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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NC-12-1160-PaMkH
)	
KENNETH BRUCE TISHGART and LORI)	Bankr. No. 09-13400
ANNE TISHGART,)	
)	Adv. Proc. 10-1087
Debtors.)	
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KENNETH BRUCE TISHGART;)	
LORI ANNE TISHGART,)	
)	
Appellants,)	
)	
v.)	M E M O R A N D U M ¹
)	
TIMOTHY W. HOFFMAN, Trustee,)	
)	
Appellee.)	
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Argued and Submitted on October 18, 2012,
at San Francisco, California

Filed - November 13, 2012

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Alan Jaroslovsky, Chief Bankruptcy Judge, Presiding

Appearances: Appellant Kenneth Bruce Tishgart argued pro se;
Katherine D. Ray of Goldberg, Stinnett, Davis &
Linchey argued for appellee Timothy W. Hoffman,
Trustee.

Before: PAPPAS, MARKELL and HOLLOWELL, Bankruptcy Judges.

¹ 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.

1 Appellants Kenneth Bruce Tishgart ("Tishgart") and Lori Anne
2 Tishgart (together, "Debtors") appeal the bankruptcy court's
3 judgment awarding appellee, chapter 7² trustee Timothy W. Hoffman
4 ("Trustee"), \$69,837.90, representing the bankruptcy estate's
5 interest in certain contingent fees received by Tishgart from his
6 legal practice. We AFFIRM.

7 **FACTS**

8 Debtors filed a chapter 7 petition on October 15, 2009. At
9 the time, Tishgart was an attorney with a solo practice
10 specializing in personal injury claims. Tishgart's practice
11 consisted primarily of representing plaintiffs in personal injury
12 cases, and he ordinarily entered into contingent fee agreements
13 with his clients. At the time of filing the bankruptcy petition,
14 Tishgart was representing over sixty clients for whom he had
15 provided legal services and for which Tishgart had not been paid
16 in full. Debtors did not list Tishgart's interest in these fees
17 in their bankruptcy schedules.

18 Trustee commenced an adversary proceeding against Debtors on
19 July 27, 2010. In his complaint, Trustee sought a declaratory
20 judgment determining the extent of the bankruptcy estate's
21 interest under § 541(a) in the contingent fees collected by
22 Tishgart after the bankruptcy filing for those cases undertaken by
23 Tishgart prepetition. He also sought turnover of the estate's
24 interest in those fees under § 542(a).

25
26 ² Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
The Federal Rules of Civil Procedure are referred to as Civil
Rules.

1 On October 7, 2011, Trustee propounded 101 Requests for
2 Admission ("RFA") to Debtors.³ The RFAs identified fifteen
3 personal injury cases in which fees were allegedly paid to
4 Tishgart within ninety days after the petition date (the "Fifteen
5 Cases"). These RFAs sought Debtors' admission that Tishgart had
6 "provided little or no legal services" in the Fifteen Cases after
7 the petition date. Debtors' responses to the RFAs were due on
8 November 9, 2011. Debtors did not respond to the RFAs by the
9 deadline, nor did they seek an extension of time to do so and, as
10 a result, under Civil Rule 36(a)(3)/Rule 7036, the RFAs were
11 deemed admitted.

12 On November 18, 2011, Trustee filed a motion for summary
13 judgment based on the deemed admissions, requesting that all fees
14 paid to Tishgart related to the Fifteen Cases be turned over to
15 Trustee. A hearing on the summary judgment motion occurred on
16 December 23, 2011. The bankruptcy court granted the motion, but
17 only in part, awarding \$3,600 paid to Tishgart in one case
18 involving Pedrou Ferrer ("Ferrer") to Trustee. The court's order
19 noted that the motion had been granted based on the deemed
20 admissions, and for the reasons stated on the record. There is no
21 transcript of this hearing in the excerpts of record or in the
22 bankruptcy court's docket.

23 Debtors then filed two Motions for Relief from Late Response
24 to Discovery. In a December 12, 2011 motion, Debtors sought

25
26 ³ On May 13, 2011, in connection with an earlier discovery
27 dispute wherein Trustee alleged that Debtors were not fully
28 cooperating, the bankruptcy court approved the withdrawal of
Debtors' counsel, and awarded sanctions against Debtors of \$1,875
under Civil Rule 37(a)(5)(A), applicable in adversary proceedings
via Rule 7037.

1 relief because their failure to timely deny the RFAs was the
2 result of mistake, inadvertence, or excusable neglect. This
3 motion was not accompanied by a notice of hearing and, because of
4 this, the bankruptcy court denied it by docket entry as an
5 inappropriate ex parte motion.

6 Debtors refiled the motion on December 30, 2011, accompanied
7 by a notice setting the motion for a hearing on January 27, 2012.
8 However, that date fell after the January 13, 2012, discovery
9 cutoff date, and only about two weeks before the scheduled trial
10 date set by the court. In this motion, Debtors argued that
11 withdrawal of the deemed admissions would allow the parties to
12 address the merits of the action, and that Trustee would not be
13 prejudiced because discovery remained open. Trustee filed a
14 response noting that, contrary to Debtors' argument, the discovery
15 cutoff date had passed, and that he would be prejudiced because
16 the trial was set to begin shortly and his preparation for trial
17 assumed that he could rely upon the deemed admissions. A
18 transcript of the January 27, 2012 hearing on Debtors' motion is
19 not included in the excerpts of record or the bankruptcy court's
20 docket. On February 10, 2012, the bankruptcy court denied
21 Debtors' request "for the reasons stated by the court at the
22 hearing."

23 The trial took place on February 14, 2012. Trustee was
24 represented by counsel; Tishgart appeared pro se. Tishgart was
25 the only witness. Trustee presented documentary evidence
26 concerning eleven of the Fifteen Cases, and Tishgart was examined
27 about each of them. Tishgart presented no documentary evidence to
28 support his testimony. After closing arguments, the bankruptcy

1 court took the issues under submission.

2 In a March 6, 2012 Memorandum Decision, the bankruptcy court
3 observed that the dispositive legal issue in the contest concerned
4 the amount of the fees from Tishgart's cases which were property
5 of the bankruptcy estate. In determining the amount Tishgart
6 should be able to retain from the fees he received after the
7 filing of his petition, the court analogized the facts of the case
8 to a situation where Tishgart's employment had been terminated by
9 the client on the petition date. The court then analyzed the
10 issues under both Federal and California state law. The court
11 concluded, in part, that:

12 In this case, Tishgart is deemed to have admitted that
13 he provided little or no services in the cases at issue
14 after bankruptcy. He has given the court scant basis
15 for differentiating between his prepetition and
16 postpetition work on the cases, which is the only
17 possible basis for avoiding the preclusive effect of
[In re Jess, 169 F.3d 1204 (9th Cir. 1999), the
principal federal case]. The court would be justified
in awarding almost all the fees in question to Hoffman.
However, in the spirit of fairness the court will not be
quite so harsh.

18 Memorandum of Decision at 3, March 6, 2012. The court noted that
19 it had already awarded to Trustee all \$3,600 of the fees Tishgart
20 received post-petition in the Ferrer case in the partial summary
21 judgment. Of the \$130,475.80 received by Tishgart in question for
22 the rest of the Fifteen Cases, the court awarded half of that
23 amount to Trustee, and half to Debtors.⁴

24 A judgment against Debtors and in favor of Trustee for
25

26 ⁴ The bankruptcy court awarded the entire \$14,800 of fees
27 Tishgart received in the Brown case to Trustee. However, before
28 entry of judgment, Trustee withdrew his request for turnover of
these fees that had been paid to Tishgart over a year after the
petition was filed.

1 \$69,837.90 plus interest was entered on March 15, 2012. Debtors
2 timely appealed.

3 **JURISDICTION**

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

7 **ISSUE**

8 Whether the bankruptcy court abused its discretion in denying
9 Debtors' request to withdraw the deemed admissions.

10 Whether the bankruptcy court erred in ordering turnover of
11 \$69,837.90 of the fees Tishgart received after the petition date
12 to Trustee as property of the estate.

13 **STANDARDS OF REVIEW**

14 The denial of a motion to withdraw a deemed admission is
15 reviewed for abuse of discretion. Jules Jordan Video v. 144942
16 Canada, Inc., 617 F.3d 1146, 1158 (9th Cir. 2012). In determining
17 whether a bankruptcy court abused its discretion, we review
18 whether the bankruptcy court applied the correct rule of law.
19 United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009)
20 (en banc). We then determine whether the court's application of
21 that rule was illogical, implausible, or without support in
22 inferences that may be drawn from the facts in the record. Id.
23 (quoting Anderson v. City of Bessemer City, N.C., 470 U.S. 564,
24 577 (1985)).

25 Whether property is included in a bankruptcy estate, and the
26 propriety of the procedures employed for recovering estate
27 property, are questions of law that we review de novo. White v.
28 Brown (In re White), 389 B.R. 693, 698 (9th Cir. BAP 2008).

1 DISCUSSION

2 I. The bankruptcy court did not abuse its discretion in denying
3 Debtors' request to withdraw the deemed admissions.

4 Civil Rule 36 governs the use of requests for admission in
5 civil actions. It is applicable in bankruptcy adversary
6 proceedings. Rule 7036. Civil Rule 36 provides in relevant part:

7 Rule 36. Requests for Admission

8 (a) Scope and Procedure.

9 (1) Scope. A party may serve on any other
10 party a written request to admit, for purposes
11 of the pending action only, the truth of any
12 matters within the scope of Rule 26(b)(1)
13 relating to: (A) facts, the application of
14 law to fact, or opinions about either; and
15 (B) the genuineness of any described
16 documents. . . .

17 (3) Time to Respond; Effect of Not Responding.
18 A matter is admitted unless, within 30 days
19 after being served, the party to whom the
20 request is directed serves on the requesting
21 party a written answer or objection addressed
22 to the matter and signed by the party or its
23 attorney. . . .

24 (4) Answer. If a matter is not admitted, the
25 answer must specifically deny it or state in
26 detail why the answering party cannot
27 truthfully admit or deny it. A denial must
28 fairly respond to the substance of the
matter[.]

29 (b) Effect of an Admission; Withdrawing or Amending It.
30 A matter admitted under this rule is conclusively
31 established unless the court, on motion, permits the
32 admission to be withdrawn or amended. Subject to
33 Rule 16(e), the court may permit withdrawal or amendment
34 if it would promote the presentation of the merits of
35 the action and if the court is not persuaded that it
36 would prejudice the requesting party in maintaining or
37 defending the action on the merits.

38 Absent a motion for an extension of time, a party's failure
to timely respond to a request for admission within the thirty-day
limit established by Civil Rule 36(a)(3) results in the admission

1 being conclusively deemed admitted. Conlon v. United States,
2 474 F.3d 616, 621 (9th Cir. 2007). In this appeal, it is not
3 disputed that Trustee properly served the RFAs on Debtors,
4 including requests specifically addressed to the Fifteen Cases.
5 These RFAs requested that Tishgart admit that he "provided little
6 or no legal services" in each of the Fifteen Cases after the
7 petition date. Debtors admit that they did not timely respond to
8 any of the Trustee's 101 RFAs within the thirty-day period allowed
9 by the rules. Thus, under both the rules and case law, that
10 Tishgart provided little or no services post-petition on the
11 Fifteen Cases was deemed conclusively admitted in the adversary
12 proceeding.

13 Although treating a request for admission that is not timely
14 disputed or contested as a conclusively deemed admission is
15 mandatory, and does not require court action, in the exercise of
16 its discretion, a trial court may allow an admission to be
17 withdrawn, but only under statutorily prescribed rules. Asea,
18 Inc. v. S. Pac. Transp. Co., 669 F.2d 1242, 1248 (9th Cir. 1981).
19 Civil Rule 36(b) vests the bankruptcy court with discretion to
20 grant relief from an admission made under Rule 36(a) only when
21 "the presentation of the merits of the action will be subserved,"
22 and "the party who obtained the admission fails to satisfy the
23 court that withdrawal or amendment will prejudice that party in
24 maintaining the action or defense on the merits." Civil
25 Rule 36(b); Conlon 474 F.3d at 621; Hadley v. United States,
26 45 F.3d 1345, 1348 (9th Cir. 1995). Other circuits agree with the
27 Ninth Circuit that withdrawal of an admission may only be made
28 where both of the conditions of Civil Rule 36(b) are satisfied.

1 See Carney v. IRS (In re Carney), 258 F.3d 415, 419 (5th Cir.
2 2001) ("[A] deemed admission can only be withdrawn or amended by
3 motion in accordance with Rule 36(b)."); Donovan v. Carls Drug
4 Co., 703 F.2d 650, 652 (2d Cir. 1983) (same).

5 Here, the bankruptcy court considered Debtors' request to
6 withdraw the deemed admissions at the hearing on January 27, 2012,
7 and, following that hearing, denied the request "for the reasons
8 stated by the Court at the hearing." Debtors did not provide the
9 Panel a transcript of the hearing, nor is it available in the
10 docket of the adversary proceeding. We have carefully examined
11 the record, both before and after the January 27, 2012, hearing,
12 and no where does the bankruptcy court explain its reasons for
13 denying Debtors' request to withdraw the deemed admissions other
14 than in the order issued as a result of the January 27, 2012
15 hearing.

16 If a bankruptcy court's findings of fact and conclusions of
17 law are made orally on the record, a transcript of those findings
18 is mandatory for the Panel's appellate review. In re McCarthy,
19 230 B.R. 414, 416 (9th Cir. BAP 1999). Moreover, where the
20 inadequacy of the record provided to the Panel affords no basis to
21 review the decision of the bankruptcy court, we may summarily
22 affirm the bankruptcy court's ruling. Ehrenberg v. Cal. State
23 Univ., Fullerton Found. (In re Beachport Entm't), 396 F.3d 1083,
24 1087-88 (9th Cir. 2005); Morrissey v. Stuteville (In re
25 Morrissey), 349 F.3d 1187, 1189 (9th Cir. 2003)(failure to provide
26 a critical transcript may result in summary affirmance).
27 Rule 8009(b)(5) provides that the appellant's excerpts must
28 include "[t]he opinion, findings of fact, or conclusions of law

1 filed or delivered orally by the [bankruptcy] court”
2 Rule 8009(b)(9) requires that the excerpts include “[t]he
3 transcript or portion thereof, if so required by a rule of the
4 bankruptcy appellate panel.” Our rules state that “the excerpts
5 of record shall include the transcripts necessary for adequate
6 review in light of the standard of review to be applied to the
7 issues before the Panel.” Ninth Circuit BAP R. 8006-1. The
8 advisory note to this BAP rule explains, “If findings of fact and
9 conclusions of law were made orally on the record, a transcript of
10 those findings is mandatory.”

11 Debtors’ failure to provide an adequate record of the reasons
12 for the bankruptcy court’s ruling denying their request to allow
13 them to withdraw the deemed admissions would likely allow us to
14 summarily affirm that ruling. However, we are mindful of the
15 instructions of the Ninth Circuit in Beachport Entm’t that we
16 should not summarily rule without first determining if there are
17 other grounds in the record for affirming a bankruptcy court’s
18 actions.

19 In this case, Tishgart submitted a sworn declaration in
20 support of his request to withdraw the deemed admissions. In that
21 declaration, Tishgart asserts that he moved his office on
22 November 2, 2011, and “misplaced” the RFAs. Tishgart fails to
23 note in that declaration, however, that he sent a letter to
24 Trustee’s counsel on October 26, 2011, that acknowledged receipt
25 of the RFAs, and indicated that he would “endeavor to respond to
26 the remaining discovery as soon as practicable.” Ray [attorney
27 for Trustee] Dec. at ¶ 2, January 13, 2012. While Tishgart has
28 thus admitted to having the RFAs two weeks before the thirty-day

1 response deadline, he claims to have misplaced them a week before
2 the deadline. Tishgart explains that his failure to timely
3 respond to the requests for admission was the result of
4 "inadvertence, mistake, or excusable neglect."⁵ In his
5 declaration, Tishgart argues that he was proceeding pro se, did
6 not practice in federal court, and was unable to hire a bankruptcy
7 specialist. Tishgart Dec. at ¶¶ 4-5.

8 Tishgart's explanation in his declaration for Debtors'
9 failure to timely respond to the RFAs lacks merit. Tishgart is an
10 attorney who has been involved in a litigation practice. While
11 this issue arises in the context of a bankruptcy adversary
12 proceeding applying the federal discovery rules, the Panel is
13 skeptical that Tishgart was unfamiliar with the consequences of
14 failure to timely respond to a request for admission under federal
15 discovery rules. Even if so, Tishgart undoubtedly had the ability
16 to obtain knowledge of the rules, and to comply with the
17 procedural and substantive law outside his professional
18 specialization. Godlove v. Bamberger, Foreman, Oswald, & Hahn,
19 903 F.2d 1145, 1148 (7th Cir. 1991) ("a pro se lawyer is entitled
20 to no special consideration"); see also Leeds v. Meltz,
21 898 F.Supp. 146, 149 (E.D.N.Y. 1995), aff'd, 85 F.3d 51 (2d Cir.
22 1996) (pro se attorney not entitled to the liberality normally
23 afforded pro se litigants). Therefore, there was considerable

24
25 ⁵ Tishgart apparently confuses the Civil Rule 36(b) grounds
26 for withdrawal of admissions with those applicable under Civil
27 Rule 60(b)(1) for relief from a judgment or order. There was no
28 order entered by which the admissions were deemed admitted; Civil
Rule 36(a) is self-effectuating and a court order is not required.
Thomas v. Bonilla, 2011 WL 4527399 at *1 (E.D. Cal. 2011). Civil
Rule 60(b)(1) is not applicable.

1 room for the bankruptcy court to doubt Debtors' allegation that
2 their failure to timely respond to the RFAs was either inadvertent
3 or excusable.

4 Debtors submitted a Memorandum of Law to the bankruptcy court
5 to support their request for relief from the deemed admissions in
6 which they more directly address the two grounds for granting a
7 request to withdraw an admission under Civil Rule 36(b):

8 [A]llowing such withdrawal will allow the presentation
9 of the merits in this matter rather than them being
10 extinguished by responses to requests for
11 admission. . . . Granting this motion will in no way
12 prejudice the requesting party in maintaining its
13 action. It simply must respond to the merits of the
14 case and all available rights and discovery remain open
15 to it.

16 Trustee's Opposition to Defendants' Motion for Relief also
17 addressed the criteria under Civil Rule 36(b). Trustee noted that
18 Tishgart had a history of resistance to his discovery requests,
19 and had already been sanctioned by the court for his
20 intransigence. Trustee argued that Debtors did not fail to
21 respond due to inadvertence, mistake or excusable neglect –
22 Debtors admitted negligence, and it was not excusable. Tishgart
23 acknowledged that he had the RFAs in his possession and simply
24 misplaced them. Trustee argued that because Tishgart is an
25 attorney, he is presumably knowledgeable about the consequences of
26 a failure to meet discovery deadlines, or to properly safeguard
27 documents. Trustee pointed out that Debtors apparently let the
28 response deadline pass before asking for another copy of the RFAs;
another three weeks passed before they submitted responses; and
Debtors did not request relief from the deemed admissions until
some six weeks after the response deadline.

1 Trustee also credibly asserted that withdrawal of the deemed
2 admissions would hinder, not promote, presentation of the merits
3 of the case. The bankruptcy court had already entered partial
4 summary judgment in the Ferrer case, based on the deemed
5 admissions, something that Debtors apparently did not challenge at
6 the summary judgment hearing.⁶ Withdrawal of the admissions could
7 potentially lead to relitigation of the partial summary judgment
8 decision, unnecessarily delaying the trial.

9 Further, as the bankruptcy court would later find in the
10 Memorandum, the deemed admissions did not comprehensively settle
11 the merits of the contest. Although they conclusively established
12 that Tishgart provided little or no services on the relevant cases
13 post-petition, the bankruptcy court was still required to
14 determine the value of whatever prepetition and post-petition
15 services Tishgart provided, and whether those few post-petition
16 services might be valued higher than the prepetition services.

17 As to the prejudice to Trustee, he argued that he had already
18 prevailed in the partial summary judgment order, which was based
19 in part on the deemed admissions, and he would be prejudiced by
20 the possibility of relitigating that order. Further, the period
21 for discovery had ended and Trustee relied on the admissions to
22 eliminate the need for further investigation.

23 While we do not know the precise reasons for its ruling,
24 given these circumstances, we can comfortably conclude that the

25
26 ⁶ Again, we must assume what occurred because we do not have
27 the transcript of the summary judgment hearing. However, Trustee
28 argued in his summary judgment motion that Civil Rule 36 applied,
and that Debtors' failure to answer the RFAs resulted in the
deemed admissions. Debtors did not respond to the Civil Rule 36
issue in their opposition to summary judgment.

1 bankruptcy court did not abuse its discretion in denying Debtors'
2 request to withdraw the deemed admissions. Civil Rule 36(b)
3 provides that the trial court may permit withdrawal only if both
4 the criteria expressed therein are satisfied, that is, that
5 withdrawal would promote the presentation of the merits of the
6 action, and that the court was not persuaded that withdrawal would
7 prejudice the requesting party in maintaining or defending the
8 action on the merits. Conlon, 474 F.3d at 624.

9 The Ninth Circuit has provided clear directions on the first
10 prong. "The first half of the test in Rule 36(b) is satisfied
11 when upholding the admissions would practically eliminate any
12 presentation of the merits of the case." Hadley, 45 F.3d at 1348.
13 Trustee argued, and the bankruptcy court apparently agreed, that
14 the deemed admissions implicated only the first element in
15 considering the merits of the case. The court still had to take
16 evidence on the specifics of the services and value of the
17 particular prepetition vs. post-petition services. Thus,
18 upholding the deemed admissions would not "practically eliminate"
19 any presentation on the merits. The first half of the Civil
20 Rule 36(b) test is not satisfied.⁷

21 _____
22 ⁷ Evaluating the second half of the test is more problematic
23 in this case. The bankruptcy court could have considered the
24 additional burden placed on Trustee by having to relitigate the
25 partial summary judgment, and that additional discovery may not be
26 available. However, Trustee's concern that discovery was no
27 longer available is less persuasive. The Ninth Circuit has ruled
28 that closed discovery does not constitute prejudice, because
discovery can always be reopened by the court. Conlin, 474 F.3d
at 624. Based on review of the record before us, we cannot
determine if the second half of the Civil Rule 36(b) test was
satisfied.

Nevertheless, both parts of the test must be satisfied. By
(continued...)

1 The bankruptcy court did not abuse its discretion in denying
2 Debtors' request for relief from the deemed admissions.

3 **II. The bankruptcy court did not err in ordering turnover of**
4 **\$69,837.90 of Tishgart's fees to Trustee as property of the**
5 **estate.**

6 Debtors' bankruptcy estate came into existence when they
7 filed their chapter 7 petition. §§ 301, 302. Notwithstanding
8 certain specified exceptions, the bankruptcy estate includes all
9 legal and equitable interests in property held by Debtors at the
10 time of filing. § 541(a). Section 541(a) also specifies that the
11 bankruptcy estate encompasses all "proceeds, product, offspring,
12 rents, or profits of or from property of the estate, except such
13 as are earnings from services performed by an individual debtor
14 after the commencement of the case." § 541(a)(6).

15 Most if not all of the contingent fees received by Tishgart
16 in the Fifteen Cases were received after the filing of the
17 petition. At least on its surface, then, § 541(a)(6) would seem
18 to exclude from property of the estate contingent fees received
19 post-petition. However, it has long been established that
20 payments for pre-petition services are not excludable from the
21 estate solely because they were received post-petition and
22 additional services were required to receive payment. Rau v.
23 Ryerson (In re Ryerson), 739 F.2d 1423, 1425-26 (9th Cir. 1984);

24 _____
25 ⁷(...continued)

26 its own later determination that the deemed admissions were only
27 one part of the merits analysis, we infer that the bankruptcy
28 court was aware that upholding the admissions would not
"practically eliminate" any presentation on the merits and, thus,
the first part of the Civil Rule 36(b) test was not met.
Consequently, we conclude that the court did not abuse its
discretion in denying the request to withdraw the admissions.

1 In re Wu, 173 B.R. at 414-15. The estate is entitled to recover
2 the portion of post-petition payments attributable to pre-petition
3 services. Jess v. Carey (In re Jess), 169 F.3d 1204, 1208 (9th
4 Cir. 1999).

5 Debtors argue that the value of Tishgart's prepetition
6 services on the relevant cases or, in other words, the amount to
7 be turned over to Trustee, should be measured solely by the total
8 hours he testified that he worked prepetition on those cases
9 multiplied by an hourly rate of \$102.50. Debtors seem to argue
10 that hours spent are fungible assets, where an hour spent
11 prepetition has the same value as an hour spent later in the case.
12 This use of an exclusively lodestar approach to valuing Tishgart's
13 services overlooks an important distinction in bankruptcy law
14 regarding property of the estate. Federal law, specifically
15 § 541(a), holds that a debtor's bankruptcy estate includes all
16 legal and equitable interests in property held by the debtor at
17 the time of filing. Those interests include contingent fee
18 payments to a lawyer in bankruptcy and owed on the petition date.
19 In re Jess, 169 F.3d at 1208. The Ninth Circuit has held that the
20 contingent fee is payable to the bankruptcy estate, less the value
21 of post-petition services necessary to obtaining the payments:

22 [A] court must first determine whether any postpetition
23 services are necessary to obtaining the payments at
24 issue. If not, the payments are entirely "rooted in the
25 pre-bankruptcy past," and the payments will be included
26 in the estate. If some postpetition services are
27 necessary, then courts must determine the extent to
28 which the payments are attributable to the postpetition
services and the extent to which the payments are
attributable to prepetition services. That portion of
the payments allocable to postpetition services will not
be property of the estate.

28 Id. at 1208.

1 In the Jess case, the Ninth Circuit determined that
2 78 percent of the debtor-attorney's work, based on recorded hours,
3 was performed prepetition, and thus the fees for those services
4 were property of the bankruptcy estate. Id. at 1206. The Jess
5 court, however, cautioned that counting the number of hours
6 expended by the debtor prepetition and post-petition was not
7 necessarily the correct procedure for determining the relative
8 value of pre- and post-petition services:

9 We should note that Jess made no attempt in the
10 bankruptcy court to place a greater value on his
11 post-petition hours than on his pre-petition hours.
12 Thus, all of Jess's hours were valued equally. We
13 recognize that in a different context it might be
14 possible to establish that hours worked at different
15 stages of a case may have different values.

16 Id. at 1208 n.4.

17 This led the bankruptcy court to the other side of the
18 property of the estate coin. While Federal law determines what
19 interests or assets of the debtor at the time of filing a
20 bankruptcy petition become property of the estate, it does not
21 settle questions of the existence and scope of the debtor's
22 interest in a given asset. We resolve those questions by
23 reference to state law. Butner v. United States, 440 U.S. 48, 55
24 (1979) ("Property interests are created and defined by state law.
25 Unless some federal interest requires a different result, there is
26 no reason why such interests should be analyzed differently simply
27 because an interested party is involved in a bankruptcy
28 proceeding.").

29 The bankruptcy court properly consulted California state law
30 to determine the value of attorney services on a contingent basis
31 where the attorney was terminated before payment was received. A

1 recent decision of the California Court of Appeals, not cited by
2 the bankruptcy court, provides insight into quantum meruit
3 determinations in contingent fee cases under California law.

4 [A] contingency fee lawyer discharged prior to
5 settlement may recover in quantum meruit for the
6 reasonable value of services rendered up to the time of
7 discharge. . . . The most useful starting point for
8 determining the amount of a reasonable fee is the number
9 of hours reasonably expended on the litigation
10 multiplied by a reasonable hourly rate. This
11 calculation provides an objective basis on which to make
12 an initial estimate of the value of a lawyer's services.
13 . . . However, providing evidence as to the number of
14 hours worked and rates claimed is not the end of the
15 analysis in such a quantum meruit action. The party
16 seeking fees must also show the total fees incurred were
17 reasonable. Factors relevant to that determination
18 include "[t]he nature of the litigation, its difficulty,
19 the amount involved, the skill required in its handling,
20 the skill employed, the attention given, the success or
21 failure of the attorney's efforts, the attorney's skill
22 and learning, including his [or her] age and experience
23 in the particular type of work demanded."

24 Mardirossian & Associates, Inc. v. Ersoff, 153 Cal. App. 4th 257,
25 273 (Cal. Ct. App. 2007). (Emphasis added, internal citations
26 omitted).

27 Thus, under the prevailing guidelines in California case law,
28 the quantum meruit value of the services performed by an attorney
who is terminated before recovery on a contingent fee case does
not end with a lodestar analysis. Instead, trial courts must look
beyond the hours worked to consider other factors, including the
results achieved. As the bankruptcy court observed, the dispute
in this case is comparable to a hypothetical case in which an
attorney worked ten hours on a case, was terminated, another
attorney worked ten hours and achieved a \$100,000 settlement.
Should the attorneys split the fees 50/50, as Tishgart would
suggest, or should the court conduct an inquiry into whether the

1 first attorney had greater or lesser responsibility for achieving
2 the results?

3 The requirement that a trial court look beyond the hours
4 worked by the attorney to consider other factors, including the
5 results achieved, appears in other California cases. In a case
6 cited by Debtors, Fricasse v. Brent, 6 Cal.3d 784, 791 (1972), the
7 California Supreme Court considered a situation where an attorney
8 devoted considerable efforts to a case, was discharged, and the
9 client achieved a settlement. The court awarded fees based on its
10 findings of whether the attorney's work was principally
11 responsible for the recovery.

12 In addition, in Padilla v. McClellan, 93 Cal. App.4th 1100,
13 1103 (Cal. Ct. App. 2001), the court considered a case dealing
14 with a probate settlement, where an attorney worked on the case
15 for a year, was discharged, and succeeded by another attorney who
16 achieved the settlement. The court awarded fees to the attorneys
17 based not only on respective hours spent on the case by the
18 attorneys, but also based on the court's view of what the court
19 perceived to be the results each attorney achieved.

20 Indeed, the California courts have explicitly rejected
21 Debtors' argument that the quantum meruit standard is based
22 strictly on hours worked:

23 Because the hourly fee is the prevailing price structure
24 in the legal profession, it is sometimes assumed that
25 the quantum meruit standard applied to legal services
26 includes nothing more than a reasonable hourly rate
27 multiplied by the amount of time spent on the
28 case. . . . However, this is an overly narrow view of
the quantum meruit standard applied in the area of
contingent fee agreement which, through no fault of
either party, could not be performed.

Cazares v. Saenz, 208 Cal. App.3d 279, 286-87 (Cal. Ct. App.

1 1989).

2 In short, California case law does not support Debtors'
3 argument that the value of Tishgart's services on the Fifteen
4 Cases to be turned over to Trustee must be determined solely by
5 reference to the number of hours Tishgart actually spent
6 prepetition on the cases. Instead, state law requires a court to
7 look beyond the hours spent and consider other factors, including
8 the results Tishgart achieved.

9 The bankruptcy court found that Tishgart had provided little
10 information on his post-petition activities in the relevant cases.
11 "He has given the court scant basis for differentiating between
12 his prepetition and postpetition work on the cases." Memorandum
13 at 3.

14 The evidentiary record supports the bankruptcy court's
15 observations. Through the various interrogatories and answers
16 admitted into evidence, the court had information about each of
17 the Fifteen Cases, including clients, dates, and amounts paid.
18 Trustee's exhibits on eleven of the Fifteen Cases, with additional
19 documentation obtained from Tishgart's files, were also admitted
20 into evidence. Debtors provided no exhibits or documentary
21 support for Tishgart's testimony.

22 Tishgart was examined under oath regarding the cases. He
23 admitted that he kept no time records and any testimony he offered
24 on the time he spent on each case was an estimate. Trial
25 Tr. 15:12-19, February 14, 2012. His testimony was at times
26 inconsistent. Regarding the Faust case, for example, in which the
27 client received a \$100,000 settlement, Tishgart originally denied
28 that it had settled before the petition date. Trial Tr. 20:23.

1 When presented with documentary evidence from his stipulations in
2 an earlier state court proceeding in the Faust case, he admitted
3 that the settlement agreement had been reached and a motion to
4 approve the settlement was submitted prepetition. Trial
5 Tr. 22:2-17. The bankruptcy court could be justifiably skeptical
6 of Tishgart's testimony that he only spent two hours prepetition
7 on this case.

8 Regarding the San Miguel case, for which Tishgart received
9 one of his largest fees of \$47,500, Tishgart only claimed one hour
10 of prepetition services. Yet Tishgart's own files, obtained by
11 Trustee and admitted into evidence, showed that Tishgart had
12 interviewed his client, and drafted the complaint initiating the
13 lawsuit on behalf of San Miguel over a year before the petition.
14 There had been at least one case management conference, Tishgart
15 had submitted discovery responses, been involved in discovery
16 disputes, and had selected mediators, all before the petition
17 date. Trial Tr. 35:ER at 130-59. As to post-petition actions,
18 Tishgart testified:

19 RAY (attorney for Trustee): So what did you do after the
20 petition date to earn that \$47,500 in fees, specifically
services you performed?

21 TISHGART: Well, you asked me two questions. The fees
22 are earned as a result of a contingency. I can't answer
the question what I did after the petition date to work
23 on the case.

24 Trial Tr. 36:13-17.

25 Tishgart answered questions about the other cases in a
26 similar vein, discussing prepetition services with frequent
27 inconsistencies, and post-petition services in general terms
28 without specific reference to actual time spent. The bankruptcy

1 court did not err in its conclusion that: "[Tishgart] has given
2 the court scant basis for differentiating between his prepetition
3 and postpetition work on the cases." Memorandum at 3.

4 What is certain, as observed by the bankruptcy court, was
5 that Tishgart had been deemed to admit that he performed little or
6 no services post-petition on the Fifteen Cases. Thus, the court
7 could reasonably infer that whatever services Tishgart performed
8 prepetition were critical to the results achieved, and to the
9 contingent fee payments made, and that the prepetition services
10 were of more value than the "little or no services" performed
11 after the bankruptcy filing.

12 In sum, absent more evidentiary support for Debtors'
13 position, the bankruptcy court would not have erred if it had
14 concluded that it was justified in "awarding almost all of the
15 fees in question to [Trustee]." Memorandum at 3. As a result,
16 Tishgart is not prejudiced because the court awarded less than
17 that amount to Trustee.

18 But the court was also fully justified in awarding half the
19 fees to Tishgart. The court noted in its memorandum that it had
20 reviewed the evidence and documentation on the cases and was not
21 relying simply on the deemed admissions.

22 In cases commenced well before the bankruptcy, most of
23 the work was prepetition. In cases commenced nearer to
24 the bankruptcy, most of the work was postpetition,
25 notwithstanding Tishgart's deemed admission to the
26 contrary. They pretty much offset each other, so a 50-
50 split seems fair. The court notes that Tishgart did
not keep time records, thereby making it difficult to
divine a fair split more precisely.

27 Memorandum at 4 n.2.

28 The bankruptcy court did not err in deciding that Tishgart

1 must turn over \$69,837.90 of the fees paid to him post-petition to
2 Trustee.⁸

3 **CONCLUSION**

4 We AFFIRM the judgment of the bankruptcy court.
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26 ⁸ Debtors also complain that the bankruptcy court failed to
27 enter adequate findings of fact pursuant to Civil Rule 52/
28 Rule 7052. But Civil Rule 52(a)(1) provides that the trial
court's findings "may appear in an opinion or a memorandum of
decision filed by the court ," and the bankruptcy court's findings
were specifically presented in the Memorandum.