NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-05-1339-PaKMa
JAVIER VALDORINOS RUIZ,	Bk. No. RS 04-23456-PC
Debtor,	Adv. No. RS 05-01048-PC
JAVIER VALDORINOS RUIZ,	
Appellant,	
v.	**M E M O R A N D U M**[1]
NIDIA C. LOERA,	
Appellee.	

Submitted Without Argument on March 23, 2006[2]

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.

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[1] 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.

[2] Neither Appellant nor Appellee appeared at the time set for oral argument. The appeal was therefore deemed submitted without argument on the briefs.

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

FACTS

The material facts are generally undisputed.

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

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

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[3] Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 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).

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

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

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

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

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

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

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

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

[5] The hearing transcript indicates that the bankruptcy judge cited Rule "4025." Tr. of Hearing (July 28, 2005) at 11. The 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.

7004(b)(9), which allows service upon the debtor by mail,[6] Ruiz had been properly served at the address he had listed in his petition.

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

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

JURISDICTION

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

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[6] Rule 7004(b) provides that:

> [S]ervice may be made within the United States by first class mail postage prepaid as follows: . . .
> (9) Upon the debtor, after a petition has been filed by or served upon th debtor and until the case is 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.

ISSUES

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

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

STANDARD OF REVIEW

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

[7] Motions for relief from a judgment or order are authorized by FED. R. BANKR. P. 9024, which in turn incorporates the provisions of FED. R. CIV. P. 60(b). In the bankruptcy court, Ruiz cited to FED. R. CIV. P. 60(b)(6), but his arguments both to the bankruptcy judge and in this appeal are based upon what he describes as "excusable neglect," which constitutes grounds for relief under FED. R. CIV. P. 60(b)(1). The Rule 60(b)(6) catchall provision, which allows relief from a judgment for "other reasons," is used sparingly as an equitable remedy to prevent manifest injustice and should be utilized only where extraordinary circumstances 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).

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

DISCUSSION

1. The Judgment Was Not Void.

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

As noted previously, Rule 7004(b)(9) provides that service of process in an adversary proceeding may be made upon a debtor 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." Service of process in accordance with Rule 7004(b) is effective to establish personal jurisdiction over a defendant. Morris Motors v. Peralta (In re Peralta), 317 B.R. 381, 386 (9th Cir. BAP 2004). This form of service has withstood constitutional challenge. Cossio, 163 B.R. at 156 (citing Matter of Park Nursing Ctr., Inc., 766 F.2d 261 (6th Cir. 1985)); see also, Greene v. Lindsey, 456 U.S. 444, 455 (1982) (holding that notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings). Although a plaintiff bears the burden of proof on the issue of personal jurisdiction, "[t]he mailing of a properly addressed and stamped item creates a rebuttable presumption that the addressee received it." Peralta, 317 B.R. at 386 (citing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The judgment of the bankruptcy court is AFFIRMED.