UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In re:	)	Bankr. No. 97-30004
KIRWAN RANCH, a South Dakota Partnership, Debtor.	)	Chapter 7
JOHN LOVALD, Plaintiff,	)	Adv. No. 99-3001
-vs-	)	
GERALD R. KIRWAN, JR. and LEONA J. KIRWAN, Defendants.	)	DECISION RE: DEFENDANTS' MOTION TO RECONSIDER

The matter before the Court is the Motion to Reconsider Denial of Defendants' Motion for Order to Show Cause and for Evidentiary Hearing filed February 16, 2001. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that Defendants' Motion shall be denied.

I.

Following a trial, the Court entered its Decision in this adversary proceeding, which involved the fraudulent transfer of estate real property to Defendants, on June 19, 2000. The Order and the Judgment were entered on June 21, 2000. Defendants timely appealed to the United States District Court for the District of South Dakota on June 28, 2000. A stay pending appeal was entered on July 19, 2000. Following a motion by Plaintiff, the District Court remanded the proceeding to this Court with instructions on November 17, 2000.

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In compliance with the District Court's directives, the Court conducted a continued trial upon remand on December 4, 2000. Additional evidence was received thereafter regarding an incorrect proof of claim that had been considered earlier in determining the portion of the judgment that needed to be protected upon any appeal. The Bankruptcy Court entered its Supplemental Findings of Fact and Conclusions of Law Upon Remand on December 19, 2000.[1] An Amended Order After Remand and an Amended Judgment were entered on December 26, 2000. On January 3, 2001, Defendants and Plaintiff jointly submitted a Supersedeas Bond, and Defendants submitted a Motion for Stay of the Judgment Pending Appeal and for Approval of the Defendant[s'] Supersedes [sic] Bond. The motion reflected the parties' earlier agreement regarding the portion of the judgment that needed to be protected on appeal.

Defendants filed an untimely Notice of Appeal on January 8, 2001.[2] The Clerk's office docketed the corresponding

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[1] In its Supplemental Findings of Fact and Conclusions of Law Upon Remand, the Court specifically noted:

> The District Court, in its November 17, 2000 Order, directed this Court to enter this supplemental decision. The District Court also advised the parties that they would have to thereafter re-file any appeal. If an appeal is renewed by Defendants and if Defendants again seek a stay pending appeal, Defendants' counsel shall submit with the motion for stay pending appeal a proposed order granting the motion. The proposed order shall be approved by Plaintiff's counsel and shall reflect the parties' agreed terms regarding the escrow of sale proceeds or an increased letter of credit by Gerald and Leona Kirwan so that $765,382.00 of the amended judgment of $793,144.52 for Trustee Lovald is secured pending resolution of the appeal.

[2] Defendants' appeal was dismissed by the District Court on February 22, 2001.

Motion for Stay and the Supersedeas Bond on that same date. On January 10, 2001, the Bankruptcy Court, noting that Defendants' appeal was untimely, granted Defendants' Motion for Stay pending resolution of any motion under Fed.R.Bankr.P. 8002(c) that sought an extension of time to file an appeal based on excusable neglect. The agreed terms under the parties' jointly filed Supersedeas Bond were also approved in the January 10, 2001 Order entered pending a final disposition. No appeal of that order was sought, nor were any post-entry motions filed regarding the January 10, 2001 Order.

Defendants filed their Motion for Extension of Time to File an Appeal under Rule 8002(c)(2) and a supporting brief on January 12, 2001. The Motion was denied by Order entered January 23, 2001. No timely appeal of that Order was filed.

On February 1, 2001, Defendants filed a Motion for Order to Show Cause and for Evidentiary Hearing. Therein, Defendants asked the Court to set "a date by which objections to Trustee's final report shall be made, and for an evidentiary hearing on (1) the creditors' claims filed against the debtor and bankruptcy estate, (2) attorneys' fees, and (3) Trustee's administrative fee, and all other issues in the Trustee's report, so this matter can be fully determined and final judgment entered." At the direction of Defendants' counsel, the Bankruptcy Clerk filed the Motion in both the main case of Debtor Kirwan Ranch, Bankr. No. 97-30004, and in this adversary proceeding.

Following receipt of a response from Plaintiff-Trustee John S. Lovald, which was also docketed in both the main case and adversary proceeding, the Court denied Defendants' Motion in the adversary

proceeding. In its February 9, 2001 Order, the Court concluded that the issues raised were better addressed in the main case.

On February 9, 2001, the Court entered a separate order in the main case in response to Defendants'[3] Motion. Noting that "the appropriate mechanism for objecting to the payment of a claim is through an objection filed under Fed.R.Bankr.P. 3007 since the Bankruptcy Code and Federal Rules do not contemplate a period of time for filing objections to a Chapter 7 trustee's proposed distribution to creditors, which is based on filed proofs of claim," the Court set deadlines in the main case for interested parties to file an objection to a proof of claim under Rule 3007 or to file a motion for reconsideration of a claim under Rule 3008. Since the District Court had not yet formally dismissed Defendants' untimely January 8, 2001 notice of appeal, the Bankruptcy Court set this deadline for fourteen days after final disposition of the adversary proceeding. The Court also ordered Trustee Lovald to file his report and a proposed interim distribution fourteen days after the final disposition of any timely objection under Rule 3007 or motion under Rule 3008.

On February 16, 2001, Defendants filed a Motion to Reconsider Denial of Defendants' Motion for Order to Show Cause and for Evidentiary Hearing.[4] Therein, Defendants raised four concerns: (1) that "[d]uring the December 4, 2000 'continued trial upon

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[3] Defendants are better identified in the main case as simply Gerald and Leona Kirwan since they are "defendants" only in this adversary proceeding.

[4] Defendants filed a separate motion to reconsider in the main case.

remand,' Trustee Lovald and the Court assured [their counsel] that [they] would have an opportunity to contest certain proofs of claim filed in the Kirwan Ranch Partnership bankruptcy;" (2) that "[a]s a matter of law, the judgment in the adversary action cannot exceed the total amount of the creditors' proofs of claim;" (3) that "[a]ttorneys fees submitted by counsel for the Trustee exceed the Fee Agreement entered into by Trustee Lovald and Attorney Johnson on January 25, 1999;" and (4) that "Defendants cannot appeal until a final order has been entered, including a final calculation of damages."

II.

Defendants have not identified the procedural rule under which they have filed this motion, leaving the Court to make the best characterization that it can. *Sanders v. Clemco Indus.*, 862 F2d 161, 168 (8th Cir. 1988)(cited in *Barger v. Hayes County Non-stock Co-op*, 219 B.R. 238, (B.A.P. 8th Cir. 1998).

> When a moving party fails to specify the rule under which it makes a post-judgment motion, the characterization is left to the court with the risk that the moving party may lose the opportunity to present the merits underlying the motion to an appellate court. Typically, such motions have been characterized as motions under either Fed.R.Civ.P. 59 [incorporated by Fed.R.Bankr.P. 7052] or 60 [incorporated by Fed.R.Bankr.P. 9024], with the precise categorization depending to some extent on the substance of the motion. In other instances, courts have considered "'any motion that draws into question the correctness of the judgment [as] functionally a motion under Rule 59(e), whatever its label.'" Courts have generally viewed any motion which seeks a substantive change in a judgment as a Rule 59(e) motion if it is made within ten days of the entry of the judgment challenged. Conversely, if a motion is filed more than ten days after the judgment, it is treated as a Rule 60(b) motion.

Barger, 219 B.R. at 244 (citations omitted). More recently, the

Court of Appeals stated:

> The Federal Rules of Civil Procedure do not mention motions for reconsideration. This Court is frequently put in the difficult position of deciding whether a "motion for reconsideration" is in fact a Rule 59(e) "Motion to Alter or Amend a Judgment," or a Rule 60(b) "Motion for Relief from Judgment or Order." Both the standard of review and the precise questions on appeal depend on how we characterize this motion.
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> This motion was not directed to a final judgment, but rather to a nonfinal order. By its terms, only Rule 60(b) encompasses a motion filed in response to an order. Rule 59(e) motions are motions to alter or amend a *judgment*, not any nonfinal order. For that reason, we agree with the District Court that this "motion for reconsideration" should be construed as a Rule 60(b) motion.

Broadway v. Norris, 193 F.3d 987, 989 (8th Cir. 1999).

Based on the guidance offered by *Broadway* and *Barger* and the related Court of Appeals decisions cited therein, it appears that the appropriate characterization of Defendants' February 16, 2001 motion is as a motion under Rule 59(e) regarding the February 9, 2001 Order Denying Motion for Order to Show Cause. This characterization is supported by the fact that Defendants have not identified any of the several grounds available for relief under Rule 60 nor established any exceptional circumstances that would give rise to Rule 60 relief. *Barger*, 219 B.R. at 244. This characterization will also preserve Defendants' right to appeal the February 9, 2001 Order, though it will not create or preserve an appeal based on any earlier judgment or order.

> Federal Rule of Civil Procedure 59(e) was adopted to clarify a district court's power to correct its own mistakes in the time period immediately following entry of judgment. Rule 59(e) motions serve a limited function of correcting "'manifest errors of law or fact or to present newly discovered evidence.'" Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been

offered or raised prior to entry of judgment.

Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills, 141 F.3d 1284, 1286 (8th Cir. 1998) (citations omitted).

III.

Because Defendants have not identified any error by the Court in its February 9, 2001 Order, their February 16, 2001 Motion to Reconsider must be denied.

OPPORTUNITY TO OBJECT TO PROOFS OF CLAIM. As they could have at any time during the pendency of the case, Defendants may file an objection to a proof of claim in the main case. The opportunity for a party in interest to object to a proof of claim is provided by Fed.R.Bankr.P. 3007 and was recognized in the Court's February 9, 2001 orders. A deadline for doing so was established at Defendants' request to speed up the administration of the case.

THE DEPENDENCY OF A FINAL JUDGMENT ON THE VALIDATION OF PROOFS OF CLAIM. As discussed in section V. of the Court's original Decision entered June 19, 2000, the remedy for Defendants' fraudulent conveyance of Debtor Kirwan Ranch's real property was governed by 11 U.S.C. § 550(a) of the Bankruptcy Code. The Court had the discretion to order that the Trustee could recover either the property itself or its present value. For the reasons discussed in the Decision, the Court awarded the Trustee the present value of the property in its June 19, 2000 Decision. Though the present value of the property increased upon entry of the Court's Supplemental Findings and Conclusions upon remand, the judgment awarded Trustee Lovald was never based on filed or allowed proofs of claim since that is not

the remedy provided by § 550(a). Defendants' reliance on state law remedies is misplaced.

The Court acknowledges that proofs of claim, at the amounts that the Trustee estimated they would be allowed, were considered in determining the portion of the judgment that would need to be protected pursuant to Fed.R.Bankr.P. 8005 by a bond or otherwise if Defendants obtained a stay pending appeal. That accommodation was made by the Trustee and accepted by the Court for Defendants' benefit at the time of the District Court's remand, so that Defendants did not have to post a bond for the full judgment. The Trustee's estimated distribution to creditors and his estimated administrative expenses and fees were used to insure that creditors were fully protected, as the District Court had cautioned in its remand decision. That estimation for purposes of the stay pending appeal, however, has no bearing on what proofs of claim are actually allowed and subsequently paid by Trustee Lovald. Those issues will be resolved through the claim objection and reconsideration process in the main case.

ATTORNEYS' FEES. Trustee Lovald cannot pay any attorneys' fees to his counsel in this adversary proceeding or to any other professional employed by the estate until he has given notice and an opportunity to object to all creditors and other parties in interest in the main case. Fed.R.Bankr.P. 2002(a)(6). That fee application process, though it may be encompassed in the Trustee's report and proposed distribution, requires separate court approval. Accordingly, Defendants will have a full opportunity to object to any attorneys' fees that Trustee Lovald proposes to pay.

ENTRY OF FINAL ORDER AND CALCULATION OF DAMAGES. As discussed above, allowed proofs of claim played no role in the remedy provided to Plaintiff-Trustee Lovald in the Court's June 19, 2000 Decision in this adversary proceeding, in the original Order and Judgment entered June 21, 2000, in the Supplemental Findings of Fact and Conclusions of Law Upon Remand entered December 19, 2000, or in the Amended Order and Judgment entered December 26, 2000. Subsequent litigation in the main case over proofs of claim did not have and will not have any bearing on the calculation of damages or the entry of a judgment in this adversary proceeding. This Court's December 26, 2000 Judgment will be final once Defendants have exhausted their remedies on appeal.

An order denying Defendants' February 16, 2001 Motion to Reconsider Denial of Defendants' Motion for Order to Show Cause and for Evidentiary Hearing will be entered.

Dated this 23rd day of February, 2001.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk
By: Deputy Clerk
(SEAL)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
FEB 23 2001
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.
FEB 23 2001
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By

Case: 99-03001 Form id: 122 Ntc Date: 02/23/2001 Off: 3 Page : 1
Total notices mailed: 10

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Aty Gerry, Clair R. PO Box 966, Sioux Falls, SD 57101-0966
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Intereste U.S. District Court, 225 S. Pierre Street, Room 205 Federal Building, Pierre, SD 57501