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NOT FOR PUBLICATION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

In re:)	BAP No. NV-15-1254-JuKiD
)	
STAN BRYAN VAUGHAN and)	Bk. No. 13-14399-GS
TATIANA VAUGHAN,)	
)	Adv. No. 14-01128-GS
Debtors.)	
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STAN BRYAN VAUGHAN; TATIANA)	
VAUGHAN,)	
)	
Appellants,)	
)	
v.)	MEMORANDUM*
)	
YVETTE WEINSTEIN, Chapter 7)	
Trustee,)	
)	
Appellee.)	
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Submitted Without Oral Argument
on February 19, 2016**

Filed - February 29, 2016

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

Honorable Gary A. Spraker, Bankruptcy Judge, Presiding

Appearances: Stan Bryan Vaughan and Tatiana Vaughan pro se on
brief; Christine A. Roberts of The Furnier Muzzo
Group LLC and James Bennett Clark and Cullen Kuhn
of Bryan Cave LLP on brief for appellee, Yvette

* 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.

** By order entered on August 15, 2014, a motions panel
determined that this appeal was suitable for submission on the
briefs and record without oral argument.

1 Weinstein, Chapter 7 Trustee.

2 _____

3 Before: JURY, KIRSCHER, and DUNN, Bankruptcy Judges.

4 After debtors Stan Bryan Vaughan and Tatiana Vaughan
5 (Debtors) obtained their discharge, the chapter 7¹ trustee,
6 Yvette Weinstein (Trustee), discovered that they had failed to
7 disclose potential assets. Trustee sought and obtained, over
8 Debtors' opposition, an order authorizing her to schedule
9 Rule 2004 examinations for both debtors (Rule 2004 Order).
10 Trustee filed and served a notice scheduling the examinations
11 for both debtors setting the date, time, and location (Notice).
12 Debtors filed numerous motions in an attempt to prevent or stay
13 the examinations which the bankruptcy court denied.

14 Trustee also filed an adversary complaint against Debtors
15 seeking to revoke their discharge under § 727(d)(1) (discharge
16 obtained by fraud) and (d)(3) (refusal to obey a lawful order of
17 the court). Debtors failed to appear for the scheduled
18 Rule 2004 examinations. Relying on Rule 2005(a), Trustee filed
19 a motion to compel Debtors' attendance for examination which the
20 bankruptcy court granted, finding that they evaded the Rule 2004
21 Order and ordering them to appear for examination under the
22 threat of sanctions.

23 Thereafter, Trustee moved for partial summary judgment in
24 the adversary proceeding, seeking to have Debtors' discharge

25 _____

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

1 revoked under § 727(d)(3) and (a)(6)(A) for their refusal to
2 obey the Rule 2004 Order. The bankruptcy court granted her
3 motion, finding that there were no genuine issues of disputed
4 fact regarding Debtors' awareness of the Rule 2004 Order and
5 their willful and intentional refusal to obey it. In the
6 exercise of its discretion, the bankruptcy court found that
7 Debtors' conduct warranted the revocation of their discharge
8 despite their eventual compliance with the Rule 2004 Order and
9 entered judgment in favor of Trustee. This appeal followed.
10 For the reasons stated below, we AFFIRM.

11 I. FACTS²

12 Debtors filed their chapter 7 petition on May 20, 2013.
13 In their schedules, Debtors did not disclose any interest in the
14 trademark "World Chess Federation Hall of Fame." Their
15 statement of financial affairs (SOFA), however, did list several
16 lawsuits involving Mr. Vaughan, World Chess Museum, and World
17 Chess Federation, Inc. (WCF), including a pending action in the
18 United States District Court for the District of Nevada,
19 captioned World Chess Museum, Inc. d/b/a World Chess Hall of
20 Fame v. World Chess Federation, Inc., and Stan Vaughan,
21 individually (Nevada Suit). The Nevada Suit was filed by
22 plaintiff World Chess Museum, Inc., d/b/a World Chess Hall of
23 Fame (WCHOF) to recover monetary damages, obtain injunctive
24 relief and other remedies against WCF and Stan Vaughan, and for
25

26 ² We borrow heavily from the facts set forth in the
27 bankruptcy court's Memorandum Decision entered July 13, 2015, in
28 the adversary proceeding pertaining to the chapter 7 trustee's
motion for partial summary judgment.

1 infringement of its trademark, "World Chess Hall of Fame®."
2 Vaughan and WCF filed counterclaims against WCHOF for WCHOF's
3 alleged infringement of the claimed trademarks "World Chess
4 Federation®" and/or "World Chess Federation Hall of Fame."

5 Although Debtors listed the Nevada Suit, they did not
6 schedule WCHOF as a creditor. Nor did they list any interests
7 in WCF, the trademark, or the counterclaims against WCHOF in
8 their initial Schedule B. This was because Mr. Vaughan had
9 personally transferred the trademark to WCF four days prior to
10 the bankruptcy filing on May 16, 2013. Debtors did not disclose
11 the transfer in response to Question No. 10 of the SOFA, which
12 requires debtors to list all transfers of property outside of
13 the ordinary course of business made within two years before the
14 petition date.

15 Debtors received their discharge on August 20, 2013.

16 Trustee later learned that Debtors failed to disclose the
17 above-described potential assets. She obtained an order
18 authorizing her to employ Christine A. Roberts of Sullivan Hill
19 Lewin Rez & Engel (Sullivan Hill) as general counsel to aid her
20 in investigating the nondisclosure and filing a potential
21 complaint for nondischargeability. Ms. Roberts subsequently
22 left Sullivan Hill and went to Furnier Muzzo Group LLC (Furnier
23 Muzzo). Trustee sought another order authorizing employment of
24 Ms. Roberts' new firm. Debtors filed four opposition briefs to
25 this employment application. Following a hearing, the
26 bankruptcy court approved Trustee's retention of Furnier Muzzo
27 over Debtors' objections by order dated September 3, 2014.

28 On December 9, 2013, Trustee filed an application to employ

1 Bryan Cave LLP (Bryan Cave) as special counsel to investigate
2 potential claims relating to recovery of the estate's assets.
3 On February 3, 2014, the bankruptcy court granted Trustee's
4 application over Debtors' objections which were based on Bryan
5 Cave's alleged adverse interest since the firm represented WCHOF
6 in the Nevada Suit.³

7 On March 6, 2014, Trustee moved for an order directing
8 examinations under Rule 2004 as to Debtors and three non-debtor
9 affiliated entities (Rule 2004 Motion). One of the non-debtor
10 affiliates to be examined was WCF, the entity to whom
11 Mr. Vaughan had transferred the trademark. Trustee asserted
12 that Debtors were officers and/or directors of WCF, and that
13 Mr. Vaughan had transferred the trademark to WCF four days
14 before filing his bankruptcy petition. Trustee sought to
15 examine Debtors about their relationship with WCF and the
16 transfers between them. The motion requested an order directing
17 Debtors and the person most knowledgeable with respect to
18 certain non-debtor affiliates (WCF, American Chess Association,
19 Inc., and Nevada State Chess Association, Inc.) to appear for
20 examination at Sullivan Hill on a date to be determined by the
21 court. Debtors opposed the Rule 2004 Motion on various grounds
22 and continued to object to Trustee's employment of Bryan Cave.

23 On May 27, 2014, following a hearing, and over Debtors'
24 objection, the bankruptcy court entered an order granting the
25 Rule 2004 Motion and directing Debtors to submit to examination

26
27 ³ Bryan Cave served at no charge to the estate subject to
28 WCHOF's right to seek allowance of an administrative claim based
upon making a "substantial contribution" to the estate.

1 (Rule 2004 Order). The order provided:

2 IT IS THEREFORE ORDERED that the trustee's Motion for
3 Order Directing Examinations Under Rule 2004 As to
4 Debtors Stan Bryan Vaughan, Tatiana Vaughan and
Certain Non-Debtor Affiliates As Identified Herein,
ECF No. 79, be and the same hereby is, GRANTED.

5 IT IS FURTHER ORDERED that the Chapter 7 trustee may
6 schedule the examinations, production of documents,
7 and inspection of premises, to take place no earlier
than fourteen calendar days from the date of entry of
this Order.

8 The Rule 2004 Order did not state the location of the
9 examinations (as had the Rule 2004 Motion), but instead said
10 that Trustee may schedule them. A copy of the Rule 2004 Order
11 was served on each of the debtors, by first class mail, on
12 May 29, 2014.

13 On June 3, 2014, Debtors moved for reconsideration arguing,
14 among other things, that there was no justification for their
15 examinations because "no valid proofs of claim have been filed."
16 They also asserted that the Rule 2004 Order should be vacated
17 or, alternatively, that any Rule 2004 examination should be
18 suspended until valid claims had been filed. The motion was
19 scheduled for hearing on July 9, 2014.

20 On June 24, 2014, pursuant to the Rule 2004 Order, Trustee
21 filed and served her notice scheduling Debtors' Rule 2004
22 examinations to commence on July 16, 2014 and July 17, 2014,
23 respectively, at the law office of Campbell & Williams in Las
24 Vegas, Nevada (Notice).

25 In their July 1, 2014, reply to Trustee's opposition to
26 their motion for reconsideration, Debtors argued that the Notice
27 was in contempt of court because it directed them to appear for
28 examination at Campbell & Williams rather than Sullivan Hill, as

1 originally requested in Trustee's Rule 2004 Motion.

2 Debtors challenged the Notice in four motions also filed on
3 July 1, 2014. In a motion for a protective order, they sought
4 an order governing the designation and handling of certain
5 confidential information being illegally sought through Trustee
6 by the initiative of Bryan Cave. In a motion for an order to
7 suspend, terminate, or in the alternative limit the 2004
8 examinations due to bad faith, Debtors challenged the Rule 2004
9 Motion as having been filed in bad faith for an improper
10 purpose. They also filed a motion for sanctions and a motion to
11 show cause for contempt of order that mostly repeated the
12 arguments made in the previous described motions. In addition,
13 each of the four motions contained arguments that the Notice
14 violated the Rule 2004 Order because it scheduled their
15 examinations at a different location than was proposed in the
16 Rule 2004 Motion. The group of motions was scheduled for
17 hearing on August 27, 2014, after their 2004 examinations set
18 for July 16 and 17, 2014.

19 The bankruptcy court heard Debtors' motion for
20 reconsideration on July 9, 2014, and denied that request by
21 order entered on July 11, 2014 (Reconsideration Order).
22 Debtors appealed the Reconsideration Order on July 14, 2014, by
23 filing a notice of appeal, an emergency motion for leave to
24 appeal, and an emergency motion for stay pending appeal. This
25 Panel denied leave to appeal the Reconsideration Order and
26 denied stay pending appeal, which was followed by an order
27 dismissing the appeal for lack of jurisdiction.

28 Trustee's counsel appeared at Campbell & Williams on

1 July 16 and 17, 2014, at the times scheduled for Debtors'
2 Rule 2004 examinations. Debtors did not appear for examination
3 at that location.

4 On July 31, 2014, Trustee filed a motion to compel
5 attendance under Rule 2005(a)(3).⁴ Her motion and supporting
6 exhibits showed that her attorneys tried to contact Debtors by
7 email and telephone to confirm their attendance at the Rule 2004
8 examinations, but Debtors did not respond to these
9 communications, nor did they appear for examination at the
10 scheduled times. Trustee argued that Debtors had willfully
11 disobeyed the court's earlier orders - the Rule 2004 Order and
12 the Reconsideration Order - directing them to submit to
13 examination.

14 In response, Debtors reiterated their opposition to
15 Trustee's employment of Bryan Cave. They also argued that
16 Trustee's efforts were a "manifest injustice," given that their
17 discharge had already been entered, and that she was using
18 discovery for an improper purpose. In their opposition and
19

20
21 ⁴ Rule 2005(a) provides that "[o]n motion of any party in
interest supported by an affidavit alleging . . .

22 (3) that the debtor has willfully disobeyed a subpoena
23 or order to attend for examination, duly served, the
24 court may issue to the marshal, or some other officer
25 authorized by law, an order directing the officer to
26 bring the debtor before the court without unnecessary
27 delay. If, after a hearing, the court finds the
28 allegations to be true, the court shall thereupon cause
the debtor to be examined forthwith. If necessary, the
court shall fix conditions for further examination and
for the debtor's obedience to all orders made in
reference thereto.

1 subsequent sur-reply, they again alleged confusion as to the
2 location of their examinations because Trustee's Notice set the
3 examinations at the office of Campbell & Williams, rather than
4 the firm of Sullivan Hill, as stated in the initial Rule 2004
5 Motion. They accused Trustee of bad faith and denied receipt of
6 any emails or telephone calls from Trustee's counsel about
7 confirming their attendance at the examinations.

8 In her supporting declaration, Ms. Vaughan declared that
9 Debtors had appeared for the scheduled examination at Sullivan
10 Hill and that she had business cards from its address as well as
11 a parking receipt for that date from the parking lot attendant
12 located next to Sullivan Hill. She claimed no one representing
13 Trustee appeared. Ms. Vaughan also declared that she and
14 Mr. Vaughan along with other witnesses were at their residence
15 on the designated date for the inspection of documents, but no
16 one heard the doorbell and no one knocked on the door.⁵

17 On August 19, 2014, Trustee commenced the adversary
18 proceeding seeking to revoke Debtors' discharge because (1) the
19 discharge had been obtained through fraud, including failure to
20 disclose assets and information to the bankruptcy court as
21 required, and (2) Debtors had refused to obey lawful orders of
22 the bankruptcy court, including the Rule 2004 Order, in
23 violation of § 727(a)(6)(A).⁶ When the adversary proceeding was
24

25 ⁵ Debtors lived in a gated community which had a call box at
26 the gate. Trustee's attorney had used the call box several times
27 on the designated date and no one answered the call.

28 ⁶ After Trustee filed the adversary proceeding, Debtors
continued to object to the employment of Bryan Cave in that

1 filed, Debtors continued to refuse to provide Trustee's court-
2 ordered discovery that had been requested since March 6, 2014.

3 The bankruptcy court heard Trustee's motion to compel on
4 August 27, 2014.⁷ Debtors' motions for a protective order, to
5 suspend or terminate the Rule 2004 examinations, for sanctions
6 against Trustee's counsel, and to show cause for contempt
7 regarding the Rule 2004 examinations were also heard on that
8 date. On October 7, 2014, the bankruptcy court granted
9 Trustee's motion to compel and denied Debtors' four motions.

10 In its order compelling attendance, the bankruptcy court
11 rejected Debtors' argument that Trustee was proceeding in bad
12 faith, noting that she was instead seeking to satisfy statutory
13 duties imposed by the Bankruptcy Code. The court observed that
14 relief under Rule 2005(a)(2) was proper upon a showing "that the
15 debtor has evaded service of a subpoena or of an order to attend
16 for examination." Based on the evidence before it, the court
17 found that both Debtors failed to appear at the Rule 2004
18 examinations, and that "they have thus evaded" the Rule 2004
19 Order. The court ordered Debtors to appear in the bankruptcy
20 court on October 20 and 21, 2014, so these examinations could
21 occur. The order further advised that, "Failure of either of
22 the Debtors to appear will subject them to sanctions."

23 As required by the order on motion to compel, Debtors
24 appeared in court for examination on October 20 and 21, 2014.

26 ⁶(...continued)
27 proceeding.

28 ⁷ This motion was heard by Judge Mike K. Nakagawa.

1 However, they filed an emergency motion for a protective order
2 and an ex parte application for order shortening time to hear
3 the emergency motion for protective order on the same day that
4 Mr. Vaughan was to be examined. Because the motions were
5 inappropriately filed in the adversary action, rather than the
6 main bankruptcy case, they were not considered by the bankruptcy
7 court.

8 Meanwhile, in the adversary proceeding, Trustee moved for
9 partial summary judgment on her request to revoke Debtors'
10 discharge under § 727(d)(3) and (a)(6)(A).⁸ Trustee argued that
11 there were no disputed material facts relevant to the elements
12 for revocation of discharge under § 727(a)(6)(A): awareness of
13 the order and refusal to obey it. Trustee asserted that Debtors
14 were aware of the Rule 2004 Order as demonstrated by their
15 numerous filings opposing the examinations.

16 She also argued that Debtors' failure to appear for their
17 examinations was willful and intentional and thus they "refused"
18 to obey the court's order within the meaning of § 727(a)(6)(A).
19 Trustee maintained that the issue of their willful or
20 intentional refusal to obey the order was previously decided by
21 the bankruptcy court when it found Debtors had "evaded" its
22 Rule 2004 Order in the order granting her motion to compel. As
23 this finding was law of the case, Trustee argued that summary
24 judgment in her favor was warranted on this issue.

25
26 ⁸ Debtors filed a counter motion for summary judgment.
27 Because the counter motion largely mirrored their opposition to
28 Trustee's motion, the bankruptcy court treated it as a
supplemental opposition rather than an independent motion for
summary judgment.

1 The bankruptcy court granted Trustee's motion, finding that
2 as a matter of law, Debtors were aware of the Rule 2004 Order
3 and willfully and intentionally refused to obey it. In
4 exercising its discretion to revoke Debtors' discharge, the
5 bankruptcy court considered that Debtors had eventually complied
6 with the order. The court observed that Debtors' refusal to
7 obey the order was willful and intentional and that they
8 complied with the order only after being ordered to comply under
9 the threat of further sanctions. The bankruptcy court decided
10 that revocation was appropriate under these circumstances. The
11 court entered the judgment⁹ revoking their discharge and Debtors
12 timely appealed.

13 II. JURISDICTION

14 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
15 §§ 1334 and 157(b)(2)(A), (J) and (O). We have jurisdiction
16 under 28 U.S.C. § 158.

17 III. ISSUES

18 Whether the bankruptcy court erred in granting Trustee's
19 motion for partial summary judgment; and

20 Whether the bankruptcy court abused its discretion in
21 revoking Debtors' discharge.

22 IV. STANDARDS OF REVIEW

23 We review summary judgments de novo; facts determined for
24 summary judgment proceedings are not entitled to the clearly
25 erroneous standard of appellate review. Audre, Inc. v. Casey

26
27 ⁹ The judgment also dismissed Count I of the adversary
28 complaint which pertained to § 727(d)(1) (discharge obtained by
fraud). Accordingly, the judgment was final.

1 (In re Audre, Inc.), 216 B.R. 19, 25 (9th Cir. BAP 1997). If
2 the pleadings, depositions, answers to interrogatories, and
3 admissions on file, together with any affidavits, show that
4 there is no genuine issue of material fact and that the moving
5 party is entitled to judgment as a matter of law, summary
6 judgment will be upheld. Civil Rule 56(c), incorporated by
7 Rule 7056; see Aubrey v. Thomas (In re Aubrey), 111 B.R. 268,
8 272 (9th Cir. BAP 1990).

9 What constitutes law of the case presents a legal issue
10 that this Panel reviews under a de novo standard. Liberty Mut.
11 Ins. Co. v. Equal Emp't Opportunity Comm'n, 691 F.2d 438 (9th
12 Cir. 1982); AT & T Universal Card Servs. v. Black (In re Black),
13 222 B.R. 896, 899 (9th Cir. BAP 1998).

14 We review the bankruptcy court's decision to revoke a
15 discharge for an abuse of discretion. Cox v. Lansdowne
16 (In re Cox), 904 F.2d 1399, 1401 (9th Cir. 1990) (stating the
17 standard of review as a "gross abuse of discretion," but
18 applying traditional abuse of discretion standard); Devers v.
19 Bank of Sheridan (In re Devers), 759 F.2d 751 (9th Cir. 1985).

20 Review for abuse of discretion has two parts. First, "we
21 determine de novo whether the bankruptcy court identified the
22 correct legal rule to apply to the relief requested." U.S. v.
23 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). If
24 so, we then determine under the clearly erroneous standard
25 whether the bankruptcy court's factual findings and its
26 application of the facts to the relevant law were
27 "(1) illogical; (2) implausible; or (3) without support in
28 inferences that may be drawn from the facts in the record." Id.

1 at 1262.

2 **V. DISCUSSION**

3 **A. Scope of the Appeal**

4 Debtors list four issues in their opening brief. In three
5 of the issues Debtors challenge (1) the standing of Trustee to
6 file the adversary proceeding; (2) the employment of her general
7 counsel; and (3) the employment of Bryan Cave as special
8 counsel.

9 While the bankruptcy court did not mention Trustee's
10 standing in its decision granting her partial motion for summary
11 judgment, Debtors raised similar issues regarding Trustee's use
12 of her maiden/professional name rather than her married name in
13 several motions filed in this proceeding. Each time the
14 bankruptcy court rejected their arguments. We reviewed the
15 issue and find no merit to Debtors' arguments on appeal.
16 Therefore, the bankruptcy court's rulings on the issue are
17 summarily affirmed.

18 Debtors' arguments regarding the employment orders of
19 general counsel and Bryan Cave are mostly incomprehensible. The
20 payment arrangement Debtors object to in Bryan Cave's employment
21 order will not become reviewable on appeal unless and until a
22 request for reimbursement from the estate is actually made and
23 granted. Until then, the matter is not ripe.¹⁰ Accordingly,
24

25 ¹⁰ Debtors also filed an objection to the appearance of
26 Bryan Cave in this appeal on October 29, 2015. In their opening
27 brief, Debtors' only argument regarding the employment was a bare
28 assertion that the employment violated § 327(e). The employment
was approved under § 327(c), not subsection (e). Debtors'

(continued...)

1 those matters are beyond the scope of this appeal and not
2 properly before us.

3 **B. Summary Judgment**

4 **1. Standards**

5 In reviewing the bankruptcy court's decision on a motion for
6 summary judgment, we apply the same standards as the bankruptcy
7 court. Summary judgment is properly granted when no genuine and
8 disputed issues of material fact remain, and, when viewing the
9 evidence most favorably to the non-moving party, the movant is
10 entitled to prevail as a matter of law. Civil Rule 56,
11 incorporated by Rule 7056; Celotex Corp. v. Catrett, 477 U.S.
12 317, 322-23 (1986). Material facts which would preclude entry of
13 summary judgment are those which, under applicable substantive
14 law, could affect the outcome of the case. The substantive law
15 will identify which facts are material. Anderson v. Liberty
16 Lobby, Inc., 477 U.S. 242, 248 (1986).

17 The moving party bears the initial burden of showing that
18 there is no material factual dispute. If the moving party meets
19 its initial burden of showing the absence of a material and
20 triable issue of fact, the burden then moves to the opposing
21 party, who must present significant probative evidence tending to
22 support its claim or defense. Intel Corp. v. Hartford Accident &
23 Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991). In other words,
24

25 ¹⁰(...continued)
26 failure to "specifically and distinctly" identify and argue any
27 relevant law on the employment issue results in the waiver of
28 that issue. See Indep. Towers of Wash. v. Washington, 350 F.3d
925, 929 (9th Cir. 2033). Therefore, we do not consider the
issue further and the objection is overruled.

1 the non-moving party must show more than the mere existence of a
2 scintilla of evidence. Anderson v. Liberty Lobby, Inc., 477 U.S.
3 242, 252 (1986). In fact, the non-moving party must come forth
4 with evidence from which a factfinder could reasonably decide in
5 the non-moving party's favor. Id.

6 **2. Trustee's Prima Facie Case Under § 727(a)(6)(A)**

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

13
14 ¹¹ The Fifth Amendment provides, in its relevant part: "No
15 person . . . shall be compelled in any criminal case to be a
16 witness against himself." U.S. Const. amend. V. This privilege
17 against self-incrimination applies to bankruptcy proceedings.
18 McCarthy v. Arndstein, 266 U.S. 34, 41 (1924). The "other than
19 an order to respond to a material question or to testify" clause
20 contained in § 727(a)(6)(A) recognizes that a debtor may appear
21 at a Rule 2004 examination and "refuse" to answer material
22 questions or testify based on the assertion of the Fifth
23 Amendment privilege. Under these circumstances, the debtor
24 cannot be denied a discharge for legitimately exercising his or
25 her right against self-incrimination. Subsections 727(a)(6)(B)
26 and (C) allow the bankruptcy court to deny the debtor a discharge
27 if he or she refuses to respond to a material question approved
28 by the court or to testify after a grant of immunity under § 344,
or improperly asserts the Fifth Amendment.

Here, the Rule 2004 Order required Debtors to appear for
examination and it was their refusal to appear which triggered
the revocation of their discharge rather than the exception.
Courts have found that a debtor's knowing and intentional failure
to appear for an examination ordered under Rule 2004 is an
example of refusal to obey a lawful order within the meaning of
§ 727(a)(6)(A) even though the examination requires the debtor to
testify. See U.S. Tr. v. Lebbos (In re Lebbos), 439 B.R. 154,

(continued...)

1 Because the bankruptcy court had jurisdiction over the
2 subject matter and Debtors, there is no dispute as to the
3 Rule 2004 Order's lawfulness. See Rainsdon v. Anderson
4 (In re Anderson), 526 B.R. 821, 825-26 (Bankr. D. Id. 2015)
5 (citing Rainsdon v. Leiser (In re Leiser), 2014 WL 3548929, at
6 *3-4 (Bankr. D. Idaho July 17, 2014) (addressing revocation of
7 discharge under § 727(d)(3) based on an alleged violation of
8 § 727(a)(6)(A) and citing Maness v. Meyers, 419 U.S. 449, 459
9 (1975) (stating "an order issued by a court with jurisdiction
10 over the subject matter and the person must be obeyed by the
11 parties until it is reversed by orderly and proper
12 proceedings.")).

13 To prove Debtors "refused" to obey the Rule 2004 Order
14 within the meaning of § 727(a)(6)(A), Trustee must show that
15 Debtors (1) were aware of the order and (2) willfully or
16 intentionally refused to obey the order (i.e., something more
17 than a mere failure to obey the order through inadvertence,
18 mistake or inability to comply). Schwarzkopf v. Goodrich
19 (In re Michaels), 2009 WL 7809926, at *5 (9th Cir. BAP Feb. 27,
20 2009) (citing Smith v. Jordan (In re Jordan), 521 F.3d 430, 434
21 (4th Cir. 2008)); see also Hicks v. Decker (In re Hicks), 2006 WL

22
23 ¹¹(...continued)
24 164-65 (E.D. Cal. 2010) (debtor's failure to appear for Rule 2004
25 examinations warranted denial of discharge under § 727(a)(6)(A));
26 Guar. Bank & Trust Co. v. Sanford (In re Sanford), 362 B.R. 743
27 (Bankr. M.D. La. 2007) (revocation of discharge for failure to
28 appear for Rule 2004 examination); Sicherman v. Rivera
(In re Rivera), 338 B.R. 318, 329-30 (Bankr. N.D. Ohio 2006)
("Despite the fact that 2004 exam includes an order to testify,
such complete failure may be grounds for revoking and denying
discharge.").

1 6810987, at *8 (9th Cir. BAP February 1, 2006) (stating that the
2 common definition of "refuse" requires a willful expression of
3 noncompliance). Trustee has the burden of proving these elements
4 by a preponderance of the evidence. In re Hicks, 2006 WL
5 68110987, at *8 (citing Searles v. Riley (In re Searles),
6 317 B.R. 368, 377 (9th Cir. BAP 2004)).

7 On appeal, Debtors do not assign error to the bankruptcy
8 court's decision regarding their awareness of the Rule 2004 Order
9 nor do they even discuss the issue. Nonetheless, upon our
10 de novo review, we conclude no rational factfinder could infer
11 that Debtors were not aware of the Rule 2004 Order based on the
12 record before us. The undisputed facts show that Debtors were
13 served with the Notice which gave the date, time and location of
14 their examinations at the law office of Campbell & Williams.
15 Further, the record shows that Debtors repeatedly attacked the
16 Rule 2004 Order through numerous motions, which included, among
17 other things, their objection to the location of the examinations
18 at Campbell & Williams. The only rational inference to be drawn
19 from these motions is that Debtors were aware of the Rule 2004
20 Order and where their examinations were to take place. Finally,
21 the bankruptcy court denied their motion for reconsideration of
22 the Rule 2004 Order and related motions, thereby reaffirming
23 Debtors' obligation to comply with the Rule 2004 Order. Debtors
24 then unsuccessfully appealed the bankruptcy court's denial of
25 their motion for reconsideration. Again, this conduct shows
26 their awareness. Because there are no disputed facts which would
27 preclude summary judgment on this issue, Debtors' awareness of
28 the order was established as a matter of law.

1 "Refusal" to obey within the meaning of § 727(a)(6)(A)
2 requires Trustee to show that the debtor "willfully or
3 intentionally refused to obey the order." In re Michaels,
4 2009 WL 7809926, at *5. A debtor's willful or intentional
5 refusal to obey requires conduct which amounts to something more
6 than a "mere failure to obey the order through inadvertency,
7 mistake or inability to comply." Id.

8 The record shows that there are no disputed facts for a
9 factfinder to resolve on the issue of whether Debtors' refusal
10 was willful or intentional. Many of the same facts relating to
11 Debtors' awareness of the Rule 2004 Order are also relevant to
12 this issue. Debtors were served with the Notice and, therefore,
13 had actual knowledge of the date, time and location of the
14 examinations they had been ordered to attend. Yet, they
15 disregarded it. On numerous occasions, Debtors alleged
16 appearance at Sullivan Hill, despite the Notice which showed the
17 examinations were scheduled at a different location.

18 The record before us does not support an inference that
19 Debtors actually appeared at Sullivan Hill or that Debtors were
20 confused about where to go. They challenged the location of
21 their examinations at Campbell & Williams and argued confusion
22 many times prior to their scheduled examinations, including in
23 their reply filed in support of the motion for reconsideration.
24 The bankruptcy court denied their motion, reconfirming that they
25 were required to comply with Rule 2004 Order and Notice, which
26 stated the location of the examinations was at the law firm of
27 Campbell & Williams. There are thus no disputed facts based on
28 this argument.

1 Moreover, in granting Trustee's motion to compel, the
2 bankruptcy court found that Debtors "evaded" the Rule 2004 Order.
3 This finding applies broadly enough so that the bankruptcy court
4 did not need to reconsider the issue of Debtors' willful or
5 intentional refusal to obey the Rule 2004 Order by application of
6 the law of the case doctrine. United States v. Alexander,
7 106 F.3d 874, 876 (9th Cir. 1997) (Under the law of the case
8 doctrine, "'a court is generally precluded from reconsidering an
9 issue that has already been decided by the same court'").
10 As explained by the bankruptcy court, to find that Debtors had
11 "evaded" the Rule 2004 Order, Debtors had to have had knowledge
12 of the order and taken affirmative action to avoid complying with
13 it. Therefore, by necessary implication, Debtors' "evasion" of
14 the Rule 2004 Order establishes that their non-compliance with it
15 was willful and intentional rather than inadvertent, by mistake,
16 or inability to comply. Evasion, like refusal, requires
17 something more than a mere failure to obey the order through
18 inadvertency, mistake or inability to comply. Debtors presented
19 no grounds for departing from the application of the law of the
20 case in the bankruptcy court or in this appeal.

21 Even if the law of the case doctrine did not apply, Debtors
22 do not point to any significant probative evidence that creates a
23 genuine factual dispute on the issue whether their refusal to
24 obey the Rule 2004 Order was willful or intentional. Construing
25 the evidence in the light most favorable to Debtors, there is no
26 reasonable basis from which the finder of fact could conclude
27 that Debtors' failure to comply with the Rule 2004 Order was
28 inadvertent, by mistake, or that they had an inability to comply.

1 The facts do not support such an inference.

2 In sum, upon our de novo review, we conclude that the
3 bankruptcy court properly granted Trustee's motion for partial
4 summary judgment with respect to the elements for revocation of
5 discharge under § 727(d)(3) and (a)(6)(A).

6 **C. The bankruptcy court did not abuse its discretion by**
7 **revoking Debtors' discharge.**

8 Nonetheless, the bankruptcy court still has discretion to
9 decide whether the Debtors' refusal to obey the Rule 2004 Order
10 was sufficiently serious to warrant revocation of their
11 discharge. Debtors argue that the bankruptcy court's revocation
12 of discharge was manifestly "unfair" in light of the facts they
13 appeared at Sullivan Hill, but also eventually appeared for their
14 examinations. The bankruptcy court rejected their first argument
15 and considered their eventual compliance when evaluating whether
16 their refusal to obey the Rule 2004 Order was sufficiently
17 serious to revoke their discharge under § 727(a)(6). In
18 concluding that Debtors' refusal to obey was sufficiently
19 serious, the bankruptcy court found that they knowingly elected
20 to evade their examinations which were lawfully ordered by the
21 court and properly scheduled by Trustee. The court also observed
22 that their belated compliance was far from voluntary, but rather
23 mandated by the order granting Trustee's motion to compel, which
24 directed Debtors to appear under threat of further sanctions.
25 Based on these facts, the bankruptcy court concluded that their
26 eventual appearance did not preclude the granting of partial
27 summary judgment in Trustee's favor and the revocation of their
28 discharge.

1 We do not discern any abuse of discretion under these
2 circumstances. The bankruptcy court correctly applied the law
3 regarding revocation under § 727(a)(6)(A). Furthermore, based on
4 the undisputed facts in the context of summary judgment, the
5 bankruptcy court acted well within its discretion when deciding
6 that revocation of Debtors' discharge was warranted.

7 **VI. CONCLUSION**

8 For the reasons stated, we AFFIRM.