NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. WW-06-1320-SDR
RANDY GEE,	Bk. No. 05-40433
Debtor.	Adv. No. 05-04195
RUTHIE PADILLA,	
Appellant,	
v.	**M E M O R A N D U M**[1]
RANDY GEE,	
Appellee.	

Submitted Without Oral Argument on March 23, 2007

Filed - March 29, 2007

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Hon. Paul B. Snyder, Bankruptcy Judge, Presiding.

Before: SMITH, DUNN and RADCLIFFE,[2] Bankruptcy Judges.

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Albert E. Radcliffe, U.S. Bankruptcy Judge for the District of Oregon, sitting by designation.

Following the reopening of the debtor's bankruptcy case, the debtor initiated a preference action against a creditor who had obtained funds through writs of garnishment. In connection with the creditor's summary judgment motion, the court determined that the debtor was entitled to recover $619 out of the alleged $7,025.75 preferential transfer. A judgment awarding debtor this amount plus pre- and post-judgment interest was entered on August 28, 2006. The creditor timely appealed. We AFFIRM in part and VACATE and REMAND in part.

I. FACTS

In May 1999, Ruthie Padilla ("Padilla") entered into a contract with Randy Gee ("Debtor") under which Debtor promised to perform work on the hillside above Padilla's home. Debtor failed to perform and, as a result, Padilla obtained a money judgment against him in the amount of $25,176.55 in state court on September 14, 2001 ("Judgment").

Shortly after entry of the Judgment, Padilla entered into a contingency fee agreement with attorney Ben Cushman for the collection of the Judgment ("Agreement"). The arrangement provided for a fee of up to 50% of the amount collected. The Agreement did not, however,

> obligate [Cushman] to undertake any representation of [Padilla] in any appeal from a judgment[,] . . . any bankruptcy proceeding or defense, or any other matter than [the collection services]; and if such additional representation is desired it will be subject to separate agreements between these parties.

Id. at 141.

On November 25, 2003, Debtor sued Thomas and Laura Skillings (the "Skillings") for nonpayment on a demolition contract. The

Skillings cross-complained against Debtor for damages. Cushman represented the Skillings in the action.

While Debtor and the Skillings were litigating their contract dispute, Cushman, on behalf of Padilla, issued a writ of garnishment upon the Skillings on April 23, 2004, for any amounts owing to Debtor (the "April 2004 Writ"). The Skillings answered the writ, indicating that as of May 12, 2004, they owed Debtor $1,692.45. The answer included not only a breakdown of the $1,692.45, but also the disclosure that the Skillings were holding $4,714.30 in trust for the remainder of the contract funds owing to Debtor.

Thereafter, the Skillings authorized Cushman to transfer the trust funds (i.e., the $4,714.30) to his IOLTA account to be held in trust for Padilla. This transfer was made as payment pursuant to the April 2004 Writ. As of May 12, 2004, Padilla had received $6,406.75.

On December 8, 2004, Debtor was awarded an arbitration award against the Skillings in the amount of $5,750 plus interest. Subsequently, on December 22, 2004, Cushman issued another writ of garnishment against the Skillings on Padilla's behalf (the "December 2004 Writ"). The December 2004 Writ was issued for the purpose of garnishing the balance of the arbitration award owing to Debtor. Pursuant to the December 2004 Writ, Padilla received an additional $619 on January 7, 2005.

Debtor filed for relief under chapter 7[3] on January 18,

[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 1001-9036, as (continued...)

2005. That same day, he filed a claim of exemption as to the arbitration award against the Skillings under § 522(d)(5). Notice of the bankruptcy filing, the deadline for objecting to discharge, and the exemption claim were served on Cushman, but not served on Padilla.

A discharge order was entered on April 19, 2005. Thereafter, on June 23, 2005, Debtor filed a motion for abandonment of his exempt personal property, including the arbitration award, which was granted on July 12, 2005. Debtor's bankruptcy was closed on July 26, 2005.

After the case was closed, Cushman reconciled the garnishment proceeds, which he was holding in trust during the bankruptcy, and paid Padilla her 50% share. Padilla then filed a "Satisfaction and Final Release of Judgment" in state court which accounted for the proceeds of the April and December 2004 Writs, credited the payments of those garnishments towards the Judgment, and recognized the bankruptcy discharge as to the remaining balance (the "Release"). The Release, entered in open court on September 2, 2005, without proper notice to Debtor[4], reflected two garnishment payments - one in the amount of $6,406.75 on May 12, 2004, and another for $619 made on January 7, 2005.

On October 13, 2005, the bankruptcy court reopened the case for the purpose of permitting Debtor to commence an adversary

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[3](...continued)
enacted and promulgated prior to the effective date (October 17, 2005) of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

[4] Notice of the September 2, 2005 hearing was served at Debtor's former address. Debtor's counsel was also not provided notice.

proceeding for the avoidance of an alleged preferential transfer. Debtor filed a complaint against Padilla on September 20, 2005. The complaint, which was amended on October 24, 2005, sought to avoid the transfer of funds to Padilla pursuant to the December 2004 Writ as a preferential transfer under § 547(b) and to recover such funds in accordance with § 522(h). Debtor also requested damages under the Revised Code of Washington ("RCW") § 6.37.270(3) for Padilla's refusal to release the exempt funds or, in the alternative, a declaratory judgment that no transfer was made between the Skillings and Padilla. Service of the complaint was accomplished through publication due to Debtor's inability to locate Padilla.

Padilla answered the complaint on December 16, 2005, and raised two affirmative defenses.[5] First, she maintained that all but $619 of the payment from Skillings to her was made pursuant to the April 2004 Writ. Second, she asserted that Debtor was barred from asserting the preferential transfer under the equitable doctrine of laches.

On May 22, 2006, Padilla filed a motion for summary judgment (the "motion"). Debtor opposed the motion, complaining that Padilla failed to provide competent evidence to establish that she had received anything constituting a "payment" for garnishment purposes from the Skillings more than 90 days before he had filed for chapter 7 protection. Rather, he asserted that the evidence indicated that all the payments and credits made to

[5] Padilla also filed a counterclaim for a determination that the Judgment was nondischargeable. The counterclaim was dismissed by the court on February 2, 2006. There was no appeal taken as to that order.

Padilla occurred after he received a discharge. He also argued that Padilla's laches defense must fail because he never misled her into believing that he had abandoned his exemption claim related to the garnishments.

In response, Padilla maintained that under Washington law a "payment" is deemed made when the garnished amounts are tendered to the garnishor's counsel. The Skillings had done just that by tendering the payments to Cushman as evidenced by the Release. Based on the Release, only $619 of the garnished funds could be considered a preferential payment. In addition, Padilla argued that laches was an available remedy because 1) during the bankruptcy Debtor was aware of the payments made to her on the garnishments, 2) Debtor did not pursue a preference action within a reasonable time, and 3) she would be materially prejudiced if Debtor was allowed to pursue a preference action after the bankruptcy was closed because she could no longer repay the funds.

The motion came on for hearing on June 14, 2006. After determining that § 546(a)(2)[6] was applicable, the court held that

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[6] Section 546(a) states,

> An action or proceeding under section . . . 547 . . . of this title may not be commenced after the earlier of–
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> (1) the later of–
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702 . . . of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 542(a).

case law supported a finding that § 546(a)(2) did not bar Debtor's preference action. Nevertheless, the court concluded that Padilla was entitled to summary judgment as a matter of law as to the amounts paid in accordance with the Release. The Release demonstrated that only $619 out of the $7,025.75 was paid during the preference period. The court therefore found that Debtor was only entitled to recover that amount.

In addressing Padilla's defenses, the court did not believe "that the doctrines of either laches or promissory estoppel appl[ied]." Hr'g Tr. 31:5-6, June 14, 2006. Instead, it found that there could not be "any question that . . . [the $619 payment] was a preference" nor "should [it] have been a surprise." Id. at 31:7-10. Because the court was not persuaded that there were any other defenses to the preference action, it concluded that the $619 transfer was preferential and Debtor was entitled to the avoidance and recovery of the transferred funds.

The order granting the motion was entered on July 5, 2006, and thereafter, the judgment awarding Debtor $737.03[7] was entered on August 28, 2006 (the "Preference Judgment").

Padilla timely appealed on September 6, 2006.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. § 1334 and § 157(b)(1) and (b)(2)(F). We have jurisdiction under 28 U.S.C. § 158.

[7] The Preference Judgment is comprised of the principal judgment amount for $619 and prejudgment interest for January 1, 2005 through August 10, 2006, valued at $118.03. It is also subject to post-judgment interest at a rate of 5% pursuant to 28 U.S.C. § 1961.

"We have an independent duty to consider jurisdictional issues sua sponte." Alcove Inv., Inc. v. Conceicao (In re Conceicao), 331 B.R. 885, 890 (9th Cir. BAP 2005). Our jurisdiction over judgments, orders, or decrees is limited by Bankruptcy Rule 8002. Saunders v. Band Plus Mortgage Corp. (In re Saunders), 31 F.3d 767, 767 (9th Cir. 1994). Rule 8002 states that a "notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." If a party files a timely motion pursuant to Rule 7052, 9023, or 9024, then the time to appeal for all parties runs from the entry of the order disposing of such motion. Fed. R. Bankr. P. 8002(b). "The provisions of Bankruptcy Rule 8002 are jurisdictional; the untimely filing of a notice of appeal deprives the appellate court of jurisdiction to review the bankruptcy court's order." Anderson v. Mouradick (In re Mouradick), 13 F.3d 326, 327 (9th Cir. 1994).

Padilla requests that we review the following two issues on appeal:

1. Whether the bankruptcy court erred in discharging her claim in light of her assertion of lack of notice of the bankruptcy.

2. Whether notice to her attorney was sufficient given Debtor's knowledge that her attorney was not authorized to accept service of the notice on her behalf.

Both these issues relate directly to the bankruptcy court's "Order Granting [Debtor's] Request for Judgment on the Pleadings" which was entered on February 2, 2006 (the "Dismissal Order"). The Dismissal Order dismissed Padilla's counterclaim pursuant to Federal Rule Civil Procedure 12(c), § 523(a)(3)(B) and (c)(1),

and Rule 4007(c). Prior to entering this order, the court would have had to determine that Padilla received proper notice of the bankruptcy.[8]

There is no evidence on the docket that Padilla ever sought a Rule 7052, 9023, or 9024 motion as to the Dismissal Order. Any appeal of the Dismissal Order needed to be filed by February 10, 2006.[9] Fed. R. Bankr. P. 8002(a). Because no appeal was taken, we lack subject matter jurisdiction to review any issues decided by the bankruptcy court pursuant to the Dismissal Order, and thus, limit our review to those issues related to the Preference

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[8] On January 4, 2006, Debtor filed a motion for judgment on the pleadings as to Padilla's counterclaim in which he argued that the counterclaim should be dismissed because it was untimely filed (the "dismissal motion"). Debtor maintained that Padilla had received timely notice of the bankruptcy through her counsel, Cushman. Therefore, in accordance with Rule 4007(c), she had up to 60 days after the date set for the first meeting of creditors under § 341(a) to file a complaint to determine the dischargeability of the Judgment pursuant to § 523(c). Padilla missed that deadline. Thus, Debtor asserted that the bankruptcy court did not have jurisdiction to hear the counterclaim.

In opposing the dismissal motion, Padilla complained that she had not been given proper notice of the bankruptcy. Cushman was not authorized to accept service of new matters on her behalf nor was he in contact with her to provide actual notice. As such, her nondischargeability complaint should be considered timely filed.

[9] Although there could be some debate as to whether the Dismissal Order is interlocutory because it does not dispose of the entire preference action, we find it to be a final order. See Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152 (1964). Examination of the Dismissal Order from a "practical rather than technical" view establishes that Padilla's counterclaim is severable from the complaint and addresses a Code section that is independent and irrelevant to the bankruptcy court's § 547 ruling. Id.; Chang v. United States, 327 F.3d 911, 926 (9th Cir. 2003).

Judgment.[10]

III. ISSUES

1. Whether the court abused its discretion in denying the laches defense.
2. Whether the bankruptcy court erred in granting summary judgment, sua sponte, in favor of Debtor when it found the $619 payment was an avoidable preferential transfer.
3. Whether Padilla was given proper notice and the opportunity to object to the form of the Preference Judgment.

IV. STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. Patterson v. Int'l Bhd. of Teamsters, Local 959, 121 F.3d 1345, 1349 (9th Cir. 1997). In viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the applicable substantive law was correctly applied by the bankruptcy court. City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1365 (9th Cir. 1992). A fact is material when, under the governing substantive law, it could affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine "if the evidence is such

[10] Even if we had jurisdiction to review the Dismissal Order, pursuant to the Release, Padilla admitted that the remaining balance on the Judgment ($18,150.90) was discharged by the bankruptcy court on July 26, 2005. The Release was entered on September 2, 2005. Padilla did not file her counterclaim until December 16, 2005. Because Padilla did not assert her counterclaim until after the Release's entry, she is judicially estopped from asserting that the Judgment is nondischargeable. Wagner v. Prof'l Eng'rs In Cal. Gov't, 354 F.3d 1036, 1044 (9th Cir. 2004); Markley v. Markley, 198 P.2d 486, 490-91 (Wash. 1948).

that a reasonable jury could return a verdict for the nonmoving party." Id.

We review whether the bankruptcy court properly applied the doctrine of laches for an abuse of discretion. Beaty v. Selinger (In re Beaty), 306 F.3d 914, 921 (9th Cir. 2002). An abuse of discretion will be found if the court "base[d] its ruling upon an erroneous view of the law or a clearly erroneous assessment of the evidence." Movitz v. Baker (In re Triple Star Welding Inc.), 324 B.R. 778, 788 (9th Cir. BAP 2005).

"Factual circumstances surrounding service of process are reviewed under the clearly erroneous standard of Fed. R. Bankr. P. 8013." United States v. Levoy (In re Levoy), 182 B.R. 827, 831 (9th Cir. BAP 1995).

V. DISCUSSION

A debtor may avoid an involuntary and unconcealed transfer of his property to the extent that it was exempt under state law if such transfer could have been avoided by the trustee under § 547 but was not. 11 U.S.C. § 522(h). Under § 547, a trustee may avoid the transfer of property of a debtor on account of an antecedent debt made within 90 days preceding the debtor's bankruptcy filing. 11 U.S.C. § 547(b).

Here, there is no dispute that the $619 payment made on January 7, 2005, was a preferential transfer. Hr'g Tr. 7:18-24, June 14, 2006 (Padilla's attorney stated "the $619 . . . was paid within the preference period"). Nor were there any disputes as to the facts underlying the preferential transfer or the laches defense. That being the case, the bankruptcy court acted within its authority to decide the motion as a matter of law.

1. The Laches Defense

Padilla asserts that the bankruptcy court abused its discretion in finding that the laches defense was inapplicable to Debtor's preference claim. The application of laches depends upon the facts of the particular case. Brown v. Cont'l Can Co., 765 F.2d 810, 814 (9th Cir. 1985). This "affirmative defense . . . 'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" Beaty, 306 F.3d at 926 (quoting Kansas v. Colorado, 514 U.S. 673, 687 (1995)).

The lack of diligence element of laches requires an examination of the length of time between the party becoming aware of the action and the filing of the complaint, as well as, the circumstances surrounding the delay. Id. at 927. Here, the bankruptcy court found that Debtor had brought the preference action "fairly quickly." Hr'g Tr. 31:7. In reviewing the factual evidence in the record before the court, we cannot find that this determination was clearly erroneous.

The evidence indicates that during the pendency of the bankruptcy, Cushman always maintained that all payments to Padilla were made pursuant to the April 2004 Writ. Assuming this to be the case, the payments would have been made outside of the requisite 90-day period before the entry of the arbitration award. If Debtor believed this to be true, then he would have had no reason to bring a preference action against Padilla. Moreover, Debtor's attorney testified that during the pendency of the bankruptcy he believed that the funds paid to Padilla were still being held in trust for the Skillings. It was not until

the Release that it became clear that two payments had been made, one on May 12, 2004, and another on January 7, 2005. Debtor waited only 18 days after the entry of the Release (September 2, 2005) to file the complaint against Padilla. Based on these facts, the record supports the bankruptcy court's finding that there was no unreasonable delay by Debtor.

Further, Padilla has not presented evidence sufficient to support her assertion that she will be unduly prejudiced by Debtor bringing the preference action. Instead, she relies on general statements regarding her financial vulnerability and the difficulty she will encounter in having to pay back the $619. This alone is insufficient to establish prejudice. Beaty, 306 F.3d at 928 ("generic claims of prejudice do not suffice for a laches defense in any case"). See, e.g., State ex rel. Casale v. McLean, 569 N.E.2d 475, 478 (Ohio 1991)(refusing to find laches where litigant offered on "a bare assertion that certain factors 'have changed dramatically' and "a review of the record shed[] little meaningful light on the precise nature of these alleged changes.").

In addition, we also agree with the bankruptcy court's finding that the preference action should not have been a "surprise" to Padilla. Padilla was the party who filed the Release which included the exact transfer dates. The January 7, 2005 transfer clearly fell within the preference period. As such, it should not have been a surprise to Padilla that Debtor would seek to recover those funds once he learned that the transfer occurred within the 90 days before he filed his petition.

Based on the foregoing, the bankruptcy court did not abuse its discretion in finding the laches defense inapplicable.

2. The Sua Sponte Granting of Summary Judgment

Padilla argues that the court erred in granting, sua sponte, summary judgment in favor of Debtor when it entered the Preference Judgment awarding him $619. According to Padilla, the court improperly ignored her evidence and arguments, including the laches defense.

There is no question that bankruptcy courts have the power to grant summary judgment sua sponte. Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986). However, "[s]ua sponte summary judgment will be proper only when 1) no material dispute of fact exists, and 2) the losing party has had an adequate opportunity to address the issues involved, including adequate time to develop any facts necessary to oppose summary judgment." Fuller v. City of Oakland, 47 F.3d 1522, 1533 (9th Cir. 1995).

Here, the record does not support Padilla's assertion that the court failed to take her evidence into account. Not only did the court make clear at the June 14 hearing that all of the pleadings filed in relation to the motion had been "read ad nauseam", Hr'g Tr. 6:24-25, it specifically addressed the laches defense in its oral ruling. In addressing this defense, the court stated,

> The $619, I conclude to be a preference. And I don't think that the doctrines of either laches or promissory estoppel apply. You know, this was brought fairly quickly. I don't think there's any question that that, [sic] by any stretch of the imagination, that it was a preference and it should have been a surprise.

Hr'g Tr. 31:4-10 (emphasis added).

Padilla does not argue that 1) there were material issues of fact in existence as to the laches defense which would have precluded summary judgment or 2) that she did not have adequate opportunity to address the laches defense. Instead, her reply brief states that every fact supporting her laches defense was undisputed. Further, the pleadings submitted in support of the motion include an extensive discussion of the doctrine. The bankruptcy court did not err on this point.

3. Notice of the Judgment

Padilla also argues that she did not receive proper notice of the Preference Judgment and was therefore denied the opportunity to object to its final form and content, which included an award of $118.03 for pre-judgment interest. Because the issue of pre-judgment interest had never been raised prior to the entry of the Preference Judgment, Padilla believes that she should be given the chance to oppose it.

Although the record indicates that on August 24, 2006, Debtor's attorney served a copy of the Preference Judgment on Cushman by facsimile and regular mail, notice of the proposed judgment was not served in compliance with Western Washington's Local Bankruptcy Rule ("LBR") 9022-1. LBR 9022-1 governs notice of judgments and orders and incorporates LBR 9013-1(I)(2) which states,

> A party presenting a proposed order at a time subsequent to hearing on a motion shall serve copies of the proposed order on parties that were present at the hearing and, unless agreement is reached as to the form of the order, shall give at least five days' notice of the time, date and place of presentation of the proposed order.

The notice to Padilla failed to provide the parties with five days notice of the time, date and place of presentation of the proposed Preference Judgment. Moreover, the Preference Judgment was entered on August 28, 2006, less than five days after notice of it was served upon Cushman. Because there was no indication in the court's oral ruling that it would be awarding pre-judgment interest and because notice of the Preference Judgment was insufficient, we find that the court clearly erred in awarding Debtor pre-judgment interest without first permitting Padilla an opportunity to respond. Accordingly, we VACATE and REMAND the award of the pre-judgment interest so as to provide Padilla the opportunity to object.

VI. CONCLUSION

We AFFIRM that portion of the bankruptcy court's decision awarding Debtor the $619 and post-judgment interest. We VACATE and REMAND for further findings as to the award of pre-judgment interest.