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NOT FOR PUBLICATION

ENTERED 7-1-05
FILED
JUN 30 2005
CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re
SUZANNE MICHALAK,

Debtor.

JAMES MICHALAK,

Plaintiff,
v.
SUZANNE MICHALAK,

Defendant.

Bankruptcy No. 04-07082-JM7
Adversary No. 04-90480-JM

MEMORANDUM DECISION

On November 8, 2004, James Michalak ("Plaintiff") filed a nondischargeability complaint pursuant to Bankruptcy Code Section 523(a)(15) against the debtor, Suzanne Michalak ("Defendant"). The dispute concerns a vehicle loan through the Navy Credit Union in the approximate amount of \$5,000.

The Plaintiff filed and served a motion for summary judgment on February 24, 2005. He asserted that the Defendant failed to respond to discovery, including a Request for Admissions, and based on those

1 admissions he should be granted a judgment. Previously, he filed and
2 served on the Defendant a "Notice of Admission of Facts," in which he
3 stated that the Defendant failed to respond to the Request for
4 Admissions. Each time the Plaintiff served documents on the Defendant
5 he used the same address: 13624 Silver Lake Drive; Poway, CA 92064
6 ("Poway address").

7 The motion for summary judgment was set for a hearing on May 5,
8 2005. On May 3, 2005, the Defendant filed a request for a continuance
9 stating that she was required by her employer to attend a conference
10 on May 5. The Defendant raised no other basis for requesting the
11 continuance.

12 It is clear from the fact that the Defendant made the request for
13 a continuance that the Defendant received notice of the May 5, 2005
14 hearing. Despite having notice of the hearing, the Defendant did not
15 file any written opposition to the motion.

16 The Defendant appeared at the hearing on May 5, 2005. She
17 asserted that she had not received various documents, including the
18 Request for Admissions, and contended that she should be served again
19 and have an opportunity to respond at that time.

20 At the hearing, the Defendant acknowledged that she had not
21 changed her address, and that the Poway address was still where she
22 received mail. The Court denied the Defendant's request, and granted
23 the motion for summary judgment. The order granting summary judgment
24 was entered on May 9, 2005. The Defendant then filed a motion for
25 reconsideration ("Motion") on May 12, 2005.

26 The Motion is one page in length and is not supported by any
27 declarations. The Motion simply states that the Defendant "did not
28 receive all the documents in question and therefore did not have the

1 opportunity to respond appropriately and within a timely manner."

2 In opposition, the Plaintiff filed a declaration from his
3 attorney, Leonard Ackerman ("Counsel"). Counsel declared that he
4 effected service of the various documents by mailing the documents to
5 the Poway address. The Plaintiff, through Ackerman's declaration,
6 also questions how the Defendant could have known there was a hearing
7 on the motion for summary judgment on May 5, 2005, if she had not
8 received the pleadings on that motion.

9 Pursuant to the mailbox rule, where it is shown that "mail is
10 properly addressed, stamped and deposited in an appropriate
11 receptacle, it is presumed to have been received by the addressee in
12 the ordinary course of the mails." In re La Sierra Financial
13 Services, Inc., 290 B.R. 718 (9th Cir. BAP 2002). This is a
14 rebuttable presumption. In construing F.R.C.P. 4(a)(6), the Ninth
15 Circuit Court of Appeals stated that a party must make a specific
16 denial of receipt in order to rebut the mailbox presumption. Nunley
17 v. City of Los Angeles, 52 F.2d 792, 796 (9th Cir. 1995).

18 In applying these rules to the evidence at hand, the Court
19 recognizes that the Defendant is acting in pro per. The same address
20 was used for all of the mailings and the Defendant acknowledges that
21 it was the correct address. The Plaintiff has provided a declaration
22 regarding service of the documents in question. This establishes that
23 the documents were properly addressed and mailed, giving rise to the
24 presumption of receipt.

25 In response, the Defendant simply states in her motion that she
26 "did not receive all the documents in question." She does not specify
27 what documents she did not receive. Furthermore, the phrasing
28 suggests that she did, in fact, receive some of the documents that

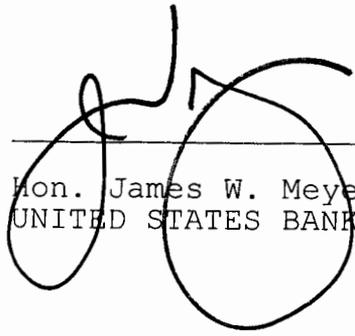
1 have been served on her. Furthermore, the Defendant filed a request
2 for a continuance two days before the hearing, which indicates that
3 she was receiving her mail. Finally, when she sought the continuance
4 she made no mention of not having received some of the documents that
5 had been served on her during the case. The Defendant has not
6 adequately rebutted the presumption of receipt.

7 The Defendant's motion for reconsideration is DENIED.

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JUN 30 2005

Date: _____



Hon. James W. Meyers
UNITED STATES BANKRUPTCY JUDGE