

JUL 08 2005

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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NOT FOR PUBLICATION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-04-1510-PMoN |
| |) | |
| MICHAEL GHIDEI, |) | Bk. No. LA 04-11020-AA |
| |) | |
| Debtor. |) | Adv. No. LA 04-02187-AA |
| _____ |) | |
| |) | |
| BRUCE M. GREENFIELD, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | |
| |) | MEMORANDUM¹ |
| C. CASEY WHITE, |) | |
| |) | |
| Appellee. |) | |
| _____ |) | |

Submitted Without Oral Argument on
June 22, 2005 at Pasadena, California

Filed - July 8, 2005

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

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding

Before: PERRIS, MONTALI, and NEWSOME,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. Randall J. Newsome, Chief Bankruptcy Judge for the Northern District of California, sitting by designation.

1 Counsel for debtor was temporarily restrained and then
2 preliminarily enjoined from sending or transmitting any documents by
3 facsimile to counsel for a creditor. Despite the court orders,
4 counsel for debtor continued sending hundreds of facsimiles to
5 creditor's counsel. The bankruptcy court awarded sanctions against
6 debtor's counsel for violation of the court orders, and counsel
7 appeals. We AFFIRM.

8 FACTS

9 Bruce Greenfield was counsel for the debtor and C. Casey White
10 was counsel for a creditor in this bankruptcy case. Beginning in
11 April 2004, Greenfield began sending hundreds of facsimiles to White
12 relating to the bankruptcy case. The facsimiles included numerous
13 copies of the same document. For example, Greenfield sent the same
14 one-page letter to White via facsimile 71 times.

15 On July 22, 2004, White filed a complaint against Greenfield,
16 alleging that he had sent her 2,769 pages of facsimiles between
17 April 1, 2004 and July 19, 2004, and seeking a preliminary and
18 permanent injunction against Greenfield and his agents from sending
19 any facsimiles to White.

20 When White enlisted the help of another attorney, Yvonne
21 Renfrow, to serve certain documents relating to the litigation,
22 Greenfield began sending multiple copies of documents by facsimile
23 to Renfrow.

24 White sought an ex-parte temporary restraining order (TRO). On
25 July 29, 2004, the bankruptcy court entered the TRO, which
26 prohibited Greenfield from sending or transmitting any documents by

1 facsimile to either White or Renfrow. The court set the hearing on
2 the motion for preliminary injunction for August 4, 2004.

3 Greenfield continued to send multiple copies of documents to
4 counsel via facsimile. He filed an opposition to the motion for
5 preliminary injunction, in which he argued only that White could
6 change her facsimile number if she wanted to avoid receiving
7 facsimile transmissions from him.

8 The court held the hearing on the motion for preliminary
9 injunction on August 4, 2004, and Greenfield did not appear. The
10 court entered the preliminary injunction, enjoining Greenfield or
11 his agents from sending documents by facsimile to either White or
12 Renfrow.

13 When Greenfield continued to send multiple copies of documents
14 via facsimile to both counsel despite the preliminary injunction,
15 White applied for and the court issued three different orders to
16 show cause why Greenfield should not be held in contempt for
17 violating the TRO and preliminary injunction.

18 Greenfield filed an opposition to the orders to show cause,
19 arguing that the court lacked jurisdiction, because Greenfield was
20 not served with the summons and complaint before entry of the TRO or
21 before the August 4 hearing on the preliminary injunction.

22 Greenfield did not appear at the hearing on the orders to show
23 cause. The court found that Greenfield had willfully violated the
24 TRO and preliminary injunction, and awarded sanctions of \$1.00 per
25 facsimile page for a total of \$3,772.00.

26 Greenfield appeals.

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ISSUE

Whether the bankruptcy court abused its discretion in awarding sanctions of \$1.00 per page of facsimiles sent in violation of the TRO and preliminary injunction.

STANDARD OF REVIEW

We review the bankruptcy court's award of sanctions, including sanctions for contempt based on willful violation of a court order, for abuse of discretion. In re Hercules Enter., Inc., 387 F.3d 1024, 1027 (9th Cir. 2004). A court abuses its discretion if it bases its ruling "on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

DISCUSSION

Greenfield raises two issues in his one-page brief. First, he claims that the bankruptcy court lacked jurisdiction to issue the TRO or preliminary injunction, because he was not served with the summons and complaint until after the hearing on the preliminary injunction.

As White points out, a person seeking to challenge personal jurisdiction for lack of service must raise that issue in the first appearance before the court. "Jurisdiction attaches if a defendant makes a voluntary general appearance" Jackson v. Hayakawa, 682 F.2d 1344, 1347 (9th Cir. 1982).

In this case, Greenfield filed an opposition to the motion for preliminary injunction on July 30, five days before the hearing. He did not challenge personal jurisdiction in that opposition; he

1 merely argued that White could change her facsimile number if she
2 did not want to receive transmissions from him. By generally
3 appearing in response to the motion for preliminary injunction, and
4 failing to raise the issue of personal jurisdiction, he waived any
5 defect of lack of personal jurisdiction.

6 Even if he had not waived the argument, the argument would
7 fail. Although service of the summons and complaint are necessary
8 to obtain jurisdiction over the defendant with regard to the
9 complaint, Fed. R. Bankr. P. 7004; Fed. R. Civ. P. 4, service of a
10 summons and complaint are not required for either a motion for TRO
11 or for preliminary injunction.

12 Fed. R. Civ. P. 65(b), made applicable to bankruptcy cases by
13 Fed. R. Bankr. P. 7065, provides that, under certain circumstances,
14 “[a] temporary restraining order may be granted without written or
15 oral notice to the adverse party” See, e.g., 11A Charles
16 Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice
17 and Procedure § 2951 (1995) (“Wright, Miller and Kane”); 13 Moore’s
18 Federal Practice - Civil § 65:32 (2005) (“Moore’s”) (TRO may be
19 granted ex parte, without notice to the adverse party). White asked
20 for and received an ex parte TRO. Greenfield does not argue that
21 the circumstances did not warrant such an ex parte order in this
22 case.

23 Fed. R. Civ. P. 65(a)(1) provides that “[n]o preliminary
24 injunction shall be issued without notice to the adverse party.”
25 The motion may be made before service of the complaint has been
26 completed. See 11A Wright, Miller and Kane at § 2949 (granting of

1 preliminary injunction may occur before complaint is filed or
2 served); Moore's at § 65:21 (preliminary injunctive relief may be
3 requested in the complaint or by motion). The rule does not specify
4 what type of notice is required; whether notice is adequate is a
5 matter within the discretion of the trial court. United States v.
6 State of Alabama, 791 F.2d 1450, 1458 (11th Cir. 1986); Plaquemines
7 Parish School Bd. v. United States, 415 F.2d 817, 824 (5th Cir.
8 1969).

9 In this case, White served the Motion for Preliminary
10 Injunction on Greenfield on July 22, 2004, by overnight Federal
11 Express. She filed her ex parte motion for TRO on July 27, 2004.
12 On July 29, the date the court granted the TRO, White served a copy
13 on Greenfield by overnight Federal Express.

14 It is apparent that Greenfield had actual notice of the request
15 for preliminary injunction before the August 4 hearing on that
16 motion, because on July 29 he filed an opposition to the motion,
17 which was dated July 28.

18 Greenfield does not argue that the information contained in the
19 motion was inadequate to inform him of what relief was being
20 requested, or that he lacked adequate notice for any reason other
21 than that he had not been served with the summons and complaint.
22 Because the rules do not require service of a summons and complaint
23 before a TRO or preliminary injunction may be issued, his argument
24 fails.

25 Second, Greenfield argues that "[b]y judicial notice" the
26 sanction of \$1.00 per page of facsimiles sent in violation of the

1 TRO and preliminary injunction is excessive. Appellant's Opening
2 Brief at 1.

3 Greenfield's only argument in opposition to the orders to show
4 cause for violation of the TRO and preliminary injunction was that
5 the court lacked jurisdiction, because he was not served with the
6 summons and complaint before the hearing on the preliminary
7 injunction. He did not argue that the sanction sought of \$1.00 per
8 page was excessive.

9 We ordinarily will not address an issue raised for the first
10 time on appeal, unless there are exceptional circumstances, there
11 has been a change in the law since the trial court acted, or the
12 issue is purely an issue of law. In re Ehrle, 189 B.R. 771 (9th
13 Cir. BAP 1995). None of those reasons applies here. There are no
14 exceptional circumstances; Greenfield could have appeared and raised
15 the argument with the bankruptcy court. The orders to show cause
16 gave notice that the court was considering awarding \$1.00 per page,
17 and possibly \$10.00 per page, as a sanction. There has been no
18 change in the law, and the issue of reasonableness of the sanction
19 is one of fact, not of law.

20 Greenfield may be requesting that we take judicial notice that
21 \$1.00 per page is excessive. Because he failed to raise the issue
22 to the bankruptcy court, we need not address it. In any event,
23 judicial notice is not appropriate here. Judicial notice is
24 governed by Fed. R. Evid. 201, which provides that "[a] judicially
25 noticed fact must be one not subject to reasonable dispute in that
26 it is either (1) generally known within the territorial jurisdiction

1 of the trial court or (2) capable of accurate and ready
2 determination by resort to sources whose accuracy cannot reasonably
3 be questioned." The reasonableness of a charge for receiving
4 facsimile transmissions is not a fact that is not subject to
5 reasonable dispute. Therefore, it is not appropriate for judicial
6 notice.

7 CONCLUSION

8 The bankruptcy court did not abuse its discretion in awarding
9 sanctions for Greenfield's violation of the TRO and preliminary
10 injunction. Therefore, we AFFIRM.

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