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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NC-14-1352-PaJuKl
)	
STEVEN PAUL WILDHABER, SR.,)	Bankr. No. 14-10875
DBA Designs Luminaire,)	
)	
Debtor.)	
_____)	
STEVEN PAUL WILDHABER, SR.,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM ¹
)	
DAVID BURCHARD, Chapter 13 Trustee,)	
)	
Appellee.)	
_____)	

Submitted Without Oral Argument²
on July 23, 2015

Filed - July 28, 2015

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

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Appearances: _____
 Steven Paul Wildhaber, Sr. on brief pro se; Lilian
 G. Tsang on brief for appellee David Burchard,
 Chapter 13 Trustee.

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 8024-1.

² After reviewing the briefs and submissions of the parties, in an order of June 3, 2015, the Panel determined that oral argument is not required in this appeal.

1 Before: PAPPAS, JURY, and KLEIN,³ Bankruptcy Judges.

2 Steven Paul Wildhaber, Sr. ("Debtor") appeals the order of
3 the bankruptcy court dismissing his chapter 13⁴ case for failure
4 to file his chapter 13 plan timely. We AFFIRM.

5 **I. FACTS**

6 Debtor filed a chapter 13 petition on June 11, 2014, to
7 prevent a foreclosure on his residence by the Brookside of Napa
8 Homeowners Association (the "HOA"). That same day the bankruptcy
9 court entered and sent Debtor a copy of an "Order to File Required
10 Documents and Notice Regarding Automatic Dismissal" (the "Order").
11 The Order advised Debtor that he had failed to file certain
12 required documents with his petition, including a chapter 13 plan,
13 and advised him that the court might dismiss his case if he did
14 not file the documents within fourteen days of the petition. On
15 June 26, 2014, the bankruptcy court entered an Order of Dismissal
16 because Debtor had not filed the missing documents, as the Order
17 had warned.

18 On July 9, 2014, Debtor filed a chapter 13 plan, twenty-eight
19 days after the petition date. Also on July 9, Debtor filed a
20 timely notice of appeal of the Order of Dismissal. In his
21 statement of issues on appeal, Debtor alleged that he sent all the
22 required documents, except the chapter 13 plan, via overnight mail

23 _____
24 ³ The Honorable Christopher M. Klein, Chief Judge of the
25 United States Bankruptcy Court for the Eastern District of
California, sitting by designation.

26 ⁴ 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 to the bankruptcy court on June 24, 2014. With respect to the
2 plan, Debtor candidly admitted that he had intentionally withheld
3 filing it because, in his words:

4 As I prepared the documents required by the
5 Order to File, I could not see how the Plan
6 could be reliable or predictive, without first
7 knowing the Court's determination of the
8 Brookside HOA Claim. On June 24, 2014 I
9 shipped all but the Ch[apter] 13 Plan to the
10 Bankruptcy Court building

11 Debtor explained that the documents he did send to the bankruptcy
12 court had been delivered on June 25, 2014, but not to the correct
13 address. Rather, Debtor noted, the documents had been sent to a
14 different location in the building housing the court and had not
15 been delivered appropriately to the clerk of the bankruptcy court
16 until June 30, 2014.

17 On August 8, 2014, Debtor filed an informal request that this
18 Panel remand the appeal to the bankruptcy court so it could
19 consider a motion for reconsideration of the Order of Dismissal.
20 On August 11, 2014, the Panel granted a limited remand to allow
21 the bankruptcy court to decide Debtor's reconsideration motion.

22 Debtor then filed a "motion to reopen" his case on August 13,
23 2014, in the bankruptcy court. Debtor stated in the motion that
24 he had sent "all required documents, except the Chapter 13 Plan"
25 within fourteen days of the filing of his petition but, as
26 described above, the documents were delivered to the wrong office
27 at the courthouse. As to his chapter 13 plan, Debtor explained
28 "[a]s a first-time bankruptcy petitioner, lacking experience with
the filing process, I was challenged to assemble and structure a
reliable projection for a Ch[apter] 13 Plan at that preliminary
date."

1 The 'motion to reopen' the case, which had not been closed,
2 was treated as a motion seeking relief from the dismissal order.

3 In response to Debtor's motion to reopen, in a memorandum and
4 order entered on August 24, 2014, the bankruptcy court wrote:

5 The debtor appears to believe that his
6 Chapter 13 case was dismissed because his
7 schedules were a day late due to being sent to
8 the wrong address. However, the case was
9 dismissed only because he failed to file a
10 Chapter 13 plan. Rule 3015(b) of the Federal
11 Rules of Bankruptcy Procedure requires that a
12 Chapter 13 plan be filed within 14 days of the
13 petition and does not permit extensions except
14 after proper notice and a showing of good
15 cause. The debtor did not file his plan until
16 28 days after the petition, the same day he
17 filed his notice of appeal. The court will
18 hear the debtor's motion to reopen his case on
19 September 10, 2014, at 1:30 P.M., provided
20 that he immediately serve his motion, all
21 related papers, and this order on all of his
22 creditors and file a certificate thereof.

23 Notice of the September 10, 2014 hearing was sent to all
24 parties in interest in the bankruptcy case by the clerk. On
25 September 8, 2014, the HOA filed an opposition to Debtor's motion,
26 arguing that dismissal of the case was appropriate due to Debtor's
27 failure to file the chapter 13 plan timely, and that it would be
28 prejudiced by further delays in the foreclosure proceeding.

The bankruptcy court heard Debtor's motion on September 10,
2014; Debtor appeared pro se and the HOA was represented by
counsel.⁵ On the same day, the court entered an Order Denying
Motion, which provided, in full,

To the extent that the Debtor's bankruptcy
papers may have been slightly late due to his
delivery of them to the wrong part of the

⁵ The Panel was not provided a transcript of the
September 10, 2014 hearing.

1 building, the neglect was slight and
2 excusable. However, the Debtor's Chapter 13
3 plan was not among those papers. The Debtor
4 has not shown any excusable neglect for his
5 violation of Rule 3015(b) of the Federal Rules
6 of Bankruptcy Procedure. Accordingly, his
7 motion for reinstatement of his case is
8 denied.

9 Debtor did not file an amended notice of appeal seeking
10 review of the bankruptcy court's September 10, 2014 order.
11 However, on September 12, 2014, Debtor filed with the Panel a
12 "Status Report" addressing the outcome of the limited remand. In
13 it, Debtor alleged he was treated inappropriately by the
14 bankruptcy court in resolving his motion, something he insisted
15 would be apparent if the Panel would review a transcript of the
16 hearing. However, Debtor did not provide a transcript. Finally,
17 Debtor stated "I hope [the Panel] will act on this."

18 **II. JURISDICTION**

19 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
20 and 157(b) (A). We have jurisdiction under 28 U.S.C. § 158.

21 **III. ISSUES**

22 Whether the bankruptcy court erred in dismissing Debtor's
23 case for failure to file a chapter 13 plan timely.

24 Whether the bankruptcy court erred in denying Debtor's motion
25 for relief from the dismissal order.

26 **IV. STANDARDS OF REVIEW**

27 The bankruptcy court's dismissal of a chapter 13 case is
28 reviewed for an abuse of discretion. Leavitt v. Soto
(In re Leavitt), 171 F.3d 1219, 1223 (9th Cir. 1999); Ellsworth v.
Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 914
(9th Cir. BAP 2011). Under this standard, we first "determine de

1 novo whether the court identified the correct legal rule to apply
2 to the relief requested.” United States v. Hinkson, 585 F.3d
3 1247, 1261-62 (9th Cir. 2009) (en banc). If the bankruptcy court
4 applied the correct legal rule, we then determine whether the
5 court’s “application of the correct legal standard was:
6 ‘(1) illogical, (2) implausible, or (3) without support in
7 inferences that may be drawn from the facts in the record.’”
8 United States v. Aguilar, 782 F.3d 1101, 1105 (9th Cir. 2015)
9 (quoting Hinkson, 585 F.3d at 1261-62) (internal quotation marks
10 omitted).

11 The bankruptcy court’s denial of a motion for relief from an
12 order is reviewed for an abuse of discretion. Bateman v. United
13 States Postal Serv., 231 F.3d 1220, 1223 (9th Cir. 2000).

14 V. DISCUSSION

15 **A. The bankruptcy court did not err in dismissing Debtor’s case 16 for failure to file a chapter 13 plan timely.**

17 Debtor argues that the bankruptcy court erred by its
18 “premature dismissal” of the chapter 13 case based upon his
19 failure to file a plan timely because such omission is not “good
20 cause” for a dismissal. Appellant’s Op. Br. at 12. We disagree.

21 Section 1307(c) provides a non-exhaustive list of what
22 constitutes “cause” to convert or dismiss a chapter 13 case.
23 In re Ellsworth, 455 B.R. at 914. As relevant here, § 1307(c) (3)
24 specifies that cause to convert or dismiss a case exists if there
25 is a “failure to file a plan timely under section 1321 of this
26 title[.]” Section 1321, in turn, provides that “[t]he debtor
27 shall file a plan,” and Rule 3015(b) establishes the deadline for
28 timely doing so:

1 **Chapter 13 Plan.** The debtor may file a
2 chapter 13 plan with the petition. If a plan
3 is not filed with the petition, it shall be
4 filed within 14 days thereafter, and such time
5 may not be further extended except for cause
6 shown and on notice as the court may direct
7

8 Here, there is no dispute that Debtor did not file a plan
9 with his chapter 13 petition on June 11, 2014, or within fourteen
10 days thereafter. Debtor also did not seek nor obtain bankruptcy
11 court approval for an extension of time to file his plan.⁶
12 Debtor's failure to comply with the deadline also contravened the
13 bankruptcy court's Order which expressly advised Debtor that his
14 case could be dismissed if he failed to file required documents,
15 including the chapter 13 plan, within fourteen days of the
16 petition.

17 Debtor concedes he made a deliberate, albeit perhaps
18 misinformed decision, to delay filing his chapter 13 plan, despite
19 the warning in the Order. A debtor's failure to file the plan
20 within fourteen days of the petition, or to obtain an extension of
21 time from the bankruptcy court to do so, violated Rule 3015(b) and
22 the Order. This constituted adequate cause for the bankruptcy
23 court to dismiss Debtor's case under § 1307(c)(3). See Tennant v.
24 Rojas (In re Tennant), 318 B.R. 860, 870-71 (9th Cir. BAP 2004)
25 (explaining that "if a case involves only very narrow procedural
26 aspects, a court can dismiss a Chapter 13 case without further
27 notice and a hearing if the debtor was provided with notice of the
28 requirements to be met [A] procedure is perfectly
29 appropriate that notifies the debtor of the deficiencies of his

⁶ A motion for an extension of time to file a chapter 13 plan is governed by Rule 9006(b).

1 petition and dismisses the case sua sponte without further notice
2 and a hearing when the debtor fails to file the required forms
3 within a deadline.”) (internal quotation marks and citations
4 omitted). Because the bankruptcy court identified the correct
5 legal rule in deciding whether to dismiss Debtor’s case, it did
6 not abuse its discretion in concluding that, based upon these
7 undisputed facts, the case should be dismissed.

8 **B. We summarily affirm the bankruptcy court’s order denying**
9 **Debtor’s motion for relief from the order on limited remand.**

10 The Panel granted Debtor’s request for a limited remand to
11 the bankruptcy court so it could consider Debtor’s motion for
12 relief from the dismissal order. While Debtor’s motion in the
13 bankruptcy court did not cite any particular authority for the
14 relief he requested, it was clear that he was asking the court to
15 reconsider its decision to dismiss the case. Debtor generally
16 argued, as he does in this appeal, that he did not file his
17 chapter 13 plan timely because he believed, at such an early point
18 in the case, a plan would not represent what he called a “reliable
19 projection” of his situation due to the unsettled issues existing
20 with the HOA’s claim.

21 On September 10, 2014, the bankruptcy court conducted a
22 hearing on Debtor’s motion and, apparently, announced its
23 decision. The bankruptcy court then entered an order stating, in
24 relevant part, that “Debtor has not shown any excusable neglect
25 for his violation of Rule 3015(b) of the Federal Rules of
26 Bankruptcy Procedure. Accordingly, his motion for reinstatement
27 of his case is denied.” After the bankruptcy court denied
28 Debtor’s motion, Debtor sent the “Status Report” to the Panel

1 advising of the bankruptcy court's ruling, suggesting that we
2 review a transcript of the hearing and requesting that the Panel
3 "act on" the bankruptcy court's order. However, Debtor failed to
4 provide a transcript of the hearing.⁷

5 Although Debtor did not file an amended notice of appeal to
6 include the bankruptcy court's order on limited remand, we review
7 that order by construing Debtor's "Status Report" as an amended
8 notice of appeal. See Smith v. Barry, 502 U.S. 244, 248-50 (1992)
9 (construing pro se's appellate brief as a potential notice of
10 appeal); Brannan v. United States, 993 F.2d 709, 710 (9th Cir.
11 1993) (construing a letter from a pro se appellant as a notice of
12 appeal). However, based upon Debtor's failure to provide a
13 transcript, we must summarily affirm the order on limited remand.

14 While the relief requested in his motion in the bankruptcy
15 court was imprecise and lacked citation to any authorities, we
16 construe it to be a motion for relief from the dismissal order
17 under Civil Rule 60(b)(1),⁸ as incorporated by Rule 9024. This

19 ⁷ Our review of the bankruptcy court's docket shows a
20 transcript of the hearing was neither requested by Debtor nor
prepared.

21 ⁸ The Civil Rule provides:

22 **Grounds for Relief from a Final Judgment,**
23 **Order, or Proceeding.** On motion and just
24 terms, the court may relieve a party or its
25 legal representative from a final judgment,
order, or proceeding for the following
reasons:

26 (1) mistake, inadvertence, surprise, or
excusable neglect

27 Civil Rule 60(b)(1). When a party files a motion for
28 reconsideration within fourteen days after the entry of a

(continued...)

1 rule allows the bankruptcy court to grant a party relief from a
2 final order or judgment for reasons including, "mistake,
3 inadvertence, surprise, or excusable neglect." Civil
4 Rule 60(b)(1). The movant bears the burden of demonstrating one
5 of the grounds provided in the Civil Rule. Engleson v. Burlington
6 N. R.R. Co., 972 F.2d 1038, 1043 (9th Cir. 1992).

7 "[D]etermination of whether neglect is excusable [under Civil
8 Rule 60(b)(1)] is an equitable one that depends on at least four
9 factors: (1) the danger of prejudice to the opposing party;
10 (2) the length of the delay and its potential impact on the
11 proceedings; (3) the reason for delay; and (4) whether the movant
12 acted in good faith." Bateman, 231 F.3d at 1223-24 (citing
13 Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S.
14 380, 395 (1993); Briones v. Riviera Hotel & Casino, 116 F.3d 379,
15 381 (9th Cir. 1997)); see also Pincay v. Andrews, 389 F.3d 853,
16 855-56 (9th Cir. 2004) (en banc).

17 The Ninth Circuit has instructed that "courts should
18 explicitly use the Pioneer-Briones framework for analysis of
19 excusable neglect under [Civil] Rule 60(b)(1)[.]" Lemoge v.
20 United States, 587 F.3d 1188, 1192 (9th Cir. 2009). However, even
21 if the trial court fails to explicitly apply the Pioneer-Briones
22 test, reversal may not be required if the court engaged in the

23
24 ⁸(...continued)
25 judgment, the motion is treated as one under Civil Rule 59(e),
26 incorporated to bankruptcy proceedings by Rule 9023. Am.
27 Ironworks & Erectors, Inc. v. N. Am. Constr. Corp., 249 F.3d 892,
28 898-99 (9th Cir. 2001). If it is beyond that period of time, the
motion is treated as a motion for relief from a judgment or order
under Civil Rule 60(b). Id. In this case, Debtor's motion was
filed well beyond the fourteen day period after the dismissal
order, and it should be reviewed under Civil Rule 60(b).

1 equitable analysis described in those cases. Id. at 1193;
2 Bateman, 231 F.3d 1224.

3 In this case, as reflected in its order denying Debtor's
4 motion, the bankruptcy court decided Debtor had not demonstrated
5 that his failure to file a plan timely resulted from excusable
6 neglect. However, lacking a transcript of the motion hearing with
7 the bankruptcy court's findings, conclusions, or comments, we are
8 unable to determine whether the court engaged in a Pioneer-Briones
9 excusable neglect analysis.

10 Debtor was obliged to provide the Panel with a record of the
11 proceedings in the bankruptcy court adequate to allow us to review
12 the court's order. Here, Debtor's failure to provide a transcript
13 of the motion hearing is grounds to summarily affirm the
14 bankruptcy court's decision. See Morrissey v. Stuteville
15 (In re Morrissey), 349 F.3d 1187, 1190-91 (9th Cir. 2003); Kyle v.
16 Dye (In re Kyle), 317 B.R. 390, 393 (9th Cir. BAP 2004). "When
17 findings of fact and conclusions of law are made orally on the
18 record, a transcript of those findings is mandatory for appellate
19 review." Clinton v. Deutsche Bank Nat'l Trust Co.
20 (In re Clinton), 449 B.R. 79, 83 (9th Cir. BAP 2011) (citing
21 McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 417 (9th Cir.
22 BAP 1999)); Rule 8009; 9th Cir. BAP R. 8009-1. "Without a
23 transcript, it is impossible to determine why the bankruptcy court
24 ruled as it did." In re Clinton, 449 B.R. at 83. That Debtor is
25 not represented by counsel in this appeal does not excuse him from
26 complying with these rules. Id. Because Debtor did not provide
27 the transcript the record provided is incomplete as a matter of
28 law. Id. (citing In re McCarthy), 230 B.R. at 417). We therefore

1 summarily affirm the order of the bankruptcy court on limited
2 remand.

3 **VI. CONCLUSION**

4 We AFFIRM the order of the bankruptcy court dismissing
5 Debtor's chapter 13 case and we AFFIRM the court's denial of
6 Debtor's motion for relief from the order.

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