NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JOHN A. TARBELL, also known as John Alvin Tarbell, also known as John King, also known as John Romero, Debtor.	BAP No. CO-07-024
SCOTT TARBELL, Plaintiff – Appellant, v. JOHN A. TARBELL, Defendant – Appellee.	Bankr. No. 05-47619-ABC Adv. No. 06-01256-ABC Chapter 7 ORDER AND JUDGMENT*

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

Before BOHANON, McNIFF, and THURMAN, Bankruptcy Judges.

THURMAN, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

The single issue in this appeal is whether the bankruptcy court abused its discretion by denying the motion of plaintiff Scott Tarbell ("Appellant") for relief

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

from the court's prior order dismissing his adversary proceeding for failure to prosecute. Because we conclude that it did not, the bankruptcy court order denying Appellant's motion is affirmed.

BACKGROUND

On February 6, 2006, Appellant filed an adversary proceeding in debtor's Chapter 7 bankruptcy case against the debtor ("defendant"), pursuant to 11 U.S.C. § 523(a)(2)(A), alleging that his claim against the debtor should not be discharged. On May 26, 2006, the bankruptcy court entered a scheduling order directing the parties to, among other things, make disclosures of witnesses and exhibits, pursuant to Federal Rule of Civil Procedure 26(a)(3), "on or before thirty (30) days before trial." By the same order, trial was set for November 28, 2006. As such, pursuant to the terms of the scheduling order, the last day for filing such disclosures was Friday, October 27, 2006. Although defendant timely filed his disclosures on that date, Appellant did not.[1] On November 7, 2006, based on the failure to file disclosures, the defendant moved to dismiss the adversary proceeding, claiming failure to prosecute.[2]

Appellant did not file a response to the defendant's motion to dismiss. However, on November 8, 2006, twelve days late and 5 days after defendant's motion to dismiss had been mailed to him, Appellant's counsel faxed the required disclosures to defendant's counsel. Appellant's counsel also claims to have mailed a copy of the disclosures, on the same date, to the bankruptcy court. This mailing was never received, however, presumably because counsel had mailed it

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[1] The bankruptcy court docket reflects no other activity in the proceeding during the ten months between entry of the scheduling order in May and the filing of the defendant's disclosures on October 27.

[2] Defendant originally filed the same motion on November 3, 2006, in both this (AP # 06-125**6**) and a related adversary proceeding (AP # 06-125**8**). However, because the docket number listed on both motions was 06-1258, the motion in the present case was re-docketed as filed on November 7.

in an envelope with no return address and insufficient postage. On November 13, 2006, the bankruptcy court granted the defendant's motion to dismiss. On November 27, 2006, Appellant filed a "Motion to Extend Time to File Notice of Appeal Under Rule 8002," which was denied on December 7, 2006. On December 18, 2006, Appellant moved for relief from the dismissal order, claiming "mistake, inadvertence, surprise, or excusable neglect," pursuant to Federal Rule of Civil Procedure 60(b)(1).[3] On December 18, 2006, Appellant filed another motion for extension of time to appeal. The motion for relief and the second motion for extension were both denied by the bankruptcy court on January 5, 2007, and Appellant timely moved for an extension of time within which to appeal, pursuant to Federal Rule of Bankruptcy Procedure 8002(c)(2), on January 16, 2007.[4] Pursuant to the order granting the extension, Appellant timely filed his notice of appeal on February 5, 2007.

APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from final judgments and orders of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002. Because the notice of appeal was timely filed from a final order denying relief from a judgment of dismissal, and because neither party to this appeal has elected to have the appeal heard by the district court, this Court has appellate jurisdiction.

STANDARD OF REVIEW

Decisions on Rule 60(b) motions are reviewed under the abuse of discretion standard as set forth in *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994), and

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[3] This rule is made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 9024.

[4] January 15, 2007, was a court holiday.

Rule 60(b) relief is intended only to be granted in exceptional circumstances. *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576-77 (10th Cir. 1996). Moreover, trial courts have substantial discretion in ruling on such motions. *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990). Under the abuse of discretion standard, "a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Moothart*, 21 F.3d at 1504 (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)).

DISCUSSION

Rule 60(b)(1) provides: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]" The basis given for Appellant's motion was that his counsel had become ill over the weekend of October 28-29, 2006 and, as a result, did not return to his office until November 7. Upon his return to the office, counsel for Appellant discovered both the defendant's disclosures document and the motion to dismiss. He immediately began preparing Appellant's disclosures, which were faxed to the defendant's counsel the next day. At the same time, counsel mailed a copy of the disclosures to the bankruptcy court. However, the disclosure document was not received by the court, apparently because counsel had mailed the document in a plain white envelope with no return address, to which he mistakenly applied insufficient postage. Counsel contends that, but for his illness, he would have received the defendant's disclosures on October 30, would then have realized that he had forgotten to file Appellant's disclosures on the date they were due, and would immediately have drafted and mailed them. In that event, he asserts, the result would have been only "a three day insubstantial delay."

The party moving for Rule 60(b) relief has the burden to prove excusable neglect. *Pelican Prod. Corp.*, 893 F.2d at 1146. Moreover, "[c]arelessness by a litigant or his counsel does not afford a basis for relief under Rule 60(b)(1)." *Id.*; *see also United States v. Torres*, 372 F.3d 1159, 1162-64 (10th Cir. 2004) (excuse given for late filing is the most important factor to consider, and counsel's mistake in applying the rules is generally not a sufficient excuse); *Lang v. Lang (In re Lang)*, 414 F.3d 1191, 1194 n.3 (10th Cir. 2005) (argument that court improperly emphasized inadequate excuse for delay was "meritless"). Given the bankruptcy court's "substantial discretion" in determining the merits of such a motion, this Court's task is limited to reviewing the record "to see if the trial judge clearly ignored excusable conduct or failed to recognize some other compelling reason for relief to be granted." *Pelican Prod. Corp.*, 893 F.2d at 1146.

In this case, the record reveals that Appellant's disclosures were not timely filed, due to neglect by counsel. Then, due to what is described as "a terrible cough and cold," counsel did not go to his office for over a week. Upon arriving back at his office, and aware that a motion to dismiss had been filed, counsel prepared a disclosure document and faxed it to the defendant's counsel. However, the disclosures were not filed in the bankruptcy court due to counsel's mishandling of the mail. Thereafter, counsel apparently made no attempts to either follow up or otherwise rectify the situation until 19 days later, when he moved for relief from the bankruptcy court's dismissal of the adversary proceeding. Significantly, the record fails to show any of the following:

1. Why counsel did not monitor his mail and/or his cases, or have anyone else do so, while he was ill;

2. Why counsel did not make more of an effort to ensure that the disclosure document had been filed;

3. Why counsel failed to file any response to the motion to dismiss;

4. Why counsel's contact with defendant's counsel and/or the court about either the disclosures or the motion to dismiss was limited to faxing the untimely disclosure document; and

5. Why it took 14 days after the case was dismissed for counsel to file a Rule 60(b) motion.

Thus, what the record reflects is simple neglect, rather than "excusable neglect." The bankruptcy court's conclusion that Appellant failed to meet his burden to prove that counsel's neglect was excusable does not constitute an abuse of discretion.

In addition to excusable neglect, Appellant also argues that: (1) he was not given sufficient time to respond to the motion to dismiss prior to entry of the dismissal order; (2) defendant's counsel failed to confer with Appellant's counsel prior to filing his motion to dismiss, in violation of local rules; and (3) that the bankruptcy court erred by not setting a briefing schedule with respect to the motion. However, none of these issues was raised in Appellant's motion for relief from the dismissal,[5] and this Court will not generally consider issues that are raised for the first time on appeal. *See In re Vaughan*, 311 B.R. 573, 584 (10th Cir. BAP 2004). Under the circumstances of this case, we decline to consider these arguments.

CONCLUSION

For the reasons set forth above, we conclude that Appellant has failed to show that the denial of his motion for Rule 60(b) relief was an abuse of discretion. The bankruptcy court's January 5, 2007 "Order Denying Rule 60

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[5] The extent of Appellant's "argument" of these issues in the bankruptcy court is the statement that "the Court's Order of Dismissal was entered only five business days after the motion [to dismiss] was received in Plaintiff's counsel's office and only four days after Plaintiffs [sic] Counsel first saw it." *Motion for the Court to Relieve the Plaintiff from its Order of September 3, 2006 Dismissing his Complaint Against the Defendant Pursuant to the Provisions of FRCP 60 Based on Excusable Neglect* at ¶ 10, *in* Appellant Scott Tarbell's Appendix at 23. This statement is simply insufficient to constitute preservation of Appellant's claims in this appeal.

Motion and Order Denying Second Motion for Extension of Time to File Notice of Appeal" is therefore affirmed.