FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
September 6, 2005
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DAVID BRIAN DERRINGER, Debtor.	BAP No. NM-05-020
DAVID BRIAN DERRINGER, Appellant, v. MICK CHAPEL and JENNIFER CHAPEL, Appellees.	Bankr. No. 13-04-17330-MA Chapter 13 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before MICHAEL, McNIFF, and THURMAN, Bankruptcy Judges.

MICHAEL, 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.

David Brian Derringer ("Derringer") appeals an order denying his motion for judicial notice, entered by the United States Bankruptcy Court for the District of New Mexico on February 2, 2005, and an order denying his motion for relief

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

under Fed. R. Civ. P. 59, entered March 3, 2005. Finding no error, we AFFIRM.[1]

I. Background

In 1993, Susan Nevitt and her mother, Norma Nevitt ("Nevitts"), purchased property along Harris Creek in Catron County, New Mexico ("Property"), which was upstream from property owned by Appellees Mick and Jennifer Chapel ("Chapels"). The Nevitts and Susan Nevitt's husband, Derringer, constructed dams on the Property, which diverted water from Harris Creek into ponds located on the Property. In 1994, the Chapels brought suit against the Nevitts in New Mexico state court, Catron County ("State Court"), seeking to establish the seniority of their water rights and to enjoin the Nevitts from obstructing or interfering with the free flow of Harris Creek or using water from Harris Creek. In 1995, before the case went to trial, Derringer acquired an interest in the Property by a special warranty deed from the Nevitts to themselves and Derringer as joint tenants; however, Derringer did not attempt to become a party to the case. In 1996, the jury rendered a verdict in favor of the Chapels, and the State Court entered judgment against the Nevitts and permanently enjoined them, and their successors and assigns, from interfering with the Chapels' water rights ("1996 Injunction"). The Nevitts appealed the judgment and injunction to the New Mexico Court of Appeals, which affirmed.

In 2000, the Chapels sought to reopen the action against the Nevitts to enforce the 1996 Injunction, which they claimed the Nevitts were violating. On his motion and with the consent of the other parties, Derringer was joined as a party-defendant. In 2001, the State Court issued a decision and judgment concluding that (1) the Nevitts and Derringer had violated the 1996 Injunction;

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[1] We also deny Appellant's Motion to Take Judicial Notice of Violations of Rule 8008 and 8008-1 by Chapels and Attorneys Joseph Manges and Stephen Long with Violations of Due Process Against the Appellant in Violation of the 14th Amendment, filed April 12, 2005; and Appellant's Motion to Strike Chapels' Untimely Reply Brief Filed Without Leave of BAP Panel, filed June 15, 2005.

(2) the Chapels were entitled to a mandatory injunction requiring the Nevitts and Derringer to remove any and all obstructions to the flow of water in Harris Creek; and (3) the Chapels were entitled to a continuing injunction prohibiting the Nevitts and Derringer from appropriating any water in Harris Creek until the Chapels had received their appropriation each year ("2001 Judgment"). The Nevitts and Derringer appealed the 2001 Judgment to the New Mexico Court of Appeals, arguing that they had a superior claim to the water rights than did the Chapels; that the State Court Judge was biased by his previous relationship with the Chapels and should have recused; that the original proceedings were infirm because Derringer was a necessary and indispensable party to them and the State Court had no jurisdiction to proceed in Derringer's absence; and that without Derringer's presence in the original proceedings, the 1996 Injunction was invalid. The New Mexico Court of Appeals affirmed the 2001 Judgment.

In 2002, the Chapels again returned to State Court to enforce the 1996 injunction and the 2001 Judgment. Following a trial in 2003, at which Derringer appeared but the Nevitts did not, the State Court awarded the Chapels compensatory and punitive damages, as well as attorney's fees and costs. The State Court further ordered that Derringer and the Nevitts would be fined $100 per day for every day that they were in violation of the 1996 Injunction ("2003 Judgment"). Derringer and the Nevitts appealed the 2003 Judgment to the New Mexico Court of Appeals, which affirmed.

From 2002 to 2003, Derringer filed a series of lawsuits in the United States District Court for the District of New Mexico ("Federal Court"). Defendants included the Chapels; the State Court Judge; the Chapels' attorney, Joseph Manges ("Manges"), and his law firm; the Judges of the New Mexico Court of Appeals; the New Mexico State Police; the Sheriff of Catron County; and the New Mexico State Engineer. In each case, Derringer alleged violations of his civil rights. He argued that the 1996 Injunction was invalid and not binding on

him. In each case, the Federal Court held that the *Rooker-Feldman* doctrine[2] prevented the court from reviewing the 1996 Injunction, the 2001 Judgment, or the 2003 Judgment. Derringer appealed several of the Federal Court orders to the Tenth Circuit Court of Appeals, which affirmed.

In 2004, the Chapels attempted to foreclose on the Property. In an attempt to avoid a foreclosure, Derringer filed his Chapter 13 petition on October 6, 2004. On October 7, the Chapels' attorney, Manges, mailed an amended notice of sale to the State Court. The State Court file-stamped the amended notice of sale on October 12, 2004.

On October 18, 2004, Derringer filed in the bankruptcy court a "Motion to Take Judicial Notice and Request for Relief, and Motion for Permanent Restraining Order Against Mick Chapel, Jennifer Chapel, and Joseph Manges" ("First Motion for Judicial Notice"), arguing that the Chapels and Manges had willfully violated the automatic stay by mailing the amended notice of sale to the State Court. On November 18, 2004, the bankruptcy court entered an order denying the First Motion for Judicial Notice to the extent it sought injunctive or equitable relief in the form of a permanent restraining order, holding that such relief could be obtained only through an adversary proceeding.

On December 27, 2004, Derringer filed "Debtor David Derringer's Motion to Take Judicial Notice and Objection to Enforcement of Chapels' Unconstitutional Claims of Debt" ("Second Motion for Judicial Notice"). In the Second Motion for Judicial Notice, Derringer argued that the Chapels violated New Mexico state law and deprived him of equal protection and due process. He claimed that the 1996 Injunction and subsequent Judgments were invalid and not binding on him, and he requested that the bankruptcy court (1) take judicial notice

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[2] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983).

of his rights, privileges and immunities under the Constitution, 42 U.S.C. § 1981(a), and 42 U.S.C. § 1982; (2) take judicial notice of the violations of 18 U.S.C. § 241; (3) reconsider enforcement of the Chapels' claims; (4) consider an FBI investigation into the Chapels; and (5) consider the court's duties under Code of Judicial Conduct Canon 3(D)(2).

On February 3, 2005, the bankruptcy court entered its order denying the remainder of the First Motion for Judicial Notice and the Second Motion for Judicial Notice. The bankruptcy court held that Derringer had not shown a willful violation of the automatic stay by clear and convincing evidence. The bankruptcy court further held that the Chapels' judgments are final, enforceable judgments that have *res judicata* effect, and even if *res judicata* were inapplicable, under the *Rooker-Feldman* doctrine the bankruptcy court had no authority to reconsider or overrule final judgments entered by a state court.

On February 11, 2005, Derringer filed a motion entitled "Debtor David Derringer's Timely Motion for a New Trial; Amendment of Order; and Relief from Order; of the February 2, 2005, Order Denying Remainder of Debtor's Motion to Take Judicial Notice and Request for Relief, and Motion for Permanent Restraining Order Against Mick Chapel, Jennifer Chapel, and Joseph Manges Pursuant to F. R. Bankruptcy Procedure Rule 9023 and 9024 and the F. R. Civ. P. Rules 59 and 60 and Pursuant to the 8th, 13th and 14th Amendment and Title 11 Section 362(A) in the 'Interest of Justice' with New Evidence to Prove Needed Reversal of Decisions" ("Rule 59 Motion"). In the Rule 59 Motion, Derringer argued that *res judicata* and *Rooker-Feldman* did not apply to him as he was not a party to the original lawsuit against the Nevitts; the bankruptcy court lacked jurisdiction to enforce the Chapels' judgments because those judgments were illegal; and the bankruptcy court had jurisdiction to provide Derringer relief from the Chapels' judgments. The bankruptcy court denied the Rule 59 Motion by order entered March 3, 2005. Derringer filed his notice of appeal on March 8,

2005.

II. Jurisdiction and Standard of Review

Derringer timely filed his notice of appeal of the order denying his Rule 59 Motion and the order denying his Second Motion to Take Judicial Notice, which is a final order under 28 U.S.C. § 158(a).[3] The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of New Mexico.

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."[4] Whether a party's actions violated the automatic stay is a question of law that is reviewed *de novo*; whether a party's violation of the automatic stay was willful is a question of fact that is reviewed for clear error.[5] The applicability of the doctrines of *res judicata* and *Rooker-Feldman* is reviewed *de novo*.[6] Finally, we review the denial of a motion under Fed. R. Civ. P. 59 for an abuse of discretion.[7]

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[3] *See Catlin v. United States*, 324 U.S. 229, 233 (1945).

[4] *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *see* Fed. R. Bankr. P. 8013.

[5] *Diviney v. Nationsbank of Tex., N.A. (In re Diviney)*, 225 B.R. 762, 769 (10th Cir. BAP 1998). *See also In re Kaiser Aluminum Corp.*, 303 B.R. 299, 303 (D. Del. 2003).

[6] *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1168 (10th Cir. 2000) (application of *res judicata* is a question of law); *Abboud v. Abboud (In re Abboud)*, 237 B.R. 777, 779 (10th Cir. BAP 1999) (application of *Rooker-Feldman* doctrine is a question of law).

[7] *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997); *Lopez v. Long (In re Long)*, 255 B.R. 241, 245 (10th Cir. BAP 2000).

III. Discussion

A. Violation of the Automatic Stay

The bankruptcy court held that Derringer had not shown by clear and convincing evidence that Manges or the Chapels willfully violated the automatic stay. Derringer makes no argument to the contrary. He has therefore waived this issue,[8] and we will not review the bankruptcy court's conclusion regarding violation of the automatic stay.

B. *Res Judicata* and *Rooker-Feldman*

The bankruptcy court held that the doctrines of *res judicata* and *Rooker-Feldman* barred Derringer's claims that the 1996 Injunction, 2001 Judgment, and 2003 Judgment were invalid or not binding on him. Derringer's arguments to the contrary are without merit.

"Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."[9] The elements of res judicata are (1) a final judgment on the merits in a prior action; (2) that the claims raised in the subsequent action are identical to those decided in the prior action; and (3) that the prior action involved the same parties or privies.[10] This doctrine is intended to relieve parties of burdensome multiple lawsuits, to prevent inconsistent decisions, and to encourage reliance on adjudication.[11]

In this case, there have been several final State Court judgments, each

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[8] *See Phillips v. Calhoun*, 956 F.2d 949, 953-54 (10th Cir. 1992); *Murrell v. Shalala*, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994).

[9] *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876)).

[10] *Hoxworth v. Blinder*, 74 F.3d 205, 208 (10th Cir. 1996); *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1467 (10th Cir.1993).

[11] *Hoxworth*, 74 F.3d at 208.

concluding that the Chapels' judgments are valid and binding on Derringer. The claims raised in this appeal are identical to those decided in the prior State Court actions. In each of the State Court actions, Derringer or his privy was a party.[12] *Res judicata* therefore prevents Derringer from litigating issues that were or could have been raised regarding the validity of the Chapels' judgments.[13]

Additionally, the *Rooker-Feldman* doctrine prevents this Court from considering Derringer's claims that the Chapels' judgments are not valid. In a recent appeal involving Derringer, the United States Court of Appeals for the Tenth Circuit held:

> The *Rooker-Feldman* doctrine precludes "a party losing in state court . . . from seeking what in substance would be appellate review of [a] state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994). Thus, the doctrine "prohibits a lower federal court from considering [both] claims actually decided by a state court and claims 'inextricably intertwined' with a prior state-court judgment." *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 473 (10th Cir. 2002). This prohibition extends to decisions of the lower and intermediate state courts, as well as the highest state court. *Id.* at 474-75.
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> Derringer's claims against the Chapels challenge the propriety of the decisions made by [the State Court Judge] and the New Mexico Court of Appeals. His claims were either directly decided by one or both of those courts, or are inextricably intertwined with their decisions. The *Rooker-Feldman* doctrine therefore precludes the federal court's review of his claims.
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> Derringer attempts to avoid the doctrine's preclusive effect by arguing that he did not have a full and fair opportunity to litigate his claims in state court because he was not included in the proceedings leading up to the original May 17, 1996 judgment and injunction. The record does not support Derringer's contention that he has not had an adequate opportunity to litigate his claims in the state court. Even if the record did support his claim, however, it would be to no avail, because "Rooker-Feldman bars any suit that seeks to disrupt or 'undo' a prior state-court judgment, regardless of whether the

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[12] Derringer was a party to the 2001 Judgment and the 2003 Judgment. Derringer chose not to participate in the case underlying the 1996 Injunction; however, his privies were participants, and the State Court subsequently determined that the 1996 Injunction is binding on Derringer.

[13] *See Hoxworth*, 74 F.3d at 208; *Plotner*, 224 F.3d at 1168-72 .

> state-court proceeding afforded the federal-court plaintiff a full and fair opportunity to litigate [his] claims." *Id.* at 478.[14]

As in that appeal to the Tenth Circuit, in this appeal Derringer makes the same claims that either were directly decided by the State Court or are inextricably intertwined with the State Court's decisions. In order for Derringer to prevail, the bankruptcy court would have to vacate or reverse the 1996 Injunction, the 2001 Judgment, and the 2003 Judgment. The *Rooker-Feldman* doctrine prevents the court from doing so.[15] The bankruptcy court's order will therefore be affirmed.

C. Rule 59 Motion

A motion filed within ten days of entry of an order is considered a motion to alter or amend a judgment under Rule 59(e) of the Federal Rules of Civil Procedure.[16] "Rule 59(e) does not allow the losing party to repeat old arguments previously considered and rejected, or to raise new legal theories that should have been raised earlier."[17] Having reviewed the Rule 59 Motion, we conclude that Derringer did not raise any new issues that would qualify as grounds for altering

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[14] *Derringer v. Chapel*, 98 Fed. Appx. 728, 733-34 (10th Cir. April 12, 2004).

[15] *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S.Ct. 1517, 1521 (2005) ("Plaintiffs in *Rooker* and *Feldman* had litigated and lost in state court. Their federal complaints, we observed, essentially invited federal courts of first instance to review and reverse unfavorable state-court judgments. We declared such suits out of bounds, i.e., properly dismissed for want of subject-matter jurisdiction."); *see also Abboud*, 237 B.R. at 779.

[16] *Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992) ("We treat Plaintiffs motion to reconsider as a motion to alter or amend the judgment because the motion was filed within ten days after the district court's order granting summary judgment and dismissing the case was entered on the docket."). Rule 59 is made applicable to bankruptcy courts by Rule 9023 of the Federal Rules of Bankruptcy Procedure. Fed. R. Bankr. P. 9023.

[17] *Nat'l Metal Finishing Co., Inc. v. BarclaysAmerican/Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990); *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986); *Voelkel v. Gen. Motors Corp.*, 846 F. Supp. 1482, 1483 (D. Kan.), *aff'd without published opinion,* 43 F.3d 1484 (10th Cir. 1994).

or amending the bankruptcy court's order.[18] The bankruptcy court therefore properly denied the Rule 59 Motion.

IV. Conclusion

The bankruptcy court did not err. Its orders denying Derringer's Motions for Judicial Notice and Rule 59 Motion are AFFIRMED.

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[18] *See In re Miller*, 288 B.R. 879, 883 (10th Cir. BAP 2003).