(any footnotes trail end of each document)
No. 18-8026
UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

PATRICK S. LAYNG, United States Trustee for Region 19,
Plaintiff- Appellee,

v.

ROBERT RAEL; LISA RAEL
Defendants - Appellants.

December 7, 2018, Filed

Appeal from the United States District Court for the District of Wyoming. (D.C. No. 1:17-CV-00104-NDF

Before LUCERO, KELLY, and PHILLIPS, Circuit Judges.

PHILLIPS, Circuit Judge.

*Submitted on briefs

This appeal involves several orders entered in the bankruptcy proceedings stemming from the joint petition for bankruptcy relief filed by Robert and Lisa Rael ("the Raels"), and the adversary proceeding filed by the United States Trustee ("Trustee") seeking denial of the Raels' claim for discharge. The Raels appeal the district court's orders (1) affirming the bankruptcy court order denying their motion to dismiss the adversary

proceeding; (2) affirming the bankruptcy court's denial of their C.R.C.P. 60(b) motions, which, like the motion to dismiss, challenged the court's jurisdiction to enter an order permitting the sale of their real property; (3) reversing the bankruptcy court judgment granting their claim for discharge; and (4) reversing the bankruptcy court's order requiring the Trustee to pay the Raels' attorney fees as a discovery sanction. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

BACKGROUND

The bankruptcy court confirmed the Raels' Amended Chapter 11 Plan of Reorganization ("the Plan") and granted a final decree soon thereafter. As pertinent here, the Plan required them to satisfy a debt to Wells Fargo Bank, N.A. ("Wells Fargo") by selling several parcels of real property in Wyoming and making monthly payments to Wells Fargo. The Raels voluntarily closed their Chapter 11 case after confirmation to avoid accruing Trustee's fees during the administration of the Plan.

After the Raels defaulted on their monthly payments, Wells Fargo obtained state court judgments against them and filed liens against the Wyoming properties based on those judgments. In response, the Raels filed motions in the bankruptcy court to reopen the Chapter 11 case and to hold Wells Fargo in contempt for filing the state court proceedings.

In the reopened proceedings, the bankruptcy court

issued an order at the Raels' request approving the sale of the Wyoming properties that were the subject of the liens ("Sale Order"). Consistent with the terms of the Plan, the Sale Order required the Raels to pay the proceeds of any sales to Wells Fargo. The court denied the Raels' motions to hold Wells Fargo in contempt for obtaining the state court judgment and filing the liens ("Contempt Orders"). After the court denied the Raels' motion for reconsideration of the Contempt Orders, they appealed to the Tenth Circuit Bankruptcy Appellate Panel ("BAP"), which affirmed. *Rael v. Wells Fargo Bank, N.A., (In re Rael),* Nos. WY-14-035, 08-20251 & WY-14-048, 527 B.R. 799, 2015 WL 847432 (B.A.P. 10th Cir. Feb. 27, 2015) ("BAP Order").

While the appeal of the Contempt Orders was pending, the Raels closed on the sale of one of the Wyoming properties that was the subject of the state court liens and the bankruptcy court's Sale Order, but they did not give the proceeds to Wells Fargo as required by the Sale Order. Instead, almost a year after the closing, they used the proceeds to pay their non-dischargeable legal fees and IRS debt. Soon thereafter, they converted their Chapter 11 case to a Chapter 7 proceeding and filed a motion for discharge.

The Trustee then commenced an adversary proceeding to prevent discharge under 11 U.S.C. § 727(a)(6), on the ground that the Raels violated the Sale Order by not giving Wells Fargo the proceeds of the sale. The Raels moved to dismiss the adversary proceeding and to set aside the

Sale Order, claiming that the bankruptcy court lacked jurisdiction to enter the Sale Order because, after the court closed the Chapter 11 case, the Wyoming properties were no longer the property of the bankruptcy estate. The court denied both motions. After trial, the court granted discharge, finding that the Raels violated the Sale Order but that their non-compliance was not willful because they violated the order in reliance on the advice of their attorney. *U.S. Trustee v. Rael (In re Rael),* Case Nos. 08-20251 & 15-2013, 2017 WL 4083128, at *4 (Bankr. D. Wyo. Sept. 14, 2017).

On appeal, the U.S. District Court for the District of Wyoming affirmed the orders denying the Raels' motion to dismiss the adversary proceeding and to set aside the Sale Order, but reversed the judgment granting discharge, concluding that the bankruptcy court's determination that the Raels' violation of the Sale Order was not willful was clearly erroneous. The district court also reversed the order awarding attorney fees against the Trustee as a discovery sanction.

DISCUSSION

I. Denial of Motion to Dismiss Adversary Proceeding

The Raels claim the bankruptcy court erred by denying their motion to dismiss the adversary proceeding under Fed. R. Civ. P. 12(b)(6) on the ground that the court lacked jurisdiction to enter the Sale Order in the reopened Chapter 11 proceeding and therefore lacked jurisdiction to

enforce that order in the adversary proceeding. We disagree.

When hearing an appeal from a district court's review of a bankruptcy court order, we independently review the underlying bankruptcy court decision. *Jubber v. SMC Elec. Prods., Inc. (In re C.W. Mining Co.),* 798 F.3d 983, 986 (10th Cir. 2015). We accept the bankruptcy court's factual findings unless they are clearly erroneous. *Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete),* 412 F.3d 1200, 1204 (10th Cir. 2005). But we review its legal conclusions, including on jurisdictional questions, de novo. *Lee v. McCardle (In re Peeples),* 880 F.3d 1207, 1212 (10th Cir. 2018).

Initially, we note that in affirming the bankruptcy court's denial of the motion to dismiss, the district court interpreted the Raels' argument as challenging the bankruptcy court's jurisdiction over the adversary proceeding itself. Aplt. App. Vol. V, at 1039. To the extent the Raels make such an argument on appeal, we reject it. A challenge to the propriety of discharge under § 727 impacts the determination whether to grant discharge. It is thus part of a core proceeding that is plainly within the bankruptcy court's jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I) (providing that the bankruptcy court may hear proceedings related to core proceedings, including "determinations as to the dischargability of particular debts").

We also reject the Raels' contention that the

bankruptcy court's ruling in the Contempt Orders constituted a finding that the court lacked jurisdiction over the property after the case was closed. In their contempt motions, the Raels claimed Wells Fargo's state court actions were improper because they violated the automatic stay and because the bankruptcy court had exclusive jurisdiction to enforce the provisions of the Plan. Relying on *Santander Consumer, USA, Inc. v. Houlik (In re Houlik),* 481 B.R. 661 (B.A.P. l0th Cir. 2012), the bankruptcy court rejected those arguments, finding that (1) after the case was closed, the automatic stay was no longer in effect, and (2) Wells Fargo was entitled to enforce its rights under the confirmed Plan in state court because the bankruptcy court did not have exclusive jurisdiction over the property. *See id.* at 674 (holding that automatic stay terminates as to bankruptcy estate property upon plan confirmation and as to all other property when the case is closed and that bankruptcy courts do not have "related to" jurisdiction to issue sanctions in non-core post-confirmation actions alleging a violation of the plan for filing state court enforcement action). With respect to the latter finding, the court concluded that the bankruptcy court retained jurisdiction over core proceedings and matters related to the bankruptcy estate, but that the state court had jurisdiction over Wells Fargo's state court actions to enforce its liens and determine the priority of lien rights. *See id.* at 679 (Brown, J., concurring) (explaining that the "state court would have concurrent jurisdiction to enforce the Plan as a contract" between the debtors and their creditors). The BAP affirmed, holding that while the

bankruptcy court was "not left without jurisdiction entirely," it "did not have *exclusive* jurisdiction to enforce" the Plan. *In re Rael,* 527 B.R. 799, 2015 WL 847432, at *1, 8 (emphasis added).

Contrary to the Raels' contention, nothing in either the Contempt Orders or the BAP Order suggested that, after the case was closed, the bankruptcy court lacked jurisdiction over any matters related to the property that was the subject of the Sale Order-those orders simply held that the bankruptcy court did not have exclusive jurisdiction over issues related to the subject property. Indeed, an order that the bankruptcy court lacked jurisdiction altogether would have been inconsistent with the jurisdiction retention language in the Plan, which provided that the bankruptcy court retained post-confirmation jurisdiction to "enter orders necessary or appropriate to carry out the provisions of the Plan. Aplt. App. Vol. I, at 152.

In any event, at the Raels' request, the case had been reopened before the Sale Order was entered. And, because entry of a sale order is a core proceeding, the bankruptcy court was statutorily within its jurisdiction to enter an order-again, at the Raels' request-authorizing them to sell the property. *See* 11 U.S.C. §§ 363(f)-(h) (setting forth circumstances under which trustee may sell property in the bankruptcy estate); 11 U.S.C. § 1107(a) (providing that, subject to limitations not applicable here, a debtor in possession has the same rights and powers as the trustee); 28 U.S.C. § 157(b)(2)(N) (providing that bankruptcy court may

hear and determine all core proceedings, which include "orders approving the sale of property"); Fed. R. Bankr. P. 6004 (establishing procedure for obtaining bankruptcy court order authorizing sale of property).

II. Denial of Rule 60(b) Motions to Vacate or Set Aside Sale Order

The Raels also claim the bankruptcy court erred by denying their motions under Fed. R. Civ. P. 60(b), which is made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 9024. We disagree.

As with the other bankruptcy court rulings, we directly review the bankruptcy court's decision on the Rule 60(b) motions and do not defer to the district court's intermediate appellate analysis. *See Paul v. Iglehart (In re Paul),* 534 F.3d 1303, 1310 (10th Cir. 2008). We review the bankruptcy court's ruling on a Rule 60(b)(4) motion de novo, *King Fisher Marine Serv., Inc. v. 21st Phoenix Corp.,* 893 F.2d 1155, 1158 (10th Cir. 1990) (determination whether judgment is void under Rule 60(b)(4) for lack of jurisdiction is reviewed de novo), and we review its ruling on Rule 60(b)(5) and (6) motions for "an abuse of discretion, keeping in mind that Rule 60(b) relief is extraordinary and may only be granted in exceptional circumstances," *Lebahn v. Owens,* 813 F.3d 1300, 1306 (10th Cir. 2016).

The Raels' Rule 60(b) motions sought to vacate the Sale Order as void under Rule 60(b)(4) and argued that enforcement of the order was inequitable

under Rule 60(b)(5) and that justice required that it be set aside under Rule 60(b)(6) due to mutual mistake. All of the Raels' Rule 60(b) arguments are based on their challenge to the bankruptcy court's jurisdiction to enter the Sale Order and their mischaracterization of the rulings in the Contempt Orders and BAP Order. Having already concluded that the bankruptcy court had jurisdiction to enter the Sale Order and that neither the Contempt Orders nor the BAP Order suggested otherwise, we find no error in the bankruptcy court's denial of the Rule 60(b) motions on the same basis.[1]

III. Denial of Discharge Claim

The Raels next contend that the district court erred by reversing the bankruptcy court order granting them a complete discharge of their debts. More specifically, they claim the district court applied the wrong standard of review in rejecting the bankruptcy court's conclusion that they did not intentionally violate the Sale Order and based its holding on its own unsupported findings, which were contrary to the findings of the bankruptcy court. We disagree.

"Where a district court acts in its capacity as a bankruptcy appellate court, we review the bankruptcy court's decision independently." *Ahammed v. Sec. Investor Prot. Corp. (In re Primeline Sec. Corp.),* 295 F.3d 1100, 1105 (10th Cir. 2002). We review the bankruptcy court's factual findings for clear error and its legal conclusions de novo. *Gullickson v. Brown (In re Brown),* 108 F.3d 1290, 1292 (10th Cir. 1997). A

finding is clearly erroneous if "it is without factual support in the record or if, after reviewing all of the evidence, [the Court is] left with the definite and firm conviction that a mistake has been made." *Gillman v. Ford (In re Ford),* 492 F.3d 1148, 1153 (10th Cir. 2007) (internal quotation marks omitted).

Under 11 U.S.C. § 727(a)(6)(A), a court will deny a discharge if "the debtor has refused…to obey any lawful order of the court, other than an order to respond to a material question or to testify." Section 727(a)(6) gives the bankruptcy court a means to ensure debtors seeking discharge are straightforward in dealings with creditors and that they comply with its orders, and the denial of discharge for refusing to obey a court order follows the general rule that a court order "must be obeyed by the parties until it is reversed by orderly and proper proceedings." *Maness v. Meyers,* 419 U.S. 449, 459 (1975) (internal quotation marks omitted).

The party objecting to discharge under§ 727(a)(6) must demonstrate that "the debtor received the order in question and failed to comply with its terms." *Standiferd v. U.S. Trustee,* 641 F.3d 1209, 1212 (10th Cir. 2011) (internal quotation marks omitted). The burden then shifts to the debtor to explain his non-compliance. *Id.* The court "may not deny discharge under§ 727(a)(6)(A) unless it finds that the debtor's non-compliance was willful." *Id.* (explaining that the Code does not grant the "substantial benefit" of discharge "indiscriminately" and that "the opportunity for a completely unencumbered new beginning is reserved only for

the honest but unfortunate debtor" (internal quotation marks omitted)).

A party acts willfully when he fails to comply with a court order even if he subjectively believed the order was invalid. *See Walker v. City of Birmingham,* 388 U.S. 307, 316-17, 320 (1967) (upholding criminal contempt for violation of injunction, even where injunction raised "substantial constitutional issues"); *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.,* 445 U.S. 375, 386 (1980) (holding that those subject to a court order "are expected to obey that [order] until it is modified or reversed, even if they have proper grounds to object to the order"). Thus, if a party "to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal," and parties "who make private determinations of the law and refuse to obey an order generally risk" adverse rulings. *Maness,* 419 U.S. at 458; *see also Howat v. Kansas,* 258 U.S. 181, 189-90 (1922) (explaining that court orders must be obeyed "however erroneous the action of the court may be," until they are "reversed for error by orderly review" and "disobedience of them is contempt of [the court's] lawful authority").

Here, the bankruptcy court found that the Trustee had satisfied its burden of establishing that the Raels violated the provision in the Sale Order requiring them to give the sale proceeds to Wells Fargo, but that they had met their burden of showing that the violation was not willful because they acted in reliance on the advice of their

counsel.

To prove their advice of counsel defense, the Raels were required to show that (1) they requested counsel's advice about what to do with the proceeds of the sale and communicated all relevant facts to counsel; (2) counsel advised them not to give the proceeds to Wells Fargo and that it was legal not to pay Wells Fargo; and (3) they relied in good faith on counsel's advice in using the proceeds to pay other debts. *See C.E. Carlson, Inc. v. S.E.C,* 859 F.2d 1429, 1436 (10th Cir. 1988) (listing elements of advice of counsel defense); *In re Rupp v. Biorge,* 536 B.R. 24, 30 (Bankr. D. Utah 2015) (same).

The bankruptcy court's conclusion that the Raels relied on counsel's advice in violating the Sale Order was based on its finding that they relied on counsel's February and March 2015 letters advising them that, based on his view that the Sale Order was invalid, they could use the proceeds of the sale to pay their non-dischargeable debts to him and the IRS. But in reversing the discharge determination, the district court found that the bankruptcy court's advice-of-counsel finding was clearly erroneous because it did not address the fact that the sale closed in April 2014 and the Raels were in violation of the Sale Order for over ten months before receiving counsel's advice.

Our independent review of the record confirms that the Raels did not explain their failure to comply with the Sale Order between when the sale closed and when they received counsel's letters. While they testified that counsel had told them he

questioned the validity of the Sale Order before he sent the letters advising them how to distribute the sale proceeds, there is no evidence indicating that he advised them between Apri1 2014 and February 2015 to ignore the clear requirement of the Sale Order that they use the proceeds to pay Wells Fargo, not to mention the Plan's mandate that they pay Wells Fargo before paying any other creditors, including the IRS.

We thus agree with the district court's conclusion that the bankruptcy court clearly erred in finding that the Raels' non-compliance was not willful because it was based on the advice of counse1.[2] *See Middleton v. Stephenson,* 749 F.3d 1197, 1201 (10th Cir. 2014) (explaining that under clear error standard, reversal is appropriate if a "finding lacks factual support in the record"); *Takecare Corp. v. Takecare of Okla., Inc.,* 889 F.2d 955, 957-58 (10th Cir. 1989) (recognizing that "under certain circumstances, a party's reasonable reliance on the advice of counsel may defuse otherwise willful conduct," but holding that defendant could not prove reasonable reliance on the advice of counsel where there was no "showing of what counsel advised defendant"); *New Prods. Corp. v. Dickinson Wright PLLC (In re Modern Plastics Corp.),* 577 B.R. 690, 710 (W.D. Mich. 2017) (upholding bankruptcy court ruling finding parties in contempt for violating an order requiring them to make certain payments, concluding that the they "did not promptly comply with the order" because they failed to make the required payment for several months following entry of the order). And, because the Raels' advice of counsel defense did not

mitigate their willful violation of the Sale Order, the bankruptcy court erred in granting their request for discharge.

IV. Award of Attorney Fees against Trustee

The Raels further maintain that the district court erred in reversing the bankruptcy court's award of attorney's fees against the Trustee as a discovery sanction, and the Trustee cross-appeals that order. We agree with the district court's conclusion that the award is inconsistent with the bankruptcy court's finding that the Trustee's lack-of-knowledge objections were substantially justified. Accordingly, we reverse the fees order.

Federal Rule of Civil Procedure 37(a)(5)(A), which is made applicable here by Federal Rule of Bankruptcy Procedure 7037, provides that, if a motion to compel discovery is granted, the court must require the party avoiding discovery to pay the movant's reasonable expenses, including attorney fees. "But the court must not order this payment" if the "nondisclosure, response, or objection was substantially justified." Fed. R. Civ. P. 37(a)(5)(A)(ii). The Supreme Court has defined "substantially justified" as "not justified to a high degree" but "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood,* 487 U.S. 552, *565* (1988) (internal quotation marks omitted).

We review the bankruptcy court's substantial justification determination and its decision to impose sanctions for an abuse of discretion. *See*

Sun River Energy, Inc. v. Nelson, 800 F.3d 1219, 1228 (10th Cir. 2015) (reviewing substantial justification determination under Fed. R. Civ. P. 37(c)(l) for abuse of discretion); *Orjias v. Stevenson,* 31 F.3d 995, 1005 (10th Cir. 1994) (reviewing imposition of sanctions for abuse of discretion). A court abuses its discretion when its decision is "arbitrary, capricious, whimsical, or manifestly unreasonable." *Coletti v. Cudd Pressure Control,* 165 F.3d 767, 777 (10th Cir. 1999) (internal quotation marks omitted). A court also abuses its discretion if it bases its ruling "on an erroneous view of the law." *Cooter & Gel/ v. Hartmarx Corp.,* 496 U.S. 384,405 (1990).

Here, the Raels served requests for admission ("RFA") on the Trustee that sought information related to the dispute between the Raels and Wells Fargo, including whether Wells Fargo had a mortgage interest in or judgment lien against their property. The Trustee objected to the RFAs on numerous grounds, including lack of knowledge.

In ruling on the Raels' motion to compel, the bankruptcy court sustained one of the Trustee's objections, overruled others, and, with respect to the lack-of-knowledge objection, ordered the Trustee to file amended responses explaining what steps it took to comply with Rule 36's reasonable-inquiry requirement. *See* Fed. R. Civ. P. 36(a)(4) (providing that a party answering RFAs "may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is

insufficient to enable it to admit or deny"). As pertinent here, the court found that the Trustee's lack-of-knowledge objection was "reasonably justified," because the RFAs may have sought information outside the Trustee's control and a party responding to RFAs is not required to obtain responsive information from third parties to satisfy the reasonable-inquiry requirement. Aplt. App. Vol. I, at 61B-61C. Despite finding that there was "substantial justification [for] objecting," the court ordered the Trustee to pay a portion of the Raels' attorney's fees as a sanction for not providing an adequate reasonable inquiry explanation. *Id.* at 61C-61D. The court denied the Trustee's motion to reconsider, reiterating its conclusion that sanctions were warranted despite its finding that the objection was "reasonably justified." Aplee. App. at 1. On appeal, the district court reversed the sanctions award, concluding that the bankruptcy court abused its discretion by ordering the Trustee to pay the Raels' attorney's fees "when [it] simultaneously found the Trustee's response was justified." Aplt. App. Vol. V, at 1035-36.

Initially, we reject the Raels' contention that the bankruptcy court "misspoke" and did not mean to find that the Trustee's objection was substantially justified. Aplt. Br. at 51. The bankruptcy court made that express finding several times in its oral ruling on the motion to compel and again in the order denying the Trustee's motion to reconsider. We decline to second guess the meaning of the court's finding and conclude that the record supports it. *See G.J.B. & Assocs., Inc. v. Singleton,* 913 F.2d 824, 831 (10th Cir. 1990) (appellate court

should not second guess at the meaning of the district court's order). And, having concluded that the Trustee's objection, though ultimately unsuccessful, was substantially justified, the bankruptcy court lacked authority under Rule 37 to impose sanctions. *See* Fed. R. Civ. P. 37(a)(5)(A)(ii) (court "must not" impose sanctions if the objection was substantially justified). Accordingly, the court's order was based on an erroneous view of the scope of its authority under Rule 37(a)(5)(A)(ii) and was therefore an abuse of discretion. *See King v. Fleming,* 899 F.3d 1140, 1147 (10th Cir. 2018) (a court abuses its discretion if its discovery or sanctions order is based on an erroneous view of the law (citing *Cooter* & *Gell,* 496 U.S. at 405)).

CONCLUSION

The district court's rulings are affirmed, and the case is remanded to the district court with instructions to remand to the bankruptcy court for further proceedings consistent with this order and judgment.

Entered for the Court

Footnotes

• After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] In light of this conclusion, we need not address the Trustee's argument that the Raels' challenges to the Sale Order in the context of their Rule 60(b) arguments are barred as untimely because they did not appeal the Sale Order within 14 days after it was entered. *See* 28 U.S.C. § 158(c)(2); Fed. R. Bankr. P. 8002(a)(1). We nevertheless note that we have previously held, in an unpublished decision, that a bankruptcy court order "authorizing sale of real property . . . is a final order" for purposes of 28 U.S.C. § 158(d), which governs the jurisdiction of the courts of appeals over appeals from final decisions, judgments, orders and decrees under 28 U.S.C. § 158(a) and (b). *Bush v. U.S. Bankr. Ct. for Dist. of Colo. (In re Bush),* No. 93-1345, 1994 WL 596762, at *1 (10th Cir. Nov. 2, 1994) (citing *Hendrick v. Avent,* 891 F.2d 583, 586 (5th Cir. 1990)) (further citations omitted).

[2] Having concluded that the bankruptcy court's advice of counsel finding was clearly erroneous, we need not address the Trustee's argument that the court further erred by not requiring the Raels to prove-in addition to the other elements of the advice of counsel defense-that counsel was independent. We recognize that this Circuit has held that to prevail on the advice of counsel defense in SEC enforcement actions, counsel must be independent or disinterested. *See S.E.C. v. Kokesh,* 834 F.3d 1158, 1167 (10th Cir. 2016) (requiring independence for advice of counsel defense in securities fraud civil enforcement action), *rev'd on other grounds,* U.S. __, 137 S. Ct. 1635 (2017); *C.E. Carlson, Inc.,* 859 F.2d at 1436 (same); *S.E.C. v. Melchior,* No. 90-C-10241, 1993 WL 89141, at *20 (D. Utah Jan. 14, 1993) (holding that "[d]efendants cannot claim to reasonably rely on the advice of counsel where counsel has a pecuniary interest in the offering and thus participated in the allegedly violative scheme"). But this Circuit has not applied that requirement in the bankruptcy context, and we need not decide whether to do so here.

3/30/2018
Case No. 1:17-CV-00104-NDF
United States District Court
For the District of Wyoming

PATRICK S. LAYNG, United States Trustee
for Region 19
Appellant/Cross-Appellee,
vs.
ROBERT RAEL and LISA RAEL,
Appellees/Cross-Appellants.

ORDER ON APPEAL

This matter is before the Court on Appellant United States Trustee's Notice of Amended Appeal from the Bankruptcy Court (Doc. 2) and Appellees' Second Amended and Restated Notice of Cross-Appeal from Bankruptcy Court. Appellant, United States Trustee ("the Trustee"), appeals the Bankruptcy Court's Judgment, Order Granting in Part and Denying in Part Defendants' Supplement to Defendants' Motion to Strike (Attorney's Fees). Appellees, Robert and Lisa Rael, appeal the Bankruptcy Court's Order Denying Defendants' Motion to Dismiss, Order Denying Motion to Alter or Amend Opinion, and Order Denying Motion to Set Aside Sale Order. This Court has jurisdiction to hear this appeal under 28 U.S.C. § 158(a)(1) and (c)(1)(A).

BACKGROUND

On May 1, 2008, Robert and Lisa Rael ("the Raels") filed a voluntary Chapter 11 bankruptcy petition.

The Raels retained Stephen Winship as their attorney. On January 20, 2010, the bankruptcy court confirmed the Raels' Amended Chapter 11 Plan of Reorganization ("the Plan") and granted a final decree on March 7, 2011. The Plan created "Class One – Wells Fargo Bank." The Plan required Wells Fargo's claim to be partially satisfied through the sale of three parcels:

> ***Class One-Wells Fargo Bank***. This creditor holds security interests against Raels' real estate and some equipment and vehicles used in their businesses. This claim, which is disputed, is for $1,176,262.00 and is secured by assets having a value of $502,261.00. This creditor's claim will be partially satisfied by the sale of the following parcels of real property:
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> | | |
> |---|---|
> | 520 Oregon Trail and Fifth Street (car wash) Lovell, Wyoming | $36,431.00 |
> | 51 East Main Street Lovell, Wyoming | $48,208.00 |
> | 330 S. 1st West Street Cowley, Wyoming | $36,817.00 |
>
> In the event any of the parcels are not sold within one year of the effective date of the Plan, such unsold parcels will be surrendered by quit claim deed to Wells Fargo and the secured claim of

> the creditor will be reduced by the values indicated above.

(SBR 12 [Doc. 16]).

The Raels voluntarily closed their case on March 7, 2011, after confirmation to avoid accruing Trustee's fees during the duration of the Plan. (BR 678). The Plan also required the Raels to make monthly payments to Wells Fargo. The Raels subsequently defaulted on the payments to Wells Fargo. Wells Fargo filed complaints in the Fifth Judicial District for the State of Wyoming and obtained judgments on the amounts the Raels owed on Well Fargo's pre-petition mortgages. Wells Fargo did not seek relief from the automatic stay prior to filing the complaints. Wells Fargo then obtained a default judgment and filed it as a lien against the Raels' Cowley property in the real estate records for Big Horn County, Wyoming.

In response to the liens, the Raels filed a Motion to Reopen Case to allow the Raels "to enforce the terms of the confirmed Plan and to bring contempt actions for violation of the Automatic Stay." (BR 78, Doc. 3-12). The bankruptcy court reopened the case on June 6, 2013.

On September 16, 2013, the Raels filed a Motion for Approval of Sale of Real Property. They sought relief from the automatic stay to sell the Cowley property to David and Michelle Banks. The motion stated that the Cowley property was "subject to a mortgage held by Wells Fargo Bank . . . the sale proceeds will be paid to the mortgagor, Wells Fargo

Bank." (BR 589). On November 13, 2013, the bankruptcy court entered the Sale Order permitting the Raels to sell the Cowley property and stated, "the proceeds thereof shall be paid in accordance with the Debtors' Motion." (BR 599). The Raels made several modifications to the sale motion, but did not modify the allocation of proceeds. The motions were uncontested. Thus, the bankruptcy court entered Sale Orders approving the motions. The bankruptcy court entered the first Sale Order on November 13, 2013.

Additionally, on October 13, 2013, the Raels filed their first motion for order to show cause and/or contempt citation against Wells Fargo. In their motion, the Raels argued Wells Fargo violated the automatic stay when obtaining a state court judgment and judicial lien on the Cowley property. The bankruptcy court held an evidentiary hearing on the motion on April 9, 2014. The bankruptcy court denied the Raels' motion because it found the automatic stay terminated upon the closure of the case, so there was no stay violation and Wells Fargo was entitled to enforce its rights under the Plan in state court. Additionally, the bankruptcy court found there was no discharge injunction because the Raels had not completed the payments under the Plan. Finally, the bankruptcy court also ruled it did not have "related to" jurisdiction over Wells Fargo's state court action to enforce its liens. (BR 688). The bankruptcy court found, "[w]hen property leaves the bankruptcy estate, however, the bankruptcy court's jurisdiction proceeding [sic] comes to an end." (BR 686). The Raels filed a motion for reconsideration and a second motion for

order to show cause and/or contempt citation against Wells Fargo. The bankruptcy court denied the motions and the Raels appealed to the Tenth Circuit Bankruptcy Appellate Panel ("BAP").

On February 27, 2015, the BAP affirmed the bankruptcy court's denial and relied on *In re Houlik*, 481 B.R. 661, 674 (B.A.P. 10th Cir.). Regarding the automatic stay, the BAP found, "[u]nder § 362(c)(1), the stay of acts against property of the estate terminated in January 2010 upon confirmation, and 'the stay of any other act...' terminated in March 2011 upon case closure." (BR 787). Regarding the bankruptcy court's jurisdiction to enforce the terms of the Plan, the BAP found, "the bankruptcy court's jurisdiction following confirmation...is reserved for matters that impact the bankruptcy process directly or involve interpretation or execution of the plan of reorganization." (BR 788).

The *Houlik* court held "when there is no automatic stay or discharge injunction violation to support jurisdiction, and there is no issue involving noncompliance with or interpretation of the confirmed plan, a bankruptcy court does not have jurisdiction to determine a post-confirmation wrongful repossession action." (BR 788). Thus, the bankruptcy court could only have jurisdiction over a non-core post-confirmation proceeding if the action was "sufficiently related to the [debtors'] Chapter 11 bankruptcy case." (BR 788).
The BAP found, "the *Houlik* decision does not state that bankruptcy courts have *no* post-confirmation jurisdiction. Instead,...bankruptcy courts do not have

'related to' jurisdiction to issue sanctions in non-core post-confirmation actions alleging a violation of the plan for state court enforcement of the plan." *Id.* at *8. Thus, "the bankruptcy court is not left without jurisdiction entirely. Instead, exclusive bankruptcy court jurisdiction did not arise based on [the facts in *Houlik*]– facts that are nearly identical to those found here." *Id.* Thus, the BAP affirmed the bankruptcy court.

Prior to the evidentiary hearing on the contempt motion, on April 4, 2014, the Raels closed on the sale of Cowley property. The property sold for $130,000, and the Raels received a total of $127,283.81. The Raels and Mr. Winship failed to notify the bankruptcy court or Wells Fargo of the sale. The Raels held on to the check for almost a year and eventually deposited the funds into a bank account on March 10, 2015. On March 11, 2015, Mr. Winship wrote the Raels a letter discussing how the funds should be distributed. On March 19, 2015, Mr. Winship sent the Raels a letter suggesting they pay $95,584 to the IRS; $4,250 to their accountants; and $22,439.72 to Mr. Winship for unpaid fees and services to convert their case to a Chapter 7.

On May 4, 2015, the Raels converted their case to a Chapter 7. On May 25, 2015, at the § 341 Meeting of Creditors, Mr. Klepperich, counsel for Wells Fargo, inquired about the status of the sale of the Cowley property. On September 30, 2014, he sent an email to Mr. Winship asking about the status of the sale, but he did not receive a response. The

Meeting of Creditors was the first time Wells Fargo was informed of the sale of the property.

On June 25, 2015, the U.S. Trustee ("the Trustee") filed the Complaint commencing the Adversary Proceeding (15-2013) seeking to deny the Raels discharge under 11 U.S.C. § 727(a)(6) for refusing to obey the Sale Order. The Raels filed a motion to dismiss under Rule 12(b)(6) arguing the bankruptcy court lacked subject matter jurisdiction to enter the Sale Order. The bankruptcy court denied the motion. Alternatively, the Raels filed a motion to set aside the sale order in the original bankruptcy case, which the bankruptcy court also denied. During the Adversary Proceeding, the Trustee objected to several of the Raels' discovery requests. The Raels filed a motion to compel and the bankruptcy court granted in part the motion. The bankruptcy court sanctioned the Trustee for the discovery violation by ordering him to pay $1,100 in attorney's fees. The bankruptcy court denied the Trustee's motion for reconsideration of the sanction.

The bankruptcy court held a trial in the Adversary Proceeding on February 21, 2017 and issued its Judgment and Opinion on June 12, 2017. The bankruptcy court found the Trustee proved the Raels violated the Sale Order, but granted the Chapter 7 discharge because the Raels violation was based on their reliance on advice of counsel. On June 19, 2017, the Trustee filed his Notice of Appeal and on June 21, 2017, the Raels filed a motion to amend the opinion to correct a factual error. The bankruptcy court granted the motion and issued an Amended

Opinion on September 14, 2017. The Raels filed a Notice of Cross-Appeal on July 17, 2017.

The Trustee appeals the bankruptcy court's Judgment and the discovery sanctions that resulted from the Order Granting the Motion to Compel. The Raels appeal the bankruptcy court's order denying their motion to dismiss under Rule 12(b)(6) and the order denying their motion for reconsideration under Rule 60.

STANDARD OF REVIEW

When a party elects to have the United States District Court hear an appeal from the Bankruptcy Court, the district court sits as an appellate court. *See* 28 U.S.C. § 1334(a). A district court reviewing a bankruptcy court's judgment shall only set aside clearly erroneous findings of fact. Fed. R. Bank. P. 8013 advisory committee notes. The district court reviews conclusions of law de novo. *In re Miniscribe Corp.*, 309 F.3d 1234, 1240 (10th Cir. 2002).

The Trustee asserts that the bankruptcy court failed to apply the proper test when it granted the debtors' discharge and this issue is reviewed de novo. Additionally, the Trustee claims the bankruptcy court should have denied the debtors' discharge because they refused to obey the bankruptcy court's order. "A decision whether to grant or deny a discharge is in the sound discretion of the bankruptcy court[;]" therefore, the bankruptcy court's decision to grant or deny discharge is reviewed for abuse of discretion. *In re Garland*, 417

B.R. 805, 810 (B.A.P. 10th Cir.).

The Trustee also appeals the bankruptcy court's decision to grant attorney's fees for the Trustee's discovery violations. Discovery decisions are within the discretion of the bankruptcy court and are reviewed for abuse of discretion. *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992).

Finally, the Raels appeal the bankruptcy court's denial of their motion under Rule 60(b)(4–6). The Court reviews the bankruptcy court's determination of Rule 60(b)(4) motions de novo. *Wilmer v. Brd. of County Com'rs of Leavenworth County*, 69 F.3d 406, 409 (10th Cir. 1995). The bankruptcy court's determinations for Rule 60(b)(5) & (6) motions are reviewed for abuse of discretion. *Id.*

DISCUSSION

The Trustee appeals the bankruptcy court's Judgment (Case No. 15-02013, Doc. 123) entered on June 12, 2017 and Order Granting in Part and Denying in Part Defendants' Supplement to Defendants' Motion to Strike (Attorney's Fees). (Case No. 15-02013, Doc. 68). Regarding the bankruptcy court's Judgment, the Trustee asks the Court to decide whether the bankruptcy court erred in finding the U.S. Trustee failed to establish the debtors refused to obey a lawful order of the court in order to deny discharge under § 727(a)(6). The Trustee also argues the bankruptcy court erred in awarding the Raels attorney's fees because the Trustee's objections to the Raels' discovery requests

were substantially justified.

The Raels cross-appeal the bankruptcy court's Order Denying Defendants' Motion to Dismiss entered on September 25, 2015, Order Denying Motion to Alter or Amend Amended Opinion entered on November 17, 2017, and Order Denying Motion to Set Aside Sale Order entered on September 23, 2015. The Raels ask the Court to determine 12(b) motion to dismiss the Trustee's Complaint in the Adversary Proceeding because the BAP found that the bankruptcy court did not have jurisdiction over the property. Second, whether under Fed. R. Bank. P. 9024(b)(4), the bankruptcy court should have set aside its Sale Order because the judgment was void. Third, whether under Fed. R. Bank. P. 9024(b)(5), the bankruptcy court abused its discretion by denying the Rael's motion to set aside the sale order because its prospective application was no longer equitable. Finally, whether under Fed. R. Bank. P. 9024(b)(6), the bankruptcy court abused its discretion in denying the Raels' motion to set aside the sale order based on mutual mistake.

Bankruptcy Court's Judgment

Under 11 U.S.C. § 727(a)(6)(A), "[t]he court shall grant the debtor a discharge unless . . . the debtor has refused, in the case . . . to obey any lawful order of the court, other than an order to respond to a material question or to testify...." "The party objecting to discharge under [§ 727(a)(6)(A)] must demonstrate that 'the debtor received the order in question and failed to comply with its terms.'" *Standiferd v. U.S. Trustee*, 641 F.3d 1209, 1212

(10th Cir. 2011) (quoting *In re Jordan*, 521 F.3d 430, 433 (4th Cir. 2008)). "The debtor then bears the burden of explaining [their] non-compliance." *Id.* The Court may only deny discharge under § 727(a)(6)(A) if it finds the debtor's non- compliance was willful. *Id.*

Here, the bankruptcy court found the Raels refused to obey its order and the Trustee established the debtor's noncompliance. (BR 13). However, the bankruptcy court also found the Raels did not fail to comply with the Court's order willfully. Instead, the bankruptcy court found Raels relied on their counsel's advice regarding the proceeds of the sale and granted the debtors a discharge. The Trustee asserts the bankruptcy court erred when applying the four-factor test to determine whether debtors relied on advice of counsel. The Trustee contends the bankruptcy court should have applied an advice of counsel test that includes a requirement that counsel is independent because, here, debtors' counsel advised the debtors to violate the Court's Sale Order and instead of turning the proceeds of the sale over to Wells Fargo, as the Sale Order required, the debtors should pay a portion to the IRS and a portion to him for their outstanding bill and a retainer for future actions.

For the advice of counsel defense, the bankruptcy court relied on *In re Biorge*, 536 B.R. 24, 30 (Bank. C. D. Utah 2015). (BR 12). The court in *In re Biorge* found the advice of counsel defense is a way a debtor can negate the element of intent. *Id.* at 30. "To meet [the] burden on the advice of counsel defense, [debtors] must show (1) that all facts were fully and

fairly communicated to counsel; (2) that counsel gave advice; (3) that [debtors] relied on the legal advice; and (4) that debtor's reliance was in good faith." *Id.* (citing *In re Gotwald*, 488 B.R. 854, 872 (Bank. E.D. Penn. 2013)). Bankruptcy courts have adopted similar tests, and have not required an element of independence of counsel. *See In re Wehri,* 212 B.R. 963, 969 (Bankr.D.N.D.1997); *In re Siddell,* 191 B.R. 544, 554 (Bankr.N.D.N.Y.1996); *In re Ketaner,* 149 B.R. 395, 401 (Bankr.E.D.Va.1992); *In re Murray,* 116 B.R. 473, 476 (Bankr.E.D.Va.1990); *see also In re Dawley,* 312 B.R. 765, 787 (Bankr.E.D.Pa.2004) (applying this principle in objection to discharge under § 727(a)).

The Trustee argues the bankruptcy court should have applied the same elements of an advice of counsel defense as courts considering this defense in the context of SEC cases. The purpose of the cited SEC actions was to punish those who violated securities laws. *See S.E.C. v. Kokesh*, 834 F.3d 1158 (10th Cir. 2016); *C.E. Carlson, Inc. v. S.E.C.*, 859 F.2d 1429 (10th Cir. 1988). In contrast, the purpose of "any bankruptcy law is to provide a discharge of debts in order to grant the debtor a fresh start." *In re Davidson Lumber Sales, Inc.*, 66 F.3d 1560, 1570 (10th Cir. 1995) (citation and quotations omitted). Therefore, "[e]xceptions to discharge are to be narrowly construed, so as to effect the 'fresh start' purpose of bankruptcy." *In re Miller*, 55 F.3d 1487, 1489 (10th Cir. 1995). Thus, the bankruptcy court did not err when applying the four-factor advice of counsel test, rather than requiring the Raels to also show counsel was independent.

Alternatively, the Trustee argues the bankruptcy court erred when finding the Raels relied on Mr. Winship's advice. The Trustee asserts the February 2015 letter from Mr. Winship to the Raels was the only evidence of advice that the Raels received regarding the proceeds and the sale that closed in April 2014, nearly a year before the letter. Thus, the Trustee contends the Raels did not rely on Mr. Winship's advice when they began refusing to comply with the Sale Orders.

For the court to find that a party lacked the intent to violate a court order, the *In re Biorge* test requires the court to find the parties relied on counsel's advice. *In re Biorge*, 536 B.R. 24, 30 (Bank. C. D. Utah 2015). The bankruptcy court found that the Raels relied on Mr. Winship's April 2015 letter about how to distribute the proceeds. (BR 12).

However, the bankruptcy court's reasoning does not support a finding that the Raels relied on their counsel's advice from the time the Cowley property sold to the 2015 letter.

The bankruptcy court authorized the sale of the Cowley property on November 12, 2013. The Cowley property sold on April 4, 2014. (BR 910). After the sale, the Raels did not turn over proceeds to Wells Fargo as directed by the Sale Order and as stated in the Raels' motion for the sale order. (*See* BR 9–10). The bankruptcy court's reliance on the letter from Winship to the Raels in April 2015 does not explain the Raels' violation of the Sale Order from the time the Cowley property sold to April 2015. During that time, the Raels did not inform the bankruptcy court

that the property sold, did not inform Wells Fargo that the property sold in spite of Wells Fargo's inquiries about the status of the
sale, and did not turn the proceeds over to Wells Fargo.

The Raels argue they did not have the requisite intent to violate the Sale Order under § 727(a)(6). However, the bankruptcy court found they did violate the Sale Order, but reliance on Mr. Winship's advice in 2015 negated intent. (BR 12–13). Yet, the bankruptcy court did not discuss the period between the sale of the Cowley property and the 2015 advice. (*See id.*). The Raels claim that the bankruptcy court's contempt orders created confusion about the bankruptcy court's jurisdiction over the Cowley property and its jurisdiction to enter the Sale Order. On October 15, 2013, the Raels filed their first motion for order to show cause and/or contempt citation against Wells Fargo, after Wells Fargo obtained a judicial lien on the Cowley property. On April 9, 2014, the bankruptcy court held a hearing on the first contempt motion. The Raels did not disclose that the Cowley property sold at that time. On September 30, 2014, Tom Klepperich sent Mr. Winship an email asking, "[d]id the closing of the Cowley property ever happen? If so, where is the money sitting?" (BR 424). Mr. Winship forwarded the email to the Raels and asked, "How should I respond?" (*Id.*). The record shows the Raels and Mr. Winship did not respond.

In November 2014, the Raels had trouble finding a bank to cash the check from the sale of the Cowley property. (BR 434–35). On February 18, 2015, Lisa

Rael asked Mr. Winship, if she could get another check issued and get Robert Rael's signature on it and asked "[w]here would I have to send the money to?" (BR 435). Mr. Winship responded with the letter, on which the bankruptcy court relied, and stated,

> [I]f the Bankruptcy Appellate Panel affirms the Bankruptcy Court ruling, it means that the proceeds from the sale to the Banks [are] not subject to Bankruptcy Court jurisdiction thereby allowing that money to then be applied in large part to the non-dischargeable IRS obligation.

(BR 438). While this letter may explain the Raels' reliance on counsel's advice in 2015, there is no evidence in the record regarding reliance on any advice by Mr. Winship from the time the property sold in April 2014 to February 2015. Instead, the Raels failed to disclose the sale of the property and failed to turn the proceeds over to Wells Fargo, in violation of the Sale Order.

Lisa Rael testified that she did not immediately deposit the check after the sale because she "didn't know what to do with it. [She] didn't know [where] it was supposed to go to. So [she] held on to it." (BR 912). Ms. Rael stated that she ultimately deposited the check and distributed the proceeds based on Mr. Winship's advice. (BR 912–13). Mr. Rael also testified that he relied on Mr. Winship's advice to make the distributions from the sale proceeds. (BR 917). The Raels argue that the bankruptcy court's

contempt order created confusion about whether the bankruptcy court even had jurisdiction over the Cowley property as the court determined it was no longer property of the estate. However, the bankruptcy court entered its contempt order *after* the property sold, so there is nothing in the record to explain why the Raels violated the Sale Order prior to the order on the contempt motions.

The bankruptcy court's reasoning focuses on Mr. Winship's 2015 letter and the testimony at the hearing focused on the confusion caused by the bankruptcy court's contempt orders, entered after the Cowley property was sold. Thus, the bankruptcy court's reasoning does not support a finding that the Raels relied on their counsel's advice when they first violated the Sale Order in April 2014, well before Mr. Winship's letter and before the hearing on the contempt motion.

As such, the Court finds the bankruptcy court's Judgment is REVERSED.

Order Granting Attorney's Fees for Discovery Violations

In the Adversary Proceedings, the bankruptcy court found the Trustee in contempt for discovery violations and ordered the Trustee to pay the debtor's attorney's fees related to the contempt motion.

> As a general rule, "[t]he imposition of sanctions for abuse of discovery under Rule 37 is a matter within the

> discretion of the trial court." *Orjias v. Stevenson*, 31 F.3d 995, 1005 (10th Cir), *cert. denied*, 513 U.S. 1000, 115 S.Ct. 511, 130 L.Ed.2d 418 (1994). A [ ] court abuses its discretion when it renders "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994).

Coletti v. Cudd Pressure Control, 165 F.3d 767, 777 (10th Cir. 1999).

Generally, "[i]f a [motion under Rule 37] is granted...the court must, after giving an opportunity to be heard, require the party...whose conduct necessitated the motion...to pay the movant's reasonable expenses incurred in making the motion." Fed. R. Civ. P. 37(a)(5)(A). However, "the Court must not order this payment if...the opposing party's nondisclosure, response, or objection was substantially justified...." Fed. R. Civ. P. 37(a)(5)(A)(ii). The Supreme Court has defined "substantially justified" as "justified to a degree that could satisfy a reasonable person...." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (citations and quotations omitted).

Here, the Trustee argues his objection to the Requests for Admissions ("RFAs") based on lack of personal knowledge were substantially justified, therefore, the bankruptcy court erred in assessing attorney's fees. He argues the bankruptcy court found the Raels were entitled to attorney's fees "simply because the court was unable to sustain the [Trustee's] objection" to the RFAs. (Doc. 21 at 51

[App. Br.]).

In response to the Raels' RFAs, the Trustee made several objections. The bankruptcy court overruled his objections based on relevance, legal conclusions, and vague and ambiguous terms. The Trustee also objected to the RFAs based on lack of personal knowledge. The bankruptcy court stated:

> [T]he Court is concerned the way the questions are phrased that these objections were probably expected and that while Mr. Morse and the U.S. Trustee's office has an obligation to review documents within their possession, there's no responsibility to interview or subpoena from third parties information. And while the U.S. Trustee may be in a position to admit or deny what a title report establishes, it may not be in a position to admit that the title report is, in fact, a representation of the fact trying to be made. So I understand the concern the U.S. Trustee has, but the problem the Court faces is the rule in law is clear that when a party objects for lack of information, it must also explain and state that a reasonable inquiry was made.

(BR 182).

> [T]he Court finds [the Trustee was] justified in objecting to the RFAs and

> claiming an insufficient knowledge to either admit or deny the requests when some of those facts may pertain to information that would possibily require the trustee to go outside of its records or outside othe reasonable investigation requirements. However, the rule in law is clear that objections to lack of knowledge require more….

(BR 183).

Additionally, later in its oral ruling, the bankruptcy court contradicted its findings, by stating that "given the substantial justification in objecting,...the Court will ask that, Mr. Winship, that you file an application for fees...." (BR 183). In its written order, the bankruptcy court reiterates that it "found the U.S. Trustee's objections to lack of knowledge potentially justified, the Court could not sustain the objection as the Trustee[ ] failed to state that it had made a reasonable inquiry and the information it knows or can readily obtain is insufficient to enable it to admit or deny as required by the rules." (BR 211). The bankruptcy court assessed attorney's fees even though it found the Trustee's objection to the RFAs was "reasonably justified" and even stated "given the substantial justification in objecting." (*Id.* at 211–12).

Rule 37 requires a court to assess attorney's fees to the movant when it grants a motion to compel; however, when the objection is substantially justified, the court shall not assess attorney's fees. Fed. R. Civ. Pro. 37(a)(5)(A). Here, the

bankruptcy court abused its discretion when ordering the Trustee to pay the Rael's attorney's fees when the bankruptcy court simultaneously found the Trustee's response was justified. Rule 37 does not require attorney's fees every time a court does not sustain an objection to a discovery request, rather only when the objection is not substantially justified.

The bankruptcy court abused its discretion in assessing attorney's fees against the Trustee. As such, the bankruptcy court's fee assessment in its Order Granting in Part and Denying in Part Defendants' Supplement to Defendants' Motion to Strike (Attorney Fees) is REVERSED.

The Raels' Cross-Appeal

The Raels appeal the bankruptcy court's denial of their motion to dismiss the adversary complaint based on the bankruptcy court's lack of subject matter jurisdiction. The Raels also appeal the bankruptcy court's denial of their motion for reconsideration of the Sale Order under Fed. R. Bankr. P. 9024. The Raels argue the Sale Order should have been vacated because it was void under Rule 60(b)(4), enforcement of the Sale Order was no longer equitable under Rule 60(b)(5), and justice required the bankruptcy court to vacate the Sale Order due to mutual mistake.

A. Order Denying Motion to Dismiss

The Raels argue the bankruptcy court erred in denying their motion to dismiss the adversary complaint. The Raels filed a motion to dismiss under

Rule 12(b)(6) arguing the bankruptcy court did not have subject matter jurisdiction over the property.

The Trustee filed a Complaint Seeking to Deny Debtors' Discharge. (BR 5). The Trustee claimed the bankruptcy court should deny the Raels a discharge under 11 U.S.C. § 727(a)(6)(A) because the Raels refused to comply with the bankruptcy court's Sale Orders when they did not turn over the proceeds of the sale of the Cowley property to Wells Fargo. (BR 9). In response, the Raels filed a motion to dismiss the complaint based on the bankruptcy court's Contempt Orders, which the BAP affirmed. In their motion to dismiss, the Raels argued the BAP's decision held the bankruptcy court no longer had jurisdiction over the property after confirmation of the plan and closure of the case because the property was no longer property of the estate. (Doc. 33-1 at 6–7 [Aple. Appx.]). Instead, the state court had jurisdiction over the Cowley property. Thus, the Raels argued the Sale Orders were void and no longer in effect because the bankruptcy court lacked jurisdiction to enter the Orders. (*Id.* at 7).

In September 2011, the Raels filed a Motion for Sale Order and a Motion for an Amended Sale Order, asking the bankruptcy court to permit the Raels to sell the Cowley property and turnover the proceeds to Wells Fargo per their confirmation plan. (BR 589, 600). In November 2013, the bankruptcy court entered a Sale Order and an Amended Sale Order regarding the sale of the Cowley Property. (BR 599, 605). The Sale Orders stated that "the proceeds of the sale shall be paid in accordance with Debtor's Motion." (BR 599, 605). The Raels' motion stated

that the "sale proceeds will be paid to the mortgagor, Wells Fargo Bank." (BR 598, 600). After the Raels filed their motion for a sale order, the Raels filed a motion for order to show cause and/or contempt citation against Wells Fargo. (BR 671). The bankruptcy court denied the motion and found it did not have "related to" jurisdiction over Wells Fargo's action to enforce its state judicial liens. (BR 688). The Raels filed a second contempt motion which the bankruptcy court denied and they appealed the denials. (BR 700, 715).

When the Rael's appealed to the BAP, regarding the bankruptcy court's jurisdiction to enforce provisions of their Chapter 11 plan, the BAP stated, "when there is no automatic stay or discharge injunction violation to support jurisdiction, and there is no issue involving noncompliance with...a confirmed plan, a bankruptcy court does not have jurisdiction to determine a post-confirmation wrongful repossession action." (BR 787) (citing *Houlik*, 481 B.R. at 676). Additionally, it stated, "the bankruptcy court's jurisdiction following confirmation...is reserved for matters that impact the bankruptcy process directly or involve interpretation of execution of the plan of reorganization." (BR 788) (citing *Houlik*, 481 B.R. at 676–77). Finally, the BAP clarified that *Houlik* held "only that bankruptcy courts do not have 'related to' jurisdiction to issue sanctions in non-core post-confirmation actions alleging a violation of the plan for state court enforcement of the plan." (BR 789).

The BAP did not determine that the bankruptcy

court no longer had jurisdiction over the property. Rather, it found the bankruptcy court did not have *exclusive* jurisdiction over the property and the automatic stay no longer protected the property from state court actions by the creditors. (*Id.*) (emphasis added). The BAP and the bankruptcy court never stated that the bankruptcy court no longer had jurisdiction over the debtors' discharge.

Here, the Trustee filed a complaint challenging the debtors' discharge of their Chapter 11 case, under § 727. The BAP cited *Houlik*, which held, "the Bankruptcy court's jurisdiction following confirmation...is reserved for matters that impact the bankruptcy process directly or involve interpretation or execution of the plan of reorganization." (BR 788). The Complaint alleged the elements for denial of discharge under § 727(a)(6)(A) for violating the Sale Orders.
The Raels argue the bankruptcy court erred by denying their motion to dismiss under Rule 12(b)(6) for lack of subject matter jurisdiction. The Raels premised their motion on the bankruptcy court's Contempt Orders. The Raels assert the bankruptcy court found it did not have jurisdiction over the Cowley property upon the closing of the case, thus, it did not have jurisdiction to enter the Sale Orders.

A challenge to discharge under § 727 is a matter that impacts the bankruptcy process, *i.e.*, whether the debtors will receive a discharge in bankruptcy. This is plainly one of the most important roles of the bankruptcy court, as without discharge, the debtors will not receive relief. Under 28 U.S.C. §

157(b)(2)(I), the bankruptcy court may hear proceedings related to "determinations as to the dischargability of particular debts" because such determinations are core-proceedings. Thus, the bankruptcy court did not err in denying the Raels' motion to dismiss based on Rule 12(b)(6) for lack of subject matter jurisdiction because the bankruptcy court had subject matter jurisdiction since the complaint contested the dischargability of the Raels' debt to Wells-Fargo.

As such, the bankruptcy court's denial of the Raels' motion to dismiss is AFFIRMED.

B. Order Denying Motion for Reconsideration

The Raels filed a motion for reconsideration of the Sale Orders under Fed. R. Bankr. P. 9024.[1] The Raels argue the bankruptcy court abused its discretion when denying their motion for reconsideration of the Sale Orders under Rule 12(b)(4) because the Sale Orders were void in light of the BAP's jurisdictional decision. The Raels also argue the bankruptcy court abused its discretion in denying their motion for reconsideration under Rule 12(b)(5) & (6) because the Sale Orders were no longer equitable and justice required the bankruptcy court vacate the Sale Orders. The Raels filed two separate motions under Rule 60(b) which the bankruptcy court denied.

1. Judgment Void

The Raels argue the bankruptcy court's Sale Orders are void because the BAP determined that

the bankruptcy court did not have jurisdiction over the Cowley property because upon confirmation of the plan, the property was no longer property of the estate.

The Tenth Circuit has held that a judgment is void under Rule 60(b)(4) for lack of subject matter jurisdiction only when "there is a plain usurpation of power, when the court wrongfully extends its jurisdiction beyond the scope of its authority," but not when the court only made "an error of law in determining whether it ha[d] jurisdiction." *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1346 (10th Cir. 2000). The "court does not usurp its power when it erroneously exercises jurisdiction." *Id.*

Here, the Raels argue the Sale Order and Amended Sale Order should be vacated as void because the subsequent ruling of the BAP rendered the Sale Order void for lack of jurisdiction over the property. However, to find the Bankruptcy Court's Sale Orders were void, there must be a plain usurpation of power, which is lacking here. "This is not a situation...in which a bankruptcy court decided to conduct a criminal trial, or to resolve a custody dispute, matters so plainly beyond the court's jurisdiction" for which a different result may be necessary. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 153 n. 6 (2009).

The Raels'

As stated above, the BAP found that the bankruptcy court did not have *exclusive* jurisdiction over the property, it did not find that the bankruptcy court

lacked jurisdiction. Thus, both the bankruptcy court and the state court could exercise jurisdiction over the property. Nothing in the BAP's opinion can be construed to state that the bankruptcy court lacked jurisdiction over the property. Thus, the bankruptcy court did not extend its jurisdiction beyond the scope of its authority and was well within its scope of authority to enter the Sale Orders. As such, there was not usurpation of power by the bankruptcy court.

Additionally, the Raels assert that the bankruptcy court "surprisingly" found it had jurisdiction to enter the Sale Order under 28 U.S.C. § 157(b)(2)(N), despite the BAP's decision. Section 157(b)(2)(N) states that the bankruptcy court may hear and determine all core proceedings, which include "orders approving the sale of property...." The BAP found that post-confirmation repossession actions by creditors are non-core proceedings. However, entry of a sale order is a core proceeding, and the bankruptcy court was statutorily within its jurisdiction to enter the order.

As such, the bankruptcy court did nor err in denying the Rael's motion for reconsideration under Rule 60(b)(4). The bankruptcy court's order denying motion for reconsideration under Rule 60(b)(4) is AFFIRMED.

2. Judgment No Longer Equitable and as Justice Requires because Mutual Mistake and Lack of Jurisdiction

The Raels also appeal the bankruptcy court's order

denying their motion under Rule 60(b)(5) & (6). The Raels argue it is inequitable to enforce the Sale Order because the bankruptcy court lacked jurisdiction to enter the Sale Order. Additionally, the Raels argue mutual mistake about whether Wells Fargo held a mortgage or a judicial lien on the Cowley property warranting relief from the Sale Order under Rule 60(b)(6). It is "well- settled that once an order has become final on direct review, the subject-matter jurisdiction of the court issuing the order can almost never be successfully raised." *In re Evans*, 506 Fed.Appx. 741, 744 (10th Cir. 2012) (citing *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152 (2009) (quotation marks omitted)). When a party "has had an opportunity to litigate the question of subject-matter jurisdiction the party may not reopen that question in a collateral attack upon an adverse judgment." *Id.*

Here, under Fed. R. Civ. P. 60(b)(5), the Raels challenge the bankruptcy court's jurisdiction to enter the Sale Orders and argue it is inequitable for the bankruptcy court to enforce the Sale Orders when it did not have subject-matter jurisdiction to enter the orders. The Raels' arguments under Rule 60(b)(5) are essentially the same arguments they made under Rule 60(b)(4) that the Sale Order was void.

Additionally, as the BAP found the bankruptcy court did not have *exclusive* jurisdiction over the Cowley property, the Sale Order was entered in 2013, and the Rule 60 motion was filed in 2015; therefore, it would be inequitable to vacate the order. While the Raels assert that enforcing the Sale Order

is no longer equitable, the bankruptcy court found that vacating the Sale Order would not be equitable because the sale of the property was consistent with the Raels' Chapter 11 plan. (Doc. 22-1 at 281 [Trans. Debtor's Mot. to Set Aside Sale Order]).

The Raels also argue the bankruptcy court erred in denying their Rule 60(b)(6) motion. Under Rule 60(b)(6), relief is available only in "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005); *Omar-Muhammed v. Williams*, 484 F.3d 1262, 1264 (10th Cir. 2007). Relief may be warranted if the movant asserts "compelling circumstance beyond [their] control." *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.*, 909 F.2d 1437, 1440 (10th Cir. 1990). "[T]he broad power granted by [Rule 60(b)(6)] is not for the purpose of relieving a party from free, calculated and deliberate choices he has made." *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 580 (10th Cir. 1996) (citation omitted). "A court may not premise Rule 60(b)(6) relief, however, on one of the specific grounds enumerated in clauses (b)(1) through (b)(5)." *State Bank of S. Utah v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1080 (10th Cir. 1996).

The Raels argue that because the bankruptcy court lacked jurisdiction to enter the Sale Order and the parties' and court's mistake about whether Wells Fargo held a mortgage or a judicial lien on the property, relief under Rule 60(b)(6) is warranted. The Raels argue Wells Fargo did not hold a mortgage on the Cowley property, so it was an unsecured creditor. The Raels assert since the

parties and court believed that Wells Fargo had a mortgage, Wells Fargo was treated like a secured creditor under the Raels' Chapter 11 plan. Thus, the Raels contend the bankruptcy court entered the Sale Order under the belief that Wells Fargo was entitled to the proceeds under the Plan, when Wells Fargo really should have been treated as an unsecured creditor. The Raels argue since the parties mistook Wells Fargo's judicial lien for a mortgage and the bankruptcy court did not have jurisdiction over the property to enter the Sale Order, the enforcement of the Sale Order radically changed the nature of the bankruptcy because it elevated Wells Fargo to a secured creditor status, even though it was an unsecured creditor.

First, the Raels' argument regarding mistake appears to be an argument that should have been raised in the context of a Rule 60(b)(1) motion. However, motions under Rule 60(b)(1) must be raised within thirty (30) days of the entry of the order. Thus, the Raels could not raise a Rule 60(b)(1) motion based on mistake because the thirty-day time limit expired. Rule 60(b)(6) does not act as a catchall when a party misses the time for filing a Rule 60 motion under (1)-(3). It appears the Raels are attempting to argue a mistake under Rule 60(b)(1) regarding the label of Wells Fargo's interest in the property. A mistake argument should have been brought under a Rule 60(b)(1) motion thirty (30) days after the bankruptcy court entered the Sale Order.

Additionally, to the extent the Raels argue justice requires granting the Rule 60 motion because the

bankruptcy court did not have jurisdiction to enter the Sale Order, the Raels have not shown an extraordinary circumstance exists to grant a Rule 60(b)(6) motion. As previously stated, the bankruptcy court did have jurisdiction to enter the Sale Order even though it did not have exclusive jurisdiction over the property. Under Rule 60(b)(6), the Raels' argument is the same as their argument that the judgment is void under Rule 60(b)(4). "A Rule 60(b)(6) motion may not be used as a vehicle to re-allege 60(b)(4) allegations." *Spitznas v. Boone*, 464 F.3d 1213, 1225 n. 11 (10th Cir. 2006) (citing *State Bank of S. Utah v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1080 (10th Cir. 1996)).

The bankruptcy court did not abuse its discretion when denying the Raels' motion to reconsider under Rule 60(b)(5–6). As such, the Court finds the bankruptcy court's ruling on the debtor's motion to set aside the Sale Order is AFFIRMED.

CONCLUSION

For the above stated reasons, the Court reverses in part and affirms in part the bankruptcy court's determinations.

IT IS ORDER the bankruptcy court's Judgment is REVERSED.

IT IS ORDERED the bankruptcy court's assessment of attorney's fees in its Order Order Granting in Part and Denying in Part Defendants' Supplement to Defendants' Motion to Strike (Attorney's Fees) is REVERSED.

IT IS FURTHER ORDER the bankruptcy court's denial of the Raels' Motion to Dismiss is AFFIRMED.

Dated this 30th day of March, 2018.

Footnotes

[1] Fed. R. Bankr. P. 9024 states that Fed. R. Civ. P. 60 applies in cases under the Bankruptcy Code. The Raels' arguments under Rule 9024 refer to Rule 60, but label the claims using a hybrid of Rule 9024 and Rule 60. For example, the Raels state they "requested the Bankruptcy Court to vacate its Sale Order as being 'void' as the term is used under Fed. R. Bankr. P. 9024(b)(4) (Rule 60(b))." (Doc. 34 at 53 [Aple. Br]). For clarity purposes, this order refers to Rule 60, rather than Rule 9024.

6/12/2017
Adv. No. 15-2013
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES TRUSTEE,
Plaintiff,

v.

ROBERT ALYN RAEL and
LISA LYNN RAEL,
Defendants.

JUDGMENT

This matter came before the court on Plaintiff United States Trustee's Complaint to Deny Debtors' Discharge under to 11 U.S.C. § 727(a)(6)(A),and the answer filed Defendants Robert Alyn Rael and Lisa Lynn Rael. The Court, pursuant to the opinion entered herein, finds for the Defendants and against the Plaintiff.

THEREFORE IT IS ORDERED the discharge for Defendants Robert Alyn Rael and Lisa Lynn Rael is GRANTED.

BY THE COURT,

6/12/2017
Adv. No. 15-2013
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES TRUSTEE,
Plaintiff,

v.

ROBERT ALYN RAEL and
LISA LYNN RAEL,
Defendants.

AMENDED OPINION

This adversary proceeding came before the court for an evidentiary hearing on February 21, 2017, on the United States Trustee's Complaint to Deny Debtors' Discharge and Debtors Robert Alyn Rael and Lisa Lynn Rael's Answer. At the conclusion of the evidentiary hearing the court took the matter under advisement. Having reviewed the record, testimony and documentary evidence, the court is prepared to rule.

Jurisdiction

This court has jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(J). Venue is proper under 28 U.S.C. § 1408. The matter is before the court pursuant to 11 U.S.C. § 727(a)(6)(A) and Fed. R. Bankr. P. 4004.

Background

The Raels filed their voluntary chapter 11 bankruptcy petition on May 1, 2008, retaining Stephen Winship, Esq. as their attorney. At the time of filing, the Raels were sole shareholders and members of Professional Contractors, Inc. (PC) and Lovell's American Car Care Center, LLC (LACC) as well as serving as these entities' officers. These businesses failed in 2011, and no longer operate.[1]

This court confirmed the Raels' Amended Chapter 11 Plan of Reorganization on January 20, 2010, and granted a final decree on March 7, 2011. The plan created Class One – Wells Fargo Bank. The Plan called for this claim to be partially satisfied through the sale of three parcels:

> ***Class One-Wells Fargo Bank***. This creditor holds security interests against Raels' real estate and some equipment and vehicles used in their businesses. This claim, which is disputed, is for $1,176,262.00 and is secured by assets having a value of $502,261.00. This creditor's claim will be partially satisfied by the sale of the following parcels of real property:
>
> | | |
> |---|---|
> | 520 Oregon Trail and Fifth Street (car wash) Lovell, Wyoming | $36,431.00 |
> | 51 East Main Street Lovell, Wyoming | $48,208.00 |
> | 330 S. 1st W. Street | $36,817.00 |

Cowley, Wyoming

In the event any of the parcels are not sold within one year of the effective date of the Plan, such unsold parcels will be surrendered by quit claim deed to Wells Fargo and the secured claim of the creditor will be reduced by the values indicated above.[2]

Additionally, Raels were to make monthly payments to Wells Fargo. With respect to the IRS's claim, the Plan provides:

> ***Class Three-IRS***. This creditor has a claim for $69,544.00, which represents a penalty assessment under 26 U.S.C. § 6672 arising from PCI payroll tax liability. This amount will be satisfied by PCI's plan payments since this is an overlapping obligation.[3]

Raels subsequently defaulted on the payments to Wells Fargo. Wells Fargo filed complaints in the Fifth Judicial District for the State of Wyoming and obtained judgments on amounts Raels owed on the Bank's pre-petition mortgages. Wells Fargo filed the complaints without having first obtained relief from the automatic stay and obtained a default judgment. Wells Fargo filed its judgment as a lien against the Cowley Parcel in the real estate records for Big Horn County, Wyoming.

Raels filed a Motion to Reopen Case "to allow Defendants to enforce the terms of the confirmed Plan and to bring contempt actions for violation of the Automatic Stay."[4] The Court reopened the case

on June 6, 2013.

On September 16, 2013, the Raels sought permission to sell the Cowley Parcel to David and Michelle Banks. The original "Motion for Approval of Sale of Real Property" asserted that the Parcel was "subject to a mortgage held by Wells Fargo Bank...the sale proceeds will be paid to the mortgagor, Wells Fargo Bank." The Sale Order stated in pertinent part that "…the proceeds thereof shall be paid in accordance with Debtors' Motion." Raels made several subsequent modifications to the sale motion to address various title insurance company requirements and to adjust the sales price, but did not modify the allocation of the proceeds. No party opposed the sale motions, and this court entered Orders approving these sale motions.

Thereafter, Raels filed their first motion for order to show cause and/or contempt citation against Wells Fargo. The court held an evidentiary hearing and denied the motion. It ruled that the stay terminated upon the case closure and that there was no discharge injunction because the Raels had not completed the plan payments. The court also ruled that it did not have "related to" jurisdiction over the Bank's action to enforce its liens.[5] "When property leaves the bankruptcy estate, however, the *bankruptcy court's jurisdiction proceeding [sic] comes to an end*."[6]

Raels filed their second motion for order to show cause and/or contempt citation against Wells Fargo which this Court also denied. The Tenth Circuit

Bankruptcy Appellate Panel affirmed the denial of relief:

> Applying the concurring opinion from *Houlik* further reiterates that the bankruptcy court is not left without jurisdiction entirely. Instead, exclusive bankruptcy court jurisdiction did not arise based on those particular facts—facts that are nearly identical to those found here. As a result, the Raels' arguments also fail as to this portion of the bankruptcy court's orders.[7]

While the appeal was pending, Raels proceeded with the sale transaction. David and Michelle Banks originally made a $5,000.00 down payment, which Counsel deposited in his trust account. On April 4, 2014, the closing occurred on the sale of the Parcel to David and Michelle Banks for a sales price of $130,000.00. Raels received a total of $127,283.81 at closing, i.e., $122,283.81 in the form of a check from the title insurance company conducting the closing and the retention of David and Michelle Banks's $5000.00 down payment.

None of the Sales Proceeds were turned over to Wells Fargo. Instead, Raels, held the check for nearly a year, eventually depositing the Sales Proceeds into a bank account opened at the Bank of Greybull on March 10, 2015. Based upon the documentary evidence, Counsel and the Raels began discussing how the Sale proceeds were going to be disbursed in a letter dated March 11, 2015.[8] The funds were placed

on a 10-day hold upon being deposited, due to the large amount. Counsel and the Raels communicated numerous times from the time the check was deposited regarding disbursing the Sale Proceeds, before converting their case to a Chapter 7. On March 19, 2015, Counsel sent Raels a letter suggesting that Raels obtain cashier's checks for the IRS in the amount of $95,584.00; $4,250.00 to pay Raels' accountants; and $22,439.72 to Mr. Winship for unpaid fees and services to convert the Rael's case to a chapter 7.[9] It appears, Ms. Rael requested to use part of the Sale Proceeds for car repair. However, it appears due to the "time-crunch" in getting the Sale Proceeds check deposited and the cashier's checks mailed to the selected creditors, this did not occur.[10]

Raels converted their bankruptcy case to a Chapter 7 on May 4, 2015. The Chapter 7 § 341 Meeting of Creditors was scheduled and held on May 25, 2015. Mr. Tom Klepperick, counsel for Wells Fargo, attended the Meeting of Creditors for the purpose of discovering the status of the sale of the Property.[11] In spite of a request to Raels' counsel, the Meeting of Creditors was the first time Mr. Klepperich was notified the closing on the sale of the parcel was completed and the resulting distribution of the proceeds. On June 25, 2015, the U. S. Trustee filed the Complaint commencing Adversary Proceeding 15-2013.

Analysis on May 4, 2015

The U.S. Trustee seeks to deny the Raels' discharge for refusal to follow a court order.[12]

In its complaint, the U.S. Trustee alleges that Raels failed to comply with the Sales Order when they distributed the proceeds to entities other than Wells Fargo. Raels' Answer asserts they relied upon advice of counsel, which affected their ability to form the requisite intent.

1. General standard for revoking/objecting to discharge

In weighing the facts put forward in a contest over a discharge, the court must bear in mind the beneficial policy of allowing honest debtors to receive a fresh start in life.[13] The Bankruptcy Code serves to relieve the honest debtor from the weight of oppressive indebtedness, and permit the debtor to start afresh, free from the obligations and responsibilities consequent upon misfortunes.[14] Jurisprudence is unequivocal that objections to discharge are to be construed liberally in favor of a debtor and strictly against creditors in order to further the fresh start policy of the Code.[15] Totally barring discharge is an extreme penalty.[16]

2. Section § 727(a)(6)(A) analysis

Under, § 727(a)(6)(A), the Trustee must establish that Debtors received the order in question and failed to comply with its terms.[17] As movant, the U.S. Trustee has the burden to prove the grounds for denial of discharge by a preponderance of the evidence.[18] Debtor then bears the burden of explaining the non-compliance.[19] The court may

only deny discharge under § 727(a)(6)(A) if it finds that Debtor's non-compliance was willful."[20] "[R]efusal, as opposed to simple failure, requires intent."[21] Failure to comply because of inability, mistake, or inadvertence is insufficient.[22] Where grounds for denying discharge are present, § 727(a) nonetheless vests this court with the discretion to grant a discharge.[23]

3. Advice of counsel as defense

Debtors argue they did not have the requisite intent as they relied upon the advice of counsel. To establish an advice of counsel defense, Debtors must present evidence, which satisfies the following elements:

> (1) that all facts were fully and fairly communicated to counsel;
> (2) that counsel gave legal advice;
> (3) that debtors relied on the legal advice; and
> (4) that debtors' reliance was in good faith.[24]

Raels relied on advice about the validity of a court order based on Mr. Winship's legal interpretation. Counsel was not only fully informed as to all relevant facts, he better understood the consequences of bankruptcy law. Thereafter, Debtors sought guidance from Mr. Winship on the distribution of the sale proceeds. In a letter dated February 19, 2015, Mr. Winship informed the Raels that "if the Bankruptcy Appellate Panel affirms the Bankruptcy Court ruling, it means that the proceeds from the sale to the Banks is not subject to Bankruptcy Court jurisdiction

thereby allowing that money to then be applied in large part to the non-dischargeable IRS obligation."[25] Subsequently, as stated above, Counsel suggested the disbursement of the Sale Proceeds to the IRS, the Rael's accountants and himself.

Debtors testified that they relied on counsel's advice. In this instance, a number of events combined to call into question the legitimacy of the order. In its first contempt order, the court found that its jurisdiction over property that leaves the bankruptcy estate "comes to an end." The Bankruptcy Appellate Panel found that the property pledged to Wells Fargo "was not estate property."[26] When combined with advice from counsel, it was not unreasonable for Debtors to have faith in Mr. Winship or have any reason to believe he was in error.

It is rare that there will not be consequences for failure to obey a court order. All parties should error on the side of clarification as opposed to disregarding. The U.S. Trustee met its burden showing Debtors failed to comply with a court order. But upon the burden shift, Debtors established their actions were not willful as they reasonably relied on the advice of counsel. Revocation of discharge is not appropriate given the principal that the exceptions to the general policy favoring discharge be narrowly construed.

4. Mutual mistake

Debtors further challenge the U.S Trustee's request to deny discharge by asserting there was a mutual mistake at the time the parties and the court moved

forward on the Sale Order. Debtors contend the parties were mutually mistaken about the existence of a mortgage on the property. Counsel for Wells Fargo, Mr. Klepperick, testified he discussed with Mr. Winship, that Wells' Fargo had a judgment lien, not a mortgage and "was surprised [to] seeing the wording" in the Sale Motion as Mr. Winship continually confused the judgment lien as a mortgage. Debtors' petition and schedules indicate the property was encumbered.[27] Regardless of the phrasing of the Motion of Wells Fargo's interest as a mortgage or judgment lien, it was the Raels' intent to turn the sales proceeds over to Wells Fargo. There was no mutual mistake.

Conclusion

In conclusion, as discussed above, the court finds the U.S. Trustee met its burden showing the Raels failed to comply with the court's Order. However, as the burden shifted, the Raels established their actions were not willful as they reasonably relied upon the advice of Mr. Winship. Therefore, the court finds for Defendants, Mr. and Mrs. Rael and against the U.S. Trustee, determining Debtors' discharge shall be entered.

This opinion constitutes the court's findings of fact and conclusions of law. A separate order shall be entered pursuant to Fed. R. Bankr. P. 9021.

BY THE COURT

Footnotes

[1] Professional Contractors, Inc. (Wyo. Bankr. Case No. 08-20252) and Lovell's American Car Care Center, LLC (Wyo. Bankr. Case No. 08-20128) were related Chapter 11 business bankruptcy cases to Debtors' individual Chapter 11 case.

[2] Case No. 08-20251, ECF 84 at p. 2.

[3] Case No. 08-20251, ECF 184 at p. 3.

[4] ECF 239.

[5] Case No. 08-20251, ECF No. 322, at p. 11.

[6] *Id* at 9, *citing In re Houlik*, 481 B.R. 661, 674 (B.A.P. 10th Cir.) (emphasis added).

[7] *In re Rael*, 527 B.R. 799, at 8 (B.A.P. 10th Cir. 2015).

[8] UST Ex. No. 9, at 112.

[9] UST Ex. No. 9 at 121.

[10] Although Ms. Rael testified she was told "no" regarding repair to her vehicle, the evidence reflects Counsel asked if she wanted to redo the [cashier] checks, to provide for the use of $584.00 of the proceeds on car repairs. *See* UST Ex. 9 at 138.

[11] Mr. Klepperick was Wells Fargo's counsel until his retirement.

[12] § 727(a)(6)(A).

[13] *Grogan v. Garner*, 498 U.S. 279, 283 (1991); *In re Brown*, 108 F.3d 1290, 1294 (10th Cir. 1997); *In re Christensen*, 561 B.R. 195, 215-16 (Bankr. D. Utah 2016).

[14] *Local Loan Co. v. Hunt*, 54 S.Ct. 695, 699 (1934).

[15] *In re Butler*, 377 B.R. 895, 915 (Bankr. D. Utah 2006).

[16] *Id.*

[17] *In re Osborne*, 476 B.R. 284, 296 (Bankr. D. Kan. 2012).

[18] *In re Garland*, 417 B.R. 805, 810–11 (B.A.P. 10th Cir. 2009).

[19] *In re Osborne*, 476 B.R. at 296.

[20] *Id.* at 297.

[21] *Id.*

[22] *Id.*

[23] *In re DiGesualdo*, 463 B.R. 503, 523 (Bankr. D. Colo. 2011).

[24] *In re Biorge*, 536 B.R. 24, 30 (Bankr. D. Utah 2015).

[25] UST Ex. No. 9 at 107.

[26] *In re Rael,* 527 B.R. 799 at * 5 (B.A.P. 10th Cir.).

[27] Case No. 08-20251, ECF 20, Schedules A and D.

9/23/2015
Case No. 08-20251
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF WYOMING

IN RE:
ROBERT AND LISA RAEL,
Debtors.

ORDER DENYING DEBTOR'S MOTION TO SET ASIDE SALE ORDER (D.E. 451)

The matter before the Court is the Debtors' Motion to Set Aside Sale Order (D.E. 451), the United States Trustee's Objection (D.E. 452), Wells Fargo Bank's Joinder to Opposition (D.E. 455), and Debtors' reply (D.E. 456). Debtors seek relief from the final order pursuant to Fed. R. Bankr. P. 9024 and Fed. R. Civil P. 60((b)(4)(5)(6). For the reasons stated and read into the record at the hearing held on September 17, 2015, the Court therefore ORDERS that Debtors' Motion to Set Aside Sale Order is DENIED.

BY THE COURT

8/7/2015
Case No. 08-20251
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF WYOMING

IN RE:
ROBERT ALYN RAEL,
LISA LYNN RAEL,
Debtors.

PARTIAL TRANSCRIPT OF RECORDED
DEBTORS' MOTION TO SET ASIDE SALE ORDER
JUDGE PARKER'S RULING

BEFORE THE HONORABLE CATHLEEN D.
PARKER
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors:	Mr. Stephen R. Winship Attorney at Law Winship & Winship, P.C. P.O. Box 548 Casper, Wyoming 82602 (Appearing by telephone)
For the U.S. Trustee:	Mr. Daniel J. Morse Assistant U.S. Trustee 308 W. 21st Street, Rm. 203 Cheyenne, Wyoming 82001 (Appearing by telephone)
For Wells Fargo:	Mr. Thomas Klepperich Attorney at Law

P.O. Box 538
Big Horn, Wyoming 82833
(Appearing by telephone)

Proceedings recorded by electronic sound recording

Transcript produced by New Life Transcription Service, 1244 Alyssa Way, Cheyenne, Wyoming, (307)214-3912

PROCEEDINGS

THE COURT: Good morning. This is Judge Parker. We are here in Case No. 08-20251. The debtors are Robert and Lisa Rael. We have before the Court debtors' motion to set aside sale order, the trustee's objection and Wells Fargo's joinder in the trustee's objection.

* * * * *

(Arguments not transcribed.)

* * * * *

THE COURT: Thank you. The Court thanks you for your arguments, and I also thank all of you for your thorough briefing. The Court has, in fact, reviewed the majority of the case law that has been cited and done some additional research on applicable law and, therefore, is prepared to rule today 15 from the bench.

This matter comes before the Court on debtors' motion to set aside sale order for lack of subject

matter jurisdiction. Appearances were noted in the record. For the following reasons, the Court denies debtors' motion to set aside the sale order:

The findings that involve uncontroverted facts in this case is that the debtors filed for Chapter 11 bankruptcy protection. The Court confirmed debtors' Chapter 11 plan on January 20, 2010. By operation of law the estate assets vested with debtor upon confirmation of plan. This Court entered upon debtors' motion a final decree on March 7, 2011.

Following the Court's closure of the case, Wells Fargo brought state court actions to enforce prepetition mortgages, which resulted in judgment liens against debtors' property. On May 28, 2013, debtors moved to have the case reopened. The Court granted this motion on June 6, 2013.

On September 5, 2013, debtors and Wells Fargo filed a stipulated motion for relief from automatic stay allowing Wells Fargo to foreclose on mortgages securing debtors' real property.

On September 16, 2013, debtors sought authorization for the sale of a parcel of real property located at 330 South 1st, Cowley, Wyoming, which was not subject to the previously filed stipulated motions for relief. Such authorization was sought under Section 363(f).

On September 30, 2013, debtors and Wells Fargo filed an amended stipulation for relief from the automatic stay allowing Wells Fargo to foreclose on the mortgages securing debtors' real property. The Court granted such relief on October 21st, 2013.

Meanwhile, on October 15, 2013, debtors filed a motion to show cause against creditors Wells Fargo Bank for their actions in the state court. On October -- excuse me, November 12, 2013, the Court entered the sale -- excuse me, entered the sale order, an amended sale order on November 20, 2013 and an order modifying the purchase agreement on April 2, 2014. The order incorporated the distribution of proceeds from the sale based on the motion filed by debtors.

In regards to the contempt sanctions brought by the debtors, the debtor denied -- excuse me, this Court denied contempt sanctions on April 28, 2014.

A second contempt motion was filed and again denied by this Court. These denials were appealed to the Bankruptcy Appellate Panel for the Tenth Circuit. The Bankruptcy Appellate Panel affirmed this Court's conclusions, which generally found that there was no automatic stay in place by virtue of the closure of the case that could have been violated. The Court further found that the bankruptcy court did not have exclusive jurisdiction to resolve the lien issues presented by the Wells Fargo to the state court. After the sale of the property, the proceeds were not paid to Wells Fargo as set forth in the motion and incorporated into the sale order.

Debtors argue to have the sale order vacated on three grounds: First under Federal Rule of Civil Procedure 60(b)(4), which allows the Court to relieve a party from final judgment when the judgment is void. Debtor argues that the Court's findings in the

contempt motions and the appeals concluded this Court was without jurisdiction, and therefore, the judgment is void.

Debtor also seeks relief under 60(b)(5) on the basis that applying the judgment would no longer be equitable.

Finally, the debtors seek to have the order set aside under the catchall provision of 60(b)(6), which allows relief when there is a change in the underlying position. Again, debtor relies on the Court's jurisdiction along with the basis for Wells Fargo -- along with the basis that Wells Fargo's claim has changed.

United States Trustee has objected to setting aside the order based on the fact that it is a final order and not subject to collateral attack. Collateral attack lacks merit because the Court did, in fact, have subject matter jurisdiction, but the request for relief was untimely, and the Court, in fact, had subject matter jurisdiction of the sale of property under 28 U.S.C. Section 157.

Wells Fargo's objection joined the trustee and asked that the Court must weigh the potential injury to those relying on the order and that it will suffer significant injury if the order is vacated.

The Court finds the following conclusions: Generally, a party may not collaterally attack the subject matter jurisdiction of the Court after the judgment becomes final. The sale order became final after the time to appeal ran and the parties did not appeal the order.

The law appears to be well settled that once an order has become final on direct review, the subject matter of the Court issuing the order can almost never be successfully raised. Parties should see Kontrick versus Ryan, which is 540 U.S. 443, which relied on Travelers Indemnity Company versus Bailey, which is 557 U.S. 137, and the Tenth Circuit's decision in In Re: Evan, 506 Federal Appendix 741.

However, Federal Rule 60(b)(4) appears to create a permissive avenue for collateral attack, and requests under 60(b)(4) are not subject to the same time limitations of other 60(b) claims.

Debtor relied on the Bankruptcy Appellate Panel's conclusion that the Bankruptcy Court did not have jurisdiction to enforce the terms of the debtors' confirmed plan. It argues that this conclusion means the Bankruptcy Court has no jurisdiction over the real estate parcels and cannot enter an order regarding the sale of the property.

The facts of this case before the Court today are different, and the Bankruptcy Appellate Panel does not conclude that the Bankruptcy Court was without any jurisdiction. In fact, the Bankruptcy Appellate Panel specifically stated "Applying the concurring opinion from Howlett further reiterates that the Bankruptcy Court is not left without jurisdiction entirely. Instead, exclusive Bankruptcy Court jurisdiction did not arise based on those particular facts."

The Court disagrees with debtors' conclusion it did not have jurisdiction over the sale of the real

property. Pursuant to 28 U.S.C. Section 157(b)(2)(N), the sale of property is a court proceeding in which the bankruptcy court has jurisdiction. Further, 11 U.S.C. 363 is the only source of authority to allow a bankruptcy court to authorize the sale of property free and clear of all liens.

Even if the Court was without this type of jurisdiction, in determining whether a judgment is void for lack of jurisdiction under 60(b)(4), the Tenth Circuit applied a broader standard than other courts. In the Tenth Circuit a judgment is void for Rule 60(b)(4) purposes if the rendering court was powerless to enter it. A judgment may in some instances be void for lack of subject matter jurisdiction. However, in the Tenth Circuit "this occurs only when there is a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority. A court does not usurp its power when it erroneously exercises jurisdiction. There must be no arguable basis on which the Court could have rested a finding that it had jurisdiction." This is set forth in Gschwind versus Cessna Aircraft Company, 232 F.3d 1342.

The In Re: Brian case in discussing that case explained that debtors under a 60(b)(4) must show a plain usurpation of power. No arguable basis on which the bankruptcy court could have rested a finding that it had jurisdiction, and it's not simply enough to show an error in interpreting a statutory grant of jurisdiction.

In this case the sale of real property affected the

debtor, was consistent and therefore interpreted the debtors' plan, affected the debtors' secured creditors as it related to the bankruptcy. The outcome of the estate of the sale affected the estate being administered in bankruptcy. As set forth in the motion, it provided additional equity for other creditors. The sale altered the debtors' rights, the creditors' rights and impacted the handling and administration of the bankruptcy estate. There was no usurpation of power from another court, and there are multiple arguable bases for this Court to have had jurisdiction. Therefore, the order will not be set aside as void for lack of subject matter jurisdiction under Rule 60(b)(4).

Under 60(b)(5) argument is the decision is no longer equitable. In fact, the Court finds that it is actually to the opposite, that vacating of the order would no longer be equitable. As Mr. Winship explained, this sale was consistent with the debtors' plan. Therefore, the Court will not set aside the order under 60(b)(5).

Under a claim under 60(b)(6), a claim under 60(b)(6) must be separate and apart from those claims that are available under 60(b)(1) through (5). If the reasons offered for relief from judgment can be considered under one or more of the specific clauses of Rule 60(b)(1) through (5), those reasons will not justify relief under 60(b)(6), and that's Anderson Living Trust versus WPX Energy Production, LLC, 2015 WestLaw 4040616.

Therefore, a claim of lack of jurisdiction is not appropriate under Rule 60(b)(6). Otherwise, relief

under 60(b)(6) is only appropriate when it offends justice to deny such relief and will be reversed only if you find a complete absence of reasonable basis and are certain that the decision is wrong. Legal error that provides a basis for relief under 60(b)(6) must be extraordinary. Zurich North America versus Matrix Service Incorporated at 426 F.3d 1281.

Debtors have not provided any legal error outside of jurisdiction, and therefore, the Court will not vacate the order under 60(b)(6).

Because the Court finds the debtor has not established a substance of basis under either 60(b)(5) and 60(b)(6), the Court need not address a reasonable period of time to file such motion under these sections.

For the foregoing reasons, the debtor (sic) denies debtors' motion to set aside the sale order.

Mr. Morse, can you please draft an order?

MR. MORSE: Yes, Your Honor.

THE COURT: There will be no need for you to recite everything I just gave you. You can simply make reference in the record "for the reasons stated and read into the record."

MR. MORSE: Yes, Your Honor.

THE COURT: Thank you. If there's nothing else, then we will be adjourned with regards to this matter.

--oOo--

C E R T I F I C A T E

I, LORI ARNOLD, a Registered Merit Reporter, do hereby certify that the foregoing is a correct transcript from the official recording of the proceedings in the above-entitled matter.

Dated this 4th day of August, 2017.

/s/ Lori Arnold
LORI ARNOLD Registered Merit Reporter

No. 18-8026
UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

PATRICK S. LAYNG, United States Trustee for Region 19,
Plaintiff- Appellee,

v.

ROBERT RAEL; LISA RAEL
Defendants - Appellants.

January 25, 2019, Filed

Appeal from the United States District Court for the District of Wyoming. (D.C. No. 1:17-CV-00104-NDF

Before LUCERO, KELLY, and PHILLIPS, Circuit Judges.

ORDER

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

ELISABETH A. SHUMAKER, Clerk