

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

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In re) Bankruptcy Case No. 81-01447
RICHARD HANSEN FAIRBOURN,)
Debtor.) Civil Proceeding No. 81P-0498
HAROLD C. WEATHERSTON and)
ATHLENE W. WEATHERSTON,)
Plaintiff.)
-vs-)
RICHARD HANSEN FAIRBOURN,)
Defendant.) MEMORANDUM OPINION AND ORDER

Plaintiff's dischargeability complaint against defendant was tried on December 17, 1981. The court determined that defendant's debt was nondischargeable for fraud. A judgment against defendant was entered on March 8, 1982.

On May 9, 1983, defendant, through new counsel, filed a motion for relief from the judgment. Defendant argues that he is entitled to relief from the judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure, applicable to this proceeding through Bankruptcy Rule 924, because in his view he has a malpractice claim against his trial attorney for failing to present an adequate defense.

A motion for relief from a judgment under Rule 60(b)(6) must be made "within a reasonable time." Defendant's motion was not

made within a reasonable time. Defendant has given no explanation for his fourteen month delay in seeking relief from the judgment. The motion is not grounded upon events subsequent to the entry of the judgment or upon events subsequent to the trial, which was held nearly three months before the entry of the judgment.

Assuming, however, that the motion is timely, defendant has not shown his entitlement to relief under Rule 60(b)(6).¹ Defendant believes his former counsel breached the required standard of care expected of attorneys and that had former counsel met the required standard of care a different result could have been reached at trial.

Some courts have applied Rule 60(b)(6) to relieve a party from a judgment based on gross negligence of counsel. According to Professors Moore and Lucas

The question presented on the motion is whether the conduct is excusable neglect. Obviously the greater the negligence involved, or the more willful the conduct, the less "excusable" it is; on the other hand, the more inexcusable it is, the greater the natural sympathy with the ultimate victim. Some courts have resolved this dilemma by treating "gross" negligence by counsel as constituting special circumstances taking the case out of subdivision (b)(1), and affording relief under (b)(6). (citing Barber v. Turberville, 218 F. 2d 34 (D.C. Cir. 1954); Lucas v. City of Juneau, 20 F.R.D. 407 (D.

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Defendant specifically declines to rely on Rule 60(b)(1) because, in defendant's view, the actions of his prior counsel constituted gross negligence not excusable neglect.

Alaska 1957); In re Estate of Cremidas, 14
F.R.D. 15 (D. Alaska 1953).)

7 MOORE'S FEDERAL PRACTICE ¶ 60.27[2] at 366 (1982). Assuming that gross negligence of trial counsel justifies relief under Rule 60(b)(6), however, defendant has not shown neglect, negligence, or gross negligence.

Defendant's affidavit swears to the following facts relevant to the conduct of former counsel in handling this lawsuit:

(1) Former counsel in the bankruptcy case, Mr. Vlahos, knew the matter was important.

(2) Defendant "turned over" this lawsuit when it was filed to a Mr. Sam Herskovitz but the attorney of record in the lawsuit, a Keith Henderson, "was not made known" to defendant until two days before trial.

(3) [Answers to] interrogatories prepared by Herskovitz were prepared without adequate review by defendant.

(4) Defendant expected his bankruptcy counsel, Mr. Vlahos, to handle the trial.

(5) Besides preparing the [answers to] interrogatories, defendant did not prepare for trial.

(6) Defendant's books and records were available for trial and his accountant was willing to testify upon adequate notice.

(7) Defendant had documents which would have let the court know about the nature of his business and the method he used to get money for his business.

An affidavit filed by defendant's present counsel swears to no facts relevant to former counsel's handling of the case.

Assuming all of the facts shown by defendant's affidavit, defendant has failed to show any reason for relieving him from the judgment entered in this action. If he did not adequately review his answers to plaintiffs' interrogatories, from the facts before the court that is his own fault. Defendant signed the answers to interrogatories under oath. If the answers were not complete, they should have been supplemented by defendant at trial. If the answers were not accurate, he should not have signed them. If defendant did not know which attorney in the firm would be handling his case until two days before trial, no facts before the court suggest that defendant should be excused for his own failure to prepare for trial or to contact his attorney in advance of trial. Defendant's affidavit fails to show that former counsel did not adequately prepare for trial or adequately represent defendant at trial. Fraud on the part of former counsel is not alleged. Nor is it alleged that plaintiffs did not prove fraud or that defendant was not guilty of fraud.

Even if defendant had shown that his counsel was guilty of some degree of neglect, that neglect is attributed to defendant under the Supreme Court's decision in Link v. Wabash Railroad, 370 U.S. 626 (1962), where the Court upheld the dismissal of a personal injury action for failure to prosecute after plaintiff's attorney failed to appear at a scheduled pretrial conference. The

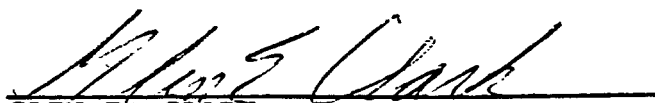
Court said "There is certainly no merit in the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot avoid the consequences of the acts and omissions of this freely selected agent." 370 U.S. at 634. Although Link was a case interpreting Rule 60(b)(1), and although the Court reserved the question of proper disposition of a motion under Rule 60(b)(6) upon an adequate showing, the Court, in reserving the question, "affirmed the position that the conduct of the attorney is attributable to the client." MOORE'S, supra at 370 n. 47. As the Supreme Court noted in Link, "if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." Link, supra at 634 n. 10. Even assuming defendant's claims of malpractice to be true, reviving this lawsuit on the theory that defendant should not be penalized for the omissions of his own attorney would be visiting the sins of defendant's lawyer upon the plaintiffs. Id. Cases permitting relief under Rule 60(b)(6) for gross negligence of counsel may run afoul of the principles announced in Link. MOORE'S supra.

For these reasons,

IT IS ORDERED that defendant's motion for relief is denied.

DATED this 28 day of July, 1983.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Glen E. Clark", is written over a horizontal line.

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE