

December 15, 1998

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE WILLIAM CLIFFORD JONES,
also known as New West Enterprises,
also known as Interwest Electric; and
SUSAN ANN DETERS JONES,

Debtors.

BAP No. WY-98-015

WILLIAM CLIFFORD JONES and
SUSAN ANN DETERS JONES,

Appellants,

v.

DONNELL R. ROBIE, SR., and
CAROLEE ROBIE,

Appellees.

Bankr. No. 95-20705
Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Wyoming

Before CLARK, ROBINSON, and CORNISH, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

William Clifford Jones and Susan Ann Deters Jones (“Debtors”) appeal two

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

orders of the United States Bankruptcy Court for the District of Wyoming: (1) an Order on Amended Objection to Allowance of Claim (“Claim Objection Order”); and (2) an Order denying the Debtor’s Motion for Reconsideration of the Claim Objection Order (“Reconsideration Order”). The issue before the Court is procedural. While the Debtor’s Motion for Reconsideration is timely, the pivotal issue is whether the Motion for Reconsideration tolled the time to file an appeal of the Claim Objection Order, so that this Court has jurisdiction to consider the merits of the October 16, 1997 order. For the reasons set forth below, we AFFIRM the judgment of the bankruptcy court.

BACKGROUND

New West Enterprises, Inc., a Wyoming corporation closely held by William Clifford Jones, purchased Donnell’s Electric, Inc., a Colorado corporation closely held by Donnell R. Robie and Carolee Robie (“Robies”). The parties executed a Purchase and Sale Agreement, a Security Agreement and Financing Statement, a Deed of Trust, and a Promissory Note personally guaranteed by William Clifford Jones and Susan Ann Deters Jones (“Debtors”).

The Debtors’ obligation to the Robies was secured by various property transferred as a part of the sale, including personal property. Under the Financing Statement and Security Agreement, the Debtors granted an interest to Robies in the personal property, which included vehicles, tools, equipment, and office furniture.

In 1993, the Debtors defaulted under the terms of the purchase agreement. In early 1994, the Bank of Rangely, a secured creditor of the Robies with a first position deed of trust on the real property, agreed to accept a deed in lieu of foreclosure on the realty as well as the titles to a ditch witch backhoe (Robies’ collateral) and a trailer in full satisfaction of the obligation owed to the bank by the Robies and the Debtors. Soon thereafter, the Debtors executed bills of sale

on the personal property and transferred this property to the Robies. On each bill of sale, the parties assigned an agreed value to the property. On the back of one bill of sale, the Debtors noted an intent that the bills of sale satisfied the balance of the debt owed to the Robies.

The Debtors also executed bills of sale transferring to the Robies electrical inventory, vehicles, a ditch witch, vibraplow, and office furniture. The parties assigned an agreed value to these transfers. It is unclear from the record whether other business-related property was abandoned to the Robies. The Robies sold, donated, or retained possession of the property. It is undisputed that the Robies at no time provided notice of the disposition of the property to the Debtors.

In 1995, the Debtors filed for protection under Chapter 7. An order of discharge was entered in February 1996. In June 1996, the Robies filed a proof of claim seeking an unsecured, deficiency claim of \$138,000. The Trustee objected to the Robies' claim, asserting a lack of documentation and accounting. The Robies and the Trustee stipulated that the claim should be \$127,000. The Debtors then objected to the stipulated claim, arguing that the conveyance of the personal property constituted a complete accord and satisfaction of the debt, and that the Robies did not comply with Colorado foreclosure notice requirements.

On October 16, 1997, the bankruptcy court denied the Debtors' objection to the Robies' amended proof of claim ("Objection Order"). The bankruptcy court first determined that, under Colorado common law, the Debtors' unilateral attempt to create an accord by noting on the back of one of the bills of sale that the sale was in full satisfaction of the debt was not adequate. Second, the bankruptcy court rejected the Debtors' contention that the Robies disposed of property in violation of Colorado's foreclosure notice provisions. The bankruptcy court concluded that, though the Robies were required to give the Debtors reasonable notice, the Debtors specifically, knowingly, and in writing

waived the right to notice after agreeing to a value for the property transferred to the Robies in the bills of sale.

The Debtors filed a motion for reconsideration (“Motion to Reconsider”) on January 22, 1998. The bankruptcy court denied the motion on March 4, 1998, holding that the requirements for notice of a sale of collateral were not violated by the manner in which the Robies disposed of the property. The Debtors now appeal from that order.

STANDARD OF REVIEW

The Panel determines its jurisdiction sua sponte. “Untimely filing of a notice of appeal deprives the appellate court of jurisdiction to review the bankruptcy court’s judgment.” *Lovelace v. Higgins (In re Higgins)*, 220 B.R. 1022, 1024 (10th Cir. BAP 1998) (citing *Deyhimy v. Rupp (In re Herwit)*, 970 F.2d 709, 710 (10th Cir. 1992)). Whether the bankruptcy court erred in denying the Motion to Reconsider is reviewed under an abuse of discretion standard. *Colley v. Nat’l Bank (In re Colley)*, 814 F.2d 1008 (5th Cir. 1987); *Employment Sec. Div. v. W.F. Hurley, Inc. (In re W.F. Hurley, Inc.)*, 612 F.2d 392 (8th Cir. 1980); *S.G. Wilson Co. v. Cleanmaster Indus. (In re Cleanmaster Indus.)*, 106 B.R. 628 (9th Cir. BAP 1989).

JURISDICTION

If a party makes a timely motion as specified in Rule 8002(b), the time for appeal runs from the entry of the order disposing of the last motion. Fed. R. Bankr. P. 8002(b). The types of motions provided in Rule 8002(b) are: (1) to amend or to make additional findings under Rule 7052; (2) to alter or amend the judgment under Rule 9023; (3) for a new trial under Rule 9023; or (4) for relief under Rule 9024, if the motion is filed no later than ten (10) days after the filing of the entry of the judgment. The question then becomes whether the Motion to Reconsider was timely. Rule 9023 makes applicable Rule 59, Fed. R. Civ. P.;

however, an exception is set forth in Rule 3008. Rule 3008 does not set forth a time limit for reconsideration of an order allowing or disallowing a claim. The bankruptcy court has the authority to reconsider the allowance or disallowance of claims for cause. 11 U.S.C. § 502(j).

“When a moving party fails to specify the rule under which it makes a post-judgment motion, the characterization is left to the court with the risk that the moving party may lose the opportunity to present the merits underlying the motion to an appellate court.” *Barger v. Hayes County Non-Stock Co-op (In re Barger)*, 219 B.R. 238, 244 (8th Cir. BAP 1998) (citing *Sanders v. Clemco Indus.*, 862 F.2d 161, 168 (8th Cir. 1988)). Generally courts view a motion that seeks a substantive change in judgment as a Rule 59(e) motion if the motion is made within ten (10) days of the entry of the judgment. *Id.* (citations omitted). If the motion is filed more than ten (10) days after the entry of the judgment, the motion is treated as a Rule 60(b) motion. *Id.* Further, the Fifth Circuit noted:

The court’s broad discretion should not, however, encourage parties to avoid the usual rules for finality of contested matters. Bankruptcy Rule 9024 incorporates Federal Rule of Civil Procedure 60 into all matters governed by the Bankruptcy Rules except, inter alia, ‘the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b)’ We interpret Rule 9024 to provide that, when a proof of claim has in fact been litigated between parties to a bankruptcy proceeding, the litigants must seek reconsideration of the bankruptcy court’s determination pursuant to the usual Rule 60 standards if they elect not to pursue a timely appeal of the original order allowing or disallowing the claim.

Colley, 814 F.2d at 1010; *See also In re Aguilar*, 861 F.2d 873, 875 (5th Cir. 1988); *Cleanmaster Indus.*, 106 B.R. at 630. As a result, this Court finds the Motion to Reconsider should be treated as a Rule 9024 motion. The Motion to Reconsider was filed 98 days after the Objection Order was entered. The expiration of the ten (10) day period was on October 26, 1997, which was a Sunday and therefore, the Appellants could have filed a timely Motion to Reconsider on October 27, 1997. Therefore, the motion did not toll the appeal

time for the underlying order since it was filed outside the ten (10) day period.

The issue then becomes whether the bankruptcy court abused its discretion in denying the Motion to Reconsider. Abuse of discretion is defined as: “an arbitrary, capricious, whimsical, or manifestly unreasonable judgement [sic].” *Lovelace*, 220 B.R. at 1025 (quoting *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994) (further citations omitted)).

Since the Motion to Reconsider is treated as a Rule 9024 motion, Rule 60, Fed. R. Civ. P., sets forth the standards for reconsideration of claims and helps define “cause” as set forth in § 502(j). *Cleanmaster Indus.*, 106 B.R. at 630. The bankruptcy court may relieve a party from a final order for: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) judgment has been satisfied, released or discharged; or (6) any other reason justifying relief. Fed. R. Bankr. P. 9024, incorporating Fed. R. Bankr. P. 60(b). “[R]ule 60(b) relief provides ‘extraordinary relief’ which should be granted only upon a showing of exceptional circumstances.” *Barger* at 244 (citations omitted). “Where a motion to vacate raises only issues of law that were previously rejected by the trial court, the court cannot be said to have abused its discretion in subsequently denying relief on the motion.” *Id.* (citations omitted). In the instant case, the appellants did not raise any issues in the Motion to Reconsider that were not previously rejected. Accordingly, the bankruptcy court did not abuse its discretion in denying the Motion to Reconsider.

CONCLUSION

The Motion to Reconsider is treated as a Rule 9024, Fed. R. Bankr. P., motion. The motion did not toll the time to appeal the objection order. The

appellants did not present any new arguments in the Motion to Reconsider. Therefore, the bankruptcy court did not abuse its discretion in denying the Motion to Reconsider and the decision of the bankruptcy court is AFFIRMED. The appeal of the Order on Amended Objection to Allowance of Claim is DISMISSED since the Motion did not toll the appeal time.