Dismissal
Express Authority
Failure to Prosecute
Implied authority
Reconsideration
Service of process
FRBP 9023
FRCP 59(e)

Smith v. Rush

9th Cir. # 07-35760
BAP # OR-06-1370BMoH
Adv. # 05-07043-aer

10/29/09 Ninth Circuit Court of Appeals Unpublished
Affirming Radcliffe's unpublished letter opinion and order

Background:

Plaintiff/Chapter 7 Debtor filed an adversary proceeding in November, 2005 against multiple defendants to determine lien rights in a certain parcel of estate property. She attempted service by serving an attorney who represented defendants in a state court matter. In May, 2006 the court denied Plaintiff's motion for a default order, holding service had not been properly effectuated. When proof of adequate service was not forthcoming, in June, 2006 the court entered an order giving notice of its intent to dismiss for lack of prosecution unless appropriate action was taken within 20 days. Plaintiff timely moved for a 30 day extension, which the court granted, giving Plaintiff until August 9, 2006 to properly prosecute the case. On August 9, 2006 Plaintiff moved for a second extension, arguing she was attempting to contact one of the judgment lienholders (who had not been named as a party defendant) to resolve the disputed judgment lien. The court denied the second motion and dismissed the case with prejudice. Plaintiff moved for reconsideration, which was denied. Plaintiff appealed.

Appellate Holdings: The Bankruptcy Appellate Panel affirmed (see summary/opinion E07-9). Plaintiff appealed to the Ninth Circuit Court of Appeals, which also affirmed.

Discussion: The court held the bankruptcy court properly concluded that Plaintiff's attempted service on the defendants' state court attorney was insufficient because the record did not establish the attorney had either express or implied authority to accept service. Further, the bankruptcy court did not abuse its discretion in dismissing the adversary as Plaintiff had failed to serve the complaint properly after receiving an extension and two warnings that failure to prosecute would result in dismissal.

She had also failed to rebut the presumption of prejudice to defendants caused by her unreasonable delay.

Finally, the bankruptcy court did not abuse its discretion in denying Plaintiff's motion to reconsider because Plaintiff did not present newly discovered evidence, demonstrate clear error, or show an intervening change in controlling law, under FRBP 59(e)(made applicable by FRBP 9023).

FILED

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of: GERALDINE KAY SMITH, Debtor. GERALDINE KAY SMITH, Appellant, v. JOHN RUSH, Appellee.	No. 07-35760 D.C. No. OR-06-01370-BMoH MEMORANDUM*

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Brandt, Montali, and Hollowell, Bankruptcy Judges, Presiding

Submitted October 13, 2009**

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

JS/Research

Before: B. FLETCHER, LEAVY, and RYMER, Circuit Judges.

Geraldine Kay Smith appeals pro se from the Bankruptcy Appellate Panel's ("BAP") judgment affirming the bankruptcy court's orders dismissing her adversary proceeding for lack of prosecution and denying her motion for reconsideration. We have jurisdiction under 28 U.S.C. § 158(d). We review de novo the BAP's decision, *Simpson v. Burkart (In re Simpson)*, 557 F.3d 1010, 1014 (9th Cir. 2009), and we affirm.

The bankruptcy court properly concluded that service of the adversary complaint on Attorney James W. Gardner was not sufficient service on defendants because the record does not establish that Gardner had express or implied authority to accept service of process on their behalf. *See Rubin v. Pringle (In re Focus Media Inc.)*, 387 F.3d 1077, 1081, 1083 (9th Cir. 2004) (explaining that the critical inquiry in determining whether an attorney is authorized to accept service of process is whether "the client acted in a manner that expressly or impliedly indicated the grant of such authority," and reviewing de novo whether service of process is sufficient (citation omitted)); *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 93-94 (B.A.P. 9th Cir. 2004) (concluding that an attorney's representation of a corporation in an action giving rise to a judicial lien did not establish implied authority by the attorney to accept service on behalf of the

corporation for a motion to avoid the judicial lien in a bankruptcy case).

The bankruptcy court did not abuse its discretion by dismissing the adversary proceeding because Smith failed (1) to serve the complaint properly after receiving an extension of time and two warnings that failure to prosecute would result in dismissal; and (2) to rebut the presumption of prejudice to defendants caused by her unreasonable delay. *See Moneymaker v. CoBen (In re Eisen),* 31 F.3d 1447, 1451-55 (9th Cir. 1994) (discussing factors that a court must consider before dismissing an action for failure to prosecute, and reviewing dismissal for an abuse of discretion).

The bankruptcy court did not abuse its discretion by denying Smith's motion for reconsideration because Smith did not present newly discovered evidence, demonstrate clear error, or show an intervening change in controlling law. *See 389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) (setting forth grounds for reconsideration under Federal Rule of Civil Procedure 59(e), and concluding that the district court did not abuse its discretion by declining to address an issue raised for the first time in a motion for reconsideration); *see also* Fed. R. Bankr. P. 9023 (applying Rule 59(e) to bankruptcy proceedings).

The parties' other contentions, including appellee's contentions regarding mootness, are unpersuasive.

Smith's request for judicial notice is denied.

AFFIRMED.