NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. OR-07-1272-JKMo
JAMES HENDERSON SANDERS,	Bk. No. 97-33882
Debtor,	Adv. No. 04-03384
JAMES HENDERSON SANDERS,	
Appellant,	
v.	**M E M O R A N D U M**[1]
PROGRESSIVE CASUALTY INSURANCE CO., et al.,	
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.

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[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.

I. INTRODUCTION

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

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

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

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

II. FACTS AND PROCEDURAL HISTORY

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

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The 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).

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

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

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

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

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

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

After a trial on June 14, 2005, the bankruptcy court found the Restitution Obligation was nondischargeable and entered the Dismissal Judgment on June 22, 2005. On July 1, 2005, debtor appealed the Dismissal Judgment. Debtor requested two time extensions to file his opening brief which we granted. However, we denied debtor's third request for a time extension and we dismissed the appeal on January 21, 2006.[3] Debtor did not appeal our dismissal.

On May 22, 2007, debtor moved to reopen the adversary proceeding to seek relief from the Dismissal Judgment. Debtor's motion for relief was titled "Fed. R. Bank. P. 3008 Interpreting Fed. R. Civ. P. 60." Because Rule 3008 governs reconsideration of orders regarding claims, the bankruptcy court treated debtor's motion as one for relief from judgment under Rule 9024, which

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[3] On October 14, 2005, debtor filed another chapter 7 petition in the District of Arizona. Progressive commenced an adversary proceeding against debtor seeking to deny discharge of the Restitution Obligation owed to it. The bankruptcy court granted Progressive's motion for summary judgment, finding the Restitution Obligation was nondischargeable under § 523(a)(2) and (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.

incorporates Federal Rule Civil Procedure ("Civil Rule") 60.[4]

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

Debtor timely appealed.

III. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.[5]

IV. ISSUES

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

V. STANDARDS OF REVIEW

We review the denial of a motion for relief from judgment under Civil Rule 60(b) for abuse of discretion. Tennant v. Rojas (In re Tennant), 318 B.R. 860, 866 (9th Cir. BAP 2004). "Under the abuse of discretion standard, we will not reverse unless we are 'definitely and firmly convinced that the

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[4] We agree with the trial judge that Rule 9024, which incorporates Civil Rule 60, is applicable to debtor's motion since he was not seeking reconsideration regarding a claim.

[5] The judgment dismissing debtor's adversary complaint does not expressly dismiss Progressive's counterclaims for nondischargeability under § 523. Nonetheless, because the 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.

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

VI. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. CONCLUSION

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

KLEIN, Bankruptcy Judge, concurring:

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

I

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

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

nondischargeable under § 523(a)(13).

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

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

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

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

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

II

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

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

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

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