

MAR 15 2006

**HAROLD S. MARENUS, CLERK
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NOT FOR PUBLICATION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-05-1137-KPaJ
)		
LINDA A. DELPIT,)	Bk. No.	RS 03-16642-DN
)		
Debtor.)	Adv. No.	RS 03-01503-DN
)		
LINDA A. DELPIT,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
LEONARD ALLENSTEIN; ALLDELP)		
RESTAURANTS; ROBERT WHITMORE,)		
Trustee; ALLDELP PROPERTIES,)		
)		
Appellees.)		

Argued and Submitted on February 23, 2006
at Pasadena, California

Filed - March 15, 2006

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

Honorable DAVID N. NAUGLE, Bankruptcy Judge, Presiding.

Before: KLEIN, PAPPAS, JAROSLOVSKY,** 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.

**Hon. Alan Jaroslovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

1 Bank statements and cancelled checks were sent directly from
2 the bank to Delpit. After examining them, she would forward them
3 to Robert for filing.

4 In July 2000, both Alldelp and Shondi purchased their food
5 products from Ameriserve. For payment of food products received
6 by Alldelp, Robert issued a check payable to Ameriserve for
7 \$38,250.18, using Delpit's signature stamp. The check to
8 Ameriserve, uncharacteristically, was sent directly to Delpit.

9 When Delpit received the check, she added "/Burger King" on
10 the payee line of the check to Ameriserve. The check was then
11 deposited into the Shondi bank account.

12 The \$38,250.18 was not forwarded to Ameriserve for Alldelp's
13 account, which still owed that sum to Ameriserve as of July 2000.

14 Ameriserve's successor, MBM, subsequently sued Alldelp for
15 past due amounts owing, which included the \$38,250.18
16 ("Ameriserve lawsuit"). When confronted by Allenstein about the
17 debt to Ameriserve, Delpit responded that she had paid the
18 \$38,250.18 to Ameriserve.

19 Allenstein subsequently received a copy of the cancelled
20 check and discovered that it had been altered and deposited into
21 the Shondi bank account.

22 The Ameriserve lawsuit was resolved when Allenstein
23 personally provided funds that were used to pay the debt owed to
24 MBM. Delpit did not reimburse Allenstein the \$38,250.18.

25 Delpit filed a voluntary petition under chapter 7 on April
26 30, 2003.

27 On August 1, 2003, Allenstein filed a nondischargeability
28 adversary proceeding in Delpit's chapter 7 bankruptcy under 11

1 U.S.C. §§ 523(a)(2), (a)(4) and (a)(6), regarding \$158,787.90
2 that Allenstein alleged was owed to him by Delpit. The complaint
3 alleged that Delpit, without Allenstein's permission, consent, or
4 knowledge, used partnership funds to pay for her own personal
5 expenses and those of her other business operated by Shondi.

6 A Joint Status Report was filed before an October 23, 2003,
7 status conference. In the report, Allenstein stated an
8 expectation of completing his discovery in January 2004; Delpit
9 expected to complete discovery in February 2004 and noted that
10 she planned a "Deposition of Plaintiff Early Dec. 2003" and also
11 planned to take depositions of 18 other persons.

12 Allenstein took Delpit's deposition on October 30, 2003. It
13 does not appear that Delpit took any depositions.

14 Allenstein filed a motion for partial summary judgment on
15 December 24, 2003, seeking determination that the \$38,250.18
16 check had been wrongfully diverted or embezzled by Delpit and
17 constituted a nondischargeable debt under §§ 523(a)(2), (a)(4),
18 and (a)(6).¹ The motion was supported by affidavits, deposition
19 testimony, and related papers.

20 The motion was heard on January 27, 2004, and decided on
21 February 23, 2004, when the bankruptcy court signed a proposed
22 Statement of Decision prepared by Allenstein's counsel.

23 The bankruptcy court granted Allenstein's summary judgment
24 motion on the premise that there was no genuine issue of material
25

26 ¹The motion was entitled "Motion For Partial Summary
27 Adjudication." Since the term of art "summary adjudication" does
28 not apply in federal civil practice, we use the appropriate
federal procedural term, "Summary Judgment." Fed. R. Civ. P. 56,
incorporated by Fed. R. Bankr. P. 7056.

1 fact and that, as a matter of law, Allenstein was entitled to a
2 determination that Delpit's acts of altering the \$38,250.18 check
3 to Ameriserve and depositing it into the Shondi bank account,
4 then using the money for her own personal use constituted
5 "embezzlement, fraud, and defalcation on a partner and
6 partnership of which the debtor was a fiduciary."

7 The bankruptcy court awarded Allenstein \$43,467.50,
8 including interest and costs, and, apparently at Allenstein's
9 request, dismissed all other causes of action in the complaint
10 without prejudice. The judgment was entered February 23, 2004.

11 Thereafter, Delpit appealed the order granting partial
12 summary judgment to the Bankruptcy Appellate Panel ("BAP"). On
13 December 3, 2004, the BAP entered an order modifying and
14 affirming the summary judgment.

15 The last paragraph of the memorandum disposition provided:

16 Delpit also contends that she has uncovered information
17 that she thinks supports an inference that Allenstein
18 doctored evidence or engineered and presented knowingly
19 false affidavits in support of his summary judgment
20 motion.

21 Although she emphasized these points with passion at
22 oral argument, the information was not presented to the
23 bankruptcy court and cannot be considered by us at this
24 time.

25 The appropriate procedure would be for her to file a
26 motion for relief from the judgment in the bankruptcy
27 court under Federal Rule of Civil Procedure 60(b)
28 pursuant to which the information alleged about
29 Allenstein's supposed fraud on the court is presented
30 to that court. Any final resolution of such a motion
31 would be subject to appellate review.

32 Two months after the BAP issued the memorandum disposition,
33 on February 7, 2005, the debtor filed a motion for relief from
34 judgment under Federal Rule of Civil Procedure 60(b).

1 Specifically, her motion requested relief under Rule
2 60(b)(2), (3), (6) and "60(b) Subsection D (new)",² further
3 requesting relief and damages.

4 For the most part, Delpit's motion for relief from judgment
5 was difficult to understand, and primarily consisted of a
6 recitation of the underlying facts according to her version of
7 the truth. Delpit contended that she would show newly discovered
8 evidence, fraud, misconduct, willful withholding of documentation
9 and exhibits, fabricated testimony, doctored evidence, and false
10 affidavits.

11 Delpit attached twenty-nine exhibits to her motion for
12 relief from judgment. It is not entirely clear which of the
13 exhibits she believed were "newly discovered evidence" and which
14 ones overlapped with previously submitted evidence. It does
15 appear that she allegedly received some of the "newly discovered
16 evidence" from her former husband Robert.

17 Delpit contended that part of the newly discovered evidence
18 included checks and wire transfers that were allegedly in
19 Allenstein's possession. Delpit alleged that the evidence proved
20 that she repaid the disputed funds to Alldelp Restaurants and
21 that the evidence contradicted Allenstein's testimony that he was
22 not in the possession of said evidence.

23 Additionally, the "newly discovered evidence" included
24 several declarations that were faxed by Allenstein's attorney to
25 her former husband Robert (Alldelp's bookkeeper). Delpit
26 characterized these declarations as "three complete copies of
27

28 ²It appears Delpit intended to cite 11 U.S.C. § 523(d).

1 falsified testimony written, fabricated and engineered by the
2 Plaintiff and produced by his counsel to the bookkeeper.”

3 These declarations were faxed to Robert for his signature by
4 Allenstein’s attorney. Because Robert allegedly requested
5 certain changes, several versions were faxed to him incorporating
6 his revisions. Robert never signed the declarations.

7 According to Delpit, these declarations demonstrate that
8 although Allenstein knew the accurate facts, he wanted Robert to
9 testify otherwise, and even paid him a “corporate expense to buy
10 perjured testimony.” When Robert refused to cooperate, he did
11 not get paid. Delpit allegedly learned of these facts after the
12 court granted the motion for partial summary judgment.

13 Delpit further contended that other “newly discovered
14 evidence” included check stubs and checks from the Alldelp
15 account written by Allenstein and his son. Delpit alleged that
16 this evidence was significant because Allenstein purportedly
17 testified that the checks were written by Robert and “were
18 handled in a precise fashion without fluctuation.” Thus, the
19 debtor contended this showed Allenstein’s “fictional testimony.”

20 The remainder of Delpit’s motion consisted of allegations of
21 fraud which included Allenstein’s fabrication of testimony and
22 doctored evidence previously filed with the court.

23 On the same day the debtor filed her motion for relief from
24 judgment, she filed a motion requesting production of documents
25 and subpoena.

26 Alenstein filed an opposition on February 22, 2005.

27 The court held a hearing on Delpit’s motion for relief from
28 judgment on March 7, 2005. At the hearing, on three separate

1 occasions, the court asked her what the newly discovered evidence
2 was and why she could not have had discovery when the case was
3 pending.

4 THE COURT: He [Robert Delpit] has the books. Why can't
5 you have discovery of the books at the time the case is
6 pending?

7 MS. DELPIT-TERBEEK: I did. I, I got everything from
8 Robert Delpit that he had.

9 THE COURT: So then, so then what's newly discovered
10 evidence here?

11 MS. DELPIT-TERBEEK: This came out of the tax boxes that
12 Robert Delpit sent to me.

13 THE COURT: Okay. So this, this famous mysterious
14 bookkeeper who did or did not sign the declarations
15 that were prepared isn't some stranger to you, it's
16 your former husband, right?

17 MS. DELPIT-TERBEEK: Correct.

18 Tr. of Oral Ruling, at p. 8-9.

19 Ultimately, on March 18, 2005, the court entered an order
20 denying the debtor's motion for relief from judgment and denying
21 her request for production of documents and subpoena.

22 The court denied the motion for the following 10 reasons:

23 1. The motion for relief from judgment is untimely.
24 Under FRBP, Rule 7060(b) a motion for relief from judgment based
25 on purported newly acquired evidence must be made within a
26 reasonable time but no more than one year after the order the
27 moving party seeks relief from. Partial Summary Adjudication was
28 ordered by this Court on January 27, 2004. The Motion for Relief
from Judgment was not filed until February 7, 2005, which exceeds
the one year limit.

2. Partial summary judgment was properly granted. The
undisputed evidence showed that Allenstein and Delpit were
partners in a business that operated a Burger King Franchise. On
or about July 17, 2000, Defendant Delpit knowingly altered a
check in the amount of \$38,250.18 that was drawn on the
partnership's account to pay for inventory. She redirected the
altered check to a separate corporation she was the shareholder
of. She then removed the money from the corporate account for
her personal use, and later tried to cover up the misconduct,
admitted it, or claimed no knowledge or memory of it.

1 3. There is no evidence that an unsigned declaration
2 prepared for Robert Delpit, the company's bookkeeper, was
3 fabricated. The declaration of David Gurnick evidences that Mr.
4 Gurnick accurately prepared a declaration based on an interview
5 with Mr. Delpit and Mr. Delpit then refused to sign it. The
6 unsigned declaration was never submitted to the Court in support
7 of the partial summary judgment. The ruling on the partial
8 summary judgment was in no way impacted by the unsigned and
9 unsubmitted declaration.

10 4. Plaintiffs were entitled to dismiss the remaining claims
11 after partial summary judgment was granted by this Court on the
12 \$38,250 check she misappropriated. Dismissal of the other claims
13 in no way admitted anything about their merit.

14 5. Defendant Delpit fails to explain what evidence she now
15 has or seeks that would exonerate her; and fails to explain why
16 it was unavailable to her before. The undisputed evidence
17 clearly showed Ms. Delpit misappropriated \$38,250 and deposited
18 the funds into a bank account of another company she owned. She
19 did this by adding "/Burger King" to the payee line of the check
20 and depositing the check (intended for the company's food
21 supplier) into the Shondi Corporation bank account. In her
22 opposition to the partial summary judgment motion (filed in
23 January 2004), Ms. Delpit did not raise the issue of needing
24 additional discovery. During the adversary proceeding, Defendant
25 Delpit told the Court she would conduct discovery. However, she
26 never noticed any deposition or served any written discovery.
27 Ms. Delpit fails to provide any evidence that she was denied an
28 opportunity to conduct discovery.

1 6. In the March 7, 2005 hearing, Ms. Delpit conceded that
2 during the adversary proceeding she could have obtained from
3 Robert Delpit the information she now submits. She fails to
4 explain why she waited over a year after partial summary judgment
5 to gather evidence from Robert Delpit. She also fails to say
6 what discovery she would have conducted and how that discovery
7 would have affected the result of the partial summary judgment
8 motion. Even the belated submission by Ms. Delpit has not shown
9 this court any evidence tending to contradict the undisputed fact
10 that she altered and redirected the check and misappropriated the
11 funds.

12 7. Defendant was not prejudiced by litigating in pro per.
13 A litigant in pro per is not entitled to special deference but in
14 this action, Ms. Delpit has received deference anyway. She had
15 made submissions that lack explanation and are not in proper
16 form, and would not be acceptable from a member of the Bar, such
17 as serving discovery request even though the case was concluded.
18 Yet these submissions have been considered by the Court. She
19 conducted herself during oral argument in a manner that would not
20 be appropriate for a member of the bar. Yet this too was
21 tolerated by the Court.

1 8. Defendant fails to present newly acquired evidence that
2 could change the result of the partial summary judgment. Nothing
3 in the new submission indicates these papers were unavailable to
4 her before, and nothing in them, even had they been submitted
5 earlier, would provide a basis for any different result in this
6 matter.

7 9. This case was previously concluded. Defendant cannot
8 request discovery after the case is over. The Court granted
9 partial summary judgment in favor of Plaintiff, judgment was
10 awarded to Plaintiffs and the case was concluded over a year ago,
11 in early 2004.

12 10. The undisputed facts are that Ms. Delpit changed the
13 payee name on a check, and then redirected the check to another
14 account she controlled. She misappropriated and embezzled
15 \$38,250, and committed a breach of fiduciary duty to the
16 partnership and to her partner. Partial summary judgment was and
17 remains proper.

18 This timely appeal ensued.

19 JURISDICTION

20 The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334
21 and 157(b). We have jurisdiction under 28 U.S.C. § 158(a)(1).

22 ISSUE

23 Whether the bankruptcy court erred when it denied the
24 debtor's motion for relief under Federal Rule of Civil Procedure
25 60(b).

26 STANDARD OF VIEW

27 Bankruptcy court decisions regarding relief pursuant to
28 Federal Rule of Civil Procedure 60 are reviewed for abuse of
discretion. Morris v. Peralta (In re Peralta), 317 B.R. 381, 384
(9th Cir. BAP 2004).

1 DISCUSSION

2 Although the court's order denied both Delpit's motion for
3 relief from judgment and her request for production of documents
4 and subpoena, it appears from Delpit's opening brief that she is
5 only appealing the denial of the relief from judgment.

6 Delpit's brief, in part, mirrors her motion for relief from
7 judgment under Rule 60(b). Delpit elevates the BAP's previous
8 assertion that a relief from judgment motion was the appropriate
9 procedure to an instruction that she file such motion.

10 The first five pages of Delpit's brief criticize the
11 bankruptcy court's procedure; the next three quote the previously
12 issued memorandum disposition; and the next eight pages recount
13 her version of the facts. The brief is followed by a list of 29
14 exhibits. It appears that these are the same exhibits that
15 Delpit filed in support of her motion for relief from judgment.

16
17 I

18 The question of whether Rule 60(b) relief should be afforded
19 entails an exercise of discretion by the bankruptcy court that we
20 can set aside only if the court did not apply a correct legal
21 standard or if it rested its decision on a clearly erroneous
22 finding of material fact and we are persuaded that there was a
23 clear error of judgment. Peralta, 317 B.R. at 387-88. Here, the
24 question is whether the court abused its discretion by declining
25 to act under Rule 60(b).

26 Federal Rule of Civil Procedure 60(b) provides, in pertinent
27 part:

28 (b) Mistakes; Inadvertence; Excusable Neglect; Newly
Discovered Evidence; Fraud, Etc. On motion and upon such

1 terms as are just, the court may relieve a party or a
2 party's legal representative from a final judgment, order,
3 or proceeding for the following reasons: (1) mistake,
4 inadvertence, surprise, or excusable neglect; (2) newly
5 discovered evidence which by due diligence could not have
6 been discovered in time to move for a new trial under Rule
7 59(b); (3) fraud (whether heretofore denominated intrinsic
8 or extrinsic), misrepresentation, or other misconduct of an
9 adverse party; (4) the judgment is void; (5) the judgment
10 has been satisfied, released, or discharged, or a prior
11 judgment upon which it is based has been reversed or
12 otherwise vacated, or it is no longer equitable that the
13 judgment should have prospective application; or (6) any
14 other reason justifying relief from the operation of the
15 judgment. The motion shall be made within a reasonable time,
16 and for reasons (1), (2), and (3) not more than one year
17 after the judgment, order, or proceeding was entered or
18 taken. A motion under this subdivision (b) does not affect
19 the finality of a judgment or suspend its operation.

20 Fed. R. Civ. P. 60(b).

21 The bankruptcy court concluded that the motion was untimely
22 under Rule 60(b)(1), (2) or (3), which motions must be brought
23 within one year. Fed. R. Civ. P. 60(b); Lake v. Capps (In re
24 Lake), 202 B.R. 751, 758 (9th Cir. BAP 1996). The order stated
25 that the motion was untimely because the partial summary
26 adjudication "was ordered by this Court on January 27, 2004. The
27 Motion for Relief From Judgment was not filed until February 7,
28 2005, which exceeds the one year limit."

The motion, however, is timely. On January 27, 2004, the
court held a hearing on Allenstein's motion for partial summary
judgment and entered findings of fact and conclusions of law on
that same day. The judgment, however, was not entered until
February 23, 2004. Using February 23, 2004 as the measuring
date, Delpit's motion for relief from judgment is timely, as it
was filed within one year on February 7, 2005.

Because the court ultimately denied the motion on the
merits, any error regarding the timeliness issue is harmless.

1 II

2 The court addressed the merits of the motion, and ruled that
3 the debtor did not explain what evidence she had that would
4 exonerate her nor did she present any newly discovered evidence
5 that could change the result of the partial summary judgment. As
6 to her former husband's unsigned declaration, the court
7 emphasized that it was never presented to the court and that the
8 "ruling on the partial summary judgment was in no way impacted by
9 the unsigned and unsubmitted declaration."

10 The court was persuaded that nothing in the new submission
11 indicated that the papers "were unavailable to her before, and
12 nothing in them, even had they been submitted earlier, would
13 provide a basis for any different result in the matter."
14 Moreover, the court ruled that the undisputed facts were that the
15 debtor "changed the payee name on a check, and then redirected
16 the check to another account she controlled. She misappropriated
17 and embezzled \$38,250, and committed a breach of fiduciary duty
18 to the partnership and to her partner."

19 We cannot say that the court abused its discretion under
20 these circumstances.³

21
22 ³We are also persuaded that there are no extraordinary
23 circumstances within the province of 60(b)(6). The Rule 60(b)(6)
24 catchall provision is used sparingly as an equitable remedy to
25 prevent manifest injustice and should be utilized only where
26 extraordinary circumstances prevented a party from taking timely
27 action to prevent or correct an erroneous judgment. United
28 States v. State of Washington, 394 F.3d 1152, 1157 (9th Cir.
2005). As such, under Rule 60(b)(6), a party seeking to reopen a
case must demonstrate both injury and circumstances beyond his
control that prevented him from proceeding with the prosecution
or defense of the action in a proper fashion. Id.

Delpit has not presented any extraordinary circumstances
that prevented her from taking timely action to prevent or

(continued...)

1 CONCLUSION

2 For the foregoing reasons, we AFFIRM.

3
4
5 JAROSLOVSKY, Bankruptcy Judge, concurring:

6
7 I agree with the analysis and conclusions of my brethren. I
8 write separately only because the passion with which Ms. Delpit
9 argued her case compels me to attempt some further explanation.

10 I begin by noting that an appellate court cannot consider
11 the passion of a litigant in rendering a decision for two very
12 sound reasons. First, if it was proper for passion to sway the
13 court then the prevailing party might be the best actor rather
14 than the most deserving. Second, the capacity of a human being
15 for self-deception appears to be essentially limitless, so even
16 heartfelt passion is no measure of a sound case. For these
17 reasons, appellate courts are bound by a strict set of rules
18 which excludes their ability to consider the passion with which
19 cases are presented to them.

20 As we are only human, our ability to dispense justice is
21 limited. The best we can do is recognize that we are human, that
22 we have both known and unrecognized biases based on our
23 background, upbringing and life experiences, and that we can come

24
25 ³(...continued)
26 correct the erroneous judgment. United States, 394 F.3d at 1157.
27 She conceded at oral argument that her former husband was in
28 possession of the allegedly new evidence and that he gave her
said evidence while the case was pending. Although she claims
she did not have access to the bank accounts during that time,
she offers no explanation why she chose not to utilize discovery
during the pertinent time to obtain any other desired documents.

1 closest to justice only by following a set of rules which are
2 applied evenly to all litigants. A litigant's best hope for
3 justice in the abstract is the zealous representation of a
4 competent lawyer. Ms. Delpit has been either unable or unwilling
5 to avail herself of such representation.

6 In this case, the bankruptcy court heard Ms. Delpit out and
7 considered her case thoughtfully. Our role is limited to making
8 sure that the bankruptcy court got the law right and, where a
9 judgment call was needed, there was some basis for the court's
10 decision. We are not otherwise permitted to substitute our
11 judgment for that of the bankruptcy court. While these
12 constraints may not result in abstract justice in every case,
13 they result in as much justice as an appellate court is capable
14 of dispensing.

15 As my brothers have noted, the bankruptcy court did make
16 a mistake in finding that Ms. Delpit's motion was time-barred; if
17 this had been the only basis for the court's ruling, we would be
18 required to send the case back for a ruling on the merits of the
19 motion. However, the bankruptcy court went further than merely
20 ruling on timeliness. It went on to discuss the merits of the
21 motion in detail. Whether or not the parties realize this, the
22 court rendered a service to them all by doing so. It saved them
23 considerable time and expense in having to return for further
24 argument and then perhaps return to an appellate court yet again.

25 The law which governs this appeal does not permit us to make
26 our own determination as to the guilt or innocence of Ms. Delpit.
27 We may only determine if the bankruptcy court had a satisfactory
28 basis for its conclusion that the extraordinary remedy of

1 reopening a case which had already been decided was not
2 appropriate in this case. The bankruptcy court's thorough ruling
3 appears sound. We are therefore required to affirm it.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28