

2015

**Transportation Alliance Bank, a Utah Banking Corporation,
Plaintiff/Appellee, vs. International Confections Company, LLC, an
Ohio Limited Liability Company; Ng Acquisition, LLC, an Ohio
Limited Liability Company; And Michael D. Ryan, and Individual,
Defendants/Appellants**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TRANSPORTATION ALLIANCE BANK,
a Utah banking corporation*,

Plaintiff and Appellee,

vs.

INTERNATIONAL CONFECTIONS
COMPANY, LLC, an Ohio limited liability
company; NG Acquisition, LLC, an Ohio
limited liability company; and MICHAEL
D. RYAN, an individual,

Defendants and Appellants.

BRIEF OF APPELLEE

Appeal No. 20150784

APPEAL FROM THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
THE HON. LAURA S. SCOTT, CIVIL NO. 140907314

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* The caption of this appeal does not accurately reflect the parties hereto. Pursuant to Utah R. App. P. 24(a)(1), a complete list “all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed,” is set forth below.

Mrs. Fields Confections, LLC: Intervenor and appellee.

Arcadia Holdings, LLC: Intervenor and appellee.

Wasatch Peak Holdings, LLC: Intervenor and appellee.

Back Bay Investments: Intervenor and appellee.

Dynamic Confections, Inc.: Intervenor and appellee.

Bank of American Fork: Intervenor and appellee.

Kent W. Goates: Receiver.

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Statement of Jurisdiction

This Court has jurisdiction over this matter pursuant to Utah Code section 78A-4-103, as this case was poured over from the Utah Supreme Court. *See* Utah Code Ann. § 78A-4-103(2)(j).

Issues Presented For Review

1. Whether the trial court correctly denied the rule 60(b)(4) motion of Appellants/Defendants International Confections Company, LLC, NG Acquisition, LLC, and Michael D. Ryan (collectively “Defendants”), seeking relief from judgment on the basis that the judgment was void for lack of subject matter jurisdiction. This issue is reviewed *de novo*. *See Migliore v. Livingston Financial, LLC*, 2015 UT 9, ¶ 25, 347 P.3d 394.

2. Whether the trial court correctly denied Defendants’ rule 60(b)(6) motion seeking relief from judgment on the basis that the judgment was invalid due to the filing of a withdrawal of counsel. “A district court has broad discretion in ruling on a motion to set aside an order of judgment under rule 60(b), and [t]hus, we review a district court’s denial of a 60(b) motion under an abuse of discretion standard.” *Crane-Jenkins v. Mikarose, LLC*, 2015 UT App 270, ¶ 9, 799 Utah Adv. Rep. 7 (quotations and citation omitted).

3. Whether the trial court correctly denied Defendants rule 60(b)(1) motion seeking relief from judgment on the basis of excusable neglect. The standard of review

is the same as issue no. 2, above. *See id.*; *see also Weber v. Mikarose, LLC*, 2015 UT App 130, ¶ 11, 351 P. 3d 1121.

4. Whether this appeal is moot given the nature of this case and Defendants' failure to appeal from the decision below or to move to stay these proceedings. An appeal is moot "when an appellant has failed to obtain a stay of the judgment and the remedy sought is thereafter rendered impossible." *Richards v. Baum*, 914 P.2d 719, 721 (Utah 1996). Moreover, "an appeal will be dismissed as moot 'if an event happening after hearing and decree in circuit court, but before appeal is taken, or pending appeal, makes determination of the appeal unnecessary or renders it clearly impossible for the appellate court to grant effectual relief.'" *Masonry Arts, Inc. v. Mobile Co. Com'n*, 628 So.2d 334, 335 (Ala. 1993) (citation omitted) (cited with approval in *Baum*, 914 P.2d at 721).

Statement of the Case

Defendants' "Statement of the Case" should not be relied upon for consideration of this appeal. Much of this "statement" is argumentative, while Defendants insert a number of unsupported and incorrect assertions as "facts." *See, e.g.,* Appellants' Br., p. 3, ¶ 1; p. 6, (Arg. III); pp. 9-12 (Arg. V). Indeed, the allegations contained in pp. 9-12 are simply taken from an unverified complaint Defendants' filed in an Ohio court, months after the final judgment at issue in this lawsuit was entered. The very first allegation contained therein (that ICC first learned of the relevant purchase agreement when it tried

to pursue post-receivership claims) is not only unsupported, but incorrect, as Defendants concede in the Ohio complaint itself and as ruled by the trial court below. *See* Ruling and Order, p. 9 (R.1459). Accordingly, Defendants’ “Statement of the Case” is not helpful in deciding the discrete issue on appeal.

The only issue on appeal is whether the trial court erred when it denied Defendants’ motion for relief from judgment pursuant to Utah R. Civ. P. 60(b). The facts relevant to that decision are set forth below:

1. On October 21, 2014, Transportation Alliance Bank Inc. (“TAB”) filed a verified complaint (the “Complaint”) commencing this action against ICC and NG (collectively the “Companies”) and their principal, Michael D. Ryan (“Ryan”). The third cause of action stated in the Complaint sought appointment of a receiver under the parties’ loan documents and under Utah R. Civ. P. 66. (*See* R. 1-20.)
2. On October 24, 2014, TAB filed a motion for the immediate appointment of a receiver (the “Receivership Motion”). (*See* R. 238-41.)
3. Defendants appeared generally in the case through their counsel, Mark F. James and the firm of Hatch, James & Dodge, P.C. (collectively, “James”). James filed a notice of appearance as counsel for all three Defendants on November 4, 2014. (*See* R.392.) James filed papers, appeared and participated in hearings, entered into binding stipulations on behalf of Defendants, and represented Defendants generally in this case. (*See, e.g.*, R. 392, 395-96, 422-23, 429-35.)

4. The Court conducted an initial hearing on November 5, 2014 at which: (a) James participated on behalf of Defendants; (b) secured creditors appeared and moved to intervene as parties; (c) counsel stipulated to allow the creditors to intervene; and (d) the Court granted the Receivership Motion, appointed Mr. Kent Goates as the Receiver, and authorized him to begin the receivership “immediately as stated on the record.” (*See* trial court docket; *see also* R. 395-96.)

5. Also on November 5, 2014, the following secured creditors filed a Stipulated Motion for Leave to Intervene pursuant to Utah R. Civ. P. 24(a): Back Bay Investments, L.C.; Dynamic Confections, Inc.; Wasatch Peak Holdings, L.L.C.; Bank of American Fork; and Arcadia Holdings, LLC (collectively, the “Intervenors”). The motion to intervene was stipulated to, signed and endorsed by James as counsel for the Defendants, and the Court entered its Order Granting Motion to Intervene (the “Intervention Order”) that same day. (*See* R. 429-35.)

6. Also on November 5, 2014, the Court entered its Interim Order Approving the Immediate Appointment of Receiver (“Interim Order”). (*See id.*)

7. After certain objections were filed to the form of the Interim Order, including an objection by Defendants (*see* R. 525-26), the Court conducted a hearing on November 13, 2014 at which James again appeared as counsel for Defendants. The parties made arguments on the record and at the conclusion of the hearing the Court signed and entered a revised Order Approving the Immediate Appointment of Receiver

(the “Receivership Order”) (*see* R.662-677). Among other things, the Receivership Order provided as follows:

Receiver, as an officer of this Court, shall immediately have and take possession, custody, and control of the business and all of the assets of both Maxfield and NG (together, the “Companies”) including, without limitation, the Collateral (as defined in the *Verified Complaint*), all real property, improvements, leases, equipment, fixtures, rents, accounts, inventory, and other personal property (the “Assets”). (R.664.)

8. On November 24, 2014, eleven days after entry of the Receivership Order, TAB filed a document purporting to be a Notice of Voluntary Dismissal pursuant to Utah R. Civ. P. 41(a)(1) (the “Notice of Dismissal”) (R.720-22). However, as noted above, the Intervenor already had been granted permission to intervene as parties in the case pursuant to Rule 24(a) and the Receiver had already been appointed and charged with duties pursuant to Rule 66. (*See* R.429-35, 662-677.)

9. On the next day, November 25, 2014, two of the Intervenor filed objections to the Notice of Dismissal asserting that voluntary dismissal pursuant to rule 41 was improper at the current stage of the proceedings. (*See* R.726-40.)

10. On November 26, 2014, Defendants filed a reply (the “Reply”) to the Intervenor’s objections to the Notice of Dismissal. The Reply raised arguments substantially similar to the subject matter jurisdiction arguments Defendants now raise again in the Rule 60(b) Motion, including assertions that upon TAB’s filing of the Notice of Dismissal the entire case was automatically dismissed by operation of law and that the Court was “deprived of jurisdiction by operation of law.” (*See* R.750-54.)

11. On December 3, 2014, the Court conducted a hearing on the dispute arising from the Notice of Dismissal, Intervenor's objections thereto, and the Reply of Defendants. The subject matter jurisdiction arguments raised by Defendants were squarely before the Court for determination. James participated in the hearing on behalf of Defendants. At the conclusion of the hearing, the Court ruled that based on agreement of the parties, the Intervenor's were substituted in as the plaintiffs as to the third cause of action in the Complaint, that all other causes of action would be dismissed, that the case would remain pending (notwithstanding Defendants' subject matter jurisdiction arguments), and that the Receiver was authorized to sell ICC's and NG's assets as stated on the record. (*See* R.1482-1495.)

12. The Court's order memorializing its rulings made at the December 3, 2014 hearing was entered on December 11, 2014 (the "Amended Receivership Order") (R.779-82). The Amended Receivership Order provided, *inter alia*, as follows:

Receiver is hereby granted authority from the Court to market and sell the Assets, as defined in the Receivership Order, or any portion thereof, and, in his business judgment, to hire the appropriate professionals to assist with the same, but subject to (a) prior notice to all parties to this action, through their counsel of record, who may object to any such proposed sale, and (b) as to any proposed disposition as to which an objection is filed with the Court, further order from the Court approving Receiver's decision to sell the Assets or any part thereof.

(R.781.) Defendants approved the Amended Receivership Order as to form prior to entry (R.782), did not appeal the Amended Receivership Order and did not seek a stay.

13. The Defendants were fully aware, as indicated in statements made by Intervenor in their filed objections to the Notice of Dismissal and by Defendants in the Reply, that the proposed asset purchaser (BBX) was insisting upon a very tight timeline for negotiating an asset purchase agreement with the Receiver and for closing on the proposed purchase of the Companies' assets. In fact, in Bank of American Fork's objection to the Notice of Dismissal, filed November 25, 2014, Bank of American Fork indicated that upon Court approval, the sale could take place "within a relatively short time, perhaps even a few weeks" from November 25, 2014. Thus, all parties in interest, including Defendants, would have known by no later than the time of the Court's ruling on December 3, 2014, that the Receiver was likely going to seek Court approval of a proposed sale to a specific purchaser by the middle of December. (R.726-54.)

14. Ultimately, Mrs. Fields offered to purchase the assets for more than the BBX offer, and on December 17, 2014, Mrs. Fields and the Receiver concluded their extensive negotiations concerning the terms and conditions of Mrs. Fields' proposed purchase. Mrs. Fields and the Receiver executed their Asset Purchase Agreement (the "APA") that same day. (*See* R.796-933.) This was not a simple purchase of a single item, but included equipment and machinery, leases, perishable inventories, accounts receivable and intangible property. *See id.*

15. On December 18, 2014, James filed a Notice of Withdrawal purporting to withdraw as counsel for the Defendants, but the Notice of Withdrawal failed to "include

the address of the attorney's client and a statement that no motion is pending and no hearing or trial has been set," as is required by Utah R. Civ. P. 74(a). (R.787-88.)

Regardless, the trial court determined that "James continued to receive electronic notice of all pending motions and hearings as required by the rules" and that "there is no evidence that Defendants did not receive actual notice of" the subsequent motion, hearing and order (R.1459).

16. Also on December 18, 2014, the Receiver filed papers seeking approval of the proposed sale to Mrs. Fields, including an Expedited Motion for Order on Sale of Receivership Assets and Related Issues (the "Sale Motion"), a Memorandum in Support of the Sale Motion, and a Notice of Hearing and Objection Deadline relating to the Sale Motion. These papers were served upon all counsel of record in the case, including James as counsel for the Defendants. (*See* R.792-889.) The papers clearly specified that "[t]he 'Assets' being sold include nearly all of the assets of Maxfield [ICC] and NG, including but not limited to all inventories, accounts receivable, intangible property, intellectual property, equipment, goodwill and going concern value." (R.797.)

17. On December 22, 2014, the Receiver filed a proposed order granting the Sale Motion and approving the APA, along with exhibits that included a full copy of the fully executed APA (with its exhibits). The proposed order and APA were served upon all counsel of record in the case, including James as counsel for the Defendants. (*See* R.917-24.)

18. On December 23, 2014, the Court conducted a hearing as scheduled on the Sale Motion, received evidence and heard arguments and statements from the parties, made a ruling granting the Sale Motion and approving the APA, and then signed and entered the proposed order at the conclusion of the hearing (the “Sale Order”). (*See* R.926-36; 1496-1519.)

19. The Sale Order contains specific findings and conclusions, including but not limited to the following: (a) the APA was “the highest and best offer” received for the assets of NG and ICC; and (b) Mrs. Fields “acted in good faith and at arm’s length” in entering into the APA. (*See* R.926-36.)

20. In reliance on the Sale Order, Mrs. Fields paid the \$2.15 million purchase price, the Receiver distributed the funds to Defendants’ creditors, the Receiver effectuated the transfer of property contemplated by the Sale Order and Mrs. Fields began operating the purchased assets. *See* Receiver’s Final Report & Accounting, p. 4 (R.948). The receivership was closed on January 23, 2015 (R.1009-13).

21. On March 9, 2015, ICC filed an improper complaint (the “Improper Complaint”) against Mrs. Fields and an affiliate in the U.S. District Court for the Southern District of Ohio asserting a claim that already had been sold to Mrs. Fields pursuant to the Sale Order. *See* Improper Complaint (R.1039-50).

22. Defendants had actual knowledge, before ICC filed the Improper Complaint, that the sale of ICC’s and NG’s assets to Mrs. Fields in the receivership case

had been completed. *See id.*, ¶ 47 (acknowledging that “Mrs. Fields Confections purchased International Confections’ assets in the receivership sale”).

23. ICC then dismissed the Improper Complaint and Defendants filed their motion for relief from judgment in this case on March 23, 2015. (*See* R.1016-33.) Defendants, in essence, sought to keep the benefit of the \$2,150,000 they received in the form of payoff of their debt, while avoiding the protections afforded Mrs. Fields in exchange for those payments. *See id.*; *see also* Defs.’ Reply Br. (R.1184-85).

24. On April 6, 2015, Mrs. Fields moved to intervene in this action (R.1105-15), which motion was unopposed and granted on April 15, 2015 (*See* R.1205-08).

25. Mrs. Fields filed a memorandum in opposition to Defendant’s motion for relief from judgment on April 6, 2015. (*See* R.1125-45.)

26. The trial court heard oral argument on Defendants’ motion on July 1, 2015. (*See* R.1520-94.)

27. The trial court issued its Ruling and Order on August 21, 2015.

Summary of Arguments

Appellants fail to show any error committed by the trial court in denying Appellants' rule 60(b)(4) motion. Res judicata applies to bar a post-judgment challenge in the same proceeding pursuant to rule 60(b)(4). Here, when the issue was raised below, the trial court determined (and all parties agreed) it had subject matter jurisdiction. This decision was not appealed and cannot be attacked pursuant to a rule 60(b) motion. Further, even if Defendants could somehow bypass the dispositive issue of finality, they cannot show that the trial court's ruling was otherwise erroneous given Defendants' stipulation to the intervention of other parties and due to the trial court's post-judgment ruling that it did, in fact have subject matter jurisdiction at all relevant times.

Appellants fail to show the trial court erred in denying Appellants' rule 60(b)(6) motion. Rulings on a motion under rule 60(b)(6) are reviewed under an abuse of discretion standard of review, a showing Defendants fail to make. The trial court provided three independent bases for its decision regarding rule 74 and the effect of James' Notice of Withdrawal. Defendants respond to only one of these bases, and even then with a response that is insufficient to show abuse of discretion.

Third, Defendants argue that the trial court abused its discretion when it denied their motion for relief under rule 60(b)(1) on the basis of "excusable neglect." Defendants again fail to make the required showing. Defendants merely restate their unsupported version of the facts and conclude with an assertion that the trial court "abused its

discretion.” This is insufficient to overturn the broad discretion afforded a trial court under rule 60(b), particularly where, as here, the trial court examined all of the facts and from that examination determined Defendants failed to exercise the due diligence required to show excusable neglect.

Finally, as argued in Mrs. Fields’ Motion for Summary Disposition, this appeal is moot. The property at the heart of this case was sold long ago to a good-faith purchaser for the highest and best price available. Defendants not only failed to appeal from the Sale Order at issue, but failed to even attempt to stay proceedings at any point thereafter. Simply too much time and too many events have passed for this transaction to be undone, making this appeal moot.

In any event, because Appellants have failed to show any error in the trial court’s ruling, that ruling should be affirmed.

ARGUMENT

I. Rule 60(b) Standard

Review of a trial court's rule 60(b) order “is limited in scope because such an appeal must only address the propriety of the denial or grant of relief, not the correctness of the underlying judgment.” *Weber v. Mikarose, LLC*, 2015 UT App 130, ¶ 11, 351 P. 3d 121.

[E]ven when an order on a Rule 60(b) motion is appealable, the appeal is narrow in scope. An appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief. The appeal does not, at least in most cases, reach the merits of the underlying judgment from which relief was sought. Appellate review of Rule 60(b) orders must be narrowed in this

manner lest Rule 60(b) become a substitute for timely appeals. An inquiry into the merits of the underlying judgment or order must be the subject of a direct appeal from that judgment or order.

Franklin Covey Client Sales v. Melvin, 2000 UT App 110, ¶ 19, 2 P. 3d 451 (quoting 12 James Wm. Moore et al., *Moore's Federal Practice* § 60.68[3] (3d ed.1999)).

This limited scope of review applies equally to a motion under rule 60(b)(4). *See, e.g., Migliore v. Livingston Fin., LLC*, 2015 UT 9, ¶ 26, 347 P.3d 394 (“we narrowly construe the concept of a void judgment”); *Wendt v. Leonard*, 431 F.3d 410 (4th Cir. 2005) (same).

II. Defendants Fail to Show Any Error Regarding the Trial Court’s Denial of Defendants’ Rule 60(b)(4) Motion.

Defendants moved the trial court to void the Sale Order based entirely on the mere filing of the Notice of Dismissal. The trial court denied this motion on three independent bases:

1. The issue of subject matter jurisdiction was specifically addressed and resolved at the hearing on December 3, 2014 and Defendants failed to appeal.
2. The Notice of Dismissal did not divest the Court of subject matter jurisdiction given the status of the proceedings and the stipulated entry of other parties.
3. Even assuming that the Notice of Dismissal implicates subject matter jurisdiction, the court had subject matter jurisdiction and Defendants consented and waived any right to object to the Court proceeding notwithstanding the Notice of Dismissal.

See Ruling and Order, pp. 6-8.

Any one of these bases is sufficient to sustain the trial court's ruling.

a. Subject Matter Jurisdiction Was Previously Raised and Determined.

Defendants' rule 60(b)(4) motion sought relief from a judgment Defendants argued was void due to the absence of subject matter jurisdiction. This argument cannot succeed because the issue was raised and decided, and Defendants failed to appeal this decision. Now that the issue is final, it is not subject to further attack pursuant to a rule 60(b) motion.

Every court has jurisdiction to determine its own jurisdiction. *See U.S. v. Hahn*, 359 F.3d 1315, 1334 (10th Cir. 2004).¹ That decision, once made, "is res judicata in a collateral attack." *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940); *see also Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9 (1982) ("It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal."); *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 152 (2009) ("[e]ven subject-matter jurisdiction ... may not be attacked collaterally") (citation omitted); *Sbkc Serv. Corp. v. 1111 Prospect*, 1998 U.S. Dist. Lexis 20471 (D. Kan. Oct. 30, 1998) (same) (Add. Ex.1).

Res judicata also applies to bar a post-appeal challenge in the same proceeding pursuant to rule 60(b)(4). *See Sbkc Serv. Corp., id. at **5-12; see also Hunter v.*

¹ The Utah Supreme Court "recognizes the persuasiveness of federal interpretations when state and federal rules are similar and few Utah cases deal with the rule in question." *Barton v. Utah Transit Authority*, 872 P.2d 1036, 1039 n.5 (Utah 1994).

Underwood, 362 F.3d 468, 475 (8th Cir.2004) ("Where a party has failed to appeal an adverse judgment, [a] Rule 60(b)(4) motion will not succeed merely because the same argument would have been successful on direct appeal."); *KBR, Inc. v. Chevedden*, 2013 U.S. Dist. LEXIS 97905 (S.D. Tex. July 12, 2013) (Add. Ex. 2), and cases cited therein (holding that rule 60(b)(4) motion was improper collateral attack on subject matter jurisdiction); *Missouri Pacific R.R. Co. v. Cartwright Transfer & Storage, Inc.*, 1992 U.S. App. LEXIS 14538, *4-5 (10th Cir. June 16, 1992); *Nemaizer v. Baker*, 793 F.2d 58, 64-65 (2d Cir. 1986) (because appellees did not move to remand or challenge district court's exercise of jurisdiction on appeal, "they are now barred by principles of res judicata and the interest in finality of judgments from mounting a [Rule 60(b)(4)] collateral attack on a prior judgment in the present action."); *Honneus v. Donovan*, 691 F.2d 1, 2-3 (1st Cir. 1982) (federal court's erroneous assumption of diversity jurisdiction does not render judgment void under Rule 60(b)(4)).

Here, the issue of subject matter jurisdiction and the effect of a rule 41 voluntary dismissal on such jurisdiction was squarely before the trial court. Immediately after the TAB's Notice of Dismissal was filed, Intervenor's each filed objections thereto. Defendants filed a response to these objections with arguments similar to those subsequently raised in their rule 60(b)(4) motion. The matter was heard by the Court on December 3. At that hearing, the parties and the court agreed that the voluntary dismissal as to all parties was improper, that the case would and could proceed, that the

intervenors were substituted as plaintiffs, and that the receivership would continue. TAB's counsel stipulated to the same, agreeing that the dismissal of TAB alone was appropriate, with the remaining parties and their claim against Defendants to be decided. The trial court effectuated these decisions pursuant to the Amended Receivership Order and, twenty days later, entered the Sale Order, its final order in the underlying case.

The Amended Receivership Order, by its terms, evidenced that the trial court and the parties were in agreement that the dismissal was ineffective and that the court did not lose subject matter jurisdiction. Even if there is no discrete finding as to this point, it does not matter, because the law provides that (absent any specific ruling to the contrary) the trial court is deemed to have ruled on the issue of subject matter jurisdiction in favor thereof. *See Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938) ("Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter."); *Sbkc Serv. Corp.*, 1998 U.S. Dist. Lexis 20471, *7; *Bryan v. Peters (In re Bryan)*, 2015 U.S. Dist. Lexis 102474, * 16 (D. Colo. Aug. 5, 2015 (Add. Ex. 3)). As described by the Utah Supreme Court:

"The general rule precluding the relitigation of material facts or questions which were in issue and adjudicated in a former action is applicable to *all matters* essentially connected with the subject matter of the litigation. This application of the general rule extends to questions necessarily involved in an issue . . . although no specific finding may have been made in reference to that matter, and although such matters were not directly referred to in the pleadings."

Macris & Assoc., Inc. v. Neways, Inc., 2000 UT 93, ¶ 40, 16 P.3d 1214 (quoting 46 Am.

Jur. 2d *Judgments* § 545)). This applies whether the court itself decided the matter or it was agreed to by stipulation. *See id.*, ¶ 43.

Aside from the res judicata effect of the Sale Order, there is the more general principal that the “concept of a void judgment is extremely limited.” *Kansas City S. Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 n. 5 (8th Cir.1980). Only when the jurisdictional error is “‘egregious’ will courts treat the judgment as void.” *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir.2000); *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1346 (10th Cir. 2000). The reason for this is, like the principal of res judicata, the “interest of finality.” *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 225 (10th Cir. 1979); *Brimhall v. Mecham*, 494 P.2d 525, 526 (Utah 1972).

Even if the trial court had erred when it determined that it had jurisdiction, rule 60(b)(4) cannot be used to overturn this decision. *See Gschwind v. Cessna Aircraft Co.*, 232 F.3d at 1346. This is because only a “clear usurpation of power” can form the basis for such a motion, and “a court does not usurp its power when it erroneously exercises jurisdiction.” *Id.* “Error in interpreting a statutory grant of jurisdiction” is simply “not equivalent to acting with total want of jurisdiction.” *Id.* *See also Wendt*, 431 F.3d at 413 (“[W]hen deciding whether an order is void under Rule 60(b)(4) for lack of subject matter jurisdiction, courts must look for the rare instance of a clear usurpation of power.”); *Hunter v. Underwood*, 362 F.3d at 475 (“A Rule 60(b)(4) motion to void the judgment for lack of subject matter jurisdiction will succeed only if the absence of jurisdiction was so glaring as to constitute

a total want of jurisdiction or a plain usurpation of power so as to render the judgment void from its inception."); *Kansas City So. Ry. Co.*, 624 F.2d 822, 825 (erroneous assumption of jurisdiction does not render judgment void under Rule 60(b)(4)). So long as there is even an "arguable basis" for jurisdiction (to which all parties below agreed), courts do not grant relief under rule 60(b)(4). *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 264 (2010).

Defendants failed to appeal the trial court's jurisdictional ruling (instead stipulating thereto). Under the law set forth above, the failure to appeal is decisive as to the matter now before the Court; an objection to the trial court's decision via a rule 60(b) motion does not provide an avenue for relief in this case. Accordingly, the trial court's denial of that motion should be affirmed.

b. The Notice of Dismissal Was Improper and Insufficient to Dismiss this Case.

Even if Defendants could somehow bypass the dispositive issue of finality, they cannot show that the trial court's ruling was otherwise erroneous.

The trial court held that the Notice of Dismissal had no effect on its subject matter jurisdiction for two reasons. First, the trial court ruled that, given the entry of various orders, including a stipulated motion to intervene granting "intervention of right" and the appointment of a receiver, TAB did not have authority to dismiss the entire case without order of the Court. Defendants fail to show any error in this ruling.

Before TAB filed the Notice of Dismissal, the parties had already stipulated to the intervention of five other creditors. The Order Granting Motion to Intervene was entered more than three weeks prior to the filing of the Notice of Dismissal. The Order appointing a receiver was entered two weeks before the alleged dismissal.

The plain language of Rule 41(a)(1) (“the plaintiff” may file a notice of voluntary dismissal), does not authorize one plaintiff acting alone to dismiss all claims of all parties. Defendants have cited no cases in which one plaintiff succeeded in automatically dismissing claims of other intervenors under Rule 41(a)(1) without their consent. Instead, Defendants argue that the manner in which the parties intervened was improper under rule 24. This argument fails for two reasons.

First, Defendants did not appeal from the trial court’s order granting intervention. Accordingly, the issue of whether the trial court properly allowed for intervention is not before this Court. *See Weber v. Mikarose, LLC*, 2015 UT App 130, ¶ 11; *Franklin Covey Client Sales, Inc. v. Melvin*, 2000 UT App 110, ¶¶ 19, 23, 2 P.3d 451; *see also Wendt v. Leonard*, 431 F.3d at 412 (courts “must be mindful that Rule 60(b)(4) is not a substitute for a timely appeal.”).

Second, Defendants *stipulated* to the intervention and therefore waived any defect they now complain of. While a party may not be able to waive an appropriate challenge to subject matter jurisdiction, it can certainly waive the right to object to intervention. *See In re E.H.*, 2006 UT 36, ¶ 52, 137 P.3d 809 (holding that standing and the right to

intervene may be stipulated); *see also Royal Resources, Inc. v. Gibraltar Fin. Corp.*, 603 P.2d 793, 798 (Utah 1979) (stipulation waives rights otherwise available).

Under rule 41, unless all parties consent to dismissal, voluntary dismissal as to those parties is improper. Where there are multiple plaintiffs, each one is deemed to have a separate and distinct cause of action and a voluntary dismissal by less than all plaintiffs can, at most, dismiss only the consenting plaintiffs' claims. *See Miller v. Stewart*, 43 F.R.D. 409, 412-13 (E.D. Ill. 1967); *Wheeler v. American Home Prod. Corp.*, 582 F.2d 891, 896 (5th Cir. 1977) (holding that Rule 41(a)(1) does not authorize dismissal of the entire case by the original plaintiff where intervening plaintiffs did not consent); *University of South Alabama v. American Tobacco Co.*, 178 F.3d 405, 409 (11th Cir. 1999) (holding that attempted notice of voluntary dismissal under Rule 41(a)(1) was ineffective where "it was by no means clear that the proper plaintiff" filed the notice).

While Defendants argue that the intervenors were not properly labelled as "plaintiffs", this ignores the trial court's ruling that they were "parties for all purposes." As intervening creditors of the Defendants, they could only be deemed plaintiffs. This was verified by the Court in its Amended Receivership Order ("The intervening creditors in this case are substituted as plaintiffs under the Third Cause of Action") (R.780). TAB's Notice of Dismissal (even ignoring the fact that all parties subsequently agreed to the withdrawal of such notice) was therefore improper and ineffective to dismiss the entire case. *See, e.g., Supernova Media, Inc. v. Pia Anderson Dorius Reynard & Moss*,

2103 UT 7, ¶ 54, 297 P.3d 559 (intervention precludes voluntary dismissal under rule 41(a)(2)).

The second ruling made by the trial court in this regard related to the broad nature of subject matter jurisdiction:

[T]here is no question that the Court had subject matter over this case when it was filed. Indeed, the alleged lack of subject matter jurisdiction is premised on a technical or procedural irregularity, not the Court's general authority to decide cases within a class. Assuming without deciding that the Notice of Dismissal implicates subject matter jurisdiction, Defendants could consent to, or waive their right to object to, the Court proceeding notwithstanding the Notice of Dismissal. *See [Johnson v. Johnson, 2010 UT 28]* at ¶ 11 (citing with approval holding in *Donovan v. Templeton, 1997 Ohio App. LEXIS 2617 at *7* (Ohio Ct. App., May 9, 1997) that technical or procedural irregularity is waived if not promptly raised). Based on their counsel's representations at the December 3rd hearing and his approval of the Order on December 3, 2014 Hearing, Defendants consented and waived any right to object to the Court proceeding notwithstanding the Notice of Dismissal.

Ruling and Order, p. 7.

Defendants attack this ruling on the basis of the general proposition that a party cannot waive subject matter jurisdiction. However, citation to this principal is insufficient to warrant reversal here.

In *Johnson v. Johnson*, the Utah Supreme Court made clear that subject matter jurisdiction is simply “the authority of the court to decide the case,” and that subject matter for a district court existed “in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.” 2010 UT 28, ¶ 8, 234 P.3d 1100 (citing *Chen v. Stewart, 2004 UT 82, 38, 100 P.3d 1177*); *see also* Utah Code Ann §

78A-5-102(1) (“The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.”). Most cases that address the issue of subject matter jurisdiction “have considered the authority of the court to adjudicate a class of cases, rather than the specifics of an individual case.” 2010 UT 28, ¶ 10. At issue in *Johnson* was a divorce case between parties who had not been married. Despite the existence of a statutory requirement of marriage before a court could issue a divorce decree, the Court held that, because the trial court could hear divorce cases generally, it had “subject matter” jurisdiction.

A similar decision was rendered in *Chen*. There, defendants (like Defendants here) argued that, because subject matter jurisdiction cannot be waived and could be raised at any time, the trial court erred when it ruled that Ms. Chen had waived her right to object to appointment of a special master. *See Chen*, 2004 UT 82, ¶¶ 33-41. The *Chen* Court, like the *Johnson* Court, noted that the trial court had subject matter jurisdiction over the case pursuant to the predecessor statute to § 78A-5-102(1). The Court also held that a party can waive an objection to the appointment of a special master, or a receiver, and that this did not relate to issues of subject matter jurisdiction, but equitable powers of the court. *See id.* and ¶ 48.

Here, Defendants do not (and cannot) argue that the trial court had no power to hear the underlying case. Indeed, TAB’s initial complaint in this case made clear that the court “has subject matter jurisdiction over this action pursuant to Utah Code Ann §

78A-5-102(1).” R 2, ¶ 6. Because Defendants fail to show that the Notice of Dismissal somehow destroyed the trial court’s general subject matter jurisdiction, and failed to show why the rulings in *Johnson* and *Chen* do not apply equally here, they fail to provide a basis to disturb the trial court’s ruling.

Because Defendants fail to provide a basis for overturning the three separate bases provided by the trial court, Defendants’ appeal of the order denying their rule 60(b)(4) motion must fail.

III. Defendants Fail to Show Abuse of Discretion Regarding the Trial Court’s Denial of Defendants’ Rule 60(b)(6) Motion.

Defendants argued below that, by virtue of the trial court’s failure to require compliance with Utah R. Civ. P. 74, the Sale Order should be set aside pursuant to the “catchall” provision of rule 60(b)(6). (R. 1027). Rulings on a motion under rule 60(b)(6) are reviewed under an abuse of discretion standard of review. *Bodell Constr. Co. v. Robbins*, 2014 UT App 203, ¶ 5. Defendants fail to show an abuse of discretion.

The trial court provided three separate bases for its decision regarding rule 74.² First, the trial court ruled that the Notice of Withdrawal was “defective, and therefore ineffective, because it did not include Defendants’ address(es).” (R.1458.) “This is not a mere technicality because the address requirement is directly tied to the other parties’ ability to comply with the notice to appear or appoint requirement and to communicate with Defendants during this critical period of time.” *Id.*

In response, Defendants argue that failure to include one's client on a notice of withdrawal is a "technical deficiency," and that the trial court should have overlooked this deficiency. Defendants cite no authority to support this assertion. Instead, the argument appears to be that "the adverse parties" could and should have contacted Defendants, despite the fact that Defendants' own counsel was (without dispute) receiving notice of all relevant pleadings and hearings (as James was still listed as counsel for Defendants on the court's electronic case management system), up until and including the final judgment entered in this case. App. Br., p. 33. This argument is without legal support and Defendants otherwise fail to show an abuse of discretion.

Second, the trial court held that Defendants' counsel had notice of all pleadings and that Defendants had actual notice of the Sale Order no later than January 2015 (R.1459). Because no action was taken despite such notice, the trial court held that Defendants "waived any rule 74 objection." *Id.* Defendants do not address, let alone dispute, this ruling or the issue of waiver, and therefore fail to show an abuse of discretion. In any event, waiver is expressly anticipated and allowed for in rule 74. *See* Utah R. Civ. P. 74(c); *Migliore v. Migliore*, 2008 UT App 208, ¶ 19, 186 P.3d 973.

The trial court provided a third reason to support its refusal to set aside the Sale Order when it held that refusal to do so was "not inconsistent with substantial justice:"

Defendants did not exercise sufficient diligence in connection with these proceedings and they received substantial benefits from the Asset

² In its Ruling and Order, the trial court lumped its review of this issue into its discussion about void judgments. However, the motion was made pursuant to rule 60(b)(6).

Purchase Agreement. As Defendants appear to concede given the limited relief they are requesting, the Court cannot undo the transaction. *See* Rule 61 of the Utah Rules of Civil Procedure (no error or defect in any ruling or order or in anything done or omitted by the court is ground for disturbing a judgment or order unless refusal to take such action appears to the court inconsistent with substantial justice).

(R.1455.) Once again, Defendants do not address this ruling, thereby failing to show an abuse of discretion. In any event, such a ruling is consistent with rule 74, which allows a court to proceed if it so chooses; going forward was “otherwise ordered by the court.” *See* Utah R. Civ. P. 74(c); Sale Order at pp. 1-2, and ¶ 4 (holding that, despite the trial court’s awareness of the withdrawal of counsel, there was sufficient notice under the “facts of this case”).

Ultimately, it was not the trial court or the parties who failed to comply with rule 74, but Defendants. The parties agree that Defendants’ counsel failed to include any contact information for Defendants as required by rule 74(a). Defendants cannot complain of lack of notice when the information needed to give notice was absent from the required pleading.

Further, there is no question that James, as counsel for the Defendants, received notice on and after December 18, 2014 of (i) the sale motion; (ii) the notice providing an opportunity to object to the sale, an opportunity to submit higher offers, and an opportunity to appear at the sale hearing; (iii) the proposed Sale Order, which included a fully executed copy of the APA with exhibits; and (iv) the Sale Order as entered by the Court on December 23, 2014. Defendants certainly knew, before James attempted to

withdraw, that the Amended Receiver Order had been entered (they stipulated to it) and that the assets of ICC and NG were about to be sold by the Receiver on a very short timeline (R.779-82). Nevertheless, Defendants chose not to actively participate in the case on and after December 18, 2014. These facts support the trial court's third ruling, and Defendants fail to show any abuse of discretion.

Last, to the extent Defendants instead now seek to alter their argument to request a ruling that the trial court's decision regarding rule 74 is "void" under rule 60(b)(4), this specific argument was not raised below. In any event, Defendants cite no legal authority to support this argument and otherwise fail to show that the trial court's ruling regarding rule 74 was erroneous.

IV. Defendants Fail to Show Abuse of Discretion Regarding the Trial Court's Denial of Defendants' Rule 60(b)(1) Motion.

Defendants argue that the trial court abused its discretion when it denied their motion for relief under rule 60(b)(1) on the basis of "excusable neglect." Once again, Defendants fail to make the required showing. Defendants merely restate their unsupported version of the facts and conclude with an assertion that the trial court "abused its discretion." This is insufficient to overturn the broad discretion afforded a trial court under rule 60(b).

"We grant broad discretion to trial court's rule 60(b) rulings because most are equitable in nature, saturated with facts, and call upon judges to apply fundamental principles of fairness that do not easily lend themselves to appellate review." *Fisher v.*

Bybee, 2004 UT 92, ¶ 7, 104 P.3d 1198 (citing *Oseguera v. Farmers Ins. Exch.*, 2003 UT App 46, ¶¶ 9-10, 68 P.3d 1008. Accordingly, “the outcome of rule 60(b) motions are rarely vulnerable to attack.” *Id.*

Here, the trial court went over the facts of the case in detail, providing a number of reasons why Defendants ultimately failed to show excusable neglect. “Excusable neglect” is defined under Utah law as “the exercise of due diligence by a reasonably prudent person under similar circumstances.” *Mini Spas v. Industrial Comm’n*, 733 P.2d 130, 132 (Utah 1987). The trial court specifically determined that “Defendants have not shown that they exercised sufficient diligence....” (R.1455.) The bases for this ruling included findings that: (1) during the relevant time period, Defendants knew a receiver had been appointed, that an offer had been made and that timing was an issue; (2) there was no evidence that Defendants did not have actual notice of all relevant proceedings; and (3) all of the relevant pleadings and notices were served on James. *See id.*

Further, the trial court addressed Defendants’ complaint (reasserted on appeal) regarding the timing of relevant hearings:

Defendants’ arguments that they had only 5 days to respond to the Expedited Motion and that Mr. Ryan could not have appeared on behalf of ICC and NG are likewise unpersuasive. While Mr. Ryan could not have represented ICC and NG at the hearing on December 23, 2014, there is nothing that prevented him from attending the hearing and alerting the Court to Defendants’ concerns about the proposed sale to Mrs. Fields and/or the short time period for reviewing and responding to the Expedited Motion. It appears Defendants did not have any objection to the sale of the assets to Mrs. Fields until they were confronted with the release language during the Ohio litigation filed months later. This, along with Defendants’ acceptance of

the beneficial aspects of the sale, does not support a finding that they acted in good faith. (R.1455-56.)

Accordingly, the trial court's determination that Defendants failed to show excusable neglect were reasonably supported by the facts of the case. This is sufficient to sustain the trial court's ruling under an abuse of discretion standard, and Defendants fail to show otherwise.

V. This Appeal Should be Dismissed for Mootness.

An appeal is moot "when an appellant has failed to obtain a stay of the judgment and the remedy sought is thereafter rendered impossible." *Richards v. Baum*, 914 P.2d 719, 721 (Utah 1996). Moreover, "an appeal will be dismissed as moot if an event happening after hearing and decree in circuit court, but before appeal is taken, or pending appeal, makes determination of the appeal unnecessary or renders it clearly impossible for the appellate court to grant effectual relief." *Masonry Arts, Inc. v. Mobile Co. Com'n*, 628 So.2d 334, 335 (Ala. 1993) (quotations and citation omitted) (cited with approval in *Baum*, 914 P.2d at 721). See also *Eighth District Electrical Pension Fund v. Westland Construction, Inc.*, 2013 UT App 273, ¶ 2, 316 P.3d 992 ("mootness can be determined by facts that change or develop as the suit is pending").

The Court should dismiss this appeal because the relief Defendants seek is not possible. Permitting Defendants to "object" now to a good-faith sale completed in 2014 would be a pointless and futile exercise, as there is no manner in which this Court can "undo" the critical aspects of the sale (i.e., payment of over two million dollars by Mrs.

Fields, transfer of clear title to the assets to Mrs. Fields, distribution of the sale proceeds to secured creditors, and incorporation of the assets into Mrs. Fields' business operations for nearly a year and a half now).

In the Sale Order, the trial court found and concluded, *inter alia*, that Mrs. Fields made the highest and best offer for the assets of ICC and NG, that the Receiver complied with all requirements of the receivership orders, that Mrs. Fields acted in good faith and at arm's length in negotiating the Purchase Agreement, and that the Purchase Agreement required the Receiver to sell the assets to Mrs. Fields free and clear of all "Encumbrances" (as broadly defined in the Purchase Agreement to include all liens, taxes, claims, charges, interests or encumbrances). *See* Sale Order , ¶¶ 2, 4-6.

Defendants have not challenged, and have no basis to challenge, these critical factual findings.

The Sale Order also provided, *inter alia*: (i) that the Receiver was authorized to sell the assets free and clear of all encumbrances, (ii) that upon closing the assets would be "fully transferred to and vested in" Mrs. Fields, (iii) that Mrs. Fields "is afforded all protections available to good faith purchasers of Assets under applicable law and the Receivership Orders," (iv) that the transfer of assets from the Receiver to Mrs. Fields would be "legal, valid, and effective transfer" of the assets and Mrs. Fields would have "all right, title, and interest" in and to the assets, and (v) that the Receiver was "authorized to execute and deliver, and empowered fully to perform under, consummate,

and implement” the asset sale. *See id.*, ¶¶ 14-18. Again, Defendants do not and cannot challenge these findings.

Rather than challenge any of the particular findings, conclusions or ordering provisions set forth above, Defendants argue they should have been allowed to object to one provision contained in the Purchase Agreement, to wit, the provision relating to release of claims. Defendants do not allege that the remaining terms of the Sale Order are unfair or should be set aside. However, in order to grant Defendants any possible relief in this appeal, the Court would have to undo the entire transaction authorized by the Sale Order. The Receiver would have to be reinstated, all funds would have to be returned to the Receiver, and all portions of the Purchase Agreement and the Sale Order would have to be rescinded. Defendants provide no authority, and none exists, that would entitle Defendants to have, or allow this Court to order, such a drastic form of relief—even if such relief were somehow possible.

This is particularly true in this case, where Defendants did not appeal the Sale Order and failed to obtain a stay at any time to prevent effectuation of the Sale Order. Defendants’ failure to seek and obtain a stay at any point along the way renders the appeal moot.

In *Baum*, the appellants sought specific performance of a real estate contract and a decree quieting title to the property. "Because of their failure to obtain a stay pending this appeal, the property was lawfully sold to another." *Id.* at 722. Given the sale of the

property, the Utah Supreme Court held that "[n]o action which we could now take would affect the litigants' rights to the property." *Id.*

The *Baum* court relied in part upon *Kelch v. Westland Minerals Corp.*, 484 P.2d 726 (Utah 1971), where stockholders brought an action to require a corporation to issue certain stock. The trial court granted the relief sought, and the corporation appealed. The corporation failed to stay the operation of the judgment or to supply a bond. The stockholders then sold and transferred the stock to third parties. The *Kelch* court held that it was "without power to grant any relief to the [corporation] and upon remand the court below would be equally powerless," and dismissed the appeal as moot. *Kelch*, 484 P.2d at 726.

Accordingly, once the property at issue in the underlying lawsuit has been sold, appellate courts will not decide the merits of the appeal. *See Baum*, 914 P.2d at 721; *see also Capri Sunshine v. E & C Fox Investments*, 2015 UT App 231, ¶ 9 n.2 ("this court cannot stop the sale after it has occurred"); *BV Lending v. Jordanelle Special Service District*, 2015 UT App 117 (holding that foreclosure sale renders appeal moot). "Any other result would nullify the requirement that the appellant obtain a stay pending appeal." *Baum*, 914 P.2d at 721.

In *Masonry Arts*, an appeal related to the refusal of a trial court to enjoin the award of a public contract. The order was not stayed on appeal, and the eventual grant of the contract rendered the appeal moot. *See* 628 So.2d at 335. Similarly, in *Westinghouse*

Elec. v. Grand River Dam Auth., 720 P.2d 713 (Okla. 1986), another case cited favorably in *Baum*, a party sought to have an appeal court prevent the awarding of a contract that had already been substantially completed. The court would not do so:

This Court cannot prevent what has already taken place, and we cannot envision any order we might issue which would grant [appellant] the relief it seeks this late in the proceedings. If the action sought to be enjoined has been performed and no particular relief can be afforded, the issues in this Court are abstract and hypothetical and the case becomes moot.

Id. at 718.

The refusal to undo a transaction applies with particular force in the context of a receivership sale of assets. For instance, the Ninth Circuit Court of Appeals addressed an equitable receivership case where the assets of a company were sold by a court-appointed receiver pursuant to a final court order. *See United States v. Alder Creek Water Co.*, 823 F.2d 343, 345 (9th Cir. 1987). The company and its owner sought to set aside the receivership sale and a return of the company's assets to the owner. *Id.* The court held that the owner "lacked standing to seek redress for the corporation's injuries" and that the company's challenges "to the validity of the receivership, sale of the assets, and disbursement of funds are moot." *Id.* at 345. The court explained that "[a] case becomes moot when interim relief or events have deprived the court of the ability to redress the party's injuries." *Id.* The failure of the company and its owner to obtain a stay of the sale order permitted irreversible changes to occur, including consummation of the sale, distribution of sale proceeds, and numerous expenses, costs and obligations incurred

by the buyer in reliance upon the sale order. *Id.* The Court concluded: “There is no reasonable way to undo the sales transaction and its many consequences at this time. These equitable considerations prevent us from examining the defendants’ challenges to the validity of the receivership, sale of the assets, or subsequent disbursement of funds.” *Id.*; see also *Warner v. DMG Color, Inc.*, 2000 UT 102, ¶¶ 9, 8-11, 18-19 (upholding a sale of assets that had occurred in a bankruptcy case against a collateral attack made in state court).³

The same reasoning should apply here. Even if Defendants could show any of them had standing at this late date to assert an objection to the Receiver’s motion, there is “no reasonable way to undo” the transaction approved by the Receiver and authorized by the trial court. The Companies’ assets have been sold and their creditors paid. Defendants’ objection to one provision contained in the Purchase Agreement, if sustained, would mean the entire transaction would need to be unraveled. Whether this situation is viewed through the lens of legal or equitable remedies, the effect is the same – the matter is moot. Had Defendants obtained a stay of the Sale Order, effectuating a remedy might have been possible. But Defendants failed to do so. In the meantime, Mrs. Fields has been running the candy manufacturing business it purchased pursuant to

³ In *Maero v. Bunker*, 2009 UT App 300, 221 P.3d 860, this Court applied a similar bankruptcy statute mandating that an order approving a bankruptcy sale is valid unless “stayed pending appeal,” even if it is reversed. *Id.* at ¶ 4 (citing 11 U.S.C.A. § 363). The policy behind that ruling applies with particular force here: “[T]his rule is in furtherance of the policy of not only affording finality to the judgment of the bankruptcy court, but particularly to give finality to those orders and judgments upon which third parties rely.” *Id.*

the Purchase Agreement for all the time that has passed since the Sale Order was entered. *See, e.g.,* Receiver's Mem. in Supp. of Expedited Motion, p.3 (describing the business purchased pursuant to the Purchase Agreement). Each day that has passed makes it all the more difficult to "undo" the effects of the Sale Order, particularly when Defendants knew of the sale and could have sought a stay.

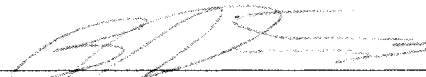
Because there is no effective relief this Court can or should provide, this appeal should be dismissed as moot.

Conclusion

Defendants fail to meet their burden on appeal and are unable to show any reversible error committed by the trial court. Had Defendants been able to show such an error, there is no meaningful relief this Court can provide. Accordingly, Mrs. Fields respectfully requests that this Court either affirm the trial court's Ruling and Order or dismiss this appeal for mootness.

DATED this 2nd day of June, 2016


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RULE 24(f)(1)(C) CERTIFICATION

I certify that this Brief contains 10,047 words and therefore complies with the maximum limit of 14,000 words, as required of Utah Rules of Appellate Procedure, Rule 26(f)(1)(A).



Bradley M. Strassberg

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of June, 2016, I caused to be served a true and correct copy of the foregoing Appellee's Brief via First Class Mail, postage fully pre-paid, to the following:

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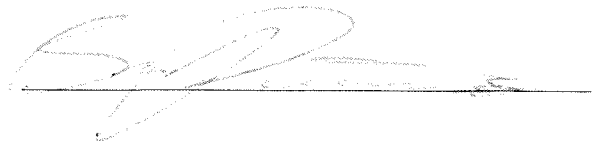
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ADDENDUM

ADDENDUM EXHIBIT 1

Sbkc Serv. Corp. v. 1111 Prospect

United States District Court for the District of Kansas

October 30, 1998, Decided ; October 30, 1998, Filed

Case No. 95-2540-JWL

Reporter

1998 U.S. Dist. LEXIS 20471; 1998 WL 928408

SBKC Service Corporation, Plaintiff, v. 1111 Prospect Partners, L.P., William Jeffery III, and Kristin Jeffery, Defendants.

Disposition: [*1] Plaintiff's motion to vacate judgment and dismiss action for lack of subject matter jurisdiction (doc. # 78) denied.

Core Terms

void, lack of subject matter jurisdiction, collateral attack, diversity, parties, subject matter jurisdiction, judgment rendered, state court, Railroad, vacate, court's jurisdiction, district court, prior judgment, usurp

Case Summary

Procedural Posture

Plaintiff creditor filed a motion to vacate the court's prior judgment in the creditor's action against defendants, debtor and associated individuals, to recover post-foreclosure deficiencies.

Overview

The creditor filed an action in state court against defendants to recover post-foreclosure deficiencies. Defendants removed the action to the court. The creditor's challenge to the removal was based solely on a forum selection clause in an underlying contract. The court granted the creditor's motion to remand, but that order was reversed on appeal. The court later entered judgment in favor of defendants. The appellate court affirmed in substance the court's order. The creditor later filed a motion to vacate the court's judgment as void for lack of subject matter jurisdiction. The court denied the motion. The court held that the creditor could not challenge the court's jurisdiction through a motion to vacate under *Fed. R. Civ. P. 60(b)(4)* because it neither appealed the court's prior implicit determination that the court had subject matter jurisdiction nor filed a motion to

remand the action to state court for lack of diversity between the parties. The court also held that the court's prior judgment was not subject to collateral attack because the court's exercise of jurisdiction was not so flagrant that the court usurped its power.

Outcome

The court denied the creditor's motion to vacate the court's prior judgment in the creditor's action against defendants to recover post-foreclosure deficiencies.

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN1 *Fed. R. Civ. P. 60(b)(4)* states in part that on motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reason: the judgment is void. In the interest of finality, the concept of setting aside a judgment on voidness grounds is narrowly restricted. For a judgment to be void under *Fed. R. Civ. P. 60(b)(4)*, it must be determined that the rendering court was powerless to enter it, plainly usurped its power, or acted in a manner inconsistent with due process of law. Moreover, if a judgment is void, relief is not a discretionary matter; it is mandatory.

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN2 A federal district court's erroneous exercise of subject matter jurisdiction is not subject to collateral attack in a subsequent proceeding. A party that has had an opportunity to litigate the question of subject matter jurisdiction may not reopen that question in a collateral attack upon an adverse judgment. Even if a court does not expressly rule on matters relating to its exercise of jurisdiction, if the parties could have challenged the court's jurisdiction and failed to do so, res judicata principles bar them from collaterally attacking jurisdiction. Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. A judgment rendered by a federal district court bars a subsequent action even where the record shows that the parties were not diverse and, thus, that the court lacked subject matter jurisdiction.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN3 If the record shows an absence of jurisdiction but no jurisdictional objection by the parties, the judgment can not be set aside as void under Fed. R. Civ. P. 60(b)(4).

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

Governments > Courts > Authority to Adjudicate

HN4 Since a court has power to determine its own jurisdiction and, in fact, is required to exercise that power sua sponte, it does not plainly usurp jurisdiction when it merely commits an error in the exercise of that power.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN5 A court without jurisdiction can render a binding judgment on the merits if the judgment is allowed to become final, unless the lack of jurisdiction is so gross that the judgment is deemed void.

Civil Procedure > ... > Jurisdiction > Diversity Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN6 A federal court's erroneous assumption of diversity jurisdiction does not render the judgment void under Fed. R. Civ. P. Rule 60(b)(4).

Counsel: For SBKC SERVICE CORPORATION, plaintiff: John L. Peterson, Williamson & Cubbison, Kansas City, KS.

For SBKC SERVICE CORPORATION, plaintiff: Robert J. Campbell, Elizabeth Drill Ney, Leland H. Corley, James E. Kelley, Jr, William H. Meyer, Lewis, Rice & Fingersh, L.C., Kansas City, MO.

For SBKC SERVICE CORPORATION, plaintiff: Louis A. Cohn, Porter & Cohn, L.L.C., Kansas City, MO.

For 1111 PROSPECT PARTNERS, L.P., WILLIAM JEFFERY, III, KRISTEN L JEFFERY, defendants: Michael J. Armstrong, Speer, Holliday, Zimmerman & Veatch, Olathe, KS.

For 1111 PROSPECT PARTNERS, L.P., WILLIAM JEFFERY, III, KRISTEN L JEFFERY, defendants: Terrence L Bingman, Luce, Forward, Hamilton & Scripps, San Diego, CA.

For 1111 PROSPECT PARTNERS, L.P., KRISTEN L JEFFERY, defendants: Charles A Bird, Luce, Forward, Hamilton & Scripps, San Diego, CA.

Judges: John W. Lungstrum, United States District Judge.

Opinion by: John W. Lungstrum

Opinion

MEMORANDUM AND ORDER

This matter is presently before the court on plaintiff SBKC Service Corporation's motion to vacate judgment and dismiss [*2] action for lack of subject matter jurisdiction (doc. # 78). For the reasons set forth below, plaintiff's motion is denied.

Procedural History

On November 1, 1995, plaintiff SBKC Service Corporation filed this action in Kansas state court against defendants 1111 Prospect Partners, L.P., William Jeffery III and Kristin Jeffery alleging that defendant 1111 owed plaintiff nearly one million dollars in post-foreclosure deficiencies and that the Jefferys were liable for the alleged deficiency.

On December 7, 1995, defendants removed this case to this court, alleging subject matter jurisdiction based on diversity of citizenship. Specifically, defendants asserted "upon information and belief" that plaintiff SBKC Service Corporation was a Kansas citizen and that defendants were California citizens. Plaintiff SBKC Service Corporation did not challenge defendants' asserted jurisdictional facts; rather, plaintiff challenged the removal based solely on a forum selection clause in an underlying contract which permitted the action to be brought in Kansas state court. Although this court granted plaintiff's motion to remand based on the forum selection clause, the Tenth Circuit reversed [*3] the ruling. See *SBKC Service Corp. v. 1111 Prospect Partners, L.P.*, 105 F.3d 578, 582-83 (10th Cir. 1997).

Plaintiff and defendants subsequently moved for summary judgment or for dismissal of the action. On May 28, 1997, this court issued an order granting the Jefferys' motion to dismiss for lack of personal jurisdiction; granting defendant 1111's motion for summary judgment; and denying plaintiff's motion for summary judgment. On May 29, 1997, this court entered judgment in favor of defendants. After plaintiff appealed the judgment,¹ the Tenth Circuit affirmed, in substance,

this court's order. See *SBKC Serv. Corp. v. 1111 Prospect Partners, L.P.*, 1998 U.S. App. LEXIS 17522, No. 97-3193, 1998 WL 436579 (10th Cir. July 30, 1998).² Plaintiff did not seek further review of the Tenth Circuit's decision.

[*4] On May 29, 1998, defendant Kristin Jeffery filed an action in California state court against plaintiff SBKC Service Corporation and its lawyers alleging that they maliciously and without probable cause filed the Kansas deficiency action against her. On July 2, 1998, SBKC Service Corporation removed the case to federal court in California claiming subject matter jurisdiction based on diversity of citizenship (i.e., Mrs. Jeffery was a California citizen and SBKC Service Corporation was a Kansas citizen). Mrs. Jeffery moved to remand the case to California state court, claiming that diversity of citizenship did not exist in that SBKC Service Corporation was a dual citizen of both Kansas and California. The California District Court, concluding that SBKC Service Corporation's last principal place of business was California, granted Mrs. Jeffery's motion and remanded the case to California state court.

SBKC Service Corporation now seeks to vacate this court's judgment as void under *Federal Rule of Civil Procedure 60(b)(4)* because, according to SBKC, this court lacked subject matter jurisdiction with respect to the deficiency action (i.e., because diversity of citizenship did not [*5] exist between the parties). As set forth in more detail below, even assuming the court lacked subject matter jurisdiction over the action, the prior judgment is not void within the meaning of *Rule 60(b)(4)*. Thus, plaintiff's motion is denied.

Applicable Standards

In light of the dearth of case law construing *Rule 60(b)(4)* motions in this district and the Tenth Circuit, it is useful to first consider the language and purpose of the rule. *HN1 Rule 60(b)(4)* states in relevant part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void;" In the interest of finality, "the concept of setting aside a judgment on

¹ Plaintiff did not appeal this court's implicit determination that it had subject matter jurisdiction over the action.

² In light of its holding that plaintiff's claims against Mr. Jeffery were barred for the same substantive defects applicable to plaintiff's claims against defendant 1111, the Tenth Circuit vacated as moot this court's dismissal of plaintiff's claims against Mr. Jeffery based on lack of personal jurisdiction. The plaintiff did not appeal the dismissal as to Mrs. Jeffery and so this Court's dismissal of the claim against her was affirmed.

voidness grounds is narrowly restricted." *V.T.A., Inc., v. Airco, Inc.*, 597 F.2d 220, 225 (10th Cir. 1979). For a judgment to be void under *Rule 60(b)(4)*, it must be determined that the rendering court was powerless to enter it, plainly usurped its power, or acted in a manner inconsistent with due process of law. *Id.* at 224-25. Moreover, if a judgment is void, relief is not a discretionary matter; it is mandatory. [*6] *Wilmer v. Board of County Comm'rs*, 69 F.3d 406, 409 (10th Cir. 1995) (citations omitted); *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994) (quoting *V.T.A.*, 597 F.2d at 224 n.8).³

Discussion

The Supreme Court has long held that **HN2** a federal district court's erroneous exercise of subject matter jurisdiction is not subject to collateral attack in a subsequent proceeding. See, e.g., *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 702 n.9, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982) ("A party that has had an opportunity to litigate the [*7] question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment.") (citing *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 84 L. Ed. 329, 60 S. Ct. 317 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 83 L. Ed. 104, 59 S. Ct. 134 (1938)). Even if a court does not expressly rule on matters relating to its exercise of jurisdiction, if the parties could have challenged the court's jurisdiction and failed to do so, res judicata principles bar them from collaterally attacking jurisdiction. *Chicot County*, 308 U.S. at 378; see *Stoll*, 305 U.S. at 171-72 ("Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter."). With respect to the facts presented here, the Supreme Court has held that a judgment rendered by a federal district court bars a subsequent action even where the record shows that the parties were not diverse and, thus, that the court lacked subject matter jurisdiction. *Des Moines Navigation & R.R. Co. v. Iowa Homestead Co.*, 123 U.S. 552, 558-59, 31 L. Ed. 202, 8 S. Ct. 217 (1887). See generally 18 Charles Alan [*8] Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4428 (1981).

The Supreme Court has not addressed whether a judgment rendered by a federal district court precludes a party from challenging the district court's jurisdiction in the same proceeding pursuant to a *Rule 60(b)* motion. Several circuit courts, however, including the Tenth Circuit, have extended the principles of *Chicot County* and *Des Moines Navigation* to the *Rule 60(b)(4)* context. See, e.g., *Missouri Pacific R.R. Co. v. Cartwright Transfer & Storage, Inc.*, 1992 U.S. App. LEXIS 14538, No. 91-5008, 1992 WL 138487, *4-5 (10th Cir. June 16, 1992); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (party barred from challenging district court's jurisdiction in a *Rule 60(b)(4)* proceeding where party had a "full and fair, unimpeded opportunity" to challenge court's jurisdiction by appeal); *Nemaizer v. Baker*, 793 F.2d 58, 64-65 (2d Cir. 1986) (because appellees did not move to remand or challenge district court's exercise of jurisdiction on appeal, "they are now barred by principles of res judicata and the interest in finality of judgments from mounting a [*Rule 60(b)(4)*] collateral attack [*9] on a prior judgment in the present action."); *Honneus v. Donovan*, 691 F.2d 1, 2-3 (1st Cir. 1982) (federal court's erroneous assumption of diversity jurisdiction does not render judgment void under *Rule 60(b)(4)*); *Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir. 1980) (erroneous assumption of jurisdiction does not render judgment void under *Rule 60(b)(4)*); *Pacurar v. Hernly*, 611 F.2d 179, 180-81 (7th Cir. 1979) (**HN3** if record showed an absence of jurisdiction but no jurisdictional objection by the parties, the judgment could not be set aside as void under *Rule 60(b)(4)*).

In *Missouri Pacific Railroad*,⁴ the lower court entered judgment in a quiet title action concerning a railroad crossing. 1992 WL 138487 at *1. Several months after the court entered judgment, the defendants filed a *Rule 60(b)(4)* motion requesting the court to vacate its judgment as void for lack of subject matter jurisdiction on the ground that the Oklahoma Corporation Commission had exclusive jurisdiction to determine whether a railroad crossing was public or private. *Id.* The lower court concluded that jurisdiction was proper and denied the defendants' motion [*10] to vacate. *Id.* at

³ The court also notes that *Rule 60(b)(4)* motions are not subject to any time limitations. *Wilmer*, 69 F.3d at 409; *Orner*, 30 F.3d at 1310 (citing *V.T.A.*, 597 F.2d 220 at 224 & n.9; *Venable v. Haislip*, 721 F.2d 297, 299-300 (10th Cir. 1983)). As the Tenth Circuit has recognized, a void judgment "is a nullity from the outset and any 60(b)(4) motion for relief is therefore filed within a reasonable time." *V.T.A.*, 597 F.2d at 224 n.9.

⁴ The court recognizes that the citation of unpublished decisions by the Tenth Circuit remains unfavored. Nonetheless, the court finds the opinion in *Missouri Pacific Railroad* has persuasive value on the issue raised by plaintiff's motion and, thus, is relevant to the court's analysis.

*2. On appeal, the Tenth Circuit observed that the defendants' failure to appeal directly the lower court's implicit findings that it had subject matter jurisdiction was fatal even if the district court's finding was erroneous. *Id.* at *4. According to the Circuit, defendants could have challenged the district court's exercise of jurisdiction on direct appeal. Because they failed to do so, "they are now barred by principles of res judicata and the interest in finality of judgments from mounting a collateral attack on a prior judgment in the present action." *Id.* See also *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 225-26 (10th Cir. 1979) (stating, in dicta, that 60(b)(4) motion is a collateral attack). The Court further explained:

Contrary case law and commentators' views permitting any collateral attack on a prior judgment under Rule 60(b)(4) always involve a clear usurpation of power by a district court, and not an error of law in determining whether it has jurisdiction. **HN4** Since a court has power to determine its own jurisdiction and, in fact, is required to exercise that power sua sponte, it does not plainly usurp jurisdiction when it merely commits [*11] an error in the exercise of that power.

Id. (quoting *Nemaizer v. Baker*, 793 F.2d 58, 64-65 (2d Cir. 1986)). See also *Disher v. Information Resources, Inc.*, 873 F.2d 136, 140 (7th Cir. 1989) (**HN5** "[A] court without jurisdiction can render a binding judgment on the merits if the judgment is allowed to become final, unless the lack of jurisdiction is so gross that the judgment is deemed void."). Ultimately, the Tenth Circuit concluded that "in the final analysis, whether the lower court had jurisdiction or not, it clearly did not 'usurp' jurisdiction" and thus, did not abuse its discretion in denying Rule 60(b)(4) relief for lack of subject matter jurisdiction. *Id.* at *5. Cf. *Depex Reina 9 Partnership v. Texas Int'l Petroleum Corp.*, 897 F.2d 461, 464 (10th Cir. 1990) (res judicata did not preclude defendant from raising lack of subject matter jurisdiction for first time at

district court on remand from Tenth Circuit where case was still pending and final judgment had not been entered).

[*12] Here, as in *Missouri Pacific Railroad*, plaintiff SBKC did not appeal directly this court's implicit determination that it had subject matter jurisdiction over the parties. Moreover, SBKC did not move to remand the action to state court for lack of diversity between the parties. See *Nemaizer v. Baker*, 793 F.2d 58, 64-65 (2d Cir. 1986) (party who could have moved to remand action to state court or challenged court's jurisdiction on direct appeal barred "from mounting a collateral attack on a prior judgment in the present action"), quoted in *Missouri Pacific Railroad*, 1992 U.S. App. LEXIS 15438, 1992 WL 138487 at *4. Finally, it cannot be said that the court's exercise of jurisdiction here was so gross that the court usurped its power, rendering the judgment void. Thus, even assuming this court lacked subject matter jurisdiction over the action, the judgment entered by the court is not subject to collateral attack through a 60(b)(4) motion. Accordingly, plaintiff's motion must be denied. See *Honneus v. Donovan*, 691 F.2d 1, 2-3 (1st Cir. 1982) (**HN6** federal court's erroneous assumption of diversity jurisdiction does not render judgment void under Rule 60(b)(4)).

IT IS THEREFORE ORDERED BY THE COURT [*13] THAT plaintiff's motion to vacate judgment and dismiss action for lack of subject matter jurisdiction (doc. # 78) is denied.

IT IS SO ORDERED.

Dated this 30th day of October, 1998, at Kansas City, Kansas.

John W. Lungstrum

United States District Judge

ADDENDUM EXHIBIT 2

KBR, Inc. v. Chevedden

United States District Court for the Southern District of Texas, Houston Division

July 12, 2013, Decided; July 12, 2013, Filed

CIVIL ACTION NO. H-11-0196

Reporter

2013 U.S. Dist. LEXIS 97905; 2013 WL 3713420

KBR, Inc., Plaintiff, vs. JOHN CHEVEDDEN, Defendant.

Prior History: *KBR Inc. v. Chevedden*, 776 F. Supp. 2d 415, 2011 U.S. Dist. LEXIS 23600 (S.D. Tex., 2011)

Core Terms

void, collateral, subject matter jurisdiction, sanctions, quotation marks, final judgment, usurpation

Counsel: [*1] For KBR, Plaintiff: Chanler Ashton Langham, Geoffrey L Harrison, Susman Godfrey LLP, Houston, TX.

Mr. John Chevedden, Defendant, Pro se, Redondo Beach, CA.

Judges: Lee H. Rosenthal, United States District Judge.

Opinion by: Lee H. Rosenthal

Opinion

MEMORANDUM AND ORDER

This court granted summary judgment for KBR and against John R. Chevedden, and entered final judgment in April 2011. The Fifth Circuit affirmed that decision in June 2012 and issued its mandate. *KBR v. Chevedden*, 478 F. App'x 213 (5th Cir. 2012). In January 2013, Chevedden moved to have the judgment vacated under *Rule 60(b)(4) of the Federal Rules of Civil Procedure*. Chevedden based his motion on *Already, LLC v. Nike, Inc.*, ___ U.S. ___, 133 S. Ct. 721, 184 L. Ed. 2d 553 S. Ct. 721 (2013). He later moved for leave to file a supplemental brief to discuss another recently issued Supreme Court decision, *Clapper v. Amnesty Int'l USA*, ___ U.S. ___, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013). (Docket Entry Nos. 49, 52). KBR opposed the motion to set aside the judgment. (Docket Entry No. 50).

Based on the record; the motions, response, and reply; and the applicable law, this court finds that *Rule 60(b)(4)* does not provide a basis for the relief Chevedden seeks. His motion to set aside the judgment is denied. [*2] Because this court does not need to, and does not, decide whether the analysis or outcome would have changed if the recent Supreme Court case law had been in effect before the judgment became final, the motion for leave to file supplemental authority is also denied. Finally, KBR's motion for sanctions is denied.

The reasons for these rulings are explained below.

I. Background

KBR sued Chevedden for a declaratory judgment that it could exclude his proposal from its 2011 proxy materials. Chevedden moved to dismiss on several grounds, including that KBR lacked standing to sue him. On March 9, 2011, this court held that "KBR has met its burden to show standing," and "may exclude Chevedden's proposal from its 2011 proxy materials." (Docket Entry No. 17 at 18). On March 14, 2011, Chevedden filed an amended motion to dismiss and included a statement that "he will not sue [KBR] if it elects to exclude his proposal from its proxy materials and his decision not to sue is irrevocable." (Docket Entry No. 18). KBR opposed Chevedden's motion and moved for summary judgment. In ruling on these motions, and Chevedden's subsequent motion for reconsideration, this court rejected Chevedden's arguments that [*3] KBR lacked standing and that his statement made KBR's suit against him moot. This court applied the relevant law, including *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 137, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007), which held that a patent licensee could seek a declaration that the patent was invalid without first exposing itself to an infringement suit by withholding payments due under its licensing agreement with the patent holder. Under these cases, Chevedden's statement did not eliminate the

controversy because he had not withdrawn his proposal and continued to demonstrate a willingness to enforce his rights.

Chevedden appealed. The Fifth Circuit affirmed this court's grant of KBR's summary judgment motion. *KBR v. Chevedden*, 478 F. App'x 213 (5th Cir. 2012). On appeal, Chevedden argued, as he did before this court and does again now, that "the dispute lacks sufficient immediacy and reality to be a justiciable dispute under the Declaratory Judgment Act." *Id.* at 214. The Fifth Circuit rejected Chevedden's argument and explained that because his proposal required KBR to choose between spending a significant sum to revise its proxy statement or excluding Chevedden's proposal and exposing itself to potential litigation, [*4] there was a justiciable dispute between the parties. *Id.* at 215. Chevedden also argued, as he did before this court and does now, that "any possibility of litigation stemming from a decision to exclude his proposal is vitiated by his stipulation that he would not sue if KBR chose that course." *Id.* The Fifth Circuit rejected this argument, noting that Chevedden "continued to refuse to withdraw his proposal." *Id.* at 214-15. The Fifth Circuit explained that excluding Chevedden's proposal would continue to "implicate KBR's duties to all of its shareholders" and "could expose KBR to an SEC enforcement action." *Id.* The Fifth Circuit affirmed eight months before Chevedden filed this motion to set aside the final judgment, denied the petition for rehearing, and issued its mandate. Chevedden ended his direct appeals at that point.

Chevedden now argues that two recent Supreme Court cases on standing and mootness, *Already* and *Clapper*, provide a basis for collateral relief under *Rule 60(b)*.

II. Analysis

Rule 60(b)(4) of the Federal Rules of Civil Procedure states that a court may relieve a party from a final judgment if it is "void." *FED. R. CIV. P. 60(b)(4)*. Voidness may be based on lack of subject [*5] matter jurisdiction, if the "rendering court was powerless to enter the judgment, plainly usurped its power, or acted in a manner inconsistent with due process of law." *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224-25 (10th Cir. 1979); see also *Carter v. Fenner*, 136 F.3d 1000, 1006 (5th Cir. 1998) (stating that "[a] judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or it acted in a manner inconsistent with due process of law." (quotation marks, brackets,

and citation omitted)). Courts agree that, "[i]n the interest of finality, the concept of setting aside a judgment on voidness grounds is narrowly restricted," *V.T.A.*, 597 F.2d at 225, because of the tension between validity and finality in judgments. *RESTATEMENT (SECOND) OF JUDGMENTS* § 12 cmt. a (1982); see also *In re Ziebarth*, 51 F.3d 1044, 1995 WL 153207, at *2 (5th Cir. 1995) ("[I]n the sound interest of finality, the concept of void judgment must be narrowly restricted." (citation, brackets, and quotation marks omitted)).

The tension between finality and voidness is reflected in the rule that when the asserted defect that makes the judgment "void" is a lack of subject matter [*6] jurisdiction, *Rule 60(b)(4)* cannot be used for a collateral challenge when the court's exercise of jurisdiction was an error of law in determining whether it had jurisdiction, as opposed to a clear usurpation of power by that court. See *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (holding that a party is "barred from challenging the district court's jurisdiction in a *Rule 60(b)(4)* proceeding" if "the challenging party was before the court when the order in question was entered and had notice of it and had a full and fair, unimpeded opportunity to challenge it, and the court's jurisdiction, by appeal."); see also *Wendt v. Leonard*, 431 F.3d 410, 413 (4th Cir. 2005) ("[W]hen deciding whether an order is void under *Rule 60(b)(4)* for lack of subject matter jurisdiction, courts must look for the rare instance of a clear usurpation of power." (quotation marks and citations omitted)); *Hunter v. Underwood*, 362 F.3d 468, 475 (8th Cir. 2004) ("A *Rule 60(b)(4)* motion to void the judgment for lack of subject matter jurisdiction will succeed only if the absence of jurisdiction was so glaring as to constitute a total want of jurisdiction or a plain usurpation of power so [*7] as to render the judgment void from its inception." (quotation marks and citations omitted)); *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000) (holding that *Rule 60(b)(4)* is not available to challenge collaterally a district court's jurisdictional error unless the error is "egregious"); *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1346 (10th Cir. 2000) (explaining that for a judgment to be void for lack of subject-matter jurisdiction under *Rule 60(b)(4)* "[t]here must be no arguable basis on which [the court] could have rested a finding that it had jurisdiction." (quotation marks and citation omitted)).

Chevedden did not file a direct attack on the judgment after the Fifth Circuit affirmed it. The judgment became final, and the case was closed. The final judgment and the expiration of the time for seeking rehearing or

certiorari made subsequent attacks on subject matter jurisdiction collateral. Such a collateral attack cannot be made under Rule 60(b)(4) when, as here, the asserted flaw is that the court erred in deciding that it had subject matter jurisdiction, an error established not by the case law in effect when this court and the appellate court ruled, but decided [*8] months later. The fact that Chevedden's argument is based on later-issued decisions makes it even more clear that this court and the appellate court did not "usurp power to act," but, at most, erroneously applied the law as clarified by subsequent authority.¹

There is no need to address whether, had the Supreme Court issued its recent decisions on standing and mootness before the judgment in this case had become final instead of months later, the trial and appellate court rulings on jurisdiction might have been different. KBR has explained why, in its view, *Nike* does not change the outcome. Because Chevedden is barred from raising the challenge collaterally, there is no need to address KBR's arguments or allow the parties to brief in more detail any effect that *Clapper* might have had on the jurisdictional analysis.

KBR seeks sanctions for [*10] Chevedden's allegedly frivolous Rule 60(b)(4) motion. Rule 11 of the Federal

Rules of Civil Procedure "prohibits filings made with 'any improper purpose,' the offering of 'frivolous' arguments, and the assertion of factual allegations without 'evidentiary support' or the 'likely' prospect of such support." Young v. City of Providence ex rel. Napolitano, 404 F.3d 33, 39 (1st Cir. 2005) (citing FED. R. CIV. P. 11(b)(1)). The rule requires that a motion for sanctions "be made separately from any other motion" and be served on the opposing party 21 days before it is filed with the court. FED. R. CIV. P. 11(c)(2). There is no indication that KBR served its request for sanctions on Chevedden 21 days before filing. KBR's motion for sanctions under Rule 11 is denied.

III. Conclusion

Chevedden's motion to set aside the judgment is denied. His motion for leave to file a supplemental brief is denied as moot. KBR's motion for sanctions under Rule 11 is denied.

SIGNED on July 12, 2013, at Houston, Texas.

/s/ Lee H. Rosenthal

Lee H. Rosenthal

United States District Judge

¹ The issue is not, as Chevedden states, framed in terms of "law of the case." Rather, the issue is presented in terms of finality and preclusion. See 18B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4478 (2d ed. 1995 & Supp. 2005) ("After final judgment, direct relief from the judgment is governed by the rules governing direct and collateral attack—principally found in Civil Rule 60(b) and habeas corpus and the procedure to vacate a criminal sentence—rather than law of the case . . ."); see also Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n. 9, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982) ("It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal."). A "court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral attack." [*9] Chicot Cnty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 377, 60 S. Ct. 317, 84 L. Ed. 329 (1940); see also Bostwick v. Baldwin Drainage District, 133 F.2d 1, 4 (5th Cir. 1943) ("[S]tanding as a complete barrier to appellants' attack upon the judgment as void is the express determination and adjudication by the court that it had jurisdiction"). "[A] Court's determination that it has jurisdiction of the subject matter is binding on that issue, if the jurisdictional question actually was litigated and decided, or if a party had an opportunity to contest subject-matter jurisdiction and failed to do so." 11 WRIGHT & MILLER § 2862.

ADDENDUM EXHIBIT 3

Bryan v. Peters (In re Bryan)

United States District Court for the District of Colorado

August 5, 2015, Decided; August 5, 2015, Filed

Civil Action No. 14-cv-3002-WJM

Reporter

2015 U.S. Dist. LEXIS 102474

IN RE: GARY LEE BRYAN, Debtor. JANEL K. BRYAN, BRAD HUNT, as Trustee of the Bryan Family Trust, Appellants, v. M. STEPHEN PETERS, as Chapter 7 Trustee, and ARTHUR CLARK, Appellees.

Judges: William J. Mart nez, United States District Judge.

Opinion by: William J. Mart nez

Subsequent History: Decision reached on appeal by, Remanded by *Bryan v. Clark*, 2016 Bankr. LEXIS 949 (B.A.P. 10th Cir., Mar. 25, 2016)

Prior History: [*1] Bankruptcy Case No. 05-38302-SBB. Adversary Proceeding No. 08-1102-SBB.

Clark v. Peters (In re Bryan), 547 Fed. Appx. 892, 2013 U.S. App. LEXIS 24178 (10th Cir. Colo., 2013)

Opinion

ORDER AFFIRMING BANKRUPTCY COURT'S DECISION

Janel K. Bryan and Brad Hunt (together, "Defendants") appeal the Bankruptcy Court's refusal to reopen an adversary proceeding in which the Bankruptcy Court previously awarded judgment to Chapter 7 Trustee M. Stephen Peters ("Peters"). For the reasons stated below, the Bankruptcy Court's decision is affirmed.

Core Terms

bankruptcy court, Re-Open, final judgment, jurisdictional, subject matter jurisdiction, parties, adversary proceeding, collateral attack, void, district court, decree, usurpation, arguable, court's jurisdiction, denial of motion, Proceedings, challenges, invalid, reasons

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For M. Stephen Peters, as Chapter 7 Trustee, Appellee: David Vincent Wadsworth, II, LEAD ATTORNEY, Sender Wasserman Wadsworth, P.C., Denver, CO.

For Mr Arthur Clark, Appellee: David Clark von Gunten, LEAD ATTORNEY, Von Gunten Law LLC, Denver, CO.

I. BACKGROUND & PROCEDURAL HISTORY

A. Bankruptcy Court Proceedings

In 2005, Gary Lee Bryan filed for bankruptcy protection. See *In re Bryan*, Case No. 05-38302-SBB (Bankr. D. Colo.). In 2008, Peters filed an adversary proceeding against Gary Bryan, Janel Bryan (apparently Gary's wife), Brad Hunt (trustee of [*2] the Bryan Family Trust), Vectra Bank Colorado, and Auto Source, LLC. (Record on Appeal ("R.") (ECF No. 8), Vol. 1 at 7-8.)¹ Through various causes of action, Peters sought to invalidate the Bryan Family Trust and claw back trust property that allegedly belonged to the bankruptcy estate. (*Id.* at 12-21.) Vectra Bank and Auto Source eventually settled (*id.* at 209-11), leaving only the individual defendants (collectively, "Adversary Proceeding Defendants").

Following pretrial motion practice, the adversary proceeding went to trial primarily on the question of

¹ Page citations to the Record on Appeal are to the consecutive pagination inserted in the bottom-right corner of each page. All other ECF page citations are to the page number in the ECF header, which does not always match the page number inserted by the filer's word processing program.

whether the Bryan Family Trust was enforceable. (*Id.* at 142-56.) The Bankruptcy Court found as a matter of Colorado law that the trust was unenforceable. (*Id.* at 143-46.) In light of this finding, the Bankruptcy Court entered judgment in favor of Peters on June 4, 2009, granting him possession of certain trust property. (*Id.* at 162-63.)

B. District Court Appeal

The Adversary Proceeding Defendants appealed to this Court. [*3] (*Id.* at 165-67.) On September 30, 2010, the Court (per the Hon. Walker D. Miller) issued its decision. (*Id.* at 212-30.) Applying the "clearly erroneous" standard of review, this Court upheld the Bankruptcy Court's conclusion that the Bryan Family Trust is invalid. (*Id.* at 227.) This Court also reversed as to certain other issues that do not appear to have continuing relevance. (*Id.* at 227-30.) The Adversary Proceeding Defendants then appealed to the Tenth Circuit. (*Id.* at 233.)

C. *Stern v. Marshall* and the Tenth Circuit Appeal

On June 23, 2011—while the Tenth Circuit appeal was pending—the Supreme Court decided *Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). The Court in *Stern* held that Article III of the U.S. Constitution prevents a Bankruptcy Court from entering final judgment on a state common law counterclaim that is not resolved as part of ruling on a creditor's proof of claim. *Id.* at 2614-15. The parties never raised *Stern* before the Tenth Circuit. On August 23, 2012—over a year after *Stern*—the Tenth Circuit issued an order and judgment affirming this Court's decision in all respects. *In re Bryan*, 495 F. App'x 884 (10th Cir. 2012).

D. Subsequent Bankruptcy Court Proceedings

On March 4, 2014, Defendants (*i.e.*, the Adversary Proceeding Defendants minus Gary Bryan) filed a *Federal Rule of Civil Procedure* 60(b)(4) motion with the Bankruptcy Court,² claiming that the June 4, 2009 judgment was void in light of *Stern*. (R., [*4] Vol. 1 at

248-51.) The Bankruptcy Court responded the next day with a "Notice of Nonjurisdiction," stating that it did not have jurisdiction to consider Defendants' motion because the case was closed. (*Id.* at 252.)

On March 28, 2014, Defendants filed a Motion to Re-Open Case ("Motion to ReOpen"). (*Id.* at 254-56.) Defendants requested reopening "to facilitate consideration" of the issues raised in their *Rule 60(b)(4)* motion. (*Id.* at 254.) The Bankruptcy Court held a hearing and then issued an oral ruling denying the Motion to Re-Open. (R., Vol. 2 at 27-32.)

The Bankruptcy Court characterized the Motion to Re-Open as "presumably [brought] under *Section 350(b) of the Bankruptcy Code*³ and/or *Rule 60(b) of the Federal Rules of Civil Procedure* and *Rule 9024 of the Bankruptcy Rules*, although Movant, at least in his submissions failed to cite authority or foundation for its motion or this procedure." (*Id.* at 27.) Without specifying which of those two legal bases under which it was analyzing the Motion to Re-Open, the Bankruptcy Court explained that it was denying the motion for six reasons:

1. failure to serve the motion on certain parties to the adversary proceeding;⁴
2. "[l]ack of statutory or jurisdictional ground in supporting the motion to reopen";
3. Defendants' failure "to timely raise the jurisdictional question";
4. "no cause shown," [*5] because the "underlying reasons" lack merit;
5. *Stern* "is not central and controlling" to the previous judgment; and
6. "there are no new issues in this case" justifying reopening.

(*Id.* at 28-29.) Defendants have appealed that ruling to this Court. (R., Vol. 1 at 280-93.)

II. STANDARD OF REVIEW

² *Rule 60(b)(4)* applies in Bankruptcy Court per *Federal Rule of Bankruptcy Procedure* 9024.

³ See 11 U.S.C. § 350(b) ("A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.").

⁴ Given this Court's disposition below, it need not analyze this particular reason for denying the Motion to Re-Open. The Bankruptcy Court here refers to Defendants' failure to serve their Motion on Gary Bryan, Vectra Bank, and Auto Source. In appellate briefing, Defendants argue that serving the motion on Gary Bryan and Auto Source would have been a pointless exercise since Defendants' counsel is also Gary Bryan's and Auto Source's counsel-of-record. (ECF No. 11 at 25-26 & n.3.) As for Vectra Bank, Defendants say it has never participated in the case in any way since settlement. (*Id.* at 26.)

The standard of review in this instance turns on what sort of motion the Bankruptcy Court denied. Here, the Bankruptcy Court expressed uncertainty about whether Defendants were moving [*6] under Rule 60(b)(4) or 11 U.S.C. § 350(b). A Rule 60(b)(4) denial is reviewed *de novo*. Gschwind v. Cessna Aircraft Co., 232 F.3d 1342, 1345 (10th Cir. 2000). A denial under 11 U.S.C. § 350(b) is reviewed only for abuse of discretion. In re Alpex Computer Corp., 71 F.3d 353, 356 (10th Cir. 1995).

The Court is not familiar with the underlying action's entire docket, but the docket entries included in the Record on Appeal do not show the uncertainty the Bankruptcy Court perceived. Defendants explicitly moved under Rule 60(b)(4), but the Bankruptcy Court instead required them to move to reopen the case. (R., Vol. 1 at 248-52.) Defendants' subsequent Motion to Re-Open did not cite any legal authority for reopening, but the Bankruptcy Court understood that 11 U.S.C. § 350(b) governs that question. Moreover, Defendants' Motion to Re-Open was specifically intended to permit the Bankruptcy Court to consider Defendants' Rule 60(b)(4) arguments on the merits. (*Id.* at 254; see also R., Vol. 2 at 13 (Defendants' counsel at oral argument referring to Defendants' Rule 60(b)(4) motion as "incorporated" into the Motion to ReOpen).)

This Court need not resolve the procedural complexities raised by this course of proceedings. In particular, this Court need not resolve whether a party to a bankruptcy proceeding wishing to bring a Rule 60(b)(4) motion must first successfully petition the Bankruptcy Court to reopen the case under 11 U.S.C. § 350(b).⁵ Even if the Bankruptcy Court had granted [*7] the Motion to Re-Open, it would then have needed to reach the Rule 60(b)(4) question directly, and it is the Rule 60(b)(4) question that occupies most of the parties' briefs on appeal. Moreover, one of the Bankruptcy Court's reasons for denying relief was that the "underlying reasons" for the Motion to Re-Open lacked merit. (R., Vol. 2 at 29.) Although ambiguous, this seems to be a reference to the availability of Rule 60(b)(4) relief.

The Court will therefore review the Bankruptcy Court's order as if the Bankruptcy Court directly denied Rule 60(b)(4) relief. As noted, such a ruling receives *de novo* review. Gschwind, 232 F.3d at 1345. In addition, this Court may affirm the Bankruptcy Court for any reason supported by the record. United States v. Myers (In re Myers), 362 F.3d 667, 674 n.7 (10th Cir. 2004).

III. ANALYSIS

A. Rule 60(b)(4) Challenges to Subject Matter Jurisdiction, Generally

Defendants argue that *Stern* prevents the Bankruptcy Court from entering final judgment based on a finding that the Bryan Family Trust is invalid as a matter of Colorado law.⁶ (ECF No. 11 at 18-19.) Defendants [*8] "candidly acknowledge that considerable time has passed since trial in 2009," and that "[n]o one believed that Article III jurisdiction was an issue at that time," but claim that they still have a right to challenge the Bankruptcy Court's subject matter jurisdiction. (*Id.* at 20-22.) Peters, of course, opposes this position. (ECF No. 21 at 14-22.)

The parties' respective arguments reveal a slight tension in the case law surrounding challenges to subject matter jurisdiction. On the one hand, it is commonly said that "[c]hallenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment." Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 571, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004) (emphasis added); see also Ruggieri v. Gen. Well Serv., Inc., 535 F. Supp. 525, 529 n.2 (D. Colo. 1982) ("If . . . a final judgment is entered, then later challenges to subject-matter jurisdiction may be barred.").⁷ On the other hand, Federal Rule of Civil Procedure 60(b)(4) specifically permits a post-judgment attack on "void" judgments—and among the reasons that a judgment may be void is that "the court that rendered it lacked jurisdiction [over] the subject matter." 11 Charles Alan Wright *et al.*, Federal Practice & Procedure § 2862 (3d ed., Apr. 2015 [*9] update) ("*Wright & Miller*"). Moreover,

⁵ Nonetheless, such a requirement would raise concerns. It could allow a Bankruptcy Court to resolve the § 350(b) question through a ruling that is, in effect, a Rule 60(b)(4) denial, but which receives only abuse-of-discretion review rather than the *de novo* review typically due to Rule 60(b)(4) rulings.

⁶ Given the disposition below, this Court need not address whether *Stern* would indeed prohibit a final judgment such as that entered by the Bankruptcy Court in this case.

⁷ In this context, "final judgment" can refer literally to a final, unappealed judgment, and also to a judgment affirmed on appeal with no possibility of further review. See, e.g., Travelers Indem. Co. v. Bailey, 557 U.S. 137, 148, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009) ("the 1986 Orders became final on direct review over two decades ago").

the Tenth Circuit has long held that *Rule 60(b)(4)* motions are not subject to any time limit. See *United States v. Buck*, 281 F.3d 1336, 1344 (10th Cir. 2002); *Gschwind*, 232 F.3d at 1345-46; *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 (10th Cir. 1979); accord 11 *Wright & Miller* § 2862 ("there is no time limit on an attack on a judgment as void"). Thus, one line of case law appears to cut off subject matter jurisdiction challenges after final judgment, while *Rule 60(b)(4)* permits subject matter jurisdiction challenges at any time.

The Court believes these two positions may be reconciled by acknowledging that a court may not deny a *Rule 60(b)(4)* motion simply due to the time elapsed since final judgment. Nonetheless, as numerous decisions demonstrate, the fact of a final judgment still matters a great deal in any *Rule 60(b)(4)* analysis.

The Supreme Court's decision in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940), illustrates this point well. In *Chicot*, the plaintiff sought to recover on certain bonds that had previously been canceled by a federal district court exercising bankruptcy jurisdiction. *Id.* at 372-73, 376. The plaintiff sought to avoid the cancellation [*10] decree by arguing that the Supreme Court later declared the statute authorizing the bond cancellation unconstitutional, and the decree was therefore "void." *Id.* at 374-75. The Supreme Court rejected this argument, holding that the decree was *res judicata* despite its basis on a later-found-unconstitutional statute. *Id.* at 378.

The Supreme Court began by noting that the plaintiff "had full opportunity to present any objections to the [prior] proceeding . . . [including] as to the validity of the statute under which the proceeding was brought." *Id.* at 375. But,

[a]pparently no question of validity was raised and the cause proceeded to decree on the assumption by all parties and the court itself that the statute was valid. . . . If the general principles governing the defense of *res judicata* are applicable, these [plaintiffs], having the opportunity to raise the question of invalidity, were not the less bound by the decree because they failed to raise it.

Id.

The Court next addressed the plaintiff's argument "that the District Court was sitting as a court of bankruptcy,

with the limited jurisdiction conferred by statute, and that, as the statute was later declared to be invalid, the District Court was without jurisdiction to [*11] entertain the proceeding and hence its decree is open to collateral attack." *Id.* at 376. The Court found this argument "untenable" because "[t]he lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." *Id.* They nonetheless have authority "to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally." *Id.*

Subsequent decisions have tempered *Chicot's* "may not be assailed collaterally" language, but not by much. For example, the *Travelers* case, *supra*, involved certain bankruptcy court orders entered in 1986, arguably in excess of bankruptcy jurisdiction. 557 U.S. at 141-47. Almost twenty years later, the Second Circuit held (in a separate action) that those 1986 orders indeed exceeded a bankruptcy court's jurisdiction at the time. *Id.* at 147. The Supreme Court reversed, reasoning that "once the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power), they became *res judicata*." *Id.* at 152.

The Court [*12] acknowledged, however, that "[t]he rule is not absolute, and we have recognized rare situations in which subject-matter jurisdiction is subject to collateral attack." *Id.* at 153 n.6. The Court cited two of its own decisions, one allowing collateral attack when sovereign immunity was at stake, and the other allowing collateral attack to a state-court foreclosure judgment entered in violation of a bankruptcy statute. *Id.* The Court also quoted the Restatement (Second) of Judgments' position, which permits collateral attacks on subject matter jurisdiction where:

- (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
- (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
- (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness

the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

Id. (quoting *Restatement (Second) of Judgments* § 12 (1980)). The Court found "no occasion to address [*13] whether we adopt all of these exceptions" because the parties argued none and the Court could not see how any would apply: "This is not a situation, for example, in which a bankruptcy court decided to conduct a criminal trial, or to resolve a custody dispute, matters 'so plainly beyond the court's jurisdiction' that a different result might be called for." *Id.*

The Tenth Circuit thoroughly addressed this "plainly beyond the court's jurisdiction" standard in its *Gschwind* decision, *supra*. The plaintiff in *Gschwind* was a Belgian citizen who brought a wrongful death action in Ohio state court against a Kansas citizen, an Ohio citizen, and a Canadian citizen. *232 F.3d at 1344*. The defendants then removed to the Southern District of Ohio. *Id.* The plaintiff moved to remand, arguing that the Ohio defendant defeated removal jurisdiction, but the Southern District of Ohio determined that the Ohio defendant had been fraudulently joined and therefore denied the motion to remand. *Id.* The case was then transferred to the District of Kansas and conditionally dismissed on *forum non conveniens* grounds. *Id.*

The plaintiff appealed to the Tenth Circuit and lost. *Id.* She "then petitioned for rehearing and rehearing en banc, [*14] arguing for the first time that the district court lacked diversity jurisdiction over suits between aliens [*i.e.*, herself and the Canadian citizen]." *Id.* The Tenth Circuit denied the petition, and the Supreme Court subsequently denied the plaintiff's petition for certiorari. *Id.* The plaintiff then filed for *Rule 60(b)(4)* relief in the district court, again arguing lack of subject matter jurisdiction over suits between aliens. *Id.* The district court denied the motion. *Id. at 1345*.

On appeal from that denial, the Tenth Circuit acknowledged that certain authorities supported the plaintiff's jurisdictional argument, but the court nonetheless affirmed the district court's denial of *Rule 60(b)(4)* relief. *Id. at 1345*. The Tenth Circuit noted that a judgment is "void for lack of subject matter jurisdiction . . . only where there is a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority." *Id. at 1346* (citation and internal quotation marks omitted). Moreover,

[a] court does not usurp its power when it erroneously exercises jurisdiction. Since federal

courts have jurisdiction to determine jurisdiction, that is, power to interpret the language of the jurisdictional instrument and its application [*15] to an issue by the court, error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction. There must be no arguable basis on which the court could have rested a finding that it had jurisdiction.

Id. (citations and internal quotation marks omitted; alterations incorporated). Under those standards, the Tenth Circuit held that the district court's allegedly

erroneous interpretation of a jurisdictional statute [did] not render the underlying judgment void. Moreover, there was at least an arguable basis for jurisdiction because the scope of the district court's jurisdiction over a case with foreign parties on both sides of an action is far from clear from the face of the [relevant] statute.

Id. (citations omitted).

B. Defendants' *Rule 60(b)(4)* Challenge

In light of *Gschwind*, Defendants here must show a "plain usurpation of power," *i.e.*, "no arguable basis on which the [Bankruptcy Court] could have rested a finding that it had jurisdiction," and not simply an "error in interpreting a statutory grant of jurisdiction." *Id.* Defendants offer only two arguments in this regard: (1) the Bankruptcy Court did not make a jurisdictional determination that they could [*16] have challenged earlier; and (2) the Bankruptcy Court's entry of final judgment was indeed a "plain usurpation of power." (ECF No. 11 at 27-28; ECF No. 24 at 15-16.) The Court will examine each argument in turn.

1. No Previous Jurisdictional Determination

Defendants argue that the Bankruptcy Court previously determined only its statutory jurisdiction, not its Article III jurisdiction, and so "this issue remains open for determination at this time." (ECF No. 11 at 28.) Defendants are incorrect. The Supreme Court held many years ago that "[e]very court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter." *Stoll v. Gottlieb*, 305 U.S. 165, 171-72, 59 S. Ct. 134, 83 L. Ed. 104 (1938).

Moreover, "[a] party that has had an *opportunity* to litigate the question of subject-matter jurisdiction may

not . . . reopen that question in a collateral attack upon an adverse judgment." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 716 n.9, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982) (emphasis added). Defendants certainly had an opportunity, and it is no excuse that "[n]o one believed that Article III jurisdiction was an issue at that time." (ECF No. 11 at 18.) The *Chicot* case, discussed *supra*, likewise involved a jurisdictional issue that no one thought to challenge at the time: "no question of validity was raised and the [*17] cause proceeded to decree on the assumption by all parties and the court itself that the [jurisdiction-granting] statute was valid." 308 U.S. at 375 (emphasis added). The judgment remained *res judicata* despite the parties' and the lower court's apparent unawareness that a jurisdictional problem might exist. *Id.* at 376. Thus, Defendants may not obtain Rule 60(b)(4) relief by arguing that the precise jurisdictional question at issue was never previously addressed.

2. Plain Usurpation of Power

Defendants also argue that the Bankruptcy Court plainly usurped jurisdictional power when it entered its June 2009 judgment. (ECF No. 24 at 15-16.) Defendants make this argument for the first time, however, in their reply brief—as the very last argument in their reply brief, no less. (*Id.*) Defendants seem to frame this as a response to Peters's invocation of the *Gschwind* standard (see ECF No. 21 at 20), but the *Gschwind* standard is Defendants' burden to satisfy. *In re Stone*, 588 F.2d 1316, 1319 (10th Cir. 1978) ("Rule 60(b) of the Federal Rules of Civil Procedure permits relief from a final judgment only if the movant can demonstrate justifiable grounds" (emphasis added)). It is not something that Defendants could ignore until raised by an opposing party. Accordingly, any argument in this regard raised for the first time [*18] in a reply brief is waived. See *Colo. Rail Passenger Ass'n v. Fed. Transit Admin.*, 843 F. Supp. 2d 1150, 1171 (D. Colo. 2011).

Even if not waived, the Court would reject the argument on its merits. Defendants' entire argument is as follows:

In this case, *Stern v. Marshall* disposes of any argument that the Bankruptcy Court possessed even an arguable basis for exercising subject matter jurisdiction. In *Stern*, the Supreme Court held that an entire category of claims—consisting of all claims under state law seeking to augment or enlarge the bankruptcy estate—lie outside the jurisdiction of

the bankruptcy courts. The Bankruptcy Court in this case exercised jurisdiction over just such a claim and ruled on it. The Bankruptcy Court did not merely make a minor error in the application of its jurisdiction; rather, it intruded upon a wide swath of claims which are constitutionally limited to Article III courts.

(ECF No. 24 at 15-16 (boldface removed).) This is not an argument about "arguable basis," but a reiteration of *Stern's* holding. To the extent Defendants mean to say that *Stern's* holding was a foregone conclusion, Defendants forget that *Stern* was a 5-to-4 decision. See *Stern*, 131 S. Ct. at 2621 (dissenting opinion). This Court is unwilling to hold that there was no arguable basis in 2009 for a position embraced [*19] by four Supreme Court justices in 2011.

Further, Defendants have not pointed this Court to a single case in which a final judgment was collaterally voided on account of *Stern*. Instead, Defendants cite cases in which lack of jurisdiction was established on direct appeal. See *In re BP RE, L.P.*, 735 F.3d 279, 281 (5th Cir. 2013); *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 755 (7th Cir. 2013), *rev'd in part*, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015); *Waldman v. Stone*, 698 F.3d 910, 917-18 (6th Cir. 2012). (See also ECF No. 11 at 21-22.) As already noted, direct appeal differs substantially from collateral attack. As the Supreme Court explained many years ago:

It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has had his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined.

Stoll, 305 U.S. at 172. Thus, "[t]he past cannot always be erased by a new judicial declaration." *Chicot*, 308 U.S. at 374. Defendants have failed to establish that this case presents one of those very rare situations where the past *can* be erased by a new judicial declaration.

IV. CONCLUSION

For the reasons stated above, the decision of the Bankruptcy Court is AFFIRMED.

Dated this 5th day of August, 2015.

BRADLEY STRASSBERG

BY THE COURT:

United States District Judge

/s/ William J. Mart nez

William J. Mart nez [*20]