

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DAVID A. WASNEY, SR.)	Case No.: 09-CV-5831-LHK
)	
Plaintiff,)	ORDER DISMISSING APPEAL WITH
v.)	PREJUDICE
)	
DONALD CHARLES SCHWARTZ,)	
)	
Defendant.)	
)	
)	
)	

Bankruptcy Judge Marilyn Morgan granted the motion of debtor and Defendant Donald Charles Schwartz to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6) on November 23, 2009. On December 11, 2009, creditor and Plaintiff David A. Wasney, Sr. filed a notice of appeal from the bankruptcy court and a statement of election for the appeal to be heard by the District Court. On May 13, 2010, the Clerk of the Court assigned the appeal to the Honorable Jeremy Fogel. Citing to Federal Rules of Bankruptcy Procedure (FRBP) 8006 and 8007, the Clerk’s Notice stated that “upon completion by parties of the perfection of the record,” the Bankruptcy Court was to transmit a copy of the record on appeal to the district court. The Clerk’s Notice also set forth the briefing schedule pursuant to the Northern District’s Bankruptcy Local Rules. The parties, however, have made no other filings since the December 11, 2009 notice of appeal.

1 The appeal was reassigned to this Court on August 2, 2010. On August 13, 2010, this
2 Court issued an Order to Show Cause as to why the appeal should not be dismissed for failure to
3 prosecute and set a hearing date of September 16, 2010. Neither party responded to the Order to
4 Show Cause. Neither the parties nor their counsel appeared at the September 16, 2010 hearing.

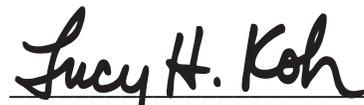
5 Pursuant to FRBP 8006 and 8007, the appellant (Plaintiff) was to have filed a designation
6 of items to be included on the record on appeal and a statement of the issues presented *within 14*
7 *days* of the notice of appeal. That filing would then trigger a 14 day deadline for the appellant
8 (Defendant) to file a designation of additional items and its own statement of the issues. Here,
9 since the appeal was filed on December 11, 2009, Plaintiff should have filed a designation of items
10 to be included on the record on appeal by December 25, 2009. It is now September 16, 2010, and
11 still the Plaintiff has made no additional filings.

12 Pursuant to the Court's Local Bankruptcy Rule 8010-1, upon the entry of the appeal on the
13 District Court's docket, the appellant has 28 days to file a brief. The appellee then has 21 days to
14 file its own brief. A reply is then due in 14 days. Here, the Clerk's Notice assigning this appeal to
15 Judge Fogel was on May 13, 2010. Per the Local Bankruptcy Rules and the Clerk's Notice,
16 Plaintiff should have filed its opening brief by June 10, 2010, and Defendant would have been
17 required to file a brief by July 1, 2010. Again, neither party has submitted any filings since the
18 December 11, 2009 notice of appeal.

19 Therefore, the Court DISMISSES WITH PREJUDICE Plaintiff's bankruptcy appeal for
20 failure to prosecute.

21 **IT IS SO ORDERED.**

22
23 Dated: September 16, 2010



24 LUCY H. KOH
25 United States District Judge