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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: FRANK JAKUBAITIS, Debtor, ---------- FRANK JAKUBAITIS, Appellant, v. CARLOS PADILLA III; et al., Appellees.	No. 19-60041 BAP No. 18-1067 MEMORANDUM*

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Spraker, Faris, and Lafferty III, Bankruptcy Judges, Presiding

In re: FRANK JOSEPH JAKUBAITIS, Debtor, ---------- FRANK JOSEPH JAKUBAITIS, Appellant,	No. 21-60030 BAP No. 20-1009

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

v.

JEFFREY IAN GOLDEN; et al.,

Appellees.

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Gan, Faris, and Spraker, Bankruptcy Judges, Presiding

Submitted December 2, 2022[**]

Before: BADE, LEE, and KOH, Circuit Judges

Frank Jakubaitis, proceeding pro se, appeals from the Bankruptcy Appellate Panel's ("BAP") order affirming the bankruptcy court's default judgment on Carlos Padilla III and Jeffrey Ian Golden's (collectively, "Appellees") claim seeking revocation of discharge under 11 U.S.C. § 727(d). The bankruptcy court struck Jakubaitis's answer and entered default judgment after Jakubaitis failed to respond to an order to show cause, to comply with discovery orders, and to pay monetary sanctions. We have jurisdiction under 28 U.S.C. § 158(d)(1). We review de novo decisions of the BAP, applying the same standard of review that the BAP applied to the bankruptcy court's ruling. *Boyajian v. New Falls Corp.* (*In re Boyajian)*, 564 F.3d 1088, 1090 (9th Cir. 2009). We review for an abuse of

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

discretion the bankruptcy court's entry of terminating sanctions under Federal Rule of Civil Procedure 37. *Visioneering Constr. & Dev. Co. v. U.S. Fid. & Guar. (In re Visioneering Constr.)*, 661 F.2d 119, 123 (9th Cir. 1981). We affirm.

1. The bankruptcy court did not abuse its discretion in sanctioning Jakubaitis by striking his answer because the record supports the finding that his conduct was due to willfulness, bad faith, or fault. *See* Fed. R. Civ. P. 37(b)(2)(A)(iii) (a court may strike pleadings as a sanction for violating discovery orders); *Jorgensen v. Cassiday*, 320 F.3d 906, 912 (9th Cir. 2003) ("Where [a] sanction results in default, the sanctioned party's violations must be due to the 'willfulness, bad faith, or fault' of the party." (citation omitted)). Jakubaitis contends that his failure to follow the show-cause order was due to his impecunity and his attorney's failure to recognize the implications of the show-cause order, but these arguments were already considered and correctly rejected by the BAP.

2. Similarly, the bankruptcy court did not abuse its discretion in entering default judgment because the record supports the finding that Jakubaitis's culpable conduct led to the default. *See Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988) ("[A] default judgment will not be disturbed if . . . the defendant's culpable conduct led to the default. . . ."). Jakubaitis's contention that the bankruptcy court was required to separately enter default under Federal Rule of Civil Procedure 55(a) lacks merit because the bankruptcy court ordered default

under Federal Rule of Civil Procedure 37. *See* C. Wright & A. Miller, 10A Fed. Prac. & Proc. Civ. § 2682 (4th ed.) ("Rule 55(a) does not represent the only source of authority in the rules for the entry of a default that may lead to judgment[;] . . . [f]or example, Rule 37(b)(2)(A)(vi) . . . provide[s] for the use of a default judgment as a sanction for a violation of the discovery rules."). Jakubaitis's contention that his answer was "not stricken as a discovery sanction," is belied by the record and his own briefing.

3. Next, the bankruptcy court did not abuse its discretion in denying Jakubaitis's motion to vacate the default judgment under Federal Rule of Civil Procedure 60(b), for two reasons. *See Briney v. Burley (In re Burley)*, 738 F.2d 981, 988 (9th Cir. 1984). First, Jakubaitis's contention that his failure to respond to the show-cause order was due to his attorney's mistake or excusable neglect is unsupported by the record, and he did not raise the contention until filing an amendment to the Rule 60(b) motion. *See Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004) ("[A]lleged attorney malpractice does not usually provide a basis to set aside a judgment pursuant to Rule 60(b)(1)," especially "where a party has waited . . . to complain about the failings of her lawyers."). Second, Jakubaitis's allegation that Appellees altered a financial document is inconsequential to this issue because the allegedly altered document was not relevant to the default judgment.

4. Finally, the BAP properly affirmed in part and reversed in part the bankruptcy court's order denying Jakubaitis's motion for a protective order. *See Reza v. Pearce*, 806 F.3d 497, 508 (9th Cir. 2015). The BAP properly reversed the bankruptcy court's denial of the protective order to the extent that the order required Jakubaitis to divulge communications with his psychotherapist. *See Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (recognizing the psychotherapist-patient privilege, which protects "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment"). However, to the extent that the order required Jakubaitis to answer questions regarding the medication he was taking and whether its side effects interfered with his ability to give accurate deposition testimony, the BAP properly found no abuse of discretion in the bankruptcy court's denial of the protective order because those questions did not concern communications with Jakubaitis's psychotherapist.

Appellees' contention that this court is without jurisdiction over Jakubaitis's appeal of the interlocutory protective order lacks merit because the BAP entered a final order disposing of the claims, which granted this court the power to adjudicate the protective-order appeal. *See Wolkowitz v. FDIC (In re Imperial Credit Indus., Inc.)*, 527 F.3d 959, 971 n.12 (9th Cir. 2008) ("We have jurisdiction to hear this claim even though [the orders at issue] were not appealable in their own right when the briefs were filed.").

5. In addition to the relief requested in the briefing, there are a number of pending motions, which we resolve as follows.

Appellees' requests for judicial notice, filed on November 12, 2020 (Dkt. No. 35), and February 2, 2022 (Dkt. No. 71), are DENIED.

Jakubaitis's motion to strike portions of the answering brief and supplemental excerpts of record, filed on March 15, 2021 (Dkt. No. 49), is DENIED.

Appellees' request to waive the requirement to send paper copies of the excerpts of record, filed on March 3, 2022 (Dkt. No. 80), is GRANTED.

Jakubaitis's requests for judicial notice, filed on May 11, 2022 (Dkt. No. 91), and May 13, 2022 (Dkt. No. 94), are DENIED.

Jakubaitis's motions to file a substitute late, oversized reply brief, filed on May 13, 2022 (Dkt. No. 92), and May 27, 2022 (Dkt. Nos. 97, 98), are GRANTED. The clerk shall file the substitute reply brief submitted on May 27, 2022 (Dkt. No. 99).

AFFIRMED.