UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re KULANI JACKSON, Debtor.	Case No. LA 03-10409 TD Adv. No. LA 03-02108 TD Chapter 7
KULANI JACKSON, Plaintiff. v. DEPARTMENT OF EDUCATION, et al. Defendants.	MEMORANDUM OF DECISION RE PLAINTIFF'S MOTION TO EXTEND TIME TO FILE APPEAL

INTRODUCTION

The Kulani Jackson complaint sought a hardship discharge of a student loan pursuant to 11 U.S.C. §523(a)(8).[1] Following a hearing on January 19, 2005,

[1]Section 523 states:

> (a) A discharge under 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt– . . .
>
> . . . .

regarding a motion for summary judgment filed by the United States Department of Education (the government) at which the motion was denied, the lawsuit was tried on March 24. At the conclusion of the trial, I announced oral findings of fact and conclusions of law determining that Mr. Jackson was not entitled to a hardship discharge with respect to his debt to the government. I asked the government's attorney to lodge a proposed form of judgment.

The proposed judgment was lodged, signed by me, and entered in the docket on April 7. On April 7, I also edited and signed supplementary findings of fact and conclusions of law that had been lodged by the government. Nothing in my orders entered in April altered the outcome I announced at the conclusion of the trial on March 24. The judgment entered was in favor of the government and denied dischargeability of Mr. Jackson's student loan. The supplementary written findings and conclusions perhaps provided some additional factual details and confirmed my orally announced conclusions as follows: (1) the court did not have subject matter jurisdiction over Mr. Jackson's claim; (2) Mr. Jackson was not eligible for discharge on the post-petition obligation at issue; and (3) repayment of the loan would not impose an undue hardship on Mr. Jackson.

Mr. Jackson filed a notice of appeal on April 22, 15 days after entry of the judgment denying his claim.

The Bankruptcy Appellate Panel for the Ninth Circuit issued an order filed on June 2, noting its issuance of a Notice of Deficient Appeal and Impending Dismissal

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> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

and Mr. Jackson's written response (a letter filed with the Panel on May 5), which the Panel construed as a motion under Federal Rule of Bankruptcy Procedure 8002(c)[2] for an extension of time to file the notice of appeal. The Panel forwarded Mr. Jackson's motion to me for consideration, noting that the Panel had deemed the motion to have been filed with the bankruptcy court as of May 5. The Panel also requested Mr. Jackson to promptly request a ruling. Mr. Jackson has done so, by several voicemail phone messages left with our courtroom deputy and phone conversations with my law clerk, and has said in an exchange of voicemail phone messages that he does not wish to file any further papers in support of his motion or wish to have a hearing on his motion. Instead, Mr. Jackson has asked for a prompt written order.

On June 14, the government filed with the bankruptcy court a brief, written response in opposition to Mr. Jackson's motion. The government asserts that Mr. Jackson

> says he "specifically and intentionally waited for two full weeks to serve the notice [of appeal] on April 21 . . . ." Apparently [Mr. Jackson] was not trying to file <u>within</u> the time period for filing a notice of appeal, but <u>outside</u> the time period (albeit, an incorrect time period).
>
> [Mr. Jackson's] failure to timely file his notice of appeal was due solely to his failure to follow unambiguous rules, including [Rule] 9006, which specified the computing of time periods.

DISCUSSION

Under the Panel's June 2 order, Mr. Jackson's motion for an extension is timely pursuant to Rule 8002(c)(2).[3] In particular, Rule 8002(c)(2) states that such a motion

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[2]All references herein to rules are to the Federal Rules of Bankruptcy Procedure.

[3]Rule 8002(c)(2) states:

> A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that <u>such a motion filed not later than 20 days after the expiration of the time for filing a</u>

"may be granted upon a showing of excusable neglect." Mr. Jackson's basis for claiming "excusable neglect" is stated in his motion as follows:

> Judge Donovan frequently referred to 5 days as meaning one week and 10 days as meaning two weeks, most recently in our Summary Judgment hearing on January 21 [sic], in reference to deadlines for submission of trial documents . . . .
>
> . . . I specifically and intentionally waited two full weeks to serve the Notice [of Appeal] on April 21, but did not find out until later that 10 days, which for two years in Judge Donovan's Court had meant 2 weeks, actually meant 10 days.

Mr. Jackson offers no independent evidence to substantiate his claim as to what I may have said on January 19, 21, or at any other time. I do not believe I ever said "10 days mean[s] two weeks" or anything to that effect to Mr. Jackson or anybody else during the course of this adversary proceeding.

I suspect that I may have said something like the following: "Your trial brief is due 5 days before trial" and "5 days in our parlance means 1 week so that I will have enough time to read your brief before trial." In doing so, I had in mind Rule 9006(a) which states in part: "When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." In any event, I do not give litigants, even pro se litigants such as Mr. Jackson, legal advice; I generally refer them to the rules or explain the results of a rule as I may have done in telling Mr. Jackson that I wanted to be sure to get his trial brief in time to read it before the trial.

Moreover, I did not affirmatively state a time period in which he had to file a notice of appeal. As the government points out, Mr. Jackson's "argument that he

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> notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later. (Emphasis added.)

relied on his interpretation of the judge's comments related to filing times for other pleadings does not excuse him from reading and complying with the applicable rules." (Emphasis added.) Indeed, Rule 8002(a) unambiguously states in part: "The notice of appeal shall be filed with the clerk within 10 days of the date of entry of the judgment, order, or decree appealed from." Furthermore, as Mr. Jackson's motion reflects, he may have known about the 10-day notice of appeal deadline, but his motion does not make clear when or how he may have learned about it.

The government also urges that Mr. Jackson "could have filed a timely notice of appeal, but did not based on unfounded legal conclusions." Here, Mr. Jackson did not file his notice of appeal within two weeks; he filed it 15 days after entry of the judgment. The judgment was entered on April 7 and Mr. Jackson's notice was filed on April 22. As the government observes, Mr. Jackson, by his own admission, "specifically and intentionally waited for two full weeks to serve the notice [of appeal] on April 21 . . . . [and] was trying to file outside the time period [required by Rule 8002(a)]." Even within the terms of Mr. Jackson's misconception that "10 days" means "two weeks," Mr. Jackson's notice was late; he filed the notice on the fifteenth day after entry of judgment rather than within 14 days.

In addition, Mr. Jackson's "status as a pro se litigant does not excuse [his] failure to understand and follow court rules." Warrick v. Birdsell, 278 B.R. 182, 187 (9th Cir. BAP 2002) (citing Briones v. Riviera Hotel & Casino, 116 F.3d 379, 382 (9th Cir. 1997)). Indeed, the Ninth Circuit held that pro se litigants ordinarily "should not be treated more favorably than parties with attorneys[,]" Jacobsen v. Filler, 790 F.2d 1362, 1364 (9th Cir. 1986), and "'must follow the same rules of procedure that govern other litigants.'" King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987). This is because one who "proceeds *pro se* with full knowledge and understanding of the risks does so with no greater rights than a litigant represented by a lawyer." Jacobsen v. Filler, 790 F.2d at 1365 n.5 (quoting United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977). To

require a court to excuse a litigant simply because he is litigating without counsel would "necessarily implicate[ ] the court's impartiality and discriminate[ ] against opposing parties who do have counsel." Id. at 1365 n.6.

Here, although the difficulties besetting a pro se litigant such as Mr. Jackson can be great, in fairness, Mr. Jackson should not be given favorable treatment and excused on this ground alone. As the government notes, "this is especially true in light of the fact that [Mr. Jackson] is highly educated, and took this matter all the way through trial by himself." I am inclined to agree with the government's sentiments, based on the evidence I have seen and heard.

I. Analysis of "Excusable Neglect"

In Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380 (1993), the Supreme Court established a flexible standard for excusable neglect. Although the Pioneer decision dealt with Rule 9006(b), the Panel has applied the Pioneer standard to Rule 8002(c) motions. See Key Bar Invs., Inc. v. Cahn, (In re Cahn), 188 B.R. 627 (9th Cir. BAP 1995).

A. "Neglect"

The Supreme Court accepted the ordinary meaning of "neglect," which is "'to give little attention or respect' to a matter, or . . . 'to leave undone or unattended to *esp[ecially] through carelessness*.'" Pioneer, 507 U.S. at 388 (emphasis added) (quoting Webster's Ninth New Collegiate Dictionary 791 (1983)). "Neglect" also encompasses "both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. . . . Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Id.

Here, there is some indication that Mr. Jackson's failure to timely file his notice of appeal does not constitute "neglect." First, Mr. Jackson admits that he "specifically

and intentionally waited for two full weeks to serve the notice [of appeal.]" (Emphasis added.) Such behavior exhibits meaningful and deliberate action, as opposed to casual inaction. Second, Mr. Jackson's specific intention to serve the notice of appeal when two weeks had elapsed evinces an awareness of and obedience to a strict deadline (albeit an incorrect deadline). There is thus some question in my mind as to why Mr. Jackson made the requisite effort to serve his notice of appeal but failed to file his notice within his own 14-day deadline. In the end, I believe that the crux of the matter now before me is whether Mr. Jackson's tardiness is "excusable," not whether it was caused by "neglect."

B. "Excusable"

In Pioneer, the Supreme Court stated that "ignorance of the rules[ ] or mistakes construing the rules do not usually constitute 'excusable' neglect[.]" Id. at 391. (Emphasis added.) The Ninth Circuit Court of Appeals has expanded on this subject in holding that, without "persuasive justification" for misunderstanding an unambiguous rule, "there is no basis for deviating from the general rule that a mistake of law does not constitute excusable neglect." Kyle v. Campbell Soup Co., 28 F.3d 928, 931 (9th Cir. 1994). Thus, Mr. Jackson's failure to adhere to Rule 8002(a) would not seem to permit a finding of excusable neglect here, absent persuasive justification.

C. Pioneer Factors

To determine whether excusable neglect has been established, the Supreme Court in Pioneer concluded that "the determination is at bottom an equitable one, taking into account . . . all relevant circumstances surrounding the party's omission." 507 U.S. at 395. The Supreme Court enumerated the following factors that should be considered: "the danger of prejudice to the [non-moving party], the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Id. I have considered each of these factors, as follows:

First, there is a danger of prejudice to the government if I were to grant Mr. Jackson's motion. Rule 8002(a) exists to provide some finality to bankruptcy court decisions and to expedite the resolution of bankruptcy cases and litigation. To extend time here would run counter to the goal of a "just, speedy, and inexpensive determination of every case and proceeding," as set forth in Rule 1001. Indeed, had the trial resulted in a judgment for Mr. Jackson, granting a Rule 8002(c) extension of time for the government to appeal the decision would be equally prejudicial to Mr. Jackson had the government made a similar error in calculating the Rule 8002(a) deadline.

Second, the length of the delay here is 5 days and not very great, though a finding of excusable neglect would prolong the final resolution of this adversary that has been pending for nearly 2 years and also would increase the costs of adjudication.

Third, a timely notice of appeal here clearly was within Mr. Jackson's reasonable control. In fact, Mr. Jackson knew of the court's adverse ruling on March 24, which was 25 days before the Rule 8002(a) deadline (April 18, a Monday) for his notice of appeal. There should not have been any question in Mr. Jackson's mind after the oral ruling that he would have to appeal or take other prompt action to keep his claim alive. In fact, Mr. Jackson had more than the usual opportunity to file a notice of appeal; the delayed entry of judgment after my oral ruling afforded Mr. Jackson an extra 14 days beyond the normal 11-day period allowed in this instance to file his appeal because the tenth day after entry of judgment fell on a Sunday. See Rule 9006(a).

As to the reason for Mr. Jackson's delay, there is no persuasive evidence, only Mr. Jackson's hearsay and conclusory statements, suggesting that he was lulled into inaction with respect to the 11-day deadline here for filing his notice of appeal. I am unaware of anything in the trial record, or otherwise, to support his conclusions.

Finally, while I do not doubt Mr. Jackson's sincerity, the evidence provided does

not support a finding of good faith. First, Mr. Jackson is litigating to obtain a discharge of a normally nondischargeable debt. The burden at all times is on him, whether at trial or on this motion. Second, the central theme of Mr. Jackson's motion reflects an interesting extension of the facts that led to the Pioneer decision. The Pioneer decision turned on an ambiguous court-issued notice of a claim-filing deadline that the Supreme Court held excused an attorney's neglect to timely file a claim. In the same vein, Mr. Jackson, a pro se litigant, implies through questionable evidence, that my ambiguous statements during the litigation process lulled him into filing an untimely notice of appeal.[4] However, Mr. Jackson provides no evidence from the record to back up his hearsay and conclusory statements about comments he attributes to me. I am not aware of any credible or plausible basis to believe or suspect that his statements about my comments are true. There being no other basis in the record to support his motion, Mr. Jackson has failed to establish a persuasive justification for a finding of excusable neglect within the requirements of Kyle v. Campbell Soup Co., 28 F.3d at 931.

CONCLUSION

The record before me does not support a finding of excusable neglect. Therefore, with all due respect, I must deny Mr. Jackson's motion for an extension of

[4]It is important to note that unlike the bankruptcy court notice addressed in Pioneer, the applicable rule here, Rule 8002(a), is simple, straightforward, and unambiguous.

time to file his notice of appeal.

SO ORDERED.

DATED: June 24, 2005

/S/

THOMAS B. DONOVAN

United States Bankruptcy Judge

NOTICE OF ENTRY OF JUDGMENT OR ORDER

AND CERTIFICATE OF MAILING

TO ALL PARTIES IN INTEREST LISTED BELOW:

1. You are hereby notified that a judgment or order entitled:

MEMORANDUM OF DECISION RE PLAINTIFF'S MOTION TO EXTEND TIME TO FILE APPEAL

was entered on 6/24/05 .

2. I hereby certify that I mailed a true copy of the order or judgment to the persons and entities listed below on 6/24/05 .

Debtor/Plaintiff
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Dated: 6/24/05

Clerk