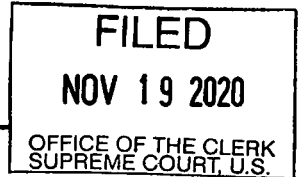


20-735
Case No. _____

ORIGINAL

In The Supreme Court of the United States

Case No.19-56187



ARTEM KOSHKALDA,

Petitioner

v.

SEIKO EPSON CORPORATION, ET. AL.,

Respondent

**On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Artem Koshkalda
3408 Chitgar Pl, San Jose,
CA, 95117
Appearing *Pro Se*
November 19, 2020

I. QUESTIONS PRESENTED

1. Did The United States District Court Central District of California ¹ err in denying Plaintiff's Motion To Set Aside a Notice of Voluntary Dismissal ² Filed By Fox Rothschild LLP on behalf of Trustee ³ ?

2. Did the CA Court err in denying Plaintiff's Motion To Set Aside a Notice of Voluntary Dismissal pursuant to Federal Rules of Civil Procedure ⁴ Rule 41(a)(1)(A)(i), where Trustee did not file a motion for substitution as a plaintiff pursuant to FRCP Rule 25(c)?

3. Did The United States Court of Appeals for the Ninth Circuit ⁵ err in affirming the CA Court orders?

¹ The United States District Court Central District of California ("CA Court");

² Notice of Voluntary dismissal of the Case with prejudice filed by Fox Rothschild LLP on behalf of Trustee (hereinafter "Dismissal");

³ E. Lynn Schoenmann, trustee of the Koshkald's Estate in the case No. 18bk30016-HLB ("Trustee");

⁴ Federal Rules of Civil Procedure ("FRCP");

⁵ The United States Court of Appeals of the Ninth Circuit ("Ninth Circuit");

II. PARTIES TO THE PROCEEDING

The petitioner is Artem Koshkalda (“Koshkalda” or “Petitioner”). Artem Koshkalda appears for himself and as an assignee of all rights for this Petition for Certiorari by ART LLC.

Respondents are Seiko Epson Corporation and Epson America, Inc. (collectively, “Epson”).

III. RELATED CASES

1. 20-483 – pending before the Supreme Court of the United States;
2. 3:2016-cv-00524 (nvd) — before the United States District Court District of Nevada.⁶ Closed. Pending Appeal before this Court, Case No. 20-483.
3. 17-72193 — before the Ninth Circuit. Disposed: 08/10/2017 Disposition: Denied - Judge Order;
4. 17-73048 — before the Ninth Circuit. Disposed: 11/16/2017;
5. 18-15124 — before the Ninth Circuit;
6. 18-15245 — before the Ninth Circuit;
7. 18bk30014-HLB — before the Bankruptcy Court.⁷ Pending;
8. 18bk30016-HLB — before the Bankruptcy Court. Pending;
9. 18bk03020-HLB — before the Bankruptcy Court. (affirmed by the United States Bankruptcy Appellate Panel of the Ninth Circuit, Case No. 19-1235, pending appeal before the Ninth Circuit, Case No. 20-60027);
10. 2:18cv05087 ⁸ — before the CA Court. Closed, pending appeal before the United States Court of Appeal for the Ninth Circuit;
11. 19-56187 — before the Ninth Circuit. Sought herein to be reviewed.

⁶ (hereinafter “NV Action”);

⁷ The United States Bankruptcy Court Northern District of California (“Bankruptcy Court”);

⁸ Case No. 2:18-CV-05087-FMO-AGR (the “Case”);

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VI. OPINION AND ORDERS BELOW

1. Notice of Voluntary Dismissal with prejudice [ECF 15 in the Case] filed by Fox Rothschild LLP acting on behalf of Trustee is reproduced at App. 1-7.
2. The order by CA Court [ECF 22] in Case No. 2:18-CV-05087-FMO-AGR is reproduced at App. 8-18.
3. A memorandum by Ninth Circuit affirming the CA Court's orders is reproduced at App. 19-21.

VII. JURISDICTION

The judgment by Ninth Circuit was made on September 8, 2020, and filed on September 15, 2020.

This petition is timely pursuant to 28 U.S.C. §2101(c).

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

VIII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 2 in pertinent part states: "... nor shall any State deprive any person of life, liberty, or property, without due process of law."

U. S. Const. amend. V in pertinent part states: "No person shall be...deprived of life, liberty, or property, without due process of law."

Federal Rules of Civil Procedure Rule 60 provides in pertinent part: ... (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment,

order, or proceeding for the following reasons: ... (4) the judgment is void, ... (6) any other reason that justifies relief.

FRCP Rule 25(c) in pertinent part states: "Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3)."

FRCP 41(a)(1)(A)(i) in pertinent part states: "(a) Voluntary dismissal. (1) By the Plaintiff. (A) ... the plaintiff may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment."

FRCP 41(a)(1)(B) in pertinent part states: "Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice..."

IX. STATEMENT OF FACTS

1. In September 2016 Epson commenced a litigation against among others Koshkalda and ART LLC before the United States District Court District of Nevada. Case No. 3:16-cv-00524-RCJ-WGC, the petition for Writ of Certiorari is currently pending before the Supreme Court of the United States. Case No. 20-483.⁹

⁹ Pursuant to the Supreme Court Rule 27(3) Koshkalda requests this petition for Writ of Certiorari to be reviewed together with Case No. 20-483 currently pending before this Court as the facts substantially overlap; Wrongful Seizure disputed in

2. On January 5, 2018, Koshkalda in his personal capacity and separately ART LLC solely owned by Koshkalda petitioned for Chapter 11 reorganization bankruptcy protection. Case Nos. 18bk30016-HLB and 18bk30014-HLB respectively, both pending before The United States Bankruptcy Court Northern District of California.¹⁰

3. On March 8, 2018, the Bankruptcy Court converted both cases to Chapter 7 liquidation. Trustee E. Lynn Schoenmann was assigned as a trustee for Koshkalda's Estate in Case No. 18bk30016-HLB (hereinafter "Trustee"), and Janina M. Hoskins was assigned as a trustee for ART LLC's Estate in Case No. 18bk30014-HLB.

4. Trustee of Koshkalda's Estate hired lawyers that concurrently represent interests of Epsom. Trustee of ART LLC's Estate hired non-disinterested counsel.

5. On June 6, 2018, Bankruptcy Court issued an order granting the trustee's of ART LLC's Estate motion for abandonment of all "*right, title and interest in the right to defend a lawsuit against the Debtor, including the appeal of a judgment, any and all claims or causes of action held by the bankruptcy estate against a party to that lawsuit and all of the estate's right, title and interest, if any, in any inventory seized by the party to the lawsuit.*"¹¹

6. On June 8, 2018, the 2nd day after the abandonment, Koshkalda as a sole owner and on

this petition was performed in the Nevada action facts of which are reviewed in Case No. 20-483;

¹⁰ The United States Bankruptcy Court Northern District of California ("Bankruptcy Court");

¹¹ See Dkt. 137, 1:24-2:1, in Case No. 18bk30014-HLB;

behalf of ART LLC assigned all rights to all claims against Epson to himself personally and commenced a litigation against Epson for wrongful seizure.¹²

7. On July 19, 2018, without filing a motion for transfer of interests pursuant to FRCP Rule 25(c) Fox Rothschild LLP on behalf of Trustee filed a notice of Voluntary dismissal of the Case with prejudice.¹³

8. Right after Trustee's Dismissal, Koshkalda moved the Bankruptcy Court for abandonment of all rights to prosecute this Case. On September 24, 2018, the Bankruptcy Court granted the motion.¹⁴

9. On the 3rd day after abandonment, on September 27, 2018, Koshkalda moved the CA Court to set aside the Dismissal with prejudice.¹⁵ On October 4, 2018, Epson filed its opposition. On October 11, 2018, Koshkalda filed reply.¹⁶

10. On September 3, 2019, CA Court issued an order denying the Koshkalda's request to set aside the Dismissal with prejudice.¹⁷

11. On September 27, 2019, Koshkalda filed a renewed motion to set aside the Dismissal with prejudice.¹⁸ On October 2, 2019, CA Court denied the Koshkalda's renewed motion.¹⁹

¹² the Case;

¹³ See App. 1-7 below, ECF 15 in the Case;

¹⁴ Dkt. 368 in Case No. 18bk30016-HLB;

¹⁵ Dkt. 16 in the Case;

¹⁶ Dkt. 20 in the Case;

¹⁷ App. 8-18 attached hereto, Dkt. 22 in the Case;

¹⁸ Dkt. 27 in the Case;

¹⁹ Dkt. 28 in the Case;

12. On October 2, 2019, Koshkalda filed a notice of appeal before the Ninth Circuit.²⁰ The assigned case No. 2019-56187 (ca9).

13. On December 9, 2019, Koshkalda filed Opening Brief.²¹ On December 30, 2019, Epson filed its Opposition Brief.²² On February 14, 2020, Koshkalda filed Reply Brief.²³

14. On September 15, 2020, the Ninth Circuit's memorandum affirming the CA Court's orders was filed.²⁴

X. REASONS FOR GRANTING THE WRIT

The Dismissal with prejudice of the Case pursuant to FRCP 41(a)(1)(A)(i) was filed by non-party (Trustee) and in violation of due process right of the named plaintiff (Koshkalda), petitioner herein, to receive a notice of the Dismissal and to be afforded a reasonable opportunity to object. In addition, the service of process of the Dismissal was defective.

XI. LEGAL ARGUMENTS

A. The Dismissal filed by Trustee is void and should be set aside pursuant to FRCP 60(b)(4).

a. Legal Standard

²⁰ Dkt. 31 in the Case;

²¹ Dkt. 4 in Case No. 2019-56187;

²² Dkt. 7 in Case No. 2019-56187;

²³ Dkt. 12 in Case No. 2019-56187;

²⁴ App. 21-23 attached hereto, Dkt. 13-1 in Case No. 2019-56187;

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950).

A judgment is void only if the court which rendered it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process of law." *United States v. Buck*, 281 F.3d 1336, 1344 (10th Cir. 2002) (quotation marks omitted). Under Rule 60(b)(4), a litigant was afforded due process if "fundamental procedural prerequisites — particularly, adequate notice and opportunity to be heard — were fully satisfied. *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir.1994). *Alford v. Cline*, No. 17-3017, at *4-5 (10th Cir. June 8, 2017)

A judgment "is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." 11 Wright Miller, *Federal Practice and Procedure* § 2862 (1973 ed.); see also *Marshall v. Board of Education*, 575 F.2d 417, 422 (3d Cir. 1978). *Williams v. New Orleans Public Service, Inc.*, 728 F.2d 730, 735 (5th Cir. 1984).

Here, ... a plaintiff is seeking to set aside.. [a] voluntary dismissal. We know of no reason to deny jurisdiction to a district court to consider granting a dismissing plaintiff relief under Rule 60(b). We therefore embrace the proposition that a plaintiff who has dismissed his claim by filing notice under Rule 41(a)(1)(A)(i) "may move before the district court to vacate the notice on any of the grounds specified in Rule 60(b)." [Citations.] *Schmier v. McDonald's LLC*,

569 F.3d 1240, 1243 (10th Cir. 2009) (citations omitted).

A judgment may be set aside on voidness grounds under Fed. R. Civ. P. 60(b)(4) for a violation of the due process clause of the Fifth Amendment. *Owens-Corning Fiberglas Corp. v. Ctr. Wholesale, Inc. (In re Ctr. Wholesale, Inc.)*, 759 F.2d 1440, 1442 (9th Cir. 1985).

Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 260, 130 S. Ct. 1367, 1370 (2010).

b. Application

Here, Koshkalda alleges the following:

- 1) Trustee lacked authority to file the Dismissal with prejudice of the Case because the Dismissal was filed by non-party to the Case in violation of FRCP 41(a)(1)(A)(i).
- 2) Koshkalda was not afforded an opportunity to object in violation of the Koshkalda's due process rights.

FRCP 41(a)(1)(A)(i) specifically states that "... *the plaintiff may dismiss an action without a court order by filing (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment...*" (emphasis added).

Here, Trustee was neither a "plaintiff," nor did Trustee file a motion for substitution of parties pursuant to FRCP 25(c), which states: "*If an interest is transferred, the action may be continued by or against the original party **unless the court, on motion, orders the transferee to be substituted in***

the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3)" (emphasis added). (Where no motion for substitution was filed, named defendant in suit remained same under Fed. R. Civ. P. 25(c) ...) *E.I. DuPont de Nemours & Co. v. Kolon Indus.*, 286 F.R.D. 288, 2012 U.S. Dist. LEXIS 144735 (E.D. Va. 2012). Here, no motion for substitution was filed, thus Koshkalda remained the only named Plaintiff in the Case.

Instead, the Dismissal with prejudice contained a Bankruptcy Court order which allegedly gave Trustee the right to file the Dismissal with prejudice of the Case.²⁵

Trustee is wrong. The specific instructions provided for Trustee in the Bankruptcy Court order do not support the Trustee's authority to file a Dismissal with prejudice of the Case for the following reasons.

First, the Bankruptcy Court order specifically authorized to dismiss the case no. 2:18-cv-0527-FMO-AGR, which does not match the case number of the Case, which is 2:18-cv-05087-FMO-AGR.²⁶ The "specific authorization" to dismiss one case does not extend to the right to dismiss "any other" cases.

Second, assuming *arguendo* that the Bankruptcy Court in its "specific instructions" made a clerical error in the case number. Trustee did not provide any evidence, nor does the CA Court record have any evidence, that the Trustee attempted to correct the clerical error in the "specific instructions" of the Bankruptcy Court.

²⁵ App. 1-9 attached herein;

²⁶ App. 6, or ECF 15, 5:6;

Third, the Bankruptcy Court order did not release the Trustee from an obligation to file a motion for substitution of a party pursuant to FRCP 25(c), which states: "If an interest is transferred, the action may be continued by or against the original party ***unless the court, on motion, orders the transferee to be substituted*** in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3)" (emphasis added). (The rules of service in Fed. R. Civ. P. 25(a)(3) govern any substitution motion that transferees choose to file) *FDIC v. SLE, Inc.*, 722 F.3d 264, 265 (5th Cir. 2013). (Where no motion for substitution was filed, named defendant in suit remained same under Fed. R. Civ. P. 25(c) ...) *E.I. DuPont de Nemours & Co. v. Kolon Indus.*, 286 F.R.D. 288, 2012 U.S. Dist. LEXIS 144735 (E.D. Va. 2012).

Here, Koshkalda at all times remained the only named plaintiff in the Case. Trustee never served Koshkalda with a motion pursuant to FRCP Rule 25(a)(3) as required by FRCP Rule 25(c), nor does CA Court have any record of Trustee filing such a motion pursuant to FRCP Rule 25(c).

Fourth, the Trustee's Dismissal was filed "with prejudice" in contradiction to the Bankruptcy Court's specific instructions. (See also 18 Wright Miller § 4435, at 329, n. 4 ("Both parts of Rule 41 . . . use the phrase 'without prejudice' as a contrast to adjudication on the merits"); 9 id., § 2373, at 396, n. 4 ("'[W]ith prejudice' is an acceptable form of shorthand for 'an adjudication upon the merits'"). See also Goddard, 14 Cal.2d, at 54, 92 P.2d, at 808 (stating that a dismissal "with prejudice" evinces "[t]he intention of the court to make [the dismissal] on the

merits")) *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001).

Here, the filed by Trustee Dismissal with prejudice adjudicated the Case on merits, while the Bankruptcy Court's specific authorization for dismissal would not adjudicate the Case on merits.

Fifth, and more importantly, the Trustee's filed Dismissal with prejudice violated the Koshkalda's ***due process rights***. As a true party in interest and the only named plaintiff in the Case, Koshkalda was notified about the filed Dismissal with prejudice only after it was filed,²⁷ which did not afford Koshkalda a due process opportunity to object. (An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to ... ***afford them an opportunity to present their objections***.) *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950)(emphasis added). Here, Koshkalda received no such opportunity to object prior to filing of the Dismissal, nor could Koshkalda somehow anticipate that Trustee, on her own initiative, would file the Dismissal "with prejudice."

Sixth, the proof of service of Koshkalda with the Dismissal with prejudice was defective as it states that the Dismissal with prejudice was filed pursuant to (non-existent) FRCP 41(A)(1)(A)(I).²⁸

²⁷ The notification of Koshkalda by Trustee was done by mail on the day of electronic filing, which arrived days after the Dismissal with prejudice was filed and got into an effect;

²⁸ See App. 6 attached herein;

Therefore, the order is void as a matter of law and this Court should grant the Koshkalda's petition for Writ of Certiorari.

B. The Dismissal filed by Trustee should be set aside pursuant to FRCP 60(b)(6).

a. Legal Standard

FRCP Rule 60(b)(6): on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: ... (6) any other reason that justifies relief.

We have held that a party merits relief under Rule 60(b)(6) if he demonstrates “extraordinary circumstances which prevented or rendered him unable to prosecute [his case].” *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729, 730 (9th Cir.1971) (per curiam); see also *Pioneer Investment Servs. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 393, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). The party must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion. *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir.1993). *Community Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002), as amended on denial of reh’g and reh’g en banc (Apr. 24, 2002).

b. Application.

Both elements are met here, because as a result of the filed Dismissal with prejudice filed by Trustee (i) the Dismissal with prejudice of the Case was filed

under circumstances beyond the Koshkalda's control, and (ii) Koshkalda suffered an injury.

As stated above, the Dismissal with prejudice was filed by non-party (Trustee) to the Case, and Koshkalda was not afforded an opportunity for to object in violation of the Koshkalda's due process rights. Defective service of the Dismissal with prejudice was done by mail on the day the Dismissal was filed electronically. Electronic filing was instant, while it took days for physical mail to arrive, thus Koshkalda found out about the filed Dismissal only after it was in effect.

As a result Koshkalda suffered injury. The wrongfully seized items never returned to Koshkalda consist of the Koshkalda's documents and merchandize which serve as an evidence in other cases,²⁹ and contain the Koshkalda's financial records.

Here, Koshkalda demonstrated that *"injury and circumstances [were] beyond his [Koshkalda's] control that prevented him [Koshkalda] from proceeding with the prosecution ... of the action in a proper fashion."* Id.

XII. CONCLUSION

²⁹ Adversary proceeding before the Bankruptcy Court filed by Epson seeking nondischargeability of the Koshkalda's debts, Case No. 18ap03020-HLB, Case No. 20-60027 before the Ninth Circuit; also Case No. 20-483 pending before this Court; also Adversary proceeding before the Bankruptcy Court filed by Trustee seeking the nondischargeability of the Koshkalda's debts, Case No. 18ap03059-HLB;

Based on the above-mentioned arguments Koshkalda requests this Court to grant the petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for The Ninth Circuit, which affirmed orders of The United States District Court Central District of California.

DATED: November 19, 2020

By: 
Artem Koshkalda, Petitioner