

Fed R Civ P 60(b)
Fed R Bankr P 7004
default judgment
service of process

Steinbrugge v. Mitchell BAP No. OR-93-1425-MeVJ, Adv. No. 91-3591

In re Hanna Case No. 390-33990-S11

9/17/93 BAP aff'g DDS oral ruling Unpublished

Service of process on the creditor's bankruptcy attorney fulfilled the requirements of Fed R Bankr P 7004. The attorney had appeared for the creditor in the bankruptcy case, and the proof of claim filed for the creditor indicated that all notices should be directed to the attorney.

Since the service of process was adequate, the default judgment entered against the creditor was valid. There was no mistake, inadvertence or excusable neglect warranting relief from the judgment.

P93-16 (9)

NOT FOR PUBLICATION

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

FILED

SEP 17 1993

SEP 17 1993 *c.d.*

TERENCE H. DUNN, CLERK

BY DEPUTY

NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re
DANIEL C. HANNA,
Debtor.

BAP No. OR-93-1425-MeVJ
Bk. No. 390-33990-S11
Adv. No. 91-3591

JOHN STEINBRUGGE,
Appellant,
v.
JOHN MITCHELL, INC.,
Appellee.

MEMORANDUM

Argued and Submitted
July 22, 1993 - Portland, Oregon

Filed: SEP 17 1993

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

Hon. Donal D. Sullivan, Bankruptcy Judge, Presiding

Before: MEYERS, VOLINN and JONES, Bankruptcy Judges

45

1 I

2 John Steinbrugge ("Appellant") appeals from the order of the
3 bankruptcy court which denied him relief from a default judgment.
4 We AFFIRM.

5
6 II

7 FACTS

8 On July 27, 1990, Daniel C. Hanna ("Debtor") filed a petition
9 under Chapter 11 of the Bankruptcy Code. The Appellant filed a
10 claim for \$360,000 allegedly secured by two trust deeds on four
11 parcels of real property. On October 18, 1991, a Chapter 11 plan
12 was confirmed.

13 On December 23, 1991, the Chapter 11 trustee, John Mitchell,
14 Inc. ("Trustee"), filed a complaint against the Appellant to
15 determine the validity, priority or extent of liens. The complaint
16 alleged that the Appellant did not have a secured claim against the
17 Debtor because the value of the properties was less than the amount
18 of the senior lienholder's claim. On January 3, 1992, the Trustee
19 filed a certificate of service stating that a copy of the summons
20 and complaint had been mailed to Alexander Bishop ("Bishop"), an
21 attorney who had represented the Appellant in other matters.
22 Bishop later mailed the complaint to the Appellant on January 24,
23 1992.¹ The Appellant failed to answer or appear. Consequently,
24

25 ¹At the hearing, the Appellant's attorney, Bishop, indicated
26 that the Appellant fired him soon after receiving the complaint and
requested that the court direct all further correspondence to
appellant.

1 the Trustee sought and obtained an order of default. The default
2 judgment was entered on February 12, 1992.

3 On July 28, 1992, the Trustee filed a second complaint against
4 the Appellant seeking to avoid alleged preferential transfers. The
5 Appellant filed a response. Thereafter, on February 5, 1993, the
6 Appellant filed a motion seeking relief from the February 12, 1992
7 default judgment, arguing that he had not been properly served and
8 that the judgment was void. Alternatively, the Appellant argued
9 that relief was warranted because the default judgment resulted
10 from mistake, inadvertence, excusable neglect or other reasons
11 justifying relief.

12 On March 5, 1993, the bankruptcy court denied the motion. The
13 Appellant filed a notice of appeal.

14
15 III

16 STANDARD OF REVIEW

17 A bankruptcy court's ruling on a motion for relief from
18 judgment is reviewed for an abuse of discretion. In re Burley, 738
19 F.2d 981, 988 (9th Cir. 1984); In re Hammer, 112 B.R. 341, 345 (9th
20 Cir. BAP 1990), aff'd, 940 F.2d 524 (9th Cir. 1991). A court
21 abuses its discretion if it rests its conclusion on clearly
22 erroneous factual findings or an incorrect legal standard. In re
23 Hammer, supra, 112 B.R. at 345. The court's discretion is limited
24 by three considerations: (1) since Fed.R.Civ.P. 60(b) is remedial
25 in nature, it must be liberally applied; (2) default judgments are
26 generally disfavored and cases should be decided on their merits;

1 and (3) where the party seeks timely relief from the judgment and
2 has a meritorious defense, doubt should be resolved in favor of the
3 motion to set aside the judgment. 112 B.R. at 345.

4
5 **IV**

6 **DISCUSSION**

7 Rule 60(b)(4) provides in relevant part: "On motion and upon
8 such terms as are just, the court may relieve a party . . . from a
9 final judgment, order, or proceeding . . . [if] the judgment is
10 void." Fed.R.Civ.P. 60(b)(4). The Appellant argues that because
11 the Trustee failed to properly serve him, the court did not have
12 personal jurisdiction over him. Consequently, the default judgment
13 is void and relief is warranted.

14 Under Fed.R.Civ.P. 4, in pertinent part, made applicable to
15 bankruptcy proceedings by Fed.R.Bankr.P. 7004, the plaintiff is
16 responsible for prompt service of the summons and complaint upon
17 the defendant. Service is to be made "[u]pon an individual . . .
18 by delivering a copy of the summons and of the complaint to the
19 individual personally or by leaving copies thereof at the
20 individual's dwelling house or usual place of abode . . . or by
21 delivering a copy of the summons and of the complaint to an agent
22 authorized by appointment or by law to receive service of process."
23 Fed.R.Civ.P. 4(d)(1); Fed.R.Bankr.P. 7004(b)(1),(8). Bankruptcy
24 Rule 7004 also authorizes service upon an individual by mailing a
25 copy of the summons and complaint to the place where the individual
26 regularly conducts a business or profession. Fed.R.Bankr.P.

1 7004(b)(1).

2 The Appellant argues that the Trustee neither personally
3 served him nor mailed the summons and complaint to his home or
4 business. This fact is not in dispute.

5 The Trustee asserts, however, that service of process was
6 properly made on the Appellant's attorney, Bishop, and that such
7 service was adequate. The Trustee points out that the Appellant's
8 proof of claim indicates that all notices should be addressed to
9 Bishop. Additionally, the Trustee states that the Appellant had
10 actual notice of the complaint and adequate time to answer.²

11 In opposition, the Appellant states that while the Trustee did
12 serve the summons and complaint on Bishop, the Appellant did not
13 authorize Bishop to accept service of process or to act as his
14 agent. The Appellant cites Schultz v. Schultz, 436 F.2d 635 (7th
15 Cir. 1971). In Schultz, the defendant was represented by an
16 attorney in a state court divorce proceeding. The attorney was
17 granted a broad power of attorney authorizing him to control and
18 manage the defendant's property. Thereafter, the plaintiff brought
19 suit in the district court alleging causes of action for fraud,
20 mental suffering and assault. The summons and complaint were
21 served on the defendant's attorney. The case was dismissed on the
22 grounds of insufficient service of process.

23 On appeal, the plaintiff argued that although the defendant's
24 attorney did not have actual authority to receive service of

25 ²The bankruptcy court stated "there is no question that
26 [Appellant] knew about this complaint within time to answer."
E.R., p.280, ln.9-11.

1 process, he had implied authority by virtue of his representation
2 of the defendant in the state court proceeding and the broad power
3 of attorney. The court of appeals rejected the argument, reasoning
4 that the fact the defendant was represented by the attorney in an
5 unrelated action furnished no basis for validation of the service
6 of process. 436 F.2d at 639. The court also noted that there was
7 no actual appointment of the attorney as the defendant's agent and
8 no actual notice of the service was given to the defendant. 436
9 F.2d at 638.

10 The Appellant also relies on Bennett v. Circus U.S.A., 108
11 F.R.D. 142 (N.D. Ind. 1985). In Bennett, the plaintiff served the
12 defendant by mailing a copy of the summons and complaint to a law
13 firm which had represented the defendant in the past and had been
14 authorized to accept service of process for the defendant. The
15 court observed that the language of Fed.R.Civ.P. 4(d)(1) makes
16 clear the agent must have been authorized by appointment or by law
17 to receive service of process. 108 F.R.D. at 146-47. The court
18 held that the fact the attorney represented the defendant in an
19 unrelated matter is not evidence of an appointment for service of
20 process. Id. at 147.

21 Both Schultz and Bennett are distinguishable. In both cases,
22 service was made on the defendant's former attorney in an unrelated
23 proceeding. In this appeal, however, service was made on the
24 Appellant's bankruptcy attorney who had performed services for the
25 Appellant relating to the bankruptcy proceeding. Bishop filed an
26 objection to confirmation of the joint plan on October 17, 1991.

1 More importantly, Bishop filed a proof of claim on behalf of the
2 Appellant on October 19, 1990. As the Trustee points out, the
3 proof of claim indicates that all notices in the bankruptcy
4 proceeding should be addressed to Bishop. By directing that all
5 notices be sent to Bishop, the Appellant effectively appointed
6 Bishop as his agent to receive service of process in the bankruptcy
7 case. Moreover, since the Appellant took an active role in the
8 case and appeared through Bishop, he impliedly authorized Bishop to
9 receive process for him. See In re Reisman, 139 B.R. 797, 801
10 (S.N.Y. 1992); Matter of Paddington Press, Ltd., 5 B.R. 343, 345
11 (S.N.Y. 1980).

12 In response to the Trustee's argument that the Appellant had
13 actual notice of the complaint, the Appellant cites Mid-Continent
14 Wood Products, Inc. v. Harris, 936 F.2d 297 (7th Cir. 1991). In
15 Mid-Continent Wood Products, the court held that actual knowledge
16 of the existence of a lawsuit is insufficient to confer personal
17 jurisdiction over a defendant in the absence of valid service of
18 process. 936 F.2d at 301. The court reasoned that even though the
19 defendant may have had knowledge of the lawsuit as a result of his
20 former attorney's negotiations with the plaintiff, actual notice
21 alone is insufficient. Id. The Appellant therefore contends that
22 the court lacked personal jurisdiction over him.

23 If service of process is not in conformity with Rule 7004, the
24 bankruptcy court does not have personal jurisdiction. In re Harlow
25 Properties, Inc., 56 B.R. 794, 799 (9th Cir. BAP 1985). However,
26 since the Appellant was properly served through his attorney,

1 personal jurisdiction existed. Whether the Appellant had actual
2 knowledge of the lawsuit is of no consequence. In addition, by
3 filing a proof of claim and participating in the proceedings, the
4 Appellant submitted himself to the jurisdiction of the court.
5 Matter of Paddington Press, Ltd., supra, 5 B.R. at 345. Also,
6 since the real property which was subject to the Appellant's claim
7 was part of the bankruptcy estate, the court had in rem
8 jurisdiction. 28 U.S.C. § 1334(d).

9 Finally, the Appellant argues that relief from judgment should
10 have been granted due to mistake, inadvertence or excusable neglect
11 pursuant to Fed.R.Civ.P. 60(b)(1). In deciding whether to reopen
12 a default judgment under Rule 60(b), the court should consider
13 whether the plaintiff will be prejudiced, whether the defendant has
14 a meritorious defense and whether culpable conduct of the defendant
15 led to the default. Falk v. Allen, 739 F.2d 461, 463 (9th Cir.
16 1984).

17 The Appellant asserts that the bankruptcy court did not allow
18 him to fully develop the facts relating to the requested relief.
19 He states that relevant advice by this attorney was not introduced
20 and that there was no evidence of the Appellant's actual knowledge
21 of the complaint. The record indicates, however, that the
22 Appellant admitted that Bishop had mailed a copy of the summons and
23 complaint to him on January 24, 1992. Although the Appellant had
24 time to answer, he neither answered nor requested additional time
25 to answer. Instead, the Appellant waited almost one year to file
26 the motion for relief. Based on the record, the bankruptcy court

1 did not abuse its discretion in concluding that there was no
2 mistake, inadvertence or excusable neglect warranting relief from
3 judgment.

4
5 **V**

6 **CONCLUSION**

7 Service of process on the Appellant's attorney was sufficient
8 notice to the Appellant of the Trustee's complaint. The default
9 judgment against the Appellant is therefore valid. There was no
10 mistake, inadvertence or excusable neglect warranting relief from
11 judgment. Accordingly, the bankruptcy court did not abuse its
12 discretion in denying the Appellant's motion and the order is
13 **AFFIRMED.**