NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re: JAMES R. GLEICH, Debtor.	BAP No. NV-25-1090-GBL Bk. No. 2:23-bk-10213-NMC
JAMES R. GLEICH; ANGELA T. GLEICH; DANIEL P. GLEICH, Appellants, v. TROY STEPHENS FOX, Chapter 7 Trustee, Appellee.	Adv. No. 2:24-ap-01039-NMC **MEMORANDUM**[*]

Appeal from the United States Bankruptcy Court
for the District of Nevada
Natalie M. Cox, Chief Bankruptcy Judge, Presiding

Before: GAN, LAFFERTY, and BRAND, 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.

INTRODUCTION

Chapter 7[1] trustee Troy Stephens Fox ("Trustee") sued debtor James R. Gleich ("Debtor"), his wife Angela,[2] and their son Daniel (collectively the "Appellants") for recovery of alleged fraudulent transfers and other relief. After Debtor and Angela failed to appear for their depositions, and Daniel untimely responded to interrogatories, Trustee filed a motion for terminating sanctions against all of the Appellants under Civil Rule 37, made applicable by Rule 7037. The bankruptcy court granted the motion, struck Appellants' answer, entered default judgment in favor of Trustee, and imposed monetary sanctions.

The bankruptcy court had discretion to enter a wide variety of sanctions for abuses of discovery, but that discretion is narrowed when considering case-dispositive sanctions. The court erred by striking Daniel's answer without determining that his late responses were the result of willfulness, fault, or bad faith. And though Debtor and Angela's failure to appear for their depositions might warrant sanctions, the bankruptcy court did not consider or impose less drastic alternatives, and the record does not

[1] Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

[2] Because the appellants share a last name, we refer to them individually by their first names for convenience and clarity. No disrespect is intended.

evidence the type of egregious conduct that would permit the court to forego this requirement. Accordingly, we REVERSE and REMAND.

FACTS

A. Debtor's chapter 7 case

In January 2023, Debtor filed a chapter 7 petition, and Trustee was appointed as chapter 7 trustee. Trustee discovered that approximately one year earlier Debtor sold real property located on Alcova Ridge in Las Vegas, Nevada ("Alcova Ridge"), which was titled as his sole and separate property. In the month prior to the petition date, Debtor transferred $538,749.14 to Angela from his bank account holding the proceeds of the Alcova Ridge sale. Angela used the funds to purchase real property located on Garden Rose Drive in Las Vegas, Nevada ("Garden Rose") as her sole and separate property.[3] Trustee also discovered that Debtor failed to disclose a personal bank account which held approximately $125,000.

Trustee prevailed on a motion for turnover of the non-exempt funds held in Debtor's undisclosed bank account, and the United States Trustee ("UST") filed an adversary complaint to deny Debtor's discharge under § 727.

[3] The same day that Debtor filed his petition, Angela transferred Garden Rose to "Angela T. Gleich, a married woman as her Sole and Separate property, James R. Gleich, Jr., a married man, and Daniel Philip Gleich, a married man all as Joint Tenants." By the time Trustee filed his adversary complaint, title to Garden Rose was held by Angela and Daniel.

B. Trustee's adversary complaint and the motion for sanctions

In September 2023, Trustee filed an adversary complaint against the Appellants, seeking to avoid as fraudulent the transfer to Angela from the Alcova Ridge proceeds. Trustee also sought declaratory relief that Garden Rose was property of the estate, and to compel turnover of that property. To the extent that Angela sought a homestead exemption in Garden Rose, Trustee asserted it should be limited to $189,500 because Garden Rose was purchased less than 1,215 days before the petition date.

The Appellants, represented by the same counsel, filed a single answer denying the allegations. The bankruptcy court entered a scheduling order setting trial for June 2025 and requiring discovery to be completed by January 31, 2025.

Trustee noticed depositions for Debtor and Angela for January 10, 2025. On January 6, 2025, counsel for Appellants notified Trustee that Debtor's mother had passed away and he needed to travel for her funeral. Trustee agreed to reschedule the depositions but requested a stipulation to extend the discovery deadline. The bankruptcy court approved the stipulation and extended the discovery deadline to February 28, 2025.

The next week, Trustee emailed Appellants' counsel to reschedule the depositions, and he proposed several possible dates. Appellants' counsel responded that he was available on February 5, 2025, but he needed to confirm the date with Debtor and Angela. According to Trustee,

he did not hear back from Appellants' counsel, so he noticed the depositions for February 5, 2025. Trustee also advised counsel that Daniel's discovery responses were past due, and he formally requested to meet and confer on that issue pursuant to Civil Rule 37(a).

On February 1, 2025, Appellants' counsel informed Trustee that Debtor was ready for the deposition, but Angela would not be able to attend because she had been in a serious accident. He also stated that he hoped Daniel's responses to interrogatories would be delivered by February 3, 2025.

In response, Trustee noted that the accident appeared to have occurred two weeks earlier, on January 21, 2025, and he indicated he would go forward with the February 5, 2025 depositions unless counsel provided an acceptable proposal. Trustee also advised that if he did not receive Daniel's interrogatory responses by February 3, 2025, he would seek relief from the bankruptcy court. Daniel returned his responses to interrogatories on February 5, 2025.

On February 4, 2025, Appellants' counsel informed Trustee that Debtor was also unable to attend the deposition because he needed to take Angela to her medical appointments. Trustee initially responded that he could conduct the depositions the following week but later notified Appellants that he intended to proceed with Debtor's deposition on February 5, 2025, and he would reschedule Angela's deposition only if: (1) she provided evidence from her doctor that she could not testify; and

(2) Appellants prepared an appropriate stipulation and order. Otherwise, Trustee would proceed with both depositions and seek appropriate relief from the bankruptcy court.

Angela and Debtor did not appear for their depositions on February 5, 2025. Trustee made a record of their absences, then discussed with Appellants' counsel the options for rescheduling the depositions. Two days later, Trustee advised Appellants' counsel of his available dates, but he maintains that counsel did not respond.

On February 20, 2025, Trustee filed a motion for sanctions, asking the court to strike Appellants' answer to the complaint, enter default judgment against them, and impose monetary sanctions against Debtor and Angela. He argued that Debtor's and Angela's failure to attend their depositions warranted sanctions under Civil Rule 37(d), and they had made no effort to seek a protective order. Trustee noted that Daniel had not timely responded to interrogatories, but he did not specifically explain why sanctions against him were appropriate.

Trustee contended that terminating sanctions were necessary because Appellants intended to delay resolution of the adversary proceeding, and their refusal to cooperate in rescheduling the depositions prejudiced Trustee and demonstrated bad faith. He argued that no less drastic sanction would deter Appellants' dilatory behavior because Debtor had yet to comply with the court's order requiring turnover of the undisclosed bank account funds, and if the court were to extend the discovery deadline

again, Appellants would have no incentive to comply with their obligations. Trustee also requested an extension of discovery deadlines but informed the court that the pre-trial deadlines and the June trial date could remain in place.

In opposing the motion, Appellants argued that Trustee unreasonably refused to postpone the depositions despite Angela's severe accident. They claimed they were willing to attend depositions and noted that they had appeared for depositions in the UST's denial of discharge case. Appellants argued that sanctions were not warranted because Trustee was aware of Angela's injuries yet proceeded to conduct the depositions instead of rescheduling. According to Appellants, Trustee was not prejudiced and less drastic sanctions, in the form of monetary sanctions, were available. Appellants stated they were willing to appear for rescheduled depositions within the next two weeks, and if Trustee confirmed the dates, the depositions could be completed prior to the hearing on the sanctions motion.

Trustee filed a reply and asserted that despite Appellants' claim that they remained willing to attend their depositions, they had not responded to his attempts to reschedule prior to the hearing on the motion for sanctions. He reiterated that terminating sanctions were appropriate.

C. The court's ruling

At the April 1, 2025 hearing, Trustee argued that he was not unsympathetic to Angela's injuries, and he tried to work with Appellants

to find available dates, but their efforts to reschedule were disingenuous. Appellants said they believed they had rescheduled the depositions for March 28, 2025, and March 31, 2025, but when they arrived, Trustee was not prepared.

The bankruptcy court confirmed that Appellants did not seek a protective order or provide declarations with their opposition. It then granted Trustee's motion and orally ruled that terminating sanctions were appropriate. It held:

> In short, even if the Gleiches provided sufficient argument or evidence that explains their failure to attend their scheduled depositions, they have not demonstrated they adequately responded to the trustee's request to reschedule the depositions before or after the close of discovery in this case. The defendants' behavior after they filed their opposition further reinforces the trustee's request for sanctions. Clearly, Defendants have willfully failed to abide by their discovery obligations in this case and default judgment is appropriate.

Hrg. Tr. 15:19-16:3, April 1, 2025.

The court cited *Thompson v. Housing Authority of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986), for the five-factor test it must employ in determining whether to dismiss a case as a sanction: (1) the public's interest in expeditious resolution; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring deciding cases on their merits; and (5) the availability of less drastic sanctions.[4] The

[4] This five-factor test is applicable whether the bankruptcy court enters case-

court noted that it was not required to make explicit findings to show it has considered the factors. It reasoned that failure to attend depositions was a sufficient basis to enter terminating sanctions, and it entered an order striking Appellants' answer and entering default. After Trustee submitted a declaration detailing his fees, the court amended its order to grant default judgment and impose monetary sanctions. Appellants timely appealed.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(1), (b)(2)(A) and (H). We have jurisdiction under 28 U.S.C. § 158.

ISSUE

Did the bankruptcy court err by imposing terminating sanctions against Appellants?

STANDARDS OF REVIEW

"A terminating sanction, whether default judgment against a defendant or dismissal of a plaintiff's action, is very severe. We review discovery sanctions for abuse of discretion." *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007) (citing *Jorgensen v. Cassiday*, 320 F.3d 906, 912 (9th Cir. 2003)). A bankruptcy court abuses its discretion if it applies an incorrect legal standard or its factual findings are illogical, implausible, or without support in the record. *TrafficSchool.com, Inc. v. Edriver, Inc.*, 653 F.3d 820, 832 (9th Cir. 2011).

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dispositive sanctions pursuant to Civil Rule 37(b) or its inherent authority. *See Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1412 n.4 (9th Cir. 1990).

"Where the drastic sanctions of dismissal or default are imposed, however, the range of discretion is narrowed and the losing party's non-compliance must be due to willfulness, fault or bad faith." *Sigliano v. Mendoza*, 642 F.2d 309, 310 (9th Cir. 1981) (citing *Societe Int'l v. Rogers*, 357 U.S. 197, 212 (1958)).

We review the bankruptcy court's finding of willfulness, fault, or bad faith for clear error. *Jorgensen*, 320 F.3d at 912. Factual findings are clearly erroneous if they are illogical, implausible, or without support in the record. *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1196 (9th Cir. 2010).

However, "[i]f the district court fails to make factual findings, the decision on a motion for sanctions is reviewed de novo." *Adriana Int'l Corp.*, 913 F.2d at 1408 (citing *United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co.*, 857 F.2d 600, 603 (9th Cir. 1988)). Under de novo review, "we consider a matter anew, as if no decision had been made previously." *Francis v. Wallace (In re Francis)*, 505 B.R. 914, 917 (9th Cir. BAP 2014).

DISCUSSION

A. Law governing discovery sanctions

Civil Rule 37(d)(1)(A) provides the court may order sanctions if: "(i) a party . . . fails, after being served with proper notice, to appear for that person's deposition; or (ii) a party, after being properly served with interrogatories under [Civil] Rule 33 . . . fails to serve its answers, objections, or written response." Civil Rule 37(d)(3) indicates that available

sanctions include any of the orders listed in Civil Rule 37(b)(2)(A)(i)-(vi),[5] and it provides that in addition to or instead of the sanctions available under Civil Rule 37(b)(2)(A), "the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust."

Before considering terminating sanctions, such as striking an answer or entering default judgment, the bankruptcy court must first determine that the party's sanctionable conduct is the result of "willfulness, bad faith, or fault" of that party. *Jorgensen*, 320 F.3d at 912. In the context of sanctions, "'disobedient conduct not shown to be outside the control of the litigant' is all that is required to demonstrate willfulness, bad faith, or fault." *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993) (quoting *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1341 (9th Cir. 1985)).

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[5] Sanctions available under Civil Rule 37(b)(2)(A)(i)-(vi) include:

> (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
> (iii) striking pleadings in whole or in part;
> (iv) staying further proceedings until the order is obeyed;
> (v) dismissing the action or proceeding in whole or in part; [or]
> (vi) rendering default judgment against the disobedient party[.]

In addition to a finding of willfulness, bad faith, or fault, before issuing terminating sanctions the Ninth Circuit requires a court to consider the following five-part test: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Conn. Gen. Life Ins. Co.*, 482 F.3d at 1096 (quoting *Jorgensen*, 320 F.3d at 912). The availability of less drastic sanctions has three sub-parts: "whether the court has considered lesser sanctions, whether it tried them, and whether it warned the recalcitrant party about the possibility of case-dispositive sanctions." *Id.*

If the bankruptcy court does not make explicit findings regarding the five factors, "the appellate court must review the record independently to determine whether the sanction was an abuse of discretion." *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990) (citing *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir. 1987)).

B. Terminating sanctions against Daniel were not warranted.

Trustee alluded to Daniel's tardiness in responding to interrogatories, but he did not cogently explain why sanctions against Daniel were appropriate. Although the court stated that Appellants "willfully failed to abide by their discovery obligations," it did so in the context of Debtor and Angela failing to appear for their depositions and not adequately responding to Trustee's attempts to reschedule. The bankruptcy court did

not find that Daniel's failure to timely respond to interrogatories was the result of willfulness, fault, or bad faith. Moreover, the facts in the record are insufficient to demonstrate this requirement.

Daniel served his responses to interrogatories after Trustee made a request to meet and confer. Civil Rule 37(a) requires parties to meet and confer prior to filing a motion to compel discovery, and under Civil Rule 37(d)(3), a party seeking sanctions for a failure to respond to interrogatories must include a certification that it "has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action." Thus, the purpose of the meet and confer requirement was satisfied; Trustee received Daniel's responses without the need of court intervention.

The record shows that Daniel served his responses to interrogatories after the response deadline, but well before Trustee filed his motion for sanctions. Trustee does not demonstrate any prejudice, and nothing in the record explains why Daniel's responses were late, much less that the delay was caused by his willfulness, fault, or bad faith. Without the necessary showing or finding of willfulness, fault, or bad faith, the bankruptcy court erred by imposing terminating sanctions against Daniel.

C. The court erred by ordering terminating sanctions against Debtor and Angela.

In holding that Debtor and Angela "willfully" failed to abide by their discovery obligations, the bankruptcy court focused on their failure to

adequately respond to Trustee's attempts to reschedule the depositions and their actions after they filed their opposition to the motion for sanctions. But the sanctions were entered under Civil Rule 37(d) for failure to appear for their depositions. The record is not clear that their failure to appear was the result of willfulness, fault, or bad faith.[6]

Although the court correctly cited the five-factor test it must apply when imposing case-dispositive sanctions, it did not explicitly weigh those factors or make any factual findings regarding them. Thus, we must independently review the record to determine whether the court erred by entering terminating sanctions. *See Wanderer*, 910 F.2d at 656.

The public's interest in expeditious resolution of litigation and the court's need to manage its dockets will virtually always weigh in favor of sanctions where the discovery violations cause delays which could result in a need to reschedule the trial. *See Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) ("The public's interest in expeditious resolution of litigation always favors dismissal . . . . The trial judge is in the best position to

[6] Civil Rule 37(d)(2) provides that a party's failure to appear at a properly noticed deposition is not excused "on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under [Civil] Rule 26(c)." We presume the bankruptcy court reasoned that, because Debtor and Angela did not file a motion for a protective order, their failure to attend the depositions was the product of willfulness or fault. Because we reverse the sanctions order for other reasons, we do not address whether the court adequately found willfulness, fault, or bad faith, or whether the record supports such a finding.

determine whether the delay in a particular case interferes with docket management and the public interest." (citations omitted)).

Likewise, the public policy favoring disposition of cases on their merits will almost always weigh against case-dispositive sanctions. *Id.* at 643. Thus, whether terminating sanctions are appropriate turns on the risk of prejudice to Trustee and the availability of less drastic sanctions. *See Wanderer*, 910 F.2d at 656 ("The first two of these factors favor the imposition of sanctions in most cases, while the fourth cuts against a default or dismissal sanction. Thus the key factors are prejudice and availability of lesser sanctions.").

Trustee argues that "when a party fails to appear for his deposition, the opposing party is prejudiced by that failure and later compliance does not 'cure the effects' of the failure to appear." Trustee relies on *Henry v. Gill Industries* to support his claim of prejudice, but he overstates the holding of that case. 983 F.2d at 947. In *Henry*, the Ninth Circuit affirmed terminating sanctions and noted the district court had concluded that lengthy delays caused by the plaintiff's refusal to engage in discovery had "irreparably prejudiced" defendant Gill Industries. *Id.* at 948. The reason for the prejudice was that another defendant—and the only participant in conversations with the plaintiff that formed the basis of his lawsuit—developed a brain tumor and became unable to assist with the defense of the case. *Id.* The plaintiff was responsible for the fact that the case had not progressed by the time the other defendant became unable to assist with

the defense, and thus, plaintiff's discovery abuses directly prejudiced Gill Industries' ability to mount a defense. *Id.*

Mere delay is insufficient to prejudice Trustee. *See Wanderer*, 910 F.2d at 656 ("Delay alone, without a focus on its effects, will not justify dismissal or default."). Trustee has not articulated any risk of prejudice other than delay and a need to extend discovery deadlines.

Moreover, the risk of prejudice to Trustee must be considered in conjunction with whether less drastic alternatives would likely result in completion of discovery and a decision on the merits. "In deciding whether to impose case-dispositive sanctions, the most critical factor is not merely delay or docket management concerns, but truth. What is most critical for case-dispositive sanctions, regarding risk of prejudice and of less drastic sanctions, is whether the discovery violations threaten to interfere with the rightful decision of the case." *Conn. Gen. Life Ins. Co.*, 482 F.3d at 1097 (cleaned up). There is no basis here to conclude that lesser sanctions would not have resulted in full compliance by Debtor and Angela, without prejudice to Trustee.

Consideration of less drastic alternatives is necessary to ensure that discovery violations are remedied while the court preserves its ability to decide the case on the merits. Terminating sanctions are appropriate only where lesser sanctions have been unsuccessful, or where the party persists in violating orders despite a warning that case-dispositive sanctions could be entered. S*ee Valley Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1057 (9th

Cir. 1998) ("While contumaciousness toward the court needs a remedy, something other than case-dispositive sanctions will often suffice. Dismissal is appropriate where a 'pattern of deception and discovery abuse made it impossible' for the district court to conduct a trial 'with any reasonable assurance that the truth would be available.'" (quoting *Anheuser-Busch, Inc. v. Nat. Beverage Distribs.*, 69 F.3d 337, 352 (9th Cir. 1995))).

There is no indication that the bankruptcy court considered or tried lesser sanctions. While it is not necessary that "every single alternate remedy be examined by the court before the sanction of dismissal is appropriate," the court must make a "reasonable exploration of possible and meaningful alternatives." *Anderson v. Air West, Inc.*, 542 F.2d 522, 525 (9th Cir. 1976).

Nor is there any evidence in the record that the court warned the Appellants about the possibility of case-dispositive sanctions. *See Malone*, 833 F.2d at 132-33 ("[W]arning a plaintiff that failure to obey a court order will result in dismissal can suffice to meet the 'consideration of alternatives' requirement. Failure to warn has frequently been a contributing factor in our decisions to reverse orders of dismissal." (citations omitted)). It is not always necessary for a court to warn an offending party of possible terminating sanctions, but absent egregious circumstances, "the failure to warn may place the district court's order in serious jeopardy." *Kahaluu Const. Co.*, 857 F.2d at 605; *see also Tenorio v.*

Osinga (In re Osinga), 91 B.R. 893, 895 (9th Cir. BAP 1988) ("Under egregious circumstances, it is unnecessary (although helpful) for a trial court to discuss why alternatives to dismissal are infeasible."). We do not discern egregious circumstances that would permit the court to dispense with the requirement to consider less drastic alternatives.

A party's failure to appear for a deposition is sanctionable conduct. But without a pattern of discovery abuse by Appellants, or other egregious circumstances, the bankruptcy court was required to consider or try less drastic sanctions before striking their answer and entering default judgment.[7] At a minimum, the court must warn the offending parties that case-dispositive sanctions could be entered for a continuing failure to comply with discovery obligations.

Less drastic sanctions were available and could reasonably have caused Debtor and Angela to comply without significant delay or prejudice to Trustee; these factors weigh heavily against case-dispositive sanctions. The bankruptcy court erred by striking Appellants' answer and entering default judgment against them.[8]

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[7] The Ninth Circuit noted that "[a]lternative sanctions include: a warning, a formal reprimand, placing the case at the bottom of the calendar, a fine, the imposition of costs or attorney fees, the temporary suspension of the culpable counsel from practice before the court, dismissal of the suit unless new counsel is secured, preclusion of claims or defenses, or the imposition of fees and costs upon plaintiff's counsel . . . . Providing plaintiff with a second or third chance following a procedural default is a 'lenient sanction,' which, when met with further default, may justify imposition of the ultimate sanction of dismissal with prejudice." *Malone*, 833 F.2d at 132 n.1 (cleaned up).

[8] Because we reverse the court's order, we do not address the portion of the order

CONCLUSION

Based on the foregoing, we REVERSE the bankruptcy court's order striking Appellants' answer and entering default judgment against them, and we REMAND for further proceedings consistent with this decision.

imposing monetary sanctions. On remand, the bankruptcy court may consider and impose lesser sanctions, including monetary sanctions, to ensure Appellants' compliance with their discovery obligations.