UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	
STEVEN OSCHEROWITZ and SUSAN OSCHEROWITZ; UNIVERSAL MERCHANTS, INC., Debtors.	BAP No. CC-08-1119-KPaMk Bk. No. LA 04-22926 BB LA 04-31426 BB (Consolidated)
L & M CONSTRUCTION; MORDECAI NOTIS, Real Party in Interest, Appellants, v. DAVID L. RAY, Ch. 7 Trustee, Appellee.	Adv. No. LA 06-01703 BB **MEMORANDUM***

Submitted Without Oral Argument
on September 19, 2008**

Filed – October 7, 2008

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

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding

Before: KLEIN,*** PAPPAS and MARKELL, Bankruptcy Judges.

*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.

**The parties expressly waived oral argument.

***Hon. Christopher M. Klein, United States Bankruptcy Judge for the Eastern District of California, sitting by designation.

A judgment debtor appeals the denial of a motion under Federal Rule of Civil Procedure 60(b)(1), (3), and (4) to vacate a $10,000 default judgment. Perceiving no abuse of discretion in the court's conclusions that relief was not warranted for mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other misconduct of the adverse party and determining that the judgment was not void, we AFFIRM.

FACTS

The personal and business finances of debtors Steven and Susan Oscherowitz and of Universal Merchants, Inc., were so commingled that their respective bankruptcy cases filed June 10 and 24, 2004, were substantively consolidated. David Ray is the chapter 7 trustee.

By check no. 2757 dated February 15, 2002, drawn on the Oscherowitz personal account at Inland Community Bank, $10,000 was transferred to L&M Construction. Their check register regarding no. 2757 bears the notation "*Loan."

Appellant contends that the purpose was to pay part of the $98,520 price of L&M's contract, dated November 23, 2001, to build an addition to the residence of Rabbi and Mrs. Shedrowitzky to be completed by March 15, 2002.

The Shedrowitzky construction contract specified that L&M was acting under California contractor's license 742090, which was issued October 31, 1997, to Mordecai Notis, who signed the L&M-Shedrowitzky contract as the contractor.

Notis used his license 742090 as a sole proprietor under the name L&M Construction until June 9, 2004, when he formally

shifted the license to Notis Enterprises, Inc.[1] Thus, L&M's letterhead in 2001 included: "General Contractor MOTTY NOTIS Lic #742090."[2] As indicated by a telecopier identification, as of December 20, 2007, Notis was still using the name L&M Construction in connection with his construction business.

In a complaint filed June 8, 2006, the trustee sued L&M under California's Uniform Fraudulent Transfer Act to avoid and recover the debtors' February 2002 transfer of $10,000 to L&M.

Validity of service of the summons and complaint made on October 16, 2006, has not been questioned.

Notis and the trustee communicated and twice stipulated (November 2006 and February 2007) to extend the time to answer the complaint and to continue status conferences. A third

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[1]Although the record is opaque regarding the business status of L&M, L&M was a sole proprietorship until June 9, 2004, when Notis shifted his contractor's license to Notis Enterprises, Inc. Appellant concedes in the Certification of Interested parties that L&M, Notis Enterprises, Inc., and Mordecai Notis are all parties in interest in the capacity of defendants. The online California State Contractor's License Board public records (http://www.cslb.ca.gov) reflect that Mordecai Notis obtained contractor license 742090 on October 31, 1997, and did business as a sole proprietor using that license under the name "L&M Construction" until June 9, 2004, when the license was reissued to Notis Enterprises, Inc., of which Mr. Notis is Responsible Managing Officer, Chief Executive Officer, and President. The California Secretary of State's public records (http://kepler.ss.ca.gov/list.html) reflect that Mordecai Notis is agent for service of process of Notis Enterprises, Inc.

[2]It follows that Mordecai Notis is the real party in interest because in February 2002 he was doing business as a sole proprietor under the name L&M Construction. As L&M was a sole proprietorship at the time, the caption of this appeal will be adjusted accordingly. Fed. R. Civ. P. 17(b), incorporated by Fed. R. Bankr. P. 7017; Fed. R. Civ. P. 19(b), incorporated by Fed. R. Bankr. P. 7019.

stipulation was limited to continuing a status conference, noted that L&M had not yet produced documents requested by the trustee, and did not purport to extend the time to answer beyond June 12, 2007: "Plaintiff expressly does not consent, and the Parties specifically do not request, additional time for the Defendant to answer the complaint." Third Stipulation to Continue Status Conference, at 2 (6/12/07).

The court added to the order approving third stipulation and continuing the status conference until September 11, 2007: "Plaintiff shall serve and file a motion for default judgment in time to have it heard concurrently with the status conference, unless the parties have agreed on a settlement by that date. Plaintiff may only obtain a further extension of this deadline upon a showing of cause, as set forth in a fully-noticed motion supported by one or more declarations under penalty of perjury."

The September 11, 2007, status conference was continued at the trustee's request until October 30, 2007, because of a change of attorneys in the law firm representing the trustee. Notice of the motion and of the order were served by mail on "Mordecai Notis, Owner."

During September 2007, there was a discussion between the trustee's attorney, Elan Levey, and Brian Dror, who was negotiating on behalf of L&M. Levey was seeking to learn the facts to support any defense L&M may have. On September 26, 2007, Levey sent Dror an e-mail notifying him that, with respect to L&M, the invoices and/or bills evidencing payment for work on the residential remodel had not yet been provided and rejecting another argument.

On October 16, 2007, the trustee sought another continuance of the status conference in order to finish compiling information to support a default judgment, including waiting for response to a subpoena to Inland Community Bank. It was noted in the motion that discussions with a representative of L&M in September had not been successful in producing a resolution. Notice of the motion and of the order were served on "Mordecai Notis, Owner."

Dror, who apparently is a certified public accountant,[3] responded to the September 26 Levey communication with an e-mail on October 22, 2007, jointly to Levey and to Notis. He informed Levey that Notis was in the process of assembling affidavits to establish that funds paid to L&M for the construction project were not property of the debtor or of the bankruptcy estate. Simultaneously, Dror notified Notis: "If you don't get these things to Elan [Levey] this week, you need to hire a lawyer to be present at the status conference."

On October 24, 2007, Payman Taheri, an attorney in the employ of Lisitsa Law Corporation, directed an e-mail to Levey's associate attorney, Christina Erickson, regarding the "Notis" matter, asking her to call him.

Erickson responded to Taheri by e-mail on October 25, 2007, apparently following the invited telephone conversation, requesting evidence of defenses to the complaint, including a copy of the construction contract and "any invoices showing that value was given in exchange for the $10,000." She further

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[3]Dror's e-mail address is brian@brdcpas.com, and he refers in the message to "recovering from tax season."

indicated that the trustee believed there was a prima facie case for a fraudulent transfer.

Taheri did not file an answer or otherwise enter an appearance in the adversary proceeding. In fact, no entry of appearance on behalf of L&M or Notis occurred until the motion to vacate default judgment was filed on March 7, 2008.

Having received no communication from Taheri, Dror, or Notis after October 24, 2007, the trustee, on November 20, 2007, served "Mordecai Notis, Owner" by mail with a Request for Entry of Default and supporting affidavit. Default was entered on November 21, 2007.

On December 6, 2007, saying that Inland Community Bank was not expected to produce bank records through its subpoena servicing company until mid-December, the trustee filed another motion for continuance and supporting affidavit seeking to defer the December 18 status conference (and designated hearing date for default judgment motion) to January 15, 2008. The motion and the order were served by mail on "Mordecai Notis, Owner."

On December 21, 2007, the trustee filed a Notice of Motion and Motion for Default Judgment, setting the hearing for January 15, 2008, at 2:00 p.m., and served the motion papers by mail on "Mordecai Notis, Owner."

On December 26, 2007, Taheri telecopied to the trustee's counsel a letter transmitting L&M's 2001 bid quotation and contract for the Shedrowitzky project.

On December 27, 2007, the trustee's counsel telecopied a letter to Taheri acknowledging receipt of his December 26 communication, notifying him that the trustee filed a motion for

default judgment on December 21, 2007, that it would continue to be prosecuted, and informing him that trustee's counsel "served a copy of the motion on L&M Construction [i.e., "Mordecai Notis, Owner"] directly as they are still unrepresented in this adversary case."

On January 15, 2008, the court granted the unopposed Motion for Default Judgment. The judgment avoiding the $10,000 transfer as a constructively fraudulent transfer, dismissing the actually fraudulent transfer count, and awarding damages of $10,000, plus costs and prejudgment interest from the day of filing the complaint, was entered on January 23, 2008, and served by the clerk of court by mail on that date on "Mordecai Notis, Owner." The default judgment was not appealed.

On March 7, 2008, L&M filed its Notice of Motion and Motion to Set Aside Default Judgment.

The trial court denied the motion after a hearing on April 15, 2008. The order was entered on docket April 22, 2008. This timely appeal ensued.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334. We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUE

1. Whether the court abused its discretion by denying relief under Federal Rule of Civil Procedure 60(b)(1).

2. Whether the court abused its discretion by denying relief under Federal Rule of Civil Procedure 60(b)(3).

3. Whether the judgment was void for purposes of Federal Rule of Civil Procedure 60(b)(4).

STANDARD OF REVIEW

We review decisions regarding relief from judgment under Federal Rule of Civil Procedure 60(b)(1) or(3) for abuse of discretion. Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1223 (9th Cir. 2000); Morris v. Peralta (In re Peralta), 317 B.R. 381, 385 (9th Cir. BAP 2004). As to Rule 60(b)(4), whether a judgment is void is reviewed de novo. Elec. Specialty Co. v. Road & Ranch Supply, Inc., 231 F.3d 1220, 1223 (9th Cir. 2000); Peralta, 317 B.R. at 385.

DISCUSSION

Since the default judgment was not timely appealed, the basic question is whether the court erroneously declined to afford relief from that judgment. The underlying merits of the judgment are pertinent only insofar as they bear on the assessment of the motion for relief from judgment.

I

Default judgments in bankruptcy litigation are governed by Federal Rule of Civil Procedure 55(b) and, as provided in Rule 55(c), may be set aside in accordance with Rule 60(b). Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055.

While a court has broad discretion when ruling on Rule 60(b) motions, the exercise of that discretion is subject to a number of legal principles. Peralta, 317 B.R. at 388; 12 JAMES WM. MOORE

ET AL., MOORE'S FEDERAL PRACTICE § 60.22[2] (3d ed. 2008 ("MOORE'S").

As applied to default judgments, those principles impose two general constraints. First, Rule 60(b) is remedial in nature and is liberally applied. Second, as between the competing interests of promoting finality for judgments and of resolving cases on their merits, "the finality interest should give way fairly readily" to the merits. TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001) ("TCI"); Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984); Peralta, 317 B.R. at 388; see generally 10 MOORE'S § 55.50[2]; 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D §§ 2694-96 (3d ed. 1998) ("WRIGHT & MILLER").

In addition, with the exception of Rule 60(b)(4) jurisdictionally deficient judgments, courts will not require relitigation that would be an empty exercise. Thus, demonstration of a meritorious claim or defense is a precondition to relief from judgment. TCI, 244 F.3d at 695-96; Falk, 739 F.2d at 463; Peralta, 317 B.R. at 388; 12 MOORE'S § 60.24.

In this circuit, three factors to consider with respect to vacating a default judgment that is not jurisdictionally defective are: (1) whether the defendant's culpable conduct led to the default; (2) whether the defendant has a meritorious defense; and (3) whether reopening the default judgment would prejudice the plaintiff. TCI, 244 F.3d at 695-96; Falk, 739 F.2d at 463; Peralta, 317 B.R. at 388.

The party seeking relief from a default judgment bears the burden of demonstrating that three factors militate in favor of relief. TCI, 244 F.3d at 695-96; Cassidy v. Tenorio, 856 F.2d

1412, 1415 (9th Cir. 1988); Peralta, 317 B.R. at 388.

Finally, a party is accountable for mere negligence or mistakes of counsel. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 397 (1993), 12 MOORE'S § 60.41[2]. Only an attorney's gross negligence or egregious misconduct that is beyond a client's control will warrant Rule 60(b) relief, and then only as an "extraordinary circumstance" under Rule 60(b)(6). Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1168-70 & n.11 (9th Cir. 2002).

II

The three specific Rule 60(b) grounds urged as bases for relief from the default judgment that are implicated by appellant's arguments are addressed in order.

A

The court's ruling was focused squarely on the excusable neglect prong of Federal Rule of Civil Procedure 60(b)(1), which provides that relief from a judgment may be obtained on account of "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1), incorporated by Fed. R. Bankr. P. 9024.

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The court's focus on excusable neglect was consistent with the Ninth Circuit test. The concept of culpable conduct leading to the default that is included under the Ninth Circuit test is construed to comport with the Supreme Court's definition of "excusable neglect" in the context of retroactive extensions of

time under procedural rules. TCI, 244 F.3d at 696; Peralta, 317 B.R. at 388.

Indeed, the trial court focused squarely on the factor of "excusable neglect." As it explained in the tentative ruling that it issued before the oral argument that served to enable the parties to focus their in-court presentations:

> Movant contends (and the trustee denies) that, in or about October of 2007, counsel for the trustee represented that she would not seek default judgment without warning him first; however, after Mr. Taheri contacted the trustee on December 26, 2007, the next day, counsel for the trustee wrote to Mr. Taheri and advised him that the trustee had filed a motion for default judgment (which had been served on his client) and that the trustee planned to proceed to hearing on that motion. Both the defendant and his counsel were on notice that the trustee was seeking a default judgment in ample time to oppose that motion. Neither did so. Neither even appeared at the hearing. Where is the excusable neglect?

Tentative Ruling, April 15, 2008 Calendar, Judge Bluebond.

The concept of excusable neglect is equitable and contemplates that the court consider "prejudice to the [opponent], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the movant acted in good faith." Pioneer Inv. Servs. Co., 507 U.S. at 395 (Fed. R. Bankr. P. 9006); TCI, 244 F.3d at 696 (Fed. R. Civ. P. 60(b)); Peralta, 317 B.R. at 388 (same). As noted, the movant has the burden to demonstrate that these considerations militate in favor of finding excusable neglect. E.g., TCI, 244 F.3d at 695-96; Peralta, 317 B.R. at 388.

At the hearing on the motion, the transcript of which fills 26 pages, the court was not persuaded that the appellant had

satisfied its burden of persuasion. The court found that it had to have been apparent to all parties that the court had made timely prosecution of this adversary proceeding an important matter by making it difficult to obtain continuances after June 2007. All relevant documents had been directed to Notis, who plainly was on notice. Taheri had notice as of December 27, 2007, that a default judgment motion was on file and would be prosecuted. Although Taheri contended that he did not read the December 27 letter until January 9, 2008, it was conceded in his declaration that he had actual knowledge of the motion for default judgment as of January 9, but took no action before the January 15 hearing to ascertain the particulars of the motion, or to enter an appearance in the adversary proceeding, or to appear at the hearing.

The court also noted the absence of logically important evidence from the client that might have been probative of excusable neglect:

> You know what else I don't seem to have, and maybe I'm missing it, but where do I have the declaration of the client saying, "I assumed that my lawyer was handling this and I didn't know", as opposed to, "Yeah, I knew it was out there and I just didn't do anything about it"? Where do I have – do I have any declaration from the client?

Tr. at 14.

In the end, the court concluded that excusable neglect was not demonstrated. It reasoned that there was no excusable neglect under the facts of the case because there were "so many bells and whistles, so many flags, so many warning signs here that the Trustee was moving forward and over an extended period that if the attorney had taken any steps at all to independently

ascertain the status of this case[,]" a default would have been averted. Tr. at 18-19 & 25.

We can find an abuse of discretion in the court's ruling only if the court applied an incorrect standard of law, operated under a clearly erroneous view of the facts, or reached a conclusion that leaves us with the definite and firm conviction that there was a clear error of judgment. Hickman v. Hana (In re Hickman), 384 B.R. 832, 836 (9th Cir. BAP 2008).

We are satisfied, however, that the court did not apply an incorrect standard of law and did not operate under a clearly erroneous view of the facts; nor does its decision leave us with the definite and firm conviction that there was a clear error of judgment in the conclusion reached. Hence, we perceive no error on this account.

2

The appellant's assertion that there is a meritorious defense that could be asserted on the premise that the $10,000 was collected and held by the debtor merely as an earmarked fund held for charitable purposes misses the point.

To be sure, the existence of a meritorious defense is one of the three factors that needs to be demonstrated in order to obtain relief under Rule 60(b)(1). TCI, 244 F.3d at 695-96; Falk, 739 F.2d at 463; Peralta, 317 B.R. at 388.

Regardless of whether appellant articulated a defense that qualifies as a "meritorious defense," the existence of such a defense does not necessarily overcome the effect of the absence of excusable neglect.

We cannot say that the defense to which allusion is made (in conclusory fashion) is of such apparent merit[4] that justice would require vacating the default judgment notwithstanding the absence of excusable neglect.

B

Federal Rule of Civil Procedure 60(b)(3) provides that relief from a judgment may be obtained on account of "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3), incorporated by Fed. R. Bankr. P. 9024.

The court noted that this was not a case in which there was an effort to mislead appellant:

> [I]t isn't as if there was somebody out there, one lawyer[,] all the time that the Trustee was trying to keep in the dark. And as soon as the Trustee knew that there was a lawyer on the scene who was acting like he represented the Defendant, the Trustee said, "By the way, we've got this [default judgment] motion out there and we're going ahead."

Tr. at 4.

We understand this to be a conclusion that there was not cognizable Rule 60(b)(3) fraud, misrepresentation, or misconduct by the trustee. We agree with the trial court and do not discern an abuse of discretion.

[4]Our review of the record persuades us that prospects for successful assertion of the defense at trial appear to be low.

C

Federal Rule of Civil Procedure 60(b)(4) provides that relief from a judgment may be obtained if the judgment is void. Fed. R. Civ. P. 60(b)(4), incorporated by Fed. R. Bankr. P. 9024. A judgment is void if the court lacked personal or subject-matter jurisdiction, or if it acted in a manner inconsistent with due process. 11 WRIGHT & MILLER § 2862.

It is plain that the court did have subject-matter jurisdiction under 28 U.S.C. § 1334(b) over an action to recover a fraudulent transfer as provided for by 11 U.S.C. § 544(b).

Nor is personal jurisdiction questioned. As there is no contention in the record that the summons and complaint were defectively served, any issue regarding personal jurisdiction has been waived. That leaves only due process as a basis for Rule 60(b)(4) relief.

Appellant points out that Rule 55(b)(2) provides that if a party has "appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 3 days before the hearing." Fed. R. Civ. P. 55(b)(2), incorporated by Fed. R. Bankr. P. 7055.

Notis, who had personally executed all three stipulations that were filed with the court, unquestionably had appeared personally before the court within the meaning of Rule 55(b)(2). Moreover, he was the real party in interest with respect to his L&M Construction sole proprietorship. Notis was served.

In contrast, Taheri made no appearance before the court. He did not file an answer or motion suspending the obligation to answer. Nor did he file a notice of appearance or any other

document with the court. Although he talked with trustee's counsel on October 24 or 25, 2007, he did not in the intervening months follow through with further communication or with information requested by the trustee regarding possible defenses until five days after the Motion for Default Judgment was filed, when, on December 26, 2007, he re-emerged by telecopying the L&M price quotation and contract.

The next day, December 27, 2007, the trustee's counsel telecopied to Taheri notice of the default judgment motion.

We agree with the court that notice in this instance was adequate. The party who had personally appeared before the court was served with the complete motion package. The lawyer who talked with trustee's counsel two months before the motion was made, but who had not appeared before the court in any manner, was promptly advised in writing of the motion and of the trustee's intention to proceed once the trustee learned that he was still involved in the case.

Moreover, regardless of whether Taheri should be charged with having knowledge on December 27, 2007, when the letter notifying him of the default judgment motion was telecopied, it is conceded that he had actual notice on January 9, 2008, which was more than three days before the January 15, 2008, hearing.

We are persuaded that the default judgment was obtained in compliance with the requirements of Rule 55(b).

In order for a default judgment to be void under Rule 60(b)(4) on a due process theory premised on violation of Rule 55(b), the violation must be of such a proportion as to amount to a constitutional violation. Owens-Corning Fiberglas Corp. v.

Ctr. Wholesale, Inc. (In re Ctr. Wholesale, Inc.), 759 F.2d 1440, 1448 (9th Cir. 1985); GMAC Mortgage Corp. v. Salisbury (In re Loloee), 241 B.R. 655, 660-61 (9th Cir. BAP 1999); 12 MOORE'S § 60.44[4]; 11 WRIGHT & MILLER § 2862.

Here, any defect was, at worst, technical noncompliance in circumstances in which there was actual knowledge of the existence of the motion by all relevant persons more than three days before the hearing, as contemplated by Rule 55(b).

We conclude that the notice that was given both to the defendant and to the lawyer who said he would be representing the defendant was reasonably calculated, under all the circumstances, to apprise both of them of the pendency of the default judgment motion and to afford the opportunity to present timely opposition. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Ctr. Wholesale, Inc., 759 F.2d at 1448. In short, there was no constitutional violation.

Accordingly, relief is not warranted under Rule 60(b)(4).

CONCLUSION

The trial court did not abuse its discretion in concluding that there was no excusable neglect warranting relief under Rule 60(b)(1) and that relief was not warranted under Rule 60(b)(3). We conclude that the judgment was not void within the meaning of Rule 60(b)(4). Accordingly, we AFFIRM.