

DEC 06 2006

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP No.	OR-06-1065-MaHK
)		
LONNY LARAMIE MCGEE, JR.)	Bk. No.	05-60428
)		
Debtor.)	Adv. No.	05-06082
)		
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CASHCO FINANCIAL SERVICES,)		
INC.,)		
)		
Appellant,)		
)		
v.)		
)		
LONNY LARAMIE MCGEE, JR.;)		
RONALD R. STICKA, Trustee;)		
UNITED STATES TRUSTEE,)		
)		
Appellee.)		
)		
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O P I N I O N

Argued and Submitted on June 22, 2006
at Portland, Oregon

Filed - December 6, 2006

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Albert E. Radcliffe, Bankruptcy Judge, Presiding.

Before: MARLAR, HOLLOWELL¹ and KLEIN, Bankruptcy Judges.

¹ Hon. Eileen W. Hollowell, United States Bankruptcy Judge
for the District of Arizona, sitting by designation.

1 MARLAR, Bankruptcy Judge:

2

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INTRODUCTION

4

5 Following a default prove-up hearing concerning the
6 nondischargeability of a \$715 loan debt, the bankruptcy court
7 denied the plaintiff-lender's motion for entry of a default
8 judgment, ruled the debt to be discharged, and dismissed the
9 adversary proceeding.

10 On appeal, the lender maintains only that, where a prima
11 facie case had been pled, the bankruptcy court erred in refusing
12 to enter default judgment on the amended complaint. We hold that
13 the bankruptcy court did not abuse its discretion in requiring
14 proof of the material facts and in refusing to enter default
15 judgment when such facts were not established. We AFFIRM.

16

17

FACTS

18

19 Lonny Laramie McGee, Jr. ("Debtor") filed a voluntary chapter
20 7² petition on January 21, 2005.

21 In his bankruptcy schedules, Debtor listed a \$715 loan debt
22 to Cashco Financial Services, Inc. ("Cashco"). On November 24,
23 2004, Debtor had executed an "Installment Loan Note and Security

24

25 ² Unless otherwise indicated, all "section," "chapter," and
26 "Code" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
27 1330, as promulgated before its amendment by the Bankruptcy Abuse
28 Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119
Stat. 23 (2005), and "rule" references are to the Federal Rules of
Bankruptcy Procedure ("Fed. R. Bankr. P."), Rules 1001-9036, which
incorporate certain Federal Rules of Civil Procedure ("Fed. R.
Civ. P.").

1 Agreement" ("Note") with Cashco, which called for eight monthly
2 payments of \$148.99, beginning December 24, 2004, a finance charge
3 of \$541.92 (190.37 percent per annum), and total payments of
4 \$1,191.92.

5 Cashco filed a timely complaint and amended complaint to
6 determine this debt to be nondischargeable. The amended complaint
7 asserted a cause of action consistent with § 523(a)(2)(B) by
8 alleging a debt for money obtained by Debtor's use of a materially
9 false written statement respecting his financial condition, with
10 intent to deceive, and upon which the creditor "reasonably
11 relied."³ These allegations were:

12
13 -- in connection with an installment loan agreement
14 ("Exhibit 1"), Debtor had signed a credit application.⁴
15 Amended Compl. ¶ 5, June 15, 2005.

16
17 -- the credit application, at ¶ 5, contained the following
18 statement concerning Debtor's financial condition:

19
20 ³ The bankruptcy court may except a debt from discharge if a
21 debtor obtained the money by "use of a statement in writing
22 (i) that is materially false; (ii) respecting the debtor's or an
23 insider's financial condition; (iii) on which the creditor to whom
24 the debtor is liable for such money, property, services, or credit
25 reasonably relied; and (iv) that the debtor caused to be made or
26 published with intent to deceive." 11 U.S.C. § 523(a)(2)(B).

27 Although Cashco did not specify which subsection of
28 § 523(a)(2) it asserted had been violated, the allegations add up
to the essential elements of § 523(a)(2)(B).

⁴ The credit application has not been included in the
excerpts of record on appeal. Nor is it apparent that it was
before the bankruptcy court, taking judicial notice of the docket.
O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d
955, 957-58 (9th Cir. 1989). Nevertheless, there was no objection
on these grounds nor is there any requirement that the actual
written statement be in the record.

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The undersigned hereby certify that the information in this application is true and complete, warrant that we have no debts or financial obligations not stated herein, and recognize the penalties and defenses resulting from giving a false statement of financial condition hereon may be illegal and fraudulent and may be the basis for denying a discharge in bankruptcy. I further state that I am not contemplating bankruptcy at this time."

Id. ¶ 6 (emphasis in original).

-- Debtor represented that he "had sufficient funds to pay the loan in full." Id. ¶ 8.1

-- Debtor's representation alleged in ¶ 8.1 was knowingly false and that "in truth and fact: . . . [he] did not have sufficient funds to pay for the loan. . . ." Id. ¶ 9.1

-- "[Cashco] believed and reasonably relied upon the aforesaid representations" Id. ¶ 10.

Cashco also sought a money judgment for \$1,395.05, which sum included prejudgment interest, costs, and attorney's fees in addition to the \$715 loan.

Cashco requested entry of default and of default judgment after Debtor did not answer either the complaint or the amended complaint. See Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055. The bankruptcy court set a hearing, giving notice that "testimony may be received" on the questions of default and default judgment.

1 Cashco's attorney appeared only telephonically at the hearing
2 on October 5, 2005, and was not prepared to present witness
3 testimony or other admissible evidence.⁵

4 At the hearing, the bankruptcy court ruled that entry of
5 default was appropriate but expressed concern about whether
6 default judgment was warranted in light of the contradiction
7 between, on the one hand, the assertion in the amended complaint
8 that Cashco had reasonably relied on Debtor's representations
9 regarding his financial condition in making the \$715 loan and, on
10 the other hand, the 190.37 percent annual interest rate disclosed
11 in Exhibit 1 to the amended complaint.

12 On the record as presented, the bankruptcy court noted that,
13 although Cashco had pled the necessary elements of the prima facie
14 case, the evidence concerning whether it had relied on Debtor's
15 misrepresentations was contradictory and "capable of more than one
16 reasonable inference." Tr. of Proceedings 5:21, Oct. 5, 2005. It
17 explained, in relevant part:

18 In reviewing the evidence in this case, the evidence
19 is somewhat contradictory. . . . I note that there's an
interest rate of over 190 percent.

20 The plaintiff indicates it relied on the defendant's
21 representations that they would not file bankruptcy.
22 However, when an interest rate that high is being charged,
23 there's also an inference that can be drawn from the
evidence that the plaintiff knew they were lending to a
very high-risk debtor who might well be insolvent, who
might well file bankruptcy.

24 And that, in part, justifies that type of an interest
25 rate because it is a high-risk loan. I think at least the

26 ⁵ Cashco made an oral motion for a continuance, which the
27 court denied. That ruling has not been challenged in this appeal.
28 Accordingly, any issue in that respect has been waived. See,
e.g., Burnett v. Resurgent Capital Servs. (In re Burnett), 435
F.3d 971, 976-77 (9th Cir. 2006).

1 element of justifiable reliance⁶ is called into question
2 here.

3 Id. at 3:21-22; 4:2-14.

4 Therefore, the bankruptcy court concluded that, without
5 additional testimony or evidence, Cashco had not met its burden of
6 proof under § 523(a)(2)(A), and, specifically, that it had failed
7 to prove the necessary element of its reliance on Debtor's alleged
8 misrepresentations. It denied the request for a default judgment
9 and entered a judgment discharging the debt and dismissing the
10 adversary proceeding.

11 Cashco filed a belated notice of appeal that was rendered
12 timely only when the bankruptcy court retroactively extended the
13 time for appeal, as permitted by Rule 8002(c)(2).

14
15 **ISSUE**

16
17 The sole issue raised is whether the bankruptcy court abused
18 its discretion when it refused to enter a default judgment in
19 favor of Cashco based only on the prima facie allegations of the
20 amended complaint but, instead, drew inferences from the evidence
21 that were unfavorable to Cashco.

22 _____
23 ⁶ The bankruptcy court's reference to "justifiable" reliance
24 is confusing since it did not distinguish between subsections
25 (a)(2)(A) or (a)(2)(B). Section 523(a)(2)(B) requires the more
26 demanding standard of proof of a creditor's "reasonable" reliance.
27 See Field v. Mans, 516 U.S. 59, 77 (1995). However, Field v. Mans
28 teaches that if the reliance is not "justifiable," then it is
impossible for the reliance to have been "reasonable." 516 U.S.
at 66-77. Therefore, the application of justifiable reliance was
either harmless error or a practical decision-maker's method of
covering any ambiguity in the pleadings by saying that Cashco did
not satisfy even the more lenient standard of § 523(a)(2)(A).

1 by Rule 7055. To obtain a default judgment of nondischargeability
2 of a loan debt, a two-step process is required: (1) entry of the
3 party's default (normally by the clerk), and (2) entry of a
4 default judgment. Fed. R. Civ. P. 55(a) and (b); Brooks v. United
5 States, 29 F. Supp. 2d 613, 618 (N.D. Cal. 1998), aff'd mem., 162
6 F.3d 1167 (9th Cir. 1998). See generally 10A Charles Alan Wright,
7 Arthur R. Miller & Mary Kay Kane, FED. PRAC. & PROC. CIV. 3D § 2682
8 (Thompson/West 2006).

9 Cashco met the requirements for entry of Debtor's default,
10 for the bankruptcy court stated in open court that it was prepared
11 to sign the lodged order of default. See Tr. of Proceedings,
12 supra, 5:17-22. However, the court was not prepared to enter the
13 default judgment, and that is the issue before us. Id.

14 "[C]ontemporary procedural philosophy encourages trial on the
15 merits," and thus, default judgments are disfavored by the law,
16 and any doubts will usually be resolved in favor of the defaulting
17 party. 10A FED. PRAC. & PROC. CIV. 3D, § 2681.

18 We first note a procedural peculiarity posed by these facts.
19 The bankruptcy court's order consisted of both the denial of a
20 default judgment as well as a judgment on the merits in favor of
21 the defaulted party. The former was an interlocutory order which
22 did not become appealable until the entry of judgment terminating
23 the adversary proceeding as to all parties on all counts.

24 In this case, the final judgment that made the interlocutory
25 order appealable ensued immediately after denial of the motion for
26 default judgment. Although that judgment is vulnerable to
27 criticism because Rule 55 is silent about such a disposition,
28 there had been no opportunity for discovery, the matter was not

1 ready for trial on the merits, and there was no notice of sua
2 sponte consideration of summary judgment or dismissal, none of
3 those issues have been raised by the appellant, Cashco.

4 Since the appeal before us is solely from the denial of the
5 motion for default judgment and not from the judgment in favor of
6 Debtor, all potential procedural issues regarding the entry of
7 judgment have been waived.⁷ Thus, we are left with a situation in
8 which there was no error in the issue that was appealed and in
9 which potential error inherent in the issue that was not appealed
10 has been waived by not being designated as an issue and not being
11 briefed and argued. To be sure, if it was error to refuse to
12 enter default judgment, then the final judgment would have to be
13 vacated; but, there is no other attack on the merits of the final
14 judgment.

15
16 ⁷ Cashco narrowly framed its appellate issue as an appeal
17 from the denial of its motion for default judgment and not from
18 the judgment in favor of Debtor on the amended complaint. The
issue, as stated by Cashco is:

19 Did the Trial Court err when it found that Plaintiff
20 failed to sustain its burden of proof for justifiable
21 reliance when the Complaint made out a prima facie case
22 against the Defendant for obtaining property by false
pretenses under 11 USC [sic] § 523(a)(2), and the
23 Defendant was in default?

24 Op. Br. 1.

25 Likewise, Cashco's summary of argument limits the focus to
26 the default judgment question:

27 The Trial Court abused its discretion in not allowing
28 judgment for Plaintiff when its Amended Complaint pleaded
a prima facie case because Plaintiff is entitled to the
benefit of all reasonable inferences from the evidence
tendered, and Plaintiff's Complaint pleaded justifiable
reliance.

Id., at 7-8.

Thus, Cashco has waived any error in regard to the merits of
the final judgment. See Doty v. County of Lassen, 37 F.3d 540,
548 (9th Cir. 1994) (by failing to brief an issue on appeal, the
appellant waives his right to raise that issue).

1 Moreover, it is not necessarily error to enter a dispositive
2 order after denying a motion for default judgment. See, e.g.,
3 Wells Fargo Bank v. Beltran (In re Beltran), 182 B.R. 820, 823
4 (9th Cir. BAP 1995) (propriety of dismissal following denial of
5 default judgment); and Saylor, 178 B.R. at 212 (same). Here, the
6 net result of affirmance, however, comports with justice.

7 In summary, since we conclude that there was nothing
8 incorrect about the refusal to enter default judgment, and since
9 no other error is presented for review, the subsequent entry of
10 judgment on the merits stands as entered, regardless of whether
11 there may have been any procedural error associated with it.

12 13 **B. Law of Default Judgments**

14
15 The bankruptcy court has broad discretion to grant a default
16 judgment; the plaintiff is not entitled to such judgment as a
17 matter of right. See Kubick v. FDIC (In re Kubick), 171 B.R. 658,
18 659-60 (9th Cir. BAP 1994); Saylor, 178 B.R. at 212.

19 The factors to be considered for entry of a default judgment
20 include (1) the possibility of prejudice to the plaintiff, (2) the
21 merits of the plaintiff's substantive claim, (3) the sufficiency
22 of the complaint, (4) the sum of money at stake in the action, (5)
23 the possibility of a dispute concerning material facts, (6)
24 whether the default was due to excusable neglect, and (7) the
25 strong policy underlying the Federal Rules of Civil Procedure
26 favoring decisions on the merits. Id. at 213 (citing Eitel v.
27 McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986)). See also 10A
28 FED. PRAC. & PROC. CIV. 3D, § 2685 (factors include whether there are

1 material issues of fact and whether the grounds for default have
2 been clearly established). Here, factors (2), (3), and (5),
3 above, were relevant.

4 In actions involving disputes about material issues of fact,
5 default judgments are disfavored, because a defendant who defaults
6 may thereby be deemed to have admitted the facts cited in the
7 complaint. See Eitel, 782 F.2d at 1472; Pitts ex rel. Pitts v.
8 Seneca Sports, Inc., 321 F. Supp. 2d 1353, 1357 (S.D. Ga. 2004);
9 10A FED. PRAC. & PROC. CIV. 3D, § 2681; § 2688 ("Once the default is
10 established, defendant has no further standing to contest the
11 factual allegations of plaintiff's claim for relief.").

12 However, a default is not an absolute confession of
13 liability, for the facts alleged in the complaint may be
14 insufficient to establish liability. See Kubick, 171 B.R. at 660;
15 Pitts, 321 F. Supp. 2d at 1357; 10A FED. PRAC. & PROC. CIV. 3D,
16 § 2688 ("Even after default, however, it remains for the court to
17 consider whether the unchallenged facts constitute a legitimate
18 cause of action, since a party in default does not admit mere
19 conclusions of law.").⁸

20 Thus, "a default establishes the well-pleaded allegations of
21 a complaint unless they are . . . contrary to facts judicially
22 noticed or to uncontroverted material in the file." Anderson v.
23 Air West Inc. (In re Consol. Pretrial Proceedings in Air West
24 Secs. Litig.), 436 F. Supp. 1281, 1285-86 (N.D. Cal. 1977)

25
26 ⁸ For this reason, a default judgment can be set aside or
27 challenged on appeal. After default judgment, "facts alleged to
28 establish liability are binding upon the defaulting party, and
those matters may not be relitigated on appeal. . . . However, it
follows from this that facts which are not established by the
pleadings of the prevailing party, or claims which are not well-
pleaded, are not binding and cannot support the judgment." Alan
Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir.
1988) (internal citations omitted); Danning v. Lavine, 572 F.2d
1386, 1388 (9th Cir. 1978) (citing Thomson v. Wooster, 114 U.S.
104, 114 (1885)).

1 (emphasis added) (citing Thomson, 114 U.S. at 114). Facts that
2 are not well pled include allegations that are "made indefinite or
3 erroneous by other allegations in the same complaint, . . .
4 allegations which are contrary to facts of which the court will
5 take judicial notice, or which are not susceptible of proof by
6 legitimate evidence, or which are contrary to uncontroverted
7 material in the file of the case." Trans World Airlines, Inc. v.
8 Hughes, 308 F. Supp. 679, 683 (S.D.N.Y. 1969), aff'd, 449 F.2d 51
9 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973).

10 It follows that a default judgment that is based solely on
11 the pleadings may only be granted upon well-pled factual
12 allegations, and only for relief for which a sufficient basis is
13 asserted in a complaint. See Benny v. Pipes, 799 F.2d 489, 495
14 (9th Cir. 1986), amended on other grounds, 807 F.2d 1514 (9th Cir.
15 1987); see also Cripps v. Life Ins. Co. of N. Am., 980 F.2d 1261,
16 1267 (9th Cir. 1992) ("[N]ecessary facts not contained in the
17 pleadings, and claims which are legally insufficient, are not
18 established by default.").

19 Here, in order to succeed on its § 523(a)(2)(B) claim,
20 Cashco had to prove, by a preponderance of evidence:

- 21 (1) a representation of fact by the debtor,
- 22 (2) that was material,
- 23 (3) that the debtor knew at the time to be false,
- 24 (4) that the debtor made with the intention of
25 deceiving the creditor,
- 26 (5) upon which the creditor relied,
- 27 (6) that the creditor's reliance was reasonable, [and]
- 28 (7) that damage proximately resulted from the

1 representation.
2 Candland Ins. Co. of N. Am (In re Candland), 90 F.3d 1466, 1469
3 (9th Cir. 1996); cf. Grogan v. Garner, 498 U.S. 279, 291 (1991).

4 As noted, Field v. Mans settled the proposition that if the
5 reliance was not "justifiable," then it would be impossible for it
6 to have been "reasonable." 516 U.S. at 66-77. Moreover,
7 exceptions to discharge are to be construed strictly against the
8 creditor and in favor of the debtor. Klapp v. Landsman (In re
9 Klapp), 706 F.2d 998, 999 (9th Cir. 1983).

10

11 **C. Scope of the Bankruptcy Court's Discretion Under Rule 55**

12

13 In this appeal, Cashco contends that the bankruptcy court
14 found that its amended complaint had presented a prima facie case,
15 and should have thereupon entered default judgment in its favor.
16 It states: "Since the reasonable inferences had to inure to the
17 benefit of the Plaintiff, the Trial Court erred in finding that
18 Plaintiff had failed to sustain its burden of proof when the
19 Complaint made out a prima facie case." Op. Br. 9. Cashco
20 maintains that the bankruptcy court "had no discretion to weigh
21 the matters in the Complaint against the Plaintiff" or "to weigh
22 the reasonable inferences to the benefit of the Defendant." Id.
23 We reject both propositions because the trial court is merely
24 permitted, and is not required, to draw inferences in a default
25 judgment context.

26 In order to do justice, a trial court has broad discretion to
27 require that a plaintiff prove up even a purported prima facie
28 case by requiring the plaintiff to establish the facts necessary

1 to determine whether a valid claim exists that would support
2 relief against the defaulting party. Beltran, 182 B.R. at 823
3 (entry of default does not automatically entitle a plaintiff to a
4 default judgment, regardless of the general effect of the entry of
5 a default to deem well-founded allegations as admitted); Saylor,
6 178 B.R. at 212 (trial court directed the plaintiff to submit
7 evidence of a prima facie case in support of a default judgment).

8 The bankruptcy court stated that Cashco had merely pled a
9 prima facie case, but had not proven a prima facie case. The
10 court stated, in relevant part:

11 THE COURT: In reviewing the evidence in this case,
12 the evidence is somewhat contradictory.
13 The necessary elements of the prima facia
14 [sic] case has [sic] been pled. However,
15 in one of the attachments which is the
16 loan agreements, because one of the
17 elements, of course, is that the creditor
18 justifiably relied upon the debtor's
19 representations, and I note that there's
20 an interest rate of over 190 percent.

21
22 I think at least the element of
23 justifiable reliance is called into
24 question here.

25
26 [A]s to the issue of entry of
27 judgment, . . . as I've indicated, the
28 evidence presented to the court is capable
of more than one reasonable inference.

The plaintiff does have the burden of
proof. And I would have to conclude that
the plaintiff has failed to carry its
burden of proof.

Tr. of Proceedings 3:21-25; 4:1-3; 4:12-14; 5:19-25, Oct. 5, 2005.

24 Federal Rule of Civil Procedure 55 provides a mechanism for a
25 trial court to determine whether alleged facts have been
26 established. Thus, a court may determine whether the plaintiff
27 has not only pled a prima facie case but has also established its
28 case with evidence. The rule provides:

1 If, in order to enable the court to enter judgment or to
2 carry it into effect, it is necessary to take an account
3 or to determine the amount of damages or to establish the
4 truth of any averment by evidence or to make an
investigation of any other matter, the court may conduct
such hearings or order such references as it deems
necessary and proper

5 Fed. R. Civ. P. 55(b) (2). See also TeleVideo Sys., Inc. v.
6 Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987).

7 In TeleVideo Sys., the Ninth Circuit approved of the trial
8 court's decision to exceed the minimum showing required by the
9 general rule--that "upon default the factual allegations of the
10 complaint, except those relating to the amount of damages, will be
11 taken as true," and, instead, to conduct a hearing so that the
12 plaintiffs could "present in open court their prima facie case
13 showing [their] entitlement to judgment." Id. at 917-18. The
14 trial court had then heard substantial testimony and admitted
15 documentary evidence on all of the plaintiffs' claims, before
16 entering default judgment in their favor. Id. In affirming the
17 trial court's decision, the Ninth Circuit concluded that "Rule 55
18 gives the court considerable leeway as to what it may require as a
19 prerequisite to the entry of a default judgment." Id. (emphasis
20 supplied).

21 Such a procedure can serve the court by establishing
22 liability and, therefore, enables the court's order to withstand
23 possible post-judgment motions or appeals, as in TeleVideo Sys.,
24 or to focus the plaintiff on the necessity of filing an amended
25 complaint, see Pitts, 321 F. Supp. 2d at 1358.

26 Because the bankruptcy court had questions concerning
27 allegations supporting the required element of "justifiable
28 reliance," it scheduled and noticed a hearing and invited

1 testimony. Cashco appeared telephonically and elected not to
2 present any additional evidence.

3 The evidence before the bankruptcy court showed contradictory
4 facts. The amended complaint alleged that Cashco had relied upon
5 Debtor's representations in his credit application that he could
6 repay the loan and was not anticipating filing for bankruptcy, yet
7 the Note disclosed an inflated annual interest rate that exceeded
8 190 percent.

9 Factual allegations that are unsupported by, or in conflict
10 with, the exhibits tendered are not well pled. Consol. Pretrial
11 Proceedings, 436 F. Supp. at 1285-86; Dundee Cement Co. v. Howard
12 Pipe & Concrete Prods., Inc., 722 F.2d 1319, 1323 (7th Cir. 1983).
13 Factual allegations that are not well pled cannot support a claim.
14 For that reason, the bankruptcy court determined that Cashco had
15 not met its burden of proof. If Cashco did not meet its burden of
16 proof, it could not have proven a prima facie case.⁹ The
17 bankruptcy court entered a formal judgment in favor of Debtor and
18 against Cashco. We hold that the bankruptcy court did not abuse
19 its discretion in refusing to enter default judgment in favor of
20 Cashco, because it properly determined that Cashco did not prove
21 its prima facie case.

22 We also reject Cashco's contention that the bankruptcy court
23 improperly weighed the evidence and made unfavorable factual
24 inferences before denying the default judgment.

25
26 ⁹ In the event that the bankruptcy court made what seemed to
27 Cashco to be an inconsistent oral ruling concerning Cashco's prima
28 facie case, its formal judgment took precedence. It is settled
that to the extent a trial court's oral decision is inconsistent
with a formal written order, the formal order controls. White v.
Wash. Pub. Power Supply Sys., 692 F.2d 1286, 1289 n.1 (9th Cir.
1982); Hong v. United States, 363 F.2d 116, 120 (9th Cir. 1966);
11 FED. PRAC. & PROC. CIV. 2D § 2785 (a judgment is rendered only
when it is set forth in writing, not when it is orally pronounced
in court).

1 The bankruptcy court's consideration of the evidence, in
2 order to establish the "truth of any averment" under Fed. R. Civ.
3 P. 55, necessarily included its review of evidence on the element
4 of reasonable reliance under § 523(a)(2)(B). "Reasonable"
5 reliance, while not defined by the Code, entails a "prudent
6 person" test, see Field v. Mans, 516 U.S. at 69-71, 77, and "is a
7 term courts can apply without additional help." Candland, 90 F.3d
8 at 1471. It is judged in light of the totality of the
9 circumstances on a case-by-case basis. See 4 Collier on
10 Bankruptcy ¶ 523.08[2][d], at 523-49 (Alan N. Resnick & Henry J.
11 Sommer, eds., 15th ed. rev. 2006).

12 In its amended complaint, Cashco alleged that Debtor
13 represented that he was not contemplating filing bankruptcy and
14 that it relied on such representation in loaning the money to him.

15 However, the credit application, which allegedly contained
16 that representation, was not made part of the excerpts of record.
17 It is Cashco's burden to provide the necessary record for our
18 review of factual findings. Massoud v. Ernie Goldberger & Co. (In
19 re Massoud), 248 B.R. 160, 163 (9th Cir. BAP 2000).

20 Even if the credit application was part of the record,
21 Cashco's allegation regarding reliance contradicted the Note,
22 which disclosed that the finance charge was 190.37 percent per
23 annum. The bankruptcy court determined that such an excessive
24 interest rate could only mean that Cashco had calculated into the
25 transaction a high risk of default.¹⁰ As such, it could reasonably

26
27 ¹⁰ The bankruptcy court thus implicitly took judicial notice
28 of ordinary interest rates for loans, which, indisputably, would
be significantly less. Bankruptcy courts can incorporate this
type of knowledge into their analysis. See, e.g. Farm Credit Bank
of Spokane v. Fowler (In re Fowler), 903 F.2d 694, 697 (9th Cir.
1990); United States v. Camino Real Landscape Maint. Contr'rs,
Inc. (In re Camino Real Landscape Maint. Contr'rs, Inc.), 818 F.2d
1503, 1507-08 (9th Cir. 1987). Moreover, Cashco neither made an

(continued...)

1 infer that Cashco was not relying on Debtor's representation that
2 he was not contemplating bankruptcy, e.g., because he was solvent
3 and could pay his debts.

4 We agree that the evidence was conflicting. It is apparent
5 that by containing an inflated, default-like, "eye-popping"
6 interest rate,¹¹ Cashco's loan evidence created an inference that
7 Cashco well knew of "red flags" in the Debtor's financial history.
8 Cf. Anastas v. Am. Savs. Bank (In re Anastas), 94 F.3d 1280, 1286
9 (9th Cir. 1996) ("[T]he credit card issuer justifiably relies on a
10 representation of intent to repay as long as the account is not in
11 default and any initial investigations into a credit report do not
12 raise red flags that would make reliance unjustifiable.").

13 In this type of installment loan transaction, Cashco was
14 required to present direct proof of its reasonable reliance on
15 Debtor's alleged misrepresentations by a preponderance of the
16 evidence. At the very least, it should have introduced witness
17 testimony concerning its reliance that might have explained its
18 position.

19 When Cashco elected to appear telephonically at the prove-up
20 hearing, where it merely requested entry of a default judgment and
21 was unprepared to present evidence to support the relief it
22 sought, the bankruptcy court did not err in determining that it
23 could not enter default judgment on the amended complaint without
24 more proof.

25 We conclude that the bankruptcy court did not abuse its
26 discretion in denying default judgment when it determined that

27 _____
28 ¹⁰(...continued)
evidentiary objection nor challenged this finding.

¹¹ Compare the 190.37 percent interest rate, here, to Till v. SCS Credit Corp., 541 U.S. 465, 480-81 (2004), where the Supreme Court rejected a cramdown approach which yielded an "eye-popping" interest rate of 21 percent.

1 Cashco had not carried the burden of proof for its prima facie
2 claim in regards to the issue of reasonable reliance. Doe v. Qi,
3 349 F. Supp. 2d 1258, 1272-73 (N.D. Cal. 2004) (citing Eitel, 782
4 F.2d at 1472).

5
6 **CONCLUSION**
7

8 A bankruptcy court has broad discretion to conduct a default
9 prove-up hearing in order to satisfy itself of the truth of the
10 allegations in a complaint. The trial court's "broad discretion"
11 over entry of default judgment includes the discretion to require
12 the plaintiff to prove its case with competent, admissible
13 evidence, to assess matters in accordance with substantial
14 justice, and to make reasonable inferences against the plaintiff.

15 The bankruptcy court was not persuaded that Cashco satisfied
16 any theory of § 523(a)(2) reliance in the face of the 190.37
17 percent annual interest rate that it charged. We cannot say that
18 it made a mistake in this respect. Hence, there was no error in
19 the denial of the motion for default judgment.

20 **AFFIRMED.**
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