

Sanders v. Progressive Casualty, Adversary No. 04-03384-tmb

In re Sanders, Case No. 97-33882-tmb7

Appellate No. OR-07-1272-JKMo

12/13/2007

TMB

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Debtor appealed a bankruptcy court order denying his motion for relief from a judgment finding that a restitution debt owed by him was excepted from discharge under §523(a)(13). The bankruptcy court held that the motion was time-barred under subsections (b)(1), (b)(2), and (b)(3) of Fed.R.Civ.P. 60, which was incorporated by Fed.R.Bankr. P. 9024 and that the allegations set forth in the motion were insufficient to warrant granting relief under subsections (b)(4), (b)(5), and (b)(6) of that rule.

The BAP affirmed the court's denial of the motion for relief from judgment. It agreed with the Bankruptcy Court's conclusion that the motion was time-barred under subsections (b)(1), (b)(2), and (b)(3) of Fed.R.Civ.P. 60 and that the debtor had failed to show that he was entitled to relief from judgment under either subsection (b)(4) or (b)(5). The BAP also agreed with the bankruptcy court's conclusion that the debtor had failed to establish the existence of extraordinary circumstances which prevented or rendered him unable to prosecute an appeal of the original judgment and was therefore not entitled to relief from the judgment under subsection (b)(6) of Fed.R.Civ.P. 60.

Judge Klein, concurring, joined the majority but wrote separately to address the "fundamental lack of merit" in the debtor's contention that the restitution debt was dischargeable.

DEC 13 2007

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	OR-07-1272-JKMo
)		
7	JAMES HENDERSON SANDERS,)	Bk. No.	97-33882
)		
8	Debtor,)	Adv. No.	04-03384
)		
9	JAMES HENDERSON SANDERS,)		
)		
10	Appellant,)		
)		
11	v.)	MEMORANDUM ¹	
)		
12	PROGRESSIVE CASUALTY)		
13	INSURANCE CO., et al.,)		
)		
14	Appellees.)		
)		

Argued and Submitted on November 30, 2007
at Seattle, Washington

Filed - December 13, 2007

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

Honorable Trish M. Brown, Bankruptcy Judge, Presiding

Before: JURY, KLEIN and MONTALI, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1) it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 **I. INTRODUCTION**

2 Chapter 7² debtor commenced an adversary proceeding which
3 sought a determination that his restitution debt owed to various
4 insurance companies was discharged. After a trial, the
5 bankruptcy court found the debt nondischargeable, dismissed
6 debtor's complaint and entered judgment in favor of the
7 defendants (the "Dismissal Judgment").

8 Debtor timely appealed the Dismissal Judgment. However, he
9 failed to file his opening brief despite being granted two time
10 extensions to do so. Accordingly, we dismissed debtor's appeal,
11 which dismissal was not appealed further.

12 Debtor subsequently moved for relief from the Dismissal
13 Judgment, which the bankruptcy court denied. Debtor timely
14 appealed.

15 Because the bankruptcy court did not abuse its discretion in
16 denying debtor's motion for relief from the Dismissal Judgment,
17 we AFFIRM.

18 **II. FACTS AND PROCEDURAL HISTORY**

19 On January 27, 1997, a criminal judgment (the "Criminal
20 Judgment") was entered against debtor in the United States
21 District Court for the Eastern District of California adjudging
22 him guilty, after a jury trial, of seven counts of mail fraud in
23

24 ² Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
27 enacted and promulgated prior to the effective date of The
28 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, 119 Stat. 23, because the case from which this
appeal arises was filed before its effective date (generally
October 17, 2005).

1 violation of 18 U.S.C. § 1384, and of aiding and abetting under
2 18 U.S.C. § 2. The district court sentenced debtor to prison for
3 51 months and ordered him to make restitution to Harco National
4 Insurance Company ("Harco"), Progressive Casualty Insurance
5 Company ("Progressive"), and Liberty Mutual Insurance Company
6 ("Liberty") in varying amounts that totaled \$5,026,657 (the
7 "Restitution Obligation").

8 On May 12, 1997, debtor filed his chapter 7 petition.
9 Debtor obtained his discharge on August 21, 1997.

10 On November 16, 1998, Harco moved to reopen debtor's case to
11 file an adversary proceeding for nondischargeability of the
12 Restitution Obligation owed to it. The motion was granted and on
13 January 7, 1999, Harco obtained a default judgment against debtor
14 determining that the Restitution Obligation was nondischargeable.
15 That judgment was not appealed.

16 On June 29, 2004, debtor filed a motion for "Order Affirming
17 the Discharge of Certain Debts per in Re: Beezley", seeking to
18 affirm that the Restitution Obligation in its entirety was
19 discharged. On August 18, 2004, debtor's case was reopened, the
20 bankruptcy court denied his motion and reaffirmed that Harco's
21 nondischargeability judgment against debtor remained in full
22 force and effect.

23 On September 21, 2004, debtor commenced an adversary
24 proceeding against Progressive, Liberty, Harco and the United
25 States, seeking a determination that the Restitution Obligation
26 was discharged because it fell outside the scope of § 523(a)(7)
27 and § 523(a)(13) was inapplicable. On November 30, 2004, the
28 bankruptcy court granted Harco's motion to dismiss. Neither

1 Liberty nor the United States filed answers. Progressive
2 answered debtor's complaint and asserted counterclaims seeking
3 relief under § 523(a)(2)(A) and (a)(4) if the bankruptcy court
4 ruled against Progressive on the § 523(a)(13) claim for relief.

5 After a trial on June 14, 2005, the bankruptcy court found
6 the Restitution Obligation was nondischargeable and entered the
7 Dismissal Judgment on June 22, 2005. On July 1, 2005, debtor
8 appealed the Dismissal Judgment. Debtor requested two time
9 extensions to file his opening brief which we granted. However,
10 we denied debtor's third request for a time extension and we
11 dismissed the appeal on January 21, 2006.³ Debtor did not appeal
12 our dismissal.

13 On May 22, 2007, debtor moved to reopen the adversary
14 proceeding to seek relief from the Dismissal Judgment. Debtor's
15 motion for relief was titled "Fed. R. Bank. P. 3008 Interpreting
16 Fed. R. Civ. P. 60." Because Rule 3008 governs reconsideration
17 of orders regarding claims, the bankruptcy court treated debtor's
18 motion as one for relief from judgment under Rule 9024, which
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22 ³ On October 14, 2005, debtor filed another chapter 7
23 petition in the District of Arizona. Progressive commenced an
24 adversary proceeding against debtor seeking to deny discharge of
25 the Restitution Obligation owed to it. The bankruptcy court
26 granted Progressive's motion for summary judgment, finding the
27 Restitution Obligation was nondischargeable under § 523(a)(2) and
28 (13). Debtor timely appealed and we affirmed the Arizona
bankruptcy court's order granting Progressive's summary judgment
on the ground that the Oregon bankruptcy court's findings were
res judicata with respect to nondischargeability of the
Restitution Obligation. See Memorandum Decision BAP AZ-06-1382
filed March 30, 2007.

1 incorporates Federal Rule Civil Procedure ("Civil Rule") 60.⁴

2 On June 1, 2007, the bankruptcy court denied debtor's motion
3 because it was time-barred under Civil Rule 60(b)(1), (2), and
4 (3), and the allegations were insufficient to warrant the
5 granting of relief under subsections (4), (5) or (6).

6 Debtor timely appealed.

7 **III. JURISDICTION**

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
9 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
10 § 158.⁵

11 **IV. ISSUES**

12 Whether the bankruptcy court abused its discretion in
13 denying debtor's motion for relief from the Dismissal Judgment.

14 **V. STANDARDS OF REVIEW**

15 We review the denial of a motion for relief from judgment
16 under Civil Rule 60(b) for abuse of discretion. Tennant v. Rojas
17 (In re Tennant), 318 B.R. 860, 866 (9th Cir. BAP 2004).

18 "Under the abuse of discretion standard, we will not reverse
19 unless we are 'definitely and firmly convinced that the
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22 ⁴ We agree with the trial judge that Rule 9024, which
23 incorporates Civil Rule 60, is applicable to debtor's motion
24 since he was not seeking reconsideration regarding a claim.

25 ⁵ The judgment dismissing debtor's adversary complaint does
26 not expressly dismiss Progressive's counterclaims for
27 nondischargeability under § 523. Nonetheless, because the
28 judgment dismissed debtor's complaint against Progressive, we
determine that Progressive's counterclaims were impliedly
dismissed as well. Accordingly, there is no jurisdictional
defect affecting this Panel's immediate review of the denial of
debtor's motion for reconsideration.

1 bankruptcy court committed a clear error of judgment.'" Tennant,
2 318 B.R. at 866 (citation omitted). "[A]n appeal from an order
3 denying a [Fed.R.Civ.P.] 60(b) motion brings up for review only
4 the correctness of that denial and does not bring up for review
5 the final judgment." Id. (citation omitted). Accordingly, our
6 review is limited to the court's denial of debtor's motion for
7 relief from the Dismissal Judgment, rather than the merits of the
8 Dismissal Judgment itself. Id.

9 **VI. DISCUSSION**

10 On appeal, debtor contends that the bankruptcy court erred
11 in denying his motion since he alleged "profound corrections"
12 were made to the "false and misleading documentary record" in his
13 criminal case on March 28, 2006, two months after the dismissal
14 of his appeal. According to debtor, these "profound corrections"
15 constitute extraordinary circumstances warranting reconsideration
16 and explain why he failed to prosecute his appeal. At oral
17 argument, however, he conceded that the "corrections" do not
18 vitiate his conviction of the seven counts of mail fraud.

19 Debtor next contends that the bankruptcy court erred in
20 denying his motion because the acts that gave rise to the
21 Restitution Obligation were committed before January 14, 1993,
22 and, therefore, § 523(a)(7) rather than § 523(a)(13) applies.
23 Debtor argues that the application of § 523(a)(13) to his prior
24 conduct violates the ex post facto clause of the United States
25 Constitution. Debtor also contends that the reasoning of Rashid
26 v. Powel (In re Rashid), 210 F.3d 201 (3rd Cir. 2000) takes his
27 Restitution Obligation outside the scope of § 523(a)(7).

28

1 To the extent debtor requests a review of the merits of the
2 Dismissal Judgment, we may not ordinarily conduct such a review.
3 This is not a timely appeal from the Dismissal Judgment. An
4 appeal from the denial of Civil Rule 60(b) relief does not bring
5 the underlying judgment up for review. Tennant, 318 B.R. at 866;
6 see also Martinelli v. Valley Bank of Nevada (In re Martinelli),
7 96 B.R. 1011, 1013 (9th Cir. BAP 1988) (noting that an appeal from
8 a denial of a Rule 60(b) motion brings up only the denial of the
9 motion for review, not the merits of the underlying judgment).

10 "A [Civil Rule] 60(b)[] motion guides the balance between
11 'the overriding judicial goal of deciding cases correctly, on the
12 legal and factual merits, with the interests of both litigants
13 and the courts in the finality of judgments.'" Sallie Mae Serv.,
14 LP v. Williams (In re Williams), 287 B.R. 787, 793 (9th Cir. BAP
15 2002) (citation omitted). We have held that "even though [Civil
16 Rule] 60(b) motions are liberally construed, 'there is a
17 compelling interest in the finality of judgments which should not
18 lightly be disregarded.'" Id. (citation omitted). It is the
19 debtor's burden to bring himself within the provisions of Civil
20 Rule 60(b). Martinelli, 96 B.R. at 1013 (finding it was the
21 moving party's burden to bring themselves within the provisions
22 of Civil Rule 60(b)(6)).

23 Although there is a narrow exception to the rule against
24 using Civil Rule 60(b) to review the merits of the underlying
25 judgment when that judgment is shown to have been infected by
26 clear error, no such error has been demonstrated in this
27 instance. McDowell v. Calderon, 197 F.3d 1253, 1255 n. 4 (9th
28 Cir. 1999) (en banc).

1 Confining our review to the bankruptcy court's denial of
2 debtor's motion for relief from the Dismissal Judgment, we
3 conclude that the denial was within the court's discretion.
4 There are six reasons for granting relief from judgment set forth
5 in Civil Rule 60(b):

6 (1) mistake, inadvertence, surprise, or excusable
7 neglect; (2) newly discovered evidence which by due
8 diligence could not have been discovered in time to
9 move for a new trial; (3) fraud...or other misconduct
10 of an adverse party; (4) the judgment is void; (5) the
11 judgment has been satisfied, released, or
12 discharged...; or (6) any other reason justifying
13 relief from the operation of the judgment.

14 A party moving for relief from judgment must make the motion
15 within a reasonable time and, for reasons (1), (2) and (3), the
16 motion shall be made not more than one year after the judgment
17 was entered or taken.

18 The bankruptcy court addressed all six of the enumerated
19 reasons for granting relief from judgment in deciding debtor's
20 motion. First, the bankruptcy court properly denied debtor's
21 motion because it was time-barred under Civil Rule 60(b) (1),
22 (2), and (3) which require a motion to have been brought no
23 longer than one year after the judgment was entered. Debtor's
24 motion was well past the one year. Lake v. Capps (In re Lake),
25 202 B.R. 751, 759 n.8 (9th Cir. BAP 1996). Debtor's invocation
26 of Rule 3008 as an exception to the one-year limitation is
27 unavailing because the motion does not seek reconsideration of
28 the allowance or disallowance of a claim filed under § 501.

Next, the court correctly ruled that debtor's motion did not
satisfy any of the grounds enumerated in Civil Rule 60(b) (4) or
(5). Debtor did not argue that relief from the Dismissal

1 Judgment was warranted because it was void or satisfied. While
2 debtor asserted that the district court had "corrected" the
3 indictment supporting the 1997 conviction, the so-called
4 correction did not alter the prior judgment of conviction and is
5 not so significant as to warrant a conclusion that the judgment
6 of conviction that included the order of restitution should lose
7 prospective effect under Civil Rule 60(b)(5).

8 Lastly, we find the court correctly decided that debtor
9 failed to show the extraordinary circumstances necessary for
10 obtaining relief under Civil Rule 60(b)(6). "The Supreme Court
11 has construed [Civil Rule] 60(b)(6) as providing relief to
12 parties who were confronted with extraordinary circumstances that
13 excused their failure to follow ordinary paths of appeal."
14 United States v. Wyle (In re Pacific Far East Lines, Inc.), 889
15 F.2d 242, 250 (9th Cir. 1989) (noting that where parties have made
16 deliberate litigation choices, Civil Rule 60(b)(6) should not
17 provide a second chance). "'In order to bring himself within the
18 limited area of [Civil] Rule 60(b)(6) a petitioner is required to
19 establish the existence of extraordinary circumstances which
20 prevented or rendered him unable to prosecute an appeal.'" Twentieth Century-Fox Film Corp. v. Dunnahoo, 637 F.2d 1338, 1341
21 (9th Cir. 1981) (citation omitted).

23 Debtor's appeal of the Dismissal Judgment was previously
24 before this Panel. Debtor requested a third time extension to
25 file his opening brief because the Ninth Circuit Court of Appeals
26 had issued an order requiring the district court to issue an
27 order regarding debtor's motion to correct the district court
28 record. We learned, however, that the district court had denied

1 debtor's motion. Accordingly, we denied debtor's third request
2 for a time extension to file his opening brief and dismissed his
3 appeal on January 27, 2006.

4 Debtor contends that it was not until March 2006, after his
5 appeal was dismissed, that the clerk of the district court
6 finally corrected the "previously false and misleading
7 documentary record" in debtor's criminal case. However, the only
8 change we can discern from the record is that the "Redacted
9 Superseding Indictment" was corrected to reflect that it was
10 filed in open court on April 23, 1996, instead of May 28, 1996.
11 That change in the filing date had no effect on the bankruptcy
12 court's findings regarding the nondischargeability of the
13 Restitution Obligation.

14 The letter from the clerk to the debtor dated April 11,
15 2006, states that the final charges against the debtor are
16 "reflected on the...Judgment issued by the court." A review of
17 the Criminal Judgment shows debtor's conviction of crimes under
18 Title 18, and the bankruptcy court found the Restitution
19 Obligation to be excepted from discharge under § 523(a)(13).
20 Debtor acknowledged at the hearing on this matter that the
21 Criminal Judgment against him on Counts 3,4,5,6,7,8 and 11 was
22 still valid.

23 We find that debtor has not met the requirement of
24 "extraordinary circumstances" as defined in Pacific Far East or
25 Twentieth Century-Fox Film. Debtor had the opportunity to
26 follow the normal path of appeal but allowed his appeal to be
27 dismissed. He cannot now have a second bite at the apple.

28

1 In sum, debtor did not meet his burden to show that any of
2 the provisions of Civil Rule 60(b) entitled him to relief from
3 the Dismissal Judgment.

4 **VII. CONCLUSION**

5 We find no clear error or abuse of discretion in the
6 bankruptcy court's denial of debtor's motion for relief from the
7 Dismissal Judgment. Accordingly, we AFFIRM.

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10 KLEIN, Bankruptcy Judge, concurring:

11
12 I join the majority decision and write separately to note
13 the fundamental lack of merit in appellant's ultimate theory for
14 why he should not be required to pay the \$5,026,657.00 in
15 restitution ordered by United States District Judge Lawrence K.
16 Karlton in United States v. Sanders, No. 2:94CR00328-001, U.S.
17 Dist. Ct., E.D. Cal. pursuant to title 18, United States Code.
18 Merit is lacking in two areas.

19 I

20 A chapter 7 discharge does not discharge a debt "for any
21 payment of an order of restitution issued under title 18, United
22 States Code." 11 U.S.C. § 523(a)(13). This provision was added
23 to the Bankruptcy Code by the Act of September 13, 1994, Public
24 Law 103-322, 108 Stat. 2135, and has been continuously in effect
25 since that time. Hence, it was in effect on May 12, 1997, when
26 the appellant filed his chapter 7 case in the District of Oregon.

27 It is plain that Judge Karlton's order of restitution was
28 issued under title 18, United States Code, and that the debt is

1 nondischargeable under § 523(a)(13).

2 Appellant has concocted a theory that § 523(a)(13) does not
3 apply in his case filed May 12, 1997, because the conduct for
4 which he was convicted by criminal judgment imposed January 22,
5 1997, occurred before the enactment of § 523(a)(13) on September
6 13, 1994. His theory is that applying § 523(a)(13) in his case
7 would offend the ex post facto clause of the Constitution.

8 The theory lacks merit for several reasons. First,
9 § 523(a)(13) is a civil statute that applies to all bankruptcy
10 cases filed after its enactment. Second, the criminal
11 restitution orders in question are compensatory, not punitive, in
12 purpose. Third, the cases upon which appellant relies do not
13 support his position.

14 The linchpin of his theory turns on a snippet of ambiguous
15 dictum in a Third Circuit decision suggesting that § 523(a)(13)
16 cannot be applied retroactively. Rashid v. United States (In re
17 Rashid), 210 F.3d 201, 204 (3rd Cir. 2000). There, both the
18 order of restitution and the bankruptcy case were filed before
19 enactment of § 523(a)(13). The retroactivity to which the Third
20 Circuit was referring related to the time the Rashid bankruptcy
21 case was filed on July 6, 1994, which was before the September
22 13, 1994, enactment of § 523(a)(13), which is a conventional
23 application of the effect of an amendment to the Bankruptcy Code.
24 Id. at 203. Thus, the restitution obligation in question was
25 assessed under § 523(a)(7), which makes nondischargeable fines,
26 forfeitures, and penalties that are payable to and for the
27 benefit of a governmental unit and that are not compensation for
28 actual pecuniary loss and was held to be discharged.

1 Our subsequent decision in Warfel v. City of Saratoga (In re
2 Warfel), 268 B.R. 205 (9th Cir. BAP 2001), involved a nonfederal
3 restitution judgment that we ruled was nondischargeable under
4 § 523(a)(7). There was no consideration of § 523(a)(13) because
5 the order of restitution was not issued under title 18, United
6 States Code. We cited Rashid only for the purpose of
7 illustrating constructions of § 523(a)(7).

8 In short, nothing in either Rashid or Warfel supports
9 appellant's theory that § 523(a)(13) does not apply in bankruptcy
10 cases filed in 1997. The order requiring restitution to the
11 victims of appellant's crimes is unambiguously compensatory and
12 not punitive in nature. There is simply no ex post facto issue
13 as to § 523(a)(13).

14
15 II

16 Once appellant has distracted attention from § 523(a)(13),
17 his theory is that his 1997 discharge in his no-asset, no-bar-
18 date case operated to discharge the restitution obligations that
19 were not scheduled in that case. That is what brought the
20 court's focus to §§ 523(a)(2) and (a)(4), because
21 nondischargeability actions on those theories are excused from
22 the strict filing deadlines under § 523(c) by virtue of
23 § 523(a)(3)(B). Beaty v. Selinger (In re Beaty), 306 F.3d 914,
24 921-23 (9th Cir. 2002). A judgment of nondischargeability was
25 entered and became final.

26 We are now affirming the bankruptcy court's denial of a
27 motion for relief from that judgment in which appellant wants the
28 ability to relitigate the judgment. The revision to the

1 indictment that seems to have been accomplished by the district
2 court clerk appears to be insubstantial and without effect on the
3 criminal conviction and attendant order of restitution and, thus,
4 is ineligible for relief under Civil Rule 60(b)(5).

5 While our analysis is correct, it is also unnecessary
6 because the §§ 523(a)(2) and (a)(4) theories are mere capillaries
7 compared to the jugular vein represented by § 523(a)(13).

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