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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
November 6, 2007
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE RONALD LYNN JONES, doing business as Jones Automotive Service, and PENNY SUE JONES, doing business as Parts One Auto Supply, Debtors.	BAP No. WO-07-032
RONALD LYNN JONES and PENNY SUE JONES, Appellants, v. FIRST SECURITY BANK OF BEAVER and L. WIN HOLBROOK, Trustee, Appellees.	Bankr. No. 05-27705-NLJ Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, NUGENT, and BROWN, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

The Appellants Ronald Lynn Jones and Penny Sue Jones ("Debtors") appeal the bankruptcy court's February 9, 2007 Order Denying their Motion to Reconsider its prior orders denying (1) Debtors' motion to vacate a previously-entered order converting their case from Chapter 13 to Chapter 7 or alternatively, to reconvert their case to Chapter 7 and (2) Debtors' motion to vacate an agreed stay relief order. For the following reasons, we AFFIRM the decision of the bankruptcy court.

I. Background

On October 13, 2007, Debtor Ronald Jones filed a Chapter 13 case[1] and Debtor Penny Jones filed a Chapter 7 case.[2] Penny Jones converted her case to Chapter 13 on March 24, 2006.[3] At Mrs. Jones' request, the court consolidated the Debtors' Chapter 13 cases into Mr. Jones' case on June 5, 2006.[4] On July 10, 2006, the Debtors filed a notice of conversion of their consolidated case to Chapter 7.[5] That same day, an order converting the case to Chapter 7 was issued ("Conversion Order").[6]

Appellee First Security Bank of Beaver ("Appellee") filed a motion for relief from stay and abandonment in Mr. Jones' bankruptcy case on May 22, 2006,[7] seeking relief from stay as to all of Appellee's collateral, including both

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1 Appellants' Appendix at 25.

2 *Id.* at 5.

3 *Id.* at 8-9 and 14.

4 *Id.* at 15-16.

5 *Id.* at 33.

6 *Id.* at 32.

7 Appellee's Appendix at 12-18.

real and personal property. Mr. Jones objected,[8] but prior to any hearing on the matter, the parties entered into an agreement. The bankruptcy court entered an agreed order granting Appellee relief from stay and abandonment as to all of the collateral on July 7, 2006 ("RFS Order").[9] Although the Appellee filed the motion for relief from stay and abandonment before consolidation of the cases, it appears from both the text of the agreed order and the briefs in this case that Mrs. Jones was also a party to the order.[10]

Debtors moved to vacate the conversion of their consolidated case to Chapter 7, or, alternatively, to convert to Chapter 13 on August 16, 2006. The motion alleges that Debtors were not fully informed of their various options, wished to save their home and that Chapter 13 was the only way to accomplish that goal.[11] On the same date, Debtors moved to vacate the agreed RFS Order, alleging they never intended to grant relief from stay on their homestead and shop.[12] Appellee objected to both motions.[13] On October 23, 2006, after holding a hearing on October 11 on the motions, the bankruptcy judge entered an order

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8 *Id*. at 23-24.

9 Appellants' Appendix at 29-31.

10 In addition, we would note that Appellee filed a motion for relief from stay and abandonment in Mrs. Jones' bankruptcy case on January 30, 2006. Appellee's Appendix at 1-5. Although Mrs. Jones initially objected to the motion, *id*. at 6-7, there was no hearing. The Court entered another agreed order on March 7, 2006, granting Appellee relief from stay and abandonment as to some, but not all, of the property mentioned in the motion. Appellants' Appendix at 10-13. The order purported to continue the stay as to other property pending a final hearing to be held on April 4, 2006. *Id*. at 10. Nothing in the record on appeal shows that a final hearing ever occurred, but Appellee states that the court first continued and then struck the final hearing by agreement of the parties. Reply (sic) Brief of Appellee at 2.

11 Appellants' Appendix at 37-38.

12 *Id*. at 39.

13 *Id*. at 40-44.

summarily denying both motions ("Vacation Order").[14]

Debtors filed a motion to reconsider within 10 days of the entry of the Vacation Order and specifically requested that the bankruptcy court make findings of fact.[15] Appellee objected.[16] The bankruptcy judge issued an order denying the Motion to Reconsider on February 9, 2007 ("Reconsideration Order").[17] In that order, the Court summarized the two motions and noted the absence of any evidence presented in support of reconsideration of the two motions. The court made no specific findings of fact or conclusions of law, but, after noting that Debtors had cited no authority or plausible reason for the court to vacate its prior order, the bankruptcy judge stated:

> Furthermore, during a hearing on Debtors' motions to vacate conducted October 11, 2006, no witnesses were called by either side to testify. Counsel were seemingly content to present legal argument only. Debtors could have called their previous attorney to testify as to their allegation of "not [being] fully informed of the various options . . ." and could have themselves even testified. Alas, they did neither.[18]

Debtors timely filed a notice of appeal from the Reconsideration Order, and only this order, on February 18, 2007.

II. Appellate Jurisdiction

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit,

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[14] *Id*. at 45.

[15] *Id*. at 46.

[16] Appellee's Appendix at 32.

[17] Appellants' Appendix at 47-49.

[18] *Id*. at 49. A review of the transcript of the October 11, 2006, hearing confirms this statement. We note that while counsel made argument at the hearing, neither side presented any legal authority. *Id*. at 50-63.

unless one of the parties elects to have the district court hear the appeal.[19] A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[20] The Reconsideration Order was a final order for purposes of § 158(a).[21] Debtors' notice of appeal was timely filed within ten days of entry of the Reconsideration Order. Neither party elected to have this appeal heard by the district court for the Western District of Oklahoma. Thus, this Court has jurisdiction to review the order.

III. Standard of Review

We review final orders denying motions to reconsider for an abuse of discretion.[22] To the extent the bankruptcy court based its ruling on discretionary factors, we review for abuse of discretion; to the extent its ruling was based on its findings of fact and conclusions of law, however, we apply the traditional review reserved for those determinations; clearly erroneous for the findings of fact and de novo for the legal conclusions.[23]

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[19] 28 U.S.C. §158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

[20] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (internal quotation marks omitted).

[21] *In re Rodriguez Camacho*, 361 B.R. 294, 299 (1st Cir. BAP 2007) (Bankruptcy court order denying reconsideration of an order granting stay relief is a final order.); *In re San Miguel Sandoval*, 327 B.R. 493, 505 (1st Cir. BAP 2005) (Bankruptcy court order denying reconsideration is "final" appealable order if underlying order was final appealable order, and together the orders end litigation on merits.); *In re Miller*, 303 B.R. 471, 472 (10th Cir. BAP 2003), *abrogated on other grounds by Marrama v. Citizens Bank of Mass.*, 127 S.Ct. 1105 (2007) (order denying conversion from a Chapter 7 to Chapter 13 is a final order); *Eddleman v. United States Dept. of Labor*, 923 F.2d 782, 784 (10th Cir. 1991), *overruled in part on other grounds by Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003, 1005 n.3 (10th Cir. 1992) (As a general rule, orders granting or denying relief from the automatic stay are appealable final orders.).

[22] *In re Rafter Seven Ranches LP*, 362 B.R. 25, 28 (10th Cir. BAP 2007).

[23] *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 727-28 (10th Cir. 1993).

IV. Discussion

The only order appealed is the bankruptcy court's Reconsideration Order. Debtors argue that the bankruptcy court abused its discretion when it ignored their presence in court and failed to question them, and instead relied upon a statement in a pleading to justify denying them a chance to reorganize and keep their homestead and business. Debtors claim "[t]he issues before the court are that of equity and due diligence of the [bankruptcy court]."[24]

1. Motions to Reconsider in General

There is no specific reference to a "Motion to Reconsider" in the Federal Rules of Civil Procedure or Bankruptcy Procedure. Instead, the rules allow a litigant subject to an adverse judgment to file either a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) or a motion seeking relief from the judgment pursuant to Federal Rule of Civil Procedure 60(b). Rule 59(e) and Rule 60(b) are made applicable to the bankruptcy courts pursuant to Bankruptcy Rules 9023 and 9024, respectively. These two rules are distinct; they serve different purposes and produce different consequences.[25] Which rule applies to a motion depends essentially on the time a motion is served. If a motion is served within ten days of the rendition of judgment, the motion ordinarily will fall under Rule 59(e).[26] If the motion is served after that time, it falls under Rule 60(b).[27]

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[24] Brief for the Appellant (sic) at 7.

[25] *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1992).

[26] *See Dalton v. First Interstate Bank of Denver*, 863 F.2d 702, 703 (10th Cir. 1988) ("post-judgment motions filed within ten days of the final judgment should, where possible, be construed as Rule 59(e) motions").

[27] *See Wilson v. Al McCord, Inc.*, 858 F.2d 1469, 1478 (10th Cir. 1988) ("Because more than ten days had elapsed before the filing of the motion to reconsider, we construe it as a motion pursuant to Fed. R. Civ. P. 60(b)(6) . . . .") (citation omitted).

A Rule 59(e) motion is only appropriate when a court has misapprehended the facts, a party's position, or controlling law.[28] Grounds warranting altering or amending a judgment include (1) an intervening change in the controlling law; (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.[29] An appeal from a ruling on a Rule 59(e) motion raises the bankruptcy court's underlying judgment for review by this court.[30]

Rule 60(b) provides that the court may grant relief from judgment based on one or more of the following:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). An appeal of a denial of a Rule 60(b)-type motion for reconsideration raises for review only the court's order of denial and not the underlying judgment itself.[31]

Debtors' motion to reconsider does not state the statutory basis for the relief requested. Since Debtors' motion to reconsider was filed seven days after the Vacation Order was entered on the docket, it should be construed as a Rule 59(e) motion. Accordingly, this court must review the underlying order that was

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[28] *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

[29] *Id.*

[30] *Van Skiver*, at 1243 n.3. *Hawkins v. Evans*, 64 F.3d 543, 546 (10th Cir. 1995) (An appeal from the denial of a motion to reconsider construed as a Rule 59(e) motion permits consideration of the merits of the underlying judgment, while an appeal from the denial of a Rule 60(b) motion does not preserve the underlying judgment for appellate review.).

[31] *Id.*

the subject of the motion for reconsideration.

2. Merits of the underlying order

In this case, the underlying order is the bankruptcy court's denial of Debtors' motion to vacate the Conversion Order, their alternative motion to reconvert, and their motion to vacate the RFS Order. Because Debtors' motions to vacate essentially sought reconsideration of the Conversion Order and RFS Order, we must dissect Debtors' motions to determine whether Rule 59(e) or Rule 60(b) analysis is required. Since the motions to vacate were filed on August 16, 2006, 37 days after the Conversion Order was filed and 40 days after the RFS Order was filed, they are Rule 60(b)-type motions. Under *Van Skiver*, the RFS Order and the Conversion Order are not reviewable and this court's review is limited to the denial of the motions to vacate under Rule 60(b).[32]

Notwithstanding that the bankruptcy court summarily denied Debtors' motions to vacate, this Court concludes that denial of the motions to vacate was the correct result. Rule 60(b) relieves an aggrieved party from a judgment on the basis of mistake, inadvertence, surprise, excusable neglect, fraud or newly discovered evidence. Relief under Rule 60(b) is afforded only in exceptional circumstances.[33]

In their motions to vacate, Debtors alleged they were not fully informed of their various options, they were told they had no option but to convert to Chapter 7, they never intended to grant relief from the stay as to their home and shop, and

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[32] Indeed, it is doubtful this Court even has jurisdiction over the Conversion Order and RFS Order. Neither the RFS Order nor the Conversion Order were timely appealed. Federal Rule of Bankruptcy Procedure 8002 requires a notice of appeal to be filed with the clerk within 10 days of the date of entry of the order appealed from. The Conversion Order was issued on July 10, 2006, and became unappealable on July 21, 2006. Likewise, the RFS Order was issued on July 7, 2006, and became unappealable on July 18, 2006.

[33] *State Bank v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1080 (10th Cir. 1996).

they wished to save their home under Chapter 13. On appeal, Debtors allege they were misled by their former attorney and equity supports giving them a chance at reorganization.[34] These arguments implicate Rule 60(b)(1) and (6).

As a general proposition, the "mistake" provision in Rule 60(b)(1) provides for the reconsideration of judgments only where: (1) a party has made an excusable litigation mistake or an attorney in the litigation has acted without authority from a party, or (2) where the judge has made a substantive mistake of law or fact in the final judgment or order.[35] Debtors do not allege that their former attorney acted without their authority, just that he gave them bad advice. The United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit") has declined to grant relief under Rule 60(b)(1) when the mistake was the result of a deliberate and counseled decision by the party.[36] A party who takes deliberate action with negative consequences will not be relieved of the consequences by Rule 60(b)(1) when it subsequently develops that the choice was unfortunate.[37]

Rule 60(b)(6) has been referred to as "a grand reservoir of equitable power to do justice in a particular case."[38] Relief under this provision generally requires a showing of actual injury and the presence of circumstances beyond the movant's control that prevented timely action to protect his interests.[39] The Tenth Circuit has found extraordinary circumstances when events not contemplated by the

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[34] Brief for the Appellant (sic) at 7.

[35] *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577-578 (10th Cir. 1996).

[36] *Id.* at 577.

[37] *Id.* at 578.

[38] *Van Skiver v. United States*, 952 F.2d 1241, 1244 (10th Cir. 1991) (internal quotation marks omitted).

[39] *Lehman v. United States*, 154 F.3d 1010, 1017 (9th Cir. 1998).

moving party render enforcement of the judgment inequitable. Rule 60(b)(6) relief is appropriate when circumstances are so "unusual and compelling" that extraordinary relief is warranted, or when it "offends justice" to deny such relief.[40] A counseled, deliberate choice with unfortunate consequences does not warrant Rule 60(b)(6) relief.[41]

We observe that many of the Debtors' complaints relate to their alleged inability to communicate with or direct their former counsel. Yet, they offered no testimony to support these assertions. Thus, we cannot say that the bankruptcy court abused its discretion in denying Debtors' motions to vacate.

The underlying order also denied Debtors' alternative motion to reconvert, which was boot-strapped to Debtors' motion to vacate the Conversion Order. Unlike the motions to vacate, the alternative motion to reconvert is not a motion to reconsider requiring Rule 60(b) analysis. Instead, given its procedural history, we must undertake a Rule 59(e) analysis of the bankruptcy court's denial of Debtors' motion to reconvert. Altering or amending a judgment, or in this case the denial of a motion, is only appropriate when a court has misapprehended the facts, a party's position, or controlling law.[42] Debtors' arguments for reconversion implicate none of these grounds. Debtors do not allege the bankruptcy court misapprehended the facts, their position, or the controlling law. Instead, Debtors allege they themselves were the ones who misapprehended the facts and consequences. Moreover, no evidence was presented to establish that Debtors had the ability to fund a plan or that their circumstances have changed to

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[40] *Cashner*, 98 F.3d at 580 (internal quotation marks omitted).

[41] See *Ackermann v. United States*, 340 U.S. 193, 198 (1950) (movant made a considered and free choice not to appeal cancellation of his naturalization and he was not entitled to relief under Rule 60(b)(6)).

[42] *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

suggest otherwise.[43] Because Debtors failed to provide a proper basis for the bankruptcy court to alter its decision and presented no evidence to support their request for reconversion, this Court concludes the bankruptcy court did not abuse its discretion in denying Debtors' motion to reconvert.

3. The bankruptcy court did not abuse its discretion in entering the Reconsideration Order

As discussed above, Debtors' motion for reconsideration is a Rule 59(e) motion. Again, a Rule 59(e) motion is only appropriate when a court has misapprehended the facts, a party's position, or controlling law. While the bankruptcy court did not specifically address these grounds or authorities, nothing in Debtors' motion to reconsider raises any of them. Indeed, the bankruptcy court noted that at the hearings on the underlying motions, the debtors appeared with counsel, but were never offered as witnesses.[44] Counsel were "content" to rely on legal arguments alone.[45] Debtors complain that the bankruptcy court did not "request" testimony, but it was their job below to offer that testimony. They did not. Indeed, no evidence whatever was offered in support of their Motion to Reconsider. Just as it is the burden of the movant below to provide the bankruptcy court with an evidentiary predicate for the relief requested, it is incumbent on the Debtors to provide a record upon which this Court can conduct meaningful review. On the record we have been provided, we cannot say that the bankruptcy court trespassed the bounds of permissible choice or committed a clear error of judgment in this case.

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[43] *See In re Johnson*, 116 B.R. 224, 227 (Bankr. D. Idaho 1990) (Absent a showing that Debtors can now confirm a plan, when they could not before, conversion must be denied.).

[44] Order Denying Debtors' Motion to Reconsider, *in* Appellants' Appendix at 49.

[45] *Id.*

V. Conclusion

For the foregoing reasons, the Reconsideration Order is AFFIRMED.