

MAR 22 2017

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NOT FOR PUBLICATION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

| | | | |
|------------------------|---|--------------------|-----------------|
| In re: |) | BAP No. | NC-16-1092-KuBS |
| |) | | |
| WILLIAM F. GARLOCK, |) | Bk. No. | 3:12-bk-30802 |
| |) | | |
| Debtor. |) | Adv. No. | 3:13-ap-03172 |
| |) | | |
| LEDESMA VENTURES, LLC, |) | | |
| |) | | |
| Appellant, |) | | |
| |) | | |
| v. |) | MEMORANDUM* | |
| |) | | |
| WILLIAM F. GARLOCK, |) | | |
| |) | | |
| Appellee. |) | | |
| |) | | |

Argued and Submitted on January 19, 2017
at San Francisco, California

Filed - March 22, 2017

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

Honorable Dennis Montali, Bankruptcy Judge, Presiding

Appearances: David M. Wiseblood argued for appellant Ledesma
Ventures, LLC; Zachary Tyson of Nova Law Group
argued for appellee William F. Garlock.

Before: KURTZ, BRAND and SPRAKER,** 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. Gary A. Spraker, Chief United States Bankruptcy Judge
for the District of Alaska, sitting by designation.

1 **INTRODUCTION**

2 Ledesma Ventures, LLC appeals from an order dismissing its
3 nondischargeability adversary proceeding and from an order
4 denying its motion for relief from dismissal under Civil
5 Rule 60(b)(1).¹

6 The bankruptcy court dismissed the adversary proceeding for
7 lack of prosecution after many months' delay and after Ledesma
8 Ventures more than once failed to comply with the court's service
9 requirements, thereby further delaying prosecution of the action.
10 While the bankruptcy court did not make explicit findings on the
11 five factors typically considered before dismissing for lack of
12 prosecution, the record supports the bankruptcy court's decision.
13 The record establishes that the public's interest in expeditious
14 litigation, the court's need to control its docket, the risk of
15 prejudice to the defendant and the availability of less drastic
16 sanctions, all militated in favor of dismissal.

17 The bankruptcy court also denied for lack of prosecution
18 Ledesma Ventures' motion for relief from the dismissal. After
19 six months' delay in prosecuting the motion, Ledesma Ventures
20 admitted that its principal had not been available to work on the
21 resolution of the litigation and that it was not immediately
22 prepared either to proceed on the merits of the motion or to
23 settle the action. Instead, Ledesma Ventures advised the court
24 that it wanted to retain new counsel and wanted a further

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

1 continuance, without offering any assurance that Ledesma Ventures
2 would diligently and expeditiously take the steps necessary to
3 move the matter forward towards completion.

4 We AFFIRM.

5 **FACTS**

6 An order for relief was entered against involuntary debtor
7 William F. Garlock in July 2012, and Ledesma Ventures timely
8 filed a nondischargeability complaint against Garlock in June
9 2013. After the denial of Garlock's motion to dismiss, Garlock
10 never filed an answer to the complaint. As a result, Ledesma
11 Ventures obtained entry of default against Garlock in September
12 2013.

13 Initially, a default judgment prove-up hearing was set for
14 October 13, 2013, at which the bankruptcy court directed Ledesma
15 Ventures to notify the court whether it wished to proceed further
16 and obtain a continued hearing date for the prove-up hearing.
17 Why the court gave this direction to Ledesma Ventures is not
18 entirely clear. Neither party provided us with a written
19 transcript of the October 13, 2013 hearing. However, comments by
20 counsel and the court at subsequent hearings suggest that the
21 prove-up needed to be put over because of evidentiary gaps in
22 Ledesma Ventures' presentation.

23 Close to a year elapsed, but Ledesma Ventures never notified
24 the court as directed at the October 13, 2013 hearing.
25 Consequently, in September 2014, the bankruptcy court entered its
26 first order to show cause why the adversary proceeding should not
27 be dismissed for failure to prosecute. Ledesma Ventures did not
28 file a response to the order to show cause. It did file a one

1 sentence notice attempting to reset the default judgment prove-up
2 for hearing on October 28, 2014, but there was no proof of
3 service accompanying the notice.

4 At the October 28, 2014 hearing, the bankruptcy court
5 pointed out the absence of a written response to the order to
6 show cause and the absence of a proof of service of Ledesma
7 Ventures's notice regarding the prove-up hearing.² Moreover,
8 Ledesma Ventures never offered any specific explanation for the
9 one-year delay in putting the prove-up hearing back on calendar.
10 Ledesma Ventures noted that, on October 17, 2014, the bankruptcy
11 court closed Garlock's bankruptcy case without granting him a
12 discharge. But that event does not explain Ledesma Ventures's
13 one-year delay, inasmuch as the case closure (without discharge)
14 occurred after the delay already had occurred.

15 Also, it is apparent that Ledesma Ventures was not
16 immediately prepared at the time of the prove-up hearing, as
17 noticed, to actually conduct the default judgment prove-up.
18 Instead, counsel for Ledesma Ventures represented that his
19 client's principal was out of the country, and he had not yet had
20 a chance to consult with his client's principal regarding the
21 potential impact of the case closure (without discharge).

22 In spite of Ledesma Ventures' deficiencies in prosecuting
23 the adversary proceeding, the bankruptcy court discharged the
24 first order to show cause and, at Ledesma Ventures' request,
25 agreed to continue the prove-up hearing because the

27
28 ²Notwithstanding the absence of a proof of service, Garlock
did appear at the October 28, 2014 hearing in pro per.

1 nondischargeability adversary proceeding was moot unless Garlock
2 reopened his bankruptcy case and took the procedural steps
3 necessary to obtain a discharge.³

4 The bankruptcy court set a continued prove-up hearing for
5 December 11, 2014, and directed Ledesma Ventures to serve on
6 Garlock written notice of the continued prove-up hearing and to
7 file a certificate of service. The court obviously felt that
8 written notice to Garlock was important. The court twice stated
9 its service direction to Ledesma Ventures' counsel, who
10 acknowledged the direction and said that he understood it. In
11 addition, the docket entry for the October 28 hearing noted the
12 continuance of the hearing to December 11, 2014, and also noted
13 the court's direction to Ledesma Ventures that it needed to serve
14 notice of the continued hearing on Garlock "by the end of this
15 week."

16 On December 5, 2014, over one month later, having not
17 received from Ledesma Ventures a certificate of service
18 reflecting the required service of notice on Garlock, the
19 bankruptcy court entered an order taking the prove-up hearing off
20 calendar and issued its second order to show cause directing
21 Ledesma Ventures to explain why the case should not be dismissed
22 for lack of prosecution. As the court put it:

23 Plaintiff has not complied with the court's October 28,
24 2014, order on the record that it serve defendant with

25 ³Eventually, Garlock did take the steps necessary to reopen
26 his bankruptcy case and obtain a discharge order. The bankruptcy
27 court entered its standard form discharge order in April 2015.
28 Of course, the discharge order was subject to Ledesma Ventures'
nondischargeability adversary proceeding, which was still pending
at the time the discharge order was entered.

1 notice of a continued prove-up hearing

2 Regrettably, this is the second time the court has had
3 to order plaintiff to show cause regarding its lack of
4 prosecution of this case. It will not do it again.
5 The court will dismiss this adversary proceeding with
6 prejudice for lack of prosecution unless, by
7 December 18, 2014, plaintiff files and serves a
8 satisfactory and convincing explanation why dismissal
9 is not appropriate.

7 Order Removing Matter from Calendar and Second Order to Show
8 Cause re Dismissal (Dec. 8, 2014) at pp. 1-2.

9 In response to the second order to show cause, Ledesma
10 Ventures' counsel filed a two-page declaration in which he
11 claimed that, because Garlock was present at the hearing, he
12 perhaps had misunderstood the bankruptcy court and did not
13 realize that he was required to give written notice of the
14 continued prove-up hearing. Even though this explanation seems
15 inadequate and unconvincing on its face, the bankruptcy court
16 once again exercised restraint and set a continued status
17 conference for March 27, 2015.

18 At the March 27, 2015 continued status conference, the
19 bankruptcy court set a half-day prove-up hearing for May 11,
20 2015, and once again directed Ledesma Ventures' counsel to serve
21 written notice of the continued prove-up hearing on Garlock.

22 Once again, Ledesma Ventures did not comply with the court's
23 directions regarding service of written notice. Consequently, on
24 May 4, 2015, the bankruptcy court entered an order dismissing the
25 adversary proceeding for lack of prosecution. The bankruptcy
26 court noted its two prior orders to show cause and Ledesma
27 Ventures' unfulfilled promises to diligently prosecute the
28 adversary proceeding. The bankruptcy court further noted that it

1 had set the default prove-up hearing for May 11, 2015, and had
2 ordered Ledesma Ventures to serve notice of the prove-up hearing
3 on Garlock, which Ledesma Ventures had failed to do. Based on
4 Ledesma Ventures' repeated lack of diligence, the bankruptcy
5 court held that dismissal for lack of prosecution was
6 appropriate.

7 Ledesma Ventures timely filed a motion for relief from
8 judgment under Rule 9024 and Civil Rule 60(b)(1). Ledesma
9 Ventures argued that the court should excuse its lack of
10 diligence for four reasons: (1) it was working on a proposed
11 settlement with Garlock and, in fact, was about to request a
12 continuance of the prove-up hearing when it received the court's
13 dismissal order; (2) the court did not state that the adversary
14 proceeding would be dismissed if Ledesma Ventures failed to serve
15 written notice on Garlock; (3) its counsel claimed that he once
16 again had misunderstood what the court had required regarding
17 service of notice; and (4) its counsel claimed that he had been
18 personally and professionally affected by the alleged murder of
19 one of his clients in March 2015.

20 After full briefing and several aborted attempts to hold a
21 hearing on the motion for relief, the bankruptcy court entered an
22 order on August 25, 2015, pointing out that it was unclear
23 whether the parties had reached an agreement in principle
24 regarding settlement and that, if the parties confirmed to the
25 court by no later than noon on August 27, 2015 that such an
26 agreement in principle had been reached, then the August 28, 2015
27 hearing on the motion for relief would be taken off calendar.
28 The parties apparently did so confirm their reaching an agreement

1 in principle, because the hearing was taken off calendar.

2 By March 1, 2016, six months later, neither party had filed
3 anything with the court indicating that the settlement had been
4 finalized or that the motion for relief could be dispensed with
5 and the adversary proceeding closed. Accordingly, on that date,
6 the bankruptcy court entered its third order to show cause against
7 Ledesma Ventures. The order directed Ledesma Ventures to appear
8 and file a written explanation why the motion for relief should
9 not be denied for lack of prosecution.

10 Ledesma Ventures filed a two-page response to the third
11 order to show cause. According to Ledesma Ventures, each side
12 had prepared its own draft settlement agreement during the
13 intervening six months but neither side had agreed to sign off on
14 the other's version. Ledesma Ventures' counsel represented that
15 Ledesma Ventures' principal "was not available" for several
16 months and that, when counsel informed the principal of the
17 court's third order to show cause, counsel was instructed to
18 inform the court that Ledesma Ventures desired to complete the
19 settlement but that it planned on retaining new counsel to
20 complete the task. In other words, Ledesma Ventures' counsel
21 advised the court that Ledesma Ventures was not prepared at that
22 time either to finalize the settlement or to proceed with the
23 motion for relief. Instead, Ledesma Ventures proposed either
24 another continuance or simply discharging the order to show cause
25 without offering any assurance of when it might be in position to
26 move forward either with the settlement or with the motion for
27 relief.

28 At the hearing on the order to show cause, Garlock was

1 represented by new counsel who advised the bankruptcy court that
2 he personally had sent a ready-to-sign draft settlement agreement
3 to Ledesma Ventures nine months ago, that Ledesma Ventures never
4 responded to that draft settlement agreement, and that - when he
5 later inquired regarding its status - Ledesma Ventures' counsel
6 informed him that the failure to respond was "due to his client."
7 Garlock's counsel further advised the court that, given the time
8 which had elapsed, his client no longer was willing to settle for
9 the terms offered nine months before. Ledesma Ventures' counsel
10 did not challenge any of these representations, except to
11 indicate that it had not been nine months since Garlock had sent
12 his draft settlement agreement, but he did admit that it had been
13 "too long" and that he never before had represented a client who
14 "disappeared" on him.

15 Based on the facts as represented by both counsel, the
16 bankruptcy court held that it would deny Ledesma Ventures' motion
17 for relief from the adversary proceeding dismissal order. The
18 court stated its reasoning as follows:

19 I don't think - whatever the reason is, Mr. Garlock,
20 although he has some other things to deal with, he's
21 entitled to a fresh start. Ledesma has had time and
22 time and time again to prosecute. I'm going to go
23 ahead and deny the motion for relief from the order
24 without - I won't say without prejudice; I won't say
25 with prejudice - it's denied. If Mr. Garlock wants to
26 remain a party to the agreement that his lawyer sent,
27 then that's fine, and he and Ledesma can make peace.
28 If he doesn't want to, Mr. Tyson, I suggest you notify
Ledesma of your client's position on it, and we'll let
nature take its course. If Ledesma wants to get new
counsel and come in and try again to revive this case,
so be it, but I'm not going to - this can't go on.

27 Hr'g Tr. (March 18, 2016) at 7:17-8:5.

28 The bankruptcy court entered its order denying the motion

1 for relief on March 18, 2016, and Ledesma Ventures timely
2 appealed.

3 **JURISDICTION**

4 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
5 §§ 1334 and 157(b)(2)(I), and we have jurisdiction under
6 28 U.S.C. § 158.

7 **ISSUES**

- 8 1. Did the bankruptcy court abuse its discretion when it
9 dismissed Ledesma Ventures' adversary proceeding for lack of
10 prosecution?
11 2. Did the bankruptcy court violate Ledesma Ventures' due
12 process rights when the court dismissed Ledesma Ventures'
13 adversary proceeding?
14 3. Did the bankruptcy court abuse its discretion when it denied
15 Ledesma Ventures' motion for relief from the dismissal
16 order?

17 **STANDARDS OF REVIEW**

18 We review the bankruptcy court's dismissal order for an
19 abuse of discretion. Oliva v. Sullivan, 958 F.2d 272, 274 (9th
20 Cir. 1992). We also review for abuse of discretion the
21 bankruptcy court's denial of Ledesma Ventures's motion for relief
22 under Civil Rule 60(b). Alonso v. Summerville
23 (In re Summerville), 361 B.R. 133, 139 (9th Cir. BAP 2007).

24 The bankruptcy court abused its discretion only if it
25 applied an incorrect legal rule or its findings of fact were
26 illogical, implausible or without support in the record. United
27 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

28 We review de novo whether the procedure employed by the

1 bankruptcy court satisfied the requirements of due process.

2 In re Summerville, 361 B.R. at 139.

3 DISCUSSION

4 **1. Dismissal of Adversary Proceedings For Lack of Prosecution**

5 Bankruptcy courts have inherent authority to sua sponte
6 dismiss adversary proceedings for lack of prosecution. See
7 Tenorio v. Osinga (In re Osinga), 91 B.R. 893, 894 (9th Cir. BAP
8 1988) (citing Henderson v. Duncan, 779 F.2d 1421 (9th Cir. 1986)).

9 Before dismissing an action for lack of prosecution under
10 Rule 41(b) (made applicable in adversary proceedings by
11 Rule 7041), the court typically must consider five factors:

12 (1) the public's interest in expeditious resolution of
13 litigation; (2) the court's need to manage its docket; (3) the
14 risk of prejudice to the defendant; (4) the public policy
15 favoring disposition of cases on their merits; and (5) the
16 availability of less drastic sanctions. See Moneymaker v. CoBEN
17 (In re Eisen), 31 F.3d 1447, 1451 (9th Cir. 1994); In re Osinga,
18 91 B.R. at 894.

19 The court may dismiss for failure to prosecute even if some
20 of the five factors are not present. See, e.g., Rio Properties,
21 Inc. v. Rio Int'l Interlink, 284 F3d 1007, 1022 (9th Cir. 2002)
22 (indicating that the policy in favor of a decision on the merits
23 does not preclude imposition of dismissal against plaintiff or
24 default judgment against defendant if other four factors support
25 the trial court's sanction); Malone v. United States Postal
26 Serv., 833 F.2d 128, 132 (9th Cir. 1987) (noting that the
27 existence of "egregious circumstances" renders it unnecessary for
28 the trial court to consider alternative lesser sanctions);

1 Henderson, 779 F.2d at 1425 (holding that absence of prejudice
2 not dispositive in the face of "inordinate delay").

3 Additionally, the trial court need not explicitly consider
4 alternative lesser sanctions if the plaintiff was warned of the
5 potential for dismissal or the court previously attempted
6 alternatives to dismissal in response to the plaintiff's prior
7 noncompliant conduct. Ferdik v. Bonzelet, 963 F.2d 1258, 1262
8 (9th Cir. 1992); Malone, 833 F.2d at 132.

9 When, as here, the trial court does not explicitly consider
10 the relevant factors, we can independently review the record to
11 determine whether the order of dismissal was an abuse of
12 discretion. In re Eisen, 31 F.3d at 1451; Malone, 833 F.2d at
13 130.

14 **a. Consideration of Dismissal Factors - Public Interest in**
15 **Expeditious Litigation Resolution and the Court's Need**
16 **to Manage its Docket**

17 The delay resulting from Ledesma Ventures' conduct was
18 lengthy. In assessing this delay, Ledesma Ventures would have us
19 focus solely on its failure to serve on Garlock written notice of
20 the May 11, 2015 default prove-up hearing. The bankruptcy court
21 did not so limit its focus, and neither will this Panel. As a
22 result of Ledesma Ventures' pattern and practice of failing to
23 expeditiously prosecute the litigation and failure to serve
24 written notices as ordered by the court, final resolution of the
25 adversary proceeding was delayed for roughly 19 months - from the
26 date of Ledesma Ventures' first attempt to prove-up its
27 entitlement to a default judgment in October 2013 until the court
28 dismissed the action in May 2015.

Moreover, the reasons Ledesma Ventures offered for the delay

1 were exceedingly weak at best and nonexistent at worst. Ledesma
2 Ventures never really attempted to explain the one-year delay
3 that elapsed between the initial prove-up hearing and the
4 bankruptcy court's first order to show cause. As for Ledesma
5 Ventures' repeated failures to comply with the court's directions
6 regarding service, Ledesma Ventures' counsel claimed that he must
7 have misunderstood the court's service directions. We are
8 perplexed by this claim. We cannot conceive how such a
9 misunderstanding could have occurred. The court repeatedly
10 stated that written service of notice was required. In fact,
11 Ledesma Ventures' counsel specifically acknowledged some of the
12 court's service directions at the time the court made them. In
13 short, to the limited extent Ledesma Ventures attempted to
14 explain its delay and its noncompliant conduct, those
15 explanations ring hollow.

16 Ledesma Ventures alternately argues that its service
17 failures were harmless because Garlock knew about the hearings.
18 We disagree. The bankruptcy court was concerned that Garlock -
19 who was not represented by counsel at either the October 28, 2014
20 hearing or at the March 27, 2015 hearing - should be served with
21 written notice of the subsequent prove-up hearings. And the
22 court unequivocally and repeatedly stated that such service was
23 required and not waived. As a result of Ledesma Ventures'
24 service failures, the court felt compelled under the
25 circumstances to take the prove-up hearings off calendar, which
26 caused a significant amount of delay.

27 Accordingly, the public interest in expeditious litigation
28 resolution and the court's need to manage its docket both

1 militated in favor of dismissal.

2 **b. Consideration of Dismissal Factors - the Risk of**
3 **Prejudice to the Defendant**

4 In the Civil Rule 41(b) context, prejudice is not weighed in
5 a vacuum. Instead, the bankruptcy court typically must weigh the
6 extent of and reason for the plaintiff's delay against any
7 showing of a risk of prejudice. Nealey v. Transportacion
8 Maritima Mexicana, S.A., 662 F.2d 1275, 1280-81 (9th Cir. 1980).
9 Sometimes, the Ninth Circuit has been willing to infer this risk
10 from inordinate and unreasonable delay; at other times, it has
11 not. Compare Morris v. Morgan Stanley & Co., 942 F.2d 648, 651
12 (9th Cir. 1991), with Mir v. Fosburg, 706 F.2d 916, 919, fn.2
13 (9th Cir. 1983); see also Henderson, 779 F.2d at 1425 (holding
14 that the absence of prejudice is not dispositive in the face of
15 "inordinate delay").

16 We think the better rule to follow in adversary proceedings
17 arising in bankruptcy cases is that followed in Morris and
18 Henderson. The expeditious resolution of adversary proceedings
19 and bankruptcy cases typically is critical to achieving the
20 cornerstone bankruptcy goal of a fresh start for the debtor.

21 Here, while no specific evidence of actual prejudice was set
22 forth in the record, the relevant dismissal factor refers to the
23 "risk" of prejudice and not to actual prejudice. It also is
24 worth noting that the bankruptcy court, in denying Ledesma
25 Ventures' Civil Rule 60(b) motion, indicated that the lengthy and
26 unreasonable delay in resolving the adversary proceeding had the
27 potential to hamper Garlock's fresh start. On this record, we
28 agree with the bankruptcy court's finding and consider the risk

1 of hampering Garlock's fresh start sufficient to satisfy the
2 prejudice factor for purposes of our Civil Rule 41(b) analysis.

3 **c. Consideration of Dismissal Factors - the Public Policy**
4 **Favoring Disposition of Cases on Their Merits**

5 As we noted at the outset, the public policy favoring merits
6 decisions does not by itself preclude dismissal of a lawsuit for
7 lack of prosecution. See Rio Properties, Inc., 284 F.3d at 1022.

8 Here, in fact, the applicability of this public policy is
9 attenuated, at best. Ledesma Ventures was not seeking to proceed
10 towards a trial on the merits. At most, Ledesma Ventures wanted
11 to keep the adversary proceeding alive long enough either to
12 obtain a favorable settlement or to complete its default judgment
13 prove-up.

14 In any event, in light of the other factors militating in
15 favor of dismissal, to the extent the public policy favoring
16 merits decisions applied here, it did not preclude the bankruptcy
17 court from dismissing for lack of prosecution.

18 **d. Consideration of Dismissal Factors - Alternative Lesser**
19 **Sanctions and Warning of Dismissal**

20 In light of Ledesma Ventures' disregard for the bankruptcy
21 court's service requirements, combined with the aggregate delay
22 attributable to Ledesma Ventures, "egregious circumstances" are
23 evident, and they rendered it unnecessary for the bankruptcy
24 court to consider alternative lesser sanctions. See In re Eisen,
25 31 F.3d at 1454-55; Malone, 833 F.2d at 132.

26 Moreover, the trial court specifically warned Ledesma
27 Ventures of the potential for imminent dismissal when it issued
28 its second order to show cause. Indeed, the potential for

1 dismissal was expressly based on Ledesma Ventures' first service
2 failure. Thus, Ledesma Ventures cannot legitimately claim that
3 it was taken by surprise when the court dismissed its adversary
4 proceeding after its second service failure. Given the prior
5 warning, it was not necessary for the bankruptcy court to have
6 considered alternative lesser sanctions before it dismissed the
7 adversary proceeding. Ferdik, 963 F.2d at 1262; Malone, 833 F.2d
8 at 132-33.

9 **e. Consideration of Dismissal Factors - Conclusion**

10 Other than the public policy favoring disposition of cases
11 on their merits, all of the other dismissal factors militate in
12 favor of dismissal. Therefore, the bankruptcy court did not
13 abuse its discretion when it dismissed Ledesma Ventures'
14 adversary proceeding for lack of prosecution.

15 **2. Ledesma Ventures' Due Process Argument**

16 According to Ledesma Ventures, even if the bankruptcy court
17 did not abuse its discretion when it dismissed the adversary
18 proceeding, the bankruptcy court violated Ledesma Ventures' due
19 process rights. Ledesma Ventures in essence asserts that the
20 dismissal occurred without any warning and that, as a result, it
21 did not have a reasonable opportunity to respond to the grounds
22 for dismissal the bankruptcy court relied upon. Due process
23 requires that parties be given "notice reasonably calculated,
24 under all the circumstances, to apprise interested parties of the
25 pendency of the action and afford them an opportunity to present
26 their objections." Mullane v. Cent. Hanover Bank & Trust Co.,
27 339 U.S. 306, 314 (1950).

28 Notwithstanding its protestations to the contrary, Ledesma

1 Ventures received adequate notice of the impending dismissal when
2 it received the bankruptcy court's second order to show cause,
3 and Ledesma Ventures was given an opportunity to appear at the
4 March 27, 2015 hearing to explain why its adversary proceeding
5 should not be dismissed for lack of prosecution. It was not an
6 absence of due process that shortly thereafter caused the court
7 to enter its dismissal order; rather, it was Ledesma Ventures'
8 continuing delay and continuing failure to comply with the
9 court's service requirements.

10 Even if we perceived some due process deficiency in the
11 procedures employed by the bankruptcy court leading up to the
12 dismissal (which we do not), there is no indication of any
13 prejudice resulting from any such deficiency. The absence of
14 prejudice is fatal to Ledesma Ventures' due process claim.
15 See Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764, 776-77
16 (9th Cir. 2008).

17 **3. Denial of Motion for Relief from Dismissal Order**

18 Ledesma Ventures argues on appeal that the bankruptcy court
19 abused its discretion when it denied Ledesma Ventures's Civil
20 Rule 60(b)(1) motion because the court did not properly consider
21 the factors articulated in Pioneer Invest. Servs. Co. v.
22 Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993).

23 Ledesma Ventures' reliance on Pioneer is misplaced. The
24 bankruptcy court never ruled on the merits of the Civil
25 Rule 60(b)(1) motion. Instead, the court denied the motion for
26 lack of prosecution. The bankruptcy court's third order to show
27 cause required Ledesma Ventures to file a response, appear at
28 the March 18, 2016 hearing, and explain why the motion for relief

1 should not be denied for lack of prosecution. At the hearing,
2 the bankruptcy court did not address the Pioneer factors.
3 Instead, the court focused on Ledesma Ventures' lengthy delays in
4 prosecuting and resolving the litigation. It further was
5 apparent, at the time of the hearing, that Ledesma Ventures was
6 not prepared either to proceed with settlement or to proceed with
7 the merits of its Civil Rule 60(b)(1) motion. In fact, Ledesma
8 Ventures effectively admitted: (1) its principal had been
9 unavailable to address resolution of the litigation during much
10 of the previous six months; (2) it wanted to retain new counsel
11 before moving forward; and (3) it sought either a further
12 continuance or a discharge of the third order to show cause
13 without offering any sort of assurance that, for the first time
14 in the three-year history of the lawsuit, it would diligently and
15 expeditiously take the steps necessary to move the action forward
16 towards resolution.

17 Ledesma Ventures' appeal brief does not contain any argument
18 explaining why, on these facts, it was an abuse of discretion for
19 the court to deny the motion for lack of prosecution, nor are we
20 obliged to go searching for error. See Christian Legal Soc'y
21 Chapter of Univ. of Cal. v. Wu, 626 F.3d 483, 487-88 (9th Cir.
22 2010); Brownfield v. City of Yakima, 612 F.3d 1140, 1149 n.4 (9th
23 Cir. 2010). The bankruptcy court had authority to deny Ledesma
24 Ventures' motion for lack of prosecution. See, e.g., TKG Europe,
25 LP v. Lehman Bros. Holdings, Inc. (In re Cent. European Indus.
26 Dev. Co.), 2005 WL 6960169, at *4 (Mem. Dec.) (9th Cir. BAP
27 Apr. 12, 2005) (upholding bankruptcy court's denial of abstention
28 motion for lack of prosecution).

CONCLUSION

For the reasons set forth above, the bankruptcy court's orders dismissing the adversary proceeding and denying Ledesma Ventures relief from the dismissal are AFFIRMED.

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