

OCT 24 2008

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NOT FOR PUBLICATION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

5	In re:	)	BAP Nos.	NV-08-1139-DHMo ¹
		)		NV-08-1140-DHMo
6	FRANK A. ROMANO and	)		NV-08-1142-DHMo
	MARIA ROMANO,)		
7		)	Bk. No.	92-24785
	Debtors.)		
8		)	Adv. Nos.	92-02265
		)		92-02273
9	FRANK A. ROMANO and)		
	MARIA ROMANO,	)	Ref. Nos.	08-9
10		)		08-10
	Appellants,	)		08-11
11)		
	v.	)	M E M O R A N D U M²	
12)		
	RUDOLPH LaVECCHIA and)		
13	RUDOLPH M. LaVECCHIA,)		
)		
14	Appellees.)		
15)		

Argued and Submitted on October 16, 2008
at Pasadena, California

Filed - October 24, 2008

¹Although three notices of appeal were filed, the Clerk consolidated the appeals at appellants' request by order filed August 7, 2008. The order on appeal is the same order in each appeal. (It appears that the order was entered in the main bankruptcy case and in two adversary proceedings.) Although the Clerk's order notes that the parties are identical for each appeal, the appellees are not parties to Adv. No. 92-02273, and the remaining parties to Adv. No. 92-02273 are not parties to the appeal. The bankruptcy court docket for Adv. No. 92-02273 reflects that it was consolidated with Adv. No. 92-02265 on November 9, 1993, on appellants' motion.

²This 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 Appeal from the United States Bankruptcy Court
2 for the District of Nevada

3 Honorable Bruce A. Markell, Bankruptcy Judge, Presiding
4

5 Before: DUNN, HOLLOWELL and MONTALI, Bankruptcy Judges.
6

7 The bankruptcy court determined that a 1995 judgment was no
8 longer enforceable where the judgment creditors failed to renew
9 it until 2002, after the expiration of the six-year deadline set
10 forth in Nev. Rev. Stat. § 11.190(1)(a). The judgment creditors
11 appeal, asserting that the judgment debtors had waived the right
12 to raise the timeliness of the 2002 "renewal" where they did not
13 raise it until a subsequent renewal was attempted in 2008. We
14 AFFIRM.
15

16 **I. FACTS**

17 Frank A. Romano and Maria Romano (the "Romanos") were
18 debtors in a chapter 11 bankruptcy case filed in the Bankruptcy
19 Court for the District of Nevada in 1992. On September 19, 1995,
20 in an adversary proceeding commenced by the Romanos, the
21 bankruptcy court entered a judgment ("Judgment") in the amount of
22 \$10,175,871.21 in favor of the Romanos and against Rudolph
23 LaVecchia and Rudolph M. LaVecchia (the "LaVecchias"). The
24 LaVecchias appealed to this panel, and we affirmed on July 16,
25 1996.

26 On January 31, 1996, the bankruptcy court granted the
27 Romanos' motion to certify the Judgment for registration in other
28 jurisdictions, and ordered the Bankruptcy Clerk to certify the

1 Judgment "whenever presented for certification, until . . .
2 further order of the Court." The Judgment was recorded in the
3 state of Hawaii and in Broward County, Florida in 1998.³

4 The Romanos, through counsel, executed an affidavit on April
5 3, 2002 ("April 2002 Affidavit"), to support renewal of the
6 Judgment ("First Renewal"). The April 2002 Affidavit was served
7 on the LaVecchias on April 4, 2002, and filed with the bankruptcy
8 court on April 5, 2002. The Romanos, through counsel, executed a
9 second "Affidavit of Renewal" on March 6, 2008 ("March 2008
10 Affidavit"), to support renewal of the Judgment ("Second
11 Renewal"). Also on March 6, 2008, the March 2008 Affidavit was
12 served on the LaVecchias and filed with the bankruptcy court.

13 On April 17, 2008, the LaVecchias filed a motion to "vacate"
14 both the First Renewal and the Second Renewal, and requested that
15 the bankruptcy court enter an order stating that the Judgment had
16 expired on the basis that the April 2002 Affidavit was filed
17 outside the time limits for renewal of the Judgment under Nevada
18 law. The Romanos countered that the First Renewal could not be
19 vacated, because Fed. R. Civ. P. 60(b) requires that a motion to
20 vacate the "renewed judgment" must be brought within a reasonable
21 time, and that a six-year delay in challenging the First Renewal
22 is inherently not within a reasonable time. The Romanos also
23 asserted that the time limit for renewing the Judgment ran not
24 from September 19, 1995, the date the Judgment was entered, but

26
27 ³The record reflects that the Judgment also was registered
28 in the states of New York and Georgia, although when is not
disclosed.

1 from the date the Judgment was affirmed on appeal.⁴

2 At the hearing on the LaVecchias' motion, the bankruptcy
3 court informed the parties that, to the extent the motion sought
4 declaratory relief, the LaVecchias were required to proceed by
5 adversary proceeding rather than by motion in a contested matter.
6 However, with the Romanos' express consent, the bankruptcy court
7 allowed the dispute to proceed on the motion.

8 The bankruptcy court applied Fed. R. Civ. P. 69, made
9 applicable by Fed. R. Bankr. P. 7069, and determined that the
10 First Renewal was untimely, where the April 2002 Affidavit was
11 filed more than six years after the date the Judgment was
12 entered, with the result that the Judgment was no longer
13 enforceable. The bankruptcy court did not vacate either the
14 First Renewal or the Second Renewal, and declined to make a
15 determination regarding the validity of the Judgment in any other
16 jurisdiction in which the Judgment had been recorded.

17 The Romanos appealed, asserting that the bankruptcy court
18 erred when it decided the LaVecchias' motion under Fed. R. Civ.
19 P. 69 rather than Fed. R. Civ. P. 60(b).

21 ⁴Relying on St. Paul Fire & Marine Ins. Co. v. Cunningham,
22 257 F.2d 731 (9th Cir. 1958), the Romanos argued before the
23 bankruptcy court that the First Renewal was timely, because "the
24 term judgment means a 'final judgment' entered upon final
25 determination of the appeal," and because the Judgment was
26 affirmed on appeal less than six years before the April 2002
27 Affidavit was filed. The Romanos have abandoned this position on
28 appeal, and for good reason. Cunningham and the other cases the
Romanos cited in support of this argument in their opposition to
the LaVecchias' motion relied on Cal. Code Civ. Proc. § 1049.
The Judgment was entered in a federal court, pursuant to the
Federal Rules of Civil Procedure and the Federal Rules of
Bankruptcy Procedure.

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
3 §§ 1334 and 157(b) (2) (O) and by explicit consent of the parties.
4 We have jurisdiction pursuant to 28 U.S.C. § 158.
5

6 **III. ISSUE**

7 Whether the bankruptcy court erred when it determined as a
8 matter of law that the Judgment was no longer enforceable.
9

10 **IV. STANDARDS OF REVIEW**

11 We review a bankruptcy court's interpretation of state law
12 de novo. State Bd. of Equalization v. Leal (In re Leal), 366
13 B.R. 77, 80 (9th Cir. BAP 2007). When interpreting state law, we
14 follow the decisions of the highest state court. Security Pac.
15 Nat'l Bank v. Kirkland (In re Kirkland), 915 F.2d 1236, 1238 (9th
16 Cir. 1990). Whether compliance with a given statute or rule has
17 been established is generally a question of fact which we review
18 for clear error. Heath v. Am. Express Travel Related Serv. (In
19 re Heath), 331 B.R. 424, 428-29 (9th Cir. BAP 2005).
20

21 **V. DISCUSSION**

22 The bankruptcy court ruled that the Judgment no longer is
23 enforceable against the LaVecchias based upon the Romanos'
24 failure to renew the Judgment within the time limit set forth in
25 Nev. Rev. Stat. § 11.190(1) (a). In reaching its decision, the
26 bankruptcy court applied Fed. R. Civ. P. 69. The Romanos contend
27 this was error, because the bankruptcy court instead should have
28 applied Fed. R. Civ. P. 60(b). The Romanos further contend that

1 a proper application of Fed. R. Civ. P. 60(b) would have led to a
2 determination that the LaVecchias had waived any defect in the
3 First Renewal by failing to raise it until 2008. Ultimately, we
4 conclude that the bankruptcy court properly applied Fed. R. Civ.
5 P. 69 and applicable Nevada law for the following reasons.

6 A. Fed. R. Civ. P. 69 and Nevada Law

7 Fed. R. Civ. P. 69 sets forth the procedure for enforcing a
8 money judgment entered by a federal court. Wright & Miller,
9 Federal Practice and Procedure: Civil 2d § 3011. Fed. R. Civ. P.
10 69 applies pursuant to Fed. R. Bankr. P. 7069.

11 Fed. R. Civ. P. 69 provides:

12 Rule 69. Execution

13 (a) In General.

14 (1) Money Judgment; Applicable Procedure. A money
15 judgment is enforced by a writ of execution, unless the
16 court directs otherwise. The procedure on
17 execution--and in proceedings supplementary to and in
aid of judgment or execution--must accord with the
procedure of the state where the court is located, but
a federal statute governs to the extent it applies.

18 Thus, state law governs the procedure for execution on a judgment
19 in the absence of an applicable federal statute. There is no
20 relevant federal statute we have been able to locate with regard
21 to the renewal of judgments. The parties agree that Nevada law
22 governs the enforcement of the Judgment.

23 Nev. Rev. Stat. § 21.050 provides, in relevant part: "Where
24 a judgment requires the payment of money or the delivery of real
25 or personal property, the same shall be enforced in those
26 respects by execution." Further, "the party in whose favor
27 judgment is given may, at any time before the judgment expires,
28 obtain the issuance of a writ of execution for its

1 enforcement. . . .” Nev. Rev. Stat. § 21.010. However, “[t]he
2 writ ceases to be effective when the judgment expires.” Id.
3 Once the judgment has expired, it is no longer enforceable.

4 Under Nevada law, an action to recover on a judgment must be
5 commenced within six years. Nev. Rev. Stat. § 11.190(1)(a).
6 Similarly, actions to renew judgments must be undertaken within
7 the six-year limitation period. Id.; Leven v. Frey, 168 P.3d
8 712, 714 n.2 (Nev. 2007), citing Evans v. Samuels, 75 P.3d 361
9 (Nev. 2003).

10 Nev. Rev. Stat. § 17.214 sets forth the procedure for
11 renewing a judgment in Nevada. As relevant to the dispute before
12 us, Nev. Rev. Stat. § 17.214 provides:

13 1. A judgment creditor or his successor in interest
14 may renew a judgment which has not been paid by:

15 (a) Filing an affidavit with the clerk of the
16 court where the judgment is entered and docketed,
**within 90 days before the date the judgment expires by
limitation.**

17 2. The filing of the affidavit renews the judgment to
18 the extent of the amount shown due in the affidavit.

19 4. Successive affidavits for renewal may be filed
20 within 90 days before the preceding renewal of the
judgment expires by limitation.

21 (emphasis added).

22 As emphasized in the above quoted text, in order to renew a
23 judgment which has not been paid, a judgment creditor in Nevada
24 must file a renewal affidavit before the judgment expires.

25 Strict compliance with the statutory provision is required.

26 Leven v. Frey, 168 P.3d at 713-14 and 717-18. The Judgment was
27 entered September 19, 1995. Under Nev. Rev. Stat.

28 § 17.214(1)(a), the first affidavit of renewal was required to be

1 filed between June 21, 2001, and September 19, 2001. The April
2 2002 Affidavit was filed outside the 90-day window. As a result,
3 and as a matter of law, the Judgment expired September 20, 2001.

4 B. Fed. R. Civ. P. 60(b) and Waiver

5 The Romanos argue that the bankruptcy court erred when it
6 failed to apply Fed. R. Civ. P. 60(b) to find that the LaVecchias
7 had waived the right to assert that the First Renewal was
8 untimely by waiting an unreasonable length of time before filing
9 their motion. They make several arguments in support of this
10 position.

11 We note at the outset the record reflects that the
12 bankruptcy court specifically addressed the waiver issue:

13 [T]here is no duty on behalf of the defendants to rush
14 into court . . . and seek some form of relief or
declaration as to [the First Renewal].

15 They are the beneficiaries of a Statute of Limitations
16 like defense at that point, and they can choose to sit
back and wait and raise it as an affirmative defense as
17 one could raise any Statute of Limitations defense or
they could as they have done here sought affirmatively
18 to come into court with respect to a declaration as to
the continuing validity of the judgment.

19 Counsel for the Romanos indicates that [the LaVecchias
20 are] just too late. That they had the opportunity to
do [it] for six [years, but they] haven't done it.
21 It's [only when] that's been tried to renew the second
time that this has come to a head.

22 The basic response to that is what I said earlier.
23 There is no duty I think to come forward when, in fact,
there is an invalid judgment for lack of renewal, and,
24 thus, the waiver arguments and the arguments under Rule
60(b) and Rule 9024 simply miss the mark [and are
25 inapplicable].

26 Tr. of May 20, 2008 H'r'ng at 20:17-21:9.

27 The Romanos assert statutory limitation periods are subject
28 to waiver. In support of this proposition they cite Copeland v.

1 Desert Inn Hotel, 673 P.2d 490 (Nev. 1983); and Hubbard v. State,
2 920 P.2d 991 (Nev. 1996). Neither case addresses waiver of the
3 right to assert that an untimely renewed judgment is
4 unenforceable. Instead, Copeland recognizes the right to assert
5 equitable tolling of the limitations period in the context of
6 Nevada's antidiscrimination statutes. At oral argument, counsel
7 for the Romanos conceded that equitable tolling did not apply
8 because no evidentiary record was made to support an equitable
9 tolling argument before the bankruptcy court. Hubbard stands for
10 the unsurprising proposition that a criminal defendant can waive
11 a statute of limitations defense to prosecution by entry of a
12 guilty plea.

13 In their waiver argument before the bankruptcy court, the
14 Romanos characterized the First Renewal as "essentially" a new
15 judgment. Proceeding from this faulty premise, the Romanos
16 assert that challenging the validity of the First Renewal six
17 years later is not "within a reasonable time" as required by Fed.
18 R. Civ. P. 60(b) and (c).⁵

19
20 ⁵Rule 60. Relief from a Judgment or Order

21 . . .
22 **(b) Grounds for Relief from a Final Judgment, Order, or**
23 **Proceeding.** On motion and just terms, the court may
24 relieve a party or its legal representative from a
25 final judgment . . . for the following reasons:

26 (1) mistake, inadvertence, surprise, or excusable
27 neglect;

28 (2) newly discovered evidence that, with
reasonable diligence, could not have been
discovered in time to move for a new trial under
Rule 59(b);

(3) fraud . . . , misrepresentation, or misconduct
by an opposing party;

(continued...)

1 Renewal of a judgment does not create a new judgment. Fed.
2 R. Civ. P. 54(a) defines judgment to include "a decree and an
3 order from which an appeal lies." The LaVecchias' appeal of the
4 Judgment was finally resolved in 1996.

5 The record reflects that the bankruptcy court made no
6 findings of fact or conclusions of law in connection with either
7 the First Renewal or the Second Renewal. Nor was the bankruptcy
8 court required to make such determinations in connection with any
9 judgment renewal. Under Nev. Rev. Stat. § 17.214, the filing of
10 an affidavit of renewal, which implicitly requires compliance
11 with the timeliness provision of Nev. Rev. St. § 11.190(1)(a), is
12 all that is necessary to effectuate the renewal. The Nevada
13 Supreme Court has adopted the view that the renewal of a judgment
14 is a ministerial act. See O' Lane v. Spinney, 874 P.2d 754 (Nev.
15 1994).

16 The Romanos do not dispute that the bankruptcy court was
17 reviewing only the validity of the First Renewal, not whether the
18 Judgment itself was invalid. The First Renewal did not
19 constitute a "final judgment, order, or proceeding." In these
20

21 ⁵(...continued)

22 (4) the judgment is void.

23 (5) the judgment has been satisfied, released or
24 discharged; it is based on an earlier judgment
25 that has been reversed or vacated; or applying it
prospectively is no longer equitable; or

(6) any other reason that justifies relief.

26 **(c) Timing and Effect of the Motion.**

27 **(1) Timing.** A motion under Rule 60(b) must be
28 made within a reasonable time--and for reasons (1),
(2), and (3) no more than a year after the entry of the
judgment or order or the date of the proceeding.

1 circumstances, the bankruptcy court did not err when it ruled
2 that Fed. R. Civ. P. 60(b) did not apply.

3 Further, even were Fed. R. Civ. P. 60(b) applicable, the
4 bankruptcy court ruled that the LaVecchias' motion was not
5 untimely because the LaVecchias had no duty to raise the issue of
6 the invalidity of the First Renewal unless and until it was
7 asserted against them in collection activity. The Second Renewal
8 presented a legitimate opportunity for the LaVecchias to
9 challenge the continued enforceability of the Judgment in Nevada.
10 Counsel for the Romanos acknowledged at oral argument that no
11 collection activity on the Judgment was undertaken in Nevada
12 between the dates of the First Renewal and the Second Renewal.
13 The LaVecchias raised the failure to renew the Judgment timely as
14 they would an affirmative defense when the prospect of further
15 collection activity in Nevada by the Romanos was indicated by the
16 Second Renewal. We conclude that the bankruptcy court did not
17 err in determining that the LaVecchias had no duty to act earlier
18 to bring the timeliness of the First Renewal before it.

19 20 **VI. CONCLUSION**

21 The bankruptcy court correctly applied Fed. R. Civ. P. 69 to
22 the issue before it, specifically, whether the Judgment remained
23 enforceable in light of the untimely First Renewal under Nev.
24 Rev. Stat. §§ 11.190(1)(a) and 17.214. The bankruptcy court made
25 no error in the computation of time for filing the April 2002
26 Affidavit under Nev. Rev. Stat. § 17.214, nor in its
27 determination of the effect of failure to comply. We AFFIRM.