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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NOT FOR PUBLICATION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. NV-15-1427-LDoKi
)	
6	RANDALL BESSLER and)	Bk. No. 14-51963-btb
	DENISE BESSLER,)	
7)	Adv. Pro. No. 15-05014-btb
	Debtors.)	
8	_____)	
)	
9	RALPH G. MERRILL,)	
)	
10	Appellant,)	
)	
11	v.)	M E M O R A N D U M *
)	
12	RANDALL M. BESSLER,)	
)	
13	Appellee.)	
14	_____)	

Submitted Without Oral Argument
on October 21, 2016

Filed - November 1, 2106

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce T. Beesley, Chief Bankruptcy Judge, Presiding

Appearances: Appellant Ralph G. Merrill, pro se on brief;
Appellee Randall M. Bessler, pro se on brief

Before: LAFFERTY, DORE,** and KIRSCHER, 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 8024-1.

** Hon. Timothy W. Dore, United States Bankruptcy Judge for
the Western District of Washington, sitting by designation.

1 **I. INTRODUCTION**

2 The bankruptcy court dismissed Appellant-Plaintiff Ralph
3 Merrill's adversary proceeding for failure to prosecute after
4 Merrill failed to appear at a continued status conference. On
5 appeal, Merrill, who is pro se, argues that he misunderstood the
6 court's instructions regarding the timing of the status
7 conference relative to a yet-to-be scheduled settlement
8 conference.

9 Because the record¹ reveals no basis for a finding of
10 unreasonable delay or prejudice to defendant, and no apparent
11 consideration of less drastic sanctions, we find that the
12 bankruptcy court abused its discretion in dismissing the
13 adversary proceeding. We therefore VACATE and REMAND.

14 **II. FACTUAL BACKGROUND**

15 On February 27, 2015, Appellant Ralph Merrill filed an
16 adversary complaint against Appellee-Debtor Randall Bessler.
17 Merrill alleged that Bessler was an antique firearms dealer, that
18 Merrill had consigned to Bessler several firearms, including a
19 rare .45 caliber German Luger pistol, and that Bessler had sold
20 the Luger and 40 other consigned firearms without Merrill's
21 knowledge or authority and failed to turn over the proceeds. The
22 complaint purported to plead three claims: conversion, breach of
23 contract, and breach of fiduciary duty. Merrill alleged damages
24

25 ¹ Not all the documents referred to in this Memorandum were
26 included in the parties' excerpts of record. To the extent
27 necessary, we take judicial notice of pleadings filed by both
28 parties in the adversary proceeding. Atwood v. Chase Manhattan
Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP
2003).

1 of \$763,000. In the prayer for relief, Merrill requested a
2 finding that the debt be found nondischargeable but did not
3 designate a specific subsection of § 523(a).²

4 Bessler filed an answer denying the allegations.
5 Thereafter, on May 14, 2015, Merrill filed a motion for summary
6 judgment and request for an order to show cause why Bessler
7 should not be held in contempt for making false statements to the
8 court. Merrill did not set the matter for a hearing.

9 The bankruptcy court set a scheduling conference for June 2,
10 2015. Merrill did not appear.³ On June 8, 2015, the bankruptcy
11 court issued an order to show cause why the adversary proceeding
12 should not be dismissed for failure to appear at the June 2
13 scheduling conference. The matter was set for hearing on
14 July 29, 2015. Merrill did not file a response to the order to
15 show cause, but he filed an application to appear by telephone at
16 the hearing.

17 On June 25, 2015, Bessler filed a motion to dismiss the
18 adversary proceeding and set it for hearing on the same date as
19 the continued scheduling conference. Merrill filed a motion to
20

21 ² Unless otherwise indicated, all chapter and section
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
23 "Rule" references are to the Federal Rules of Bankruptcy
24 Procedure, and "Civil Rule" references are to the Federal Rules
of Civil Procedure.

25 ³ It is not clear why Merrill failed to appear for the
26 June 2 scheduling conference. The Notice of Scheduling
27 Conference was included with the summons issued March 2, 2015.
28 The bankruptcy court docket indicates that the summons was served
on Bessler via the Bankruptcy Noticing Center on March 4, 2015,
but there is no record of service of the summons/notice on
Merrill.

1 strike the pleading and, as noted, an application to appear
2 telephonically at the July 29 hearing.

3 On July 21, 2015, the bankruptcy court issued an order
4 indicating that the July 29 hearing would be a status conference
5 regarding the pending motion for summary judgment and motion to
6 dismiss. The order setting the status conference indicated that
7 the parties could appear either in person or by telephone.

8 At the July 29, 2015 hearing, Merrill appeared
9 telephonically. The bankruptcy court informed the parties that
10 after reading their pleadings, it intended to send them to a
11 settlement conference. The court strongly encouraged Merrill to
12 settle, stating

13 I think it is highly unlikely from looking at this in
14 the sort of not documented, confused state, various
15 conflicting representations. And I'm not suggesting
16 that anyone is lying, but you have a long and
17 complicated relationship that had lots and lots and
lots and lots of variables in it. And I will be
surprised if you can prove a dischargeability case. So
I'm sending you to a settlement conference.

18 Hr'g Tr. (July 29, 2015) 5:8-17.

19 Merrill asked if he could respond, but the bankruptcy court
20 declined that request, informing Merrill that he could not
21 prosecute the adversary proceeding unless he appeared in person,
22 and that he should save his response for the settlement
23 conference.⁴ The bankruptcy court indicated that it would not

24
25 ⁴ The bankruptcy court stated:

26 No. You are in my court, this is a status
27 conference. I wanted to tell you this. You asked to
28 be allowed to appear. You are not allowed to prosecute
(continued...)

1 set a trial date until after a settlement conference had
2 occurred, and that the court would notify the parties of the date
3 set for the settlement conference and the name of the settlement
4 judge. The court then stated that the status conference would be
5 continued to December 2, 2015, but that if the case had settled
6 before then Merrill would not be required to appear. The court
7 then stated: "If you're doing anything else, you do have to be
8 here." Id. 7:15-16.

9 At the end of the hearing, Bessler informed the court that
10 Merrill was incarcerated and that he believed Merrill was being
11 released in March 2016.⁵ The court commented: "Okay. We'll set
12 the trial after that [if] we have to. . . . I don't know that I
13 realized that." Id. 9:6-7.

14 On August 6, 2015, the bankruptcy court issued a Notice of
15 Continued Status Hearing setting the status conference for
16 December 2, 2015. The notice contains a notation that "[t]he
17 court's hearing calendar for the date scheduled by this Notice

18
19 ⁴(...continued)
20 cases here if you are not here. So I'm not going to
21 hear you. I'm ordering you to a settlement conference.
22 You can make your statements to the settlement judge.
Next time there is a hearing you need to be here. I
will not let you appear by telephone.

23 Hr'g Tr. 6:8-14. The record does not indicate the reason for the
24 bankruptcy court's apparent irritation with Merrill regarding his
25 telephonic appearance. As noted, the order setting the status
conference explicitly permitted telephonic appearances.

26 ⁵ In Merrill's response to the motions panel's order
27 requiring him to file a complete copy of the transcript, Merrill
28 alleges that he had hung up the telephone before Bessler informed
the court of Merrill's incarceration. Merrill states that he was
released from prison on November 20, 2015.

1 may be viewed at www.nvb.uscourts.gov up to five days before the
2 scheduled hearing date to determine whether or not the hearing
3 has been kept on calendar."

4 In late August and early September, Merrill and a deputy
5 clerk for the bankruptcy court exchanged emails regarding the
6 scheduling of the settlement conference. Merrill included those
7 emails in his excerpts of record, but the record does not reveal
8 whether the bankruptcy court ever saw or considered any of that
9 correspondence. On August 24, 2015, the clerk sent Merrill an
10 email informing Merrill of available dates for a settlement
11 conference of November 2, 3, or 4, 2015. The clerk requested
12 Merrill inform him which dates and times would suit his schedule
13 and stated that he was transmitting the same information to
14 Bessler, and that once the parties agreed on a date and time, a
15 scheduling order would be issued. On August 31, 2015, the clerk
16 sent a follow-up email asking for a response no later than
17 September 4, 2015.

18 On September 4, 2015, Merrill replied to the clerk's email
19 as follows:

20 Thank you for your notice. I received a written notice
21 from the Court a couple of weeks ago or so, informing
22 me of a settlement conference on the 2nd of December.
23 Assuming that was pretty reliable, I scheduled my
24 travel plans to align with that date so that I would be
25 in the region at that time, thus able to attend. I am
26 in Colorado at the present time, and would find it very
27 difficult to change my current travel plans for the 2nd
28 of December. Is there any possibility that we can
adhere to the original plan? That would help
considerably.

26 It appears to us from this email that Merrill was conflating
27 the settlement conference with the continued status conference.
28 Indeed, the clerk replied the same day, explaining to Merrill

1 that the settlement conference was separate from the December 2
2 status conference:

3 Reviewing the docket, I see that on 8/6 a notice was
4 issued continuing the 7/29 status hearing(s) to Tues.
5 Dec. 2. **In contrast to this, what I am attempting to**
6 **coordinate is a separate settlement conference which**
7 **the Court ordered during the 7/29 hearings.** My review
8 of the record of the 7/29 hearing(s) indicates that the
9 Court will not bring the matter to trial until such a
10 settlement conference takes place, so I wanted to give
11 you the opportunity for one of the November settings -
12 since they are the very soonest available. . . .

13 (emphasis added). The clerk then informed Merrill that if the
14 November dates were not feasible, the clerk would advise Merrill
15 of future dates as they became available.

16 A few days later, Merrill sent a reply email to the clerk
17 stating that his return to the Utah/Nevada area would be
18 difficult to manage any sooner than December and requested a date
19 "around that time." On September 10, 2015, the clerk responded
20 with "Fair enough, Mr. Merrill. Right now, it looks like the next
21 chance we'll have for settlement conferences will be sometime in
22 the second quarter of 2016. I'll be back in contact then."

23 The next item on the bankruptcy court's docket is the Order
24 Dismissing Adversary Proceeding entered December 4, 2015. The
25 Order states:

26 At the prior hearing on July 29, 2015, the
27 Plaintiff was ordered to be present at this hearing.
28 There was no appearance by Plaintiff, and no pleading
filed or request for a continuance received.

Therefore, this matter is dismissed for lack of
prosecution.

No minute entry appears on the bankruptcy court docket to
indicate that a hearing was held or to otherwise explain the
court's ruling.

1 Merrill timely appealed.

2 **III. JURISDICTION**

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

6 **IV. ISSUE**

7 Did the bankruptcy court abuse its discretion in dismissing
8 the adversary proceeding for lack of prosecution?

9 **V. STANDARD OF REVIEW**

10 The bankruptcy court may sua sponte dismiss an adversary
11 proceeding for lack of prosecution under Civil Rule 41(b),
12 applicable in bankruptcy via Rule 7041. See Henderson v. Duncan,
13 779 F.2d 1421, 1423 (9th Cir. 1986); Abandonato v. Stuart
14 (In re Stuart), 88 B.R. 247, 249 (9th Cir. BAP 1988). We review
15 the bankruptcy court's dismissal of an adversary proceeding based
16 upon a plaintiff's failure to prosecute for abuse of discretion.
17 Moneymaker v. CoBEN (In re Eisen), 31 F.3d 1447, 1451 (9th Cir.
18 1994). Dismissal is a harsh penalty to be imposed only in
19 extreme circumstances. Henderson, 779 F.2d at 1423.

20 A bankruptcy court abuses its discretion if it applies the
21 wrong legal standard, misapplies the correct legal standard, or
22 if its factual findings are illogical, implausible, or without
23 support in inferences that may be drawn from the facts in the
24 record. See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d
25 820, 832 (9th Cir. 2011). To reverse for abuse of discretion, we
26 must have a definite and firm conviction that the bankruptcy
27 court committed a clear error of judgment in the conclusion it
28 reached upon a weighing of the relevant factors. In re Eisen,

1 31 F.3d at 1451.

2 **VI. DISCUSSION**

3 **A. Factors to be considered in determining whether dismissal is**
4 **appropriate**

5 In determining whether to dismiss a case for lack of
6 prosecution, the bankruptcy court is to weigh the following
7 factors: (1) the public's interest in expeditious resolution of
8 litigation; (2) the court's need to manage its docket; (3) the
9 risk of prejudice to the defendants; (4) the public policy
10 favoring the disposition of cases on their merits; and (5) the
11 availability of less drastic sanctions. In re Eisen, 31 F.3d at
12 1451; Henderson, 779 F.2d at 1423; Tenorio v. Osinga
13 (In re Osinga), 91 B.R. 893, 894 (9th Cir. BAP 1988). No finding
14 of bad faith is required. Henderson, 779 F.2d at 1425.

15 A dismissal for lack of prosecution must be supported by a
16 showing of unreasonable delay. Nealey v. Transportacion Maritima
17 Mexicana, S.A., 662 F.2d 1275, 1280 (9th Cir. 1980).

18 Unreasonable delay creates a presumption of injury to the
19 defense. Ash v. Cvetkof, 739 F.2d 493, 496 (9th Cir. 1984). We
20 give deference to the bankruptcy court in reviewing whether
21 unreasonable delay existed, as the bankruptcy court is in the
22 best position to determine what period of delay can be endured
23 before its docket becomes unmanageable. In re Osinga, 91 B.R. at
24 895; In re Stuart, 88 B.R. at 249. Because of the countervailing
25 interest in disposing of cases on their merits, the pertinent
26 question is not simply whether there has been a delay but rather
27 whether there has been sufficient delay or prejudice to justify
28 dismissal of the plaintiff's case. Nealey, 662 F.2d at 1280.

1 **B. Application of the factors to the facts of this case**

2 The bankruptcy court did not make explicit findings to
3 support the dismissal of the adversary proceeding, but such
4 findings are not required; we may independently review the record
5 to determine whether the bankruptcy court abused its discretion.
6 Ash, 739 F.2d at 496.

7 **1. Unreasonable delay**

8 It appears to us that the bankruptcy court dismissed the
9 case based on unreasonable delay. However, we find no basis for
10 such a finding. It is not clear that Merrill's failure to appear
11 at the December 2 status conference resulted in any delay at all.
12 Rather, the delay was due to the rescheduling of the settlement
13 conference. Even though Merrill's unavailability for the
14 November dates caused the delay in scheduling the settlement
15 conference, it appears that his unavailability was due to his
16 incarceration.⁶

17 To the extent the bankruptcy court also relied on Merrill's
18 failure to appear at the original June 2 scheduling conference in
19 dismissing the case, it is not clear whether Merrill had notice
20 of the June 2 hearing; therefore, any such reliance was probably
21 misplaced.

22 **2. Prejudice**

23 Nothing in the appellate record or the bankruptcy court
24 docket reflects prejudice to Bessler resulting from Merrill's
25 failure to appear at the December 2 status conference, beyond the
26

27 ⁶ The bankruptcy court may well not have recalled Bessler's
28 assertion that Merrill would be incarcerated until March 2016.

1 presumed inconvenience and possible expense of appearing at a
2 hearing that did not occur. **Both** parties were waiting for the
3 scheduling of the settlement conference, which would not have
4 occurred before April 2016.

5 **3. The bankruptcy court did not consider less drastic**
6 **sanctions.**

7 Dismissal is a harsh penalty that should be imposed only in
8 extreme circumstances. Henderson, 779 F.2d at 1423. Here,
9 dismissal was effectively with prejudice because any
10 nondischargeability action would be time-barred if refiled.
11 Thus, Merrill has lost the opportunity to have his claims heard
12 on the merits. Less drastic sanctions, such as a monetary
13 penalty, could have been imposed, but there is nothing in the
14 record to suggest that the bankruptcy court considered those.

15 **4. Merrill's failure to appear was based on his**
16 **misunderstanding of the court's instructions.**

17 Merrill argues in his brief that he believed that the
18 settlement conference was to occur before another status
19 conference would be held. Merrill contends in his opening brief
20 that he interpreted the court clerk's communications to mean that
21 no status conference would be held until after the settlement
22 conference had occurred:

23 Merrill assumed that if the Settlement Conference was
24 to be rescheduled, as the Clerk clearly inferred, then
25 the Status Conference that was going to follow it,
26 would necessarily be rescheduled. Otherwise, the
27 "status" would not have changed for the scheduled
28 December 2, 2015 Status Conference, rendering it moot.
Accordingly, Merrill cancelled his plans for travel and
awaited further notification from the Clerk of Court
who had previously advised: "I'll be back in contact
then."

1 Thus, Merrill did not appear for the December 2 status conference
2 because he was awaiting an order setting the date for the
3 settlement conference. It does not appear that the bankruptcy
4 court was aware of this.

5 Bessler argues that Merrill "repeatedly" ignored the
6 bankruptcy court's orders to personally appear at hearings on
7 June 2, 2015, July 29, 2015, and December 2, 2015. Bessler
8 states that "Merrill was told at the hearing on July 29th, 2015,
9 that if he did not appear at the next hearing on December 2nd,
10 2015, that his Adversary Complaint would be dismissed."

11 These assertions are not completely accurate. First,
12 Merrill was **not** required to appear in person on July 29; the
13 order setting the status conference explicitly permitted the
14 parties to appear telephonically (by making arrangements with
15 Court Call one day before the hearing). Second, although the
16 bankruptcy court told Merrill that, barring settlement, Merrill
17 needed to personally appear at the continued status conference,
18 the court did **not** explicitly state that a failure to appear would
19 result in dismissal of the adversary proceeding.

20 Still, the bankruptcy court's dismissal of the adversary
21 proceeding was not entirely baseless: Merrill failed to appear
22 at the initial scheduling conference on June 2, after which the
23 court issued an order to show cause; the court stated on the
24 record on July 29, 2015 that if the case had not settled, Merrill
25 had to personally appear at the December 2 status conference; and
26 the court clerk explained to Merrill that the settlement
27 conference and status conference were two different hearings.
28 Also, Merrill could have contacted the court to confirm whether

1 the December 2 status conference was going forward.

2 Notwithstanding the foregoing, as noted above, dismissal is
3 a harsh penalty to be imposed only in extreme circumstances.

4 Henderson, 779 F.2d at 1423. At an early point in the case, the
5 decision to terminate is subject to further scrutiny. Taylor v.
6 Singh (In re Singh), 2016 WL 770195, at *5 (9th Cir. BAP Feb. 26,
7 2016).⁷ And, "in the absence of less drastic alternative
8 sanctions and where there is no evidence of prejudice to the
9 defendant, dismissal of the plaintiff's case is improper."

10 In re Stuart, 88 B.R. at 250 (citing Raiford v. Pounds, 640 F.2d
11 944, 945 (9th Cir. 1981)).

12 VII. CONCLUSION

13 Under the totality of the circumstances presented in this
14 appeal, we find that the the public policy favoring the
15 disposition of cases on their merits was not outweighed by the
16 court's need to manage its docket, the risk of prejudice to the
17 defendant, or the public's interest in expeditious resolution of
18 litigation. Moreover, the bankruptcy court did not consider
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21 ⁷ In Singh, the bankruptcy court dismissed the adversary
22 proceeding at the first status conference for plaintiff's
23 counsel's failure to file a status report as required by local
24 rule. Counsel did not file the status report because the parties
25 were in the process of preparing a stipulation and order to stay
26 the proceedings pending the outcome of a § 727 action brought by
27 the United States Trustee. We reversed, finding that counsel's
28 noncompliance was minimal, and that the bankruptcy court erred in
finding risk of prejudice to the debtor where debtor was subject
to a denial of discharge proceeding as well as related adversary
proceedings. We also found that the bankruptcy court erred in
its consideration of lesser sanctions, and that on balance, the
need to manage the court's docket did not outweigh the public
interest in having cases heard on their merits.

1 lesser sanctions. Thus, the bankruptcy court abused its
2 discretion in dismissing the adversary proceeding.

3 Therefore, we VACATE and REMAND for further proceedings in
4 accordance with this disposition.

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