**SO ORDERED,**

**Judge Neil P. Olack**
**United States Bankruptcy Judge**
**Date Signed: April 6, 2016**

**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:**

| | |
|---|---|
| **VALERIE DENISE NICKELSON,** | **CASE NO. 15-01271-NPO** |
| **DEBTOR.** | **CHAPTER 13** |
| **VALERIE DENISE NICKELSON** | **PLAINTIFF** |
| **VS.** | **ADV. PROC. NO. 15-00046-NPO** |
| **FRANKLIN CHECK SERVICE, LLC AND JOHN LAIRD** | **DEFENDANTS** |

**ORDER DENYING MOTION FOR RECONSIDERATION**

This matter came before the Court for hearing on March 31, 2016 (the "Hearing"), on the Motion for Reconsideration (the "Motion") (Adv. Dkt. 35)[1] filed by Franklin Check Service, LLC ("Franklin Check Service") and John Laird ("Laird," or together with Franklin Check Service, the "Defendants") and the Response to Motion for Reconsideration (Adv. Dkt. 44) filed by the debtor, Valerie Denise Nickelson (the "Debtor"), in the Adversary. At the Hearing, the Debtor was represented by Thomas Carl Rollins, Jr., the Defendants were represented by Kenneth T. O'Cain, and the standing chapter 13 case trustee, Harold J. Barkley, Jr., was

[1] Citations to docket entries in the above-referenced adversary proceeding (the "Adversary") are cited as (Adv. Dkt. ____)" and citations to docket entries in the above-styled bankruptcy case (the "Bankruptcy Case") are cited as "(Bankr. Dkt. ____)".

represented by Todd S. Johns. The Court, after considering the pleadings, testimony, affidavits, and arguments of counsel, denied the Motion from the bench at the Hearing. This Order memorializes and supplements that bench ruling.[2]

**Jurisdiction**

The Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(E) and (H). Notice of the Motion was proper under the circumstances.

**Facts**

The facts are stated fully in the Memorandum Opinion and Order on Complaint and Motion to Lift Automatic Stay (the "Opinion") (Adv. Dkt. 32) issued on February 19, 2016. Only a brief summary of the facts necessary for an understanding of the issues raised in the Motion are set forth below.

On July 20, 2014, the Debtor purchased a mobile home for $8,700.00. (Debtor Ex. 1).[3] In need of funds, the Debtor went to Franklin Check Service on December 18, 2014, for the purpose of obtaining a title loan on her mobile home. Franklin Check Service is a consumer financial services business wholly owned by Laird. In addition to title loans, Franklin Check

[2] Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, the following constitutes the findings of fact and conclusions of law of the Court.

[3] At the Trial of the Adversary on January 13, 2016 (the "Trial"), sixteen (16) joint exhibits were introduced into evidence by stipulation, and four (4) additional exhibits were introduced into evidence by the Debtor. The joint exhibits are cited as "(Jt. Ex. ____)", and the Debtor's exhibits are cited as "(Debtor Ex. ____)". To avoid confusion, the citations are to the exhibit numbers that appear on the stickers affixed to the documents by the parties in accordance with the Pretrial Order for Adversary Proceeding 15-00046-NPO, Motion to Lift Automatic Stay, Response to Motion to Lift Automatic Stay, and Order Consolidating Motion to Lift Automatic Stay and Response to Motion to Lift Automatic Stay with Adversary Proceeding (Adv. Dkt. 29 at 10). Because some of the premarked documents were not introduced into evidence at Trial, the exhibit numbers are not consecutive.

Service offers payday loans and bill payment services. At the time of the transaction in question, Valerie Delozier ("Delozier") was Franklin Check Service's sole employee.

After discussing the transaction with Laird and Delozier, the Debtor signed a document that she believed to be a promissory note in connection with a title loan on the mobile home. She gave Laird the Certificate of Title to her mobile home (Jt. Ex. 2), and Laird gave her $2,500.00.

When the Debtor filed her chapter 13 petition for relief (Bankr. Dkt. 1) on April 17, 2015, she listed Franklin Check Service as a secured creditor in her bankruptcy schedules (Bankr. Dkt. 4) and proposed to pay Franklin Check Service the balance of the title loan in her repayment plan (Bankr. Dkt. 2). Laird filed a Motion to Lift Automatic Stay (the "Stay Motion") (Bankr. Dkt. 24), disputing the Debtor's treatment of the claim because, *inter alia*, Franklin Check Service was allegedly not involved in the transaction. In the Stay Motion, Laird maintained that he purchased the mobile home from the Debtor for $2,500.00 prior to the commencement of the Bankruptcy Case. (*Id.*). Laird sought relief from the automatic stay in order to commence eviction proceedings against the Debtor in state court. (*Id.*).

On July 1, 2015, the Debtor filed the Complaint (Adv. Dkt. 1) against the Defendants, asking the Court to avoid the purported sale of the mobile home as a constructive fraudulent transfer under 11 U.S.C. § 548(a). (Compl. ¶¶ 22-32). She also sought damages against the Defendants under state law for fraud in the inducement. (*Id.* ¶¶ 33-42). Because of the overlapping issues in the Bankruptcy Case and the Adversary, and to promote judicial economy, the Court consolidated the Stay Motion with the Adversary. (Bankr. Dkt. 50).

Before the Trial, the issues of punitive damages and attorney's fees and expenses were reserved for later determination, if necessary. (Adv. Dkt. 29 at 12). Four (4) witnesses testified

live at Trial, including the Debtor; the Debtor's father, David Sanders, Sr.; Laird; and Delozier. A fifth witness, Jack Lazarus, testified by deposition. (Jt. Ex. 20).

In the Opinion, the Court found there was no valid sale of the mobile home to Laird and no lawful title loan on the mobile home by Franklin Check Service. (Op. at 27). The Court reached these findings after determining that the Debtor's testimony about the transaction in question was more credible than either Laird's or Delozier's. (*Id*. at 17). Based on these findings, the Court concluded that the Debtor established a constructive fraud claim under 11 U.S.C. § 548 and was entitled to recover the Certificate of Title to the mobile home under 11 U.S.C. § 550. (*Id*. at 27). The Court next concluded that the Debtor proved fraud in the inducement under Mississippi law. (*Id*.). The Court did not enter a separate final judgment but informed the parties that a hearing would be set on the issues of punitive damages and attorney's fees and expenses. (*Id*.). That hearing is now scheduled to take place on May 12, 2016. (Adv. Dkt. 45).

Aggrieved by the Opinion, the Defendants filed the Motion seeking an evidentiary hearing to address the testimony of two new witnesses, Melissa Mitchell ("Mitchell") and Hunter Hatcher ("Hatcher"), who tell a similar story.[4] In separate affidavits (the "Mitchell Affidavit" and "Hatcher Affidavit," respectively, or together, the "Affidavits") (Adv. Dkt. 35-1, 35-2), both Mitchell and Hatcher claimed they were present at Franklin Check Service when they allegedly overheard Laird informing the Debtor that he could not grant her a title loan on the mobile home but would buy it from her. (Mitchell Aff. ¶ 3; Hatcher Aff. ¶ 3).

[4] In the Motion, the Defendants made no mention of the banker they later subpoenaed to appear and testify at the Hearing. (Adv. Dkt. 43); s*ee infra* at 6.

Mitchell and Hatcher explained in their Affidavits that a "curtain" or "divider" separates Franklin Check Service's title loan business from its check-cashing business.[5] (Mitchell Aff. ¶ 2; Hatcher Aff. ¶ 2). When the conversation in question took place, Mitchell was supposedly on the title loan side of the curtain (Mitchell Aff. ¶ 2) while Hatcher was allegedly on the check cashing side of the divider, as were the Debtor and Laird (Hatcher Aff. ¶ 2). From her vantage point behind the curtain, Mitchell claimed that she could not have observed the transaction (Mitchell Aff. ¶ 2), but Hatcher testified in his affidavit that he saw Laird giving the Debtor a check, the Debtor signing a document, and Delozier notarizing that same document. (Hatcher Aff. ¶ 3). Hatcher did not describe the content of the document signed by the Debtor and notarized by Delozier. (*Id*.).

The Defendants asserted in the Motion that Mitchell was unknown to exist prior to Trial and "could not have reasonably been discovered except by chance." (Mot. at 4). They suggested in the Motion and at the Hearing that Hatcher's testimony was likewise discovered only by happenstance. Based on the Affidavits of these alleged new witnesses, the Defendants ultimately seek a reversal of the Court's conclusions of law rendered in favor of the Debtor. (Mot. at 5-6).

Apart from the affidavit testimony of Mitchell and Hatcher, the Defendants asked the Court to reconsider its factual finding on page four (4) of the Opinion that the "Debtor endorsed the check to Laird, and Laird gave the Debtor $2,500.00 in cash." (Mot. at 5). The Defendants attached to the Motion a copy of the $2,500.00 check (Adv. Dkt. 35-3), showing that the Debtor

[5] Mississippi law defines a title pledge office as "the location at which, or premises in which, a title pledge lender regularly conducts business. *No other business other than title pledge business shall be conducted at a Title Pledge Office*." MISS. CODE ANN. § 75-67-403 (emphasis added). Regulations promulgated by the Mississippi Department of Banking & Consumer Finance further define a title pledge office as having "a minimum of 100 square feet, with walls from floor to ceiling separating the operation from any other business(es)." MISS. ADMIN. CODE 5-3:4.5

signed the back of the check without any additional instructions or limitations. The Defendants alleged in the Motion that the "negotiation of the check, based on the check itself, did not involve John Laird." (Mot. at 5).

The check did not constitute newly discovered evidence and, indeed, was admitted into evidence at Trial as a joint exhibit. (Jt. Ex. 3). In an effort to support their contention that the Court's finding was erroneous, the Defendants attempted to introduce into evidence the live testimony of a banker for the alleged purpose of explaining the relevance of the numbers on the back of the check. The Court sustained the objection of the Debtor because the Defendants did not mention the banker in the Motion and his testimony would raise matters not brought to the Court's attention before or during the Trial. *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986) (holding that although a trial court should correct an erroneous judgment, [t]his is not to say . . . that a motion to amend should be employed to introduce evidence that was available at trial, but was not proffered, to relitigate old issues, to advance new theories, or to secure a rehearing on the merits").

**Discussion**

The Defendants filed the Motion pursuant to Rules 52(b), 54(b) and 59(e) of the Federal Rules of Civil Procedure as made applicable by Rules 7052, 7054, and 9023 of the Federal Rules of Bankruptcy Procedure. These rules permit a court, on motion of a party, to amend its findings of fact in certain circumstances. The Court first considers whether Rules 52(b) and 59(e) apply to the relief requested in the Motion.

Rule 52(a) requires a court in "an action tried on the facts without a jury" to "find the facts specially and state its conclusions of law separately." FED. R. CIV. P. 52(a)(1). Rule 52(b) permits a court "to amend its findings—or make additional findings—and may amend the

judgment accordingly." FED. R. CIV. P. 52(b). The purpose of Rule 52(b) generally is to "correct manifest errors of law or fact." *Fontenot*, 791 F.2d at 1219. To prevail on a Rule 52(b) motion to amend, the movant must show that a court's findings of fact or conclusions of law are not supported by the evidence in the record. *Id*. A motion under Rule 52(b) "may accompany a motion for a new trial under Rule 59." FED. R. CIV. P. 52(b).

Rule 59(e) permits the filing of a motion "to alter or amend a judgment." *Templet v. HydroChem Inc*., 367 F.3d 473, 478 (5th Cir. 2004) (holding that Rule 59 "calls into question the correctness of a judgment") (quotation omitted). Under Rule 59(e), a final judgment may be amended if: (1) there is a manifest error of law or fact; (2) newly discovered evidence; or (3) an intervening change in controlling law. *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003) (citing *Rosenzweig v. Azurix Corp*., 332 F.3d 854, 863-64 (5th Cir. 2003)). "To succeed on a motion for relief from judgment based on newly discovered evidence, our law provides that a movant must demonstrate: (1) that it exercised due diligence in obtaining the information; and (2) that the evidence is material and controlling and clearly would have produced a different result if present before the original judgment." *Gen. Univ. Sys., Inc. v. Lee*, 379 F.3d 131, 158 (5th Cir. 2004) (quoting *Goldstein v. MCI WorldCom*, 340 F.3d 238, 257 (5th Cir. 2003)) (applying FED. R. CIV. P. 60(b)(2)). An undue delay to provide evidence available at the time a judgment is entered is grounds for denying a motion for reconsideration filed under Rule 59. *Templet*, 367 F.3d at 479.

By their express language, Rules 52(b) and 59(e) apply only to a "judgment." The term "judgment" is defined in Rule 54(a) to "include[] a decree and any order from which an appeal lies." FED. R. CIV. P. 54(a). Thus, the term "judgment" encompasses both a final order from which an appeal is permitted under 28 U.S.C. § 1291 and an appealable interlocutory order. 10

CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 2651 (4th ed. 2014). "Orders that are not appealable under one of those two categories do not qualify as judgments." *Id*.

The Opinion rendered by the Court in the Adversary is neither a final judgment nor an appealable interlocutory order. The Opinion itself provides that "[a] final judgment will not be entered until final disposition of all matters," (Op. at 27), and no party has requested that a final judgment be entered under Rule 54(b). Moreover, the Defendants concede that no final judgment has been entered in the Adversary. (Mot. at 1). Thus, the Court concludes that neither Rule 52(b) nor Rule 59(e) provides the Defendants with a basis for the relief they request in the Motion.

With respect to non-final orders, however, the Court agrees with the Defendants that the Court retains the power under Rule 54(b) "to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Saqui v. Pride Cent. Amer., LLC*, 595 F.3d 206, 210 (5th Cir. 2010) (quotation omitted). Rule 54(b) provides:

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

FED. R. CIV. P. 54(b).

Rule 54(b) does not address the standards that a court should apply when addressing a motion to reconsider an interlocutory order. For that reason, the Court looks to the standards under Rules 52(b) and 59(e) for guidance, although, as noted previously, Rules 52(b) and 59(e) are not technically applicable to the Motion since the Opinion is neither a final judgment nor an

appealable interlocutory order. *See Morgan v. Miss*., Civil Action No. 2:07cv15-MTP, 2009 WL 1809417, at *1 n.1 (S.D. Miss. June 23, 2009).

**A. New Witnesses**

The Court finds that the affidavit testimony of Mitchell and Hatcher does not constitute new evidence that would necessitate an evidentiary hearing or an amendment of the Opinion. The alleged "new evidence" is not really new, is not credible, and is cumulative.

To qualify as "newly discovered" evidence, their testimony must have been previously unavailable to the Defendants. *Goldstein*, 340 F.3d at 257. In an attempt to support the Defendants' contention that the witnesses "could not have reasonably been discovered except by chance" (Mot. at 4), Laird testified at the Hearing that he first learned that Hatcher was at Franklin Check Service on the day in question from a conversation with his son after the Trial. If Hatcher was in the same room with Laird when Laird allegedly purchased the mobile home, then Laird should have seen Hatcher and remembered him being there before the Trial. (Hatcher Aff. ¶ 4). As to Mitchell, Laird testified that he remembered—only after the Trial—that she was there that day too, but he was unable to explain why his memory failed him before the Trial. Indeed, Laird's testimony at the Hearing contradicted his testimony at Trial that Delozier was the only witness to the transaction. (Test. of Laird at 2:05:10-2:05:17). In her deposition, Delozier likewise testified that she was the only witness there that day. (Delozier Dep. at 5:18-5:19, Jt. Ex. 18).

Laird's testimony on cross-examination at the Hearing established that he took no action before the Trial to determine who was at Franklin Check Service on the date in question:

> Q. Who did you talk to and ask to investigate who might have information about the case?
>
> A. Say that one more time.

Q. After the trial . . . after the case was filed . . . .

A. In what . . . what?

Q. The case we are in right now.

A. When it was first filed?

Q. From that date until trial who did you speak to, to investigate the facts around the case?

A. I don't remember speaking with anyone.

Q. Did you pay anyone to investigate the facts of this case?

A. Oh, no, sir.

Q. Did you talk to Valerie about what she remembered that day?

A. Valerie Delozier?

Q. Yes.

A. We have had a few conversations. I don't remember exactly what it was.

Q. Did you ask Valerie Delozier who else was there that day?

A. I don't remember ever asking her that.

(Test. of Laird at 2:38:05-2:39:10).[6] Based on Laird's testimony at the Hearing, the Court finds that the Defendants failed to conduct any investigation to find other witnesses, if at all, until well after the Trial. That Laird may have discovered Mitchell and Hatcher "by chance" after the Trial is not tantamount to a finding that he exercised due diligence in bringing their testimony to this Court's attention before the Trial. A movant's lack of investigation is one of the reasons why the

[6] The Trial was not transcribed. The references to testimony are cited by the time stamp of the audio recording.

Fifth Circuit Court of Appeals in *Schiller* denied a motion for reconsideration and likewise is sufficient grounds to deny the Motion here. *See Schiller*, 342 F.3d at 568-69.

Even if the Affidavits constituted newly discovered evidence, however, the Court finds that the testimony of Hatcher and Mitchell is not credible. *Goldstein*, 340 F.3d at 257 (noting that newly discovered evidence under FED. R. CIV. P. 60(b) must be both admissible and credible). The Defendants did not explain why Mitchell and Hatcher waited more than a year to come forward or why they remembered a conversation that did not involve them. In their Affidavits, they testified that Laird only recently mentioned the outcome of the Trial to them and they supposedly voluntarily disclosed to Laird that they were present at Franklin Check Service and overheard his conversation with the Debtor. (Mitchell Aff. ¶ 4; Hatcher Aff. ¶ 4). Laird's sudden discovery of these witnesses is not the only circumstance in which Laird has struggled to provide a reasonable explanation. As noted in the Opinion, there were two (2) versions of the same bill of sale signed by the Debtor (Op. at 10); and on the morning of the Trial, Laird gave Delozier a file that he previously forgot existed (Op. at 8 n.5).

Finally, the Court finds that the "newly discovered" evidence is cumulative, and even if considered by the Court, would not change the outcome of the Opinion. *Longden v. Sunderman*, 979 F.2d 1095, 1103 (5th Cir. 1992). Neither Hatcher nor Mitchell offer any new evidence. At best, their testimony attempts to corroborate the testimony of Laird and Delozier, which the Court has already considered and rejected as not credible. *See McDonald v. Entergy Operations, Inc*., 2005 WL 1528611, at *1 (S.D. Miss. May 31, 2005) (holding that a motion to reconsider is not "intended to give an unhappy litigant an additional change to sway the judge") (quotation omitted). As the Fifth Circuit noted in *Fontenot* with regard to a Rule 52(b) motion, "[b]lessed with the acuity of hindsight, [a party] may now realize that it did not make its initial case as

compellingly as it might have, but it cannot charge the [trial court] with responsibility for that failure through [a] Rule 52(b) motion." *Fontenot*, 791 F.2d at 1220.

**B. Negotiation of Check**

The Court next considers the Defendants' request to strike its factual finding that "Laird handed the Debtor a check in the amount of $2,500.00 . . . , the Debtor endorsed the check to Laird, and Laird gave the Debtor $2,500.00 in cash." (Op at 4). The Defendants attached a copy of the $2,500.00 check to their Motion to show that Laird's name does not appear on the back. (Adv. Dkt. 35-3). But the Debtor's testimony at Trial disputes the Defendants' contention that "the negotiation of the check . . . did not involve John Laird." (Mot. at 5). On cross-examination by counsel for the Defendants, the Debtor testified, as follows:

> Q. And the check and you took the check from John Laird and you took it to the bank and cashed it?
>
> A. No, I did not.
>
> Q. What did you do?
>
> A. John Laird, I had got this the check on . . . well, I signed the back of the check on December 18th but I didn't get the money until December 19th. John Laird cashed it. I didn't.
>
> Q. John Laird cashed the check that he wrote to you?
>
> A. Yes, I did not go to a bank and cash the check.
>
> * * *
>
> Q. You don't dispute you got the money?
>
> A. Huh? I didn't get a check.
>
> Q. You got the money?
>
> A. Yeah, I got the money, but I didn't get a check. I didn't go to a bank and cash it if that's what you were asking. No, I did not.
>
> Q. That's your signature on the back of the check?

A. Yes.

Q. John Laird didn't write the check to himself, did he?

A. But I didn't go to the bank and cash it.

(Test. of Debtor at 11:33:00-11:34:10). This testimony supports the Court's finding that the Debtor endorsed the check, and Laird cashed it. Although the back of the check shows that the Debtor signed her name without any special endorsement, a contrary finding does not appear in the Opinion. Moreover, even if the check was not cashed by Laird but by a bank, the facts surrounding the negotiation of the check are immaterial to the Court's findings there was no valid sale of the mobile home to Laird and no lawful title loan on the mobile home by Franklin Check Service. (Op at 27). The negotiation of the check was mentioned as background information but was not an element of the Debtor's constructive fraud claim under 11 U.S.C. § 548(a) or her fraud in the inducement claim under Mississippi law.

**Conclusion**

For all of the above and foregoing reasons, the Court concludes that the Motion should be denied. With respect to Mitchell and Hatcher, their affidavit testimony is not newly discovered, is not credible, and is cumulative. As to the negotiation of the check, the Court finds no manifest error of fact or law.

IT IS, THEREFORE, ORDERED that the Motion is hereby denied.

##END OF OPINION##