

Eighth Circuit Bankruptcy Case Summaries

11/5/2010

The National Benevolent Association of the Christian Church (Disciples of Christ), et. al v. Weil, Gotshal & Manges, LLP, No. 09-6084, 09-6085 (8th Cir. BAP 10/8/10).

The Eighth Circuit Bankruptcy Appellate Panel comprised of Judges Kressel, Venters, and Saladino reversed and remanded back to the bankruptcy court for remand to the state court an adversary proceeding that had been dismissed for lack of subject matter jurisdiction. The debtor, a non-profit corporation primarily located in Missouri, filed an adversary seeking damages for alleged legal malpractice in connection with the law firm's pre-petition and post-petition services in its Chapter 11 case in Texas. The Fifth Circuit Court of Appeals affirmed the Texas bankruptcy court's decision and dismissed the case for lack of subject matter jurisdiction due to the debtor's lack of standing in federal court resulting from the absence of an unequivocal retention of pre-petition causes of action in the confirmed Chapter 11 plan. The debtor, joined by the State of Missouri, commenced an action in Missouri state court alleging the same causes of action against the law firm as the Texas adversary. The Missouri case was subsequently removed to Missouri bankruptcy court where it was dismissed because the state's claims were derivative of the debtor's claims that had already been ruled upon by the Fifth Circuit. The BAP proceeded to affirm the Missouri bankruptcy court's decision that it lacked subject matter jurisdiction. The court evaluated 28 US § 1447(c) which requires remand if the district court lacks subject matter jurisdiction. In applying the plain language of the statute, the court found that the entire Missouri adversary should have been remanded to the state court in lieu of the dismissal. The court also acknowledged that potential judicial economy may have been better served by the dismissal but that the applicable statute required remand of the entire matter.

Fokkena v. Rodney Goodwin (*In re Goodwin*), No. 10-6027 (8th Cir. BAP 10/13/10).

The Bankruptcy Appellate Panel comprised of Judges Kressel, Schermer, and Nail reversed the bankruptcy court's order allowing an extension of time to file his notice of appeal of an adversary proceeding and dismissed the debtor's pending appeal. At issue were two adversary actions seeking dischargeability determinations by a creditor and the US Trustee. The bankruptcy court issued an oral ruling in favor of the creditor and the US Trustee in the respective adversaries. Debtor filed untimely motions in each adversary proceeding seeking an extension of the time to file an appeal due to a need to obtain a transcript. The bankruptcy court granted the debtor's motion over the creditor's objection. The BAP articulated that Rule 8002(c) requires a request to extend the time to be filed within the appeal period absent a showing of excusable neglect. The court then applied the standard for excusable neglect as articulated by the Supreme Court in *Pioneer Investment Services* in the context of 9006. The BAP found that the debtor failed to meet its burden to establish excusable neglect and that there was an absence of findings by the bankruptcy court on the required issue. The court also held that the mere issuance of an oral opinion and a need for a transcript is not sufficient to establish excusable neglect as it was not required for purposes of filing the notice or a timely motion to extend the time. The BAP also dismissed the debtor's appeal of the creditor's ruling as untimely which also functioned to make the issue of the appeal of the US Trustee's ruling irrelevant to the creditor.

Lovald v. Tennyson (*In re Wolk*), No. 10-6050 (8th Cir. BAP 10/14/10).

Judge Kressel, Judge Federman, and Judge Saladino sat on the Eighth Circuit Bankruptcy Appellate Panel which concluded that reversed the bankruptcy court's decision denying a motion to sell assets pursuant to 11 USC 363. The Trustee appealed the bankruptcy court's denial of his motion to sell a residential property and the co-owner objected on the basis that the estate held no interest as she

contributed the payments on the property to rebut the presumption of 50% ownership. The BAP held that the trustee's status as a bona fide purchaser under section 544 must be considered in the context of a motion under section 363(h). The BAP explained that the trustee's failure to assert the argument at the lower level was not detrimental as he was not required to take some affirmative action to acquire bona fide purchaser status that is automatically conferred by section 544. The court further held that the trustee is not always bound to just the rights of the debtor by standing in his shoes as such rights may actually be greater as a bona fide purchaser under section 544.

Marino v. Seeley (*In re Marino*), No. 10-6022 (8th Cir. BAP 10/25/10).

The Eighth Circuit Bankruptcy Appellate Panel comprised of Judges Nail, Venters, and Saladino affirmed the bankruptcy court's decision dismissing a stay violation adversary with prejudice. Debtor's adversary sought damages arising from a purported violation of the automatic stay where the opponent obtained post-petition an ex parte protection order under the Minnesota Domestic Abuse Act. The BAP held that the commencement or continuation of a proceeding regarding domestic violence is not subject to the automatic stay. The court held that the plain meaning of "domestic violence" encompassed the statutory definition of domestic abuse set forth in the Minnesota Domestic Abuse Act. No evaluation of the remaining elements of the claim under section 362(k) was performed because the court already held that the action for a protection order was not subject to the stay. But, the court noted that the cause of action still failed as debtor did not establish damages stemming from the protection order.

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**United States Bankruptcy Appellate Panel
FOR THE EIGHTH CIRCUIT**

Nos. 09-6084, 09-6085

The National Benevolent Association	*
of the Christian Church (Disciples	*
of Christ),	*
	*
Plaintiff – Appellant	*
	*
State of Missouri, ex rel Chris Koster,	*
Attorney General of Missouri,	*
	*
Plaintiff-Appellant	*
	*
v.	*
	*
Weil, Gotshal & Manges, LLP,	*
	*
Defendant – Appellee	*
	*

Submitted: September 15, 2010
Filed: October 8, 2010

Before KRESSEL, Chief Judge, VENTERS and SALADINO, Bankruptcy Judges.

VENTERS, Bankruptcy Judge.

These appeals seek review of the bankruptcy court’s order dismissing the state-court petition brought by the Plaintiffs, the National Benevolent Association of the

Christian Church (Disciples of Christ) (“NBA”) and the State of Missouri, and removed to the bankruptcy court by the Defendant, Weil, Gotshal & Manges, LLP. NBA’s and the State’s primary contention is that the bankruptcy court should have remanded the matter to state court rather than dismissing their claims.

For the reasons stated below, we reverse and remand the matter to the bankruptcy court for remand to the state court.

I. STANDARD OF REVIEW

The bankruptcy court’s dismissal of the complaint for failure to state a claim is subject to *de novo* review.¹

II. BACKGROUND

The bankruptcy court’s factual findings are not in controversy; therefore, the Court adopts them here with editorial revisions only.

NBA is a Missouri nonprofit corporation with its principal place of business in Missouri. On February 16, 2004, NBA filed a petition for relief under Chapter 11 of Bankruptcy Code in the United States Bankruptcy Court for the Western District of Texas, San Antonio Division. The Texas bankruptcy court confirmed NBA’s First Amended Joint Plan of Reorganization on March 2, 2005 and it became effective shortly thereafter. All of NBA’s creditors were paid 100% of their claims pursuant to the confirmed plan.

After confirmation of NBA’s plan, NBA filed an adversary proceeding against the Defendant, Weil, Gotshal & Manges, LLC, (“Weil”) in the Texas bankruptcy court. Weil had assisted NBA in its pre-petition attempts to restructure its bond

¹ *Carton v. General Motor Acceptance Corp.*, 611 F.3d 451, 454 (8th Cir. 2010).

indebtedness and continued to represent the NBA (along with other counsel) in the bankruptcy case. The adversary sought damages for Weil's alleged legal malpractice, negligence, and breach of fiduciary duty in connection with its pre-petition and post-petition services. The portion of the Texas bankruptcy court action relating to Weil's pre-petition conduct was, for all relevant purposes, identical to the action subsequently filed in the Missouri state court and removed to the bankruptcy court.

Weil moved the Texas bankruptcy court for summary judgment on *res judicata* and estoppel grounds. The Texas bankruptcy court granted Weil's motion and the District Court for the Western District of Texas affirmed. NBA then appealed the portion of the judgment pertaining to pre-petition malpractice claims to the Fifth Circuit Court of Appeals.

On Weil's motion, the Court of Appeals dismissed the case for lack of subject matter jurisdiction on June 11, 2009. The Court of Appeals held that because NBA had not unequivocally provided in its confirmed Chapter 11 plan for the retention of ownership of the asserted pre-petition causes of action, NBA lacked standing to pursue its claims in federal court.² Accordingly, the Court of Appeals vacated the District Court order and dismissed the case without prejudice for lack of subject matter jurisdiction.

On August 10, 2009, NBA, joined by the State of Missouri, filed a petition in the Circuit Court of St. Louis County, Missouri alleging, in substance, the same cause

² In its opinion, the Court of Appeals stated that "NBA, as the reorganized debtor, has no standing to pursue these claims in federal court." *In re National Benevolent Association of the Christian Church (Disciples of Christ)*, 333 Fed.App'x. 822, 829 (5th Cir. 2009). We share the bankruptcy court's suspicion that the Fifth Circuit's reference only to "federal" court was unintentional, and that NBA lacks standing to pursue its claims in state court as well. But we do not need to make that determination to support our decision here.

of action that NBA had brought against Weil in the Texas bankruptcy court in connection with Weil's pre-petition representation of NBA.³

Weil removed the Plaintiffs' action from the Circuit Court of St. Louis County to the Bankruptcy Court for the Eastern District of Missouri on October 2, 2009, and filed a motion to dismiss and a motion to transfer venue on October 21, 2009. Shortly thereafter, NBA and the State moved to remand the case to the state court or for the bankruptcy court to abstain from hearing the case.

On December 18, 2009, the bankruptcy court entered an order dismissing the case. The bankruptcy court found, *inter alia*, that the State's claims against Weil were wholly derivative of NBA's claims against Weil, and that the Fifth Circuit had already decided that NBA's failure to preserve in its Plan of Reorganization its claims against Weil precluded a federal court from exercising jurisdiction over those claims. The bankruptcy court further concluded that the Fifth Circuit's decision precluded NBA and the State from pursuing their claims in any court, not just federal court. Accordingly, it dismissed their claims instead of remanding them to state court.

III. DISCUSSION

A. NBA is bound by the Fifth Circuit Court of Appeals's ruling that NBA lacks standing to pursue its claims against Weil in federal court.

The bankruptcy court's determination that NBA lacks standing to bring its claims against Weil in federal court is supported by an application of the doctrines of *res judicata* and collateral estoppel to the Fifth Circuit Court of Appeals's decision dismissing NBA's claims based on a lack of subject matter jurisdiction.

³ The Attorney General for the State of Missouri joined the action in his capacity as the common law guardian of charitable trusts of which the public is or may be the beneficiary.

In the Fifth Circuit, *res judicata* bars the re-litigation of a claim where: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.⁴ Collateral estoppel bars the re-litigation of an issue where: (1) the issue at stake is identical to the one involved in the prior action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action.⁵

None of NBA's or Weil's arguments undermines any of these elements, and we find that all of the elements necessary for the application of both of these doctrines to NBA's claims against Weil are indeed present here. Therefore, we find that the bankruptcy court properly concluded that it lacked subject matter jurisdiction over NBA's claims against Weil.

B. In the absence of subject matter jurisdiction over NBA's claims, the bankruptcy court was required to remand the entire case to state court.

28 U.S.C. § 1447(c) provides in pertinent part: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."⁶ As emphasized, this language is mandatory and leaves no discretion for a court to dismiss or otherwise exercise jurisdiction over the case.⁷

⁴ See *Frank C. Minvielle LLC v. Atlantic Refining Co.*, 337 Fed.App'x. 429 (5th Cir. 2009).

⁵ See *Ballenger v. Mobil Oil Corp.*, 138 Fed.App'x. 615, 619 (5th Cir. 2005).

⁶ 28 U.S.C. § 1447(c) (emphasis added).

⁷ See 20 Am.Jur.2d Courts § 65 (1995) ("A court devoid of jurisdiction over the case cannot make a decision in favor of either party, cannot dismiss the

Weil contends that there is a “futility” exception to § 1447(c), but we find no room to depart from the statute’s unambiguous, mandatory directive to remand the case, especially in the absence of Eighth Circuit precedent recognizing such an exception.

Moreover, the plain language of § 1447(c) required remand of the entire case, not just the claims over which federal jurisdiction was lacking, *i.e.*, NBA’s claims against Weil.⁸ On this point, a comparison to 28 U.S.C. § 1441(c) is instructive. Section 1441(c) provides that when “a separate and independent claim within the jurisdiction conferred by section 1331” is joined with “otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all *matters* in which state law predominates.”⁹ In contrast, § 1447(c) specifies that “the *case* shall be remanded” when the court lacks subject matter jurisdiction.¹⁰ From this juxtaposition, we find § 1447(c)’s reference to remand of the “case” indicative of Congress’s intent to provide for partial remands in § 1441(c), but only total remands in § 1447(c).¹¹

complaint for failure to state a claim, and cannot render a summary judgment, as such a decision would be on the merits of the action.”).

⁸ See *RMP Consulting Group, Inc. v. Datronic Rental Corp.*, 189 F.3d 478, *4 (10th Cir. 1999) (unpublished). See also, *Wilson v. New York Terminal Warehouse Co., Inc.*, 398 F.Supp. 1379, 1383 (M.D. Ala. 1975) (“Unlike § 1441(c), § 1447(c) does not leave a court with discretion to remand only part of an action.”).

⁹ 28 U.S.C. § 1441(c) (emphasis added).

¹⁰ 28 U.S.C. § 1447(c) (emphasis added).

¹¹ See *RMP Consulting Group, Inc.*, 189 F.3d at *4.

CONCLUSION

Despite the potential judicial economy to be served by dismissing the case, once the bankruptcy court determined that NBA lacked standing to pursue its claims against Weil in federal court, *i.e.*, that federal subject matter jurisdiction was lacking over NBA's claims, it was required by 28 U.S.C. § 1447(c) to remand the entire case to state court.

Therefore, for the reasons stated above, we reverse the bankruptcy court's dismissal of NBA's and the State's petition and remand the case to the bankruptcy court with directions to remand the entire case to the Circuit Court of St. Louis County.

No. 10-6049

In re:	*	
	*	
Rodney Nathan Goodwin,	*	
doing business as Goodwin Family Farms,	*	
	*	
Debtor.	*	
	*	
St. Ansgar Mills, Inc.,	*	Appeal from the
	*	United States
Plaintiff - Appellee,	*	Bankruptcy Court for the
	*	Southern District of Iowa
v.	*	
	*	
Rodney Nathan Goodwin,	*	
doing business as Goodwin Family Farms,	*	
	*	
Defendant - Appellant.	*	

Submitted: September 23, 2010
Filed: October 13, 2010

Before KRESSEL, Chief Judge, SCHERMER and NAIL, Bankruptcy Judges
SCHERMER, Bankruptcy Judge

This matter concerns three appeals related to two adversary proceedings tried in the bankruptcy court. Two of the appeals (Appeal Nos. 10-6027 and 10-6049) were filed by Rodney Nathan Goodwin (the “Debtor”). These two appeals concern the merits of the adversary proceedings filed by the United States Trustee (the “U.S. Trustee”) and a creditor, St. Ansgar Mills, Inc. (the “Creditor”), against the Debtor.

After a combined trial on the complaints in the adversary proceedings, the bankruptcy court denied the Debtor's discharge. The bankruptcy court also determined that the specific debt owed to the Creditor would be non-dischargeable. The Creditor filed the third appeal (Appeal No. 10-6028), seeking reversal of an order of the bankruptcy court allowing the Debtor to extend the time to appeal the adverse bankruptcy court's order in the Creditor's adversary proceeding.

For the reasons set forth below, we reverse the bankruptcy court's order allowing the Debtor an extension of time to file his notice of appeal of the bankruptcy court's decision in the Creditor's adversary proceeding. As a result of our ruling, the Debtor's appeal was untimely, and his appeal of the bankruptcy court's decision denying his discharge is dismissed. Consequently, we also dismiss the Debtor's appeal of the bankruptcy court's decision in the U.S. Trustee's adversary proceeding since the denial of the Debtor's discharge by the Creditor leaves the Debtor no effective relief.

ISSUE

The issues on appeal are: (1) whether the bankruptcy court erred when it entered an order granting the Debtor's request for an extension of the time to file his appeal of the bankruptcy court's decision in the Creditor's adversary proceeding; and (2) whether the Debtor's appeal of the bankruptcy court's decision in the U.S. Trustee's adversary proceeding should be dismissed. We conclude that the bankruptcy court improperly allowed the Debtor to extend the time to appeal its decision in the Creditor's adversary proceeding and, accordingly, the Debtor's appeals of the bankruptcy court's decisions in the Creditor's and the U.S. Trustee's adversary proceedings should be dismissed.

BACKGROUND

The Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Thereafter, the Creditor commenced an adversary proceeding in the Debtor's bankruptcy case seeking a denial of the Debtor's discharge and the determination of the dischargeability of the debt owed by the Debtor to the Creditor. The U.S. Trustee commenced a separate adversary proceeding seeking denial of the Debtor's discharge. On April 23, 2010, the bankruptcy court held a consolidated trial on the two adversary proceedings. The bankruptcy judge read findings of facts and conclusions of law on the record in a bench ruling denying the Debtor's discharge and determining that the debt owed from the Debtor to the Creditor was non-dischargeable. The bench ruling was followed by a written orders entered the same day in each adversary proceeding denying the Debtor's discharge and providing that the court record would constitute the bankruptcy court's findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052(a)(1).

On May 10, 2010, after the applicable appeal period had expired, the Debtor filed identical motions in each adversary proceeding (the "Motion") asking the court to extend the time to file his notice of appeal. In the Motion, the Debtor asked for an extension of twenty days to file his notice of appeal. As the basis for his request, the Debtor asserted that because the bankruptcy court's ruling was oral, he needed a trial transcript to determine whether an appeal would be appropriate. He also explained that he wanted to review the bankruptcy court's "written decision with potential new appellate counsel." According to the Debtor's Motion, he requested a copy of the transcript on April 29, 2010. The Motion did not mention that the appeal period had expired before the Debtor requested an extension of it. The Creditor objected to the Debtor's request to extend the time to appeal. The U.S. Trustee did not object.

On May 11, 2010, the bankruptcy court held a hearing on the Debtor's request for an extension of time to appeal. The Debtor's counsel acknowledged that he was

inexperienced in adversary proceedings and that he had been mistaken about the law regarding the deadline to appeal the bankruptcy court's decision. He explained that he advised his client that he had 30 days to appeal since that is the "standard for federal civil cases." The Creditor argued that the Debtor should not be allowed an extension of time to appeal because he had failed to request the extension of time before the original deadline had passed. In addition, the Creditor explained that the grant of an extension of time to appeal after expiration of the original appeal period would require a showing of excusable neglect. According the Creditor, the Debtor had not alleged excusable neglect and the facts did not demonstrate that it existed.

The bankruptcy court determined that the Debtor should be granted an extension of time to file the notices of appeal until May 21, 2010 because the bankruptcy court's decision had been oral. Also on May 11, 2010, bankruptcy court entered docket text orders in each adversary proceeding extending the deadline for the Debtor to appeal. The Debtor's appeals of the bankruptcy court's decisions on the merits of the two adversary proceedings followed on May 21, 2010. The Creditor filed a timely notice of appeal of the bankruptcy court's May 11, 2010 order allowing the Debtor an extension of time to appeal the bankruptcy court's denial of its discharge and the dischargeability of the debt to the Creditor.

STANDARD OF REVIEW

We review the bankruptcy court's decision to allow a party additional time for a filing for an abuse of discretion. *Chorosevic v. Metlife Choices*, 600 F.3d 934, 946 (8th Cir. 2010), *Dial Nat'l Bank v. Van Houweling (In re Van Houweling)*, 258 B.R. 173, 175 (B.A.P. 8th Cir. 2001). An abuse of discretion occurs where "the bankruptcy court relies upon erroneous legal conclusions or clearly erroneous factual findings." *Van Houweling*, 258 B.R. at 175 (citation omitted).

DISCUSSION

Appeals Concerning Creditor's Adversary Proceeding

The Creditor's appeal asserts that the bankruptcy court improperly extended the deadline for the Debtor to appeal its decision in the Creditor's adversary proceeding. Federal Rule of Bankruptcy Procedure 8002 governs the time for filing a notice of appeal. Fed. R. Bankr. P. 8002. Subsection (a) of Rule 8002 provides that "[t]he notice of appeal shall be filed with the clerk within 14 days of the date of entry of the judgment, order, or decree appealed from." Fed. R. Bankr. P. 8002(a). Subsection (c) of Rule 8002 explains the procedure for obtaining an extension of the time for appeal. Fed. R. Bankr. P. 8002(c). It provides, in pertinent part, that the request must be made in writing "filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 21 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of *excusable neglect*." Fed. R. Bankr. P. 8002(c)(emphasis added).

The parties agree that the Debtor did not request an extension of the time to file a notice of appeal until after the original appeal period had expired. Therefore, we address whether the bankruptcy court abused its discretion by granting the Debtor an extension to file his notice of appeal.¹

¹The Creditor asked the bankruptcy court to summarily deny the Debtor's request for extension of time without examining whether excusable neglect existed because the Debtor did not file his motion until after the original appeal period expired and he did not cite to the excusable neglect standard. It also argued on appeal that Rule 8002(c)'s excusable neglect standard "is not available or applicable to the Debtor." We do not think that the bankruptcy court acted improperly by considering whether the Debtor could obtain an extension of the deadline to appeal.

The Supreme Court set forth the standard for determining whether excusable neglect exists for the purposes of Fed. R. Bankr. P. 9006(b)(1). *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993). The Supreme Court's standard has been applied to determinations of excusable neglect under rules other than Rule 9006(b)(1), such as decisions about extending the time to file a notice of appeal. See *Van Houweling*, 258 B.R. at 175-76 (collecting cases). The determination regarding whether failure to comply with a deadline is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer*, 507 U.S. at 395. The factors considered "include . . . the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Gibbons v. U.S.*, 317 F.3d 852, 854 (8th Cir. 2003)(quoting *Pioneer*, 507 U.S. at 395). "In cases where 'the judicial disfavor for default dispositions is not implicated,' courts may focus primarily on the reason for the movant's delay. *Chorosevic*, 600 F.3d at 947 (quoting *Gibbons*, 317 F.3d 852).

The Debtor did not cite to the excusable neglect standard or offer any evidence to show excusable neglect and the bankruptcy court made no findings to support its extension of the appeal deadline. See *Hartford Casualty Ins. Co. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 214 B.R. 197, 200 (B.A.P. 8th Cir. 1997))(movant has burden to demonstrate excusable neglect).

With respect to the primary focus of an excusable neglect determination, the reasons given by the Debtor for his delay, the Debtor simply did not provide support for a determination of excusable neglect. The only reasons given to the bankruptcy court for the failure to file a timely notice of appeal were that the Debtor wanted a copy of the transcript or "written decision" to give to potential appellate counsel and to review himself before deciding whether to appeal, and that the Debtor's counsel was mistaken about the law regarding the applicable appeal period.

The Debtor's argument that he was waiting for a copy of the transcript is of no consequence. He did not need to wait until he had a copy of the transcript before he filed a motion to extend the time to appeal. Rather, he could have filed his motion to extend time before the appeal period had expired. Finally, any argument by the Debtor that he was waiting for a written decision by the court is similarly unpersuasive.

“Although inadvertance, ignorance of the rules, or mistakes concerning rules do not usually constitute ‘excusable’ neglect, it is clear that ‘excusable neglect’ . . . is a somewhat ‘elastic concept’ and is not limited strictly to omissions caused by circumstances beyond the control of the movant.” *Pioneer*, 507 U.S. at 392. The Debtor's reliance on his attorney's application of the incorrect law regarding the applicable appeal period did not provided a basis for a finding of excusable neglect. *See Ceridian Corp.*, 212 F.3d at 404 (mistakes of law do not constitute excusable neglect); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463-464 (8th Cir. 2000)(citation omitted)(counsel's misapplication of clear procedural rule was not excusable neglect), *cert. denied*, 531 U.S. 929 (2000); *Food Barn*, 214 B.R. at 200-201 (counsel's mistake in calculating time for appeal under non-bankruptcy rules was not excusable neglect); *Van Houweling*, 258 B.R. at 176 n.4 (in dicta)(even if misapplication of inapplicable rule could be accredited with late appeal, party still would not have established excusable neglect). Rule 8002(a) clearly provides that the deadline for filing a notice of appeal runs from “the entry of the judgment, order, or decree” being appealed. Fed. R. Bankr. P. 8002(a). It makes no specific reference to or exception for the time required to obtain a transcript of a court's oral findings of fact and conclusions of law. Even if the Debtor's counsel did not have prior experience with adversary proceedings or bankruptcy appeals, he certainly could have calculated the proper deadline to appeal.

Neither the Debtor nor the bankruptcy court specifically addressed the remaining three *Pioneer* factors, but we gather the following from the record: (1) it

seems that the length of the Debtor's delay was minimal and would likely have little impact on the proceedings; (2) the Debtor appears to have acted in good faith; and (3) the prejudice to the Creditor is uncertain since the Debtor did not address the Creditor's argument that it would be prejudiced by the delay because it could not move forward with its proceedings against the Debtor in state court until this matter is resolved. The Debtor did not provide any evidence to prove excusable neglect and the bankruptcy court abused its discretion by extending the Debtor's deadline to file his notices of appeal without making findings.

Appeal of the U.S. Trustee's Adversary Proceeding

Because we reverse the bankruptcy court's order extending the time for the Debtor to appeal the ruling in favor of the Creditor, the Debtor's appeal is dismissed as untimely. This leaves us with the Debtor's appeal of the bankruptcy court's decision in favor of the U.S. Trustee, denying the Debtor's discharge. Prosecution of the Debtor's appeal will not achieve the result the Debtor desires. The effect of our decision to dismiss the Debtor's appeal of the Creditor's ruling is that such ruling by the bankruptcy court stands: the Debtor's discharge is denied. The Debtor does not have an effective remedy by appealing the bankruptcy court's ruling in favor of the U.S. Trustee. If the Debtor was successful in his appeal of the U.S. Trustee's ruling, the denial of his discharge in favor of the Creditor still stands.

CONCLUSION

For the foregoing reasons, the bankruptcy court's grant of an extension of time for the Debtor to file a notice of appeal of the decision in the Creditor's adversary proceeding is reversed (Appeal No. 10-6028). The Debtor's appeals of the bankruptcy court's decisions in the U.S. Trustee's and the Creditor's adversary proceedings are dismissed (Appeal Nos. 10-6027 and 10-6049).

The Chapter 7 trustee appeals the June 24, 2010, judgment of the bankruptcy court in favor of the defendant, denying the trustee's request to sell jointly owned real estate free and clear of the defendant co-owner's interest pursuant to 11 U.S.C. § 363(h). For the reasons set forth below, we remand.

Background

The debtor and his wife own a single-family residence in Rapid City, South Dakota. They hold title as tenants in common. When the debtor filed his bankruptcy petition, he and his wife were in the process of dissolving their marriage. The debtor did not claim a homestead exemption in the house. The trustee sought a court order authorizing him to sell the property under § 363(h),¹ arguing that partition was impracticable, a sale of only the estate's interest would realize significantly less than a sale free of the co-owner's interest, and that the benefit to the estate of the sale

¹Section 363 governs the use, sale, or lease of property. Subsection (h) states in relevant part:

(h) [T]he trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if —

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

would outweigh any detriment to the co-owner. The property is not used for energy production, so the fourth element of § 363(h) is not an issue. The third element – benefit to the estate vs. detriment to the co-owner – is the only element in dispute.

At the conclusion of trial, the bankruptcy court made findings of fact and conclusions of law on the record. The court ruled that the trustee had the initial burden of establishing that the proposed sale would create a benefit to the bankruptcy estate. The court further found that under South Dakota law, the record title as tenants in common gives rise to a presumption that each co-owner holds an equal share. *Cudmore v. Cudmore*, 311 N.W.2d 47, 49 (S.D. 1981). The presumption is rebuttable by a showing of unequal contribution. *Id.* The evidence at trial indicated that the co-owner contributed more toward the purchase price of the house than the debtor did, and had made all of the payments on the first mortgage. The court found that the fair market value of the house was \$185,000.00, with equity at the time of trial of approximately \$63,000.00. Since the undisputed evidence showed that all of the equity amount was attributable to the co-owner's financial input, the bankruptcy court determined that all of the equity would accrue to her upon sale. Therefore, the court held that since the trustee stands in the shoes of the debtor, the bankruptcy estate had nothing to gain from a sale of the jointly held property.²

Judgment was entered denying the trustee's request to sell the property free and clear of the co-owner's interest.

²Because the court found that there was no benefit to the estate, it did not complete the balancing test of § 363(h)(3).

The trustee filed this appeal, arguing that 11 U.S.C. § 544(a)³ grants him the rights and powers of a hypothetical judicial lienholder or bona fide purchaser. As such, the trustee asserts that the presumption of equal ownership cannot be rebutted because South Dakota caselaw holds that, as to bona fide purchasers and creditors, co-owners hold in accordance with the recorded title. *See Cudmore*, 311 N.W.2d at 50. Therefore, the trustee asserts, because the co-owner's contribution argument would be inapplicable to the sale of the property to a third party, it should not be imposed against him and he should be permitted to sell the house and distribute half of the proceeds to the co-owner and half to the bankruptcy estate.

³That section states:

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by —

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

In response, the co-owner argues that the bankruptcy court correctly decided the matter, and that the trustee should not be allowed to raise § 544 now when it had not been pleaded in his complaint or raised in the bankruptcy court. The co-owner also argues that § 544 does not offer relief to the trustee because there is no transfer to avoid and the trustee cannot act as a lien creditor of the bankruptcy estate.

Discussion

We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *First Nat'l Bank of Olathe v. Pontow (In re Pontow)*, 111 F.3d 604, 609 (8th Cir. 1997); *Sholdan v. Dietz (In re Sholdan)*, 108 F.3d 886, 888 (8th Cir. 1997); Fed. R. Bankr. P. 8013. We review issues committed to the bankruptcy court's discretion for an abuse of that discretion. *Official Comm. of Unsecured Creditors v. Farmland Indus., Inc. (In re Farmland Indus., Inc.)*, 397 F.3d 647, 651 (8th Cir. 2005) (citing *Jones Truck Lines, Inc. v. Foster's Truck & Equip. Sales, Inc. (In re Jones Truck Lines, Inc.)*, 63 F.3d 685, 686 (8th Cir. 1995)). The bankruptcy court abuses its discretion when it fails to apply the proper legal standard or bases its order on findings of fact that are clearly erroneous. *Farmland Indus., supra* (citing *Stalnaker v. DLC, Ltd.*, 376 F.3d 819, 825 (8th Cir. 2004)). The authorization to sell property under § 363(h) is discretionary with the court. *Probasco v. Eads (In re Probasco)*, 839 F.2d 1352, 1357 (9th Cir. 1988).

The parties seem to be in agreement that long-standing caselaw in South Dakota holds that tenants in common are presumed to hold title in equal shares, although as between them the deed is not conclusive and they may put forth evidence of intent or disproportionate contributions to establish their ownership interests in something other than equal shares. *Cudmore*, 311 N.W.2d at 49. However, the trustee asserts that the presumption of equal ownership cannot be rebutted as to bona fide purchasers and creditors who take in accordance with the recorded title and the presumption of equal ownership. *Id.* at 50 (citing *Stover v. Stover*, 36 A. 921, 922 (Pa. 1897)).

The Bankruptcy Code, at § 704, directs the trustee to collect and reduce to money the property of the estate. One of the tools the trustee may use in performing that duty is 11 U.S.C. § 544(a) which expressly confers on the trustee – as of the commencement of the case and without regard to knowledge – the rights and powers of a bona fide purchaser of real property. This authority underpins the trustee’s ability to use § 363(h) to maximize the estate’s liquidation of assets to be used to pay creditors and must necessarily be part of the analysis. However, in this instance, the trustee’s status under § 544(a) is newly raised on appeal. Ordinarily, we would not consider an issue that is newly raised on appeal since the bankruptcy court did not have the opportunity to address it. However, the trustee’s rights in the property (including his rights and powers under § 544) must necessarily be addressed in connection with any proposed sale in order to determine exactly what can be sold. Further, failing to consider the trustee’s rights under § 544 could leave the erroneous impression that the trustee must take some affirmative action to acquire his status as a bona fide purchaser. To the contrary, the rights and powers of a bona fide purchaser are conferred upon the trustee as a matter of law under the terms of § 544 (a).

The trustee’s position as a bona fide purchaser affects the analysis of a motion under § 363(h). According to *Cudmore*, a bona fide purchaser must be able to rely on the title records regardless of whatever unrecorded arrangements the owners may have made between or among themselves. Otherwise, such a purchaser would bear the untenable burden of conducting a factual inquiry into the respective ownership interests on any jointly owned real estate before completing the transaction. *See Morris v. Kasparek (In re Kasparek)*, 426 B.R. 332, 348 (B.A.P. 10th Cir. 2010) (“We believe that a duty to inquire about the possibility of an implied trust or other unrecorded agreements when title is held by joint tenants undermines the purpose of

the Kansas recording statutes, imposes an undue burden on purchasers, and impairs the reliability of record title.”).⁴

The bankruptcy court’s ruling relied upon the proposition that the trustee “stands in the shoes of the debtor.” We review that conclusion of law de novo. While that statement is often accurate under the Bankruptcy Code, under § 544(a), the trustee’s rights are actually greater than those of the debtor. However, the trustee’s status as a hypothetical bona fide purchaser was not raised at the trial level, so the bankruptcy court did not have occasion to consider it and to complete the § 363(h) analysis with regard to the estate’s benefit vis-à-vis the co-owner’s detriment.⁵ Therefore, the matter will be remanded to permit the bankruptcy court to consider the impact under South Dakota law of the trustee’s rights and powers under § 544(a) and to complete the analysis under § 363(h).

Conclusion

Because the bankruptcy court did not consider the effect of § 544(a), we remand the matter for further consideration consistent with this opinion.

⁴*Kasparek* is factually similar to the case at hand and involves a trustee’s motion to sell jointly owned property under § 363(h) and a discussion of the trustee’s rights and powers under § 544(a).

⁵While there is nothing in the record on appeal to indicate that this issue was raised at trial, we note that we were only provided a partial transcript of the proceedings in the bankruptcy court.

**United States Bankruptcy Appellate Panel
FOR THE EIGHTH CIRCUIT**

No. 10-6022

In re:	*	
	*	
Brett William Marino,	*	
	*	
Debtor.	*	
	*	
Brett William Marino,	*	Appeal from the United States
	*	Bankruptcy Court for the
Plaintiff-Appellant,	*	District of Minnesota
	*	
v.	*	
	*	
Joe Seeley,	*	
	*	
Defendant-Appellee.	*	

Submitted: September 23, 2010
Filed: October 25, 2010

Before VENTERS, SALADINO, and NAIL, Bankruptcy Judges.

NAIL, Bankruptcy Judge.

Brett William Marino appeals the April 6, 2010 judgment of the bankruptcy court¹ dismissing his complaint against Joe Seeley. We affirm.

¹ The Honorable Nancy C. Dreher, Chief Judge, United States Bankruptcy Court for the District of Minnesota.

BACKGROUND

Marino rented a room in Seeley's home. Twyla Sederstrom, Seeley's significant other, also resided in the home.

On April 13, 2009, Marino filed a petition for relief under chapter 7 of the bankruptcy code. Marino claimed later that same day, he told Sederstrom he had filed bankruptcy. Sederstrom's recollection of their conversation differed. At some point, Seeley became involved in the conversation, threats were exchanged, and Marino called the police.² After the police arrived, Marino left the premises.

On April 14, 2009, Seeley sought and obtained an *ex parte* order for protection under the Minnesota Domestic Abuse Act.³ The order for protection prohibited Marino from committing acts of domestic abuse against Seeley, having any contact with Seeley, or entering Seeley's home.

On April 15, 2009, the bankruptcy noticing center mailed notice of the filing of Marino's bankruptcy to Marino's creditors, including Seeley. Seeley did not deny having received this notice sometime thereafter.

In his adversary complaint, Marino alleged Seeley violated the automatic stay when he sought the order for protection. The matter was tried, and the bankruptcy court entered a written decision in which it concluded Marino had not met his burden of proof. Judgment was entered dismissing with prejudice Marino's complaint against Seeley, and Marino timely appealed.

² It is not clear from the record whether there were two (or more) separate conversations or a single extended conversation.

³ MINN. STAT. § 518B.01.

STANDARD OF REVIEW

We review the bankruptcy court's legal conclusions *de novo* and its findings of fact for clear error. *See R & R Ready Mix v. Freier (In re Freier)*, 604 F.3d 583, 587 (8th Cir. 2010) (citing *First Nat'l Bank of Olathe, Kansas v. Pontow*, 111 F.3d 604, 609 (8th Cir. 1997)).

DISCUSSION

The filing of a petition for relief under title 11 automatically stays a variety of acts to collect or otherwise enforce a pre-petition debt. 11 U.S.C. § 362(a). If a creditor violates the automatic stay, the debtor is entitled to recover actual damages, including costs and attorney fees, and may, depending on the circumstances, also recover punitive damages. 11 U.S.C. § 362(k). To prevail under § 362(k), the debtor must show: (1) the creditor violated the automatic stay; (2) the violation was willful; and (3) the debtor was injured by the violation. *See Lovett v. Honeywell, Inc.*, 930 F.2d 625, 628 (8th Cir. 1991). A violation is willful "when the creditor acts deliberately with knowledge of the bankruptcy petition." *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir. 1989).

The bankruptcy court correctly concluded Seeley did not violate the automatic stay when he sought and obtained an *ex parte* order for protection under the Minnesota Domestic Abuse Act. The filing of a petition for relief under title 11 does not stay the commencement or the continuation of a civil action or proceeding regarding domestic violence. 11 U.S.C. § 362(b)(2)(A)(v).

The bankruptcy code does not define or incorporate by reference another statute's definition of "domestic violence." We must therefore resort to the dictionary to determine its ordinary meaning.

In the absence of a statutory definition or clear contrary legislative intent, statutory terms are given their plain, ordinary, and commonly understood meaning. This court often turns to a commonly used dictionary to ascertain a word's ordinary meaning.

Schumacher v. Cargill Meat Solutions Corp., 515 F.3d 867, 871 (8th Cir. 2008) (citation omitted). *See U.S. v. Timley*, 507 F.3d 1125, 1129 (8th Cir. 2007).

Black's Law Dictionary defines "domestic violence" as:

1. Violence between members of a household, usu. spouses; an assault or other violent act committed by one member of a household against another. . . . 2. The infliction of physical injury, or the creation of a reasonable fear that physical injury or harm will be inflicted, by a parent or a member or former member of a child's household, against a child or against another member of the household. . . .

Black's Law Dictionary 1705-06 (9th ed. 2009). We will give "domestic violence" this ordinary meaning for the purposes of § 362(b)(2)(A)(v).

The Minnesota Domestic Abuse Act creates a civil action "known as a petition for an order for protection in cases of domestic abuse." MINN. STAT. § 518B.01, subdiv. 4. The statute defines "domestic abuse" as:

the following, if committed against a family or household member by a family or household member:

(1) physical harm, bodily injury, or assault;

(2) the infliction of fear of imminent physical harm, bodily injury, or assault; or

(3) terroristic threats . . .; criminal sexual conduct . . .; or interference with an emergency call[.]

MINN. STAT. § 518B.01, subdiv. 2(a).

The ordinary meaning of "domestic violence" certainly encompasses "domestic abuse" within the meaning of the Minnesota Domestic Abuse Act. Indeed, the terms appear to be synonymous. *See Black's Law Dictionary* 558 (referring its users to the definition of "domestic violence" for the definition of "domestic abuse").

In seeking an order for protection under the Minnesota Domestic Abuse Act, Seeley was therefore commencing a civil action regarding domestic violence. That civil action was not stayed by the filing of Marino's chapter 7 petition. Thus, Seeley did not violate the automatic stay.⁴

This conclusion is dispositive of Marino's appeal. As a result, we do not need to consider the remaining elements of a claim under § 362(k). We note, however, the bankruptcy court found Marino failed to establish Seeley was aware of Marino's bankruptcy when Seeley sought the order for protection. The bankruptcy court also found while Marino may have been injured by the order for protection, he failed to prove his damages.

Because Marino did not provide a transcript, we are unable to review the evidence presented at trial. Consequently, we can only conclude the bankruptcy court's findings of fact were not clearly erroneous. *McCormick v. Diversified*

⁴ Marino argued, without citing any authority, the bankruptcy court abused its discretion in not considering Seeley's intent in seeking the order for protection. On its face, § 362(b)(2) says nothing about the intent of the party commencing or continuing a civil action or proceeding within its scope. Nevertheless, the bankruptcy court *did* consider Seeley's intent, and it found he acted reasonably in seeking the order for protection.

Collection Servs., Inc. (In re McCormick), 259 B.R. 907, 909 (B.A.P. 8th Cir. 2001) (citations therein).⁵

CONCLUSION

For the foregoing reasons, we affirm the bankruptcy court's judgment dismissing with prejudice Marino's complaint against Seeley.

⁵ For the same reason, to the extent Seeley's intent is relevant under § 362(b)(2), we reach the same conclusion regarding the bankruptcy court's finding that Seeley acted reasonably in seeking the order for protection.