

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF:
LEONARD A. PELULLO

v.

EDWARDS & ANGELL,
A Partnership or
Professional Corporation

CIVIL ACTION

NO. 99-2053

M E M O R A N D U M

Broderick, J.

October 28, 1999

Presently before this Court is an appeal from the March 17, 1999 order of the United States Bankruptcy Court for the Eastern District of Pennsylvania denying Appellant's motion seeking reconsideration of the dismissal of Appellant's amended adversary complaint. Appellant in this case is debtor Leonard A. Pelullo. The Appellee is Edwards & Angell, a law firm organized as a partnership maintaining offices in several states. For the reasons stated below, this Court will affirm the order of the Bankruptcy Court.

BACKGROUND

In November 1995, Leonard Pelullo ("Pelullo") filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Pennsylvania. Thereafter, on October 16, 1996, Pelullo filed an adversary complaint against the law firm of Edwards & Angell,

("Edwards"), the Appellees herein. Pelullo's bankruptcy case was subsequently converted to a Chapter 7 proceeding on June 26, 1997. David A. Eisenberg, Esquire, was appointed as trustee for Pelullo's bankruptcy estate, ("the Trustee"), and he was substituted as the plaintiff in the Adversary Proceeding. See 11 U.S.C. § 323 (trustee is representative of estate and has capacity to sue and be sued).

The adversary complaint alleged state law claims of fraud and breach of fiduciary duty. After the Bankruptcy Court denied Appellee's motion for abstention pursuant to 28 U.S.C. § 1334(c), Appellee moved to dismiss the adversary complaint arguing that Pelullo's claims were barred by applicable statutes of limitation, that Pelullo had no standing to pursue his claims, and that the complaint failed to state claims upon which relief could be granted. Pelullo failed to respond timely to Appellee's motion to dismiss. After the underlying bankruptcy case was converted from a Chapter 11 to a Chapter 7 proceeding, the adversary proceeding was stayed pending a response by the Chapter 7 Trustee. Having failed to receive any response from the Trustee, the Bankruptcy Court, on December 11, 1997, ordered the Trustee to respond to Edwards' motion to dismiss.

On December 19, 1997, the Trustee sought appointment of the law firm of Calo Agostino as Special Counsel to the Trustee to pursue this adversary proceeding. The Bankruptcy Court approved

that appointment and, over objection, granted Special Counsel until February 17, 1998 to file a response to the motion. In that order, the Bankruptcy Court warned that were no opposition filed, "the motion to dismiss shall be granted, without further notice or hearing . . ." Again, no opposition was timely filed. Nevertheless, the Bankruptcy Court extended the Trustee's deadline to March 30, 1998. Finally, on March 30, 1998, the Trustee filed his opposition to the motion to dismiss and simultaneously sought leave to amend the complaint. On October 16, 1998, the Bankruptcy Court granted leave to amend and denied Edwards' motion to dismiss as moot. Although, the Bankruptcy Court found the Trustee "guilty of delay", it granted the motion to amend citing the liberal policy favoring amendment of pleadings.

The Trustee then revised his complaint to include the following counts: actual fraud, constructive fraud, breach of fiduciary duty, legal malpractice, breach of contract, and rescission. Edwards renewed its motion to dismiss on November 5, 1998. The parties then agreed to a briefing schedule, with the Trustee's opposition brief being due on December 7, 1998. Despite this agreement, the Trustee asked the Court for an extension to January 8, 1999 upon which to file a response, because of the departure of an associate at Special Counsel's firm. Special Counsel also subsequently filed a motion to

withdraw as counsel on December 17, 1998. The motion to withdraw made no reference to the pending motion to dismiss.

January 8, 1999- the Trustee's self-imposed deadline to file opposition to the motion to dismiss- came and went without any response from the Trustee whatsoever. On January 15, 1999, with still no opposition having been filed by the Trustee, Edwards filed a Certificate of No Objection to its motion to dismiss the amended adversary complaint. Also on January 15, Allen B. Dubroff, Esquire, filed a request to substitute as Special Counsel to the Trustee. The Bankruptcy Court held a telephonic conference with all counsel, including Mr. Dubroff, to discuss the motion to dismiss on January 21, 1999. With the Trustee's counsel unable to render any explanation for its repeated failures to file an opposition, the Bankruptcy Court expressed its intent to dismiss the amended adversary complaint, and did so in an Order dated January 29, 1999.

On February 9, 1999, the Trustee filed a motion for reconsideration of the January 29, 1999 Order. Bankruptcy Judge Twardowski held an oral argument on the reconsideration motion on March 3, 1999. At this hearing, the Trustee argued, for the first time, that the reconsideration motion should be granted due to counsel's "excusable neglect." Bankr. Ct. Order of March 17, 1999, at 5-6. The Bankruptcy Court found that any neglect of counsel in failing to oppose timely the motion to dismiss was

inexcusable: "we find as a fact that Pelullo was neglectful in failing to timely oppose Edwards & Angell's motion to dismiss the amended adversary complaint, and that this neglect is inexcusable as a matter of law." Bankr. Ct. Order of March 17, 1999 at 6.

Appellant now appeals this order of the Bankruptcy Court. Appellant first claims that the Bankruptcy Court erred by dismissing Appellant's amended complaint. Appellant next claims that the Bankruptcy Court erred by finding Appellant's motion for reconsideration was filed pursuant to Civil Rule of Procedure 59(e), incorporated into adversary proceedings under Bankruptcy Rule 9023, and was therefore untimely, as opposed to being filed pursuant to Civil Rule of Procedure 60(b), incorporated into adversary proceedings under Bankruptcy Rule 9024. Finally, Appellant claims that the Bankruptcy Court erred by finding that Appellant's failure to respond to the motion to dismiss was inexcusable.

Standard of Review

The standard of review of a bankruptcy court's denial of a motion for reconsideration due to untimeliness considered under Rule 59(e) is abuse of discretion. Furthermore, under Rule 60(b), the standard of review for denial of a reconsideration motion based on excusable neglect is likewise abuse of discretion. Marta Group, Inc. v. County Appliance Co., Inc., 79

B.R. 200, 205 (E.D.Pa. 1987); see also North River Insurance Co. v. Cygnet Reinsurance Co., 52 F.3d 1194, 1203 (3d Cir. 1995); Lorenz v. Griffith, 12 F.3d 23, 26 (3d Cir. 1993). The review of the denial of a Rule 60(b) motion for relief from judgment does not encompass a review of the underlying order sought to be reconsidered. Smith v. Evans, 853 F.2d 155, 158 n.1 (3d Cir. 1988).

Discussion

The Bankruptcy Court made a determination on the merits that the reconsideration motion should be dismissed regardless of whether it was considered under Rule 59(e) or 60(b). See Bankr. Ct. Order of March 17, 1999 at 5-6, and at 4n.1. This decision, as well as the underlying decision of the Bankruptcy Court to dismiss the complaint, was well within the discretion of the Bankruptcy Court.

As heretofore pointed out, the standard for reviewing a bankruptcy court's denial of a motion for reconsideration based on excusable neglect is abuse of discretion. The Bankruptcy Court did not abuse its discretion in denying the reconsideration motion by finding that the Trustee's neglect in this case was inexcusable. "Time limits imposed by the rules and the court serve an important purpose for the expeditious processing of litigation. If compliance is not feasible, a timely request for an extension should be made to the court. A history by counsel

of ignoring these time limits is intolerable." Poulis v. State Farm & Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984).

The history of this case, recounted above, reveals that the Bankruptcy Court has been more than generous in granting the Trustee extension after extension upon which to file opposition to Edwards' motion to dismiss. The Trustee has consistently failed to do so. The Trustee complains that the Bankruptcy Court failed to respond to a few of his many requests for extensions. Appellant's Br. at 14. The fact that the Bankruptcy Court grew weary of the Trustee's consistent tardiness in this adversary proceeding is hardly surprising. The Bankruptcy Court certainly has no obligation to tolerate the blatant inability of the Trustee to meet its deadlines.

This Court also notes that the Trustee's dilatoriness has not been confined to this adversary proceeding alone. See Pelullo v. Schwartz, No. 98-5526, 1999 WL 14238012, at 12 (E.D.Pa. March 16, 1999) (noting Trustee's history of dilatoriness with regard to adversary proceedings in Pelullo bankruptcy). For two years, Edwards & Angell has persistently objected to Appellant's repeated failures to meet deadlines in a case that Appellant has instigated. The Bankruptcy Court was well within its discretion to dismiss both the amended complaint and to deny Appellant's reconsideration motion by concluding that Appellant's neglect was inexcusable.

For the reasons stated, the order of the Bankruptcy Court dated March 17, 1999 denying Appellant's motion for reconsideration of the Bankruptcy Court's order of January 29, 1999 dismissing the Trustee's amended adversary complaint with prejudice will be affirmed. An appropriate Order follows.

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AND NOW, this 28th day of October, 1999; having considered Appellant Leonard A. Pelullo's appeal of the Bankruptcy Court's order dated March 17, 1999 denying reconsideration of the Bankruptcy Court's order of January 29, 1999 dismissing Appellant's amended adversary complaint with prejudice, Appellee Edwards & Angell's response thereto, and Appellant's reply; for the reasons set forth in this Court's accompanying memorandum of this date;

IT IS **ORDERED** that the order of the Bankruptcy Court dated March 17, 1999 denying Appellant Pelullo's motion for

reconsideration is **AFFIRMED**.

RAYMOND J. BRODERICK, J.