UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 97-115

In re: TRACY CRONIN

CATHERINE B. NATES, Individually and as Trustee of GOODROW FAMILY TRUST,
Plaintiff/Appellee

V.

TRACY CRONIN, Individually and d/b/a CRONIN ENTERPRISES,
Defendant/Appellant

Appeal from the United States Bankruptcy Court for the District of Massachusetts
[Hon. William C. Hillman, Bankruptcy Judge]

Before

GOODMAN, LAMOUTTE and de JESÚS, Bankruptcy Judges.

Kevin P. McRoy, with whom Thomas E. Pontes and Wynn & Wynn, P.C., were on brief for appellant.

William J. Hudak, Jr. was on brief for appellee.

October 14, 1998

PER CURIAM.

The Debtor, Tracy Cronin, d/b/a Cronin Enterprises, (Cronin) appeals from an order of the bankruptcy court denying his motion for relief from a default judgment pursuant to Fed.R.Civ.P. 60(b), made applicable to this proceeding by Fed.R.Bankr.P. 9024. Because the record does not reveal the basis of the bankruptcy court's decision, we remand.

BACKGROUND

The parties have a long history beginning in October of 1994, when the Appellee, Catherine Nates (Nates), sued the Appellant, Cronin, in state court for numerous claims including fraud and breach of contract in connection with construction work performed by Cronin at the Nates' home subsequent to a fire. In that state court proceeding, the court entered a default and default judgment (herein the "State Court Judgment") against Cronin. Thereafter, Cronin filed a bankruptcy petition in December of 1995, and Nates filed a Complaint seeking to have the State Court Judgment claim excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A) and to deny debtor discharge pursuant to 11 U.S.C. § 727(a)(2)(A), (a)(3), (a)(4)(A) & (a)(4)(D). Initial pretrial and trial schedules were set. However, upon counsels' requests for continuances, the trial date was rescheduled for August 4, 1997, with the joint pretrial statement due on July 5, 1997.

Prior to these deadlines, Cronin's counsel filed a motion to

withdraw. Although the motion to withdraw was initially denied, upon reconsideration, and upon a showing of grounds for the withdrawal, the motion to withdraw was granted. Withdrawal was permitted on June 2, 1997. At the time of the withdrawal, Cronin's file was returned to him, and he was given notice of the pretrial filing deadlines, including the July 5, 1997 deadline for filing pretrial statements and the trial date of August 4, 1997.

Cronin did not appear at the trial before the bankruptcy court and default judgment was entered on August 4, 1997.[1] (the "Bankruptcy Court Default") One day later, Cronin wrote a letter to the bankruptcy court, addressed to "Mr. Hillman". Cronin stated that he had inadvertently missed the trial date and he requested reconsideration. The bankruptcy court treated the letter as a Notice of Appeal. The appeal was dismissed on October 6, 1997 for failure to prosecute.[2]

Shortly thereafter, Cronin retained new counsel and filed a motion for relief from default judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (the "60(b) Motion"). After a hearing held November 25, 1997, the bankruptcy court denied the 60(b) Motion and this appeal followed.

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[1] This is not a direct appeal from the order entering judgment by default. As set forth below, that appeal was dismissed.

[2] In that appeal, Cronin failed to file a statement of issues on appeal and designation of the record. See FED. R. BANKR. P. 8006.

JURISDICTION

The Bankruptcy Appellate Panel has jurisdiction over this appeal pursuant to 28 U.S.C. § 158. See e.g., Schiff v. Rhode Island, 199 B.R. 438, 440(D.R.I. 1996).

STANDARD OF REVIEW

This Court reviews the bankruptcy court order denying Cronin's 60(b) Motion for abuse of discretion. Cotto v. United States, 993 F.2d 274, 277 (1st Cir. 1993)(a court determining a Rule 60(b) motion has considerable discretion and which is reviewed only for an abuse of that broad discretion); see also Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co., Inc., 953 F.2d 17, 19 (1st Cir. 1992); Rodriguez-Antuna v. Chase Manhattan Bank Corp., 871 F.2d 1, 3 (1st Cir. 1989); Ojeda-Toro v. Rivera-Mendez, 853 F.2d 25, 28 (1st Cir. 1988); see also Jones v. Phipps, 39 F.3d 158, 162 (7th Cir. 1994)(review is "exceedingly deferential" and the order denying or granting a Rule 60(b) motion to set aside a default judgment may only be disturbed upon a finding that no reasonable person could agree with the court's ruling).

Consideration of a Rule 60(b) motion demands the balancing of competing underlying policies: the importance of finality and the preference of resolving disputes on the merits. Cotto, 993 F.2d at 277; Teamsters, 953 F.2d at 19; Blois v. Friday, 612 F.2d 938, 940 (5th Cir. 1980). While courts traditionally prefer resolution of disputes on the merits, due deference is given to the practical

requirements of judicial administration and prejudice that may result to the nonmoving party. Key Bank of Maine v. Tablecloth Textile Co., Corp., 74 F.3d 349, 356 (1st Cir. 1996); see also Civic Center Square Inc. v. Ford (In re Roxford Foods, Inc.), 12 F.3d 875, 879-81 (9th Cir. 1993) (Rule 60 relief is remedial in nature and should be applied liberally and only limited by significant policy considerations); Coon, 867 F.2d at 79 (where the case is close, doubts should be resolved in favor of adjudicating the dispute on the merits).

DISCUSSION

In the First Circuit, an "[a]buse 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." Coon v. Grenier, 867 F.2d 73, 78 (1st Cir. 1989) (*citing*, Independent Oil and Chemical Workers v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988).

The specific factors that the bankruptcy court should have considered are set forth in Rule 55 of the Federal Rules of Civil Procedure,[3] which provides, in relevant part that "[f]or good cause shown, the court may set aside an entry of default and, if judgment by default has been entered may likewise set it aside in accordance

[3] Fed.R.Civ.P. 55 is made applicable in adversary proceedings pursuant to Rule 7055 of the Federal Rules of Bankruptcy Procedure.

with Rule 60(b)." In denying Cronin's 60(b)Motion, the bankruptcy court should have considered the following factors: 1) whether the default was wilful, 2) whether the defendant had a meritorious defense, and 3) whether the nondefaulting party would be prejudiced if the relief requested is granted. In re Zeitler, 221 B.R. 934, 938 (1st Cir. BAP 1988). See also State Bank of India v. Chalasani(In re Chalasani), 92 F.3d 1300, 1307-08 (2nd Cir. 1996); Florida Physician's Ins. Co., Inc. v. Ehlers, 8 F.3d 780, 783 (11th Cir. 1993); S.E.C. v. Hasho, 134 F.R.D. 74, 76 (S.D.N.Y. 1991).

At the hearing for Rule 60(b) relief in the bankruptcy court, counsel for Cronin argued that despite his client's failures to follow court orders, he is entitled to his day in court; that Cronin is "not a sophisticated man in legal matters" ... [h]e has tried his best to comply" and that "[h]e just fouled up on the dates."[4] Appellant's Appendix, Exhibit X p. 2. Also, he asserts that Cronin has a meritorious defense and that Cronin's prior attorney, Mr. Mahoney, was to blame for the defaults.[5] Opposing counsel countered

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[4] In his affidavit below, Cronin states the following: "[m]y failure to comply with the Rules of the Bankruptcy Court, and my misunderstanding of the Court date for the trial in this Adversary Proceeding was due completely to my lack of sophistication with the rules of the Bankruptcy Court, the withdrawal of my former counsel, James P. Mahoney, and his inadequate representation of me throughout this entire matter." Appellant's Appendix, Exhibit U ¶ 20.

[5] Cronin's new counsel also asserts that Cronin acted on the advice of counsel by not defending in the state court action and he questions the res judicata effect of the State Court Judgment in the dischargeability action. However, the bankruptcy court did not

alleging that "[t]his is not a case of a man who doesn't know what's going on" citing numerous defaults by Cronin since the initiation of a lawsuit by Nates in 1994 including the failure to comply with orders of the bankruptcy court despite communications made by telephone and letters notifying Cronin of his obligations and the pertinent dates and advising him of the consequences for noncompliance. Appellant's Appendix, Exhibit X p. 4.

In open court, the bankruptcy judge rejected Cronin's arguments indicating that a party can not escape the consequences of a voluntarily chosen attorney's acts or omissions and stating "that [Cronin] had all the process that [was] due" and "had enough bites of the apple." Appellant's Appendix, Exhibit X p. 11. However, the order denying Cronin's 60(b)Motion fails to contain any specific finding relating to whether the default was wilful, whether Cronin had a meritorious defense, and whether Nates would suffer any prejudice.

Although there is some indication in the record that the bankruptcy court may have considered the evidence of Cronin's failure to participate in the proceedings as wilful, there are no specific findings in the record. Entry of judgment by default based on a finding of wilful failure to obey court orders and failure to participate in the proceedings would be appropriate and well-founded

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explicitly rely on the State Court Judgment when it denied Cronin's Rule 60(b) Motion. Appellant's Appendix, Exhibit X p. 4.

in the inherent authority of a court to manage cases and control its docket. This inherent authority has its source in the control vested in each court to manage its docket and dispose of matters in an orderly and expeditious manner. Link v. Wabash R.R. Co., 370 U.S. 626, 629-31 (1962)(upholding dismissal of action for failure to attend pre-trial conference where counsel has history of dilatory conduct).[6]

The record in this case is simply not sufficient for us to evaluate Cronin's conduct or the bankruptcy court's order.

CONCLUSION

From the record before it, this court recognizes the seemingly dilatory conduct of Cronin. However, in the absence of a record demonstrating that the judge considered Cronin's conduct in light

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[6] Several statutes provide additional authority for trial courts to take appropriate action, including dismissal of the action or entry of default judgment, where a party, either acting pro se or through counsel, has failed to follow court orders and/or proceed in good faith. See FED. R. CIV. P. §§ 16(f)(sanctions for failure to obey scheduling or pretrial order or failure to appear at pretrial conference); 37(sanctions for failure to make disclosure or cooperate in discovery); 41(b)(involuntary dismissal for failure to prosecute or comply with court's order); 55(a)(default entered against a party for failure to plead or defend in an action).

The First Circuit has affirmed numerous dismissals of actions and entries of default judgment for such acts or omissions. See Velazquez-Rivera v. Sea-Land Service, Inc., 920 F.2d 1072, 1076-78 (1st Cir. 1990)(review cases); Damiani v. Rhode Island Hosp., 704 F.2d 12, 17 (1st Cir. 1983)(listing cases since 1964). While entry of default judgment, as well as dismissal with prejudice, is the most severe sanction, these tools are appropriate in extreme circumstances. Enlace Internacional, Inc. v. Senior Industries, Inc., 848 F.2d 315, 317 (1st Cir. 1988); Affanato v. Merrill Bros., 547 F.2d 138, 140 (1st Cir. 1977).

of the relevant factors, this Court is unable to review the bankruptcy court's order.

Accordingly, this matter is REMANDED to the bankruptcy court so that the judge may set forth the reasons for the denial of the 60(b) Motion in light of the appropriate factors.

This appeal will be closed so that the lower court may fully exercise its jurisdiction on remand.

SO ORDERED.