

**APR 07 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**NOT FOR PUBLICATION**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**

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| In re:                  | ) | BAP No.  | CC-05-1339-PaKMa |
| JAVIER VALDORINOS RUIZ, | ) | Bk. No.  | RS 04-23456-PC   |
|                         | ) | Adv. No. | RS 05-01048-PC   |
| Debtor,                 | ) |          |                  |
| _____                   | ) |          |                  |
| JAVIER VALDORINOS RUIZ, | ) |          |                  |
|                         | ) |          |                  |
| Appellant,              | ) |          |                  |
| v.                      | ) |          |                  |
| NIDIA C. LOERA,         | ) |          |                  |
|                         | ) |          |                  |
| Appellee.               | ) |          |                  |
| _____                   | ) |          |                  |

**M E M O R A N D U M<sup>1</sup>**

Submitted Without Argument on March 23, 2006<sup>2</sup>

Filed - April 7, 2006

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

Honorable Peter H. Carroll, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: PAPPAS, KLEIN AND MARLAR, Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> Neither Appellant nor Appellee appeared at the time set for oral argument. The appeal was therefore deemed submitted without argument on the briefs.

1 Appellant Javier Valdorinos Ruiz ("Ruiz"), a chapter 7  
2 debtor, appeals a final order of the bankruptcy court denying his  
3 motion for relief from a default judgment in an adversary  
4 proceeding declaring his debt to Appellee Nidia C. Loera ("Loera")  
5 excepted from discharge under 11 U.S.C. § 523(a)(15).<sup>3</sup> The  
6 bankruptcy court determined that the default judgment was not void  
7 for improper service, that Ruiz's culpable conduct was the cause  
8 of the default and that Ruiz did not show he had a meritorious  
9 defense to the action if the default judgment were to be set  
10 aside. We AFFIRM.

### 11 **FACTS**

12 The material facts are generally undisputed.

13 Ruiz filed for relief under chapter 7 of the Bankruptcy Code  
14 on December 16, 2004. In his petition, Ruiz indicated his address  
15 was 1019 S. Belle Ave., Corona, CA 92882 (the "South Belle"  
16 address). He was represented by attorney Alejo Lugo ("Lugo"), who  
17 indicated that his office address was 42145 Lyndie Lane, Suite  
18 106, Temecula, CA 92591 (the "Lyndie Lane" address).

19 Loera filed an adversary proceeding on February 15, 2005,  
20 against Ruiz to determine the dischargeability of a debt he owed  
21 to her under § 523(a)(15). On February 18, 2005, a copy of the  
22 adversary complaint and a summons were mailed to both Ruiz and  
23 Lugo<sup>4</sup> at the addresses they listed in Ruiz's bankruptcy petition.

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25 <sup>3</sup> Unless otherwise indicated, all chapter, section, and  
26 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
27 1330 and to the Federal Rules of Bankruptcy Procedure, Rules  
28 1001-9036, in effect prior to the effective date of the Bankruptcy  
Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"),  
Pub.L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

<sup>4</sup> Lugo's Rule 2016(b) disclosure of compensation filed in  
the bankruptcy case expressly excluded representation of Ruiz in  
any dischargeability action.

1 Ruiz did not file an answer or other response to the complaint by  
2 April 15, 2005, the deadline set in the summons.

3 On April 25, 2005, Loera filed a request for entry of default  
4 under FED. R. CIV. P. 55(a), made applicable in bankruptcy  
5 proceedings by Rule 7055. A copy of this request was also served  
6 by mail on both Ruiz and Lugo at the South Belle and Lyndie Lane  
7 addresses, respectively. The clerk entered the default on April  
8 27, 2005. On May 6, 2005, Loera filed a motion for default  
9 judgment and again served Ruiz and Lugo by mail at the South Belle  
10 and Lyndie Lane addresses.

11 The bankruptcy court conducted a status conference in the  
12 adversary proceeding on May 26, 2005, at which Loera's counsel and  
13 Ruiz, individually, appeared. The court advised Loera's counsel  
14 that the motion was deficient in that it lacked the appropriate  
15 supporting declarations, while Ruiz was told by the bankruptcy  
16 judge to "seek the advice of counsel immediately so that he could  
17 take appropriate steps to protect his rights in the adversary  
18 proceeding." Ruiz did not file a response to the adversary  
19 complaint, even after this warning.

20 Loera supplemented the record with the required declarations  
21 on June 9, 2005, serving them by mail on Ruiz at his South Belle  
22 address. Thereafter, on June 21, 2005, the bankruptcy court  
23 entered an order granting Loera's motion, and entered a default  
24 judgment against Ruiz declaring his debt to Loera excepted from  
25 discharge.

26 Ruiz's motion for relief from the default judgment was filed  
27 the following day, June 22, 2005, by his new counsel, Moises A.  
28 Aviles. In this motion, Ruiz did not dispute that all of Loera's

1 pleadings had been mailed to the South Belle address. Instead,  
2 Ruiz represented that he had not lived at that address since  
3 October 2004, and had been caring for his terminally ill wife.  
4 Although he stated in his declaration accompanying his motion for  
5 relief that he had moved from the South Belle address on December  
6 24, 2004, Ruiz had never informed the bankruptcy court of his new  
7 address during the pendency of either his bankruptcy case or the  
8 adversary proceeding. Lugo had informed Ruiz of the pending  
9 adversary proceeding some time prior to the May 26, 2005, status  
10 conference, and Ruiz acknowledged that the bankruptcy court had  
11 advised him at that conference to seek legal advice.

12 At the hearing on the motion for relief from judgment  
13 conducted on July 28, 2005, the bankruptcy court rejected Ruiz's  
14 contention that he had not been properly served. The court found  
15 that Ruiz did not deny that, as late as the January 20, 2005,  
16 meeting of creditors, he had reaffirmed that the South Belle  
17 address was his correct street and mailing address, and that all  
18 subsequent notices in his bankruptcy case were mailed there,  
19 including the notice of discharge entered on March 29, 2005. The  
20 bankruptcy court noted that the Rules impose a duty upon a debtor  
21 to inform the court of any change of address during the bankruptcy  
22 case.<sup>5</sup> Because Ruiz never notified the clerk about his alleged  
23 change of address, the bankruptcy court concluded that under Rule

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26 <sup>5</sup> The hearing transcript indicates that the bankruptcy judge  
27 cited Rule "4025." Tr. of Hearing (July 28, 2005) at 11. The  
28 Panel assumes this was either an inadvertent mistake by the judge,  
or possibly a transcription error. The provision requiring a  
debtor to file a statement of any change of address is Rule  
4002(5); there is no Rule 4025.

1 7004(b) (9), which allows service upon the debtor by mail,<sup>6</sup> Ruiz  
2 had been properly served at the address he had listed in his  
3 petition.

4 The bankruptcy court next discussed the three-part test of  
5 Franchise Holding II, LLC v. Huntington Restaurants Group Inc.,  
6 375 F.3d 922 (9th Cir. 2004), cert. denied, 125 S.Ct. 1704 (2005),  
7 applicable to motions for relief from default judgments under FED.  
8 R. Civ. P. 60(b). The court found that Ruiz had engaged in  
9 culpable conduct that led to the default. The court also  
10 concluded that Ruiz had not shown he had a meritorious defense to  
11 the complaint if the default judgment were to be set aside, in  
12 that he failed to offer any specific facts beyond a general denial  
13 of the allegations in the complaint. The bankruptcy court did not  
14 consider whether forcing Loera to litigate on the merits would be  
15 prejudicial, the third factor in the case law.

16 The bankruptcy court entered its order denying Ruiz's motion  
17 for relief from the default judgment on August 1, 2005. This  
18 timely appeal followed on August 11, 2005.

#### 19 JURISDICTION

20 The bankruptcy court had jurisdiction pursuant to  
21 28 U.S.C. § 1334 and § 157(b). This Panel has jurisdiction under  
22 28 U.S.C. §§ 158(a) (1) and (b) (1).

23 <sup>6</sup> Rule 7004(b) provides that:

24 [S]ervice may be made within the United States by first  
25 class mail postage prepaid as follows: . . .

26 (9) Upon the debtor, after a petition has been  
27 filed by or served upon th debtor and until the case is  
28 dismissed or closed, by mailing a copy of the summons  
and complaint to the debtor at the address shown in the  
petition or statement of affairs or to such other  
address as the debtor may designate in a filed writing  
and, if the debtor is represented by an attorney, to the  
attorney at the attorney's post office address.

1 **ISSUES**

2 1. Whether the bankruptcy court erred in deciding that the  
3 default judgment was not void for lack of proper service.

4 2. Whether the bankruptcy court abused its discretion in  
5 deciding that Ruiz's culpable conduct was the cause of the  
6 default, and that Ruiz did not show he had a meritorious defense  
7 if the default judgment were to be set aside.<sup>7</sup>

8 **STANDARD OF REVIEW**

9 Whether a judgment is void for purposes of FED. R. CIV. P.  
10 60(b)(4) is a question of law reviewed de novo. See Virtual  
11 Vision, Inc. v. Praegitzer Indus., Inc., 124 F.3d 1140, 1143 (9th  
12 Cir. 1997); Cossio v. Cate (In re Cossio), 163 B.R. 150, 154 (9th  
13 Cir. BAP 1994), aff'd, 56 F.3d 70 (9th Cir. 1995). The factual  
14 circumstances surrounding service of process are reviewed under  
15 the clearly erroneous standard. FED R. BANKR. P. 8013; Cossio, 163  
16 B.R. at 154. A trial court's decision whether to grant relief  
17 under FED. R. CIV. P. 60(b)(1) is reviewed for an abuse of

18 <sup>7</sup> Motions for relief from a judgment or order are authorized  
19 by FED. R. BANKR. P. 9024, which in turn incorporates the provisions  
20 of FED. R. CIV. P. 60(b). In the bankruptcy court, Ruiz cited to  
21 FED. R. CIV. P. 60(b)(6), but his arguments both to the bankruptcy  
22 judge and in this appeal are based upon what he describes as  
23 "excusable neglect," which constitutes grounds for relief under  
24 FED. R. CIV. P. 60(b)(1). The Rule 60(b)(6) catchall provision,  
25 which allows relief from a judgment for "other reasons," is used  
26 sparingly as an equitable remedy to prevent manifest injustice and  
27 should be utilized only where extraordinary circumstances  
28 prevented a party from taking timely action to prevent or correct  
an erroneous judgment. U.S. v. Washington, 394 F.3d 1152, 1157  
(9th Cir. 2005). As such, under Rule 60(b)(6), a party seeking  
relief from a judgment 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. Further, Rule 60(b)(6) is not a substitute  
for FED. R. CIV. P. 60(b)(1). U.S. v. Alpine Land & Reservoir Co.,  
984 F.2d 1047, 1050 (9th Cir. 1993). Ruiz has not attempted to  
make the showing required under Rule 60(b)(6), and consequently,  
the Panel construes Ruiz's request for relief based upon excusable  
neglect under FED. R. CIV. P. 60(b)(1).

1 discretion. Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1223  
2 (9th Cir. 2000).

### 3 **DISCUSSION**

#### 4 1. The Judgment Was Not Void.

5 Ruiz asserts he did not receive the summons and complaint,  
6 served in this case by first-class mail, and therefore the service  
7 was ineffective and the resulting default judgment void. He  
8 argues that his attorney is to blame for not submitting notice of  
9 his change of address to the bankruptcy court.

10 As noted previously, Rule 7004(b) (9) provides that service of  
11 process in an adversary proceeding may be made upon a debtor by  
12 mailing a copy of the summons and complaint to the debtor "at the  
13 address shown in the petition or statement of affairs or to such  
14 other address as the debtor may designate in a filed writing and,  
15 if the debtor is represented by an attorney, to the attorney at  
16 the attorney's post-office address." Service of process in  
17 accordance with Rule 7004(b) is effective to establish personal  
18 jurisdiction over a defendant. Morris Motors v. Peralta (In re  
19 Peralta), 317 B.R. 381, 386 (9th Cir. BAP 2004). This form of  
20 service has withstood constitutional challenge. Cossio, 163 B.R.  
21 at 156 (citing Matter of Park Nursing Ctr., Inc., 766 F.2d 261  
22 (6th Cir. 1985)); see also, Greene v. Lindsey, 456 U.S. 444, 455  
23 (1982) (holding that notice by mail may reasonably be relied upon  
24 to provide interested persons with actual notice of judicial  
25 proceedings). Although a plaintiff bears the burden of proof on  
26 the issue of personal jurisdiction, "[t]he mailing of a properly  
27 addressed and stamped item creates a rebuttable presumption that  
28 the addressee received it." Peralta, 317 B.R. at 386 (citing

1 Moody v. Bucknum (In re Bucknum), 951 F.2d 204, 207 (9th Cir.  
2 1991)). A certificate of mailing raises the presumption that the  
3 documents sent were properly mailed and received. Id.  
4 Importantly, however, Rule 7004(b)(9) "does not require actual  
5 receipt by the person being served." Cossio, 163 B.R. at 154.

6 The facts here are similar to those in Cossio, in which the  
7 Panel concluded that service was effective under Rule 7004(b)(9)  
8 when it was the debtor's attorney who failed to notify the  
9 bankruptcy court of the attorney's change in address. The Panel  
10 noted that under the Rules, the debtor (and under Cossio, his  
11 attorney) has a duty to file a change of address with the  
12 bankruptcy court, and that the Rule "implicitly requires diligence  
13 to provide notice of the change to those who initially received  
14 it." Id. at 156. The primary purpose of Rule 7004 service by  
15 mail is to streamline bankruptcy practice and, therefore, parties  
16 should be entitled to rely upon the contact information provided  
17 by the debtor or his attorney during the course of the case. Id.

18 We adhere to the principle stated in Cossio that, unless the  
19 clerk is notified in a filed writing of a change of address by a  
20 debtor, adversaries do not have a duty to ascertain the debtor's  
21 current address. Id. at 156-57. Cf. Jorgenson v. State Line  
22 Hotel, Inc. (In re State Line Hotel, Inc.), 323 B.R 703, 714 (9th  
23 Cir. BAP 2005) (holding that where designation of receipt of notice  
24 is within the debtor's control, "creditors cannot reasonably be  
25 required to expend the effort and incur the expense of finding  
26 claimants" who could be anywhere).

27 In this case, Loera complied with Rule 7004(b)(9) by serving  
28 the summons and complaint by mail on Ruiz at the address listed in



1 his petition. A copy of the summons and complaint was also mailed  
2 to Ruiz's attorney of record, Lugo. Both Rule 7004(b)(9) and Rule  
3 4002(5) place the burden squarely upon the debtor to apprise the  
4 clerk of the bankruptcy court of any change of address. Loera had  
5 no other way of ascertaining that Ruiz had moved and, in the  
6 absence of a filed notice, she should be entitled to rely upon the  
7 address listed in Ruiz's petition.

8 Moreover, Ruiz had actual notice of the pendency of the  
9 adversary proceeding, having been informed about the action by his  
10 bankruptcy counsel, Lugo, in sufficient time to attend the May 26,  
11 2005, status conference. The bankruptcy court noted that Ruiz did  
12 not inform the court of his address change, either at the  
13 creditor's meeting or the status conference, leaving the South  
14 Belle address as his address of record until the case was closed  
15 on April 13, 2005.

16 Loera satisfied her burden of establishing that service of  
17 the summons and complaint was made in accordance with Rule  
18 7004(b)(9). Consequently, the bankruptcy court correctly decided  
19 that the default judgment is not void for lack of proper service.

20  
21 2. Ruiz's Culpable Conduct Led to the Entry of the Default  
22 Judgment, Ruiz Failed to Show a Meritorious Defense and,  
therefore, Defendant's Neglect Was Not Excusable.

23 The bankruptcy court may set aside a clerk's default "for  
24 good cause" under FED. R. BANKR. P. 7055 and FED. R. CIV. P. 55(c).  
25 The court may grant relief from a default judgment in accordance  
26 with FED. R. BANKR. P. 9024 and FED. R. CIV. P. 60(b). The "good  
27 cause" standard for vacating an entry of default is the same  
28 standard for vacating a default judgment under FED. R. CIV. P.

1 60(b). Franchise Holding, 375 F.3d at 927 (citing TCI Group Life  
2 Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001)).

3 Rule 60(b)(1) allows relief from a judgment or order when the  
4 moving party establishes "mistake, inadvertence, surprise or  
5 excusable neglect . . . ." In deciding whether to grant relief  
6 under this provision in the context of a default judgment, the  
7 trial court must examine three factors: (1) whether the  
8 defendant's culpable conduct led to the default, (2) whether the  
9 defendant had a meritorious defense or (3) whether reopening the  
10 default judgment would prejudice the plaintiff. Franchise  
11 Holding, 375 F.3d at 926; Peralta, 317 B.R. at 388; Hammer v.  
12 Drago (In re Hammer), 112 B.R. 341, 345 (9th Cir. BAP 1990),  
13 aff'd, 940 F.2d 524 (9th Cir. 1991). These factors are  
14 disjunctive, meaning that the bankruptcy court may properly deny  
15 the motion and refuse to grant relief if any one of the three  
16 factors are satisfied. Franchise Holding, 375 F.3d at 926.  
17 Because the bankruptcy court found that the first two factors did  
18 not favor vacating the judgment, it was not required to address  
19 the third factor of prejudice to Loera. As the moving party, Ruiz  
20 bears the burden of demonstrating that these factors favor  
21 vacating the default judgment. Knoebber, 244 F.3d at 696;  
22 Peralta, 317 B.R. at 388.

23 The concept of "culpability" for this purpose is consistent  
24 with the definition of "excusable neglect," and entails such  
25 considerations as "prejudice to the debtor, the length of the  
26 delay and its potential impact on judicial proceedings, the reason  
27 for the delay, including whether it was in the reasonable control  
28 of the movant, and whether the movant acted in good faith."

1 Peralta, 317 B.R. at 388 (quoting Pioneer Inv. Servs. Co. v.  
2 Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993)). See  
3 also Franchise Holding, 375 F.3d at 926 (explaining that the  
4 concept of excusable neglect overlaps with the issue of  
5 culpability, and that there is no reason to analyze these criteria  
6 separately). The concept of "excusable neglect" is an elastic  
7 one, equitable in nature, and there are no per se rules. Pincay  
8 v. Andrews, 389 F.3d 853, 854–59 (9th Cir. 2004) (en banc), cert.  
9 denied, 125 S.Ct. 1726 (2005).

10 In considering whether a movant has shown a potentially  
11 meritorious defense, the movant's factual assertions are accepted  
12 as true, but "mere legal conclusions, general denials, or simple  
13 assertions that the movant has a meritorious defense" are  
14 insufficient to justify upsetting the underlying judgment.  
15 Hammer, 112 B.R. at 345 (quoting In re Stone, 588 F.2d 1316, 1319  
16 (10th Cir. 1978)). See also Franchise Holding, 375 F.3d at 926  
17 (holding conclusory statements were insufficient to justify  
18 vacating a default judgment).

19 Measuring the facts in this case against these factors, we  
20 cannot say that the bankruptcy court abused its discretion in  
21 refusing to set aside the default judgment. By availing himself  
22 of the Bankruptcy Code's protections, Ruiz was obligated under the  
23 Rules to inform the court of any change of his address. Ruiz not  
24 only had within his control the ability to inform the court of his  
25 new address, but had several opportunities to do so: at the § 341  
26 meeting in January 2005; upon being informed by his attorney of  
27 the proceedings; and later, at the status conference held in May  
28 2005. He never did so. His address of record throughout the

1 adversary proceedings and the bankruptcy case remained the South  
2 Belle address. Loera, meanwhile, complied with Rule 7004(b)(9).  
3 Ruiz cannot shift the blame to his attorney under these facts,  
4 especially since Lugo informed Ruiz of the pendency of the  
5 adversary proceedings. For all these reasons, the bankruptcy  
6 court did not abuse its discretion in concluding that Ruiz's  
7 culpable conduct led to entry of the default and default judgment  
8 in this case.

9 But even if Ruiz's conduct was not culpable, the bankruptcy  
10 court did not abuse its discretion in deciding that Ruiz failed to  
11 offer specific facts to show he had a meritorious defense to  
12 Loera's § 523(a)(15) claim were the default judgment to be set  
13 aside. Ruiz's proposed Answer simply denied the allegations  
14 contained in Loera's complaint and parroted the language of the  
15 statutory defenses verbatim. And Ruiz's declaration submitted in  
16 support of the motion for relief from the judgment does not  
17 elaborate upon any facts tending to prove the assertions he made  
18 in his proposed Answer. Under Franchise Holding and Hammer, Ruiz  
19 was required to do more than simply deny the allegations of  
20 Loera's complaint. Ruiz was obliged to offer specific facts to  
21 the bankruptcy court to show that, if the default judgment were  
22 indeed set aside, Ruiz's debt should not be excepted from  
23 discharge under § 523(a)(15). Because Ruiz provided no such  
24 facts, the bankruptcy court did not abuse its discretion in  
25 refusing to vacate the default judgment.

26 **CONCLUSION**

27 The judgment of the bankruptcy court is AFFIRMED.

28