



Signed and Filed: June 01, 2005

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

9 In re)) Bankruptcy Case
)) No. 01-30923DM
10 PACIFIC GAS & ELECTRIC COMPANY,)) Chapter 11
))
11 Debtor.))
_____))

MEMORANDUM DECISION ON MOTION TO
VACATE ENFORCEMENT ORDER

14 I. Introduction

15 The City of Oakland ("City") filed a motion (the "Motion To
 16 Vacate") for an order vacating the Order Enforcing Order
 17 Confirming PG&E's Plan of Reorganization (the "Enforcement Order")
 18 entered on September 3, 2004. Debtor, Pacific Gas & Electric
 19 Company ("PG&E"), opposed the Motion To Vacate. The court held a
 20 hearing on April 25, 2005, and appearances were noted on the
 21 record. During the course of that hearing the court indicated to
 22 counsel for City that its complaint in the Motion To Vacate about
 23 PG&E's failure to serve its Omnibus Motion To Enforce Order
 24 Confirming PG&E's Plan of Reorganization ("Motion To Enforce")
 25 filed on July 29, 2004, was well taken and that the court would
 26 grant the Motion To Vacate as long as City could show that it had
 27 a meritorious defense to the Motion To Enforce.

28 City was given time to submit proof that its failure to file

1 a proof of claim based upon its cross-complaint for indemnity and
2 contribution against PG&E in Dickinson, et al. v. PG&E, et al.,
3 Alameda County Superior Court No. 830495-5 (the "State Court
4 Action"), was the result of excusable neglect. On May 9, 2005,
5 City filed declarations of Barbara Parker, Latonda Simmons and a
6 supplemental declaration of Jannie L. Wong. On May 23, 2005, PG&E
7 filed its supplemental opposition to City's Motion To Vacate,
8 submitting the matter for decision.

9 After reviewing all of the papers presented and the arguments
10 of counsel, the court has determined that the Motion To Vacate
11 should be denied because City has not shown excusable neglect for
12 its failure to file a proof of claim based upon the State Court
13 Action by the October 3, 2001, deadline for the filing of proofs
14 of claim by governmental entities. Thus it would be unable to
15 defeat the Motion To Enforce.

16 II. Discussion

17 When PG&E filed and served its Motion To Enforce it did not
18 comply with the requirements of Fed. R. Bankr. P. 7004(b)(6),
19 which provides as follows:

20 (b) Service by first class mail. Except as
21 provided in subdivision (h) ... service may be made
22 within the United States by first class mail postage
pre-paid as follows:

23 * * *

24 (6) Upon a state or municipal corporation or other
25 governmental organization thereof subject to suit, by
26 mailing a copy of the summons and complaint to the
27 person or office upon whom process is prescribed to be
28 served by the law of the state in which service is made
when an action is brought against such a defendant in
the courts of general jurisdiction of that state, or in
the absence of designation of any such person or office
by state law, then to the chief executive office
thereof.

1 Under California law, service on a governmental and municipal
2 entity is controlled by California Code of Civil Procedure
3 §416.50, which provides as follows:

4 (a) A summons may be served on a public entity by
5 delivering a copy of the summons and complaint to the
6 clerk, the secretary, president, presiding officer or
7 other head of its governing body.

8 PG&E served the Motion To Enforce addressed to the attention
9 of Jannie Wong, Esq., the attorney representing the City in the
10 State Court Action, incorrectly identifying her as "Attorneys
11 (sic) for Mark Dickinson." There was, therefore, no compliance
12 with Fed. R. Bankr. P. 7004(b)(6). This failure by PG&E would
13 normally entitle City to the granting of the Motion To Vacate and
14 relief from the Enforcement Order if it could show how it would
15 defeat the Motion To Enforce. See Beneficial California, Inc. v.
16 Villar (In re Villar) 317 B.R. 88 (9th Cir. BAP 2004).

17 In the Motion To Vacate, City argues that even if the Motion
18 To Vacate was properly served (which it was not), Fed. R. Bankr.
19 P. 9024, incorporating Fed. R. Civ. P. 60(b), provides a basis for
20 relief, subject to three important considerations, the first two
21 of which are not relevant. The final one, supporting relief from
22 a default, presumes that the movant has a meritorious defense.
23 City cites Fed. R. Civ. P 60(b)(1) and (6), but the court will
24 focus only on the former subsection, recognizing that the latter
25 is not a catchall to suffice where other subsections cannot be
26 satisfied. LaFarge Conseils Et Etudes, S.A. v. Kaiser Cement &
27 Gypsum Corp., 791 F.2d 1334, 1338 (9th Cir. 1986).

28 The inquiry thus turns on whether City really has a
meritorious defense to the Motion To Enforce. The Motion To

1 Vacate is construed as a motion for relief from the Enforcement
2 Order and is based on excusable neglect pursuant to Fed. R. Civ.
3 p. 60(b)(1). Fed. R. Civ. P. 60(b)(1) provides:

4 On Motion and upon such terms as are just, the court may
5 relieve a party ... from a final ... order for the following
reasons:

6 (1) mistake, inadvertence, surprise, or excusable neglect ...

7 ... The motion shall be made within a reasonable time, and
8 for reasons (1), (2), and (3) not more than one year after
the ... order ..., was entered or taken.

9 The test for determining "excusable neglect" is well
10 established: it is "at bottom, an equitable one, taking account of
11 all relevant circumstances surrounding the party's omission."

12 Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P'ship,
13 507 U.S. 380, 395 (1993). Such an analysis requires the weighing
14 or balancing of relevant factors, including the following four:

15 (1) the danger of prejudice to the debtor,

16 (2) the length of the delay and its potential impact on
17 judicial proceedings,

18 (3) the reason for the delay, including whether it was
within the reasonable control of the movant, and

19 (4) whether the movant acted in good faith.

20 Id. at 395; Pincay v. Andrews, 389 F.3d 853, 855 (9th Cir. 2004).

21 The non-exclusive factors discussed in the above quotation provide
22 a framework for determining whether City has demonstrated
23 "excusable neglect" in this case.

24 In the Ninth Circuit "excusable neglect" is construed
25 liberally under Fed. R. Civ. P. 60(b). Fasson v. Maqourik (In re
26 Maqourik), 693 F.2d 948 (9th Cir. 1982). In Pincay an en banc
27 panel of the Ninth Circuit rejected the concept that certain types
28 of culpable conduct (such as an attorney relying on a paralegal to

1 interpret and abide by a court rule instead of reading and
2 complying with the rule himself) are "per se" not excusable
3 neglect. In so holding, the panel noted that the "real question"
4 is "whether there [is] enough in the context of [the] case to
5 bring a determination of excusable neglect within the [trial]
6 court's discretion." Pincay, 389 F.3d at 859.

7 Applying the Pioneer factors to the present case, the court
8 concludes that the first factor, danger of prejudice to PG&E,
9 weighs ever-so-slightly in favor of PG&E since it is entitled to
10 finality and to be able to rely on the fact that City did not
11 timely file a proof of claim based upon the State Court Action.

12 The second factor, the length of the delay, weighs only
13 slightly in favor of City. While it moved promptly on the Motion
14 To Vacate, the time that has gone by since the governmental claims
15 bar date is quite significant and cannot be ignored.

16 The fourth factor, good faith, is weighed in favor of City.
17 It has a mechanism in place to process incoming legal matters and
18 there is no evidence to suggest that it intentionally disregarded
19 those procedures to lead to the current state of affairs on this
20 dispute.

21 Finally, the reason for the delay, the third factor, tips in
22 favor of PG&E and against City because its very mechanisms in
23 place to process incoming legal matters should have been
24 sufficient to lead to a filing of a proof of claim based upon the
25 State Court Action.

26 The declaration of Robert L. Berger establishes that City was
27 served with the original notice of the Chapter 11 filing at
28 various addresses, including the very same address used for

1 service of process, namely One Frank Ogawa Plaza, Oakland,
2 California. While it is true that Mr. Berger's declaration does
3 not establish that the notice of the Chapter 11 filing was
4 addressed to the attention of a clerk, secretary, president,
5 presiding officer, or head of any governing body for City, Fed. R.
6 Civ. P. 7004 is not applicable to notice given under Fed. R.
7 Bankr. P. 2002. Thus, unlike the creditor who was improperly
8 served in Villar, here service of the original notice of the
9 Chapter 11 case was proper. More importantly, City filed four
10 unrelated proofs of claim in a timely fashion. This suggests that
11 notice of the Chapter 11 filing was timely received by City. No
12 explanation has been offered why Ms. Wong, the attorney
13 responsible for City's prosecution of the State Court Action, did
14 not receive the notice in time to file the proof of claim. On
15 balance, therefore, this factor weighs in favor of PG&E and
16 against City.

17 Balancing these factors is not a mathematical test, and the
18 court is not obligated to give equal weight to them. Rather, it
19 is to balance the factors together and to determine whether the
20 neglect should be excused.

21 Given the adequacy of the notice of the Chapter 11 filing to
22 cause the City to file other proofs of claim, the court concludes
23 in its discretion that City's neglect in failing to file a timely
24 proof of claim in connection with the State Court Action was not
25 excusable. For this reason, while the Motion To Enforce was not
26 properly served, no purpose would be served by granting the Motion
27 To Vacate since the Motion To Enforce, had it been properly
28 served, could not have been successfully defended. The Motion To

1 Vacate must be denied.

2 III. Disposition

3 Counsel for PG&E should submit a form of order denying the
4 Motion To Vacate for the reasons stated in this Memorandum
5 Decision.

6 *END OF MEMORANDUM DECISION*

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