

FEB 26 2016

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	CC-15-1126-TaFC
6	PRADEEP SINGH and RINDI P.)	Bk. No.	6:14-bk-19919-SC
7	SINGH,)	Adv. No.	6:14-ap-01304-SC
8	Debtors.)		
9	CAROLE TAYLOR,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	PRADEEP SINGH; RINDI P. SINGH,)		
13	Appellees.)		

Argued and Submitted on January 21, 2016
at Pasadena, California

Filed - February 26, 2016

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Scott C. Clarkson, Bankruptcy Judge, Presiding

Appearances: Elliot R. Speiser of Elliot R. Speiser &
Associates for appellant Carole Taylor; Myron
Wayne Tucker of Orrock, Popka, Fortino & Dolen
for appellee Pradeep Singh.

* This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1(c)(2).

1 Before: TAYLOR, FARIS, and CORBIT,** Bankruptcy Judges.

2 **INTRODUCTION**

3 Appellant Carole Taylor commenced an adversary proceeding
4 against chapter 7¹ debtors Pradeep Singh and Rindi Singh,
5 seeking § 523(a) exception to discharge and § 727(a) discharge
6 denial. At the first status conference, the bankruptcy court
7 dismissed the adversary proceeding for lack of prosecution based
8 solely on Taylor's failure to file a joint or unilateral status
9 report prior to the hearing. It subsequently denied Taylor's
10 motion for reconsideration.

11 We conclude that the bankruptcy court abused its discretion
12 in issuing terminating sanctions. Thus, we REVERSE and REMAND
13 for further proceedings consistent with this decision.

14 Separately, Pradeep² moves for sanctions against Taylor and
15 her attorney based on the allegation that the appeal was
16 frivolous. We DENY the motion.

17 ///

18 ///

19
20 ** The Honorable Frederick P. Corbit, Chief United States
21 Bankruptcy Judge for the Eastern District of Washington, sitting
22 by designation.

23 ¹ Unless otherwise indicated, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
25 All "Bankruptcy Rule" references are to the Federal Rules of
26 Bankruptcy Procedure; all "Civil Rule" references are to the
27 Federal Rules of Civil Procedure; and all "LBR" or "local rules"
28 references are to the local rules for the United States
Bankruptcy Court for the Central District of California.

² For the sake of clarity, we refer to Pradeep and Rindi
by their first names. No disrespect is intended.

1 **FACTS**

2 **Initiation of litigation against the Debtors.** Following
3 the Debtors' chapter 7 filing, Taylor commenced an adversary
4 proceeding against Pradeep and Rindi.³ She alleged that she
5 attended a retirement planning course taught by Pradeep,
6 participated in a one hour consultation with Pradeep that he
7 offered to students, and received a solicitation regarding an
8 investment opportunity through his company, Pradeep Singh
9 Corporation, doing business as Secure Vision Associates ("SVA").
10 Pradeep allegedly promised a guaranteed fixed income and that
11 the money would be invested in equities through SVA; he
12 allegedly represented himself as a licensed investment
13 professional. The adversary complaint alleged that Taylor
14 invested \$100,000 in SVA.

15 Three days before filing the chapter 7 petition, Pradeep
16 dissolved SVA. The adversary complaint alleged that Pradeep was
17 the alter ego of SVA, that he was not a licensed investment
18 professional, and that he did not invest Taylor's money in
19 equities but, instead, converted her funds to his own use.
20 Taylor sought to except her claim from discharge under
21 § 523(a)(2) and (a)(4) and sought a denial of the Debtors'
22 discharge under § 727(a)(4)(A).

23 Other parties also commenced similar litigation. On
24 January 9, 2015, the United States Trustee ("UST") initiated an
25

26 ³ Rindi appears to have separate counsel. Although her
27 counsel appeared at the reconsideration hearing, only Pradeep
28 was active in the adversary proceeding prior to case dismissal.
Similarly, only Pradeep has appeared in this appeal.

1 adversary proceeding against the Debtors and sought discharge
2 denial under § 727(a)(2), (a)(4), and (a)(5). The UST's
3 adversary complaint was consistent with Taylor's allegations; it
4 alleged that the Debtors had "engaged in a scheme whereby
5 Pradeep Singh solicited funds from individuals with the promise
6 of investing the funds with SVA" but, instead, used the
7 investments for personal use. Taylor's case was listed as one
8 of six related proceedings.

9 **Service of Taylor's adversary proceeding initiation**
10 **documents.** The proof of service attached to Taylor's adversary
11 complaint evidenced that on November 7, 2014, the complaint was
12 served on M. Wayne Tucker and the chapter 7 trustee via Notice
13 of Electronic Filing; Tucker represented Pradeep generally in
14 his chapter 7 case and eventually represented him in the
15 adversary proceeding and on appeal. The proof of service
16 evidenced, however, that Taylor failed to serve the Debtors at
17 that time.

18 Taylor thereafter filed a second proof of service,
19 evidencing that on November 12, 2014, the adversary complaint,
20 summons, notice of status conference, and "notice to defendants;
21 early meeting requirements" were served on Pradeep via U.S.
22 mail. The address in the proof of service matched Pradeep's
23 mailing address in the chapter 7 petition. Rindi, however, was
24 not separately served; and the chapter 7 petition stated that
25 her mailing address was not the same as Pradeep's. The new
26 proof of service also evidenced that Tucker was served with the
27 documents via Notice of Electronic Filing.

28 **Activities consistent with the local rules, Pradeep's**

1 **failure to respond to the complaint, and the joint decision to**
2 **stay this litigation.** After Taylor filed her adversary
3 proceeding, the bankruptcy court issued a summons, notice of
4 status conference, and "Order re: Rule 26(f) Meeting, Initial
5 Disclosures, and Scheduling Conference," which provided that a
6 status conference was scheduled for February 4, 2015.⁴ The
7 notice also contained the following warning:

8 **You must comply with LBR 7016-1, which requires you to**
9 **file a joint status report and to appear at a status**
10 **conference.** All parties must read and comply with the
11 rule, even if you are representing yourself. You must
12 cooperate with the other parties in the case and file
13 a joint status report with the court and serve it on
14 the appropriate parties at least 14 days before a
15 status conference. A court-approved joint status
16 report form is available on the court's website
17 (LBR form F 7016-1.STATUS.REPORT) with an attachment
18 for additional parties if necessary (LBR form F
19 7016-1.STATUS.REPORT.ATTACH). If the other parties do
20 not cooperate in filing a joint status report, you
21 still must file with the court a unilateral status
22 report and the accompanying required declaration
23 instead of a joint status report 7 days before the
24 status conference. The court may fine you or impose
25 other sanctions if you do not file a status report.
26 **The court may also fine you or impose other sanctions**
27 **if you fail to appear at a status conference.**

19 Adv. Dkt. No. 5 at 2 (emphasis in original). Based on the
20 status conference date, the deadline for filing the joint status
21 report was January 21, 2015, and the unilateral status report
22 deadline was January 28, 2015.

23 Pradeep did not file a response to the adversary proceeding
24 complaint. Later, he asserted that he was never served; but he

25
26 ⁴ We exercise our discretion to take judicial notice of
27 documents electronically filed in the adversary proceeding and
28 in the underlying bankruptcy case. See Atwood v. Chase
Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th
Cir. BAP 2003).

1 also acknowledged that he knew about the complaint and agreed to
2 waive service errors in exchange for an extension until
3 January 22, 2015 of his time to answer.

4 It is undisputed that Taylor's attorney, Elliot R. Speiser,
5 took action in regard to the Civil Rule 26(f) meeting. Tucker
6 was responsive but relayed Pradeep's request that Taylor stay
7 her proceeding pending the outcome of the UST's action. This
8 was a logical request; to the extent the UST prevailed, all of
9 the Debtors' debts would be excepted from discharge, and
10 Taylor's action would be moot. It was also in Debtors' best
11 interests as it allowed them to focus their attention and
12 resources on one adversary proceeding as opposed to fighting
13 what could rapidly become a war of attrition on multiple fronts.
14 Thus, at the Civil Rule 26(f) meeting, the parties agreed to
15 seek a stay. According to Tucker, Speiser stated that he,
16 nonetheless, would file a pre-status conference report advising
17 the bankruptcy court of the stipulation.

18 On January 20, 2015, Tucker emailed Speiser the proposed
19 stipulation and order to stay the Taylor proceeding, stating:
20 "[i]f it meets your approval, please sign and return, if not,
21 please let me know what changes are desired." Adv. Dkt. No. 16,
22 Ex. B. Speiser did not respond for a week.

23 In the meantime, the January 21st deadline date came and
24 went; no one filed a joint status report. Similarly, Pradeep
25 relied on the proposed stipulation; he did not answer on
26 January 22.

27 On January 27, 2015, Speiser emailed Tucker an executed
28 copy of the stipulation. He also suggested language for the

1 proposed order taking the status conference off calendar as a
2 result of the stipulation. Tucker agreed and added the proposed
3 language. But, like Speiser, Tucker then stalled. Neither he
4 nor Speiser filed a unilateral status report on January 28.
5 Instead, Tucker filed the stipulation and lodged the proposed
6 order on February 2, 2015, just two days prior to the scheduled
7 status conference.

8 The bankruptcy court declined to enter the proposed order,
9 and the status conference went forward.

10 **The initial status conference and issuance of terminating**
11 **sanctions.** The bankruptcy court opened the hearing by stating
12 its inclination to dismiss the adversary proceeding based on
13 lack of prosecution. It focused, in particular, on the fact
14 that Speiser failed to file a status report, either joint or
15 unilateral, as required by the local rules. Speiser attempted
16 to explain himself, but the bankruptcy court was not receptive
17 to his arguments:

18 THE COURT: [W]hen did I become chopped liver?

19 MR. SPEISER: No disrespect to the Court and I am not trying to
20 essentially --

21 THE COURT: What do you mean, not talking about no disrespect
22 to the Court

23 MR. SPEISER: deflect the Court's inquiry --

24 THE COURT: What do you mean, no disrespect to the Court?

25 MR. SPEISER: But we executed our stipulation on --

26 THE COURT: When did I become chopped liver?

27 MR. SPEISER: No, no. I

28 THE COURT: When did you decide to ignore me?

1 MR. SPEISER: We did not. Again, our office executed

2 THE COURT: Didn't ignore me? You don't think I play a role
3 in this?

4 Hr'g Tr. (Feb. 4, 2015) at 5:7-23.

5 In brief response, Tucker represented that during a prior
6 conversation, Speiser had stated that he would file the joint
7 status report, reflecting the parties' intent to seek a stay of
8 the Taylor proceeding.

9 The bankruptcy court did not deviate from its initial
10 inclination; it dismissed the adversary proceeding based on lack
11 of prosecution. Citing Blade Energy Pty Ltd. v. Rodriguez
12 (In Re Rodriguez), 2013 WL 6697839 (9th Cir. BAP Dec. 19, 2013),
13 it noted that the BAP had previously affirmed its dismissal of
14 an adversary complaint at the initial status conference based on
15 a failure to file the requisite status report. Then, after
16 identifying the factors set forth in Malone v. U.S. Postal
17 Service, 833 F.2d 128 (9th Cir. 1987), it noted that its
18 resources were stretched thin and that voluminous cases burdened
19 its docket. It also accepted and apparently relied on Tucker's
20 representation that Speiser agreed to file the status report.

21 **Taylor's motion for reconsideration.** Taylor promptly moved
22 for reconsideration under Bankruptcy Rule 9024, which
23 incorporates Civil Rule 60(b) into adversary proceedings. Aside
24 from its caption, however, the motion did not advance any
25 argument under Civil Rule 60(b). Instead, Taylor argued that
26 Malone did not support dismissal because: the parties had agreed
27 to stay the Taylor proceeding; there was no burden on the
28 bankruptcy court; there was no prejudice to the Debtors; public

1 policy did not support dismissal as Taylor's proceeding involved
2 elder abuse and possibly a criminal case; dismissal was a severe
3 sanction; and the case was factually distinguishable from
4 Rodriguez. In a concurrently filed declaration, Speiser
5 attested that his "failure to file a status report was based
6 upon mistake, excusable neglect and inadvertence."

7 Pradeep opposed; he asserted that reconsideration was
8 unwarranted, whether under Civil Rule 59 or 60(b). Among other
9 things, he argued that Taylor received several warnings as to
10 the possibility of "harsh sanctions which could result from a
11 failure to file a mandatory status report."

12 The bankruptcy court denied the reconsideration motion and
13 issued written findings as to the Malone factors. Taylor timely
14 appealed.

15 JURISDICTION

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
17 §§ 1334 and 157(b)(2)(B) and (K). We have jurisdiction under
18 28 U.S.C. § 158.

19 ISSUES

- 20 1. Whether the bankruptcy court abused its discretion in
21 dismissing the adversary proceeding based on failure to
22 prosecute.
- 23 2. Whether an award of sanctions against Taylor, Speiser, or
24 both is warranted under Bankruptcy Rule 8020.

25 STANDARD OF REVIEW

26 The bankruptcy court's dismissal of an adversary proceeding
27 based upon a plaintiff's failure to prosecute is reviewed for an
28 abuse of discretion. Al-Torki v. Kaempfen, 78 F.3d 1381, 1384

1 (9th Cir. 1996); MoneyMaker v. CoBEN (In re Eisen), 31 F.3d
2 1447, 1451 (9th Cir. 1994).

3 A bankruptcy court abuses its discretion if it applies the
4 wrong legal standard, misapplies the correct legal standard, or
5 if its factual findings are illogical, implausible, or without
6 support in inferences that may be drawn from the facts in the
7 record. See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d
8 820, 832 (9th Cir. 2011).

9 **DISCUSSION**

10 **A. Sanctions based on violations of the local rules.**

11 When a party fails to comply with LBR 7016-1(a)(2) and (3),
12 that party is subject to potential sanctions under
13 LBR 7016-1(f). That subsection provides that, in addition to
14 sanctions authorized by Civil Rule 16(f), the bankruptcy court
15 may award non-monetary sanctions, including an entry of judgment
16 of dismissal.

17 There is no question that a bankruptcy court has the power
18 to sanction for violations of local rules. Miranda v. S. Pac.
19 Transp. Co., 710 F. 2d 516, 519 (9th Cir. 1983). The Ninth
20 Circuit, while acknowledging this authority, requires restraint:

21 First, by the terms of the statute, sanctions must be
22 consistent with the Federal Rules and with other
23 statutes. Second, the order must be **necessary** for the
24 court to carry out the conduct of its business. There
25 must be a **close connection** between the sanctionable
26 conduct and the need to preserve the integrity of the
27 court docket or the sanctity of the federal rules.
28 Third, the order must be consistent with "principles
of right and justice." Finally, any sanction imposed
must be **proportionate to the offense** and commensurate
with principles of restraint and dignity inherent in
judicial power. This last principle includes **a
responsibility to consider the usefulness of more
moderate penalties** before imposing a monetary
sanction.

1 Zambrano v. City of Tustin, 885 F.2d 1473, 1480 (9th Cir. 1989)
2 (internal quotation marks and citation omitted) (emphases
3 added).

4 In Zambrano, the Ninth Circuit reversed an award of
5 monetary sanctions against counsel where the sanctioned
6 attorneys failed to obtain admission to the district court prior
7 to appearing at trial. The decision outlined the basis for such
8 a sanctions award and held that sanctions for local rule
9 violations were unavailable when the violation resulted from
10 mere negligence or oversight; instead, the Zambrano court
11 required a finding of recklessness, repeated disregard of court
12 rules, gross negligence, or willful misconduct. Id.; see also
13 In re Colville Confederated Tribes, 980 F.2d 736 (9th Cir. 1992)
14 (table) (sanctions for violation of local rules are subject to
15 the limits upon the court's inherent power and statutory
16 authority, and that "[t]hese limits require at a minimum that
17 the sanctions order be supported with an explicit finding of an
18 attorney's bad faith, and that the misconduct amount to more
19 than a negligent transgression of the local rules"); Wehrli v.
20 Pagliotti, 1991 WL 143815, at *2 (9th Cir. Aug. 1, 1991) ("The
21 district court's authority to impose sanctions for violation of
22 local rules should be reserved for 'serious breaches,' not
23 thoughtless conduct.") (citation omitted).

24 Zambrano involved monetary sanctions against counsel. Its
25 holding on the limits of sanctions against attorneys for local
26 rules violations applies with equal, if not greater, force here,
27 in a case involving terminating sanctions. The bankruptcy court
28 did not make the state of mind findings required by Zambrano,

1 and the record is devoid of any such factual support. Indeed,
2 we question whether Zambrano allows any sanction here.

3 Speiser's non-compliance was minimal. The record suggests
4 that he believed that the status conference would not proceed;
5 we cannot on this record say that this belief was grossly
6 negligent or reckless. While he did not file a status report in
7 the form mandated by the local rules, he did participate in
8 filing the proposed stipulation seeking a stay. This document
9 provided the bankruptcy court with the essential information
10 relevant to the conduct of the litigation; the parties wanted to
11 stay the Taylor proceeding because resolution of the UST's
12 pending case potentially made its pursuit unnecessary. We
13 cannot see how it would be grossly negligent or reckless to
14 assume that this was sufficient and that the bankruptcy court
15 would not need additional information, such as anticipated
16 discovery, given this request.

17 In short, as in Zambrano, this appears to be a case of mere
18 negligence at worst. And, as the Ninth Circuit there cautioned,
19 "[t]he minor problems created by counsel should not be visited
20 upon the litigants." 885 F.2d at 1476 n.4. Having said that,
21 we hereafter remand for additional proceedings based on our
22 conclusion that terminating sanctions were not appropriate. If
23 sanctions are awarded at all, it cannot be one that terminates
24 the proceeding in Pradeep's favor.

25 **B. The bankruptcy court erred in issuing terminating**
26 **sanctions.**

27 In determining whether to dismiss a case for lack of
28 prosecution, the bankruptcy court must weigh the following

1 factors: (1) the public's interest in expeditious resolution of
2 litigation; (2) the court's need to manage its docket; (3) the
3 risk of prejudice to the defendant; (4) the public policy
4 favoring disposition of cases on their merits; and (5) the
5 availability of less drastic sanctions. See Malone, 833 F.2d at
6 130; see also Thompson v. Hous. Auth. of L.A., 782 F.2d 829, 831
7 (9th Cir. 1986). As this case involved a terminating sanction
8 based on a local rule infraction, a consideration of the last
9 factor necessarily includes a consideration of whether the
10 punishment is proportionate to the offense. Zambrano, 885 F.2d
11 at 1480.

12 As this Panel has previously stated, "[d]ismissal is a
13 harsh penalty and is to be imposed only in extreme
14 circumstances." In re Rodriguez, 2013 WL 6697839, at *8 (citing
15 Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986)). And,
16 at an early point in the case, the decision to terminate is
17 subject to further scrutiny. Notwithstanding, reversal of a
18 terminating sanction is appropriate "only if we have a definite
19 and firm conviction that it was clearly outside the acceptable
20 range of sanctions." Id. (citing Malone, 833 F.2d at 130). We
21 have such a conviction here.

22 Again, here, we have only a minor act of non-compliance.
23 Speiser properly called for and participated in the Civil
24 Rule 26(f) meeting. Taylor agreed to Pradeep's request for a
25 stay. Speiser signed the proposed stipulation and suggested,
26 consistent with Bankruptcy Rule 1001's mandate that rules should
27 be construed to secure the just, speedy, and inexpensive
28 determination of every proceeding, that the pre-trial status

1 conference be vacated until it became clear that the Taylor
2 proceeding would go forward. Against this background, Speiser's
3 failure to file a status report did not justify a terminating
4 sanction. And, in any event, a terminating sanction that
5 punished both Taylor and Speiser was excessive.

6 This conclusion is supported by the following.

7 **1. Zambrano precluded terminating sanctions based on a**
8 **local rules violation.**

9 **The sanction was not proportionate to the offense, to**
10 **the culpability of Pradeep, or to the lack of culpability of**
11 **Taylor.** As noted, Zambrano requires that any sanction for a
12 local rule violation be proportionate to the offense. The
13 bankruptcy judge here failed to make any Zambrano findings,
14 including one related to proportionality. We see error, and we
15 determine that proportionality analysis does not justify a
16 terminating sanction here.

17 **The infraction was minimal.** It is true that
18 LBR 7016-1(a)(2) requires a joint status report discussing
19 specific matters. There is no question that Taylor did not file
20 such a report. But when one reviews the required information,
21 it becomes clear that the proposed stipulation presented to the
22 bankruptcy court prior to the hearing provided the information
23 required to the extent relevant. Given the early point in the
24 case and the fact that the parties reasonably requested a stay,
25 a discussion of proposed discovery and pending law and motion
26 matters, beyond the stay request, was premature.

27 Similarly, a proposed date for pre-trial conference or
28 trial was unnecessary. The proposed stipulation made obvious

1 that the parties had met and conferred in compliance with Civil
2 Rule 26(f); admittedly, it does not give the date of that
3 meeting. And, the parties' intentions regarding alternative
4 dispute resolution prior to the resolution of the UST litigation
5 can be inferred. In short, the parties' proposed stipulation
6 operated as a status report in the case, albeit untimely. We
7 also acknowledge, that in minor detail, it did not strictly
8 adhere to the local rule requirements. This, however, was the
9 sum and substance of the infraction – it did not justify a
10 terminating sanction.

11 **The bankruptcy court erred when it tasked only Taylor**
12 **with the local rule status report obligation and ignored**
13 **Pradeep's failure to answer.** Proportionality also requires that
14 we consider Pradeep's non-compliance with the Bankruptcy Rules
15 and the local rules. Here, the local rule clearly states that
16 "the parties" are required to file a status report. The
17 bankruptcy court, however, sanctioned only Taylor even though
18 Pradeep was also in violation of the rule. The bankruptcy
19 court's decision to sanction assumed that Taylor, as the
20 plaintiff, and Speiser, as plaintiff's counsel, bore the sole
21 responsibility for filing a status report, while Pradeep, as the
22 defendant, and Tucker, as defendant's counsel, had none. This
23 was error; the applicable local rule did not support such an
24 interpretation.

25 That the bankruptcy court allocated the burden solely to
26 Taylor is clear from the status conference:

27 THE COURT: Well, you're the plaintiff in this case. It's
28 your case. You relied on Mr. Tucker.

1 MR. SPEISER: Well, Mister --

2 THE COURT: Counsel for the defendant.

3 MR. SPEISER: Correct.

4 THE COURT: Mr. Tucker, let me ask you this. Does your
5 client [Pradeep] really want to be in all these
6 lawsuits?

7 MR. TUCKER: Absolutely not, Your Honor.

8 THE COURT: You see, why would you rely on Mr. Tucker to do
9 anything?

10 Hr'g Tr. (Feb. 4, 2015) at 12:15-24.

11 The bankruptcy court's interpretation was also inconsistent
12 with the form summons and notice of status conference, served
13 with the adversary complaint as required under the local rules.
14 Addressed to the Debtors as the defendants, it stated to them:
15 "[y]ou must comply with LBR 7016-1, which requires **you** to file a
16 joint status report and to appear at a status conference."

17 (Emphasis added.)

18 This error was not harmless as Pradeep shared culpability
19 for the non-compliance but, in effect, was rewarded with case
20 dismissal.⁵

21 _____

22 ⁵ Pradeep cannot skirt this requirement by alleging that
23 he was not properly served with the adversary complaint or
24 summons. Although Pradeep attested that he never received the
25 adversary complaint or summons, he also waived any allegation of
26 deficiency of service and then proceeded to participate in the
27 adversary proceeding. And, according to emails exchanged
28 between counsel, Pradeep was supposed to file his answer on
January 22, 2015; he never did.

Moreover, the proof of service filed by Speiser provided
that, on November 12, 2014, Pradeep was served with the

(continued...)

1 The bankruptcy court also ignored that Pradeep failed to
2 comply with a much more significant obligation: he failed to
3 file a timely response to the complaint. Such non-compliance
4 subjected him to the possibility of a default judgment; it
5 certainly did not justify case dismissal. Here, both parties
6 failed to comply with relevant rules; but one was given absolute
7 victory while the other was accorded crushing defeat. This lack
8 of even-handed assessment of sanctions was an abuse of
9 discretion.

10 **A terminating sanction must be proportionate between**
11 **counsel and the client.** Finally, for a sanction to be
12 proportionate, it must take into consideration whether the
13 party, as opposed to counsel, was at fault. Where an attorney
14 consistently fails to comply with the rules, a terminating
15 sanction may be appropriate even though the burden falls
16 disproportionately on the represented party. The bankruptcy
17 court can reasonably expect a party to police the actions of his
18 own attorney. At such an early point in the case, however,
19 Taylor could have no basis for understanding that her agreement
20 to stay the proceeding and to authorize her attorney to enter
21 into the stipulation would subject her case to a terminating
22 sanction. Nor would she have witnessed and ignored repeated

23
24 ⁵(...continued)
25 adversary complaint, summons, and notice of status conference at
26 his mailing address. The mailing address matches that listed on
27 the chapter 7 petition. At a minimum, this created a
28 presumption that he received the documents. See Fed. R.
Evid. 301. Although the presumption was rebuttable, in the
absence of an evidentiary hearing, the bankruptcy court was
required to assume that Pradeep was timely served.

1 acts of non-compliance by her attorney. The sanction in this
2 case, thus, was again not proportionate because it failed to
3 take into consideration the total inability of Taylor to right
4 the ship by policing or replacing her attorney.

5 **2. Consideration of the Malone factors also evidences**
6 **error.**

7 Our review of the bankruptcy court's more detailed findings
8 after the motion for reconsideration further evidences error.
9 We assume that these findings were consistent with those which
10 led the bankruptcy court to assess a terminating sanction at the
11 initial hearing. This is particularly true as we have nothing
12 else from which to determine the bankruptcy court's analysis.⁶

13 The bankruptcy court's consideration of the Malone factors
14 reveals that it afforded significant weight to addressing what
15 it perceived as systemic non-compliance issues with the local
16 rules. In doing so, it ignored the circumstances in this case
17 beyond the non-compliance; namely, the existence of the UST's
18 § 727 action, Pradeep's failure to respond to the adversary
19 complaint, and the parties' agreement to Pradeep's suggestion
20 for a stay. On this record, disregarding these facts was an
21 abuse of discretion.

22 **The bankruptcy court failed to take the unique facts**
23 **of this case into consideration when evaluating the public's**
24 **interest in expeditious resolution of litigation.** In deciding
25 the motion for reconsideration, the bankruptcy court found that:

26 _____
27 ⁶ Because of our decision to reverse and remand, we do not
28 review the bankruptcy court's denial of reconsideration on the
merits.

1 The public ha[d] an interest [in] avoiding
2 unreasonable delay in the resolution of complaints to
3 determine the dischargeability of debts and complaints
4 to deny a debtor's discharge. The delay caused by
5 Mr. Speiser's failure to file a status report was
6 completely unreasonable. Mr. Speiser assumed that the
7 status conference would be continued and in so doing
8 he disregarded the Court's time and the local rules,
9 which required him to file a status report.

6 In addition, due to what the Court perceives as a
7 systemic failure of counsel to abide by LBR 7016-1,
8 the public's interest in expeditious litigation is
9 particularly important. The Court's resources are
burdened with numerous instances of disregard of the
local rules, which individually and in the aggregate
negatively affects the public's interest. . . .

10 Adv. Dkt. No. 20 at 5-6.

11 It is true that the public has an interest in avoiding
12 unreasonable delay and in the expeditious resolution of
13 complaints as to the dischargeability of debts and the denial of
14 discharge. That said, those interests were addressed properly
15 here. Given the pending UST action, the failure to file a
16 status report did not affect the expeditious resolution of the
17 Taylor proceeding. Although the bankruptcy court was not
18 required to approve the stipulation to stay the Taylor
19 proceeding, we cannot imagine that on this record, and absent
20 the status report compliance issue, it would not have done so.

21 The bankruptcy court also identified systemic issues of
22 non-compliance with the local rules in considering this factor.
23 There is no indication on this record, however, that either
24 Taylor or Speiser had a history of non-compliance. Again, given
25 the circumstances here, the public's interest in expeditious
26 resolution of the proceeding was assuaged.

27 **The bankruptcy court's need to manage its docket did**
28 **not justify a terminating sanction.** The bankruptcy court

1 determined that "Speiser ha[d] flouted the local rules governing
2 the filing of a status report. Disregard for the local rules,
3 particularly governing the filing of status reports, [was] a
4 systemic problem, which significantly affect[ed] this Court's
5 ability to manage its docket."

6 Again, the bankruptcy court's attempt to correct systemic
7 non-compliance issues in this case was disproportionate, given
8 the parties' agreement to stay the Taylor proceeding in light of
9 the UST action. In an appropriate case, a bankruptcy court has
10 discretion to issue terminating sanctions for non-compliance
11 with the local rules, but here, the failure to provide
12 information to the bankruptcy court prior to the status
13 conference was mitigated. The bankruptcy court was aware of the
14 parties' intent to stay the proceeding prior to the status
15 hearing based on the proposed order lodged. Thus, the impact on
16 the bankruptcy court's docket was limited and, in effect, caused
17 by its own decision to deny the proposed order and proceed
18 forward with the status conference. The bankruptcy court was
19 advised that a stay was requested; a brief investigation would
20 support that the request was appropriate.

21 **The bankruptcy court clearly erred in finding risk of**
22 **prejudice to Pradeep.** The bankruptcy court found that
23 "Mr. Speiser's failure to abide by the local rules [was]
24 prejudicial to the Debtors and their ability to obtain a fresh
25 start," citing Herrero v. Guzman (In re Guzman), 2010 WL 6259994
26 (9th Cir. BAP Sept. 20, 2010), and Barr v. Barr (In re Barr),
27 217 B.R. 626 (Bankr. W.D. Wash. 1998). This finding was clearly
28 erroneous.

1 While it is generally true that delay may be prejudicial to
2 a defendant, here, Pradeep was subject to a separate discharge
3 denial proceeding in the UST's action, as well as other related
4 adversary proceedings. And, Pradeep, not Taylor, requested a
5 stay of the adversary proceeding. Regardless of the outcome of
6 those cases, the failure to file a status report in the Taylor
7 proceeding did not prejudice Pradeep (or Rindi, for that
8 matter). That a defendant is impacted by the mere existence of
9 pending litigation against them is not prejudice as contemplated
10 by this factor.

11 Our determination of error in this regard is underscored by
12 Tucker's admission at oral argument before the Panel that there
13 was no prejudice to his client in this case.

14 **The bankruptcy court failed to consider the public**
15 **policy favoring disposition of cases on their merits.** The
16 bankruptcy court acknowledged that public policy favored
17 disposition of a case on the merits but then concluded the
18 public's interests were harmed when counsel ignored the local
19 rules, "designed to facilitate judicial economy and prompt
20 resolution of disputes" and that judicial economy was
21 "particularly important in bankruptcy proceedings."

22 The bankruptcy court erred in its analysis of this factor;
23 it simply reiterated its consideration of the first Malone
24 factor. Given the nature of the claims alleged and the UST
25 action, which underscored that this was not frivolous
26 litigation, public policy favored a disposition of the Taylor
27 proceeding on the merits unless rendered moot by the UST action
28 or settlement.

1 **The bankruptcy court erred in its analysis regarding**
2 **the availability of less drastic sanctions.** Finally, the
3 bankruptcy court determined "that less drastic sanctions [were]
4 not warranted and would not be effective." In reaching this
5 conclusion, it "considered the feasibility of alternative
6 sanctions, such as monetary sanctions against Mr. Speiser." Id.
7 It concluded, however, that monetary sanctions were ineffective,
8 as they were "treated as the cost of doing business." Id. And,
9 it "considered other non-monetary sanctions, sanctions,
10 including disciplinary proceedings against Mr. Speiser or
11 requiring Mr. Speiser to attend additional continuing legal
12 education seminars concerning the local rules." Id. at 7. But,
13 it also believed these "less drastic sanctions" insufficient, as
14 Speiser was aware of LBR 7016-1(a)(2) and (3) and proceeded to
15 ignore them. Id.

16 Again, there is no indication in the record that Speiser
17 had a history of non-compliance with the local rules or prior
18 disciplinary issues. Instead, the bankruptcy court sanctioned
19 Speiser - and, really, Taylor - in order to address systemic
20 rather than attorney or case-specific non-compliance issues;
21 this was inappropriate.

22 The bankruptcy court's findings under this factor also beg
23 the question: if a failure to comply with the local rules always
24 evidences that non-monetary sanctions are inappropriate, without
25 regard to the degree of the non-compliance, then when would
26 terminating sanctions not be warranted? This logic contravenes
27 the direction given to the courts; terminating sanctions should
28 be imposed only in "extreme circumstances."

1 **Our unpublished Rodriguez decision provides no support**
2 **for terminating sanctions in this case.** We also agree with
3 Taylor that Rodriguez is factually distinguishable. In that
4 case, after serving the summons and adversary complaint,
5 plaintiff's counsel took no action to comply with the Civil
6 Rule 26(f) meeting requirement until well after the time to do
7 so, was largely non-responsive to the numerous attempts by
8 debtor's counsel to meet and confer or to coordinate the filing
9 of a joint status report as required under the local rules, and
10 filed a unilateral status report late. Debtor's counsel, on the
11 other hand, fully complied with his duties.

12 Further, debtor had responded to the complaint with a
13 timely motion to dismiss under Civil Rule 12(b)(6). Plaintiff's
14 counsel, however, treated the motion to dismiss as a summary
15 judgment motion and requested a delay of the hearing to allow
16 for discovery; such a response was totally lacking in merit and
17 the motion to dismiss could be considered by the bankruptcy
18 court when it issued terminating sanctions. Finally, there was
19 clear evidence that plaintiff's counsel was duplicitous as he
20 inappropriately attempted to blame his many failures on debtor's
21 counsel; the record showed the clear impropriety of this
22 argument. Other evidence of plaintiff's attorney's lack of
23 candor existed. Although plaintiff's counsel later filed an
24 untimely unilateral status report, the same bankruptcy judge
25 dismissed the adversary proceeding based on lack of prosecution.

26 Here, Speiser took action to meet and confer as required by
27 Civil Rule 26(f). And, there was no delay negatively impacting
28 discovery or the adjudication of a pending dispositive motion.

1 The only development in the Taylor proceeding was the parties'
2 agreement to stay it, pending resolution of the UST's action.
3 Finally, there was no evidence in the form of an essentially
4 unopposed Civil Rule 12(b)(6) motion that this litigation lacked
5 merit. Nor was there evidence of deceit. Rodriguez is an
6 unpublished decision with limited utility beyond its very
7 specific facts; it did not support a terminating sanction here.

8 In sum, we conclude that the bankruptcy court abused its
9 discretion in determining that, under these circumstances,
10 terminating sanctions were warranted. That said, we REMAND to
11 the bankruptcy court to determine whether, in light of the
12 parties' joint contribution to the non-compliance, less drastic
13 sanctions against Taylor or Pradeep or both are appropriate.

14 Based on this determination, we do not address whether the
15 bankruptcy court abused its discretion in denying the motion to
16 reconsider.

17 **C. Sanctions under Bankruptcy Rule 8020 are not warranted.**

18 Pradeep has separately moved for sanctions under Bankruptcy
19 Rule 8020, based on the alleged frivolousness of this appeal.
20 Given our determination in favor of Taylor, we deny this motion.

21 **CONCLUSION**

22 Based on the foregoing, we REVERSE and REMAND to the
23 bankruptcy court for further proceedings consistent with this
24 decision. We DENY Pradeep's motion for sanctions.