

SEP 11 2007

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

NOT FOR PUBLICATION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

Before: KLEIN, MONTALI and DUNN, Bankruptcy Judges.

*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.

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

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

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

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

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

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

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

5 Thomas filed a voluntary chapter 7 case on April 23, 2003,
6 which case was dismissed February 3, 2004.¹

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

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

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

17 Trial in the adversary proceeding was held on April 13,
18 2005, on the bifurcated question of whether Thomas' interest in
19 the lease/option agreement was separate property or community
20 property, and thereby property of Cecilia's estate.² After that
21

22 ¹Thomas listed the State Court Action as an asset in his
23 amended schedules, which is how the trustee discovered the lease
24 and lease option of the Riverside Property. Seeing a potential
25 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.

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

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

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

18 The bankruptcy court entered judgment on the community
19 property issue only on April 27, 2005. The court attempted to
20 make a so-called Rule 54(b) certification by saying, "Pursuant to
21 Fed. R. Civ. P. 54(b), as incorporated into Fed. R. Bankr. P.
22 7054(a), this Court's judgment on the Community Property Issue,
23 as set forth above, is a Final Judgment; and . . . trial on any
24 and all remaining bifurcated issues is continued to June 21,
25 2005."

26
27 ²(...continued)
28 record did not indicate that appellant requested the need for an
interpreter. Nor does the record indicate that he was difficult
to understand.

1 This attempted Rule 54(b) certification was defective under
2 controlling precedent³ because the court did not make an express
3 determination that there was "no just reason for delay" in entry
4 of judgment and did not make an "express direction for the entry
5 of judgment."

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

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

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

20 Regardless of whether the time to appeal began on April 27,
21 2005, or July 13, 2005, Thomas did not appeal.

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

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

³See 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).

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

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

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

14 This appeal ensued.

15 //

16 //

17 //

18
19 ⁴The appellant's request to have his daughter interpret for
20 him due to his laryngectomy was denied, and the court
21 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.

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

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

1 JURISDICTION

2 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
3 We have jurisdiction under 28 U.S.C. § 158(a)(1).
4

5 ISSUE

6 Whether the bankruptcy court erred in denying the
7 appellant's motion to vacate judgment that the subject property
8 was community property.
9

10 STANDARD OF REVIEW

11 The denial of a motion for relief from judgment or order
12 under Rule 60(b) is reviewed for abuse of discretion. Tennant v.
13 Rojas (In re Tennant), 318 B.R. 860, 866 (9th Cir. BAP 2004)
14 (denial of motion to vacate dismissal order). Under the abuse of
15 discretion standard, the Panel will not reverse unless it has a
16 definite and firm conviction that the trial court committed a
17 clear error of judgment. Id. A bankruptcy court also abuses
18 discretion if it bases its ruling upon an erroneous view of the
19 law or a clearly erroneous assessment of the evidence. United
20 States v. Levoy (In re Levoy), 182 B.R. 827, 831 (9th Cir. BAP
21 1992).

22 An appeal from an order denying a Rule 60(b) motion brings
23 up for review only the correctness of that denial and does not
24 bring up for review the merits of the judgment itself. Tennant,
25 318 B.R. at 866; Fernandez v. GE Capital Servs., Inc., 227 B.R.
26 174, 177 (9th Cir. BAP 1998). Thus, we do not review the merits
27 of the court's judgment that the Riverside Property was community
28

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

3
4 DISCUSSION

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

13
14 I

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

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

23 _____
24 ⁵The appellant brought his motion to vacate judgment under
25 the "clear error rule" of Rule 8013. On an appeal, Rule 8013
26 authorizes the Panel to affirm, modify, or reverse a bankruptcy
27 judge's judgment or order if the findings of fact are determined
28 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 (1) mistake, inadvertence, surprise, or excusable
neglect;
- 2 (2) newly discovered evidence which by due diligence
could not have been discovered in time to move for a
3 new trial under Rule 59(b);
- 4 (3) fraud . . . , misrepresentation, or other misconduct
of an adverse party;
- 5 (4) the judgment is void;
- 6 (5) the judgment has been satisfied . . . ; or
- 6 (6) any other reason justifying relief from the
operation of the judgment.

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

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

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

22 The Federal Rules of Civil Procedure are clear that motions
23 requesting relief under Rules 60(b)(1), (2), or (3) must be
24 brought within one year of the entry of judgment. The trustee
25 contends that, regardless of the appellant's arguments, the
26 appellant cannot be entitled to the relief requested under Rules
27 60(b)(1) or (2) because he is time-barred by the one-year
28

1 limitation.⁶

2 The appellant did not bring his motion to vacate until more
3 than eighteen months after the order closing the adversary
4 proceeding was entered. The closing order finally disposed of
5 all the claims in the adversary proceeding, including the
6 bifurcated community property issue. Thus, pursuant to Rule
7 60(b), the appellant's arguments under Rules 60(b)(1) and (2) are
8 unable to withstand the timeliness requirement. Despite the
9 appellant's arguments, he cannot be afforded a remedy under Rules
10 60(b)(1) and (2) because he did not bring his motion for relief
11

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

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

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

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

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

7
8 II

9 The appellant, in his reply brief, makes the same arguments
10 under Rules 60(b)(4) and (6) as he makes under Rules 60(b)(1) and
11 (2). He contends that his motion was brought within a
12 "reasonable time" and was not time-barred by the one-year
13 limitation. The appellant argues that the judgment is "void"
14 under Rule 60(b)(4) because his constitutional rights were
15 violated by denying his request that his daughter and son-in-law
16 interpret for him at different hearings. He further contends
17 that his medical condition, including suffering from
18 tuberculosis, justifies his relief from final judgment under Rule
19 60(b)(6).

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

24
25 A

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

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

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

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

20
21 B

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

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

1 and only where extraordinary circumstances prevented the party
2 from taking timely action to prevent or correct an erroneous
3 judgment. United States v. State of Washington, 394 F.3d 1152,
4 1157 (9th Cir. 2005). The movant must show both injury and that
5 circumstances beyond its control prevented timely action to
6 protect its interest; neglect or lack of diligence is not to be
7 remedied through this rule. Lehman v. United States, 154 F.3d
8 1010, 1017 (9th Cir. 1998).

9 The appellant first raises his argument under Rule 60(b)(6)
10 in his reply brief, only after the appellee's opposition brief
11 exposed that the appellant's motion was time-barred for purposes
12 of Rule 60(b)(1) and (2). It is a well-established principle
13 that Rules 60(b)(1) and (6) are mutually exclusive, and a party
14 who does not take timely action may not seek relief more than one
15 year after the judgment by resorting to Rule 60(b)(6). Pioneer
16 Inv. Svcs. Co. v. Brunswick Assocs., 507 U.S. 380, 393 (1993);
17 see also United States v. Alpine Land & Reservoir Co., 984 F.2d
18 1047, 1049-50 (9th Cir. 1993). The appellant cannot use Rule
19 60(b)(6) to circumvent the time limitations of other provisions
20 for setting aside a judgment.

21 While the appellant's medical problems may have complicated
22 his ability to bring his motion earlier, courts have applied the
23 catchall provision of Rule 60(b)(6) sparingly. The record does
24 not demonstrate the existence of manifest injustice by the
25 court's denial of the appellant's motion to vacate the judgment.
26 Furthermore, the appellant appears to be attempting to circumvent
27 the time limitations by raising his arguments under Rules
28 60(b)(4) and (6) only after he realized that his position was

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

4
5 CONCLUSION

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