UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SAN FERNANDO VALLEY DIVISION

In re: Donald Davies Pamela Monroe Davies Debtor(s).	CHAPTER 7 Case No.: 1:10-bk-23817-GM Adv No: 1:11-ap-01070-GM **ORDER DENYING MOTION TO REOPEN ADVERSARY PROCEEDING (Dkt. 160)** Date: July 12, 2016 Time: 10:00 AM Courtroom: 303
Paul W Herbert Plaintiff(s), v. Donald Davies Defendant(s).	

On May 26, 2016, plaintiff Paul Herbert ("Plaintiff") filed a motion to reopen this adversary proceeding ("the "Motion") in order to file a motion to vacate a judgment as void.

The Motion was not opposed.

Upon consideration of the Plaintiff's arguments in the Motion and for the reasons

stated in the Court's tentative ruling, which will be filed in conjunction with this order, the Motion is hereby DENIED.

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Date: July 15, 2016

Geraldine Mund
United States Bankruptcy Judge

United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Geraldine Mund, Presiding
Courtroom 303 Calendar

Tuesday, July 12, 2016 **Hearing Room 303**

10:00 AM

1:10-23817 Donald Davies **Chapter 7**

Adv#: 1:11-01070 Herbert v. Davies et al

#4.00 Motion to Reopen Adversary Proceeding to Allow Creditor to File Motion to Vacate Void Judgment

Docket 160

Tentative Ruling:

THE COURT POSTED THE FOLLOWING TENTATIVE RULING ON 7/11. LATER IN THE DAY, COUNSEL FOR PLAINTIFF NOTIFIED THE COURT THAT PLAINTIFF SUBMITS ON THE TENTATIVE RULING SO AS TO AVOID AN APPEARANCE. NO OPPOSITION HAD BEEN FILED BY DEFENDANT. THE TENTATIVE RULING WILL BE THE ORDER OF THE COURT. THE COURT WILL PREPARE THE ORDER. ALL APPEARANCES ARE WAIVED.

Creditor Paul W. Herbert ("Creditor") moves for an Order to Reopen the Case under 11 U.S.C. §350(b) to allow him to file a Motion to Vacate Void Judgment under Federal Rule of Bankruptcy Procedure 9024; FRCP Rule 60 (b)(4).

Service: Service appears to be in order.

Facts:

On June 29, 2010, Creditor obtained a California State Court Judgment against Kevin Davies ("Debtor") in the sum of $1,636,107 (the "State Court Judgment"). After Debtor filed bankruptcy on October 31, 2010, Creditor brought this adversary proceeding under §523(a)(2), (a)(4), and (a)(6) to have the State Court Judgment declared nondischargeable. On October 15, 2015, this court entered a Judgment and Memorandum of Decision declaring that $497,058 of Debtor's indebtedness to Creditor will not be discharged pursuant to §523(a)(4) and (a)(6). (Dkt. 148, 149, collectively, the "Judgment"). Post-judgment interest was awarded under 28 U.S.C. §1961 at the federal interest rate of 0.27 percent compounded annually.

Creditor filed a Motion to Reconsider/Amend Judgment on November

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19, 2015. (Dkt. 152). Creditor sought clarity on the Judgment's effect and claimed that the court impeded his ability as a judgment creditor to enforce the State Court Judgment in the amount determined non-dischargeable when the court applied the federal interest rate instead of the state interest rate. The Court concluded that the motion was a motion to correct clerical mistakes, oversights and omissions under Rule 60(a) and denied it:

> The thrust of this motion is that the Plaintiff wants to clarify the effect of this judgment on the one he obtained in state court. The judgment is clear and does not need amendment. The state court "indebtedness" is not being touched, but it is being divided by law between a dischargeable and a non-dischargeable section. $497,058 survives the discharge and accrues interest at .27% per annum from 10/16/16, with the interest to be compounded and reset annually, pursuant to 11 U.S.C. §1961. The balance of the state court judgment has been discharged and is not collectible in that the Debtors obtained a discharge on 3/4/11.

(Dkt. 156 at 2:10-18). To the extent this motion sought a substantive change to the Judgment and thus was a motion to amend a judgment under FRBP 9023 and FRCP 59, the Court concluded that it was untimely (having been filed 30 days after the entry of the Judgment).

On December 30, 2015, the adversary case was closed. However, on May 26, 2015, Creditor filed this Motion to Reopen Case (the "Motion") to allow Creditor to file Motion to Vacate Void Judgment. The hearing for the Motion has been set for July 12, 2016 at 10:00 A.M.

Motion

Section 350(b) of the United State Bankruptcy Code states that, "A case may be reopened in the court which such case was closed to administer assets, to accord relief to the debtor, or for other cause." Creditor requests that this case be reopened in order to allow Creditor to file a Motion to Vacate Void Judgment.

The Creditor argues that the Judgment "impermissibly replaced" the

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State Court Judgment's interest rate with the federal interest rate: "Interest on this $497,058 will accrue at the rate of .27 per annum (which is 3.67/ day) commencing on October 16, 2015 (with such interest to be compounded and reset annually, pursuant to 11 U.S.C. §1961." (Dkt. 160 at 4:19-22.) The Judgment is accordingly void because the Bankruptcy Court did not have jurisdiction to apply a federal interest rate where the State Court Judgment had already been entered. The Bankruptcy Court's jurisdiction is limited to determining the sum that is non-dischargeable and the date of such determination. Creditor cites to *In re Oak Park Calabasas Condominium Association* 302 B.R. 682, 685 (Bankr. C.D., 2003), *In re Heckert*, 272 F.3d 2590260 (4th Cir., 2001), and *Gertsch v. Johnson & Johnson Finance Corp. (In re Gertsch)*, 237 B.R. 160, 172 (B.A.P. 9th Cir. 1999), in support of this argument.

Creditor also argues that: "while the Judgment determined that $497,058 ($441,706 in damages, plus interest) is nondischargeable, the Judgment does not indicate the date of such determination." (Dkt. 160 at 4:23-24.)

Creditor attached a copy of the proposed Motion to Vacate Void Judgment to the Declaration of Allan Herzlich, attorney to Creditor, as Exhibit "A."

Opposition

No opposition filed as of 7/7.

Analysis

Issue 1: Was the Motion timely filed?

Pursuant to FRCP Rule 60(b)(4), the court may relieve a party from a final judgment if that judgment is void. FRCP Rule 60(c) requires that such motions must be made within a reasonable time. In this case, the Judgment was entered on October 15, 2015 and this motion was made on May 26, 2016, a little more than seven months later. *See In re Lovitt*, 757 F.2d 1035, 1040 (9th Cir. 1985)("motion to vacate a void judgment . . . not subject to the one-year limitations period"). Courts in the Ninth Circuit have allowed generous amounts of time to bring a Rule 60(b)(4) motion. *See, e.g., In re Krum*, 898 F.2d 156 (9th Cir. 1990)(unpublished) ("a motion to set aside a judgment as void may be brought at any time"). The Court sees no reason not

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to conclude that this Motion is timely under FRCP 60(b)(4).

However, if the Judgment is not void, but simply erroneous, the time for filing a motion under Rule 60(b)(1) for legal errors has passed. "[T]he general rule [is] that legal errors cannot justify Rule 60(b) relief once the time for filing an appeal . . . has passed. . . . [P]etitioner may qualify for relief under Rule 60 (b) based on a legal error if he can show 'extraordinary circumstances which prevented or rendered him unable to prosecute an appeal.'" *Griffey v. Lindsey*, 345 F.3d 1058, 1063 (9th Cir. 2003) *vacated as moot upon death of petitioner*, 349 F.3d 1157 (9th Cir. 2003) (quoting *Plotkin v. Pacific Tel. & Tel. Co.,* 688 F.2d 1291, 1293 (9th Cir. 1982).

[It does not appear that the Creditor's earlier Motion to Reconsider/Amend bars consideration of this Motion. The earlier motion was made under FRCP 59 and/or 60(a), so this is the Creditor's first motion under FRCP 60(b). In any event, I have found no case law that bars a second motion under Rule 60(b).]

Issue 2: Is Judge limited to stating amount of nondischargeability OR can Judge enter a final judgment?

This question was essentially decided by the Ninth Circuit in *In re Sasson*, 424 F.3d 864 (9th Cir. 2005), *cert. denied,* 547 U.S. 1206 (2006), which states its holding as:

> In this appeal, we are presented with the question of whether a bankruptcy court has subject matter jurisdiction to enter a money judgment in a nondischargeability adversary proceeding where the underlying debt has been reduced to judgment in state court. We conclude that it may and affirm the decision of the Ninth Circuit Bankruptcy Appellate Panel ("BAP").

424 F.3d at 866. The facts of *In re Sasson* are strikingly similar to the facts in the current case. A California Superior Court entered judgment against Sasson and in favor of Sololoff for $120,000, plus accrued interest and statutory costs, for breach of a promissory note. Sasson subsequently filed for Chapter 7 relief. Sokoloff then filed a complaint seeking determination of nondischargeability of the state judgment under §523(a)(6). The bankruptcy court subsequently found that Sasson committed a willful and malicious injury against Sokoloff and entered a judgment for $148,142.46, plus costs and accrued interest. Sasson's bankruptcy and the adversary proceeding were closed by the bankruptcy court. Sokoloff then filed a notice of the judgment

lien and recorded an abstract judgment based on the federal judgment entered by the bankruptcy court. Years later, after Sokoloff renewed the judgment and abstract of judgment, the Bankruptcy Court granted Sasson's ex-parte motion to reopen his Chapter 7 proceedings. Sasson then filed a motion pursuant to FRCP 60(b) to vacate the money judgment and to quash a related abstract of judgment as void ab initio, arguing that the bankruptcy court lacked subject matter jurisdiction to enter a new federal money judgment. The bankruptcy court denied the motion after a hearing and the Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP") affirmed.

The Ninth Circuit's analysis started with the conclusion that: [w]e have long held that "the Bankruptcy Court has jurisdiction to enter a monetary judgment on a disputed state law claim in the course of making a determination that a debt is nondischargeable." *Id.* at 867-68 (quoting *Cowen v. Kennedy (In re Kennedy),* 108 F.3d 1015, 1016 (9th Cir.1997)). This case law was "firmly grounded" in the bankruptcy court's "exclusive jurisdiction over nondischargeability actions brought pursuant to §523(a)(2), (4), (6), and (15)" and the bankruptcy court's equitable powers under §105(a). 424 F.3d at 868-870.

The *Sasson* court then considered whether the existence of the earlier state court judgment changed this rule and concluded that:

> There is nothing in the text of the Bankruptcy Code or its history that contains a jurisdictional exception for debts that have been liquidated to judgment. To hold otherwise would be to deprive the bankruptcy court of its exclusive jurisdiction over bankruptcy discharge pursuant to 11 U.SC. §523(a).
>
> ….
>
> The fact that a debt has been previously liquidated to judgment does not deprive the bankruptcy court of jurisdiction, nor of any of its statutory and equitable power. It may, as we shall discuss in Part II.D, have an effect on the form of relief that the bankruptcy court grants in nondischargeability proceedings. However, it does not alter the Kennedy jurisdictional analysis. The existence of a state court judgment does not deprive the bankruptcy court of the statutory power to enter a new judgment of nondischargeability.

Id. at 870.

The Ninth Circuit then concluded that a variety of doctrines invoked by Sasson did not change this result. Rooker-Feldman does not apply to

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bankruptcy proceedings invoking substantive rights under the Bankruptcy Code, or, put more specifically, "[a]ctions seeking a determination of nondischargeability are core bankruptcy proceedings . . . and are not subject to the Rooker–Feldman doctrine." *Id.* at 871. Full faith and credit, res judicata, and collateral estoppel do not affect the jurisdiction of federal courts. Full faith and credit does require the bankruptcy court to give preclusive effect to a prior state court ruling. However, "a preexisting judgment does not have preclusive effect on the bankruptcy court's determination of dischargeability" and does not dictate "how a bankruptcy court may choose to enforce its determination of nondischargeability." *Id*. at 873, 874.

The Ninth Circuit did urge bankruptcy courts to use caution in filing a new money judgment in the face of an existing state court judgment and to do so only "under unusual circumstances," but "these prudential concerns do not affect the jurisdiction and the power of the bankruptcy court to enter a new money judgment as part of declaring a debt nondischargeable." *Id.* at 874.

Finally, the *Sasson* decision concluded with a longstanding rule of civil procedure, that a "judgment is not void merely because it is erroneous," but rather only if the court lacks jurisdiction:

> We have consistently held that a "final judgment is 'void' for purposes of Rule 60(b)(4) only if the court that considered it lacked jurisdiction, either as to the subject matter of the dispute or over the parties to be bound, or acted in a manner inconsistent with due process of law.

Id. at 876 (citations omitted); *see also* §2862 Void Judgment, 11 Fed. Prac. & Proc. Civ. § 2862 (3d ed.). The Ninth Circuit accordingly upheld the bankruptcy court and BAP decisions refusing relief under Rule 60(b)(4).

The Ninth Circuit's decision in *Sasson* is squarely on point and dictates the decision on this issue. Relief under Rule 60(b)(4) on the grounds that the Judgment is void should be granted only if this court lacked jurisdiction. Under *Sasson*, this court had the jurisdiction to enter the Judgment, notwithstanding the prior State Court Judgment. Like the courts in *Sasson*, this court will decline to grant relief under Rule 60(b)(4).

Issue 3: If Judge can enter a final judgment, which interest rate must be applied?

As a general matter, a bankruptcy court should use the federal rate for post-judgment interest, as the court noted in the original Judgment:

"Under federal law, 'interest shall be allowed on any money judgment

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> in a civil case recovered in a district court.' 28 U.S.C. §1961. Because a bankruptcy court is part of the district court, the statute applies to bankruptcy proceedings." *Pester Ref. Co. v. Ethyl Corp. (In re Pester Ref. Co.),* 964 F.2d 842, 849 (8th Cir. 1992).

Dkt. 149 at 77:26-78:2.

However, several decisions (cited by the Creditor) have held that a court should not apply the federal rate in the face of a prior state court judgment. This court's decision in *In re Oak Park Calabasas Condominium Association* stated:

> In the §523(a) context, if a state court judgment had been obtained prior to bankruptcy, the most that the bankruptcy court should do is to find that some or all of that judgment is nondischargeable. The state court judgment would not be replaced with a federal judgment at the federal interest rate.

302 B.R. 682, 686 (Bankr. C.D. Cal. 2003). Another decision, *In re Heckert,* 272 F.3d 253 (4th Cir. 2001), overturned a bankruptcy court decision that replaced the state interest rate with the federal interest rate. The Fourth Circuit in *Heckert* found that the amount of a state-court judgment should not be altered in a bankruptcy dischargeability action and that, by doing so, the bankruptcy and district courts failed to accord the state judgment full faith and credit. 272 F.3d at 259.

But, neither of these decisions is consistent with the Ninth Circuit's later decision in *Sasson,* and *Sasson* expressly disagreed with *Heckert*. 424 F.3d at 876 n.5. Although *Sasson* did not consider the specific issue of post-judgment interest, it did indicate that bankruptcy courts have a broad authority and discretion to issue new judgments in the enforcement of their determination of nondischargeability. However, Sasson counseled restraint by a bankruptcy court deciding whether to issue a new judgment in the face of an existing state judgment. Thus, in the post-*Sasson* world, it is not clear whether the court could have erred in applying the federal rate for post-judgment interest.

The court need not answer this question, however. Even if its application of federal interest were erroneous, it would be a mistake of law. As noted above, a timely Rule 60(b)(1) motion based on a mistake of law must be filed within the time to appeal. This Motion was filed more than 7 months after the Judgment was entered, the time to appeal and, thus, the time to make a Rule 60(b)(1) motion based on a mistake of law have long passed.

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passed.

Issue 4: Does the Judgment indicate the date of such determination?

The Court is simply baffled by the Creditor's second ground for relief in the motion to vacate: "while the Judgment determined that $497,058 ($441,706 in damages, plus interest) is nondischargeable, the Judgment does not indicate the date of such determination." The Judgment was quite clear on this point:

> Herbert will be awarded interest, accruing from October 15, 2006 and compounded annually, on $399,784 of the above damages arising from Herbert's partnership interest in RVI. Herbert would not have been entitled to any distribution on account of his partnership interest until completion of the winding-up period. Davies has testified that the wind up of RVI took approximately 18 months. [FTR 2/6/15 @ abt. 2:25.] The last RVI property was sold on May 4, 2006. [Ex. 81 at tab 6.] October 15, 2006 was eighteen months after dissolution, giving Davies over five months after the last RVI property sold to finalize wind up of RVI and pay Herbert for his residual interest in RVI. The remaining $41,922 of non-dischargeable damages arose from the failure to pay brokerage fees, which would have been paid at or close to the time of the relevant property sale. The last of these properties sold on June 21, 2005. [Ex. 81 at Sch. E, Tab 6.] Thus, all of these commissions should certainly have been paid by June 30, 2005, and interest will accrue from that date on the $41,922 of damages due for failure to pay brokerage fees.

Dkt. 149 at 73:14-74:3.

Conclusion:

A motion to vacate the Judgment as void under Rule 60(b)(4) would be denied under the clear authority of the Ninth Circuit's decision in *Sasson*. If the court were to view the motion as one for reconsideration on the grounds of mistake under Rule 60(b)(1), it would be time barred. Thus, it would be futile to reopen this adversary proceeding in order for the Creditor to bring the proposed motion to vacate.

Proposed Ruling: DENY the Motion.

Party Information

United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Geraldine Mund, Presiding
Courtroom 303 Calendar

Tuesday, July 12, 2016 **Hearing Room 303**

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Debtor(s):

Donald Davies	Represented By Charles Shamash Raymond H Aver

Defendant(s):

Pamela Monroe Davies	Represented By Raymond H Aver
Donald Davies	Represented By Raymond H Aver

Interested Party(s):

Courtesy NEF	Represented By Allan Herzlich

Joint Debtor(s):

Pamela Monroe Davies	Represented By Charles Shamash Raymond H Aver

Plaintiff(s):

Paul W Herbert	Represented By Jerome J Blum Allan Herzlich

Trustee(s):

David R Hagen (TR)	Pro Se
David R Hagen (TR)	Pro Se

US Trustee(s):

United States Trustee (SV)	Pro Se