

DEC 29 2006

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

| | | | |
|---------------------------|---|--------------------|-----------------|
| In re: |) | BAP Nos. | CC-05-1352-KMoB |
| |) | | |
| STEPHEN LAW, |) | Bk. No. | LA 04-10052-TD |
| |) | | |
| Debtor. |) | Adv. No. | LA 04-01666-TD |
| |) | | |
| STEPHEN LAW, |) | | |
| |) | | |
| Appellant, |) | | |
| |) | | |
| v. |) | MEMORANDUM* | |
| |) | | |
| ALFRED H. SIEGEL, Chapter |) | | |
| 7 Trustee, |) | | |
| |) | | |
| Appellee. |) | | |
| |) | | |

Argued and Submitted on November 15, 2006
at Orange, California

Filed - December 29, 2006

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI and BRANDT, Bankruptcy Judges.

*This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 The debtor, Stephen Law, appeals from an order striking his
2 answer pursuant to Federal Rule of Civil Procedure 37(b)(2)(C)
3 and the ensuing entry of default and default judgment. Given the
4 debtor's unambiguous disregard of the bankruptcy court's written
5 orders and oral directives, the court's actions of striking the
6 debtor's answer, entering default, and entering a default
7 judgment was not an abuse of discretion. Accordingly, we AFFIRM.

8
9 FACTS

10 The debtor filed a chapter 7 case in January 2004. On
11 September 21, 2004, the chapter 7 trustee filed a first amended
12 complaint objecting to the debtor's discharge pursuant to 11
13 U.S.C. § 727(a)(4)(A).¹

14 The trustee objected to the debtor's discharge because the
15 debtor "knowingly and fraudulently made a false oath or account,
16

17 ¹The procedural history leading up to the trustee's first
18 amended complaint was that on April 8, 2004, Cau-Min Li and the
19 United States Judgment Enforcement Agency filed adversary
20 proceeding 04-1666 against the debtor pursuant to 11 U.S.C.
21 §§ 523(a)(6) & (a)(19) and 727(a)(3) & (a)(4). On April 12,
2004, Shong-Ching Tong, Yei-Hwei Tong, Cau-Min Li, and the Estate
of Robert Shucker filed adversary proceeding 04-1672 seeking
relief identical to that in adversary proceeding 04-1666.

22 In July 2004, a status conference and order to show cause
23 regarding dismissal of adversary proceeding 04-1666 for the
24 plaintiffs' failure to prosecute was held. The plaintiffs in
25 both cases requested that the trustee substitute in as the real
party in interest in both adversary proceedings. Per order of
the court, the trustee substituted in as the real party in
interest in both adversary proceedings, which were consolidated
on November 15, 2004.

26 On September 21, 2004, the trustee filed a first amended
27 complaint whereby only the § 727(a)(4)(A) claim was pursued. The
trustee abandoned the § 523 claims and the § 727(a)(3) claim.

1 by listing" in his Schedule D a fictitious deed of trust as an
2 encumbrance on his property in Hacienda Heights, California.

3 The trustee specifically alleged that in June 1999 the
4 debtor made, executed, and delivered to "Lili Lin" a promissory
5 note for the principal sum of \$168,000. To encumber the property
6 and to secure the obligation, the debtor made, executed, and
7 delivered to Lili Lin a deed of trust and assignment of rents.
8 This transfer was the subject of another adversary proceeding
9 (04-1969) and pending appeal (BAP No. CC-05-1303).

10 On October 26, 2004, the trustee served on the debtor
11 interrogatories (set one), a request for admissions (set one),
12 and a request for production of documents (collectively
13 "Discovery Documents").

14 On December 29, 2004, the debtor served the trustee with
15 incomplete discovery responses.

16 On February 24, 2005, the trustee sent the debtor a
17 Stipulation Regarding Discovery Dispute in accordance with Rule
18 37(a) and Local Bankruptcy Rule 9013-1(c).² The debtor did not
19

20 ²Local Bankruptcy Rule 9013-1(c) provides:

21 For any dispute which may arise under FRBP 7026-7037 or
22 FRBP 2004, counsel shall comply with all portions of
23 this subsection of the Local Bankruptcy Rules unless
24 excused from doing so by order of the court for good
25 cause shown.

26 (1) Meeting of Counsel. Prior to the filing of any
27 motion relating to discovery, counsel for the parties
28 shall meet in person or by telephone in a good faith
effort to resolve the discovery dispute. It shall be
the responsibility of counsel for the moving party to
arrange for the conference. Unless altered by

(continued...)

1 respond to the Stipulation.

2 The trustee then filed a Motion to Compel responses to the
3 Discovery Documents in March 2005.³

4 A hearing on the motion was held on April 20, 2005. The
5 court granted the motion, finding:

6 The Court, having considered the Motion, found good
7 cause for granting same, as it found that the Debtor
8 had not cooperated in attempting to resolve this
9 discovery dispute as required by Loc. Bankr. R. 9013-
10 1(c), that the Debtor's written discovery responses
11 that were attached as Exhibit 2 to the Motion were
12 obstinate and evasive pursuant to Fed. R. Civ. P.

11 ²(...continued)

12 agreement of the parties or by order of the court upon
13 good cause shown, counsel for the opposing party shall
14 meet with counsel for the moving party within 10 days
15 of service upon counsel of a letter requesting such
16 meeting and specifying the terms of the discovery order
17 to be sought.

18 (2) Moving Papers. If counsel are unable to settle
19 their differences, the party seeking discovery shall
20 file and serve a notice of motion together with a
21 written stipulation. This written stipulation shall be
22 formulated by the parties and shall specify, separately
23 and with particularity, each issue that remains to be
24 determined at the hearing and the contentions and
25 points and authorities of each party as to each issue.

26 . . . In the absence of such stipulation or a
27 declaration of counsel of noncooperation by the
28 opposing party, the court will not consider any
discovery motion.

(3) Cooperation of Counsel - Sanctions. The failure of
any counsel to cooperate in such procedures and to
attend the meeting of counsel or to provide the moving
party the information necessary to prepare the
stipulation required by this Local Bankruptcy Rule
within 7 days of the meeting of counsel shall result in
the imposition of sanctions, including but not limited
to the sanctions provided in Local Bankruptcy Rule
1002-2 and FRBP 7037.

³The trustee followed the procedures required by Local
Bankruptcy Rule 9013-1(c) prior to filing its Motion to Compel.

1 37(2) (a) (3), that the opposition that the Debtor filed
2 to the Motion was not substantially justified, and that
3 the circumstances made an award of sanctions in the
amount of \$3,520 against the debtor and in favor of the
Trustee just.

4 The court ordered that on or before May 18, 2005, the debtor
5 was to provide the trustee with amended discovery responses. The
6 court further ordered the debtor to pay the trustee monetary
7 sanctions of \$3,520 on or before May 20, 2005.

8 A status conference was held on May 18, 2005. The trustee
9 informed the court that the debtor still had not provided the
10 trustee with the ordered amended discovery responses. The debtor
11 then informed the court that an appeal of the discovery order was
12 pending. The court orally advised the debtor that a pending
13 appeal did not have any effect on his "duties to furnish
14 information" to the trustee.

15 On May 23, 2005, the trustee sent a letter to the debtor
16 stating that the debtor has yet to provide the trustee with the
17 court ordered responses and monetary sanctions. The debtor
18 responded via letter on May 24, 2005, stating that he had not
19 complied with the court order because it had been "stayed" at the
20 May 18, 2005, hearing. On May 27, 2005, the trustee sent the
21 debtor another letter confirming that the discovery order had not
22 been stayed and that the transcript of the hearing would confirm
23 the lack of stay.

24 The trustee then filed a Motion to Strike the debtor's
25 answer pursuant to Federal Rule of Civil Procedure 37(b) (2) (C) on
26 June 27, 2005, on the grounds that the debtor failed to comply
27 with discovery and the court's discovery order, and had acted in
28 direct contravention of the court's oral directives. The debtor

1 filed an opposition and sought sanctions of \$800 against the
2 trustee for his "vexatious frivolous tactics."

3 A hearing was held, and on August 10, 2005, the court
4 granted the trustee's motion to strike the debtor's answer.

5 Debtor's default was entered on August 31, 2005. On
6 September 15, 2005, the trustee filed a Motion for Default
7 Judgment. A default judgment denying the debtor's discharge
8 pursuant to § 727(a)(4)(A) was granted on September 27, 2005.

9 The debtor timely appealed the order striking the debtor's
10 answer, the entry of default, and the default judgment.

11 JURISDICTION

12 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
13 We have jurisdiction under 28 U.S.C. § 158(a)(1).
14

15 ISSUES

16 (1) Whether the bankruptcy court abused its discretion when
17 it granted the trustee's motion to strike the debtor's answer
18 pursuant to Rule 37(b)(2)(C).
19

20 (2) Whether the court abused its discretion when it entered
21 debtor's default and later granted the trustee's motion for
22 default judgment.
23

24 STANDARD OF REVIEW

25 We review a court's ruling on a motion to strike pursuant to
26 Rule 37(b)(2)(C) for an abuse of discretion. El Pollo Loco, Inc.
27 v. Hashim, 316 F.3d 1032, 1038 (9th Cir. 2003). A court's
28 decision to impose a default judgment as a sanction is also

1 reviewed for an abuse of discretion. Fair Housing of Marin v.
2 Combs, 285 F.3d 899, 905 (9th Cir. 2002) ("Combs"). Discretion
3 is abused when the judicial action is "arbitrary, fanciful or
4 unreasonable" or "where no reasonable [person] would take the
5 view adopted by the trial court." Id. quoting United States
6 Cellular Inv. Co. of L.A., Inc. v. GTE Mobilnet, Inc., 281 F.3d
7 929, 934 (9th Cir. 2002).

8
9 DISCUSSION

10 The only orders presented for review in this appeal are the
11 orders granting the trustee's motion to strike the debtor's
12 answer and the subsequent entry of default and default judgment.
13 Therefore, we limit our analysis to the arguments made with
14 respect to those orders only and do not address arguments of the
15 debtor that are unrelated to those orders.

16 Rule 37(b) (2) (C) applies in bankruptcy adversary proceedings
17 and provides:

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

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

25 Fed. R. Civ. P. 37(b) (2) (C), incorporated by Fed. R. Bankr. P.
26 7037.

27 The debtor asserts that his discovery responses were
28 "accurate and complete" and that the trustee's complaint is

1 "groundless and meritless" filed "only for harassment and for
2 their attorney's fees as well as Trustee fees."

3 Regardless of the debtor's assessment of the adequacy of his
4 discovery responses and of the trustee's motives, the salient
5 points are that the court ordered the debtor to amend his
6 discovery responses and that the debtor did not comply with the
7 order.

8 At the hearing on the motion to compel, the court determined
9 that the debtor's responses were "not cooperative answers
10 designed to work this case through to a reasonable conclusion.
11 They're not designed to enable the trustee to complete his duties
12 in prosecuting this case."

13 Further, both the court and the trustee repeatedly explained
14 to the debtor that his appeal of the discovery order had no
15 effect on his duty to comply with the discovery mandate.

16 Nevertheless, the debtor continued to refuse to "obey an
17 order to provide or permit discovery" and continues to stand firm
18 on appeal that such responses are unnecessary.

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

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

27 The bankruptcy court in this case was familiar with the
28 debtor and was in the best position to assess the circumstances

1 of noncompliance and to determine what action to take to remedy
2 the trustee's continuous and failed attempts to complete the
3 discovery process. Rule 37(b)(2)(C) authorizes the court to
4 strike out pleadings or parts thereof. The court decided that
5 the best action was to strike the debtor's answer.

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

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

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

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, enter
24 default, and grant a default judgment thereby denying the
25 debtor's discharge under § 727(a)(4)(A).⁴ AFFIRMED.

26
27 ⁴The trustee's theory for denial of the debtor's discharge
28 pursuant to § 727(a)(4)(A) rested upon allegations that the
debtor "knowingly and fraudulently made a false oath or account,
(continued...)

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⁴(...continued)
by listing" in his schedules a fictitious deed of trust as an encumbrance on his property. The offending deed of trust was allegedly made, executed, and delivered to "Lili Lin" to secure a debt to Lili Lin. The trustee filed adversary proceeding number 04-1969 against Lili Lin to avoid and recover the deed of trust as a fraudulent transfer pursuant to 11 U.S.C. §§ 544(b), 550, 551, and California Civil Code § 3439.04(a). This transfer is the subject of another appeal (BAP No. CC-05-1303) in which it is asserted that there are two Lili Lins - one resident in the United States and one resident in China.

In appeal CC-05-1303, the court approved a compromise between the trustee and an individual claiming to be Lili Lin ("Lili Lin of Artesia"). The debtor and another person claiming to be Lili Lin ("Lili Lin of China") opposed the compromise motion. In the compromise proceeding, the court ruled that the debtor and Lili Lin of China lacked standing to oppose the compromise between the trustee and Lili Lin of Artesia. Lili Lin of China appealed the compromise order.

As we explain in our disposition of BAP No. CC-05-1303, the court's ruling that Lili Lin of China lacked standing to oppose the compromise with Lili Lin of Artesia was not a preclusive determination that Lili Lin of China does not hold a lien on the debtor's property. Hence, the trustee will need to file an adversary proceeding against Lili Lin of China seeking to clear the cloud on title created by her lien claim.

If, after such adversary proceeding is resolved, it is determined that Lili Lin of China does in fact hold a valid lien on the subject property, the debtor may have grounds to revisit the denial of his discharge pursuant to Federal Rule of Civil Procedure 60(b)(4).