

FILED & ENTERED

OCT 05 2017

CLERK U.S. BANKRUPTCY COURT
Central District of California
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NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

PETER W. BARTHELMMESS and
KIM E. BARTHELMMESS,

Debtors.

Case No. 2:16-bk-12723-RK

Chapter 7

**ORDER DENYING CHAPTER 7 TRUSTEE'S
MOTION FOR RECONSIDERATION AND
VACATING HEARING**

Date: October 10, 2017
Time: 2:30 p.m.
Courtroom: 1675

Pending before this court is the Motion of Chapter 7 Trustee ("Trustee") Rosendo Gonzalez for Reconsideration, or in the Alternative, to Set Aside the August 31, 2017 Order Sustaining Mustapha Sanusi's Objection to the Trustee's Final Report Denying Without Prejudice the Approval of the Final Report ("Motion") (Docket No. 64) which has been noticed for hearing before the undersigned United States Bankruptcy Judge on October 10, 2017 at 2:30 p.m.

1 Having considered the Motion, the court determines that pursuant to Local
2 Bankruptcy Rule 9013-1(j)(3), oral argument on the Motion is not necessary, dispenses
3 with it, vacates the hearing on the Motion, takes the Motion under submission and rules
4 as follows:

- 5 1. The Motion is denied.
- 6 2. Trustee argues that the Motion should be granted under Federal Rules of
7 Civil Procedure 60(b)(1) and 60(6) for “excusable neglect” based on his
8 inadvertent failure to appearance at the July 25, 2017 hearing on the
9 Trustee’s final report. Trustee argues that the court either: (1) set aside its
10 prior order and enter an order overruling Creditor Sanusi’s objection to his
11 Final Report and approving the Final Report; or (2) set aside its prior order
12 and allow Trustee to address and argue against Creditor’s objection as
13 lacking in legal or factual merit. The court declines to grant either form of
14 relief sought by Trustee.
- 15 3. First, Federal Rules of Civil Procedure 60(b)(1) and 60(b)(6) are inapplicable
16 because the court’s prior order is not a final judgment or order within the
17 purview of these rules as the prior order was for denial of approval of the
18 Final Report without prejudice. Trustee is rather seeking reconsideration of
19 an order before a final judgment or order, which is not covered by a Federal
20 Rule of Civil Procedure, but within the court’s inherent power to reconsider
21 and modify its interlocutory orders prior to entry of judgment. See 3
22 O’Connell and Stevenson, *Rutter Group Practice Guide: Federal Civil*
23 *Procedure Before Trial*, ¶ 12:158 at 12-89 (2017), citing *Smith v.*
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1 *Massachusetts*, 543 U.S. 462, 475 (2005). “However, reconsideration is an
2 ‘extraordinary remedy to be used sparingly.’ Absent highly unusual
3 circumstances, a motion for reconsideration will not be granted ‘unless the
4 district court is presented with *newly discovered evidence, committed clear*
5 *error, or if there is an intervening change in the controlling law.*” *Id.*, citing and
6 *quoting inter alia, Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877,
7 890 (9th Cir. 2000)(emphasis added; internal quotation marks omitted). None
8 of these circumstances (i.e., newly discovered evidence, commission of clear
9 error or intervening change in controlling law) are present here, so denial of
10 reconsideration is warranted here.
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- 13 4. Second, assuming for the sake of argument that the “excusable neglect”
14 standard under Federal Rule of Civil Procedure 60(b)(1) applied here, it is not
15 met. Trustee stated in his declaration in support of reconsideration that there
16 is “excusable neglect” here because he checked the court’s tentative ruling
17 prior to the hearing, but did not see any posted, and based on the court’s
18 alleged past practice of not requiring a hearing on a Chapter 7 trustee’s final
19 report, he erroneously and inadvertently assumed that the court would
20 approve his final report without requiring an appearance. Trustee’s
21 declaration lacks merit on several counts: (1) as he acknowledged in his
22 papers, the court posted a tentative ruling for the matter treating it as a
23 contested matter in light of Creditor’s filed objection to the Final Report and
24 requiring appearances on the day before the hearing at 4:39 p.m., consistent
25 with its regular practice and procedure to post tentative rulings by 4:00 p.m.
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1 on the day before the scheduled hearing, which practice and procedure is
2 posted on the court's website; (2) even if Trustee was justified in overlooking
3 the court's posted tentative ruling, he needed to appear at the hearing under
4 Local Bankruptcy Rule 9013-1(j)(1) as appearances at hearings on motions,
5 such as his motion to approve the Final Report, is mandatory unless excused
6 by the court in advance, which was not given here; (3) the court's ruling
7 denying the motion to approve the Final Report is consistent with Local
8 Bankruptcy Rule 9013-1(j)(1) that failure of counsel or an unrepresented
9 party, such as Trustee, to appear, unless excused by the court in advance,
10 may be deemed consent to a ruling upon the motion adverse to that counsel's
11 or unrepresented party's position, thus there was no clear error here; (4)
12 Trustee's understanding that the court has some alleged past practice of not
13 requiring a hearing on a Chapter 7 trustee's final report is faulty and not
14 based on this court's experience and understanding, particularly here since
15 Creditor filed an objection to the Final Report on July 5, 2017, at least 14 days
16 before the hearing on July 25, 2017, which put Trustee on notice that he
17 needed to appear and address the objection (however, the court notes that
18 Creditor failed to attach a proof of service to the objection, but the Bankruptcy
19 Notice Center notice for the objection indicated that Trustee was electronically
20 mailed with notice on July 5, 2017) since due to the objection, the matter of
21 approval of the Final Report was a contested matter under Federal Rule of
22 Bankruptcy Procedure 9014; and (5) the substance of Trustee's motion for
23 reconsideration goes to the merits of an objection that Trustee has to the
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1 claim of Creditor Sanusi, which is a matter not before the court as yet and
2 should be the subject of a separate motion objecting to claim under Federal
3 Rule of Bankruptcy Procedure 3007, and thus, is not about reconsideration of
4 the court's prior order denying approval of the Final Report. Thus, the court is
5 not in a position to approve the Final Report on this motion for reconsideration
6 because a party in interest, Creditor Sanusi objects to the Final Report, which
7 makes it a contested matter under Federal Rule of Bankruptcy Procedure
8 9014.
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- 10 5. Third, Trustee can simply file an amended motion to approve his Final Report,
11 at which time, Creditor Sanusi would likely assert another objection, and the
12 matter will have to be treated as a contested matter to address the treatment
13 of his claim. Trustee's instant motion for reconsideration is overreaching here
14 because he needs to deal with the dispute over the treatment of Creditor
15 Sanusi's claim, and the court will not allow Trustee to make an end run
16 around the contested matter procedures of Federal Rule of Bankruptcy
17 Procedure 9014 by simply asking for reconsideration of the order denying
18 approval of the Final Report, which did not address this dispute. Trustee
19 should not be rewarded for his lack of attentiveness to the court's posted
20 tentative ruling or Creditor Sanusi's filed objection to Trustee's prior motion
21 and for his disregard of the court's procedural requirements for mandatory
22 attendance at hearings unless excused by the court in advance, no matter
23 how innocent he thinks he is. Trustee is not prejudiced by this ruling by
24 requiring him to follow the applicable procedures and refile and renote an
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1 amended motion for approval of the Final Report, and/or an objection to the
2 claim of Creditor Sanusi as the case may not be ready for approval of a final
3 report without first litigating the matter of Trustee's apparent objection to
4 Creditor Sanusi's claim.

- 5 6. The hearing on the Motion on October 10, 2017 at 2:30 p.m. is vacated, and
6 no appearances are required.
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8 IT IS SO ORDERED.
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25 Date: October 5, 2017



26 Robert Kwan
27 United States Bankruptcy Judge
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