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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-12-1131-PaMkBe
)	
ANDREA R. BECKFORD, ¹)	Bankr. No. 10-10591-MW
)	
Debtor.)	Adv. Proc. 10-01280-MW
_____)	
)	
ANDREA R. BECKFORD,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ²
)	
RAKIYA L. JONES,)	
)	
Appellee.)	
_____)	

Submitted Without Argument on November 15, 2012³

Filed - December 14, 2012

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

Honorable Mark Wallace, Bankruptcy Judge, Presiding

Appearances: Andrea R. Beckford pro se on brief; Gregory W. Brittain, Esq. on brief for appellee Rakiya L. Jones.

¹ During the course of the bankruptcy case, Andrea R. Lewis was married and took the name, Andrea L. Beckford. We will refer to her by this name.

² This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

³ After examination of the briefs and record, and after notice to the parties, the Panel unanimously determined that oral argument was not needed in an order entered October 4, 2012. Fed. R. Bankr. P. 8012.

1 Before: PAPPAS, MARKELL and BEESLEY,⁴ Bankruptcy Judges.

2

3 Chapter 7⁵ debtor Andrea R. Beckford ("Beckford") appeals the
4 order of the bankruptcy court imposing discovery sanctions and the
5 resulting judgment entered against her determining that the debt
6 she owed to appellees Rakiya L. Jones and Rakiya L. Jones, D.D.S.,
7 A Professional Corporation ("Jones"), is excepted from discharge
8 under § 523(a)(4). We AFFIRM.

9

FACTS

10 Beckford and Jones are licensed dentists. In the Summer of
11 2006, they formed a partnership to open and operate a dental
12 practice in Beaumont, California, known as Oak Valley Family
13 Dental. Their partnership agreement was oral.⁶

14 In August 2006, Beckford and Jones, through their
15 professional corporations, entered into loan agreements with
16 MATSCO, a division of Wells Fargo Bank, N.A., to borrow

17

18 ⁴ The Honorable Bruce T. Beesley, United States Bankruptcy
19 Judge for the District of Nevada, sitting by designation.

20 ⁵ Unless otherwise indicated, all chapter, section and rule
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
22 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
The Federal Rules of Civil Procedure are referred to as Civil
Rules.

23 ⁶ There was some discussion in the record concerning whether
24 the partnership was between Beckford and Jones, or between
25 Beckford's professional corporation (Andrea R. Lewis, D.D.S., a
26 Professional Corporation) and Jones's professional corporation,
27 Rakiya L. Jones, D.D.S., a Professional Corporation. The
28 fictitious name certificate and California Dental Board
certificate for their joint dental practice were issued in the
names of the corporations. However, the evidence before the
bankruptcy court was that Beckford and Jones were not consistent
in whether they considered themselves to be partners individually,
or through their professional corporations. Further details and
evidence on this point are discussed below.

1 \$276,618.45 for dental and office equipment, fixtures, and
2 leasehold improvements. Jones and Beckford personally guaranteed
3 the loans (the "Loans").

4 The practice began seeing patients in January 2007. Jones
5 and Beckford practiced together for approximately six months. The
6 parties agree that Jones approached Beckford in June 2007, and
7 told her that she wanted to disassociate from the partnership.
8 Jones sent a formal letter to Beckford on August 31, 2007, which
9 states: "I and my corporation intend to dissociate from [and not
10 dissolve] the partnership so that you may continue the business of
11 the partnership without disruption or inconvenience." The
12 parties agree that at the time of disassociation, the partnership
13 was not profitable.

14 Jones obtained a payoff quote on the Loans as of the date of
15 disassociation, August 31, 2007, showing a total due of
16 \$221,657.20.

17 In September 2007, Jones and Beckford met to discuss the
18 terms of Jones withdrawing from the partnership. It appears that
19 Jones sought \$26,072.94 for her partnership interest, and wanted
20 Beckford to assume full liability for repayment of the Loans.
21 There is considerable disagreement between the parties on
22 subsequent events, but it is clear that Beckford did not accept
23 the terms suggested by Jones.

24 Beckford continued to operate the practice and hired an
25 associate, Priscilla Tall, who performed general dentistry.
26 Beckford acknowledges that from her initial hiring, Tall expressed
27 interest in purchasing the practice. Beckford rejected an offer
28 from Tall of \$120,000 for the practice. Tall did not make a

1 subsequent offer. Beckford appears to have had discussions with
2 three other potential buyers who chose not to purchase the
3 practice.

4 Jones engaged a dental practice broker, Reno Iannini, to
5 attempt to sell the practice. The bankruptcy court would later be
6 given competing declarations from Iannini and Beckford, each
7 alleging that the other was uncooperative and interfered with
8 prospective buyers. None of the efforts of Jones or Beckford
9 resulted in sale of the practice.

10 Beckford left the practice in December 2008 to move to the
11 East Coast to be with her ill mother. There is no indication in
12 the record when she returned. During her absence, the practice
13 was operated by Tall.

14 MATSCO notified Beckford and Jones that they were in default
15 in the Loans, and MATSCO filed suit against them and their
16 professional corporations in San Bernadino Superior Court, seeking
17 payment of \$276,618.46. MATSCO v. Andrea L. Lewis, D.D.S., a
18 Prof'l Corp., Case no. CIVDS 910545 (San Bernadino Super. Ct.
19 July 23, 2009). Jones filed a cross-complaint in the state court
20 action against Beckford, seeking \$240,000 in damages for breach of
21 fiduciary duty, conversion, willful misconduct, constructive
22 trust, accounting and injunctive relief.

23 Due to poor economic conditions, Beckford closed the practice
24 in August 2009. She filed chapter 7 petitions for herself and her
25 corporation in January, 2010. On her personal bankruptcy
26 schedules, she listed \$1,124,254.62 in total unsecured claims,
27 including a claim by MATSCO for \$553,238.00. The state court
28 action was stayed when Beckford filed her bankruptcy petition.

1 On April 19, 2010, Jones commenced the adversary proceeding
2 involved in this appeal. In a First Amended Complaint filed on
3 May 19, 2011, Jones sought an exception to discharge for her
4 claims against Beckford under §§ 523(a)(2), (a)(4) and (a)(6); she
5 also asked that Beckford be denied a discharge under §§ 727(a)(3),
6 (a)(4) and (a)(5). The complaint did not specify the amount of
7 Jones's claims against Beckford, but indicated that they resulted
8 from Jones's potential liability and judgment in the MATSCO
9 litigation for \$276,620, and for Beckford's alleged failure to pay
10 her \$26,072.94 for her interest in the dental practice.

11 On May 24, 2010, Beckford filed an answer ("Answer")
12 generally denying all allegations. The bankruptcy court entered
13 an Amended Scheduling Order on August 6, 2010, setting a discovery
14 cutoff on January 31, 2011. The cutoff was later extended by
15 stipulation of the parties to February 14, 2011.

16 On April 1, 2011, Jones filed her first Motion to Compel and
17 for Sanctions. In it, Jones argued that Beckford had walked out
18 of her deposition without cause, and had not responded to Jones's
19 second set of interrogatories or produced documents requested to
20 be brought to the deposition. Jones sought sanctions, requesting
21 an award of attorney's fees and an order striking Beckford's
22 Answer.

23 On April 12, 2011, Jones and Beckford, through counsel,
24 entered into a stipulation regarding the first Motion to Compel.
25 In the stipulation, Beckford agreed to appear for another
26 deposition on April 13, 19, and 21, 2011; would submit responses
27 to the second set of interrogatories on April 12; and would make a
28 reasonably diligent search for documents requested in the original

1 notice of deposition, including any emails to or from Jones, to or
2 from Emily Ndela, to or from Tall, and any regarding Oak Valley
3 Family Dental. In return, Jones agreed to take the first Motion
4 to Compel off calendar and waive the sanctions requested. The
5 Stipulation was approved by the bankruptcy court on April 21,
6 2011, in an order directing the parties to comply with all
7 provisions of the stipulation.

8 On April 20, 2011, Jones's attorney filed a supplemental
9 declaration. Counsel stated that Beckford had not provided the
10 documents requested to be brought to the April 13 deposition, but
11 Jones's counsel would have accepted them if brought to the
12 deposition session on April 19. The declaration states that, at
13 the April 19 deposition, Beckford did not produce the documents,
14 had not responded to the interrogatories, and that she and her
15 lawyer again walked out of the deposition after only 35 minutes.
16 According to the deposition transcript, Beckford's attorney
17 stated, "I don't really care if this deposition ever gets
18 finished." Beckford Dep. 160: 16-18, April 19, 2011.

19 On May 12, 2011, Jones submitted a Second Motion to Compel
20 and for Sanctions. Jones provided a sixteen-page list and
21 explanation of alleged discovery abuses committed by Beckford and
22 her attorney from the beginning of the adversary proceeding to
23 May 12, 2011. The second motion sought attorney's fees caused by
24 delays in the proceedings and an order striking Beckford's Answer.

25 On June 21, 2011, Beckford's counsel filed a Declaration in
26 Opposition to Sanctions. Counsel argued that after June 2, 2011,
27 he had complied with the discovery requests, submitting over
28 900 pages of documents to Jones's lawyer, and that his client had

1 attended the rescheduled deposition on June 14, 2011.

2 The bankruptcy court held a hearing on the Second Motion to
3 Compel on June 23, 2011. The court had posted a tentative ruling,
4 which the parties agreed that they had seen before the hearing, in
5 which the court indicated its intent to grant the motion and
6 impose sanctions for Beckford's failure to comply with discovery
7 rules. At the hearing, there was a colloquy between the court and
8 Beckford's counsel:

9 WEAR [counsel for Beckford]: I was ready, willing and
10 able, ever since the last appearance on the First Motion
11 to Compel, to complete the discovery. I made every
12 effort to do so. . . . My client can't pay that cash
13 amount, and it's in essence handing the case to the
14 plaintiff on a technicality.

15 THE COURT: Mr. Wear, it's not a technicality. There
16 have been a long series of delinquencies with respect to
17 discovery, a long series of missed depositions, evasive
18 answers to interrogatories, failure to comply with court
19 orders regarding production of emails. There have been
20 a long series of abuses in this matter.

21 Later that day, the bankruptcy court entered an Order
22 Granting in Part Plaintiff's Second Motion to Compel and for
23 Sanctions. The order directed Beckford to pay Jones \$12,012.50,
24 "which represents the attorney's fees and costs incurred as a
25 result of the Defendant's repeated violation of the rules
26 pertaining to discovery in adversary proceedings"; the payment was
27 to be "in full, in cash, in immediately payable funds on or before
28 July 29, 2011 at 3:00 p.m. PDT", and if Beckford failed to timely
pay the sanction, the bankruptcy court would strike Defendant's
Answer to the complaint.

Also on June 23, 2011, the bankruptcy court entered an Order
to Show Cause why a default should not be entered against Beckford
for failure to comply with discovery rules, and set a hearing on

1 the OSC for August 4, 2011.

2 On August 2, 2011, Jones's counsel filed a declaration with
3 the bankruptcy court stating that Beckford had not complied with
4 the court's order to pay the \$12,012.58 sanction by the July 29,
5 2011 deadline.

6 The hearing on the OSC was held on August 4, 2011. Jones
7 appeared through counsel. Beckford appeared pro se, indicating to
8 the bankruptcy court that her attorney had sent her an email on
9 August 2, 2011, withdrawing as her counsel. The court ruled that
10 Beckford was now representing herself.

11 At the beginning of the hearing, the court observed that
12 Beckford had sent the court an unauthorized ex parte communication
13 consisting of a letter and emails detailing communications between
14 Beckford and her attorney. The court returned the communication
15 unread to Beckford. After acknowledging that Jones was aware of
16 the communication, although Jones had not seen it, the court "will
17 permit those materials to be filed." Hr'g Tr. 2:1-3, August 4,
18 2011. However, the adversary proceeding docket indicates that
19 those materials were never refiled with the court.

20 Beckford attempted to fix the blame for her discovery abuses
21 on the performance of her counsel. The court admonished her:

22 Ms. Beckford, parties are bound by the actions of their
23 counsel for good or ill, and I suppose that in
24 retrospect, Mr. Wear took some actions in this case that
25 appear to have been decidedly unwise but nonetheless you
26 chose him as your attorney. You're bound by his
27 actions. The Court had ordered the sanctions to be
28 paid. The Court, therefore, will strike the answer and
will enter your default and that's really where we are
on this.

27 Hr'g Tr. 7:22-8:6.

28 On August 8, 2011, the bankruptcy court entered an order

1 striking Beckford's Answer and entering a default. The order
2 provided that: (1) Jones's objection to consideration of the ex
3 parte communication by the court was sustained; (2) Beckford's
4 Answer was stricken, and default entered against her, for failing
5 to pay the monetary sanctions; and (3) directing Jones to submit a
6 request for entry of a default judgment against Beckford.

7 Jones filed a motion for default judgment on December 29,
8 2011. Regarding her request for exception to discharge for her
9 claims under § 523(a)(4),⁷ Jones alleged that she and Beckford
10 were partners; that Beckford had breached her fiduciary duty to
11 Jones by embezzlement; and that Beckford had absconded with the
12 most valuable assets of the partnership, which assets she did not
13 disclose in either her personal or corporate bankruptcy schedules.
14 Jones presented a list detailing the damages she had allegedly
15 suffered. The motion was accompanied by declarations from Jones,
16 Till, Iannini, her counsel Brittain, and fifteen exhibits.
17 Beckford submitted responses to the declarations of Jones, Till
18 and Brittain, and twenty-one exhibits.

19 The bankruptcy court held the hearing on Jones's motion for
20 default judgment on February 23, 2012. Jones was represented by
21 counsel and Beckford appeared pro se. The court announced its
22 intention to enter default judgment on the request for exception
23 to discharge under § 523(a)(4). Beckford and Jones submitted on
24 their papers. The court then announced its decision on the
25 record:

26
27 ⁷ Since the bankruptcy court only granted the exception to
28 discharge under § 523(a)(4), and its denial of Jones's requests
under the other sections was not appealed, we discuss only Jones's
allegations concerning § 523(a)(4) in this decision.

1 The court . . . will enter default judgment against the
2 Defendant under Section 523(a)(4) only in the amount of
3 \$153,276.66, finding that Mr. Brittain's motion for
4 entry of default judgment was well taken, and that there
occurred the necessary predicates for
nondischargeability under Section 523(a)(4).

5 Hr'g Tr. 3:3-8, February 23, 2012.

6 On March 1, 2012, the court entered an amended judgment for
7 Jones and against Beckford for \$153,276.86 (which included the
8 \$12,012.50 sanction award). The judgment declared that the debt
9 was excepted from discharge in Beckford's bankruptcy case under
10 § 523(a)(4). The court denied Jones's requests for judgment under
11 § 523(a)(2) and (a)(6) and § 727(a).

12 Beckford filed a timely appeal on March 7, 2012.

13 JURISDICTION

14 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
15 and 157(b)(2)(A) and (I). We have jurisdiction under 28 U.S.C.
16 § 158.

17 ISSUES

18 Whether the bankruptcy court abused its discretion in
19 imposing discovery sanctions on Beckford.

20 Whether the bankruptcy court erred in determining that the
21 Beckford's debt to Jones was excepted from discharge under
22 § 523(a)(4).

23 STANDARDS OF REVIEW

24 The imposition of discovery sanctions is reviewed for abuse
25 of discretion. Childress v. Darby Lumber, Inc., 357 F.3d 1000,
26 1009 (9th Cir. 2004).

27 In an appeal from an exception to discharge judgment, we
28 review the bankruptcy court's fact findings under the clearly

1 erroneous standard and its conclusions of law de novo. Honkanen
2 v. Hopper (In re Honkanen), 446 B.R. 373, 382 (9th Cir. BAP 2011).
3 However, the ultimate question of whether a particular debt is
4 excepted from discharge is a mixed question of law and fact that
5 we review de novo. Id.; Searles v. Riley (In re Searles),
6 317 B.R. 368, 373 (9th Cir. BAP 2004) (Mixed questions of law and
7 fact are reviewed de novo when they require the bankruptcy court
8 "to consider legal concepts and exercise judgment about values
9 animating legal principles.").

10 DISCUSSION

11 I. The bankruptcy court did not abuse its discretion 12 in imposing discovery sanctions on Beckford.

13 Beckford appeals the bankruptcy court's order imposing a
14 monetary discovery sanction against her of \$12,012.50, striking
15 her Answer, and entering a default. Although striking Beckford's
16 Answer and deeming her to be in default in the adversary
17 proceeding are obviously severe sanctions, we conclude that the
18 bankruptcy court did not abuse its discretion in this decision.

19 Civil Rule 37(b)(2)(A), made applicable in bankruptcy
20 adversary proceedings by Rule 7037, provides that "[i]f a party
21 fails to obey an order to provide or permit discovery, the court
22 where the action is pending may issue just orders [including]
23 . . . (iii) striking pleadings in whole or in part; . . .
24 (vi) rendering a default judgment against the disobedient party."
25 The Ninth Circuit has long recognized a bankruptcy court's
26 authority under Civil Rule 37(b) to strike a debtor's answer and
27 enter default. Visioneering Constr. v. U.S. Fidel. & Guar.
28 (In re Visioneering Constr.), 661 F.2d 119, 122 (9th Cir. 1981)

1 (affirming the bankruptcy court's imposition of Rule 37 sanctions,
2 including striking an answer and entering default, for the
3 debtor's "obstructionist and delaying tactics" in discovery);
4 Brunson v. Rice (In re Rice), 14 B.R. 843, 846 (9th Cir BAP 1981)
5 (bankruptcy court may strike answer and enter default under Civil
6 Rule 37(b) for discovery abuses). However, as a condition of
7 imposing such severe sanctions, the Ninth Circuit requires that
8 the trial court find that a party's inappropriate conduct be the
9 result of the "willfulness, bad faith, or fault." Jorgensen v.
10 Cassiday, 320 F.3d 906, 912 (9th Cir. 2003). And in the context
11 of sanctions, "willfulness is disobedient conduct not outside the
12 control of the litigant." Henry v. Gill Indus., Inc., 983 F.2d
13 943, 948 (9th Cir. 1993). The bankruptcy court's determination of
14 willfulness for Civil Rule 37 sanctions is reviewed for clear
15 error. Hester v. Vision Airlines, Inc., 687 F.3d 1162, 1169 (9th
16 Cir. 2012).

17 In this case, the record demonstrates that Beckford was a
18 willing participant in the particular discovery abuses that led to
19 the sanctions. She twice walked out of deposition sessions
20 without completing them. And in the depositions on February 21,
21 April 13, and April 19, she failed to produce emails in response
22 to Jones's requests for production without proper justification.

23 For example:

24 BRITTAIN: Since your last session of your deposition
25 last Wednesday, have you done anything to look for
26 documents responsive to our request for production of
27 documents?

28 BECKFORD: No.

BRITTAIN: Why not?

1 BECKFORD: I don't know.

2 Beckford Dep. 55:10-16, April 19, 2011.

3 Beckford maintained in the bankruptcy court, and now on
4 appeal, that her obstructionist actions were taken under direction
5 of counsel, and that she had provided most of the requested
6 documents to her counsel, who then failed to submit them to
7 Jones's attorney. However, she never provided admissible evidence
8 to the bankruptcy court to substantiate that excuse, by
9 declaration or otherwise.⁸ And finally, Beckford admitted that
10 she would not comply with the court's order to pay the initial
11 sanction by July 29, 2011, because, she alleged, she did not have
12 the money to do so. However, Beckford never contacted Jones's
13 attorney or the bankruptcy court before the payment deadline,
14 requesting an extension of time to pay. On the other hand, the
15 court had evidence from her bankruptcy schedules that Beckford was
16 employed at the time as a dentist by Loma Linda University. And
17 although she was heavily in debt, she was shielded from her
18 creditors by the automatic stay. Thus, the court and this Panel
19 can conclude that Beckford's failure to pay the sanction was

20
21 ⁸ Even though Beckford did not submit any admissible
22 evidence of her allegations regarding her attorney's faults, the
23 bankruptcy court was aware of her allegations: "THE COURT:
24 Ms. Beckford, parties are bound by the actions of their counsel
25 for good or ill, and I suppose that in retrospect, Mr. Wear took
26 some actions in this case that appear to have been decidedly
27 unwise but nonetheless you chose him as your attorney. You're
28 bound by his actions." Hr'g Tr. 7:22-25, August 4, 2011. The
29 bankruptcy court followed the long established rule in this
30 circuit that "the faults and defaults of the attorney may be
31 imputed to, and their consequences visited upon, his or her
32 client." Allen v. Bayer Corp. (In re Phenylpropanolamine (PPA)
33 Prods. Liability Litigation), 460 F.3d 1217, 1233 (9th Cir. 2006)
34 (quoting W. Coast Theater Corp. v. City of Portland, 897 F.2d
35 1519, 1523 (9th Cir. 1990)).

1 within her control. The bankruptcy court did not clearly err in
2 concluding that Beckford's sanctionable conduct was willful.
3 Rodriguez v. Holder, 683 F.3d 1164, 1171 (9th Cir. 2012) ("Where
4 there are two permissible views of the evidence, the factfinder's
5 choice between them cannot be clearly erroneous.")

6 Before entering a "severe sanction," including striking an
7 answer and directing entry of default, the Ninth Circuit requires
8 consideration of the following criteria:

9 We have constructed a five-part test, with three
10 subparts to the fifth part, to determine whether a
11 case-dispositive sanction under Rule 37(b)(2) is just:
12 "(1) the public's interest in expeditious resolution of
13 litigation; (2) the court's need to manage its dockets;
14 (3) the risk of prejudice to the party seeking
15 sanctions; (4) the public policy favoring disposition of
16 cases on their merits; and (5) the availability of less
17 drastic sanctions." Jorgensen v. Cassidy, 320 F.3d
18 906, 912 (9th Cir. 2003) (quoting Malone v. U.S. Postal
Serv., 833 F.2d 128, 130 (9th Cir. 1987)). The
sub-parts of the fifth factor are whether the court has
considered lesser sanctions, whether it tried them, and
whether it warned the recalcitrant party about the
possibility of case-dispositive sanctions. This "test"
is not mechanical. It provides the district court with a
way to think about what to do, not a set of conditions
precedent for sanctions or a script that the district
court must follow[.]

19 Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d
20 1091, 1096 (9th Cir. 2007); see also Hester, 687 F.3d at 1169-70
21 (applying these factors in striking an answer and entering a
22 default).

23 The first two criteria focus upon the public interest in
24 expeditious resolution of litigation, and the trial court's
25 interest in docket control. Both of these factors support the
26 imposition of the sanctions under these facts. Jones documented
27 sixteen pages of discovery abuses by Beckford that had
28 inordinately delayed the adversary proceeding. Beckford's conduct

1 significantly impeded resolution of this action, caused delay, and
2 prevented the bankruptcy court from adhering to its trial
3 schedule.

4 The third criterion requires consideration of any prejudice
5 to the party seeking sanctions. A party is prejudiced if the
6 opposing party impairs its ability to go to trial. Adriana Int'l
7 Corp. v. Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990). There is
8 evidence of prejudice to Jones here. Beckford failed to provide
9 responses to discovery requested by Jones, and thus Jones was
10 prejudiced in her preparation for trial.

11 The fourth criterion requires the trial court to consider the
12 public policy favoring decisions on the merits. The bankruptcy
13 court's decision to strike the Answer and enter default did not
14 end the dispute. The court informed Beckford that she would have
15 the opportunity in the final default hearing to present her
16 evidence and to cross-examine any witnesses called by Jones. In
17 this procedural respect, then, the bankruptcy court's ultimate
18 decision was "on the merits."

19 Finally, before resorting to severe sanctions, a trial court
20 must ponder the availability of less drastic sanctions. The Ninth
21 Circuit instructs that this criterion has three components:
22 whether the trial court has considered lesser sanctions, whether
23 it tried them, and whether it warned the recalcitrant party about
24 the possibility of different sanctions. New Images of Beverly
25 Hills, 482 F.3d at 1096.

26 Beckford was afforded clear warnings from the bankruptcy
27 court on multiple occasions that striking the Answer and entering
28 default were possible sanctions for her continuing discovery

1 abuses. Indeed, Jones had requested these severe sanctions in
2 both the First and Second Motions to Compel. Jones withdrew the
3 First Motion based on a stipulation by Beckford that she would
4 promptly cooperate in discovery, but she failed to do so. The
5 bankruptcy court imposed the lesser sanction of a monetary award
6 of \$12,012.50, and informed Beckford that it would not impose the
7 more severe sanctions of striking the Answer and entry of default
8 if Beckford timely paid that monetary sanction. Again, Beckford
9 did not pay.

10 We also note that, even in the face of Beckford's
11 recalcitrance, the bankruptcy court did not import the even more
12 severe sanction under Civil Rule 37 – the immediate entry of a
13 default judgment in Jones's favor. The court could have imposed
14 this more draconian penalty in light of Beckford's violation of
15 numerous court orders (the general discovery orders, the order
16 approving the stipulation on April 21 where the court again
17 ordered compliance with the discovery requests, and the order of
18 June 23, 2011 imposing monetary sanctions). Thompson v. Hous.
19 Auth. Of Los Angeles, 782 F.2d 829, 831 (9th Cir. 1986) (willful
20 disobedience of court orders is grounds for entry of default
21 judgment). Instead, the bankruptcy court adopted a measured
22 response to the many infractions, with frequent advance warnings
23 of the likely consequences of failure to comply with the various
24 orders, then imposing a financial sanction, then warning that a
25 more severe sanction of striking the Answer and entering default
26 would follow if Beckford failed to comply with the order for the
27 monetary sanction. Finally, the bankruptcy court stayed its hand
28 from imposing the ultimate sanction of default judgment and

1 indicated that Beckford would still have the opportunity to
2 contest a default judgment in a subsequent hearing.

3 In sum, we conclude the bankruptcy court did not abuse its
4 discretion in striking Pryor's Answer and ordering entry of
5 default.

6 **II. The bankruptcy court did not err in determining that**
7 **Beckford's debt to Jones was excepted from discharge**
8 **under § 523(a)(4).**

9 Beckford also challenges the bankruptcy court's ultimate
10 decision to except her debt to Jones from discharge. Beckford's
11 arguments lack merit.

12 Section 523(a)(4) excepts from discharge debts "for fraud or
13 defalcation while acting in a fiduciary capacity, embezzlement or
14 larceny." In an action under § 523(a)(4), a creditor must
15 establish: (1) that an express trust existed between the debtor
16 and creditor; (2) that the debt was caused by the debtor's fraud
17 or defalcation; and (3) that the debtor was a fiduciary to the
18 creditor at the time the debt was created. Otto v. Niles
19 (In re Niles), 106 F.3d 1456, 1459 (9th Cir. 1997); Nahman v.
20 Jacks (In re Jacks), 266 B.R. 728, 735 (9th Cir. BAP 2001).

21 The evidence submitted to the bankruptcy court established
22 that a partnership relationship existed between Jones and
23 Beckford. In her declaration, Jones asserted that she and
24 Beckford were partners in the dental practice in their individual
25 capacities. Beckford never contradicted this statement with
26 admissible evidence. In the First Amended Complaint, Jones
27 asserted a partnership existed between Jones and Beckford. After
28 entry of default, the longstanding, general rule is that well-pled
allegations in the complaint are deemed to be true. Fair Housing

1 of Marin v. Combs, 285 F.3d 899, 906 (9th Cir. 2002); Geddes v.
2 United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977) (citing Pope
3 v. United States, 323 U.S. 1 (1944)). Finally, the evidence
4 showed that Beckford sent Jones a Schedule K-1 tax form on
5 March 24, 2008, which is intended to detail a "Partner's Share of
6 Income," I.R.S. Form 1065, accompanied by a letter from Beckford
7 to Jones that stated: "Dear Partner: . . . This schedule
8 summarizes your information from the partnership."

9 State law determines when an express trust exists. Ragsdale
10 v. Haller, 780 F.2d 794, 796 (9th Cir. 1986). Beckford and Jones
11 organized and operated their partnership in California and, under
12 California state law, an express trust exists between partners.
13 Id. at 796.

14 Did the existence of a partnership render Beckford a
15 fiduciary to Jones? A partner is in a fiduciary to fellow
16 partners. Galardi v. State Bar, 739 P.2d 134, 138 (Cal. 1987);
17 see also, Cal. Corp. Code § 16404 (outlining fiduciary duties owed
18 by partners to each other).

19 [P]artners are trustees for each other, and in all
20 proceedings connected with the conduct of the
21 partnership every partner is bound to act in the highest
22 good faith to his co-partner and may not obtain any
23 advantage over him in the partnership affairs by the
24 slightest misrepresentation, concealment, threat or
25 adverse pressure of any kind.

23 Leff v. Gunter, 658 P.2d 740, 744 (Cal. 1983)(quoting Page v.
24 Page, 359 P.2d 41, 46 (Cal. 1961)).

25 A defalcation occurs for purposes of § 523(a)(4) through the
26 "misappropriation of trust funds or money held in a fiduciary
27 capacity; failure to properly account for such funds." Lewis v.
28 Scott (In re Lewis), 97 F.3d 1182, 1186 (9th Cir. 1996). A

1 defalcation also exists when a fiduciary cannot account for the
2 trust res, commingles funds with trust funds, and uses the
3 company's money for his personal benefit. Id. at 1186-87.
4 Defalcation includes "failure of a party to account for money or
5 property that has been entrusted to them." Woodworking Enters.,
6 Inc. v. Baird (In re Baird), 114 B.R. 198, 204 (9th Cir. BAP 1990)
7 (emphasis added).

8 Jones alleges the elements of defalcation in her First
9 Amended Complaint.

10 [Beckford] breached her fiduciary duty to the plaintiff
11 with respect to [partnership assets]. The plaintiff
12 . . . is informed and believes and thereon alleges that
13 the defendant has sold or otherwise disposed of such
14 assets for her own benefit and has failed to protect
15 such assets and make them available to creditor MATSCO
16 in accordance with that creditor's security interest and
17 agreement.

18 First Amended Complaint at ¶ 25. This allegation is deemed true.
19 Combs, 285 F.3d at 906.

20 On this record, we conclude that, based on the allegations in
21 the well-pled complaint that are deemed true, the evidence
22 presented to the bankruptcy court, and Beckford's admissions,
23 Jones established the requirements for an exception to discharge
24 of her claim against Beckford under § 523(a)(4): Beckford was her
25 partner and an express trust existed between Beckford and Jones;
26 the debt was caused by Beckford's fraud or defalcation; and
27 Beckford was a fiduciary to Jones at the time the debt was
28 created. The bankruptcy court therefore did not err in entering
default judgment in favor of Jones excepting her claims against
Beckford from discharge.

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CONCLUSION

We AFFIRM the judgment of the bankruptcy court.