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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

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.	**M E M O R A N D U M**[1]
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.

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

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Procedural History

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

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

initiated against debtor arising from these same transactions. After the criminal case ended with an acquittal, the trial in the adversary proceeding was held in October 2008.

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

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

On June 19, 2009, the bankruptcy court issued its Memorandum Decision, concluding that the debt was nondischargeable under

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

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

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

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

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[4] The trial court found the debt nondischargeable under § 523(a)(4) both for defalcation while acting in a fiduciary 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.

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

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

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

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

JURISDICTION

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

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

ISSUES

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

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

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

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

STANDARDS OF REVIEW

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

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

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

DISCUSSION

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

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

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

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

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

A. The Judgment

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

The Bankruptcy Appellate Panel has jurisdiction to review final judgments, orders, and decrees. 28 U.S.C. § 158(a), (b). An appeal 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

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

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

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

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

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[5] Because all of the actions relevant to this appeal, including entry of the judgment and the orders on the post-judgment 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.

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

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

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

980, 981 (9th Cir. 1978).[6]

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

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

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[6] Debtor raises numerous arguments in her attempt to gain reversal of the underlying judgment. Those arguments include:

(1) The court's findings were not supported by the evidence.
(2) The court's findings were based on false testimony.
(3) The court's findings were inconsistent.
(4) The trial court failed to follow its own procedure in proceeding with trial without requiring entry of a pretrial order.
(5) The bankruptcy court and Chang's counsel had improper ex parte contacts, in particular counsel's submission of proposed findings of fact and conclusions of law and a proposed judgment.
(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.

Because we do not have jurisdiction to review the judgment, this Memorandum does not address those arguments. We note, however, that to the extent debtor challenges the evidentiary basis for the 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[7] The bankruptcy court may have relied on the July 9, 2009, 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Federal Rules of Bankruptcy Procedure provide for the

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

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

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

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[8] The motion was filed within 10 days of entry of the Order 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.

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

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

> (1) That the court's judgment was against the weight of the evidence;
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> (2) That the judge was partial and biased, and that he based his rulings on false statements;
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> (3) That the judge's ruling, finding that debtor had acted in a fiduciary capacity, was contradicted by his finding that debtor did business under the name of Madelyn Nguyen; and
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> (4) That the judge did not follow his usual procedure of requiring a pretrial order before commencing the trial.

Each of the bases raised for granting relief, other than the alleged bias or partiality of the judge, is merely a challenge to the judgment that could have been raised on a direct appeal. On a direct appeal from the judgment, debtor could have raised the issue 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

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

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

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

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[9] On appeal, debtor argues that she did not have an opportunity to dispute the findings. Debtor was at the trial and 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.

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

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

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

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

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

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

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

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[10] Debtor also argues that the trial court erred in changing its view of the breach of fiduciary duty claim after the judge indicated at the continued trial in January that he was inclined to rule for debtor on that claim. The purpose of the continued trial was to get clarification of the legal argument about the breach of fiduciary duty claim. The court took that argument and the supplemental briefs into consideration in reaching its final 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.

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

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

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

The bankruptcy court did not abuse its discretion in denying 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.