

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 11-11900
)
SHAUN E. LOWE and) Chapter 13
KAMIL S. LOWE,)
)
Debtors.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**
) **AND ORDER**

This court entered an order finding Cleveland Municipal Court Clerk Earl Turner in contempt of court. The order directed Clerk Turner to pay funds back to the debtor Shaun Lowe and to pay attorney fees to his counsel. Clerk Turner paid the sums due, albeit beyond the deadline set by the court, and did not appeal from that order. Clerk Turner filed a motion to vacate the order.¹ The debtors object.² For the reasons stated below, the motion is denied.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and this decision is within the court's constitutional authority as analyzed by the United States Supreme Court in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

¹ Docket 42, 53.

² Docket 43, 54.

FACTS

The Clerk stated that he did not want an evidentiary hearing³ and the debtors did not request one. Although both state that the facts are undisputed, they offer different facts. As a result, the court limits these findings of fact to those that are truly undisputed:

A. The Order Finding Clerk Turner in Contempt of Court

The debtors filed their bankruptcy case on March 10, 2011, at which time the automatic stay protection of 11 U.S.C. § 362 went into effect as a matter of law. After that, Shaun Lowe's employer responded to a prepetition garnishment by paying \$360.24 to the Cleveland Municipal Court.

On April 22, 2011, the debtors filed a motion for an order on Earl Turner, Clerk of the Cleveland Municipal Court, to appear and show cause why he should not be held in contempt of court for violating the automatic stay by refusing to deliver the garnished funds to the debtors. The debtors served Clerk Turner by mail at his regular business address at the Municipal Court: 1200 Ontario Street, Cleveland, Ohio 44113.⁴ When Clerk Turner did not respond to the motion or appear at the hearing, Judge Baxter—the judicial officer then presiding over this case—granted the motion and ordered Clerk Turner to appear to show cause why he should not be held in contempt for violating the stay.⁵ The Bankruptcy Clerk's office served the order on Clerk Turner by mail, again at his regular business address.⁶

³ Docket 53.

⁴ There is no allegation that Clerk Turner does not maintain his business address at the address used for service of the Bankruptcy Court motions and orders.

⁵ Docket 26.

⁶ *Id.* at 3.

Clerk Turner did not respond to the order or appear at the hearing. On July 5, 2011, Judge Baxter found Clerk Turner in contempt of court and ordered him to turn over the \$360.24 to debtors' counsel and also to pay debtors' counsel \$675.00 in legal fees for filing and prosecuting the motion.⁷ Clerk Turner paid both sums without protest, although he did so a few days after the deadline set by Judge Baxter. Clerk Turner did not appeal and he did not reserve any rights when he complied with the order.

B. Clerk Turner's Motion and Amended Motion to Vacate the Order Finding Him in Contempt

On July 29, 2011, Clerk Turner moved for an order vacating the order finding him in contempt and directing him to pay the garnished funds and the attorney fees. He argued that:

1. "[N]either the Clerk nor anyone else in authority to receive and act upon the motion or the order received them until on or about July 18, 2011, when Debtors' counsel apprised Clerk personnel of the existence of the order finding the Clerk in contempt."⁸

2. Debtors' counsel should have provided the Clerk with a court order from the Bankruptcy Court, or the Chapter 13 Trustee, or the court that issued the judgment underlying the garnishment specifically directing the Clerk to pay the funds to the debtor.

3. The creditor who garnished the funds should have taken steps to reverse the garnishment.

4. Payment of any penalty would be a windfall to the debtors.⁹

This court held a hearing on the motion and the debtors' opposition to it, at which time the court directed Clerk Turner to file an amended motion stating, among other things, the legal

⁷ Docket 40.

⁸ Docket 42 at 2.

⁹ According to the amended motion, Clerk Turner did not turn the funds over by July 15, 2011, which delay triggered an obligation to pay an additional \$300.00 under the order.

basis for his motion. Clerk Turner filed such a motion. In it, he argued the merits of the stay violation and identified the legal issues as “whether the Clerk violated the automatic stay” and whether “the Debtors are entitled both to their legal fees and punitive damages under Bankruptcy Code § 362.” He asked that the money he paid be returned to him.

ISSUE

Whether Clerk Turner established that he is entitled to relief from the judgment entered on July 5, 2011?

DISCUSSION

Clerk Turner did not identify any legal basis for vacating the order.¹⁰ The two most likely possibilities are Federal Rules of Bankruptcy Procedure 9023 and 9024.

A. Federal Rule of Bankruptcy Procedure 9023

This rule states that a party may move to alter or amend a judgment within 14 days after the judgment is entered. Clerk Turner filed his motion outside of this time, and the Court may not extend this deadline. FED. R. BANKR. P. 9006(b)(2).

B. Federal Rule of Bankruptcy Procedure 9024

Federal Civil Rule 60(b), made applicable by Bankruptcy Rule 9024, provides that the court may vacate a final order for these reasons:

- (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

¹⁰ The motion cited Federal Rule of Bankruptcy Procedure 8011 and Local Bankruptcy Rule 9013-1. The former applies to cases on appeal, while the latter sets deadlines for briefing. The amended motion cited Bankruptcy Code § 362.

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) (made applicable by FED. R. BANKR. P. 9024). Rule 60(b) relief “is circumscribed by public policy favoring finality of judgments and termination of litigation.” *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (internal quotation marks and citation omitted). “Accordingly, the party seeking relief under rule 60(b) bears the burden of establishing the grounds for such relief by clear and convincing evidence.” *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 454 (6th Cir. 2008).

C. The Motion

Clerk Turner failed to establish the existence of any ground for relief under Rule 60(b). Instead, his amended motion argued the merits of the contempt order and challenged the earlier determination regarding contempt. While those issues could have been raised on appeal, Clerk Turner did not appeal the contempt order and the time for appeal has expired. *See* FED. R. BANKR. P. 8002(a) (providing that 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”). A Rule 60(b) motion cannot be used as a substitute for an appeal. *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373 (6th Cir. 2007). Because Clerk Turner’s motion failed to establish a basis for relief under Rule 60(b), it is denied.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge