

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re:) Bk. No. 10-12222-BLS
VALERIE BANKS COOPER,) Chapter 7
Debtor.)

VALERIE BANKS COOPER,)
Appellant,)
v.) Civ. No. 11-791-SLR
GOLDMAN SACHS MORTGAGE)
COMPANY,)
Creditor/Appellee.)

MEMORANDUM ORDER

At Wilmington this *3rd* day of January, 2013, having reviewed the appeal filed by Valerie Banks Cooper ("Cooper") and creditor/appellee Goldman Sachs Mortgage Company's (creditor/appellee) motion to dismiss (D.I. 4);

IT IS ORDERED that motion to dismiss (D.I. 4) is **granted**, and the appeal is **dismissed**, for the reasons that follow:

1. **Standard of review.** This court has jurisdiction to hear an appeal from the bankruptcy court pursuant to 28 U.S.C. § 158(a). In undertaking a review of the issues on appeal, the court applies a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's legal conclusions. *See American Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999). With mixed questions of law and fact, the court must accept the bankruptcy court's "finding of historical or narrative facts unless clearly erroneous, but exercise[s] 'plenary

review of the [bankruptcy] court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.” *Mellon Bank, N.A. v. Metro Commc'ns, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) (citing *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981)). The district court's appellate responsibilities are further informed by the directive of the United States Court of Appeals for the Third Circuit, which effectively reviews on a *de novo* basis bankruptcy court opinions. See *In re Hechinger*, 298 F.3d 219, 224 (3d Cir. 2002); *In re Telegroup*, 281 F.3d 133, 136 (3d Cir. 2002).

2. **Background.** On July 13, 2010, Cooper, proceeding pro se, filed a voluntary petition under chapter 7 of the bankruptcy code in the United States Bankruptcy Court for the District of Delaware (“the Bankruptcy Action”). Cooper's bankruptcy discharge issued November 5, 2010. (Bankruptcy Action, D.I. 30) On January 21, 2011, Cooper filed a motion for sanctions for violation of the discharge injunction. (*Id.* at D.I. 33) Following the parties' responses and replies, the bankruptcy court entered an order on June 30, 2011, denying Cooper's motion for sanctions (*id.* at D.I. 33), finding no legal or factual basis for the relief she requested. (*Id.* at D.I. 44) Cooper filed a motion for clarification of the order (*id.* at D.I. 47), and the matter was set to be heard on July 28, 2011. (*Id.* at D.I. 48) Cooper did not appear at the scheduled hearing. (*Id.* at D.I. 50) Thereafter, the bankruptcy court denied the motion for clarification/reconsideration for Cooper's failure to appear and prosecute. (*Id.* at D.I. 51)

3. Cooper appealed the order on August 11, 2011. (D.I. 1; (Bankruptcy Action, D.I. 56) The notice of appeal states in pertinent part, “I am writing to request an appeal of the order issued by the Bankruptcy Court Judge issued in this case dated August 1,

2011. I am a pro se debtor in this case and was unable to attend the hearing for clarification July 28, 2011, due to a debilitating illness. However, I did not ask the judge for reconsideration.” (*Id.*) Cooper requested counsel in the notice of appeal and followed the request, on January 18, 2012, with a letter/motion to appoint counsel. (See D.I. 8) In the interim, creditor/appellee filed the instant motion to dismiss and the court entered an order setting a briefing schedule. (See D.I. 4, 7) Cooper did not respond to the motion to dismiss.

4. On June 19, 2012, the court denied without prejudice Cooper's request for counsel and set a new briefing schedule for Cooper to respond to the pending motion to dismiss. (D.I. 9) Cooper did not file a response to the motion to dismiss but, instead, filed a notice of appeal of the memorandum order that denied her request for counsel. (See D.I. 10) On September 20, 2012, the United States Court of Appeals for the Third Circuit dismissed the appeal for lack of jurisdiction. (D.I. 12) Five days later, this court entered a third briefing schedule for Cooper to respond to the pending motion to dismiss with her response due on October 25, 2012. (See D.I. 13) To date, no response has been filed by Cooper.

5. Creditor/appellee moves for dismissal of the appeal on the grounds that Cooper: (1) does not set forth the basis of her request for clarification or the issues on which clarification is being sought; (2) had not complied with Fed. R. Bankr. P. 8006; and (3) did not file a brief in support of her appeal. (See D.I. 4)

6. **Discussion.** Federal Rule of Bankruptcy Procedure Rule 8006 provides that within fourteen days after filing the notice of appeal, entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type

specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the creditor/appellee a designation of the items to be included on the record on appeal and a statement of the issues to be presented. The notice of appeal was filed on August 11, 2011. Therefore, Cooper should have complied with Rule 8006 in August 2011; the relevant deadline being no later than fourteen days following August 11, 2011. Creditor/appellee contends that, because Cooper has failed to comply with Rule 8006, the appeal must be dismissed. Cooper did not respond to this ground for dismissal, provides no explanation for her failure to comply with Rule 8006 and, to date, has not complied with Rule 8006.

7. Federal Rule of Bankruptcy Procedure Rule 8001(a) provides that the failure of an appellant “to take any step other than timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal.” Federal Rule of Bankruptcy Procedure 9006(b)(1) provides that, “when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.” Creditor/appellee’s motion to dismiss placed Cooper on notice of her failure to comply with Fed. R. Bankr. P. 8006. Cooper did not, however, seek leave to rectify her non-compliance with the Rule nor is there evidence of excusable neglect.

8. **Excusable neglect.** The following four non-exclusive factors are relevant in determining whether a party's neglect is excusable: (1) the danger of prejudice; (2) the length and effect of the delay; (3) the reason for the delay; and (4) whether the movant acted in good faith. See *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (analyzing "excusable neglect" pursuant to Rule 9006(b)(1)). Prejudice should be a conclusion based on the facts in evidence. *In re O'Brien Envtl. Energy, Inc.*, 188 F.3d 116, 127 (3d Cir. 1999). Here, creditor/appellee is prejudiced by the delay as the passing of time impairs its ability to defend its interests.

9. The court also considers the length of delay and its potential impact on judicial proceedings. Cooper's delay has an impact on the creditor/appellee's ability to determine and/or respond to any issues Cooper might present on appeal. Last, the court looks to the reason for delay, including whether it was within the reasonable control of Cooper and the good faith of Cooper. Cooper is silent on her failure to comply with Rule 8006. In reviewing the court docket, it is evident that Cooper had the ability to timely file documents given that she appears to have had no difficulty filing documents subsequent to initiating this appeal, including a request for counsel and a notice of appeal to the United States Court of Appeals for the Third Circuit. (See D.I. 8, 10) The delay in complying with Rule 8006 has caused, and will cause, prejudice to the creditor/appellee. Even without deciding the good faith of Cooper, her neglect in failing to comply with Rule 8006 is not excusable. Finally, had Cooper sought relief, when considering all the *Pioneer* factors, the court finds they do not weigh in favor of granting relief from the time constraints of Rule 8006.

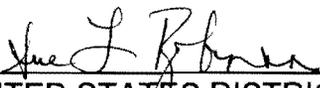
10. **Poullis factors.** A district court may dismiss a bankruptcy appeal for failure to meet nonjurisdictional deadlines, such as the fourteen day time-period found in Rule 8006, only after balancing a number of equitable factors set forth in *Poullis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d Cir. 1984); See *In re Richardson Indus. Contractors, Inc.*, 189 F. App'x 93, 96 (3d Cir. 2006) (unpublished) (vacating district court's dismissal of bankruptcy appeal for failure to submit Rule 8006 documents or to obey briefing deadlines).

11. The six factors to be considered are: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of other sanctions; and (6) the meritoriousness of the claim or defense. *Poullis*, 747 F.2d at 868. The court must balance the factors and need not find that all of them weigh against Cooper to dismiss the action. *Emerson v. Thiel Coll.*, 296 F.3d 184, 190 (3d Cir. 2002).

12. First, as a pro se litigant, Cooper is solely responsible for her filing delay. *Id.* Second, as discussed above, the creditor/appellee is prejudiced by Cooper's failure to comply with Rule 8006. As to the third factor, the court docket provides evidence of Cooper's failure to abide by court deadlines. Cooper has failed to respond to the instant motion to dismiss despite this court's issuance of three scheduling orders, each giving her additional time to do so. As to the fourth factor, the court cannot conclude that Cooper's failure to timely file was willful or in bad faith but notes that she failed to provide the court with any reasons for her failure. As to the fifth factor, there are no

alternative sanctions the court could effectively impose. Because Cooper proceeds pro se and she was granted leave to proceed in forma pauperis (see D.I. 1), it is doubtful that monetary sanctions would be effective. As to the sixth factor, the merits of the claim, it rests upon the Bankruptcy Court's denial of Cooper's motion for sanctions. Cooper's motion was denied after she failed to appear at the hearing and failed to prosecute the motion. The Bankruptcy Court's ruling weighs in favor of dismissal. Notably, Cooper's failure to prosecute continues with the instant appeal. On balance, the *Poulis* factors weigh in favor of dismissal of Cooper's bankruptcy appeal. Therefore, the court will grant creditor/appellee's motion to dismiss the appeal.

14. Conclusion. For the above reasons, the court grants creditor/appellee's motion to dismiss and dismisses the appeal. (D.I. 4)


UNITED STATES DISTRICT JUDGE