

FILED & ENTERED

JUN 03 2013

CLERK U.S. BANKRUPTCY COURT  
Central District of California  
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UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
LOS ANGELES DIVISION

In re:

Marcelo Britto Gomez

Debtor.

CHAPTER 7

Case No.: 2:11-bk-26905-TD  
Adv No: 2:11-ap-02360-TD

**MEMORANDUM DECISION  
REGARDING REMAND**

Carter Stephens

Plaintiff,

v.

Marcelo Britto Gomez

Defendant.

By order entered February 8, 2012, this adversary proceeding was dismissed for lack of prosecution. That order was not appealed timely and now is final. On February 27, 2012, the Plaintiff, Carter Stephens (Stephens or Plaintiff), representing himself,

1 filed with the court a Motion for Reconsideration (Motion). Stephens' Motion was denied  
2 by an order entered March 1, 2012. Stephens appealed the court's March 1 order to  
3 the Bankruptcy Appellate Panel (BAP). The BAP vacated the court's March 1 order and  
4 remanded this adversary to this court for findings of fact and conclusions of law  
5 pursuant to Rules 7052 and 9013.

6 Rule 9013 of the Federal Rules of Bankruptcy Procedure (FRBP) generally  
7 requires a written motion stating with particularity the grounds for the motion and the  
8 relief sought and that the motion be served as the court directs. FRBP 9014 requires  
9 that orders in contested matters generally be requested by motion and that reasonable  
10 notice and opportunity for hearing shall be afforded to the party against whom the relief  
11 is sought. In adversary proceedings, FRBP 7005 requires written motions other than ex  
12 parte motions to be served on every party. The specific basis for the court's March 1  
13 order was that Stephens' motion was not an appropriate ex parte motion, was not  
14 served on any adverse party, and was not accompanied by a notice of hearing or any  
15 other notice to any adverse party. In this case, both the adversary Defendant, Marcelo  
16 Britto Gomez (Gomez or Defendant), and Stephens' attorney Lori Smith (Smith) were  
17 adverse to Stephens on his Motion. They were not served with such notice and  
18 opportunity, nor were they served with Stephens' Motion.

19 Our Local Bankruptcy Rules (LBRs) (as in effect in 2011 and 2012) required that  
20 in this matter a party seeking a hearing must serve and set for hearing a motion for  
21 which a hearing is necessary in accordance with LBR 9013-1(a)(1). A party must self-  
22 set a motion for hearing at a date and time permitted on the judge's motion calendar  
23 and calendaring instructions. LBR 9013-1(b)(2). Every motion must be accompanied  
24 by written notice of motion and, if applicable, the date, time, and place of hearing, and  
25 the motion must advise an opposing party that LBR 9013-1(f) requires a written  
26 response to be filed and served at least 14 days before the hearing. LBR 9013-1(c)(2).  
27 A motion requires a declaration or affidavit along with a written statement of all reasons  
28 in support and a memorandum of points and authorities upon which the moving party

1 will rely. FRBP 9006(d); LBR 9013-1(c)(3). Testimony is required to be under oath.  
2 FRBP 9014(d); LBR 9013-1(c)(3)(A) and (i). There are exceptions to the foregoing, but  
3 none applies to Stephens' Motion, or for that matter to motions under FRBP 9024.

4 Absent an exception, every motion and notice must be served on adverse  
5 parties. LBR 9013-1(d)(1). Every paper filed pursuant to LBR 9013-1 must be  
6 accompanied by a proof of service in the form specified by LBR 9013-3. LBR 9013-  
7 1(e). Papers not served in accordance with LBR 9013-1 may be deemed by the court to  
8 be consent to the denial of the motion. LBR 9013-1(h). Stephens' failure to comply with  
9 the foregoing federal and local rules warranted denial of his Motion based on Stephens'  
10 "deemed" consent as provided in LBR 9013-1(h).

11 In addition to the foregoing shortcomings, Stephens' Motion offered no legal  
12 reasoning and cited no statute or rule as a basis for the reconsideration requested.  
13 Instead, it offered a recapitulation of the argument that Stephens had made in court at  
14 the February 2, 2012 status conference hearing attended by Stephens and his attorney  
15 Smith, as well as by Thomas Duque, attorney for Defendant Gomez. The transcript of  
16 the February 2 hearing shows clearly that both Smith and Stephens voiced strongly  
17 worded claims against each other. Many of Stephens' comments about Smith were  
18 highly disparaging, based on hearsay, and unsupported by any corroborating sworn  
19 testimony or authenticated documentary evidence. In the February 2 hearing, Stephens  
20 expressed **no** recognition of the court's (1) repeated warnings to him at the September  
21 1, 2011 hearing that if he was not satisfied with Smith's services he should fire her and  
22 get another lawyer or (2) other suggestions made by the court on September 1.

23 In response to the courtroom February 2 debate between Smith and her client  
24 Stephens, the court dismissed the adversary proceeding for lack of diligent prosecution,  
25 saying at the time, ". . . I'm not sitting here in judgment of who did what to whom  
26 between Mr. Stevens [sic] and Ms. Smith." The court concluded, ". . . it would seem to  
27 me in a case that's been pending before this Court for seven months, for me to learn . . .  
28 [the things said by them today] at a status conference hearing, and not in formal

1 pleadings from one side or the other [Stephens or Smith], is inexcusable, and an  
2 inexcusable burden on the Defendant, and on the legal process, and on this Court . . . .”  
3 Tr. Feb. 2, 2012 hrg, 9:12-20.

4 As the records of this court show, since the Stephens adversary was filed by  
5 Smith on June 15, 2011, Smith had been largely derelict throughout. On the other  
6 hand, Stephens attended all three hearings in the case, on September 1, 2011,  
7 September 29, 2011, and February 2, 2012. Meanwhile, Smith filed no status  
8 conference report for the September 1 hearing. Smith was absent from the September  
9 1 hearing, without excuse. Smith signed (via a proxy) a unilateral status conference  
10 report filed September 13 and attended the September 29 hearing. After that, and  
11 contrary to her discussion with the court and her oral comments at the September 29  
12 hearing, Smith produced no written discovery, settlement proposal, mediation stipulation  
13 and proposed order, or proposed scheduling order. Smith did not file a status  
14 conference report for the February 2, 2012 hearing. Smith did not file a response to  
15 Defendant’s Motion to Dismiss. Smith was required to do all of those things (1) by her  
16 duties to Stephens, and (2) based on our September 29 status conference discussion  
17 and the court’s rulings on the record at the hearing, and as required by the LBRs. To  
18 add to the foregoing, the following will recount the history of the Stephens adversary  
19 from its inception to the court’s order dismissing the adversary for lack of prosecution.

20 Stephens’ adversary was filed on June 15, 2011. On behalf of Defendant  
21 Gomez, Attorney Nicole Lewis of Dvortsin & Associates filed an answer to the  
22 Stephens’ complaint on July 25, 2011.

23 A status conference hearing was scheduled for September 1, 2011 at 11:00 a.m.  
24 by a summons issued by the court on June 23, 2011. LBR 7016-1(a)(1) and (2)  
25 requires a status conference report to be filed 14 days before the date set for each  
26 status conference hearing and attendance at each such hearing by the “attorney . . .  
27 who is responsible for trying the case or the attorney who is responsible for preparing  
28 the case for trial.”

1 In this adversary, the only status conference report filed for the September 1  
2 hearing was a unilateral report filed August 24, 2011, by attorney Lewis for the  
3 Defendant. The report commented among other things that the Defendant would be  
4 ready for trial on November 1, 2011, and that the "Parties are in the process of drafting  
5 a settlement agreement acceptable to both sides."

6 The case was called for hearing on September 1 shortly after 11:00 a.m. The  
7 only appearance entered at that time was by Travis Kasper, an attorney appearing for  
8 the Defendant. There was no appearance for Plaintiff at that time. Kasper reported that  
9 settlement negotiations had hit a snag but said that the defense would be ready for trial  
10 by November 1, 2011, as stated in Defendant's previously filed and served unilateral  
11 written report. The court continued the hearing to September 29 at 11:00 a.m. The  
12 hearing was concluded at 11:10 with only Kasper in attendance.

13 Later that day, at about 12:30 by the court's personal notes and recollections,  
14 Stephens, the Plaintiff himself appeared. He reported that he had been present in court  
15 earlier in the day. The court told Stephens that his lawyer Lori Smith was not present  
16 when the case was called shortly after 11:00 a.m. Tr. Sept. 1, 2011, 6:1-6. The court  
17 told Stephens that Defendant had filed a status report saying "that the parties are in the  
18 process of drafting a settlement agreement acceptable to both sides." At the hearing  
19 earlier on September 1, Defendant's attorney reported that the settlement process had  
20 not gone anywhere and that the hearing was continued to September 29 at 11:00 a.m.  
21 Tr. Sept. 1, 9:2-24.

22 Stephens questioned the court whether he had a lawyer since Lori Smith had not  
23 shown up for the hearing and because of other concerns he expressed. During this  
24 discussion the court suggested several times to Stephens that if he was dissatisfied he  
25 could fire Smith and hire another lawyer, or he could represent himself but if he did that  
26 the lawsuit would be his responsibility. The court advised Stephens that he is the  
27 Plaintiff; that Plaintiff's responsibility is to get a written report on file in advance; that no  
28 written report had been filed by Plaintiff; that the absence of such a report from Plaintiff

1 authorizes the court to dismiss the lawsuit; and that if Stephens personally takes over  
2 the lawsuit, he would have to follow all the rules to properly prosecute his lawsuit; and  
3 that Stephens ought to have a lawyer he can rely on and trust. Tr. Sept. 1, 7:17–13:18.

4 On September 13, Smith filed a unilateral status conference report. Smith and  
5 Stephens appeared at the September 29 hearing. Attorney Thomas Duque appeared  
6 for Defendant. The court expressed its frustration at some length with a now three-  
7 month old lawsuit that did not seem to be going anywhere. The court specifically  
8 informed Stephens and Smith that it was Plaintiff's duty to prosecute the lawsuit  
9 diligently, to follow the discovery rules and other rules, and to prepare their adversary  
10 complaint against Gomez for trial or other disposition. Defendant's duties were  
11 emphasized as well. The court commented on the many missteps that had occurred to  
12 date by each side. In the end, Plaintiff was instructed to engage in "productive  
13 prosecution." Smith promised to follow up with what she acknowledged would be a joint  
14 mediation request and represented that the court would receive a proposed mediation  
15 order shortly. The court set a deadline to complete discovery by December 30, 2011;  
16 set a further status conference hearing date for January 19, 2012, at 11:00 a.m.; and  
17 requested Smith to lodge a scheduling order [the responsibility of the plaintiff under LBR  
18 7016-1]. Neither of the above proposed orders was lodged.<sup>1</sup>

19 By a notice filed and served by the court on December 16, 2011, the status  
20 conference hearing was continued to February 2, 2012.

21 Defendant filed and served a unilateral status conference report on January 6,  
22 2012. On January 13, 2012, Defendant filed and served a Notice of Hearing and Motion  
23 to Dismiss with Prejudice Pursuant to Federal Rule of Civil Procedure (Civil Rule) 41(b),  
24 while stating in the notice an unavailable and unauthorized hearing date. An Amended  
25 Notice setting the hearing date for February 9, 2012, at 11:00 a.m., was filed and served  
26 by Defendant on January 27, 2012. No response to Defendant's Motion to Dismiss was  
27

28 <sup>1</sup> There is no transcript of the September 29 hearing. The foregoing is a summary of the court's notes  
from listening to the recording of the hearing.

1 filed by Plaintiff. As of February 2, 2012, Smith had filed nothing after her September  
2 13, 2011 unilateral status conference report.

3 All this time, the record before the court reflected that Stephens knew he had a  
4 serious problem with his attorney Smith. See the transcript of the September 1, 2011  
5 hearing discussion between Stephens and the court. Stephens' remarks at that time  
6 reflect that he was fully cognizant of his frustrations and dissatisfaction with Smith's  
7 legal services and that he was monitoring his interests in the lawsuit carefully. In  
8 addition, based on Stephens' Motion filed on February 27, 2012, it is apparent that  
9 Stephens also was monitoring Smith's status with the California State Bar. See  
10 Stephens' Motion, filed February 27, 2012, docket 21, pages 8-10. Stephens was  
11 present at the September 29 and February 2 hearings. At the February 2 hearing,  
12 Stephens commented vehemently about his personal dissatisfaction with Smith, but  
13 Stephens' comments then reflected that he had taken no constructive action to move  
14 forward on his lawsuit against the Defendant or to heed the court's September 1  
15 warnings and suggestions.

16 It is correct that relief may be provided for extraordinary reasons from any order,  
17 as the BAP noted in its decision. However, the cases where FRBP Rule 9024 or Civil  
18 Rule 60(b)(6) were cited as a basis to afford extraordinary relief provided examples of  
19 clients who were kept in the dark about important litigation matters by their attorney, in  
20 one case a defendant who incurred a \$2 million default judgment. Those cases were  
21 quite unlike the record before this court at the time of the March 1 order dismissing this  
22 adversary proceeding. Here the situation is markedly different from the authorities  
23 discussed by the BAP. Stephens was a constant presence at every phase of his lawsuit  
24 in this court. The record reflects that well before Stephens' comments and those of  
25 Smith at the February 2, 2012 hearing, Stephens had been upset at least since  
26 September 1 with Smith's inattention to Stephens' case. Stephens was urged at that  
27 early date to take corrective action to protect and prosecute his claims. He was  
28 informed of his responsibilities as the Plaintiff if he was dissatisfied with Smith's

1 services. Instead of taking corrective action as suggested by the court, Stephens  
2 allowed his dispute with Gomez to morph into one between Stephens and Smith. But  
3 the Defendant Gomez was the party at expense and risk as a result of the ongoing but  
4 utterly unproductive seven-month long prosecution of Stephens' lawsuit.

5 LBR 7016-1(g) provided as follows:

6 **Failure to Appear at Hearing or Prepare for Trial.** The  
7 failure of a party's counsel (or the party, if not represented by  
8 counsel) to appear before the court at the status conference  
9 or pretrial conference, or to complete the necessary  
10 preparations therefor, or to appear at or to be prepared for  
11 trial may be considered abandonment or failure to prosecute  
or defend diligently, and judgment may be entered against  
the defaulting party either with respect to a specific issue or  
as to the entire proceeding, or the proceeding may be  
dismissed.

12 Under the circumstances of this case, neither Smith nor Stephens adequately  
13 followed the federal rules of the rules of this court nor the court's admonitions,  
14 suggestions or direct orders. In the court's judgment, they were abusing Mr. Gomez by  
15 their lack of diligence and by delaying the trial and disposition that Gomez was seeking  
16 actively as early as November 1, 2011, as stated in Defendant's August 24, 2011 status  
17 conference report and emphasized again in Defendant's timely appearance and  
18 comments at the September 1 hearing. The court cannot conclude that anything in this  
19 court's record supports a basis for finding "mistake, inadvertence, surprise, or excusable  
20 neglect," "newly discovered evidence," "fraud" by any opposing party, or "any other  
21 reason" that justifies the relief that Stephens sought in his Motion.

22 In the end, it appears that Stephens spent five months from September 1 to  
23 February 2, engaged in bickering with his attorney while failing to follow the court's  
24 directions, warnings, suggestions and comments, each of which were designed to  
25 provide him with helpful guidance to get his lawsuit on track. None of the evidence in  
26 the record before the court at the February 2 hearing establishes that Stephens'  
27 grievances with his attorney's conduct "prevented" Stephens or "rendered him unable"  
28 to prosecute his lawsuit diligently. See Martella v. Marine Cooks & Stewards Union,



1 448 F.2d 729, 730 (9<sup>th</sup> Cir. 1971). The result in this court's judgment is that Stephens  
2 must take responsibility for the abject misconduct of his attorney Smith. Stephens  
3 should be held responsible for what resulted in an inexcusably abusive prosecution of  
4 his lawsuit insofar as the rights of Defendant Gomez were concerned.

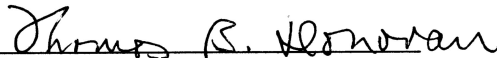
5 Otherwise, many of the remarks cited in the BAP's decision remanding this case  
6 to this court cite moving testimony filed long after this court's March 1 order while this  
7 appeal was pending before the BAP. Such testimony reveals an extremely unfortunate  
8 breakdown in attorney-client relations between Smith and Stephens. Most of those  
9 remarks were presented nowhere in the record before this court on March 1. It was the  
10 record before this court then upon which the court's March 1, 2012 order was based.

11 For those reasons, Stephens' Motion for Reconsideration is denied.

12 IT IS SO ORDERED.

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24 Date: June 3, 2013

  
Thomas B. Donovan  
United States Bankruptcy Judge

## NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*): MEMORANDUM OF DECISION REGARDING REMAND was entered on the date indicated as Entered on the first page of this judgment or order and will be served in the manner stated below:

**1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)** <sup>B</sup> Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of (*date*) 5/31/13, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

Douglas A Crowder on behalf of Interested Party Courtesy NEF  
Notices@crowderlaw.com, dcrowder1776@gmail.com;crowderlawmail@gmail.com

Nicole R Lewis on behalf of Defendant Marcelo Gomez  
susannad71@hotmail.com

Ron Reitshtein on behalf of Interested Party Courtesy NEF  
ron@ronesq.com

Lori Smith - SUSPENDED - on behalf of Plaintiff Carter Stevens  
esquiresmith1089@yahoo.com

United States Trustee (LA)  
ustpreion16.la.ecf@usdoj.gov

☐ Service information continued on attached

page

**2. SERVED BY THE COURT VIA UNITED STATES MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

Defendant/Debtor  
Marcelo Britto Gomez  
3992 East Blvd. #103  
Los Angeles,, CA 90232

Attorney for Defendant  
Nicole R Lewis  
Dvortsin & Associates  
2552 Zoe Ave  
Huntington Park, CA 90255

Attorney for Plaintiff  
Lori Smith  
Law Offices of Lori Smith  
454 N Arrowhead Ave 2nd FL  
San Bernadino, CA 92401

Plaintiff  
Carter Stephens  
P.O. Box 781258

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

Los Angeles, CA 90016

Plaintiff

Carter Stephens  
P.O. Box 361271  
Los Angeles, CA 90036

page ☐ Service information continued on attached

**3. TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by United States mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following persons and/or entities at the addresses, facsimile transmission numbers, and/or email addresses stated below:

page ☐ Service information continued on attached