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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re

UNIVERSAL CLEARING HOUSE COMPANY, a Trust, aka NATIONAL CLEARING HOUSE COMPANY, a Trust,

Debtor.

INDEPENDENT CLEARING HOUSE COMPANY, a Trust,

Debtor.

ACCOUNTING SERVICES COMPANY, a Trust,

Debtor.

ROBERT D. MERRILL, Trustee,

Appellee,

-vs-

CHAD ALLEN, et al., specifically AL TORONTO, dba ALPINE ENTERPRISES,

Appellant.

ORDER AFFIRMING DECISION OF BANKRUPTCY COURT

Civil No: C-86-760W

Bankruptcy No. 81-02887

Bankruptcy No. 81-02886

Bankruptcy No. 81-03704

This matter is before the court on appellants Al Toronto's ("Toronto") bankruptcy appeal. Toronto is asking this court to overrule the decision of the bankruptcy court denying him relief from a judgment under 60(b) Fed. R. Civ. P. This court heard oral argument on the appeal on September 2, 1987.

Toronto represented himself. William G. Fowler represented the appellee bankrupt estate. Prior to the hearing the court had read all memoranda filed for and against the decision of the bankruptcy court. After taking the appeal under advisement the court has further considered the law and the facts relating thereto and now renders the following memorandum decision and order.

Procedural Background

This is one of a long line of cases resulting from the collapse of Universal Clearing House's ("UCH") ponzi scheme.[1] Toronto worked as a salesperson for UCH. In March of 1982 the trustee brought suit against Toronto and 126 other UCH salespersons. The trustee alleged that the commission payments the agents received were fraudulent conveyances and sought an order requiring the salespersons to return all commission payments. On May 3, 1985, the Bankruptcy Judge John H. Allen granted the trustee's motion for summary judgment against Toronto and the 126 other salespersons.[2] Nine of those 126 salespersons appealed Judge Allen's decision to this court; Toronto was not among them. In April of 1986 this court reversed Judge Allen's

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1 A ponzi scheme, as that term is generally used, refers to an investment scheme in which returns to investors are not financed through the success of the underlying business venture, but are taken from principal sums of newly attracted investments. Typically, investors are promised large returns for their investments. Initial investors are actually paid the promised returns, which attract additional investors.

2 Judge Allen entered separate judgments against each defendant.

decision as to those nine appellants and remanded their cases to the bankruptcy court for a factual determination of whether each of them had given value for their commission payments. See, In re Universal Clearing House v. Allen, et al., consolidated case No. C-85-0597W, April 22, 1986. In July of 1986 Toronto filed a Rule 60(b) motion seeking to set aside the summary judgment entered against him. Judge Allen heard the motion on August 19, 1986. After taking the matter under advisement Judge Allen denied Toronto's motion on September 4, 1986. Toronto is now appealing Judge Allen's refusal to grant his 60(b) motion.

Standard of Review

Judge Allen had jurisdiction over this case pursuant to 28 U.S.C. § 157, supp. 1987. Section 157 provides in pertinent part:

> Bankruptcy judges may hear and determine all cases under Title 11 and all core proceedings arising under Title 11 . . . and may enter appropriate orders and judgments subject to review under § 158 of this title. 28 U.S.C. § 157(b)(1).

A core proceeding is defined as "a proceeding to determine, avoid, or recover fraudulent conveyances." 28 U.S.C. § 157(2)(h), supp. 1987.

This court has jurisdiction to hear bankruptcy appeals pursuant to 28 U.S.C. § 158, supp. 1987. Section 158 provides in pertinent part:

> The District Court of the United States shall have jurisdiction to hear appeals from . . . proceedings referred to the bankruptcy judges under § 157 of this title. 28 U.S.C. § 158(a), supp. 1987.

Section 158 goes on to provide "that an appeal under subsection (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district court and in the time provided by Rule 8002 of the Bankruptcy Rules." 28 U.S.C. § 158(a)-(c).

Since this court is acting as an appellate court, the standard of review is the standard of review which the Tenth Circuit would use in reviewing a decision made by the district court. In re Osborne, 42 Bankr. Rptr. 988, 992 (D. Wisc. 1984); Big Shanty Land Corporation v. Comer Properties, 61 Bankr. Rptr. 272 (N.D. Ga. 1985). In reviewing a trial court's ruling on a 60(b) motion the trial court's decision should not be disturbed unless when the decision reflects a manifested abuse of discretion. Security Mutual Casualty Company v. Century Casualty Company, 621 F.2d 1062, 1068 (10th Cir. 1980); Balandros v. Merrill Lynch, Pierce, Fenner & Smith, 703 F.2d 1152 (10th Cir. 1981.

After careful study and balancing of the interests, this court finds that Judge Allen did not abuse his discretion when he denied Toronto's motion.

Standard for Granting Relief Under Rule 60(b)

Rule 60(b) is a grand reservoir of equitable power to insure justice in particular cases. It should be liberally construed when substantial justice will be served. Morris v. Adams/Millis Corporation, 758 F.2d 1352, 1359 (10th Cir. 1985).

Toronto presents a sympathetic case to this court. He did not appeal Judge Allen's summary judgment because: (1) he could not afford a lawyer and (2) he did not proceed pro se because his wife was dying of terminal cancer and he lacked the stamina to take on the battle. While the court is sympathetic to the personal tragedy Toronto suffered, the administration of this case had to proceed.

Toronto's argument that he could not afford counsel has been accepted by a few courts as a factor in deciding to exercise equitable power in favor of an indigent party. See, Daly v. Stratton, 304 F.2d 666, 668 (7th Cir. 1962); Allen Russell Publishing, Inc. v. Levy, 109 F.R.D. 315, 317 (D. Ill. 1985). However, neither of the above cases relied solely on the complaining party's lack of funds. Further, this court finds the reasoning in McKnight v. United States Steel Corp., 726 F.2d 333 (7th Cir. 1984) persuasive. In McKnight the district judge dismissed, by summary judgment, McKnight's employment discrimination suit. McKnight did not appeal the decision. After the time for appeal ran McKnight made a 60(b) motion to set aside the summary judgment. One of the grounds which McKnight argued was that the district court erred in not appointing him counsel. McKnight argued that the failure to appoint counsel resulted in his failure to file a timely appeal. The Seventh Circuit panel held that:

> Rule 60(b) is not intended to correct errors of law made by the district court in the underlying decision which resulted in the final judgment. . . . A plaintiff cannot

> avoid the time limits on filing an appeal by filing a Rule 60(b) motion challenging the district court's legal rulings and then appealing from the denial of that motion. . . . The appropriate way to seek review of alleged legal errors is by a timely appeal; a 60(b) motion is not a substitute for an appeal or means to enlarge indirectly the time for appeal. . . . By not filing a timely appeal from the order dismissing his case plaintiff waived his rights to have this court review errors of law made by the district court in that order. Such errors may not be used as a basis to obtain relief under 60(b). McKnight, supra at 338 (citations omitted).

Since even an error by the court in failing to appoint counsel does not relieve a pro se defendant of the requirements of filing a timely appeal, Toronto's inability to hire counsel should not excuse his failure to file a timely appeal.

The trustee has made three arguments as to why Judge Allen's decision is correct. First, there is something inherently unfair in allowing Toronto to take a free ride on the efforts of the nine salespersons who did appeal. It is worth noting here that some of the nine salespersons who appealed appeared pro se. Second, if Toronto gets his requested relief the other 117 salespersons would logically be entitled to the same relief. And lastly, a Rule 60(b) motion cannot be used as a substitute for an appeal if we are to have an orderly appellate process.

Even though it might be unfair to the nine salespersons who did appeal to allow Toronto to take a free ride those parties are not before the court, and their interests will not be adversely affected if Toronto is allowed to take a free ride.

However, the last two points raised by the trustee are compelling. The interest in an orderly administration of judicial proceedings is a factor that must be balanced against the equitable considerations that favor Toronto. Without rules of procedure the judicial system could not function. By liberally construing the rules to assure a just, speedy, and inexpensive determination of every action, courts attempt to balance the interests of parties who do not fully comply with the rules against the interest of the judicial system in having a system which functions. In balancing these competing interests the interest in finality of judgments and the interest in an orderly processing of appeals outweighs Toronto's interest in having his judgment set aside.

The Tenth Circuit has held that finality of a judgment is an important concern. Pierce v. Cook & Company, Inc., 518 F.2d 720, 722 (10th Cir. 1975). Though this court would not deny a Rule 60(b) motion merely to avoid having another case added to the calendar this case poses a special problem. All 127 salespersons were a party to the original summary judgment proceeding before Judge Allen. If this court grants Toronto's motion the 117 remaining non-appealing parties also might try to have their summary judgments set aside. After setting the judgments aside, new hearings might have to be held and, in keeping with this court's April 22, 1986 decision, each of the 117 salespersons might be entitled to a separate factfinding hearing. This would impose a substantial burden on the court.

At this late date it seems unwarranted to thus open the door for the 117 salespersons who, for whatever reasons, chose not to appeal.

Furthermore, Rule 60(b) is not designed to enlarge the time allowed for appeal. Morris v. Adams/Millis Corporation, 758 F.2d 1352 (10th Cir.). An orderly administration of appeals is essential to judicial administration. In order to have this court ignore the time limits for appeal Toronto must show unusual circumstances entitling him to relief. Morris, supra at 1359. While the court sympathizes with Toronto's position, and admires his attempts to become familiar with the judicial process, the circumstances in this case are not so unusual that they justify the extraordinary relief which Toronto seeks.

Conclusion

After balancing the interests of both parties this court finds that no unusual circumstance exists which would warrant relief under Rule 60(b). Therefore, the order of Judge Allen dated September 4, 1986 is AFFIRMED.

Dated this 11th day of September, 1987.

David K. Winder
United States District Judge