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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	CC-09-1261-PDH
)		
PHUONG THI NGUYEN,)	Bk. No.	SA 05-12154 RK
)		
Debtor.)	Adv. No.	SA 05-01283 RK
)		
PHUONG THI NGUYEN, aka Madelyn)		
Nguyen,)		
)		
Appellant,)		
v.)	MEMORANDUM¹	
)		
ELIZABETH CHANG,)		
fdba Investment Management)		
International,)		
)		
Appellee.)		

Argued and Submitted on
March 19, 2010 at Pasadena, California

Filed - April 12, 2010

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

Honorable Robert N. Kwan, Bankruptcy Judge, Presiding.

Before: PERRIS,² DUNN 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.

² Hon. Elizabeth L. Perris, Chief Bankruptcy Judge for the District of Oregon, sitting by designation.

1 Debtor, Phuong Thi Nguyen ("debtor"), seeks reversal of the
2 bankruptcy court's judgment that the debt she owes to plaintiff
3 Elizabeth Chang ("Chang") is nondischargeable. Debtor did not,
4 however, file a timely notice of appeal from the judgment. Instead,
5 she filed notices of appeal from two post-judgment orders: the
6 bankruptcy court's order awarding costs and calculating prejudgment
7 interest and the bankruptcy court's order denying debtor's Motion
8 for Reconsideration and Motion for New Trial. Although debtor
9 raises a few issues that relate to the post-trial orders that were
10 timely appealed, fundamentally she is challenging the underlying
11 judgment. We AFFIRM.

12 **FACTS**

13 The following facts come from the court's Memorandum Decision.

14 During the time pertinent to this dispute, debtor was a
15 licensed real estate agent. Chang and her husband made financial
16 investments in real estate under the fictitious business name,
17 Investment Management International. Chang was a piano teacher; her
18 husband was an engineer employed by Boeing.

19 In 1995, debtor acted as a real estate agent for Chang in the
20 sale of two real estate properties. After that, debtor contacted
21 Chang from time to time to talk about potential investment
22 properties.

23 In 2002, debtor contacted Chang and asked her if she was
24 interested in investing with debtor's real estate clients who
25 purchase property, fix it up, then resell it. Chang said no.
26 Debtor then proposed that Chang lend money to debtor's real estate

1 investment clients, providing funding needed so the clients could
2 close escrow on purchases of investment properties. Debtor
3 represented to Chang that the clients would purchase the property,
4 fix it up, then resell it at a profit. Chang would be repaid the
5 money she loaned plus interest. Debtor told Chang that she, debtor,
6 would guarantee that the payments would be made, and that Chang had
7 no risk of loss because the properties would be titled so that the
8 investors could not sell them without paying Chang. The loans were
9 for short terms and high interest rates.

10 Debtor told Chang that the real estate transactions were being
11 conducted through debtor's employer, ReMax, but that ReMax was not
12 participating in the transactions because of a conflict of interest.
13 Debtor also told Chang that the names of the investor clients and
14 specifics of the transactions could not be disclosed to Chang
15 because of confidentiality issues.

16 Chang agreed to provide the funds to debtor's clients on a
17 short-term basis, and thereafter in 2002 began periodically giving
18 debtor checks when debtor told Chang that she had clients who needed
19 loans. Chang understood that debtor was a conduit for the payment
20 of these funds. The checks were made out to debtor, who was to give
21 them to her clients. The clients were then to give the repayment
22 amount plus interest to debtor, who would then write a check to
23 Chang for repayment.

24 Between 2002 and 2005, Chang gave debtor a number of checks,
25 written out to debtor, based on debtor's representations that the
26 funds to repay the loans were coming from debtor's clients and that

1 debtor was acting as a conduit for the loans to the investment
2 clients.

3 Debtor repaid the loans with interest without incident from
4 2002 through early 2004. On some of the repayment checks, debtor
5 wrote in the check's memo line that the repayment was "for Scott,"
6 "for Thomas" or "for Raquel." Chang understood that these names
7 were the investment clients who were making the loan repayments.

8 The frequency of the loan transactions increased in 2004.
9 Between May 14, 2004, and February 14, 2005, Chang gave debtor 26
10 checks totaling \$115,000. All of the checks were payable to debtor,
11 and Chang believed that they were for debtor's real estate
12 investment clients.

13 Debtor cashed each of the checks. As a guaranty of repayment
14 for some of the funds, debtor gave Chang nine post-dated checks,
15 drawn on debtor's checking account, with dates of December 2004 and
16 January 2005.

17 In December 2004, before the date of any of the post-dated
18 checks, debtor told Chang not to deposit the checks, because the
19 client who was to repay the money was going through a divorce and
20 the client's funds had been frozen.

21 In late February 2005, debtor visited Chang at her house.
22 Debtor asked to see the nine checks. After debtor wrote down the
23 information from the checks, she told Chang there were too many
24 checks, and that the client would repay the loans with a cashier's
25 check in a couple of days. Debtor took the nine checks and replaced
26 them with a single check for the total amount of \$74,465. She

1 promised to call Chang in a couple of days when the cashier's check
2 came in from the client.

3 Debtor never called. When Chang tried to deposit the \$74,465
4 check, it was dishonored due to insufficient funds.

5 As it turned out, the funds Chang gave to debtor were not being
6 used for real estate investment clients, but instead were being used
7 by debtor personally. Debtor had large gambling losses in 2004 and
8 early 2005. She used the funds she received from Chang for
9 gambling. Chang did not know that debtor was a gambler or that she
10 was using the funds for her own gambling purposes. Debtor testified
11 that the reason she wrote the notations "for Scott" and the like in
12 the memo line of the checks was to hide from her sister, with whom
13 debtor lived, the fact that she was borrowing money. The court
14 found, however, that the notations were intended to deceive Chang
15 into thinking that the funds were for the investment clients whose
16 names were on the checks.

17 At the time debtor filed her bankruptcy petition, she had not
18 repaid \$85,410 of the funds borrowed from Chang.

19 Procedural History

20 After debtor filed her bankruptcy petition in 2005, Chang filed
21 an adversary complaint to determine whether the \$85,410 debt owed to
22 Chang was nondischargeable under § 523(a)(2), (4), and (6).³ Debtor
23 cross-claimed for usury. The adversary proceeding was continued
24 various times pending the outcome of a criminal action Chang had

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26 ³ Unless otherwise indicated, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 initiated against debtor arising from these same transactions.

2 After the criminal case ended with an acquittal, the trial in the
3 adversary proceeding was held in October 2008.

4 At the one-day trial, debtor testified and also cross-examined
5 Chang, whose direct testimony was submitted by declaration. In
6 early January 2009, the court held a continued hearing on the trial
7 at which the judge indicated his tentative thoughts about the
8 claims, and also sought clarification about certain legal arguments.
9 Debtor was at the hearing. At the close of the hearing, the court
10 allowed counsel for Chang a week to file a supplemental memorandum
11 addressing questions about the § 523(a)(4) breach of fiduciary duty
12 claim, and also asked counsel to upload proposed findings of fact
13 and conclusions of law and a proposed judgment, based on the
14 tentative ruling that had been discussed at the hearing. Transcript
15 of January 7, 2009 hearing at 49:15 - 52:12. The court gave debtor
16 two weeks to file a response to the supplemental memorandum and the
17 proposed findings of fact and conclusions of law. Id.

18 On January 21, 2009, Chang filed her Supplemental Trial Brief
19 addressing the breach of fiduciary duty issue. On the same day, she
20 lodged with the court and served on debtor a proposed form of
21 judgment. Debtor filed a response to the supplemental brief on
22 January 30, 2009.

23 On June 19, 2009, the bankruptcy court issued its Memorandum
24 Decision, concluding that the debt was nondischargeable under
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1 § 523(a) (2) and (a) (4),⁴ and finding for debtor on the § 523(a) (6)
2 claim. The court found that Chang was credible and that debtor was
3 not credible, essentially accepting Chang's version of the facts.
4 Memorandum Decision at 5:16 - 7:2. The court dismissed debtor's
5 usury claim. Id. at 15:23 - 16:2. It discussed and rejected
6 Chang's request for punitive damages, id. at 15:1 - 22, and
7 explained its decision to award prejudgment interest from the date
8 the complaint was filed until the date judgment was entered. Id. at
9 14:12 - 27.

10 The court entered the judgment the same day. The judgment held
11 the debt nondischargeable, provided that Chang would recover
12 prejudgment interest at the federal rate from the date of filing of
13 the complaint, and that Chang would be awarded her costs.

14 Debtor did not file a notice of appeal within 10 days of entry
15 of the judgment. Chang filed a Bill of Costs and Calculation of
16 Pre-Judgment Interest on July 14, 2009. Debtor filed an objection
17 to the cost bill and motion for new trial on July 20, 2009. The
18 court rejected the objection to the cost bill and entered the order
19 awarding costs and calculating prejudgment interest on July 30.
20 That order did not address the motion for new trial.

21 On August 4, 2009, debtor filed two documents: a Notice of
22 Appeal from the July 30 Order on Bill of Costs and Calculation of
23

24 ⁴ The trial court found the debt nondischargeable under
25 § 523(a) (4) both for defalcation while acting in a fiduciary
26 capacity and for embezzlement. Therefore, even if debtor were
correct that she was not acting in a fiduciary capacity, the debt
would nonetheless be nondischargeable for embezzlement.

1 Pre-Judgment Interest, and a separate document that contained
2 objections to the cost bill and pre-judgment interest order and
3 again included a motion for a new trial. The Notice of Appeal
4 simply said that debtor "files this notice of appeal to oppose Judge
5 Robert Kwan's bill of costs and calculation of pre-judgment interest
6 order." Notice of Appeal filed August 4, 2009.

7 On August 28, 2009, debtor filed Amendments to Notice of
8 Appeal, in which she detailed her arguments for the appeal of the
9 order on the cost bill and calculation of pre-judgment interest.

10 The bankruptcy court treated the August 4, 2009, objection to
11 the cost bill and pre-judgment interest order and motion for new
12 trial as (1) a motion for reconsideration of the Order on Bill of
13 Costs and Calculation of Pre-Judgment Interest and (2) a Motion for
14 New Trial. The court held a hearing on those motions on September
15 22, 2009, at which debtor did not appear. Transcript of September
16 22, 2009 hearing. Three days later, debtor filed a request for a
17 continuance of the September 22 hearing, saying she had been unable
18 to attend the hearing due to illness. The court denied both of the
19 August 4 motions on September 30, 2009. It did not mention the
20 untimely motion for continuance.

21 On October 9, 2009, debtor filed a notice of appeal of the
22 September 30 order, which she referred to as an amended notice of
23 appeal.

24 **JURISDICTION**

25 The bankruptcy court had jurisdiction over the dischargeability
26 adversary proceeding and post-judgment motions under 28 U.S.C.

1 §§ 1334 and 157(b) (2) (I). We have jurisdiction over the appeal
2 under 28 U.S.C. § 158.

3 **ISSUES**

4 1. What bankruptcy court decisions do we have jurisdiction to
5 review?

6 2. Whether the bankruptcy court abused its discretion in awarding
7 costs and calculating pre-judgment interest.

8 3. Whether the bankruptcy court abused its discretion in denying
9 debtor's motion to alter or amend the Order on Bill of Costs and
10 Calculation of Pre-Judgment Interest.

11 4. Whether the bankruptcy court abused its discretion in denying
12 debtor's motion for new trial.

13 **STANDARDS OF REVIEW**

14 We review the bankruptcy court's award of costs for abuse of
15 discretion. Dawson v. City of Seattle, 435 F.3d 1054, 1070 (9th
16 Cir. 2006). We also review the bankruptcy court's denial of the
17 motion to alter or amend the costs order and the motion for new
18 trial for abuse of discretion. In re Roxford Foods, Inc., 12 F.3d
19 875, 879 (9th Cir. 1993) (review denial of Rule 60(b) motion for
20 abuse of discretion); In re Sandoval, 186 B.R. 490, 493 (9th Cir.
21 BAP 1995) (same); In re Nunez, 196 B.R. 150, 155 (9th Cir. BAP 1996)
22 (review denial of Rule 59 motion for abuse of discretion); In re
23 Negrete, 183 B.R. 195, 197 (9th Cir. BAP 1995), aff'd, 103 F.3d 139
24 (9th Cir. 1996) (table) (same).

25 To determine whether the bankruptcy court abused its
26 discretion, we conduct a two-step inquiry: (1) we review de novo

1 whether the bankruptcy court "identified the correct legal rule to
2 apply to the relief requested" and (2) if it did, whether the
3 bankruptcy court's application of the legal standard was illogical,
4 implausible, or "without support in inferences that may be drawn
5 from the facts in the record." United States v. Hinkson, 585 F.3d
6 1247, 1261-62 (9th Cir. 2009) (internal quotation marks omitted).

7 **DISCUSSION**

8 1. What bankruptcy court decisions do we have jurisdiction to
9 review?

10 There are three trial court decisions about which debtor
11 complains in her briefs: (1) the Judgment, supported by the
12 bankruptcy court's Memorandum Decision, both entered on June 19,
13 2009; (2) the Order on Bill of Costs and Calculation of Pre-Judgment
14 Interest, entered on July 30, 2009; and (3) the Order Denying
15 Debtor's Motions for Reconsideration of the July 30 order and for a
16 New Trial, entered on September 30, 2009. Although it is clear that
17 debtor's goal in this appeal is reversal of the judgment, she does
18 raise some arguments challenging the other two orders as well. The
19 first question is whether we have jurisdiction to review each of
20 those decisions.

21 The chronology of the relevant post-trial procedural history in
22 this case is as follows:

23	June 19, 2009	Memorandum Decision and Judgment entered
24	July 14, 2009	Chang's Bill of Costs and Calculation of Pre-Judgment Interest filed
25		
26	July 20, 2009	Debtor's Objection to Bill of Costs and Calculation of Pre-Judgment Interest and Motion for New Trial filed

1 July 30, 2009 Order on Bill of Costs and Calculation of
2 Pre-Judgment Interest entered
3 August 4, 2009 Debtor's Notice of Appeal from the Order on
4 Bill of Costs and Calculation of Pre-
5 Judgment Interest filed
6 August 4, 2009 Debtor's Motions (1) to Reconsider the
7 Order on Bill of Costs and Pre-Judgment
8 Interest and (2) for New Trial filed
9 September 22, 2009 Hearing held on August 4 motions
10 September 30, 2009 Order Denying Motions for (1)
11 Reconsideration of Order on Bill of Costs
12 and Calculation of Pre-Judgment Interest
13 and (2) New Trial entered
14 October 9, 2009 Debtor's Amended Notice of Appeal adding
15 the September 30 order
16

17 A. The Judgment

18 Debtor's briefs primarily challenge the bankruptcy court's
19 findings after trial, memorialized in the Memorandum Decision, that
20 resulted in entry of the judgment determining that the debt she owes
21 Chang is nondischargeable. Chang argues that debtor did not timely
22 appeal the judgment, so we cannot review the merits of the judgment.
23 Chang is correct.

24 The Bankruptcy Appellate Panel has jurisdiction to review final
25 judgments, orders, and decrees. 28 U.S.C. § 158(a), (b). An appeal
26 from a bankruptcy court's judgment is taken by filing a notice of
appeal within the time allowed by Fed. R. Bankr. P. 8002. Fed. R.
Bankr. P. 8001(a). At the time the judgment was entered in this
adversary proceeding, Rule 8002(a) required that a notice of appeal

1 be filed within 10 days of entry of the judgment.⁵ A timely notice
2 of appeal is jurisdictional, so if a notice of appeal is not timely
3 filed, the panel does not have jurisdiction to review the judgment.
4 In re Wiersma, 483 F.3d 933, 938 (9th Cir. 2007); In re Mouradick,
5 13 F.3d 326, 327 (9th Cir. 1994).

6 The judgment in this adversary proceeding was entered on June
7 19, 2009. Debtor did not file a notice of appeal within 10 days
8 after entry of the judgment. Therefore, we do not have jurisdiction
9 to review the judgment.

10 Although debtor acknowledges that she missed the deadline to
11 file an appeal from the judgment, she argues in passing, without any
12 supporting authority, that the Order on Bill of Costs and
13 Calculation of Pre-Judgment Interest "was a part of the judgment."
14 Opening Brief, third page (pages are unnumbered). If she is arguing
15 that a timely appeal from the Order on Bill of Costs and Calculation
16 of Pre-Judgment Interest encompasses an appeal of the underlying
17 judgment, she is wrong.

18 An appeal from a final order or judgment must be commenced by
19 the timely filing of a notice of appeal from that order or judgment.
20 Fed. R. Bankr. P. 8001(a). A final judgment is one that fully
21 adjudicates the issues before the court and "clearly evidences the

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24 ⁵ Because all of the actions relevant to this appeal,
25 including entry of the judgment and the orders on the post-judgment
26 matters, occurred before the Federal Rules of Bankruptcy Procedure
were amended effective December 1, 2009, the version of the rules
cited and relied on are the rules that were in effect immediately
prior to December 1, 2009.

1 judge's intention that it be the court's final act in the matter."
2 In re Slimick, 928 F.2d 304, 307 (9th Cir. 1990). A judgment
3 entered in an adversary proceeding "ends the litigation on the
4 merits and leaves nothing for the court to do but execute the
5 judgment." Id. at 307 n.1 (internal quotes omitted). "[A] formal
6 judgment is prima facie the final decision" Id. at 308.

7 The judgment entered on June 19, 2009, was a final disposition
8 of the merits of the dischargeability complaint. It awarded a
9 nondischargeable money judgment against debtor, ordered that Chang
10 would recover prejudgment interest at the federal judgment interest
11 rate from the date of the filing of the complaint, and ordered that
12 Chang would recover her costs. The court had finally disposed of
13 the merits of the complaint as well as Chang's request for
14 prejudgment interest, leaving only a calculation based on the date
15 of filing of the complaint and the proper rate of interest. The
16 judgment was final.

17 The award of costs, on the other hand, raised issues "wholly
18 collateral to the judgment," and was a separate final, appealable
19 order. Osterneck v. Ernst & Whinney, 489 U.S. 169, 175 (1989). An
20 appeal of an order awarding costs does not encompass an appeal of
21 the underlying judgment. Burt v. Hennessey, 929 F.2d 457, 458 (9th
22 Cir. 1991). Debtor's failure to file a notice of appeal within 10
23 days of entry of the judgment precludes us from reviewing the
24 judgment. See, e.g., Rodriguez v. S. Pac. Transp. Co., 587 F.2d
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1 980, 981 (9th Cir. 1978).⁶

2 B. The Order on Bill of Costs and Calculation of Pre-Judgment
3 Interest

4 On July 30, 2009, the court entered its Order on Bill of Costs
5 and Calculation of Pre-Judgment Interest. Debtor filed a notice of
6 appeal "to object and to oppose Judge Robert Kwan's Bill of Costs
7 and Calculation of Pre-Judgment Interest Order" on August 4, 2009.
8 On the same day, she filed a single document that contained two

9 _____
10 ⁶ Debtor raises numerous arguments in her attempt to gain
11 reversal of the underlying judgment. Those arguments include:

- 12 (1) The court's findings were not supported by the evidence.
- 13 (2) The court's findings were based on false testimony.
- 14 (3) The court's findings were inconsistent.
- 15 (4) The trial court failed to follow its own procedure in
16 proceeding with trial without requiring entry of a pretrial
17 order.
- 18 (5) The bankruptcy court and Chang's counsel had improper ex
19 parte contacts, in particular counsel's submission of proposed
20 findings of fact and conclusions of law and a proposed
21 judgment.
- 22 (6) The bankruptcy judge was biased and prejudiced against
debtor.
- (7) The bankruptcy judge entered judgment against debtor in
retaliation for her complaint that the court was taking too
long in making its decision.
- (8) The court was wrong to award prejudgment interest, because
debtor should not have to pay interest for the lengthy delay in
getting the case to trial and decision.

23 Because we do not have jurisdiction to review the judgment, this
24 Memorandum does not address those arguments. We note, however, that
25 to the extent debtor challenges the evidentiary basis for the
26 judgment, she has failed to include as part of the record on appeal
Chang's trial declaration, which was treated as Chang's direct
testimony, or Chang's exhibits that were admitted at trial, making
it impossible for us to review the sufficiency of the evidence.

1 motions: (1) to oppose the Bill of Costs and Calculation of Pre-
2 Judgment Interest Order and (2) to have a new trial with a new
3 judge.

4 Because it was filed within 10 days of entry of the order,
5 debtor's August 4 motion to oppose the July 30 order was essentially
6 a motion to alter or amend the July 30 order under Fed. R. Bankr. P.
7 9023 and Fed. R. Civ. P. 59(e). See Shapiro ex rel. Shapiro v.
8 Paradise Valley Unified School Dist., 374 F.3d 857, 863 (9th Cir.
9 2004); Taylor v. Knapp, 871 F.2d 803, 805 (9th Cir. 1989). That
10 motion tolled the time for appeal from the July 30 Order on Bill of
11 Costs and Calculation of Pre-Judgment Interest. The notice of
12 appeal filed on August 4 was premature and became effective on
13 September 30, 2009, when the bankruptcy court entered the order
14 denying the August 4 motion. Fed. R. Bankr. P. 8002(b). See
15 Tripati v. Henman, 845 F.2d 205, 206 (9th Cir. 1988) (notice of
16 appeal filed before timely motion to alter or amend the judgment was
17 ineffective until the trial court disposed of the tolling motion).

18 The notice of appeal was timely to appeal the Order on Bill of
19 Costs and Calculation of Pre-Judgment Interest. As discussed above,
20 appeal of that order does not encompass an appeal of the judgment.

21 C. The Order Denying [Debtor's] Motions For: (1)
22 Reconsideration of the Order on Bill of Costs and
23 Calculation of Pre-Judgment Interest; and (2) A New Trial

24 The bankruptcy court denied debtor's Motions for
25 Reconsideration of the Order on Bill of Costs and Calculation of
26 Pre-Judgment Interest and for New Trial on September 30, 2009.
Debtor filed an Amended Notice of Appeal within 10 days, on October

1 9, 2009, in which she challenges the September 30 order.

2 Chang argues that debtor cannot obtain review of the portion of
3 the order that denied the motion for new trial for two reasons.
4 First, she contends that there is no authority for allowing an
5 amended notice of appeal to include a subsequent final order in an
6 appeal from a previous final order.

7 Debtor's original Notice of Appeal, filed on August 4,
8 specified only the Order re Bill of Costs and Calculation of Pre-
9 Judgment Interest. Her request for reconsideration of the costs
10 order, filed along with her motion for new trial, raised issues
11 pertaining both to the costs and interest order as well as to
12 alleged errors in the trial. Until the bankruptcy court ruled on
13 the motion for new trial, debtor could not appeal its denial. When
14 the court ruled on the motion on September 30, 2009, debtor timely
15 filed an amendment to her notice of appeal, specifically referring
16 to the September 30, 2009, order denying her two motions. Any
17 appeal of the denial of the motion for new trial would have been
18 premature before September 30, when the trial court first ruled on
19 the motion.

20 We liberally construe a notice of appeal when it is filed by a
21 party who is not represented by counsel. In re Sweet Transfer &
22 Storage, Inc., 896 F.2d 1189, 1193 (9th Cir. 1990). Debtor's
23 Amended Notice of Appeal clearly set out the September 30, 2009,
24 order as the subject of appeal. Even assuming that debtor should
25 have filed a separate notice of appeal of the denial of the motion
26 for new trial, it was clear that she intended to appeal from that

1 portion of the September 30 order, and Chang has addressed it in her
2 supplemental brief on appeal. Including the order denying the
3 motion for new trial in the amended notice of appeal is not fatal to
4 debtor's appeal of that order.

5 Second, Chang argues that debtor did not mention the denial of
6 her motion for new trial in either her statement of issues and
7 designation of record filed on November 23, 2009, nor in her
8 statement of issues in her opening brief, and so she has waived any
9 issues relating to the denial of that motion.

10 Bankruptcy Rule 8006 requires that, within 10 days after filing
11 the notice of appeal, the appellant file a statement of issues to be
12 presented. Whatever might be the rule in the circuits whose
13 decisions Chang cites in support of the waiver argument, in the
14 Ninth Circuit an appellant's failure to list an issue in its
15 statement of issues required by Fed. R. Bankr. P. 8006 does not
16 constitute a waiver of the issue on appeal or preclude the appellant
17 from arguing it in the opening brief. In re Bishop, Baldwin,
18 Rewald, Dillingham & Wong, Inc., 104 F.3d 1147, 1148 (9th Cir.
19 1997); In re Gertsch, 237 B.R. 160, 166 (9th Cir. BAP 1999); In re
20 Cantrell, 269 B.R. 413, 420 n.5 (9th Cir. BAP 2001), aff'd, 329 F.3d
21 1119 (9th Cir. 2003).

22 Therefore, whatever the deficiencies, if any, in debtor's
23 statement of issues, we have jurisdiction to consider debtor's
24 appeal from the order denying her motion for new trial.

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1 2. Whether the bankruptcy court erred in awarding costs and
2 calculation of pre-judgment interest.

3 Although most of debtor's arguments relate to claimed errors in
4 the trial and resulting judgment, debtor does make some arguments
5 challenging the Order re Bill of Costs and Calculation of Pre-
6 Judgment Interest.

7 First, she argues that the trial court was wrong in its order
8 when it said that she had failed to timely file an objection to the
9 Bill of Costs.

10 She is correct that she did actually file a timely objection.
11 The Bill of Costs was filed on July 14, 2009, with notice pursuant
12 to the then-current Local Bankruptcy Rule 7054-1(e) that debtor had
13 five days to file any objections. Bankruptcy Rule 9006(a) provides
14 that, in computing the time under local rules, if the period of time
15 prescribed is less than 8 days, "intermediate Saturdays, Sundays,
16 and legal holidays shall be excluded[.]" July 14 was a Tuesday.
17 Therefore, the fifth day, disregarding Saturday and Sunday, was
18 Tuesday, July 21. Debtor filed her objection on Monday, July 20.
19 It was timely.⁷

20 The trial court's error in saying that the objection was
21 untimely is harmless, however. The court made clear in its order
22 that it considered debtor's objection, even though it thought the
23 objection was untimely. Because the court took debtor's objection
24

25 ⁷ The bankruptcy court may have relied on the July 9, 2009,
26 date on which counsel for Chang signed the Bill of Costs. However,
the Bill of Costs was not filed with the court or served on debtor
until July 14.

1 into account, its error in saying that the objection was late had no
2 consequence.

3 The only objection that debtor raised to the cost bill in the
4 bankruptcy court was that the bill of costs had not been included in
5 the trial exhibits.

6 Bankruptcy Rule 7054(b) and Local Bankruptcy Rule 7054-1(a)
7 provide that the bankruptcy court may award costs to the prevailing
8 party. Local Bankruptcy Rule 7054-1 requires that the prevailing
9 party "file and serve a bill of costs not later than 30 days after
10 entry of judgment." LBR 7054-1(c). The prevailing party's attorney
11 "must file a declaration with the bill of costs certifying that" the
12 cost items are correct, that the costs were necessarily incurred,
13 the services for which fees were charged were actually and
14 necessarily performed, and that the costs were either paid or an
15 obligation for payment was incurred. Id. The rule does not require
16 that the costs be proved by evidence admissible under the Rules of
17 Evidence or allow the supporting documents to be submitted as trial
18 exhibits.

19 Debtor did not challenge the taxing of any particular item or
20 the amount of any particular item of costs, nor did she complain
21 that counsel's certification was faulty in some way. Because the
22 Bill of Costs was not required to be an exhibit at trial, but is
23 instead a certification of costs necessarily incurred in prosecuting
24 the action, debtor has not demonstrated that the bankruptcy court
25 abused its discretion in awarding the costs as requested.

26 Debtor argues for the first time on appeal that Chang did not

1 submit receipts for the fees, so there is no way to verify that the
2 fees were paid. As a general rule, we will not consider an issue
3 raised for the first time on appeal. U.S. v. Bigman, 906 F.2d 392,
4 395 (9th Cir. 1990); In re N. Cal. Homes and Gardens, Inc., 92 B.R.
5 410, 413-14 (9th Cir. BAP 1988). We have discretion to do so in
6 some narrow circumstances, such as where justice will be better
7 served if the court addresses all of the pro se litigant's
8 contentions. In re Jackson, 105 B.R. 542, 544 (9th Cir. BAP 1989).

9 There was no error in the lack of verification that the fees
10 were paid. Counsel's declaration, under penalty of perjury, that
11 the requested costs "are correct and were necessarily incurred in
12 this action," Bill of Costs and Calculation of Pre-Judgment Interest
13 at 3, provides the evidentiary support for the award of those costs.

14 As for the award of interest, debtor argues that the award of
15 prejudgment interest from the date of the filing of the complaint is
16 unfair, because the adversary proceeding was continued for more than
17 two years, resulting in an increase in the interest that accrued.

18 The judgment provides that "[p]laintiff shall recover
19 prejudgment interest . . . from the date of filing of the complaint
20 in this adversary proceeding[.]" The bankruptcy court explained the
21 award of interest in its Memorandum Decision. Thus, any challenge
22 to the date from which the court's award of interest began would
23 have had to have been raised in an appeal from the judgment. Debtor
24 did not timely appeal the judgment, and so cannot complain that the
25 judgment awarded interest from the date the complaint was filed.

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1 3. Whether the bankruptcy court abused its discretion in denying
2 debtor's Motion for Reconsideration of the Order on Bill of
3 Costs and Calculation of Pre-Judgment Interest.

4 The bankruptcy court considered debtor's August 4, 2009, Motion
5 to Object and Oppose Judge Robert Kwan's Bill of Costs and
6 Calculation of Pre-Judgment Interest Order as a motion for
7 reconsideration of the order awarding costs and calculating
8 interest. A motion seeking reconsideration, filed within 10 days of
9 entry of the order, is treated as a motion to alter or amend the
10 order pursuant to Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59(e).
11 Taylor v. Knapp, 871 F.2d 803, 805 (9th Cir. 1989). Thus, we review
12 the order denying the motion as one denying a motion to alter or
13 amend the July 30 costs and interest order.

14 Debtor argued that the bankruptcy court should reconsider its
15 cost award and calculation of prejudgment interest because it was
16 wrong to find that she did not file her objection on time. As
17 explained above, debtor did in fact file her objection on time. The
18 court took debtor's objection into consideration, even though the
19 court said it was not timely filed. Debtor has not demonstrated
20 that the bankruptcy court abused its discretion in denying the
21 August 4 motion to alter or amend the Order on Bill of Costs and
22 Calculation of Pre-Judgment Interest.

23 4. Whether the bankruptcy court erred in denying debtor's motion
24 for new trial.

25 The bankruptcy court denied debtor's Motion for New Trial,
26 which sought a new trial on the merits.

The Federal Rules of Bankruptcy Procedure provide for the

1 filing of a motion for new trial, based on "any reason for which a
2 rehearing has heretofore been granted in a suit in equity in federal
3 court." Fed. R. Civ. P. 59(a); Fed. R. Bankr. P. 9023. A motion
4 for new trial must, however, be filed within 10 days of entry of the
5 judgment. Fed. R. Civ. P. 59(b). Debtor first filed her request
6 for new trial on July 20, 2009, more than 10 days after entry of the
7 June 19, 2009, judgment. Thus, if the motion is characterized as a
8 motion for new trial, the bankruptcy court did not err in denying
9 it, because it was not timely filed.⁸

10 Where the time for appeal of a judgment has expired before a
11 motion for reconsideration is filed, a motion for new trial should
12 be construed as a motion for relief from the judgment under Fed. R.
13 Bankr. P. 9024 and Fed. R. Civ. P. 60(b). In re Negrete, 183 B.R.
14 195 (9th Cir. BAP 1995); In re Cleanmaster Indust., Inc., 106 B.R.
15 628, 630 (9th Cir. BAP 1989). The fact that the motion is labeled a
16 motion for new trial is not dispositive; the court will construe the
17 motion to be the type proper for the relief requested. Miller v.
18 Transam. Press, Inc., 709 F.2d 524, 527 (9th Cir. 1983). Therefore,
19 we characterize debtor's new trial request as a motion for relief
20 from the judgment under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P.
21 60(b).

22 Rule 60(b) allows a court to relieve a party from a final
23 judgment for a number of reasons, including newly discovered

24
25 ⁸ The motion was filed within 10 days of entry of the Order
26 on Bill of Costs and Calculation of Pre-Judgment Interest, but it
did not challenge that order. It challenged the judgment, which had
been entered more than a month before.

1 evidence, fraud, misconduct of an adverse party, or for "any other
2 reason that justifies relief." Fed. R. Civ. P. 60(b). "Any other
3 reason" is limited to exceptional or extraordinary circumstances,
4 and the moving party bears the burden of establishing the existence
5 of such circumstances. In re Martinelli, 96 B.R. 1011, 1013 (9th
6 Cir. BAP 1988); Negrete, 183 B.R. at 197. Appeal from the denial of
7 a Rule 60(b) motion brings up only the denial of the motion for
8 relief, not the merits of the underlying judgment. Martinelli, 96
9 B.R. at 1013. Further, Rule 60(b) cannot be used as a substitute
10 for an appeal. McCarthy v. Mayo, 827 F.2d 1310, 1318 (9th Cir.
11 1987).

12 Debtor's motion raised four arguments for a new trial:

13 (1) That the court's judgment was against the weight of the
14 evidence;

15 (2) That the judge was partial and biased, and that he based
16 his rulings on false statements;

17 (3) That the judge's ruling, finding that debtor had acted in a
18 fiduciary capacity, was contradicted by his finding that debtor
19 did business under the name of Madelyn Nguyen; and

20 (4) That the judge did not follow his usual procedure of
21 requiring a pretrial order before commencing the trial.

22 Each of the bases raised for granting relief, other than the
23 alleged bias or partiality of the judge, is merely a challenge to
24 the judgment that could have been raised on a direct appeal. On a
25 direct appeal from the judgment, debtor could have raised the issue
26 of whether the court's judgment was supported by the evidence,
whether the evidence on which the court based its rulings was false,
whether the court's findings were contradictory, and whether the

1 court erred in proceeding with the trial without a pretrial order.
2 Debtor failed to timely appeal the judgment and so cannot use the
3 Rule 60(b) motion to argue the issues that she could have raised in
4 a direct appeal.

5 The only issue raised in the motion that could possibly support
6 the granting of debtor's motion is her assertion that the bankruptcy
7 judge was biased against her and partial to Chang. Although she did
8 not say so directly, she seems to have been trying to get the judge
9 to recuse himself. The basis for the argument seems to be that
10 counsel for Chang lodged with the court a proposed judgment and
11 proposed findings of fact and conclusions of law, which debtor
12 argues she did not have an opportunity to see or respond to before
13 they were entered.⁹

14 Debtor knew that counsel was going to submit proposed findings
15 and a proposed judgment. Debtor was present at the continued trial
16 on January 7, 2009. The judge discussed his tentative rulings on
17 the issues in the case, including his inclination to rule in favor
18 of Chang on some of the claims. The court had questions about the
19 breach of fiduciary duty claim, and questioned the legal authority
20 for finding that debtor was acting in a fiduciary capacity. He
21 allowed Chang to submit supplemental authorities regarding the
22 fiduciary duty issue, and provided debtor with an opportunity to
23

24 ⁹ On appeal, debtor argues that she did not have an
25 opportunity to dispute the findings. Debtor was at the trial and
26 the continued trial, at which she and Chang argued their views of
the facts. She also had an opportunity to and did file a response
to Chang's post-trial supplemental memorandum.

1 file a response to the supplemental authorities. He also, in
2 debtor's presence, asked counsel to file a proposed judgment and
3 proposed findings of fact and conclusions of law by January 16. He
4 gave debtor until January 30 to file her responsive brief and
5 "anything in response to the proposed findings of facts and
6 conclusions of law and proposed judgment[.]" Transcript of January
7 7, 2009, hearing at 55:12-18. Debtor filed her response to Chang's
8 supplemental brief on January 30.

9 Thus, there was nothing untoward or secret about the fact that
10 counsel would be submitting proposed findings and conclusions and a
11 proposed judgment. The judgment entered on June 19, 2009, shows
12 that the proposed judgment was served on debtor on January 21, 2009.
13 The judgment that was entered showed that the court had made changes
14 to the proposed judgment. This indicates that the court did not
15 simply accept the proposed judgment as filed but made sure that the
16 judgment accurately reflected the court's ruling.

17 However, there is nothing in the record to show that proposed
18 findings and conclusions were either submitted to the court, as
19 debtor asserts they were, or that, if they were submitted to the
20 court, debtor was not served with a copy, just as she was served
21 with a copy of the proposed judgment. Unlike the judgment, Chang's
22 counsel's name and address are not at the top of the first page of
23 the Memorandum Decision that the court entered, which would have
24 indicated that counsel had submitted the document to the court as
25 proposed findings and conclusions.

26 At oral argument, debtor argued that she can tell that Chang's

1 counsel prepared the findings and conclusions, because portions of
2 the Memorandum Decision were lifted verbatim from Chang's trial and
3 supplemental trial briefs. She did not point to any specific
4 portion of the Memorandum Decision that purportedly came from either
5 brief. Even if there is language in the Memorandum Decision that is
6 the same as or similar to language in Chang's trial briefs, a judge
7 is entitled to use portions of the parties' briefs in his or her
8 ruling if those portions accurately reflect the findings and
9 reasoning of the court.¹⁰

10 Debtor has not demonstrated that there was any bias by the
11 judge nor that he was partial to Chang or Chang's counsel. The fact
12 that the court believed Chang's testimony at trial and did not
13 believe debtor, leading the court to find that the debt is
14 nondischargeable, does not itself demonstrate either bias or
15 partiality. It demonstrates that the court was doing its job in
16 deciding between conflicting versions of the facts.

17 Also, debtor did not actually file a motion to recuse the
18

19 ¹⁰ Debtor also argues that the trial court erred in changing
20 its view of the breach of fiduciary duty claim after the judge
21 indicated at the continued trial in January that he was inclined to
22 rule for debtor on that claim. The purpose of the continued trial
23 was to get clarification of the legal argument about the breach of
24 fiduciary duty claim. The court took that argument and the
25 supplemental briefs into consideration in reaching its final
26 determination that there was a fiduciary duty that was breached.
The judge apparently was persuaded by argument and briefing that he
should change his initial inclination to rule for debtor on the
fiduciary duty issue. The court is entitled to make a decision
based on all of the argument presented, even if it has indicated an
inclination to rule one way or the other.

1 judge. Even treating the motion for new trial as a motion to recuse
2 the judge, the bankruptcy court did not abuse its discretion in
3 denying the motion. A judge may be disqualified "in any proceeding
4 in which his impartiality might reasonably be questioned[,]" or
5 "[w]here he has a personal bias or prejudice concerning a party[.]"
6 28 U.S.C. § 455(a), (b).

7 The test for evaluating bias or prejudice under § 455 is an
8 objective one, "whether a reasonable person with knowledge of all
9 the facts would conclude that the judge's impartiality might
10 reasonably be questioned." In re Goodwin, 194 B.R. 214, 222 (9th
11 Cir. BAP 1996) (internal quotation marks omitted); Liteky v. United
12 States, 510 U.S. 540, 548 (1994). "An allegation of personal bias
13 must be based on an 'extrajudicial source and result in an opinion
14 on the merits on some basis other than what the judge learned from
15 his participation in the case.'" In re Basham, 208 B.R. 926, 933
16 (9th Cir. BAP 1997) (quoting United States v. Grinnell Corp., 384
17 U.S. 563, 583 (1966)).

18 To the extent debtor's motion for new trial, seeking a new
19 trial before a new judge, could be interpreted as a motion to recuse
20 the judge, debtor did not provide evidence to the bankruptcy court,
21 and does not point to any evidence on appeal, that would support an
22 objective conclusion that the judge's impartiality could reasonably
23 be questioned.

24 The bankruptcy court did not abuse its discretion in denying
25 debtor's motion for new trial or for relief from the judgment.

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CONCLUSION

Debtor did not timely appeal the judgment, therefore we do not have jurisdiction to review it. The bankruptcy court did not abuse its discretion in awarding costs and calculating prejudgment interest, or in denying debtor's motion for reconsideration of the costs and interest order or for a new trial. We AFFIRM.