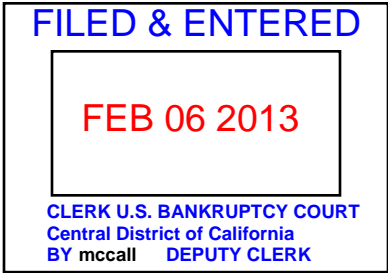


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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA DIVISION

In re
LLOYD MYLES RUCKER,

Debtor,

THOMAS H. CASEY, Chapter 7 Trustee,

Plaintiff,

vs.
RONALD A. CUNNING, DDS, an
individual and as trustee of the RONALD
CUNNING DDS, INC. PROFIT SHARING
PLAN AND TRUST and THE CUNNING
FAMILY TRUST,

Defendants.

Case No. 8:06-bk-10195-CB
Chapter 7
Adv. No. 8:07-ap-01337-CB

MEMORANDUM OF DECISION

Trial dates: January 11, 2013
January 22, 2013
January 23, 2013
January 28, 2013
Courtroom: 5D

BACKGROUND

Back in 1997, Ronald A. Cunning, DDS, the Cunning Pension Trust and the
Cunning Profit Sharing Plan and Trust (collectively the "Cunning Defendants") obtained
judgments against debtor Lloyd Myles Rucker ("Rucker") in California Superior Court.
The Cunning Defendants have been trying to collect on their judgments ever since. This
bankruptcy adversary case is the latest chapter in the saga.

1 The Court will not attempt a detailed description of the background of this matter
2 since, while colorful, it is largely irrelevant to the current adversary proceeding.

3 This particular litigation involves the lawsuit filed on October 1, 2007 by Thomas H.
4 Casey, the Trustee in Rucker's Chapter 7 bankruptcy case ("Trustee"), for return of an
5 alleged preferential transfer pursuant to 11 U.S.C. § 547.¹ The alleged preference is an
6 Order to Appear for Examination Lien ("ORAP Lien") that the Cuning Defendants
7 believe they hold pursuant to California Code of Civil Procedure § 708.110 as a result of
8 serving a Judgment Debtor's Examination Order on Rucker prior to the 90-day
9 preference period. The service on Rucker of a Judgment Debtor's Examination Order
10 was the main and almost exclusive topic of testimony during the four-day trial.²

11 **SERVICE OF THE JUDGMENT DEBTOR EXAMINATION ORDER**

12 The critical date is June 9, 2005. It was on that date that the Cuning Defendants
13 contend they served Rucker with a Judgment Debtor's Examination Order issued by the
14 Orange County Superior Court dated the same date (the "JDE Order"). The date stated
15 in the JDE Order for Rucker's appearance for the judgment debtor's examination was
16 July 28, 2005.

17 Indeed, the evidence presented at trial clearly showed that Rucker was served
18 with the JDE Order on June 9, 2005.³ Not only is there a proof of service signed by a
19 certified process server, Timothy Bercovitz ("Bercovitz"), evidencing the service, but the
20 contemporaneous evidence presented at trial indicated that Rucker was served as

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23 ¹ Rucker filed bankruptcy on October 12, 2005 in Florida. He attempted to claim he was
24 a resident of Florida, but was unsuccessful. The bankruptcy case was transferred
25 to the Central District of California, Santa Ana Division shortly thereafter.

26 ² While not the subject of much direct discussion at trial, the Trustee also contends that
27 the Cuning Defendants qualify as "insiders" for purposes of this litigation. And,
28 while barely mentioned at trial, the Trustee objects to a proof of claim filed by one
of the Cuning Defendants and has raised issues regarding whether the ORAP
lien reaches Rucker's Pension Trust.

³Rucker may have been served with the JDE Order a total of **three** times. However, this
Court need only find that he was served once, and that is abundantly clear.

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1 contended by the Cunning Defendants in Rucker's attorney's office on the afternoon of
2 June 9, 2005.

3 At trial, Bercovitz, a lively older gentleman who continues to work as a process
4 server, testified that he did exactly what is stated in the proof of service he signed on
5 June 13, 2005 (the "POS") – specifically, he served Rucker with the JDE Order on June
6 9, 2005 at 4:37 p.m. when Rucker was at his attorney's office located at 3 Park Plaza,
7 Suite 1650, Irvine, California. Nothing presented by the Trustee rebutted the
8 presumption under California Evidence Code § 647 that this service by a certified
9 process server was valid.

10 Trustee's counsel did his best to throw doubt on whether service occurred as
11 maintained by Bercovitz and as detailed in the POS. And, obviously, time dims
12 memories for all of us. That is one of the many reasons we have proofs of service. We
13 need to have accurate records of service or our courts would grind to a halt with the
14 passage of time and the inevitable deaths of those who served the documents. Indeed,
15 in this case, one process server **did** die prior to trial. Fortunately, that process server's
16 testimony was not pivotal here.

17 Among the witnesses called by the Trustee were Rucker's attorney Anthony Lanza
18 ("Lanza") and Lanza's receptionist, Laura Malnar ("Malnar"). Both Lanza and Malnar
19 testified that they were in Lanza's office on June 9, 2005, and that they did not see
20 Rucker being served.⁴ Of course, this is testifying to a negative. And, it was not at all
21 clear from their testimony that they were in the reception area at all times and that Rucker
22 could not have been served without them witnessing the service. Their testimony does
23 not rebut the presumption of service.

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27 ⁴ The Trustee also called Rucker as a witness. This Court gives no weight to Rucker's
28 testimony given his well-documented propensity to lie under oath.

1 Interestingly, the Trustee identified Malnar as the Trustee's crucial witness,
2 without whom he could not proceed.⁵ Malnar actually testified that Bercovitz was,
3 indeed, at Lanza's office on June 9, 2005 (she remembered him quite clearly because he
4 flirted with her). According to Malnar, Bercovitz was there to serve her with documents
5 for a Rucker-related entity. She was wrong. In actuality, as was shown at trial, Malnar
6 was served by an individual named Adolfo Aldana, not Bercovitz. Bercovitz was in
7 Lanza's office to serve Rucker, which he did.

8 As if more were needed, attorney Lanza kept meticulous timesheets for use in
9 creating his client invoices. The invoice for work done by Lanza on June 9, 2005
10 included, in addition to a meeting with Rucker and other things, a review of a "judgment
11 debtor exam order." This was Rucker's personal invoice, not an invoice for one of
12 Rucker's related entities; more contemporaneous evidence that shows Rucker was
13 served.

14 Then, there was Rucker's behavior around this time. Through his lawyers, he tried
15 desperately to continue the July 28, 2005 judgment debtor examination. He even
16 brought an ex parte motion in state court seeking a continuance of the examination.
17 When the state court judge denied the request, Rucker returned to California from Florida
18 for what he called his "deposition." Then, on the day of the examination, he checked
19 himself into a hospital complaining of chest pains. It is beyond belief that Rucker's "chest
20 pains" on July 28, 2005 were not directly related to the court-ordered judgment debtor
21 examination.

22 The Court finds that Rucker was served as detailed in the POS. Therefore, the
23 ORAP Lien attached on June 9, 2005 and is not subject to avoidance as a preferential
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25 ⁵Malnar submitted her direct testimony by declaration, as did all of the witnesses in this
26 trial. She was aware that she had to be present at trial for purposes of cross
27 examination. Yet, despite two subpoenas, she failed to appear in court twice (11
28 days apart) claiming she was not feeling well each time. The proposed issuance
of a bodily detention order appears to be what finally persuaded Malnar to appear
and testify.

1 transfer. Further, the Court does not find the Cuning Defendants to be insiders of
2 Rucker for purposes of this litigation.

3 **OBJECTION TO CLAIM AND THE REACH OF THE ORAP LIEN**

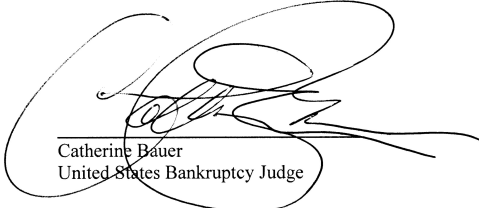
4 The Court requests further briefing on the two remaining issues: first, the validity
5 of the proof of claim filed by Ronald Cuning that is based on an assignment from the
6 Cuning Pension Trust and, second, the extent to which the Cuning Defendants have a
7 lien on Rucker's Pension Trust. These are the only issues to be included in further
8 briefing. Briefs are due 14 days after the date this Memorandum of Decision is filed and
9 entered.

10 **ORDER CONSISTENT WITH THIS MEMORANDUM OF DECISION**

11 Once the remaining issues are resolved, counsel for the Cuning Defendants shall
12 upload an order consistent with this Memorandum of Decision and the further rulings of
13 the Court.

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24 Date: February 6, 2013

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Catherine Bauer
United States Bankruptcy Judge

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **ORDER GRANTING DEFAULT JUDGMENT IN FAVOR OF PLAINTIFFS PURSUANT TO 11 U.S.C. § 523(a)(2), § 523(a)(4) and § 523(a)(6)** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of **October 15, 2012**, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below:

Kyra E Andrassy kandrassy@wglp.com
Thomas H Casey (TR) msilva@tomcaseylaw.com, thc@trustesolutions.net
Franklin J Contreras fcontreras@shblp.com, lverstegen@shblp.com
Steven J Katzman SKatzman@bmkattorneys.com
Elmer D Martin elmermartin@gmail.com
Hutchison B Meltzer hmeltzer@wglp.com
Sean OKeefe sokeefe@okeefelc.com
Evan D Smiley esmiley@wglp.com
United States Trustee (SA) ustpreion16.sa.ecf@usdoj.gov

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below: