



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

Date: March 13, 2019  
Time: 2:30 p.m.

**ORDER ON MOTION FOR RECONSIDERATION OF  
ORDER GRANTING MOTION FOR RELIEF FROM AUTOMATIC  
STAY TO PROCEED WITH STATE COURT ACTION<sup>1</sup>**

On March 13, 2019, the court heard the Motion for Reconsideration of Order Granting Motion for Relief from Automatic Stay to Proceed with State Court Action (“RAS 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

<sup>1</sup> 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 “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.

the same date, Debtor commenced Adversary Proceeding No. 18-01085-MKN 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”).<sup>2</sup>

On October 31, 2018, the Chapter 7 trustee assigned to the case filed a notice setting a deadline of January 29, 2019, for creditors to file proofs of claim. (ECF No. 83).

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).<sup>3</sup>

On November 16, 2018, Ross filed a motion to remand the Ross Litigation back to the State Court (“Remand Motion”). (AECF No. 9). The Remand Motion was noticed to be heard on December 19, 2018. (AECF No. 10).

On December 4, 2018, Ross filed a motion for relief from automatic stay (“MRAS”) seeking to proceed with the Ross Litigation in State Court in anticipation that the matter would be remanded. (ECF No. 89). The MRAS was noticed to be heard on January 9, 2019. (ECF No. 92).

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

On January 9, 2019, Debtor filed a motion seeking reconsideration of the Remand Order (“Remand Reconsideration Motion”) that was noticed to be heard on February 28, 2019. (AECF Nos. 34 and 35).<sup>4</sup>

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<sup>2</sup> All references to “AECF No.” are to the documents filed in the adversary proceeding encompassing the removed Ross Litigation.

<sup>3</sup> All references to “2AECF No.” are to the documents filed in the Ross Non-Dischargeability Action.

<sup>4</sup> 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).

On January 23, 2019, the court entered an order granting relief from stay (“RAS Order”) to permit Ross to proceed to judgment in the Ross Litigation, but conditioned enforcement of any final judgment to a determination by this court in connection with the Ross Non-Dischargeability Action. (ECF No. 104).

On February 6, 2019, Debtor filed the instant RAS Reconsideration Motion that was noticed to be heard on March 13, 2019. (ECF Nos. 108 and 109).

On February 27, 2019, Ross filed an opposition (“Opposition”). (ECF No. 114).

On March 6, 2019, Debtor filed a reply (“Reply”). (ECF No. 116).

### DISCUSSION

The parties are familiar with the determinations set forth in the MRAS 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 counsel presented at the hearing. For the reasons that follow, the RAS Reconsideration Motion will be denied.<sup>5</sup>

Unfortunately, Debtor seeks relief from the RAS 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). See RAS Reconsideration Motion at 3:3-8. 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. Debtor apparently argues that there is “newly discovered evidence” and that the RAS Order is “manifestly unjust.” See RAS Reconsideration Motion at 3:9 to 4:6. The party seeking relief under Rule 59(e) bears the burden of persuasion. See, e.g. Lazaridis v. Wehmer, 591 F.3d

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<sup>5</sup> Although there are multiple parties to the Ross Litigation, none of them have joined in the RAS Reconsideration Motion.

1 666, 669 (3rd Cir. 2010).

2 Rule 59(e) is the last subparagraph of Rule 59, which addresses requests for a new trial,  
3 as well as requests to alter or amend a judgment. Rule 59 applies in bankruptcy cases under  
4 FRBP 9023, and the bankruptcy rule also refers to new trials and amendment of judgments.  
5 Clearly, the RAS Order is not a final judgment. Rather, it simply grants relief from stay to  
6 effectuate the Remand Order: the Ross Litigation having been returned to the State Court, relief  
7 from stay has been granted to allow Ross to proceed to judgment with respect to the Debtor and  
8 all other parties.

9 Relief from a court order (rather than a judgment), however, may be obtained under Rule  
10 60, which applies in bankruptcy cases pursuant to FRBP 9024. As the Ninth Circuit observed in  
11 School Dist. No. 1J:

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

15 5 F.3d at 1263. In response to Ross’s opposition, Debtor suggests that relief should be granted  
16 under Rule 60(b)(6) and Section 105(a), see Reply at 4:15-28, even though he previously relied  
17 on “newly discovered evidence.” Relief based on “extraordinary circumstances” appears to be  
18 unlimited, but the circuit also has observed that a motion under Rule 60(b)(6) must be based on  
19 some ground not encompassed by subsections (1) through (5) of Rule 60(b). See Liljeberg v.  
20 Health Serv. Acquisition Corp., 486 U.S. 847, 863 n.11 (1988); Lyon v. Agusta S.P.A., 252 F.3d  
21 1078, 1088 (9th Cir. 2001). A party seeking relief under Rule 60(b)(6) bears the burden of  
22 demonstrating “both injury and circumstances beyond his control that prevented him from  
23 proceeding with the prosecution or defense of the action in a proper fashion.” In re Native  
24 Energy Farms, 745 Fed.Appx. 272, 276 (9th Cir. Nov. 6, 2018), quoting Cmty. Dental Services  
25 v. Tani, 282 F.3d 1164, 1168 (9th Cir. 2002).

26 In this instance, Debtor specifically argues that there is “newly discovered evidence”  
27 warranting reconsideration of the RAS Order. See RAS Reconsideration Motion at 3:9-11. If  
28 this is the ground on which he relies under Rule 60(b)(2), Debtor cannot seek relief under Rule

1 60(b)(6). Debtor's "newly discovered evidence," however, appears to be simply a factual  
2 circumstance: Ross had not filed a proof of claim before the hearing on the MRAS nor before  
3 entry of the RAS Order. It is abundantly clear that this "evidence" was neither "newly  
4 discovered" nor material to the issuance of the RAS Order.

5 As previously mentioned, the bar date for creditors to file proofs of claim was January  
6 29, 2019. The MRAS was heard on January 9, 2019. That Ross had not filed a proof of claim  
7 before the hearing was known to all parties or was easily discoverable by the Debtor by  
8 reviewing the publicly available claims register maintained by the clerk of the court. But the  
9 Debtor did not raise this "evidence" at the hearing. Moreover, Debtor did not raise this  
10 "evidence" prior to the entry of the RAS Order on January 23, 2019, even though the deadline to  
11 file proofs of claim had not elapsed. So even if this historical fact constitutes evidence, it is not  
12 newly discovered.

13 More important, Debtor misunderstands the purpose of a proof of claim. Distribution of  
14 property of a Chapter 7 estate applies only to claims, "proof of which is timely filed under  
15 Section 501(a)." 11 U.S.C. § 726(a). Under Section 501(a), a proof of claim may be filed by  
16 any "creditor or indenture trustee." 11 U.S.C. § 501(a). Under FRBP 3001(f), a properly filed  
17 proof of claim constitutes "prima facie evidence of the validity and amount of the claim." As a  
18 result, "a claim or interest, proof of which is filed under section 501..., is deemed allowed,  
19 unless a party in interest objects..." 11 U.S.C. § 502(a).

20 In this instance, Ross has not filed a proof of claim and is not eligible to receive a  
21 distribution, if any, from the Debtor's bankruptcy estate. As a creditor of the Debtor, however,  
22 he is free to seek a determination that the Debtor's obligation is not dischargeable on the theories  
23 alleged in the Ross Non-Dischargeability Action. If Ross prevails, he would be able to continue  
24 to pursue collection of the amounts, if any, awarded in that proceeding. Debtor's discharge of  
25 other debts incurred prior to commencement of this Chapter 7 case, would not apply to such a  
26 judgment in favor of Ross, nor any other debts he has incurred after he commenced his current  
27 bankruptcy case. In essence, Ross has chosen not to receive a distribution from the Debtor's  
28 bankruptcy estate, if any, but is not giving up his claim against the Debtor. For this reason,

1 Ross's failure to file a proof of claim is immaterial even if the fact constitutes evidence and even  
2 if it is newly discovered.<sup>6</sup>

3 Notwithstanding the Debtor's misguided assertion of newly discovered evidence, the  
4 court also considers whether the Debtor has met his burden of demonstrating that relief from the  
5 RAS Order is appropriate based on manifest injustice, extraordinary circumstances, or simply  
6 equitable circumstances. Debtor has not done so.

7 As previously discussed, Debtor has relied on the misguided assumption that Ross is  
8 required to file a proof of claim. For the reasons previously discussed, Ross is not required to do  
9 so. At the hearing on the instant motion, Debtor's counsel also asserted that the Debtor could no  
10 longer afford the legal cost of defending the Ross Litigation prior to bankruptcy, and he now  
11 seeks to avoid such costs by limiting his attorney's fees to defending the Ross Non-  
12 Dischargeability Action. Debtor argues in writing that he "will be inequitably forced to pay for  
13 unnecessary legal fees in defending in the state court action (with complex claims and multiple  
14 parties), rather than merely defending against the much more limited \$523 claims in the pending  
15 Adversary Action," see RAS Reconsideration Motion at 3:18-21, and that "continued litigation  
16 with Debtor in the State Court Action is futile, wasteful, inequitable, and akin to an abuse of  
17 process." Reply at 4:26-28. Debtor also argues because the findings in the Ross Litigation may  
18 have issue preclusive effect in the Ross Non-Dischargeability Action, he "may now be  
19 compelled to continue to defend the state court action, even though any liability arising their  
20 form [sic] has already been discharged." RAS Reconsideration Motion at 3:15-17.

21 Because the Debtor has offered no evidence of his post-bankruptcy income, there are no  
22 factual determinations that can be made as to his ability to pay his counsel. Debtor's earnings  
23 after he filed his Chapter 7 petition are not and have not been property of the bankruptcy estate.

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25 <sup>6</sup> In response to Debtor's argument, Ross suggested that the Ross Litigation could be  
26 treated as an "informal proof of claim." See Opposition at 3 n.2. Debtor disagrees with that  
27 characterization inasmuch as there allegedly is no "discernible amount" of damages specified in  
28 the complaint filed in the Ross Litigation. See Reply at 2:16 to 3:17. Because Ross is not  
required to file a proof of claim, however, the absence of a "discernible amount" being sought in  
the Ross Litigation also is immaterial.

1 See 11 U.S.C. § 541(a)(6). Debtor also has offered no evidence of the legal expenses he has  
 2 incurred in connection with the Ross Non-Dischargeability Action, nor the expenses that he  
 3 incurred in connection with the Ross Litigation prior to bankruptcy. Thus, there are no factual  
 4 determinations that can be made as to the relative burden of his litigation expenses in either  
 5 court.<sup>7</sup>

6 The court already concluded that cause exists under Section 362(d)(1) to allow the Ross  
 7 Litigation, including the claims against Debtor that are encompassed by the Ross Non-  
 8 Dischargeability Action, to proceed to judgment. Considerations of judicial efficiency and  
 9 economy favored entry of the RAS Order then, see id. at 9:8-21, and the same considerations  
 10 favor denial of the Debtor's motion now.

11 For the reasons discussed above, the court concludes that the Debtor has failed to meet  
 12 his burden of demonstrating that relief from the RAS Order is warranted.

13 **IT IS THEREFORE ORDERED** that the Motion for Reconsideration of Order  
 14 Granting Motion for Relief from Automatic Stay to Proceed with State Court Action,  
 15 brought by Jairo Alejandro Rodriguez, Docket No. 108, be, and the same  
 16 hereby is, **DENIED**.

17  
 18 Copies sent via CM/ECF ELECTRONIC FILING  
 19

20 Copies sent via BNC to:  
 21 JAIRO ALEJANDRO RODRIGUEZ  
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 23 HENDERSON, NV 89012

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25 <sup>7</sup> In connection with his motion to dismiss the Ross Non-Dischargeability Action that was  
 26 heard on February 28, 2019, see note 4, supra, Debtor submitted the Declaration of Jairo  
 27 Rodriguez ("Rodriguez Declaration"). In that declaration, Debtor asserts that the conduct of  
 28 Ross and burden of the Ross Litigation forced Rutishauser out of business. See Rodriguez  
 Declaration at ¶¶ 25, 26, 27, 28 and 29. The declaration simply does not address the legal  
 expenses that were incurred in the Ross Litigation, nor the Debtor's ability to satisfy the costs of  
 defending the nondischargeable claim theories in any forum.