

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In re:)	Bankr. No. 97-30004
)	Chapter 7
KIRWAN RANCH, a South Dakota Partnership,)	
)	
Debtor.)	DECISION RE: GERALD AND LEONA KIRWAN'S MOTION TO RECONSIDER
)	

The matter before the Court is the Motion to Reconsider Order Setting Certain Deadlines in Response to Motion for Order to Show Cause filed by Gerald and Leona Kirwan on 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 the Kirwans' Motion shall be denied.

I.

Following a trial in a related adversary proceeding, No. 99-3001, which involved Chapter 7 Trustee John S. Lovald as the plaintiff and Gerald and Leona Kirwan as the defendants, on June 19, 2000, the Court entered its Decision regarding the fraudulent transfer of estate real property to Defendants Gerald and Leona Kirwan. The Order and the Judgment were entered on June 21, 2000. Defendants Gerald and Leona Kirwan 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-Trustee Lovald, the District Court remanded the proceeding to this Court with instructions on November 17, 2000.

78.

In compliance with the District Court's directives, the Court conducted a continued trial in the adversary proceeding 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 in the adversary 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 Gerald and Leona Kirwan and Plaintiff-Trustee Lovald jointly submitted a Supersedeas Bond, and Defendants Gerald and Leona Kirwan 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 Gerald and Leona Kirwan filed an untimely Notice of

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.

Appeal on January 8, 2001.² The Clerk's office docketed the corresponding Motion for Stay and the Supersedeas Bond on that same date. On January 10, 2001, the Bankruptcy Court, noting that their appeal was untimely, granted Defendants Gerald and Leona Kirwan's 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 Gerald and Leona Kirwan filed their Motion for Extension of Time to File an Appeal under Rule 8002(c)(2) in the adversary proceeding. The Motion was denied by Order entered January 23, 2001. No timely appeal of that Order was filed.

On February 1, 2001, Defendants Gerald and Leona Kirwan filed a Motion for Order to Show Cause and for Evidentiary Hearing in the adversary proceeding. Therein, Defendants Gerald and Leona Kirwan 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

² Defendants Gerald and Leona Kirwan's appeal was dismissed by the District Court on February 22, 2001.

Defendants Gerald and Leona Kirwan's counsel, the Bankruptcy Clerk filed the Motion in this main case of Debtor Kirwan Ranch and in the 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 this main case in response to Gerald and Leona Kirwans' Motion for Order to Show Cause and for Evidentiary Hearing. 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 Gerald and Leona Kirwan's untimely January 8, 2001 notice of appeal in the adversary proceeding, 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, Gerald and Leona Kirwan filed a Motion to Reconsider Order Setting Certain Deadlines in Response to Motion for Order to Show Cause and for Evidentiary Hearing.³ Therein, Gerald and Leona Kirwan raised four concerns: (1) that "Defendants [sic] cannot appeal until a final order has been entered, including a final calculation of damages;" (2) that "[d]uring the December 4, 2000 'continued trial upon 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; (3) that "[a]s a matter of law, the judgment in the adversary action cannot exceed the total amount of the creditors' proofs of claim;" and (4) 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."

II.

Gerald and Leona Kirwan have not identified the procedural rule under which they have filed this Motion to Reconsider, 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

³ Defendants Gerald and Leona Kirwan filed a separate motion to reconsider in the main case.

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.

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 Gerald and Leona Kirwans' February 16, 2001 Motion is as a motion under Rule 59(e) regarding the February 9, 2001 Order Setting Certain Deadlines in Response to Motion for Order to Show Cause Filed by Gerald and Leona Kirwan.

This characterization is supported by the fact that the Kirwans 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 the Kirwans' right to appeal the February 9, 2001 Order, though it will not create or preserve an appeal based on any earlier judgment or order in the adversary proceeding.

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

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 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 (all in the adversary proceeding). Subsequent litigation in the main case over proofs of claim 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 in the adversary proceeding will be final once Defendants Gerald and Leona Kirwan have exhausted their remedies on appeal.

OPPORTUNITY TO OBJECT TO PROOFS OF CLAIM. As they could have at any time during the pendency of the case that they were a party in interest, Gerald and Leona Kirwan may file an objection to a proof of claim in the main case. The opportunity for a party 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. The deadline for doing so in this case was established at the Kirwans' 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 in the adversary proceeding, the remedy for Defendants Gerald and Leona Kirwan's 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 reason 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). The Kirwans' 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 in the adversary proceeding that would need to be protected pursuant to Fed.R.Bankr.P. 8005 by a bond or otherwise if Defendants Gerald and Leona Kirwan obtained a stay pending appeal. That accommodation was made by the Trustee and accepted by the Court for Defendants Gerald and Leona Kirwan's benefit at the time of the District Court's remand, so that Defendants Gerald and Leona Kirwan did not have to post a bond for the full judgment. The Trustee's estimated distribution to creditors in the main case 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 this 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, Gerald and Leona Kirwan will have a full opportunity to object to any attorneys' fees that Trustee Lovald proposes to pay.

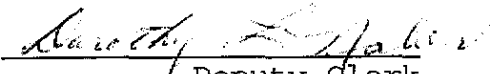
An order denying Gerald and Leona Kirwans' February 16, 2000 Motion to Reconsider Order Setting Certain Deadlines in Response to Motion for Order to Show Cause will be entered.

Dated this 23 day of February, 2001.

BY THE COURT:


Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: 
Deputy Clerk

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: 97-30004 Form id: 122 Ntc Date: 02/23/2001 Off: 3 Page : 1
Total notices mailed: 12

Debtor Kirwan Ranch, A South Dakota Partnership, HC 76, Box 32, Bristow, NE 68719
Aty Gerry, Clair R. PO Box 966, Sioux Falls, SD 57101-0966
Aty Harmelink, John E. PO Box 18, Yankton, SD 57078
Trustee Lovald, John S. PO Box 66, Pierre, SD 57501
Aty Damgaard, Roger W. PO Box 5027, Sioux Falls, SD 57117
Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321
Aty Goldammer, Vance RC PO Box 5015, Sioux Falls, SD 57117-5015
Aty Johnson, Rick PO Box 149, Gregory, SD 57533
Creditor Kirwan, Gerald R., Jr. 1018 Par Street, O'Neill, NE 68719
Aty Kane, Nora M. 1065 N. 115th St., Omaha, NE 68154-4423
Creditor Kirwan, Leona J. 1018 Par Street, O'Neill, NE 68719
Aty Prendergast, Terry N. PO Box 5015, Sioux Falls, SD 57117-5015