Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
March 19, 2019

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re: JAIRO ALEJANDRO RODRIGUEZ, fdba RUTISHAUSER, LLC DBA NLV PAIN MANAGEMENT & URGENT CARE, dba CAF MEDICAL, LLC DBA INJURY & CHRONIC PAIN CENTER, dba INJURY MEDICAL CONSULTANTS, LLC Debtor.	Case No. 18-14694-MKN Chapter 7
DOUGLAS ROSS, M.D., Plaintiff, v. JAIRO ALEJANDRO RODRIGUEZ, an individual, et al., Defendant.	Adv. Proc. No. 18-01085-MKN Date: February 28, 2019 Time: 1:30 p.m.

ORDER ON MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO REMAND STATE COURT ACTION[1]

[1] In this Order, all references to "ECF No." are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to "AECF No." are to the documents filed in the above-captioned adversary proceeding. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "Rule" are to the Federal Rules of Civil Procedure.

On February 28, 2019, the court heard the Motion for Reconsideration of Order Granting Motion to Remand State Court Action ("Remand Reconsideration Motion") brought by Jairo Alejandro Rodriguez ("Debtor"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On August 6, 2018, Debtor commenced the above-captioned Chapter 7 proceeding. On the same date, Debtor commenced the above-captioned adversary proceeding by removing a lawsuit from the Eighth Judicial District Court, Clark County, Nevada ("State Court"), styled as Douglas B. Ross, M.D. v. Jairo Rodriguez, PAC, et al., Case No. A-15-728577-B ("Ross Litigation").

On November 13, 2018, Douglas Ross ("Ross"), the plaintiff in the Ross Litigation, commenced a separate adversary proceeding against the Debtor to determine dischargeability of debts, denominated Adversary Proceeding No. 18-01123-MKN ("Ross Non-Dischargeability Action"). (ECF No. 86).[2]

On January 3, 2019, the court entered an order remanding the Ross Litigation back to the State Court. (AECF No. 30).

On January 9, 2019, Debtor filed the instant Remand Reconsideration Motion that was noticed to be heard on February 28, 2019. (AECF Nos. 34 and 35).[3]

On February 18, 2019, Ross filed an opposition ("Opposition"). (AECF No. 39).

On February 21, 2019, Debtor filed a reply ("Reply"). (AECF No. 44).

DISCUSSION

The parties are familiar with the determinations set forth in the Remand Order and its provisions are incorporated herein, including the defined terms. The court has reviewed the written arguments and materials submitted by the parties and has considered the arguments of

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[2] All references to "2AECF No." are to the documents filed in the Ross Non-Dischargeability Action.

[3] On the same date, the court heard the Debtor's motion to dismiss, or alternatively, for summary judgment, in connection with the Ross Non-Dischargeability Action ("Dismissal Motion"). (2AECF No. 7).

counsel presented at the hearing. For the reasons that follow, the Remand Reconsideration Motion will be denied.[4]

Unfortunately, Debtor seeks relief from the Remand Order, but does not specify the applicable statute or rule on which the request is based. In his written argument, Debtor refers only to the Ninth Circuit decision in Smith v. Clark County School Dist., 727 F.3d 950, 955 (2013), which in turn cites its earlier decision in School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc., 5 F.3d 1255 (9th Cir. 1993). In considering whether relief from a judgment is appropriate under Rule 59(e), both decisions permit reconsideration by a court if it "(1) is presented with newly discovered evidence, (2) **committed clear error or the initial decision was manifestly unjust**, or (3) if there is an intervening change in controlling law." Smith, 72 F.3d at 955; School Dist. No. 1J, 5 F.3d at 1263. It is the second basis that the Debtor emphasizes in its written argument and which it repeated at oral argument. See Remand Reconsideration Motion at 7:22-27 (emphasis in original). The party seeking relief under Rule 59(e) bears the burden of persuasion. See, e.g. Lazaridis v. Wehmer, 591 F.3d 666, 669 (3rd Cir. 2010).

Rule 59(e) is the last subparagraph of Rule 59, which addresses requests for a new trial, as well as requests to alter or amend a judgment. Rule 59 applies in bankruptcy cases under FRBP 9023, and the bankruptcy rule also refers to new trials and amendment of judgments. Clearly, the Remand Order is not a final judgment. Rather, it returns the Ross Litigation to the State Court where a final judgment can be entered with respect to all parties.

Relief from a court order, however, may be obtained under Rule 60, which applies in bankruptcy cases pursuant to FRBP 9024. As the Ninth Circuit observed in School Dist. No. 1J:

> Rule 60(b) 'provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief."

5 F.3d at 1263. Although relief based on "extraordinary circumstances" appears to be unlimited, the circuit also has observed that a motion under Rule 60(b)(6) must be based on some ground

[4] Although there are multiple parties to the Ross Litigation, none of them have joined in the Remand Reconsideration Motion.

not encompassed by subsections (1) through (5) of Rule 60(b). See Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 863 n.11 (1988); Lyon v. Agusta S.P.A., 252 F.3d 1078, 1088 (9th Cir. 2001). A party seeking relief under Rule 60(b)(6) bears the burden of demonstrating "both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion." In re Native Energy Farms, 745 Fed.Appx. 272, 276 (9th Cir. Nov. 6, 2018), quoting Cmty. Dental Services v. Tani, 282 F.3d 1164, 1168 (9th Cir. 2002).

Any party trying to convince a court that its prior decision constitutes "clear error" or was "manifestly unjust" faces a difficult task. If there is evidence that could not have been presented previously, or if the law has changed, relief from a prior decision will be based on factual or legal arguments that were not available prior to the challenged ruling. A party's mere disagreement with a prior decision, however, is not evidence of clear error nor does it make the decision manifestly unjust.

In this instance, Debtor does not offer newly discovered evidence that was not available when he opposed the Remand Motion, nor does he suggest that there has been a change in applicable law. Rather, Debtor argues that the Remand Order was based on what he considers to be five separate errors allegedly made by the court: (1) an erroneous conclusion that Rutishauser is a sole proprietorship, see Remand Reconsideration Motion at 3:26 to 4:23 and Reply at 3:1-9[5]; (2) an erroneous conclusion that Debtor failed to list his state court counterclaims against Ross in his Schedule "A/B," id. at 5:1-11 and Reply at 4:1-18; (3) an erroneous conclusion that the Debtor was forum shopping, id. at 5:13-23 and Reply at 3:11-27; (4) that the Debtor and Rutishauser had no choice but to seek bankruptcy protection, id. at 6:1-17; and (5) that the State Court injunction was improper, id. at 6:19 to 7:17. None of these assertions of error, however, support relief from the Remand Order.

First, the status of Rutishauser as a sole proprietorship or a limited liability company is immaterial. As the court previously indicated, Rutishauser could not have commenced a

[5] All references to "Rutishauser ECF No." are to the documents filed in that Chapter 7 case.

separate Chapter 7 proceeding as a sole proprietorship, and the Debtor also had no authority to commence a separate bankruptcy proceeding on behalf of Rutishauser after the Debtor filed his own bankruptcy case.[6] Moreover, because the Debtor's interest in Rutishauser was property of his Chapter 7 estate, his exercise of control over that property interest also violated the automatic stay in his case. See Remand Order at 5:5-9. Thus, the court's allegedly erroneous reliance of the Debtor's own representations is unimportant: under either circumstance, Debtor's commencement of the Rutishauser bankruptcy was invalid.

Second, Debtor did fail to list his counterclaims against Ross in his Schedules. Inexcusably, Debtor mis-reads or misconstrues his own exhibits attached to the instant motion. Debtor has presented a copy of the answer, counterclaim and third-party complaint that was filed in the Ross Litigation on behalf of Rutishauser, his spouse (Candy Carillo), and himself. See Exhibit "1" to Remand Reconsideration Motion. The counterclaim appears in Debtor's own exhibit from pages 23 through 30, while the third-party complaint appears at pages 31 through 35. The counterclaim is asserted by the Debtor and Rutishauser against Ross, while the third-party complaint is brought by the Debtor and Rutishauser against Douglas Ross, M.D., P.C. The first, second, third, fourth and sixth causes of action in the counterclaim seek relief on behalf of the Debtor and Rutishauser. The second and third causes of action in the third-party complaint seeks relief on behalf of the Debtor and Rutishauser. Notwithstanding the Debtor's representations in connection with the instant Remand Reconsideration Motion, those claims were not listed in his property Schedules.[7]

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[6] See Remand Order at 4:23 to 5:5. At the hearing on the instant motion, Debtor's counsel argued that Rutishauser is not a single-member limited liability company, and a Chapter 7 trustee, therefore, cannot exercise its management rights, including the decision to file a separate Chapter 7 proceeding. Remarkably, however, counsel also argued that the Debtor and Ross have equal management rights under the operating agreement for the company. If that is correct, those equal management rights also constituted a legal interest in the constructive possession and control of the Chapter 7 trustee. Under the Debtor's own theory, he was exercising a legal right that he no longer had after he voluntarily filed for Chapter 7 liquidation.

[7] Debtor improperly filed the voluntary Chapter 7 petition ("Petition") and schedules of assets and liabilities ("Schedules") for Rutishauser on December 18, 2018. (Rutishauser ECF No. 1). In response to Question 10 of the Petition, Debtor attested on behalf of Rutishauser that there were no "bankruptcy cases pending or being filed by a business partner or an affiliate of the

Third, the Debtor's forum shopping remains evident from the record. See Remand Order at 7:24 to 8:10. Debtor argues in writing and argued at the hearing that "he would have removed the action months, if not years ago" if he had been forum shopping. See Remand Reconsideration Motion at 5:22-23. Unfortunately, Debtor identifies no basis on which the State Court action could have been removed. There is no dispute that all of the claims at issue in the State Court action are based on state law. There is no dispute that all of the parties to the State Court action are Nevada residents. There is no dispute that the State Court was scheduled to conduct an evidentiary hearing from August 6 through 9, 2018, to determine whether the Debtor should be held in civil contempt for violating a preliminary injunction ("Preliminary Injunction"). Until he filed his voluntary Chapter 7 petition, federal subject matter jurisdiction simply did not exist and removal under 28 U.S.C. § 1141(a) was not an option.

Once the Debtor filed his voluntary Chapter 7 petition, Ross was prevented by the automatic stay from continuing to prosecute the Ross Litigation. Under Section 362(b)(4), however, the automatic stay did not prevent the State Court from exercising its police power to find the Debtor in civil contempt for violating the preliminary injunction. See Dingley v. Yellow

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debtor." This response was clearly incorrect inasmuch as the Debtor, who is an affiliate of Rutishauser under Section 101(2), had been in bankruptcy since August 6, 2018. In property Schedule "A/B" at Part 11, Rutishauser did not list "any other assets that have not been reported" in response to Question 70. On January 2, 2019, however, Debtor improperly filed an amended Schedule "A/B" in which Rutishauser listed under "contingent and unliquidated claims, or causes of action of every nature, including counterclaims" in response to Questions 70 and 75, only a claim in an unknown amount against Ross. (Rutishauser ECF No. 7). In response to Question 75, Debtor attests on the same Schedule that Rutishauser has no "causes of action against third parties (whether or not a lawsuit has been filed)." In response to Question 77, Debtor attests on the same schedule that Rutishauser has no "other property of any kind not already listed." Along with those amended schedules he filed in the Rutishauser proceeding, Debtor filed a declaration under penalty of perjury stating that the information is true and correct. (Rutishauser ECF No. 8).

In his individual Chapter 7 case, Debtor filed an amended property Schedule "A/B" on January 3, 2019. In his response to Part 4, Questions 33 and 34, Debtor attests that he has no "claims against third parties" as well as no "other contingent and unliquidated claims of every nature, including counterclaims." In his response to Part 7, Question 53, Debtor attests that he has no "other property of any kind you did not already list."

Logistics, LLC (In re Dingley), 852 F.3d 1143, 1147 (9th Cir. 2017).[8] But then the Debtor removed the Ross Litigation to this bankruptcy court pursuant to 28 U.S.C. § 1452(a), thereby preventing Ross from pursuing his state law claims against the co-defendants, including Rutishauser and Carillo. See Remand Order at 8:6-10. Inasmuch as Ross would not consent to the bankruptcy court entering a final judgment on his state law claims as to non-debtor parties, a remand of the Ross Litigation to the State Court was appropriate. Id. at 7:15-19 and 9:15-18.

Fourth, Debtor's suggestion that removal of the Ross Litigation was the only option available to end "Ross' Vexatious, Baseless, and Contentious Litigation," see Remand Reconsideration Motion at 6:1-2 and 6:11-17, is misguided at best. The Ross Litigation involves twelve separate causes of action, at least three of which are encompassed by the Ross Non-Dischargeability Action.[9] It should have come as no surprise that Ross has continued to pursue his legal theories in this Chapter 7 proceeding, requiring the Debtor to defend the Ross Non-Dischargeability Action. Filing for Chapter 7 and then removing the Ross Litigation did nothing to reduce the litigation that could be pursued against the Debtor on the theories set forth in the

[8] At the hearing on the instant motion, Debtor's counsel asserted that the Dingley decision involved a criminal contempt proceeding that would fall under the police power exception. That was a misstatement inasmuch as the underlying state court proceeding in Dingley involved an order to show cause why the debtor should not be held in civil contempt for his failure to pay court-ordered discovery sanctions. 852 F.3d at 1144. Whether or not a state court contempt proceeding is criminal or civil in nature, however, is irrelevant: the state court is still exercising its police power authority to enforce its own order. Thus, Debtor's erroneous distinction is without a difference.

[9] The prospect of dischargeability objections being pursued in his Chapter 7 proceeding apparently was contemplated by the Debtor and his counsel. Debtor's flat fee agreement with his bankruptcy counsel specifically excluded representation in dischargeability actions. See Disclosure of Compensation of Attorney for Debtor(s) at ¶ 6. (ECF No. 46). At the hearing on the instant motion, Debtor's counsel argued that the Debtor might simply default in the Ross Litigation due to his inability to pay the litigation costs. He could choose to do so, of course, but any factual determinations by the State Court would still have issue preclusive effect in the Ross Non-Dischargeability Action. In other words, if the Debtor seeks to discharge his obligations to Ross, he cannot escape having to litigate the factual issues underlying the claims alleged in the dischargeability action.

Ross Non-Dischargeability Action.[10] The only thing removal accomplished was to delay the State Court contempt proceeding because the entire action was removed.

Fifth, the validity of the Preliminary Injunction is immaterial. In addition to castigating his prior State Court counsel for negotiating the terms of the Preliminary Injunction, Debtor asserts that the Preliminary Injunction is now improper.[11] Specifically, Debtor argues that the Preliminary Injunction imposed affirmative duties on Rutishauser that it cannot perform because it no longer operates. See Remand Reconsideration Motion at 6:24 to 7:13. Debtor apparently appealed the Preliminary Injunction but the appeal was dismissed, and the Preliminary Injunction itself apparently has not been stayed pending appeal. The collateral bar rule requires the Debtor to seek relief from the Preliminary Injunction rather than risk contempt sanctions by violating the order. See generally U.S. v. United Mine Workers of Am., 330 U.S. 258, 293 (1947) ("an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."). See, e.g., United States v. Forte, 742 Fed.Appx. 207 (9th Cir. July 17, 2018) ("We reject Forte's argument that his conviction cannot be upheld because the order he violated is unconstitutional. The collateral bar rule 'permits a judicial order to be enforced through criminal contempt even though the underlying decision may be incorrect and even unconstitutional.'"). States are not required to adopt a

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[10] Removing the Ross Litigation made even less sense as to Rutishauser and Carillo. As a non-individual, Rutishauser is ineligible for a Chapter 7 discharge even if the Debtor had authority to file its bankruptcy petition. See 11 U.S.C. § 727(a)(1). Thus, entry of a judgment against Rutishauser in the Ross Litigation would serve only to liquidate any claims but would not impact the discharge of any debt. Similarly, Carillo has not filed her own bankruptcy petition, is not protected by the automatic stay, and will not receive a discharge. Removal of the Ross Litigation as to Carillo served only to delay the State Court contempt proceeding without any impact on any current bankruptcy proceeding brought on her behalf.

[11] Debtor alleges that his prior state court counsel, Michael Hamilton, Esq., improperly stipulated to the Preliminary Injunction, thereby causing damage to the Debtor. See Remand Reconsideration Motion at 6:3-12. Similar to his alleged claims against Ross, Debtor's bankruptcy Schedules list no claims or causes of action against attorney Hamilton for professional negligence. Likewise, the Schedules improperly filed by the Debtor under penalty of perjury on behalf of Rutishauser, lists no claims or causes of action against attorney Hamilton. Debtor's failure under penalty of perjury to list any claims against attorney Hamilton may bar him or Rutishauser from pursuing any such claims. See Remand Order at 6 n.11.

collateral bar rule, see Zal v. Steppe, 968 F.2d 924, 927 (9th Cir. 1992), but the rule has been adopted in the State of Nevada. See Truesdell v. State, 129 Nev. 194, 304 P.3d 396, 400 (Nev. 2013) (temporary protective order not subject to collateral attack in criminal proceeding). Federal courts in Nevada also apply the collateral bar rule. See U.S. v. McKee, 2010 WL 1849330, at * 4 (D. Nev. May 6, 2010) (collateral bar rule precluded U.S. Attorney's defense to violation of court order).

Because the State Court's enforcement of the Preliminary Injunction is not subject to the automatic stay, and because the collateral bar rule prevents the Debtor from challenging the validity of the order at the enforcement stage, Debtor has failed to demonstrate that there was clear error or manifest injustice in remanding the matter to the State Court.

For these reasons, the court concludes that the Debtor has failed to meet his burden of persuasion that the Remand Order is the product of clear error or is manifestly unjust. Additionally, Debtor has failed to demonstrate that the Remand Order requires him to participate in litigating claims that he otherwise would not face in the Ross Non-Dischargeability Action. Moreover, he has failed to demonstrate that there were any circumstances beyond his control that prevented him from responding to the Remand Motion. In essence, Debtor has attempted to rehash the same arguments that were considered and rejected in connection with the Remand Order.

IT IS THEREFORE ORDERED that the Motion for Reconsideration of Order Granting Motion to Remand State Court Action, brought by defendant Jairo Alejandro Rodriguez, as Adversary Docket No. 34, be, and the same hereby is, **DENIED.**

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