

JUL 07 2016

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	EC-15-1111-TaJuD
6	LARRY TEVIS and NANCY TEVIS,)	Bk. No.	2:04-bk-26357
7	Debtors.)	Adv. No.	2:08-ap-2004
8	_____)		
9	LARRY TEVIS; NANCY TEVIS,)		
10	Appellants,)		
11	v.)	MEMORANDUM*	
12	CALIFORNIA DEPARTMENT OF)		
13	VETERANS AFFAIRS; JAN P.)		
14	JOHNSON, Chapter 13 Trustee,)		
	Appellees.**)		
	_____)		

Submitted Without Oral Argument***
on June 23, 2016

Filed - July 7, 2016

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

Honorable Christopher D. Jaime, Bankruptcy Judge, Presiding

Appearances: Larry Tevis and Nancy Tevis, pro se, on brief;
Todd D. Irby and Vasilios Stylianos Spyridakis on

* 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(c)(2).

** Appellee Jan P. Johnson did not file a brief; pursuant to the BAP Clerk of Court's conditional order of waiver, he waived the right to appear in this appeal.

*** The Panel unanimously determined that the appeal was suitable for submission on the briefs and record pursuant to Rule 8019(b)(3).

1 brief for appellee California Department of
2 Veterans Affairs.

3 Before: TAYLOR, JURY, and DUNN, Bankruptcy Judges.

4 **INTRODUCTION**

5 Chapter 13¹ debtors Larry Tevis and Nancy Tevis appeal from
6 an order dismissing their adversary proceeding against the
7 California Department of Veterans Affairs and the chapter 13
8 trustee for failure to prosecute.

9 We AFFIRM the bankruptcy court.

10 **FACTS²**

11 Prepetition, the Tevises contracted with the California
12 Department of Veterans Affairs ("CalVet"). The Tevises needed
13 money to acquire a mobile home, and CalVet provided the funding.
14 CalVet, however, did not provide a typical real or personal
15 property secured loan. Instead of taking a lien on the mobile
16 home or the underlying real property (the "Property"), located
17 in Rescue, California, CalVet obtained legal title to the
18 Property as a form of security. The Tevises would acquire (or
19 reacquire) title when they paid CalVet in full.

20 Unfortunately, the Tevises were dissatisfied with the
21

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

27 ² We exercise our discretion to take judicial notice of
28 documents electronically filed in the adversary proceeding and
in the underlying bankruptcy case. See Atwood v. Chase
Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th
Cir. BAP 2003).

1 mobile home; they claimed that it was damaged and initiated
2 state court litigation against the vendor and others.
3 Litigation between the Tevises and their state court counsel
4 followed. And a payment default under the CalVet contract was
5 not far behind. CalVet cancelled the contract after default and
6 commenced an unlawful detainer action against the Tevises.

7 The parties quickly reached a settlement; CalVet agreed to
8 reinstate the contract if the Tevises met certain conditions,
9 including a payment due in July 2004. The Tevises, however,
10 failed to pay as required by the settlement and, instead, filed
11 a chapter 7 petition on June 21, 2004.

12 The chapter 7 trustee reached a compromise with CalVet
13 allowing sale of the Property. This was unacceptable to the
14 Tevises, so they converted to chapter 13 in December of 2004.
15 Their amended confirmed chapter 13 plan provided for payment to
16 CalVet and included a balloon payment in the amount of \$13,100
17 in the 36th and final month of the amended plan - January 2008.
18 The plan stated that the source of the balloon payment was a
19 refinance or sale of the Property. Once again, however, the
20 Tevises defaulted. As a result, the chapter 13 trustee moved to
21 dismiss the case.

22 On January 2, 2008, more than 36 months into the chapter 13
23 case, the Tevises commenced an adversary proceeding against
24 CalVet, the Trustee, the chapter 7 trustee, and others. The
25 complaint asserted 18 claims for relief including fraud,
26 negligence, breach of contract, defamation, and a request for
27 injunctive relief. Soon after, the bankruptcy court granted in
28 part the request for a preliminary injunction and entered an

1 order enjoining CalVet from "taking action to take possession"
2 of the Property, including removing the Tevises from the
3 Property, pending resolution of the adversary proceeding or
4 further bankruptcy court order. The preliminary injunction also
5 enjoined the Trustee from "taking action to dismiss the
6 chapter 13 case." When the Tevises filed a third amended
7 complaint in 2009 without leave from the bankruptcy court,
8 several defendants, other than CalVet and the Trustee,
9 successfully moved for dismissal. The Tevises unsuccessfully
10 appealed these dismissals, but the adversary proceeding
11 otherwise was inactive until its reassignment to a new
12 bankruptcy judge approximately five years later.

13 The new bankruptcy judge promptly issued a scheduling
14 order, which invited the parties to file status conference
15 statements. The Tevises responded with a one paragraph
16 statement opening with their statement of opposition to "the
17 adversary proceedings in the bankruptcy court" and concluding
18 with the assertion that the bankruptcy court was biased, had no
19 integrity, and treated them unfairly. Their allegations were
20 short on particulars; they merely pointed out that the
21 bankruptcy court had denied their motion for relief under Civil
22 Rule 60(b), based upon fraud on the court, and that an appeal of
23 this ruling was pending before the Ninth Circuit.

24 Only CalVet and the Trustee appeared at the status
25 conference. The bankruptcy court stated that it would issue an
26 order that the Tevises show cause as to why the case should not
27 be dismissed for failure to prosecute. In the OSC that
28 followed, the bankruptcy court directed the Tevises to explain

1 in writing why the case should not be dismissed. The Tevises
2 responded and asserted that prior to the status conference, they
3 had called the courtroom deputy and advised that they would not
4 attend due to illness. They also continued to assert that a
5 fraud was perpetrated on the bankruptcy court and accused the
6 bankruptcy court of colluding with those perpetrating the fraud.

7 The Tevises did not appear at the hearing on the OSC. The
8 bankruptcy court stated that since the adversary proceeding was
9 filed in 2008, there had been "little, if any, movement or
10 progress toward the resolution and virtually no prosecution of
11 this case other than the previously mentioned appeals." It
12 noted that, as far as it could tell, there had been no discovery
13 and that the chapter 13 case was also stagnant. It stated that
14 the Tevises had not made plan payments in several years; in
15 fact, CalVet had not received a payment since February 2008.
16 The bankruptcy court then analyzed the five factors necessary to
17 dismiss the case based on a failure to prosecute under Civil
18 Rule 41(b), as incorporated into adversary proceedings by
19 Rule 7041, and dismissed the case. Finally, it dissolved the
20 injunctions against CalVet and the Trustee issued seven years
21 before.

22 The bankruptcy court entered an order dismissing the
23 adversary proceeding, and the Tevises appealed.

24 **JURISDICTION**

25 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
26 §§ 1334 and 157(b) (2) (O). We have jurisdiction under 28 U.S.C.
27 § 158.

28 ///

1 31 F.3d at 1451. We give deference to the bankruptcy court's
2 determination of "what is unreasonable because it is in the best
3 position to determine what period of delay can be endured before
4 its docket becomes unmanageable." Id. (internal quotation marks
5 and citation omitted).

6 Here, the bankruptcy court found that the first factor
7 weighed in favor of dismissal and implicitly found an
8 unreasonable delay. In doing so, it did not clearly err.

9 The Tevises filed the adversary proceeding in January 2008;
10 seven years passed before the bankruptcy court dismissed the
11 case. The record reflects little to no activity during those
12 seven years, other than motions to dismiss filed by various
13 defendants and the Tevises' appeals from the orders granting
14 those motions. There is no indication that the parties ever
15 engaged in discovery, filed any status reports, or did much of
16 anything prior to the bankruptcy court's issuance of the OSC.
17 On this record, the delay was plainly unreasonable.

18 **The bankruptcy court's need to manage its docket.** The
19 bankruptcy court typically reviews this factor in conjunction
20 with the first; again, we give deference to the bankruptcy
21 court's decision as to its docket management. See In re Eisen,
22 31 F.3d at 1452.

23 The bankruptcy court determined that the second factor
24 weighed in favor of dismissal because the Tevises affirmatively
25 refused to prosecute the case. It found that based on their
26 failure to attend the status conference scheduled after the
27 judicial reassignment, the bankruptcy court was hindered in its
28 ability to set pretrial deadlines or to "determine discovery"

1 and that it had expended resources on the case which could have
2 been better spent in other matters. Again, its finding was not
3 clearly erroneous.

4 The bankruptcy court on its own volition scheduled a status
5 conference in January 2015 and ordered that the parties file
6 statements. The Tevises filed an unproductive, one-paragraph
7 statement; they alleged that the bankruptcy court had treated
8 them unfairly, was biased, and lacked integrity. The Tevises
9 did not appear at the OSC hearing and filed a response to the
10 OSC that alleged that the bankruptcy court was colluding with
11 CalVet and the Trustee. Given this unhelpful response to the
12 new judge's attempt to manage the litigation properly and the
13 fact that the adversary proceeding was pending for seven years
14 with little to no activity, the record clearly supports the
15 bankruptcy court's finding.

16 **Risk of prejudice to the defendants.** There is a rebuttable
17 presumption of prejudice to the defendant, "even in the absence
18 of a showing of actual prejudice," based on the plaintiff's per
19 se failure to prosecute diligently. In re Eisen, 31 F.3d at
20 1452 ("The law presumes injury from unreasonable delay.")
21 (citation omitted). Only if the plaintiff shows that the delay
22 was not frivolous, that is, excusable, must the defendant show
23 actual prejudice. Id. at 1453.

24 Here, the bankruptcy court found that the third factor
25 weighed in favor of dismissal. Given its finding of
26 unreasonable delay, prejudice was properly assumed. In
27 addition, the bankruptcy court noted that the Tevises' failure
28 to prosecute the adversary proceeding had prevented Cal Vet and

1 the Trustee from engaging in discovery, which, in turn, hampered
2 their ability to meaningfully defend the case. It found that
3 "over time memories fade, evidence disappears, evidence that may
4 perhaps have been once available is no longer available," making
5 it unreasonably difficult for Cal Vet and the Trustee to mount a
6 meaningful defense. Finally, the bankruptcy court stated that
7 it considered it prejudicial to CalVet and the Trustee to
8 forcibly remain as parties in a case that was seven years old.
9 Again, its findings were not clearly erroneous.

10 The seven years in which the adversary proceeding was open
11 but inactive facially evidence delay. The Tevises have failed
12 to show that the delay was excusable. And while the adversary
13 proceeding and chapter 13 case languished, the injunctions
14 continued. Apparently, the Tevises have not made a payment on
15 the CalVet contract since 2008. At the time of the OSC hearing,
16 they had lived on the Property for free for roughly seven years.
17 Similarly, the Trustee remained as the panel trustee in a
18 chapter 13 that was well past its statutory expiration date, and
19 he could not seek case dismissal. The actual prejudice to the
20 appellees here was substantial.

21 **The policy favoring disposition of cases on their merits.**

22 The bankruptcy court "weigh[s] this factor against the
23 plaintiff's delay and the prejudice suffered by the defendant."
24 In re Eisen, 31 F.3d at 1454. The Panel, however, "need not
25 scrutinize the merits of a case when reviewing a dismissal."
26 Id. ("Even if the plaintiff has an obviously strong case,
27 dismissal would be appropriate if the plaintiff has clearly
28 ignored his responsibilities to the court in prosecuting the

1 action and the defendant had suffered prejudice as a result
2 thereof.") (citation omitted).

3 Here, the bankruptcy court found that the fourth factor
4 initially weighed against dismissal because of the public policy
5 in favor of disposing a case on the merits. That said, however,
6 it ultimately found that this factor could not militate against
7 dismissal. Once again, it did not clearly err. Even if the
8 Tevises had a meritorious case at one point - something we do
9 not determine - the length of time that this adversary
10 proceeding has been pending required that the public policy
11 factor be accorded little weight.

12 **Availability of less drastic sanctions.** Although the
13 bankruptcy court is not required to discuss alternatives
14 expressly where egregious circumstances exist, it generally
15 should conduct "a reasonable exploration of possible and
16 meaningful alternatives." In re Eisen, 31 F.3d at 1455
17 (internal quotation marks and citation omitted).

18 The bankruptcy court found that the fifth factor was the
19 most important and also weighed in favor of dismissal. It found
20 that the Tevises had made it "abundantly clear" that they did
21 not intend to prosecute the case and that there was nothing it
22 could do to persuade them to move forward with the case. It did
23 not clearly err in making this determination.

24 The bankruptcy court dismissed the case after issuing the
25 OSC. The Tevises filed an unhelpful response to the OSC and
26 then did not appear at the OSC hearing. Even the risk of case
27 dismissal did not incentivize them to meaningfully participate
28 in the proceeding. On this record, we cannot say that the

