NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. SC-07-1290-MoCK
STEVEN H. SALOMON AND VICTORIA Y. SALOMON,	Bk. No. 05-14843
Debtors.	Adv. No. 07-90015
STEVEN H. SALOMON; VICTORIA Y. SALOMON,	
Appellants,	
v.	**M E M O R A N D U M** [1]
GERALD H. DAVIS, Chapter 7 Trustee,	
Appellee.	

Argued and Submitted on March 19, 2008
at Pasadena, California

Filed - June 27, 2008

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

Honorable James W. Meyers, Bankruptcy Judge, Presiding

Before: MONTALI, CASE[2] and KLEIN, Bankruptcy Judges.

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[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. Charles G. Case, II, Bankruptcy Judge for the District of Arizona, sitting by designation.

Appellants, Chapter 7 debtors, Steven H. Salomon and Victoria Y. Salomon, appeal from a default judgment revoking their discharge pursuant to sections 727(d)(1) and (d)(2),[3] and from a default entered pursuant to Federal Rule of Civil Procedure 55 ("FRCP"), as incorporated by Rule 7055, in favor of Appellee, Chapter 7 Trustee, Gerald H. Davis. Because the default judgment is based upon insufficient findings and conclusions, and the court did not exercise its discretion to consider evidence from the debtors at the prove-up hearing as to the revocation of discharge, we VACATE the default judgment and REMAND for further proceedings.

FACTS

Appellants, Debtors Steven H. Salomon and Victoria Y. Salomon ("Salomons") filed a joint voluntary Chapter 7 bankruptcy petition on October 15, 2005. At the time of filing, Salomons were represented by the Pacific Law Center. Because Salomons wanted to file prior to the October 17, 2005 effective date of BAPCPA, their attorney "rushed through the process," completing most of their petition over the phone in a question and answer method with an employee of the Pacific Law Center. However, both Salomons admit they were given at least one opportunity to look over their petition prior to signing. The Salomons's section 341 hearing took place on November 15, 2005, during which they filled out their questionnaire, swearing under oath that everything was

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23. ("BAPCPA")

accurate to the best of their knowledge. Salomons received their discharge on January 17, 2006.

In a related adversary proceeding, Greenfield v. Salomon (A.P. 06-90083), evidence that Salomons may have committed bankruptcy fraud was presented to the Chapter 7 Trustee, Gerald H. Davis ("Trustee") by Greenfield's counsel, Alan Nahmias. In that proceeding, the Salomons did not cooperate in the discovery process, and both were ordered to pay significant sanctions. The Salomons then agreed, via a court-approved stipulation, to Rule 2004 examinations conducted by Trustee to investigate further their already-discharged bankruptcy case. Those examinations commenced on January 2 and 3, 2007, at which Salomons were represented by Frederick C. Phillips.

On January 16, 2007, just one day prior to the expiration of the one-year statute of limitations of section 727(e), Trustee filed an adversary proceeding against Salomons, seeking to revoke their discharge pursuant to sections 727(d)(1) and (2), based on what he believed to be numerous instances of fraud and misappropriation of bankruptcy estate property.

Salomons were served with the Summons and Complaint to Revoke Discharge ("Complaint") on January 19, 2007. They had until February 15, 2007, to file an answer. On February 16, 2007, Mr. Nahmias[4] received correspondence from Mr. Phillips stating that his firm would not be representing the Salomons in

[4] Mr. Nahmias was first employed as counsel to Mr. Greenfield, a former business partner and potential creditor of Salomons. It was during the Greenfield v. Salomon discovery that Mr. Nahmias obtained evidence indicating possible bankruptcy fraud by Salomons, which he presented to Trustee. Mr. Nahmias then became Trustee's Special Counsel.

this adversary proceeding, and that:

> [I]n light of their inability to hire any other attorney to represent them, the Salomons have decided that they will be unable to adequately defend the complaint and that they will be required to allow their defaults to be entered in that proceeding.

On February 21, 2007, Trustee filed a Request to Enter Default with the Clerk of Court, pursuant to Rule 7055. Consequently, the Clerk of Court entered the default ("Default") and gave notice of its entry that same day.

Following the Default, in May, 2007, Trustee filed an Application for Entry of Default Judgment ("Application"). Although Salomons did not answer the Complaint, on May 31, 2007, they filed their "Opposition to Application of Gerald H. Davis, Chapter 7 Trustee, for Entry of Default Judgment" ("Opposition"). In that Opposition, Salomons explained that since the Default, they had educated themselves with the legal process and were now prepared to offer a defense, pro se.

In his Complaint and Application, Trustee alleged under section 727(d)(2) that Salomons acquired or became entitled to various property belonging to the estate, and knowingly and fraudulently failed to report or deliver it to Trustee, including:

- a country club/golf membership;
- wedding/engagement rings;
- two checking accounts;
- household furniture and a big-screen television; and
- various unidentified personal property.

Salomons rebutted each of the allegations in their Opposition with the potentially meritorious defense that they were unaware

certain items were property of the estate, and/or that they had to report or possibly deliver those items to Trustee.

To support his allegations that Salomons's discharge was obtained through fraud pursuant to section 727(d)(1), Trustee contended that Salomons:

- did not report a set of golf clubs;
- understated the value of:
  - jewelry;
  - a checking account balance on date of petition;
  - cash on hand;
  - furniture and personal property;
- did not report income for years 2003, 2004, and 2005;
- did not report income from selling a country club/golf membership;
- disclosed the net proceeds received on sale of their home instead of gross proceeds;
- did not report financial statements given to financial institutions and/or creditors within 2 years of filing;
- made misrepresentations at the 341 meeting that:
  - they had not made any payment or transferred any property, other than regular periodic contract required payments, to any person or entity within four years of filing their petition, yet they actually:
    1. transferred/sold a home
    2. transferred/sold a golf membership
    3. transferred a valuable clock to a family member for no consideration;
- did not list all creditors in their schedules; and

- repeatedly admitted at the 2004 examination that their schedules and statement of financial affairs ("SOFA") were incorrect.

Salomons rebutted each of the allegations in their Opposition with the potential meritorious defense that they never intentionally or fraudulently misrepresented themselves at any time. They also contended that errors or omissions in their schedules and SOFA were honest oversights, and had Trustee been more thorough in reviewing their documents, those mistakes would have been discovered and easily remedied, thus avoiding his revocation action against them.

To support the proposition that he was unaware of the alleged fraud prior to discharge pursuant to section 727(d)(2), Trustee argued that none of the misrepresentations by Salomons were discovered until Mr. Nahmias conducted discovery in the section 523 nondischargeability action, which Greenfield commenced on January 16, 2006, just one day before the Salomons received their discharge. Furthermore, since Salomons were not complying with discovery requests, much of the potential fraud information was not discovered until at least September, 2006, when Salomons finally provided partial responses and documents.

A prove-up hearing on Trustee's Application was held on June 28, 2007, pursuant to FRCP 55(b)(2), as incorporated by Rule 7055. Salomons attended and urged the court to consider their Opposition and not revoke their discharge. Salomons argued they had complied and answered everything correctly and honestly in their petition, to the best of their knowledge. They contended they were not aware of any errors until Trustee pointed them out.

Salomons then asked the court for an opportunity to go through each of Trustee's allegations because they believed them to be false. However, the bankruptcy court reminded them that the issue before it was whether their Default should be set aside - it was not a trial in which they could present evidence.[5]

After a brief recess, the bankruptcy court ruled on the Salomons's request to set aside the default and Trustee's Application stating:

> Here the debtors failed to respond and the default was entered and they now claim they should have been given further opportunity to defend. In evaluating their request, the court must note that they may be lacking funds necessary to fully engage in this process. However, they offer no adequate excuse for failing to answer . . .
>
> . . . .
>
> The court also notes that in the other complaint that there was a sanction for failing to properly respond. So, I think in this case the request to set aside the default will be denied.

With respect to the Application, the court stated:

> I've looked over the pleadings and it does appear that the trustee has satisfied this court. He has the wherewithal, the evidentiary sense to show that debtors have failed in their duties as debtors before this court and the discharge order should be revoked.

The court then ordered Trustee's counsel to draft proposed findings and conclusions, which it later adopted in their entirety. Unfortunately, those findings are devoid of any actual findings under FRCP 52, as incorporated by Rule 7052, and merely

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[5] Salomons filed only one pleading with the bankruptcy court regarding the revocation action - their Opposition. However, in that Opposition, Salomons also requested the court set aside the Default. Although Salomons did not file a separate motion for that request, to which Trustee objected, the bankruptcy court treated it as a formal motion nonetheless.

recite a procedural history of the case. They do not state any facts relevant to revocation under sections 727(d)(1) or (d)(2). Furthermore, the conclusions in their entirety are boilerplate statutory language of those same sections, lack any specificity, and are not supported by requisite factual findings.

Judgment revoking the discharge was entered on July 31, 2007. Salomons filed a premature Notice of Appeal on July 24, 2007, that was deemed timely upon entry of the judgment, pursuant to Rule 8002(a).[6] This Panel heard oral argument by the parties on March 19, 2008.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 157(b)(2)(J),(O) and 1334. We have jurisdiction under 28 U.S.C. § 158.

ISSUES

1. Did the bankruptcy court err in granting Trustee's Application without sufficient findings of fact and conclusions of law?
2. Did the bankruptcy court err in granting Trustee's Application without considering Salomons's Opposition?

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[6] On December 17, 2007, Trustee filed an objection to deficiencies in Appellants' Revised Opening Brief and Excerpts of Record and requested that the appeal be dismissed, or in the alternative, that Appellants be required to cure all defects and pay sanctions before the brief and excerpts be accepted for filing. On December 20, 2007, the Panel entered an order denying the request to dismiss the appeal, but took under advisement the request for sanctions. Appellants' brief does not contain page references, a table of cases, a statement of jurisdiction, or a statement of issues presented and standard of appellate review as required by Rule 8009. While we do not condone such errors, we will not sanction Appellants. By separate order we will deny Appellee's request.

STANDARD OF REVIEW

The grant or denial of a default judgment is reviewed for abuse of discretion. Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1391-92 (9th Cir. 1988); Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). An abuse of discretion may be based on an incorrect legal standard, or a clearly erroneous view of the facts, or a ruling that leaves the reviewing court with a definite and firm conviction that there has been a clear error of judgment. Khachikyan v. Hahn (In re Khachikyan), 335 B.R. 121, 125 (9th Cir. BAP 2005); accord, SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2004).

We review the bankruptcy court's findings of fact for clear error and its legal conclusions de novo. Bowman v. Belt Valley Bank (In re Bowman), 173 B.R. 922, 924 (9th Cir. BAP 1994). A bankruptcy court abuses its discretion if its conclusions of law are based upon clearly erroneous findings of fact or an incorrect legal standard. Hammer v. Drago, 112 B.R. 341 (9th Cir. BAP 1990), aff'd, 940 F.2d 524 (citing SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 947 (9th Cir. 1985)).

DISCUSSION

Salomons contend the bankruptcy court erred when it granted Trustee's Application, thereby revoking their discharge, because they were denied the opportunity to defend themselves against the Trustee's damaging and inaccurate allegations. They further argue that the bankruptcy court should have set aside the Default because they were without counsel, could not afford counsel or obtain any pro bono, were without legal knowledge, and therefore could not answer Trustee's Complaint. Finally, they complain the

court denied them the opportunity to disprove Trustee's allegations, denying them due process.[7]

Because the bankruptcy court's judgment in favor of Trustee is supported by insufficient findings and conclusions, we believe the bankruptcy court erred when it granted his Application. Furthermore, we believe the court, under an incorrect assumption of law, erred by not exercising its discretion to consider Salomons's testimony as to revocation. Thus, we will vacate the default judgment granting Trustee's Application and remand for further proceedings on the merits.

I. The Bankruptcy Court Erred When It Granted Trustee's Application on Insufficient Findings and Conclusions.

In this case, granting Trustee's Application resulted in Salomons losing their discharge - one of the harshest penalties a debtor in bankruptcy can receive.

Revocation of discharge is a drastic measure that runs contrary to the Bankruptcy Code's general policy of giving Chapter 7 debtors a "fresh start." In re Poole, 177 B.R. 235 (Bankr. E.D. Pa. 1995); see Tighe v. Valencia (In re Guadarrama), 284 B.R. 463, 469 (C.D. Cal. 2002)(revocation is an extraordinary remedy)(citing Bowman, 173 B.R. at 924)(emphasis added).

Judgment by default is appropriate only in extreme circumstances. Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984). Default judgments are generally disfavored and a case should, whenever possible, be decided on its merits. Meadows v.

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[7] Because service was proper in every circumstance and Salomons attended the prove-up hearing, we conclude they were not denied due process.

Dominican Republic, 817 F.2d 517, 521 (9th Cir. 1987) (citing Schwab v. Bullock's Inc., 508 F.2d 353, 355 (9th Cir. 1974)).

The power to grant a default judgment is within the broad discretion of the trial court. Robert Kubick et. al. v. FDIC (In re Kubick), 171 B.R. 658, 659 (9th Cir. BAP 1994). Factors courts consider in exercising that discretion include: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Eitel, 782 F.2d at 1472 (citing 6 Moore's Federal Practice § 55-05[2], at 55-24 to 55-26). See also Kubick, 171 B.R. at 661 (citing Eitel factors to determine whether to grant or deny default judgment).

According to FRCP 52(a)(1), as incorporated by Rule 7052, in an action tried on the facts without a jury, the court must find the facts specially and state its conclusions of law separately. Such findings and conclusions may be stated on the record, or may appear in an opinion or a memorandum of decision filed by the court. Although FRCP 52(a)(1) and Rule 7052 apply to trials and not specifically to prove-up hearings under Rule 7055, the bankruptcy court exercised its discretion under the latter rule, conducted a prove-up hearing, and chose to make findings and conclusions with regard to Trustee's Application. We must therefore review the adequacy of those findings in order to

determine the appropriateness of the default judgment.[8]

If there is an absence of indication by the court as to how, why, or on what basis the finding of fact rested, there has not been sufficient compliance with Rule 52(a). Theriault et. al. v. Silber et. al., 547 F.2d 1279, 1280-1281 (5th Cir. 1977). However, it is harmless error when a court's insufficient formal findings can be supported by explicit oral statements made at trial. Griffin v. U.S., 513 F.2d 1321, 1323 (9th Cir. 1975).

A trial court's "findings should be explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision." Alpha Distrib. Co. of Cal., Inc., v. Jack Daniel Distillery, Inc., 454 F.2d 442, 453 (9th Cir. 1972).

An appropriate review by the appellate court is not possible when the trial court provides only conclusory findings, illuminated by no subsidiary findings or reasoning on all relevant facts; such findings lack that "detail and exactness" on material issues of fact necessary for rational determination on whether findings of the trial court are clearly erroneous. E.E.O.C. v. United Va. Bank/Seaboard Nat'l, 555 F.2d 403, 406 (4th Cir. 1977).

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[8] We acknowledge that in In Adriana Intern. Corp. v. Thoeren the Ninth Circuit held a default judgment generally precludes a trial of the facts except as to damages, and therefore Rule 52 is inapplicable except as to damages. 913 F.3d 1406, 1414 (9th Cir. 1990) (citing Brown v. Kenron Aluminum & Glass Corp., 447 F.2d 526, 531 (8th Cir. 1973)) (emphasis added). However, since the "damages" here is revocation of discharge, we believe adequate findings and conclusions were appropriate and necessary.

As a result, "[t]he absence of findings . . . leaves no pediment on which a judgment can stand," Waialua Agr. Co. v. Maneja, 178 F.2d 603, 607 (9th Cir. 1949), and under such circumstances the appellate court may appropriately vacate the judgment and remand the cause to the district court for supplemental findings. Alpha Distrib., 454 F.2d at 453.

In this case, the bankruptcy court ordered Trustee's counsel to draft the proposed findings and conclusions, which the court adopted wholesale. The Ninth Circuit reviews a district court's findings of fact "'with special scrutiny'" 'when a district court' "'engage[s] in the regrettable practice of adopting the findings drafted by the prevailing party wholesale.'" Silver v. Executive Car Leasing Long-Term Disability Plan, 466 F.3d 727, 733 (9th Cir. 2006)(citing Sealy, Inc. v. Easy Living, Inc., 743 F.2d 1378, 1385 (9th Cir. 1984)). See Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd., 205 F.3d 1107, 1112 (9th Cir. 1999)(factual findings are "'reviewed for clear error, but with particularly close scrutiny [where] the district court adopt[s][one party's] proposed findings'").

Regardless of whether the instant findings and conclusions were drafted by the court or Trustee's counsel, or the stricter scrutiny applied when drafted by the prevailing party, they are devoid of any actual findings under Rule 7052, and merely recite a procedural history of the case. For example, on the issue of fraud, there is not one "found fact" which shows that Salomons did (or did not do) "a, b, and c," and therefore they committed fraud justifying revocation. There is simply a conclusion that Salomons committed fraud. On that same note, the conclusions, in

their entirety, are boilerplate statutory language of sections 727(d)(1) and (d)(2), lack any specificity, and are not supported by requisite factual findings.

Even though the court stated at the conclusion of the prove-up hearing that Trustee had shown Salomons failed at their duties as debtors and that their discharge should be revoked, without any specific findings as to how, why, or on what basis Trustee satisfied the elements of (d)(1) and/or (d)(2), it is impossible for us to review or make any rational determination on whether its findings and conclusions are clearly erroneous. In fact, since there are essentially no actual findings or supported conclusions on the record before us, that alone sustains our decision to vacate and remand.

II. The Bankruptcy Court Erred When It Granted Trustee's Application Without Considering Salomons's Opposition.

In general, the effect of an entry of default, if not set aside, is to establish the liability of the defaulting party as a basis for default judgment. 10 Moore's Federal Practice § 55.32[1][a] (3d. ed. 2007). After defaulting, the defaulted party has no right to dispute the issue of liability. Id. See Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977) (default by defendants established their liability, but not extent of damages).

However, that is not the case as to damages. Such evidence by a defaulted defendant on damages is allowed pursuant to FRCP 8(b)(6), as incorporated by Rule 7008, which states, "[a]n allegation - other than one relating to the amount of damages - is admitted if a responsive pleading is required and the

allegation is not denied." "As defendant by his default has admitted all the transversable facts which were properly pleaded in the declaration or complaint . . . he usually is not permitted on the hearing of an application for a default judgment to introduce any evidence controverting plaintiff's cause of action and his liability thereon; but . . . he may, in a proceeding for the assessment of damages, offer evidence in mitigation or reduction of the damages claimed by plaintiff." 49 C.J.S. Judgments § 223 (2008) (emphasis added). Therefore, even in a default situation, the claimant must establish the amount of damages and the defaulting party is entitled to be heard in opposition on the matter. 10 Moore's Federal Practice § 55.32[1][c].

Moreover, a defaulted defendant can present evidence to attack the sufficiency of a plaintiff's complaint for failing to state a claim upon which relief can be granted, as legally insufficient, or that it simply parrots mere conclusions of law with no supporting facts. Id. at §§ 55.32[1][a], [b]; and see DirecTV, Inc. v. Hoa Huynh, 503 F.3d 847, 854 (9th Cir. 2007).

Most, if not all, of the case law on the issue of damages or remedy stems from the tort arena, where there are clear lines of distinction between liability and damages. Unfortunately, this clear distinction does not lend itself to the realm of bankruptcy, particularly in an action to deny or revoke a discharge. The lines between liability and damages or remedy are blurred and difficult to parse out into two neat categories. Furthermore, in a revocation case there is no "damaged" plaintiff, per se, but only a potentially damaged system should a

dishonest debtor get the benefit of the "fresh start" that bankruptcy guarantees.

Yet, even though the lines are blurred between liability and damages or remedy in bankruptcy actions, parallels to tort actions can be made. Much like damages are the natural consequence of a defendant's tortious conduct, a denial or revocation of discharge is the natural consequence of a debtor's violation of the rules set out in section 727. In this case, the damage is revocation.

Although with the default in place the Salomons were prevented from disputing Trustee's well-pleaded facts as to their liability under sections 727(d)(1) and (d)(2), their evidence offered possibly to mitigate, reduce, or eliminate the damages - i.e., defeat the revocation of their of discharge - should have been considered by the court before it entered judgment in favor of Trustee.

The prove-up hearing transcript does not contain any indication that the court focused on the damages or remedy aspects of default judgment procedure. To the contrary, based on colloquy at the prove-up hearing, the court appeared to be under the incorrect assumption that it could not receive evidence from the Salomons as to the revocation unless the default was vacated. Furthermore, Trustee, misstating pertinent law, argued that, "if the court decides that their default should not be vacated, then I don't believe they have the right to appear on the trustee's application and be heard." The court apparently accepted this position.

The transcript suggests the court's focus was purely on whether to set aside the Default. However, based on the testimony of Ms. Salomon it is clear the Salomons were offering to explain why they should not suffer the legal consequence of losing their discharge, i.e., they were trying to offer evidence to dispute the damage or remedy. Because the court has such broad discretion in deciding whether to grant or deny a default judgment, such evidence should not have only been allowed but considered by the court in its decision. Although the court heard it, it is apparent it did not consider it.

The problems inherent in proving fraud, when combined with explanations proffered by the Salomons, suggest that if the court had applied the Eitel standards it might have required a trial on the merits, which is the preferred course of action.

Even though we vacate the default judgment, in light of the discussion above it does not follow that we necessarily have to vacate the Default. It is plausible that the bankruptcy court could, on remand, conduct a more extensive hearing and consider what Salomons have to offer as to the nature of the damages - the revocation of their discharge - as distinguished from their liability, which may have been established by the well-pleaded facts in the Complaint. It is also possible the court may conclude the more practicable solution is to vacate the Default so as to eliminate the potential for confusion about what is being considered. Hence, the bankruptcy court may choose to exercise its discretion, vacate the Default, and proceed to a full trial on the merits.

CONCLUSION

Based upon the foregoing reasons, we VACATE the judgment granting Trustee's Application and REMAND for further proceedings on the merits.