

AUG 08 2007

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

6	In re:	)	BAP No.	AZ-06-1348-KPaA
		)		
7	EDWARD J. BALL, JR.,	)	Bk. No.	03-14674
		)		
8	Debtor.	)	Adv. No.	05-00243
		)		
9	_____	)		
		)		
10	EDWARD J. BALL, JR.,	)		
		)		
11	Appellant,	)		
		)		
12	v.	)	<b>MEMORANDUM*</b>	
		)		
13	DAVID BIRDSELL, Trustee,	)		
		)		
14	Appellee.	)		
		)		
15	_____	)		

Argued and Submitted on July 26, 2007  
at Phoenix, Arizona

Filed - August 8, 2007

Appeal from the United States Bankruptcy Court  
for the District of Arizona

Honorable George B. Nielsen, Jr., Bankruptcy Judge, Presiding

Before: KLEIN, PAPPAS and AHART,\*\* 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.

\*\*Hon. Alan M. Ahart, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.



1           Soon after the trustee was appointed, the debtor refused to  
2 cooperate with him, and the debtor began a series of multiple e-  
3 mails, phone messages, and filings principally aimed at the  
4 trustee, his attorney, and the court that were abusive, profane,  
5 derogatory, scandalous, and defamatory. Such filings by the  
6 debtor were so disturbing and disruptive, that the bankruptcy  
7 court entered an order on October 14, 2004, that set standards  
8 for the debtor's future filings.

9           Due to the debtor's lack of cooperation with the trustee,  
10 and due to his history of filing unfocused and defamatory  
11 documents with the court, on November 12, 2003, the bankruptcy  
12 court granted the trustee's motion for authority to control the  
13 affairs of the debtor's business on behalf of the chapter 11  
14 estate.

15           The debtor continued his refusal to cooperate with the  
16 trustee and actively interfered with the trustee's administration  
17 of the estate. In November 2004, the trustee filed a motion to  
18 convert the debtor's case to chapter 7 primarily because the  
19 debtor "has been remarkably difficult and volatile in his  
20 dealings with the trustee" and without the debtor's full  
21 cooperation, the trustee would not be able to effectuate a  
22 chapter 11 plan. The court converted the debtor's case to  
23 chapter 7 on December 22, 2004. Appellee David Birdsell was  
24 appointed as the chapter 7 trustee.

25           After the case was converted, the debtor did not appear at  
26 the 11 U.S.C. § 341 meeting of creditors (nor did the debtor seek  
27 to reschedule or continue the meeting). Debtor also did not  
28 provide the trustee with certain requested business records.

1 On March 25, 2005, the trustee filed a complaint seeking to  
2 deny the debtor's discharge pursuant to 11 U.S.C.  
3 §§ 727(a) (2) (B), (a) (6) (C), (a) (2) (A), (a) (3), and (a) (4) (D).

4 The debtor continued his practice of sending frequent and  
5 harassing letters, telephone and e-mail messages, telephone  
6 calls, and court filings. The debtor's communications made  
7 charges of fraud, misrepresentation, malfeasance, perjury,  
8 incompetence against the trustee, his attorney, the court, and  
9 the U.S. Trustee. The debtor made defamatory and slanderous  
10 charges regarding the sexual practices of the members of the  
11 trustee's attorney's law firm and the court. The debtor also  
12 accused the trustee's attorney's law firm of bribing the court  
13 and made threats of life-long litigation to "take the firm  
14 down."<sup>1</sup>

15 On September 9, 2005, the trustee filed his first request  
16 for production of documents. The initial deadline for the debtor  
17 to produce documents or otherwise respond to the discovery  
18 request was October 12, 2005. The bankruptcy court subsequently  
19 granted the debtor's informal request for an extension of the  
20 deadline to respond to October 24, 2005.

21 Still having not received the requested documents from the  
22 debtor by the extended October 24 deadline, the trustee sent an  
23 email reminder to the debtor on October 25, 2005, stating that  
24 the required documents were past due and that the trustee would

---

25  
26 <sup>1</sup>The debtor's threatening and harassing behavior caused the  
27 trustee to file with the bankruptcy court a complaint and  
28 application for a temporary restraining order and preliminary  
injunctive relief against the debtor. The trustee's motion was  
denied.

1 be filing a motion to compel discovery on October 27, 2005,  
2 unless the matter had been resolved to the trustee's  
3 satisfaction.

4 The debtor did not respond to the trustee's October 25 e-  
5 mail, nor did he provide any of the requested documents to the  
6 trustee.

7 On November 1, 2005, the trustee filed his Motion to Compel  
8 Discovery. The debtor did not respond to the motion.

9 A hearing on the trustee's motion to compel was held on  
10 January 12, 2006. The debtor appeared at the hearing. At the  
11 hearing, the debtor informed the court that he had "approximately  
12 40 banker's boxes" of documents to provide to the trustee that  
13 were not in any order.

14 The debtor subsequently provided the trustee with twenty-  
15 eight banker's boxes of documents and records. According to the  
16 trustee, fifteen of the twenty-eight boxes contained documents  
17 that were unresponsive and irrelevant to the discovery request.  
18 "The remaining thirteen boxes contained records in such a state  
19 of disarray it would be extremely difficult, if not impossible,  
20 to reconstruct the debtor's business affairs."

21 Further hearings on the trustee's motion to compel discovery  
22 were held on February 16, 2006, and April 19, 2006. The debtor  
23 did not appear at the April 19, 2006, hearing.

24 At the April 19 hearing, the trustee requested that the  
25 debtor's answer to the trustee's complaint to deny debtor's  
26 discharge be stricken and judgment entered by default in favor of  
27 the trustee. The court declined to enter a default judgment  
28 against the debtor at that stage, but granted the trustee's

1 motion to compel discovery. An order on the motion was entered  
2 on May 1, 2006.

3 On May 11, 2006, the trustee filed an application for  
4 attorney's fees in connection with its motion to compel  
5 discovery. The trustee sought attorney's fees totaling \$3,112.  
6 The debtor did not appear at the June 20, 2006, hearing on the  
7 trustee's request for attorney's fees, and the court, after  
8 reducing the trustee's requested fees, granted the fee request in  
9 the amount of \$2,560.

10 At the June 20, 2006, hearing, the trustee informed the  
11 court that he had not had any communication with the debtor, and  
12 that he intended to move for sanctions. The court ordered the  
13 trustee to file and serve on the debtor its sanctions motion by  
14 June 30, 2006, and gave the debtor until July 31, 2006, to  
15 respond. The court then set oral argument on the sanctions  
16 motion for August 22, 2006.

17 On June 30, 2006, the trustee filed his Motion to Strike the  
18 Debtor's Answer to Trustee's Complaint and to enter judgment by  
19 default. The debtor did not file a response to the trustee's  
20 motion, nor did he attend the hearing on the motion held on  
21 August 22, 2006.

22 Despite the debtor's lack of response to the motion and lack  
23 of appearance at the hearing, the court declined to strike the  
24 debtor's answer and enter a default judgment. Instead, the court  
25 ordered the trustee to draft a "stern order" directing the debtor  
26 to comply with the court's orders (i.e., attorney's fees and  
27 discovery) within ten days or the trustee would be authorized to  
28

1 file an entry of default judgment for a denial of the debtor's  
2 discharge.

3 The trustee filed his Order Directing Compliance on August  
4 24, 2006. The debtor had ten days to comply with the court's  
5 order. The debtor produced no documents, made no effort to  
6 resolve the discovery issues with the trustee, and made no  
7 payment of attorney's fees to the trustee, nor did he make  
8 arrangements with the trustee for payment.

9 Due to the debtor's lack of compliance with the court's  
10 Order Directing Compliance, on September 14, 2006, the trustee  
11 filed his motion for entry of final judgment on his complaint  
12 seeking to deny the debtor's discharge.

13 On September 18, 2006, the bankruptcy court granted the  
14 trustee's motion and entered an order striking the debtor's  
15 answer pursuant to Federal Rules of Bankruptcy Procedure 7026,  
16 7037, 7055 and Federal Rules of Civil Procedure 26, 37(b)(2)(C),  
17 and 55(b)(2), and denying the debtor's discharge pursuant to  
18 §§ 727(a)(2)(B), (a)(6)(C), (a)(3), and (a)(4)(D).

19 This appeal ensued.  
20

#### 21 JURISDICTION

22 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.  
23 We have jurisdiction under 28 U.S.C. § 158(a)(1).  
24

#### 25 ISSUES

26 (1) Whether the bankruptcy court abused its discretion when  
27 it granted the trustee's motion to strike the debtor's answer  
28 pursuant to Rule 37(b)(2)(C).

1 (2) Whether the court abused its discretion when it granted  
2 the trustee's motion for default judgment.

3  
4 STANDARD OF REVIEW

5 We review a court's ruling on a motion to strike pursuant to  
6 Rule 37(b)(2)(C) for an abuse of discretion. El Pollo Loco, Inc.  
7 v. Hashim, 316 F.3d 1032, 1038 (9th Cir. 2003). A court's  
8 decision to impose a default judgment as a sanction is also  
9 reviewed for an abuse of discretion. Fair Housing of Marin v.  
10 Combs, 285 F.3d 899, 905 (9th Cir. 2002) ("Combs"). Discretion  
11 is abused when the judicial action is "arbitrary, fanciful or  
12 unreasonable" or "where no reasonable [person] would take the  
13 view adopted by the trial court." Id. quoting United States  
14 Cellular Inv. Co. of L.A., Inc. v. GTE Mobilnet, Inc., 281 F.3d  
15 929, 934 (9th Cir. 2002).

16  
17 DISCUSSION

18 Rule 37(b)(2)(C) applies in bankruptcy adversary proceedings  
19 and provides:

20 (2) Sanctions by court in which action is pending. If  
21 a party . . . fails to obey an order to provide or  
22 permit discovery, . . . the court in which the action  
is pending may make such orders in regard to the  
failure as are just, and among others the following:  
23 . . .

24 (C) An order striking out pleadings or parts thereof,  
or staying further proceedings until the order is  
25 obeyed, or dismissing the action or proceeding or any  
part thereof, or rendering a judgment by default  
26 against the disobedient party[.]

27 Fed. R. Civ. P. 37(b)(2)(C), incorporated by Fed. R. Bankr. P.  
28 7037.

1           The debtor asserts that he voluntarily produced to the  
2 trustee two banker's boxes of "key books and records" in  
3 September 2003, and that the trustee took those boxes and held  
4 onto them for six to nine months. When the trustee returned the  
5 boxes to the debtor (six to nine months later), the debtor  
6 thought that the trustee had made copies of the pertinent records  
7 for himself.

8           The debtor argues that when he was later served with an  
9 order in late 2005 demanding that he produce "books and records",  
10 he did not re-produce the records he previously produced in  
11 September 2003 because he assumed the trustee had copies of those  
12 documents. Instead, debtor contends that he voluntarily produced  
13 other books and records primarily made up of various receipts and  
14 other documents not associated with the "key books and records"  
15 previously produced in September 2003. Debtor therefore contends  
16 that he produced all books and records necessary to ascertain his  
17 financial affairs.

18           Regardless of the debtor's assessment of the adequacy of his  
19 discovery responses, the salient points are that the court  
20 ordered the debtor to cooperate with the trustee and comply with  
21 the trustee's discovery requests. Instead, the debtor did not  
22 respond to the trustee's motions, did not appear at hearings on  
23 the discovery disputes, and did not comply with the court's  
24 orders.

25           At the hearing on the motion to compel discovery, the debtor  
26 finally agreed to produce documents sought by the trustee in his  
27 discovery request. The debtor subsequently produced twenty-eight  
28 banker's boxes of documents. However, according to the trustee,

1 the documents received were irrelevant, outside the requested  
2 time frame, or so incomplete and in a state of such disarray that  
3 it was impossible to reconstruct the debtor's business affairs.

4 A continued hearing on the trustee's motion to compel  
5 discovery was held on April 18, 2006. The debtor did not appear.  
6 At that hearing, the court granted the trustee's motion to compel  
7 discovery (originally filed on November 1, 2005). The court  
8 granted the motion after having granted to the debtor several  
9 extensions of time to file a response to the trustee's motion,  
10 and several chances to comply with the trustee's discovery  
11 requests. Despite the extensions of time, the debtor never  
12 responded to the trustee's motion, never complied with the  
13 trustee's requests, and did not comply with the court's orders.

14 Faced with refusal to comply with the court's order, the  
15 trustee filed a motion under Rule 37(b)(2)(C) in an effort to  
16 invoke the court's power to sanction the debtor as a measure to  
17 enforce the court's discovery order.

18 A determination that an order has been disobeyed is entitled  
19 to considerable weight because the trial judge is best equipped  
20 to assess the circumstances of the non-compliance. Halaco Eng'g  
21 Co. v. Costle, 843 F.2d 376, 379 (9th Cir. 1988).

22 The bankruptcy court in this case was familiar with the  
23 debtor and was in the best position to assess the circumstances  
24 of noncompliance and to determine what action to take to remedy  
25 the trustee's continuous and failed attempts to complete the  
26 discovery process. The court had patiently taken less drastic  
27 intermediate steps that proved ineffective. Rule 37(b)(2)(C)  
28 authorizes the court to strike out pleadings or parts thereof.

1 The court decided that the best action was to strike the debtor's  
2 answer.

3 The record is clear that the debtor repeatedly and  
4 purposefully flouted his discovery obligations and violated court  
5 orders. See Combs, 285 F.3d at 905-06.

6 Pursuant to Rule 37(b)(2)(C), the court also had the  
7 authority to render a judgment by default. Once the answer had  
8 been stricken, the trustee moved for entry of a default judgment.  
9 Based on the debtor's history, we cannot say that the court's  
10 decision to order the default judgment and deny the debtor's  
11 discharge was an abuse of discretion.

12 Given the court's extensive experience of dealing with this  
13 bankruptcy case, we conclude that the court's action was not  
14 "arbitrary, fanciful or unreasonable" and that we cannot say that  
15 "no reasonable [person] would take the view" adopted by the  
16 bankruptcy court in this situation.

17 The debtor protested during oral argument of this appeal  
18 that he is "not a liar." We accept that, but nevertheless affirm  
19 because the discharge was denied on other grounds.

20  
21 CONCLUSION

22 The bankruptcy court did not abuse its discretion when it  
23 invoked Rule 37(b)(2)(C) to strike the debtor's answer, and  
24 granted a default judgment thereby denying the debtor's  
25 discharge. AFFIRMED.