

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re)	
)	
DWAYNE BODRICK)	Case No. 11-50090
KIMBERLY BODRICK)	Chapter 13
)	Judge C. Kathryn Preston
Debtor(s))	
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DEWAYNE M. JENNINGS)	Adversary No. 11-2162
)	Judge Beth A. Buchanan
Plaintiff(s))	
)	
vs.)	
)	
DWAYNE A. BODRICK)	
)	
Defendant(s))	
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MEMORANDUM ORDER

This matter is before this Court on the (1) *Motion for Reconsideration* [Docket Number 105]; (2) *Motion for Extension of Time to File Notice of Appeal* [Docket Number 106]; (3) *Motion for Extension of Time to File Notice of Appeal Instanter* [Docket Number 107]; (4)

Notice of Appeal [Docket Number 108]; and (5) *Motion for Stay of Execution of Judgment Pending Appeal* [Docket Number 110] filed by or on behalf of Plaintiff Dewayne M. Jennings.

At issue are this Court's *Memorandum Opinion Dismissing Complaint* [Docket Number 101] and corresponding *Order on Decision Finding Debt Dischargeable Pursuant to 11 U.S.C. §§ 523(a)(2)(A), 523(a)(2)(B), 523(a)(4) and 523(a)(6)* [Docket Number 102] (collectively, the "Order") entered on April 18, 2014. The deadline for filing a notice of appeal of the Order was May 2, 2014. *See* Bankruptcy Rule 8002(a) ("The notice of appeal shall be filed with the clerk within 14 days of the date of the entry of the judgment, order, or decree appealed from."). Plaintiff does not dispute that he failed to timely appeal the Order. Rather, Plaintiff asks this Court to either reconsider its decision in the Order or to extend the time to file a notice of appeal based on excusable neglect of his counsel.

I. Motion for Reconsideration

Plaintiff indicates that his *Motion for Reconsideration* is brought pursuant to Rule 8011 of the Federal Rules of Bankruptcy Procedure (hereafter, the "Bankruptcy Rules"). Bankruptcy Rule 8011, however, relates to requests for relief directed to the district court or the bankruptcy appellate panel during the pendency of an appeal and therefore is inapplicable to the matter before this Court.

Rather than Bankruptcy Rule 8011, it appears that the Plaintiff is asking this Court to reconsider the Order under either Bankruptcy Rule 9023 or 9024, which extend Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure (the "Civil Rules") to bankruptcy proceedings. *Equity Sec. Holders' Comm. v. Wedgestone Fin. (In re Wedgestone Fin.)*, 152 B.R. 786, 788-89 (Bankr. D. Mass. 1993). Whether the *Motion for Reconsideration* is viewed as a motion to alter or amend under Civil Rule 59(e) or a motion for relief from judgment under Civil Rule 60(b)

depends on when the motion is filed. *Lopez v. Long (In re Long)*, 255 B.R. 241, 244 (10th Cir. B.A.P. 2000).

Bankruptcy Rule 9023 provides that a motion to alter or amend a judgment must be filed within fourteen (14) days after the entry of judgment. Fed. R. Bankr. P. 9023. The *Motion for Reconsideration* was filed on May 9, 2014, which was twenty-one (21) days after the entry of the Order. Accordingly, to the extent that the Plaintiff asks this Court to reconsider the Order pursuant to Civil Rule 59(e), such request is denied as untimely under Bankruptcy Rule 9023.

If the *Motion for Reconsideration* is premised on Civil Rule 60(b), Plaintiff must establish one of the following grounds:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b); *see also Rogan v. Countrywide Home Loans, Inc. (In re Brown)*, 413 B.R. 700, 705 (B.A.P. 6th Cir. 2009) (holding that the party seeking to invoke Civil Rule 60(b) bears the burden of establishing that its prerequisites are satisfied) (citations omitted).

By the *Motion for Reconsideration*, Plaintiff asks this Court to “reconsider its ruling determining [Plaintiff’s] reliance was neither reasonable nor justifiable.” In support of this request, Plaintiff does not offer any evidence or make any arguments that would warrant relief

from the Order for any of the reasons enumerated by Civil Rule 60(b)(1) through (5). Nor does the *Motion for Reconsideration* warrant relief under Civil Rule 60(b)(6).

Civil Rule 60(b)(6) applies where one of the grounds described in Civil Rule 60(b)(1) through (5) is not present and only then in such “exceptional or extraordinary circumstances” where relief is necessary to “achieve substantial justice.” *In re Brown*, 413 B.R. at 705 (citing *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001) and *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989)). Stated differently, relief pursuant to Civil Rule 60(b)(6) is appropriate only in “unusual and extreme situations where principles of equity mandate relief [and it is shown] that if relief is not granted extreme and undue hardship will result.” *Id.* (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)(internal quotations marks omitted)).

The *Motion for Reconsideration* does not set forth any exceptional or extraordinary circumstances to support relief under Civil Rule 60(b)(6). The Plaintiff is merely restating arguments previously made to and considered by this Court. Such arguments are best directed to the appellate tribunal. Accordingly, to the extent that the Plaintiff asks this Court to reconsider the Order pursuant to Civil Rule 60(b), such request is denied.

II. Motions for Extension of Time to File Notice of Appeal

Plaintiff’s Attorney, Joy Marshall,¹ filed a *Motion for Extension of Time to File Notice of Appeal* on May 9, 2014. Plaintiff also filed, *pro se*, a *Motion for Extension of Time to File*

¹ In the *Motion for Extension of Time to File Notice of Appeal Instanter*, the Plaintiff states that he and Attorney Marshall “terminated their Attorney-Client relationship.” This Court notes that Attorney Charles E. Smith has filed a *Notice of Appearance as Counsel* [Docket Number 114] on behalf of Plaintiff “in this appellate matter before the Bankruptcy Appellate Panel.” It is unclear to this Court whether Attorney Smith has been retained to represent Plaintiff with regard to anticipated matters before the Bankruptcy Appellate Panel, if any, or if Attorney Smith will be representing Plaintiff with regard to the appellate-related motions pending before this Court. In any event, the proper procedure has not been followed with respect to either the withdrawal or substitution of Attorney Marshall. See Local Bankruptcy Rule 2091-1. As such, this Court considers Attorney Marshall to still be an attorney of record in this case.

Notice of Appeal Instanter on May 22, 2014 (collectively, the “Motions for Extension of Time”). The Motions for Extension of Time were filed within the time period set forth in Bankruptcy Rule 8002(c)(2)(“a motion filed not later than 21 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect”). Both motions allege that Attorney Marshall suffered from vertigo and that she was unaware that the Order had been entered. The Motions for Extension of Time, however, make no reference to any medical treatment sought by Attorney Marshall nor is either motion accompanied by an affidavit or other supporting evidence. This Court finds that the Motions for Extension of Time, standing alone, do not establish a finding of excusable neglect. See *HER, Inc. v. Barlow (In re Barlow)*, 2013 Bankr. LEXIS 1230, at *8-9, 2013 WL 1316029, at *3 (Bankr. S.D. Ohio Mar. 29, 2013)(“The burden of establishing excusable neglect rests with the movant.”)(citations omitted). While this Court could deny the Motions for Extension of Time on this basis, in the interest of justice and in light of the long-standing dispute between the parties in this case, this Court will schedule by separate order an evidentiary hearing on the Motions for Extension of Time.

III. Notice of Appeal and Motion for Stay of Execution of Judgment Pending Appeal

Plaintiff, *pro se*, filed a *Notice of Appeal* on May 22, 2014. The filing of the *Notice of Appeal* is premature until such time as this Court enters a final decision on the Motions for Extension of Time. Accordingly, the *Notice of Appeal* is stricken. In the event that this Court grants the Motions for Extension of Time, the Plaintiff will need to file a new notice of appeal.

Plaintiff also filed, *pro se*, a *Motion for Stay of Execution of Judgment Pending Appeal* by which Plaintiff requests that this Court “stay the execution of judgment rendered by this Court on April 18, 2014.” One factor that a court considers when evaluating a request for a stay of an order pending appeal is “the likelihood that the moving party will be irreparably harmed absent a

stay.” *In re Gress*, 435 B.R. 520, 523 (Bankr. S.D. Ohio 2010)(quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). The “judgment” at issue in this case is the determination that any debt owed to Plaintiff by the Debtor is dischargeable. It is unclear to this Court from the motion precisely what harm—let alone irreparable harm—Plaintiff would suffer during the pendency of an appeal if a stay is not granted. Accordingly, the *Motion for Stay of Execution of Judgment Pending Appeal* is denied.

IV. Conclusion

For the foregoing reasons:

A. the *Motion for Reconsideration* is DENIED (i) as untimely under Bankruptcy Rule 9023 to the extent that the Plaintiff asks this Court to reconsider the Order pursuant to Civil Rule 59(e) and (ii) on the merits to the extent that the Plaintiff asks this Court to reconsider the Order pursuant to Civil Rule 60(b);

B. the Motions for Extension of Time will be set for evidentiary hearing by separate order of this Court;

C. the *Notice of Appeal* is STRICKEN; and,

D. the *Motion for Stay of Execution of Judgment Pending Appeal* is DENIED.

IT IS SO ORDERED.

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