ORIGINAL

No. 19-7073

In the
Supreme Court of the United States
October Term 2018

Anthony Thomas,

Petitioner,

vs.

Kenmark Ventures, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[CORRECTED] PETITION FOR A WRIT OF CERTIORARI

Anthony G. Thomas
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Dated: March 18, 2019

QUESTIONS PRESENTED

1. Did the Ninth Circuit commit error by failing to recall the mandate based upon this Court's intervening decision in *Lamar, Archer & Cofrin. LLP v. Appling,* 138 S.Ct.1752 (2018)("*Lamar*")?

2. Did the Ninth Circuit shirk its' responsibility to consider the new evidence in the form of the Machado declaration submitted on February 12, 2018, under the principle in *Hazel-Atlas Glass Co. v Hartford-Empire Co.*, 322 U.S. 238 (1944)("*Hazel-Atlas*"), requiring appellate Courts to take action when confronted with Fraud upon the Court?

3. Does new evidence in the form of judicial admissions by the judge of bias render the findings of the Bankruptcy Court void on its face due to judicial bias?

4. When an inspection of the judicial roll shows that the judgment is void on its face, does an appellate court have the jurisdiction to declare the judgment void on its face?

5. Is the conversion order converting the Debtor's case from Chapter 11 to Chapter 7 a void order based on a deprivation of due process under *Powell v. Alabama,* 287 U.S. 45 (1932)?

PARTIES

All parties to this Petition appear in the caption of the case on the cover page. However, all of the parties to the proceedings below do not appear in the caption of the case on the cover page. An additional party to the proceedings in the Ninth Circuit, whose order is the subject of this petition, was Wendi Thomas.

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TABLE OF AUTHORITIES CITED

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OPINIONS BELOW

The October 17, 2018 decision of the United States Court of Appeals for the Ninth Circuit, denying Petitioner's motion to recall the mandate, is appended hereto as Appendix "A." It is unpublished. The March 23, 2018 decision of the Ninth Circuit is appended hereto as Appendix "B." It is unpublished, but is reported at 716 Fed. Appx. 647 (9th Cir. 2018). The March 28, 2017 decision of the Bankruptcy Appellate Panel ("the BAP") is appended hereto as Appendix "C." It is unpublished, but is reported at 2017 WL 1160868 (BAP 2017). The ruling of the Bankruptcy Court is appended hereto as Appendix "D." It is unpublished.

JURISDICTION

The Ninth Circuit denied Petitioner's motion to recall mandate on October 17, 2018. No petition for rehearing, or suggestion for rehearing *en banc*, was filed because the Ninth Circuit ordered that no further filings would be permitted in this case. (See App. "A," p.3). An application to extend time to file this Petition was granted (to and including March 16, 2018), on January 8, 2019, in Application No.18A701. March 16, 2018 was a Saturday and this petition was timely filed on Monday, March 18, 2018.

The jurisdiction of the U.S. Supreme Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

With respect to issues relating to *Lamar, supra,* the statutory provisions at issue in the proceedings below were 11 U.S.C. § 523 (a)(2)(A) and (B).

With respect to the issues of fraud upon the Court and void judgments that are void on the face of the record due to deprivations of constitutional due process, the Due Process Clauses of the Fifth and Fourteenth Amendments as enunciated in *Powell v. Alabama, supra,* as well as *U.S. v. Throckmorton*, 98 U.S. 61 (1878) are raised in this petition.

STATEMENT OF THE CASE

The Ninth Circuit issued its original Memorandum Order in this case on March 23, 2018. Its mandate issued on April 16, 2018, but was not received by the BAP until June 6, 2018 (See App. "E."). Two days earlier, on June 4, 2018, this Court handed down its decision in *Lamar.*

Unaware of *Lamar*, but with a June 21, 2018 deadline for filing a petition for certiorari fast approaching, Thomas consulted with Gerald D.W. North ("North"), a member of this Court's (as well as the Ninth Circuit's) bar. He learned of the just-issued decision in *Lamar* and retained North to seek an extension of time. An application for a 60-day extension was filed with then-Circuit Justice Kennedy on June 11, 2018, one week after *Lamar,* and exactly 10 days before the petition was due. On June 18, 2018, then-Justice Kennedy granted the application, extending the time to seek a writ of certiorari to August 20, 2018.

Petitioner is a Chapter 7 Bankrupt with limited resources. As the new deadline for certiorari approached, he was unable to undertake a petition for certiorari, but managed the less expensive alternative of filing a motion to recall the mandate in the Ninth Circuit. The motion was filed on August 17, 2018, within the time allowed

for the filing of a petition for a writ of certiorari. Briefs were filed and the Ninth Circuit issued its order on October 17, 2018, essentially adopting Kenmark's arguments that necessitate the filing of this Petition. An Application for a sixty-day extention of time was filed on January 4, 2019 and granted by Justice Kagan on January 8, 2019, extending the time to seek a writ to Saturday March 16, 2019.

Petitioner additionally seeks review of the Ninth Circuit's failure to consider new evidence in the form of the Declaration of Robert Machado, his former attorney, on February 2, 2018 that was ignored by the Ninth Circuit in violation of the principles enunciated in *Hazel-Atlas, supra*, mandating appellate court intervention when faced with evidence of fraud upon the Court as is the case here. Further appellate review is warranted as is the case here when the underlying judgments are void on the face of the record. As such, Petitioner requests that the Court consider the evidence that shows that the underlying judgments are void on their face and either make a judicial finding of fact or order the Ninth Circuit or lower courts to do so.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision of October 17, 2018 was wrongly decided.

A. Legal Arguments for Granting the Writ

Kenmark conceded that *Lamar* changed the controlling law in the Ninth Circuit regarding non-dischargeability under 11 U.S.C. Section 523(a)(2)(A). Kenmark further conceded that, under *Lamar*, the Emerald-related nondisclosures do not provide a basis for non-dischargeability. It nevertheless opposed Petitioner's' motion to recall the mandate on two grounds:

(1) It claimed that the circumstances were not sufficiently exceptional to justify a recall and

(2) It suggested there were alternate grounds for affirmance.

The Ninth Circuit accepted Kenmark's argument in error as a basis for its October 17, 2019 decision.

B. Law Regarding Recall of Mandate

Zipfel v. Halliburton. 861 F.2d 565, 567-68 (9th Cir. 1988), holds that where a new Supreme Court decision "departs in some pivotal aspects" from a recent decision of this Court, "recall of a mandate may be warranted ... 'to protect the integrity' of the ... prior judgment.... [and to] promote [] uniformity in judicial decision making and in the treatment of litigants."

Thus, in *Bryant v. Ford Motor Co.*. 886 F.2d 1526, 1530-31 (9th Cir.1989), *cert. denied*, 493 U.S. 1076 (1990), the Ninth Circuit, relying on *Zipfel,* observed that "an abrupt change in the law shortly after the panel's opinion justifies a recall of the mandate ...." That is consistent with decisions in other Circuits. In a very recent Fifth Circuit

decision, for example, the Court held that "[r]ecalling the mandate is appropriate when a subsequent decision of the Supreme Court... renders a previous decision 'demonstrably wrong.'" *United States v. Montalvo-Davila,* 890 F.3d 583, 587 (5th Cir. 2018). The Fifth Circuit stated that "[a] previous decision is 'demonstrably wrong' if it 'directly conflicts with' the subsequent [Supreme Court] decision [,]" and observed that the interest in correcting a recent decision (that has been rendered "demonstrably wrong"),"weighs heavily in favor of recalling the mandate ...." *Id.*

Indeed, the primary reason for caution in exercising the power to recall the mandate is the desire to preserve finality. As noted by the Fifth Circuit, "[w]hen faced with a motion to recall the mandate, [a] court must balance two opposing interests: the interest in 'prevent[ing] injustice ... and the interest in maintaining ... finality ...." *Montalvo-Davila. supra*, 890 F.3d at 586.

But where a case is not yet final at the time the intervening decision is rendered, considerations of repose carry little, if any, weight. And here, as of June 4, 2018, when *Lamar* was handed down, the proceedings in this case were not yet final. The conclusion of the direct federal appellate process occurs when this Court denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires. See *Clay v. U.S.*, 537 U.S. 522, 527 (2003); see also *Griffith v. Kentucky.* 479 U.S. 314, 321 n.6 (1987) ("By 'final' we mean a case in which ... the time for a petition for certiorari lapsed or a petition for certiorari finally denied.").

Prior to that time, the case is still *sub judice* and "the dominant principle is that.... intervening and conflicting decisions will...cause the reversal of judgments which were correct when entered ...." *Vandenbark v. Owens- Illinois Glass Co.*, 311 U.S. 538, 543 (1941).

In the circumstances, recall of the mandate was plainly warranted. GVRs are routinely granted by this Court where "intervening developments ... reveal a reasonable probability that the decision below rests on a [faulty] premise ...." See *Lawrence v. Chafer,* 576 U.S. 163, 166, 167 (1996). Recalling the mandate would have done nothing more than what this Court would have done had a petition for certiorari been filed instead of the motion to recall mandate.

Petitioner hereby requests that this Court review the Ninth Circuit's ruling and order the Ninth Circuit to perform a panel review and also review the additional arguments made in the application for an extension to file a writ of certiorari filed on January 4, 2019 and granted by Justice Kagan on January 8, 2019.

Kenmark's first argument accepted by the Ninth Circuit ignored the principle that where, as here, a supervening Supreme Court decision conflicts with a recent decision of this Court, recall of the mandate is justified. More importantly, the Ninth Circuit ignored the fact that *Lamar* was an intervening decision, because it was handed down before te Ninth Circuit's mandate was received by the BAP and before the time for seeking a writ of certiorari expired. The proceedings in this case

were not yet final and *Lamar* is thus the law to be applied. Recall of the mandate is an appropriate mechanism to do so as well as any relief this Court deems appropriate. Kenmark's second argument also accepted by the Ninth Circuit in its October 17, 2018 decision hinged on a plain misconstruction of Section 523(a)(2)(A) and an untruthful, and unsupportable, rewrite of the history of the proceedings.

According to Kenmark, "statement[s] respecting the debtor's ... financial condition" are not a carve-out of "false pretenses, a false representation, or actual fraud" that cannot be used to obtain nondischargeability but are an entirely separate category of conduct (a category Kenmark purports to derive from Section 523(a)(2)(B)). With alacrity, it then claimed that the Emerald-related nondisclosures that consumed the Bankruptcy Court, the BAP, and this Court were just icing on the cake. The cake, it said, consisted of the Electronic Plastic ("EP")-related representations and nondisclosures - representations and non-disclosures that were never addressed by the Ninth Circuit in its March 23, 2018 decision, barely mentioned (only to be ignored) by the BAP, and passed over as unimportant by the Bankruptcy Court. Then, by virtue of its misconstruction of 523(a)(2)(A), it asserted that the EP-related statements and omissions were "false pretenses" or constituted "a false representation" unaffected by Lamar because they are not, according to Kenmark, "statements] respecting ... financial condition."

All this ignored the fact that Petitioner was a major owner of EP, the entity that actually received the loan proceeds. There was no evidence whatsoever that Petitioner ever received any of the so-called loan proceeds (the evidence clearly

shows that the Kenmark wires were an investment, not a loan, and if they were a loan, Petitioner is entitled to $18million in a usury claim under the California Constitution, an issue that went ignored in the lower courts).

The Ninth Circuit erred when it decided that there was other evidence of fraud that justifies not recalling the mandate in accordance with the law established by *Lamar*, however, a separate and distinct meaning for the term "actual fraud" was not established until May 16, 2016 - months after the Bankruptcy Judge delivered his findings and conclusions on February 8, 2016 - when this Court handed down its decision in *Husky International Electronics, Inc, v. Ritz*, 136 S.Ct. 1581 (2016). Prior to *Husky*, a creditor could not prevail under Section 523(a)(2)(A) in the Ninth Circuit without a "misrepresentation, fraudulent omission or deceptive conduct." *Turtle Rock Meadows Homeowners Ass 'n v. Slyman*, 234 F.3d 1081, 1085 (9th Cir. 2000).

CONCLUSION

For the foregoing reasons, and those set forth in the motion to recall mandate, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

Tony Thomas

Anthony G. Thomas, Debtor
In Propria Persona

March 18, 2019