



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

In re:
ARTURO GONZALEZ,

Debtor.

Case No. 2:15-bk-25283-RK
Chapter 7
Adv. No. 2:16-ap-01037-RK

**MEMORANDUM DECISION ON
DEFENDANT’S MOTION TO VACATE
“ORDER 18”**

Vacated Hearing

Date: May 30, 2023
Time: 2:30 p.m.

WESLEY H. AVERY, Chapter 7 Trustee,

Plaintiff,

vs.
ARTURO GONZALEZ,

Defendant.

Pending before the court in this adversary proceeding is the “Motion to Vacate Order 18 for Trustee Lack of Estate Control and Lack of Due Process” filed by Defendant Arturo Gonzalez, Docket No. 222,¹ filed on April 15, 2023. Defendant noticed this motion for hearing before the court on May 30, 2023 at 2:30 p.m. This motion is an amended motion of the one that Defendant filed on March 28, 2023,

¹ In this memorandum decision, “Docket No. ____” refers to the case docket in this adversary proceeding, and “Bankruptcy Case Docket No. ____” refers to the case docket in the main bankruptcy case.

1 Docket No. 219, also called “Motion to Vacate Order 18 for Trustee Lack of Estate
2 Control and Lack of Due Process”, noticing that motion for hearing before the court on
3 May 9, 2023 at 2:30 p.m. Since that motion was superseded by the amended motion,
4 Defendant renoticed the hearing to May 30, 2023 from May 9, 2023.

5 The adversary proceeding had been administratively closed on September 22,
6 2020 after the District Court dismissed Defendant’s appeal in this adversary proceeding
7 on June 26, 2020. In light of Defendant’s recent motions, on March 29, 2023, the court
8 entered an order that the adversary proceeding be reopened to allow the motions to be
9 filed. Docket No. 220.

10 On April 21, 2023, Plaintiff Wesley H. Avery, Chapter 7 Trustee in the underlying
11 bankruptcy case, filed a written opposition to Defendant’s amended motion. Docket No.
12 226. Having considered Defendant’s amended motion and Plaintiff’s written opposition,
13 the court by prior order entered on May 24, 2023 (Docket No. 229) determined that oral
14 argument on the motion is not necessary and dispensed with it, vacated the hearing on
15 the motion on May 30, 2023 and took the matter under submission pursuant to Local
16 Bankruptcy Rule 9013-1(j)(3). Having taken the matter under submission, the court
17 issues this memorandum decision ruling on the motion.

18 In Defendant’s amended motion now before the court, he requests that the court
19 vacate the so-called “Order 18,” apparently referring to Docket No. 18, an order for
20 turnover of funds, which was after a hearing on the trustee’s motion for preliminary
21 injunction on February 17, 2016. The actual order for turnover of funds that Defendant
22 is complaining about is Docket No. 19, filed and entered on February 19, 2019.

23 Regarding Defendant’s original motion, the court issued an order on March 29,
24 2023, Docket No. 220, reopening this adversary proceeding, but noting that Defendant
25 in the motion does not cite any legal authority for the court to vacate one of its prior
26 orders which is now final in light of the District Court’s dismissal of Defendant’s appeal
27 of the final order in this adversary proceeding. In its order, the court stated that in
28 fairness to the other party, the trustee, and the court, the court ordered Defendant to file

1 a supplemental statement of authority, identifying his legal authority for the court to
2 vacate a prior order which is now final, so the trustee and the court can address
3 Defendant's motion, commenting that the court and the parties should not have to
4 guess what Defendant's claim for relief is, even if he is a self-represented litigant and
5 accorded some latitude, and that the court cannot generally set aside its final orders
6 without some legal basis, such as Federal Rule of Civil Procedure 60(b), but Defendant
7 does not identify such a legal authority and how it would apply here, which is a problem
8 that needs to be addressed. Defendant did not file the statement of legal authority as
9 ordered by the court or address the concerns raised by the court in its order in his
10 subsequently filed amended motion.

11 Regarding the motion itself, the court observes that the procedural history of this
12 adversary proceeding indicates that it was extensively and fully considered. The court
13 entered judgment in the adversary proceeding on April 16, 2019 (Docket No. 129).
14 Defendant sought reconsideration of the judgment by filing a motion to amend or alter
15 judgment pursuant to Federal Rule of Bankruptcy Procedure (Docket No. 137) on May
16 14, 2019, which was denied by the court in its order filed and entered on August 23,
17 2019 (Docket No. 170). Defendant filed a notice of appeal of the judgment and order
18 denying reconsideration on September 6, 2019 (Docket No. 173), but the appeal was
19 dismissed by the United States District Court by its order filed and entered on June 26,
20 2020 (Docket No. 192). The record indicates that Defendant did not seek further appeal
21 with the United States Court of Appeals for the Ninth Circuit. Thus, the procedural
22 history of this adversary proceeding indicates that it has been fully and finally litigated
23 as Defendant has exhausted his appeal rights in this adversary proceeding.

24 Over three years since this court entered a final order denying Defendant's
25 motion to amend or alter judgment on August 23, 2019, Defendant by the pending
26 motion wants to relitigate the issues in this adversary proceeding. As discussed in this
27 memorandum decision, he may not.

28 Defendant in his moving papers cited no legal authority for the court and the

1 parties to relitigate this adversary proceeding as noted in the court's reopening order
2 (Docket No. 220) and in the Chapter 7 Trustee's opposition (Docket No. 227), which
3 argued that Defendant's motion should be denied for failure to comply with the court's
4 reopening order requiring Defendant to cite legal authority in support of his motion.
5 Apparently, Defendant believes that he can relitigate this adversary proceeding by
6 raising completely new arguments. Defendant's new arguments are that: (1) his filing of
7 his motion to convert this Chapter 7 bankruptcy case to Chapter 13 deprived the
8 Chapter 7 Trustee of authority to exercise control over the assets of the bankruptcy
9 estate; and (2) Defendant was deprived of due process of law on grounds that the
10 turnover of funds to the trustee was ordered on an ex parte basis. Defendant did not file
11 a declaration or properly authenticated exhibits in support of the factual contentions of
12 his motion as required by Local Bankruptcy Rule 9013-1(c) and (i). Motion, Docket No.
13 222. Defendant only attached two unauthenticated exhibits, which were copies of a
14 summary of amended schedules dated May 9, 2016 filed on his behalf, which he
15 contends he never signed, but these exhibits are not really germane to his claims of
16 procedural error asserted in the motion as these exhibits do not directly relate to the
17 proceedings for the trustee's turnover motion and the order granting that motion, the
18 subject of Defendant's current motion.

19 The court's judgment in this adversary proceeding is a final and nonappealable
20 judgment as the District Court dismissed Defendant's appeal and there was no further
21 appeal. As just noted, Defendant did not cite any legal authority for considering this
22 adversary proceeding further. It is problematic that Defendant cited no authority for the
23 court to hear the motion, and thus, the court agrees with the Chapter 7 Trustee that
24 Defendant's failure to cite legal authority for the basis of his claims in his motion violates
25 the court's reopening order directing Defendant to cite such authority and is a ground for
26 denial of the motion. It is not up to the court to guess what Defendant's claims for relief
27 are or to fashion an argument for him.

28 Regarding Defendant's first claim of procedural error that the court erred in not

1 ruling that the Chapter 7 Trustee was deprived of control over the assets of the
2 bankruptcy estate once Defendant filed his motion to convert the case to Chapter 13,
3 that claim is that the court made a mistake of law, which might be covered by Federal
4 Rule of Civil Procedure 60(b)(1), made applicable to this adversary proceeding by
5 Federal Rule of Bankruptcy Procedure 9024, which rules provide that relief from
6 judgment may be obtained for mistake. *See Kemp v. United States*, 142 S.Ct. 1856,
7 1860-1865 (2022)(legal error by a court may be the basis of a claim under Federal Rule
8 of Civil Procedure 60(b)(1) for mistake). However, pursuant to Federal Rule of Civil
9 Procedure 60(c)(1), a motion under Federal Rule of Civil Procedure 60(b)(1) must be
10 made “within a reasonable time” and at most, within one year after entry of the order for
11 which relief is sought. *Id.* at 1860. Because Defendant’s motion filed on March 28,
12 2023, as amended on April 15, 2023 was filed more than a year after the court’s final
13 order denying his motion to amend or alter the judgment in this adversary proceeding
14 on August 23, 2019, it is too late for him to seek relief from judgment based on an
15 alleged mistake of law by the court under Federal Rule of Civil Procedure 60(b)(1) and
16 Federal Rule of Bankruptcy Procedure 9024 as the deadline set by Federal Rule of Civil
17 Procedure 60(c)(1) was August 23, 2023, almost three years ago. Accordingly,
18 Defendant’s first claim of procedural error may be denied for this reason alone.

19 In any event, there was no mistake of law by the court in not ruling that
20 Defendant’s filing of a motion to convert this Chapter 7 bankruptcy case to Chapter 13
21 deprived the Chapter 7 Trustee of control over the bankruptcy estate. Defendant fails to
22 cite any legal authority to support his argument. There is not any such authority. The
23 filing of Defendant’s motion to convert the case from Chapter 7 to Chapter 13 by itself
24 did not terminate the Chapter 7 Trustee’s control of the bankruptcy estate as the case
25 remained in Chapter 7 unless and until the court granted the motion to convert. This is
26 implicit in the procedures governing motions to convert in Federal Rule of Bankruptcy
27 Procedure 1017. On January 15, 2016, Defendant filed in the main bankruptcy case his
28 motion to convert the bankruptcy case from Chapter 7 to Chapter 13 pursuant to 11

1 U.S.C. § 706(a). Bankruptcy Case Docket No. 27. Federal Rule of Bankruptcy
2 Procedure 1017-1(f)(2) states: “Conversion or dismissal under [11 U.S.C.] §§ 706(a),
3 1112(a), 1208(b), or 1307(b) shall be on motion filed and served by Rule 9013.”

4 Federal Rule of Bankruptcy Procedure 9013, in turn, states:

5 A request for an order, except when an application is authorized by these
6 rules, shall be by written motion, unless made during a hearing. The motion shall
7 state with particularity the grounds therefor, and shall set forth the relief or order
8 sought. Every written motion other than one which may be considered ex parte,
shall be served by the moving party within the time determined under Rule
9006(d). The moving party shall serve the motion on:

9 (a) the trustee or debtor in possession and on those entities specified by
10 these rules; or

11 (b) the entities the court directs if these rules do not require service or specify
12 the entities to be served.

13 The procedures for a Chapter 7 debtor, such as Defendant, seeking voluntary
14 conversion of his case under 11 U.S.C. § 706(a) as set forth in these rules indicate that
15 the Chapter 7 debtor had to file a motion for conversion of the case to another chapter
16 of the Bankruptcy Code and serve it on the case trustee, all creditors and the United
17 States Trustee, any of whom could file opposition, which would make the motion a
18 contested matter. Federal Rules of Bankruptcy Procedure 1017, 2002(a)(4), 9013 and
19 9014. As generally provided by Federal Rule of Bankruptcy Procedure 9013, a request
20 for an order shall be by written motion, that is, a motion is a written request for a court
21 order.

22 In response to Defendant’s motion for conversion, on January 29, 2016, the
23 Chapter 7 Trustee filed an opposition to the motion (Bankruptcy Case Docket No. 36),
24 which made the motion a contested matter within the meaning of Federal Rule of
25 Bankruptcy Procedure 9014. On June 23, 2016 and July 15, 2016, the court conducted
26 a trial of the contested matter of Defendant’s motion for conversion (see Bankruptcy
27 Case Docket No. 127). By memorandum decision and order filed and entered on July
28 19, 2016 (Bankruptcy Case Docket No. 127), the court denied Defendant’s motion to

1 convert, and thus, the case was never ordered converted from Chapter 7 to Chapter 13.
2 Thus, Defendant's bankruptcy case remained in Chapter 7, and never left it, and the
3 Chapter 7 Trustee remained in authority in this case with continuing control of the
4 bankruptcy estate pursuant to 11 U.S.C. § 704.

5 Defendant cites and quotes the following language from the Supreme Court
6 opinion in *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 374-375, 127
7 S.Ct. 1105, 1111-1112 (2007), as supporting his claim that the Chapter 7 Trustee lost
8 control over the assets of the bankruptcy estate when Defendant filed his motion for
9 conversion:

10 A statutory provision protecting a borrower from waiver is not a shield
11 against forfeiture. Nothing in the text of either § 706 or § 1307(c) (or the
12 legislative history of either provision) limits the authority of the court to take
13 appropriate action in response to fraudulent conduct by the atypical litigant who
14 has demonstrated that he is not entitled to *375 the relief available to the typical
15 debtor.¹¹ On the contrary, **1112 the broad authority granted to bankruptcy
16 judges to take any action that is necessary or appropriate "to prevent an abuse of
17 process" described in § 105(a) of the Code,¹² is surely adequate to authorize an
18 immediate denial of a motion to convert filed under § 706 in lieu of a conversion
19 order that merely postpones the allowance of equivalent relief and may provide a
20 debtor with an opportunity to take action prejudicial to creditors.¹³

21 Indeed, as the Solicitor General has argued in his brief amicus curiae,
22 even if § 105(a) had not been enacted, the *376 inherent power of every federal
23 court to sanction "abusive litigation practices," see *Roadway Express, Inc. v.*
24 *Piper*, 447 U.S. 752, 765, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), might well
25 provide an adequate justification for a prompt, rather than a delayed, ruling on an
26 unmeritorious attempt to qualify as a debtor under Chapter 13.

27 Motion, Docket No. 222 at 2-3, citing and quoting, *Marrama v. Citizens Bank of*
28 *Massachusetts*, 549 U.S. at 374-375, 127 S.Ct. at 1111-1112.

Defendant in his motion further cited and quoted with emphasis in bold footnote
13 relating the above passage from the *Marrama* opinion, indicating his heavy reliance
on this language for his argument:

Both the Chapter 7 trustee and the United States as amicus curiae argue in their briefs that in the interval between the allowance of a motion to convert under § 706(a) and the subsequent granting of a motion to dismiss under § 1307(c), the fact that the debtor would have possession of the property

1 **formerly under the control of the trustee would create an opportunity for**
2 **the debtor to take actions that would impair the rights of creditors.** Whether
3 or not that risk is significant, under our understanding of the Code, the debtor's
4 prior misconduct may provide a sufficient justification for a denial of his motion to
5 convert.

6 Motion, Docket No. 222 at 3, citing and quoting, *Marrama v. Citizens Bank of*
7 *Massachusetts*, 549 U.S. at 375 n. 13, 127 S.Ct. at 1112 n. 13 (emphasis in bold in
8 Defendant's motion).

9 This language from the *Marrama* opinion cited and quoted by Defendant does
10 not support his argument that the filing of a motion to convert a case from Chapter 7 to
11 Chapter 13 automatically deprives the Chapter 7 trustee of control over assets of the
12 bankruptcy estate. The language bolded by Defendant regarding "the fact that the
13 debtor would have possession of the property formerly under the control of the trustee"
14 refers only to "the interval between the allowance of a motion to convert under [11
15 U.S.C.] § 706(a) and the subsequent granting of a motion to dismiss under [11 U.S.C.] §
16 1307(c)", which is the time period between the time that a bankruptcy court "allows"
17 conversion by granting a motion to convert a bankruptcy case from Chapter 7 to
18 Chapter 13 and during the Chapter 13 phase of the case before a motion to dismiss the
19 case in Chapter 13 is granted. Here, in this bankruptcy case, this interval after a motion
20 to convert to Chapter 7 is granted never occurred, so that the debtor would have
21 possession of the property of the bankruptcy estate which was under the control of the
22 Chapter 7 Trustee. Specifically, in this case, there was no allowance of a motion to
23 convert under 11 U.S.C. § 706(a) as the court never granted Defendant's motion to
24 convert in which he sought the court's allowance of conversion. Thus, the language
25 cited and quoted by Defendant is inapplicable and does not support his claim that the
26 court made a mistake of law that his filing of the motion to convert deprived the trustee
27 of control over the assets of the bankruptcy estate. Apparently, based on his
28 misreading of the language of the *Marrama* decision, Defendant understood his motion
to convert was "allowed" when he filed it, but this apparent understanding is mistaken as

1 shown by the procedural rules governing motions to convert a case from Chapter 7 to
2 Chapter 13, which require a bankruptcy debtor to file and serve a motion to convert for
3 the bankruptcy court to consider after notice and hearing, which may or may not be
4 granted, or “allowed” as the Supreme Court in *Marrama* put it. Nothing in the *Marrama*
5 decision is inconsistent with the procedural rules in Federal Rules of Bankruptcy
6 Procedure 1017 and 9013 that voluntary conversion of a bankruptcy case from Chapter
7 7 to Chapter 13 must be by a bankruptcy debtor’s motion and an order granting such a
8 motion by the bankruptcy court.

9 The court also notes that the holding of the *Marrama* case itself does not support
10 Defendant’s claim as the Supreme Court held that a Chapter 7 debtor does not have the
11 absolute right to convert a Chapter 7 case to Chapter 13 pursuant to 11 U.S.C. §706,
12 which does not support Defendant’s position asserted in the motion. *Marrama v.*
13 *Citizens Bank of Massachusetts*, 549 U.S. at 367-375. Indeed, in *Marrama*, the
14 Supreme Court upheld the rulings of the lower courts that the Chapter 7 debtor did not
15 have the absolute right to convert to Chapter 13 for lack of good faith. *Id.*

16 Accordingly, Defendant’s first claim of procedural error should be rejected not
17 just because it is untimely, but also, on the merits.

18 Regarding Defendant’s second claim of procedural error that he was denied due
19 process of law when he was ordered to turn over his real estate sales commissions to
20 the trustee, contending that it was done on the trustee’s ex parte application, Defendant
21 did not cite any authority for the court to vacate its turnover order of February 19, 2016
22 (Docket No. 19), such as Federal Rule of Civil Procedure 60(b)(4) for voidness. As the
23 Supreme Court stated in *United Student Aid Funds Inc. v. Espinosa*, 559 U.S. 260
24 (2010), “Rule 60(b)(4) applies only in the rare instance where a judgment is premised
25 either on a certain type of jurisdictional error or on a violation of due process that
26 deprives a party of notice or the opportunity to be heard.” *Id.* at 271 (citations omitted);
27 accord, *Federal Trade Commission v. Hewitt*, ___ F.4th ___, 2023 WL 3364496 (9th Cir.
28 May 11, 2023), slip op. at *4.

1 This case is not the rare instance of a due process violation where Defendant
2 was deprived of notice or the opportunity to be heard. Pursuant to Federal Rule of
3 Evidence 201, the court takes judicial notice of its proceedings in this case and notes
4 that the court's turnover order (Docket No. 19), the subject of Defendant's current
5 motion, was based upon the trustee's motion for preliminary injunction (Docket No. 2).
6 See *Gugino v. Clark (In re Clark)*, 525 B.R. 442, 449 and n. 8 (Bankr. D. Idaho 2015),
7 *aff'd*, BAP No. ID-15-1065-KFJu, 2016 WL 1377807 (9th Cir. BAP Mar. 29, 2016),
8 *aff'd*, 893 Fed. Appx. 644 (9th Cir. 2017) (the court may take judicial notice of its files
9 and records to explain the history of the case, to address certain procedural aspects
10 and to place evidence in appropriate context with events in the case and adversary
11 proceedings). On February 17, 2016, the court conducted an evidentiary hearing on the
12 trustee's motion for turnover, and Defendant appeared and was heard at that hearing
13 through his counsel, who offered evidence and gave oral argument on behalf of
14 Defendant in opposition to the trustee's turnover motion at that hearing. The court also
15 takes judicial notice of its proceedings recorded in the official audio recording of the
16 hearing on February 17, 2016 pursuant to Federal Rule of Evidence 201. The court
17 also notes that the record reflects that Defendant's counsel had filed written opposition
18 and evidentiary objections to the trustee's turnover motion (Docket Nos. 14 and 15), but
19 in which counsel said Defendant opposed turnover in general, but agreed to turn over
20 nonexempt funds to the trustee. *Id.* Defendant does not explain his position how these
21 circumstances denied him due process as the record of this adversary proceeding
22 shows that the order granting the trustee's turnover motion was not issued on an ex
23 parte basis, but after an opportunity to be heard and a hearing at which Defendant was
24 heard on the trustee's turnover motion through counsel at the hearing and in written
25 opposition before the turnover order was issued. Defendant's second claim of
26 procedural error based on due process is not supported by the record in this adversary
27 proceeding, which shows that he had the opportunity to be heard on turnover before the
28 court ordered it.

1 It may be that Defendant is complaining about the court's issuance of a
2 temporary restraining order (Docket No. 5) upon application of the trustee on an ex
3 parte basis (Docket No. 3) that temporarily restrained Defendant from dissipating the
4 funds of the bankruptcy estate, but that temporary restraining order did not include any
5 order that Defendant turn over assets to the trustee at that time. That order just
6 directed Defendant not to dissipate estate funds. *Id.* The temporary restraining order is
7 not the order that is the subject of Defendant's motion, nor it can be because it did not
8 order Defendant to turn over assets. Giving a benefit of a doubt to Defendant as a self-
9 represented litigant, it appears that he just conflated the temporary restraining order
10 issued on an ex parte basis with the preliminary injunction order for turnover after notice
11 and hearing. Nevertheless, the record in this adversary proceeding reflects that
12 Defendant's due process claim has no basis in fact as unsupported by evidence and
13 must be rejected.

14 In his opposition to Defendant's motion, the trustee argues that the motion should
15 be denied because: (1) Defendant has not complied with the court's reopening order
16 requiring Defendant to state the legal basis for his claims of procedural error to vacate
17 the turnover order; (2) the motion violates Local Bankruptcy Rule 9013-1(c) and (i) as it
18 contains neither a coherent memorandum of authorities nor any evidence; (3) the
19 motion is unintelligible and thus, in violation of Federal Rule of Civil Procedure 8(a)
20 made applicable by Federal Rule of Bankruptcy Procedure 7008. Opposition, Docket
21 No. 227 at 4. The trustee further argues that "at this point the Debtor [Defendant] is
22 simply filing twaddle with the Court--the same result would be reached if Debtor just
23 took a picture of his lunch and filed that instead of a cut and paste of legal jargon that
24 are the musings of a vexatious litigant" and "[t]he time has come for this Court to
25 consider a prefiling order against the Debtor else this Kabuki Play will go on wasting
26 judicial resources indefinitely." *Id.*

27 The court agrees with the trustee's first and second arguments that the motion
28 should be denied because Defendant did not comply with the court's reopening order

1 that Defendant specify the legal basis for his claims to vacate the turnover order and the
2 motion is not supported by evidence and points and authorities indicating the legal basis
3 for Defendant's claims. The court does not agree with the trustee's third argument that
4 the motion violates Federal Rule of Civil Procedure 8(a) as unintelligible because that
5 rule only applies to pleadings as specifically defined by Federal Rule of Civil Procedure
6 7(a) limited to complaints, counterclaims, third party claims, cross claims and answers
7 thereto, and a reply to answer if court-ordered, and the rule does not apply to motions
8 under Federal Rule of Civil Procedure 7(b), which constitute a separate category from
9 pleadings.

10 As to the trustee's suggestion that the court issue a prefiling order against
11 Defendant, if the trustee believes that a prefiling injunction order should be issued,
12 pursuant to Federal Rule of Bankruptcy Procedure 9013, he could file a motion to
13 declare Defendant a vexatious litigant to warrant the issuance of a prefiling order, but
14 the court notes that the trustee will have to support such a motion with an adequate
15 evidentiary record for the court to make the appropriate findings under the rigorous legal
16 standard set forth in *Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057, 1061-
17 1067 (9th Cir. 2014).

18 For the foregoing reasons, the court determines that Defendant's motion lacks
19 merit and must be denied. A separate final order is being filed and entered concurrently
20 herewith.

21 IT IS SO ORDERED.

22 ###

23
24
25 Date: May 26, 2023



26 _____
Robert Kwan
United States Bankruptcy Judge