SO ORDERED

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: December 5, 2014

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: M. BART JOHNSON **CASE NO. 13-51843**

DEBTOR **CHAPTER 7**

ORDER DENYING MOTION TO RECONSIDER

The matter before the Court is the Motion to Reconsider (the "Motion"), (Dkt. No. 79), filed by debtor M. Bart Johnson ("Johnson"), and the Response in Opposition, (Dkt. No. 84), filed by creditor Marjory Robert ("Robert"). A hearing was held on the matter on November 6, 2014. (Dkt. No. 86). Paul S. Murphy appeared on behalf of Robert and Johnson, who is not represented by counsel, did not appear. (*Id.*). At the hearing, the Court noted that Johnson had failed to properly upload the "evidence and documentation" referenced in his motion. (Dkt. No. 79 at 3). Counsel for Robert indicated he had copies of the documents referenced and agreed to upload them as an exhibit. Those documents were uploaded on November 6, 2014. (Dkt. No. 85). After considering the Motion and documents referenced therein, the response, and the arguments of counsel at the hearing, the Court finds that the Motion is not well taken and should be denied for the reasons stated below.

I. Jurisdiction

The Court has jurisdiction of the parties to and the subject matter of this contested matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

II. Discussion

On September 9, 2014, the Court entered an order sustaining Robert's objection to Johnson's claimed exemptions in two parcels of real property,[1] commonly referred to in this case as the Oscar Smith Road property in Carriere, MS and the Versailles Crescent property in New Iberia, LA. (Dkt. No 77). Johnson filed his Motion on September 29, 2014, asking the Court to reconsider its decision. In his Motion, Johnson argues that he has located the documentation necessary to show that the properties are owned by the M. Bart Johnson & Associates, Ltd. Profit Sharing Retirement Plan (the "retirement plan") rather than Johnson individually, and that the properties are therefore properly claimed as exempt. (Dkt. No. 79 at 2–3).

In her response, Robert argues that none of the documents proffered by the debtor have been recorded and that they constitute "self-created, self-serving" hearsay. (Dkt. No. 84 at 3 ¶ 6). She also argues that relief under Federal Rule of Civil Procedure ("Rule") 60(b) is only granted under extraordinary circumstances and arguments that could or should have been raised prior to the decision in question cannot serve as the basis for reconsideration. (*Id.* at 2 ¶ 4–5). The Court agrees.

Rule 60(b), applicable in in this contested matter through Federal Rule of Bankruptcy Procedure ("FRBP") 9024, provides that:

> On 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:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not

[1] Robert also objected to Johnson's claimed exemption in a profit-sharing plan and moved for the case to be dismissed for bad faith. The Court overruled those objections in its order. (Dkt. No. 77 at 2).

> have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

The Fifth Circuit has held that "relief under 60(b) is 'extraordinary[,] . . . and the requirements of the rule must be strictly met.'" *Johnson v. Okolona Mun. Separate School Dist.*, No. 1:09-CV-99-SA-JAD, 2010 WL 1848924, at *2 (N.D. Miss. May 6, 2010) (quoting *Longden v. Sunderman*, 979 F.2d 1095, 1102 (5th Cir. 1992)). Further, "[a] motion for reconsideration 'cannot be used to raise arguments which could, and should, have been made before' the Court issued its decision." *Id.* (quoting *Templet v. Hydrochem, Inc.*, 367 F.3d 472, 478 (5th Cir. 2004)). Subsections three, four, and five of Rule 60(b) are not applicable in this case,[2] but the Court will consider subsections one, two, and six for the purposes of deciding Johnson's Motion.

A. Subsection One: Mistake, Inadvertence, Surprise, or Excusable Neglect

Rule 60(b)(1) allows the Court to grant relief for "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). But, "[g]ross carelessness, ignorance of the rules, or ignorance of the law are insufficient bases for Rule 60(b)(1) relief." *Castleberry v. Citifinancial Mtg. Co.*, 230 Fed. App'x 352, 356 (5th Cir. 2007). And the Fifth Circuit has held that the movant must "make a sufficient showing of unusual or unique circumstances justifying [Rule 60(b)(1)] relief." *Pryor v. United States Postal Serv.*, 769 F.2d 281, 286–87 (5th Cir. 1983).

In his Motion, Johnson states that his health and the complexity of his case have

[2] Johnson has not alleged that Robert has engaged in any fraudulent behavior or other misconduct. Nor has he alleged that the judgment is void; that the judgment has been satisfied, released, or discharged; that the judgment is based on an earlier judgment that has been reversed or vacated; or that applying the judgment prospectively is no longer equitable.

prevented him from competently representing himself. (Dkt. No. 79 at 2). But, ignorance of the rules or the law are not sufficient bases for relief under Rule 60(b)(1) and Johnson has failed to make a showing of unique or unusual circumstances justifying his request for relief. Indeed, the hearing on Robert's objection to Johnson's claimed exemptions was originally set for June 5, 2014, but was reset three times: first to July 10, 2014; then to August 7, 2014; and finally to September 4, 2014. (Adv. Dkt. Nos. 70, 72, and 75). Thus, Johnson had ample opportunity to gather the evidence needed and either obtain counsel or familiarize himself with the law applicable to his case. He failed to do so, and the Court finds that Johnson has also failed to make a sufficient showing of unusual or unique circumstances warranting relief under Rule 60(b)(1). The Court now turns to Rule 60(b)(2).

B. Subsection Two: Newly Discovered Evidence

Rule 60(b)(2) allows the Court to grant relief when newly discovered evidence is uncovered and that evidence could not have been discovered in time to move for a new trial under Rule 59(b). Fed. R. Civ. P. 60(b)(2). "It is clear under the rule that to be newly discovered evidence the evidence must have been in existence at the time of the trial." *Chilson v. Metro. Transit Auth.*, 796 F.2d 69, 70 (5th Cir. 1986) (citing *NLRB v. Jacob Decker & Sons*, 569 F.2d 357, 364 (5th Cir. 1978)). But, "a motion for reconsideration is 'not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment.'" *Fisher v. Halliburton*, 2005 WL 2001351, at *1 (S.D. Tex. 2005) (quoting *Templet*, 367 F.3d at 479).

In this case, none of the documents Johnson has asked the Court to consider post-date 2008. Thus, the documents were in existence at the time of the hearing, prior to the Court's decision. All of the documents appear to have been within the possession and control of Johnson

in his capacity as trustee for the retirement fund.[3] Therefore, these documents—along with Johnson's arguments as to the ownership of the real property—could, and should, have been offered or raised prior to the entry of judgment. Accordingly, the Court finds that Johnson has failed to make a sufficient showing that relief under Rule 60(b)(2) is warranted and turns finally to Rule 60(b)(6).

C. Subsection Six: Any Other Reason That Justifies Relief

Rule 60(b)(6) allows the Court to grant relief for "any other reason that justifies [it]." Fed. R. Civ. P. 60(b)(6). Rule 60(b)(6) is a catch-all provision, intended to apply to circumstances not covered by the other enumerated provisions of the rule. *Johnson*, 2010 WL at *2 (citing *Hess v. Cockrell*, 281 F.3d 212 (5th Cir. 2002)). Thus, "'relief under Rule 60(b)(6) is mutually exclusive from relief available under sections (1)–(5).'" *Id.* (quoting *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 643 (5th Cir. 1971)). And "Rule 60(b)(6) 'motions will be granted only if extraordinary circumstances are present.'" *Hess*, 281 F.3d at 216 (quoting *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990)). Moreover, "'an unexcused failure to present evidence available at the time of [the decision on the underlying motion] provides a valid basis for denying a subsequent motion for reconsideration." *Johnson*, 2010 WL at * 3 (quoting *Templet*, 367 F.3d at 479). Finally, to prevail on a motion under 60(b)(6), "'the newly-submitted evidence must establish a fact so central to the litigation that it shows the initial judgment to have been manifestly unjust.'" *Johnson*, 2010 WL at * 3 (quoting *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990), abrogated on other grounds 37 F.3d 1069 (1994)).

Johnson's failure to present the evidence at the prior hearing that he now asks the Court to consider could itself support a decision to deny his motion for reconsideration. *Templet*, 367 F.3d at 479. But, given Johnson's *pro se* status in this case, the Court did review the documents

[3] (*See* Dkt. No. 85 at 2).

Johnson argues establish ownership of the properties in question. Those documents consist of: (1) the first and last pages of the creation of the retirement plan by adoption of another company's model; (2) Article VII of an unknown document, which outlines various provision relating to the role of trustee; (3) a counter letter, composed by Johnson in his individual capacity, in which he states that he purchased a piece of real property in his capacity as the trustee for the retirement plan; (4) personal financial statements, prepared by Johnson and a copy of an undated and apparently unsigned promissory note with Hancock Bank, which indicates an indebtedness owed by "M. Bart Johnson," and bears the undated, handwritten notations "as trustee" and "MBJ & Assoc. PSRP" at the top left and right sides of the document; (5) copies of bank statements Johnson claims evidence payment of the mortgage loans by the retirement plan; (6) an undated, un-titled email from Michael Boaz, who Johnson claims is an IRS Employee Plans Specialist who was conducting a compliance audit of the retirement plan in 2008; (7) a memo, composed by Johnson, dated July 11, 2008, apparently written in response to Boaz's email; (8) a balance sheet, presumably composed by Johnson, for the retirement plan; (9) a copy of the purchase option and lease agreements for #23 Oscar Smith Road, which name the retirement plan as the "seller" of the property; (10) a copy of a check issued by Title Max to "Maxwelton Bart Johnson" in the amount of $85,791.85, which Johnson endorsed "pay to MBJ & Associates PSRP"; and a copy of a letter from the IRS, granting continued tax exempt status to the retirement plan.

A thorough review of the above-listed documents reveals that, at best, they show that a retirement plan was in existence, and that Johnson may have believed he was acting in his capacity as trustee for the plan when he purchased the real property in question. But, the documents do not establish that the retirement plan owned the real property in question. Indeed,

apart from the purchase option and lease agreements, none of the documents submitted specifically reference either of the parcels of real property in question. Further, the promissory note included in the attached documents states that "M. Bart Johnson ("Borrower") promises to pay to Hancock Bank ("Lender")." (Dkt. No. 85 at 13). While there are notations at the top, which appear to be in Johnson's handwriting, that state "as trustee" and "MBJ & Assoc PSRP," it is impossible for the Court to discern when those notations were made, the document does not reference either parcel of real property in question, and the document itself names Johnson individually as the borrower. And the rest of the documentation presented to the Court consists largely of documents either prepared by or filled out by Johnson himself, which do not specifically reference the real property in question. Finally, none of the documents presented were recorded. In short, Johnson has failed to put forth evidence "establish[ing] a fact so central to the litigation that it shows the initial judgment to have been manifestly unjust." *Johnson*, 2010 WL at * 3 (quoting *Lavespere*, 910 F.2d at 173). Accordingly, his Motion is not well taken and should be denied.

III. Conclusion

For the reasons stated above, the Court finds that Johnson has failed to make a sufficient showing that relief under Rule 60(b) is warranted. The Motion failed to allege facts indicating relief is warranted under Rule 60(b)(1) or (2). And the documents Johnson submitted failed to establish relief is warranted under Rule 60(b)(6) because they failed to establish a fact so central to the initial decision that the initial judgment was shown to have been manifestly unjust.

IT IS HEREBY ORDERED AND ADJUDGED that the relief sought in the Motion (Dkt. No. 79) is **DENIED.**

END OF ORDER