Motion to vacate under FRCP 60(b)

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| Grassmueck v. Jeffrey and Sharon Anderson | 96-6102-fra |
| In re Jeffrey and Sharon Anderson | 695-62637-fra7 |

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| 2/2/99 | Dist. Court (Hogan, CJ) affirming order of FRA | Unpublished |

The Trustee brought an action against the Debtor/Defendants to deny their discharge on the grounds that they willfully failed to turn over books and records pursuant to a court order. The Defendants failed to answer and a default judgment was entered against them. One year later the Defendants moved to set aside the judgment and the court granted the judgment over the objection of the Trustee. The Trustee based his appeal on two grounds: 1) that the motion to set aside the default judgment was untimely, and 2) that the Defendants' failure to turn over the books and records prejudiced the Trustee's prosecution of avoidance actions and caused those actions to be settled for less than their potential value.

FRCP 60(b) allows the court to vacate an order or judgment under that section within one year; the motion to vacate was therefore timely. The District Court also found that the Defendants' motion to set aside the default judgment was made in good faith and asserted what may be a meritorious claim or defense. Defendants asserted that they were confused by the conflicting advice they received from their previous counsel with regard to the adversary proceeding. The Court found no abuse of discretion by the bankruptcy court. The decision of the bankruptcy court was affirmed.

FILED

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CLERK, UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE, OREGON
BY_____

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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| In re<br><br>JEFFERY ARTHUR ANDERSON and<br>SHARON ROSALIE ANDERSON,<br><br>Debtors. | |
| MICHAEL A. GRASSMUECK, INC.,<br>Trustee,<br><br>Plaintiff,<br><br>v.<br><br>JEFFERY ARTHUR ANDERSON and<br>SHARON ROSALIE ANDERSON,<br><br>Defendant. | Adv. Pro 96-6102 fra<br><br>Case No: 98-6049-HO<br>Bankruptcy Court Case no:<br>95-62637-fra7<br><br>ORDER |

This is an appeal by the plaintiff-trustee, Michael Grassmueck, from an order of the United States Bankruptcy Court for the District of Oregon, vacating judgement denying debtor's



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discharge. (#33). This court has jurisdiction pursuant to 28 U.S.C. §158(3).

**Background:**

Plaintiff-trustee brought an action in bankruptcy court to deny debtor-defendants Jeffrey and Sharon Anderson discharge, on the grounds that they had willfully failed to turn over books and records pursuant to a court order. The defendants failed to answer and the bankruptcy court on October 24, 1996, entered a judgment against them denying discharge. This judgment was amended on October 30, 1996.

One year later on October 30, 1997, defendants moved to set aside that judgment and the bankruptcy court granted that motion over the plaintiff-trustee's objections.

**Summary of plaintiff-trustee's argument:**

The plaintiff-trustee bases his appeal on two arguments: (1) that the motion to set aside the default judgment was untimely and (2) that the defendants' failure to turn over the books and records prejudiced the plaintiff-trustee's prosecution of avoidance actions against the defendants' relatives and caused the claims therefore to be settled for less than their potential value. (#36-p.1).

**Standard of review:**

A district court reviews questions of law decided by the bankruptcy court *de novo*. See In re Kashani, 190 B.R. 875, 881

(B.A.P. 9th Cir.1995). Findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Fed. R. Br. P. 8013.

Discussion:

1. Timeliness:

Motions applying for relief from judgment "shall be made within a reasonable time, and for reasons (1), (2), and (3)[1] not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(b). Defendant's motion to vacate the court's order, coming as it did exactly one year after the amended judgment was entered, is timely.

2. Intentional delay:

Plaintiff-trustee alleges that defendant Sharon Anderson admitted that the motion to vacate the judgment was intentionally delayed awaiting the resolution of the claims against the defendants' relatives even as the books and records continued to be withheld from the trustee-plaintiff. Defendants argue that they were confused about the status of the adversary proceeding and their need to appear and contest it as well as

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[1] These reasons include (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

their obligation to move against the default judgment in a reasonable time. While the general rule is that a person may not excuse his breaches of duty on the ground that the negligence was that of his agent, courts have shown considerable sympathy for the plight of confused but otherwise diligent litigants. In re Ireco Industries, Inc., 2 B.R. 76, 83 (Bankr. D. Or. 1979)(citing L.P. Steuart, Inc. v. Matthews, 329 F.2d 234 (D.C.Cir.1964)).

Although the decision to set aside a default judgment rests on the sound discretion of the trial court, the Ninth Circuit has articulated two policy concerns which guide a court in applying Fed. R. Civ. P. 60(b). Madsen v. Bumb, 419 F.2d 4 (9th Cir.1969); Falk v. Allen, 739 F.2d 461, 463 (9th Cir.1984). First, the rule is meant to be remedial in nature and must therefore be liberally applied. Falk, 739 F.2d at 463. Second, judgment by default is generally disfavored; a case should, whenever possible, be decided on the merits. Id.(citing Schwab v. Bullocks, Inc., 508 F.2d 353, 355 (9th Cir.1974)).

Defendants' motion to set aside the default order was made in good faith, was timely and asserted what may be a meritorious claim or defense. I find no support for plaintiff-trustee's argument that the bankruptcy court's determination[2] was

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[2] The bankruptcy court found that the defendants were credible and were confused by the conflicting advice they received from their previous counsel regarding the proceedings and their responsibilities. Further, the bankruptcy judge found that defendants may have a meritorious defense to the adversary proceeding, to wit, that they failed to turn over records because

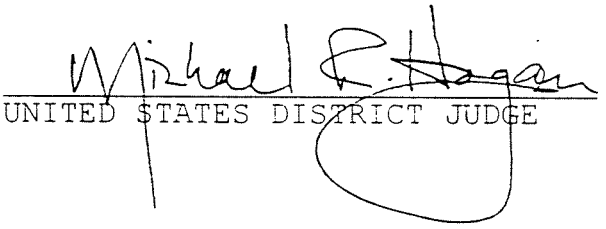
clearly erroneous.

Conclusion:

For the aforementioned reasons the decision of the bankruptcy court is AFFIRMED.

IT IS SO ORDERED.

Dated this 2nd day of February, 1999.



UNITED STATES DISTRICT JUDGE

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of mistake rather than willful refusal.

FILED
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CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
EUGENE, OREGON
BY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL A GRASSMUECK

**Plaintiff,**

v.

**Civil No. 98-6049-HO**
USBK #95-62637-fra7

JEFFERY ARTHUR ANDERSON
and SHARON ROSALIE ANDERSON

**Defendants.**

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# JUDGMENT

The decision of the bankruptcy court is affirmed.

Dated: February 4, 1999.

Donald M. Cinnamond, Clerk

by Lea Force

Lea Force, Deputy

**JUDGMENT** **DOCUMENT NO: _____**