

AUG 03 2015

SUSAN M. SPRAUL, 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NOT FOR PUBLICATION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 No.	CC-14-1526-KiBrD
6	DANNY WAYNE PRYOR,)	Bk. No.	09-23842-BR
7	Debtor.)	Adv. No.	09-2291-BR
8	_____)		
9	DANNY WAYNE PRYOR,)		
10	Appellant,)		
11	v.)	MEMORANDUM¹	
12	RW INVESTMENT COMPANY, INC.,)		
13	Appellee.)		
	_____)		

Argued and Submitted on July 23, 2015,
at Pasadena, California

Filed - August 3, 2015

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

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: Appellant Danny Wayne Pryor argued pro se; Appellee
RW Investment Company, Inc. did not appear for oral
argument.

Before: KIRSCHER, BRANDT² and DUNN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have, it has no precedential value. See 9th Cir. BAP Rule 8024-1.

² Hon. Philip H. Brandt, Bankruptcy Judge for the Western
District of Washington, sitting by designation.

1 Appellant, chapter 7³ debtor Danny Wayne Pryor ("Pryor"),
2 appeals an order denying his motion for relief from judgment under
3 Civil Rule 60(d)(1) and (3). Previously, the bankruptcy court
4 determined by way of default judgment that the debt of appellee,
5 RW Investment Co., Inc. ("RW"), was excepted from discharge under
6 § 523(a)(2)(A) and that Pryor's discharge was denied under
7 § 727(a)(2), (3), (4) and (5) ("RW Judgment"). On appeal, the
8 Panel affirmed the bankruptcy court's § 523(a)(2)(A) ruling, but
9 vacated the § 727 rulings because RW had abandoned those claims at
10 the prove-up hearing. Pryor appealed the Panel's decision to the
11 Ninth Circuit, which affirmed. Pryor then sought relief from the
12 RW Judgment under Civil Rule 60(b), which the bankruptcy court
13 denied. Pryor's appeal of that order to the Panel was dismissed
14 as untimely. Presenting the same arguments, Pryor then filed the
15 instant motion seeking relief from the RW Judgment under Civil
16 Rule 60(d), which the bankruptcy court denied. We AFFIRM.⁴

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21 ³ Unless specified otherwise, all chapter, code and rule
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
23 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

24 ⁴ Despite the over 300 pages Pryor submitted in his excerpts
25 of the record, he failed to submit the two documents we need for
26 proper review of this appeal – the motion and related order at
27 issue. RW did not do much better. In its one-page response
28 brief, which fails to present any substantive argument, RW quoted
the bankruptcy court's order denying Pryor's motion in its
entirety but failed to submit an excerpt of the record containing
the missing order. Therefore, we had to review these (and other)
documents electronically. See O'Rourke v. Seaboard Sur. Co.
(In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989).

1 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY⁵**

2 RW is engaged in the business of real estate investments,
3 construction and development. Its sole shareholders are brothers
4 Ronald and Robert Wilson (collectively, "Wilsons"). Ronald Wilson
5 is an attorney and has represented RW throughout these
6 proceedings.

7 In 2003, RW purchased a property for the purpose of
8 constructing six townhomes. To fund the project, RW obtained a
9 loan from IndyMac Bank in July 2005 for \$1.8 million. RW engaged
10 Pryor in February 2006 as the general contractor for the project.

11 The townhouse project suffered several setbacks requiring
12 extensions on the loan's maturity date from IndyMac Bank. As part
13 of the second extension agreement, IndyMac required RW to enter
14 into a new agreement with Pryor to complete work on the
15 townhouses. RW entered into a written agreement with Pryor known
16 as the Real Estate Construction and Purchase Agreement on
17 February 24, 2007 ("RECPA"). Indymac conditioned its approval of
18 the RECPA by insisting that Pryor take over complete financial,
19 management and construction control of the townhouse project
20 pursuant to a written Assumption Agreement dated March 29, 2007.
21 Under the RECPA, RW sold the property to 704 Market, LLC, an
22 entity wholly owned by Pryor. The property was purchased with a
23 promissory note for \$525,000 in favor of RW. Although 704 Market,
24 LLC assumed responsibility for payment of the IndyMac loan, RW's
25 promise to repay the loan and the Wilsons' guarantees remained in
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27 ⁵ A more thorough background of this appeal can be found in
28 the Panel's Memorandum Decision issued on August 12, 2011, in
Case No. 10-1259-PaKiSa.

1 effect. The Assumption Agreement provided these same terms.

2 Ultimately, the townhouse project never came to fruition.
3 Pryor and/or his entity failed to pay RW on the \$525,000
4 promissory note and IndyMac foreclosed on the property. RW sued
5 Pryor, his related entities, IndyMac Bank and others in Los
6 Angeles Superior Court in April 2008 (BC389267). In July 2008,
7 IndyMac was closed by the Office of Thrift Supervision and its
8 assets were transferred to the FDIC as conservator. The FDIC was
9 appointed receiver of the newly chartered institution, IndyMac
10 Federal Bank, in March 2009.

11 **A. The underlying bankruptcy case and prior appeal**

12 Pryor filed his first bankruptcy case under chapter 11 on
13 March 28, 2008. The court dismissed that case on May 21, 2008,
14 for cause under § 1112(b) in an order containing a one-year bar
15 from filing another bankruptcy case. In violation of the order,
16 Pryor filed a chapter 7 case on March 9, 2009. That case was
17 promptly dismissed on May 5, 2009.

18 On June 7, 2009, Pryor filed yet another chapter 7 case,
19 which led to the prior appeal before the Panel and this appeal.
20 After unsuccessfully moving to have that case dismissed, RW filed
21 a nondischargeability and denial of discharge complaint against
22 Pryor seeking relief under §§ 523 and 727 on the grounds of fraud
23 and embezzlement. Pryor filed his answer pro se. As a sanction
24 for Pryor's failure to appear at a status conference and comply
25 with RW's discovery requests, the bankruptcy court struck his
26 answer and entered a default.

27 RW then moved for a default judgment, supported with exhibits
28 and an extensive declaration from Ronald Wilson. RW sought entry

1 of a \$997,988.45 nondischargeable fraud judgment against Pryor.
2 After a prove-up hearing on June 30, 2010, the bankruptcy court
3 entered the RW Judgment for the requested amount on July 19, 2010.
4 Pryor appealed. The Panel affirmed the RW Judgment on the
5 § 523(a)(2)(A) claim, but vacated the § 727 rulings and remanded
6 the matter to the bankruptcy court to enter an amended judgment.⁶
7 Pryor appealed. The Ninth Circuit affirmed on October 23, 2013.
8 It denied Pryor's request for rehearing on February 21, 2014, and
9 issued a mandate on May 5, 2014.

10 **B. Pryor's motions to set aside the RW Judgment**

11 Meanwhile, Pryor filed his first motion to set aside the
12 RW Judgment on March 31, 2014, seeking relief under Civil
13 Rule 60(b)(1) and (2). The gist of Pryor's motion was that RW had
14 committed "extrinsic fraud" against him and the bankruptcy court
15 by not disclosing that RW lacked standing to sue him, because RW
16 had sold the property and assigned all of its rights to the
17 townhouse project to 704 Market, LLC pursuant to the RECPA and
18 Assumption Agreement. Pryor further complained that because RW
19 lacked standing, its filed "Proof of Claim" was a fraud
20 perpetrated against him and on the bankruptcy court. Pryor made
21 such assertions even though RW's promise to repay the loan and the
22 Wilsons' guarantees remained in effect.

23 Pryor contended that his newly discovered evidence proving
24 that RW lacked standing and owed him money was not available at
25 the time of the prove-up hearing, because "all records" were being
26 withheld from IndyMac Bank due to its seizure by the FDIC. Had

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28 ⁶ The bankruptcy court entered an amended judgment on
September 13, 2011.

1 this evidence been before the bankruptcy court at the prove-up
2 hearing, argued Pryor, the court would not have entered the
3 RW Judgment. Pryor's evidence included a February 20, 2006
4 promissory note for \$407,450 executed by RW in favor of Acres,
5 Inc., another entity owned by Pryor, and the RECPA and the
6 Assumption Agreement, which showed that RW had sold the property
7 and its rights to the townhouse project to 704 Market, LLC in
8 March 2007.

9 RW objected to Pryor's motion on the basis that it had not
10 been filed within one year of the RW Judgment and was therefore
11 untimely.

12 In his reply, Pryor contended the motion was not untimely
13 based on the Ninth Circuit's mandate dated May 15, 2014. He also
14 attempted to assert a new claim for relief under Civil
15 Rule 60(d)(1) and (3) for "fraud upon the court."

16 The bankruptcy court denied Pryor's first motion to set aside
17 the RW Judgment on June 30, 2014. The order (drafted by Ronald
18 Wilson) fails to state the basis for why the motion was denied,
19 but according to the transcript from the hearing (which Pryor has
20 provided), the bankruptcy court denied it because Pryor had not
21 shown any evidence of "fraud upon the court" and because it was
22 untimely. The Panel dismissed Pryor's appeal of that order on
23 July 21, 2014, as untimely.

24 In a related adversary proceeding involving another creditor,
25 ITEC Financial, Inc., Pryor had also sought relief from ITEC's
26 nondischargeable fraud judgment under Civil Rule 60(b) and (d)
27 after that judgment had been affirmed by this Panel and the Ninth
28 Circuit. During the course of that proceeding, the bankruptcy

1 court entered two orders on July 7, 2014, declaring Pryor a
2 vexatious litigant: one in the ITEC adversary, the other in
3 Pryor's main bankruptcy case. Pryor was ordered to seek court
4 permission before filing any further documents. Pryor did not
5 appeal the vexatious litigant orders.

6 Not deterred by the bankruptcy court's previous ruling or the
7 vexatious litigant orders, Pryor filed his second motion to set
8 aside the RW Judgment on October 23, 2014, this time seeking
9 relief under Civil Rule 60(d)(1) and (3). Although titled under a
10 different subsection of Civil Rule 60, Pryor's second motion
11 reiterated the same arguments as in the first motion, contending
12 that RW had committed fraud upon him and the bankruptcy court and
13 that his newly discovered evidence would prove it. Pryor's motion
14 indicated that he did not want a hearing.

15 The next day, the bankruptcy court entered an order denying
16 Pryor's second motion to set aside the RW Judgment for failure to
17 show good cause ("Order"). The Order reads as follows:

18 This Motion is the latest in a lengthy series of baseless
19 motions seeking reconsideration of this Court's rulings.
20 The Motion is also in direct violation of this Court's
21 "Order Determining That the Debtor Is a Vexatious
22 Litigant," entered in this chapter 7 case on July 7,
2014. In addition, the debtor filed the Motion without
23 first filing a motion and obtaining a court order for
24 approval to file any additional documents in this case,
25 in violation of the July 7, 2014 Order.

26 The Court has considered the Motion and all accompanying
27 exhibits and will deny the Motion because no good cause
28 has been shown for the relief sought therein. In
addition, the Court has determined that it would deny the
Motion for this reason even if the debtor had first filed
an application and obtained approval to file it, as
required by the July 7, 2014 Order.

Adv. No. 09-2291, dkt. no. 86. Pryor timely appealed the Order.

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1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
3 and 157(b)(2)(A) and (I). We have jurisdiction under 28 U.S.C.
4 § 158(b).

5 **III. ISSUE**

6 Did the bankruptcy court abuse its discretion when it denied
7 Pryor's second motion to set aside the RW Judgment under Civil
8 Rule 60(d)(1) and (3)?

9 **IV. STANDARD OF REVIEW**

10 We review denials of motions for relief under Civil Rule 60
11 for an abuse of discretion. See United States v. Stonehill,
12 660 F.3d 415, 443 (9th Cir. 2011). Accordingly, we reverse where
13 the bankruptcy court applied an incorrect legal rule or where its
14 application of the law to the facts was illogical, implausible or
15 without support in inferences that may be drawn from the record.
16 Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1258 (9th Cir.
17 2010) (citing United States v. Hinkson, 585 F.3d 1247, 1262 (9th
18 Cir. 2009) (en banc)).

19 **V. DISCUSSION**

20 The only substantive argument we discern from Pryor's brief
21 is that: RW committed fraud against him and on the bankruptcy
22 court; and the bankruptcy court abused its discretion by refusing
23 to hear the new evidence establishing RW's lack of standing to
24 file the dischargeability action and the "Proof of Claim."
25 According to the Order, the bankruptcy court considered the
26 extensive documents Pryor submitted, but determined that he had
27 failed to show good cause to grant his second motion to set aside
28 the RW Judgment. In other words, the bankruptcy court determined

1 that Pryor had not established fraud on the court. Leaving aside
2 that this issue had already been decided against Pryor in the
3 order denying his first motion to set aside the RW Judgment and
4 that ruling was not timely appealed, we address the merits of this
5 appeal.

6 **A. The bankruptcy court did not abuse its discretion in denying
7 Pryor's second motion to set aside the RW Judgment under
8 Civil Rule 60(d)(1) and (3).**

9 **1. No relief was available under Civil Rule 60(d)(1).**

10 Although Pryor sought relief under Civil Rule 60(d)(1) and
11 (3), incorporated by Rule 9024, no basis ever existed for relief
12 under (d)(1). Civil Rule 60(d)(1) provides that the court may
13 "entertain an independent action to relieve a party from a
14 judgment, order, or proceeding."

15 For a movant to seek equitable relief through independent
16 actions, the movant must: (1) show that no other remedy is
17 available or adequate; (2) demonstrate that movants' own fault,
18 neglect or carelessness did not create the situation for which
19 they seek equitable relief; and (3) establish a recognized ground
20 — such as fraud, accident or mistake — for the equitable relief.
21 Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655,
22 662 (2d. Cir. 1997). The movant must also establish that a "grave
23 miscarriage of justice" will be done if the underlying judgment is
24 not set aside. United States v. Beggerly, 524 U.S. 38, 47 (1998).

25 Pryor failed to meet virtually all of these requirements.
26 First, another remedy was available. Pryor had previously moved
27 for the same relief in his first motion to set aside the
28 RW Judgment under Civil Rule 60(b), which was denied and
unsuccessfully appealed. His second motion was nothing more than

1 a restatement of the same arguments and a "Hail Mary" reference to
2 Civil Rule 60(d). Furthermore, Pryor's failure to comply with the
3 rules of discovery and the bankruptcy court's pretrial schedule is
4 what created the default and, ultimately, the RW Judgment. Thus,
5 he is not without fault. Finally, Pryor's second motion failed to
6 establish the "grave miscarriage of justice" that would occur if
7 he were not allowed to file an independent action against RW for
8 its alleged fraud committed in the underlying dischargeability
9 action.

10 **2. Pryor failed to establish fraud on the court.**

11 Civil Rule 60(d)(3) allows a court to "set aside a judgment
12 for fraud on the court." Such fraud "embraces only that species
13 of fraud which does or attempts to, defile the court itself, or is
14 a fraud perpetrated by officers of the court so that the judicial
15 machinery can not perform in the usual manner its impartial task
16 of adjudging cases that are presented for adjudication." Latshaw
17 v. Trainer Wortham & Co., 452 F.3d 1097, 1104 (9th Cir. 2006)
18 (quotations and citations omitted) (applying Civil Rule 60(b)).
19 "Fraud on the court 'should be read narrowly, in the interest of
20 preserving the finality of judgments.'" Id. (quoting Toscano v.
21 Comm'r, 441 F.2d 930, 934 (9th Cir. 1971)).

22 The Ninth Circuit places a high burden on a plaintiff seeking
23 relief from a judgment based on fraud on the court. Id. See
24 Stonehill, 660 F.3d at 443 (burden of proof is a "clear and
25 convincing" standard). The type of fraud asserted here must
26 involve egregious conduct, such as an unconscionable plan or
27 scheme designed to improperly influence the court in its decision.
28 Latshaw, 452 F.3d at 1104 (citing Abatti v. Comm'r, 859 F.2d 115,

1 118 (9th Cir. 1988); Toscano, 441 F.2d at 934)). "Mere
2 nondisclosure of evidence is typically not enough to constitute
3 fraud on the court, and 'perjury by a party or witness, by itself,
4 is not normally fraud on the court.'" Stonehill, 660 F.3d at 444
5 (quoting Levander v. Prober (In re Levander), 180 F.3d 1114, 1119
6 (9th Cir. 1999)).

7 Pryor argued that RW had committed fraud on the court by
8 failing to disclose that it lacked standing to bring any claims
9 against him in the nondischargeability action, based on the fact
10 that RW had sold the property and its rights to the townhouse
11 project to 704 Market, LLC, Pryor's wholly-owned entity. Pryor
12 argued that his newly discovered evidence of the February 20, 2006
13 promissory note from RW to Acres, Inc. and the RECPA and
14 Assumption Agreement, which were not available at the time of the
15 prove-up hearing, proved RW's lack of standing. Given RW's
16 promise to repay the loan and that the Wilsons' guarantees
17 remained in effect, Pryor's argument is without merit.

18 We agree with the bankruptcy court that Pryor did not meet
19 his high burden here. RW's failure to disclose its alleged lack
20 of standing, even if true, is not enough to constitute fraud on
21 the court. Further, two of the documents Pryor complains of – the
22 RECPA and the Assumption Agreement – were submitted by RW in
23 support of its motion for default judgment. As for the
24 February 20, 2006 promissory note, it is not clear if that
25 document was presented to the bankruptcy court prior to the RW
26 Judgment. However, it defies logic that IndyMac Bank, who was not
27 a party to the 2006 note, was in sole control of that document and
28 prevented Pryor from obtaining it for his defense at the prove-up

1 hearing in June 2010. Pryor never presented any evidence that he
2 subpoenaed IndyMac to produce this (or any other) document he
3 claims IndyMac controlled but was refused. Moreover, considering
4 that the 2006 note was executed four years before the prove-up
5 hearing in 2010, it was certainly evidence available to Pryor at
6 the time.

7 We also reject Pryor's argument that only he, not RW, could
8 file the "Proof of Claim." In support, Pryor cites to
9 Rule 3001(e), which governs proofs of claim involving transferred
10 claims. RW never filed a proof of claim in Pryor's chapter 7
11 bankruptcy case. Further, Pryor's case was a "no asset" case, so
12 nothing would have been paid on any such claim had one been filed.

13 We also correct Pryor's contention that the bankruptcy
14 court's vexatious litigant order was entered only in the ITEC
15 adversary proceeding, thereby not prohibiting him from filing the
16 second motion to set aside the RW Judgment. On July 7, 2014, the
17 bankruptcy court also entered an identical vexatious litigant
18 order in Pryor's main bankruptcy case, which prohibited him from
19 filing **any** documents without first obtaining court approval.
20 Nonetheless, Pryor was not prejudiced; the bankruptcy court
21 considered the merits of his second motion to set aside the RW
22 Judgment despite the order and his failure to obtain prior
23 approval.

24 With his motions to set aside the RW Judgment, Pryor has
25 repeatedly attempted to litigate RW's claims against him, which he
26 failed to litigate in the first instance, contending that he
27 complied with the parties' agreement(s) and that RW and the
28 Wilsons defrauded him. We see no abuse of discretion by the

1 bankruptcy court in denying his second motion to set aside the RW
2 Judgment.

3 **VI. CONCLUSION**

4 For the foregoing reasons, we AFFIRM.
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