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NOT FOR PUBLICATION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. WW-13-1254-KuPaJu
)	
ROBERT RADAKOVICH,)	Bk. No. 11-49810
)	
Debtor.)	Adv. No. 12-04117
)	
ROBERT PETER RADAKOVICH,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM*
)	
STEPHEN J. WILSON; TRICIA)	
WILSON,)	
)	
Appellees.)	
)	

Argued and Submitted on June 26, 2014
at Pasadena, California

Filed - September 19, 2014

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Brian D. Lynch, Bankruptcy Judge, Presiding

Appearances: Randall L. Stewart, Esq., argued for appellant
Robert Radakvoich; Kevin R. Vibbert, Esq. argued
pro se and for appellees Stephen J. and Tricia
Wilson.

Before: KURTZ, PAPPAS and JURY, Bankruptcy Judges.

Memorandum by Judge Kurtz
Concurrence by Judge Jury

* 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 **INTRODUCTION**

2 Chapter 7¹ debtor Robert Peter Radakovich appeals from the
3 bankruptcy court's order denying his motion for Rule 9011
4 sanctions against appellees Stephen and Trisha Wilson and their
5 attorney Kevin Vibbert.

6 In denying Radakovich's sanctions motion, the bankruptcy
7 court determined that the complaint and other adversary
8 proceeding papers Vibbert filed on behalf of the Wilsons were
9 not frivolous. Under the applicable standard of review, abuse
10 of discretion, Radakovich has not persuaded us that the
11 bankruptcy court committed reversible error in making this
12 determination.

13 Accordingly, we AFFIRM.

14 **FACTS**

15 The relevant facts are mostly procedural and undisputed.
16 Radakovich filed a chapter 7 petition on December 21, 2011. The
17 Wilsons received notice that the last day for filing a complaint
18 objecting to Radakovich's discharge was March 26, 2012.

19 Vibbert prepared an adversary complaint on the Wilsons'
20 behalf objecting to Radakovich's discharge under § 727(a)(2)(A)
21 and attempted to file it with the bankruptcy court through the
22 court's electronic case filing system ("ECF") a few hours before
23
24

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

1 the bar date expired at midnight.² Vibbert's delay in filing
2 was partially caused by his miscalendaring the bar date as March
3 27 rather than March 26, 2012. Vibbert also discovered that he
4 did not remember his password for ECF access, and he was locked
5 out of the system after several failed attempts. He eventually
6 obtained the correct password from his assistant at
7 approximately 11:40 p.m., but after so many attempts to gain ECF
8 access, he was locked out and could not gain access until after
9 midnight. Also, unknown to him, his assistant was attempting to
10 log into the account to verify that she had given Vibbert the
11 correct password at the same time he was attempting to log into
12 the account. Vibbert finally filed the complaint at 12:19 a.m.
13 on March 27, 2012.

14 Radakovich then served the Wilsons and Vibbert with a safe
15 harbor motion for sanctions under Rule 9011 on the ground that
16 the complaint was time-barred as a matter of law. The sanctions
17 motion stated that, if the Wilsons did not voluntarily dismiss
18 their complaint within twenty-one days, Radakovich would seek to
19 hold the Wilsons and Vibbert jointly and severally liable for
20 monetary sanctions and attorney's fees.

21 Believing that they had a valid basis for arguing that the
22 complaint was not time-barred, the Wilsons did not dismiss their
23 complaint. Thereafter, Radakovich filed an answer to the
24 complaint followed by a motion for summary judgment. The
25 Wilsons responded by explaining the circumstances surrounding

26
27 ²Under Rule 9006(a)(4)(A), the deadline for all electronic
28 filings is midnight local time on the day set by the relevant
order of the bankruptcy court.

1 their late-filed complaint and by arguing that the bankruptcy
2 court should grant equitable relief from the bar date under
3 these circumstances. In support of their argument, the Wilsons
4 relied upon a Seventh Circuit decision, In re Kontrick, 295 F.3d
5 724 (7th Cir. 2002), aff'd, Kontrick v. Ryan, 540 U.S. 443
6 (2004). The Wilsons also relied upon two prior decisions of
7 this panel, Schunk v. Santos (In re Santos), 112 B.R. 1001 (9th
8 Cir. BAP 1990), and DeLesk v. Rhodes (In re Rhodes), 61 B.R. 626
9 (9th Cir. BAP 1986).

10 In Santos, the Panel held that the doctrines of equitable
11 tolling, equitable estoppel and excusable neglect were at odds
12 with the strict construction of the complaint filing deadlines
13 set forth in Rules 4004(a) and 4007(c). In re Santos, 112 B.R.
14 at 1006-08. At the same time, however, the Santos Panel
15 acknowledged the continuing validity of the exceptional or
16 unique circumstances doctrine: "Notwithstanding this strict
17 construction, we recognize and reaffirm those Panel cases
18 indicating that relief from the bar date may be available in
19 extraordinary circumstances." Id. at 1007 n.6 (citing
20 In re Rhodes, 61 B.R. at 630). This was the aspect of Santos
21 and Rhodes that the Wilsons and Vibbert were relying upon.

22 At the September 5, 2012 hearing on the summary judgment
23 motion, Vibbert explained that there was a change in his
24 password for the ECF system: "[Q]uite simply, I screwed up when
25 I was trying to log into the system. I got locked out. . . ."
26 Vibbert argued that the case law supported equitable relief from
27 the bar date in "exceptional" circumstances.

28 Without explicitly deciding whether the underlying facts

1 constituted exceptional or unique circumstances, the bankruptcy
2 court determined that the Wilsons had received notice of the bar
3 date and that there were no equitable grounds pursuant to which
4 the court could grant the Wilsons relief from the bar date.
5 Consequently, the bankruptcy court granted Radakovich's summary
6 judgment motion and dismissed the Wilsons' adversary complaint
7 with prejudice by order entered on September 10, 2012.

8 In September 2012, Radakovich filed the previously served
9 motion for sanctions in the bankruptcy court. Radakovich sought
10 monetary sanctions under Rule 9011(c)(1)(A) and (2) and
11 attorney's fees in the amount of \$4,664.

12 The Wilsons opposed the sanctions motion by essentially
13 reiterating their arguments previously made in response to the
14 summary judgment motion. On the Wilsons' behalf, Vibbert
15 admitted that the case law he cited did not identify what
16 specific circumstances would justify equitable relief from the
17 bar date. He nonetheless asserted that, after reviewing the
18 case law, he believed that he had a reasonable basis for arguing
19 that relief from the bar date should be allowed. He further
20 contended that the decision to proceed with the complaint was
21 based on a diligent review of existing case law and an argument
22 to extend that case law to allow the Wilsons' objection to
23 discharge claim to proceed.

24 At the hearing on the sanctions motion, Vibbert argued that
25 the legal position he had taken on behalf of the Wilsons was not
26 frivolous and that the case law he cited "very clearly states"
27 that bankruptcy courts have discretion to allow matters to
28 proceed after the bar date under certain circumstances, even

1 though that case law did not identify what those circumstances
2 were. He further asserted that he did not find any case law
3 that addressed his particular problem with ECF. Vibbert
4 maintained that because the ECF system lockout prevented him
5 from filing the complaint on time, this constituted an
6 "extraordinary circumstance" which should have allowed the case
7 to continue. Finally, Vibbert again asserted that his arguments
8 were based on an extension of the law.

9 The bankruptcy court agreed that Vibbert's arguments, while
10 ultimately unsuccessful, were not legally baseless or frivolous
11 because no existing case law addressed the inability of counsel
12 to access ECF due to the system's security features. In fact,
13 Radakovich's counsel conceded at the sanctions hearing that
14 there was no case law on point at the time the Wilsons filed
15 their papers. As a result, the court held that the Wilsons'
16 papers were not sanctionable under Rule 9011(b)(2).

17 Radakovich moved for relief from the order denying
18 sanctions under Rule 9024. In the motion, Radakovich requested
19 the court to more specifically articulate its analysis, findings
20 and conclusions with respect to the dispositive order. On
21 May 16, 2013, the court entered its order denying Radakovich's
22 Rule 9024 motion. That order essentially reiterated the
23 bankruptcy court's previous findings and conclusions.
24 Specifically, the court decided that "[The Wilsons'] argument to
25 extend the law to cover the factual situation at issue here,
26 involving technical difficulties accessing the Court's ECF
27 system, was warranted, made in good faith and nonfrivolous,
28 although eventually unsuccessful." Radakovich timely filed this

1 appeal.

2 **JURISDICTION**

3 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
4 §§ 1334 and 157(b) (2) (J). We have jurisdiction under 28 U.S.C.
5 § 158.

6 **ISSUE**

7 Whether the bankruptcy court abused its discretion in
8 denying Radakovich's motion for sanctions under Rule 9011.

9 **STANDARD OF REVIEW**

10 We review the bankruptcy court's denial of a motion for
11 sanctions under Rule 9011 for an abuse of discretion. See
12 Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) ("an
13 appellate court should apply an abuse of discretion standard in
14 reviewing all aspects of a district court's [Civil] Rule 11
15 determination."); Valley Nat'l Bank v. Needler (In re Grantham
16 Bros.), 922 F.2d 1438, 1441 (9th Cir. 1991).

17 Under Ninth Circuit law, a bankruptcy court abuses its
18 discretion when it applies the incorrect legal rule or its
19 application of the correct legal rule is "(1) illogical,
20 (2) implausible, or (3) without support in inferences that may
21 be drawn from the facts in the record." United States v. Loew,
22 593 F.3d 1136, 1139 (9th Cir. 2010).

23 **DISCUSSION**

24 Rule 9011(b) (1) provides for an award of sanctions against
25 an attorney or a party who files pleadings or papers that are
26 "interposed for any improper purpose." Id. Rule 9011(b) (2)
27 provides for an award of sanctions against an attorney or a
28 party who files pleadings or papers that are not "warranted by

1 existing law or by a nonfrivolous argument for the extension,
2 modification, or reversal of existing law or the establishment
3 of new law." Id.; see also Townsend v. Holman Consulting Corp.,
4 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc) ("Our cases have
5 established that sanctions must be imposed on the signer of a
6 paper [under Civil Rule 11] if either a) the paper is filed for
7 an improper purpose, or b) the paper is 'frivolous.'").

8 The language of Rule 9011 parallels that of Civil Rule 11.
9 Therefore, in analyzing sanctions under Rule 9011 we generally
10 may rely on cases interpreting Civil Rule 11. In re Grantham
11 Bros., 922 F.2d at 1441; but cf. Marsch v. Marsch
12 (In re Marsch), 36 F.3d 825, 829-30 (9th Cir. 1994) (declining
13 to apply in the Rule 9011 context particular Ninth Circuit
14 precedent applicable to Civil Rule 11 cases because of perceived
15 policy differences between bankruptcy cases and general federal
16 civil litigation).

17 In this appeal, Radakovich challenges only one aspect of
18 the bankruptcy court's ruling. Radakovich contends that the
19 Wilsons' complaint and summary judgment opposition were
20 frivolous and that the bankruptcy court erred when it held
21 otherwise. We will limit our appellate review to this single
22 issue. See Christian Legal Soc'y Chapter of Univ. of Cal. v.
23 Wu, 626 F.3d 483, 487-88 (9th Cir. 2010); Brownfield v. City of
24 Yakima, 612 F.3d 1140, 1149 n.4 (9th Cir. 2010) (citing
25 Greenwood v. Fed. Aviation Admin., 28 F.3d 971, 977 (9th Cir.
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1 1994)).³

2 For Civil Rule 11 sanctions purposes, the Ninth Circuit
3 uses the term "frivolous" to describe "a filing that is both
4 baseless and made without a reasonable and competent inquiry."
5 Townsend, 929 F.2d at 1362 (emphasis added). Accord, Holgate v.
6 Baldwin, 425 F.3d 671, 676 (9th Cir. 2005).

7 Frivolousness in this context is measured objectively. See
8 G.C. & K.B. Invs., Inc. v. Wilson, 326 F.3d 1096, 1109 (9th Cir.
9 2003). This means that the litigant's filings are measured
10 against a reasonableness standard set by what a competent
11 attorney admitted to practice before the same court would have
12 filed. See id.; In re Grantham Bros., 922 F.2d at 1441. This
13 also means that, when the court assesses the reasonableness of
14 the litigant's inquiry, the actual inquiry undertaken is
15 measured against what the hypothetical competent attorney would
16 have learned at the time from reasonable inquiry. See id. at

17 _____
18 ³ While In re Marsch, 36 F.3d at 829-30, holds that a
19 bankruptcy court in making a Rule 9011 Sanctions determination
20 must concurrently consider both frivolousness and improper
21 purpose, we decline to address at length the improper purpose
22 issue here because Radakovich made no argument in his opening
23 appeal brief regarding improper purpose. See Wu, 626 F.3d at
24 487-88; Brownfield, 612 F.3d at 1149 n.4. In any event, even
25 though the bankruptcy court did not make an explicit finding
26 regarding improper purpose, the entirety of the record and the
27 explicit findings of the bankruptcy court convince us that the
28 court implicitly found no improper purpose and that this finding
was not clearly erroneous. See Townsend, 929 F.2d at 1366
(holding that remand was not necessary for further findings on
improper purpose issue because the district court's limited
findings when combined with the record were adequate for purposes
of appellate review); see also Simeonoff v. Hiner, 249 F.3d 883,
891 (9th Cir. 2001) ("Conclusory and unhelpful findings of fact do
not necessarily require reversal if the record supports the
district court's ultimate conclusion.").

1 1442; see also Townsend, 929 F.2d at 1364 (“whether a pleading
2 is sanctionable must be based on an assessment of the knowledge
3 that reasonably could have been acquired at the time the
4 pleading was filed.”)

5 Under the objective standard, “counsel can no longer avoid
6 the sting of [Civil] Rule 11 sanctions by operating under the
7 guise of a pure heart and empty head.” Smith v. Ricks, 31 F.3d
8 1478, 1488 (9th Cir. 1994). On the other hand, Civil Rule 11
9 frivolousness is a minimal standard. As stated in Strom v.
10 United States, 641 F.3d 1051, 1059 (9th Cir. 2011), “[Civil]
11 Rule 11 sets a low bar: It deters ‘baseless filings’ by
12 requiring a ‘reasonable inquiry’ that there is some plausible
13 basis for the theories alleged.” When there is a plausible
14 basis, even a very weak one, supporting the litigant’s position,
15 imposition of Civil Rule 11 sanctions is inappropriate. Id. As
16 stated in Simon DeBartolo Grp., L.P. v. Richard E. Jacobs Grp.,
17 Inc., 186 F.3d 157, 167 (2d Cir. 1999): “[T]o constitute a
18 frivolous legal position for purposes of [Civil] Rule 11
19 sanction, it must be clear under existing precedents that there
20 is no chance of success and no reasonable argument to extend,
21 modify or reverse the law as it stands.” Id. (quoting Mareno v.
22 Rowe, 910 F.2d 1043 (2d Cir. 1990)), quoted with approval in
23 Strom, 641 F.3d at 1059.

24 This minimalist approach to assessing frivolousness is no
25 accident. Rather, it is necessitated by the risk that losing
26 arguments easily can be conflated with frivolous arguments. See
27 Operating Eng’rs Pension Trust v. A-C Co., 859 F.2d 1336,
28 1344-45 (9th Cir. 1988). To mitigate this risk, Civil Rule 11

1 is treated as an "extraordinary remedy" that must be imposed
2 "with extreme caution." Id. at 1345. Indeed, imposing a
3 broader frivolousness standard could chill effective
4 representation and zealous advocacy. As the Ninth Circuit has
5 explained:

6 [Civil] Rule 11 must not be construed so as to
7 conflict with the primary duty of an attorney to
8 represent his or her client zealously. Forceful
9 representation often requires that an attorney attempt
10 to read a case or an agreement in an innovative though
11 sensible way. Our law is constantly evolving, and
12 effective representation sometimes compels attorneys
to take the lead in that evolution. [Civil] Rule 11
must not be turned into a bar to legal progress. The
simple fact that an attorney's legal theory failed to
persuade the district court does not demonstrate that
counsel lacked the requisite good faith in attempting
to advance the law.

13 Id. at 1344. Accord, Townsend, 929 F.2d at 1363-64.

14 Here, the bankruptcy court held that the Wilsons'
15 exceptional or unique circumstances argument was a losing
16 argument but not a frivolous one. In essence, the bankruptcy
17 court determined that the Wilsons' invocation of the unique
18 circumstances doctrine was not frivolous because of the status
19 of Ninth Circuit law at the time the argument was made. At that
20 time, there was no case directly on point - no Ninth Circuit
21 precedent determining whether an eleventh-hour denial of access
22 to the bankruptcy court's ECF system resulting from the routine
23 operation of the system's password security features constituted
24 exceptional or unique circumstances for purposes of seeking
25 relief from an expired deadline under Rule 4004(a).

26 Radakovich contends that the bankruptcy court's
27 determination was erroneous and that the Wilsons' position was
28 nothing more than a variation of the oft-rejected attempts by

1 litigants to assert excusable neglect as a basis for relief from
2 the Rule 4004(a) and Rule 4007(c) filing deadlines. See, e.g.,
3 Jones v. Hill (In re Hill), 811 F.2d 484, 486 (9th Cir. 1987);
4 In re Santos, 112 B.R. at 1008 (9th Cir. BAP 1990); Osborn v.
5 Ricketts (In re Ricketts), 80 B.R. 495, 496-97 (9th Cir. BAP
6 1987); Buckeye Gas Prods. Co. v. Rhodes (In re Rhodes), 71 B.R.
7 206, 208 (9th Cir. BAP 1987).

8 The record does not support Radakovich's characterization
9 of the Wilsons' position. In their summary judgment motion
10 opposition, in their sanctions motion opposition, and at the
11 hearings on these two motions, the Wilsons' acknowledged that
12 "equitable defenses" like equitable estoppel and equitable
13 tolling were not generally available for the purpose of seeking
14 equitable relief from the Rule 4004(a) and Rule 4007(c) filing
15 deadlines. Rather, they argued that the particular
16 circumstances that occurred on the eve of the filing deadline
17 involving their counsel Vibbert constituted exceptional
18 circumstances under which the court could exercise its equitable
19 discretion to relieve them from the complaint filing deadline.
20 The Wilsons further admitted that their counsel, after
21 conducting research, could not articulate with any certainty the
22 parameters of the exceptional or unique circumstances doctrine.
23 Consequently, we reject Radakovich's assertion that the Wilsons'
24 argument was nothing more than an excusable neglect argument.

25 We acknowledge that the Wilsons' account of the status of
26 the unique circumstances doctrine in the Ninth Circuit was
27 partisan and incomplete. They failed to mention that the Ninth
28 Circuit has questioned the continued existence of the doctrine

1 and that it "appears" limited to situations where it is
2 necessary to remedy an explicitly misleading statement made by
3 the court. See Allred v. Kennerley (In re Kennerley), 995 F.2d
4 145, 147 (9th Cir. 1993); see also Shull v. Wells (In re Wells),
5 2010 WL 6259961, at **3-4 (9th Cir. BAP 2010) (more-recent,
6 albeit unpublished, Ninth Circuit decision stating the same
7 points). Nonetheless, an adversarial and incomplete statement
8 of the law does not, by itself, permit a court to conclude that
9 such a statement is sanctionable under Civil Rule 11. See
10 United States v. Stringfellow, 911 F.2d 225, 226 (9th Cir 1990)
11 ("The failure to cite relevant authority, whether it be case law
12 or statutory provisions, does not alone justify the imposition
13 of [Civil Rule 11] sanctions.").

14 As we already have indicated above, the critical question
15 is not whether the legal position taken is partisan or
16 incomplete but whether that position is frivolous. As we
17 already have explained, a legal position is not frivolous for
18 purposes of Rule 9011 if it was supported by reasonable inquiry
19 - "knowledge that reasonably could have been acquired at the
20 time the pleading was filed" by a hypothetical competent
21 attorney admitted to practice before the same court. Townsend,
22 929 F.2d at 1364; see also In re Grantham Bros., 922 F.2d at
23 1442.

24 Here, both Vibbert and the bankruptcy court stated that
25 their respective inquiries turned up no cases directly on point.
26 Nor have we found any cases on all fours that were in existence
27 at the time the Wilsons invoked the unique circumstances
28 doctrine.

1 More importantly, our research indicates that, in the
2 context of Rules 4004(a) and 4007(c), the continued existence
3 and parameters of the unique circumstances doctrine were
4 uncertain at the time the Wilsons filed their papers. See,
5 e.g., In re Kennerley, 995 F.2d at 147; In re Wells, 2010 WL
6 6259961, at **3-4. The unsettled state of the law supports the
7 bankruptcy court's conclusion that sanctions were inappropriate.
8 See Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472
9 (9th Cir. 1990).

10 Furthermore, two recent Ninth Circuit cases indicate that
11 the application of the doctrine in this context remains in a
12 state of flux. See Willms v. Sanderson, 723 F.3d 1094, 1103
13 (9th Cir. 2013); Anwar v. Johnson, 720 F.3d 1183, 1188 n.6 (9th
14 Cir. 2013). Anwar is particularly instructive on this point.
15 Anwar states:

16 We acknowledge that the U.S. Supreme Court has not
17 expressly addressed whether FRBP 4007(c)'s filing
18 deadline admits of any equitable exceptions and that
19 lower courts are divided on the issue. We need not,
20 and do not, reach the question of whether external
21 forces that prevented any filings - such as emergency
22 situations, the loss of the court's own electronic
23 filing capacity, or the court's affirmative misleading
24 of a party - would warrant such an exception.

25 Id. (citations omitted).

26 We acknowledge that neither the Willms decision nor the
27 Anwar decision was available at the time the Wilsons asserted
28 their position regarding the unique circumstances doctrine.
Nonetheless, these two decisions support the proposition that a
reasonably competent attorney admitted to practice before the
bankruptcy court, upon reviewing the cases cited in Willms and
Anwar, would have reached the same conclusion - that the

1 existence and parameters of the unique circumstances doctrine
2 were and are unsettled.

3 At bottom, on this record and in light of the unsettled
4 state of the law regarding the unique circumstances doctrine, we
5 hold that the bankruptcy court did not err when it concluded
6 that the Wilsons' papers were not frivolous. Because Radakovich
7 has not posited any other grounds for holding that the
8 bankruptcy court abused its discretion, we will uphold the
9 bankruptcy court's ruling on Radakovich's sanctions motion.⁴

10 Finally, it is worth noting that, if the bankruptcy court
11 had determined that the Wilsons' papers were frivolous, we might
12 have been equally hard pressed to find reversible error given
13 the fact-sensitive nature of the inquiry and the inherently
14 close calls associated with determinations of this type. See
15 Townsend, 929 F.2d at 1362 ("[Civil Rule 11] calls for an
16 intensely fact-bound inquiry, and for this kind of inquiry,
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18 ⁴According to the concurrence, our majority decision
19 suggests that the absence of case authority directly on point
20 "precludes" a determination that the Wilsons' papers were
21 frivolous. This is not what we mean to say. Our majority
22 decision is meant to establish a more modest proposition:
23 that, based on the entire record and the unsettled state of the
24 law regarding the parameters of the unique circumstances
25 doctrine, we decline to overturn the bankruptcy court's
26 assessment that the Wilsons' papers were not frivolous.

24 In reality, there is little difference between our viewpoint
25 and that of the concurrence. The concurrence perceives as
26 frivolous not the Wilsons' legal argument, but rather the
27 Wilsons' attempt to characterize the facts and circumstances of
28 this case as anything other than mere negligence on the part of
their counsel. Unlike the concurrence, we believe the bankruptcy
court was acting within its discretion when it concluded that the
Wilsons' attempted characterization was not frivolous.

1 'bright lines' are not appropriate"); see also Cooter & Gell,
2 496 U.S. at 401-05 (explaining at length why all aspects of
3 Civil Rule 11 sanctions rulings are entitled to a deferential
4 standard of review). The highly deferential effect of appellate
5 review under the abuse of discretion standard when applied in
6 fact-intensive settings is not unusual. Cf. Pincay v. Andrews,
7 389 F.3d 853, 858-59 (9th Cir. 2004) (en banc) (noting that,
8 whichever way the district court had decided the issue under
9 review, the court of appeals would have been hard pressed to
10 identify any grounds for reversal given the fact-intensive
11 nature of the inquiry and the abuse of discretion standard of
12 review).

13 **CONCLUSION**

14 For the reasons set forth above, we AFFIRM the bankruptcy
15 court's denial of Radakovich's sanctions motion.

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19 Concurring decision begins on next page.
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1 JURY, Bankruptcy Judge, concurring:

2 I concur in the result achieved by the majority, but I
3 arrive at that conclusion from a different path. Although I
4 would determine that a Rule 9011 violation did occur here as a
5 matter of law, because the bankruptcy court has broad discretion
6 in awarding sanctions if such violation occurred, I would not
7 disturb the exercise of that discretion on the facts of this
8 case.

9 The majority, as did the bankruptcy court, suggests that
10 the lack of authority on whether an ECF security lock out may
11 constitute the sort of unique and exceptional circumstance which
12 justifies denial of sanctions under Rule 9011. It suggests that
13 an absence of an existing case on all fours with this one makes
14 the argument that the circumstances were unique or exceptional
15 non-frivolous so as to avoid Rule 9011 sanctions. In my mind,
16 the lack of case law on point did not automatically preclude a
17 finding of a Rule 9011 violation, especially when ample case law
18 existed to determine that mere negligence would not excuse the
19 time-barred filing. See, for example, Schunk v Santos
20 (In re Santos), 112 B.R. 1001, 1008 (9th Cir. BAP 1990), where
21 our panel held that the bankruptcy court has no discretion to
22 enlarge the time periods under Rules 4004(a) and 4007(c) on the
23 basis of excusable neglect when the request is made after the
24 time period has expired.

25 Indeed, I do not see unique or exceptional circumstances in
26 this case. I disagree with the majority's statement that
27 Radakovich's characterization of the Wilsons' position as
28 nothing more than negligence is not supported by the record.

1 Objectively, the record shows just that. Although the Wilsons
2 argued something different than negligence, Vibbert's difficulty
3 with timely filing the Wilsons' complaint using the ECF system
4 was nothing more. Vibbert mis-calendared the bar date and as a
5 result attempted to file the complaint after business hours and,
6 more or less, at the last minute. The ECF security lock out was
7 triggered because Vibbert forgot his password – he "screwed up,"
8 he attempted to sign in with the wrong password multiple times,
9 and his legal assistant was trying to access the system
10 presumably with the correct password at the same time that he
11 was. When Vibbert's conduct is properly recognized for what it
12 was, the supposedly unsettled state of the law with respect to
13 the parameters of the unique circumstances doctrine holds little
14 significance in my mind. On these facts, no reasonable,
15 objective argument for an exception to the bar date could be
16 made. See Simon DeBartolo Grp., L.P. v. Richard E. Jacobs Grp.,
17 Inc., 186 F.3d 157, 167 (2nd Cir. 1999).

18 That said, even if Vibbert's conduct constituted
19 negligence, which I think it did, and even if the time-barred
20 complaint had no chance of success, which I think it did not, in
21 light of the bankruptcy court's substantial discretion in these
22 matters, I feel compelled to concur in the result. The
23 bankruptcy court has substantial discretion when deciding
24 whether to award or not award sanctions even when a violation of
25 Rule 9011(b) has been found. The text of Rule 9011(c) states
26 that a court may impose sanctions for a violation, but it is not
27 required to do so. See Rule 9011(c) ("If, after notice and a
28 reasonable opportunity to respond, the court determines that

1 subdivision (b) has been violated, the court may impose an
2 appropriate sanction on any attorney, law firm, or
3 party. . . .") (emphasis added); see also Civil Rule 11 advisory
4 committee's note, 1993 Amendment ("[W]hat sanctions, if any, to
5 impose for a violation are matters committed to the discretion
6 of the trial court."); Thompson v. RelationServe Media, Inc.,
7 610 F.3d 628, 666 (11th Cir. 2010) (noting that under Civil
8 Rule 11 sanctions are discretionary and a court can "excuse an
9 attorney's negligence, mistake, or plain-old incompetence" if it
10 chooses). In short, the bankruptcy court's discretion under
11 Rule 9011(c) makes it very difficult to demonstrate reversible
12 error when the court decides not to award sanctions.

13 As a consequence, on these facts, I defer to the bankruptcy
14 court's substantial discretion in deciding no sanctions were
15 warranted.