

JUN 08 2011

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. AZ-10-1386-DMkMa
)	
6	NHIEM TIN NGUYEN,)	Bk. No. 07-06989-GBN
)	
7	Debtor.)	Adv. Proc. No. 10-00238-GBN
)	
8	_____)	
)	
9	NHIEM TIN NGUYEN,)	
)	
10	Appellant,)	
)	
11	v.)	M E M O R A N D U M ¹
)	
12	JILL H. FORD,)	
)	
13	Appellee.)	
)	
	_____)	

Argued and Submitted on May 13, 2011
at Phoenix, Arizona

Filed - June 8, 2011

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

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

Appearances: Nhiem Tin Nguyen argued pro se.
No appearance for the Appellee.

Before: DUNN, MARKELL, and MANN² Bankruptcy Judges

¹ 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.

² Hon. Margaret M. Mann, Bankruptcy Judge for the Southern District of California, sitting by designation.

1 The bankruptcy court entered a default money judgment against
2 the pro se debtor and revoked the debtor's Chapter 7³ discharge.
3 The debtor appealed, asserting that the default judgment should be
4 vacated. Because the debtor did not seek relief from entry of the
5 default judgment before the bankruptcy court in the first instance,
6 we DISMISS this appeal.

7 I. FACTS⁴

8 With the assistance of a Bankruptcy Petition Preparer, Nhien
9 Tin Nguyen filed his voluntary Chapter 7 petition in the Phoenix
10 Division of the United States Bankruptcy Court for the District of
11 Arizona on December 20, 2007. Jill H. Ford ("Trustee") was
12 appointed the Chapter 7 trustee in the case. The bankruptcy court
13 set the § 341(a) Meeting of Creditors for February 1, 2008, and
14 notified parties in interest that April 1, 2008, was the deadline
15 for filing complaints objecting to Mr. Nguyen's discharge. No
16 objection to Mr. Nguyen's discharge was filed within the time
17 allowed. The bankruptcy court entered Mr. Nguyen's discharge on
18 May 12, 2008, after Mr. Nguyen had certified his completion of the
19 instructional course concerning personal financial management
20 ("Financial Counseling Certificate") mandated by § 727(a)(11).

21 On April 29, 2008, on the Trustee's application, the bankruptcy
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23 ³ Unless otherwise indicated, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
25 all rule references are to the Federal Rules of Civil Procedure,
26 Rules 1-86.

⁴ Pursuant to the Panel's December 16, 2010, "Order re
Appellant's Informal Brief," these facts are taken from the
bankruptcy court's publicly available electronic record.

1 court entered an order, which required Mr. Nguyen to appear for a
2 Rule 2004 Examination "on a date and time agreed to by the parties
3 or if upon notice, after not less than twenty (20) days notice." On
4 September 2, 2008, for the purpose of enabling the Trustee to
5 evaluate Mr. Nguyen's interest in two businesses, the bankruptcy
6 court entered orders requiring H. The Manh to produce records to the
7 Trustee for Morgan's Hair and Nails Spa ("Spa") and ABACUS Services
8 Accounting and Taxes to produce to the Trustee records for Pacific
9 Seafood & Market, Inc. ("Pacific").⁵

10 On August 17, 2009, the Trustee filed a motion ("Turnover
11 Motion") to compel Mr. Nguyen, as the sole owner of the Spa, to
12 cooperate with the Trustee and to "surrender to the trustee all
13 books, documents, records, and papers relating to property of the
14 estate" as required by §§ 521(a)(3) and (4)⁶ and by § 542(e).⁷ The

15
16 ⁵ Mr. Nguyen disclosed only his interest in the Spa in his
17 bankruptcy schedules.

18 ⁶ Section 521(a)(3) provides: "The debtor shall . . . if a
19 trustee is serving in the case . . . cooperate with the trustee as
20 necessary to enable the trustee to perform the trustee's duties
21 under this title[.]"

22 ⁷ Section 521(a)(4) provides: "The debtor shall . . . if a
23 trustee is serving in the case . . ., surrender to the trustee all
24 property of the estate and any recorded information, including
25 books, documents, records, and papers, relating to property of the
26 estate, whether or not immunity is granted under section 344 of this
27 title[.]"

28 ⁷ Section 542(e) provides: "Subject to any applicable
29 privilege, after notice and a hearing, the court may order an
30 attorney, accountant, or other person that holds recorded
31 information, including books, documents, records, and papers,

(continued...)

1 Turnover Motion also alleged that the Trustee had determined that as
2 of the petition date (1) the value of Mr. Nguyen's ownership
3 interest in the Spa was \$2,948.00, (2) the value Mr. Nguyen's one-
4 third ownership interest in Pacific was \$5,823.33, and (3) the value
5 of these ownership interests constituted property of Mr. Nguyen's
6 bankruptcy estate which the bankruptcy court should compel
7 Mr. Nguyen to turn over to the Trustee as required by § 542(a).⁸
8 The bankruptcy court entered an order ("Turnover Order") granting
9 the Turnover Motion on September 16, 2009. As requested in the
10 Turnover Motion, the Turnover Order contained a provision which
11 imposed a \$100 per day sanction if Mr. Nguyen failed to comply with
12 the Turnover Order within ten days of its entry. Despite numerous
13 demands from the Trustee, Mr. Nguyen failed to comply with the
14 Turnover Order. On February 8, 2010, the Trustee filed an adversary
15 proceeding (1) to enforce the Turnover Order and (2) to revoke
16 Mr. Nguyen's discharge based on his failure to comply with the

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18 ⁷(...continued)
19 relating to the debtor's property or financial affairs, to turn over
or disclose such recorded information to the trustee."

20 ⁸ Section 542(a) provides:

21 Except as provided in subsection (c) or (d) of this
22 section, an entity, other than a custodian, in possession,
23 custody, or control, during the case, of property that the
24 trustee may use, sell, or lease under section 363 of this
25 title, or that the debtor may exempt under section 522 of
26 this title, shall deliver to the trustee, and account for,
such property or the value of such property, unless such
property is of inconsequential value or benefit to the
estate.

1 Turnover Order. As authorized by Rule 7004, the Trustee served the
2 summons and complaint on Mr. Nguyen by first class mail at his
3 address of record in the bankruptcy case.

4 Default was entered in the adversary proceeding by the
5 bankruptcy court clerk on March 19, 2010, based on the Trustee's
6 application and affidavit. On September 2, 2010, the Trustee moved
7 for entry of a default judgment without a hearing and advised
8 Mr. Nguyen that the proposed default judgment had been lodged with
9 the bankruptcy court. The form of judgment entered September 13,
10 2010, awarded the Trustee judgment in the amount of \$8,771.33, post-
11 judgment interest pursuant to 28 U.S.C. § 1961, attorneys' fees in
12 the amount of \$947.50, and costs in the amount of \$250.00. On
13 September 16, 2010, the Trustee provided notice to Mr. Nguyen that
14 he had lodged an amended default judgment with the bankruptcy court.
15 The amended default judgment was entered September 21, 2010, adding
16 to the relief previously granted the revocation of Mr. Nguyen's
17 discharge. On the same date, the amended default judgment was
18 docketed in the main case as an order revoking Mr. Nguyen's
19 discharge. Mr. Nguyen filed a timely Notice of Appeal ("2010
20 Appeal") from the amended default judgment and the order revoking
21 his discharge.

22 In the 2010 Appeal, Mr. Nguyen asserts that the amended default
23 judgment should be vacated because (1) he was sick and unable to
24 travel from California to Arizona to participate in the adversary
25 proceeding which resulted in revocation of his discharge,
26 (2) telling the Chapter 7 trustee to get missing documents from

1 debtor's accountant was sufficient to satisfy debtor's obligation to
2 provide the documents to the Chapter 7 trustee, and (3) he is
3 Vietnamese and did not understand the legal documents or
4 proceedings.

5 After the discharge was revoked in Mr. Nguyen's bankruptcy
6 case, the Trustee filed a no asset report on September 28, 2010.
7 The bankruptcy court closed the estate December 28, 2010, as having
8 been fully administered. On the same date, the bankruptcy court
9 sent a notice to Mr. Nguyen ("Notice of Case Closing"), which stated
10 that the case had been closed without entry of a discharge, and
11 which erroneously cited as cause Mr. Nguyen's alleged failure to
12 file a Financial Counseling Certificate as required by § 727(a)(11).
13 The Notice of Case Closing should instead have informed Mr. Nguyen
14 that the case had been closed without entry of a discharge as a
15 consequence of the order revoking Mr. Nguyen's discharge which
16 resulted from entry of the amended default judgment in the adversary
17 proceeding.

18 In response to the Notice of Case Closing, Mr. Nguyen refiled
19 his Financial Counseling Certificate on January 19, 2011. On
20 January 21, 2011, the bankruptcy court noted on the docket that the
21 Notice of Case Closing had been entered in error. The Notice of
22 Case Closing itself was not corrected, withdrawn, or otherwise
23 vacated. The bankruptcy case remains closed, without entry of a
24 discharge for the benefit of Mr. Nguyen.

25 On January 24, 2011, Mr. Nguyen filed a second notice of appeal
26 ("2011 Appeal") with respect to the "December 28, 2010 decision and

1 all previous decisions." On March 22, 2011, our motions panel
2 dismissed the 2011 Appeal as untimely. The dismissal order
3 clarified that Mr. Nguyen's rights in the 2010 Appeal, in which Mr.
4 Nguyen challenges the revocation of his discharge, were not harmed
5 by the dismissal of the 2011 Appeal.

6 Nevertheless, Mr. Nguyen was confused about the status of each
7 of his appeals. On April 7, 2011, Mr. Nguyen filed with the Panel a
8 document ("April 2011 Document") which contained the case numbers
9 for both the 2010 Appeal and the 2011 Appeal. The April 2011
10 Document was docketed in the 2011 Appeal as a notice of appeal to
11 the Ninth Circuit; as such we are divested of jurisdiction over the
12 2011 Appeal. The April 2011 Document also was docketed in the 2010
13 Appeal as a motion for reconsideration and a request to consolidate
14 the two appeals before the Panel. Because no dispositive action had
15 yet been taken in the 2010 Appeal, and because the Panel no longer
16 had jurisdiction over the 2011 Appeal, we entered an order on April
17 27, 2011, which denied the relief sought in the April 2011 Document
18 with respect to the 2010 Appeal. We clarified for Mr. Nguyen that
19 we would be addressing at the oral argument scheduled for May 13,
20 2011, only the issues presented in the 2010 Appeal.

21 II. JURISDICTION

22 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
23 and 157(b)(2)(J). We have jurisdiction under 28 U.S.C. § 158.

24 III. ISSUE

25 Whether the Panel may consider the appeal from a default
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1 judgment⁹ where no motion to set aside either the entry of default
2 or the entry of the default judgment was first brought before the
3 bankruptcy court.

4 IV. DISCUSSION

5 In her complaint, the Trustee asserted that Mr. Nguyen failed
6 to obey the Turnover Order. Section 727(d)(3) provides that the
7 court shall revoke a debtor's discharge upon the trustee's request
8 if the debtor committed an act enumerated in § 727(a)(6). Section
9 727(a)(6)(A) provides that a debtor is not entitled to a discharge
10 if he "has refused . . . to obey any lawful order of the court,
11 other than an order to respond to a material question or to
12 testify." 11 U.S.C. § 727(a)(6)(A).

13 When Mr. Nguyen failed to appear in the adversary proceeding
14 within the prescribed time after he had been served with the summons
15 and complaint, the Trustee requested and obtained entry of
16 Mr. Nguyen's default in the adversary proceeding. Nearly six months
17 later, with Mr. Nguyen still having made no appearance in the
18 adversary proceeding, the Trustee moved first for entry of the
19 default judgment, and then for entry of the amended default
20 judgment, all with notice to Mr. Nguyen.

21 In light of Mr. Nguyen's default, the bankruptcy court was
22 entitled to assume as true the facts alleged in the Trustee's
23 complaint, except as to the amount of damages when it ruled on the
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25 ⁹ Mr. Nguyen's ability to challenge the entry in the main
26 case of the order revoking his discharge is derivative of his
success on appeal from the amended default judgment.

1 motion for entry of default judgment. Geddes v. United Fin. Group,
2 559 F.2d 557, 560 (9th Cir. 1977).¹⁰ The amended default judgment
3 entered against Mr. Nguyen not only granted the Trustee a money
4 judgment in the amounts set forth in the Turnover Order, it also
5 revoked Mr. Nguyen's discharge.

6 Only after the amended default judgment was entered did
7 Mr. Nguyen take any action in connection with the Trustee's
8 complaint. Unfortunately, that action, the filing of the 2010
9 Appeal, was insufficient to entitle Mr. Nguyen to relief from the
10 amended default judgment.

11 Whether Mr. Nguyen was entitled to relief from the amended
12 default judgment was a matter within the discretion of the
13 bankruptcy judge in the first instance. Madsen v. Bumb, 419 F.2d 4,
14 6 (9th Cir. 1969). Under Rule 55(c), applicable in adversary
15 proceedings pursuant to Fed. R. Bankr. P. 7055, the bankruptcy court
16 has discretion (1) to set aside an entry of default "for good cause"
17 and (2) to set aside the amended default judgment under Rule 60(b).
18 "Relief from a default judgment must be requested by a formal
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20 ¹⁰ The bankruptcy court did not conduct a hearing prior to
21 entry of the default judgment, nor was it required to, where the
22 money judgment sought by the Trustee was for a sum certain. 10A
23 Wright, Miller & Kane, Fed. Practice and Proc. 2d § 2688 (2010)
24 ("Once the court determines that a judgment by default should be
25 entered, it will determine the amount and character of the recovery
26 that should be awarded . . . If defendant does not contest the
amount prayed for in the complaint and the claim is for a sum
certain or a sum that can be made certain by computation, the
judgment generally will be entered for that amount without any
further hearing.").

1 application as required by Rule 60(b)." 10A Wright, Miller & Kane,
2 Fed. Practice and Proc. 2d § 2692 (2010). "Relief under Rule 60(b)
3 ordinarily is obtained by motion **in the court that rendered the**
4 **judgment.**" 11 Wright, Miller & Kane, Fed. Practice and Proc. 2d
5 § 2865 (2010) (emphasis added). "Motions to vacate default
6 judgments . . . are addressed to the broad equitable discretion of
7 the court where the default was taken." State Bank of India v.
8 Chalasanani (In re Chalasanani), 92 F.3d 1300, 1307 (2d Cir. 1996),
9 cited by Investors Thrift v. Lam (In re Lam), 192 F.3d 1309, 1311
10 (9th Cir. 1999).

11 Mr. Nguyen did not seek relief from the amended default
12 judgment in the bankruptcy court. As an appellate body, our role
13 with regard to a Rule 60(b) motion is limited to reviewing the
14 bankruptcy court's decision to determine if there was an abuse of
15 discretion. First Beverages, Inc. v. Royal Crown Cola Co., 612 F.2d
16 1164, 1172 (9th Cir. 1980). "An appeal to this court cannot be used
17 as a substitute for the timely procedure set forth by Rule 60(b)."
18 Rohauer v. Friedman, 306 F.2d 933, 937 (9th Cir. 1962).

19 The Ninth Circuit, when faced with a defaulted party who
20 appealed a default judgment rather than seek relief from the trial
21 court under Rule 60(b), dismissed the appeal, stating:

22 Federal courts are not run like a casino game in which
23 players may enter and exit on pure whim. A defaulted
24 party may not re-enter litigation, particularly on appeal,
25 on sheer caprice. It must follow proper procedure to set
26 aside the default.

1 In re Lam, 192 F.3d at 1311. Accord Consorzio del Prosciutto v.
2 Domain Name Clearing, 346 F.3d 1193, 1195 (9th Cir. 2003)(appeal of
3 default judgment dismissed where defaulting party had not first
4 moved the trial court to set aside entry of default or relief from
5 the default judgment).

6 V. CONCLUSION

7 Consistent with Ninth Circuit precedent, we DISMISS this
8 appeal.

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