

DEC 10 2015

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	EC-14-1200-FDJu
)		
6	ROBERT NORIK KITAY and)	Bk. No.	13-20645
	TRISTINA COFFIN KITAY,)		
7)	Adv. Pro.	13-02126
	Debtors.)		
8	_____)		
)		
9	DANIEL E. GONZALEZ,)		
)		
10	Appellant,)		
)		
11	v.)	MEMORANDUM*	
)		
12	ROBERT NORIK KITAY;)		
	TRISTINA COFFIN KITAY; LAW)		
13	OFFICES OF ROBERT NORIK KITAY,)		
)		
14	Appellees.)		
	_____)		

Argued and Submitted on November 19, 2015
at Sacramento, California

Filed - December 10, 2015

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

Honorable Thomas C. Holman, Bankruptcy Judge, Presiding

Appearances: Appellant Daniel E. Gonzalez argued pro se.

Before: FARIS, DUNN, and JURY, Bankruptcy Judges.

* 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.

1 **INTRODUCTION**

2 Appellant Daniel E. Gonzalez appeals from the bankruptcy
3 court's order granting in part and denying in part Appellees
4 Robert Norik Kitay's and Tristina Coffin Kitay's¹ motion to set
5 aside default. We hold that the bankruptcy court did not err in
6 granting Mr. Gonzalez default judgment against Mr. Kitay in the
7 amount of \$5,000 as a nondischargeable debt pursuant to 11 U.S.C.
8 § 523(a)(4)² and dismissing the remainder of Mr. Gonzalez's
9 claims. Accordingly, we AFFIRM.

10 **FACTUAL BACKGROUND**

11 Beginning in January 2010, Mr. Gonzalez retained Mr. Kitay,
12 an attorney, to represent him and his daughter, Christina, in
13 numerous state court actions. Those cases involved an automobile
14 accident, alleged wrongful foreclosure, and a probate collection
15 matter. Mr. Gonzalez alleged that, during the course of his
16 representation, "Mr. Kitay committed professional negligence,
17 fraudulent concealments, and misrepresentations." Mr. Kitay
18 responded in kind, claiming that Mr. Gonzalez engaged in "several
19 acts of fraud and dishonesty . . . , all of which led me to sever
20 all ties with Mr. Gonzalez as a client Over time, it
21 became clear that all his personal cases that he brought to me
22 presented multiple acts of fraud, dishonesty, and a complete lack

24 ¹ The Kitays did not file an answering brief or otherwise
25 make an appearance in this appeal.

26 ² Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037, and all "Civil Rule" references are
to the Federal Rules of Civil Procedure, Rules 1-86.

1 of ethics or morality.”³

2 On October 29, 2012, Mr. Gonzalez filed a complaint against
3 Mr. Kitay in the Superior Court of California, County of
4 Sacramento (“state-court action”). Mr. Gonzalez alleged that Mr.
5 Kitay breached the agreement to provide legal services by “acting
6 incompetent and failing or refusing to conduct proper and timely
7 discovery, prosecute, investigate, and research, and in
8 abandoning client.” He claimed that he

9 suffered judgments for attorney fees in the amount of
10 \$48,000, negligent or intentional emotional distress,
11 incurred over \$12,000 in attorney fees and costs to
12 correct the negligence of [Mr. Kitay], and will incur
13 additional attorney fees in an amount not yet
ascertained, but in excess of \$50,000 including appeals
and trial. [I]n addition, plaintiff claims damages in
the amount of \$140,000 or more for restitution.

14 The aggregate amount claimed by Mr. Gonzalez was \$250,000 plus
15 attorneys’ fees.

16 On January 17, 2013, Mr. and Mrs. Kitay filed their
17 chapter 7 petition in the United States Bankruptcy Court for the
18 Eastern District of California. The Kitays’ Schedule F
19 identified Mr. Gonzalez as a creditor with an unsecured,
20 nonpriority claim of \$250,000 for the state-court action.

21 Mr. Gonzalez initiated an adversary proceeding against
22 Mr. Kitay and the Law Offices of Robert N. Kitay, PC, on or
23 around April 15, 2013. Mr. Gonzalez objected to discharge under
24 §§ 727(a) (3) and 727(a) (4) (a) and sought a determination as to

25
26 ³ Not all facts discussed herein are included in the
27 excerpts of record. We have exercised our discretion to review
28 the bankruptcy court’s docket. See Woods & Erickson, LLP v. Leonard (In re AVI, Inc.), 389 B.R. 721, 725 n.2 (9th Cir. BAP 2008).

1 dischargeability of the debt arising from the state-court action
2 under §§ 523(a)(2)(A), 523(a)(4), and 523(a)(6).

3 Mr. Kitay filed an answer to Mr. Gonzalez's complaint, but
4 the bankruptcy court struck Mr. Kitay's answer for his failure to
5 comply with the court's order to meet and confer with
6 Mr. Gonzalez on issues including initial disclosures, settlement,
7 and a discovery plan. The court issued its Entry of Default and
8 Order re: Default Judgment Procedures, in which it directed
9 Mr. Gonzalez to apply for a default judgment.

10 Mr. Gonzalez filed his Motion for Entry of Default Judgment,
11 in which he requested that the bankruptcy court enter default
12 judgment against Mr. Kitay based on his failure to properly
13 represent him and his daughter in the various state-court
14 lawsuits. Mr. Gonzalez stated that he paid Mr. Kitay and his law
15 firm "over \$2,500 in attorney's fees" in a wrongful foreclosure
16 case and "over \$2,500 for legal services" in two consolidated
17 cases regarding a probate collection matter.

18 The bankruptcy court granted in part and denied in part the
19 Motion for Entry of Default Judgment. It stated that
20 Mr. Gonzalez shall recover \$5,000 plus costs from Mr. Kitay, the
21 total of which shall be nondischargeable pursuant to 11 U.S.C.
22 § 523(a)(4). However, the court denied Mr. Gonzalez's request
23 for entry of default judgment pursuant to 11 U.S.C.
24 §§ 523(a)(2)(A), (a)(6), 727(a)(3) and (a)(4). It dismissed
25 Mr. Gonzalez's claims under Civil Rule 12(b)(6), stating that the
26 allegations in the complaint were insufficient.

27 The court gave Mr. Gonzalez leave to amend his complaint,
28 stating:

1 On or before November 19, 2013, the plaintiff shall
2 file and serve on both defendants consistent with the
3 requirements of Fed. R. Bankr. P. 7004 an amended
4 complaint. If the plaintiff does not file an amended
5 complaint by the foregoing deadline, the plaintiff's
6 claims under 11 U.S.C. §§ 523(a)(2)(A), (a)(6),
7 727(a)(3) and (a)(4) will be dismissed without further
8 notice or hearing. Judgment will not be entered until
9 all of the plaintiff's claims, including those that may
10 be asserted in an amended complaint, are resolved.

11 On November 19, 2013, Mr. Gonzalez filed his First Amended
12 Complaint. The bankruptcy court issued a Reissued Summons and
13 Notice of Status Conference in an Adversary Proceeding the
14 following day.

15 On November 27, 2013, the bankruptcy court issued a minute
16 order, noting that Mr. Gonzalez had not yet filed proof of
17 service for the First Amended Complaint. The court instructed
18 Mr. Gonzalez to file a proof of service. In response,
19 Mr. Gonzalez filed a notice of compliance in which he stated that
20 he had mailed a copy of the First Amended Complaint to Mr. Kitay
21 on November 19. He attached to the notice a copy of the proof of
22 service affixed to the end of the First Amended Complaint and a
23 U.S. Postal Service receipt dated November 19. Mr. Gonzalez
24 filed a renewed Motion for Entry of Default Judgment on
25 December 3, 2013.

26 Mr. Gonzalez said that, on December 28, 2013, the complaint
27 was returned to him as undeliverable, and he realized for the
28 first time that he had mailed the First Amended Complaint to the
wrong address. He claimed that he had mistakenly used the
address listed on the chapter 7 petition. On December 30,
Mr. Gonzalez effected personal service on the Kitays at
Mr. Kitay's law firm.

1 On January 3, 2014, Mr. Kitay (on behalf of himself and
2 Mrs. Kitay) filed a motion to set aside the entry of default and
3 to dismiss the complaint ("Motion to Set Aside"). In support of
4 the Motion to Set Aside, Mr. Kitay referred to Mr. Gonzalez as a
5 "con-man" and a liar. He raised issues of truthfulness and
6 veracity from Mr. Gonzalez's past, including the suspension of
7 his dental and real estate licenses, allegedly for negligence and
8 fraud. Mr. Kitay claimed that, as working with Mr. Gonzalez on
9 the state cases became more unsavory, he "decided to completely
10 disassociate [himself] from Mr. Gonzalez."⁴ Mr. Kitay also
11 disputed that he received \$5,000 in retainer payments from
12 Mr. Gonzalez and stated that he only received \$1,000 as an
13 initial retainer.

14 Mr. Kitay argued that the bankruptcy court should not have
15 struck his answer for failing to meet and confer with
16 Mr. Gonzalez. He stated that Mr. Gonzalez never contacted him to
17 meet and confer, and he was never served with any order to meet
18 and confer. Mr. Kitay argued that he tried to cooperate with
19 Mr. Gonzalez on discovery issues, but Mr. Gonzalez never
20 responded to his communications. Mr. Kitay also informed the

21
22 ⁴ For example, Mr. Kitay stated that Mr. Gonzalez
23 "fraudulently filed documents, or pleadings, under counsel's name
24 without counsel's consent." Mr. Gonzalez allegedly filed a
25 chapter 11 petition under Mr. Kitay's name on behalf of a company
26 that Mr. Kitay did not represent. Mr. Gonzalez's subsequent
27 attorney also sought to withdraw as Mr. Gonzalez's counsel for
28 similar reasons. Mr. Kitay also claimed that Mr. Gonzalez "was
holding himself out to the public, and charging substantial money
(thousands in retainers), representing to his purported 'clients'
that he would be able to get their loans re-financing, or
modified, and that if he was unable to accomplish that, he would
secure counsel on their behalf"

1 court that he was not served with any pleadings after
2 September 30, 2013, and did not receive the First Amended
3 Complaint until December 30.

4 In its written disposition entered on January 14, 2014, the
5 bankruptcy court denied Mr. Gonzalez's Motion for Entry of
6 Default Judgment, filed December 3, 2013, since the First Amended
7 Complaint added Mrs. Kitay as a defendant and added additional
8 claims. The court held that the Kitays were entitled to answer
9 the First Amended Complaint. Inexplicably, the Kitays never
10 filed an answer.

11 On January 28, 2014, Mr. Gonzalez filed his Amended Motion
12 for Entry of Default Judgment.

13 On April 8, 2014, the bankruptcy court issued its written
14 ruling regarding Mr. Kitay's Motion to Set Aside. The court
15 denied Mr. Kitay's request to vacate the court's August 21, 2013
16 order striking his answer and entering default and the
17 November 4, 2013 order entering default judgment. However,
18 regarding the request to dismiss the adversary proceeding, the
19 court dismissed all claims without leave to amend, "with the
20 exception of the claim for relief under 11 U.S.C. § 523(a)(4) as
21 to Robert N. Kitay only"

22 First, regarding Mr. Kitay's request to vacate the default
23 order and default judgment, the court stated that Mr. Kitay did
24 not satisfy the three-prong test set out in Franchise Holding II,
25 LLC v. Huntington Restaurants Group, Inc., 375 F.3d 922, 925-26
26 (9th Cir. 2004). The court held that Mr. Kitay did not meet his
27 burden regarding the first prong, i.e., whether default was
28 willful or whether culpable conduct of defendant led to default.

1 The court stated that, even though Mr. Kitay may not have
2 received any communication from Mr. Gonzalez regarding orders to
3 confer, the filing of his answer subjected him to the
4 jurisdiction of the court, and he was required to comply with all
5 court orders. The court also held that Mr. Kitay did not meet
6 the third prong, i.e., whether setting aside default would
7 prejudice the adverse party, since this factor was not addressed
8 in the Motion to Set Aside. However, the court held that
9 Mr. Kitay satisfied the second prong, i.e., whether a meritorious
10 defense has been presented.

11 Second, regarding Mr. Kitay's request to dismiss the
12 adversary proceeding, the court agreed that Mr. Gonzalez's
13 failure to timely serve the First Amended Complaint warranted
14 dismissal of the remaining claims. It also noted that the new
15 claims against Mrs. Kitay were time-barred and that the remaining
16 claims should be asserted in a proof of claim. Finally, the
17 court found that \$5,000 was the proper amount of the
18 nondischargeable debt owed to Mr. Gonzalez.

19 Also on April 8, 2014, Mr. Gonzalez filed a proof of claim
20 for "\$250,000 or more" in the underlying bankruptcy action.

21 Mr. Gonzalez filed his notice of appeal on April 17, 2014.
22 On April 18, 2014, the bankruptcy court entered its Judgment in
23 Mr. Gonzalez's favor for \$5,000 plus \$293 in costs and held that
24 those amounts are nondischargeable under § 523(a)(4).⁵

25
26 ⁵ On November 12, 2015, Mr. Gonzalez filed his Motion for
27 Judicial Notice, which requested that the Panel take notice of:
28 (1) a case in support of his "liberality of amendment" argument;
(2) Mr. Kitay's discovery responses regarding his liability
(continued...)

1 **JURISDICTION**

2 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
3 §§ 1334 and 157(b)(1) and (b)(2)(I) and (J). We have
4 jurisdiction under 28 U.S.C. § 158.

5 **ISSUES**

6 (1) Whether the bankruptcy court erred in awarding
7 Mr. Gonzalez \$5,000 plus costs instead of \$250,000.

8 (2) Whether the bankruptcy court erred in finding that
9 Mr. Kitay had asserted a meritorious defense, even though it
10 found that Mr. Kitay did not satisfy the other two prongs
11 required to set aside the default judgment.

12 (3) Whether the bankruptcy court erred in dismissing the
13 remaining claims against the Kitays for Mr. Gonzalez's failure to
14 timely serve the amended complaint.

15
16 _____
17 ⁵(...continued)
18 insurance policy; (3) a case concerning whether the court had
19 constitutional authority to enter a final judgment; (4) a state-
20 court minute order purporting to establish the validity of his
dismissed claims; and (5) a disciplinary opinion demonstrating
that Mr. Kitay has been suspended for thirty days by the
California state bar.

21 These documents are not appropriate for judicial notice.
22 First, the Panel does not take judicial notice of the cases
23 presented by Mr. Gonzalez, which may be appropriate as case
24 citations or authority, rather than adjudicative facts. Second,
25 the remainder of the documents are irrelevant to the present
26 appeal. See Ly v. Che (In re Ly), 601 F. App'x 494, 496 n.1 (9th
27 Cir. 2015) ("We deny all of the pending requests for judicial
28 notice because all of them seek notice of matters irrelevant to
the decision of this appeal."); Santa Monica Food Not Bombs v.
City of Santa Monica, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006)
(declining to take judicial notice of documents not relevant to
resolution of the appeal). Therefore, Mr. Gonzalez's Motion for
Judicial Notice is DENIED.

1 **STANDARD OF REVIEW**

2 "In bankruptcy discharge appeals, the Panel reviews the
3 bankruptcy court's findings of fact for clear error and
4 conclusions of law de novo, and applies de novo review to 'mixed
5 questions' of law and fact that require consideration of legal
6 concepts and the exercise of judgment about the values that
7 animate the legal principles." Oney v. Weinberg
8 (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009), aff'd,
9 407 F. App'x 176 (9th Cir. 2010) (citing Wolkowitz v. Beverly
10 (In re Beverly), 374 B.R. 221, 230 (9th Cir. BAP 2007), aff'd in
11 part & dismissed in part, 551 F.3d 1092 (9th Cir. 2008)).

12 We review the bankruptcy court's ruling on a motion to set
13 aside a default judgment for abuse of discretion. Sallie Mae
14 Serv., LP v. Williams (In re Williams), 287 B.R. 787, 791 (9th
15 Cir. BAP 2002) (citing United States v. Real Prop., 135 F.3d
16 1312, 1314 (9th Cir. 1998)). A bankruptcy court abuses its
17 discretion if it applied the wrong legal standard or its findings
18 were illogical, implausible, or without support in the record.
19 See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832
20 (9th Cir. 2011).

21 We review for abuse of discretion the bankruptcy court's
22 dismissal of a complaint for failure to comply with the rules or
23 court order. See Schmidt v. Herrmann, 614 F.2d 1221, 1224 (9th
24 Cir. 1980).

25 "We do not reverse for errors not affecting substantial
26 rights of the parties, and may affirm for any reason supported by
27 the record." COM-1 Info, Inc. v. Wolkowitz (In re Maximus
28 Computers, Inc.), 278 B.R. 189, 194 (9th Cir. BAP 2002); see

1 28 U.S.C. § 2111; Civil Rule 61, incorporated by Rule 9005.

2 **DISCUSSION**

3 While many of Mr. Gonzalez's arguments are unclear,
4 Mr. Gonzalez is proceeding pro se in this appeal, so we will
5 construe the arguments in his brief liberally. See Kashani v.
6 Fulton (In re Kashani), 190 B.R. 875, 883 (9th Cir. BAP 1995).

7 **A. The bankruptcy court did not err in awarding Mr. Gonzalez**
8 **\$5,000, rather than \$250,000.**

9 Mr. Gonzalez first assigns error to the bankruptcy court's
10 award of \$5,000 plus costs as nondischargeable under § 523(a)(4).
11 He argues that the bankruptcy court erred by failing to apply the
12 rule of "liberality in amendments." He claims that his proof of
13 claim for "\$250,000 or more," filed on the same day the
14 bankruptcy court issued its order on the Motion to Set Aside
15 Default, as well as the \$250,000 informally requested in the
16 adversary complaint, put the bankruptcy court on notice that he
17 sought recovery of \$250,000 from Mr. Kitay. He argues that,
18 because a "[p]roof of claim is prima facie evidence of the
19 validity and amount of claim[,] " the bankruptcy court should have
20 awarded him the entire \$250,000 he requested. He requests that
21 the Panel order the \$250,000 "paid 'on demand' by the liability
22 policy carrier of attorney/debtor Kitay."

23 Mr. Gonzalez does not understand that filing a proof of
24 claim in a bankruptcy case is different from, and not a
25 substitute for, filing a complaint and presenting evidence in an
26 adversary proceeding. A party who wishes to share in the
27 distribution from a bankruptcy estate generally must file a proof
28 of claim in the parent bankruptcy proceeding. See Rule 3001;

1 § 501. A party who wishes to object to the debtor's discharge,
2 or seek a determination of the dischargeability of debt, must
3 file a complaint to commence an adversary proceeding. See
4 Rule 7001; Rule 7003. Filing a proof of claim in the underlying
5 bankruptcy case is separate from any adversary proceeding: "the
6 filing of a proof of claim does not . . . initiate an adversary
7 proceeding." Lyon v. Gila River Indian Cmty., 626 F.3d 1059,
8 1070 (9th Cir. 2010) (citing Lundell v. Anchor Constr.
9 Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000)).

10 The distinction between a proof of claim and a complaint is
11 important in several respects, one of which has to do with the
12 burdens of production and proof. A proof of claim is
13 presumptively valid. Garner v. Shier (In re Garner), 246 B.R.
14 617, 620 (9th Cir. BAP 2000) ("There is an evidentiary
15 presumption that a correctly prepared proof of claim is valid as
16 to liability and amount."). Anyone who contests the claim must
17 produce evidence sufficient to dispel the presumptive validity of
18 the claim. In an adversary proceeding, however, the plaintiff
19 has the burdens of production and proof. The plaintiff cannot
20 carry or shift that burden by the simple expedient of filing a
21 proof of claim. In other words, the mere filing of a proof of
22 claim does not establish the validity of the claim for the
23 purposes of an adversary proceeding.

24 Mr. Gonzalez points out that, in appropriate circumstances,
25 an adversary complaint can serve as an informal proof of claim.
26 See Dicker v. Dye (In re Edelman), 237 B.R. 146, 154 (9th Cir.
27 BAP 1999). But the converse is not true. While an adversary
28 complaint can sometimes suffice as an informal proof of claim, a

1 proof of claim cannot suffice as a complaint under Rules 7001 and
2 7003. The filing of the proof of claim in the underlying
3 bankruptcy proceeding does not affect the adversary proceeding or
4 require the court to determine that the entire amount of the
5 claim is nondischargeable.

6 Moreover, the bankruptcy court's August 21, 2013 Entry of
7 Default and Order re: Default Judgment Procedures specifically
8 required Mr. Gonzalez to apply for a default judgment and "prove
9 up" his request. The court then found that, based on
10 Mr. Gonzalez's two alleged payments of \$2,500 to Mr. Kitay,
11 \$5,000 plus costs were nondischargeable under § 523(a)(4).
12 Mr. Gonzalez did not submit evidence that would substantiate the
13 remainder of his claim for \$250,000. In any event, Mr. Gonzalez
14 has not assigned any other error to the award. Accordingly, we
15 hold that the bankruptcy court did not err in awarding
16 Mr. Gonzalez \$5,000 plus costs as nondischargeable debt.

17 **B. The bankruptcy court did not err in its application of Civil**
18 **Rule 55(c) and finding that Mr. Kitay stated a meritorious**
19 **defense.**

20 Second, Mr. Gonzalez argues that the court erred in its
21 application of Civil Rule 55 because it held that Mr. Kitay
22 satisfied the second prong of the test by stating a "meritorious
23 defense."

24 Civil Rule 55(c), made applicable through Rule 7055,
25 provides that "[t]he court may set aside an entry of default for
26 good cause" The "good cause" inquiry considers three
27 factors: "(1) whether [the defendant] engaged in culpable conduct
28 that led to the default; (2) whether [the defendant] had a
meritorious defense; or (3) whether reopening the default

1 judgment would prejudice [the plaintiff]." Franchise Holding II,
2 LLC v. Huntington Restaurants Grp., Inc., 375 F.3d 922, 926 (9th
3 Cir. 2004). "As these factors are disjunctive, the district
4 court was free to deny the motion 'if any of the three factors
5 was true.'" Id. (quoting Am. Ass'n of Naturopathic Physicians v.
6 Hayhurst, 227 F.3d 1104, 1108 (9th Cir. 2000)).

7 In the present case, the bankruptcy court found that
8 Mr. Kitay could not establish the first and third factors, but
9 that he had stated "a meritorious defense" under the second
10 factor. It stated that Mr. Kitay "has alleged sufficient facts
11 in the motion that, if true[,] would constitute a defense to the
12 plaintiff's claims." Nevertheless, because Mr. Kitay did not
13 satisfy all three factors, the court denied the Motion to Set
14 Aside.

15 Mr. Gonzalez argues that the court "overreached to the point
16 of denying [him] an appropriate award of damages according to the
17 amended proof of claim or the amount of damages detailed in the
18 [First Amended Complaint]." He claims that, in another case
19 concerning a motion to set aside, the bankruptcy court stopped
20 its analysis after finding that the movant did not meet the third
21 criterion. Citing In re Christiansen, Case No. 05-200050-B-7,
22 United States Bankruptcy Court for the Eastern District of
23 California, Mr. Gonzalez points to the court's conclusion that,
24 "[b]ecause the court finds prejudice, it declines to reach the
25 other two possible reasons for denial enumerated in Franchise
26 Holding."

27 Mr. Gonzalez misapprehends the court's analysis. While it
28 is true that a movant's failure to establish any one of the three

1 factors is fatal to his position, nothing prevents a court from
2 articulating a complete analysis of all factors. Further, the
3 court's decision to award Mr. Gonzalez \$5,000 rather than
4 \$250,000 had nothing to do with its analysis of the second
5 factor. The court awarded \$5,000 months before it considered
6 Mr. Kitay's Motion to Set Aside. The court did not "overreach"
7 when it determined that Mr. Kitay had alleged meritorious
8 defenses.

9 Mr. Gonzalez also argues that the court "overreached" and
10 "made reversible error in finding that Kitay met the second
11 factor" ⁶ Mr. Gonzalez goes on at length to argue
12 Mr. Kitay's alleged professional negligence and fraud. However,
13 the bankruptcy court was not adjudicating the merits of
14 Mr. Gonzalez's case or Mr. Kitay's defenses. Mr. Kitay needed
15 only to offer "specific facts that would constitute a defense."
16 Franchise Holding II, LLC, 375 F.3d at 926 (citing Madsen v.
17 Bumb, 419 F.2d 4, 6 (9th Cir. 1969)). Although Mr. Gonzalez may
18 not have liked the fact that Mr. Kitay's defenses involved
19 allegations of Mr. Gonzalez's wrongdoing and misconduct, the
20 court found that these facts were sufficient to carry the
21 relatively light burden of stating a meritorious defense. As
22 such, the court did not err in its analysis of the Civil

23
24 ⁶ Mr. Gonzalez seems to conflate the Motion to Set Aside
25 with the Motion to Strike the Adversary Proceeding. He states
26 that the court overreached when it held that Mr. Kitay met the
27 second factor of the three-part test "based on a mistaken and
28 inadvertent mailing error causing no consequence to Kitay." The
late service of the First Amended Complaint is unrelated to
Mr. Kitay's burden to offer meritorious defenses to the claims
raised by Mr. Gonzalez.

1 Rule 55(c) test, and it did not adjudicate the merits of
2 Mr. Kitay's defense.

3 Mr. Gonzalez states that, because of the court's ruling, he
4 will face prejudice by having to "re-litigate" the issues raised
5 by Mr. Kitay. Mr. Gonzalez will face no such burden. In fact,
6 because the bankruptcy court ruled that Mr. Kitay's
7 nondischargeable liability is only \$5,000, Mr. Gonzalez's
8 additional claims will be barred (assuming Mr. Kitay receives a
9 discharge).

10 In any event, Mr. Gonzalez lacks standing to appeal on this
11 basis, because he prevailed in the bankruptcy court: the court
12 declined to set aside the default. See Duckor Spradling &
13 Metzger v. Baum Tr. (In re P.R.T.C., Inc.), 177 F.3d 774, 777
14 (9th Cir. 1999) ("[C]ourts have created an additional prudential
15 standing requirement in bankruptcy cases: The appellant must be a
16 'person aggrieved' by the bankruptcy court's order." (citing
17 Brady v. Andrew (In re Commercial W. Fin. Corp.), 761 F.2d 1329,
18 1334 (9th Cir. 1985)); id. ("An appellant is aggrieved if
19 'directly and adversely affected pecuniarily by an order of the
20 bankruptcy court'; in other words, the order must diminish the
21 appellant's property, increase its burdens, or detrimentally
22 affect its rights." (quoting Fondiller v. Robertson
23 (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983))).

24 **C. The court did not err in dismissing the remaining claims for**
25 **Mr. Gonzalez's failure to timely serve an amended complaint.**

26 Next, Mr. Gonzalez argues that the bankruptcy court erred in
27 dismissing his remaining claims for failing to comply with the
28 court's deadline to serve the First Amended Complaint. We hold

1 that the court did not abuse its discretion in dismissing the
2 untimely complaint.⁷

3 A court may dismiss an untimely complaint pursuant to a
4 federal statute or rule, a local rule, or the court's inherent
5 power. As the bankruptcy court did not identify the underlying
6 authority for its dismissal, we first consider whether the court
7 properly dismissed the remaining claims under the federal rules.

8 Civil Rule 41(b), which is made applicable to adversary
9 proceedings pursuant to Rule 7041, states that, "[i]f the
10 plaintiff fails to prosecute **or to comply with** these rules or **a**
11 **court order**, a defendant may move to dismiss the action or any
12 claim against it." Civil Rule 41(b) (emphases added). "[W]hen a
13 plaintiff fails to amend his complaint after the district judge
14 dismisses the complaint with leave to amend, the dismissal is
15 typically considered a dismissal for failing to comply with a
16 court order rather than for failing to prosecute the claim."
17 Yourish v. Cal. Amplifier, 191 F.3d 983, 986 (9th Cir. 1999).

18 [I]n order for a court to dismiss a case as a sanction,
19 the district court must consider five factors: "(1) the
20 public's interest in expeditious resolution of
21 litigation; (2) the court's need to manage its docket;
22 (3) the risk of prejudice to the defendants; (4) the
23 public policy favoring disposition of cases on their
24 merits; and (5) the availability of less drastic
25 alternatives." We "may affirm a dismissal where at

26 ⁷ Mr. Gonzalez also argues that the court erred in
27 dismissing the remaining claims, because, inter alia, it found
28 that Mr. Kitay "acted in willful bad conduct," it "disregarded
the availability of Kitay's \$1M liability policy," and it did not
award \$250,000 in the interest of justice. However, these
arguments are facially not relevant to dismissal of claims that
the debt is nondischargeable, and Mr. Gonzalez develops no
arguments that make them pertinent. Therefore, we are unable to
discern any error.

1 least four factors support dismissal, . . . or where at
2 least three factors 'strongly' support dismissal."
3 "Although it is preferred, it is not required that the
4 district court make explicit findings in order to show
5 that it has considered these factors and we may review
6 the record independently to determine if the district
7 court has abused its discretion."

8 Id. at 990 (internal citations omitted). "These factors are not
9 a series of conditions precedent before the judge can do
10 anything, but a way for a district judge to think about what to
11 do." In re Phenylpropanolamine Prods. Liab. Litig., 460 F.3d
12 1217, 1226 (9th Cir. 2006) (internal quotation marks omitted).

13 In the present case, it is undisputed that Mr. Gonzalez did
14 not comply with the court's order to timely serve the Kitays.
15 The bankruptcy court gave Mr. Gonzalez until November 19, 2013 to
16 **file and serve** his amended complaint and cautioned that, if
17 Mr. Gonzalez did "not file an amended complaint by the foregoing
18 deadline, the plaintiff's claims under 11 U.S.C. §§ 523(a)(2)(A),
19 (a)(6), 727(a)(3) and (a)(4) will be dismissed without further
20 notice or hearing."

21 Mr. Gonzalez filed his First Amended Complaint on
22 November 19. He sent a copy to the Kitays via U.S. mail, but
23 mailed it to the wrong address. He claims that he did not
24 realize the error until the complaint was returned undelivered.
25 Mr. Gonzalez eventually served the Kitays on December 30, over a
26 month past the court's deadline.

27 In dismissing the First Amended Complaint, the bankruptcy
28 court's April 8, 2014 order did not explicitly address the five
factors articulated in Hernandez and Yourish. We thus review the
five factors to determine whether the bankruptcy court abused its
discretion in dismissing the First Amended Complaint. See

1 Yourish, 191 F.3d at 989 (the appellate court has “not always
2 been troubled by a district court’s failure to explain the
3 reasons for dismissal”).

4 The first two factors weigh heavily in favor of dismissal.
5 First, “the public’s interest in expeditious resolution of
6 litigation always favors dismissal.” Id. at 990. Moreover,
7 “[d]istrict judges are best situated to decide when delay in a
8 particular case interferes with docket management and the public
9 interest.” Id. (quoting Ash v. Cvetkov, 739 F.2d 493, 496 (9th
10 Cir. 1984)). Second, “to be able to manage its docket
11 effectively, the Court must be able to dismiss actions without
12 operative complaints which have stalled due to one party’s
13 unilateral inaction in meeting court-imposed deadlines.” Gleason
14 v. World Sav. Bank, FSB, Case No. 12-cv-03598-JST, 2013 WL
15 3927799, at *1 (N.D. Cal. July 26, 2013). Here, Mr. Gonzalez’s
16 failure to serve his First Amended Complaint for over a month
17 after the court-imposed deadline cuts against the public interest
18 and the court’s ability to manage its docket. The court made
19 clear that Mr. Gonzalez was to “file and serve” the amended
20 complaint by November 19, 2013. The record supports a factual
21 finding that Mr. Gonzalez’s delay interfered with the expeditious
22 resolution of the case. Thus, the first two factors strongly
23 favor dismissal. See Yourish, 191 F.3d at 991 (“[W]e accept [the
24 court’s] factual finding that Plaintiffs knew that they were
25 required to file the amended complaint within sixty days rather
26 than within sixty [days] of the issuance of a written order as
27 they claim. Because the district judge was in a superior
28 position to evaluate the effects of delay on her docket, . . . we

1 find that this factor strongly favors dismissal.”).

2 The third factor, the risk of prejudice to the defendants,
3 “is related to the plaintiff’s reason for defaulting in failing
4 to timely amend.” Id. (citation omitted). A plaintiff’s “paltry
5 excuse for his default on the judge’s order” may “indicate[]
6 that there was sufficient prejudice to Defendants from the delay
7” Id. at 992. In the present case, the bankruptcy court
8 made clear that Mr. Gonzalez’s excuse for his failure to serve
9 the Kitays was unacceptable. It noted that the Kitays had filed
10 a notice of change of address months before Mr. Gonzalez
11 instituted the adversary proceeding. It also pointed out that
12 Mr. Gonzalez had previously used the Kitays’ correct address for
13 earlier filings. In sum, the bankruptcy court found
14 Mr. Gonzalez’s excuses “unavailing.” We agree that Mr. Gonzalez
15 was not justified in untimely serving the Kitays with the First
16 Amended Complaint, and this factor weighs in favor of dismissal.⁸
17 See League of United Latin Am. Citizens Inc. v. Eureste,
18 No. 13-CV-04725-JSC, 2014 WL 5473560, at *4 (N.D. Cal. Oct. 28,
19 2014) (finding that the third factor slightly favors dismissal
20 where the court “does not find this explanation credible[,]”
21 where the plaintiff claimed he had miscalculated the number of
22 days that he had to file an amended complaint).

24 ⁸ Mr. Gonzalez argues that the court should have accepted
25 the untimely filing under Rule 9006(b)(1), which allows for an
26 enlargement of time “where the failure to act was the result of
27 excusable neglect.” However, Rule 9006(b)(1) is invoked “on
28 motion made[,]” and Mr. Gonzalez did not file any motion for
enlargement of time. Moreover, the bankruptcy court did not err
in rejecting Mr. Gonzalez’s excuse for the late filing, so we do
not recognize any “excusable neglect.”

1 The fourth factor, whether public policy favors disposition
2 of the case on the merits, "normally weighs strongly against
3 dismissal." Gleason, 2013 WL 3927799, at *2. On the other hand,
4 "this factor lends little support to a party whose responsibility
5 it is to move a case toward disposition on the merits but whose
6 conduct impedes progress in that direction."

7 In re Phenylpropanolamine Prods. Liab. Litig., 460 F.3d at 1228.

8 We cannot say that the tardiness in serving the First Amended
9 Complaint created such a great delay as to trump the presumption
10 in favor of resolution on the merits. As such, this factor
11 weighs against dismissal.

12 Finally, we consider whether the bankruptcy court should
13 have employed less drastic alternatives. On the one hand, the
14 Ninth Circuit has held that, in some circumstances, a chance to
15 amend the complaint and a "warning to a party that his failure to
16 obey the court's order will result in dismissal can satisfy the
17 'consideration of alternatives' requirement." Ferdik v.
18 Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992) (citation omitted).
19 On the other hand, the Ninth Circuit has also held that a warning
20 and "the district court's granting Plaintiffs leave to amend was
21 not a lesser sanction because they had not yet disobeyed the
22 court's order." Yourish, 191 F.3d at 992; see Pagtalunan v.
23 Galaza, 291 F.3d 639, 643 (9th Cir. 2002) ("we are constrained by
24 the holding in Yourish to find that the availability of less
25 drastic alternatives was not considered by the district court").
26 The record does not disclose whether the bankruptcy court
27 considered less drastic alternatives to dismissal. Although the
28 bankruptcy court gave Mr. Gonzalez a chance to amend his

1 deficient pleading and warned that it would dismiss the complaint
2 if not filed and served by November 19, the warning alone appears
3 to be insufficient to constitute a less drastic sanction. As
4 such, this factor weighs against dismissal.

5 In weighing the five factors, we are guided by the Ninth
6 Circuit's decision in Yourish, which also involved dismissal
7 under Civil Rule 41(b) for failure to timely amend a complaint.
8 In that case, the court granted the defendants' motion to
9 dismiss, but, upon agreement of the parties, gave the plaintiffs
10 sixty days to file an amended complaint. When the plaintiffs
11 failed to do so, the defendants moved to dismiss the case. The
12 court granted the motion and dismissed the case with prejudice.

13 On appeal, the Ninth Circuit considered the five factors for
14 dismissal under Civil Rule 41(b). As in the present case, the
15 court found that the first three factors favored dismissal, while
16 the latter two factors weighed against dismissal. The court
17 concluded that, "[b]ecause we have found that three factors
18 strongly favor dismissal, we feel that the district court did not
19 abuse its discretion in dismissing Plaintiffs' case for failing
20 to amend in a timely fashion. Although dismissal was harsh, we
21 do not have a 'definite and firm conviction' that the district
22 court 'committed a clear error of judgment in the conclusion it
23 reached upon a weighing of the relevant factors.'" Yourish,
24 191 F.3d at 992 (quoting Ferdik, 963 F.2d at 1260).

25 Accordingly, because a permissible weighing of the five
26 factors favors dismissal, we hold that the bankruptcy court did
27 not abuse its discretion in dismissing the First Amended
28 Complaint for Mr. Gonzalez's failure to comply with the court's

1 order.⁹ (We therefore need not consider the bankruptcy court's
2 authority to dismiss the amended complaint under the local rules
3 or its inherent powers.)

4 Furthermore, the court dismissed the claims against
5 Mrs. Kitay, who was newly added as a defendant to the First
6 Amended Complaint. The court held that, not only did
7 Mr. Gonzalez fail to timely serve Mrs. Kitay, but objections as
8 to Mrs. Kitay's "discharge or nondischargeability as to a debt
9 . . . are time-barred; the filing of the FAC on November 19, 2013
10 . . . occurred long after the deadline of April 15, 2013, to file
11 a claim objecting [to Mrs. Kitay's] discharge or the
12 nondischargeability of a debt as to [Mrs. Kitay] expired."
13 Mr. Gonzalez does not challenge the court's dismissal of the
14 claims against Mrs. Kitay as time-barred. As such, the court did
15 not err in dismissing all claims against Mrs. Kitay.

16 **D. The Panel declines to consider issues not raised before the**
17 **bankruptcy court or not properly on appeal.**

18 Mr. Gonzalez offers materials and arguments not properly
19 before this Panel on appeal. We decline to consider them.

20 First, we will only consider documents that are properly a
21 part of the record below. Except in rare cases where "'the
22 interests of justice demand it,' an appellate court will not
23 consider evidence not presented to the trial court[.]" Graves v.

24
25 ⁹ Presumably in connection with his discussion of prejudice,
26 Mr. Gonzalez argues at length about a law firm that represented
27 both Mr. Kitay and a defendant in one of the state-court cases,
28 Mr. Kitay's allegations of Mr. Gonzalez's questionable background
and character, and his difficulties collecting the \$5,000 award
from Mr. Kitay. These arguments are not relevant to the present
appeal and are not addressed herein.

1 Myrvang (In re Myrvang), 232 F.3d 1116, 1119 n.1 (9th Cir. 2000)
2 (citations omitted). Mr. Gonzalez attaches numerous documents to
3 his appendix (specifically, his Supplemental Excerpts) that were
4 not presented to the bankruptcy court. The vast majority of
5 these documents were filed in the state-court action **after** the
6 bankruptcy court's April 8, 2014 order. Furthermore, these
7 documents have little bearing on the present appeal, since they
8 do not appear to concern the issues raised by the bankruptcy
9 court's April 8, 2014 order. As such, the interests of justice
10 do not demand that we consider the documents and arguments not
11 raised before the bankruptcy court.

12 Second, Mr. Gonzalez requests that the Panel not only award
13 him \$250,000 per his proof of claim, but that we order
14 Mr. Kitay's liability insurer to satisfy the judgment
15 immediately. Mr. Gonzalez's request is outside of the scope of
16 this appeal. Most importantly, the insurer is not a party to
17 this appeal, so we cannot exercise jurisdiction over the insurer
18 to compel payment. Nor was the insurer a party before the
19 bankruptcy court, and the bankruptcy court never adjudicated the
20 obligations of Mr. Kitay's insurer. Even if we were to find in
21 Mr. Gonzalez's favor, we cannot afford Mr. Gonzalez the relief he
22 requests with regard to Mr. Kitay's insurer.

23 **CONCLUSION**

24 For the reasons set forth above, we conclude that the
25 bankruptcy court did not err in awarding Mr. Gonzalez \$5,000 plus
26 costs under § 523(a)(4) and dismissing his other claims.
27 Accordingly, we AFFIRM.