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NOT FOR PUBLICATION

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 Nos.	CC-05-1488-BKPa
)		CC-05-1489-BKPa
RANDY HALL,)		(Related Appeals)
)		
Debtor.)	Bk. No.	LA 04-19698-SB
)		
)	Adv. Nos.	LA 04-02225-SB
TODD HARDING and)		LA 04-02226-SB
KIMBERLY HARDING,)		

TODD HARDING and
KIMBERLY HARDING,
Appellants,

v.

RANDY HALL aka Durand D.
Hall, aka Delamar Durand
Hall; SONDRA L. KAUFELT, aka
Sondra Lavon Kaufeldt aka
Sondra L. Kaufeldt-Hall,

Appellees.

BARBARA ROGERS,

Appellant,

v.

RANDY HALL aka Durand D.
Hall, aka Delamar Durand
Hall; SONDRA L. KAUFELT, aka
Sondra Lavon Kaufeldt aka
Sondra L. Kaufeldt-Hall,

Appellees.

MEMORANDUM¹

Argued and Submitted on July 14, 2006
at Pasadena, California

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 Filed - August 14, 2006

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

4 Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding

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6 Before: BRANDT, KLEIN and PAPPAS, Bankruptcy Judges.

7
8 Appellants in these related appeals filed separate adversary
9 proceedings against debtor seeking determinations of nondischargeability
10 under § 523(a)(2)(A),² based on debtor's allegedly fraudulent failure to
11 complete contracts for home improvements or to return payments received.
12 After trial of all issues other than damages, which issue was bifurcated
13 and to be the subject of further proceedings if necessary, the bankruptcy
14 court found that the payments made to debtor under both contracts came
15 from corporations that were not before the court. Accordingly, the
16 bankruptcy court ruled that appellants had not proven that they had been
17 damaged, an essential element of fraud under the applicable section, and
18 entered orders declaring the debts dischargeable. We REVERSE and REMAND.

19
20 **I. FACTS**

21 In July 2001 debtor, Randy Hall, contracted with John and Barbara
22 Rogers to build an enclosed pool house on their property in Lebec,
23

24 ² Absent contrary indication, all "Code," chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
26 its amendment by the Bankruptcy Abuse Prevention and Consumer
27 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from
28 which these adversary proceedings and these appeals arise was filed
before its effective date (generally 17 October 2005).

All "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and all "FRCP" references are to the Federal Rules of Civil
Procedure.

1 California. In December of the same year, Hall contracted with the
2 Rogers' daughter and son-in-law, Kimberly and Todd Harding, to build an
3 enclosed patio on their property, also located in Lebec, California.

4 At the time these contracts were entered into, debtor's California
5 contractor's license had been suspended for disciplinary reasons. Debtor
6 represented to Ms. Rogers that his license was not active because he had
7 been living in Oregon, but did not disclose to any of the parties that
8 his license was suspended. His license was later reinstated on 2 May
9 2002.

10 Debtor did not complete either project, despite receiving partial
11 payment on both contracts. Those payments came from either Winning
12 Performance Products, Inc. ("WPP"), a California corporation, of which
13 Todd and Kimberly Harding and Barbara Rogers are the shareholders, or Hy-
14 Tech Motorcycle Parts ("Hy-Tech"), a British corporation with a branch
15 in the United States. None of the relevant parties are shareholders in
16 Hy-Tech, but Hy-Tech owed money to WPP. Kimberly Harding works for Hy-
17 Tech or had signatory authority on a Hy-Tech checking account.

18 Barbara Rogers and the Hardings each sued debtor in state court,
19 whereupon debtor filed the instant chapter 7 case. On 30 July 2004
20 Rogers and the Hardings each filed complaints objecting to
21 dischargeability.³

22

23 ³ The Rogers complaint contained claims under §§ 523(a)(2)(A)
24 and 523(a)(6), for denial of discharge under § 727(a)(4), and various
25 claims against non-debtor parties. The Harding complaint is not in
26 the excerpts of record. In response to our orders requesting an
27 explanation as to why the orders on appeal are final, appellants
28 stated that all causes of action other than the § 523(a)(2)(A) claims
had been dismissed pursuant to pre-trial orders in each adversary
proceeding. The pre-trial orders do not expressly dismiss those
causes of action, but narrow the issues to those which comprise a
fraud claim. To the extent the orders may not be final, we grant
leave to appeal.

1 Trial was combined and the issues bifurcated, with liability to be
2 tried first, and damages reserved for a further trial if necessary.

3 After the 22 September 2005 liability trial, the bankruptcy court
4 issued an order in each adversary proceeding concluding that the debts
5 at issue were dischargeable because the payments had been made by
6 corporations not before the court, rather than by Rogers or the Hardings.
7 Thus, the court concluded, the individual plaintiffs suffered no damages.

8 The bankruptcy court did not issue separate judgments as required
9 by FRCP 58, applicable via Rule 9021. However, 150 days have run from
10 entry of those orders, and the judgments are deemed entered. FRCP
11 58(b)(2)(B); In re Garland, 295 B.R. 347, 353 (9th Cir. BAP 2003).
12 Moreover, no party has raised the issue. See Bankers Trust Co. v.
13 Mallis, 435 U.S. 381, 387-88 (1978) (separate judgment requirement deemed
14 waived where party has not objected).

15 Rogers and the Hardings timely appealed.

17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
19 § 157(b)(1) and (B)(2)(I), and we do under 28 U.S.C. § 158(c).

21 **III. ISSUE**

22 Whether the bankruptcy court erred in ruling that debtor's
23 obligations to appellants were dischargeable.

25 **IV. STANDARDS OF REVIEW**

26 The bankruptcy court's findings of fact are reviewed for clear
27 error, and its conclusions of law de novo. In re Focus Media, Inc., 387
28 F.3d 1077, 1081 (9th Cir. 2004), cert. denied, 544 U.S. 923 (2005).

1 Appellants argue that admitted facts in the parties' pre-trial
2 orders established that payments were made for their benefit. This
3 argument raises a mixed question of law and fact. A mixed question
4 occurs when the historical facts are established, the rule of law is
5 undisputed, and the issue is whether the facts satisfy the legal rule.
6 Mixed questions are reviewed de novo. In re Bammer, 131 F.3d 788, 791-92
7 (9th Cir. 1997).

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9

V. DISCUSSION

10 The record on appeal does not include complete transcripts of the
11 trial testimony, nor does it include all the documentary evidence that
12 was before the bankruptcy court. Therefore, were appellants' arguments
13 premised upon erroneous factual findings, we would be entitled to affirm.
14 In re Kritt, 190 B.R. 382, 387 (9th Cir. BAP 1995). But appellants do
15 not argue that the bankruptcy court's factual findings are clearly
16 erroneous; rather, they argue that the bankruptcy court's ruling was in
17 error because: (1) the issue of damages had been bifurcated, essentially
18 relieving appellants from the burden of showing damages at the initial
19 trial; and (2) the pre-trial order contained admitted facts showing that
20 the payments to debtor were made for plaintiffs' benefit.

21 The order of bifurcation in the Harding adversary proceeding
22 indicates that, at the parties' request, the court would try all issues
23 other than damages on the initial trial date of 22 September 2005, and
24 would schedule a hearing on damages if one were necessary. The pre-trial
25 order in the Rogers adversary proceeding similarly indicates that the
26 parties wish to bifurcate the fraud issue, with a further hearing to be
27 set only if necessary.

28

1 To prove fraud under § 523(a)(2)(A) the creditor must show that:

2 (1) debtor made a representation;

3 (2) knowing at the time that it was false;

4 (3) with the intention and purpose of deceiving the creditor;
and that

5 (4) creditor justifiably relied on the representation; and

6 (5) creditor sustained damage as the proximate result of the
7 representation.

8 In re Apte, 96 F.3d 1319, 1322 (9th Cir. 1996).

9 Although the bifurcation did not explicitly relieve appellants from
10 the burden of showing the fact of damages, as they seem to argue,
11 uncontroverted evidence established that Hy-Tech made payments to the
12 debtor in (presumably partial) satisfaction of obligations Hy-Tech owed
13 to WPP: Kimberly Harding's testimony that she wrote checks from Hy-Tech
14 to debtor because Hy-Tech owed WPP and appellants money, with the
15 blessing of the corporate accountant, and the admitted facts that the
16 payments were made for the benefit of appellants, that they were the
17 shareholders of WPP, and that Hy-Tech was indebted to WPP by at least as
18 much as Hy-Tech paid to debtor, as the trial judge found.

19 The evidence establishes an inference that the individual plaintiffs
20 were damaged: the value of WPP was diminished by the amount of its
21 payments to debtor, and by the offset Hy-Tech has on its obligation to
22 WPP resulting from its payments to debtor for the benefit of appellants.
23 Hall proposes no other reasonable inference, and as there is no contrary
24 evidence, the finding that appellants suffered no damage is clearly
25 erroneous, and we must reverse.

26 Assuming the bankruptcy court finds that the other elements of fraud
27 have been established, the damages will need to be determined. Remand
28 is therefore appropriate.

1 A final note: in its memorandum the bankruptcy court characterized
2 the payments from the corporations as a "raid" on corporate assets.
3 Although appellants did not handle the transactions with appropriate
4 corporate formalities, there is no evidence of any impropriety in
5 appellants directing their corporation and Hy-Tech to make payments
6 (documented, and cleared by the corporations' accountant) to make
7 payments on their behalf.

8

9

VI. CONCLUSION

10 The bankruptcy court erred in concluding that appellants had not
11 established that they had been damaged. Accordingly, we REVERSE both
12 orders and REMAND for determination of whether the other elements of
13 nondischargeability have been established, and if so, the damages.

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