NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. CC-07-1116-KMoD
	)	
CECILIA MARIE WOOTEN,	)	Bk. No. RS 00-13276-DN
	)	
Debtor.	)	
	)	
_____	)	
	)	
THOMAS ROGER WOOTEN,	)	
	)	
Appellant,	)	
	)	
v.	)	**MEMORANDUM**[*]
	)	
ROBERT S. WHITMORE, Trustee,	)	
	)	
Appellee.	)	
_____	)	

Submitted Without Oral Argument
on September 10, 2007[**]

Filed – September 11, 2007

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable David N. Naugle, Bankruptcy Judge, Presiding

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Before: KLEIN, MONTALI and DUNN, Bankruptcy Judges.

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[*]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.

[**]This appeal was ordered removed from our September 21, 2007 oral argument calendar pursuant to Federal Rule of Bankruptcy Procedure 8012 without objection from the parties following notice to them.

The pro se appellant appeals from an order denying his motion to vacate a judgment entered more than eighteen months earlier that determined certain property to have been community property that was property of the estate of the appellant's now-former spouse and, hence, subject to administration by the appellee trustee.

The bankruptcy court's denial of the motion to vacate judgment was apparently premised upon the conclusion that the appellant had not timely appealed and did not merit Federal Rule of Civil Procedure 60(b) relief. We AFFIRM.

FACTS

Thomas Wooten ("appellant" or "Thomas") is the sole proprietor of a construction business called Wooten Construction that he had operated since approximately 1973.

On June 2, 1993, Cecilia Wooten ("debtor" or "Cecilia") and the appellant entered into a premarital agreement and were subsequently married. The premarital agreement provided that certain identified property was to remain the separate property of the respective spouses. While the premarital agreement designated Cecilia's separate property interest in a business as her separate property to remain as such after marriage, there was no provision designating Wooten Construction as Thomas' separate property.

The premarital agreement also specified that any funds deposited into a joint account and any community investments would be held in both appellant's and debtor's names as community

property but could be transmuted to separate property by a written agreement executed by both parties.

During the marriage, real property located in Riverside, California ("Riverside Property") was leased from Bruce Roberts ("Roberts"), its owner, for five years with an option to purchase for $275,000. The lessees were "Tom & Cecilia Wooten" and the stated purpose was "Roofing Contractor yard and Administration, or similar use." The lease/option agreement was executed by both Thomas and Cecilia, individually, as "Lessee," and signed by Thomas as "Pres" and Cecilia as "V.P."

The accompanying purchase agreement, signed August 7, 1998, was executed by Thomas, individually, as "Buyer" and signed by Thomas as "Pres" and Cecilia as "V.P."

As established in the Joint Pretrial Order as facts admitted and not requiring proof, at some later time, a "new" lease/option was created that designated "Thomas Wooten dba Wooten Construction" as Lessee. Cecilia did not sign the second lease/option; however, the second lease/option referred to the purchase agreement which contained Cecilia's name and initials. No consideration was given by anyone for this second lease/option.

On March 3, 2000, Cecilia filed a voluntary chapter 7 petition. Robert Whitmore ("appellee" or "trustee") was appointed as trustee. Cecilia did not schedule an interest in the Riverside Property, the lease/option, or purchase agreement in her bankruptcy schedules.

A dispute arose with Roberts regarding the Riverside Property. On April 1, 2003, Thomas and Cecilia filed a complaint

in state court for specific performance and breach of contract against Roberts ("State Court Action"). Thomas and Cecilia were co-plaintiffs in the State Court Action. Cecilia alleged she had an interest in the Riverside Property.

Thomas filed a voluntary chapter 7 case on April 23, 2003, which case was dismissed February 3, 2004.[1]

On May 20, 2003, less than one month after Thomas filed his chapter 7 case, Cecilia filed for divorce.

On August 5, 2003, the trustee, having learned of the existence of the option during Thomas' case, exercised the option to purchase the Property on behalf of Cecilia's estate by giving notice to Roberts of his ratification and exercise of the option.

On August 12, 2003, the trustee removed the State Court Action to the bankruptcy court. The court then granted the trustee's motion to substitute himself as a plaintiff in lieu of Cecilia.

Trial in the adversary proceeding was held on April 13, 2005, on the bifurcated question of whether Thomas' interest in the lease/option agreement was separate property or community property, and thereby property of Cecilia's estate.[2] After that

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[1]Thomas listed the State Court Action as an asset in his amended schedules, which is how the trustee discovered the lease and lease option of the Riverside Property. Seeing a potential conflict of interest because appellee was also trustee for Cecilia's bankruptcy estate, appellee resigned as the chapter 7 trustee for the estate of Thomas Wooten on December 30, 2003.

[2]Thomas was represented by Jeffrey W. Vanderveen and testified at trial. Neither he nor trustee's counsel called any other witnesses. Although the appellant underwent a laryngectomy in October 2001 and was dealing with other medical issues, the

(continued...)

issue was decided, the strategy was to proceed to litigate the second issue involving the enforceability of the option against Roberts; in the end, however, the remaining issue settled before trial.

At the conclusion of testimony on April 13, 2005, the bankruptcy court ruled in favor of the trustee. The court determined that, even if Thomas held the business Wooten Construction separate and apart from himself (though it was a sole proprietorship), the premarital agreement, the lease agreement with option to purchase, and the purchase agreement taken together supported the conclusion that the property was community property and not the separate property of Thomas through Wooten Construction or otherwise. Thus, the court held that the leasehold interest in the Riverside Property and the purchase option contract rights with Roberts were community property that was property of Cecilia's bankruptcy estate subject to administration by her trustee.

The bankruptcy court entered judgment on the community property issue only on April 27, 2005. The court attempted to make a so-called Rule 54(b) certification by saying, "Pursuant to Fed. R. Civ. P. 54(b), as incorporated into Fed. R. Bankr. P. 7054(a), this Court's judgment on the Community Property Issue, as set forth above, is a Final Judgment; and . . . trial on any and all remaining bifurcated issues is continued to June 21, 2005."

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[2](...continued)
record did not indicate that appellant requested the need for an interpreter. Nor does the record indicate that he was difficult to understand.

This attempted Rule 54(b) certification was defective under controlling precedent[3] because the court did not make an express determination that there was "no just reason for delay" in entry of judgment and did not make an "express direction for the entry of judgment."

The defect was resolved, however, when the remaining dispute with Roberts was settled with an agreement to sell the property and pay Roberts the $275,000 purchase price plus a percentage of the surplus. The court approved the compromise, which order Thomas did not appeal.

The adversary proceeding was terminated on July 13, 2005, with an order that said:

> The complaint filed in the above case has been disposed of and is no longer pending due to either the dismissal of the main case or the entry of a judgment in the Adversary Proceeding. Since it appears that no further matters are required that this adversary proceeding remain open, it is ordered that the adversary proceeding is closed.

Regardless of whether the time to appeal began on April 27, 2005, or July 13, 2005, Thomas did not appeal.

A year and a half later, on January 22, 2007, Thomas, now pro se, filed a motion to vacate judgment on the bifurcated community property issue, "due to [the] clear error rule" of Federal Rule of Bankruptcy Procedure 8013.

The trustee filed an opposition to the motion to vacate. Recognizing the difficulty of determining exactly what relief the appellant sought in his motion, the trustee concluded that the

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[3]See Belli v. Temkin (In re Belli), 268 B.R. 851, 853-54 (9th Cir. BAP 2001); Frank Briscoe Co. v. Morrison-Knudsen Co., 776 F.2d 1414, 1415-16 (9th Cir. 1985).

appellant could have only sought relief from the judgment under Federal Rule of Civil Procedure 60(b) and contended that the appellant was not entitled to relief under Rule 60(b) because his motion was not filed within a reasonable time and laches applied. Furthermore, the property which the appellant contended was his separate property had already been sold and disbursements made pursuant to the unappealed settlement with the defendant, Roberts.

The appellant filed a reply, arguing Rule 60(b), among other reasons.

After oral arguments at the hearing on the motion on February 26, 2007, the court denied the motion to vacate.[4] An order was entered on March 9, 2007.

This appeal ensued.

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[4]The appellant's request to have his daughter interpret for him due to his laryngectomy was denied, and the court acknowledged that none of the parties in the courtroom had trouble understanding his testimony even if the transcriber was unable to record his words verbatim.

> THE COURT: We keep a tape of what you say. When you want a copy of it, then you order a copy under certain circumstances and they have it transcribed. It's usually the transcriber who says this is indiscernible. They don't work very hard to try to understand what you say. That doesn't mean I don't understand what you say. I assume that your daughter understood what you said, [the trustee and his counsel] understood what you said. We don't have any trouble understanding you, sir.

(Vacate J. Hr'g Tr. 15:8-17, Feb. 26, 2007)

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334. We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUE

Whether the bankruptcy court erred in denying the appellant's motion to vacate judgment that the subject property was community property.

STANDARD OF REVIEW

The denial of a motion for relief from judgment or order under Rule 60(b) is reviewed for abuse of discretion. Tennant v. Rojas (In re Tennant), 318 B.R. 860, 866 (9th Cir. BAP 2004) (denial of motion to vacate dismissal order). Under the abuse of discretion standard, the Panel will not reverse unless it has a definite and firm conviction that the trial court committed a clear error of judgment. Id. A bankruptcy court also abuses discretion if it bases its ruling upon an erroneous view of the law or a clearly erroneous assessment of the evidence. United States v. Levoy (In re Levoy), 182 B.R. 827, 831 (9th Cir. BAP 1992).

An appeal from an order denying a Rule 60(b) motion brings up for review only the correctness of that denial and does not bring up for review the merits of the judgment itself. Tennant, 318 B.R. at 866; Fernandez v. GE Capital Servs., Inc., 227 B.R. 174, 177 (9th Cir. BAP 1998). Thus, we do not review the merits of the court's judgment that the Riverside Property was community

property, subject to administration by the trustee of debtor's bankruptcy estate.

DISCUSSION

Regardless of when the April 27, 2005 "judgment" was final, the appellant's ten-day time to appeal, prescribed by Federal Rule of Bankruptcy Procedure 8002, began to run no later than when the closing order was entered. Fed. R. Bankr. P. 8002. The appellant did not appeal. Instead, more than eighteen months later, he filed a motion to vacate the judgment on the community property issue. The bankruptcy court denied his request, from which the appellant timely appealed.

I

The appellant bases his appeal of the order denying his motion to vacate on Rule 60(b), after the trustee had previously pointed out the inapplicability of Federal Rule of Bankruptcy Procedure 8013, the Rule under which the appellant initially brought his motion to vacate.[5]

Federal Rule of Civil Procedure 60(b), applicable via Federal Rule of Bankruptcy Procedure 9024, provides for relief from final judgment for the following reasons:

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[5]The appellant brought his motion to vacate judgment under the "clear error rule" of Rule 8013. On an appeal, Rule 8013 authorizes the Panel to affirm, modify, or reverse a bankruptcy judge's judgment or order if the findings of fact are determined to be clearly erroneous. However, Rule 8013 only applies on appeal. Notice of appeal must be brought within ten days of the date of entry of the judgment pursuant to Rule 8002. The appellant never appealed the judgment, and thus, Rule 8013 is not applicable.

> (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 under Rule 59(b);
> (3) fraud . . ., misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied . . .; or
> (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) further provides that any motion under this Rule must be made within a "reasonable time," and motions requesting relief under reasons (1), (2), and (3) must be made not more than one year after the judgment was entered.

Under Rule 60(b)(1), the appellant argues that he is qualified for relief for several reasons, including that his counsel ignored his instruction to appeal, he was hospitalized for tuberculosis shortly after the trial, and he was dealing with a host of other medical problems that debilitated him and prevented him from appealing earlier. The appellant also alleges his rights were denied by the bankruptcy court itself when it did not allow him to use an interpreter.

Furthermore, the appellant attempts to raise newly discovered evidence pursuant to Rule 60(b)(2), claiming that Cecilia knew that it was his property and not community property.

The Federal Rules of Civil Procedure are clear that motions requesting relief under Rules 60(b)(1), (2), or (3) must be brought within one year of the entry of judgment. The trustee contends that, regardless of the appellant's arguments, the appellant cannot be entitled to the relief requested under Rules 60(b)(1) or (2) because he is time-barred by the one-year

limitation.[6]

The appellant did not bring his motion to vacate until more than eighteen months after the order closing the adversary proceeding was entered. The closing order finally disposed of all the claims in the adversary proceeding, including the bifurcated community property issue. Thus, pursuant to Rule 60(b), the appellant's arguments under Rules 60(b)(1) and (2) are unable to withstand the timeliness requirement. Despite the appellant's arguments, he cannot be afforded a remedy under Rules 60(b)(1) and (2) because he did not bring his motion for relief

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[6]Even if the appellant's arguments had been timely brought, the trustee contends that the appellant has not demonstrated that relief would be appropriate. As to the appellant's argument that his counsel did not follow his instructions to file an appeal, the trustee argues that the appellant's uncorroborated assertion about his counsel is not an adequate basis for relief pursuant to Rule 60(b), or any other rule. To the extent the appellant has a claim, any relief must be sought directly against the attorney.

Furthermore, the trustee contends that there was no error in denying the appellant's request for an interpreter because the transcript of the hearing on the motion to vacate evinces that the judge and the other parties in the courtroom understood the appellant, even if the transcriber did not record the appellant's testimony verbatim.

Moreover, the trustee argues that the "newly discovered evidence" of Cecilia's opinion is faulty because no competent evidence was presented in that regard, and it was, at best, hearsay. Cecilia's position is not new evidence, as her position seemed to have been known at the time of trial, given that she made no claim to an interest in the Riverside Property or the lease/option agreement in her bankruptcy schedules and she was not called to testify at trial. Regardless, the documentary evidence of the premarital agreement, the lease/option agreement, and the purchase agreement convinced the court that no transmutation of the property had occurred in writing in accordance with the premarital agreement; and thus, the Riverside Property was originally acquired by Cecilia and Thomas, individually, as community property, even if Thomas had a construction business.

until after the one-year limitation had expired. See Ackermann v. United States, 340 U.S. 193, 197 (1950); Lyon v. Agusta S.P.A., 252 F.3d 1078, 1088 (9th Cir. 2001).

Accordingly, the bankruptcy court did not err in denying the appellant's motion to vacate the judgment to the extent it was a motion under Rules 60(b)(1) and (2).

II

The appellant, in his reply brief, makes the same arguments under Rules 60(b)(4) and (6) as he makes under Rules 60(b)(1) and (2). He contends that his motion was brought within a "reasonable time" and was not time-barred by the one-year limitation. The appellant argues that the judgment is "void" under Rule 60(b)(4) because his constitutional rights were violated by denying his request that his daughter and son-in-law interpret for him at different hearings. He further contends that his medical condition, including suffering from tuberculosis, justifies his relief from final judgment under Rule 60(b)(6).

Even if it is conceded that the appellant brought his motion within a reasonable time under Rules 60(b)(4) and (6), which are not subject to the one-year time requirement, the appellant's arguments are not persuasive.

A

A final judgment is "void" for purposes of Rule 60(b)(4) only if the court that considered it lacked jurisdiction, either as to subject matter of the dispute or over the parties to be

bound, or acted in a manner inconsistent with due process of law, and is not void merely because it is erroneous. United States v. Berke, 170 F.3d 882, 883 (9th Cir. 1999).

Although not explicitly stated, the appellant appears to argue that the judgment is rendered void because his procedural due process right was violated by being denied an interpreter. On the contrary, the trial transcript on the bifurcated claim does not indicate that the appellant ever requested an interpreter or that he was incomprehensible to the court when he testified. Moreover, during the hearing on the motion to vacate judgment, at which the appellant did request an interpreter, the court confirmed that it understood the appellant's testimony in denying his request.

Thus, it would appear that the appellant had an adequate opportunity to be heard. We conclude that the judgment is not void because the bankruptcy court was justified in denying the appellant's request for an interpreter. We are not definitely and firmly convinced that the court committed a clear error in its judgment.

B

The appellant next argues that relief under Rule 60(b)(6) is justified because his medical condition incapacitated his ability to appeal earlier.

Rule 60(b)(6) provides for relief from a final judgment for "any other reason justifying relief from the operation of judgment." The catchall provision of Rule 60(b)(6) is used sparingly as an equitable remedy to prevent manifest injustice,

and only where extraordinary circumstances prevented the party from taking timely action to prevent or correct an erroneous judgment. United States v. State of Washington, 394 F.3d 1152, 1157 (9th Cir. 2005). The movant must show both injury and that circumstances beyond its control prevented timely action to protect its interest; neglect or lack of diligence is not to be remedied through this rule. Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998).

The appellant first raises his argument under Rule 60(b)(6) in his reply brief, only after the appellee's opposition brief exposed that the appellant's motion was time-barred for purposes of Rule 60(b)(1) and (2). It is a well-established principle that Rules 60(b)(1) and (6) are mutually exclusive, and a party who does not take timely action may not seek relief more than one year after the judgment by resorting to Rule 60(b)(6). Pioneer Inv. Svcs. Co. v. Brunswick Assocs., 507 U.S. 380, 393 (1993); see also United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049-50 (9th Cir. 1993). The appellant cannot use Rule 60(b)(6) to circumvent the time limitations of other provisions for setting aside a judgment.

While the appellant's medical problems may have complicated his ability to bring his motion earlier, courts have applied the catchall provision of Rule 60(b)(6) sparingly. The record does not demonstrate the existence of manifest injustice by the court's denial of the appellant's motion to vacate the judgment. Furthermore, the appellant appears to be attempting to circumvent the time limitations by raising his arguments under Rules 60(b)(4) and (6) only after he realized that his position was

unsustainable under Rules 60(b)(1) and (2). We do not believe the court abused its discretion in denying the appellant's motion. The court's ruling remains undisturbed.

CONCLUSION

The bankruptcy court did not abuse its discretion in denying the appellant's motion to vacate judgment that the lease/option agreement regarding the Riverside Property was community property, subject to administration by the trustee for debtor's bankruptcy estate. We AFFIRM.