

Sanctions
Abuse of Discretion

In re Porter

Bankr. No. 694-60095-psh13

8/4/95

BAP aff'g PSH

Unpublished

The debtor was represented by attorney Eric Haws. On June 24, 1994 an order was filed which had been signed by Judge Higdon instructing Mr. Haws to present a proposed order of confirmation within 10 days. The order cautioned that the court would consider a reduction of the award of attorney fees if the documents were not timely filed. On September 7, the court sent a letter to Mr. Haws stating that his fee award would be reduced to zero for non-compliance with the June order and warning him that the case would be dismissed unless he presented the proposed order within five days. Mr. Haws did not respond and the case was dismissed. The debtor appealed the order of dismissal.

The BAP held that the bankruptcy court did not abuse its discretion in dismissing the case. Factors considered by the reviewing court in making its determination include 1) the plaintiff's diligence, 2) the trial court's need to manage its docket, 3) the danger of prejudice to the party suffering the delay, 4) the availability of other sanctions, and 5) the existence of a warning.

NOT FOR PUBLICATION

1 U.S. BANKRUPTCY COURT
2 DISTRICT OF OREGON
3 FILED

FILED

4 AUG 04 1995

AUG - 4 1995 C.A.

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

6 BY βD DEPUTY.

7 UNITED STATES BANKRUPTCY APPELLATE PANEL
8 OF THE NINTH CIRCUIT

9	In re)	BAP No. OR-94-2234-VAsH
10	TERRY A. PORTER,)	BK. No. 694-60095-psh13
11)	
12	Debtor.)	
13	_____)	
14	TERRY A. PORTER,)	
15)	
16	Appellant,)	
17	v.)	<u>MEMORANDUM</u>
18	UNITED STATES TRUSTEE,)	
19)	
20	Appellee.)	
21	_____)	

22 Submitted¹ on June 22, 1995
23 at Portland, Oregon

24 Filed - AUG - 4 1995

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

Honorable Polly S. Higdon, Bankruptcy Judge, Presiding

Before: VOLINN, ASHLAND, and HAGAN, Bankruptcy Judges.

¹The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument.

1 OVERVIEW

2 After reducing the debtor's attorney's fees to zero in an
3 effort to enforce his compliance with its orders, the bankruptcy
4 court dismissed this chapter 13 case as a sanction for failure
5 to present an order confirming the plan. We AFFIRM.

6
7 FACTS AND PROCEEDINGS BELOW

8 The debtor, Terry A. Porter, is represented by attorney
9 Eric Haws. Mr. Haws' letterhead lists offices in seven Oregon
10 cities and towns and an additional nine phone numbers in other
11 state-wide locations. According to the bankruptcy court, Haws
12 has "practiced Chapter 13 for many years" In January
13 1994, Haws represented Porter when he filed a voluntary chapter
14 13 petition and a proposed chapter 13 plan.

15 In June 1994, Bankruptcy Judge Higdon signed an order
16 styled "ORDER REQUIRING PRESENTATION OF PROPOSED
17 CONFIRMATION/WAGE ORDER" ("the June order"). The order was
18 filed on June 24, 1994, and the clerk of the court mailed copies
19 of the order to "the debtor(s), debtor's attorney, if any, and
20 trustee."

21 The order instructed Haws to present a proposed order of
22 confirmation within 10 days.

23 The order cautioned that if the documents were not timely
24 presented, "the court will consider a reduction of the attorney
25
26

1 fees for the debtor's attorney."²

2 The order further stated that in future cases the attorney
3 would be required to file proposed confirmation orders not later
4 than two business days prior to the confirmation hearing, or to
5 tender them at the confirmation hearing.

6 On September 7, 1994, the court sent a letter to Haws, with
7 a copy to Porter (the September letter), stating that the court
8 was reducing Haws' fee to zero for non-compliance with the June
9 order and warning him that it would dismiss the case unless he
10 presented the proposed order within five days.

11 Apparently Haws did not respond. By order entered
12 September 13, 1994, the court dismissed the case for failure to
13 comply with the June order.

14 Porter appealed on September 23.³

15
16 STANDARD OF REVIEW

17 Orders of dismissal are reviewed for an abuse of
18 discretion. In re Hill, 775 F.2d 1385, 1386 (9th Cir. 1985); In
19 re Loya, 123 B.R. 338, 340 (9th Cir. BAP 1991).

20 / / /

21
22 ²In a proposed order confirming the chapter 13 plan, provided
23 in appellant's excerpts of record with this appeal, Haws asked for
24 \$1,200. This order is not file-stamped, and apparently has never
25 been presented.

26 ³By order entered October 20, 1994, the bankruptcy court
denied a motion for stay of the order pending appeal. The order
noted that Haws and Porter failed to appear at the scheduled
hearing on the motion or offer any reason for their absence.

1 no support for it.

2 We do not consider the September letter to be an order of
3 the court, but rather, a warning of potential consequences which
4 could be incurred for continued failure to obey a past order.
5 The order which is the basis for the dismissal is the June
6 order, entered some nine weeks prior to dismissal for failure to
7 obey it. Therefore the rule of time computation does not apply
8 to the warning, and, in any event, Haws does not contend that
9 the timing of the dismissal constituted a surprise which
10 deprived him of the opportunity to present the confirmation
11 order.

12 The procedural leg of Haws' argument would have been
13 sturdier had he alleged or provided evidence that he submitted
14 the proposed order by or on September 14, and it was rejected.
15 Because Haws does not contend that the timing of the dismissal
16 deprived him of the opportunity to comply with the court's
17 order, we conclude that the timing of the dismissal was
18 harmless.

19 Haws' substantive argument is simply that the debtor should
20 not be penalized for his attorney's failure because the debtor
21 had no responsibility for the presentation of the order, and a
22 less extreme sanction would have been proper.⁴ We examine the
23 merits of this contention.

24
25 ⁴Haws also contends that the failure to file the order did not
26 constitute bad faith or fraudulent conduct on the part of the
debtor, citing as authority, In re Ford, 78 B.R. 729 (Bankr. E.D.
Penn. 1987). However, such were not the grounds for dismissal.

1 This case was dismissed essentially for failure to
2 prosecute. In Tolbert v. Leighton, 623 F.2d 585 (9th Cir.
3 1980), the court held such dismissal to be an abuse of
4 discretion where: 1) the only evidence of dilatoriness was
5 failure to attend a pretrial conference, 2) no prior warning of
6 the risk of dismissal was given by the court, and 3) the case
7 was still "young." 623 F.2d at 586. Where one or more of these
8 factors is present, the court considering dismissal must first
9 consider less drastic sanctions. Id.

10 As the factors delineated in Tolbert are more or less
11 present in this case, the court was required to consider less
12 drastic sanctions prior to dismissal. The court did so. In the
13 September letter, the court reduced Haws' attorney's fees to
14 zero and warned him expressly of the possibility of dismissal.
15 Despite this warning, Haws failed to comply with the order.

16 In determining whether the trial court committed an abuse
17 of discretion by dismissing a suit, relevant factors to be
18 considered by the reviewing court include: 1) the plaintiff's
19 diligence, 2) the trial court's need to manage its docket, 3)
20 the danger of prejudice to the party suffering the delay, 4) the
21 availability of other sanctions, and 5) the existence of a
22 warning. Hamilton v. Neptune Orient Lines, Ltd., 811 F.2d 498,
23 499 (9th Cir. 1987).

24 In the instant case, the debtor's dilatory conduct was
25 failure to present the proposed confirmation order. While the
26 June order did not warn that failure to comply with it could

1 lead to dismissal, the September letter clearly warned that
2 dismissal was at risk. While there does not appear to be any
3 prejudice to an opposing party, the court's management of its
4 docket has been affected insofar as the debtor's dilatoriness
5 has required the court to issue an order and subsequently write
6 a letter in the face of non-compliance.

7 The court's dismissal of this case appears to have been in
8 some measure a reaction to a pattern of behavior by this
9 debtor's attorney. As noted, in the September letter the court
10 wrote to Haws, "[y]ou have practiced Chapter 13 for many years
11 and have received many of these form orders." The court
12 apparently found no excuse for Haws' failure to obey the June
13 order. We conclude that adequate warning was given, and
14 therefore, the court was within its discretion to dismiss the
15 case.

16 We are not unmindful of Haws' argument that the debtor
17 should not pay a penalty for misconduct by his attorney.
18 Ordinarily, faults and defaults of an attorney are imputed to
19 his client. In re Hill, 775 F.2d at 1387. In Hill, the
20 district court dismissed an appeal because the trustee's
21 attorney failed to timely file its appeal brief with the
22 district court. Nevertheless, the court of appeals reversed the
23 dismissal because the district court did not consider the
24 severity of the effect of the sanction on the litigant.

25 In the case before us, however, such effect was considered
26 and warning was clearly given. The debtor received copies of

1 the June order and of the September letter notifying him of his
2 attorney's failure to comply with it and the potential
3 consequences for continued failure. We can discern no lesser
4 sanction which could have been employed by the court to enforce
5 compliance with its order.

6 In view of the court's need to manage its docket, the
7 debtor's attorney's apparent recurring recalcitrance in the face
8 of orders of the court, and the debtor's potential recourse
9 against his attorney for any damage caused by failure to comply
10 with a simple order of the court, we cannot conclude that the
11 court abused its discretion by dismissing this case.

12
13 CONCLUSION

14 Although appellant has given the panel very little help,
15 dismissal is a harsh sanction and should only be invoked in
16 extreme circumstances. In re Hill, 775 F.2d at 1387.
17 Nevertheless, the court took action short of dismissal in an
18 effort to enforce compliance, and such action was ignored. The
19 order, therefore, is AFFIRMED.

OFFICE OF THE CLERK
United States Bankruptcy Appellate Panel
of the Ninth Circuit

NOTICE OF ENTRY OF JUDGMENT

A separate Judgment was entered in this case on 8/4/95.

Motions for Rehearing

A motion for rehearing may be filed within 10 days after entry of the judgment. (Bankruptcy Rule 8015).

The motion shall be submitted on 8½ by 11 inch paper, shall not exceed 15 pages in length, and shall comply with rules governing service and signature. An original and three copies shall be filed.

A motion for rehearing may toll the time for filing a notice of appeal to the Court of Appeals. See Bankruptcy Rule 8015.

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. Also see, Federal Rules of Appellate Procedure 39.

Issuance of the Mandate

The mandate, a certified copy of the judgment addressed to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 21 days after entry of the judgment unless otherwise ordered by the Panel. A timely motion for rehearing will stay issuance of the mandate until 7 days after disposition of the motion, unless otherwise ordered. See Bankruptcy Rule 8017 and Federal Rules 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 \$100 filing fee. Checks may be made payable to the U.S. Court of Appeals For The Ninth Circuit. See Federal Rules of Appellate Procedure 4 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.