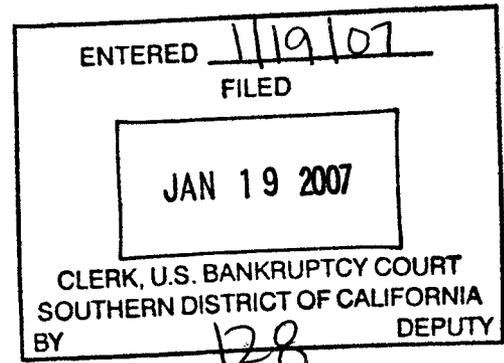


1 WRITTEN DECISION - NOT FOR PUBLICATION



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6 UNITED STATES BANKRUPTCY COURT
7 SOUTHERN DISTRICT OF CALIFORNIA

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11 In re) Case No. 96-00871-B11
12) Adv. No. 06-90341-B11
13 JAMES W. KEENAN and)
14 JUDY M. KEENAN,)
15) ORDER ON PLAINTIFFS'
16 Debtors.) UNNOTICED MOTION FOR
17) RECONSIDERATION
18)
19 JAMES W. KEENAN and)
20 JUDY M. KEENAN,)
21)
22 Plaintiffs,)
23)
24 v.)
25)
26 ROSS M. PYLE; PROCOPIO, CORY)
HARGREAVES & SAVITCH, A)
BUSINESS ENTITY FOR UNKNOWN,)
JEFFREY ISAACS, an individual,)
AND DOES 1-50, INCLUSIVE,)
Defendants.)

23 In the course of preparing for hearings on defendants'
24 motions, presently set for hearing on January 26, 2007, the Court
25 discovered a putative and alternative written motion for
26 reconsideration of its prior order denying a 90 day continuance

1 of the scheduled hearing. The plaintiffs' motion was made
2 without the requisite notice for hearing and has never been on
3 the Court's calendar for resolution.

4 Because the history of just the instant proceeding is
5 tortuous, the Court will review it briefly.

6 Plaintiffs' complaint was filed on June 30, 2006. After
7 service of an alias summons defendants filed a motion to dismiss
8 or for summary judgment, and a state law Anti-SLAPP motion to
9 strike on September 11, 2006. Those motions were originally
10 noticed for hearing on October 10, 2006, in accordance with this
11 district's local rules. Personal service of the moving papers
12 was made on plaintiffs' counsel.

13 Because of the Court's calendar conflicts, the Court
14 unilaterally continued the hearing date to October 23, 2006.
15 A postponement of the hearing date did not change the date
16 opposition to the motions was due. Bankruptcy Local Rule
17 9014-4(b) has provided for many years, and continues to provide:

18 (b) TIME FOR SERVING OPPOSITION. Except as
19 otherwise provided by an order shortening time,
20 each party opposing a motion shall serve that
21 opposition together with a memorandum of points
22 and authorities on the movant's counsel, or, if
23 none, the movant not later than fourteen (14) days
24 after service of the notice of motion, if
25 personally served. If served by mail, opposing
26 party shall have seventeen (17) days to serve such
opposition as provided by Fed.R.Bankr.P. 9006(f).

24 On September 28, counsel for plaintiffs filed an ex parte
25 application for a 90 day continuance of the hearing and
26 corresponding extension of time to file opposition to the

1 motions. The thrust of the motion for continuance and extension
2 was that defendants' moving papers were so voluminous in
3 addressing plaintiffs' voluminous complaint of 15 pages asserting
4 seven separate claims for relief "based upon extensive and
5 numerous factual allegations in 67 separate paragraphs covering a
6 period of almost ten years." Plaintiffs' Ex Parte Application,
7 p.2, 11. 24-25. So, because plaintiffs filed a sizeable
8 complaint, thereby necessitating defendants respond to it within
9 30 days of service with sizeable moving papers, plaintiffs
10 therefore need an additional 90 days to defend the allegations of
11 their complaint. The supporting declaration of counsel for
12 plaintiffs added:

13 In addition, Plaintiffs submit that a
14 continuance is warranted under FRCP 56(f),
15 also in light of the sheer volume of the
16 documentation and issues raised, as well as
17 the fact that discovery has yet to be
18 initiated inasmuch as this case was just
19 filed. Plaintiffs intend and need to depose
 the Defendants and third parties in order to
 present evidence to oppose Defendants'
 motions. It is believed that Defendants as
 well as third parties possess evidence
 concerning Plaintiffs' claims which are
 incorporated herein by this reference.

20 Only the request for continuance and extension of time to respond
21 was filed by plaintiffs. No substantive opposition to either of
22 the Defendants' motions was filed. Plaintiffs did not submit a
23 proposed form of order with their application and, since their
24 motion was not noticed for hearing, there was nothing the
25 plaintiffs did which even brought the ex parte application to the
26 ///

1 Court's attention. It was purely fortuitous that the Court's
2 staff found it on a review of the electronic case file.

3 As it happened, defendants were served with the ex parte
4 application, and filed a detailed opposition. The gist of the
5 opposition was that no discovery was warranted; many of the
6 documents supporting the moving papers were documents plaintiffs
7 already had and were pleadings and transcripts from earlier
8 proceedings; and the application was untimely.

9 While the plaintiffs provided the Court with no procedure to
10 act upon, whether by a proposed form of order or noticed hearing,
11 the Court reviewed the application and concluded no sufficient
12 grounds were provided in support, particularly in light of the
13 fact plaintiffs had been afforded opportunities over several
14 years to review all the documents in the trustee's possession,
15 including under a detailed written order of production, which
16 plaintiffs chose not to do. No explanation was given for why
17 90 days was necessary, as distinct from 30, or 45, and no showing
18 was made as to the type of documents or testimony plaintiffs
19 claimed they would need to oppose the specific motions at issue.
20 After consideration of plaintiffs' application, the Court
21 instructed its staff to notify counsel for both sides that the
22 application was denied.

23 Then, on October 13, 2006 plaintiffs filed a pleading
24 captioned: "Plaintiffs' Reply to Defendants' Opposition and/or
25 Motion for Reconsideration Re Ex Parte Application for 90 Day
26 Continuance of Hearing on and Extension of Time to Respond to

1 Defendants' Anti-SLAPP Motion to Strike Pendent State Law Claims
2 in Plaintiffs' Complaint and Defendant's [sic] Motion to Dismiss,
3 Or, In the Alternative, Motion for Summary Judgment". As with
4 the Ex Parte Application, plaintiffs provided no vehicle for
5 bringing the matter to the Court's attention. Notwithstanding
6 that plaintiffs knew the Ex Parte was denied (as evidenced in
7 part by their alternative "Motion for Reconsideration" language),
8 they asserted: "The Court has not yet issued a formal ruling on
9 Plaintiff's ex parte application." Plaintiff's Reply at p.2,
10 1.7.

11 Plaintiffs' first argument is that their counsel did not
12 recognize that the moving papers had been personally served,
13 thereby triggering the 14 day period to oppose immediately,
14 rather than allowing an additional 3 days for service by mail.
15 Counsel asserts he relied on the court's docket, which shows an
16 expected due date for opposition based on the date of filing and
17 assumes service is by mail. That expected date is entered on the
18 docket as a tickler date, and is entered as part of the entry
19 showing the filing of the motion itself, not any proof of
20 service. Counsel acknowledged in the papers that the Ex Parte
21 Application was late, but he asked that it be excused because he
22 did not realize the papers were personally served. Instead, he
23 relied on a court tickler date rather than looking at the rule.

24 As already noted, plaintiffs invoked no mechanism to bring
25 this "Reply . . . And/Or Motion for Reconsideration" to the
26 attention of the Court. However, on the same date, October 13,

1 plaintiffs filed a motion to disqualify this Court from hearing
2 further proceedings, and to vacate the hearing date on the
3 defendants' pending motions. Upon review of that motion, the
4 Court learned that plaintiffs had filed suit against this judge
5 in the United States District Court more than two weeks before
6 (September 25), although no service of process had been made.

7 After learning of the motion to disqualify, the Court
8 entered an order continuing the hearing on the defendants'
9 motions to the same date as the hearing on the disqualification
10 motion, which was to be decided first, "and depending on
11 resolution of the disqualification motion, the defendants'
12 motions may be rescheduled for hearing before this or another
13 court." The Order continuing the hearings expressly recited:

14 This continuance of the hearing on the
15 defendants' motions is not an enlargement of
16 time for any party to file any further
17 pleadings on the motions, whether in support
18 or opposition. Any filing deadlines which
19 may have passed are unaffected by this Order.

20 This Court heard argument on the disqualification motion on
21 November 13, and took the matter under submission. Defendants'
22 motions would be reset as appropriate depending on the outcome of
23 the disqualification motion. On the same date, counsel for
24 plaintiff filed a supplemental declaration in support of his
25 reconsideration motion. The focus was on his understanding of
26 the due date for filing an opposition to the defendants' motions
and that any failure to timely file was the product of excusable
neglect. Again, there was no motion noticed for hearing or

1 resolution, but rather just the filing of documents into the
2 court's electronic case file, with nothing to invite the Court's
3 or staff's attention to them. Nevertheless, defendants filed
4 opposition.

5 By Order entered November 20, this Court decided to ask
6 another judge to hear and decide the disqualification motion
7 because it felt too close to the situation. The Clerk was
8 directed to conduct a random draw. Whoever was assigned to hear
9 the motion:

10 [S]hall be free to schedule a new argument,
11 ask for supplemental briefing, and proceed
12 in any manner it deems appropriate. If that
13 court determines this Court is disqualified,
14 then the adversary proceeding shall be
15 reassigned in accordance with the established
16 procedure in this district. If it is
17 determined that this Court is not
18 disqualified, then upon receipt of any such
19 ruling this Court will reschedule the hearing
20 on defendants' motions to dismiss and to
21 strike. In the meantime, absent further
22 order of this or another court with
23 jurisdiction, all prior orders and filing
24 deadlines remain in force and effect.

18 Judge Meyers of this Court was assigned to hear the
19 disqualification motion, and did so on December 14. By written
20 opinion filed and entered on December 21, 2006, the motion to
21 disqualify this Court was denied. Accordingly, on January 4,
22 2007, this Court reset the hearing on defendants' motions for
23 January 26.

24 As noted at the outset, in preparing for the January 26
25 hearing, the Court uncovered "Plaintiffs' Reply . . . And/Or
26

1 Motion for Reconsideration" Although plaintiffs have
2 taken no steps to bring that matter before the Court for
3 resolution, including presenting a proposed form of order as
4 required under BLR 9013-6(a), the Court formally addresses it
5 now.

6 In this Court's view, this adversary proceeding is different
7 from most others because here plaintiffs complain of events which
8 have occurred in the context of Mr. Keenan's bankruptcy over
9 approximately ten years, during which time many of the Court's
10 decisions were appealed. The Court recognizes that many of those
11 appeals were abandoned or dismissed, but the conduct was always
12 reviewable. Mr. Keenan has been a party to virtually all the
13 proceedings in the intervening years, received copies of
14 pleadings and orders, appeared for years in his own behalf or on
15 behalf of himself and Mrs. Keenan, and made arguments to the
16 Court. The trustee tried to get Mr. Keenan to review the
17 documents in the trustee's possession. The trustee tried to set
18 up a process for review, then closure of the case, which
19 Mr. Keenan opposed and the Court initially denied in 2001. In
20 2003 the trustee made a new motion to aid in closure of the case.
21 Debtor opposed, but the Court granted a version of the motion
22 that required the trustee to make available all documents in his
23 actual or constructive possession for examination, and debtor was
24 given a year to complete his review.

25 Plaintiffs have made no showing of what discovery would be
26 relevant to opposing the defendants' motions, much less why it

1 was not available to them under the Closure Order or through the
2 court file. The declarations filed in support of plaintiffs'
3 Application and Reply do not even attempt to address the showing
4 necessary under Rule 7056(f), Fed.R.Bankr.P.

5 Plaintiffs' opposition to defendants' motions was due to be
6 filed on or before September 25, 2006, because the moving papers
7 were personally served. As the Court writes this Order, it is
8 January 18, 2007 - one week short of four months since
9 plaintiffs' opposition was due to be filed. No document
10 purporting to address any facet of the defendants' motions has
11 been filed by plaintiffs, nor has leave been properly sought to
12 do so. The Court recognizes that had plaintiffs late-filed an
13 opposition, defendants would likely move to strike it. To date,
14 though, plaintiffs have given not even a hint of substantive
15 opposition to the merits of the defendants' motions.

16 The Court is mindful that defendants have asserted that even
17 plaintiffs' Application to Continue and Extend, filed September
18 28, was late-filed. Plaintiffs appear to concede that argument,
19 but urge the Court to find excusable neglect. Plaintiffs did not
20 mention Kyle v. Campbell Soup Co., 28 F.3d 928 (9th Cir. 1994),
21 which appears to reject plaintiffs' argument. The Court notes
22 Kyle was decided before the Supreme Court's decision in Pioneer,
23 although Kyle still appears to be applicable. Although it could,
24 the Court does not base its decision on the timeliness of
25 plaintiffs' Application of September 28.

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1 Although plaintiffs have not taken the requisite steps to
2 put before the Court the issue of a continuance and extension,
3 the Court previously communicated to both sides its denial of the
4 September 28 Application (the Court presumes plaintiffs' counsel
5 understood that, at least to the point of including "Motion for
6 Reconsideration" in the caption of "Plaintiffs' Reply"), and by
7 this Order advises that plaintiffs' Motion for Reconsideration is
8 also denied, for all the foregoing reasons, including the failure
9 to make even a minimal showing of why, in the context of this
10 case and the underlying bankruptcy, and considered in the fact of
11 the specific grounds asserted by the defendants in their moving
12 papers, plaintiffs are, and have been, unable to respond to the
13 motions.

14 IT IS SO ORDERED.

15 DATED: JAN 19 2007

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19 PETER W. BOWIE, Chief Judge
20 United States Bankruptcy Court
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