

**FILED**

OCT 24 2017

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: NABILSI YUNES ABUD,  
Debtor,

No. 15-60064

RAM SAXENA,  
Appellant,  
v.  
NABILSI YUNES ABUD,  
Appellee.

BAP No. 14-1444

ORDER

Before: GOODWIN, FARRIS, and FERNANDEZ, Circuit Judges.

We treat Saxena's motion for reconsideration (Docket Entry No. 9) as a petition for panel rehearing, and deny the petition.

No further filings will be entertained in this closed case.

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FEB 22 2017

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

In re: NABILSI YUNES ABUD,

No. 15-60064

Debtor.

BAP No. 14-1444

RAM SAXENA,

MEMORANDUM\*

Appellant,

v.

NABILSI YUNES ABUD,

Appellee.

Appeal from the Ninth Circuit  
Bankruptcy Appellate Panel  
Kurtz, Perris, and Taylor, Bankruptcy Judges, Presiding

Submitted February 14, 2017\*\*

Before: GOODWIN, FARRIS, and FERNANDEZ, Circuit Judges.

Ram Saxena appeals pro se from the Bankruptcy Appellate Panel's ("BAP")

---

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

judgment affirming the bankruptcy court's order denying relief from its judgment dismissing Saxena's adversary proceeding as untimely. We have jurisdiction under 28 U.S.C. § 158(d). We review BAP decisions de novo and apply the same standard of review that the BAP applied to the bankruptcy court's ruling. *Boyajian v. New Falls Corp. (In re Boyajian)*, 564 F.3d 1088, 1090 (9th Cir. 2009). We affirm.

The bankruptcy court did not abuse its discretion by denying Saxena's motion for relief from judgment under Fed. R. Civ. P. 60(b) because Saxena failed to demonstrate any basis for relief. *See* Fed. R. Bankr. P. 9024 (making Fed. R. Civ. P. 60 applicable to bankruptcy cases); *see also, e.g., Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 394-97 (1993) (discussing requirements for excusable neglect under Fed. R. Civ. P. 60(b)(1)); *Zurich Am. Ins. Co. v. Int'l Fibercom, Inc. (In re Int'l Fibercom, Inc.)*, 503 F.3d 933, 940-41 (9th Cir. 2007) (discussing requirements for application of "catch-all provision" of Fed. R. Civ. P. 60(b)(6)).

**AFFIRMED.**

FILED

NOV 16 2010

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

1 NOT FOR PUBLICATION  
2

3 UNITED STATES BANKRUPTCY APPELLATE PANEL  
4

5 OF THE NINTH CIRCUIT  
6

7 5 In re: ) BAP No. CC-09-1207-MkJaD  
8 YUNES ABUD NABILSI, ) Bk. No. LA 08-25451-SB  
9 aka Nabilsi Yunes Abud, )  
10 Debtor. )  
11 )  
12 RAM SAXENA, )  
13 Appellant, )  
14 v. ) MEMORANDUM  
15 YUNES ABUD NABILSI, )  
16 aka Nabilsi Yunes Abud, )  
17 Appellee. )  
18 )  
19 Argued And Submitted On May 20, 2010  
20 at Pasadena, California  
21 Filed: November 16, 2010  
22 Appeal From The United States Bankruptcy Court  
23 for the Central District of California  
24 Honorable Samuel Bufford, Bankruptcy Judge, Presiding  
25 Appearances: Appellant Ram Saxena argued pro se  
26 Before: MARKELL, JAROSLOVSKY and DUNN, Bankruptcy Judges.  
27  
28

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 8013-1.

"Hon. Alan Jaroslovsky, United States Bankruptcy Judge for  
the Northern District of California, sitting by designation.

## INTRODUCTION

1 Appellant Ram Saxena, M.D. ("Saxena"), commenced an  
2 involuntary chapter 7<sup>1</sup> bankruptcy against appellee Yunes Abud  
3 Nabilsi ("Nabilsi"). After holding four status conferences, the  
4 bankruptcy court dismissed Saxena's involuntary petition on two  
5 grounds: (1) untimely service of process, and (2) lack of  
6 evidence in support of the merits of the petition.

7 evidence in support of the merits of the  
8 On appeal from the dismissal order, we disagree with both of  
9 the bankruptcy court's grounds for dismissal. Nabilsi waived the  
10 defects in service by appearing at all four hearings on the  
11 involuntary petition, by orally acknowledging receipt of the  
12 summons and petition, and by repeatedly attempting to orally  
13 argue the merits of the petition. In short, Nabilsi engaged in a  
14 course of conduct in the litigation inconsistent with the  
15 assertion of an objection to the court's personal jurisdiction  
16 over him. Given that Nabilsi waived the service defects, the  
17 first basis for the court's dismissal - untimely service of  
18 process - must fail.

18 process - must fail.  
19 , The second basis for dismissal - lack of evidence to support  
20 the petition - also is problematic. Although Nabilsi appeared in  
21 the proceeding, he never filed any written response to the  
22 involuntary petition. Consequently, the bankruptcy court should  
23 have taken steps to enter the order for relief based on Nabilsi's  
24 default rather than purporting to try the merits. In addition,

25                   <sup>1</sup>Unless specified otherwise, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all  
27 "Rule" references are to the Federal Rules of Bankruptcy  
28 Procedure, Rules 1001-9037, and all "Civil Rule" references are  
to the Federal Rules of Civil Procedure.

1 the court never indicated that the merits of the involuntary  
2 petition were to be tried at the final status hearing. To the  
3 contrary, the bankruptcy court had told the parties that the sole  
4 purpose of that hearing would be to consider service and proof of  
5 service issues. The court had also stated that, if the petition  
6 survived the service issues, the court would further continue the  
7 matter for a later hearing to take evidence and consider the  
8 merits of the petition. Thus, the court's dismissal based on  
9 Saxena's failure to present evidence in support of the merits of  
10 the petition at the service issues hearing raised due process  
11 concerns.

12 These concerns, however, need not be addressed. Despite  
13 appearing and attempting to argue the merits, Nabilisi failed to  
14 ever contest the petition's allegations in writing, as required  
15 by Rule 1013, and thus the court should have entered an order for  
16 the relief requested in the petition.

17 Accordingly, we must REVERSE the dismissal order and REMAND  
18 to allow the bankruptcy court to enter an order for relief  
19 against Nabilisi.

20       ///

21       ///

22       ///

23       ///

24       ///

25       ///

26       ///

27       ///

28       ///

## FACTS<sup>2</sup>

1                   Saxena alleges that he is a creditor of Nabilsi, arising  
2                   from a \$50,000 loan Saxena claims he made to Nabilsi in  
3                   connection with a joint business venture between the two parties.  
4                   Saxena further claims that his wife lent Nabilsi an additional  
5                   \$25,000. According to Saxena, Nabilsi has not repaid the money  
6                   lent.  
7

On September 19, 2008, Saxena commenced an involuntary bankruptcy against Nabilsy by filing an involuntary chapter 7 petition pursuant to § 303(b), naming Nabilsy as the alleged debtor. Saxena is the only petitioning creditor on the petition.<sup>3</sup>

12 petition.

13 For some reason that is not apparent, the bankruptcy court

14 did not issue a summons pursuant to Rule 1010(a) until January

15 26, 2009. Three days later, on January 29, 2009, Saxena filed a

16 return of service. The related proof of service suggests that

17 Saxena personally served Nabilsi on January 28, 2009, 130 days

18 after the filing of the petition.

1       On March 3, 2009, the bankruptcy court held its first  
2 hearing on the involuntary petition, and both parties appeared  
3 pro se. At first, the court apparently believed that Saxena had  
4 not filed his return of service.<sup>1</sup> However, after consulting the  
5 docket, the court located the docket entry referencing Saxena's  
6 filing of the return of service, and the court concluded that the  
7 summons and petition had been served.

8       Both parties argued at the hearing. For his part, Nabilsi  
9 admitted that he received notice of his need to appear at the  
10 March 3 hearing. Nabilsi also made statements indicating that he  
11 had received service of the summons and petition. Further,  
12 Nabilsi attempted to argue the merits. He argued that there were  
13 insufficient grounds for an involuntary bankruptcy, including  
14 noting that there was only a single petitioning creditor.  
15 Nabilsi also argued that the bankruptcy case would adversely  
16 affect his ability to repay Saxena, and that outside of  
17 bankruptcy, he was willing to repay Saxena over time.

18       The bankruptcy court fended off both Nabilsi's and Saxena's  
19 attempts to argue the merits. The bankruptcy court told Nabilsi  
20 that, if he desired to challenge the sufficiency of the petition,  
21 he needed to file a motion to dismiss, and the court told Saxena  
22 that he needed to submit in writing, in advance of the next  
23 hearing, his evidence in support of the involuntary petition, or

24       

---

  
25       The parties' comments at the March 3 hearing indicate that  
26 the bankruptcy court, prior to the hearing, issued a written  
27 tentative ruling suggesting that the matter might be dismissed  
28 based on Saxena not having submitted proof of service. However,  
neither party has provided us with a copy of this tentative  
ruling, nor is it available for us to review on the bankruptcy  
court's electronic docket.

1 the petition would be dismissed. The bankruptcy court set the  
2 next hearing for April 7, 2009.

3 On April 7, 2009, Saxena was represented by counsel, but  
4 Nabilsi again appeared pro se. The main accomplishment of the  
5 April 7, 2009 hearing was its continuance to May 19, 2009,  
6 ostensibly for the purpose of enabling the parties to discuss  
7 settlement. The continuance also might have been a tacit  
8 concession to the fact that, at the time of the second hearing,  
9 neither party had filed any papers in support of their respective  
10 positions. As the April 7 hearing was concluding, Nabilsi again  
11 attempted to orally argue for dismissal of the petition on the  
12 merits. The court again told Nabilsi that any such motion needed  
13 to be filed in writing, and Nabilsi again indicated that he would  
14 do so.

15 By the time of the May 19, 2009, hearing, the matter had  
16 regressed back to the issue of service. Even though the  
17 bankruptcy court had concluded at the March 3 hearing that Saxena  
18 had filed his return of service, and had established service of  
19 the summons and the petition, the bankruptcy court apparently  
20 issued a tentative ruling in advance of the May 19 hearing  
21 suggesting that the petition might be dismissed based on a  
22 failure to timely serve the summons and petition.

23 According to the bankruptcy court:

24 The tentative ruling is to dismiss because you have not  
25 served the summons and the involuntary petition within  
26 the time limit required by the law. . . . What you have  
27 to do is file proof that you served it within the time  
28 limits.

1 Hrg. Transcript (5/19/09) at 2:13-2:17; 3:12:14.<sup>5</sup>

2 At the May 19 hearing, even though the court and Saxena  
3 spent their time discussing the sufficiency of service, Nabilisi  
4 for his part again argued the merits:

5 Your Honor, he from the beginning have no grounds to  
6 even file this, and his attorney indicated to the Court  
7 the last time that we were here, indicating that they  
8 didn't think that this matter belonged here, and I  
9 really think that it shouldn't be dragged on anymore.  
10 He doesn't have anymore -- he's the only creditor, and  
11 we are not in any financial problems except in the fact  
12 that the merchandise that was purchased with the money  
13 that he loaned us is still sitting in our premises and  
14 we have not been able to sell it. As a result, I  
15 cannot pay him right this moment, but I am willing to  
16 pay him. I, respectfully, like to see that when this  
17 case is dismissed, he only has one creditor, not three,  
18 and the amount owed has no limits. Therefore, I don't  
19 -- the note does not do. I would respectfully ask you  
20 to dismiss the case today if it's possible.

21 Hrg. Transcript (5/19/09) at 5:1-5:16.

22 The court again told Nabilisi to put his merits arguments in  
23 writing. Meanwhile, after Saxena complained about his counsel's  
24 failure to appear, the court agreed to continue the hearing, this  
25 time to June 2, 2009. The court further specified that, if  
26 Saxena or his counsel did not file proof of timely service of the  
27 summons and petition in advance of the June 2 hearing, the  
28 petition would be dismissed. The court made clear that the  
purpose of the June 2 hearing was to resolve the issue of the

29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
8010  
8011  
8012  
8013  
8014  
8015  
8016  
8017  
8018  
8019  
8020  
8021  
8022  
8023  
8024  
8025  
8026  
8027  
8028  
8029  
8030  
8031  
8032  
8033  
8034  
8035  
8036  
8037  
8038  
8039  
8040  
8041  
8042  
8043  
8044  
8045  
8046  
8047  
8048  
8049  
8050  
8051  
8052  
8053  
8054  
8055  
8056  
8057  
8058  
8059  
8060  
8061  
8062  
8063  
8064  
8065  
8066  
8067  
8068  
8069  
8070  
8071  
8072  
8073  
8074  
8075  
8076  
8077  
8078  
8079  
8080  
8081  
8082  
8083  
8084  
8085  
8086  
8087  
8088  
8089  
8090  
8091  
8092  
8093  
8094  
8095  
8096  
8097  
8098  
8099  
80100  
80101  
80102  
80103  
80104  
80105  
80106  
80107  
80108  
80109  
80110  
80111  
80112  
80113  
80114  
80115  
80116  
80117  
80118  
80119  
80120  
80121  
80122  
80123  
80124  
80125  
80126  
80127  
80128  
80129  
80130  
80131  
80132  
80133  
80134  
80135  
80136  
80137  
80138  
80139  
80140  
80141  
80142  
80143  
80144  
80145  
80146  
80147  
80148  
80149  
80150  
80151  
80152  
80153  
80154  
80155  
80156  
80157  
80158  
80159  
80160  
80161  
80162  
80163  
80164  
80165  
80166  
80167  
80168  
80169  
80170  
80171  
80172  
80173  
80174  
80175  
80176  
80177  
80178  
80179  
80180  
80181  
80182  
80183  
80184  
80185  
80186  
80187  
80188  
80189  
80190  
80191  
80192  
80193  
80194  
80195  
80196  
80197  
80198  
80199  
80200  
80201  
80202  
80203  
80204  
80205  
80206  
80207  
80208  
80209  
80210  
80211  
80212  
80213  
80214  
80215  
80216  
80217  
80218  
80219  
80220  
80221  
80222  
80223  
80224  
80225  
80226  
80227  
80228  
80229  
80230  
80231  
80232  
80233  
80234  
80235  
80236  
80237  
80238  
80239  
80240  
80241  
80242  
80243  
80244  
80245  
80246  
80247  
80248  
80249  
80250  
80251  
80252  
80253  
80254  
80255  
80256  
80257  
80258  
80259  
80260  
80261  
80262  
80263  
80264  
80265  
80266  
80267  
80268  
80269  
80270  
80271  
80272  
80273  
80274  
80275  
80276  
80277  
80278  
80279  
80280  
80281  
80282  
80283  
80284  
80285  
80286  
80287  
80288  
80289  
80290  
80291  
80292  
80293  
80294  
80295  
80296  
80297  
80298  
80299  
80300  
80301  
80302  
80303  
80304  
80305  
80306  
80307  
80308  
80309  
80310  
80311  
80312  
80313  
80314  
80315  
80316  
80317  
80318  
80319  
80320  
80321  
80322  
80323  
80324  
80325  
80326  
80327  
80328  
80329  
80330  
80331  
80332  
80333  
80334  
80335  
80336  
80337  
80338  
80339  
80340  
80341  
80342  
80343  
80344  
80345  
80346  
80347  
80348  
80349  
80350  
80351  
80352  
80353  
80354  
80355  
80356  
80357  
80358  
80359  
80360  
80361  
80362  
80363  
80364  
80365  
80366  
80367  
80368  
80369  
80370  
80371  
80372  
80373  
80374  
80375  
80376  
80377  
80378  
80379  
80380  
80381  
80382  
80383  
80384  
80385  
80386  
80387  
80388  
80389  
80390  
80391  
80392  
80393  
80394  
80395  
80396  
80397  
80398  
80399  
80400  
80401  
80402  
80403  
80404  
80405  
80406  
80407  
80408  
80409  
80410  
80411  
80412  
80413  
80414  
80415  
80416  
80417  
80418  
80419  
80420  
80421  
80422  
80423  
80424  
80425  
80426  
80427  
80428  
80429  
80430  
80431  
80432  
80433  
80434  
80435  
80436  
80437  
80438  
80439  
80440  
80441  
80442  
80443  
80444  
80445  
80446  
80447  
80448  
80449  
80450  
80451  
80452  
80453  
80454  
80455  
80456  
80457  
80458  
80459  
80460  
80461  
80462  
80463  
80464  
80465  
80466  
80467  
80468  
80469  
80470  
80471  
80472  
80473  
80474  
80475  
80476  
80477  
80478  
80479  
80480  
80481  
80482  
80483  
80484  
80485  
80486  
80487  
80488  
80489  
80490  
80491  
80492  
80493  
80494  
80495  
80496  
80497  
80498  
80499  
80500  
80501  
80502  
80503  
80504  
80505  
80506  
80507  
80508  
80509  
80510  
80511  
80512  
80513  
80514  
80515  
80516  
80517  
80518  
80519  
80520  
80521  
80522  
80523  
80524  
80525  
80526  
80527  
80528  
80529  
80530  
80531  
80532  
80533  
80534  
80535  
80536  
80537  
80538  
80539  
80540  
80541  
80542  
80543  
80544  
80545  
80546  
80547  
80548  
80549  
80550  
80551  
80552  
80553  
80554  
80555  
80556  
80557  
80558  
80559  
80560  
80561  
80562  
80563  
80564  
80565  
80566  
80567  
80568  
80569  
80570  
80571  
80572  
80573  
80574  
80575  
80576  
80577  
80578  
80579  
80580  
80581  
80582  
80583  
80584  
80585  
80586  
80587  
80588  
80589  
80590  
80591  
80592  
80593  
80594  
80595  
80596  
80597  
80598  
80599  
80600  
80601  
80602  
80603  
80604  
80605  
80606  
80607  
80608  
80609  
80610  
80611  
80612  
80613  
80614  
80615  
80616  
80617  
80618  
80619  
80620  
80621  
80622  
80623  
80624  
80625  
80626  
80627  
80628  
80629  
80630  
80631  
80632  
80633  
80634  
80635  
80636  
80637  
80638  
80639  
80640  
80641  
80642  
80643  
80644  
80645  
80646  
80647  
80648  
80649  
80650  
80651  
80652  
80653  
80654  
80655  
80656  
80657  
80658  
80659  
80660  
80661  
80662  
80663  
80664  
80665  
80666  
80667  
80668  
80669  
80670  
80671  
80672  
80673  
80674  
80675  
80676  
80677  
80678  
80679  
80680  
80681  
80682  
80683  
80684  
80685  
80686  
80687  
80688  
80689  
80690  
80691  
80692  
80693  
80694  
80695  
80696  
80697  
80698  
80699  
80700  
80701  
80702  
80703  
80704  
80705  
80706  
80707  
80708  
80709  
80710  
80711  
80712  
80713  
80714  
80715  
80716  
80717  
80718  
80719  
80720  
80721  
80722  
80723  
80724  
80725  
80726  
80727  
80728  
80729  
80730  
80731  
80732  
80733  
80734  
80735  
80736  
80737  
80738  
80739  
80740  
80741  
80742  
80743  
80744  
80745  
80746  
80747  
80748  
80749  
80750  
80751  
80752  
80753  
80754  
80755  
80756  
80757  
80758  
80759  
80760  
80761  
80762  
80763  
80764  
80765  
80766  
80767  
80768  
80769  
80770  
80771  
80772  
80773  
80774  
80775  
80776  
80777  
80778  
80779  
80780  
80781  
80782  
80783  
80784  
80785  
80786  
80787  
80788  
80789  
80790  
80791  
80792  
80793  
80794  
80795  
80796  
80797  
80798  
80799  
80800  
80801  
80802  
80803  
80804  
80805  
80806  
80807  
80808  
80809  
80810  
80811  
80812  
80813  
80814  
80815  
80816  
80817  
80818  
80819  
80820  
80821  
80822  
80823  
80824  
80825  
80826  
80827  
80828  
80829  
80830  
80831  
80832  
80833  
80834  
80835  
80836  
80837  
80838  
80839  
80840  
80841  
80842  
80843  
80844  
80845  
80846  
80847  
80848  
80849  
80850  
80851  
80852  
80853  
80854  
80855  
80856  
80857  
80858  
80859  
80860  
80861  
80862  
80863  
80864  
80865  
80866  
80867  
80868  
80869  
80870  
80871  
80872  
80873  
80874  
80875  
80876  
80877  
80878  
80879  
80880  
80881  
80882  
80883  
80884  
80885  
80886  
80887  
80888  
80889  
80890  
80891  
80892  
80893  
80894  
80895  
80896  
80897  
80898  
80899  
80900  
80901  
80902  
80903  
80904  
80905  
80906  
80907  
80908  
80909  
80910  
80911  
80912  
80913  
80914  
80915  
80916  
80917  
80918  
80919  
80920  
80921  
80922  
80923  
80924  
80925  
80926  
80927  
80928  
80929  
80930  
80931  
80932  
80933  
80934  
80935  
80936  
80937  
80938  
80939  
80940  
80941  
80942  
80943  
80944  
80945  
80946  
80947  
80948  
80949  
80950  
80951  
80952  
80953  
80954  
80955  
80956  
80957  
80958  
80959  
80960  
80961  
80962  
80963  
80964  
80965  
80966  
80967  
80968  
80969  
80970  
80971  
80972  
80973  
80974  
8097

1 timeliness of service, and that if that issue was resolved in  
2 Saxena's favor, an evidentiary hearing would be set in late June  
3 or early July.

4 Neither party filed any papers after the May 19 hearing. At  
5 the June 2 hearing, Nabilsi once again argued that the petition  
6 should be dismissed on the merits:

7 You indicated the last time that I was here that he --  
8 if the case did not have any merits, that you'd be  
9 willing to dismiss it. This gentleman has only one --  
10 he's only one creditor. He wants to do an involuntary  
11 bankruptcy on a small business that is owned by a  
family, and it would be a great hardship for us to have  
him do that. I respectfully request that you dismiss  
the case on the ground that there's no merit to him  
getting an involuntary bankruptcy.

12 Hrg. Transcript (6/2/09) at 1:7-1:15.

13 After a colloquy with Saxena regarding his failure to file  
14 any papers showing timely service, the court stated that the  
15 petition would be dismissed based on Saxena having not presented  
16 evidence in support of the merits of the petition:

17 Well, there is no -- no evidence before the Court that  
18 the Debtor has fewer than 12 creditors, and this is the  
fourth hearing on this matter. It's time to dismiss  
it. The case is dismissed.

19 Hrg. Transcript (6/2/09) at 6:23-7:2. While at the precise  
20 moment of ruling the court focused on the merits of the petition,  
21 a fair reading of the entire transcript of the June 2, 2009  
22 hearing, especially when read in conjunction with the transcript  
23 from the May 19, 2009 hearing, leads us to construe  
24 the court's ruling as dismissing the petition on two independent  
25 grounds: (1) untimely service of process; and (2) lack of  
26 evidence in support of the merits of the petition.

27 On June 5, 2009, the bankruptcy court entered its order  
28

1 dismissing the involuntary petition for the reasons stated on the  
2 record, and Saxena timely appealed.

3 **JURISDICTION**

4 The bankruptcy court had jurisdiction under 28 U.S.C.  
5 §§ 1334 and 157(b)(2)(A) and (O), and we have jurisdiction under  
6 28 U.S.C. § 158.

7 **ISSUES**

- 8 1. Did the bankruptcy court properly dismiss the petition based  
9 on untimely service of process?  
10 2. Did the bankruptcy court properly consider the merits of the  
11 involuntary petition, and properly dismiss the petition  
12 based on Saxena's failure to submit evidence in support of  
13 the merits of the petition, or should it have entered an  
14 order for relief as requested in the involuntary petition?

15 **STANDARDS OF REVIEW**

16 Construction of rules of procedure and the Bankruptcy Code  
17 presents questions of law that we review de novo. Litton Loan  
18 Serv'g, LP v. Garvida (In re Garvida), 347 B.R. 697, 703 (9th  
19 Cir. BAP 2006); Ruvacalba v. Munoz (In re Munoz), 287 B.R. 546,  
20 550 (9th Cir. BAP 2002).

21 Issues regarding the sufficiency of service of process also  
22 are reviewed de novo. Rubin v. Pringle (In re Focus Media), 387  
23 F.3d 1077, 1081 (9th Cir. 2004).

24 **DISCUSSION**

25 Even reading Saxena's appeal brief in the most favorable  
26 possible light, he has not challenged on appeal either ground the  
27 bankruptcy court gave for its dismissal. To the extent his brief  
28 is comprehensible, Saxena only argues on appeal why he thinks,

Case 2:13-ap-01383-DS Doc 43 Filed 06/30/14 Entered 06/30/14 11:29:18 Desc  
Main Document Page 31 of 46

1 given his perception of the merits, the order for relief should  
2 have been entered.

3 Even though Saxena did not raise on appeal any issues  
4 relating to the propriety of the dismissal, appellate courts have  
5 discretion to consider arguments not raised in appeal briefs  
6 where the issue "is purely one of law and either does not depend  
7 on the factual record developed below, or the pertinent record  
8 has been fully developed." Vasquez v. Holder, 602 F.3d 1003,  
9 1010 n.6 (9th Cir. 2010) (quoting United States v. Berger, 473  
10 F.3d 1080, 1100 n.5 (9th Cir. 2007)). Here, the propriety of the  
11 bankruptcy court's dismissal, on either of the grounds relied  
12 upon by the bankruptcy court, sufficiently meets these criteria:  
13 these are predominantly legal questions that require no further  
14 development of a factual record for their correct determination.<sup>6</sup>  
15 Accordingly, we will exercise our discretion to consider the  
16 issues discussed below.

17 A. Dismissal based on service defects.

18 There apparently were two defects in Saxena's service of the  
19 summons and petition. One arose from the fact that Saxena  
20 himself personally served the petition, and the other arose from  
21

22 The facts in the record regarding sufficiency of service  
23 and waiver of service are undisputed. These two issues require  
24 us to consider the undisputed facts in light of the correct legal  
25 standard. Such consideration has been held to present a mixed  
26 question of law and fact. Murray v. Bammer (In re Bammer),  
27 131 F.3d 788, 792 (9th Cir. 1997), abrogated in part on other  
28 grounds by, Kawaauhau v. Geiger, 523 U.S. 57 (1998). In any  
event, we believe it appropriate to exercise our discretion to  
consider these issues in light of the absence of any factual  
dispute or the need for further factual development of the  
record.

1 the fact that Saxena served the summons 130 days after he filed  
2 the petition. We must determine whether the bankruptcy court  
3 properly dismissed the petition on the basis of defective  
4 service. But before we make that determination, we must first  
5 identify the relevant procedural rules that govern the service of  
6 the summons and the involuntary petition.

7 1. Applicable procedural rules.

8 The procedural rules governing involuntary petitions  
9 generally mirror adversary proceeding procedures, which in turn  
10 generally mirror the Federal Rules of Civil Procedure. See Mason  
11 v. Integrity Ins. Co. (In re Mason), 709 F.2d 1313, 1318 (9th  
12 Cir. 1983). As stated in Mason:

13 The procedure on a petition for an order for  
14 relief has many of the attributes of "adversary  
15 proceedings" governed by Part VII of the Bankruptcy  
16 Rules. In turn, the rules governing adversary  
17 proceedings are derived largely from the Federal Rules  
18 of Civil Procedure. In a proceeding on an involuntary  
19 petition, the rules contemplate a procedure much like  
any other lawsuit: the petition for relief is treated  
as a complaint which must be answered by the debtor to  
avoid default . . . .

20 Id. (citations omitted). But the bankruptcy rules only  
21 selectively incorporate aspects of federal civil procedure.  
22 Furthermore, procedural requirements can be weakened or  
23 strengthened in the process of incorporation.

24 Rule 1010(a) directs that involuntary petitions, and their  
25 corresponding summonses, should be served "in the manner provided  
26 for service of a summons and complaint by Rule 7004(a) or (b)." In  
27 relevant part, Rule 7004(a)(1) specifies that, when the  
28 plaintiff elects to serve a defendant by personal service, such  
service must be made by a person at least 18 years old, who is

1 not a party to the lawsuit.

2 Rule 7004(a)(1) also makes Civil Rule 4(m) applicable in  
3 adversary proceedings. Civil Rule 4(m) provides that, if the  
4 plaintiff fails to serve a summons and complaint within 120 days  
5 of the filing of the complaint, the court either must dismiss or  
6 must order that service be made within a specified time. Rule  
7 4(m) further provides that, if the plaintiff shows good cause for  
8 the delay, the court must grant an extension of time for service.

9 However, unlike Rule 7004(a)(1), Rule 1010(a) does not on  
10 its face make Civil Rule 4(m) applicable to the service of  
11 involuntary petitions. The final sentence of Rule 1010(a)  
12 supports the notion that Civil Rule 4(m) is inapplicable to  
13 involuntary petitions. The final sentence of Rule 1010(a) states  
14 that Civil Rule 4(l) applies; it would have been easy enough for  
15 the drafters to expressly reference Civil Rule 4(m) at the same  
16 time, but they did not do so.

17 Alternately, if Rule 1010(a) had broadly incorporated Rule  
18 7004(a), by stating that Rule 7004(a) "applies" to involuntary  
19 petitions, it would have been easy for us to conclude that Civil  
20 Rule 4(m) was meant to apply to involuntary petitions, because  
21 Rule 7004(a) expressly incorporates Civil Rule 4(m). However,  
22 instead of using broad language indicating the wholesale  
23 incorporation of Rule 7004(a), Rule 1010(a) more narrowly  
24 provides that service of the summons and petition shall be served  
25 "in the manner provided for service of a summons and complaint by  
26 Rule 7004(a) or (b)." The advisory committee notes accompanying  
27 Rule 1010(a) indicate that the purpose of Rule 1010(a)'s  
28 incorporation of Rule 7004(a) and (b) was to delineate methods of

1 service. The only discussion in the advisory committee notes of  
2 the issue of timing of service is in relation to Rule 1010(a)'s  
3 express application of Rule 7004(e) - which does not include any  
4 firm deadline for service akin to that found in Civil Rule 4(m).<sup>7</sup>

5 Apparently on account of the omission of Civil Rule 4(m)  
6 from the procedures made applicable to involuntary petitions, the  
7 Local Bankruptcy Rules for the Central District of California  
8 ("Local Bankruptcy Rules") provide:

9 LBR 1010-1. INVOLUNTARY PETITIONS

10 The court may dismiss an involuntary petition sua  
11 sponte if the petitioner fails to (a) serve the summons  
12 and petition within the time allowed by FRBP 7004; (b)  
13 file a proof of service of the summons and petition  
14 with the court; or (c) appear at the status conference  
15 set by the court.

16 Local Bankruptcy Rule 1010-1 is less than crystal clear, but  
17 this local rule apparently makes the 120-day service deadline  
18 from Civil Rule 4(m) applicable to involuntary petitions. While  
19 the parts of Civil Rule 4(m) permitting and/or requiring the  
20 court to extend the 120-day service deadline are not explicitly  
21 incorporated into Local Bankruptcy Rule 1010-1, the local rule on  
22 its face makes dismissal permissive rather than mandatory. In  
23 most instances, in the process of exercising its discretion under  
24 Local Bankruptcy Rule 1010-1, a bankruptcy court presumably would  
25 want to consider the propriety of extension of the 120-day  
26 deadline in the same manner that a district court would need to  
27 consider such extension under Civil Rule 4(m).<sup>7</sup>

---

28 'Saxena's delay in service might not have been entirely due  
29 to his own inaction. The record reflects that Saxena served the  
30 summons and the petition two days after the bankruptcy court  
(continued...)

1 As alluded to previously, Saxena contravened the service  
2 rules in two ways. First, the record establishes that Saxena  
3 himself personally served Nabilsi, in violation of Rule  
4 7004(a)(1). Second, Saxena did not serve the summons and  
5 petition within 120 days, apparently in violation of Local  
6 Bankruptcy Rule 1010-1.

7 We now turn to the issue of whether Nabilsi waived the  
8 service defects.

9 2. Nabilsi waived the service defects.

10 Notwithstanding the defects in Saxena's service of the  
11 summons and petition, we must determine whether Nabilsi waived  
12 the defects. Ineffective or insufficient service of process can  
13 prevent a federal court from acquiring personal jurisdiction over  
14 a defendant. See In re Focus Media, 387 F.3d at 1081. A  
15 judgment or order entered against a defendant is void where the  
16 court lacks personal jurisdiction over the defendant. Thomas P.  
17 Gonzalez Corp. v. Consejo Nacional De Produccion De Costa,  
18 614 F.2d 1247, 1255-56 (9th Cir. 1980).

19 Because of the voidness of judgments and orders entered in  
20 the absence of personal jurisdiction, defendants generally do not  
21

---

22 '(...continued)  
23 issued the summons, and that the bankruptcy court did not issue  
24 the summons until 128 days after the petition was filed. Cf.  
25 Abdel-Latif v. Wells Fargo Guard Servs., Inc., 122 F.R.D. 169,  
26 174 (D.N.J. 1988) (stating that good cause for extending the  
27 120-day deadline may exist when there is delay in issuance of a  
28 summons due to factors beyond the plaintiff's control, and citing  
4A C. Wright & A. Miller Federal Practice & Procedure § 1086  
(1987)). However, there is no indication in the record that  
Saxena offered any evidence tending to show that the delay in  
issuance of the summons was due to factors beyond his control.

1 waive a personal jurisdiction argument if they do not take any  
2 action at all in the litigation from which the judgment or order  
3 arose. See id. (affirming order vacating default judgment, even  
4 though defendants did nothing in response to complaint, because  
5 court lacked personal jurisdiction over the defendants).

6 However, defendants can waive objections concerning the  
7 sufficiency of service when they do take action in response to a  
8 complaint. For instance, if a defendant files an answer or a  
9 responsive motion under Civil Rule 12(b) but does not raise in  
10 those papers any objections regarding the sufficiency of service,  
11 those objections are considered waived under the plain language  
12 of Civil Rule 12. See Civil Rule 12(b) and (h)(1); Peterson v.  
13 Highland Music, Inc., 140 F.3d 1313, 1318 (9th Cir. 1998); Roberts  
14 v. Erhard (In re Roberts), 331 B.R. 876, 881-82 (9th Cir. BAP  
15 2005), aff'd, 241 Fed.Appx. 420 (9th Cir. 2007); McCurdy v.  
16 American Bd. of Plastic Surgery, 157 F.3d 191, 195 (3d Cir.  
17 1998).

18 Failure to raise the service defects in either an answer or  
19 a responsive motion is not the only way to waive such objections.  
20 A defendant also may waive them "as a result of a course of  
21 conduct pursued . . . during litigation." Peterson, 140 F.3d at  
22 1318. In other words, even when Civil Rule 12(h)(1) is  
23 inapplicable because the defendants filed no answer or response  
24 to the complaint, a defendant can waive its objections and  
25 defenses concerning the adequacy of service by engaging in a  
26 course of conduct in the litigation inconsistent with a claim  
27 that the court lacks personal jurisdiction over the defendant.  
28 See Trustees of Central Laborers' Welfare Fund v. Lowery.

1 924 F.2d 731, 732-33 (7th Cir. 1991); Broadcast Music, Inc. v.  
2 MTS Enterprises, Inc., 811 F.2d 278, 281 (5th Cir. 1987). See  
3 generally In re Focus Media, 387 F.3d at 1082-84 (holding that  
4 counsel's and defendant-client's activity in underlying  
5 bankruptcy case established that counsel was "impliedly  
6 authorized" to accept service on behalf of his client, thereby  
7 defeating client's insufficient service arguments).

8 MTS Enterprises is particularly instructive. In litigation  
9 against a corporation and two of its shareholders, all three  
10 defendants were represented by the same counsel, who duly  
11 received notice of all relevant matters taking place in the  
12 litigation, but there was an issue as to whether the two  
13 shareholders had been formally served with process. Counsel  
14 attended a pretrial conference on behalf of all three defendants,  
15 participated in settlement negotiations on behalf of all three  
16 defendants, and moved to withdraw as counsel for all three  
17 defendants. The two shareholders never responded to the  
18 plaintiff's complaint, and the first time the shareholders'  
19 counsel raised the service issue was at a hearing on the  
20 plaintiff's motion for entry of default judgment. After the  
21 bankruptcy court entered the default judgment against the  
22 shareholders and denied the shareholders' motion to vacate the  
23 default judgment under Civil Rule 60(b), the shareholders  
24 appealed.

25 The MTS Enterprises court rejected the shareholders'  
26 argument on appeal regarding plaintiff's failure to properly  
27 serve them. The MTS Enterprises court acknowledged that a lack  
28 of personal jurisdiction would render the default judgment void,

1 and acknowledged that there was no waiver under Civil Rule  
2 12(h)(1) because the shareholders never filed any sort of  
3 responsive pleading. The MTS Enterprises court nonetheless  
4 concluded that the shareholders had waived the service defects:

5 The Federal Rules do not in any way suggest that a  
6 defendant may halfway appear in a case, giving  
7 plaintiff and the court the impression that he has been  
8 served, and, at the appropriate time, pull failure of  
9 service out of the hat like a rabbit in order to escape  
10 default judgment. To countenance this train of events  
11 would elevate formality over substance and would lead  
12 plaintiffs to waste time, money, and judicial resources  
13 pursuing a cause of action. Indeed, that waste would  
14 result here if we void the district court's judgment  
15 for lack of service of process. Nor is there any  
16 indication in the record that appellants, the two  
17 shareholders of the corporate defendant, were unaware  
18 of the suit against them. . . . Thus, we hold that [the  
19 shareholders] . . . through the actions of their  
20 counsel, voluntarily appeared in this case and waived  
21 the defense of insufficiency or failure of service of  
22 process.

23 Id. at 281. . . .

24 The nature and extent of Nabilsi's conduct, here, is  
25 comparable to that of the shareholders in MTS Enterprises. By  
26 the time of the bankruptcy court's dismissal of Saxena's  
27 petition, over four months had elapsed since service of the  
summons and the petition, so there was ample time for Nabilsi to  
give some indication of his desire to contest the court's  
personal jurisdiction, but Nabilsi never did so. More  
importantly, Nabilsi participated in all four of the hearings  
before the bankruptcy court on the involuntary petition, and he  
gave every indication at these hearings that he considered the  
court to have personal jurisdiction over him. He repeatedly  
raised arguments at these hearings based on the merits of the  
involuntary petition.

28

1        Additionally, in our case, as in MTS Enterprises, the  
2 responding party had ample notice of the litigation. Here,  
3 Nabilsa admitted in open court that he received notice of the  
4 initial hearing and made further statements indicating that he  
5 received the summons and complaint notwithstanding any service  
6 defects.\*

7        We recognize that we are dealing with service of a summons  
8 and an involuntary bankruptcy petition, rather than with service  
9 of a summons and complaint, and that the court here ultimately  
10 dismissed the petition based on the insufficient service of  
11 process. However, we conclude that the similarity of the conduct  
12 of the responding parties is key, and that our analogy to MTS  
13 Enterprises is apt and appropriate. The Federal Rules of  
14 Bankruptcy Procedure impose a duty on alleged debtors to  
15 expeditiously come forward with any objections and defenses they  
16 have to an involuntary petition filed against them. See  
17 § 303(h); Rules 1011, 1013. This duty is analogous to what is  
18 required of defendants in ordinary federal civil litigation.  
19 Further, there is no difference in the harm that alleged debtors  
20 can cause when they act in the litigation as if the court has

21  
22        \*In both MTS Enterprises and in the appeal before us,  
23 personal jurisdiction is not complicated by the attempted  
24 invocation of longarm jurisdiction. Both MTS Enterprises and our  
25 case only involve defective service issues. At least one circuit  
26 court has opined that, when the issue of personal jurisdiction  
27 only implicates a problem of defective service, waiver by conduct  
28 requires less of a showing. Datskow v. Teledyne, Inc., 899 F.2d  
1298, 1303 (2d Cir. 1990) (" . . . this is not a case where a  
defendant is contesting personal jurisdiction on the ground that  
longarm jurisdiction is not available. We would be slower to  
find waiver by a defendant wishing to contest whether it was  
obliged to defend in a distant court.").

Case 2:13-ap-01383-DS Doc 43 Filed 06/30/14 Entered 06/30/14 11:29:18 Desc  
Main Document Page 40 of 46

1 personal jurisdiction over them, from the harm a defendant causes  
2 when it keeps arguments regarding service defects in its hip  
3 pocket while arguing the merits of the case. In both contexts,  
4 such conduct can lead to a waste of judicial resources and  
5 needless incurrence of legal costs by the parties.

6 Accordingly, we hold that, through his course of conduct in  
7 the litigation, Nabilsi waived any defects in service of the  
8 summons and the petition.

9 3. Impact of waiver on dismissal based on service defects.

10 In light of Nabilsi's waiver of the service defects, the  
11 bankruptcy court erred when it dismissed the petition based on  
12 those defects. Roberts and McCurdy, *supra*, support this  
13 conclusion. In both Roberts and McCurdy, the trial court was  
14 faced with a failure to timely serve a summons and complaint in  
15 violation of Civil Rule 4(m). On appeal, both Roberts and  
16 McCurdy concluded that the defendants' failure to raise the  
17 service defects in their first responsive pleading waived the  
18 service defects pursuant to Civil Rule 12(h)(1). In ruling that  
19 the district court erred in dismissing the complaint based on  
20 untimely service, the McCurdy court explained that the Civil Rule  
21 12(h)(1) waiver had primacy over the violation of Civil Rule  
22 4(m):

23 On its face, the language of Rule 4(m) appears to be  
24 inconsistent with Rule 12's waiver scheme. It provides  
25 that where service is not effected on a defendant  
within 120 days of the filing of the complaint, the  
court "upon motion or on its own initiative . . . shall  
26 dismiss the action without prejudice as to that  
defendant." Fed.R.Civ.P. 4(m). The district court  
here concluded that an objection to the timeliness of  
service was governed by the "clear, mandatory time  
27 requirements set forth in the Rule," so that Rule 4(m)  
28 effectively overrides the waiver provisions of Rule

12(h). Though an arguably plausible resolution, courts  
and commentators addressing the apparent tension  
between Rules 4(m) and 12(h) have unanimously concluded  
that Rule 4(m) does not trump Rule 12(h) and that an  
objection that service is untimely under Rule 4(m) is  
subject to waiver by the defendant if not made in  
compliance with Rule 12.

5 McCurdy, 157 F.3d at 194, 95 (citations omitted). Accord,  
6 Roberts, 331 B.R. at 881-82.

7 Admittedly, neither Civil Rule 4(m) nor Civil Rule 12(h)(1)  
8 are directly implicated in our appeal. Rather, we are presented  
9 here with a similar tension between violation of the deadline for  
10 service imposed by Local Bankruptcy Rule 1010-1, and the waiver  
11 of service defects by course of conduct as recognized in  
12 Peterson, Lowery and MTS Enterprises.

13 But the difference in applicable rules does not justify a  
14 different result. Indeed, the facially-binding nature of Civil  
15 Rule 4(m), which gave the McCurdy court pause, is absent here;  
16 rather, the bankruptcy court's dismissal under Local Bankruptcy  
17 Rule 1010-1 was purely discretionary. In the face of purely  
18 discretionary grounds for dismissal, the bankruptcy court should  
19 have given primacy to Nabilsis's waiver of the service defects.

20 Accordingly, the bankruptcy court erred when it dismissed  
21 the petition based on untimely service of process.

22 B. Dismissal on the merits.

23 Section 303(h) directs the bankruptcy court to hold trial  
24 weighing the merits of the involuntary petition only if the  
25 alleged debtor (or another interested party) has contested the  
26 petition.<sup>9</sup> See also 2 COLLIER ON BANKRUPTCY ¶ 303.20[2] (Alan N.

27  
28 \*Section 303(h) provides in full:

(continued...)

1 Resnick & Henry J. Sommer, eds., 15th ed. rev. 2010)

2 ("Importantly, section 303(h) provides that if a petition is not  
3 timely controverted, the order for relief will be entered.").

4 The bankruptcy rules further flesh out the requirements of  
5 the statute. In relevant part, Rule 1011(b) provides: "Defenses  
6 and objections to the petition shall be presented in the manner  
7 prescribed by Rule 12 F.R.Civ.P. and shall be filed and served  
8 within 21 days after service of the summons . . . ."<sup>10</sup> Rule  
9 1013(a) reiterates the direction in § 303(h) that the bankruptcy  
10 court may consider the merits of the petition only if the  
11 petition has been timely contested.

12 Here, material issues regarding the merits of the petition  
13 are evident in the record: issues regarding both the sufficiency

14 . . .  
15 . . .  
16 . . .  
17 . . .  
18 . . .  
19 . . .

15 '(...continued)

16 (h) If the petition is not timely controverted, the  
17 court shall order relief against the debtor in an  
18 involuntary case under the chapter under which the  
19 petition was filed. Otherwise, after trial, the court  
shall order relief against the debtor in an involuntary  
case under the chapter under which the petition was  
filed, only if--

20 (1) the debtor is generally not paying such  
21 debtor's debts as such debts become due unless  
22 such debts are the subject of a bona fide dispute  
as to liability or amount; or

23 (2) within 120 days before the date of the filing  
24 of the petition, a custodian, other than a  
trustee, receiver, or agent appointed or  
25 authorized to take charge of less than  
substantially all of the property of the debtor  
26 for the purpose of enforcing a lien against such  
property, was appointed or took possession.

27  
28 <sup>10</sup>On December 1, 2009, a minor amendment to Rule 1011(b)  
took effect, which amendment changed the time to respond from  
20 days to 21 days.

1 of the allegations contained in the petition and regarding  
2 whether Saxena at trial could meet his evidentiary burden as to  
3 the alleged grounds for entry of the order for relief. For  
4 instance, the petition on its face did not contain the requisite  
5 allegation that Nabilsi was a person against whom an order for  
6 relief could be entered, as contemplated by § 303(a) and Official  
7 Form B5. Further, the parties' statements at the hearings  
8 suggested that there was a factual issue regarding the overall  
9 number of Nabilsi's creditors, which is relevant for determining  
10 whether the involuntary petition required only one petitioning  
11 creditor, or a minimum of 3 petitioning creditors. See § 303(b).

12 But the above-referenced merits issues only properly could  
13 come into play if Nabilsi timely contested the petition, by  
14 filing an answer or responsive motion. See § 303(h); Rules 1011,  
15 1013, see also *In re Mason*, 709 F.2d at 1314 (explaining that the  
16 defense regarding the number of petitioning creditors was not  
17 jurisdictional and was waived by alleged debtor's failure to  
18 timely file an answer raising the defense); *Dahlby v. Key* (In re  
19 Key), 209 B.R. 737 (10th Cir. BAP 1997) (reversing bankruptcy  
20 court dismissal of petition based on alleged debtor's failure to  
21 timely contest petition).

22 In particular, Rule 1013(b) states that:

23 If no pleading or other defense to a petition is filed  
24 within the time provided by Rule 1011, the court, on  
25 the next day, or as soon thereafter as practicable,  
shall enter an order for the relief requested in the  
petition.

26 In sum, because Nabilsi never filed a written response to  
27 the petition, the bankruptcy court should not have considered the  
28 merits of the petition; rather, it should have taken steps to

1 enter the order for relief based on Nabilsi's default.  
2 Accordingly, the bankruptcy court erred when it dismissed the  
3 petition based on Saxena's failure to submit evidence in support  
4 of the merits of the petition.<sup>11</sup>

5 **CONCLUSION**

6 For the reasons set forth above, the bankruptcy court erred  
7 when it dismissed Saxena's petition. Therefore, the order of  
8 dismissal is REVERSED, and this matter is REMANDED for entry of  
9 the order for relief against Nabilsi.

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

---

27 <sup>11</sup>Because we are reversing the dismissal order on other  
28 grounds, we need not reach the constitutional issue of whether  
Saxena's due process rights were violated. See Meinhold v. Dept.  
of Defense, 34 F.3d 1469, 1474 (9th Cir. 1994).

**U.S. Bankruptcy Appellate Panel  
of the Ninth Circuit**

125 South Grand Avenue, Pasadena, California 91105  
Appeals from Central California (626) 229-7220  
Appeals from all other Districts (626) 229-7225

**NOTICE OF ENTRY OF JUDGMENT**

BAP No.: CC-09-1207-MkJaD

RE: YUNES ABUD NABILSI

A separate Judgment was entered in this case on 11/16/2010.

**BILL OF COSTS:**

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. 9th Cir. BAP Rule 8014-1

**ISSUANCE OF THE MANDATE:**

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. ~~See Federal Rules of Appellate Procedure 41.~~

**APPEAL TO COURT OF APPEALS:**

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the \$455 filing fee and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

24

**General Docket**  
**U. S. Bankruptcy Appellate Panel for the Ninth Circuit**

**Bankruptcy Appellate Panel Docket #:** 14-1444  
**Ram Saxena MD v. Nabilsi Abud**  
**Appeal From:** California Central - Los Angeles  
**Fee Status:** fee paid

**Docketed:** 09/12/2014  
**Termed:** 09/03/2015

**Case Type Information:**

- 1) Bankruptcy
- 2) Chapter 7 Non-Business - Adv
- 3) null

**Originating Court Information:**

**District:** 0973-2 : 2:08-bk-25451-DS  
**Trial Judge:** Deborah J. Saltzman, U.S. Bankruptcy Judge  
**Date Filed:** 03/22/2013  
**Date NOA Filed:** 09/09/2014      **Date Rec'd BAP:** 09/11/2014

**Adversary Proceeding:** 2:13-ap-01383-DS

**Prior Cases:**

<u>09-1207</u>	<b>Date Filed:</b> 06/24/2009	<b>Date Disposed:</b> 11/16/2010	<b>Disposition:</b> Reversed & Remanded; Memo opinion
<u>14-1261</u>	<b>Date Filed:</b> 05/21/2014	<b>Date Disposed:</b> 06/11/2014	<b>Disposition:</b> Jurisdictional Defects; Judge order

**Current Cases:**

None

**Panel Assignment:**

**Panel:** FLK ELP LST  
**Date of Hearing:** 07/23/2015      **Date of Decision:** 09/03/2015

In re: NABILSI YUNES ABUD  
 Debtor

RAM SAXENA  
 Appellant

Ram Saxena  
 Direct: 818-675-1286  
 [NTC Pro Se]  
 446 West Spruce Street  
 Compton, CA 90220

v.

NABILSI YUNES ABUD  
 Appellee

Nabilsi Yunes Abud  
 [NTC Pro Se]  
 17425 Sonora Ave.  
 Cerritos, CA 90703

25