

FILED & ENTERED

SEP 22 2015

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY penning DEPUTY CLERK

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

Timothy P Hayden

Debtor.

CHAPTER 7

Case No.: 2:12-bk-24531-TD

Adv No: 2:12-ap-01981-TD

**MEMORANDUM OF DECISION RE:
PLAINTIFF'S MOTION FOR RELIEF FROM
DISMISSAL**

[Fed. R. Civ. Proc. 60(b)]

Frank Locatell

Plaintiff,

v.

Timothy P Hayden

Defendant.

Date: September 9, 2015

Time: 10:00 a.m.

Courtroom: 1345

Judge Thomas B. Donovan

FACTS

Timothy P. Hayden ("Debtor") filed a Chapter 7 Petition on April 25, 2012. In his Schedules, Debtor listed an unsecured, non-priority claim of \$58,329 related to a pending action "for Foreclosure of Mechanic's Lien; Breach of Contract, Quantum Meruit" filed by Frank Locatell ("Plaintiff") against Debtor in the Los Angeles Superior Court.

Plaintiff appeared in the bankruptcy case by filing a 3-page adversary complaint against Debtor on July 31, 2012. The complaint, captioned as a fraudulent transfer action under § 548 of the Bankruptcy Code, alleged that Plaintiff had performed "improvement work" on Debtor's real property located at 1566-1572 Silverwood Drive, Los Angeles, CA (the "Property") and that, within two years prior to the petition date, Debtor conveyed an interest in the Property to third parties with the intent to hinder and defraud his creditors, including Plaintiff.

The complaint alleged no facts to support the claims asserted; failed to document Debtor's alleged ownership of the Property; failed to document any transfer of the Property from Debtor to any third party; failed to describe the nature of the alleged improvement work, the time at which it was performed, or its value; failed to establish Plaintiff's standing to invoke § 548 of the Bankruptcy Code; made no mention of the mechanic's lien litigation alluded to in Debtor's Schedules; and contained no exhibits or documentary evidence.

After comments on the record at a hearing on September 20, 2012, the Court dismissed the complaint with leave to amend no later than October 25, 2012.

Plaintiff timely filed a first amended complaint alleging three causes of action against Debtor. Plaintiff's first cause of action, styled "Fraudulent Transfer," alleged that in March, 2007, Plaintiff "furnished and delivered construction materials, services and labor" worth \$37,795 to the Property; that Plaintiff recorded a mechanic's lien against the Property in April, 2009; and that Debtor fraudulently conveyed a "fractional interest"

1 in the Property to Hillandale LLC and other transferees prior to filing his bankruptcy
2 petition “in his effort to avoid payment of a legitimate debt owing to Plaintiff.” Plaintiff
3 further alleged, in his first cause of action, that Debtor “fraudulently testified at the
4 Creditor’s [sic] Meeting . . . that HAYDEN no longer had any ownership interest in” the
5 Property. Plaintiff requested damages in the principal amount of the labor and services
6 allegedly delivered to the Property, plus fees and costs.

7 Plaintiff’s second cause of action, styled “Conspiracy,” alleged that the
8 transferees of the prepetition conveyance of the Property “would act as the record
9 owners of [the Property] so as to protect this real property asset against any creditor
10 claims[.]”

11 Plaintiff’s third cause of action, styled “Violation of 11 U.S.C. § 548,” reiterated
12 the claim set forth in the original complaint that Debtor fraudulently transferred the
13 Property *within two years* of filing his Chapter 7 petition. Plaintiff requested that the
14 Property be returned to the Debtor’s estate.

15 To the extent that they are comprehensible, Plaintiff’s claims are unsupported by
16 assertions of fact or documentation adequate to support any cause of action in Debtor’s
17 chapter 7 case. Plaintiff attached three exhibits to his first amended complaint, two of
18 which are facially incomplete and none of which is sufficient to support his adversary
19 claims.
20

21 The first exhibit is a recorded grant deed conveying the Property to Debtor in
22 2004.

23 The second exhibit appears to be an incomplete copy of a recorded 2006 grant
24 deed conveying real property from Debtor to 6600 Hillandale LLC. It contains no
25 description of the property purportedly conveyed; makes no reference to the transfer of
26 a “fractional interest”; fails to establish “record ownership” of the Property in any party;
27 and is dated September 28, 2006, which is *more than five years* prior to the petition
28

1 date. Section 548, on which Plaintiff's third cause of action expressly relies, provides for
2 a two-year reach-back period for fraudulent transfers of estate assets.

3 The third exhibit, which appears to be an incomplete copy of a recorded
4 mechanic's lien on real property owned by Debtor in favor of Plaintiff, contains no
5 description of the property allegedly improved.

6 In sum, Plaintiff failed to substantiate by allegations of fact the basic claims of his
7 complaint with respect to any of the three stated causes of action.

8 At a status conference on December 13, 2012, this court granted Plaintiff's
9 motion for relief from stay to pursue his asserted damages claim against Debtor in the
10 superior court. This court ordered Plaintiff to lodge a proposed order within seven days,
11 which Plaintiff failed to do. On July 29, 2013, the Court prepared and entered the
12 written order itself, admonishing Plaintiff for his delinquency and warning Plaintiff that
13 any further inattention to court orders, the Local Bankruptcy Rules, and the Court
14 Manual may result in the dismissal of Plaintiff's adversary proceeding.

15 The parties appeared at two subsequent status hearings on December 19, 2013
16 and June 19, 2014. At the close of the June 19, 2014 hearing, Plaintiff requested that
17 the next status conference take place in September or October, 2014. The Court, with
18 the agreement of both parties, set the hearing for October 23, 2014 and ordered that a
19 status report be filed no later than October 9, 2014.

20 Plaintiff failed to file a status report and failed to appear at the October 23, 2014
21 hearing. The Court dismissed Plaintiff's first amended complaint On October 28, 2014
22 as a sanction pursuant to Rule 7016. Plaintiff was served with notice of the dismissal by
23 first class mail on October 30, 2014.

24
25 **PLAINTIFF'S MOTION UNDER RULE 60(b)**

26 Nearly nine months later, on July 24, 2015, Plaintiff filed a motion for relief from
27 dismissal pursuant to Civil Rule (or Rule) 60(b)(6) (the "Motion"). Plaintiff also invokes
28

1 Rule 60(b)(1) by attaching a declaration from his attorney, Steven Miller, stating that
2 Miller's failure to prosecute Plaintiff's case was the result of "excusable neglect."

3 In the Motion, Miller alleges that he "miscalendared" the October 23, 2014 status
4 conference for a date in December, 2014 due to "personnel changes" in his office and
5 "a congested calendar."

6 Miller further alleges that litigation regarding Plaintiff's purported mechanic's lien
7 is ongoing in the superior court, and that a hearing was scheduled to take place on July
8 31, 2015. Miller concludes that, absent the requested relief, "the prejudice to [Plaintiff]
9 resulting from his counsel's inadvertence would be substantial in that he could well be
10 denied his remedies against Hayden for Hayden's alleged abuse of the bankruptcy
11 laws."

12 Miller failed to attach to his Motion any judgment, order, pleading, or
13 documentation from the superior court lawsuit.

14 Prior to the September 9, 2015 hearing on Plaintiff's Motion, Debtor filed a
15 "Unilateral Status Report" including minutes from a July 31, 2015 superior court hearing.
16 The minutes indicate that Plaintiff failed to appear.

17 **DISCUSSION**

18 As set forth in detail below, the court has four independent reasons to deny
19 Plaintiff's Motion:
20

21 First, the Motion is untimely.

22 Second, Plaintiff's arguments for relief under Rule 60(b) have no merit.

23 Third, Plaintiff has never provided this court with adequate factual allegations or
24 documentary evidence to support any claim set forth in his adversary complaint. Nor
25 does it appear that Plaintiff has diligently pursued his state court action against Debtor.

26 Fourth, granting Plaintiff's Motion at this point in time would be futile. It is too late
27 for Plaintiff to plead adequately any as-yet unasserted claim for nondischargeability with
28 respect to Plaintiff's action for damages against Debtor in the superior court.

1 **A. Plaintiff's Motion Is Untimely**

2 Rule 60(c)(1) states that "a motion under Rule 60(b) must be made within a
3 reasonable time[.]"

4 What constitutes "reasonable time" [under Rule 60(c)(1)] depends upon the facts
5 of each case, taking into consideration the interest in finality, the reason for delay, the
6 practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to
7 other parties." Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981) (per curiam).

8 Here, all four factors weigh against Plaintiff.

9 Miller does not contest that he received the October 28, 2014 dismissal order. He
10 was served by mail on October 30, 2014. Plaintiff provides no reason or explanation for
11 the nearly 9-month delay in filing his Motion. Debtor received a discharge on August 6,
12 2012, and his case was closed on July 1, 2013. Granting Mr. Miller's motion under
13 these circumstances would unreasonably frustrate the Debtor's attempt to move on with
14 his life long after his chapter 7 case has otherwise been fully administered.
15

16 **B. Plaintiff's Motion For Relief Pursuant to Rule 60(b) Is Without Merit.**

17 Miller's arguments for relief under Rule 60(b) are without merit.

18 Under Rule 60(b)(1), a court may set aside an order due to the movant's
19 "excusable neglect."

20 To determine whether neglect is "excusable," the Ninth Circuit "will ordinarily
21 examine all of the circumstances involved rather than holding that any single
22 circumstance in isolation compels a particular result." See Briones v. Riviera Hotel &
23 Casino, 116 F.3d 379 (9th Cir. 1997).

24 However, there is "no merit to the contention that dismissal of petitioner's claim
25 because of his counsel's unexcused conduct imposes an unjust penalty on the client."
26 Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P'ship, 507 U.S. 380, 396 (1993)
27 (citing In Link v. Wabash R. Co., 370 U.S. 626 (1962)).
28

 Here, the alleged "personnel changes" and "congested calendar" at Miller's law

1 office are insufficient excuses for Miller's failure to calendar and file a status report and
2 to appear at the October 23, 2014 status conference. The Supreme Court has "give[n]
3 little weight to the fact that counsel was experiencing upheaval in his law practice" when
4 deciding whether an attorney's negligence is excusable. See Pioneer at 398. We see
5 no reason to entertain Miller's claim that he was too busy to follow the orders of this
6 court.

7 Likewise, Miller's argument that his negligence "should not be allowed to inure to
8 the serious detriment of plaintiff" has "no merit" under Pioneer. See id. at 396.

9 The catch-all provision of Rule 60(b)(6), which allows the court to set aside an
10 order for "any other reason that justifies relief," is used "sparingly as an equitable
11 remedy to prevent manifest injustice." Lal v. State of California, 610 F.3d 518 (9th Cir.
12 2010).

13 To receive relief under subsection (b)(6), a party must demonstrate
14 "extraordinary circumstances which prevented or rendered him unable to prosecute [his
15 case]." Community Dental Servs. v. Tani, 282 F.3d 1168 (9th Cir. 2002) (en banc).

16 Here, simply stated, Plaintiff has failed to show, or even plead, any "extraordinary
17 circumstances" justifying relief.

18
19 **C. Plaintiff's Underlying Complaint Is Inadequate to Support the Claims**
20 **Asserted.**

21 As described in the above recitation concerning Plaintiff's pleadings, Plaintiff has
22 never supplied this court with any sufficient allegations of fact or documentation to
23 adequately support any claim of his first amended complaint. Indeed, this Court has
24 found it difficult to discern, in Plaintiff's pleadings, any factual assertions which give rise
25 to a coherent and cognizable claim for relief under the Bankruptcy Code and the law of
26 Civil Rules 8(a)(2), 12(b)(6) and 9(b), all incorporated in the Federal Rules of
27 Bankruptcy Procedure. See Ashcroft v. Iqbal, 556 U.S. 662, 663, (2009) (Rule 8(a)(2)
28

1 “call[s] for sufficient factual matter, accepted as true, to state a claim to relief that is
2 plausible on its face”) (citation omitted); see also Bell Atlantic Corp. v. Twombly, 550
3 U.S. 544, 545 (2007) (“While a complaint attacked by a Rule 12(b)(6) motion to dismiss
4 does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds
5 of his entitlement for relief requires more than labels and conclusions[.]”) (citation
6 omitted); see also Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)
7 (“Averments of fraud must be accompanied by the who, what, when, where, and how of
8 the misconduct charged. A party alleging fraud must set forth *more* than the neutral
9 facts necessary to identify the transaction.”) (emphasis in original) (citations omitted).
10

11
12 With respect to Plaintiff’s state court litigation, Plaintiff alleges that he performed
13 work on Debtor’s real property in March, 2007. When this court granted relief from stay
14 in December 2012, Plaintiff had shown little to no progress in that action. At present,
15 Plaintiff has yet to demonstrate any progress or that he has diligently pursued his case
16 before the superior court or has any viable claim pending there at this late date.
17

18 **D. Reopening Plaintiff’s Adversary Proceeding Would Be Futile.**

19 Finally, the Court finds that granting Plaintiff’s reconsideration Motion would fail
20 to serve Plaintiff’s interests.

21 In his Motion, Plaintiff argues that if the Court does not grant relief from
22 dismissal, Plaintiff would be “denied his remedies.”

23 Plaintiff’s purported dilemma appears to stem from the fact that if he were to
24 prevail on his damages claim against Debtor in the superior court, he would win, at
25 most, an uncollectable judgment due to Debtor’s discharge on August 6, 2012.

26 The real problem, in the Court’s view, is that it is simply too late for Plaintiff to
27 seek a determination from this court that Plaintiff’s damage claim is nondischargeable
28 under § 523(a).

1 There is, at present, no § 523 action pending. Under Rule 4007(c), an action to
2 determine nondischargeability pursuant to § 523(a) must be made no later than 60 days
3 after the first date set for the meeting of creditors under § 341(a). In this case, the §
4 341(a) meeting took place on June 22, 2012, more than three years ago.

5 **CONCLUSION**

6 As far as this court is able to discern, Plaintiff has nothing to show for his superior
7 court litigation against the Debtor. If Plaintiff is to be believed, that case has been
8 dragging on without progress since July, 2009.

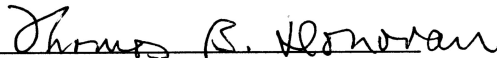
9 What we do know is that Plaintiff has failed, at every turn, to diligently and
10 effectively prosecute his adversary proceeding in the Bankruptcy Court.

11 In light of all of the considerations set forth herein, the Plaintiff's Motion to
12 reconsider this court's order dismissing his complaint for failure to prosecute is denied.

13 **IT IS SO ORDERED**

14
15
16 ###
17
18
19
20
21
22

23
24 Date: September 22, 2015

25 
26 Thomas B. Donovan
27 United States Bankruptcy Judge
28