Failure to Prosecute
FRBP 7004(a)(1)
FRBP 7041
FRBP 9006(b)
FRBP 9023
FRCP 4(m)
FRCP 41(b)
FRCP 59(e)

Smith v. Rush BAP # OR-06-1370BMoH
Adv. # 05-07043-aer

7/12/07 BAP Unpublished
Affirming Radcliffe's unpublished letter opinion and order

Plaintiff/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 then 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 then appealed.

The Bankruptcy Appellate Panel affirmed:

The Panel first denied Plaintiff's request to take judicial notice of the entire bankruptcy court file and a state court matter she brought against another creditor.

On the appeal's merits, given the numerous delays and the previous extension, the bankruptcy court did not abuse its discretion when it found Plaintiff had not shown "cause" under FRBP 9006(b) for the second extension. Further, the court did not abuse its discretion in dismissing the case with prejudice sua sponte under FRCP 41(b) (made applicable by FRBP 7041). The attorney's prior representation of defendants in state court did

not equate to his accepting service on their behalf in the adversary, or to being their agent for service. The Panel noted failure to effectuate proper service was a particularly serious failure to prosecute. The bankruptcy court's reliance on the 120 day service deadline of FRCP 4(m)(made applicable by FRBP 7004(a)(1)) was also warranted.

Finally, the bankruptcy court did not abuse its discretion in denying Plaintiff's motion to reconsider, which was treated as one to alter or amend judgment or for new trial under Rule 59. Plaintiff presented nothing in support of reconsideration which could not have been presented earlier.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. OR-06-1370-BMoH
GERALDINE KAY SMITH,	Bk. No. 97-62183
Debtor.	Adv. No. 05-07043
GERALDINE KAY SMITH,	
Appellant,	
v.	**M E M O R A N D U M**[1]
JOHN RUSH,	
Appellee.	

Argued and Submitted on June 20, 2007
at Pasadena, California

Filed - July 12, 2007

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

Honorable Albert E. Radcliffe, Bankruptcy Judge, Presiding

Before: BRANDT, MONTALI, and HOLLOWELL,[2] Bankruptcy Judges.

[1] 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 8013-1.

[2] Hon. Eileen W. Hollowell, U.S. Bankruptcy Judge for the District of Arizona, sitting by designation.

The bankruptcy court denied debtor's motion for a second extension of time to prosecute a nine-month-old adversary proceeding and dismissed the case. Debtor moved for reconsideration, which the bankruptcy court also denied. Debtor timely appealed, but only identified a previously dismissed defendant as an appellee. We AFFIRM.

I. FACTS

Geraldine Smith filed a chapter 13[3] petition on 16 April 1997; the case was converted to chapter 7 on 12 November 1999, and she received her discharge on 26 October 2000. In July 2005 the chapter 7 trustee noticed an intent to pay a judgment lien against estate assets. Smith objected, and the bankruptcy court abated the matter and gave her the opportunity to file an adversary proceeding to deal with the disputed lien.

On 22 November 2005 (after having requested and received an extension from the original 8 November deadline) Smith filed an adversary proceeding against John Rush and several other named and unnamed defendants.[4] The judgment at issue, in the amount of $1204.10, was entered in 1992 by the Oregon Supreme Court against Smith and in favor

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[3] Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from which this appeal arises was filed before its effective date (generally 17 October 2005).

All "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "FRCP" references are to the Federal Rules of Civil Procedure.

[4] The other named defendants are Judy Rush, Gary Wilhoft, Brenda Wilhoft, John Reslock, Judith Reslock, Roy Reslock, and Millette Reslock. None of these parties were named as appellees, nor is there any indication they have notice of this appeal. The bankruptcy court found they had never been properly served in the adversary proceeding, and denied Smith's motion to enter defaults against them.

of Judy Rush and Richard Barron, a Curry County Circuit Court judge, who was not named as a defendant in the adversary proceeding. The judgment was for attorney's fees and costs incurred on appeal.

On 31 January 2006 Smith filed a certificate of service indicating the adversary summons and complaint had been served on attorney James Gardner. After the bankruptcy court denied John and Judy Rush's motion to dismiss and for a more definite statement, they filed an answer. Shortly thereafter John Rush moved to amend the pleadings to reflect that Judy Rush had been inadvertently named, and that John Rush's counsel (Keith Boyd of Muhlheim, Boyd) did not represent Judy Rush. At a subsequent pre-trial conference, John Rush was dismissed from the proceeding on his representation that he had no claim or lien against the estate. The order dismissing Rush without prejudice was entered 4 May 2006. The same day the bankruptcy court denied Smith's motion for entry of default against the remaining defendants, ruling that service on attorney Gardner did not suffice as service on them under Rule 7004.

After no action in the adversary proceeding for 47 days, the bankruptcy court entered an order on 20 June 2006 giving notice of its intent to dismiss for lack of prosecution unless appropriate action were taken within 20 days. On 10 July 2007 Smith moved for a 30-day extension of time, explaining that she had attempted to contact Judge Barron, the Curry County Circuit Court, and Judy Rush, regarding the lien, but had been unsuccessful. She indicated she was waiting for Judge Barron to return on 24 July 2006.

The court granted the motion, setting 9 August 2006 as the deadline for further action. On 9 August Smith moved for a further 30-day extension, explaining that she "has been diligent but she has been unable to reach the people with whom she needed to communicate[] within the

previously requested extention [sic] time period due to vacations and time out of the office."

The bankruptcy court denied the motion, finding in a letter ruling docketed 29 August 2006 that Smith had not shown "cause" under Rule 9006(b)(1) for a further extension, and that she had failed to prosecute within the meaning of FRCP 41(b), applicable via Rule 7041. The bankruptcy court entered an order dismissing the adversary proceeding with prejudice, and an order in the main case overruling Smith's objection to the trustee's notice of intent to pay judgment lien and authorizing the trustee to take any actions consistent with that notice.

Smith timely moved for reconsideration, which the bankruptcy court also denied, entering its letter ruling and order 14 September 2006. Smith timely appealed.

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and § 157(b)(1) and (b)(2)(K), and we do under 28 U.S.C. § 158(c).

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III. ISSUES[5]

A. Whether we should grant Smith's requests for judicial notice;

B. Whether the bankruptcy court abused its discretion in denying debtor's motion for extension of time and dismissing the adversary proceeding for lack of prosecution; and

C. Whether the bankruptcy court abused its discretion in denying Smith's motion for reconsideration.

IV. STANDARDS OF REVIEW

We review the bankruptcy court's denial of a motion for extension of time under Rule 9006 for abuse of discretion. In re Nunez, 196 B.R. 150, 155 (9th Cir. BAP 1996). Likewise, the dismissal of an adversary proceeding for lack of prosecution under FRCP 41(b), Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976); see also Southwest Marine Inc. v. Danzig, 217 F.3d 1128, 1137 n.10 (9th Cir. 2000), and the denial of a motion for reconsideration under FRCP 59, applicable via Rule 9023. Nunez, 196 B.R. at 155.

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[5] In her notice of appeal, Smith did not reference the order in the main case overruling her objection to the trustee's notice of intent, but she requested abatement of payment of the claim until the appeal was concluded. She requested a stay pending appeal on 20 November 2006, which we denied 1 December 2006. The trustee subsequently paid the lien, according to his notice of 27 November 2006. Were Smith to prevail on appeal the bankruptcy court could likely fashion some sort of relief such as disgorgement, we do not believe we must dismiss this appeal as moot. But Smith has waived any issues relating to this order by failing to address it in her opening brief. Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.") See also In re Sedona Inst., 220 B.R. 74, 76 (9th Cir. BAP 1998).

Nor did she reference the 14 September 2006 order denying reconsideration. Based on this omission, appellee argues the appeal is untimely. However, this deficiency did not result in inadequate notice to appellee. See Interstate Natural Gas Ass'n v. F.E.R.C., 756 F.2d 166, 170 (D.C. Cir. 1985).

A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). We may reverse for abuse of discretion only when we have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached. S.E.C. v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001); In re Black, 222 B.R. 896, 899 (9th Cir. BAP 1998).

V. DISCUSSION

A. Requests for Judicial Notice

In her opening brief, Smith requests we take judicial notice of the entire bankruptcy court file, and of a state court matter she brought against Brookings Smuggler's Cove Homeowner's Association. Further, on 18 June 2007, two days before argument in this appeal, she requested we take judicial notice of a letter dated 3 January 2006 which she contends establishes that James Gardner is the agent for John and Judy Rush.

And although this appeal was submitted at the conclusion of argument on 20 June 2007, Smith filed a Correction of Statement at Hearing and Request for Judicial Notice on 3 July 2007. This latest request is that we take judicial notice of a 12 December 2006 letter from Mr. Gardner to John Rush, and its enclosure, a check from the trustee payable to Judy Rush, which Smith avers she obtained in discovery on 25 June 2007.

While we may take judicial notice of bankruptcy court files, In re E.R. Fegert, Inc., 887 F.2d 955, 957-58 (9th Cir. 1985), we see no reason to look beyond the excerpts provided by the parties, and Smith has not articulated one. The state court action is irrelevant to the issues in this appeal, which are procedural only. Neither the 3 January 2006

letter nor that of 12 December 2006 was before the bankruptcy court, and in any event, they do not establish any facts relevant to dismissal, extension of time, or reconsideration. The requests are denied.

B. Denial of Motion for Extension/Dismissal for Lack of Prosecution

Rule 9006(b) provides, in relevant part:

> [W]hen an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order . . . .

The bankruptcy court found that Smith had not shown "cause" under Rule 9006(b) for another extension:

> This case is now 9 months old. It has been over 5 months since Ms. Smith was put on notice that the Muhlheim firm did not represent Judy Rush. It has been 3 and ½ months since I ruled that Ms. Smith's attempted service (back in December 2005) did not comply with FRBP 7004. It has been 7 weeks since her first motion for extension was granted. All this, and yet Ms. Smith has not attained good service on any of the remaining defendants. Her present motion and declaration again outlines unsuccessful attempts to communicate with Judge Barron's chambers, as well as the State Court Administrator regarding the disputed judgment lien. However, Judge Barron has not been named as a party defendant. She does not mention any effort to gain service on any of the remaining defendants.

Letter Ruling, 28 August 2006, pages 2-3 (emphasis in original). Given the numerous delays in this case and the previous extensions granted by the bankruptcy court, it is difficult to see how denial of this one constituted abuse of discretion.

The bankruptcy court dismissed the case for delay based on Smith's failure to effectuate proper service. FRCP 41(b) authorizes involuntary dismissal for failure to prosecute, and a bankruptcy court may act sua sponte under this rule. See McKeever v. Block, 932 F.2d 795, 797 (9th Cir. 1991). The rule provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

FRCP 41(b). The failure to prosecute must be unreasonable. McKeever, 932 F.2d at 797. Failure to effectuate proper service is "a particularly serious failure to prosecute . . . ." Anderson, 542 F.2d at 525. The bankruptcy court correctly noted that Gardner's prior representation of the defendants in state court does not equate to his accepting service on their behalf in the adversary proceeding, or being their agent for service. In re Villar, 317 B.R. 88, 93-94 (9th Cir. BAP 2004); but see In re Focus Media Inc., 387 F.3d 1077, 1083 (9th Cir. 2004) (implied agency existed where attorney had been "extensively involved" in the underlying bankruptcy proceeding).

In determining whether dismissal is appropriate, the bankruptcy court must consider:

> (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits and (5) the availability of less drastic sanctions.

Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986) (citation omitted). But the bankruptcy court is not required to make specific findings on these factors, and no finding of prejudice to defendants is required, as it is presumed. Anderson, 542 F.2d at 524; Al-Torki v. Kaempen, 78 F.3d 1381, 1384 (9th Cir. 1996).

In the bankruptcy court's words:

> I have carefully considered the factors required under FRCP 41(b) for dismissal. I find the delay here unreasonable. I also find this case is delaying closure of Ms. Smith's main

> bankruptcy, which is now over 9 years old. I find no good rationale or excuse given for Ms. Smith's dilatory conduct. Although she is acting pro se, she is an experienced litigant, who should not be given any more favorable treatment than a represented party. The court on two specific occasions . . . has given Ms. Smith an opportunity to avoid dismissal. At this point, dismissal with prejudice under Rule 41(b) is warranted.

Letter Ruling, 28 August 2006, page 3 (footnotes omitted).

The bankruptcy court also cited FRCP 4(m), applicable via Rule 7004(a)(1), as an alternative ground for dismissal. That Rule sets a 120-day limit for serving the summons and complaint, and provides:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

The bankruptcy court noted that, although dismissal under FRCP 4(m) is without prejudice, in this instance the dismissal would effectively be with prejudice because the bankruptcy court's deadline for filing the complaint had passed. Although the bankruptcy court apparently never entered a written order setting a deadline, Smith does not dispute that one was set, and the bankruptcy court has the inherent power to manage its own docket. Landis v. North American Co., 299 U.S. 248, 254 (1936); Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962). And in any event, the dismissal for failure to prosecute under FRCP 41(b) was with prejudice. In re Jee, 799 F.2d 532, 534 n.2 (9th Cir. 1986).

Given the history of this adversary proceeding, the dismissal was not an abuse of the bankruptcy court's discretion. The court gave Smith ample opportunity to pursue the matter, and correctly concluded that her

pro se status did not excuse her from compliance with the rules. King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987).

On appeal, Smith insists upon arguing about the validity of the lien and without citation to authority, that service on Gardner was good service on the defendants, that default should be entered against the Rushes, and that the bankruptcy court's order denying her motion for default against them is not a separate document and thus not an effective order. Even if these contentions were correct, they do not pertain to the order on appeal.

She argues that she did not act in bad faith and that the delay in removing Judge Barron from the judgment was not her fault. But the bankruptcy court did not find any bad faith and none is required. Finally, she accuses the bankruptcy judge of misconduct and of engaging in ex parte contacts, but points to nothing in the record to support these assertions.

C. Reconsideration

Smith timely moved for reconsideration of the order of dismissal and the order overruling her objection to the trustee's notice of intent, arguing that there were changed circumstances, in that Judge Barron's name had been removed from the judgment. She also argued that: (1) James Gardner was in fact the agent for the Rushes and their partners (based on his 26 February 2004 letter to the trustee stating that he had been the attorney for John Rush and other plaintiffs in a state court lawsuit against Smith), and thus service on him was sufficient to give notice to his clients; (2) since he had not objected to service he had waived any objection; and (3) the Rushes had actual notice because they made an appearance in the proceeding. Nevertheless she requested the

court allow her to serve Judy Rush by publication. She argued that dismissal was prejudicial to her, but that defendants had not made a showing of prejudice.

A motion for reconsideration filed within ten days of entry of the underlying order is treated as a motion to alter or amend judgment or for a new trial under FRCP 59(e), applicable via Rule 9023. American Ironworks & Erectors, Inc. v. North Am. Const. Corp., 248 F.3d 892, 898-99 (9th Cir. 2001). Reconsideration under that rule is appropriate only if the moving party demonstrates (1) manifest error of fact; (2) manifest error of law; or (3) newly discovered evidence. In re Basham, 208 B.R. 926, 934 (9th Cir. BAP 1997).

The bankruptcy denied the motion, noting that removal of Judge Barron from the judgment had no bearing on the issues. Moreover, any arguments regarding the efficacy of service should have been made in her motion for entry of default, the denial of which Smith neither appealed nor identified as an issue in this appeal. Nor, as indicated in footnote 4, are the would-be defendants parties to this appeal.

Smith has articulated no basis on which we could conclude that the bankruptcy court abused its discretion: she presented nothing in support of reconsideration which could not have been presented at the time of the original motion. A motion to reconsider may not be used to present new legal arguments or to rehash prior arguments. In re JSJF Corp., 344 B.R. 94, 103 (9th Cir. BAP 2006).

VI. CONCLUSION

We deny Smith's requests for judicial notice; the subject documents are not relevant to the issues in this appeal.

Smith has shown no abuse of discretion in the denial of her motion for extension or in dismissing her adversary proceeding against Rush, et al. Nor has she shown any abuse of discretion in the bankruptcy court's denial of her motion for reconsideration.

Accordingly, we AFFIRM.