IT IS ORDERED as set forth below:

Date: September 22, 2016

Lisa Ritchey Craig
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
DANNY HAWK,	:	BANKRUPTCY CASE 11-84245-LRC
Debtor.	:	
DANNY HAWK,	:	ADVERSARY PROCEEDING NO. 13-05200-LRC
Plaintiff,	:	
v.	:	
BANK OF AMERICA, N.A. CHASE HOME FINANCE,	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
Defendants.	:	

ORDER

Danny Hawk (the "Debtor") has filed a Motion to Reopen this adversary proceeding

for the purpose of setting aside the order dismissing the complaint for failure to state a claim (the "Dismissal Order"). The Debtor argues that the Dismissal Order should be set aside under Rule 60(b)(4) of the Federal Rules of Civil Procedure because it is void for lack of subject matter jurisdiction and lack of personal jurisdiction. Additionally, the Debtor has filed a Petition for Writ of *Scire Facias* to Remove Federal Judges, in which he seeks the removal of District Court Judge Batten and Magistrate Court Judge King.

PROCEDURAL HISTORY

The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code (Case Number 11-84245-LRC) on December 2, 2011. In that case, the Debtor scheduled ownership of real property known as 1849 Long Drive, Decatur, GA (the "Property"), subject to a first mortgage held by Bank of America ("BOA") and a second mortgage held by Chase Manhattan Mortgage. The Debtor claimed an exemption of $10,000 in the value of the Property. Following the filing by the Chapter 7 Trustee of a report of no distribution, the Debtor received his discharge on November 26, 2012, and the Clerk of Court closed the case.

On April 5, 2013, the Debtor filed a motion to reopen the bankruptcy case for the purpose of adding a debt to his bankruptcy schedules and filing a "Motion to Have Lien to His Home Avoided or Eliminated." Along with his motion to reopen, the Debtor also filed a motion to avoid the liens against the Property and a complaint for injunctive relief and

damages, in which he sought a temporary restraining order and a preliminary injunction against BOA. The Debtor asserted that BOA had mailed the Debtor several letters in violation of the discharge injunction and that foreclosure was imminent. The Debtor sought a finding of contempt and an award of sanctions and damages. Following a hearing, the Court[1] reopened the bankruptcy case, but later denied the motion for injunctive relief, contempt, and damages on the basis that the discharge order did not prevent a secured creditor from foreclosing on the Property.

On June 5, 2013, the Debtor filed the complaint that initiated this adversary proceeding (the "Complaint"). The Complaint requested a determination of the validity of the liens on the Property and alleged that: (1) the Debtor owned the Property; (2) the Debtor had exempted the Property under Georgia law; (3) no party had objected to his exemption of the Property; and (4) he received a discharge. Citing *In re Gamble*, 168 F.3d 442 (11th Cir. 1999), the Debtor argued that, if a secured creditor failed to file a proof of claim and failed to object to his exemption in the Property, the creditor's lien was avoided upon the entry of the discharge order. The Debtor also asked the Court to declare that BOA and Chase Home Finance ("Chase") (collectively, the "Creditors") held no valid liens because the "transferee engaged in fraud or illegality" and because the Creditors were not "the legitimate owners of the Note and/or Security Deed" because: (1) any alleged transfers of

[1] At the time of the actions discussed herein, the Hon. Margaret Murphy presided over these cases. Following Judge Murphy's retirement, the adversary proceeding was re-assigned to the oversigned.

title to any of the notes or security deeds were not perfected under the Georgia UCC 11-2-203; the Creditors were not holders in due course; the Creditors did not have possession, delivery, or control of any collateral proceeds, original loan documents, or accounts under Georgia UCC § 11-9-207; and the Creditors did not have a security interest filed on a UCC Financing Statement with DeKalb County.

The Clerk of Court issued summonses on June 5, 2013, for the Creditors. The certificate of service accompanying the Complaint indicates that the Debtor served the Complaint and the summonses by first class mail on BOA at a post office box in Tampa, and on Chase at 2548 Candler Road, Decatur, Georgia. On July 5, 2013, BOA filed a motion to dismiss, asserting that the Complaint failed to state a claim upon which relief could be granted and that the Complaint had not been properly served because it was not served in accordance with Rule 7004(h) of the Federal Rules of Bankruptcy Procedure. The Debtor did not respond to the motion to dismiss, and, on September 11, 2013, the Court granted the motion, finding that: (1) the Debtor did not plead any fraud allegations with regard to BOA's interest in the Property with sufficient particularity under Rule 9(b); and (2) the Debtor's claim that the discharge and failure to file a proof of claim or object to the Debtor's discharge avoided the Creditors' liens failed as a matter of law.

On May 6, 2015, the Debtor filed in the Chapter 7 case an emergency motion for contempt and sanctions for violations of the discharge injunction against BOA. The Court

denied the motion because the bankruptcy case was closed. On June 4, 2015, the Debtor filed an emergency motion to reopen the Chapter 7 bankruptcy case (the "2015 Motion to Reopen") for the purpose of filing his contempt motion, which BOA opposed. After a hearing held on June 23, 2015, the Court denied the 2015 Motion to Reopen for failure to prosecute.

Meanwhile, in the United States District Court for the Northern District of Georgia, on October 31, 2014, the Debtor filed a complaint against BOA and its counsel, Brock & Scott, PLCC ("BSP"). Case No. 14-cv-03517-ELR. The District Court complaint alleged claims for declaratory judgment, cancellation of security deed, slander of title, and quiet title regarding the BOA mortgage. The District Court dismissed the complaint for lack of subject matter jurisdiction (lack of complete diversity and no federal question).[2]

On March 3, 2016, the Debtor filed the instant motions to reopen the adversary proceeding and to set aside the Dismissal Order. On April 4, 2016, the Debtor filed the petition for writ of *scire facias* seeking to "remove" Judges Batten and King.

A. *The Motion to Reopen Adversary Proceeding and Set Aside the Dismissal Order*

[2] Prior to the dismissal and closing of the District Court case, however, the Debtor had filed a complaint against BOA, BSP, and Magistrate Judge King. Case No. 15-cv-00703-ELR. The complaint was styled as a "Petition for Writ of Mandamus and Petition for Writ of Prohibition." The Debtor sought to disqualify Judge King from presiding over any case in which the Debtor was a party and complained of several rulings that Judge King had made against him. He also requested in his prayer for relief that Judges Batten and Ross be enjoined from presiding over any case involving the Debtor. On March 25, 2015, Judge Ross dismissed the case after an IFP frivolity review conducted by Judge King, stating that "[a]lthough the undersigned is intrigued by the idea of issuing a permanent injunction against herself, she is not nearly as amused at Plaintiff's request that the Court transfer his cases 'to another Judge of his peers, namely democratic and a male.'" *Id*. Doc. No. 4, at 2 (Mar. 25, 2015).

The Debtor moves under Rule 60(b)(4) of the Federal Rules of Civil Procedure to set aside the Dismissal Order because it was void of subject matter jurisdiction and personal jurisdiction and argues that the Court erred in dismissing the Complaint for failure to state a claim (a determination on the merits) without first determining that it had subject matter jurisdiction and personal jurisdiction. Rule 60(b)(4) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 9024, provides that, "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void." FED. R. CIV. P. 60(b)(4); FED. R. BANKR. P. 9024.

"Generally, a judgment is void under Rule 60(b)(4) if, *inter alia*, the court that rendered it lacked jurisdiction over the subject matter." *Bennick v. Boeing Co.*, 504 F. App'x 796, 2012 WL 6740405, *1 (11th Cir. Dec. 31, 2012). Therefore, a court must determine whether it has subject matter jurisdiction over a controversy before it considers whether the complaint fails to state a claim upon which relief may be granted. *See id*. at *2 ("Whether the complaint states a cause of action on which relief could be granted is a question of law that must be decided after and not before the court assumes jurisdiction over the controversy."); *see also Bell v. Hood*, 327 U.S. 678, 776 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed

jurisdiction over the controversy."). That being said, "only where there is a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority' will a jurisdictional error be corrected through a 60(b)(4) motion." *R.C. by Alabama Disabilities Advocacy Program v. Nachman*, 969 F. Supp. 682, 692 (M.D. Ala. 1997). Therefore, where the court "mistakenly interprets its own jurisdiction" a Rule 60(b)(4) motion would fail, but where "'there is a total want of jurisdiction and no arguable basis upon which [the court] could have rested a finding that it had jurisdiction,' . . . a 60(b)(4) motion must be granted." *Id*. at 693 ("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. Rather, a court will be deemed to have plainly usurped jurisdiction only when there is a 'total want of jurisdiction' and no arguable basis on which it could have rested a finding that it had jurisdiction."); *see also In re Optical Technologies, Inc*., 425 F.3d 1294, 1306 (11th Cir. 2005) ("'[I]t is well-settled that a mere error in the exercise of jurisdiction does not support relief under Rule 60(b)(4).'").

Here, the Debtor argues that the Dismissal Order is void due to the Court's lack of subject matter jurisdiction and personal jurisdiction over the Creditors. The Bankruptcy Court's subject matter jurisdiction is limited to "any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11." 28

U.S.C. § 157(a); 28 U.S.C. § 1334(b). A proceeding "arising under" title 11 involves a substantive right created by the Bankruptcy Code. *See In re Toledo*, 170 F.3d 1340, 1344–1345 (11th Cir. 1999). A proceeding "arising in" title 11 typically includes administrative matters that can only arise in a bankruptcy case. *Id*. Such matters constitute "core" proceedings. *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 787 (11th Cir. 1990). The Court may also hear and decide "noncore" matters that are "related to" the bankruptcy proceeding, but may only submit proposed findings of fact and conclusions of law to the districts court in such matters. *See* 28 U.S.C. § 157(c)(1).

In this case, the Court clearly had subject matter jurisdiction over the Debtor's claim that the liens on the Property had been voided by the combination of his exemption of the Property and his bankruptcy discharge. As the Debtor relied upon provisions of the Bankruptcy Code (sections 506, 522, and 727(a)) that do not exist outside of bankruptcy to support his claim for relief, the Court had subject matter jurisdiction under 28 U.S.C. § 1334(b). *See* 28 U.S.C. § 1334(b);(the district court shall have "original but not exclusive jurisdiction of all civil proceedings . . . arising under . . . cases under title 11)"; *see also In re Toledo*, 170 F.3d 1340, 1344 (11th Cir. 1999) ("Matters arising under title 11 involve 'matters invoking a substantive right created by the Bankruptcy Code . . . .").

The Debtor's claim that the liens were void due to the "fraud and illegality" engaged in by the Creditors presents a more difficult question. Such a claim is not a core

proceeding that arises "under title 11" or "in" cases under title 11. *See Parks v. Bank of Am. Corp*., 12-77687-BEM, at 4 (Bankr. N.D. Ga. July 29, 2014) (Ellis-Monro, J.); *Maxwell v. HSBC Mortgage Corp.*, 2012 WL 3678609 (Bankr. N.D. Ga. Aug. 2, 2012) (Mullins, J.) (citing *Wood v. Wood (In re Wood)*, 825 F.2d 90, 94 (5th Cir. 1987)) (rejecting debtor's argument that a complaint to determine the extent or validity of a lien on property abandoned by the Chapter 7 trustee to the debtor is a core proceeding). A complaint to determine the validity of the mortgage creditor's lien on property that has been abandoned by the Chapter 7 trustee is also not a "related to" matter because there is "simply no nexus between" the complaint and the related bankruptcy case. *In re Maxwell*, 2012 WL 3678609, *8 (Bankr. N.D. Ga. Aug. 2, 2012) (Mullins, J.); *see also In re Skillings*, 2012 WL 7009704, at *2 (Bankr. N.D. Ga. Nov. 6, 2012) (Diehl, J.) (dismissing complaint for lack of subject matter jurisdiction because the claims were "based on state law and nonbankruptcy federal law, and the Property to which all of the claims relate[d] [was] not property of the bankruptcy estate").

Here, the Debtor filed a complaint to determine the validity of a lien against property after the Property had been deemed abandoned upon the closing of the bankruptcy case. *See* 11 U.S.C. § 554(c). The Property did not reenter the bankruptcy estate upon the reopening of the bankruptcy case. *See In re Cole*, 521 B.R. 410 (Bankr. N.D. Ga. 2014) (Diehl, J.) (holding that the reopening of a bankruptcy case under section 350(b) does not

automatically revoke the deemed or "technical" abandonment of property of the estate). Therefore, the Debtor's claim that the liens were invalid due to fraud could not have been "related to" the bankruptcy case, and the Court lacked independent subject matter jurisdiction over the Debtor's claim that the liens were invalid due to fraud.

However, courts have held that, in certain circumstances, the Bankruptcy Court may exercise ancillary (or supplemental) jurisdiction over claims that would not otherwise meet the "related to" jurisdiction test. *See In re Hosp. Ventures/LaVista*, 358 B.R. 462, 474 (Bankr. N.D. Ga. 2007), *aff'd per curiam*, 265 F. App'x 779 (11th Cir. 2008); *but see In re Conseco, Inc.*, 305 B.R. 281 (Bankr. N.D. Ill. 2004) (finding that bankruptcy court lacked authority to exercise ancillary jurisdiction); *In re Davis*, 216 B.R. 898, 902 (Bankr. N.D. Ga. 1997) (Massey, J.) ("Nor does 28 U.S.C. § 1367 supply a basis for the exercise of jurisdiction by a bankruptcy court in non-core cases, even with consent."). "Ancillary jurisdiction has been defined as jurisdiction 'over claims or parties over whom the federal court lacked independent subject matter jurisdiction, but that arose out of the same conduct, transaction, or occurrence as the plaintiff's original claim to which federal subject matter jurisdiction extended.'" *In re Conseco, Inc.*, 305 B.R. 281, 285 (Bankr. N.D. Ill. 2004) (quoting 1 MOORE'S FEDERAL PRACTICE AND PROCEDURE ¶ 5.90[3] (2d ed. 2003)); *see also* 28 U.S.C. 1367(a) (codifying one type of ancillary jurisdiction—over cases forming part of the same case or controversy—as being within the jurisdiction of the

District Court).

In *In re Hosp. Ventures/LaVista*, 358 B.R. at 474, Judge Bonapfel held that, where a "'core-related supplemental claim'" exists, 28 U.S.C. § 1367(a) allowed the district court, under 28 U.S.C. § 157(a) and LR 83.7, ND Ga., to refer a claim to the Bankruptcy Court for determination. He defined a "core-related supplemental claim" as one "with three attributes . . . : (1) It does not meet the usual 'conceivable effect' test and, therefore, lacks an independent basis for jurisdiction under § 1334(b); (2) It is asserted in a proceeding in which the primary claim arises under the Bankruptcy Code such that the original proceeding is 'core'; and (3) It has a nexus with the primary claim that is sufficient to bring the claim within a district court's § 1334(b) jurisdiction as supplemented by § 1367." *Id.*

In this case, the Court may have concluded that it had supplemental jurisdiction over the Debtor's fraud claim as a "core-related supplemental claim" because the Debtor asserted a core claim that arose under the Bankruptcy Code and the two claims were sufficiently related as to comprise the same "case or controversy." Even if the Court erred in its exercise of jurisdiction, it would be inappropriate to set aside the Dismissal Order under Rule 60(b)(4) solely because of that error, as it did not involve a total want of jurisdiction with no arguable basis upon which the Court could have rested a finding that it had jurisdiction.

The Debtor also asserts that the Dismissal Order should be set aside due to lack of

personal jurisdiction over the Creditors, which was caused by the Debtor's failure to serve the summons and Complaint properly. The Court rejects this argument. First, the Court clearly had personal jurisdiction over the Debtor, the party against whom relief was granted when the Dismissal Order was entered. Second, the Debtor was the plaintiff, responsible for serving the Complaint and summons properly to ensure that the Court had personal jurisdiction over the Creditors. It would be absurd to allow the Debtor to oppose the dismissal of his Complaint on the merits upon BOA's request, solely because the Debtor failed to perfect service of process. Third, even if the Debtor had a right to oppose the Court's consideration of the Complaint on its merits due to a lack of personal jurisdiction over the Creditors, the Debtor would be barred at this point from collaterally attacking jurisdiction on that basis, having failed to raise any jurisdictional objections at the time and having waited for over two years to raise the issue.[3] Finally, even if the Debtor were not barred from raising the issue now, it is clear that, at least with regard to BOA, the "failure of process" was not "constitutionally defective," as BOA necessarily had actual notice of the Complaint, having appeared in the lawsuit to request its dismissal on the merits.

[3] Although Rule 60 provides that a motion for reconsideration must be brought within a "reasonable time," *see* FED. R. CIV. P. 60(c), the Eleventh Circuit Court of Appeals has held that a Rule 60(b)(4) motion attacking a judgment for lack of jurisdiction is not subject to a time bar. *See Hertz Corp. v. Alamo Rent–A–Car, Inc.*, 16 F.3d 1126, 1130 (11th Cir. 1994). Nonetheless, the Court of Appeals has recognized that objections to a judgment based on "personal jurisdiction (unlike subject matter jurisdiction) are generally waivable." *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 737 (11th Cir. 2014). Accordingly, where a defendant "knowingly sat on his rights for nine months before filing anything at all with the district court, he waived his right to object to any defects in the service of process or to any denial of his right to be heard." *Id*.

Accordingly, not even BOA, as the defendant, could have set aside the Dismissal Order under Rule 60(b)(4). For all of these reasons, the Debtor's motion to set aside the Dismissal Order shall be denied. As there is no other reason to "reopen" the adversary proceeding, that motion will be denied as well.

B. *Debtor's Petition for Writ of Scire Facias Seeking to "Remove" Federal Judges*

The Debtor seeks the "removal" of District Court Judge Batten and Magistrate Judge King. The Debtor makes several convoluted arguments that citizens retain the right to seek removal of judges with life tenure by petitioning the ordinary courts. *See* Saikrishna Prakash, Steven D. Smith, How to Remove A Federal Judge, 116 YALE L. J. 72, 137 (2006) (recognizing that the common consensus is that impeachment is the sole method of removing a judge of an Article III court, but arguing that Congress could enact legislation under the Necessary and Proper clause to provide for removal for "misbehavior," and to allow for a judge to determine "in a judicial proceeding that a colleague has misbehaved" and to terminate the judge's "good-behavior tenure"). Whatever the merits may be to such arguments, as discussed above, Bankruptcy Courts are courts of limited jurisdiction. It is clear beyond all doubt that this Court would lack subject matter jurisdiction over any such proceeding. Accordingly, the Debtor's Petition for Writ of *Scire Facias* shall be dismissed for lack of subject matter jurisdiction.

CONCLUSION

For the reasons stated above, the Debtor has failed to state any grounds for reopening this adversary proceeding or setting aside the Dismissal Order, and this Court lacks subject matter jurisdiction over the Debtor's request to "remove" sitting federal judges. Accordingly,

IT IS ORDERED that the Debtor's Motion to Reopen Adversary Proceeding (Doc. 9) and Motion for Relief from Void Judgments (Doc.10) are **DENIED**;

IT IS ORDERED that the Petition for Writ of *Scire Facias* (Doc. 11) is **DISMISSED** for lack of subject matter jurisdiction.

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