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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. HI-11-1635-PaJuH
)	
SUNRA COFFEE, LLC,)	Bankr. No. 09-01909
)	
Debtor.)	Adv. Proc. 10-90009
_____)	
)	
MICHAEL NEKOBA,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
HAWAII NATIONAL BANCSHARES, INC.,)	
dba HAWAII NATIONAL BANK,)	
)	
Appellee.)	
_____)	

Submitted Without Oral Argument
on July 20, 2012²

Filed - August 21, 2012

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

Honorable Robert J. Faris, Chief Bankruptcy Judge, Presiding

Appearances: Jerrold K. Guben and Jeffery Steven Flores of
O'Connor Playdon & Guben LLP on brief for
Appellant; Keith Y. Yamada and Theodore D. C. Young
of Cades Schutte LLP on brief for Appellee.

Before: PAPPAS, JURY and HOLLOWELL, 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.

² Pursuant to Rule 8012, in an order entered on May 14,
2012, a motions panel unanimously determined after examination of
the briefs and record that oral argument was not needed.

1 Appellant Michael Nekoba ("Nekoba") appeals a final judgment
2 and subsequent charging order entered by the bankruptcy court in
3 favor of Appellee Hawaii National Bank ("HNB") and against him.
4 We AFFIRM.

5 **I. FACTS**

6 The facts in this case are undisputed.

7 Debtor Sunra Coffee, LLC ("Sunra") owns and operates coffee
8 farms and engages in the production of coffee products in Hawaii.
9 Nekoba is a certified public accountant and member of Sunra.
10 Among Sunra's properties was a 214-acre development known as the
11 Royal Hualalai Gardens (the "Property"). Sunra obtained several
12 loans from HNB secured by mortgages against the Property. Nekoba
13 signed commercial guarantees of Sunra's obligations to HNB on the
14 loans secured by the Property. ER at 34-36.

15 HNB filed a complaint in Hawaii state court on December 3,
16 2008, alleging that Sunra defaulted on its obligations to HNB
17 under the notes and mortgages. ER at 1. Hawaii Nat'l Bank v.
18 Sunra Coffee, civ. no. 08-1-00377 (Third Circuit, State of Hawaii)
19 (the "State Court Action"). Nekoba was named as a defendant in
20 the State Court Action, and was served with a summons and
21 complaint. ER at 32, EER at 10. Nekoba concedes that he did not
22 file a counterclaim against HNB, nor a cross-claim against Sunra
23 for indemnification or contribution, in the State Court Action.
24 Nekoba Op. Br. at 3. Indeed, Nekoba made no appearance at all in
25 the State Court Action. ER at 34. On August 3, 2009, the state
26 court entered a default judgment against Sunra and Nekoba for
27 \$9,249,245.89, plus interest from February 20, 2009, of \$4,233.90
28 per diem. ER at 33, 36.

1 Sunra filed a petition for relief under chapter 11 on
2 August 21, 2009. An official committee of unsecured creditors was
3 appointed on September 2, 2009 (the "Committee"). Bankr. dkt.
4 no. 28.

5 HNB filed a motion for relief from the automatic stay on
6 December 1, 2009, seeking an order allowing it to proceed to
7 foreclose on the Property. Without opposition, the bankruptcy
8 court granted the motion on January 26, 2010. ER at 41. The
9 order granting relief from stay explicitly stated that the stay
10 did not apply to Nekoba. ER at 44.

11 On January 19, 2010, the Committee filed a motion for
12 appointment of a chapter 11 trustee. Bankr. dkt. no. 166. The
13 bankruptcy court granted the motion on February 18, 2010. Bankr.
14 dkt. no. 185. David Farmer ("Farmer") was appointed to serve as
15 chapter 11 trustee on February 22, 2010. Bankr. dkt. nos. 189,
16 194.

17 Farmer immediately removed the State Court Action to the
18 bankruptcy court on February 24, 2010. See Rule 9027(a)(2)(B).
19 ER at 48. In the removal notice, Farmer consented to the entry of
20 final orders and a judgment by the bankruptcy court. ER at 51.
21 The removal notice was served on Nekoba. EER at 28. Nekoba did
22 not oppose the removal.

23 The Property was auctioned at a foreclosure sale on March 30,
24 2010. ER at 71. HNB submitted the only bid for \$9.5 million and
25 purchased the Property. Id. The bankruptcy court approved the
26 sale of the Property to HNB on April 30, 2010, as part of the
27 removed action. ER at 78. Although Nekoba had received notice of
28 the hearing concerning approval of the sale, he did not appear

1 either in person or by counsel. ER at 254. The bankruptcy court
2 issued a Writ of Possession on June 15, 2010, allowing HNB to take
3 Possession of the Property. ER at 307.

4 HNB then sought the entry of a deficiency judgment against
5 Sunra and Nekoba for \$2,405,247.82, the difference between the
6 total amount of the judgment debt, including interest and
7 attorney's fees of \$11,905,247.82, and the credit bid it made at
8 the foreclosure sale of \$9,500,000. ER at 339. No opposition to
9 this request was filed by either Sunray or Nekoba, nor did they
10 appear at the hearing on HNB's motion for the deficiency judgment
11 held on September 17, 2010. ER at 417. The bankruptcy court
12 granted the unopposed motion on September 23, 2010; the Order and
13 Final Judgment Re: HNB's Motion for Deficiency Judgment and
14 Attorneys' Fees and Costs provided, in part, that the court:

15 Approves HNB's request for a deficiency judgment, and
16 this document shall constitute entry of judgment in
17 favor of Plaintiff HNB and against each of the named
18 defendants, to wit: Defendants Sunra Coffee, LLC, ADI
LLC, and Michael Nekoba, aka Michael H. Nekoba, in the
amount of \$2,405,247.82. This order shall constitute a
final judgment[.]

19 Judgment, September 23, 2010 at 2-3, ER at 417-18 (the
20 "Judgment"). The Judgment was not appealed, nor was collection of
21 the Judgment stayed. ER at 418. No party, including Nekoba, has
22 ever sought review or reconsideration of the Judgment.

23 Although a named defendant in the adversary proceeding who
24 was served with all papers and pleadings filed in the proceeding,
25 Nekoba never participated, personally or through counsel, until he
26 was compelled to attend his oral examination in January 2011. At
27 the examination, Nekoba disclosed his assets, including several
28 properties he purportedly held in tenancy by the entireties with

1 his spouse. Nekoba suggested that those properties, including
2 those owned by Tropic Land, LLC, were exempt from execution
3 because he and his wife were not jointly obligated on his debt to
4 HNB. ER at 440.

5 On March 7, 2011, HNB filed a motion for entry of a charging
6 Order against Nekoba's membership interest in Tropic Land, LLC,
7 for satisfaction of the Judgment debt. A hearing on the motion
8 was scheduled for April 19, 2011. ER at 421. Meanwhile, on
9 March 14, 2011, the bankruptcy court granted HNB's ex parte motion
10 for a Writ of Execution After Judgment directed at Nekoba's
11 personal and real property. ER at 430.

12 On April 4, 2011, Nekoba filed an Opposition to the issuance
13 of the Writ of Execution and requested an evidentiary hearing.
14 Nekoba argued that property held by tenancy by the entirety must
15 be excluded from satisfaction of HNB's judgment against him alone.
16 ER at 441. Nekoba requested that the bankruptcy court delay
17 execution of the Writ pending an evidentiary hearing where it
18 could "determine which of the claimed tenancy by the entirety
19 personal properties holding[s] are excluded from execution by the
20 judgment creditors[.]" ER at 444. On April 19, 2011, the court
21 granted Nekoba's request for an evidentiary hearing to be held
22 July 5, 2011. Adv. dkt. nos. 114, 115.

23 On June 23, 2011, the United States Supreme Court decided
24 Stern v. Marshall, 121 S.Ct. 2594 (2011).

25 HNB and Nekoba submitted briefs to the bankruptcy court. HNB
26 argued that, as to Tropic Land, LLC, Nekoba had owned his member
27 interest in that company for five years as an individual before
28 transferring it to him and his wife on September 30, 2010, seven

1 days after entry of the Judgment against him on September 23,
2 2010. ER at 450. Nekoba's position was that the funds used to
3 purchase the Tropic Land, LLC, interests came from other tenancy
4 by the entireties interests. ER at 462.

5 At the evidentiary hearing on July 5, 2011, Nekoba for the
6 first time challenged the subject matter jurisdiction and
7 Constitutional authority of the bankruptcy court to enter the
8 Judgment against him based upon Stern v. Marshall. Hr'g Tr. 4:10-
9 23, July 5, 2011, ER at 474. Following Nekoba's testimony
10 regarding his various assets, the court invited the parties to
11 submit written closing arguments. Hr'g Tr. 100:23, ER at 570.

12 HNB submitted its closing arguments on July 22, 2011,
13 presenting its arguments why Nekoba's assets were subject to
14 seizure by execution. HNB's brief made no reference to Nekoba's
15 Stern v. Marshall argument. ER at 590. In contrast, Nekoba's
16 closing argument concentrated solely on the Stern v. Marshall
17 issue. ER at 599.

18 The bankruptcy court entered detailed Findings of Fact and
19 Conclusions of Law on October 18, 2011. ER at 740. In addition
20 to ruling against Nekoba on the merits, the court decided that
21 Nekoba could not challenge the court's jurisdiction or authority
22 to enter a judgment once it has become final:

23 A party cannot challenge the court's subject matter
24 jurisdiction after the judgment has become final.
25 Travelers Indem. Co. v. Bailey, [557 U.S. 137, 152-53
26 (2009)]; Ins. Corp. Of Ireland v. Compagnie des Bauxite
27 de Guinee, 456 U.S.694, 702 n.9 (1982); Chicot County
Drainage Dist. V. Baxter State Bank, 308 U.S. 371, 375
(1940). Mr. Nekoba did not appeal the [Judgment] and it
is now final. Mr. Nekoba can no longer question the
court's subject matter jurisdiction.

28 Conclusion of Law 3b, October 18, 2011, ER at 748.

1 As to the constitutional authority of a bankruptcy judge to
2 enter a final judgment in these proceedings, the court ruled:

3 Stern v. Marshall does not limit the bankruptcy court's
4 subject matter jurisdiction. . . . Stern v. Marshall
5 deals with the power of the bankruptcy court to enter a
6 final judgment. . . . [E]ven under Stern v. Marshall,
7 the bankruptcy court can enter judgment against a
8 consenting party.

9 Conclusion of Law 3a, October 18, 2011. ER at 747-48. The court
10 went on to observe that the adversary proceeding itself was
11 clearly a core proceeding, because it primarily dealt with HNB's
12 claim against the debtor. Then the court ruled that, even if the
13 proceeding was non-core as to Nekoba, he had impliedly consented
14 by his conduct. Conclusion of Law 9b, October 18, 2011.

15 On November 11, 2011, the bankruptcy court entered its Order
16 Granting Plaintiff's Motion for Charging Order and Order
17 Sustaining in Part and Overruling in Part Defendant Michael
18 Nekoba's Opposition to Plaintiff's Ex Parte Motion for Writ of
19 Execution After Judgment (the "Charging Order"). ER at 789. The
20 court ruled that HNB was entitled to avoidance of the transfer of
21 Nekoba's interest in Tropic Land, LLC, and that the interests of
22 Nekoba "shall be used to satisfy the Judgment in the amount of
23 \$2,405, 247.82." ER at 791.

24 Nekoba filed a timely appeal of the order on November 9,
25 2011.

26 **II. JURISDICTION**

27 As discussed below, Nekoba challenges the subject matter
28 jurisdiction of the bankruptcy court and Constitutional power to
enter the Judgment in this adversary proceeding. Nekoba has not
challenged the Panel's jurisdiction to decide this appeal under

1 28 U.S.C. § 158.

2 **III. ISSUE**

3 Whether the bankruptcy court erred in holding that Nekoba
4 could not challenge the court's subject matter jurisdiction to
5 enter the Judgment after it became final.

6 **IV. STANDARD OF REVIEW**

7 We review de novo questions involving the subject matter
8 jurisdiction of the bankruptcy court. Cal. Franchise Tax Bd. v.
9 Wilshire Courtyard (In re Wilshire Courtyard), 459 B.R. 416, 423
10 (9th Cir. BAP 2011).

11 **V. DISCUSSION**

12 In this appeal, Nekoba asserts that, under Stern v. Marshall,
13 a bankruptcy judge, as an Article I judge, does not have subject
14 matter jurisdiction to adjudicate state law "private right"
15 disputes between two nondebtor parties, and therefore, the
16 bankruptcy court erred when it entered the order in this case
17 granting HNB a money judgment against Neboka.³ However, we need

18 _____
19 ³ In his Opening Brief, Nekoba invokes various statements in
20 Stern to support his attack that an Article I judge cannot enter a
21 final judgment in a non-core adversary proceeding in which he did
22 not consent to entry of a final judgment. The attack, in the
23 opening brief, appears to fall into two areas. First, Nekoba
24 suggests that the bankruptcy court did not have any subject matter
25 jurisdiction, because the court did not have "related to"
26 jurisdiction and, if it did, he did not consent. Second, applying
27 Stern, an Article I judge cannot enter final judgment under the
28 facts of this case. In short, Nekoba's Constitutional argument in
the Opening Brief is unfocused, simply that Stern does not allow
entry of final judgment in a non-core case where the parties do
not consent to entry of that judgment. Such an overbroad
interpretation is not supported in Stern.

26 Nekoba goes into a more precise Constitutional challenge in
27 his Reply Brief, where he shifts his attention from the final
28 judgment to the Writ of Execution, arguing in more specific detail
how entry of an order in a "supplementary proceeding" runs afoul

(continued...)

1 not endorse nor reject Neboka's contention, because we agree with
2 the bankruptcy court that it is simply too late for Neboka to
3 collaterally attack the bankruptcy court's subject matter
4 jurisdiction, because the Judgment is clearly final.

5 First, Nekoba's assertion that the Supreme Court decision in
6 Stern was somehow a wide-ranging limitation on the authority of
7 Article I courts to adjudicate private rights disputes overstates
8 the Court's holdings in that limited decision. In Stern, the
9 Supreme Court held that a bankruptcy court "lacked the
10 constitutional authority to enter a final judgment on a state law
11 counterclaim that is not resolved in the process of ruling on a
12 creditor's proof of claim" in a bankruptcy case. Stern, 131 S.Ct.
13 at 2620. The Court instructed that, though 28 U.S.C.
14 § 157(b)(2)(C) expressly authorized the bankruptcy court to decide
15 the merits of the bankruptcy estate's counterclaim against a
16 creditor, such an exercise of judicial power by an Article I
17 bankruptcy judge violated the Constitution, because "Congress may
18 not bypass Article III simply because a proceeding may have some
19 bearing on a bankruptcy case; the question is whether the action
20 at issue stems from the bankruptcy itself or would necessarily be
21 resolved in the claims allowance process." Id. at 2618.

22 However, in Stern, the Court emphasized that its holding was
23 a "narrow one," id. at 2620, that the constitutional infirmity in
24 the bankruptcy court's reliance upon 28 U.S.C. § 157(b)(2)(C) was

25 _____
26 ³(...continued)
27 of Stern. But as we discuss below, his argument is too little,
28 too late, and we will not examine arguments that were neither
raised in the bankruptcy court nor in the appellant's opening
brief.

1 limited to "one isolated respect," id., that the Court doubted its
2 decision would generate significant practical consequences, and
3 that the Court "[did] not think that removal of counterclaims such
4 as [the debtor's] from core bankruptcy jurisdiction meaningfully
5 changes the division of labor in the current statute" Id.
6 And more importantly for our purposes in this appeal, Stern also
7 makes clear that 28 U.S.C. § 157, the statute considered by the
8 Court, merely "allocates the authority to enter final judgment
9 between the bankruptcy court and the district court," and contrary
10 to Nekoba's position here, "[t]hat allocation does not implicate
11 questions of subject matter jurisdiction." Id. at 2607.

12 Nekoba's arguments invoking Stern are all premised on an
13 assumption that a Constitutional challenge to the bankruptcy
14 court's subject matter jurisdiction may be advanced at any stage
15 of the proceedings, including an appeal from an order entered long
16 after the judgment in question became final. Nekoba's Op. Br. at
17 14. Nekoba provides unconvincing authority for this assumption,⁴
18 however, and it would appear to directly contradict a well-

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20 ⁴ Nekoba, in the Opening Br. at 14, argues that under Civil
21 Rule 60(b)(4), "a party may challenge the subject matter
22 jurisdiction of the Court at any time." Nekoba badly misconstrues
23 this provision. It does not give the litigant an unfettered right
24 to challenge jurisdiction "at any time." It simply provides the
25 proper (and only) way of challenging subject matter jurisdiction
26 after entry of final judgment. United Student Aid Funds, Inc. v.
27 Espinosa, 130 S.Ct. 1367, 1370 (2010) (quoting Traveler's Indem.
28 Co., 129 S.Ct at 2198, for its holding that final unappealed
judgments "stand in the way of challenging enforceability," but
observing that Rule 60(b)(4) allows a party to seek relief from a
final judgment that may be void for jurisdictional error).
Indeed, the bankruptcy court in this appeal ruled that Neboka
could not challenge subject matter jurisdiction long after entry
of an unappealed final judgment except through a Civil Rule
60(b)(4) motion, which Nekoba never brought. Conclusions of Law
¶¶ 2 and 3b. We agree with the bankruptcy court's ruling.

1 established rule.

2 There is no timeless right to challenge the subject matter
3 jurisdiction of the trial court that entered a final judgment
4 against the challenger. Indeed, the Supreme Court has squarely
5 held that, subject to narrow exceptions not applicable here, a
6 bankruptcy court's final orders are not subject to a later,
7 collateral attack based upon a challenge to its subject matter
8 jurisdiction. Traveler's Indem. Co. v. Bailey, 557 U.S. 137, 147
9 (2009). As long as a party to an action is given a fair chance to
10 challenge the bankruptcy court's subject matter jurisdiction
11 during the proceedings, it cannot attack it later by resisting the
12 enforceability of its orders. Id. at 2206, citing Ins. Corp. of
13 Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9
14 (1982) ("A party that has had an opportunity to litigate the
15 question of subject matter jurisdiction may not . . . reopen that
16 question in a collateral attack upon an adverse judgment.");
17 Chicot County Drainage Dist. V. Baxter State Bank, 308 U.S. 371,
18 375 (1940). The Ninth Circuit has amplified this rule in several
19 of its decisions. See, e.g., City of S. Pasadena v. Mineta,
20 284 F.3d 1154, 1157 (9th Cir. 2002) ("Even objections to subject
21 matter jurisdiction, which may be raised at any time, even on
22 appeal, . . . may not be raised for the first time by way of
23 collateral challenge[.]"); Trulis v. Barton, 107 F.3d 685, 691
24 (9th Cir. 1995) ("Since the plaintiffs never appealed the
25 bankruptcy court's confirmation order, the order is a final
26 judgment and plaintiffs cannot challenge the bankruptcy court's
27 jurisdiction over the subject matter.").

28 Put another way, Nekoba's subject matter jurisdiction

1 challenge in this appeal comes too late. As the Supreme Court has
2 noted, Constitutional challenges to judgments must be timely: "'No
3 procedural principle is more familiar to this Court than that a
4 constitutional right,' or a right of any other sort, 'may be
5 forfeited . . . by the failure to make timely assertion of the
6 right before a tribunal having jurisdiction to determine it.'" Stern,
7 131 S.Ct. at 2608, quoting United States v. Olano, 507 U.S.
8 725, 731 (1993).

9 In this case, it is unquestioned that Nekoba had ample
10 opportunity to appear in the adversary proceeding and assert a
11 challenge to the bankruptcy court's exercise of subject matter
12 jurisdiction over HNB's claims against him. He did not oppose
13 removal of the state court action to the bankruptcy court.
14 Likewise, though he was give notice of the requests for entry of
15 both the original and deficiency judgment against him, he did not
16 object. When entered, he did not appeal those judgments.
17 Instead, his first appearance in the bankruptcy court was six
18 months later when he sought an evidentiary hearing, not to
19 challenge any judgment, but to seek a ruling that certain
20 properties he owned with his wife were not subject to the Writ of
21 Execution issued in favor of HNB. It was not until the July 5,
22 2011 hearing, and the Supreme Court's decision in Stern, that he
23 finally altered his position addressing the merits of the
24 proceedings and attacked the bankruptcy court's subject matter
25 jurisdiction.

26 Nekoba seemingly recognizes that his attack on the bankruptcy
27 court's jurisdiction to enter the judgments is time-barred.
28 Apparently to counter this, on appeal, he now tardily advances an

1 argument that the bankruptcy court lacked jurisdiction to enter
2 the post-judgment order:

3 While the September 23, 2010 Final Judgment in Adv. No.
4 10-9009 was rendered before Stern v. Marshall, and might
5 not be subject to challenge even if an Article I judge
6 entered judgment against Mr. Nekoba, that is not the
7 case with the enforcement of the judgment, which began
8 on December 30, 2010, when HNB initiated its Rule 69
9 supplemental proceedings.

10 Appellant's Reply Br. at 11. This is the first time in the
11 bankruptcy court or on appeal, that Nekoba suggests that the
12 proceedings relating to the Writ of Execution are somehow separate
13 from those resulting in entry of the Judgment. Up to that point
14 in this action, Nekoba has addressed the Writ of Execution as a
15 legal consequence of the Judgment, not as a separate proceeding
16 requiring Stern analysis. In the Reply Brief, Nekoba offers an
17 extended discussion of how supplementary proceedings to aid in
18 collection of a judgment fall within the prohibited zone of Stern:
19 "The Rule 69 supplemental proceeding raises the issue of whether
20 during the enforcement phase of an adversary proceeding judgment,
21 does the Stern v. Marshall decision entitle Mr. Nekoba to an
22 Article III judge to enforce the writ of execution." Appellant's
23 Reply Brief at 15.

24 Of course, as can be seen from Nekoba's own words, this is a
25 new issue raised for the first time only in his Reply Brief. This
26 argument was not made to the bankruptcy court, nor does it appear
27 in his Opening Brief in this appeal. An appellant may not raise
28 arguments on appeal that were not raised and adequately argued in
29 the bankruptcy court. Conn. Gen. Life Ins. Co. v. New Images of
30 Beverly Hills, 321 F.3d 878, 882 (9th Cir. 2003) ("These arguments
31 are raised for the first time on appeal, and because they were

1 never argued before the district court, we deem them waived.");
2 Concrete Equip. Co. v. Virgil Bros. Constr., Inc. (In re Virgil
3 Bros. Constr., Inc.), 193 B.R. 513, 520 (9th Cir. BAP 1996) ("The
4 rule is well established that an issue not raised by a party in
5 the court below will not be considered on appeal, absent
6 exceptional circumstances."). Moreover, by waiting to make his
7 argument in a reply, without mentioning it in his Opening Brief,
8 he impermissibly prejudices HNB's ability to respond to it.
9 Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024, 1033 (9th
10 Cir. 2008) (deeming waived issues not raised in the opening
11 brief).

12 In sum, we decline to consider Neboka's Stern argument, in
13 this appeal.

14 VI. CONCLUSION

15 Nekoba could not wait until long after the Judgment was final
16 to collaterally attack the subject matter jurisdiction, or
17 Constitutional power, of the bankruptcy court to enter that
18 Judgment. Since this is the sole basis Neboka offers to reverse
19 the bankruptcy court's order, we AFFIRM.

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