

1 **NOT FOR PUBLICATION**

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6 CLERK U.S. BANKRUPTCY COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA  
8 DEPUTY

9 UNITED STATES BANKRUPTCY COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re  
12  
13 SAMUEL KELSALL,  
14 Debtor.

Bankruptcy No. 04-10374-JM7  
Memorandum Decision

15  
16 On August 4, 2005, the Court conducted a hearing on the motion  
17 of Q Mortgage Investments, Inc., ("Q Mortgage") and Claudio Sassi  
18 ("Sassi") for reconsideration of an order allowing James Kennedy, as  
19 Chapter 7 trustee ("Trustee"), to abandon a state court action brought  
20 by Samuel Kelsall ("Debtor") against Q Mortgage. At the same time,  
21 the Trustee brought on a motion for approval of a settlement between  
22 the bankruptcy estate and Q Mortgage and Sassi. The motion for the  
23 settlement hinges on the motion for reconsideration. The Court DENIES  
24 both motions.

25 On May 5, 2005, the Court conducted a hearing on the Trustee's  
26 ("Trustee") motion to abandon certain property. Among the assets to  
27 be abandoned were a series of state court actions where the Debtor was  
28 plaintiff. In this motion to abandon, the Trustee indicated that he

1 was abandoning property listed in the Debtor's Schedule B. The Debtor  
2 listed the asset in question under subsection 20 of Schedule B as  
3 *Kelsall v. Preferred Mortgage, Q Mortgage, Mainstream Syndestrel*  
4 *200,000*. Under that listing of the asset, the Debtor additionally  
5 stated "Debtor does not expect to receive any money."

6 The Court granted the motion and counsel for the Trustee, Gary  
7 Rudolph ("Counsel"), was directed to prepare an appropriate order.  
8 The order ("Order") was entered on May 19, 2005. Paragraph 12 of the  
9 Order included the asset described as *Kelsall v. Preferred Mortgage*  
10 *(\$200,000.00)*. The Order became final on May 31, 2005, pursuant to  
11 Fed.R.Bankr.P. 8002(a) and 9006(a).<sup>1</sup>

12 According to Counsel, on June 2, 2005, Q Mortgage and Sassi  
13 approached him regarding a possible settlement. Counsel also  
14 represented to the Court that he believed the state court action  
15 involving Q Mortgage had been abandoned pursuant to the Order, in  
16 which case the Trustee did not have authority to settle the Debtor's  
17 claims against Q Mortgage. Furthermore, he stated that when he  
18 checked the Order he noticed that the description of the asset did not  
19 specifically mention Q Mortgage by name. Counsel described this as a  
20 "scrivener's error."

21 Counsel then filed what he styled as an amended order ("Amended  
22 Order"). This was not filed until June 10, 2005. In a declaration  
23 in support of the entry of the Amended Order, Counsel stated that when  
24 he drafted the Order he "inadvertently only identified the claim as  
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26 <sup>1</sup>Pursuant to Fed.R.Bankr.P. 8002(a) the time to appeal is 10 days  
27 from the date of entry of the order. That would have been Saturday,  
28 May 29, 2005. Since that was a Saturday, and the following Monday was  
a legal holiday - Memorial Day - the final day to appeal would have  
been Tuesday, May 31, 2005, pursuant to Fed.R.Bankr.P. 9006(a).

1 *Kelsall v. Preferred Mortgage.*" He asserted that the Amended Order  
2 was only necessary to "accurately reflect the intent of the parties  
3 and the court order."

4 The Amended Order was entered on June 22, 2005. Q Mortgage filed  
5 its motion for reconsideration of the abandonment on June 30, 2005,  
6 asserting a right to relief pursuant to Fed.R.Bankr.P. 9023 and  
7 Fed.R.Civ.P. 59. Fed.R.Civ.P. 59 requires that a motion under that  
8 Rule be brought within ten days of the entry of the order in question.  
9 Q Mortgage contended that it sought reconsideration of the Amended  
10 Order, effectively asserting that entry of the Amended Order create  
11 a new 10-day time period to appeal or seek reconsideration.

12 At the August 4 hearing, the Debtor objected on the ground that  
13 the Order was final before the motion for reconsideration was filed  
14 and that the Amended Order could not be used to revive or renew the  
15 time to appeal and the time for reconsideration. An objection was  
16 raised to this argument on the ground that it was being raised for the  
17 first time at argument, and that the Debtor had not put it forward in  
18 his opposition papers. However, the Court must resolve the issue in  
19 order to determine if it even has jurisdiction to consider the motion  
20 for reconsideration. The Court gave all sides an opportunity to argue  
21 the issue. It finds that further briefing is unnecessary.

22 The Court is satisfied that the original description of the asset  
23 in the Order entered on May 19, 2005, was sufficient and adequate.  
24 The Amended Order, at best, could be described as an attempt to  
25 clarify a clerical mistake. Pursuant to Fed.R.Civ.P. 60(a), as  
26 incorporated by Fed.R.Bankr.P. 9024, such a correction can be made  
27 even after an order has become final. A clerical mistake is described  
28 as one where a minor error has been made, and an order is corrected

1 to reflect the understanding of the parties. No new relief is granted  
2 by the correction. More important, a corrected order does not give  
3 rise to a new opportunity to appeal. Harman v. Harper, 7 F.3d 1455,  
4 1457 (9<sup>th</sup> Cir. 1993). The Amended Order did not alter the time for  
5 filing a motion under Fed.R.Civ.P. 59.

6 This means that the Order, entered on May 19, 2005, became final  
7 on May 31, 2005, and that the time to appeal or file a motion for  
8 reconsideration under Rule 59 expired on May 31, 2005. Q Mortgage's  
9 only possible avenue for relief would be a motion pursuant to Rule  
10 60(b). In fact, in a pleading in support of reconsideration, the  
11 Trustee argued that relief could be granted under Rule 60(b)(5) or  
12 (b)(6).

13 The general rule is that abandonment is irrevocable. In re  
14 DeVore, 223 B.R. 193, 198 (9<sup>th</sup> Cir. BAP 1998). "The rationale for the  
15 general rule is that once an asset has been abandoned, it is no longer  
16 part of the estate and is effectively beyond the reach and control of  
17 the trustee." Id. However, revocation of abandonment is appropriate  
18 if the debtor provides incomplete or false information, and the  
19 trustee foregoes a proper investigation as a result. Cusano v. Klein,  
20 264 F.3d 936, 946 (9<sup>th</sup> Cir. 2001). Additionally, where the  
21 abandonment was the result of a mistake or inadvertence, and no undue  
22 prejudice will result, a court may revoke the abandonment. Devore,  
23 223 B.R. at 198. But neither mistakes in valuation, nor subsequent  
24 discovery that an asset is worth more than first thought will allow  
25 the trustee to recover an abandoned asset. Cusano, 264 F.2d at 946.  
26 And where the value of an asset is unknown, the debtor can meet his  
27 duties by including a simple statement to that effect. Id.

28 In In re Adair, 253 B.R. 85 (9<sup>th</sup> Cir. BAP 2000), the debtor

1 listed a personal injury claim as an asset and listed a value of  
2 \$20,000 for exemption purposes. The debtor also stated that recovery  
3 was speculative. The trustee questioned the debtor at the meeting of  
4 creditors and received more information from the debtor's personal  
5 injury attorney. The trustee filed a no asset report and the case was  
6 closed. This resulted in a technical abandonment pursuant to Code  
7 Section 554(c). After the case was closed, the debtor settled the  
8 lawsuit for approximately \$430,000.

9 Three years after closure of the case the trustee moved to reopen  
10 the case and revoke the abandonment. The bankruptcy court denied the  
11 motion and the Bankruptcy Appellate Panel affirmed. The Panel stated  
12 that the "mere fact that Debtor indicated that the value of the  
13 Lawsuit was essentially unknown does not mean she misled the Trustee  
14 or that he was deprived of sufficient information so as to preclude  
15 him from performing his duties." 253 B.R. at 89.

16 In this case, the Debtor listed as an asset *Kelsall v. Preferred*  
17 *Mortgage, Q. Mortgage, Mainstream Syndestrel* \$200,000. He listed the  
18 asset as having a value of \$ 0.00 and further stated that "Debtor does  
19 not expect to receive any money." This listing provided information  
20 regarding the actual amount in dispute, as well as the Debtor's  
21 opinion as to its worth. Additionally, the Trustee can hardly argue  
22 that he was misled by the Debtor's statement that he did not expect  
23 to receive any money from the asset. In support of the motion to  
24 approve the settlement with Q Mortgage and Sassi, the Trustee  
25 contended that the settlement amount of \$10,000 was reasonable, in  
26 part, because there was no merit to the claims asserted by the Debtor  
27 against Q Mortgage.

28 The Court is satisfied that the Trustee had adequate information

1 based on the Debtor's listing of the asset. The Trustee could have  
2 contacted Q Mortgage prior to abandonment to see if it was willing to  
3 make a settlement offer. At the August 4, 2005, Counsel represented  
4 that the Trustee had not done that before moving to abandon the asset.  
5 The Court sees nothing in how the asset was described that would  
6 provide a basis for the Trustee to go back now on the decision to  
7 abandon the asset. There was nothing preventing the Trustee from  
8 entering into such discussions before moving to abandon the asset.  
9 Finally, the abandonment was not due to a mistake or inadvertence.  
10 The parties have not put forward an adequate basis for this Court to  
11 exercise any authority it might have under Fed.R.Civ.P. 60(b) to  
12 reconsider the Order.<sup>2</sup>

13 The Order, entered on May 19, 2005, became final on May 31, 2005.  
14 That was the last day to file an appeal or to seek reconsideration.  
15 No party sought such relief. The Amended Order merely made a clerical  
16 correction, and it did not give rise to a new time period in which to  
17 appeal or seek reconsideration. The asset in question, therefore, was  
18 abandoned as of May 31, 2005. Furthermore, the Court will not  
19 reconsider that final order regarding abandonment of that asset.

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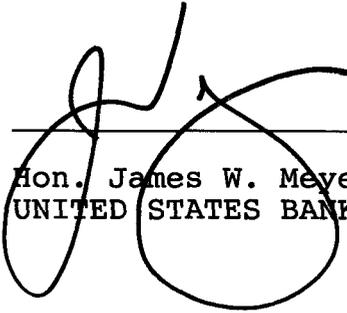
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23 <sup>2</sup> The Trustee suggested relief would be appropriate pursuant to  
24 Rule 60(b)(5). That Rule clearly has no application in this matter.  
25 That provision comes into play when a court, in entering its own  
26 judgment in a matter, relies on another judgment, only to have that  
27 underlying judgment later reversed or vacated. Here, the rulings the  
28 Trustee relied on when he asserted that the assets were worthless have  
not been reversed or vacated. To the contrary, the ruling in February  
was from the Supreme Court of the State of Arizona denying any further  
review and upholding, not reversing, the decision from the state court  
of appeals. The offer by Q Mortgage to settle the action does not  
invalidate the state court rulings, and does not make Rule 60(b)(5)  
applicable.

1           Therefore, the motion for reconsideration is DENIED.  
2 Additionally, since the Trustee's motion to approve the settlement  
3 hinged on the Court granting reconsideration, that motion is also  
4 DENIED.

5           The Debtor shall file an order consistent with this Memorandum  
6 Decision within 14 days of the entry of this Memorandum.

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Date:                     AUG 12 2005          

  
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Hon. James W. Meyers  
UNITED STATES BANKRUPTCY JUDGE