at 395.

12 The Ninth Circuit has applied the teachings of Pioneer to
13 requests for extensions of time to file appeals. See Pincay v.
14 Andrews, 389 F.3d 853, 858 (9th Cir. 2004). The Pincay court
15 articulated the factors a trial court should consider in
16 determining whether to grant or deny an extension of time to file
17 an appeal: (1) the danger of prejudice to the non-moving party;
18 (2) the length of delay and its potential impact on judicial
19 proceedings; (3) the reason for the delay, including whether it
20 was within the reasonable control of the movant; and (4) whether
21 the moving party's conduct was in good faith. Pincay, 389 F.3d
22 at 855; see also Pioneer, 507 U.S. at 395.

23 **C.**

24 In this case, in reviewing, but rejecting, Appellant's
25 request for an extension of time to appeal, the bankruptcy court
26 examined each of the relevant elements developed by the appellate
27 courts, mindful that the determination was "at bottom an
28 equitable one, taking into account all relevant circumstances
surrounding the party's omission." Order at 1, April 3, 2013
(citing Pioneer, 507 U.S. at 395).

As to the potential for prejudice to the Debtor, the

1 bankruptcy court found, "Ms. Smith has been delayed for years in
2 obtaining the fresh start she was otherwise entitled to under the
3 Bankruptcy Code. The fact that this follows well over a decade
4 of other litigation with Mr. Smith in the Family Court
5 underscores that the resumption of litigation, that was concluded
6 when Mr. Smith failed to timely appeal may have profoundly
7 negative consequences." Order at 2. The bankruptcy court also
8 noted that, during the pendency of the litigation, Appellant had
9 expressed a willingness to settle his claims against Debtor for a
10 token award of \$1, and thus, "the prejudice to [Appellant] cannot
11 be deemed more significant than the detriment to [Debtor] if he
12 is willing to settle for a dollar." Order at 1. We agree with
13 the bankruptcy court's conclusion that significant prejudice may
14 result to the Debtor if an extension to appeal were granted to
15 Appellant under these circumstances.

16 As to the length of Appellant's delay in seeking to appeal,
17 the bankruptcy court found that factor was either neutral, or
18 balanced slightly in favor of Appellant and granting an
19 extension. Order at 2.

20 The bankruptcy court determined that Appellant's reason for
21 delay in seeking to appeal, i.e., his attempt to obtain a token
22 settlement, was not an appropriate basis for failing to file a
23 timely appeal. The court reasoned, "[Appellant] knew at all
24 times when the appeal period ended. [Appellant] is an experienced
25 litigant who has litigated repeatedly in state and federal
26 court. . . . There is not a shred of evidence that [Appellant]
27 was unable to timely appeal; he simply chose not to." Order at
28 3. The court concluded that this factor "balances strongly

1 against extending the time limit." Id. We agree.

2 Finally, concerning Appellant's good faith, the bankruptcy
3 court expressed reluctance to "put fuel on the fire" by a bad
4 faith ruling. Again, we defer to the bankruptcy court's finding
5 in this respect based on its long acquaintance with the parties
6 and familiarity with this litigation.

7 The bankruptcy court concluded that, in its view, two of the
8 four Pincay/Pioneer factors favored or strongly favored denying
9 Appellant's motion, and that the other two factors were neutral.
10 The court also observed that Appellant's pro se status would not
11 change its analysis. Although he is not an attorney, Appellant
12 has apparently engaged in litigation in both federal and state
13 court for thirteen years and, in the bankruptcy court's words,
14 "is an exceptionally experienced litigator . . . [and the] Court
15 has absolutely no doubt based on its experience with this case,
16 and its discussions at the last hearing that [Appellant] was
17 capable of filing a timely appeal, but chose not to do so."
18 Order at 3.

19 We are satisfied that the bankruptcy court applied the
20 correct legal rule in analyzing Appellant's request for an
21 extension of time to appeal. As noted, in a thoughtful decision,
22 it identified and applied the Pioneer/Pincay factors in analyzing
23 whether Appellant had shown his delay in filing the notice of
24 appeal was the result of excusable neglect for purposes of
25 Rule 8002(c). All of the bankruptcy court's factual findings
26 were supported by the record; none were clearly erroneous. In
27 addition, the bankruptcy court's reasons for its decision are
28 well-founded based on the facts and circumstances in this case,

1 and its assessment of the weight to attribute to each of the
2 applicable factors was reasonable. Applying the required
3 deferential standard of review, we conclude that the bankruptcy
4 court did not abuse its discretion in denying Appellant's motion
5 for extension of time to file the appeal.

6 **CONCLUSION**

7 We AFFIRM the order of the bankruptcy court.
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