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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ANIBAL MESALA SILVA,

Appellant,

vs.
PATRICK C. HARGADON;
GERALD DAVIS;

and
FEDERAL APPELLEES,

Appellees.

CASE NO. 08cv784-WQH-RBB
ORDER

HAYES, Judge:

The matter before the Court is the request for dismissal for failure to prosecute filed by the Federal Appellees (Doc. 12) and the motion to dismiss for failure to file an opening brief filed by Appellee Gerald Davis (Doc. 14).

On April 29, 2008, Appellant Anibal Mesala Silva, acting pro se, filed an appeal of an order of the United States Bankruptcy Court for the Southern District of California pursuant to Federal Rule of Bankruptcy Procedure 8001 and 28 U.S.C. § 158. (Doc. 1.) Appellant appeals from the April 15, 2008 Order of the Bankruptcy Court denying Plaintiff's motion for summary judgment and granting Patrick C. Hargadon's motion to set aside default. (Adversary Case No. 07-90588, Doc. # 39.)

On June 17, 2008, Appellant filed a motion to stay these proceedings until September

1 30, 2008 pursuant to the Servicemembers Civil Relief Act, 50 U.S.C. App. § 522. (Doc. 5.)

2 On August 6, 2008, the Court denied without prejudice the motion to stay the
3 proceedings due to Appellant's failure to submit a letter of communication from his
4 commanding officer as required by § 522(b)(2)(B). (Doc. 9.) In the same order, the Court set
5 a briefing schedule pursuant to Bankruptcy Rule 8009 ordering Appellant to file his opening
6 brief by September 30, 2008 and Appellees to file their responsive briefs by October 31, 2008.
7 (Doc. 9 at 2.)

8 On September 30, 2008, Appellant filed an ex parte motion requesting the Court to
9 extend the time to file his opening brief to October 6, 2008. (Doc. 10.) The Court granted the
10 ex parte motion and ordered Appellant to file his opening brief by October 6, 2008. (Doc. 11.)

11 On October 31, 2008, the Federal Appellees in this proceeding filed their brief, in which
12 they request dismissal of this appeal for lack of prosecution. (Doc. 12.) On the same date,
13 Appellee Gerald Davis filed his appellate brief (Doc. 13) and a motion to dismiss this appeal
14 "based upon Appellant's failure to file an opening brief in accordance with this Court's Order
15 or the applicable appellate law." (Doc. 14 at 2.)

16 On November 13, 2008, Appellant filed an ex parte motion requesting the Court to
17 extend the time to file a response in opposition to the motions to dismiss to December 5, 2009.
18 (Doc. 16.)

19 On November 18, 2008, the Court granted the ex parte motion and ordered Appellant
20 to file a response in opposition to the motions to dismiss on or before December 5, 2008.
21 (Doc. 17.) No response was filed by Appellant.

22 On February 4, 2009, the Court ordered Appellate to serve and file an opening brief and
23 any response to the motion to dismiss no later than Monday, February 23, 2009. (Doc. 18.)
24 Appellant was warned that failure to comply with the Court's order may result in dismissal of
25 his bankruptcy appeal. Appellant did not file an opening brief or a response to the motion to
26 dismiss.

27 **RULING OF THE COURT**

28 When a bankruptcy court ruling is appealed to the district court, Bankruptcy Rule

1 8009(a)(1) requires that an appellate brief be filed within fifteen days of the filing of the appeal
2 unless the district court “by local rule or by order excuses the filing of briefs or specifies
3 different time limits.” Fed. R. Bankr. P. 8009(a). The failure to file a required pleading or
4 brief in a timely manner may be a ground for dismissal of the appeal under Bankruptcy Rule
5 8001, which provides: “[f]ailure of an appellant to take any steps other than the timely filing
6 of a notice of appeal does not affect the validity of the appeal, but is ground only for such
7 action as the district court . . . deems appropriate, which may include dismissal of the appeal.”

8 “When imposing sanctions for non-jurisdictional, procedural defaults and deficiencies
9 in the management of litigation, the selection of the sanction to be imposed must take into
10 consideration the impact of the sanction and the alternatives available to achieve assessment
11 of the penalties in conformity with fault.” *Morrissey v. Stuteville (In re Morrissey)*, 349 F.3d
12 1187, 1190 (9th Cir. 2003). “Fault refers to whether the fault for the delay rests with the party
13 or with the attorney.” *In re Fitzsimmons*, 920 F.2d 1468, 1474 n. 6 (9th Cir. 1990). A district
14 court’s “actual use of alternative sanctions prior to dismissal” such as the imposition of
15 deadlines and warnings of dismissal, “constitutes explicit consideration of alternative
16 sanctions.” *Id.* at 1474; *see Greco v. Stubenberg*, 859 F.2d 1401, 1404 (9th Cir. 1988) (“the
17 district court imposed deadlines for the prosecution of appellant’s appeal. In addition, the
18 court, in effect, warned appellant that if he did not comply with the court’s schedule, his appeal
19 would be subject to dismissal. These intermediate steps show that the court had sufficiently
20 considered and exhausted alternatives to dismissal”).

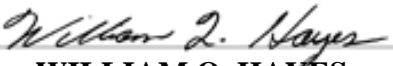
21 In this case, appellant has failed to file any pleading other than the motion to proceed
22 IFP (Doc. 2), the motion to stay the proceedings (Doc. 5), the motion for an extension of time
23 to file his opening brief (Doc. 10), and the motion for an extension of time to file a response
24 in opposition to the motion to dismiss (Doc. 16). This Court has imposed and extended
25 deadlines for prosecution of Appellant’s appeal. (Docs. 11 and 17.) After failing to meet those
26 deadlines, Appellant was expressly cautioned on February 4, 2009 by order of this Court that
27 his appeal would be subject to dismissal if he failed to file his opening brief and opposition to
28 Respondents’ motions to dismiss by February 23, 2009. (Doc. 18.) This Court has sufficiently

1 considered and exhausted alternative sanctions. The Court concludes that dismissal of this
2 appeal is an appropriate sanction in conformity with fault in this matter.

3 **CONCLUSION**

4 IT IS HEREBY ORDERED that the request for dismissal (Doc. 12) filed by the Federal
5 Appellees is GRANTED. The motion to dismiss (Doc. 14) filed by Appellee Davis is
6 GRANTED. The Clerk of the Court is ordered to close this case.

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8 DATED: February 26, 2009

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10 **WILLIAM Q. HAYES**
11 United States District Judge

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