

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 24 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GREGORY KELLY,
Plaintiff-Appellee,

v.

JODY MARIE CUOMO,
Defendant-Appellant.

and

FRANK SILVER, M.D.,
Respondent,

No. 22-16305

D.C. No.
2:18-cv-00923-JAD-VCF

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Jennifer A. Dorsey, District Judge, Presiding

Submitted May 18, 2023**
Phoenix, Arizona

Before: NGUYEN and COLLINS, Circuit Judges, and KORMAN,*** District
Judge.
Concurrence by Judge COLLINS.

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision
without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Edward R. Korman, United States District Judge for
the Eastern District of New York, sitting by designation.

Jody Marie Cuomo filed a Federal Rule of Civil Procedure 60(b)(4) motion seeking to void the Bankruptcy Court's judgment that she owed Gregory Kelly for a debt that was nondischargeable under 11 U.S.C. § 523(a)(2)(A) because the loan was obtained via false pretenses, false representations, or actual fraud. Cuomo argues that Kelly, as an assignee, lacked standing to pursue the § 523(a)(2)(A) action because Nevada does not permit the assignment of fraud claims and thereby contends that the Bankruptcy Court lacked jurisdiction to enter the judgment. The district court denied Cuomo's motion. We affirm.

Under Rule 60(b)(4), a judgment is void because of a jurisdictional defect only in the rare case in which the court that entered it lacked any arguable basis for exercising jurisdiction. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010); *Hoffmann v. Pulido*, 928 F.3d 1147, 1151 (9th Cir. 2019). In this case, the district court properly denied Cuomo's Rule 60(b)(4) motion because the Bankruptcy Court had two arguable bases for exercising jurisdiction over Kelly's § 523(a)(2)(A) action.

First, although Nevada prohibits the assignment of most fraud claims, *see Reynolds v. Tufenkjian*, 461 P.3d 147, 152 (Nev. 2020), it is uncertain whether the Nevada courts would extend that rule to this context because Kelly sought to avoid discharge in order to recover purely pecuniary losses. Such an action does not clearly implicate the policy interests that underlie Nevada's prohibition on the

assignment of fraud claims. *See id.* at 152–53. It instead more closely resembles the types of claims that Nevada courts have held are assignable. *See id.* at 153–54 (permitting assignment of a negligent-misrepresentation claim because it “is more akin to a claim seeking recovery for a loss of property”); *Superpumper, Inc. v. Leonard*, 495 P.3d 101, 106 n.1 (Nev. 2021) (allowing assignment of a fraudulent-conveyance claim). Nevada law therefore may not prohibit the assignment at issue here.

Second, even if Nevada did restrict assignment in this context, it is possible that federal interests would override such a prohibition. Although the Bankruptcy Code generally accepts that “[p]roperty interests are created and defined by state law,” the Supreme Court has recognized that “some federal interest [may] require[] a different result” in certain cases. *Butner v. United States*, 440 U.S. 48, 55 (1979). One interest that animates the Bankruptcy Code, and § 523(a)(2)(A) in particular, is permitting honest debtors to achieve a fresh start while not allowing perpetrators of fraud to shirk their obligations. *See Ragsdale v. Haller*, 780 F.2d 794, 797 (9th Cir. 1986). Our court recently relied on that federal interest in *In re Boyajian*, 564 F.3d 1088 (9th Cir. 2009), when holding that the closely related § 523(a)(2)(B) claims generally are assignable under federal law. *Id.* at 1092–93. It is possible that this same federal interest would justify overriding any Nevada restriction on the assignment of § 523(a)(2)(A) actions because such a restriction would afford

an undue windfall to perpetrators of fraud whenever a debtor assigns his or her obligation to a third party.

Because the Bankruptcy Court had an arguable basis for jurisdiction under either of these theories, the district court was right to deny Cuomo's motion to set aside the judgment.

AFFIRMED.

Kelly v. Cuomo, No. 22-16305

AUG 24 2023

COLLINS, Circuit Judge, concurring in the judgment:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I agree with the majority that the district court properly denied Appellant Jody Marie Cuomo’s motion for relief under Federal Rule of Civil Procedure 60(b)(4) from the bankruptcy court’s judgment, but I reach that conclusion on somewhat different grounds. I therefore concur in the judgment.

“Lawsuits by assignees, including assignees for collection only, are ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’” *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 285 (2008) (citation omitted). The theory of Cuomo’s Rule 60(b)(4) motion is that, despite this general rule, Kelly lacked Article III standing in the bankruptcy court because he was not a valid assignee under Nevada law. That is true, according to Cuomo, because the relief sought in Kelly’s adversary complaint in the bankruptcy court rested on fraud, but Nevada law prohibits assignment of fraud claims. I need not decide whether every step of this syllogism is correct, because its starting premise—*i.e.*, that the bankruptcy court adversary complaint asserted a fraud claim under Nevada law—is questionable. Cuomo therefore has not satisfied the high standard for setting aside a judgment for lack of jurisdiction under Rule 60(b)(4). *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010) (holding that the movant must show that “the court that rendered judgment lacked even an

‘arguable basis’ for jurisdiction” (citation omitted)).

The debt in question—a loan made pursuant to a written agreement that Cuomo signed with lender Patricia Ritchie—was assigned to Appellee Gregory Kelly in 2011. The bankruptcy court, in rendering judgment, concluded that (1) the loan was “due and owing” in the amount of \$96,000, plus interest; and (2) the “amount of the ordered judgment” on the loan “is not dischargeable under Section 523(a)(2)” of the Bankruptcy Code. Although the judgment does not itself specify which subparagraph of § 523(a)(2) was invoked by the bankruptcy court, it is undisputed that the bankruptcy court relied on § 523(a)(2)(A). It is well-settled that, although the underlying debt sought to be held nondischargeable is governed by state law, the issue of non-dischargeability for fraud under § 523(a)(2)(A) is governed by federal common law and not state law. *See Field v. Mans*, 516 U.S. 59, 69–70 & n.9 (1995). Viewed in this light, the bankruptcy court judgment can be read as concluding that (1) a contract debt was due and owing (under Nevada law); and (2) the contract debt was not dischargeable due to fraud as defined under *federal* law. Cuomo has not made the extraordinarily high showing that it is not even “arguable” to read the judgment in this way. And once the judgment is read this way, Cuomo’s argument falls apart: the question whether federal law chooses not to discharge, for fraud, a *contract* debt that was properly assigned under state law is distinct from whether an underlying *fraud* claim under state law is

assignable. These points are at least arguable, and so Cuomo did not carry her very high burden.

Accordingly, I concur in the judgment affirming the district court's order denying relief under Rule 60(b)(4).