FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP NOS. NH 06-022, 06-023

Bankruptcy Case No. 05-15357-MWV
Adversary Proceeding 06-01045-MWV

RAYMOND C. COX, JR.,
and JOCELYN G. COX,
Debtors.

DIANE POLIQUIN, d/b/a GOT INK 4 U,
Plaintiff-Appellant,

v.

RAYMOND C. COX, JR.,
and JOCELYN G. COX,
Defendants-Appellees.

Appeal from the United States Bankruptcy Court
for the District of New Hampshire
(Hon. Mark W. Vaughn)

Before Feeney, Boroff, and Somma,
U.S. Bankruptcy Appellate Panel Judges.

Arthur O. Gormley, III, Esq., on brief for Appellant.

W. John Deachman, Esq., and Marc van Zanten, Esq., on brief for Appellees.

December 21, 2006

Per Curiam.

I. INTRODUCTION

Creditor Diane Poliquin ("Poliquin") appeals from an order dismissing her complaint objecting to the debtors' discharge as untimely and from a related order that, by vacating an earlier extension of the deadline for objecting to discharge, retroactively rendered the objection to discharge untimely. The vacatur was entered on a motion to vacate filed by the debtors only after Poliquin had relied on the extension. The panel must determine whether the debtor's motion to vacate an order extending an objection deadline was untimely when the debtor received prompt notice of the extension order but did not move to vacate the extension until after the creditor had relied on it. We rule that the motion to vacate was not filed within a reasonable time and, therefore, that the bankruptcy court erred in granting it.

II. BACKGROUND

On October 14, 2005, Raymond Cox and Jocelyn Cox (the "debtors") filed a joint petition for relief under Chapter 7 of the Bankruptcy Code. The first (and only) date set for the first meeting of creditors was November 17, 2005. Normally, the deadline for objecting to discharge in a chapter 7 case is the sixtieth day after the first date set for the meeting of creditors under 11 U.S.C. § 341(a).[1] In this instance, the sixtieth day thereafter, Monday January 16, 2006, was a federal holiday, the day on which was observed the birthday of Martin Luther King, Jr. By operation of Fed. R. Bankr. P. 9006(a), the deadline for filing complaints objecting to discharge

[1]See Fed. R. Bankr. P. 4004(a) ("In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a).").

was therefore January 17, 2006.[2] Nonetheless, the bankruptcy court's notice to creditors stated, in error, that the deadline was January 16, 2006.

On January 13, 2006, the United States trustee, on behalf of herself and of Poliquin, moved to extend certain deadlines, including the deadline for the United States trustee and for Poliquin to file any complaint objecting to the debtor's discharge. In the motion, counsel for the United States trustee stated that the then-current deadline for objecting to discharge was January 16, 2006 and that debtors' counsel had consented to a 30-day extension of time for the United States trustee and Poliquin to file a complaint objecting to discharge. She concluded by asking that the court extend the time for the United States trustee and Poliquin to object to discharge "from January 16, 2006 through February 16, 2006." On January 17, 2006, the bankruptcy court allowed the motion by extending the deadline to February 16, 2006. Notice of this order was promptly sent to and received by debtors' counsel.

On February 16, 2006, Poliquin filed a complaint objecting to the debtors' discharge. On March 14, 2006, the debtors responded by filing two motions. First, in the bankruptcy case, they moved to vacate the January 17 extension order and amend that order "to indicate that the extension was for 30 days through February 15, 2006." In support of the motion, they stated that they had expressly agreed to an extension only to February 15, and that the United States trustee's motion contravened that agreement by requesting an extension to February 16. Second, in the adversary proceeding that had been commenced by the complaint objecting to discharge, the debtors moved to dismiss the complaint on the basis that the complaint was late because filed

[2]See Fed. R. Bankr. P. 9006(a), which provides, in relevant part, that in computing any period of time prescribed by the Federal Rules of Bankruptcy Procedure, the last day of the period shall be included unless it is a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. The same paragraph expressly defines "legal holiday" to include "Birthday of Martin Luther King, Jr."

after February 15, the date to which they had, by their motion to vacate, separately asked the court to remit the extended deadline.[3]

Poliquin opposed both motions. She denied that there had been an express agreement to extend the deadline to February 15. She also stated that she had relied on the order extending the deadline to February 16, and that the debtors had received a copy of the extension order on January 20 and should have moved to vacate the extension order at that time. She argued that the motion to vacate should be denied as untimely, that the extension order should not be vacated, and that her objection to discharge should not be dismissed as untimely.

The United States trustee also filed a response to the motion to vacate. In it, she stated that it was clear from the email exchanges attached to the debtors' motion to vacate that the debtors had agreed to an extension of time through February 15 rather than February 16; her request for an extension to the sixteenth had been, she said, a clerical error. However, citing In re Riso, 57 B.R. 789 (D.N.H. 1986) (district court affirmed bankruptcy court's order allowing an otherwise untimely complaint where creditor relied on official notice from clerk's office that had contained a new bar date following transfer of case from Florida to New Hampshire), she also opposed the motion to vacate, arguing that it would work an injustice against Poliquin to vacate the extension order.

At a hearing on the motion, the bankruptcy judge heard the parties and, for reasons announced on the record, granted the motion to vacate[4] and dismissed the complaint as untimely.

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[3]The motion to dismiss also sought dismissal, in the alternative, for failure to state a claim on which relief could be granted. The bankruptcy judge did not address this part of the motion.

[4]The written order on the motion to vacate simply states that "the Debtors' motion to vacate the Court's order is granted." It is not clear from this order whether the court thereby simply vacated the earlier order (i.e., without setting a new deadline) or whether it also thereby replaced the earlier extended deadline with a new deadline of February 15, as the debtors' motion had requested. Because the court

He found that it was clear that the parties had agreed to an extension only to February 15. He also found that the debtors had authorized their counsel to assent to a continuance only to the fifteenth. This the court deemed dispositive. Citing In re Phillippe Charles,[5] an unpublished decision of the United States Court of Appeals for the First Circuit, the bankruptcy judge stated: "[Phillippe Charles] does stand for the proposition that the Court's not going to approve orders that were not authorized by the client, and when it comes down to the end, that's what happened here." He also distinguished In re Riso, stating that in Riso, the error in overextending the objection period had been the court's, and there had been no agreement among the parties, whereas in the present case, the extension order had been presented as an assented-to order. This was the full extent of the bankruptcy judge's rulings on the matter. He received no evidence at the hearing and made no findings or rulings concerning the timeliness of the motion to vacate. Poliquin timely appealed from both orders.

III. ARGUMENTS ON APPEAL

On appeal, Poliquin first argues that the bankruptcy judge's finding that the debtors had agreed to an extension only to the fifteenth was clearly erroneous. Poliquin maintains that the emails show that the agreement was ambiguous. While conceding that the debtors specified a deadline of February 15, Poliquin points out that the debtors also agreed in the emails to an extension of thirty days. By operation of Fed. R. Bankr. P. 9006(a), the original deadline was January 17, 2006, and the thirtieth day thereafter was February 16. Therefore, she contends, the

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also allowed the motion to dismiss on the basis that the complaint was untimely, we conclude that, by its order granting the motion to vacate, the court not only vacated the earlier order but also established, retroactively, a new deadline of February 15.

[5] In re Phillippe Charles, 96 Fed.Appx. 726 (1st Cir. 2004).

email communications show that any agreement of the parties, or assent by the debtors, was at best ambiguous in extent because it was internally inconsistent.

Poliquin also argues that the court made two errors of law: first, in its ruling that it had no option but to vacate the extension order where that order had not been authorized by the debtors; and second, in its further ruling that it lacked authority to protect a creditor from vacatur of an extension, however appropriate such vacatur may otherwise have been, where the creditor had already reasonably relied upon the extension. Poliquin contends that the bankruptcy court has inherent equitable power to deny vacatur of an extension order and to protect a party who reasonably relies upon it, especially where that party was not responsible for the mistake that gave rise to the alleged defect in the order.

The debtors respond that the court's findings of fact are reviewable only for clear error and that no clear error was committed. The finding was supported by an email communication in which debtors' counsel explicitly stated to the United States trustee "that the debtors agreed to a 30 day extension to end on February 15, 2006."[6] The debtors state that the finding was also supported by the "testimony"[7] of counsel for the United States trustee and of counsel for Poliquin as to their respective understandings of the agreement. The debtors concede that the communication "could have been more clear" and that another conclusion could have been reached from this evidence, but, they argue, this falls short of a showing that the bankruptcy judge's finding was in error, much less clear error.

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[6]This is the debtors' own characterization of the email in their brief on appeal.

[7]By "testimony" we understand the debtors to be referring to statements made by counsel in the course of their respective arguments at the hearing on the motion to vacate. The transcript of the hearing does not indicate that any testimony was received under oath or in any usual sense.

The debtors further argue that the bankruptcy court did not abuse its discretion by vacating the extension order. Rather, they argue, the bankruptcy judge correctly applied the law of the First Circuit as announced in Phillippe Charles. That decision, they contend, stands for the proposition that where the court enters an order on the understanding that the party to be bound has assented to its entry, and that assumption is later shown to be false, the court must vacate the order.

The debtors also argue that the court was correct in distinguishing Riso. Riso recognizes the equitable power of the court to protect parties from the consequences of the court's own errors. It does not apply here, the debtors contend, because the creditor is to blame for the erroneous bar date. The debtors argue that Poliquin is to blame because, they state, Poliquin was one of the filers of the misleading motion to extend.[8]

IV. JURISDICTION

The Bankruptcy Appellate Panel has jurisdiction over this appeal, as an appeal from final orders of a bankruptcy judge, by virtue of 28 U.S.C. § 158(a)(1) and (c)(1). The bankruptcy court's order on the motion to vacate, which not only vacated the extension order but also effectively established a new and earlier bar date, conclusively determined whether Poliquin could timely object to discharge. For that reason, it was a final order. Lure Launchers, LLC v. Spino, 306 B.R 718, 720 (B.A.P. 1st Cir. 2004). Likewise, the order dismissing the adversary complaint as untimely concluded the adversary proceeding and therefore was a final order. Matter of Riggsby, 745 F.2d 1153 (7th Cir.1984) (dismissal of a complaint objecting to discharge is final).

[8]This argument is factually incorrect. The motion was filed by the United States trustee alone, albeit in part on behalf of Poliquin.

V. STANDARD OF REVIEW

On this appeal, this panel must determine, in the first instance, whether the bankruptcy court properly vacated its earlier extension order. The determination of whether to vacate a final order is governed by Federal Rule of Civil Procedure 60(b), which entrusts the determination to the discretion of the bankruptcy judge: "the court *may* relieve a party . . . from a final judgment [or] order." Fed. R. Civ. P. 60(b), made applicable by Fed. R. Bankr. P. 9024. The determination is subject to review for abuse of discretion.[9] "Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them."[10] The relevance of a particular factor is an issue of law, which we consider *de novo*. In re LaRoche, 969 F.2d 1299, 1301 (1st Cir. 1992).

VI. DISCUSSION

We begin with the bankruptcy court's entry of the order extending the deadline for objecting to discharge to February 16, 2006. An order of the court affects the rights and obligations of the parties. Parties can and do rely on orders, and therefore the ability of the Court or a party to seek to vacate or modify an order, however infirm that order may have been in its

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[9] Farm Credit Bank of Baltimore v. Ferrera-Goitia, 316 F.3d 62, 65-66 (1st Cir. 2003); Dankese v. Defense Logistics Agency, 693 F.2d 13, 15 (1st Cir. 1982) ("Motions to reopen judgments pursuant to Fed.R.Civ.P. 60(b) are addressed to the discretion of the district court and will be reversed only when that discretion is abused."); Manning v. Trustees of Tufts College, 613 F.2d 1200, 1204 (1st Cir.1980) (same); Pagan v. American Airlines Inc., 534 F.2d 990, 993 (1st Cir.1976) (same).

[10] Independent Oil & Chemical Workers of Quincy, Inc. v. Proctor & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988); Mitchell v. Hobbs, 951 F.2d 417, 420 (1st Cir. 1991); Ross-Simons of Warwick, Inc., v. Baccarat, Inc., 102 F.3d 12, 14 (1st Cir. 1996) ("a finding of abuse usually entails proof that the nisi prius court, in making the challenged ruling, ignored pertinent elements deserving significant weight, considered improper criteria, or, though assessing all appropriate and no inappropriate factors, plainly erred in balancing them").

genesis, is limited by Federal Rules of Civil Procedure 59 and 60, as made applicable to bankruptcy cases and proceedings by Fed. R. Bankr. P. 9023 and 9024.

In their motion to vacate, the debtors did not cite the rule or rules pursuant to which they were seeking relief. In the motion they asked that the extension order be vacated or, in the alternative, that it be amended to indicate that the extension was to February 15, 2006. Insofar as it sought amendment of the order, the motion was "a motion to alter or amend the judgment" within the scope and meaning of Fed. R. Civ. P. 59(e) (made applicable in a bankruptcy case by Fed. R. Bankr. P. 9023). Insofar as it sought to vacate the extension order, the motion was one for relief from a final order within the scope and governance of Fed. R. Civ. P. 60(b) (made applicable in a bankruptcy case and adversary proceeding by Fed. R. Bankr. P. 9024).

Both rules limit the time within which motions within their respective scopes may be brought. Rule 59(e) provides: "Any motion to alter or amend a judgment must be filed no later than ten days after entry of the judgment." Fed. R. Civ. P. 59(e). Rule 60(b) specifies that a motion within its scope "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b).

The debtors did not file their motion to vacate until March 14, 2006, some 56 days after entry of the order they sought to vacate or amend. The motion was thus filed long after expiration of the time within which a motion to alter or amend judgment might properly have been filed. Therefore, as a motion to alter or amend judgment under Rule 59(e), the motion to vacate was untimely and, for that reason, should have been denied. Barrett v. United States, 965 F.2d 1184 (1st Cir. 1984) ("The ten-day time bar under Rule 59(e) is jurisdictional.").

The bankruptcy judge did not specify the rule under which he allowed the motion. He may have acted under Rule 60(b). Accordingly, we proceed to consider the motion to vacate as a motion under Rule 60(b).

Rule 60(b) permits a party to move for relief from a final order for certain reasons, including (in relevant part) mistake, but the rule also expressly requires that any motion thereunder be made within a reasonable time.[11] Fed. R. Civ. P. 60(b) ("The motion shall be made within a reasonable time[.]"); Matter of Whitney-Forbes, Inc., 770 F.2d 692, 697 (7th Cir 1985) (any motion under Rule 60(b), except for Rule 60(b)(4) [not applicable here], must be made within a reasonable time). In determining whether to grant relief from an order, a court must consider whether the Rule 60(b) motion for such relief was brought within a reasonable time. Because we have no indication that the bankruptcy judge considered the timeliness of the motion, we must, at a minimum, vacate the orders on appeal. However, we do not remand for consideration of that issue; for the reasons articulated below, we conclude that, on the undisputed facts, a court could reasonably conclude only that the motion was not filed within a reasonable time.

"What is 'reasonable' depends upon the circumstances of the particular case." Farm Credit Bank of Baltimore v. Ferrera-Goitia, 316 F.3d 62, 66 (1st Cir. 2003). "The circumstances to be considered include the length of the delay, the justification for it, and the prejudice (if any) associated with the granting of relief."[12] Id.; Teamsters, Chauffeurs, Warehousemen and Helpers

[11]The rule further requires that certain motions thereunder must, in any event, be made no more than one year after entry of the order at issue. The one-year limitation is not implicated here.

[12]See also 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2866 (1982): "What constitutes a reasonable time must of necessity depend upon the facts in each individual case. The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner."

Union Local No. 59 v. Superline Transp. Co., Inc., 953 F.2d 17, 19-20 (1st Cir. 1992) (courts are "disinclined to disturb judgments under the aegis of Rule 60(b) unless the movant can demonstrate that certain criteria have been achieved. In general, these criteria include (1) timeliness, (2) the existence of exceptional circumstances justifying extraordinary relief, and (3) the absence of unfair prejudice to the opposing party."); U.S. v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990) ("The relevant considerations include, whether the parties have been prejudiced by the delay and whether a good reason has been presented for failing to take action sooner.").

In this instance, the relevant facts are straightforward and undisputed. The disputed order concerned an extension of time in which to file a complaint objecting to discharge. The debtors indicated to the moving party, the United States trustee, that they assented to an extension until February 15.[13] The United States trustee inadvertently sought an extension to the sixteenth and, in her motion, represented to the court that the debtors had assented to an extension to that date. (The debtors do not suggest that the United States trustee—much less Poliquin, who did not draft or file the motion—acted with fraudulent intent.) On that representation, the bankruptcy court promptly extended the time to February 16. The debtors' attorney received this order within days of its entry but took no action. In reliance on the order, Poliquin's counsel filed an objection to discharge on (as lawyers typically do) the last day of the time as extended. Only after expiration of the extended period did the debtors move to vacate. Poliquin, having relied on the order, would be prejudiced by vacatur and remission of the deadline to February 15: her complaint

[13]For purposes of argument, we ignore any evidence or suggestion that the debtors' representations had been ambiguous regarding the duration of the extension to which they were assenting. We express no opinion on Poliquin's argument that the court's finding regarding the agreement between the parties was clearly erroneous.

would be rendered untimely after the fact, leaving her unable even to petition for a retroactive extension of the time.[14] As justification for having waited until after the deadline to file their motion, the debtors state only that their counsel did not notice the error until after the deadline. Counsel concedes, however, that he received timely notice of the order.

Moreover, the debtors do not contend that they have in any way been prejudiced by the one-day error; that they filed their motion to vacate almost four weeks later would tend to indicate that time was not of the essence. The error in question was one of a single day. Certainly, even if Poliquin's counsel had known for certain that the length of the extension had been an error, it would by no means have been evident to Poliquin or her counsel from this error or the circumstances surrounding it that the debtors would view this error as anything but de minimis and inconsequential.

On this record, one can reasonably conclude only that the motion to vacate was *not* filed within a reasonable time. If the debtors were dissatisfied with the order, it was incumbent upon them to move to vacate or amend in sufficient time not to prejudice Poliquin. Accordingly, we hold that the motions to vacate the extension order and to dismiss the adversary complaint as untimely should have been denied.[15]

The decision of the Court of Appeals in Phillippe Charles, 96 Fed.Appx. 726 (1st Cir. 2004), does not require a different result. First, the Court of Appeals elected *not* to publish that opinion, thereby indicating that the panel itself viewed it as having no precedential value. 1st Cir. R. 36(c) ("[A] panel's decision to issue an unpublished opinion means that the panel sees no

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[14]Under Fed. R. Bankr. P. 4004(b) and 9006(b)(3), a motion to extend the time to file a complaint objecting to discharge must be filed before the time has expired.

[15]The debtors' motion to dismiss also sought dismissal on other grounds. We express no opinion on the other grounds.

precedential value in that opinion."); see also 1st Cir. R. 32.3(a)(2) (regarding the citation of unpublished opinions of the Court of Appeals for the First Circuit in that court: "Citation of an unpublished decision of this court is disfavored. . . . The court will consider such opinions for their persuasive value but not as binding precedent."). In addition, Phillippe Charles (whose convoluted and highly unusual facts we need not belabor) is simply inapposite. In that case, the bankruptcy court had denied an "assented to" motion and a related motion to approve a stipulation where, it turned out, the debtor had in fact *not* assented to the motion or agreed to the stipulation; rather, his attorney had assented and agreed on his behalf, but without the debtor's knowledge or consent. The issue on appeal was whether the motions had properly been denied. The opinion did not address the criteria for granting relief from an order under Fed. R. Civ. P. 60(b).

Accordingly, the panel concludes that the bankruptcy court abused its discretion in allowing the motion to vacate the extension order because the debtors waited an unreasonable length of time to file it to the prejudice of Poliquin.

VII. CONCLUSION

For these reasons we **REVERSE** and **REMAND** for continuation of the adversary proceeding.