

SO ORDERED.

SIGNED this 19th day of October, 2020.



Dale L. Somers

Dale L. Somers
United States Chief Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

Bradley J. Mattox,

Debtor.

Case No. 18-10101-13

Order Granting Debtor's Motion to Vacate

Debtor Bradley J. Mattox and the Chapter 7 Trustee of his bankruptcy estate have been engaged in a dispute over the exemption of Debtor's homestead for more than two years.¹ The parties settled their dispute by agreeing that the Trustee could sell "approximately 8 or 9 acres" on the west side of Debtor's property, which would be surveyed at a future point to establish the exact legal description. Unfortunately, the survey that was

¹ Debtor appears by William H. Zimmerman, Jr., and the Chapter 7 Trustee, J. Michael Morris, appears personally.

completed did not reflect what was agreed to at mediation. All parties agree to that fact. Debtor now seeks to set aside the supplemental order establishing the incorrectly surveyed area as the property to be sold by the Chapter 7 Trustee. The Trustee opposes, arguing that Debtor missed his opportunity to object, the supplemental order that was entered is final, and Debtor has waited too long to set that order aside.

The Court grants Debtor's motion to vacate. The Court would not have signed and entered the supplemental order if it had realized the surveyed legal description varied from the parties' agreement in the significant way it did. The Trustee should obtain a new survey, endeavoring to establish the actual parameters of the parties' settlement agreement.

I. Findings of Fact²

Debtor filed a Chapter 7 bankruptcy petition on January 23, 2018. The petition was precipitated by the filing of a civil action against Debtor by a local law firm for the collection of a \$177,834.67 debt for legal services rendered.³ The debt to this creditor is Debtor's only significant liability.

² The following facts were either established at trial or taken from the Court's record. *Tal v. Hogan*, 453 F.3d 1244, 1235 n.24 (10th Cir. 2006) (court may take judicial notice of "its own files and records" to show their contents, not to prove the truth of the matters therein).

³ Doc. 1 pp. 39 and 43.

Debtor lives on his family farm, just west of Derby, Kansas. Debtor's Schedule A described his real property as 4418 E. 83rd St. S., in Derby, Kansas, valued at \$244,970.⁴ Debtor's Schedule C then further described the real property as:

S ½ NE ¼ EXC W 419.8 FT & EXC 17.44A FLDY CC A-29459 &
EXC S 35 FT E 1536 FT & EXC COND. CASE 98C-1442 SEC 11-
29-1E⁵

Debtor claimed this real property exempt under K.S.A. § 60-2301 (providing for exemption of “a homestead to the extent of 160 acres of farming land . . . occupied as a residence by the owner . . . together with all the improvements on the same”).⁶

The Chapter 7 Trustee objected to Debtor's claimed homestead exemption, arguing that the claimed “43 acres of property” were not farming land, but were instead devoted to running a rodeo arena operated as a commercial business.⁷ Debtor admits that he has an arena on his property where he holds rodeos and other events. The Court scheduled the matter for trial and the pretrial order on the issue stipulated the following:

The debtor has claimed as exempt real estate described as: “S/2 NE/4, Except W 519.8 ft, and Except 1744 acres FLDY CCA-29459, and Except S 35 ft E 1536 ft, and Except Cond. Case 986-1442, Sec. 11-29-1E,” containing approximately 43 acres.

⁴ Doc. 1 p.22.

⁵ Doc. 1 p. 35.

⁶ Doc. 1 p. 33.

⁷ Doc. 25.

Such property lies outside any city limit.⁸

Ultimately, the matter did not go to trial, but was mediated.

Following the mediation, the parties settled their dispute. The settlement agreement has the following language:

4. Mattox waives his claim of exemption as [to] a strip of land along the full west side of his real estate as shown on the attached aerial map. The “waiver property” is approximately 8 or 9 acres and is bounded by the west, north and south sides of the debtor’s ownership, with the east side of the “waiver property” being the tree line as shown.

5. The “waiver property” will be subject to survey to establish its exact legal description. The parties further agree that ad valorem property taxes will be apportioned by agreement with the County.

6. Once established the “waiver property” will be subject to sale by the Trustee.⁹

The attached Exhibit A is reproduced here in its entirety. In the below image,

Debtor’s neighbor’s property is shown as the far west “rectangle” of land.

Debtor’s property begins on the tree line to the west of the written words

“waive homestead.” At trial, Debtor testified that the east line of the waived

homestead indicated on the below picture as a pen-marked line, was intended

to include only bare land (containing no buildings). Debtor testified that he

had just guessed at the mediation on the acreage, and that he truly had no

idea how many acres would have been included in the “waived” portion.

⁸ Doc. 41 p. 2.

⁹ Doc. 58 p.3.

2/7/2017

Google Maps Maddox Arena

Maddox Arena - Google Maps

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<https://www.google.com/maps/place/Maddox+Arena/@37.5448182,-97.285572377m/data=!3m1!1e3!1s39m4!1s0x877b6e2ca0100090a7:731b64d8187d819a253d75427595d4-97.284208174-en>

Imagery ©2017 Google, Map data ©2017 Google, 100 ft

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The settlement agreement was approved by the Court on May 29, 2019.¹⁰

More than seven months passed. On February 14, 2020, the Chapter 7 Trustee filed an application to employ a surveyor to conduct a survey “of the non-exempt real property of the bankruptcy estate.”¹¹ The surveyor never contacted Debtor personally. Then on March 2, 2020, the Trustee filed a motion for a supplemental order on his objection to claim.¹² In that motion, the Trustee reported that he had obtained a survey of the “waiver property,” and that the survey described the “waiver property” as:

Commencing at the S.W. Corner of the NE1/4 of Sec. 11, Twp. 29-S, R-1-E, of the 6th P.M., Sedgwick County, Kansas; thence S89°55'40"E, along the South line of said NE1/4, 419.81 feet; thence N00°21'20" E, parallel with the West line of said NE1/4, 65.53 feet to the Point of Beginning and being the North Right-of-Way of 83rd St. S. as Established by Condemnation Case No. 98C1442; thence continuing N00°21'20"E, 1258.54 feet to the North Line of the S1/2 of said NE1/4; thence S89°28'40"E, along said North line 350.00 feet; thence S00°21'20"W, 1255.35 feet to said North Right-of-Way line of 83rd St. S.; thence S90°W, along said Right-of-Way 350.00 feet to the Point of Beginning.

A copy of the survey sketch was attached as an exhibit, and it showed the property as follows:

¹⁰ Doc. 60 (Order Approving Settlement).

¹¹ Doc. 62.

¹² Doc. 65.

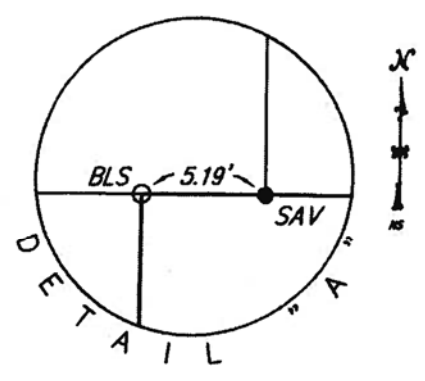
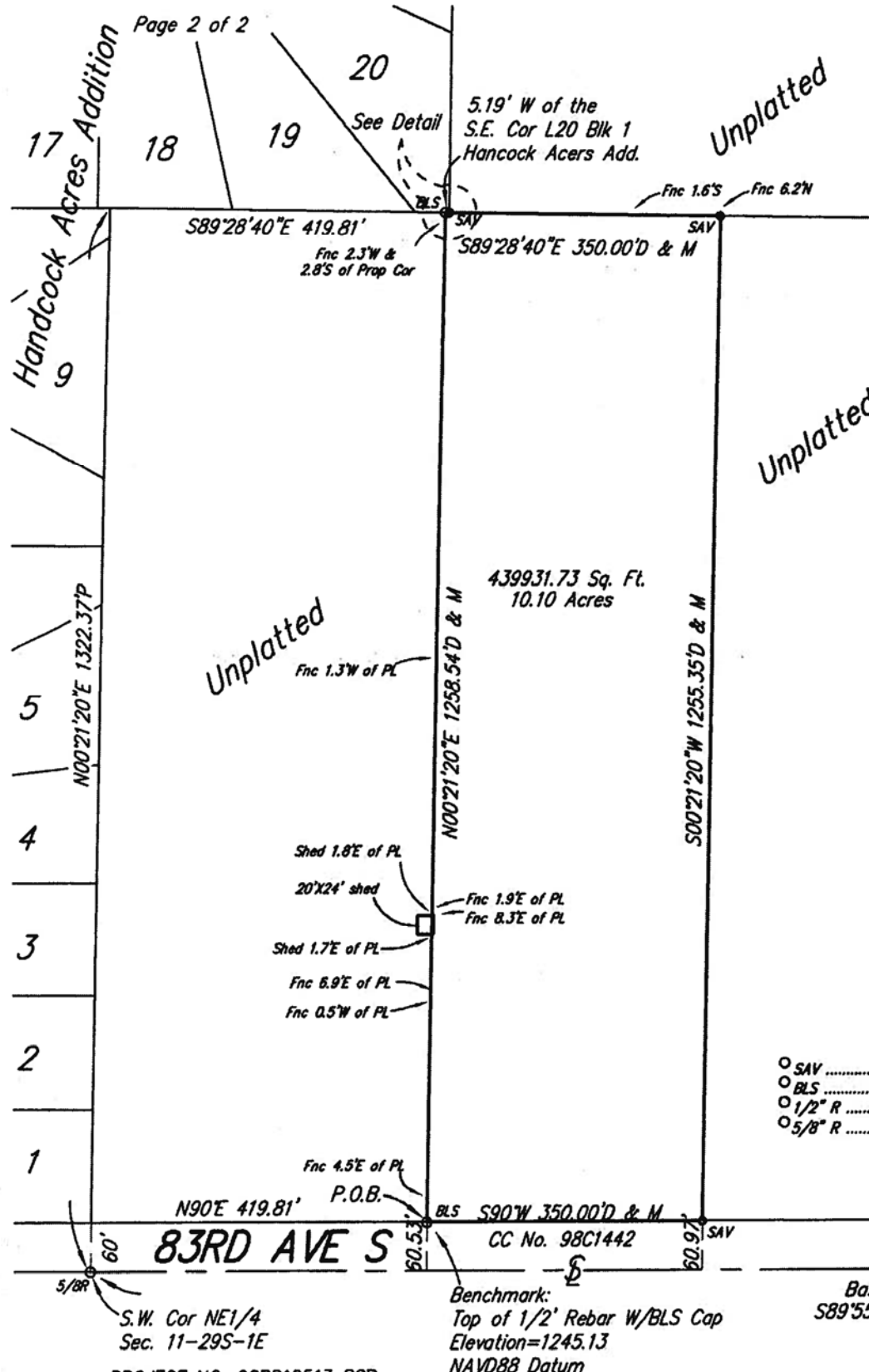


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1" = 200'

LEGEND:

- P = Platted
- M = Measured
- C = Calculated
- D = Described

- SAV 1/2" REBAR W/SAVOY CAP (SET)
- BLS 1/2" REBAR W/BENCHMARK CAP (FOUND)
- 1/2" R 1/2" REBAR (FOUND ORIGIN UNKNOWN)
- 5/8" R 5/8" REBAR (FOUND ORIGIN UNKNOWN)

Benchmark:
 Top of 1/2" Rebar W/BLS Cap
 Elevation=1245.13
 NAVD88 Datum

Basis of Bearing
 S89°55'40"E 2643.90'M

In the above image, the southwest corner of Debtor’s property starts at the area marked “P.O.B.” (for Point of Beginning). The surveyed property extends to the east and north to encompass the rectangle in the middle of the page, with “unplatted” areas on both sides, and results in a total of 10.10 acres. The above surveyed area includes land with a barn and utility services that is visibly to the east of the line drawn on the map included with the settlement agreement. No objections to the motion were filed, and an order was entered on March 17, 2020, granting the Trustee’s motion (hereinafter, the “Supplemental Order”).¹³

This time, four months passed. The Chapter 7 Trustee next filed an application to employ an auctioneer on July 15, 2020,¹⁴ and on August 8, 2020, a notice of the intended sale by auction of the property was filed.¹⁵ At this point, on August 10, 2020, Debtor’s counsel filed a motion to vacate the Supplemental Order.¹⁶ In that motion to vacate, counsel argued:

Unknown to Debtor and his counsel, the survey description does not accurately describe the Tract, as it includes additional land to the east of the agreed easterly boundary of the Tract. Upon learning of the discrepancy, Debtor’s counsel advised the trustee and interested creditors counsel that there appeared to be a mistake, and that counsel wanted to view the tract. This was in early March 2020 at the time the state was shutting down due to the COVID pandemic.

¹³ Doc. 69.

¹⁴ Doc. 71.

¹⁵ Doc. 73.

¹⁶ Doc. 77.

Counsel has now visited with Debtor and viewed the Tract; it is clearly not what was agreed to at the Mediation. However, the Trustee's counsel advises that the Trustee intends to offer for sale the Tract as surveyed, and not make adjustments to the description.

As further evidence of the inaccuracy of the survey, Counsel for the Trustee has advised Debtor's counsel that the appraiser explained that Sedgwick County zoning and land use regulations prohibit new tracts being platted of less than 10 acres. Unknown to Counsel and the parties thereto, the appraiser surveyed a larger tract than had been agreed to at the mediation in order to comply this regulation. The above-mentioned county regulation was not discussed nor know[n] to be an issue at the mediation.¹⁷

Debtor moved to vacate the order because it was "entered by mistake," and also objected to the Trustee's notice of intended sale.

At trial, the Chapter 7 Trustee acknowledged that the survey was not correct compared to what was agreed at the settlement, but that Debtor knew a survey would occur and should have acted at the time the legal description was presented in the supplemental motion. The Chapter 7 Trustee also acknowledged that he had hired the surveyor, and it was the surveyor who had communicated the "need" to have the survey yield ten acres so that the property could be marketed for sale.

Debtor testified that it was a neighbor that notified him of the survey flags on his property, and that he contacted his counsel as soon as he saw

¹⁷ Doc. 77 ¶¶ 4-6.

that the flags extended beyond what he had agreed at the settlement.

Debtor's counsel claimed he visited the property and assessed the situation as soon as possible after restrictions related to the 2020 Covid-19 pandemic were eased and it was safe for him to travel to see the property.

II. Conclusions of Law

Contested matters concerning the “allowance or disallowance of claims against the estate or exemptions from property of the estate” are core matters under 28 U.S.C. § 157(b)(2)(B) over which this Court may exercise subject matter jurisdiction.¹⁸

A. Timing under Federal Rule of Civil Procedure 60(b)(1)

Federal Rule of Civil Procedure 60, incorporated to bankruptcy via Federal Rule of Bankruptcy Procedure 9024, permits relief from final orders. Under Rule 60(b)(1), upon the filing of a “motion and just terms,” the court may relieve a party from a final order if there has been “mistake, inadvertence, surprise, or excusable neglect.”

The Chapter 7 Trustee's first challenge to Debtor's motion is as to its timeliness. A motion filed under Rule 60(b)(1) “must be made within a

¹⁸ This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and §§ 1334(a) and (b) and the Amended Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's Bankruptcy Judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective June 24, 2013. D. Kan. Standing Order 13-1, *printed in* D. Kan. Rules of Practice and Procedure (March 2018).

reasonable time” and “no more than a year after the entry of the judgment or order or the date of the proceeding.”¹⁹ The Supplemental Order was entered on March 17, 2020, and Debtor filed his motion to vacate that order five months later, on August 10, 2020. The motion was, therefore, filed within the year requirement, and the Court’s only task is to decide if five months is reasonable in the circumstances present.

The testimony at trial was that Debtor recognized the error of the Trustee’s survey once he saw the stakes in the ground. But he also testified that he had no idea how long the stakes had been there when he saw them. It is undisputed that Debtor and his counsel received actual notice of the motion in March 2020, setting out the incorrect legal description from the survey. And Debtor testified that he did contact counsel as soon as he saw the stakes indicating the incorrect boundary line. Counsel claimed that because of the timing of the motion and Supplemental Order occurring right as Covid-19 restrictions began, combined with the need to see the physical land in person, he did not travel to Debtor’s land until the summer of 2020, as soon as it was safe to do so. The Court concludes that, considering the circumstances, the five-month lapse in time between the entry of the

¹⁹ Fed. R. Civ. P. 60(c)(1).

Supplemental Order and the motion to vacate was reasonable. Debtor contacted his attorney as soon as he knew there was a problem

B. Meeting Rule 60(b)(1)'s Burden of Proof

Moving on to the substance of Debtor's motion, Debtor must show he is entitled to relief under Rule 60(b)(1) based on mistake. Rule 60(b) "is an extraordinary procedure," that should be utilized only "upon a showing of good cause within the rule."²⁰ The burden to prove grounds for relief under Rule 60(b)(1) is on the party moving to have the judgment set aside.²¹

The Tenth Circuit has directed that:

Rule 60(b)(1) motions premised upon mistake are intended to provide relief to a party in only two instances: (1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order.²²

The Tenth Circuit has given lots of examples of what an "excusable litigation mistake" is *not*. An excusable litigation mistake is not "a deliberate and counseled decision by the complaining party."²³ In addition, if a party "simply misunderstands or fails to predict the legal consequences of his deliberate

²⁰ *Cessna Fin. Corp. v. Bielenberg Masonry Contracting Inc.*, 715 F.2d 1442, 1444 (10th Cir. 1983).

²¹ *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990).

²² *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999).

²³ *Id.*

acts,” then that is not an excusable litigation mistake.²⁴ The Tenth Circuit has also said that “Rule 60(b) does not provide relief for mistakes made in the negotiation of a contract or a stipulation (which is treated like a contract).”²⁵ And as a final example, “[c]arelessness by a litigant or his counsel does not afford a basis for relief under Rule 60(b)(1).”²⁶

To the contrary, there is not a lot of guidance on what an excusable litigation mistake *is*. The Tenth Circuit has said that an excusable litigation mistake is one which “a party could not have protected against, such as counsel acting without authority.”²⁷ In addition, the Tenth Circuit has advised that “Rule 60(b)(1) deals with mistakes that occur in the judicial process of enforcing whatever rights might arise from the historic facts.”²⁸ For example, Rule 60(b)(1) would *not* apply if a mistake arises in the negotiation of an underlying stipulation, but it *would* apply to “the

²⁴ *Id.* See also *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 578 (10th Cir. 1996) (“Rule 60(b)(1) is not available to provide relief when a party takes deliberate action upon advice of counsel and simply misapprehends the consequences of the action.”).

²⁵ *Cashner*, 98 F.3d at 578.

²⁶ *Pelican Prod. Corp.*, 893 F.2d at 1146.

²⁷ *Yapp*, 186 F.3d at 1231.

²⁸ *Cashner*, 98 F.3d at 578.

subsequent enforcement of the stipulation by the court.”²⁹ In addition, the mistake must be excusable, meaning that the party is not at fault.³⁰

Debtor argues that the Supplemental Order should be vacated based on mistake under Rule 60(b)(1) because the land description reflected in the Supplemental Order was not intended by either party in their settlement agreement. The Trustee admits that the east boundary of the legal description is incorrect. He acknowledges that the east line was established by the surveyor, based on the surveyor understanding that he needed to extend the “waiver property” to ten acres for the Trustee to be able to sell it. All parties acknowledge that the line that was drawn by the survey is *not* what they agreed to in their settlement.

Despite all this, because the settlement was that the “waiver property” would be “8 or 9 acres,” the Chapter 7 Trustee argues that his legal description yielding “10.10 acres” should be allowed to stand. But the settlement was very clear about the boundaries, and only gave an estimate as to the acreage. It is the boundaries that were explicitly agreed, and that is what all parties believed controlled. The parties specifically agreed that the east boundary would be the tree line as shown on the exhibit to their

²⁹ *Id.*

³⁰ *See Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (“This leaves, of course, the Rule’s requirement that the party’s neglect be ‘excusable.’”)

settlement. Yes, Debtor at the settlement discussed that this area was eight or nine acres, but he credibly testified that it was clear at the settlement that his guess was *just* a guess, nothing more. That was the entire point of getting the land surveyed: to obtain the legal description.

There was simply no reason for Debtor or his counsel to think the Chapter 7 Trustee would have obtained a survey with a legal description that blatantly exceeded their agreement. As the Tenth Circuit has noted, “Rule 60(b) should be liberally construed when substantial justice will thus be served.”³¹ The Court concludes that the current scenario is more like the examples given by the Tenth Circuit permitting relief under Rule 60(b)(1) based on mistake. The situation that occurred was not one which could have been protected against, and Debtor notified his counsel as soon as he saw survey markers that seemed incorrect. The mistake did not arise in the negotiation of the settlement, but arose in the judicial enforcement of that settlement through the obtaining of the Supplemental Order. As a result, the Court concludes that Debtor has carried his burden to prove that he is entitled to relief from the Supplemental Order under Rule 60(b)(1) on the basis of an excusable litigation mistake.

³¹ *Cessna Finance Corp.*, 715 F.2d at 1444 (internal quotation omitted).

III. Conclusion

The Court grants Debtor's motion to vacate³² under Rule 60(b)(1). Debtor has carried his burden to show that the Supplemental Order, entered by this Court on March 17, 2020,³³ should be set aside. The parties' settlement requires a survey to establish a legal description for the "waiver property," defined as "bounded by the west, north and south sides of the debtor's ownership, with the east side of the 'waiver property' being the tree line as shown" in the referenced aerial image. Once this legal description is established, the property "will be subject to sale by the Trustee," per the parties' agreement.

It is so Ordered.

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³² Doc. 77.

³³ Doc. 69.