NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-10-1259—PaKiSa
DANNY WAYNE PRYOR,	Bk. No. CC-09-23842-BR
Debtor.	Adv. No. CC-09-2291-BR
DANNY WAYNE PRYOR,	
Appellant,	**M E M O R A N D U M**[1]
v.	
RW INVESTMENT COMPANY, INC.	
Appellee.	

Argued and Submitted on May 13, 2011
at Pasadena, California

Filed - August 12, 2011

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

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: Appellant Danny Wayne Pryor appeared pro se.

Maurice L. Chenier appeared for appellee R.W. Investment Company, Inc.

Before: PAPPAS, KIRSCHER and SARGIS[2], 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] The Honorable Ronald H. Sargis, U.S. Bankruptcy Judge for the Eastern District of California, sitting by designation.

Chapter 7[3] debtor Danny Wayne Pryor ("Pryor") appeals the decision of the bankruptcy court granting a default judgment against him, determining that his debt to creditor RW Investment Company, Inc. ("RW") is excepted from discharge under § 523(a)(2), and denying him a discharge under §§ 727(a)(2),(3),(4) and (5). We AFFIRM the bankruptcy court's nondischargeability determination under § 523(a)(2), but VACATE the court's denial of Pryor's discharge and REMAND for entry of an amended judgment.

FACTS

RW is a California corporation engaged in the business of real estate investments, construction and development. In October 2003, RW purchased a property on Market Street in Inglewood, California (the "Property") for the purpose of constructing six townhouse apartments. On July 27, 2005, RW entered into a loan agreement with Indymac Bank in the amount of $1,840,000.00 to finance construction of the townhouses; the loan had a maturity date of July 26, 2006.

RW engaged Pryor, through his wholly owned company, Turnkey Development, Inc., as the general contractor for the construction project on February 20, 2006. The terms of the engagement included a construction schedule requiring completion of the townhouses by November 30, 2006.

Indymac agreed to extend the maturity date of the construction loan to November 30, 2006. It charged RW $20,969.67

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

for this extension. Pryor told RW representatives that the additional time would allow him to create building plans, obtain approval for the plans from local authorities, and to start construction. However, when the extended maturity date arrived, Pryor had neither created the plans, submitted the plans to the city, nor commenced construction of the townhouses. As a result, RW was required to obtain yet another extension of time to pay Indymac to January 29, 2007. RW paid another $9,983.25 as consideration for this extension.

RW alleges that through early 2007, Pryor made continuing excuses for his failure to work on the plans or commence construction, yet assured RW that he would start immediately. As part of the second extension agreement, Indymac required RW to enter into a new agreement with Pryor to complete work on the townhouses. RW entered into a written agreement with Pryor known as the Real Estate Construction and Purchase Agreement on February 24, 2007 ("RECPA"). Indymac conditioned its approval of the RECPA, insisting that Pryor take over complete financial, management, and construction control of the construction project pursuant to a written Assumption Agreement on March 24, 2007. Among the relevant terms of RECPA were:

- RW sold the Property to 704 Market, LLC; Pryor was the sole member and responsible officer of this company.

- Pryor and 704 Market executed a promissory note in the amount of $525,000 in favor of RW, as full payment for purchase of the Property.

- Pryor agreed to pay $57,000 to Indymac to reduce the principal balance on the construction loan.

- 704 Market assumed responsibility for payment of the construction loan, although RW's promise to pay the loan, and the guarantees of the loan previously executed by its shareholders, continued in effect.

The Assumption Agreement provided:

- Indymac consented to 704 Market's assumption of the construction loan, on condition that RW also remain liable for the loan.

- Before Pryor was permitted to draw funds from the construction loan,

a. the city must approve the final construction plans.

b. Pryor was required to purchase and maintain a completion bond.

c. Pryor must pay the $57,000 to Indymac to reduce the construction loan principal.

- Pryor agreed to use the construction loan exclusively for construction of the townhouses and according to the disbursement schedule.

Despite his agreements, the evidence presented to the bankruptcy court was that Pryor never submitted final plans to the city authorities, never paid the $57,000 to reduce the Indymac construction loan principal, did not maintain a completion bond, and did not start the construction project. Nevertheless, over the four months following execution of the RECPA and Assumption Agreement, Pryor drew $335,034.13 from the construction loan account. In addition to his failure to satisfy the conditions precedent to drawing funds from the account, RW alleges, and Pryor provides insufficient evidence to the contrary, that he drew the

funds without providing any documentation to Indymac or to RW normally associated with the payment to a contractor, such as receipts, invoices, and subcontractor releases.

The $525,000 promissory note from Pryor to RW for the purchase of the Property was due on February 28, 2008. When Pryor did not pay the note, RW sued him to collect in Los Angeles Superior Court.

On March 28, 2008, Pryor filed a chapter 11 petition, listing RW's suit against him in his Statement of Financial Affairs. This bankruptcy case was dismissed on May 21, 2008, for cause under § 1112(b) in an order by the bankruptcy court containing a one-year bar to filing another bankruptcy petition. In clear violation of that order, Pryor nonetheless filed a chapter 7 petition on March 9, 2009. That case was also promptly dismissed on May 5, 2009.

On June 7, 2009, Pryor filed yet another chapter 7 petition, initiating the case involved in this appeal. His statement of financial affairs again listed the RW lawsuit.

RW filed a motion to dismiss the bankruptcy case under § 109(g) on June 11, 2009, asserting that Pryor's earlier bankruptcy case had been dismissed within 180 days, and that he had willfully violated the bankruptcy court's order not to file another case within a year of the earlier case. Pryor responded on July 15, 2009, arguing, inter alia, that his earlier filing was inadvertent, and that the bankruptcy court had made no finding of willful failure to abide by its order. After a hearing on July 29, 2009, the bankruptcy court determined that good cause had not been shown for dismissal.

On October 13, 2009, RW filed a Complaint to Deny Discharge Pursuant to 11 U.S.C. § 523 and 727. RW asserted that, based upon a variety of acts described therein, Pryor's discharge should be denied under § 727(a)(2),(3),(4) and (5) and his debt to RW should be excepted from discharge under § 523(a)(2) because, paraphrasing the provisions of that statute, he fraudulently obtained "money, property, services, or an extension, renewal, or refinancing of credit to the Debtor obtained by (A) false pretenses, a false representation, and actual fraud, through the use of a statement in writing that is materially false; respecting the debtor's on which Plaintiff reasonably relied; and with which the debtor caused to be made or published with intent to deceive."[4] The summons served by RW on Pryor indicated that a status conference would be held on January 13, 2010.

Pryor filed an answer to the complaint on December 24, 2009,[5] generally denying the allegations in the complaint.

At the January 13 status conference before the bankruptcy court, RW was present through counsel but Pryor failed to appear.

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[4] As discussed later, this allegation is an attempt to paraphrase the relevant Code provisions, but instead conflates § 523(a)(2)(A) and (B), and the allegation omits the critical phrase "respecting the debtor's . . . financial condition" found in subsection (B).

[5] Pryor initially moved to dismiss the complaint under Civil Rule 12(b)(6), arguing that under Rule 4004(a), a complaint objecting to discharge must be filed no later than 60 days after the first date set for the meeting of creditors. Pryor later withdrew his motion, apparently because the bankruptcy court had approved a stipulation between another creditor and the Chapter 7 trustee on August 10, 2009, extending the deadline for any objections to discharge to October 12, 2009. Since October 12 was Columbus Day, a national holiday recognized in Rule 9006(a)(6)(A), RW's filing of its complaint the next day, on October 13, was timely.

Consequently, on February 1, 2010, the bankruptcy court issued an Order to Show Cause directing that Pryor appear at a hearing to show cause why his answer should not be stricken, and default judgment entered against him. The OSC recited that:

- Pryor did not appear at the regularly scheduled January 13, 2010 status conference.

- Pryor had failed to respond to RW's discovery requests including Special Interrogatories served on November 16, 2009, and a demand for production of documents served on November 6, 2009.

- RW had sent Pryor a meet and confer letter pursuant to C.D. Cal. Local R. 7026-1, regarding Pryor's failure to respond to discovery, and Pryor failed to either respond, provide the discovery responses or documents, or to otherwise participate as required by Local R. 7026-1.

The OSC hearing was held on March 16, 2010. RW was represented by counsel, and Pryor appeared pro se. At the hearing, counsel for RW informed the bankruptcy court that there was "zero compliance with discovery." Hr'g Tr. 15:9 (March 16, 2010). Pryor insisted that he had submitted documents in response to RW's production requests. Hr'g Tr. 15:15. The bankruptcy court obviously did not believe Pryor:

> PRYOR: Well, I have — I have mailed off these documents.
>
> THE COURT: Well, Mr. Pryor, you didn't. I am going to grant the OSC as far as to strike your answer. It's clear to me that you have no intention to actually comply with the rules. You say you have, but we have a docket. We have things. We know when things are filed and we know when they're not filed. You're saying that they have been filed doesn't make it so, and it is a pattern here. So I am going to strike the answer . . . and I'm going to set it for default [judgment hearing] to prove up in 60 days.

Hr'g Tr. 18:18–19:4. The bankruptcy court directed RW's counsel to prepare an order striking Pryor's answer and directing the entry of default. Hr'g Tr. 20:15-17. That order was eventually entered on May 27, 2010.

RW filed a motion for default judgment on May 18, 2010. It supported the motion with a declaration of Ronald Wilson, President of RW (the "Wilson Declaration"). The motion, with its extensive declaration and exhibits, sought entry of a $997,988.45 nondischargeable fraud judgment in favor of RW and against Pryor.

At the prove-up hearing conducted on June 30, 2010, the bankruptcy court heard argument from both counsel for RW and Pryor. RW's attorney relied on the Wilson Declaration to support entry of a default judgment under § 523(a)(2). However, when asked about RW's § 727(a) denial of discharge claims, the following exchange occurred between the court and RW's lawyer:

> THE COURT: What about the objection to discharge, the 727 count[s]?
>
> CHENIER (attorney for RW): Well, as to our — there should —
>
> THE COURT: You've objected both on the 523 and 727?
>
> CHENIER: — well, I'd like to limit it to our client. In other words, his — his attempts to discharge our client's —
>
> THE COURT: You're not concerned any longer with the —
>
> CHENIER: whether he proceeds with other creditors — no, that's not my responsibility, your Honor, just with respect to my client.
>
> THE COURT: well, well, well — well, wait. But you did — you did file, did you not [have] an objection to discharge as well as the Section [523]?
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> CHENIER: Right, your Honor. But I was – if — bear with me if I was incorrect. My intent was to limit it to the discharge of my client's [claim].

THE COURT: Right.

Hr'g Tr. 10:12—11:2.[6]

Afer hearing from the parties, the bankruptcy court granted RW a default judgment and it directed its counsel to prepare a judgment. Tr. Hr'g 11:20-21. The default judgment submitted by RW's attorney was entered by the bankruptcy court on July 19, 2010. While that judgment granted relief in favor of RW and against Pryor on RW's exception to discharge claim under § 523(a)(2), it also granted judgment in favor of RW denying Pryor's discharge under §§ 727(a)(2),(3),(4) and (5).[7]

Pryor filed a timely appeal on July 7, 2010.[8]

JURISDICTION

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

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[6] At oral argument before the Panel, the same attorney who represented RW in the bankruptcy court hearing conceded that he agreed to withdraw the § 727 claims at the prove-up hearing.

[7] The form of default judgment was also drafted and submitted by the same attorney who had represented RW at the prove-up hearing, something which was also verified at the oral argument before the Panel. The attorney offered no persuasive explanation for submitting a form at judgment at odds with the position he had taken at the hearing before the bankruptcy court.

[8] On May 10, 2011, Pryor filed his Motion to Dismiss Appeal as Moot based upon recent events occurring in state court litigation involving RW and Indymac's successor. As directed by the Panel, the parties addressed the motion at oral argument in this appeal. The Panel concludes Pryor's motion lacks any merit, neither this appeal, nor the contest between these parties, is moot, and Pryor's motion is therefore DENIED.

ISSUES

Whether the bankruptcy court abused its discretion in directing entry of default or in its decision to grant RW a default judgment?

Whether the bankruptcy court erred in determining that RW's claim was excepted from discharge under § 523(a)(2)?

Whether the bankruptcy court erred in denying Pryor's discharge under §§ 727(a)(2),(3),(4) and (5)?

STANDARDS OF REVIEW

A trial court's decision to order entry of default, or to enter default judgment, is reviewed for abuse of discretion. Speiser, Krause & Madole, P.C. v. Ortiz, 271 F.3d 884, 886 (9th Cir. 2001).

Whether a claim is excepted from discharge under § 523(a) presents mixed issues of law and fact and is reviewed de novo. Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 704 (9th Cir. 2008); Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 230 (9th Cir. BAP 2007), aff'd in relevant part, 551 F.3d, 1092 (9th Cir. 2008).

On appeal of a denial of discharge under § 727(a), the bankruptcy court's determinations of the historical facts are reviewed for clear error; its selection of the applicable legal rules under § 727 is reviewed de novo; and its application of the facts to the applicable rules is reviewed de novo because it requires the exercise of judgment about values animating those rules. Murray v. Bammer (In re Bammer), 131 F.3d 788, 791-92 (9th Cir. 1997)(en banc); Searles v. Riley (In re Searles), 317 B.R.

368, 373 (9th Cir. BAP 2004).

In applying an abuse of discretion test, we first "determine de novo whether the [bankruptcy] court identified the correct legal rule to apply to the relief requested." United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009). If the bankruptcy court identified the correct legal rule, we then determine whether its "application of the correct legal standard [to the facts] was (1) illogical, (2)implausible, or (3) without support in inferences that may be drawn from the facts in the record." Id. (internal quotation marks omitted). If the bankruptcy court did not identify the correct legal rule, or its application of the correct legal standard to the facts was illogical, implausible, or without support in inferences that may be drawn from the facts in the record, then the bankruptcy court has abused its discretion. Id.

"Under the 'clear error' standard, we accept findings of fact unless they leave the 'definite and firm conviction that a mistake has been committed.'" In re Beverly, 374 B.R. at 230.

DISCUSSION

The bankruptcy court did not abuse its discretion in directing entry of default and striking Pryor's answer.

Civil Rule 37(b)(2)(A), made applicable in bankruptcy adversary proceedings by Rule 7037, provides that "[i]f a party fails to obey an order to provide or permit discovery, the court where the action is pending may issue just orders [including] . . . (iii) striking pleadings in whole or in part; . . . (vi) rendering a default judgment against the disobedient party."

The Ninth Circuit has long recognized a bankruptcy court's authority under Civil Rule 37(b) to strike a debtor's answer and enter default. Visioneering Constr. v. U.S. Fidel.& Guar. (In re Visioneering Constr.), 661 F.2d 119, 122 (9th Cir. 1981) (affirming the bankruptcy court's imposition of Rule 37 sanctions, including striking the answer and entering default, for the debtor's "obstructionist and delaying tactics" in discovery); Brunson v. Rice (In re Rice), 14 B.R. 843, 846 (9th Cir BAP 1981) (bankruptcy court may strike answer and enter default under Civil Rule 37(b) for discovery abuses).

However, before considering the imposition of severe sanctions, the Ninth Circuit requires that a party's sanctionable conduct be the result of the "willfulness, bad faith, or fault." Jorgensen v. Cassiday, 320 F.3d 906, 912 (9th Cir. 2003). In the context of sanctions, "willfulness is disobedient conduct not outside the control of the litigant." Henry v. Gill Indus., Inc., 983 F.2d 943, 948 (9th Cir. 1993).

Pryor has never suggested that his failure to participate in discovery or attend court hearings occurred for reasons beyond his control. Indeed, in the bankruptcy court, and before the Panel at oral argument, he apologized for failing to attend the status conference because he did not enter it on his calendar and was distracted by personal problems. His defense to RW's claim of discovery abuse was that he had already provided the relevant documents to RW's attorneys in the state court action. In short, there is no question that Pryor's conduct in declining to participate in discovery in the bankruptcy court was willful.

Before entering a "severe sanction," including striking an

answer, directing entry of default, entering default judgment, or dismissal as a sanction, the Ninth Circuit requires consideration of the following criteria:

> We have constructed a five-part test, with three subparts to the fifth part, to determine whether a case-dispositive sanction under Rule 37(b)(2) is just: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." (Quoting Jorgensen v. Cassiday, 320 F.3d 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[.]

Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th Cir. 2007); see also Computer Task Group v. Brotby, 364 F.3d 1112, 1115 (9th Cir. 2004).

The first two criteria focus upon the public interest in expeditious resolution of litigation, and the trial court's interest in docket control. Both of these factors clearly favor imposition of sanctions under these facts. Pryor had an established track record of improper and dilatory conduct in the bankruptcy court. He had filed multiple bankruptcy cases, one of which violated the bankruptcy court's unambiguous time bar; he sought dismissal of this action arguing it was untimely when the bankruptcy court had already granted an extension of time to file such complaints; he failed to attend a compulsory status conference though he had received notice of the hearing; and he had generally failed to comply with RW's discovery requests. In

short, Pryor's conduct significantly impeded resolution of this action, caused delay, and prevented the bankruptcy court from adhering to its trial schedule.

The third criteria requires consideration of any prejudice to the party seeking sanctions. There is clear evidence of prejudice to RW here. The bankruptcy court found, after issuance of an OSC to Pryor, that he had completely failed to provide responses to discovery requested by RW and that RW was prejudiced by Pryor's refusal to provide the discovery responses and his failure to attend court hearings. A party is prejudiced if the opposing party impairs its ability to go to trial. Adriana Int'l Corp. V. Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990); Chism v. Nat'l Heritage Life Ins. Co., 637 F.2d 1328, 1331 (9th Cir. 1981) (indicating that defendant had been prejudiced by plaintiff's continual flouting of discovery rules, and failure to comply with pretrial conference obligations).

The fourth criterion requires the trial court to consider the public policy favoring decisions on the merits. At first glance, this criterion should weigh against imposition of sanctions by the bankruptcy court designed to end the action. However, while the bankruptcy court struck Pryor's answer and directed entry of default against him, it did not at that point enter default judgment against him. Instead, it required that RW appear at a hearing and prove the merits of its claims for relief and offered Pryor the opportunity to appear and contest RW's arguments.

Finally, before resorting to severe sanctions, a trial court must ponder the availability of less drastic sanctions. The Ninth Circuit instructs that this criterion has three components:

whether the trial court has considered lesser sanctions, whether it tried them, and whether it warned the recalcitrant party about the possibility of different sanctions. New Images of Beverly Hills, 482 F.3d at 1096.

Pryor had a clear warning of the sanctions that could be imposed, because the OSC indicated that striking the answer, entry of default and default judgment were under consideration by the bankruptcy court. As noted above, after hearing from the parties, the court struck Pryor's answer, entered a default, but did not adopt the drastic sanction of an immediate default judgment. Later, at the prove-up hearing, RW challenged Pryor's right to be heard, but the court allowed Pryor to appear and contest RW's arguments. On this record, we are comfortable in concluding that the bankruptcy court properly considered the availability of lesser sanctions, and indeed employed the lesser sanction of striking the answer and entering default, deferring consideration of the greater sanction of default judgment to a hearing where Pryor would have the opportunity to be heard again.

In sum, under the guiding case law, we conclude the bankruptcy court did not abuse its discretion in striking Pryor's answer and ordering entry of default.

The bankruptcy court did not err in granting default judgment to RW for an exception to discharge under § 523(a)(2)(A).

In its complaint, RW asked the bankruptcy court to order that its claim against Pryor be excepted from discharge under § 523(a)(2). The complaint, however, did not specify whether RW

sought relief under subsection (A) or (B) of § 523(a)(2).[9] The complaint alleged Pryor's fraud occurred when he "obtained by (A) false pretenses, a false representation, and actual fraud, through the use of a statement in writing that is materially false. . . and with which the debtor caused to be made or published with intent to deceive." Of course, this allegation conflates two distinct bases for an exception to discharge under § 523(a)(2).

No doubt, a writing that is not a statement of the debtor's financial condition may constitute a false representation for purposes of § 523(a)(2)(A). Here, while alleging the RW debt should be excepted from discharge for Pryor's false written statements, the complaints allegations do not include the critical requirement under the subsection (B) of the statute that the contents of the offensive writings are "respecting the debtor's . . . financial condition". Boyajian v. New Falls Corp. (In re Boyajian), 564 F.3d 1088, 1091 (9th Cir. 2009) (explaining that § 523(a)(2)(B) only applies where the debt was obtained by means of a materially false written financial statement as to the

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[9] § 523. **Exceptions to discharge**

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt– . . . (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by — (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; [or] (B) use of a statement in writing — (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive[.]

debtor's financial condition).

In addition, the evidence submitted by RW to the bankruptcy court to support its motion for default judgment included no written financial statements of Pryor. It appears RW engaged Pryor on the basis of a recommendation from Indymac, and there is no evidence before us that RW received any statement of Pryor's financial condition when it accepted Pryor's promissory note in exchange for conveyance of the Property to him.

In sum, while RW's complaint, and the declaration submitted by RW, together with the bankruptcy court's judgment, all refer to RW's claim for relief under § 523(a)(2) without explicit reference to the subsection, a fair reading of the record persuades us to construe RW's request for relief to be one for an exception to discharge under 523(a)(2)(A), not (B).

While Congress intended the Bankruptcy Code as a means to providing debtors a financial fresh start, it created the § 523(a)(2) exception to discharge "to prevent a debtor from retaining the benefits of property obtained by fraudulent means and to ensure that the relief intended for honest debtors does not go to dishonest debtors." Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1088 (9th Cir. 2000). To support a claim of nondischargeability under § 523(a)(2)(A) requires the creditor to prove: (1) the debtor made . . . representations; (2) that at the time he knew they were false; (3) that he made them with the intention and purpose of deceiving the creditor; (4) that the creditor relied on such representations; and (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations

having been made. Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010).

Although the bankruptcy court struck Pryor's answer and directed entry of default, entry of a default did not necessarily entitle RW to a default judgment. Cashco Fin. Servcs. v McGee (In re McGee), 359 B.R. 764, 773 (9th Cir. BAP 2006). Whether to enter default judgment requires the exercise of discretion by the bankruptcy court, and that it consider, inter alia, "the merits of the substantive claim and the sufficiency of the complaint." All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (9th Cir. BAP 2007). Whether to hold a prove-up hearing before entering a default judgment is within the discretion of the bankruptcy court. In re McGee 359 B.R. at 773. The bankruptcy court elected to hold a prove-up hearing to determine RW's entitlement to relief, examining the complaint, the Wilson Declaration, and Pryor's Opposition.

RW presented evidence that Pryor repeatedly assured RW that he was preparing the building plans, would submit them to the city for approval, and would start and complete the construction project on time. The evidence is overwhelming that Pryor never undertook these actions. Had the assurance been given once, it is conceivable that Pryor could merely be engaged in "wishful thinking" and not intending to defraud RW. But, in this case, Pryor's representations were made repeatedly over an extended period of time. Moreover, Pryor was aware that the construction delays resulted in additional charges to RW from Indymac. At the same time, Pryor had unfettered access to the construction loans, and the evidence is clear that he made over $300,000 in draws

without fulfilling his agreement to first obtain approval of the construction plans and abide by the construction schedule.

All things considered, the bankruptcy court could infer from the proof offered by RW that Pryor made his repeated assurances to RW when he knew they were false and with the intention and purpose of deceiving RW. Ormsby v. First Am. Title Co. (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010). ("Fraudulent intent . . . may be inferred from the totality of the circumstances and the conduct of the person accused."). The evidence submitted to the bankruptcy court showed that RW relied on Pryor's representations, twice extending the maturity date of the construction loan. RW suffered injuries by the charges imposed on it by Indymac for the maturity date extensions, and furthermore, ultimately lost its secured interest in the Property because of its reliance on the assurances by Pryor that he would perform the promised actions.

We conclude that the bankruptcy court did not clearly err in finding that Pryor made false representations that he would prepare the plans, submit them to the city, and complete the construction project according to the construction schedules. Based on the totality of the circumstances, the bankruptcy court could conclude that Pryor made the representations with intent to deceive RW, and that RW relied on those representations to its financial detriment. Based upon these findings, the bankruptcy court did not err in awarding RW a nondischargable money judgment against Pryor under § 523(a)(2)(A).

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The bankruptcy court erred in denying discharge to Pryor under §§ 727(a)(2),(3),(4) and (5).

At the June 30, 2010, prove-up hearing, counsel for RW indicated his client was no longer seeking a denial of Pryor's discharge under § 727(a). At the hearing, RW's attorney asserted that it was never his intent to prosecute the denial of discharge actions, meaning instead to focus solely on protecting only his client's debt from discharge. In addition, we have carefully examined RW's brief in this appeal, and its arguments relate solely to its § 523 exception to discharge claim, making no arguments in support of denial of Pryor's discharge under § 727. Moreover, at oral argument, in response to questions from the Panel, the same attorney who appeared before the bankruptcy court again confirmed that he and his client never intended to pursue a general denial of discharge, only a judgment excepting RW's debt from discharge by Pryor.

The four claims for denial of discharge in the RW complaint each paraphrase the relevant subsections of § 727(a). The facts alleged in that complaint in support of the denial of discharge claims, however, were, for the most part,[10] repetitions of the

[10] Besides the facts relating to a fraud exception to discharge, in the complaint, RW argued that a February 2009 UCC filing statement by Pryor indicated that he had received approximately $700,000 related to the Royrp Corporation and had not accounted for the funds, and listed several automobiles that were not listed on his bankruptcy schedules. Pryor challenged these assertions, claiming that the money was related to a company that he did not own and that he never transferred money or property into Royrp. RW failed to rebut this challenge, or even address it, in the Wilson Declaration. We also note that the alleged UCC filing statement is not in the excerpts of record or anywhere in the docket of this adversary proceeding. We conclude (continued...)

facts alleged in support of the exception to discharge under § 523(a)(2). In addition, the evidentiary submission made in support of the motion for default judgment, the Wilson Declaration, discusses only the facts implicated in RW's § 523(a)(2) fraud claim.

Despite this record, the proposed judgment submitted by RW's attorney, and later entered by the bankruptcy judge, provides that RW's debt not only be excepted from discharge under § 523(a)(2), but also provides for denial of Pryor's discharge under § 727(a)(2),(3),(4) and (5). The four paragraphs of the judgment of the bankruptcy court relating to denial of Pryor's discharge each end with the sentence, "The court further finds that Defendant Danny Pryor's actions constituted fraud upon the Plaintiff RW Investment Co., Inc." Of course, that a debtor engages in fraudulent prebankruptcy conduct in transactions with a single creditor, without more, is not a basis for denial of discharge under any of the subsections of § 727(a). This common feature of these paragraphs of the judgment leads us to believe that the bankruptcy court's execution of a judgment denying Pryor's discharge was likely inadvertent.

But even if this was a ministerial error, it was not a harmless one. In this case, there was no support in the record to justify a denial of discharge. Because we conclude that (1) RW abandoned its § 727 claims in the bankruptcy court and (2) there

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[10](...continued)
that all allegations related to the UCC filing statement, including the Royrp Payments and the missing vehicles, are not supported in the record presented to us in the appeal.

is inadequate support in the record for denial of discharge, it was an abuse of discretion for the bankruptcy court to enter default judgment denying Pryor's discharge under § 727(a)(2),(3),(4) and (5). That portion of the bankruptcy court's judgment must be vacated, and the matter should be remanded to the bankruptcy court for entry of an amended judgment.

CONCLUSION

We AFFIRM the bankruptcy court's judgment awarding RW a nondischargeable judgment against Pryor under § 523(a)(2)(A). However, we VACATE the bankruptcy court's judgment denying discharge under § 727(a)(2),(3),(4) and (5), and REMAND this matter to the bankruptcy court for entry of an amended judgment.