

AUG 07 2014

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. CC-13-1557-PaKiTa
	)	
EDWARD NEGRETE, JR.	)	Bankr. No. 13-10036-RN
	)	
Debtor.	)	
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EDWARD NEGRETE, JR.,	)	
	)	<b>M E M O R A N D U M</b> <sup>1</sup>
Appellant,	)	
	)	
v.	)	
	)	
CITIZENS STATE BANK,	)	
	)	
Appellee.	)	
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Submitted Without Oral Argument<sup>2</sup>  
on July 25, 2014

Filed - August 7, 2014

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

Honorable Richard M. Neiter, Bankruptcy Judge, Presiding

Appearances: Edward Negrete, Jr., on brief, pro se.

Before: PAPPAS, KIRSCHER AND TAYLOR, Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> In an order entered April 4, 2014, the Panel unanimously determined that this appeal is suitable for submission without oral argument. Fed. R. Bankr. P. 8012; Ninth Circuit BAP R. 8012-1.

1 Chapter 7<sup>3</sup> debtor Edward Negrete, Jr. ("Debtor") appeals the  
2 bankruptcy court's order denying his motion for reconsideration  
3 of an order denying his motion for contempt. We AFFIRM.

4 **FACTS**

5 At the center of this appeal are proceeds from the sale of a  
6 single family home located on a residential lot in Riverside  
7 County, California (the "Property"). Debtor's mother  
8 transferred title to the Property to her eight children as  
9 tenants in common in 2006.

10 On October 3, 2011, a state court judgment was entered  
11 against Debtor in favor of Citizens State Bank ("Creditor") for  
12 \$231,373.65 ("Judgment"). Creditor recorded an Abstract of the  
13 Judgment in Riverside County, and thereby obtained a judgment  
14 lien against the Property. Cal. Code Civ. Proc. § 697.310(a).  
15 The Property was also encumbered by a consensual lien in favor of  
16 Wells Fargo Bank which, as of September 9, 2012, had a balance of  
17 \$4,035.82.

18 On January 2, 2013, Debtor filed a chapter 7 petition. In  
19 his schedules, Debtor listed his interest in the Property on  
20 schedule A, and claimed it exempt in the amount of \$20,815.87 on  
21 schedule C pursuant to California's "wildcard" exemption, Cal.  
22 Civ. Proc. Code § 703.140(b)(5). He also listed the Judgment as  
23 a secured claim on schedule D, and in his Statement of Intention,  
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26 <sup>3</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all  
28 Rule references are to the Federal Rules of Bankruptcy Procedure,  
Rules 1001-9037, and all Civil Rule references are to the Federal  
Rules of Civil Procedure 1-86.

1 Debtor advised that it was his intent to avoid Creditor's  
2 judgment lien.

3 On February 19, 2013, Debtor, acting pro so, filed his first  
4 motion seeking to avoid Creditor's judgment lien on the Property,  
5 which motion was denied by the bankruptcy court for "[f]ailure to  
6 serve authorized agent of Wells Fargo Bank and the lienholders.  
7 Failure to submit reliable evidence of Fair Market Value of  
8 property." Order on Motion to Avoid Lien at 2, March 18, 2013.  
9 Debtor filed another motion to avoid Creditor's judgment lien on  
10 the Property on April 9, 2013. This second motion was also  
11 denied by the bankruptcy court due to "insufficient and  
12 inadmissible evidence of fair market value of property." Order  
13 on Motion to Avoid Lien at 2, April 25, 2013.

14 In May 2013, four of the Property owners commenced an action  
15 in California state court against Debtor and the three other  
16 owners for partition and for an accounting, seeking to have the  
17 Property sold and the proceeds distributed among the eight  
18 owners. The Property was listed for sale by July 2013.

19 On July 10, 2013, Debtor filed a third motion seeking to  
20 avoid Creditor's judgment lien, this time accompanied by  
21 evidence concerning the Property's fair market value. The  
22 bankruptcy court entered an order on August 8, 2013, granting the  
23 motion, but only in part (the "Partial Avoidance Order"). This  
24 Partial Avoidance Order avoided Creditor's judgment lien on the  
25 Property, but only to the extent of \$96,225.52.<sup>4</sup> The following

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26  
27 <sup>4</sup> This amount was determined by the bankruptcy court  
28 presumably as the result of erroneously attributing sole  
continue...

1 day, August 9, 2013, Debtor filed an ex parte application to  
2 reconsider the Partial Avoidance Order; it was granted by the  
3 bankruptcy court in an order entered on September 4, 2013 (the  
4 "Total Avoidance Order"). The Total Avoidance Order avoided  
5 Creditor's judgment lien on the Property in its entirety, and  
6 declared it void and unenforceable.

7 In the meantime, however, a sale of the Property had been  
8 negotiated. In anticipation of this sale, on August 12, 2013,  
9 after entry of the Partial Avoidance Order, but prior to entry of  
10 the Total Avoidance Order, Creditor's counsel contacted the  
11 escrow officer handling the closing of the sale of the Property  
12 and offered to release its judgment lien in exchange for payment  
13 of Debtor's share of the net proceeds of the sale. The following  
14 day, on August 12, 2013, Debtor recorded the bankruptcy court's  
15 order granting him a discharge, as well as the Partial Avoidance  
16 Order, in Riverside County.

17 On August 19, 2013, the sale of the Property closed, and  
18 Debtor informed Creditor's counsel of the existence of the  
19 bankruptcy discharge as well as the Partial Avoidance Order.  
20 Despite this, according to the closing statement, Debtor's  
21 siblings each received their respective share of the sale  
22 proceeds, but Debtor's portion, \$19,461.54, was disbursed by the  
23 escrow company to Creditor's counsel on August 20, 2013.

24 On August 22, 2013, Debtor sent a written demand to  
25 Creditor's counsel seeking payment of the sale proceeds because

26 \_\_\_\_\_  
27 <sup>4</sup>...continue  
28 ownership of the Property to Debtor, rather than the one-eighth  
interest he actually held.

1 Creditor's judgment lien had been avoided by the bankruptcy court  
2 and because the sale proceeds were exempt. Creditor did not  
3 return the proceeds to Debtor, and on September 4, 2013, Debtor  
4 filed a motion in the bankruptcy court seeking an order holding  
5 Creditor in contempt. On October 4, 2013, the bankruptcy court  
6 entered an order denying the motion for contempt:

7 The Court, having reviewed the pleadings and related  
8 docket, and finding that (i) the amended order entered  
9 on September 4, 2013 ("Amended Order") avoiding the  
10 Citizens State Bank lien in its entirety was not  
11 entered until after Citizens State Bank (the  
12 "Creditor") had already legally collected the proceeds  
13 from the sale of the subject property; (ii) there was  
14 no evidence to demonstrate that the Creditor willfully  
15 violated a direct order of the Court in retaining the  
16 funds; and (iii) the Debtor has other means available  
17 to him outside of the bankruptcy process in order to  
18 collect the funds from the Creditor . . . IT IS HEREBY  
19 ORDERED that Debtor's Motion is DENIED.

20 Order Denying Debtor's Motion for Contempt at 1, October 4, 2013.  
21 ("Order Denying Contempt").

22 Debtor requested that the bankruptcy court reconsider the  
23 Order Denying Contempt in a motion filed October 10, 2013. The  
24 motion was set for hearing on November 6, 2013, and the day  
25 before the hearing, the bankruptcy court issued a tentative  
26 ruling denying the motion. Neither of the parties appeared at  
27 the scheduled hearing and, on November 27, 2013, the bankruptcy  
28 court entered an order adopting its tentative ruling and denying  
the motion ("Order Denying Reconsideration") because, the court  
explained:

[T]he First Order Avoiding Lien only partially avoided  
Creditor's lien. Creditor collected Debtor's 1/8

1 interest in the Property, or \$19,480.94<sup>5</sup>, which was  
2 within the un-avoided amount under the First Order  
3 Avoiding Lien. The Amended Order had not yet been  
4 entered. As such, taking into consideration this fact,  
5 which the Court did take into consideration when  
6 deciding the Motion for Contempt, there was no  
7 violation of a Court order. . . . The Court found that  
8 Creditor did not willfully violate a Court order when it  
9 obtained the sales proceeds for the reasons explained  
above. In addition, the Court found that Creditor did  
not willfully violate a Court order to turn over the  
sale proceeds. Debtor provides no evidence showing  
that Creditor willfully disregarded a Court  
Order. . . . Debtor has not shown by clear and  
convincing evidence that Creditor violated a specific  
and definite Order of the Court either in collecting  
the sale proceeds or in retaining them.

10 Order Denying Reconsideration at 2, November 27, 2013.

11 Debtor filed a timely appeal of the Order Denying  
12 Reconsideration.

### 13 JURISDICTION

14 The bankruptcy court had jurisdiction under 28 U.S.C.  
15 §§ 1334 and 157(b) (2) (A). We have jurisdiction under 28 U.S.C.  
16 § 158.

### 17 ISSUES<sup>6</sup>

18 Whether the bankruptcy court abused its discretion when it  
19 denied Debtor's motion for contempt?

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21 <sup>5</sup> The closing statement indicated that \$19,461.54 was  
22 disbursed to Creditor's counsel. Any difference in this amount  
is immaterial.

23 <sup>6</sup> Although Debtor's notice of appeal indicates that he  
24 appeals only the denial of his motion to reconsider, the  
25 arguments in his briefing also reiterate the arguments made in  
26 favor of his contempt motion. Because Debtor appears pro se, we  
27 have exercised our discretion and construe his papers liberally.  
28 Ozenne v. Bendon (In re Ozenne), 337 B.R. 214, 218 (9th Cir. BAP  
2006). Accordingly, we consider both the Order Denying Contempt  
as well as the Order Denying Reconsideration to be within the  
scope of this appeal.



1 Creditor from enforcing what was now an unsecured Judgment. The  
2 bankruptcy court denied Debtor's contempt motion, reasoning that,  
3 at the time Creditor received the sale proceeds, only the Partial  
4 Avoidance Order had been entered and that order left a portion of  
5 Creditor's judgment lien intact. Thus, the court ruled, because  
6 it held a secured claim, collection of the sale proceeds by  
7 Creditor was not prohibited by the discharge order. Moreover,  
8 the bankruptcy court concluded, Creditor's retention of the funds  
9 was not a willful violation of any order of the court. Finally,  
10 the bankruptcy court noted that if Debtor were entitled to  
11 recover the funds paid to Creditor, he could seek that relief in  
12 a forum other than the bankruptcy court and through a motion  
13 other than one based on contempt.

14 Debtor's motion for reconsideration was based on what Debtor  
15 alleged was newly discovered evidence and manifest injustice  
16 resulting from the Order Denying Contempt. Because the  
17 bankruptcy court erred in calculating the extent that Creditor's  
18 judgment lien should be avoided when it entered the Partial  
19 Avoidance Order, but later corrected that mistake in the Total  
20 Avoidance Order, Debtor contended that it would be manifestly  
21 unjust to permit Creditor to rely upon the incorrect order to  
22 obtain payment of the funds, or to allow Creditor to retain those  
23 funds once the error was corrected by the bankruptcy court's  
24 entry of the Total Avoidance Order.

25 The bankruptcy court denied Debtor's motion for  
26 reconsideration, holding that since Creditor still held a partial  
27 judgment lien when it obtained Debtor's portion of the sale  
28 proceeds, Creditor did not violate any order in place at the

1 time. The court again noted there were other avenues by which  
2 Debtor could pursue Creditor for the funds.

3 Debtor's motion for contempt was founded on § 105(a), which  
4 provides that the bankruptcy court:

5 may issue any order, process, or judgment that is  
6 necessary or appropriate to carry out the provisions of  
7 this title. No provision of this title providing for  
8 the raising of an issue by a party in interest shall be  
9 construed to preclude the court from, sua sponte,  
taking an action or making any determination necessary  
or appropriate to enforce or implement court orders or  
rules, or to prevent an abuse of process.

10 To hold a party in civil contempt, "the bankruptcy court  
11 must find by clear and convincing evidence that the offending  
12 party knowingly violated a definite and specific court order."  
13 Knupfer v. Lindblad (In re Dyer), 322 F.3d 1178, 1190 (9th Cir.  
14 2003); Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1069  
15 (9th Cir. 2002). Following such showing, the burden shifts to  
16 the alleged contemnor to show why it was unable to comply with  
17 the order. In re Bennett, 298 F.3d at 1069; FTC v. Affordable  
18 Media, 179 F.3d 1228, 1239 (9th Cir. 1999). A court has wide  
19 latitude in determining whether there has been contemptuous  
20 defiance of its order. Gifford v. Heckler, 741 F.2d 263, 266  
21 (9th Cir. 1984) (citing Neebars, Inc. v. Long Bar Grinding, Inc.,  
22 438 F.2d 47, 48 (9th Cir. 1971)).

23 Civil contempt is appropriate only when a party fails to  
24 comply with a court order that is both specific and definite.  
25 Balla v. Idaho State Bd. of Corr., 869 F.2d 461, 465 (9th Cir.  
26 1989) (citing Gifford, 741 F.2d at 265). Thus, to support a  
27 contempt motion, the order alleged to have been disobeyed must be  
28 sufficiently specific. In re Dual-Deck Video Cassette Recorder

1 Antitrust Litig., 10 F.3d at 695 (citing Int'l Longshoremen's  
2 Ass'n, Local 1291 v. Phila. Marine Trade Ass'n, 389 U.S. 64, 76  
3 (1967)).

4 We conclude the Partial Avoidance Order was sufficiently  
5 specific and definite to avoid a portion of Creditor's lien.  
6 Although it was a form order in which the bankruptcy court  
7 checked boxes and filled in blanks, it clearly declared in a  
8 handwritten notation by the bankruptcy court that Creditor's lien  
9 was avoided "in part" in the amount of "\$96,225.57".

10 However, the Partial Avoidance Order was neither specific  
11 nor definite regarding how any proceeds should be disbursed in  
12 the event the Property subject to Creditor's judgment lien was  
13 sold. The Partial Avoidance Order also made no reference to  
14 either the amount of Debtor's claim of exemption in any sale  
15 proceeds, or whether any amount remained above the exemption  
16 which Creditor could seize and apply to the unavoided portion of  
17 its judgment lien. In short, because nothing in the Partial  
18 Avoidance Order – the only order in effect as of the date  
19 Creditor was paid – specifically dictated what was to be done  
20 with the sale proceeds, Creditor's actions in directing the  
21 escrow company to disburse those funds to Creditor did not run  
22 afoul of its terms. See In re Dorado Marine, Inc., 343 B.R. 711,  
23 713 (Bankr. M.D. Fla. 2006) ("The Opinion and Final Judgment  
24 merely establish Kollenbaum's right to an equitable lien; they do  
25 not specifically direct Lickert or the Debtor to pay any net  
26 proceeds of the sale to Kollenbaum," and thus will not support a  
27 finding of contempt); see also Mueller v. Hall (In re Parker),  
28 368 B.R. 86 (6th Cir. BAP 2007) (a sale order that approved the

1 trustee's sale of the debtor's interest in an ongoing lawsuit but  
2 did not require debtor or his counsel to perform or refrain from  
3 performing any particular acts was not specific enough to support  
4 an order of contempt when debtor's counsel continued to prosecute  
5 the lawsuit).

6         Simply stated, a party cannot be in contempt of an order  
7 that does not yet exist. The bankruptcy court did not abuse its  
8 discretion when it determined that Creditor had not violated any  
9 specific order and, therefore, denied Debtor's motion for  
10 contempt.

## 11                                 **II. The Reconsideration Motion**

12         Debtor sought reconsideration of the Order Denying Contempt  
13 under Civil Rule 59(e), made applicable in bankruptcy cases by  
14 Rule 9023. The case law explains that reconsideration under  
15 Civil Rule 59(e) is appropriate where the movant establishes the  
16 existence of any one of three conditions:

17                 To establish that the bankruptcy court abused its  
18 discretion in denying the motions for reconsideration,  
19 [the movant] must demonstrate the existence of newly  
20 discovered evidence that was not available at the time  
21 of the original hearing, or that the bankruptcy court  
committed clear error or made a decision that was  
manifestly unjust, or that there was an intervening  
change in controlling law.

22 Marciano v. Fahs (In re Marciano), 459 B.R. 27, 51 (9th Cir. BAP  
23 2011) (citing Zimmerman v. City of Oakland, 255 F.3d 734, 740  
24 (9th Cir. 2001)).

25         Debtor argues that because the Total Avoidance Order was  
26 entered after Debtor filed the motion for contempt, it  
27 constituted "newly discovered evidence" sufficient to require  
28 reconsideration by the bankruptcy court of the Order Denying

1 Contempt. We disagree.

2 In its ruling concerning Debtor's motion for contempt, the  
3 bankruptcy court explicitly considered the timing and effect of  
4 the Total Avoidance Order, but correctly determined that, at the  
5 time Creditor was paid, its judgment lien had only been partially  
6 avoided. Because the bankruptcy court considered the Total  
7 Avoidance Order at the time it made its decision concerning the  
8 motion for contempt, it cannot be characterized as newly  
9 discovered evidence to support reconsideration of the Order  
10 Denying Contempt. That the bankruptcy court entered the Total  
11 Avoidance Order completely avoiding Creditor's judgment did not  
12 alter the fact that, at the time Creditor was paid Debtor's  
13 portion of the sale proceeds, Creditor still held a partially  
14 valid judgment lien on the Property.

15 Debtor also contends that there was a "manifest failure by  
16 the [bankruptcy court] to consider material facts and dispositive  
17 legal arguments which were presented to the Court before the  
18 entry of the Order Denying Debtor's Motion For Contempt." By  
19 this contention, we assume Debtor is arguing that the bankruptcy  
20 court employed an incorrect legal standard in ruling on the  
21 motion for contempt.

22 In the Order Denying Contempt, the bankruptcy court  
23 concluded that there was "no evidence to demonstrate that the  
24 Creditor willfully violated a direct order of the Court in  
25 retaining the funds." Order Denying Debtor's Motion for Contempt  
26 at 1, October 4, 2013. Debtor correctly asserts that the proper  
27 standard for contempt required him to demonstrate that Creditor  
28 "violated a specific and definite order of the court," but argues

1 that it was not the retention of the funds but rather the  
2 Creditor's original receipt of the funds in the first instance  
3 which constituted Creditor's contemptible act.

4 The bankruptcy court did not abuse its discretion in denying  
5 Debtor's motion for reconsideration. The court's statement in  
6 its order recited the proper standard for civil contempt, i.e.,  
7 that the moving party must demonstrate that a violation of a  
8 definite, specific court order occurred. As explained above,  
9 however, the Total Avoidance Order simply did not address either  
10 the disbursement or retention of any sale proceeds for the  
11 Property. Therefore, especially given the other potential  
12 remedies available to Debtor to recover the payment to Creditor,<sup>7</sup>  
13 Debtor has not shown the Order Denying Contempt constitutes a  
14 manifest injustice sufficient to warrant reconsideration of the  
15 order denying Debtor's motion for contempt.

16 **CONCLUSION**

17 We AFFIRM the orders of the bankruptcy court.  
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25  
26 <sup>7</sup> Debtor's motions in the bankruptcy court sought an order  
27 holding Creditor in contempt; they did not seek to recover the  
28 sale proceeds paid to Creditor. We do not consider and express  
no opinion as to whether Debtor could obtain such relief in  
either the bankruptcy court or another forum.