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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NOT FOR PUBLICATION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 No.	CC-05-1201-KPaB
)		
RICHARD S. CHAVEZ and)	Bk. No.	LA 02-22482-ES
JOANN F. CHAVEZ,)		
)	Adv. Pro.	LA 02-02331-ES
Debtors.)		
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CAU-MIN LI; JENNY TONG,)		
MICHAEL GOUDIE,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM*	
)		
RICHARD S. CHAVEZ and)		
JOANN F. CHAVEZ,)		
)		
Appellees.)		
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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.

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

5
6 FACTS

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

10 On August 5, 2002, pro se appellants Michael Goudie, Cau-Min
11 Li, and Jenny Tong, two of whom are judgment creditors on a
12 \$6,141.00 state court default judgment dated October 21, 1999,
13 for damages based on the termination of a tenancy, filed an
14 adversary proceeding seeking to have the debt excepted from
15 discharge under 11 U.S.C. §§ 523(a)(2) and (a)(6) and to have the
16 discharge denied under 11 U.S.C. § 727(a)(4).

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

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

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

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

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

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

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

13 On February 21, 2003, before the court entered the order,
14 appellants filed a notice of appeal that became BAP No. CC-03-
15 1095. We dismissed the appeal on August 7, 2003, having treated
16 the notice of appeal pursuant to Federal Rule of Bankruptcy
17 Procedure 8003(c) as a motion for leave to appeal that we denied.

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

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

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

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

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

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

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

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

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

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

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

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

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

3 The following discussion occurred regarding § 727:

4 THE COURT: Specifically what you say is that ... in the
5 petition the defendants falsely answered several questions
6 including income from employment, lawsuits, foreclosures and
returns. Was there some evidence of ... specific instances
included as part of that motion?

7 PLAINTIFF GOUDIE: Just that they were purchasing a house at
8 that time and didn't disclose it.

9 THE COURT: Okay. But the fact that a house was purchased
10 post-petition in and of itself would not be evidence of
11 anything - the actual purchase because the schedules are
filed and are answered based upon what has occurred as of
the date of the bankruptcy.

12 Tr. 4/7/05 at 4.

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

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

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

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

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

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

6 And just to explain the procedure, there was no response
7 filed so you filed a motion for a default judgment, and
8 you've got to provide some ... prima facie evidence that
9 there's ... something there. If that doesn't happen the
10 alternative is not to go to trial because for one thing if
11 we go to trial the standard is higher, not lower. Here I'm
12 looking for what we call a prima facie, just some evidence.
13 If we go to trial you've got to show better than fifty
14 percent, in other words, a preponderance of the evidence.
15 So it's actually a higher standard if we go to trial[.]

16 So at this point the case will basically be dismissed

17 because I just, based on what's before me, I just can't find
18 - - I can't make a finding of fraud, even given the
19 relatively low threshold here.

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

21 Appellants filed their notice of appeal on May 9, 2005,
22 before entry of the orders denying the motion for default
23 judgment (May 31, 2005) and dismissing the adversary proceeding
24 (June 3, 2005), and amended the notice of appeal on June 17,
25 2005.

26 JURISDICTION

27 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
28 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.

1 2. Whether the court erred by dismissing the complaint.

2
3 STANDARD OF REVIEW

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

11
12 DISCUSSION

13 The order denying the motion for default judgment merged
14 into the dismissal order and, thus, may be challenged upon appeal
15 from the dismissal order. Baldwin v. Redwood City, 540 F.2d 1360
16 (9th Cir. 1976). Hence, we review both orders.

17
18 I

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

22 The court has wide discretion in determining whether to
23 enter default judgment pursuant to Rule 55. Villegas, 132 B.R.
24 742, 746 (9th Cir. 1991); see 10 C. WRIGHT, A. MILLER & M. KANE,
25 FEDERAL PRACTICE AND PROCEDURE CIVIL 2D § 2685 (1983). Likewise, a
26 trial court has broad discretion as to the nature of the hearing
27 that it will hold pursuant to Rule 55(b)(2) in determining
28 whether to enter default judgment. Id. This provides the trial

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

4 The factors to be considered for entry of default judgment
5 include: (1) the possibility of prejudice to the plaintiff; (2)
6 the merits of plaintiff's substantive claim; (3) the sufficiency
7 of the complaint; (4) the sum of money at stake in the action;
8 (5) the possibility of a dispute concerning material facts; (6)
9 whether the default was due to excusable neglect; and (7) the
10 strong policy underlying the Federal Rules of Civil Procedure
11 favoring decisions on the merits. Villegas, 132 B.R. at 746,
12 citing Eitel v. McCool, 782 F.2d 1470, 1471-2 (9th Cir. 1986).

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

23
24 II

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

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

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

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

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

28

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

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

11
12 CONCLUSION

13 For the foregoing reasons, we AFFIRM.
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