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NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: VICTOR HUEZO, Debtor.	Case No. 2:11-bk-35922-RK Chapter 7 Adv. No. 2:11-ap-02825-RK
JOEY BALL, v. VICTOR HUEZO, Plaintiff, Defendant.	ORDER VACATING THE COURT'S MEMORANDUM DECISION AND ORDER ON PLAINTIFF'S ADVERSARY COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT PURSUANT TO 11 U.S.C. §§ 523(a)(2)(A) AND (a)(6), ENTERED ON SEPTEMBER 30, 2016, AND SETTING POST-TRIAL STATUS CONFERENCE

In this adversary proceeding, on September 30, 2016, the court entered its Memorandum Decision and Order on Plaintiff's Adversary Complaint to Determine Dischargeability of Debt Pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (a)(6) ("Memorandum Decision and Order"), which ordered counsel for Plaintiff Joey Ball ("Ball") to lodge a proposed final judgment consistent with the Memorandum Decision and Order, and to file a declaration in support of Ball's computations of prejudgment interest within 30 days of

1 entry of the Memorandum Decision and Order. ECF 215. Before counsel for Ball lodged
2 a proposed final judgment, Defendant Victor Huezo (“Huezo”) filed a Notice of Appeal of
3 the court’s Memorandum Decision and Order on October 14, 2016, ECF 217, and an
4 Amended Notice of Appeal of the court’s Memorandum Decision and Order on October
5 24, 2016. Thereafter, counsel for Ball lodged his proposed final judgment, ECF 224, and
6 filed his supporting declaration, ECF 225.

7 Having reviewed the proposed final judgment and supporting declaration
8 submitted by Ball through his counsel, the court must confess that it erroneously relied on
9 California Civil Code § 3287(c) in its Memorandum Decision and Order to determine the
10 amount of prejudgment interest Huezo owes Ball since that provision is not applicable as
11 Ball contended through his counsel’s supporting declaration.

12 Because Ball’s claims are based on Huezo’s fraudulent misrepresentations that
13 Ball’s loans would be used to fund secured loans and thus, sound in tort and not in
14 contract, in determining whether Ball is owed interest on any of his loans to Fremont, the
15 court does not apply the 15% interest rate set forth in the investor activity reports and the
16 promissory notes. Under California Civil Code § 3287(a), “A person who is entitled to
17 recover damages certain, or capable of being made certain by calculation, and the right
18 to recover which is vested in the person upon a particular day, is entitled also to recover
19 interest thereon from that day, except when the debtor is prevented by law, or by the act
20 of the creditor from paying the debt.” Further, under California Civil Code § 3287(a),
21 prejudgment interest may be awarded in tort actions. *See, e.g., Levy-Zentner Company*
22 *v. Southern Pacific Transportation Company*, 74 Cal.App.3d 762, 798 (1977). Moreover,
23 “[w]here the right to prejudgment interest is not based on a contract (interest is awarded
24 on a tort or other noncontractual claim), the rate is 7% per annum from the date the claim
25 arose unless a statute otherwise provides.” 1 Ahart, *Rutter Group California Practice*
26 *Guide: Enforcing Judgments and Debts*, ¶ 3:307.15 at 3-110 (2015), *citing*, California
27 Constitution, Article XV § 1; *Children’s Hospital & Medical Center v. Bonta*, 97

1 Cal.App.4th 740, 775 (2002); and *Michelson v. Hamada*, 29 Cal.App.4th 1566, 1585
2 (1994).

3 The court had determined that Ball's right to recover was vested in him on the day
4 that Fremont/Huezo used the money from Ball's loans to fund unsecured loans by
5 Fremont to borrowers rather than the secured loans as Huezo promised Ball.
6 Accordingly, the court determines that for the debts of Huezo which are
7 nondischargeable, pursuant to Article XV of the California Constitution § 1, Ball is entitled
8 to prejudgment interest at 7 percent per annum from the date Fremont/Huezo used Ball's
9 loans to fund unsecured loans by Fremont to borrowers rather than the secured loans as
10 Huezo promised Ball. In this regard, despite the usurious nature of Ball's loans to
11 Fremont, the court does not apply the general rule for usurious loans to allow recovery of
12 principal, plus interest at the legal rate from the date of maturity of the loan, but applies
13 an estoppel against Huezo based on Huezo's fraudulent conduct to start the date of
14 accrual of interest at the legal rate for prejudgment interest from the dates the wrongful
15 conduct occurred, the dates when Fremont made the unsecured loans to borrowers with
16 Ball's money in disregard of Huezo's representations to Ball that only secured loans
17 would be made to borrowers. Upon recomputation of prejudgment interest at the
18 corrected rate, Ball may choose a later date, such as the dates of maturity of the
19 November and January Notes if Ball is unable to establish earlier dates.

20 Because the court's prior conclusion about the rate of prejudgment interest was
21 erroneous, the court will need to modify its Memorandum Decision and Order and thus,
22 hereby vacates it in order to modify and reissue it with the correct rate of prejudgment
23 interest. However, as a threshold matter, the court must address whether it has
24 jurisdiction to do so in light of Huezo's notices of appeal.

25 Generally, "[t]he filing of a proper notice of appeal transfers jurisdiction over the
26 matters appealed to the court of appeals. During pendency of the appeal, the district
27 court is divested of jurisdiction over those aspects of the case involved in the appeal." 3
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1 Jones, Rosen, Wegner and Jones, *Rutter Group Practice Guide: Federal Civil Trials and*
2 *Evidence*, ¶ 20:550 at 20-112 (2015), *citing*, *Griggs v. Provident Consumer Discount Co.*,
3 459 U.S. 56, 58 (1982), *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir. 1997) and *Lopez*
4 *Dominguez v. Gulf Coast Marine & Associates, Inc.* 607 F.3d 1066, 1073 (5th Cir. 2010).
5 “The rule of exclusive appellate jurisdiction is a creature of judicial prudence, however,
6 and is not absolute.” *Masalosalo by Masalosalo v. Stonewall Insurance Company*, 718
7 F.2d 955, 956 (9th Cir. 1983), *citing*, *Hoffman v. Beer Drivers & Salesmen’s Local Union*
8 *No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976). “A district court . . . retains jurisdiction
9 over an interlocutory order—and thus may reconsider, rescind, or *modify* such an order—
10 until a court of appeals grants a party permission to appeal.” *City of Los Angeles, Harbor*
11 *Division v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001) (emphasis
12 added). An interlocutory order is one which does not finally determine a cause of action
13 but instead decides only an intervening matter.” *In re Travers*, 202 B.R. 624, 625 (9th
14 Cir. BAP 1996), *citing*, *In re Kashani*, 190 B.R. 875, 882 (9th Cir. BAP 1995). “To
15 become final, the order must end the litigation or dispose of a complete claim for relief,
16 leaving nothing for the court to do but execute the judgment.” *In re Kashani*, 190 B.R. at
17 882, *citing*, *Elliot v. Four Seasons Properties (In re Frontier Properties, Inc.)*, 979 F.2d
18 1358, 1362 (9th Cir. 1992).

19 Because the court’s Memorandum Decision and Order left open the issue of the
20 amount of the judgment based on the incomplete computation of prejudgment interest
21 Huezo owes Ball, the court’s Memorandum Decision and Order did not end the litigation
22 or dispose of the complete claims for relief and thus, is interlocutory and not a final order.
23 The court in its Memorandum Decision and Order specifically stated that Ball was to
24 submit a proposed judgment based on submission of a computation of prejudgment
25 interest upon declaration under penalty of perjury, which was an issue that involved
26 unadjudicated issues of when Fremont/Huezo used Ball’s money from Ball’s loans to
27 fund unsecured loans by Fremont to borrowers and what interest rate should be applied
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1 under California Civil Code § 3287(a). Thus, it cannot be said that there was nothing for
2 the court to do but execute the judgment, and therefore, the court determines that its
3 Memorandum Decision and Order is an interlocutory order. Accordingly, under *City of*
4 *Los Angeles, Harbor Division v. Santa Monica Baykeeper, supra*, because the court's
5 Memorandum Decision and Order was an interlocutory order, the court retains jurisdiction
6 to modify or vacate the Memorandum Decision and Order.

7 Further, in its review of the docket regarding the proposed judgment and
8 supporting declaration, the court has reviewed the documents related to Huezo's notices
9 of appeal, including the statement of issues on appeal, and Huezo's proposed findings of
10 fact and conclusions of law submitted in this adversary proceeding. Huezo contends that
11 the court erred in determining that the loans that he and Fremont made to borrowers
12 were unsecured because the evidence indicates that the loans were secured, and in
13 more closely reviewing Huezo's proposed findings of fact and conclusions of law, the
14 court observes that Huezo cites to, and relies upon, exhibits attached to his requests for
15 judicial notice, filed on April 2, 2014, before the start of trial on April 17, 2014, ECF 171
16 and 172, and well after the final pre-trial conference, which was held on January 15,
17 2014. The 67 exhibits attached to Huezo's requests for judicial notice, ECF 171 and 172,
18 were not listed in Huezo's exhibit list and exhibit register, ECF 162, which listed 60
19 exhibits and was filed with the court and adopted as part of the court's Final Pretrial
20 Order on April 7, 2014, ECF 174, nor were the 67 exhibits attached to Huezo's requests
21 for judicial notice submitted in the exhibit binders offered by Huezo at trial.

22 Furthermore, it is the court's recollection that the court only received into evidence
23 the exhibits offered by the parties which were listed on their exhibit registers and in the
24 exhibit binders, that the exhibits attached to Huezo's requests for judicial notice were not
25 specifically offered by Huezo at trial, nor were they formally received by the court at trial,
26 that the exhibits attached to Huezo's requests for judicial notice were not discussed in the
27 testimony of the witnesses at trial and that the court did not specifically grant Huezo's
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1 requests for judicial notice. Thus, it appears that the court did not consider the exhibits
2 attached to Huezos requests for judicial notice as part of the trial record upon which the
3 court based its Memorandum Decision and Order. Yet it also appears that Huezos relies
4 upon the exhibits attached to his requests for judicial notice as evidence in support of his
5 contentions on appeal. The court and the parties should examine the trial record more
6 closely to address the issue of whether the exhibits attached to Huezos requests for
7 judicial notice are part of the trial record or not, which examination should be made easier
8 since the parties have now ordered the transcripts of the trial proceedings for Huezos
9 appeal.

10 Huezo's citation to and reliance upon the evidence in the exhibits attached to his
11 requests for judicial notice as a basis for his appeal in this case presents issues that were
12 not addressed by the court or the parties at trial. Thus, the court determines that such
13 issues should be addressed by this court first before appellate review on Huezos appeal.
14 It seems to this court that it is a serious issue not previously addressed that Huezos is
15 relying upon the exhibits attached to his requests for judicial notice since they were not
16 listed in his exhibit list before trial that was incorporated into the Final Pretrial Order and
17 that he did not specifically offer these exhibits into evidence at trial. Huezos apparently
18 believes that he made these exhibits part of the trial record by just filing these exhibits
19 with the court in placing them on the docket.

20 Thus, the court determines that it should examine whether Huezos requests for
21 judicial notice with the attached exhibits are properly part of the trial record upon which
22 the court would base its final decision on the claims in this case, and whether their
23 submission outside the pretrial conference process should be permitted as an improper
24 variance from the Final Pretrial Order and unfair surprise and prejudice to Ball since it
25 may have been that such exhibits were not produced to Ball during discovery before
26 Huezos filed his requests for judicial notice on the eve of trial.

27 Accordingly, the court vacates its Memorandum Decision and Order entered on
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1 September 30, 2016 and sets a post-trial status conference for December 12, 2016 at
2 2:00 p.m. to discuss further proceedings to address these issues. Counsel for the parties
3 are ordered to appear at the post-trial status conference on December 12, 2016 at 2:00
4 p.m., and no written status report is required for the status conference.

5 IT IS SO ORDERED.

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23 Date: November 29, 2016



24 Robert Kwan
25 United States Bankruptcy Judge
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