

JAN 29 2016

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NOT FOR PUBLICATION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

In re:)	BAP No.	CC-15-1145-KiGD
)		
DANNY WAYNE PRYOR,)	Bk. No.	2:09-bk-23842-BR
)		
Debtor.)	Adv. No.	2:09-ap-02322-BR
)		
<hr/>			
DANNY WAYNE PRYOR,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM ¹	
)		
ITEC FINANCIAL, INC.,)		
)		
Appellee.)		
)		

Argued and Submitted on January 21, 2016,
at Pasadena, California

Filed - January 29, 2016

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; David
Brian Lally argued for appellee ITEC Financial,
Inc.

Before: KIRSCHER, GAN² 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. Scott H. Gan, Bankruptcy Judge for the District of
Arizona, sitting by designation.

1 Chapter 7³ debtor Danny Wayne Pryor appeals an order denying
2 his motion for relief from judgment under Civil Rule 60(d)(3) for
3 "fraud on the court." In a prior proceeding, the bankruptcy
4 court: entered a default judgment; excepted from discharge under
5 § 523(a)(2)(A) the debt of appellee, ITEC Financial, Inc.
6 ("ITEC"); and denied Pryor's discharge under § 727(a)(2), (3), (4)
7 and (5) ("Judgment"). On appeal, the Panel affirmed the
8 bankruptcy court's § 523(a)(2)(A) ruling but vacated the § 727
9 rulings for lack of evidence and remanded for entry of an amended
10 judgment. Pryor appealed the Panel's decision to the Ninth
11 Circuit Court of Appeals, which affirmed.

12 Several months after the Ninth Circuit's affirmance of the
13 Panel's decision, Pryor filed a motion seeking relief from the
14 Judgment under Civil Rule 60(b)(1), (2), (3), (6) and (d)(3). The
15 bankruptcy court denied the motion as untimely and declared Pryor
16 a vexatious litigant. The Panel affirmed the bankruptcy court's
17 ruling as to Pryor's claims for relief under Civil Rule 60(b)(1),
18 (2), (3) and (6), but vacated and remanded its ruling as to
19 Pryor's claim under Civil Rule 60(d)(3). Upon remand, the
20 bankruptcy court denied Pryor's motion for relief under Civil
21 Rule 60(d)(3), determining that he failed to present sufficient
22 evidence to support his claim for fraud on the court. He now
23 appeals that ruling. We AFFIRM.

24 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

25 The Panel's Memorandum Decisions issued on August 12, 2011,

26
27 ³ Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 in Case No. 10-1258 and on April 6, 2015, in Case No. 14-1365
2 contain a more thorough background of this appeal.

3 ITEC is engaged in the business of real estate investments,
4 construction and loan funding in Los Angeles. Pryor is a general
5 contractor and real estate developer. In 2006 and 2007, ITEC and
6 Pryor engaged in three real estate development projects owned by
7 Pryor. ITEC provided Pryor, either directly or through one of his
8 entities, various loans for the projects.

9 **A. The underlying bankruptcy case and Pryor's appeal of the**
10 **Judgment**

11 Pryor filed his first bankruptcy case under chapter 11 in
12 2008. The bankruptcy court dismissed it for cause under § 1112(b)
13 and imposed a one-year bar from filing another case. Pryor filed
14 a chapter 7 bankruptcy case before the one-year bar had expired,
15 which the court promptly dismissed.

16 Pryor filed another chapter 7 case in June 2009, initiating
17 the bankruptcy case involved in the two prior appeals before the
18 Panel and this appeal. ITEC filed its complaint seeking relief
19 under §§ 523 and 727; Pryor filed his answer pro se. As a
20 sanction for Pryor's failure to appear at a status conference or
21 comply with ITEC's discovery requests, the bankruptcy court struck
22 his answer and entered a default. Pryor moved for reconsideration
23 of the order striking his answer; the bankruptcy court denied it.
24 Pryor did not appeal that order.

25 ITEC then moved for a default judgment, which Pryor untimely
26 opposed on the day of ITEC's prove-up hearing. ITEC offered a
27 declaration from its president, Nina Patel, and extensive
28 exhibits. Pryor's untimely response failed to address any of the

1 representations contained in Patel's declaration. However, Pryor
2 did offer extensive oral argument.

3 The bankruptcy court entered the Judgment on July 30, 2010.
4 Pryor timely appealed. We affirmed the § 523(a)(2)(A) claim,
5 vacated the § 727 claims and remanded the Judgment to the
6 bankruptcy court to enter an amended judgment. (Case
7 No. 10-1258). Pryor timely appealed the § 523(a)(2)(A)
8 determination to the Ninth Circuit. The Ninth Circuit affirmed
9 the Panel's ruling excepting ITEC's Judgment from Pryor's
10 discharge under § 523(a)(2)(A). During the pendency of the
11 appeals, the bankruptcy court ordered the estate's claims, if any,
12 against ITEC abandoned to Pryor.

13 **B. Pryor's appeal of the motion to set aside the Judgment**

14 Nearly four years after entry of the Judgment, Pryor moved
15 the bankruptcy court to set aside the Judgment under Civil
16 Rule 60(b)(1), (2), (3), (6) and (d)(3) on April 23, 2014 ("Motion
17 to Set Aside Judgment"). Although mostly incomprehensible, the
18 gist of Pryor's motion alleged that ITEC committed "extrinsic
19 fraud" by failing to disclose to the bankruptcy court that it had
20 no license to issue the subject loans and that such loans
21 contained usurious interest charges and unenforceable provisions.
22 Pryor contended that new evidence uncovered in the parties' state
23 court trial revealed ITEC's unlicensed status and its inability to
24 conduct any actions requiring a license under California law, as
25 set forth in Exhibit H in his Request for Judicial Notice.
26 Exhibit H consisted of Pryor's motion for a new trial filed in his
27 state court action against ITEC, which referenced the alleged new
28 document obtained from the Department of Real Estate regarding

1 Patel's licensing history. Pryor argued that the bankruptcy court
2 entered the \$11 million Judgment without knowing of the alleged
3 fraud and thereby allowed ITEC to recover on allegedly illegal and
4 usurious loans. Thus, given the alleged voidness and
5 unenforceability of ITEC's loans, Pryor argued the Judgment had to
6 be set aside.

7 ITEC opposed the Motion to Set Aside Judgment, contending it
8 lacked merit and constituted a bad faith filing and Pryor's fourth
9 attempt to defend against the allegations of the dischargeability
10 complaint. ITEC argued that the alleged "extrinsic fraud"
11 involved old and stale issues Pryor had raised before the state
12 trial and appellate courts, which determined that Pryor's
13 allegations lacked merit. ITEC further argued the motion was
14 untimely and failed to cite any authority for vacating a judgment
15 after two appeals. ITEC requested that Pryor be declared a
16 vexatious litigant.

17 In reply, Pryor contended he timely filed the Motion to Set
18 Aside Judgment because the one-year filing rule under Civil
19 Rule 60(c) did not start to run until the Ninth Circuit entered
20 its ruling on the Judgment on October 23, 2013. Pryor did not
21 oppose ITEC's vexatious litigant request. In support of his
22 reply, Pryor included a copy of the document he contended showed
23 that ITEC lacked the license required to provide the subject
24 loans.

25 The bankruptcy court entered an order on July 7, 2014,
26 denying the Motion to Set Aside Judgment on the basis that Pryor's
27 claims were untimely and declaring Pryor a vexatious litigant.
28 Pryor appealed to the BAP.

1 On April 6, 2015, the Panel entered its Memorandum Decision
2 affirming the bankruptcy court's ruling as to Pryor's claims for
3 relief under Civil Rule 60(b)(1), (2), (3) and (6), but vacating
4 and remanding the court's ruling respecting Pryor's claim for
5 "fraud on the court" under Civil Rule 60(d)(3). (Case No.
6 14-1365). The Panel determined that the Civil Rule 60(b)(1), (2)
7 and (3) claims were untimely, having been filed nearly four years
8 after entry of the Judgment. Contrary to Pryor's argument, the
9 one-year limitation period for filing a motion under Civil
10 Rule 60(b)(1), (2) and (3) is not tolled during the pendency of an
11 appeal of the underlying judgment. Nevitt v. United States,
12 886 F.2d 1187, 1188 (9th Cir. 1989).⁴

13 However, because motions to set aside a judgment for "fraud
14 on the court" under Civil Rule 60(d)(3) are not subject to time
15 limits, Wood v. McEwen, 644 F.2d 797, 801 (9th Cir. 1981), the
16 Panel vacated and remanded the bankruptcy court's order respecting
17 that claim to determine whether Pryor was entitled to any relief
18 under Civil Rule 60(d)(3).

19 **C. Pryor's appeal of the bankruptcy court's order upon remand**

20 On April 23, 2015, the bankruptcy court entered further
21 findings and a judgment determining that Pryor was not entitled to
22 relief under Civil Rule 60(d)(3). Pryor timely appealed.

23 **II. JURISDICTION**

24 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334

25
26 ⁴ The Panel also affirmed the bankruptcy court's ruling under
27 Civil Rule 60(b)(6) on the basis that Pryor waived the issue for
28 failing to present any specific argument for how the bankruptcy
court erred as to that claim or, alternatively, that it lacked
merit. (Case No. 14-1365). Because Pryor did not contest the
vexatious litigant ruling, the Panel affirmed that ruling as well.

1 and 157(b) (2) (I) & (J). We have jurisdiction under 28 U.S.C.
2 § 158(b).

3 **III. ISSUE**

4 Did the bankruptcy court abuse its discretion in denying the
5 Motion to Set Aside Judgment under Civil Rule 60(d) (3) on remand?

6 **IV. STANDARD OF REVIEW**

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

16 **V. DISCUSSION**

17 As with his last appeal, Pryor's brief is largely
18 incomprehensible and attempts to argue the underlying merits of
19 the Judgment and matters already decided against him by the state
20 court. Those matters are not properly before us.⁵ In fact,
21 Pryor's brief is essentially identical to the one he filed in his
22

23 ⁵ An appeal from an order denying a Civil Rule 60 motion
24 raises only the merits of the order denying the motion and does
25 not raise the merits of the underlying judgment, unless it is
26 filed within the time period required by Rule 8002(b) (1) (D), which
27 is 14 days after entry of the judgment. See Maraziti v. Thorpe,
28 52 F.3d 252, 254 (9th Cir. 1995) (applying former 10-day rule).
Because the Motion to Set Aside Judgment was not filed within
14 days after entry of the Judgment, we do not consider any
arguments Pryor has raised as to the propriety of the Judgment.
In any event, those arguments have already been considered and
ruled upon by this Panel and the Ninth Circuit and are final.

1 last appeal. Thus, his arguments make little sense, particularly
2 those regarding his Civil Rule 60(b) claims. Those claims were
3 decided against him by this Panel and not appealed. As such, we
4 do not consider any of the arguments Pryor raises as to his claims
5 for relief under Civil Rule 60(b). The only issue relevant to
6 this appeal is whether the bankruptcy court abused its discretion
7 in denying Pryor relief under Civil Rule 60(d)(3).

8 **A. Governing law for relief from judgment under Civil**
9 **Rule 60(d)(3)**

10 Civil Rule 60(d)(3), incorporated by Rule 9024, allows a
11 court to "set aside a judgment for fraud on the court." A
12 plaintiff must establish fraud on the court by clear and
13 convincing evidence. Pizzuto v. Ramirez, 783 F.3d 1171, 1181 (9th
14 Cir. 2015) (citing Stonehill, 660 F.3d at 443, 445).

15 Not all "fraud 'connected with the presentation of a case to
16 a court' is . . . necessarily a fraud on the court." Stonehill,
17 660 F.3d at 444 (quoting C. Wright & A. Miller, FEDERAL PRACTICE AND
18 PROCEDURE § 2870 (2d ed. 1987)). Rather, fraud on the court
19 "embraces only that species of fraud which does or attempts to,
20 defile the court itself, or is a fraud perpetrated by officers of
21 the court so that the judicial machinery can not perform in the
22 usual manner its impartial task of adjudging cases that are
23 presented for adjudication." Latshaw v. Trainer Wortham & Co.,
24 452 F.3d 1097, 1104 (9th Cir. 2006) (applying Civil Rule 60(b)).
25 The relevant inquiry is not whether fraudulent conduct prejudiced
26 the opposing party, but whether it harmed the integrity of the
27 judicial process. Stonehill, 660 F.3d at 444. Fraud on the court
28 involves far more than an injury to a single litigant. Id.

1 The type of fraud asserted here must involve egregious
2 conduct, such as an unconscionable plan or scheme designed to
3 improperly influence the court in its decision. Latshaw, 452 F.3d
4 at 1104 (citing Abatti v. Comm'r, 859 F.2d 115, 118 (9th Cir.
5 1988); Toscano v. Comm'r, 441 F.2d 930, 934 (9th Cir. 1971)).
6 "Mere nondisclosure of evidence is typically not enough to
7 constitute fraud on the court, and 'perjury by a party or witness,
8 by itself, is not normally fraud on the court.'" Stonehill,
9 660 F.3d at 444 (quoting Levander v. Prober (In re Levander),
10 180 F.3d 1114, 1119 (9th Cir. 1999)). See Pizzuto, 783 F.3d at
11 1181 (evidence of fraud on the court must consist of more than the
12 "garden-variety" nondisclosure). Perjury or nondisclosure of
13 evidence, however, may constitute fraud on the court if "that
14 perjury or nondisclosure was so fundamental that it undermined the
15 workings of the adversary process itself." Stonehill, 660 F.3d at
16 445. "Fraud on the court 'should be read narrowly, in the
17 interest of preserving the finality of judgments.'" Latshaw,
18 452 F.3d at 1104 (quoting Toscano, 441 F.2d at 934).

19 **B. The bankruptcy court did not abuse its discretion in denying**
20 **the Motion to Set Aside Judgment under Civil Rule 60(d)(3).**

21 The bankruptcy court reviewed the Motion to Set Aside
22 Judgment, Pryor's accompanying declaration, his RJN, ITEC's
23 opposition and RJN, the court's notes from the prior hearing and
24 that hearing's transcript. It concluded that Pryor had not
25 presented sufficient evidence to support his claim for "fraud on
26 the court" under Civil Rule 60(d)(3).

27 Pryor fails to present any cogent argument for how the
28 bankruptcy court abused its discretion in denying him relief under

1 Civil Rule 60(d)(3). He argued in his Motion to Set Aside
2 Judgment that ITEC committed "extrinsic fraud" by failing to
3 disclose it was not licensed to issue the subject loans and that
4 such loans contained usurious interest charges and unenforceable
5 provisions. "'Extrinsic fraud is conduct which prevents a party
6 from presenting his claim in court.'" Kougasian v. TMSL, Inc.,
7 359 F.3d 1136, 1140 (9th Cir. 2004) (quoting Wood, 644 F.2d at
8 801). See also Abatti, 859 F.2d at 118 ("fraud on the court may
9 occur when the acts of a party prevent his adversary from fully
10 and fairly presenting his case or defense"). Pryor did not allege
11 that ITEC prevented him from presenting his defense to its
12 § 523(a)(2)(A) claim. It appears from the record that his lack of
13 diligence was to blame. Even so, the bankruptcy court considered
14 his extensive oral argument at ITEC's prove-up hearing before
15 entering the Judgment.

16 In any event, the only discernable complaint Pryor has is
17 that ITEC failed to disclose to the bankruptcy court the illegal
18 nature of the loans and that Patel had committed perjury by
19 claiming she was a licensed broker. According to Pryor's
20 declaration in support of his Motion to Set Aside Judgment, ITEC's
21 counsel "had no knowledge of the initial fraud perpetrated against
22 the Court."

23 On this record, Pryor has not shown by clear and convincing
24 evidence how ITEC's alleged nondisclosure and Patel's alleged
25 perjury were "so fundamental that it undermined the workings of
26 the adversary process itself." Stonehill, 660 F.3d at 445. This
27 is particularly true since ITEC's counsel was not involved in the
28 alleged fraud. Id. at 444 (perjury should not usually constitute

1 fraud on the court unless an attorney or other officer of the
2 court was a party to it). We further note Pryor conceded to the
3 Panel at oral argument that these same acts by ITEC and Patel he
4 claims constituted fraud on the court were considered and rejected
5 by the California state court and court of appeals as lacking
6 merit.

7 **VI. CONCLUSION**

8 Because the bankruptcy court did not abuse its discretion in
9 denying Pryor relief under Civil Rule 60(d)(3), we AFFIRM.

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