

MAR 09 2010

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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NOT FOR PUBLICATION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

In re:	)	BAP No. AZ-09-1035-JuPaDu
	)	
BRADLEY WILLIAM KENNEDY,	)	Bk. No. 08-03893-GBN
	)	
Debtor.	)	Adv. No. 08-00537-GBN
	)	
<hr/>	)	
BRADLEY WILLIAM KENNEDY,	)	M E M O R A N D U M <sup>1</sup>
	)	
Appellant,	)	
	)	
v.	)	
	)	
JOANN KNIGHT KENNEDY,	)	
	)	
Appellee.	)	
<hr/>	)	

Argued and Submitted on February 17, 2010  
at Tucson, Arizona

Filed - March 9, 2010

Appeal from the United States Bankruptcy Court  
for the District of Arizona

Honorable George B. Nielsen, Jr., Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: JURY, PAPPAS, and DUNN, Bankruptcy Judges.

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<sup>1</sup> 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.

1 Appellant-debtor Bradley William Kennedy appeals pro se the  
2 bankruptcy court's order granting a default judgment against him  
3 in favor of appellee Joanne Knight Kennedy ("JAK").

4 For the reasons stated below, we VACATE the portion of the  
5 judgment pertaining to JAK's claims under § 523(a)(4) and (6)  
6 and REMAND to the bankruptcy court for further proceedings as  
7 may be appropriate. We conclude, however, that the bankruptcy  
8 court correctly decided that JAK's prepetition judgment debts  
9 for child support and attorney's fees and costs were  
10 nondischargeable. Thus, we AFFIRM that portion of the default  
11 judgment.

#### 12 I. FACTS<sup>2</sup>

13 Debtor and JAK married in November 1994 and subsequently  
14 divorced. In 1999, during the course of a child support and  
15 custody proceeding, an Arizona superior court judge held debtor  
16 in contempt for failing to pay child support and ordered him  
17 jailed over the Thanksgiving holiday. As a consequence, debtor  
18 held a grudge against the judge and embarked on a course of  
19 action that ultimately led to a Maricopa County Grand Jury  
20 investigation, subsequent charges and debtor's conviction.  
21 Debtor was sentenced to 119 years in prison and incarcerated  
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23  
24 <sup>2</sup> Relevant underlying facts and the procedural history  
25 related to the default judgment were obtained through judicial  
26 notice of the pleadings docketed and imaged in debtor's  
27 bankruptcy case no. 08-03893 and adversary proceeding  
28 nos. 08-00378 and 08-00537. O'Rourke v. Seaboard Surety Co.  
(In re Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989).

1 prior to his bankruptcy filing. His conviction and sentence  
2 were upheld on appeal.<sup>3</sup>

3 During the divorce proceedings, JAK filed a civil action  
4 against debtor in the Maricopa County Superior Court (Arizona  
5 Superior Court Case No. CV-010254) alleging conversion,  
6 fraudulent conveyance and conspiracy to defraud based on acts  
7 committed by debtor during the marriage (the "Fraud Action").  
8 In this action, JAK challenged the validity of a quitclaim deed  
9 allegedly executed by debtor in favor of his sister, Kate Stone,  
10 transferring the family home.

11 JAK also commenced a separate action to recover child  
12 support (Arizona Superior Court Case No. FC2003-001980).

13 The Fraud Action and divorce proceeding were heard by  
14 Judge Figueroa of the Maricopa County Superior Court. On  
15 February 20, 2007 Judge Figueroa entered judgment against debtor  
16 in favor of JAK in the Fraud Action for \$678,983.<sup>4</sup> JAK recorded

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17  
18 <sup>3</sup> The background of debtor's criminal conviction and  
19 subsequent appeal is in State v. Kennedy, No. 2 CA-CR 2009-006,  
2009 WL 3154810 (Ariz. Ct. App. 2009).

20 <sup>4</sup> On February 16, 2006 Judge Figueroa found the deed from  
21 debtor to his sister invalid. Throughout the pleadings in this  
22 appeal, debtor contends Judge Figueroa erred in invalidating the  
23 quitclaim deed. According to debtor, Judge Weaver in his  
24 criminal case had determined the deed was valid. Thus, debtor  
25 asserts that res judicata prevented Judge Figueroa from reaching  
26 a contrary conclusion. From what we can tell, it appears that  
27 when JAK discovered the allegedly fraudulent deed, she filed a  
petition or motion, in debtor's criminal case to have his bail  
bond revoked. JAK argued that because the deed was fraudulent  
and invalid, debtor's pledge of the family home as security for  
the bond was inadequate. The prosecutor evidently did not  
support the motion and Judge Weaver denied it.

1 the judgment on March 8, 2007. On July 17, 2007 Judge Figueroa  
2 entered a judgment against debtor in favor of JAK for \$39,073  
3 based on past due child support. On the same date, he entered a  
4 separate judgment against debtor in favor of JAK for attorney's  
5 fees and costs for \$25,000 and \$1,197.68 respectively, which JAK  
6 had incurred in pursuing debtor for child support.

7 Debtor filed his voluntary chapter 7 petition on April 9,  
8 2008. Brian Mullen was appointed the chapter 7 trustee.<sup>5</sup>

9 On May 30, 2008 JAK filed an adversary complaint against  
10 debtor to have her three prepetition judgment debts declared  
11 nondischargeable under § 523(a)(4), (5), (6) and (15). On  
12 June 23, 2008, debtor's attorney, Timothy W. Steadman  
13 ("Steadman"), filed an answer on his behalf. The court  
14 scheduled a status conference for July 24, 2008. On August 4,  
15 2008 the bankruptcy court dismissed JAK's complaint for lack of  
16 prosecution and failure to appear because neither party appeared  
17 at the July 24, 2008 status conference.

18 Two days later, on August 6, 2008, JAK commenced a second  
19 adversary proceeding against debtor by filing an identical  
20 complaint to the one in the dismissed adversary.<sup>6</sup> On August 12,

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21  
22 <sup>5</sup> The trustee and his attorney Dawn Bayne ("Bayne") were  
dismissed from this appeal on September 16, 2009.

23  
24 <sup>6</sup> We cannot determine whether JAK's second adversary  
25 complaint was timely filed due to confusing docket entries.  
Nonetheless, debtor has not challenged the timeliness and the  
26 issue is waived. See Kontrick v. Ryan, 540 U.S. 443, 458  
27 (2004)(the time limitation under Rule 4007(c) for filing  
nondischargeability complaints under § 523 is not jurisdictional  
and can be waived).

1 2008 JAK served the summons and complaint on Steadman. When no  
2 answer was filed to the complaint, JAK moved for entry of  
3 default and a default judgment against debtor. The clerk  
4 entered the default against debtor on September 25, 2008 and the  
5 court signed the default judgment on the same day.

6 On October 8, 2008 debtor moved pro se to set aside the  
7 default judgment. Debtor raised many of the same arguments in  
8 his motion that he raises in this appeal. He maintained then,  
9 as he does now, that the state court judgment in the Fraud  
10 Action was void under Fed. R. Civ. P. 60(b)(4) because he was  
11 denied due process. The basis for this argument was "newly  
12 discovered evidence" of misconduct and ethical violations by  
13 attorneys and Judge Figueroa that allegedly occurred during the  
14 proceedings.

15 On December 2, 2008 the bankruptcy court granted debtor's  
16 motion to set aside the default judgment presumably because the  
17 complaint was served only on Steadman and he failed to answer  
18 JAK's complaint on debtor's behalf.<sup>7</sup> The court required JAK to  
19 serve debtor with the summons and complaint by December 12, 2008  
20 and debtor to file an answer by January 12, 2009. The minute  
21 entry on the court's docket indicates that debtor appeared  
22 telephonically at the December 2, 2008 hearing. The court  
23 continued the matter to January 22, 2009.

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25  
26 <sup>7</sup> On December 9, 2008 the bankruptcy court approved  
27 Steadman's motion to withdraw as debtor's attorney.

1 JAK timely served debtor, but he failed to answer the  
2 complaint. On January 13, 2009 JAK moved for entry of default  
3 and default judgment against debtor. The clerk entered the  
4 default on January 14, 2009.

5 At the January 22, 2009 hearing the court considered  
6 whether it should grant debtor an extension of time to file an  
7 answer. The minute entry reflects that debtor believed the  
8 court needed to determine whether it had jurisdiction. The  
9 minute entry further states that the court was prepared to set  
10 aside the default for a second time, but then the next sentence  
11 indicates that the default judgment was entered against debtor  
12 on the same day. The docket confirms entry of a separate  
13 default judgment on January 22, 2009.

14 On January 30, 2009 debtor timely filed this appeal.<sup>8</sup>

## 15 II. JURISDICTION

16 The bankruptcy court had jurisdiction over this proceeding  
17 under 28 U.S.C. §§ 1334 and 157(b)(2)(I).<sup>9</sup> This panel has

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18  
19 <sup>8</sup> On April 7, 2009 the bankruptcy court denied debtor's  
20 request to have the court pay for the transcripts in connection  
21 with this appeal. The court found that the transcript dates  
22 listed in his request were incorrect, it was not authorized to  
23 waive or pay appellate fees, and it could not certify that  
debtor's appeal was not frivolous and presented a substantial  
question. Debtor filed a motion for reconsideration which the  
court denied.

24 <sup>9</sup> Debtor raises the bankruptcy court's jurisdiction as an  
25 "issue" in his Notice of Appeal. He asserts that the bankruptcy  
26 court did not have jurisdiction because the state court Fraud  
27 Action was on appeal. However, this fact goes to whether JAK's  
28 state court judgment should be given full faith and credit in the  
bankruptcy court and does not implicate the subject matter  
jurisdiction of the bankruptcy court.

1 jurisdiction to hear debtor's appeal from the bankruptcy court's  
2 default judgment pursuant to 28 U.S.C. § 158(a).<sup>10</sup>

3 **III. ISSUE**

4 Whether the bankruptcy court abused its discretion in  
5 granting the default judgment.

6 **IV. STANDARD OF REVIEW**

7 We review the bankruptcy court's decision to enter a  
8 default judgment for an abuse of discretion. Haw. Carpenters'  
9 Trust Funds v. Stone, 794 F.2d 508, 511-12 (9th Cir. 1986).

10 We follow a two-part test to determine objectively whether  
11 the bankruptcy court abused its discretion. United States v.  
12 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009). First, we  
13 "determine de novo whether the bankruptcy court identified the  
14 correct legal rule to apply to the relief requested." Id.  
15 If it did, under the second part of the abuse of discretion  
16 test, we examine the bankruptcy court's factual findings under  
17 the clearly erroneous standard. We must affirm the court's  
18 factual findings unless those findings are "(1) 'illogical,'  
19 (2) 'implausible,' or (3) without 'support in inferences that  
20 may be drawn from the facts in the record.'" Id. If we  
21 determine that the court erred under either part of the test,  
22 we must reverse for an abuse of discretion. Id.

23 **V. DISCUSSION**

24 This is a direct appeal from entry of a default judgment.  
25 Debtor's brief is difficult to parse, JAK's brief cites no law

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26  
27 <sup>10</sup> Debtor filed a motion for leave to appeal because he was  
28 under the misconception that his appeal was interlocutory.

1 or evidence, and we have a meager and fragmented record before  
2 us. Based on our review of the docket in this adversary  
3 proceeding, we are able to evaluate whether the court abused its  
4 discretion in entering the default judgment.

5 In general, it is not our role to make arguments for debtor  
6 who has not made them or to assemble them from assorted hints  
7 and references scattered throughout his opening brief. We do,  
8 however, liberally construe the pleadings of pro se litigants.  
9 Kashani v. Fulton (In re Kashani), 190 B.R. 875, 883 (9th Cir.  
10 BAP 1995). Debtor asserts that the state court judgment in the  
11 Fraud Action is invalid on substantive and constitutional  
12 grounds. He also contends that the bankruptcy court lacked  
13 jurisdiction because the Fraud Action was on appeal. Debtor  
14 thus implicitly raises the question whether JAK met her burden  
15 of proof on her claims of nondischargeability related to the  
16 Fraud Action. Graham v. Henderson, 89 F.3d 75, 79 (2d Cir.  
17 1996)(pro se pleadings should be read "to raise the strongest  
18 arguments they suggest.").

19 He also asserts that the default judgment should be vacated  
20 because (1) the bankruptcy judge did not act impartially in this  
21 case, and (2) the bankruptcy judge failed to report violations  
22 of professional conduct by attorneys Terrance Dunmire and  
23 Patrick Sampair and alleged misconduct by Arizona Superior Court  
24 Judge Figueroa. We address each of these arguments below.

25 **A. Law of Default Judgments**

26 Fed. R. Civ. P. 55(b), applicable in adversary proceedings  
27 under Rule 7055, sets forth a two-step process to obtain a  
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1 default judgment in a nondischargeability proceeding:  
2 "(1) entry of the party's default (normally by the clerk), and  
3 (2) entry of a default judgment." Cashco Fin. Servs., Inc. v.  
4 McGee (In re McGee), 359 B.R. 764, 770 (9th Cir. BAP 2006);  
5 Fed. R. Civ. P. 55(b). The two-step process "is designed to  
6 assure that the plaintiff is entitled to the relief requested."  
7 All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84,  
8 88-89 (9th Cir. BAP 2007).

9 **1. Step One**

10 Without question, debtor's failure to answer JAK's  
11 complaint constitutes a permissible basis for entry of default  
12 by the clerk. See Fed. R. Civ. P. 55(a)(providing that a court  
13 may enter default or judgment by default if a party has "failed  
14 to plead or otherwise defend, and that failure is shown by  
15 affidavit or otherwise . . . ."). Debtor does not contend that  
16 notice was improper nor can we glean from the spotty record any  
17 valid reason why he failed to answer JAK's complaint.<sup>11</sup> Once the  
18 default was entered, JAK could then seek a default judgment  
19 against him.

20 Entry of the default, however, does not entitle the  
21 nondefaulting party to a default judgment as a matter of right.  
22 Gordon v. Duran, 895 F.2d 610, 612 (9th Cir. 1990); McGee,  
23 359 B.R. at 771. Thus, JAK's premise on appeal that she was  
24 entitled to entry of a default judgment against debtor because  
25 she "complied with all the procedural requirements" and "no just

26 \_\_\_\_\_  
27 <sup>11</sup> To be clear, since debtor received actual notice of JAK's  
28 complaint he cannot complain that he was denied due process.

1 cause existed to prevent entry of a default judgment" is  
2 incorrect.

3 **2. Step Two**

4 The decision whether to enter a default judgment, making  
5 the default final, is discretionary. Haw. Carpenters' Trust  
6 Funds, 794 F.2d at 511-12. Technical compliance with procedural  
7 requirements aside, the court's decision to grant a default  
8 judgment is based on inquiry into, and the balancing and  
9 weighing of, numerous factors which may include: (1) the  
10 possibility of prejudice to the plaintiff; (2) the merits of the  
11 plaintiff's substantive claims; (3) the sufficiency of the  
12 complaint; (4) the sum of money at stake in the action; (5) the  
13 possibility of a dispute concerning material facts; (6) whether  
14 the default was due to excusable neglect; and (7) the strong  
15 policy underlying the Federal Rules of Civil Procedure favoring  
16 decisions on the merits. Eitel v. McCool, 782 F.2d 1470, 1471-  
17 72 (9th Cir. 1986).

18 Both relevant and, we believe, dispositive here is the  
19 second Eitel factor, namely, the merits of JAK's § 523(a)(4) and  
20 (6) claims. The ultimate question then before us is whether JAK  
21 was entitled to the relief requested after considering the  
22 merits of her claims – if she was not, then the court abused its  
23 discretion in entering the default judgment.

24 It is black letter law that a default neither establishes  
25 legal arguments made in the pleadings nor requires entry of  
26 judgment on a legally unsound claim. McGee, 359 B.R. at 772  
27 ("[N]ecessary facts not contained in the pleadings, and claims  
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1 which are legally insufficient, are not established by  
2 default."). It follows then that the bankruptcy court must  
3 determine whether an adjudication on the merits presents "some  
4 possibility" that a defendant would prevail on at least some of  
5 the claims or damages asserted. Haw. Carpenters' Trust Funds,  
6 794 F.2d at 513; see also Eitel, 782 F.2d at 1471-72; Chanel,  
7 Inc. v. Gordashevsky, 558 F. Supp. 2d 532, 536 (D.N.J.  
8 2008)("[B]efore granting a default judgment, the court must  
9 first ascertain whether 'the unchallenged facts constitute a  
10 legitimate cause of action, since a party in default does not  
11 admit mere conclusions of law.' (citation omitted)").

12 Bankruptcy courts have discretion to require some proof of  
13 facts that must be established to determine liability.  
14 10A Wright, Miller & Kane, Federal Practice & Procedure § 2688  
15 (3d ed. 2009). Because nondischargeability proceedings  
16 implicate a debtor's fresh start, we believe it is especially  
17 important that bankruptcy courts exercise their discretion to  
18 require that plaintiffs prove their prima facie case before  
19 entry of a default judgment. Lu v. Liu (In re Liu), 282 B.R.  
20 904, 907 (Bankr. C.D. Cal. 2002). We have held that "[t]he  
21 court, prior to the entry of a default judgment, has an  
22 independent duty to determine the sufficiency of a claim, as  
23 stated in Rule 55(b)(2) . . . ." Kubick v. Fed. Deposit Ins.  
24 Corp. (In re Kubick), 171 B.R. 658, 662 (9th Cir. BAP 1994).

25 In Kubick, we further observed that "for a court to  
26 exercise discretion, it must in fact exercise discretion.  
27 Obviously, this requires the Bankruptcy Court to articulate the  
28

1 reasons for its exercise of discretion. . . ." Id. at 661.  
2 Here, we are left with the impression that the bankruptcy court  
3 did not exercise its discretion in this matter. The default  
4 judgment states that the \$678,983 due to JAK from debtor arose  
5 out of "defendant's fraud upon the plaintiff, and conspiracy to  
6 defraud, and is not dischargeable . . . pursuant to . . .  
7 Section 523(a)(4) . . . and Section 523(a)(6)," but fails to  
8 make clear the rationale for finding the judgment debt arising  
9 out of the Fraud Action nondischargeable under either section.

10 Further, the only support for JAK's conclusory allegations  
11 in her complaint that we can find is the one-page state court  
12 judgment from the Fraud Action which, on its face, does not  
13 support her nondischargeability claims under either § 523(a)(4)  
14 or (6).

15 **3. Elements of JAK's Claim Under § 523(a)(4)**

16 To succeed on her § 523(a)(4) claim, JAK had to prove, by a  
17 preponderance of the evidence, that her judgment debt was based  
18 on one of the three separate bases for nondischargeability:

19 (1) the debtor's fraud or defalcation while acting in a  
20 fiduciary capacity; (2) embezzlement; or (3) larceny. If JAK  
21 was relying on the first basis, her debt is nondischargeable  
22 under § 523(a)(4) only "where (1) an express trust existed,  
23 (2) the debt was caused by fraud or defalcation, and (3) the  
24 debtor acted as a fiduciary to the creditor at the time the debt  
25 was created." Otto v. Niles (In re Niles), 106 F.3d 1456, 1459  
26 (9th Cir. 1997). "Embezzlement" within the meaning of  
27 § 523(a)(4) requires three elements: (1) property rightfully in  
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1 the possession of the nonowner debtor; (2) the nonowner's  
2 misappropriation of the property to a use other than that for  
3 which it was entrusted; and (3) circumstances indicating fraud.  
4 Transamerica Commercial Fin. Co. v. Littleton (In re Littleton),  
5 942 F.2d 551, 555 (9th Cir. 1991). "The elements of larceny  
6 differ only in that a larcenous debtor has come into possession  
7 of funds wrongfully." U-Save Auto Rental of Am. v. Mickens  
8 (In re Mickens), 312 B.R. 666, 680 (Bankr. N.D. Cal. 2004).

9 **4. Elements of JAK's Claim Under § 523(a)(6)**

10 A claim under § 523(a)(6) has its own specific statutory  
11 requirements. Under § 523(a)(6), JAK must prove that her  
12 judgment debt obtained in the Fraud Action was for a "willful  
13 and malicious injury by the debtor to another entity or to the  
14 property of another entity." § 523(a)(6). The willful injury  
15 requirement is met only when the debtor has a "subjective motive  
16 to inflict injury or when the debtor believes that injury is  
17 substantially certain to result from his own conduct."  
18 Carillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002).  
19 "A malicious injury involves (1) a wrongful act, (2) done  
20 intentionally, (3) which necessarily causes injury, and (4) is  
21 done without just cause or excuse." Petralia v. Jercich  
22 (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001). Moreover,  
23 a finding of conversion does not necessarily create a willful  
24 and malicious injury. "[W]hat may be a technical conversion  
25 under some state law is not necessarily sufficient under  
26 § 523(a)(6)." Nat'l Gold Exch., Inc. v. Stern (In re Stern),  
27 403 B.R. 58, 69 (Bankr. C.D. Cal. 2009).

1           Nothing in the record shows that the elements under either  
2 § 523(a)(4) or (6) were considered in the state court Fraud  
3 Action. We are not surprised, since JAK's counsel conceded  
4 during oral argument on this matter that there was no prove up  
5 of the nondischargeability elements under § 523(a)(4) or (6).  
6 Accordingly, the record before the bankruptcy court was  
7 insufficient for it to have made the necessary findings in  
8 support of the default judgment based on JAK's § 523(a)(4) and  
9 (6) claims.

10           We cannot simply speculate that JAK's state court judgment  
11 from the Fraud Action meets the standards for  
12 nondischargeability which usually require a rigorous analysis.  
13 Therefore, we conclude the bankruptcy court abused its  
14 discretion in granting the default judgment on JAK's § 523(a)(4)  
15 and (6) claims without requiring a further showing that the  
16 necessary elements have been established. See McGee, 359 B.R.  
17 at 770 ("[D]efault judgments are disfavored by the law, and any  
18 doubts will usually be resolved in favor of the defaulting  
19 party."). Consequently, we vacate the portion of the default  
20 judgment that relates to § 523(a)(4) and (6) and remand to the  
21 bankruptcy court for further inquiry. We make no determination  
22 about the merits of JAK's claims under these subsections but  
23 simply note JAK has to prove either the preclusive effect of  
24 the state court judgment in the Fraud Action with respect to the  
25  
26  
27  
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1 elements discussed above or separately provide an evidentiary  
2 basis for the debt to be excepted from discharge.<sup>12</sup>

3 **5. Elements of JAK's Claim Under § 523(a)(5)**

4 We do not question the bankruptcy court's ruling regarding  
5 the nondischargeability of JAK's judgment debts for child  
6 support and attorney fees. Here, the record sufficiently shows  
7 that those debts met the requirements for nondischargeability  
8 under § 523(a)(5) without further inquiry.

9 Section 523(a)(5) makes a debt for a domestic support  
10 obligation nondischargeable. Section 101(14A) defines a  
11 "domestic support obligation" as one accruing before the date  
12 for the order of relief and that is (A) owed to a former spouse;  
13 (B) in the nature of support of a child; (C) established by an  
14 order of the court; and (D) not assigned to a nongovernmental  
15 entity.

16 It is evident JAK's state court judgment for child support  
17 is excepted from discharge within the statutory language of  
18 § 523(a)(5). Moreover, her state court judgment for attorney's  
19 fees that were incurred in pursuing child support is also  
20 properly nondischargeable under § 523(a)(5). Rehkov v. Lewis  
21 (In re Rehkov), 239 F. App'x 341, 342 (9th Cir. 2007); Macy v.  
22 Macy, 114 F.3d 1, 2-3 (1st Cir. 1997). Because of our  
23 conclusion, it is unnecessary to address whether JAK's claim  
24 falls under § 523(a)(15).

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25  
26 <sup>12</sup> The preclusive effect of JAK's state court judgment is  
27 determined under the preclusion law of Arizona. See Gayden v.  
28 Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995).

1 We emphasize that we were unable to construe any of  
2 debtor's arguments as pertaining to these debts. Therefore,  
3 debtor has waived them. See Smith v. Marsh, 194 F.3d 1045, 1052  
4 (9th Cir. 1999)("[O]n appeal, arguments not raised by a party in  
5 its opening brief are deemed waived.").

6 **B. Debtor's Remaining Arguments**

7 In light of our decision to remand to the bankruptcy court,  
8 we address the other issues debtor raises on appeal to obviate  
9 the need to deal with redundant allegations of judicial bias and  
10 the like later on.

11 **1. The Bankruptcy Judge's Alleged Failure to Act**  
12 **Impartially As a Ground to Set Aside the Default**

13 For purposes of our discussion, we presume that debtor's  
14 allegations of judicial bias relate to his assertions of due  
15 process violations that crop up from time to time in his briefs.  
16 In re Murchison, 349 U.S. 133, 136 (1955)(The right to trial by  
17 an impartial judge "is a basic requirement of due process.").

18 Our review of the bankruptcy case and adversary proceeding  
19 docket reveals that debtor never filed a recusal motion in the  
20 bankruptcy court. Rather, debtor raises the issue of the  
21 bankruptcy judge's impartiality for the first time in this  
22 appeal. "Although an impartiality issue can be raised at any  
23 time, the timing may affect the weight ascribed to the evidence  
24 said to be probative of bias or prejudice. One who waits to  
25 raise an impartiality issue until after adverse decisions are  
26 announced undermines the weight that will be ascribed to the  
27 evidence of bias or prejudice." Am. Express Travel Related

1 Servs. Co. v. Fraschilla (In re Fraschilla), 235 B.R. 449, 459  
2 (9th Cir. BAP 1999), aff'd 242 F.3d 381 (9th Cir. 2000); cf.  
3 United States v. Bosch, 951 F.2d 1546, 1548 (9th Cir. 1991)  
4 (reviewing recusal claim for the first time on appeal under the  
5 plain error standard rather than for an abuse of discretion).

6       Actually, it makes little difference whether or not debtor  
7 previously raised the issue because he has presented no  
8 competent evidence of bias or prejudice in this appeal for us to  
9 weigh. Debtor's feeling – which is all he has offered – that  
10 the bankruptcy judge is personally biased against him is legally  
11 insufficient for the reasons discussed below.

12       "A bankruptcy judge shall be governed by 28 U.S.C. § 455,  
13 and disqualified from presiding over the proceeding or contested  
14 matter in which the disqualifying circumstance arises, or, if  
15 appropriate, shall be disqualified from presiding over the  
16 case." Rule 5004(a). Section 455 of Title 28 provides:

17       (a) Any justice, judge, or magistrate of the United  
18 States shall disqualify himself in any proceeding in  
19 which his impartiality might reasonably be questioned.

20       (b) He shall also disqualify himself in the following  
21 circumstances:

22       (1) Where he has a personal bias or prejudice  
23 concerning a party, or personal knowledge of disputed  
24 evidentiary facts concerning the proceeding.

25       "Judicial impartiality is presumed." First Interstate Bank  
26 of Ariz., N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 987  
27 (9th Cir. 2000); see also Liteky v. U.S., 510 U.S. 540, 554-55  
28 (1994). Generally, allegations of bias or prejudice must stem  
from some extrajudicial source. Liteky, 510 U.S. at 550-55. If

1 there is no evidence of extrajudicial sources of bias or  
2 prejudice, then a charge of impartiality would have to be  
3 supported on evidence that the judge exhibited "such a high  
4 degree of favoritism or antagonism to make fair judgment  
5 impossible." Id. at 554-55. Further, evaluations of bias or  
6 prejudice are judged from an objective perspective; "whether a  
7 reasonable person with knowledge of all the facts would conclude  
8 that the judge's impartiality might reasonably be questioned."  
9 Seidel v. Durkin (In re Goodwin), 194 B.R. 214, 222 (9th Cir.  
10 BAP 1996).

11 The factual basis for debtor's claim of lack of  
12 impartiality falls into three categories: (1) the bankruptcy  
13 judge's rulings and judgments themselves; (2) the allegation  
14 that the bankruptcy judge allowed debtor's attorney to act  
15 without debtor's knowledge or authorization; and (3) the  
16 allegation that the bankruptcy judge's brother's employment at  
17 the Arizona Attorney General's ("AG") Office somehow influenced  
18 his opinion about debtor.

19 We dispose of debtor's allegations in short order. First,  
20 "[j]udicial rulings alone almost never constitute a valid basis  
21 for a bias or partiality motion," absent a showing of a high  
22 degree of antagonism or favoritism in the text accompanying the  
23 order or ruling. Liteky, 510 U.S. at 555. Debtor fails to  
24 identify anything in the character or content of the rulings  
25 that reasonably questions the bankruptcy judge's impartiality.

26 Debtor's next reason for questioning the bankruptcy judge's  
27 impartiality is also legally unsound. To allow debtor's lawyer,  
28

1 Steadman, to submit various orders, schedules, and statements to  
2 the court (which were allegedly against debtor's will and  
3 without his knowledge or authorization) does not demonstrate  
4 bias. Pleadings filed in the bankruptcy court can hardly be  
5 considered as an "extrajudicial" source of information.  
6 Moreover, these facts do not show that the bankruptcy judge  
7 exhibited "such a high degree of favoritism or antagonism to  
8 make fair judgment impossible." A bankruptcy judge has little  
9 or no control over what a debtor's counsel files and the docket  
10 does not show any motion by debtor asking the court to strike  
11 any of the pleadings.

12 Debtor also urges us to conclude that the bankruptcy judge  
13 is biased or prejudiced against him because the judge has a  
14 brother employed at the Arizona AG's office. Debtor does not  
15 elaborate, merely stating that the AG's office has connections  
16 to other Arizona judges and attorneys who have known grudges  
17 against debtor. These statements are conclusory and not  
18 supported by any competent evidence in the record.

19 Debtor's remaining arguments pertain to issues that have  
20 been fully and finally adjudicated in the bankruptcy court.  
21 Debtor maintains that the bankruptcy judge ignored his claims  
22 that Steadman did not provide materials to him. However, on  
23 February 6, 2009, the bankruptcy judge ruled for the fourth time  
24 that it lacked jurisdiction regarding a dispute over documents  
25 between a client and former attorney that had no impact on the  
26 bankruptcy estate. The court noted that debtor could seek his  
27 papers through the state court system where the dispute over the  
28

1 papers apparently arose. That order has become final because  
2 debtor did not appeal it. Therefore, we do not have  
3 jurisdiction over that matter. Tucker v. Sambo's Restaurant  
4 (In re Sambo's Restaurant), 27 B.R. 630, 631 (9th Cir. BAP  
5 1983).

6 A further illustration of debtor's assertions occurred on  
7 December 29, 2008, when debtor moved for an order to have  
8 attorney Terrance Dunmire return certain alleged stolen deeds.  
9 The court denied the motion by order entered on January 9, 2009.  
10 Since debtor did not appeal, that order has become final too,  
11 and we have no jurisdiction over the matter. Id.

12 Debtor has lost on each of the above-mentioned "issues" he  
13 raises again in this appeal. There is no further relief  
14 available.

15 In sum, debtor's charges are not grounded on facts that  
16 would create a reasonable doubt concerning the judge's  
17 impartiality. To the extent debtor's due process challenge  
18 rests on impartiality grounds, it too must fail. As a result,  
19 the alleged lack of impartiality cannot be used to vacate the  
20 default judgment.

21 **2. The Bankruptcy Judge's Failure to Report Ethical**  
22 **Violations of Professional Conduct As a Ground to Set**  
23 **Aside the Default**

24 Debtor maintains that the bankruptcy judge had an "ethical  
25 obligation" to report violations of professional conduct by  
26 attorneys Terrance Dunmire and Patrick Sampair and alleged  
27  
28

1 misconduct by Judge Figueroa.<sup>13</sup> Indeed, debtor goes so far as to  
2 state that the bankruptcy judge is "charged with knowledge" of  
3 alleged ethical violations of various attorneys and alleged  
4 misconduct by Judge Figueroa that occurred in the Arizona  
5 Superior Court. From what we can tell, debtor raised these  
6 arguments in his set aside motion in connection with the first  
7 default judgment entered against him.

8 We are unaware of any legal authority that supports  
9 debtor's premise that the bankruptcy judge - through judicial  
10 notice no less - should report professional or judicial  
11 misconduct that occurred in the state court and outside his  
12 presence. We hasten to point out that debtor's remedy for any  
13 alleged misconduct by attorneys or the judge in the state court  
14 Fraud Action was to file a complaint with the Arizona State Bar  
15 or Judicial Commission. The record indicates that debtor had  
16 exercised that remedy and, at least with respect to Judge  
17 Figueroa, the Arizona Judicial Commission investigated and then  
18 dismissed his complaint. Thus, this is not the proper forum to  
19 raise the issue again.

20 Throughout his briefs, debtor raises a number of objections  
21 to the state court's decision in the Fraud Action, including  
22 erroneous rulings, ethical violations by attorneys and the  
23 judge, prejudice and violations of due process. We do not  
24 consider any of these arguments because debtor is precluded from

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25  
26 <sup>13</sup> At another point in his brief, debtor argues that the  
27 bankruptcy judge had a duty to report the conduct of Bayne  
28 because she acted for financial gain. There is no legal support  
for this argument.

1 collaterally attacking the state court's decision either in the  
2 bankruptcy court or this appeal, even on constitutional grounds.  
3 Ryan v. Loui (In re Corey), 892 F.2d 829, 834 (9th Cir. 1989).

4 **VI. CONCLUSION**

5 We VACATE the portion of the default judgment relating to  
6 JAK's claims for relief under § 523(a)(4) and (6) and REMAND to  
7 the bankruptcy court for proceedings consistent with this  
8 decision. We AFFIRM that portion of the judgment pertaining to  
9 JAK's claims for relief under § 523(a)(5).