

**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**NOT FOR PUBLICATION**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
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BRUCE M. GREENFIELD,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	<b>MEMORANDUM<sup>1</sup></b>
C. CASEY WHITE,	)	
	)	
Appellee.	)	
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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,<sup>2</sup> Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> 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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