United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Daniel J. Lodderhose

Bankruptcy No. 99 B 17282

Adversary Caption: Anglo-Iberia Underwriting Management Company and Industrial Re International, Inc. v. Daniel J. Lodderhose

Adversary No. 99 A 01368

Date of Issuance: October 19, 2000

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff: John S. Delnero, Esq., Bell. Boyd & Lloyd, 70 West Madison Street, Suite 3300, Chicago, IL 60602 and John Keough, Esq., Waesche Sheinbaum & O'Regan, 111 Broadway, 4th Floor, New York, NY 10006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: DANIEL J. LODDERHOSE, Debtor.	)	Chapter 7 Bankruptcy No. 99 B 17282 Judge John H. Squires
ANGLO-IBERIA UNDERWRITING MANAGEMENT COMPANY and INDUSTRIAL RE INTERNATIONAL, INC., Plaintiffs, v. DANIEL J. LODDERHOSE, Defendant.	)	Adversary No. 99 A 01368

MEMORANDUM OPINION

This matter comes before the Court on the motion of Anglo-Iberia Underwriting Management Company and Industrial Re International, Inc. (the "Plaintiffs") to reconsider the Court's Memorandum Opinion and Order dated September 19, 2000. For the reasons set forth herein, the Court denies the motion.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A), (G), (I), (J) and (O).

II. FACTS AND BACKGROUND

All of the relevant facts and background are contained in the Court's Memorandum Opinion dated September 19, 2000. See Anglo-Iberia Underwriting Management Co. v. Lodderhose (In re Lodderhose), Ch. 7 Case No. 99 B 17282, Adv. No. 99 A 01368, 2000 WL 1474441 (Bankr. N.D. Ill. Sept. 19, 2000). Therein, the Court was asked to decide the Plaintiffs' motion for summary judgment on a seven-count complaint filed in this adversary proceeding. Counts I through III of the complaint seek a determination that the debt owed by Daniel J. Lodderhose (the "Debtor") to the Plaintiffs is non-dischargeable under 11 U.S.C. § 523(a)(2)(A), § 523(a)(4) and § 523(a)(6), respectively. Counts IV through VI of the complaint assert claims against the Debtor for violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1964. Count VII alleges objections to the Debtor's discharge under 11 U.S.C. § 727(a)(2), (3), (4) and (5).

Prior to the Debtor's bankruptcy petition, the Plaintiffs obtained a default judgment in the United States District Court for the Southern District of New York (the "District Court") against the Debtor's company, Security Resources International, Inc. ("SRI"), based upon repeated violations of the District Court's discovery orders by SRI and the Debtor. Lodderhose, 2000 WL 1474441, at *3. It is this District Court default judgment which the Plaintiffs contend entitles them to summary judgment. The Court ultimately denied the motion for summary judgment because not all of the elements of collateral estoppel had been met, even though under Local Bankruptcy Rule 402.N(3)(b), the Court deemed admitted the facts set forth in the Plaintiffs' Local Bankruptcy Rule 402.M statement of facts because the Debtor did not file the required Local Bankruptcy Rule 402.N statement. Id. at *2 and 4.

The Plaintiffs contend that the Court incorrectly denied their motion for summary judgment by overlooking or misapprehending that the admitted facts establish the Plaintiffs' claims as a matter of law and preclude the Debtor from receiving a discharge, even without the use of collateral estoppel, based on the District Court's default judgment. In support of their motion to reconsider, the Plaintiffs have filed a revised Rule 402.N statement of undisputed facts.

In addition, they filed an affidavit from Gina B. Krol, the Chapter 7 Case Trustee (the "Trustee"), wherein the Trustee states that the Debtor failed to explain satisfactorily the loss of assets or deficiency of assets and misled the Trustee by giving incomplete, contradictory and false testimony; that the Debtor initially failed to disclose in his bankruptcy petition that his attorney, Mr. Engel, was a creditor and that the Debtor had formed several companies in his wife's name; that the Debtor falsely denied that he had any connection with certain companies, but then acknowledged that he had formed them; that the Debtor failed to provide a complete response to the Trustee's request to produce income tax returns, bank records, real estate records and incorporation papers and corporate records; that the Debtor failed to comply with the Trustee's instructions and his willful failure has obstructed, delayed and hindered the case; that the Debtor failed to keep, preserve or produce documents from which his financial condition and business transactions might be ascertained without an excuse for such failure; and the Debtor withheld from the Trustee records relating to the Debtor's property or financial affairs. See Affidavit of Gina B. Krol at ¶s 3-9. The Trustee concludes that the Court should deny the Debtor a discharge and grant the Plaintiffs' motion under 11 U.S.C. § 727(a)(2), (3), (4) and/or (5). Id. at ¶ 10.

Furthermore, the Plaintiffs submitted an affidavit from John R. Keough, III ("Keough"), counsel for the Plaintiffs in the District Court action and co-counsel in this adversary proceeding. See Affidavit of John R. Keough, III at ¶ 1. Keough states that he participated extensively in the District Court action for three years through the date when the District Court entered the default judgment against SRI. Id. at ¶ 3. Keough further states that the Debtor was represented by counsel in the District Court proceeding. Id. at ¶s 4 and 5. Finally, Keough cites In re Docteroff, 133 F.3d 210 (3d Cir. 1997) and states that it applies to this matter. Id. at ¶ 6.

III. APPLICABLE STANDARDS

"Motions to reconsider" are not formally designated by either the Federal Rules of Bankruptcy Procedure or the Federal Rules of Civil Procedure, except as provided in Bankruptcy Rule 3008 which allows reconsideration of orders allowing or disallowing claims against the estate. Rule 59(e) of the Federal Rules of Civil Procedure, as adopted by Bankruptcy Rule 9023, permits a party to move the Court to alter or amend a judgment entered by filing a motion to alter or amend, not one styled as a "motion to reconsider."

The Seventh Circuit Court of Appeals has instructed courts to treat all substantive post-judgment motions filed within ten days of judgment under Rule 59. Charles v. Daley, 799 F.2d 343 (7th Cir. 1986). Because the Plaintiffs' "motion to reconsider" was filed on September 29, 2000, exactly ten days from the entry of the judgment, the procedural standards and authorities construing Rule 59 control.

Rule 59(e) motions serve a narrow purpose and must clearly establish either a manifest error of law or fact or must present newly discovered evidence. Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996); Federal Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986); Publishers Resource, Inc. v. Walker-Davis Publications, Inc., 762 F.2d 557, 561 (7th Cir. 1985). "The rule essentially enables a district court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." Russell v. Delco Remy Div. of General Motors Corp., 51 F.3d 746, 749 (7th Cir. 1995) (citation omitted). The function of a motion to alter or amend a judgment is not to serve as a vehicle to relitigate old matters or present the case under a new legal theory. Moro, 91 F.3d at 876 (citation omitted); King v. Cooke, 26 F.3d 720, 726 (7th Cir. 1994), cert. denied, 514 U.S. 1023 (1995). Moreover, the purpose of such a motion "is not to give the moving party another 'bite of the apple' by permitting the arguing of issues and procedures that could and should have been raised prior to judgment." Yorke v. Citibank, N.A. (In re BNT Terminals, Inc.), 125 B.R. 963, 977 (Bankr. N.D. Ill. 1990) (citations omitted). The rulings of a bankruptcy court "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." See Quaker Alloy Casting Co. v. Gulfco Indus., Inc., 123 F.R.D. 282, 288 (N.D. Ill. 1988). "A motion brought under Rule 59(e) is not a procedural folly to be filed by a losing party who simply disagrees with the decision; otherwise, the Court would be inundated with motions from dissatisfied litigants." BNT Terminals, 125 B.R. at 977. The decision to grant or deny a Rule 59(e) motion is within the Court's discretion. See LB Credit Corp. v. Resolution Trust Corp., 49 F.3d 1263, 1267 (7th Cir. 1995).

IV . DISCUSSION

The Court finds that the Plaintiffs have failed to present newly discovered evidence or make a showing that the Court committed a manifest error of law or fact. The Plaintiffs contend that the Court erred in failing to apply collateral estoppel to the District Court's default judgment. Specifically, the Plaintiffs argue that the Court overlooked the express showing in the default judgment that the Debtor and SRI were represented by counsel in the District Court action. Further, the Plaintiffs claim that the Court failed to consider the law in the Seventh Circuit that a sole shareholder and principal, as the Debtor is here, is in privity with the corporation and is bound by a judgment entered against the corporation.

First, the Court will address the argument that the Debtor was represented by counsel in the District Court action. In its Opinion, the Court held that the Plaintiffs never alleged, let alone demonstrated, that the Debtor was fully represented in the District Court proceeding. Lodderhose, 2000 WL 1474441, at *4. The Plaintiffs argue that, based upon the record before the Court, it is undisputed that the Debtor was fully represented by counsel at all relevant times in the District Court action. Unfortunately, the Plaintiffs never alleged in the papers filed in support of the motion for summary judgment that the Debtor was represented by counsel. Moreover, a close examination of the District Court's default judgment does not clearly reveal, as the Plaintiffs would have this Court find, that the Debtor was fully represented by counsel. The relevant language in the default judgment provides:

> The above-entitled action having come before the Honorable Victor Marrero, U.S.D.J. and thereafter The Court having entered an Order dated March 13, 2000, that the defendant Security Resources International, Inc. ("SRI") by Daniel Lodderhose appear for deposition in Chicago beginning on Monday, March 27, 2000, ***as requested by SRI and its***

> ***counsel***, and that the deponent's failure to appear for the deposition would result in this Court imposing appropriate sanctions, including entry of default judgment against the defendant SRI; ***SRI's counsel*** having notified counsel for plaintiffs by fax on March 21, 2000 . . . .

See Plaintiffs' Exhibit B at Exhibit No. 2 to Motion to Reconsider.

This language demonstrates that SRI was represented by counsel. It makes no mention of the Debtor's counsel. While counsel for SRI and the Debtor may have been one and the same, the language of this default judgment does not clearly show that fact. Moreover, it was the burden of the Plaintiffs to demonstrate that the Debtor was fully represented by counsel. The Plaintiffs did not even allege this requisite element for application of the doctrine of collateral estoppel.

Now, on an incorrectly styled "motion for reconsideration," the Plaintiffs submit Keough's affidavit which states that the Debtor was in fact fully represented by counsel in the District Court action. Unfortunately for the Plaintiffs, this affidavit does not constitute newly discovered evidence. The Seventh Circuit has held that "[a] Rule 59(e) motion cannot be used to present evidence that could and should have been presented prior to the entry of final judgment." Retired Chicago Police Ass'n v. City of Chicago, 76 F.3d 856, 867 (7th Cir.), cert. denied, 519 U.S. 932 (1996). "Where a party is made aware that a particular issue will be relevant to its case but fails to produce readily available evidence pertaining to that issue, the party may not introduce the evidence to support a Rule 59(e) motion." In re Prince, 85 F.3d 314, 324 (7th Cir.), cert. denied, 519 U.S. 1040 (1996) (citing Green v. Whiteco Indus., Inc., 17 F.3d 199, 202 n.5 (7th Cir. 1994)). Rule 59(e) "does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party

to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." Moro, 91 F.3d at 876 (citation omitted).

The information contained in Keough's affidavit does not constitute newly discovered evidence, nor does it demonstrate that the Court made a manifest error of law or fact. Rather, it constitutes an attempt by the Plaintiffs to undo the inadequacies in the original motion and supporting papers which failed to allege, let alone demonstrate, that the Debtor was fully represented by counsel in the District Court action. Keough's belated affidavit is an attempt to get a second bite at the summary judgment apple, which this Court will not condone.

Keough also states in his affidavit that the reasoning in In re Docteroff, 133 F.3d 210 (3d Cir. 1997) applies to this matter. In the Docteroff case, the Third Circuit applied the doctrine of collateral estoppel to a default judgment. There, the court noted that the actually litigated element had been met where the debtor deliberately prevented resolution of the lawsuit. Id. at 215. First, the Court notes that it is not bound by a decision from the Third Circuit. Rather, the Court must follow the law pronounced by the United States Supreme Court and the Seventh Circuit Court of Appeals. Thus, while the Docteroff case provides for interesting reading, this Court certainly is not bound by its holding nor any of the other cases cited by the Plaintiffs in their motion.

What is controlling is the point made in Meyer v. Rigdon, 36 F.3d 1375 (7th Cir. 1994), wherein the Seventh Circuit specifically noted that default judgments are not ordinarily given preclusive effect in subsequent court proceedings because no issue was "actually litigated" in the earlier proceeding. Id. at 1379. As the Court noted in its Opinion,

the District Court entered its default judgment against SRI, not the Debtor, and did so based on the Debtor's failure to appear for deposition in willful violation of a prior court order. Lodderhose, 2000 WL 1474441, at *4. Thus, the Court was unable to determine the factual and legal bases underlying the judgment. Id. The District Court made no findings whatsoever regarding the Debtor's commission of fraud or breach of a fiduciary duty. Hence, it is not clear from the default judgment what elements were considered by the District Court in entering the judgment.

The matter at bar is also distinguishable from the submissions furnished the Court in AMFA v. Wien (In re Wien), Ch. 7 Case No. 92 B 19154, Adv. No. 92 A 01565, 1993 WL 266897 (Bankr. N.D. Ill. June 30, 1993). There, the movant's papers included a fifteen-page opinion from the district court on a default judgment with numerous factual findings and legal authorities to support proper application of the doctrine of collateral estoppel. That is in marked contrast to the sparse record furnished here from the prior proceeding, which included no factual findings regarding the Debtor's personal liability for the underlying conduct complained of in the complaint filed in this adversary proceeding.

The Court concludes that the Plaintiffs should have prepared a more comprehensive motion for summary judgment the first time around, with proper citations to the Bankruptcy Code sections and applicable case law under which they were proceeding. The motion for summary judgment was woefully inadequate and this motion to reconsider constitutes nothing but an attempt to correct those procedural deficiencies. Consequently, the Court will not alter or amend its Opinion on this point.

Next, the Plaintiffs contend that under the controlling law in the Seventh Circuit, a

sole shareholder and principal, as the Debtor was here with SRI, is in privity with the corporation and is bound by a judgment entered against the corporation. However, the Plaintiffs have not cited the applicable case law on which they rely for this proposition. Once again, the Plaintiffs have failed to support their contention with case authority. The Court does not have a duty to research and construct legal arguments for a party. Head Start Family Educ. Program, Inc. v. Cooperative Educ. Serv. Agency 11, 46 F.3d 629, 635 (7th Cir. 1995). In any event, the Court cannot properly apply the doctrine of collateral estoppel to the default judgment. The District Court's default judgment does not find or conclude that the Debtor used his company, SRI, to commit the fraud complained of.

Additionally, the Plaintiffs argue that the admitted facts in their unopposed Local Bankruptcy Rule 402.M statement establish the Debtor's fraud, and is sufficient to determine that the debt owed by the Debtor to the Plaintiffs is non-dischargeable under § 523(a)(2)(A) and § 523(a)(4). The Court disagrees with the Plaintiffs' contention. The Plaintiffs' Rule 402.M statement made conclusory statements that the District Court's default judgment established that the Debtor and SRI had willfully and intentionally made misrepresentations to the Plaintiffs and that the Plaintiffs reasonably relied upon those misrepresentations. Further, the Rule 402.M statement concluded that the fraudulent conduct alleged in the District Court action is the same as that alleged in this adversary proceeding. Finally, the Plaintiffs state that the Debtor failed to explain satisfactorily his loss of assets or deficiency of assets and misled the Trustee and Plaintiffs by giving incomplete, contradictory and false testimony.

The Plaintiffs recited in the motion for summary judgment a portion of the Debtor's

testimony at the 11 U.S.C. § 341 meeting of creditors wherein the Trustee was examining the Debtor. Specifically, the Plaintiffs highlighted the Trustee's statement that "I think that it casts a pall over the hour and a half that we've just spent examining you, Mr. Lodderhose, and that is disturbing to me." The Plaintiffs have submitted the Trustee's affidavit which states that she believes the Court should deny the Debtor a discharge under § 727(a)(2), (3), (4) and (5).

Based upon the conclusory statements in the Plaintiffs' Rule 402.M statement and the Trustee's statement at the § 341 meeting, along with her affidavit, the Plaintiffs argue that they are entitled to judgment as a matter of law under § 523(a)(2)(A), § 523(a)(4) and § 727(a)(2), (3), (4) and (5). The Court disagrees with the Plaintiffs that the undisputed facts amply establish that the debt should be found non-dischargeable under § 523(a)(2)(A) and § 523(a)(4) or show the evidence required to sustain the various objections to discharge under § 727(a)(2), (3), (4) or (5). As the Court previously held in its Opinion, the default judgment contained no findings of fact or conclusions of law whatsoever regarding the Debtor's fraudulent conduct. 2000 WL 1474441 at *4. Thus, it was impossible for the Court to determine the factual and legal bases underlying the default judgment. Id. The Court still is unable to determine, based upon the record before it, which factual allegations were actually proven, litigated and found essential to the District Court's default judgment.

Moreover, the Trustee's affidavit does not constitute newly discovered evidence, but rather, smacks of an attempt by the Plaintiffs to undo their procedural failure to attach same as part of their papers submitted with the motion for summary judgment. The Plaintiffs have

not offered any explanation at all as to why the information contained in the Trustee's affidavit was not available to them when they filed the motion for summary judgment. The Plaintiffs' untimely attempt to introduce the affidavits of the Trustee and Keough on a Rule 59(e) motion is too little, too late. Moreover, the Plaintiffs have failed to demonstrate that the Court made any manifest errors of law or fact. Therefore, their motion must be denied.

V. CONCLUSION

For the foregoing reasons, the Court denies the Plaintiffs' motion to reconsider.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List