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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	CC-14-1274-TaPaKi
6	BOAZ SHAMAM,	)	BAP No.	CC-14-1300-TaPaKi
		)		(cross-appeals)
7	Debtor.	)	Bk. No.	11-19995-VK
8	_____	)	Adv. No.	11-01619-VK
9	BOAZ SHAMAM,)		
	Appellant/ Cross-Appellee,)		
10)		
11	v.	)	MEMORANDUM*	
12	DONALD MOTZKIN,)		
13	Appellee/ Cross-Appellant,)		
14)		
15	ERIT SHAMAM; DAVID KEITH GOTTLIEB, Chapter 7 Trustee,**)		
16	Appellees.)		
17	_____)		

Submitted Without Oral Argument***
on March 19, 2015

Filed - April 7, 2015

* 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 8024-1(c)(2).

** Neither Erit Shamam nor David Keith Gottlieb have filed briefs or otherwise appeared in these appeals.

*** After examination of the briefs and record, and after notice to the parties, in an order entered January 9, 2015, the Panel unanimously determined that oral argument was not needed for this appeal. See Fed. R. Bankr. P. 8019(b); 9th Cir. BAP Rule 8019-1.

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

3 Honorable Victoria S. Kaufman, Bankruptcy Judge, Presiding

4 Appearances: Boaz Shaman, pro se, on brief; Eric P. Israel and
5 Michael G. D'Alba of Danning, Gill, Diamond &
6 Kollitz, LLP on brief for appellee/cross-appellant
7 Donald Motzkin.

8
9 Before: TAYLOR, PAPPAS, and KIRSCHER, Bankruptcy Judges.
10

11 Creditor Donald Motzkin filed an adversary proceeding
12 against chapter 7¹ debtor Boaz Shamam and his non-filing spouse,
13 seeking, as relevant to this appeal, to except from discharge
14 certain debts under § 523(a)(4) and (a)(6). Following a long
15 series of events in the adversary proceeding and two state court
16 proceedings, the bankruptcy court reinstated an entry of default
17 against the Debtor and granted, in part, Motzkin's motion for
18 default judgment. The bankruptcy court subsequently entered an
19 order denying the Debtor's motion to set aside the reinstated
20 default, an order granting in part and denying in part Motzkin's
21 motion for default judgment, and a default judgment fully
22 resolving the adversary proceeding against the Debtor. The
23 Debtor appeals, pro se, from that order and the default judgment.

24 Motzkin cross-appeals from the bankruptcy court's partial
25 denial of his motion for default judgment.

26 We AFFIRM the bankruptcy court.
27

28

1 Unless otherwise indicated, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
All "Rule" references are to the Federal Rules of Bankruptcy
Procedure and all "Civil Rule" references are to the Federal
Rules of Civil Procedure.

1 **FACTS**

2 **Pre-Bankruptcy**

3 The Debtor and Motzkin were the sole shareholders, officers,
4 and directors of D&B Real Estate Corporation, a California
5 corporation (the "Corporation"). The Corporation was the sole
6 general partner of Good Land Partners, L.P., a California limited
7 partnership (the "Partnership"). The Debtor and Motzkin formed
8 the Partnership for the purpose of real estate investment. They
9 were, individually, limited partners in the Partnership.

10 In 2006, the Debtor and Motzkin applied for and obtained an
11 American Express business credit card for the Corporation (the
12 "Corporate Card"). The account was opened under the names of the
13 Corporation and Motzkin, based on Motzkin's personal financial
14 information. It appears that the Debtor was an authorized user
15 on the account and, thus, that he had his own credit card.
16 American Express mailed the statements directly to the Debtor's
17 personal residence.

18 The Debtor apparently engaged in the unauthorized use of the
19 Corporate Card. He arranged for a card to be issued to his non-
20 debtor spouse, Erit Shamam ("Mrs. Shamam"), although she was not
21 an officer, director, or employee of the Corporation. He and
22 Mrs. Shamam then made a number of non-business related charges
23 over the course of a three-year period.

24 Notwithstanding the unauthorized use, the Debtor made
25 regular payments on the Corporate Card for approximately three
26 years before defaulting. American Express then demanded payment
27 from Motzkin for the past due payment. Following negotiations,
28 Motzkin settled the account by paying American Express

1 \$32,958.76. During this time, Motzkin also learned that the
2 Debtor opened a second American Express account in the
3 Corporation's name, which carried a balance of \$3,131.08.

4 In 2006, the Debtor also obtained a Bank of America Visa
5 business credit card, this time, in the name of the Partnership
6 (the "Partnership Card"). As with the Corporate Card, this card
7 was opened using Motzkin's personal financial information and
8 Bank of America mailed the statements directly to the Debtor's
9 personal residence. According to Motzkin, the Debtor obtained
10 the Partnership Card without Motzkin's knowledge or consent.

11 The charges incurred on the Partnership Card included a
12 number of non-business related transactions. Motzkin asserted
13 that he first learned of the Partnership Card in 2009, when Bank
14 of America demanded payment for the past due balance. Motzkin
15 eventually settled the account by paying Bank of America
16 \$23,654.39.²

17 In 2010, Motzkin commenced two actions in California state
18 court. The first case, against the Debtor and Mrs. Shamam (among
19 others), included causes of action for fraud, breach of fiduciary
20 duty, and breach of contract. The second case, against the
21 Debtor and the Corporation, sought a judgment removing the Debtor
22 as an officer and director of the Corporation and other
23 declaratory and injunctive relief.

24 ///

25

26 ² Of this amount paid, Bank of America eventually
27 reimbursed Motzkin for \$7,169.83; this supports Motzkin's later
28 request to except from discharge \$16,484.56 in connection with
the Partnership Card.

1 **Bankruptcy and Adversary Proceeding**

2 The Debtor filed a chapter 7 petition on August 19, 2011.
3 Mrs. Shamam was not a co-debtor.

4 In November 2011, Motzkin commenced an adversary proceeding
5 against the Debtor and Mrs. Shamam. Motzkin sought to except
6 from discharge the unauthorized credit card charges incurred by
7 the Debtor and Mrs. Shamam, pursuant to § 523(a)(4) for
8 defalcation while acting in a fiduciary capacity and § 523(a)(6)
9 for willful and malicious injury.

10 In January 2012, Motzkin obtained entry of default against
11 the Debtor.³ The following month, the Debtor, pro se, moved to
12 set aside the entry of default, which Motzkin opposed. The
13 bankruptcy court denied the Debtor's motion.

14 Next, Motzin moved for a default judgment. The Debtor yet
15 again moved to set aside the entry of default, which Motzkin
16 opposed.

17 Following a series of hearings, the bankruptcy court entered
18 an order conditionally granting the Debtor's motion to set aside
19 the default. As provided in a prior order instructing the Debtor
20 to explain why it should not require payment of sanctions as a
21 condition to his requested relief, the bankruptcy court expressly
22 conditioned its vacation of the default on the Debtor's payment
23 of compensatory sanctions to Motzkin in the amount of \$2,930.16;
24 the payments were to be made in equal monthly installments of
25

26 ³ We exercise our discretion to take judicial notice of
27 documents electronically filed in the bankruptcy case. See
28 Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R.
227, 233 n.9 (9th Cir. BAP 2003).

1 \$488.33. The order further provided that the default would not
2 be set aside until the Debtor made two installment payments.

3 In a subsequent status report, Motzkin reported the entry of
4 a default judgment against the Debtor in the second state court
5 action. The state court judgment awarded damages to Motzkin in
6 the amount of \$49,343.32, prejudgment interest of \$14,620.78,
7 attorneys fees of \$55,935, and costs of \$511, for a total
8 judgment of \$120,410.10.

9 Instead of fully complying with the bankruptcy court's
10 conditional order, the Debtor moved to dismiss the adversary
11 proceeding. After the bankruptcy court denied the motion, the
12 Debtor appealed from the denial order to this Panel. See BAP No.
13 CC-13-1187. The Panel dismissed his appeal as untimely.

14 Although the record is not entirely clear, at some point
15 prior to the bankruptcy court's denial of the motion to dismiss,
16 the Debtor made a second installment payment pursuant to the
17 conditional order. Therefore, following a status conference in
18 November 2012, Motzkin's motion for default judgment was deemed
19 withdrawn without prejudice.

20 Months passed without activity in the adversary proceeding.
21 Then, in September 2013, Motzkin moved to strike the Debtor's
22 answer to the adversary complaint pursuant to Civil
23 Rule 16(f)(1)(C) and to reinstate the entry of default against
24 the Debtor, based on the Debtor's failure to complete the
25 sanctions installment arrangement. The Debtor did not oppose the
26 motion.

27 Following a hearing, the bankruptcy court entered an order
28 granting Motzkin's motion in October 2013; it deemed the Debtor's

1 answer to the adversary complaint stricken, and it reinstated the
2 default against the Debtor ("Default Reinstatement Order").

3 **Motion for Default Judgment**

4 Motzkin filed a second motion seeking a default judgment
5 against the Debtor. Based on the state court judgment, he sought
6 to except from discharge \$49,343.32, which constituted \$16,484.56
7 in connection with the Partnership Card and \$32,958.76 in
8 connection with the Corporate Card,⁴ in addition to the awarded
9 fees and costs. He also requested attorneys fees incurred in the
10 adversary proceeding.⁵

11 Prior to the default prove-up hearing, the bankruptcy court
12 issued a tentative ruling reflecting its intent to grant, in
13 part, Motzkin's motion. On the § 523(a)(4) claims, it indicated
14 it would except from discharge the Partnership Card debt as the
15 Partnership was the account holder and the Debtor was a partner.
16 But, it also indicated its intent to discharge the Corporate Card
17 debt under § 523(a)(4); as the Corporation was the holder of that
18 account, the requisite fiduciary relationship did not exist under
19 California law.

20 On the § 523(a)(6) claim, the bankruptcy court indicated its
21 intent to deem the entire state court judgment nondischargeable.

22 At the default prove-up hearing, the Debtor appeared and was
23 permitted to argue. The bankruptcy court ultimately adopted its
24

25 ⁴ The total stated credit card amounts reflect a nominal
26 difference of \$100 from the \$49,343.32 amount.

27 ⁵ Motzin also requested an award of punitive damages.
28 Contrary to the Debtor's assertion on appeal, the bankruptcy
court did not award punitive damages.

1 tentative ruling on the § 523(a)(4) issue, but changed its
2 tentative determination on the § 523(a)(6) issue. It determined
3 that the Debtor's payments on the credit cards precluded a
4 finding of the requisite intent necessary for nondischargeability
5 under § 523(a)(6). Given its determination, the bankruptcy court
6 continued the default prove-up hearing for a re-calculation of
7 the prejudgment interest in the state court judgment, limited to
8 the Partnership Card, and the attorneys fees incurred in the
9 adversary proceeding.

10 **Order Denying the Debtor's Motion to Set Aside the Default**
11 **Reinstatement Order and Default Judgment**

12 Pursuant to the bankruptcy court's instruction, Motzkin
13 filed a supplemental brief on the re-calculation, asserting
14 \$77,948.06 as the amount of nondischargeable debt and \$124,812.50
15 in attorneys fees incurred in the adversary proceeding. In
16 response, the Debtor moved to dismiss, yet again, and to vacate
17 Motzkin's claims. The bankruptcy court promptly denied his
18 motion.

19 On March 14, 2014, the Debtor moved to set aside the Default
20 Reinstatement Order entered in October of 2013. Attached to his
21 motion was a copy of a default judgment, dated October 28, 2013,
22 entered by the state court in the first state court action and in
23 the Debtor's favor.

24 At the final hearing on May 14, 2014, the bankruptcy court
25 heard both the Debtor's motion to set aside the Default
26 Reinstatement Order and the continued default prove-up hearing.
27 Following a brief recitation of the history of the proceedings
28 and its reasoning for partially granting Motzkin's motion for

1 default judgment, the bankruptcy court denied the Debtor's motion
2 to set aside the Default Reinstatement Order.

3 The bankruptcy court then entered two orders: an order
4 denying the Debtor's motion to set aside the Default
5 Reinstatement Order ("Order Denying Motion to Set Aside") and an
6 order granting in part and denying in part Motzkin's motion for
7 default judgment ("Order on Default Judgment"). And it entered a
8 default judgment against the Debtor, which provided that only
9 \$77,948.06 of the state court judgment was nondischargeable under
10 § 523(a)(4). The default judgment also awarded attorneys fees in
11 the amount of \$124,812.50, plus post-judgment interest.

12 The Debtor timely appealed from the orders and default
13 judgment. Motzkin cross-appealed from the Order on Default
14 Judgment and the default judgment.

15 JURISDICTION

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
17 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
18 § 158.⁶

19 ISSUES

20 BAP Appeal No. CC-14-1274

21 Whether the bankruptcy court abused its discretion when it
22 denied the Debtor's motion to set aside the Default Reinstatement
23

24 ⁶ The adversary complaint also alleged two claims under
25 § 523(a)(2) with respect to another loan and a claim against
26 Mrs. Shamam under § 523(a)(3). The § 523(a)(2)(A) claims were
27 dismissed in the default judgment on appeal and the § 523(a)(3)
28 claim was outside the scope of the default judgment.

Nonetheless, both the order on default judgment and the
default judgment contain an implicit Civil Rule 54 certification.

1 Order.

2 **BAP Appeal No. CC-14-1300**

3 As to the Corporate Card debt, whether the bankruptcy court
4 abused its discretion when it denied Motzkin's motion for default
5 judgment.

6 **STANDARDS OF REVIEW**

7 We review for an abuse of discretion the denial of a motion
8 for default judgment, Eitel v. McCool, 782 F.2d 1470, 1471-72
9 (9th Cir. 1986), and the denial of a motion to set aside a
10 default, Jeff D. v. Kempthorne, 365 F.3d 844, 850 (9th Cir.
11 2004).

12 A bankruptcy court abuses its discretion if it applies the
13 wrong legal standard, misapplies the correct legal standard, or
14 if its factual findings are illogical, implausible, or without
15 support in inferences that may be drawn from the facts in the
16 record. See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d
17 820, 832 (9th Cir. 2011) (citing United States v. Hinkson,
18 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

19 **DISCUSSION**

20 **A. Motzkin's Motion to strike the Debtor's opening brief and**
21 **dismiss his appeal (BAP Appeal No. CC-14-1274).**

22 Motzkin moved to strike the Debtor's opening brief and
23 excerpts of record and for dismissal of his appeal (BAP
24 No. CC-14-1274). He argues that the Debtor included in his
25 excerpts of record various documents not presented to the
26 bankruptcy court, that the record is not continuously paginated,
27 and that the table of contents to the appendix fails to provide
28 page numbers, in contravention of BAP Rule 8018(b)-1(b).

1 Motzkin further argues that the Debtor's opening brief fails
2 to comply with Rule 8014, as it lacks a table of cases, a table
3 of authorities, basis of appellate jurisdiction, standards of
4 appellate review, statement of the case, summary of the argument,
5 and statement of facts with appropriate record citation. And, he
6 argues that the Debtor failed to provide a certification of
7 interested parties or related cases in accordance with BAP Rule
8 8015(a)-1(b)-(c). Thus, Motzkin requests that we strike the
9 Debtor's opening brief and dismiss his appeal.

10 The Debtor opposes; the opposition, however, is not helpful,
11 as he asserts only that he does not owe Motzkin money and
12 attaches the default judgment entered in his favor in the first
13 state court action.

14 On October 20, 2014, a motions panel issued an order taking
15 Motzkin's motion under advisement for determination by the merits
16 panel. Having considered the motion, opposition, and documents
17 at issue, we grant the motion in part and deny it in part.

18 To the extent that documents in the Debtor's excerpts of
19 record were not presented to the bankruptcy court, they are
20 deemed stricken from the record on appeal. See Oyama v. Sheehan
21 (In re Sheehan), 253 F.3d 507, 512 n.5 (9th Cir. 2001) ("Evidence
22 that was not before the lower court will not generally be
23 considered on appeal.").

24 We deny Motzkin's request to strike the Debtor's opening
25 brief on appeal and to dismiss his appeal. It is true that the
26 Debtor's brief falls woefully short of compliance with either the
27 Federal Rules of Bankruptcy Procedure or BAP rules and that the
28 Panel is not required to search the record unaided for error.

1 See Dela Rosa v. Scottsdale Mem. Health Sys, Inc., 136 F.3d 1241,
2 1244 (9th Cir. 1998). That said, we possess a sufficient record
3 for review. Motzkin supplemented the record with four volumes of
4 excerpts in connection with his cross-appeal. And, as stated, we
5 exercise our discretion to take judicial notice of documents
6 filed in the adversary proceeding and underlying bankruptcy case.

7 **B. The Debtor's appeal, BAP Appeal No. CC-14-1274.**

8 The Debtor, in effect, appeals from the Order Denying Motion
9 to Set Aside and the default judgment. On this record, we
10 conclude that the bankruptcy court did not abuse its discretion
11 in denying the Debtor's motion and rejecting his arguments as to
12 the default judgment.

13 **1. Civil Rule 55⁷ default and judgment by default.**

14 To obtain a default judgment of nondischargeability of a
15 debt, a two-step process is required: (1) an entry of default
16 (typically by the clerk of court); and (2) a judgment by default.
17 Cashco Fin. Serv., Inc. v. McGee (In re McGee), 359 B.R. 764, 770
18 (9th Cir. BAP 2006). The bankruptcy court has ample discretion
19 in determining whether to enter a default judgment under Civil
20 Rule 55. All Points Capital Corp. v. Meyer (In re Meyer),
21 373 B.R. 84, 88 (9th Cir. BAP 2007) ("[D]efault judgment is a
22 matter of discretion in which the court is entitled to consider,
23 among other things, the merits of the substantive claim, the
24 sufficiency of the complaint, the possibility of a dispute
25 regarding material facts, whether the default was due to
26

27 ⁷ Civil Rule 55 is incorporated in adversary proceedings by
28 Rule 7055.

1 excusable neglect, and the 'strong policy' favoring decisions on
2 the merits."). But, the bankruptcy court is cautioned against
3 entry of a default judgment if the plaintiff is not entitled to
4 the relief requested; indeed, the bankruptcy court "may even
5 enter judgment in favor of the defaulted defendant." Id. at 89.

6 **2. The bankruptcy court did not abuse its discretion in**
7 **denying the Debtor's motion to set aside the Default**
8 **Reinstatement Order.**

9 The bankruptcy court may set aside the entry of default upon
10 a showing of good cause. Fed. R. Civ. P. 55(c). To determine
11 whether good cause exists, the bankruptcy court must consider
12 whether: (1) the defendant engaged in culpable conduct that led
13 to the default; (2) the defendant lacked a meritorious defense;
14 or (3) reopening the default judgment would prejudice the
15 plaintiff. United States v. Signed Pers. Check No. 730 of Yubran
16 S. Mesle, 615 F.3d 1085, 1091 (9th Cir. 2010) (internal citation
17 and quotation marks omitted). These factors are "disjunctive,
18 such that a finding that any one of these factors is true is
19 sufficient reason for the [] court to refuse to set aside the
20 default." Id.

21 Here, the bankruptcy court applied the correct legal
22 standard. It found that the Debtor engaged in culpable conduct
23 when he failed to oppose Motzkin's motion to reinstate the
24 default, failed to complete the sanctions installment
25 arrangement, and emailed Motzkin stating his intent to run up the
26 attorneys fees in the adversary proceeding. The bankruptcy court
27 stated that it considered the Debtor's defense in the first state
28 court action default judgment, but that its decision to enter

1 default judgment was not based on that particular state court
2 litigation. And, it found that reopening the default would
3 prejudice Motzkin, who had taken substantial action based on the
4 default.

5 The bankruptcy court's findings were not clearly erroneous.
6 The Debtor previously obtained a vacation of the default,
7 contingent on payment of a compensatory sanction. He failed to
8 complete the required sanction payments despite the ability to
9 pay them in monthly installments of \$488.33. He provided no
10 sufficient explanation for his noncompliance. The default was
11 reinstated only because the Debtor failed to comply with the
12 bankruptcy court's order.

13 Moreover, as the bankruptcy court observed, Motzkin sought
14 default judgment in the adversary proceeding based on the state
15 court judgment entered in the **second** state court action. That
16 the state court entered default judgment against Motzkin in the
17 first state court action based on different causes of action had
18 no bearing on the judgment obtained in the second state court
19 action. There was no evidence that Debtor had a meritorious
20 defense.

21 Finally, the record shows that the Debtor did not oppose
22 Motzkin's motion to reinstate default. Instead, as was his wont,
23 he moved to dismiss the adversary proceeding.

24 Motzkin, on the other hand, had already obtained partial
25 default judgment at the prove-up hearing in January 2014. The
26 only issue remaining when the Debtor moved to set aside default,
27 for the third time, was the award of attorneys fees incurred in
28 the adversary proceeding.

1 On this record, the bankruptcy court did not abuse its
2 discretion in denying the Debtor's motion to set aside the
3 Default Reinstatement Order.

4 **3. The Debtor's remaining arguments as to the default**
5 **judgment do not apply here or lack merit.**

6 The Debtor advances a number of arguments with respect to
7 the default judgment. He argues that the bankruptcy court erred
8 by entering the default judgment based on excusable neglect,
9 mistake, and his pro se status. He argues that good cause exists
10 to set aside the default judgment, including defenses to
11 Motzkin's claims. And he argues that the default judgment led to
12 unfair, unjust, and inequitable consequences, and that it is his
13 fundamental right as a debtor and defendant to due process,
14 notice, and the opportunity for justice. These arguments are
15 either inapplicable here or lack merit.

16 The record reflects that the Debtor never moved to set aside
17 the default judgment.⁸ Indeed, there was no opportunity to do
18 so; the bankruptcy court entered the default judgment on May 22,
19 2014, and the Debtor appealed from the judgment five days later.
20 Thus, we do not review whether good cause existed to set aside
21 the default judgment (as opposed to the entry of default,
22 discussed in section B(2), supra) pursuant to Civil Rule 60(b).

23
24 ⁸ The record also reflects that although the bankruptcy
25 court granted in part Motzkin's motion for default judgment at
26 the prove-up hearing, the Debtor did not move for reconsideration
27 of that determination. Instead, once again, he moved to dismiss
28 the adversary proceeding. The bankruptcy court issued an order
denying that motion; the adversary proceeding docket incorrectly
links that order to another, premature motion to set aside
default judgment.

1 The record further reflects that the Debtor was an active
2 participant in the adversary proceeding. He lacked neither
3 notice nor the opportunity to respond with respect to any of the
4 motions or hearings in the adversary proceeding. Instead, the
5 Debtor was an active, albeit noncompliant, litigant at almost
6 every stage of the litigation. Thus, his arguments as to due
7 process fail.

8 We also reject the Debtor's attempt to use his pro se status
9 as both a shield and a sword. Civil Rule 55 sets forth the
10 procedures for default and default judgment. Pro se litigants
11 are not excused from complying with procedural rules. "Pro se
12 litigants must follow the same rules of procedure that govern
13 other litigants." King v. Atiyeh, 814 F.2d 565, 567 (9th Cir.
14 1987), overruled on other grounds, Lacey v. Maricopa Cnty.,
15 693 F.3d 896 (9th Cir. 2012). Thus, that the Debtor appeared pro
16 se in the adversary proceeding does not justify his multiple
17 failures, compounded, to defend in the litigation.

18 The Debtor instead lays blame on Motzkin for incurring
19 additional attorneys fees and on the bankruptcy court for its
20 alleged prejudice against him, as evidenced by its remarks that
21 the Debtor contributed to the length of the case. Neither
22 assertion has merit. A litigant bears the rights and
23 responsibilities of prosecution and defense in a lawsuit; that
24 the Debtor could not or would not obtain counsel did not preclude
25 Motzkin from doing so and defending against the Debtor's numerous
26 motions to dismiss or to set aside bankruptcy court orders.

27 Moreover, the record shows that the bankruptcy court gave
28 the Debtor ample opportunity to appear and be heard. Its comment

1 that the Debtor contributed to the length of the adversary
2 proceeding was not prejudicial; it was accurate. That the Debtor
3 subjectively believes that the default judgment is unfair,
4 unjust, and inequitable is not a cognizable basis for reversal on
5 appeal.

6 **C. Motzin's cross-appeal, BAP Appeal No. CC-14-1300.**

7 On cross-appeal, Motzkin focuses solely on the Corporate
8 Card; he argues that the bankruptcy court abused its discretion
9 in denying default judgment of that debt under either
10 §§ 523(a)(4) or (a)(6). On this record, we disagree.

11 **1. Procedural posture**

12 The default judgment provided that only \$77,948.06 of the
13 state court judgment was excepted from discharge.⁹ In doing so,
14 it appears that the bankruptcy court granted judgment in the
15 Debtor's favor on the § 523(a)(4) and (a)(6) claims relating to
16 the Corporate Card debt.

17 "Following denial of a motion for entry of a default
18 judgment, a plaintiff would ordinarily be afforded the
19 opportunity to conduct discovery and proceed to trial in an
20 effort to prove its case." Wells Fargo Bank v. Beltran
21 (In re Beltran), 182 B.R. 820, 826 (9th Cir. BAP 1995). This is
22 particularly true where "a plaintiff was unprepared at the
23 default prove up hearing to present any evidence (e.g., because
24 it assumed its allegations would be deemed admitted without the
25

26 ⁹ Curiously, neither the judgment nor the order state the
27 basis of nondischargeability. The motion for default judgment,
28 however, was brought only as to the § 523(a)(4) and (a)(6)
claims.

1 need for presentation of any evidence at the hearing), or where a
2 plaintiff requested additional time to conduct discovery and/or
3 requested a trial on the merits.” Id.

4 The record here shows that, with respect to the Corporate
5 Card debt, Motzkin did not request additional time to conduct
6 discovery or a trial on the merits of the § 523(a)(4) and (a)(6)
7 claims. Nor does the record show that he was unprepared to
8 present evidence at the prove-up hearing or that additional
9 evidence existed that supported his claims. Motzkin did not
10 raise any such issue in the months following the prove-up
11 hearing, while the bankruptcy court considered attorneys fees
12 issues. Finally, Motzkin does not raise procedural issues on
13 appeal.

14 We conclude that it was not improper for the bankruptcy
15 court to enter a default judgment that, in effect, discharged the
16 Corporate Card debt without further proceedings.

17 **2. The bankruptcy court did not err in denying an**
18 **exception from discharge of the Corporate Card debt**
19 **under § 523(a)(4).**

20 Section § 523(a)(4) excepts from discharge debts for
21 defalcation while acting in a fiduciary capacity. Whether a
22 debtor is a fiduciary for the purposes of § 523(a)(4) is a
23 question of federal law. Lewis v. Scott (In re Lewis), 97 F.3d
24 1182, 1185 (9th Cir. 1996). The definition is construed
25 narrowly, requiring that the fiduciary relationship arise from an
26 express or a technical trust that was imposed prior to the
27 wrongdoing that caused the debt. Ragsdale v. Haller, 780 F.2d
28 794, 796 (9th Cir. 1986) (“The broad, general definition of

1 fiduciary—a relationship involving confidence, trust and good
2 faith—is inapplicable in the dischargeability context.”); see
3 also Otto v. Niles (In re Niles), 106 F.3d 1456, 1459 (9th Cir.
4 1997). But, state law informs whether the requisite trust
5 relationship exists. See In re Lewis, 97 F.3d at 1185; Mele v.
6 Mele (In re Mele), 501 B.R. 357, 365 (9th Cir. BAP 2013).

7 Motzkin argues that the bankruptcy court erred in failing to
8 consider the various partnership relationships that existed;
9 namely, between the Corporation (as general partner of the
10 Partnership) and the Debtor and Motzkin (as limited partners in
11 the Partnership), and between the Debtor and Motzkin in relation
12 to the Partnership. He argues that based on In re Frain,
13 230 F.3d 1014 (7th Cir. 2000), shareholders of a corporation may
14 owe one another fiduciary duties.

15 Motzkin is incorrect. California law expressly imposes
16 trustee duties on partners in a partnership and members in a
17 member-managed limited liability company. See Cal. Corp. Code
18 §§ 16404, 17704.09. The same is simply not true of directors,
19 officers, or shareholders to a corporation or to fellow
20 directors, officers, and shareholders.

21 In fact, under California law, “although officers and
22 directors are imbued with the fiduciary duties of an agent and
23 certain duties of a trustee, they are not trustees with respect
24 to corporate assets.” Cal-Micro, Inc. v. Cantrell
25 (In re Cantrell), 329 F.3d 1119, 1126 (9th Cir. 2003). Thus,
26 even though an officer or director may exercise some control over
27 corporate assets, they are not a fiduciary within the meaning of
28 § 523(a)(4). Id. at 1127; see also Swimmer v. Moeller

1 (In re Moeller), 466 B.R. 525, 529 (Bankr. S.D. Cal. 2012) (“[A]
2 corporate principal is not a trustee of an express or statutory
3 trust and, thus, is not a fiduciary to the corporation and its
4 shareholders for the purposes of the section 523(a)(4) discharge
5 exception.”).

6 Here, the bankruptcy court determined that because the
7 Debtor was an officer and director of the Corporation and the
8 Corporation was the account holder of the Corporate Card, the
9 Debtor was not a fiduciary within the meaning of § 523(a)(4).
10 Under California law, this determination was not erroneous. In
11 his capacity as an officer and director, the Debtor did not hold
12 the Corporation’s assets in trust for the Corporation or Motzkin.
13 Thus, he was not a fiduciary as required by § 523(a)(4).

14 That partnership relationships existed in the periphery of
15 the Corporation does not change the calculus. The Debtor and
16 Motzkin were limited partners in the Partnership. Under
17 California law, limited partners do not owe a fiduciary duty to
18 other partners or the limited partnership.¹⁰ Cal. Corp. Code
19 § 15903.05(a). With the Partnership Card, the Debtor appears to
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21 ¹⁰ The § 523(a)(4) judgment - including the determination
22 of the requisite fiduciary status within the meaning of that
23 nondischargeability section - is not before us on appeal. Even
24 if it were, however, the Debtor’s conduct here is supportive of
the necessary fiduciary relationship.

25 An exception to Cal. Corp. Code § 15903.05 exists implicitly
26 where the limited partner participates in control of the
27 business. See Cal. Corp Code § 15903.03. Causing the
28 Partnership to obtain credit appears to violate the restricted
duties of a limited partner; it is also consistent with an
implicit determination that the Debtor took on general
partnership status by exercising control.

1 have acted outside his role as a limited partner, having
2 exercised control and assumed the corresponding duties of a
3 general partner. But there is no argument or evidence that ties
4 his actions as a corporate officer in connection with the
5 Corporate Card to any imputed general partnership status.

6 Based on the foregoing, the bankruptcy court appropriately
7 exercised its discretion and denied Motzkin's motion for default
8 judgment as to the Corporate Card debt under § 523(a)(4).

9 **3. The bankruptcy court did not err in denying an**
10 **exception from discharge of the Corporate Card debt**
11 **under § 523(a)(6).**

12 Section 523(a)(6) excepts from discharge debts arising from
13 a debtor's "willful and malicious" injury to another person or to
14 the property of another. Barboza v. New Form, Inc.
15 (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008). The
16 "willful" and "malicious" are conjunctive requirements, subject
17 to separate analysis. Id.; Carrillo v. Su (In re Su), 290 F.3d
18 1140, 1146-47 (9th Cir. 2002).

19 **a. Willfulness under § 523(a)(6).**

20 Section "523(a)(6) renders debt nondischargeable when there
21 is either a subjective intent to harm, or a subjective belief
22 that harm is substantially certain." Id. at 1144; see also
23 Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1208 (9th
24 Cir. 2001). The injury must be deliberate or intentional, "not
25 merely a deliberate or intentional **act** that leads to injury."
26 Kawaauhau v. Geiger, 523 U.S. 57, 61-62 (1998) (emphasis in
27 original); see also In re Barboza, 545 F.3d at 706 ("A willful
28 injury is a deliberate or intentional injury, not merely a

1 deliberate or intentional act that leads to injury.”) (citation
2 and quotation marks omitted). Thus, “debts arising from
3 recklessly or negligently inflicted injuries do not fall within
4 the compass of § 523(a)(6).” Geiger, 523 U.S. at 64.

5 Motzkin argues that the bankruptcy court erred when it
6 determined that the Debtor lacked the requisite intent to injure
7 based on the history of payments made on the Corporate Card.
8 Among other things, he contends that the bankruptcy court
9 improperly applied the standard for credit card issuers under
10 § 523(a)(2)(A), rather than the Jercich standard required under
11 § 523(a)(6). As a result, Motzkin argues that it erroneously
12 focused on the Debtor’s intent at the time that he incurred the
13 charges, rather than at the time that the Debtor stopped making
14 payments on the account.

15 Motzkin is correct that the state of mind analysis is
16 determined at the time of injury. He is incorrect, however, that
17 here the relevant injury occurred when the Debtor stopped making
18 payments on the Corporate Card. Section 523(a)(6) relates to
19 intentional torts. See Geiger, 523 U.S. at 61. Here, as the
20 bankruptcy court attempted to point out, the Debtor’s
21 unauthorized use of the Corporate Card gave rise to the tort, not
22 his cessation of payments. We reject the notion that failure to
23 pay a credit card is in and of itself an intentional tort.
24 Therefore, the bankruptcy court did not err in determining that
25 its examination of the Debtor’s state of mind was at the time
26 that he used the Corporate Card without authorization, not when
27 he defaulted on the payments on the account.

28 The bankruptcy court determined that the Debtor lacked the

1 requisite intent to injure Motzkin, as evidenced by the Debtor's
2 consistent history of payments on the Corporate Card from 2006 to
3 2009:

4 I don't think that there's proof that when [the Debtor]
5 used the [Corporate Card] that was under [the
6 Corporation], and when he made his payments monthly,
7 that he deliberately or intentionally injured [Motzkin]
8 and that [the Debtor] intended the consequences of his
9 act and that he acted with a subjective motive to
10 inflict injury or with a belief that injury was
11 substantially certain to result from the conduct.

12 Hr'g Tr. (Jan. 8, 2014) at 86:10-17. It found the undisputed
13 fact that the Debtor made payments on the Corporate Card over a
14 three-year period of time was inconsistent with the notion that
15 the Debtor subjectively intended to injure Motzkin when he
16 incurred the non-business charges or that he subjectively
17 believed that injury was substantially certain to occur. The
18 bankruptcy court's finding was not illogical, implausible, or
19 without support from the record.

20 Motzkin further argues that the bankruptcy court erred in
21 ruling that he could not use circumstantial evidence to prove the
22 Debtor's intent. Again, we disagree.

23 Entry of default against a defendant does not automatically
24 entitle a plaintiff to a default judgment; this is so even though
25 the entry of default serves to deem the allegations pled as
26 admitted. Valley Oak Credit Union v. Villegas (In re Villegas),
27 132 B.R. 742, 746 (9th Cir. BAP 1991). The bankruptcy court may
28 require proof of the facts necessary to a claim or to determine
liability. See TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915,
917 (9th Cir. 1987) (Civil Rule 55 provides the bankruptcy court
with "considerable leeway as to what it may require as a

1 prerequisite to the entry of a default judgment."); Fed. R. Civ.
2 P. 55(b)(2) ("The court may conduct hearings . . . when, to enter
3 or effectuate judgment, it needs to . . . determine the amount
4 of damages; [] **establish the truth of any allegation by evidence;**
5 or [] investigate any other matter.") (emphasis added). The
6 bankruptcy court, thus, has "the discretion to require proof of
7 the facts necessary to determine a valid claim for relief against
8 the defaulting parties." Kring v. CitiBank, N.A. (In re Kring),
9 208 B.R. 73, 75 (Bankr. S.D. Cal. 1997).

10 Here, at the default prove-up hearing, the bankruptcy court
11 stated to Motzkin: "You haven't demonstrated what the debtor
12 thought. You're using circumstantial evidence." Hr'g Tr.
13 (Jan. 8, 2014) at 85:2-4. But, the bankruptcy court did not rule
14 that Motzkin could not use circumstantial evidence. Its comment
15 instead reflects that, in accordance with Civil Rule 55(b)(2), it
16 required additional proof on the issue of the Debtor's intent,
17 beyond Motzkin's declaration detailing the scope of authorized
18 use of the Corporate Card. The bankruptcy court was well within
19 its discretion to do so. See TeleVideo Sys., Inc., 826 F.2d at
20 917. There was no error in this regard.

21 Finally, Motzkin argues that the bankruptcy court erred by
22 permitting the Debtor, as a defaulting party, to dispute his
23 liability at the prove-up hearing. He contends that by
24 permitting the Debtor to argue the issue of intent at the
25 hearing, the bankruptcy court "allowed a record that exceeded
26 what is permitted by law" and that it erroneously "credited" the
27 Debtor's version of events. The record belies Motzkin's
28 contention.

1 At the default prove-up hearing, the bankruptcy court
2 permitted the Debtor to appear and be heard in opposition. But,
3 the Debtor was not sworn in and, thus, did not testify on any
4 issue, let alone on the issue of intent. In any event, there is
5 no evidence that the bankruptcy court "credited" the Debtor's
6 version of events. To the extent it determined that the Debtor
7 lacked the requisite intent for § 523(a)(6), the record is clear
8 that it did so based on the documentary evidence before it, not
9 on the Debtor's statements at the default prove-up hearing.

10 In sum, the bankruptcy court appropriately exercised its
11 discretion and denied Motzkin's motion for default judgment as to
12 the Corporate Card debt under § 523(a)(6).

13 **CONCLUSION**

14 Based on the foregoing, we AFFIRM the bankruptcy court.
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