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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Kevin R. Jones, Plaintiff, vs. Bank of America, N.A., a foreign business corporation, Defendant.	No. CV 09-2129-PHX-JAT **ORDER**

Currently before the Court is Defendant Bank of America's Motion to Vacate the Court's "Insurance Ruling" in its June 1, 2010 Order (Doc. 79). Plaintiff Kevin R. Jones has not filed a response. For the reasons that follow, the Court denies Defendant's Motion to Vacate.

I. Background

Plaintiff Kevin R. Jones brought suit against Defendant Bank of America when Defendant began foreclosure proceedings on Plaintiff's home. One of Plaintiff's several claims against Defendant was a bad faith claim, alleging that there was a "special contract directly with [Defendant] that was in the nature of an insurance contract—namely the 'Borrowers Protection Plan.'" (*Id.*, 3:5–6). In its Reply in Support of its Motion to Dismiss, Defendant claimed that under state law in Arizona the Borrowers Protection Plan was not an insurance policy, and there was no special relationship to sustain a bad faith claim. (Doc. 44,

3:24–7:11). On June 1, 2010, the Court ruled that under Arizona law, "the Bank 'is an insurer with respect to the Borrowers Protection Plan' and the Plan 'created an insurer/insured relationship' between the parties." (Doc. 79, 3:13–14).

On June 21, 2010, Defendant filed a Motion for Reconsideration of the Court's June 1, 2010 order. In its motion, Defendant asked the Court to reconsider the ruling in light of Federal banking law which Defendant argued both (1) preempts state banking law and (2) holds that banks do not create insurance policies by issuing plans like the Borrowers Protection Plan. However, *without ruling on the merits of Defendant's argument*, the Court denied the motion as untimely because it had not been filed within 14 days of the June 1 order, as required under LRCiv 7.2(g)(2). Defendant also requested relief in its Motion for Reconsideration under FED.R.CIV.P. 60(b). In a Motion for Clarification, the Court ruled that "Rule 60(b) is only applicable to 'final' orders and that the June 1 Order was not a 'final' order." (Doc. 79, 4:21).

Shortly thereafter, Plaintiff settled with Defendant, agreeing to dismiss, with prejudice, all of his remaining claims. Following the settlement, Defendant submitted this motion to vacate the June 1 order. Defendant's argument is two-fold: the Court should vacate the June 1 order under the powers granted by Rule 60(b) or the Court should vacate the order under the its plenary powers to review interlocutory rulings.

II. Rule 60(b)

FED.R.CIV.P. 60(b) allows a court to relieve a party "from a *final* judgment, order, or proceeding . . . ." (emphasis added). The Court's June 1 order was not a final order because it "did not 'end[] litigation on the merits and leave[] nothing for the court to do but execute the judgment.'" *Baker v. Fair, Issac and Co., Inc.*, 2007 WL 641539, *1 (D. Ariz. 2007). The Court had denied Defendant's Motion to Dismiss with respect to Plaintiff's negligence, bad faith, and intentional infliction of emotional distress claims. *See id.* (plaintiff was not able to avail herself of Rule 60(b) because "there [were] a host of issues which the court must resolve before entering a final judgment"). However, Defendant correctly states that an "interlocutory order merges in the final judgment and may be challenged in an appeal from

that judgment." *Hook v. Ariz. Dep't of Corr.*, 107 F.3d 1397, 1401 (9th Cir. 1997) (quoting *Baldwin v. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976)). Therefore, a preliminary issue before the Court is whether there has been a final judgment in this matter.

When Plaintiff agreed to dismiss his remaining claims against Defendant, the parties requested that the Court dismiss the action, with prejudice, and entered into a Stipulation and Notice of Dismissal under FED.R.CIV.P. 41(a)(1)(A)(ii). (Doc. 77). The Court granted the parties' request and dismissed the action, with prejudice. (Doc. 78). Relying on the Sixth Circuit, the court in *Laurenzano v. Crossland Savings Bank, FSB* held that "a stipulation of dismissal is a final judgment subject to a Rule 60(b) motion." 837 F. Supp. 514, 515 (E.D.N.Y. 1993). However, the Court is not persuaded by *Laurenzano*'s interpretation which creates broad and "wide ranging . . . bases for relief" under Rule 60(b). *Id.*

In *Hinsdale v. Farmers Nat'l Bank & Trust Co.*, the Sixth Circuit case cited by *Laurenzano*, the parties also "executed a stipulation for dismissal with prejudice . . . [and] [t]he district court then unconditionally dismissed the action with prejudice." 823 F.2d 993, 995 (6th Cir. 1987). However, the Sixth Circuit went on to explain that this dismissal "terminated the district court's 'jurisdiction except for the limited purpose of reopening and setting aside *the judgment of dismissal* within the scope allowed by Rule 60(b).'" *Id.* at 995–96. (emphasis added). The Tenth Circuit has held that it "agree[s] with the Seventh Circuit that '[a]n unconditional dismissal terminates federal jurisdiction except for the limited purpose of reopening and setting aside the judgment of dismissal within the scope allowed by [FED.R.CIV.P.] 60(b).'"(alterations in original). Unlike the cases before the Sixth and Tenth Circuits, neither party in this case seeks to enforce or dispute the terms contained in the Stipulation and Notice of Dismissal. Instead, Defendant wishes to unilaterally[1] vacate an interlocutory order. Once the parties settled, the case became moot and the Court no longer retained jurisdiction, except for the limited purpose of addressing the judgment of dismissal. *See DHX, Inc. v. Allianz AGF MAT, LTD.*, 425 F.3d 1169, 1174 (9th Cir. 2005) ("Where

[1]Plaintiff has not filed a response to Defendant's motion.

parties enter into a settlement that resolves all outstanding disputes . . . the case becomes moot."). Therefore, the Court denies Defendant's Motion to Vacate based on relief sought under FED.R.CIV.P. 60(b).

III. Plenary Powers

Defendant correctly states that the Court has "inherent common-law authority 'to rescind an interlocutory order over which it has jurisdiction.'" *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581 (D. Ariz. 2003). *See Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005) ("[A] district court [has] inherent common-law authority to rescind or modify any interlocutory order as long as the court retains jurisdiction over the matter."). However, the dismissal order terminated the Court's jurisdiction over the action, except for the narrow purpose of examining and setting aside the judgment of dismissal.

Defendant also correctly states that a "federal court may consider collateral issues after an action is no longer pending." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990). However, the Supreme Court has given a narrow explanation of what constitutes a "collateral issue." A collateral issue is not a "judgment on the merits of an action . . . [but rather, an] independent proceeding[] supplemental to the original proceeding and not a request for a modification of the original decree." *Id.* at 395–96. These independent proceedings include motions for costs, attorney's fees, and Rule 11 sanctions. *Id.* Defendant's Motion to Vacate is not a supplemental independent proceeding, but instead strikes at the very heart of the original matter: whether or not Defendant entered into an insurer/insured relationship by issuing the Borrowers Protection Plan.

Therefore, Defendant's plenary powers argument fails for two reasons. First, the Court does not have common-law authority to rescind its interlocutory order because its jurisdiction was terminated by the dismissal order. Second, under the Supreme Court's explanation in *Hartmarx*, Defendant's motion is not a collateral issue which the Court is able to consider when the action is no longer pending.

The Court wishes to reiterate the unique procedural history of this case and its reasons

for denying Defendant's motion. In its Motion to Dismiss, Defendant argued that *under Arizona state law* it had not entered into an insurance relationship with Plaintiff. The Court held that *under Arizona state law* Defendant had indeed entered into such a relationship. Defendant then filed a Motion for Reconsideration arguing that *Federal banking law* preempts state banking law on this point and that *Federal law* holds that agreements like the Borrowers Protection Plan are not insurance contracts. Without ever having reached the merits of that argument, the Court denied Defendant's motion as untimely. As part of its Motion for Reconsideration, Defendant sought relief under Rule 60(b). The Court denied that relief because the Motion to Dismiss ruling was interlocutory and not final.

Defendant has presented essentially the same Federal preemption and Rule 60(b) relief arguments in its current Motion to Vacate. The Court finds that relief is not warranted under 60(b) or its plenary powers because the Court's jurisdiction was terminated by the dismissal order and the motion to vacate is not a collateral issue as defined by the Supreme Court. Accordingly, the Court will not reach a decision based on the merits of the arguments Defendant raised for the first time in its Motion for Reconsideration—whether Federal banking law preempts state banking law and whether under Federal banking law Defendant's Borrowers Protection Plan created an insurer/insured relationship.

Accordingly,

IT IS ORDERED that Defendant's Motion to Vacate the Court's "Insurance Ruling" in its June 1, 2010 Order (Doc. 79) is **DENIED.**

DATED this 28th day of March, 2011.

James A. Teilborg
United States District Judge