UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: Ashley Susan Aarons, Debtor(s)	Case No.: 2:19-bk-18316-NB Chapter: 7
Julius Aarons, Plaintiff, v. Patch of Land Lending, LLC, FCI Lender Services, Inc., California TD Specialists, Versus Residential LoanCo, LLC, Defendants.	Adv. No.: 2:22-ap-01104-NB **ORDER DENYING RECONSIDERATION MOTION FOR LACK OF JURISDICTION, AND INDICATIVE RULING TO DENY MOTION** [No Hearing Held]

This Bankruptcy Court has reviewed Plaintiff's "Motion to Reconsider Order Granting Defendant Patch of Land Lending, LLC's, FCI Lender Services, Inc.'s, California TD Specialists', and Verus Residential LoanCo, LLC's, Motion to Dismiss Complaint for Failure to State a Claim." Adv. dkt. 50 (the "Reconsideration Motion"). This order addresses the Reconsideration Motion without a hearing, pursuant to the posted Procedures of the undersigned Bankruptcy Judge (available at

www.cacb.uscourts.gov) (the "Procedures"). *See also* Rule 9029(b) (Fed. R. Bankr. P.), LBR 1001-12(d) *and* 9013-1(o)-(q), *and In re Nicholson,* 435 B.R. 622, 635-36 (9th Cir. BAP 2010) (discussing when evidentiary hearing is required), *abrogated on other grounds, as stated in In re Elliott,* 523 B.R. 188 (9th Cir. BAP 2014).

The Reconsideration Motion is denied for lack of jurisdiction due to the pending appeal. In addition, because it might aid any appellate courts and the parties, this order includes an indicative ruling that the Reconsideration Motion would be denied on the merits, if there were no pending appeal, for the reasons set forth below.

1. Background

On May 31, 2022, Julius Aarons ("Plaintiff") filed a First Amended Complaint (adv. dkt. 16, "FAC") asserting claims against Patch of Land Lending, LLC and others purportedly acting with it (collectively, "Defendants"). On July 12, 2022, Defendants moved to dismiss the FAC for failure to state a claim under Rule 12(b)(6) (Fed. R. Civ. P.), made applicable to this proceeding pursuant to Rule 7012 (Fed. R. Civ. P.). Adv. dkt. 26 (the "MTD"). The matter was fully briefed (adv. dkt. 36, 37) and the parties' oral arguments were set forth on the record at a hearing on August 9, 2022. On August 17, 2022, this Bankruptcy Court issued a Memorandum Decision (adv. dkt. 44) and an Order granting the MTD without leave to amend (adv. dkt. 45, the "Dismissal Order"). Fifteen days later, on September 1, 2022, Plaintiff filed the Reconsideration Motion.

2. Legal standards

The Reconsideration Motion seeks relief under Rule 9024 (Fed. R. Bankr. P.), which incorporates Rule 60(b) (Fed. R. Civ. P.). Rule 60(b) provides, in relevant part:

> (b) On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> …
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> …
> (6) any other reason that justifies relief. [Fed. R. Civ. P. 60(b)(1)-(6)].

A party seeking relief under Rule 60(b) bears a heavy burden. Parties "may not use Rule 60(b) as an alternative to an appeal to obtain reconsideration of the merits and declare the original judgment void." *In re Atkins*, 134 B.R. 938-39 (9th Cir. BAP 1992). "A motion for reconsideration is not for rehashing the same arguments made the first time, or to assert new legal theories or new facts that could have been raised at the initial hearing." *In re Guzman*, 2012 Bankr. LEXIS 2166, at *12 (9th Cir. BAP May 15, 2012) (citations omitted).

3. Jurisdiction and authority

This Bankruptcy Court's jurisdiction and authority over the parties' litigation has been addressed in a prior Memorandum Decision (adv. dkt. 44, p. 6:15-8:5 & n. 4). That analysis is incorporated into this order by this reference.

A separate question, which Plaintiff has not addressed but this Bankruptcy Court has an independent duty to consider, is whether the filed notices of appeal divest this lower court of jurisdiction to address the Reconsideration Motion. *See* adv. dkt. 48-58. The first notice of appeal (adv. dkt. 48) was filed on August 31, 2022 – fourteen days after the Dismissal Order was entered on the docket, and one day prior to filing the Reconsideration Motion.

This Bankruptcy Court concludes that it lacks jurisdiction to grant the Reconsideration Motion, and therefore that motion must be denied, because it was filed (a) after Plaintiff filed his (timely) notice of appeal, and (b) more than fourteen days after entry of the Dismissal Order. *See* Rule 8002(b)(1)(D) (Fed. R. Bankr. P.) (staying effective date of notice of appeal when motion for relief under Rule 9024 is brought "within 14 days after the judgment is entered"). *See also, e.g., In re Sherman*, 491 F.3d 948, 967 (9th Cir. 2007) ("The timely filing of a notice of appeal … will typically divest a bankruptcy court of jurisdiction over those aspects of the case involved in the appeal") (citation, internal quotation marks omitted); *In re Marino*, 234 B.R. 767, 769 (9th Cir. BAP 1999) ("A pending appeal divests a bankruptcy court of jurisdiction to vacate or modify an order which is on appeal") (citation omitted); *cf. In re Est. of Taplin*, 2022

Bankr. LEXIS 1907 at *3 (Bankr. E.D. Cal. July 11, 2022) (if reconsideration motion is made within 14 days, any pending "notice of appeal does not become 'effective' until the last such motion is resolved") (citing Rule 8002(b)(1)-(2) (Fed. R. Bankr. P.), 20 Moore's Federal Practice – Civil § 303.32 (2022)).

Alternatively, if there were no pending appeal, this Bankruptcy Court would deny the Reconsideration Motion on the merits. This issue is addressed below because, despite this Bankruptcy Court's general lack of jurisdiction, the rules have been amended to permit "indicative rulings":

> **Rule 8008. Indicative Rulings**
> **(a) Relief Pending Appeal** If a party files a timely motion in the bankruptcy court for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the bankruptcy court may:
> (1) defer considering the motion;
> (2) deny the motion; or
> (3) state that the court would grant the motion if the court where the appeal is pending remands for that purpose, or state that the motion raises a substantial issue. [Rule 8008(a), Fed. R. Bankr. P (emphasis added).]

On the face of this rule, there appears to be some ambiguity whether the authority to "deny" a reconsideration motion is limited to a denial for lack of jurisdiction, or if this lower court has authority to deny the motion on the merits. This lower court would be extremely wary of deciding on the merits anything that is on appeal, but it is not necessary to research or decide that issue because this Bankruptcy Court has discretion (it "may" take any of the three acts described in the rule) and, after examining the merits below, it will exercise its discretion to explain its analysis of the merits but not actually rule on the merits in view of the pending appeal.

4. Plaintiff Has Not Articulated Any Grounds Warranting Reconsideration

Plaintiff seeks reconsideration of this Bankruptcy Court's denial of leave to amend the FAC "because new facts have become known." Reconsideration Motion (adv. dkt. 50), pp. 3:3-19, 4:14-27, 12:5-14 (emphasis added). Plaintiff argues that reconsideration is appropriate under Rule 60(b)(2) (newly discovered evidence) or, alternatively, under Rule 60(b)(6) (any other reason that justifies relief). For the

following reasons, this Bankruptcy Court's analysis under Rule 8008(a) is that Plaintiff has not established sufficient grounds for reconsideration under Rule 60(b).

First, under the posted Procedures, Plaintiff was required to seek Defendants' consent (even if he thought that request would be denied) before filing the Reconsideration Motion. He was also required to summarize any grounds given by Defendants for their refusal, or any inability to communicate with Defendants. There is no evidence of compliance with such Procedures.

Second, Plaintiff has not presented any argument or evidence addressing the very first ground upon which this Bankruptcy Court found that dismissal without leave to amend was appropriate – that Plaintiff lacks standing to assert the claims in the FAC. *See* Memorandum Decision (adv. dkt. 44), pp. 12:4-13:27 & Dismissal Order (adv. dkt. 45).

Third, aside from briefly referencing the applicable standards for reconsideration under Rule 60(b), Plaintiff has not provided any argument or evidence actually tying his arguments to those standards. For example, Plaintiff asserts that reconsideration is appropriate under Rule 60(b)(2) "because new facts have become known." Reconsideration Motion (adv. dkt. 50), p. 3:3-19. But relief from judgment on the basis of newly discovered evidence is only warranted if "(1) the moving party can show the evidence relied on in fact constitutes newly discovered evidence within the meaning of Rule 60(b); (2) the moving party exercised due diligence to discover this evidence; and (3) the newly discovered evidence would be of such magnitude that production of it earlier would have been likely to change the disposition of the case." *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003) (internal quotations and citation omitted, emphasis added). Plaintiff has not addressed any one of these three elements.

As to the first two elements (newly discovered evidence and diligence), Plaintiff has not shown that his evidence could not have been discovered through due diligence prior to this Bankruptcy Court's ruling on the MTD. In fact, from a review of the moving

papers, it appears that all of the alleged facts were readily discoverable and that Plaintiff's failure to make those allegations sooner were the result of Plaintiff's own inexcusable neglect. As to the third element, this Bankruptcy Court is not persuaded that the alleged newly discovered evidence would have changed the ruling, for the reasons discussed below.

Similarly, Plaintiff has not articulated any reason why this Bankruptcy Court should grant relief under Rule 60(b)(6). "Rule 60(b)(6) is a catch-all provision that allows a court to relive a party from a final judgment, order or proceeding for 'any other reason that justifies relief.'" *Sundby v. Marquee Funding Group, Inc.,* 2021 U.S. Dist. LEXIS 223123, at *6 (S.D. Cal. Nov. 18, 2021) (quoting Rule 60(b)(6)). "Courts in the Ninth Circuit require extraordinary circumstances justifying the reopening of a final judgment under 60(b)(6)." *Id.* (internal quotations and citation omitted). Because Plaintiff has not identified any ground for Rule 60(b)(6) relief that is materially different from his arguments under Rule 60(b)(2), he is not entitled to relief under Rule 60(b)(6).

Fourth and finally, Plaintiff's arguments suffer from the same defects as the dismissed FAC. For example, Plaintiff asserts that Debtor's settlement with Defendants was based on some sort of "misrepresentation as to the true calculation of late charges in [that settlement]" that, allegedly, were "calculated based on an illegal [sic] late charge of 18%" rather than "the 10%" rate to which the parties allegedly agreed. Reconsideration Motion (dkt. 50), pp. 5:27-6:2 (emphasis added). But (a) the calculations and late charge percentages were set forth in the settlement that was incorporated into the Plan; (b) Plaintiff's predecessor in interest voted in favor of that Plan; (c) this Bankruptcy Court confirmed that Plan; (d) the Plan is binding on Plaintiff and all other parties under 11 U.S.C. § 1141(a); (e) events have occurred under that Plan that cannot be unwound; (f) other creditors have relied on the binding effect of that Plan; (g) Plaintiff has not identified "the who, what, when, where, and how" of the alleged misrepresentation; and (h) because Plaintiff's predecessor in interest obtained relief from this Bankruptcy Court in reliance on the Plan, Plaintiff is judicially estopped to

contest the binding effect of the Plan. All of this was pointed out in the prior Memorandum Decision, but the Reconsideration Motion does not address any of these issues. *See* Memorandum Decision (adv. dkt. 44), p. 9:8-12 *and* pp. 16:12-18:18; *and see also* Modification and Release Agreement (dkt. 383, at PDF p. 57 & 64 of 153) (default interest and late charges of 18%) (copied, but without legible PDF pages, at adv. dkt. 26-3, Ex. 9).

To take just a few examples of Plaintiff's lack of adequate allegations, where is there any allegation of an actual "misrepresentation" that misled Debtor into agreeing to the settlement, let alone a misrepresentation that satisfies the elements of fraud or the standards for revoking this Bankruptcy Court's order confirming the Plan? Where is there any alleged reliance by Plaintiff, or any alleged causation? As noted in the Memorandum Decision (adv. dkt. 44, pp. 15:25-16:2, 20:16-27) it does not appear to matter if the debt was miscalculated at $X+1 instead of $X if Debtor (or Plaintiff) was not ready, willing, and able to cure either dollar amount.

True, according to Plaintiff, there were events after Debtor's chapter 11 Plan was confirmed. Debtor allegedly made "over seven written requests for a detailed accounting" but "did not receive a response to any of the requests" and, because those requests "pertained to post-confirmation calculations" any "waivers within the [Bankruptcy Rule] 9019 Compromise [that was incorporated into the confirmed Plan] are inapplicable." Reconsideration Motion (adv. dkt. 50), p. 5:3-8.

But from what this Bankruptcy Court can tell the actual communications attached to Debtor's declaration show the opposite of these allegations. There were payoff statements; and Debtor's disputes about those statements did not raise post-confirmation errors in calculation but instead raised issues that had been resolved in the parties' settlement incorporated into the confirmed Plan.

For example, Debtor's email dated March 11, 2022 (at 2:18 p.m.) disputes pre-settlement calculations, namely that the "$73,200 paid in 2019 should have been applied to payments from 2018 and 2019," and argues that some of the dollar amounts

demanded by Defendants "should have never been included in the payoff demand." *See* 3/11/22 email, ¶ 2 & 3 (A. Aarons Decl., adv. dkt. 50-1, Ex. 8, at PDF p. 96 of 142) (emphasis added). As the emphasized language shows, there were payoff demands, and Debtor's assertion that she was not in default, despite missed post-confirmation payments, was based on attempts to revisit disputes from long before her Plan was confirmed. *See also, e.g.,* Ex. 6 to A. Aarons Decl. (adv. dkt. 50-1) at PDF pp. 72-75 of 142 (detailed calculations and payoff demand, and Debtor's disputes involving matters that had been settled).

As Defendants' counsel has argued before:

> It honestly feels like Ground Hog's Day. We've been here before. We were here two years ago dealing with the same exact issues, the same exact allegations. We spent countless hours working with really three separate counsel, recently Mr. Bastian [one of Debtor's former bankruptcy attorneys], to work hard on a plan or resolution that resolves all these claims by Ms. Aarons and her new counsel are alleging, regarding late charges, the [$]73,000. And again, I won't get into all those issues now. But we spent countless hours resolving these issues.
>
> There was a 9019 compromise that was approved by this Court, included language in the order addressing the exact amount of the claim, that all claims were resolved and these issues were done. They are done, Your Honor. [Tr. 9/28/21 at p. 23:10-22 (Ex. 5 to A. Aarons Decl. (adv. dkt. 50-1) at PDF p. 56 of 142 (emphasis added).]

//

5. Conclusion

This Bankruptcy Court's indicative ruling is that the Reconsideration Motion would be denied, if the merits of the parties' disputes were not on appeal. In addition, because there is a pending appeal, this lower court lacks jurisdiction, and on that basis the Reconsideration Motion is hereby DENIED.

###

Date: September 15, 2022

Neil W. Bason
United States Bankruptcy Judge