

MAY 29 2018

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-17-1235-LSKu
)	
LEYLA FATIMA,)	Bk. No. 8:15-bk-15581-MW
)	
Debtor.)	Adv. No. 8:16-ap-01175-MW
)	
_____)	
LEYLA FATIMA,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M*
)	
JANUARY STERN,)	
)	
Appellee.)	
_____)	

Submitted Without Argument on May 24, 2018

Filed - May 29, 2018

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

Honorable Mark S. Wallace, Bankruptcy Judge, Presiding

Appearances: Appellant Leyla Fatima, pro se on brief; Neal S. Zaslavsky on brief for Appellee.

Before: LAFFERTY, SPRAKER, and KURTZ, 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 Debtor Leyla Fatima appeals the bankruptcy court's entry of
2 a default judgment finding her debt to Plaintiff-Appellee January
3 Stern nondischargeable under §§ 523(a)(2) and (a)(6).¹ The
4 bankruptcy court struck Ms. Fatima's answer and entered the
5 default judgment as a terminating sanction after Ms. Fatima
6 failed to comply with the bankruptcy court's order granting
7 Ms. Stern's motion to compel Ms. Fatima to provide the initial
8 disclosures required under Civil Rule 26(a), incorporated in
9 bankruptcy via Rule 7026.

10 Under the facts presented, we find no abuse of discretion in
11 the award of terminating sanctions. Accordingly, we AFFIRM.

12 **FACTS**

13 In December 2012 Ms. Stern obtained an \$815,000 judgment
14 against Ms. Fatima in Orange County Superior Court on a cause of
15 action for intentional misrepresentation. In the course of that
16 litigation, Ms. Fatima failed to appear at her deposition and a
17 subsequent hearing on Ms. Stern's motion for sanctions; the state
18 court judge thus awarded discovery sanctions of \$28,546.61 in
19 addition to the principal amount of the judgment.

20 Ms. Fatima filed a chapter 7 petition in May 2013. That
21 case was dismissed on the chapter 7 trustee's motion because
22 Ms. Fatima failed to appear at her continued section 341 meeting.
23 Ms. Fatima filed a second chapter 7 petition in November 2015.
24 Ms. Stern timely filed an adversary proceeding seeking to except

25
26 ¹Unless 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, and all "Civil Rule" references are to the Federal
Rules of Civil Procedure.

1 the state court judgment from discharge under §§ 523(a)(2) and
2 (a)(6) and for denial of discharge under various subsections of
3 § 727(a). Ms. Fatima filed an answer, and the parties thereafter
4 met and conferred as required under Civil Rule 26(f), agreeing to
5 exchange initial disclosures by November 30, 2016. At
6 Ms. Fatima's request, Ms. Stern's counsel, Neal Zaslavsky, agreed
7 to extend the deadline to January 16, 2017, but Ms. Fatima did
8 not timely provide the disclosures or contact Mr. Zaslavsky to
9 request a further extension. Accordingly, on January 23, 2017,
10 Ms. Stern filed and served a motion to compel Ms. Fatima's
11 initial disclosures. Ms. Fatima did not file a response or
12 appear at the hearing on the motion to compel.

13 On February 27, 2017, the bankruptcy court entered an order
14 granting the motion to compel. The order required Ms. Fatima to
15 make all required disclosures by March 15, 2017, and to pay
16 Ms. Stern monetary sanctions of \$4,000 by April 15, 2017. The
17 order warned: "Defendant Leyla Fatima is further advised that her
18 failure to comply with this Court's Order will result in the
19 Court striking her answer and entering a default against her,
20 absent extraordinary circumstances."

21 Ms. Fatima again failed to make the required disclosures.
22 Accordingly, on March 16, 2017, Ms. Stern filed a motion for
23 terminating sanctions against Ms. Fatima. Ms. Fatima did not
24 file a written response, but she appeared at the hearing on
25 April 19, 2017. At that hearing, Ms. Fatima indicated that she
26 had the initial disclosures with her and could "turn them in,"
27 although she apparently did not do so. She explained that the
28 delay was due to "confusion on my part not understanding exactly

1 what it was that I needed to do." She alluded to having been in
2 Australia and not being properly served; she therefore asked the
3 court for another extension of time to make the disclosures,
4 which the bankruptcy court denied.

5 Mr. Zaslavky advised the court that although Ms. Fatima had
6 not paid the \$4,000 in monetary sanctions awarded in the court's
7 February 27 order, he had agreed to an arrangement for Ms. Fatima
8 to pay the sanctions by August 1.

9 After hearing argument, the bankruptcy court granted the
10 motion for terminating sanctions pursuant to Civil Rule
11 37(b)(2)(A)(iii), applicable via Rule 7037. The court thereafter
12 issued a memorandum decision and order striking Ms. Fatima's
13 answer, directing the clerk of the court to enter default, and
14 ordering Ms. Stern to file a motion for entry of default judgment
15 by August 31, 2017. In the memorandum decision, the bankruptcy
16 court found:

17 The evidence here shows that Ms. Fatima, although
18 self-represented, is no stranger to the judicial
19 process in general and discovery rules in particular -
20 and sanctions imposed when discovery rules are
21 violated. . . . [S]anctions of over \$28,000 were
22 imposed against her in May 2012 in the Orange County
23 Superior Court action when she failed to appear at her
24 duly noticed deposition. Any reasonable person (and
25 probably not a few unreasonable people as well) would
26 understand the seriousness of discovery obligations and
27 the seriousness of potential sanctions for discovery
28 violations as a result of that experience.

29 Soon after Ms. Fatima's main bankruptcy case
30 began, she continued a pattern and practice of being
31 obstructive and non-cooperative with respect to the
32 obligations imposed by the legal process. At her
33 section 341(a) examination, she refused to provide most
34 of the documents she was ordered to provide as part of
35 that examination, and she refused to answer most of the
36 questions posed to her during that examination.

37 As reviewed above, this pattern and practice of

1 obstruction and non-cooperation continued during this
2 adversary proceeding. Despite the fact that she was
3 given one chance after another to "get right" with her
4 obligations regarding discovery - and knowing full well
5 the consequences of disregarding these obligations -
6 she continually failed to comply. Even the issuance of
7 this Court's order compelling initial disclosures and
8 the imposition of \$4,000 in sanctions failed to
9 motivate her to comply.

10 Ms. Fatima is not a person who is unfamiliar with
11 the legal process and who is unsure of how to proceed.
12 Rather, she is a person who has a long history of
13 disregarding legal obligations and Court orders. She
14 has not shown any physical or mental infirmity that
15 prevented her from complying with the Court's order.
16 Nor has she shown any other good cause for her failure
17 to comply. The Court has observed her demeanor during
18 hearings and does not believe she is a truthful, honest
19 individual. The Court concludes and specifically finds
20 that her failure to comply with this Court's order on
21 the motion to compel is due to her (1) willfulness,
22 (2) bad faith and (3) fault.

23 Memorandum Decision and Order at 4-5.

24 After entry of default, Ms. Stern filed a motion for entry
25 of default judgment, supported by the declarations of Ms. Stern
26 and her counsel, numerous exhibits, and a request for judicial
27 notice. A few days later, Ms. Fatima filed a motion to set aside
28 entry of default. The bankruptcy court issued an order finding
the motion untimely but permitted hearing on July 26, 2017, the
date set for hearing on Ms. Stern's motion for entry of default
judgment, and extended the deadline for Ms. Stern to file an
opposition.

At the hearing on the motions, the bankruptcy court
permitted Ms. Fatima to argue at length. She indicated, first,
that she was not necessarily familiar with the procedures
involved in an adversary proceeding and that she had not delayed
in an attempt to "drag this process out." Second, she described
her efforts between December 2016 and May 2017 to get her son

1 into rehab for a drug addiction. Third, she expressed concerns
2 that information she provided to Ms. Stern's counsel might be
3 revealed to her allegedly abusive ex-husband and used against
4 her. She accused Mr. Zaslavsky of mocking her during her 2004
5 examination regarding an alleged sexual assault she had suffered,
6 and asserted that, given her post-traumatic stress disorder,
7 "this all re-traumatizes me." She admitted, however, that at no
8 point had she contacted Mr. Zaslavsky to explain her need for
9 additional time.

10 The court denied with prejudice Ms. Fatima's motion to set
11 aside the default on two grounds. First, the court found that
12 the motion was untimely. Second, the court found that Ms. Fatima
13 had not satisfied her burden under Civil Rule 60(b), applicable
14 via Rule 9024, to show either newly discovered evidence or
15 excusable neglect.

16 Ms. Fatima presented no argument in opposition to the motion
17 for entry of default judgment, and the bankruptcy court granted
18 it. The court entered a judgment on August 1, 2017 finding both
19 the state court judgment and the state court sanctions award
20 nondischargeable under §§ 523(a)(2) and (a)(6). Additionally,
21 the judgment provided that Ms. Fatima was still liable for the
22 \$4,000 monetary sanction previously imposed by the court, along
23 with interest at the federal judgment rate.²

24 Ms. Fatima timely appealed.
25
26

27
28 ²The bankruptcy court later entered an amended judgment
clarifying that the judgment was intended to be a final judgment.

1 **DISCUSSION**

2 Civil Rule 37(b)(2)(A) provides in relevant part that if a
3 party fails to obey an order to provide discovery, including an
4 order under Rule 37(a), the court may issue further "just
5 orders," including "striking pleadings in whole or in part" and
6 "rendering a default judgment against the disobedient party."
7 Civil Rule 37(b)(2)(A)(iii) and (vi). Where the sanction results
8 in default, the sanctioned party's violations must be due to
9 willfulness, bad faith or fault of the party. Hester v. Vision
10 Airlines, Inc., 687 F.3d 1162, 1169 (9th Cir. 2012). In this
11 context, willfulness, bad faith, or fault may be established by
12 showing disobedient conduct not outside the control of the
13 litigant. Henry v. Gill Indus., Inc., 983 F.2d 943, 948 (9th
14 Cir. 1993). A court may consider prior misconduct when weighing
15 a sanctions motion. Adriana Int'l Corp. v. Thoeren, 913 F.2d
16 1406, 1411 (9th Cir. 1990).

17 In the Ninth Circuit, the bankruptcy court must apply a
18 five-part test to determine whether a case-dispositive sanction
19 under Rule 37(b)(2) is just: (1) the public's interest in
20 expeditious resolution of litigation; (2) the court's need to
21 manage its dockets; (3) the risk of prejudice to the party
22 seeking sanctions; (4) the public policy favoring disposition of
23 cases on their merits; and (5) the availability of less drastic
24 sanctions. As to the fifth factor, the bankruptcy court must
25 have considered and tried lesser sanctions and warned the
26 recalcitrant party about the possibility of case-dispositive
27 sanctions. Connecticut Gen. Life Ins. Co., 482 F.3d at 1096.

28 Here, as noted, the bankruptcy court found that Ms. Fatima's

1 failure to comply with the court's order on the motion to compel
2 was due to willfulness, bad faith and fault based on her history
3 of disregarding court rules and orders and her failure to show a
4 physical or mental infirmity or other good cause for her failure
5 to comply. Ms. Fatima does not explicitly dispute this finding.

6 The court then applied the Ninth Circuit test and found that
7 the factors weighed in favor of a terminating sanction. The
8 bankruptcy court found, first, that the adversary proceeding had
9 been pending for more than nine months when the court first
10 considered the motion for sanctions in April 2017 and that no
11 initial disclosures had occurred, thus thwarting the public
12 interest in expeditious resolution of the litigation.

13 Second, the court found that its docket would be "hopelessly
14 overburdened" if all litigants behaved as Ms. Fatima had behaved
15 in the adversary proceeding, noting that Ms. Fatima's conduct had
16 "significantly impeded resolution of this action, caused delay
17 and [had] adversely impacted the Court's ability to adhere to a
18 trial schedule. . . ."

19 Third, the bankruptcy court found that Ms. Stern had been
20 prejudiced because Ms. Fatima's refusal to provide initial
21 disclosures had impaired Ms. Stern's ability to prepare for
22 trial, Ms. Stern having asserted that she needed documents and
23 information under Ms. Fatima's possession and control.

24 Fourth, while acknowledging that public policy favors the
25 adjudication of cases on their merits, the court noted that "this
26 factor lends little support to a party whose responsibility it is
27 to move a case toward disposition but whose conduct impedes
28 progress in that direction," citing Allen v. Bayer Corp. (In re

1 Phenylpropanolamine (PPA) Prods. Liab. Litig.), 460 F.3d 1217,
2 1228 (9th Cir. 2006).

3 Finally, as to lesser sanctions, the bankruptcy court found
4 that even though the state court and the bankruptcy court had
5 imposed monetary sanctions on Ms. Fatima for discovery abuses,
6 those sanctions had not "achieved the effect of making Ms. Fatima
7 understand the importance of complying with rules of procedure
8 and court orders." Accordingly, the bankruptcy court concluded
9 that lesser sanctions would be "utterly useless." The court also
10 noted that it had specifically warned Ms. Fatima about the
11 possibility of terminating sanctions if she failed to comply with
12 the order on the motion to compel.

13 The bankruptcy court noted that it had considered the fact
14 that Ms. Fatima was not represented by counsel but observed that
15 the majority of pro se litigants "act in good faith, comply with
16 the rules, get through the process and sometimes prevail." The
17 court concluded that Ms. Fatima was not such a litigant,
18 specifically finding that "Ms. Fatima is acting in utmost bad
19 faith with respect to this case in general and this discovery
20 matter in particular."

21 On appeal, Ms. Fatima focuses her argument on alleged verbal
22 and psychological abuse she has suffered at the hands of
23 Ms. Stern and Mr. Zaslavsky. Specifically, she complains about
24 questions asked at her 341 meeting and 2004 examination that were
25 not "asset-related."³ She argues that the bankruptcy court "had

27 ³Ms. Fatima's reply brief focuses almost exclusively on the
28 2004 examination and includes a copy of the transcript (BAP Dkt.
(continued...)

1 a duty to hold [Ms. Stern and her counsel] accountable and demand
2 that they remain focused on the asset related topics." She
3 contends that the bankruptcy court did not take into account
4 evidence of Ms. Fatima's diagnosis of PTSD, anxiety, and
5 depression, and her fear over alleged connections between
6 Ms. Stern and her counsel and Ms. Fatima's ex-husband, an alleged
7 abuser. Finally, she argues that the bankruptcy court did not
8 take her seriously and that she did not feel she was being heard.

9 None of these arguments persuade us that the bankruptcy
10 court abused its discretion in granting terminating sanctions to
11 Ms. Stern. The record reflects that Ms. Fatima has a history of
12 ignoring her legal obligations despite being afforded significant
13 leeway. Ms. Stern granted a nearly two-month extension to
14 Ms. Fatima to provide the initial disclosures, and the bankruptcy
15 court went out of its way to allow Ms. Fatima to present her
16 case. The court permitted Ms. Fatima to argue at length at the
17 hearing on Ms. Stern's motion for terminating sanctions even
18 though Ms. Fatima had not filed a written opposition to that
19 motion. The court also permitted extensive argument on
20 Ms. Fatima's untimely motion to set aside default. Despite these
21 opportunities, Ms. Fatima never presented coherent, specific
22 argument or evidence explaining why she did not provide Ms. Stern
23 with her Civil Rule 26 initial disclosures.

24 Moreover, the bankruptcy court found Ms. Fatima's
25 explanations not credible, and we will not disturb that finding

27 ³(...continued)
28 No. 40).

1 on appeal. The court's credibility finding is bolstered by the
2 fact that Ms. Fatima's arguments were inconsistent. She
3 initially stated at the April hearing that she had the
4 disclosures and the delay was due to her having been preoccupied
5 for several months trying to get her son into rehab. At the same
6 time, she asserted that she was afraid to provide any information
7 to Ms. Stern because of concerns that such information would be
8 shared with Ms. Fatima's ex-husband.

9 In any event, Ms. Fatima has not demonstrated that the
10 bankruptcy court erred in finding that a terminating sanction was
11 appropriate. As noted, Ms. Fatima was given every opportunity to
12 comply with her discovery obligations. In its order on the
13 motion to compel, the court imposed a not insignificant monetary
14 sanction on Ms. Fatima and provided ample warning that a
15 terminating sanction would result if Ms. Fatima failed to comply
16 with the order. The court found that Ms. Fatima had a long
17 history of disregarding legal obligations and court orders and
18 had engaged in a pattern of obstruction and non-cooperation in
19 the bankruptcy case. Moreover, the court found not credible
20 Ms. Fatima's rambling and inconsistent explanations for her
21 noncompliance. Ms. Fatima has not shown that these findings were
22 illogical, implausible, or without support in the record, or that
23 the bankruptcy court otherwise abused its discretion.

24 **CONCLUSION**

25 For the reasons explained above, we AFFIRM the bankruptcy
26 court's entry of a default judgment as a terminating sanction for
27 Ms. Fatima's failure to comply with the court's order to provide
28 initial disclosures.