

NOT FOR PUBLICATION

OCT 07 2008

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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

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.

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

8  
9 FACTS

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

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

19 Appellant contends that the purpose was to pay part of the  
20 \$98,520 price of L&M's contract, dated November 23, 2001, to  
21 build an addition to the residence of Rabbi and Mrs. Shedrowitzky  
22 to be completed by March 15, 2002.

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

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

1 shifted the license to Notis Enterprises, Inc.<sup>1</sup> Thus, L&M's  
2 letterhead in 2001 included: "General Contractor MOTTY NOTIS Lic  
3 #742090."<sup>2</sup> As indicated by a telecopier identification, as of  
4 December 20, 2007, Notis was still using the name L&M  
5 Construction in connection with his construction business.

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

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

11 Notis and the trustee communicated and twice stipulated  
12 (November 2006 and February 2007) to extend the time to answer  
13 the complaint and to continue status conferences. A third  
14

---

15 <sup>1</sup>Although the record is opaque regarding the business status  
16 of L&M, L&M was a sole proprietorship until June 9, 2004, when  
17 Notis shifted his contractor's license to Notis Enterprises, Inc.  
18 Appellant concedes in the Certification of Interested parties  
19 that L&M, Notis Enterprises, Inc., and Mordecai Notis are all  
20 parties in interest in the capacity of defendants. The online  
21 California State Contractor's License Board public records  
22 (<http://www.cslb.ca.gov>) reflect that Mordecai Notis obtained  
23 contractor license 742090 on October 31, 1997, and did business  
24 as a sole proprietor using that license under the name "L&M  
25 Construction" until June 9, 2004, when the license was reissued  
26 to Notis Enterprises, Inc., of which Mr. Notis is Responsible  
27 Managing Officer, Chief Executive Officer, and President. The  
28 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.

<sup>2</sup>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.

1 stipulation was limited to continuing a status conference, noted  
2 that L&M had not yet produced documents requested by the trustee,  
3 and did not purport to extend the time to answer beyond June 12,  
4 2007: "Plaintiff expressly does not consent, and the Parties  
5 specifically do not request, additional time for the Defendant to  
6 answer the complaint." Third Stipulation to Continue Status  
7 Conference, at 2 (6/12/07).

8 The court added to the order approving third stipulation and  
9 continuing the status conference until September 11, 2007:

10 "Plaintiff shall serve and file a motion for default judgment in  
11 time to have it heard concurrently with the status conference,  
12 unless the parties have agreed on a settlement by that date.  
13 Plaintiff may only obtain a further extension of this deadline  
14 upon a showing of cause, as set forth in a fully-noticed motion  
15 supported by one or more declarations under penalty of perjury."

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

21 During September 2007, there was a discussion between the  
22 trustee's attorney, Elan Levey, and Brian Dror, who was  
23 negotiating on behalf of L&M. Levey was seeking to learn the  
24 facts to support any defense L&M may have. On September 26,  
25 2007, Levey sent Dror an e-mail notifying him that, with respect  
26 to L&M, the invoices and/or bills evidencing payment for work on  
27 the residential remodel had not yet been provided and rejecting  
28 another argument.

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

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

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

21 Erickson responded to Taheri by e-mail on October 25, 2007,  
22 apparently following the invited telephone conversation,  
23 requesting evidence of defenses to the complaint, including a  
24 copy of the construction contract and "any invoices showing that  
25 value was given in exchange for the \$10,000." She further  
26

---

27  
28 <sup>3</sup>Dror's e-mail address is brian@brdcpas.com, and he refers  
in the message to "recovering from tax season."

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

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

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

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

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

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

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

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

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

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

16 The trial court denied the motion after a hearing on April  
17 15, 2008. The order was entered on docket April 22, 2008. This  
18 timely appeal ensued.

#### 19 20 JURISDICTION

21 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.  
22 We have jurisdiction under 28 U.S.C. § 158(a)(1).  
23

#### 24 ISSUE

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

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

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

3  
4                                   STANDARD OF REVIEW

5           We review decisions regarding relief from judgment under  
6 Federal Rule of Civil Procedure 60(b)(1) or(3) for abuse of  
7 discretion. Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1223  
8 (9th Cir. 2000); Morris v. Peralta (In re Peralta), 317 B.R. 381,  
9 385 (9th Cir. BAP 2004). As to Rule 60(b)(4), whether a judgment  
10 is void is reviewed de novo. Elec. Specialty Co. v. Road & Ranch  
11 Supply, Inc., 231 F.3d 1220, 1223 (9th Cir. 2000); Peralta, 317  
12 B.R. at 385.

13  
14                                   DISCUSSION

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

20  
21                                   I

22           Default judgments in bankruptcy litigation are governed by  
23 Federal Rule of Civil Procedure 55(b) and, as provided in Rule  
24 55(c), may be set aside in accordance with Rule 60(b). Fed. R.  
25 Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055.

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



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

2 As applied to default judgments, those principles impose two  
3 general constraints. First, Rule 60(b) is remedial in nature and  
4 is liberally applied. Second, as between the competing interests  
5 of promoting finality for judgments and of resolving cases on  
6 their merits, "the finality interest should give way fairly  
7 readily" to the merits. TCI Group Life Ins. Plan v. Knoebber,  
8 244 F.3d 691, 696 (9th Cir. 2001) ("TCI"); Falk v. Allen, 739  
9 F.2d 461, 463 (9th Cir. 1984); Peralta, 317 B.R. at 388; see  
10 generally 10 MOORE'S § 55.50[2]; 10A CHARLES A. WRIGHT, ARTHUR R. MILLER  
11 & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D §§ 2694-96 (3d  
12 ed. 1998) ("WRIGHT & MILLER").

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

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

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

1 1412, 1415 (9th Cir. 1988); Peralta, 317 B.R. at 388.

2 Finally, a party is accountable for mere negligence or  
3 mistakes of counsel. Pioneer Inv. Servs. Co. v. Brunswick  
4 Assocs. Ltd. P'ship, 507 U.S. 380, 397 (1993), 12 MOORE'S  
5 § 60.41[2]. Only an attorney's gross negligence or egregious  
6 misconduct that is beyond a client's control will warrant Rule  
7 60(b) relief, and then only as an "extraordinary circumstance"  
8 under Rule 60(b)(6). Cnty. Dental Servs. v. Tani, 282 F.3d 1164,  
9 1168-70 & n.11 (9th Cir. 2002).

10  
11 II

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

15  
16 A

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

22  
23 1

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

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

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

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

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

22 The concept of excusable neglect is equitable and  
23 contemplates that the court consider "prejudice to the  
24 [opponent], the length of the delay and its potential impact on  
25 judicial proceedings, the reason for the delay, including whether  
26 it was in the reasonable control of the movant, and whether the  
27 movant acted in good faith." Pioneer Inv. Servs. Co., 507 U.S.  
28 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

1 satisfied its burden of persuasion. The court found that it had  
2 to have been apparent to all parties that the court had made  
3 timely prosecution of this adversary proceeding an important  
4 matter by making it difficult to obtain continuances after June  
5 2007. All relevant documents had been directed to Notis, who  
6 plainly was on notice. Taheri had notice as of December 27,  
7 2007, that a default judgment motion was on file and would be  
8 prosecuted. Although Taheri contended that he did not read the  
9 December 27 letter until January 9, 2008, it was conceded in his  
10 declaration that he had actual knowledge of the motion for  
11 default judgment as of January 9, but took no action before the  
12 January 15 hearing to ascertain the particulars of the motion, or  
13 to enter an appearance in the adversary proceeding, or to appear  
14 at the hearing.

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

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

25 Tr. at 14.

26 In the end, the court concluded that excusable neglect was  
27 not demonstrated. It reasoned that there was no excusable  
28 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

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

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

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

15  
16 2

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

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

25 Regardless of whether appellant articulated a defense that  
26 qualifies as a “meritorious defense,” the existence of such a  
27 defense does not necessarily overcome the effect of the absence  
28 of excusable neglect.

1 We cannot say that the defense to which allusion is made (in  
2 conclusory fashion) is of such apparent merit<sup>4</sup> that justice would  
3 require vacating the default judgment notwithstanding the absence  
4 of excusable neglect.

5  
6 B

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

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

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

21 Tr. at 4.

22 We understand this to be a conclusion that there was not  
23 cognizable Rule 60(b)(3) fraud, misrepresentation, or misconduct  
24 by the trustee. We agree with the trial court and do not discern  
25 an abuse of discretion.  
26

27  
28 

---

<sup>4</sup>Our review of the record persuades us that prospects for  
successful assertion of the defense at trial appear to be low.

1  
2 Federal Rule of Civil Procedure 60(b)(4) provides that  
3 relief from a judgment may be obtained if the judgment is void.  
4 Fed. R. Civ. P. 60(b)(4), incorporated by Fed. R. Bankr. P. 9024.  
5 A judgment is void if the court lacked personal or subject-matter  
6 jurisdiction, or if it acted in a manner inconsistent with due  
7 process. 11 WRIGHT & MILLER § 2862.

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

11 Nor is personal jurisdiction questioned. As there is no  
12 contention in the record that the summons and complaint were  
13 defectively served, any issue regarding personal jurisdiction has  
14 been waived. That leaves only due process as a basis for Rule  
15 60(b)(4) relief.

16 Appellant points out that Rule 55(b)(2) provides that if a  
17 party has "appeared personally or by a representative, that party  
18 or its representative must be served with written notice of the  
19 application at least 3 days before the hearing." Fed. R. Civ. P.  
20 55(b)(2), incorporated by Fed. R. Bankr. P. 7055.

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

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

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

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

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

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

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

25 In order for a default judgment to be void under Rule  
26 60(b)(4) on a due process theory premised on violation of Rule  
27 55(b), the violation must be of such a proportion as to amount to  
28 a constitutional violation. Owens-Corning Fiberglas Corp. v.



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

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

9 We conclude that the notice that was given both to the  
10 defendant and to the lawyer who said he would be representing the  
11 defendant was reasonably calculated, under all the circumstances,  
12 to apprise both of them of the pendency of the default judgment  
13 motion and to afford the opportunity to present timely  
14 opposition. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S.  
15 306, 314 (1950); Ctr. Wholesale, Inc., 759 F.2d at 1448. In  
16 short, there was no constitutional violation.

17 Accordingly, relief is not warranted under Rule 60(b)(4).  
18

#### 19 CONCLUSION

20 The trial court did not abuse its discretion in concluding  
21 that there was no excusable neglect warranting relief under Rule  
22 60(b)(1) and that relief was not warranted under Rule 60(b)(3).  
23 We conclude that the judgment was not void within the meaning of  
24 Rule 60(b)(4). Accordingly, we AFFIRM.  
25  
26  
27  
28