

TENTATIVE Order Regarding Order to Show Cause and Motion to Strike

On May 18, 2022, the Court entered an order requiring Appellant Arturo Gonzalez (“Gonzalez”) to show cause not later than June 3, 2022, why this action should not be dismissed for lack of prosecution. Order to Show Cause (“OSC”), Dkt. 27. Additionally, on June 13, 2022, Appellee and Chapter 7 Trustee for the Bankruptcy Case, Wesley H. Avery (the “Trustee”), filed a motion to strike the records and transcripts designated on appeal and, in the alternative, to dismiss the appeal for failure to provide an adequate record. Dkt. 32. The Trustee also filed a request for judicial notice in conjunction with that motion. Dkt. 33. On July 5, 2022, Gonzalez filed an opposition to the motion. Dkt. 34. The Trustee responded. Dkt. 35.

For the following reasons, the Court sua sponte **DISMISSES** Gonzalez’s appeal pursuant to Federal Rule of Bankruptcy Procedure 8003(a)(2). The Court **VACATES** the Trustee’s motion and the accompanying request for judicial notice as moot.

I. BACKGROUND

This case concerns an appeal from a Bankruptcy Court order. On January 5, 2022, Gonzalez filed the notice of appeal. See Dkt. 1. On January 24, 2022, the bankruptcy court filed an appeal deficiency notice on the Court’s docket, noting that Gonzalez had not filed a statement of issues, designation of record, notice of transcript, or filing fee for notice of appeal. See Dkt. 13. On March 15, 2022, the Court entered its first order to show cause why this action should not be dismissed for lack of prosecution. See Dkt. 19. The first order to show cause stated that Gonzalez could avoid dismissal by filing a designation of record, statement of issues on appeal, and a filing of notice regarding ordering of transcripts. Id.

On March 18, 2022, Gonzalez filed a motion to correct the record. See Dkt. 20. On March 22, 2022, the Trustee filed a motion to strike the records and transcripts designated on appeal and, in the alternative, to dismiss the appeal for failure to provide an adequate record. See Dkt. 21. On April 19, 2022, the Court

entered an order denying the Trustee’s motion for failure to comply with Local Rule 7-3 and denying Gonzalez’s motion to correct the record. See Dkt. 24. The Court indicated that the proper venue for Gonzalez’s motion to correct the record would be in the Bankruptcy Court. Id. at 2. The Court also vacated the order to show cause it entered on March 15, 2022.

On May 5, 2022, the bankruptcy court filed a second appeal deficiency notice on the Court’s docket, indicating that “Designated transcripts, ordered 03/14/2022, have not been filed.” See Dkt. 26. On May 18, 2022, the Court entered a second order to show cause why this action should not be dismissed for lack of prosecution. See Dkt. 27. The OSC indicated that the Court would consider filing of the transcripts and certificate of readiness from the Bankruptcy Court by the deadline of June 3, 2022, to be an appropriate response. Id.

Subsequently, Gonzalez submitted several filings. On June 3, 2022, he requested that the Court take judicial notice of the motion to modify the transcript he had filed on the bankruptcy case docket. Dkt. 28. On June 3, 2022, he responded to the OSC. Dkt. 29. The majority of the filing does not address the Court’s OSC and instead argues that the appeal is meritorious. However, Gonzalez also argues that it should not be dismissed because of a pending motion to correct the transcript in the bankruptcy court. Dkt. 29 at 7. On June 4, 2022, Gonzalez filed a status report, see Dkt. 30, and on June 6, 2022, Gonzalez filed a “supplemental response to order to show cause,” see Dkt. 31, neither of which address his failure to timely prosecute his appeal.

On June 3, 2022, Gonzalez filed a motion to modify transcripts on the Bankruptcy Court docket. Bankr. Dkt 598.¹ On June 15, 2022, the Bankruptcy Court entered an order granting in part and denying in part Gonzalez’s motion to modify. Bankr. Dkt. 601. On June 23, 2022, Gonzalez filed a request for an audio recording of the June 23, 2016 hearing in his underlying bankruptcy case. Bankr. Dkt. 604. As of July 5, 2022, he still has not designated transcripts for this appeal.

As a preliminary matter, the Court notes that Gonzalez’s opposition brief in

¹ Throughout this Order, the Court uses the abbreviation “Bankr. Dkt.” when citing to the docket in the underlying bankruptcy case, In re Arturo Gonzalez, No. 2:15-bk-25283-RK (Bankr. C.D. Cal.).

response to the Trustee’s motion was untimely. See L.R. 7-9 (requiring opposing papers to be filed not later than twenty-one days before the date designated for hearing). While it is within the Court’s discretion to decline to consider untimely filings, the Court will still consider Gonzalez’s filing. See L.R. 7-12.

II. LEGAL STANDARD

The Federal Rules of Bankruptcy Procedure require an appellant to “file with the bankruptcy clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented.” Fed. R. Bankr. P. 8009(a)(1)(A). “The appellant must file and serve the designation and statement within 14 days after . . . the appellant’s notice of appeal as of right becomes effective under Rule 8002; or . . . an order granting leave to appeal is entered.” Fed. R. Bankr. P. 8009(a)(1)(B). This requires the appellant to, among other things, “order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of such parts of the proceedings not already on file as the appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk” within the time period prescribed by subdivision (a)(1). Fed. R. Bankr. P. 8009(b)(1)(A).

District courts have discretion to dismiss a bankruptcy appeal where an appellant fails to provide a required transcript. Fed. R. Bankr. P. 8003(a)(2). “[U]nless there are egregious circumstances, the district court must, as the general rule requires, explicitly consider relative fault and alternative sanctions” before dismissing an action for procedural violations of a Bankruptcy Rule. In re Fitzsimmons, 920 F.2d 1468, 1474 (9th Cir. 1990). However, “the existence of bad faith constitutes egregious circumstances which can warrant dismissal even without the explicit consideration of alternative sanctions and relative fault.” Id. at 1474.

III. DISCUSSION

A. *Compliance with the Federal Rules of Bankruptcy Procedure*

Gonzalez filed his notice of appeal on January 5, 2022. See Dkt. 1. Thus, he was required to designate transcripts no later than January 19, 2022. See Fed. R. Bankr. P. 8009(a)(1)(B); Fed. R. Bankr. P. 8009(b)(1)(A). As of July 5, 2022,

Gonzalez has yet to meet that obligation, causing a delay of 167 days. During that time Gonzalez was notified on multiple occasions by this Court and the Bankruptcy Court that he had missed the deadline. His response to the OSC avers that the delay is due to his pending motion to modify transcripts. However, the Court denied his motion to modify on April 19, 2022, and directed him to re-file it in the Bankruptcy Court if he wished to be heard. Yet Gonzalez did not file the motion until June 3, 2022, forty-five days later, and on the final day to respond to the Court's OSC. Twenty days have now passed since the Bankruptcy Court ruled on his motion on June 15, 2022, and Gonzalez still has not designated transcripts on the Bankruptcy Court docket.

On July 5, 2022, more than a month after the deadline to respond to the OSC and two weeks after his opposition to the motion to strike was due, Gonzalez submitted another filing. See Dkt. 34. He now maintains that he intends to file another motion to modify the transcripts in the Bankruptcy Court, and urges the Court to delay ruling on these issues until that motion is heard on August 9, 2022. See Dkt. 34 at 10, Ex. 6. First, the Court notes that it does not appear that Gonzalez's second motion to modify the transcript has been entered on the Bankruptcy Court docket yet. Additionally, the Court's review of the proposed filing indicates that Gonzalez seeks to reargue some issues that were previously addressed in the Bankruptcy Court's prior order and raises some new issues that were not raised in his first motion to modify. Gonzalez does not explain why the Bankruptcy Court should reconsider its prior ruling or why those new issues could not have been raised sooner.

Gonzalez has not provided any reason to explain why such extensive delays occurred in the prosecution of this matter. The Court issued multiple orders explaining his obligations to meet the procedural requirements established by the Federal Rules of Bankruptcy Procedure and directing him to prosecute his case in a timely fashion. However, he has continually failed to diligently prosecute his appeal. While Gonzalez's conduct could support a finding of bad faith, the Court does not believe that it necessarily qualifies as egregious conduct. Compare In re Aspen Healthcare, Inc., 265 B.R. 442, 447 (N.D. Cal. 2001) (holding that appellant's conduct that caused 200-day delay exhibited bad faith to support involuntary dismissal of his appeal), with In re Erde v. Pebble Creek Realty, Inc., No. CV 10-05784 VAP, 2011 WL 13217502, at *4-5 (C.D. Cal. Feb. 22, 2011) (finding that while 134-day delay in designating the record was not insignificant,

it was not bad faith that warranted dismissal).

Regardless, consideration of relative fault and alternative sanctions supports the conclusion that dismissal of Gonzalez's appeal is warranted. While the Court is understanding of Gonzalez's relative inexperience as a pro se litigant, that does not excuse him from compliance with Court rules and orders. At this stage his failure to designate transcripts has delayed resolution of this appeal for over five months. He does not provide any explanation for his dilatory conduct, thus the Court concludes that he is at fault. See In re Morrissey, 349 F.3d 1187, 1191 (9th Cir. 2003) (noting that "the traditional concern with imputing mistakes of counsel to clients was not at issue" where the appellant was representing himself). The Court also finds that alternative sanctions would not be sufficient. The Court has already issued two separate orders to show cause identifying Gonzalez's failure to meet procedural requirements and giving him the opportunity to remedy that failure. Despite multiple opportunities, he continues to miss deadlines and fail to prosecute his case in an expeditious manner. Gonzalez has not given the Court any reason to believe that additional opportunities would lead to a different outcome.

Sua sponte dismissal is an appropriate remedy in circumstances like this one where an appellant's failure to comply with procedural deadlines and court orders causes lengthy delays. See In re Waksberg, 2009 WL 1211351 (C.D. Cal. Apr. 27, 2009) (dismissing appeal sua sponte where failure to designate record on appeal caused delay of 133 days); In re Luo, No. 96-56125, 1997 WL 342231, *1 (9th Cir. June 19, 1997) (Unpub. Disp.) (upholding sua sponte dismissal of bankruptcy appeal where appellant "waited forty-nine days to designate the record on appeal, to file a statement of issues, and to file a notice of transcripts"); see also In re Pei Ti Tung, 2005 WL 2001918 (W.D. Wash. Aug. 17, 2005) (dismissing bankruptcy appeal sua sponte for failure to file an opening brief within the deadline set by procedural rules). After consideration of relative fault and the availability of alternative measures, the Court finds that dismissal is appropriate in this instance.

Accordingly, the Court **DISMISSES** Gonzalez's appeal pursuant to Federal Rule of Bankruptcy Procedure 8003(a)(2).

B. Trustee's Motion

The Trustee filed a motion to strike the transcripts designated by Gonzalez on appeal and to dismiss the appeal for failure to provide an adequate record. Mot. at 10. The Trustee argues that the requested relief is warranted based on the Federal Rules of Appellate Procedure and Ninth Circuit case law applying those rules. See id. at 8–10. But the arguments raised by the Trustee do not support the requested relief. This case is on appeal from the Bankruptcy Court, so at this stage it is governed by the Federal Rules of Bankruptcy Procedure and the Central District of California Local Rules. Regardless, the motion is moot because the Court is sua sponte dismissing Gonzalez's appeal for failure to comply with the Federal Rules of Bankruptcy Procedure. Thus, the Court will not rule on the merits of the Trustee's motion or the accompanying request for judicial notice.

IV. CONCLUSION

For the foregoing reasons, the Court sua sponte **DISMISSES** Gonzalez's appeal pursuant to Federal Rule of Bankruptcy Procedure 8003(a)(2). The Court **VACATES** the Trustee's motion and the accompanying request for judicial notice as moot.

IT IS SO ORDERED.

The Court **VACATES** the hearing scheduled for July 11, 2022. Any party may file a request for hearing of no more than five pages no later than 5:00 p.m. on Tuesday, July 12, 2022, stating why oral argument is necessary. If no request is submitted, the matter will be deemed submitted on the papers and the tentative will become the order of the Court. If the request is granted, the Court will advise the parties when and how the hearing will be conducted.