NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-05-1201-KPaB
RICHARD S. CHAVEZ and JOANN F. CHAVEZ,	Bk. No. LA 02-22482-ES
	Adv. Pro. LA 02-02331-ES
Debtors.	
CAU-MIN LI; JENNY TONG, MICHAEL GOUDIE,	
Appellants,	
v.	**MEMORANDUM***
RICHARD S. CHAVEZ and JOANN F. CHAVEZ,	
Appellees.	

Argued and Submitted on May 18, 2006
at Pasadena, California

Filed - June 19, 2006

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

Honorable Erithe A. Smith, Bankruptcy Judge, Presiding.

Before: KLEIN, PAPPAS 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.

This appeal challenges the dismissal of an adversary proceeding, as well as the interlocutory order denying a second motion for default judgment that immediately preceded the court's sua sponte order of dismissal. We AFFIRM on all counts.

FACTS

Debtors Richard and Joann Chavez commenced a chapter 7 case on April 29, 2002. Upon completion of the meeting of creditors, the trustee filed a no-asset report.

On August 5, 2002, pro se appellants Michael Goudie, Cau-Min Li, and Jenny Tong, two of whom are judgment creditors on a $6,141.00 state court default judgment dated October 21, 1999, for damages based on the termination of a tenancy, filed an adversary proceeding seeking to have the debt excepted from discharge under 11 U.S.C. §§ 523(a)(2) and (a)(6) and to have the discharge denied under 11 U.S.C. § 727(a)(4).

The pro se complaint alleged, in general, that the debtors did excessive damage to the premises they occupied for more than seven years until being evicted in September 1999. The repairs cost $8,000 and prevented re-rental for one month.

As to their claims under § 523, appellants alleged two counts of fraud and one count of willful and malicious damage based on: (1) false statements to appellants and repeated nonpayment of rent; (2) NSF checks issued with knowledge that funds were not available to honor the items; and (3) intentional damage to the premises beyond normal wear and tear.

Objecting to discharge under § 727(a)(4)(A), appellants alleged that the schedules and statements were materially false

because the debtors: (1) omitted their tax refund on Schedule B; (2) stated that they had no dependents on Schedule I, but listed child support of $12,987 on Schedule E; (3) listed the state court judgment and other debts twice; and (4) omitted to state in their statement of financial affairs that Joann Chavez's wages were being garnished.

No answer to the complaint was filed, albeit that Joann Chavez appeared at hearings in the adversary proceeding.

Default was entered on November 25, 2002, at the request of appellants, who also moved for a default judgment.

At a hearing on January 23, 2003, the court denied the motion for default judgment and entered the order March 17, 2003.

On February 21, 2003, before the court entered the order, appellants filed a notice of appeal that became BAP No. CC-03-1095. We dismissed the appeal on August 7, 2003, having treated the notice of appeal pursuant to Federal Rule of Bankruptcy Procedure 8003(c) as a motion for leave to appeal that we denied.

On October 10, 2003, appellants filed a "Request for Setting" seeking to have the court set a trial date.

By letter dated June 7, 2004, appellants inquired about the status of their "Request for Setting" about which they had heard nothing, which precipitated the setting of a status hearing for August 19, 2004.

The court, however, removed the August 19 status hearing from calendar and ordered it continued to October 14, 2004, with a notation on the tentative ruling that the court would issue an order to show cause ("OSC"), to be heard on October 14, why the adversary proceeding should not be dismissed for failure to

prosecute. The court issued the promised OSC on August 20, 2004.

Appellants filed a response relating that they had been trying to get the matter heard but had been ignored by the court.

The court vacated the OSC and set a pretrial conference for December 16, 2004, required that a pretrial order be lodged with the court in accordance with Central District of California Local Bankruptcy Rule 7017-1(b) by December 2, 2004, and noted that trial would be set at the December 16 conference.

A "Unilateral Pre-Trial Order" was lodged by appellants on December 2, 2004, in which they stated they were ready for trial and did not indicate that any discovery needed to be completed.

On December 16, 2004, the court continued the pretrial conference until March 3, 2005.

On February 25, 2005, appellants filed a status report in anticipation of the March 3 pretrial conference in which they stated that they were preparing a default judgment motion.

Appellants filed their second default judgment motion on March 2, 2005. Twenty days later the declaration of appellant Michael Goudie was filed in support of the motion for default judgment, wherein he asserted that the county records reflected that debtor Richard Chavez purchased a home in June 2002.

The court set a default judgment hearing for April 7, 2005, and continued the pretrial conference to that date.

At the hearing on the second motion for default judgment, debtor Joann Chavez appeared and opposed the motion. The court inquired into the facts and legal theories underlying the complaint and denied the second motion for default judgment because there was no prima facie evidence of fraud, of willful

and malicious injury, or of materially false statements in the bankruptcy schedules and statement of financial affairs.

The following discussion occurred regarding § 727:

> THE COURT: Specifically what you say is that ... in the petition the defendants falsely answered several questions including income from employment, lawsuits, foreclosures and returns. Was there some evidence of ... specific instances included as part of that motion?
>
> PLAINTIFF GOUDIE: Just that they were purchasing a house at that time and didn't disclose it.
>
> THE COURT: Okay. But the fact that a house was purchased post-petition in and of itself would not be evidence of anything – the actual purchase because the schedules are filed and are answered based upon what has occurred as of the date of the bankruptcy.

Tr. 4/7/05 at 4.

After this discussion, debtor Joann Chavez explained that the house purchased post-petition was purchased by her son Richard Chavez, not her husband Richard Chavez. Upon reviewing the grant deed, the bankruptcy court explained that the grant deed reflected that the house was in fact purchased by "Richard Chavez, a single man." Tr. 4/7/05 at 7.

Presumptively dealing with the § 523(a)(2) claim, the court explained that not paying rent on time does not rise to the level of fraud, and without more than copies of canceled checks, the court could not infer fraud. Tr. 4/7/05 at 6.

As to the § 523(a)(6) claim, the court ruled that the evidence of repairs showed normal wear and tear, but nothing that evidenced an intent to cause injury that would amount to a willful and malicious injury. Tr. 4/7/05 at 8-9.

The court explained that under § 727 the main argument was that the debtors acquired a property after the bankruptcy case

was filed. In that regard, the court reiterated that on the face of the grant deed it appeared that the house went to someone other than the debtor. Tr. 4/7/05 at 10.

In addition to denying the second default judgment motion, the court also announced that it would dismiss the complaint:

> And just to explain the procedure, there was no response filed so you filed a motion for a default judgment, and you've got to provide some ... prima facie evidence that there's ... something there. If that doesn't happen the alternative is not to go to trial because for one thing if we go to trial the standard is higher, not lower. Here I'm looking for what we call a prima facie, just some evidence. If we go to trial you've got to show better than fifty percent, in other words, a preponderance of the evidence. So it's actually a higher standard if we go to trial[.]
>
> So at this point the case will basically be dismissed
>
> because I just, based on what's before me, I just can't find - - I can't make a finding of fraud, even given the relatively low threshold here.

Tr. 4/7/05 at 10-11.

Appellants filed their notice of appeal on May 9, 2005, before entry of the orders denying the motion for default judgment (May 31, 2005) and dismissing the adversary proceeding (June 3, 2005), and amended the notice of appeal on June 17, 2005.

JURISDICTION

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

ISSUES

1. Whether the court abused its discretion by refusing to enter default judgment.

2. Whether the court erred by dismissing the complaint.

STANDARD OF REVIEW

We review denial of default judgment under Federal Rule of Civil Procedure 55(b) for abuse of discretion. Valley Oak Credit Union v. Villegas (In re Villegas), 132 B.R. 742, 746 (9th Cir. BAP 1991). We treat the dismissal of the adversary proceeding as the equivalent of a sua sponte entry of summary judgment against plaintiffs, which we review de novo. Kassbaum v. Steppenwolf Prod., Inc., 236 F.3d 487, 491 (9th Cir. 2000).

DISCUSSION

The order denying the motion for default judgment merged into the dismissal order and, thus, may be challenged upon appeal from the dismissal order. Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976). Hence, we review both orders.

I

Default judgments are governed by Federal Rule of Civil Procedure 55, which is incorporated by Federal Rule of Bankruptcy Procedure 7055. Fed. R. Civ. P. 55; Fed. Bankr. P. 7055.

The court has wide discretion in determining whether to enter default judgment pursuant to Rule 55. Villegas, 132 B.R. 742, 746 (9th Cir. 1991); see 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE CIVIL 2D § 2685 (1983). Likewise, a trial court has broad discretion as to the nature of the hearing that it will hold pursuant to Rule 55(b)(2) in determining whether to enter default judgment. Id. This provides the trial

court with discretion to require at the hearing some proof of the facts that are necessary to a valid cause of action or to determine liability. Id.

The factors to be considered for entry of default judgment 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. Villegas, 132 B.R. at 746, citing Eitel v. McCool, 782 F.2d 1470, 1471-2 (9th Cir. 1986).

In this instance, the court acted within its discretion in requiring a hearing to consider proof of facts necessary to deny discharge based on the conclusory allegations in the complaint. Villegas, 132 B.R. at 746. At the hearing, the court focused on the merits of the plaintiffs' substantive claim and concluded that the evidence presented did not prove the plaintiffs' case. In light of the allegations, which do not in and of themselves rise to a nondischargeable claim, and the little evidence presented, we cannot say the court abused its discretion in denying the motion for default judgment.

II

The next question is whether the court erred when it dismissed the complaint. A fair reading of the transcript of the hearing indicates that the court assessed the pleadings and evidence on a summary judgment basis and concluded that there was

no possibility that the plaintiffs could prevail. In effect, it concluded that there was no genuine issue of material fact that would preclude summary judgment in favor of the defendants.

Under limited circumstances, a court may enter summary judgment on its own motion. Portsmouth Square, Inc. v. S'holders Protective Comm., 770 F.2d 866, 869 (9th Cir. 1985). Where the court grants summary judgment in the absence of a formal motion, we review the record closely to ensure that the parties against whom judgment was entered had a full and fair opportunity to develop and present facts and legal arguments in support of their motion. Id. A litigant is entitled to reasonable notice that the sufficiency of his or her claim will be in issue. Id.

After reviewing the record with "great care" to assure that appellants had an opportunity to show that they might be entitled to judgment, we are persuaded that the court correctly concluded that the adversary proceeding should be dismissed. This was appellants' second motion for default judgment. In light of the denial of their first motion, the circumstances indicate that appellants used the second motion as their opportunity to develop and present any facts and legal arguments that would support the sufficiency of their claims. The adversary proceeding had been pending for four years, and appellants contended they were ready for trial. Hence, they had ample time to make their case.

We agree with the bankruptcy court in its discussion of the record that there is no indication of any factual predicate for denying the discharge under § 727 or for concluding that the debt was either incurred by fraud or a willful and malicious injury.

In response to the court's question of whether appellants had evidence of specific instances that would support their § 727 objection to discharge, the appellants conceded that the only instance was the purchase of the house post-petition. The grant deed, which the court examined at the hearing, established that the claim was not meritorious as the house was not purchased by the debtor Richard Chavez, but rather the debtors' son, Richard Chavez, a single man.

As to the § 523 claims, we likewise agree with the bankruptcy court's findings.

CONCLUSION

For the foregoing reasons, we AFFIRM.