

FILED

9-25-14

THIS IS A REPLICA OF THE FILED DOCUMENT
PROVIDED IN TEXT SEARCHABLE FORMAT.
THE ORIGINAL IS AVAILABLE ON PACER.

UNITED STATES BANKRUPTCY COURT EASTERN
DISTRICT OF CALIFORNIA

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re

Case No. 12-10802-A-7

Terence Edward Moore,

Debtor.

Timothy E. Moore, individually
and as trustee of the Edward C. Moore
and Marie Moore Family Trust dated
November 12, 1992,

Adv. No. 12-01135-A

Plaintiff,

vs.

Terence Edward Moore,

Defendant.

MEMORANDUM DECISION

1 If a defendant in an adversary proceeding brings an untimely
2 motion to amend a final judgment under Rule 59(e), must the court
3 nevertheless reconsider whether it made judicial errors under Rule
4 60(b)(1) within a reasonable time not to exceed one year? The answer
5 is no.

6 **FACTS**

7 Timothy E. Moore ("Timothy") and Terence E. Moore ("Terence") are
8 the sons of Edward Moore ("Edward"). Edward established an inter
9 vivos trust for his children. Upon Edward's death, Terence became the
10 trustee. Five years after Edward's death, a state court removed
11 Terence as trustee. Timothy was named successor trustee.

12 Terence filed a Chapter 7 bankruptcy, and Timothy, individually
13 and as trustee, brought an adversary proceeding against Terence under
14 11 U.S.C. § 523(a)(4), claiming that Terence's debts as a result of
15 Terence's bad acts during his tenure as the trustee were
16 nondischargeable. After a trial on these claims, the court issued a
17 memorandum decision and rendered a nondischargeable judgment in favor
18 of Timothy and against Terence in the amount of \$27,639.78.

19 Twenty seven days after entry of the judgment, Terence filed a
20 Motion to Alter or Amend Judgment under Federal Rule of Civil
21 Procedure 59(e). The motion argues that the Memorandum Decision
22 contains errors in law and fact that are carried forward into the
23 judgment so that amendment of the judgment is warranted.

24 **DISCUSSION**

25 **I. Terence's motion is untimely under Rule 59(e)**

26 Absent an appeal, a Rule 59(e) motion is the proper procedure to
27 request an alteration or amendment of a judgment or order based on
28 grounds of judicial error of law or fact. See *Turner v. Burlington N.*

1 *Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003). Rule 59(e)
2 motions must be filed no later than 14 days after entry of judgment.
3 See Fed. R. Bankr. P. 9023 (incorporating Fed. R. Civ. P. 59 but
4 shortening the time from 28 days to 14 days for filing motions to
5 alter or amend a judgment).

6 Terence's motion was filed 27 days after the court's entry of the
7 judgment against him. His motion under Rule 59(e) is therefore
8 untimely.

9 **II. Terence's motion is untimely under Rule 60(b)(1)**

10 An untimely motion under Rule 59(e) should be deemed as a motion
11 under Rule 60(b). *Mount Graham Red Squirrel v. Madigan*, 954 F.2d
12 1441, 1462-63 n.35 (9th Cir. 1992). Rule 60(b)(1) affords parties
13 relief occasioned by mistake. Fed. R. Civ. P. 60(b)(1). Such
14 mistakes include the court's substantive errors of law or fact. See
15 *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 387 F.3d 1021, 1024 (9th Cir.
16 2004) ("The district court has discretion to correct a judgment for
17 mistake or inadvertence, either on the part of counsel or the court
18 itself." (citation omitted)); *Phonometrics, Inc. v. Hospitality*
19 *Franchise Sys., Inc.*, 126 F. App'x 793, 794 (9th Cir. 2005)
20 (unpublished decision) ("The 'mistakes' of judges may be remedied
21 under [Rule 60(b)(1)], which also encompasses mistakes in the
22 application of the law.").

23 Ordinarily, a motion brought under Rule 60(b)(1) must be brought
24 within a reasonable time not to exceed one year after the entry of the
25 judgment or order. See Fed. R. Civ. P. 60(c)(1), incorporated by Fed.
26 R. Bankr. P. 9024. Notwithstanding this time limitation, Rule
27 60(b)(1) motions arising from the court's errors must be made prior to
28 the expiration of time to file an appeal. *Gila River Ranch, Inc. v.*

1 *United States*, 368 F.2d 354, 357 (9th Cir. 1966); *Phonometrics, Inc.*,
2 126 F. App'x at 794; *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 578
3 (10th Cir. 1996). A different rule would mean that Rule 60(b) motions
4 would operate as untimely appeals. *Morris v. Adams-Millis Corp.*, 758
5 F.2d 1352, 1358 (10th Cir. 1985).

6 Appeals from adversary proceedings in bankruptcy cases must be
7 filed not later than 14 days after entry of the judgment or order from
8 which an appeal is taken. Fed. R. Bankr. P. 8002(a). Here, the
9 motion was filed 27 days after entry of the judgment. Considered
10 under Rule 60(b)(1), the motion will be denied as untimely.

11 **CONCLUSION**

12 The court denies the motion as untimely and does not address the
13 merits of the motion or reconsider the judgment on substantive
14 grounds. The court will issue a separate order.

15 Dated: September 25, 2014

16 /FREDRICK E. CLEMENT/

17 _____
18 Fredrick E. Clement
19 United States Bankruptcy Judge
20
21
22
23
24
25
26
27
28