Excusable Neglect
Pioneer factors

U.S. Forest Industries v. Highcrest Wood Products, et al., Adversary No. 02-6435
US Forest Industries, Inc., Case No. 600-67584-fra11
Appellate No. OR-04-1474-KMoR

06/08/2005 BAP rev's FRA and remands Unpublished

In late 2002, the Debtor filed 49 adversary proceedings for the recovery of preferential transfers, including against the five Defendants which were part of this consolidated appeal. In January 2004, the court asked the Debtor to file a status report regarding the five remaining adversary proceedings. Douglas Pahl, an attorney for the Debtor, prepared and filed a status report which stated that settlement negotiations were being discussed.

In April 2004, the court entered dismissal orders in the five cases on the grounds that Debtor had failed to prosecute the cases in a timely manner, including the failure to file a Pre-trial Order as required by the scheduling order. If the Debtor did not remedy the matter within the period of time set by the court, the adversary proceedings would be dismissed without further notice. The Dismissal Orders were addressed and mailed to Douglas Bosley, the attorney listed in court records as the Debtor's lead attorney. During this time, however, responsibility for handling the case was being transferred to Pahl. Because of an error in handing the mail at their law firm, neither Bosley nor Pahl saw the orders when they were delivered to the law firm. Due to inaction on the Debtor's part, each of the remaining adversary proceedings were closed in early May. After learning of the dismissals, Pahl filed motions to reopen. After hearing, the court stated that the movant had not met its burden to show that circumstances beyond its control had led to misplacement of the files and its failure to meet the court's deadlines. Debtor appealed to the Bankruptcy Appellate Panel.

The BAP held that the bankruptcy court must specifically address the four factors cited by Pioneer Inv. Svcs. Co. v. Brunswick Assocs, 507 U.S. 380 (1993) to determine whether the attorney's negligence constituted excusable neglect under Fed.R.Bankr.P. 9006(b)(1). As the court had not done so, the matter was remanded for further proceedings.

CLERK, U.S. BANKRUPTCY COURT
DISTRICT OF OREGON

JUN 0 8 2005

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JUN 08 2005

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: U.S. FOREST INDUSTRIES, INC., Debtor.	BAP Nos. OR-04-1474-KMoR OR-04-1475-KMoR OR-04-1476-KMoR OR-04-1477-KMoR OR-05-1007-KMoR Bk. No. 00-67584
U.S. FOREST INDUSTRIES, INC., Appellant, v. HIGHCREST WOOD PRODUCTS, INC., Appellee.	Adv Nos. 02-06435 02-06433 02-06426 02-06418 02-06448
U.S. FOREST INDUSTRIES, INC., Appellant, v. SPAR-TEK INDUSTRIES, INC., Appellee.	**MEMORANDUM***
U.S. FOREST INDUSTRIES, INC., Appellant, v. NESTE RESINS CORPORATION, Appellee.	

*This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

U.S. FOREST INDUSTRIES, INC.,

Appellant,

v.

SUN VENEER,

Appellee.

U.S. FOREST INDUSTRIES, INC.,

Appellant,

v.

DYNO OVERLAYS, INC.,

Appellee.

Argued and Submitted on May 20, 2005
at Eugene, Oregon

Filed - June 8, 2005

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

Honorable Frank R. Alley, III, Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI, and RIEGLE,** Bankruptcy Judges.

**Hon. Linda B. Riegle, United States Bankruptcy Judge for the District of Nevada, sitting by designation.

The debtor appeals from five orders denying its motions to reopen several adversary proceedings. The debtor argues that the bankruptcy court applied the wrong legal standard when it refused to set aside several dismissal orders under Federal Rule of Civil Procedure 60(b)(1). The debtor further contends that the court did not engage in a full equitable analysis in reaching its decision as mandated by the Ninth Circuit. We hold that the court did not engage in an adequate equitable analysis to determine if the dismissal orders should be set aside because of excusable neglect. REVERSED and REMANDED.

FACTS

On December 27, 2000, the debtor, United States Forest Industries, filed a voluntary chapter 11 case. On January 4, 2002, the bankruptcy court confirmed the debtor's second amended Plan of Reorganization, and on April 4, 2002, the Plan became effective.

Pursuant to the Plan, GMAC funded the distribution to the debtor's unsecured creditors in exchange for an assignment of the proceeds of several preference actions to be filed by the debtor.

In late 2002, the debtor filed forty-nine adversary proceedings seeking the recovery of preferential payments. Five of those forty-nine adversary proceedings are at issue in these cases.[1] Appellees are Highcrest Wood Products, Inc., Spar-Tek Industries, Inc., Neste Resins Corporation, Sun Veneer, and Dyno Overlays, Inc.

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[1]The other forty-four adversary proceedings were settled.

In all but one of the adversary proceedings at issue on appeal, the bankruptcy court entered a scheduling order that required the parties to file a pretrial order by a set date.

On August 11, 2003, while the adversary proceedings were still pending, the debtor filed a separate chapter 7 case. A chapter 7 trustee was appointed and determined that the estate had no assets for distribution to creditors. On November 26, 2003, the chapter 7 case was dismissed.

On January 13, 2004, the bankruptcy court held a hearing in the chapter 11 case to discuss the remaining preferential transfer adversary proceedings. The court ordered the debtor to file a written status report regarding the remaining pending adversary proceedings. The court stated it would set status conferences in the matters after the status report was filed.

On January 22, 2004, Douglas Pahl (one of the debtor's attorneys) sent a letter to the bankruptcy court that described the status of the pending adversary proceedings. Pahl stated that settlement negotiations were being discussed in each case at issue on appeal.

The court set no status conference after January 13, 2004. Rather, on April 16, 2004, the court entered an "Order Re: Dismissal or Other Final Disposition" ("Dismissal Orders") in each case. In the Highcrest Wood Products, Sun Veneer, and Dyno Overlays cases, the Dismissal Orders stated:

> The parties failed to timely file a proposed pre-trial order, and therefore,
>
> IT IS ORDERED that this proceeding will be dismissed for lack of prosecution, without further Court order, unless the appropriate proposed pre-trial order is filed with the Clerk of Court within 13 days of this

> order's "FILED" date. Any subsequent motion required to reopen the proceeding shall be accompanied by BOTH: (1) an affidavit averring substantial reasons why this proceeding should be reopened, AND (2) a $150.00 reopening fee.

In the Spar-Tek and Neste Resins cases, the Dismissal Orders stated:

> The interested parties have failed to timely prosecute this matter, and therefore,
>
> IT IS ORDERED that this proceeding will be dismissed for lack of prosecution, without further Court order, unless appropriate action is taken to bring this proceeding to issue or trial within 20 days of this order's "FILED" date. Any subsequent motion required to reopen the proceeding shall be accompanied by BOTH: (1) an affidavit averring substantial reasons why this proceeding should be reopened, AND (2) a $150.00 reopening fee.

Each of the Dismissal Orders were addressed and mailed to Douglas Bosley, the attorney listed on the court records as the lead attorney for the debtor. During this time, however, the responsibility for handling the debtor's case was being transferred from Bosley to Pahl. Bosley and Pahl are both attorneys in the same large law firm. Notice of this internal change was not formally submitted to the court.

Neither Bosley nor Pahl saw the Dismissal Orders when they were delivered to the firm. According to the debtor, the firm's general procedure for handling the mail is that the mail is first routed to the assistant for the addressee of the letter. That assistant opens the mail, date stamps it as received, dockets it if necessary, and then gives it to the addressee for review. After the addressee reviews it, the documents are routed to the mail file room and placed in the firm's central files.

According to the debtor, in these five cases on appeal, the normal mail procedure was not followed and all five Dismissal Orders ended up in the firm's central files without a date stamp and without being initialed as docketed.

Unaware of the Dismissal Orders, Pahl took no action on the matters, and the Dismissal Orders became effective. On May 3, 2004, and May 4, 2004, each of the adversary proceedings were closed.

By July 21, 2004, after learning that the cases had been dismissed and closed, the debtor filed Motions to Reopen Case in all five dismissed adversary proceedings. Highcrest Wood Products, Neste Resins, and Sun Veneer filed objections to the motions. The debtor filed a reply to each objection arguing that the court should set aside the Dismissal Orders pursuant to Federal Rule of Civil Procedure 60(b)(1) because of excusable neglect.

On August 5, 2004, the court held a hearing on all five Motions to Reopen. At the hearing, the court denied all five motions stating findings on the record. The court focused its ruling on Rule 60(b)(1) and found that excusable neglect had not been established on the record before the court. The court stated:

> This is not, you know, I emphasize, a finding of culpability or willful mishandling of the case. Something went wrong, I think because either inadequate controls were in place; or, much more likely, Mr. Pahl, I think that adequate controls just didn't happen to work on this occasion. Either way, the burden is a high one and it's on the movant to demonstrate that circumstances beyond its control led to its misplacement of the files and it's failure to meet the Court's deadlines. I don't find that to be the case.

On August 9, 2004, the court entered identical orders in each adversary proceeding denying the Motions to Reopen.

These timely appeals ensued.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUE

Whether the court abused its discretion when it denied the debtor's Motions to Reopen after finding that the debtor had not met its burden of establishing excusable neglect under Rule 60(b)(1).

STANDARD OF REVIEW

A court's denial of a Rule 60(b) motion is reviewed for an abuse of discretion. Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1223 (9th Cir. 2000). It is an abuse of discretion to apply an incorrect legal standard. Arden v. Motel Partners (In re Arden), 176 F.3d 1226, 1228 (9th Cir. 1999).

DISCUSSION

Under Rule 60(b)(1), as incorporated by Federal Rule of Bankruptcy Procedure 9024, a court may relieve a party from a final order upon a finding of excusable neglect. FED. R. CIV. P. 60(b)(1). In Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'Ship, 507 U.S. 380 (1993), the Court held that excusable neglect, for purposes of Federal Rule of Civil Procedure

9006(b)(1), encompasses an attorney's negligence. Pioneer, 507 U.S. at 395.

The Pioneer court articulated an equitable test to determine whether the attorney's "neglect" is "excusable." Id. The equitable factors a court must consider are: 1) the danger of prejudice to the opposing party; 2) the length of the delay and its potential impact on the proceedings; 3) the reason for the delay; and 4) whether the movant acted in good faith. Bateman, 231 F.3d at 1223-24 citing Pioneer, 507 U.S. at 395.

The Ninth Circuit adopted the Pioneer test for Rule 60(b)(1) cases in Briones v. Riviera Hotel & Casino, 116 F.3d 379, 381 (9th Cir. 1997). See Pincay v. Andrews, 389 F.3d 853, 856-57 (9th Cir. 2004) (en banc). The four Pioneer factors are not exclusive, rather they provide a framework for evaluating whether excusable neglect has been established. Bateman, 231 F.3d at 1224.

In Pincay, the Ninth Circuit recently held that the weighing of Pioneer's equitable factors is left "to the discretion of the district court in every case." Pincay, 389 F.3d at 860. Thus, our review of a court's findings of each factor is highly deferential assuming, of course, that the court engaged in the appropriate analysis.

Here, the court did not apply the Pioneer factors in reaching its decision. Rather, it described why it believed that the misplaced dismissal orders were not due to circumstances beyond the debtor's control. It was erroneous for the court to focus on whether the circumstances were beyond the movant's control in isolation of the four Pioneer factors. See Pioneer,

507 U.S. at 392.

The appellees argue that the court did engage in a Pioneer-type equitable analysis that was sufficient to support a finding of excusable neglect. We disagree. The court does not state the name of any case that governs the analysis, nor does it expressly enumerate any of the Pioneer factors or clearly state its findings on each one. The Ninth Circuit's en banc decision in Pincay persuades us that the court must specifically address the Pioneer factors in the course of making its decision.

Accordingly, an incorrect legal standard was applied, which constitutes an abuse of discretion.

Therefore, we reverse and remand to the bankruptcy court for it to apply and make findings on each Pioneer factor when deciding whether to set aside the dismissal orders.

CONCLUSION

The court did not engage in the Pioneer equitable analysis sufficient to satisfy the Ninth Circuit's mandate for evaluating Rule 60(b)(1) excusable neglect cases. REVERSED and REMANDED.

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit
125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-04-1474-KMoR OR-04-1477-KMoR
OR-04-1475-KMoR OR-05-1007-KMoR
OR-04-1476-KMoR
RE: U.S. FOREST INDUSTRIES, INC.

A separate Judgment was entered in this case on ____6/8/05_____.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $255 filing fee (effective November 1, 2003) and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this certificate appears was mailed this date to all parties of record to this appeal.

By: Elaine Lewis

Deputy Clerk: June 8, 2005