UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

In re:

LINDA WILSON and
EDDIE L. WILSON,

No. 7-12-13396 TL

Debtors.

PAUL M. GAYLE-SMITH,

Plaintiff,

v.

Adv. No. 12-1330 T

LINDA WILSON,
EDDIE L. WILSON,
and POND-S-SCAPES,

Defendants.

ORDER DENYING MOTION TO RECONSIDER

This matter came before the Court on Plaintiff's Motion for Reconsideration and Motion to Correct the Record, filed December 16, 2013, doc. 45 (the "Motion"). Plaintiff seeks reconsideration of the Memorandum Opinion and Judgment entered December 2, 2013, in which the Court determined Plaintiff failed to satisfy the elements of the § 523(a)(2)(A) exception to dischargeability. Having carefully reviewed the record and the Motion, the Court finds that the Motion is not well taken and should be denied.

I. MOTIONS FOR RECONSIDERATION

Generally, motions for reconsideration filed within 14 days of the entry of a judgment or order are governed by Fed.R.Civ.P. 59(e), as incorporated into the bankruptcy rules by Fed.R.Bankr.P. 9023. *See Buchanan v. Sherrill,* 51 F.3d 227, 230 n. 2 (10th Cir. 1995) ("No

matter how styled, we construe a post-judgment motion filed within [14] days challenging the correctness of the judgment as a motion under Rule 59(e)."); *In re McCaull*, 2009 WL 185469, *3 (10th Cir. 2009) (construing Debtor's motion to reconsider filed within the 14 day period prescribed by Rule 9023 as a motion to alter or amend the judgment under Rule 59).

Grounds warranting reconsideration include: "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Reconsideration may also be granted when "the court has obviously misapprehended a party's position on the facts or the law, or the court has mistakenly decided issues outside of those the parties presented for determination." *In re Sunflower Racing, Inc.,* 223 B.R. 222, 223 (D. Kan. 1998). However, Rule 59 does not afford parties seeking relief an opportunity to raise new arguments, or to "rehash arguments previously considered and rejected by the court." *Id.*

II. DISCUSSION

Plaintiff has not offered newly discovered evidence or alleged an intervening change in the law. Instead, he contends that various findings contained the Memorandum Opinion are misleading, inaccurate, defamatory, or illogical. Plaintiff first argues that in several instances the Court erred by drawing inferences where no direct evidence was available. He complains, for example, that the Court found he knew Defendants fairly well and was familiar with the vehicles they drove despite the fact that he never explicitly testified to that effect. This argument is unavailing. In making its findings, the Court is not confined to the testimony of witnesses; it may also draw reasonable inferences from all of the evidence presented at trial. *U.S. v. Cash,* 733 F.3d 1264, 1273 (10th Cir. 2013) ("The … weight to be given evidence, and the reasonable inferences drawn from the evidence fall within the province of the [trial] court.") (internal

quotation marks omitted); *U.S. v. Hernandez-Roman,* 200 WL 259751, *3 (10th Cir. 2007) ("[T]he finder of fact … [is] permitted to draw … reasonable inferences from the evidence before it"). The Court has carefully reviewed each instance in which Plaintiff claims a particular finding lacked a sufficient evidentiary basis and believes that its inferences were reasonable and appropriate.

Plaintiff next argues the Court erred by making findings that were contrary to his testimony. For example, Plaintiff contends his testimony conclusively established that Plaintiff and Defendants executed a written fee agreement, and that Defendants had misrepresented the value of their assets since 2007. This argument misunderstands the Court's role as the trier of fact.

Fact findings are not simply recitations of the testimony presented at trial. While the Court may find facts based on a witness' testimony, it is not required to do so. The Court is "entitled to discount … testimony based on its … assessments of [a witness'] credibility" or if it believes other evidence tends to weaken the testimony. *Hull by Hull v. U.S.,* 971 F.2d 1499, 1512 (10th Cir. 1992); *Harvey v. Office of Banks and Real Estate,* 377 F.3d 698, 712 (7th Cir. 2004) ("It is the prerogative of a … trier of fact to disbelieve uncontradicted testimony unless other evidence shows that the testimony must be true.") (internal quotation marks omitted). The Court considered Plaintiff's version of events in light of the entire record and accepted much, but not all, of the testimony he offered in support of his claims. To the extent Plaintiff wishes to challenge the Court's decision to discount certain portions of his testimony in light of other evidence, the Motion must be denied.

Third, Plaintiff takes issue with the Court's finding that although Defendants made misrepresentations regarding their assets, Plaintiff's reliance on those misrepresentations was not

justifiable. Such findings are not mutually exclusive. 11 U.S.C. § 523(a)(2)(A) contains five elements, all of which must be satisfied in order for the movant to prevail.[1] Although Defendants made several misrepresentations, Plaintiff failed to carry his burden of showing he justifiably relied on those statements. Consequently, the Court is not persuaded that its ruling is "illogical."

Finally, Plaintiff takes issue with the Court's conclusion that it could not determine a reasonable fee, and complains that the Court's description of his billing practices is defamatory. This argument is regrettable, both because the findings are accurate and because - as Plaintiff surely knows - the findings are privileged. *See, e.g., Baker v. Bhajan,* 871 P.2d 374, 377 (N.M. 1994) (statements made in the context of judicial proceedings are absolutely privileged); *Taylor v. West Pub. Co.,* 693 F.2d 837, 838 (8th Cir. 1982) (citing *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978)) (applying the absolute privilege to statements in a judicial opinion). The Court has reviewed its findings and conclusions on this issue and declines Plaintiff's invitation to modify them.

III. CONCLUSION

Plaintiff has failed to demonstrate that any grounds exist to alter or amend the Court's Memorandum Opinion, Order, and/or Judgment (Doc. Nos. 40 & 41).

IT IS THEREFORE ORDERED that the Motion is DENIED.

[1] The movant must prove: (1) the debtor made a false representation; (2) the debtor made the representation with the intent to deceive the creditor; (3) the creditor relied on the representation; (4) the creditor's reliance was reasonable; and (5) the debtor's representation caused the creditor to sustain a loss. *Johnson v. Riebesell (In re Riebesell)*, 586 F.3d 782, 792 (10th Cir. 2009) (quoting *Fowler Bros. v. Young (In re Young),* 91 F.3d 1367, 1373 (10th Cir. 1996)).

Hon. David T. Thuma
United States Bankruptcy Judge

Entered on: December 23, 2013.

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