UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

In re: MICHAEL JACQUES JACOBS, No. 19-12591-j11

Debtor.

MEMORANDUM OPINION AND ORDER DENYING RULE 60(b) MOTION FOR RELIEF FROM A JUDGMENT OR ORDER OVERRULING OBJECTION TO CLAIM #6

THIS MATTER is before the Court on the Rule 60(b) Motion for Relief from a Judgment or Order Overruling Objection to Claim #6 ("Rule 60(b) Motion"–Doc. 197). The Court previously entered an Order Overruling Objection to Claim #6 ("Order Allowing Claim of DLJ Mortgage"–Doc. 161), which overruled Debtor's objection[1]and allowed the claim of DLJ Mortgage Capital, Inc. ("DLJ Mortgage") as a secured claim in the amount of $497,457.45 as asserted in DLJ Mortgage's proof of claim.[2]

By the Rule 60(b) Motion, Debtor Michael Jacobs, pro se, requests the Court to 1) vacate the Order Allowing Claim of DLJ Mortgage; 2) vacate the Order Granting In rem Stay Relief under 11 U.S.C. § 362(d)(4) ("Stay Relief Order"–Doc. 160);[3] 3) rule that DLJ Mortgage is not the 100% claimant as it claims but a 50% beneficiary; 4) rule that DLJ Mortgage shall provide deficient discovery; and 5) order DLJ Mortgage to honor a HAMP[4] modification. For the reasons set forth below, the Court will deny the Rule 60(b) Motion.

[1] *See* Objection to Claim #6 (DLJ Mortgage Capital) ("Claims Objection"–Doc. 96).
[2] The Order Allowing Claim of DLJ Mortgage was supported by an accompanying Memorandum Opinion (Doc. 159).
[3] Debtor filed a separate motion seeking relief from the Stay Relief Order (Doc. 176), which the Court denied. *See* Memorandum Opinion Regarding Debtor's Motion for Relief from a Judgment or Order (Doc. 228) and Order Denying Motion for Relief from Judgment or Order (Doc. 229).
[4] HAMP refers to the Home Affordable Modification Program.

BACKGROUND AND PROCEDURAL HISTORY

Debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code on November 13, 2019. Doc. 1. On April 20, 2020, DLJ Mortgage filed a motion for relief from stay ("Stay Relief Motion"–Doc. 27) that included a request for in rem stay relief to allow it to foreclose its interest in the Debtor's real property located at 800 Calle Divina NE, Albuquerque, New Mexico (the "Property").

DLJ Mortgage filed a proof of claim on May 6, 2020, asserting a secured claim in the amount of $497,457.45 secured by the Property. *See* Claim No. 6-1. Supporting documentation attached to DLJ Mortgage's proof of claim included a copy of the following documents:

1. The Note executed by Ruby Handler Jacobs in favor of Encore Credit Corp., a California Corporation ("Encore");

2. An Endorsement Allonge to the Note from Encore to Impac Funding Corporation ("Impac");

3. An Endorsement Allonge to the Note from Impac to EMC Mortgage Corporation ("EMC Mortgage");

4. An Allonge to the Note from EMC Mortgage endorsed in blank;

5. The Mortgage on the Property signed by Ruby Handler Jacobs and Michael Jacobs in favor of Encore;

6. Several Assignments of Mortgage, including an Assignment of Mortgage from U.S. Bank National Association, not individually, but solely as Trustee for the holders of Maiden lane Asset Backed Securities I Trust 2008-1, its Successors and Assigns to DLJ Mortgage; and

7. Final Judgment on the Merits as a Result of Trial on August 31, 2016, Stipulated *In Rem* Foreclosure Judgment as to Defendant Jonathan K. Gitlen, in his Capacity as Personal Representative of the Estate of Howard Gitlen, Deceased, Default Foreclosure Judgment, and Order for Foreclosure Sale ("Foreclosure Judgment") entered in an action styled, *DLJ Mortgage Capital, Inc. and Selene Finance, L.P. vs. Ruby Handler Jacobs, et al.,* Case No. D-202-CV-2012-09237 (the "State Court Action").

Debtor filed the Claims Objection on November 15, 2020.[5]

In February of 2021, this Court determined that the Foreclosure Judgment and Findings of Fact and Conclusions of Law ("Findings and Conclusions") entered in the State Court Action had preclusive effect which barred Debtor from asserting that DLJ Mortgage lacks standing to seek relief from the automatic stay.[6] Following a final, evidentiary hearing on the Stay Motion and the Claims Objection,[7] the Court granted DLJ Mortgage in rem stay relief and overruled Debtor's objection to DLJ Mortgage's claim.[8]

Debtor's Claims Objection is short. The grounds for Debtor's objection to DLJ Mortgage's claim, in their entirety, are:

1. Claimant fails to establish a claim.
2. In the underlying State Court Action, Selene Finance, LP ("Selene Finance") was added as a co-plaintiff by DLJ Mortgage in an amended complaint as a nod to § 55-3-203(d) (NMSA 1978) hoping to establish greater rights than the rights of a partial assignee.[9]
3. Judgment in the state court case was granted to plaintiffs DLJ Mortgage and Selene Finance.

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[5] Doc. 96.

[6] *See* Memorandum Opinion (Doc. 117) and Order Granting Motion for Issue/Claim Preclusion (Doc. 118). Debtor filed a Motion for Reconsideration (Doc. 130) of the Court's Memorandum Opinion, which the Court denied. *See* Memorandum Opinion and Order on Motion for Reconsideration (Doc. 148).

[7] The Foreclosure Judgment and the Findings and Conclusions entered in the State Court Action were admitted into evidence at the final hearing on the Claims Objection and the Stay Relief Motion as Exhibits 12 and 11, respectively.

[8] *See* Memorandum Opinion–Doc. 159; Stay Relief Order–Doc. 160; Order Allowing Claim of DLJ Mortgage–Doc. 161.

[9] Section 55-3-203(d) (NMSA 1978) is a provision of the Uniform Commercial Code ("UCC") as adopted in New Mexico. It provides, with respect to negotiation of a promissory note: "If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this article and has only the rights of a partial assignee." Based on this provision of the UCC, Debtor has asserted that DLJ Mortgage is not the holder of the promissory note secured by a mortgage against his residence and has no right to foreclose the mortgage. In the State Court Action, the State Court concluded that "Plaintiffs [referring to DLJ Mortgage and Selene Finance] have not impermissibly split the Note," "are declared to be the holders of a first priority lien on the Property," and "are entitled to judgment." Findings and Conclusions, ¶¶ 4, 7, and 9 of the conclusions. The State Court then issued the Foreclosure Judgment, an in rem judgment in favor of DLJ Mortgage and Selene Finance entitling them to recover from the Property the full amount due under the note. The Foreclosure Judgment is on appeal in State Court.

4. Only DLJ Mortgage and Selene Finance, as purported joint-holders of a mortgage note, have the right to bring the underlying claim.

At the final hearing on the Claims Objection,[10] Debtor was represented by counsel. Counsel pointed out that the State Court found that DLJ Mortgage and Selene CS Participation, LLC ("Selene CS") both had a 50% interest in the asset and that in the State Court amended complaint there is an allegation of a joint venture owning the loan. Debtor's counsel argued that DLJ Mortgage did not have standing to bring the State Court Action by itself and does not have the right to assert its proof of claim without Selene Finance and/or Selene CS being included as claimants. The only argument Debtor made regarding the amount DLJ Mortgage's claim, apart from objecting to the chain of title to the loan, was that payments were made on the loan to prior mortgage companies that are not reflected in the proof of claim. The alleged payments, therefore, if made, would have been made prior to entry of the Foreclosure Judgment.

The Court issued a 22-Page Memorandum Opinion (Doc. 159) in support of its Stay Relief Order granting in rem relief from the automatic stay in favor of DLJ Mortgage (Doc. 160) and its Order Allowing Claim of DLJ Mortgage (Doc. 161), which allowed the claim in full. The Memorandum Opinion, like the final hearing on both the Stay Relief Motion and Claims Objection, focused mostly on the Stay Relief Motion. The portion of the Memorandum Opinion addressing the Claims Objection stated the following:

> Debtor's objection to DLJ Mortgage's claim is premised on the fact that the State Court Judgment was entered in favor of both DLJ Mortgage and Selene Finance, LP and only DLJ Mortgage filed a proof of claim. *See* Doc. 96. Based on that fact, Debtor reasons that both purported joint holders [of][11] the Note must bring the underlying claim together. *Id*. As this is the only basis for Debtor's objection, the Court will overrule it. The Court has already determined that DLJ Mortgage has standing to seek relief from the stay without joining Selene Finance, L.P. based on the preclusive effect of the State Court Judgment. The same reasoning holds true

[10] The final hearing addressed not only the Claims Objection but also the Stay Relief Motion. Most of the evidence and argument at the hearing was directed to the Stay Relief Motion.
[11] The Memorandum Opinion used the word "if" instead of "of," an unintended typographical error.

> as to DLJ Mortgage's right to file a proof of claim. Debtor did not object to the amount or nature of DLJ Mortgage's claim.

Memorandum Opinion (Doc. 159), p. 21.

In overruling Debtor's objection to DLJ Mortgage's claim, the Court pointed out that it had already ruled that DLJ Mortgage had standing to seek relief from the automatic stay without joining Selene Finance based on the preclusive effect of the Foreclosure Judgment entered in the State Court Action, and that the same reasoning holds true as to the Claims Objection.[12] Even though Debtor's counsel argued at the final hearing that Debtor made certain pre-Foreclosure Judgment payments on the loan that were not reflected in DLJ Mortgage's proof of claim, the Claims Objection did not otherwise object to the nature or amount of DLJ Mortgage's claim. Based on the preclusive effect of the Foreclosure Judgment, the Court allowed the claim in the total amount of the Foreclosure Judgment, plus interest through the petition date, as stated in DLJ Mortgage's proof of claim.[13]

Debtor filed a motion seeking to alter or amend the Court's Memorandum Opinion (Doc. 159) and Stay Relief Order under Fed.R.Civ.P. 59(e)[14] (Doc. 163) and filed a second motion under Fed.R.Civ.P. 59(e) (Doc. 172) seeking to alter or amend the Order Allowing Claim of DLJ Mortgage. The Court denied both motions as untimely.[15]

Debtor filed the Rule 60(b) Motion (Doc. 197) on September 13, 2021. The Rule 60(b) Motion asks the Court to grant relief from the Order Allowing Claim of DLJ Mortgage (Doc. 161) and the related Memorandum Opinion (Doc. 159). DLJ Mortgage filed a response (Doc. 211).

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[12] Memorandum Opinion (Doc. 159), p. 21.
[13] *See* Doc. 161
[14] Rule 59(e) of the Fed.R.Civ.P. is made applicable to bankruptcy cases by Fed.R.Bankr.P. 9023.
[15] *See* Order Denying Motions to Alter or Amend Judgment as Untimely Filed (Doc. 173)

In his Rule 60(b) Motion, Debtor for the first time argues that DLJ Mortgage is entitled only to 50% of the amount of the claim set forth in its proof of claim. Debtor's ground for disallowing DLJ Mortgage's claim as stated in his Claims Objection was that DLJ Mortgage had not established a claim at all because "only DLJ and Selene Finance, as purported joint-holders of a mortgage note, have the right to bring the underlying claim."[16] At the hearing, counsel for the Debtor couched his objection to DLJ Mortgage's claim in terms of DLJ Mortgage's standing to file the claim by itself. The Court understood that to mean the Debtor was not objecting to the amount of the claim apart from his objection that the claim should be disallowed in its entirety based on the lack of standing argument. Because the State Court had granted an in rem foreclosure judgment in favor of DLJ Mortgage and Selene Finance permitting foreclosure of the mortgage to recover the full amount of the judgment against the Property, the Court overruled Debtor's objection that DLJ Mortgage did not have standing to file the proof of claim based on the preclusive effect of the Foreclosure Judgment. Debtor's only argument regarding the amount of DLJ Mortgage's claim made at the final hearing on the Claims Objection was that certain payments made prior to the entry of the Foreclosure Judgment were not properly credited to the loan. Because Debtor's current argument was not included in the Claims Objection or argued at the hearing, the Court has never ruled on whether the preclusive effect of the Foreclosure Judgment establishes that DLJ Mortgage alone is entitled to enforce the entire judgment amount.

Debtor seeks relief under Rule 60(b)from the Order Allowing Claim of DLJ Mortgage under subsections (1) (based on an excusable litigation mistake by his counsel), (2) (based on newly discovered evidence), and (3) (based on misconduct of an adverse party).

[16] Claims Objection (Doc. 96), ¶ 4.

The Court held a status conference on the Rule 60(b) motion to discuss the following issues:

1. Whether the preclusive effect of the Findings and Conclusions and the Foreclosure Judgment establishes that DLJ Mortgage alone has a valid claim against Debtor's bankruptcy estate in the full amount set forth in its Claim No. 6-1 or otherwise has the right to claim the full amount set forth in Claim No. 6-1.

2. Whether the preclusive effect of the Findings and Conclusions and the Foreclosure Judgment, together with events subsequent to entry of the Foreclosure Judgment, establish that DLJ Mortgage alone is owed or has the right to claim the entire amount set forth in its Claim No. 6-1.

Order Setting Status Conference on Rule 60(b) Motion for Relief from a Judgment or Order Overruling Objection to Claim #6–Doc. 231.

Having reviewed this matter further, for the reasons set forth below, the Court has determined that it need not address these issues; did not need to ask the parties at the status conference to submit additional materials; and need not review those materials.

DISCUSSION

A. Debtor is not entitled to relief from the Order Allowing DLJ Mortgage's Claim under Rule 60(b)(1), (2), or (3)

Rule 60(b)(1)

Debtor seeks relief from the Order Allowing Claim of DLJ Mortgage under Rule 60(b)(1) based on litigation mistakes by his counsel of record.

Under Fed.R.Civ.P. 60(b)(1), made applicable to bankruptcy cases by Fed.R.Bankr.P. 9024, a party may obtain relief from a final judgment or order based on "mistake, inadvertence, surprise, or excusable neglect." The moving party bears the burden of demonstrating entitlement to relief under Rule 60(b)(1). *In re Mattox*, No. 18-10101-13, 2020 WL 6194593, at *4 (Bankr. D. Kan. Oct. 19, 2020) (citing *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990)). In general, "the 'mistake' provision in Rule 60(b)(1) provides for the reconsideration of

judgments only where: (1) a party has made an excusable litigation mistake or an attorney in the litigation has acted without authority from a party, or (2) where the judge has made a substantive mistake of law or fact in the final judgment or order." *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996). *See also Macias v. New Mexico Dep't of Lab.,* 300 F.R.D. 529, 544 (D.N.M. 2014) ("Under some circumstances, a party can rely on Rule 60(b)(1) for a mistake by their attorney or when their attorney has acted without . . . [the party's] authority." (citing *Yapp v. Exel Corp.,* 186 F.3d 1222, 1231 (10th Cir. 1999))). If the mistake is based on a litigation mistake or inadvertence by counsel, then the conduct must satisfy the excusable neglect standard of *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 394 (1993). *See United States v. Loera*, 182 F. Supp. 3d 1173, 1203 (D.N.M. 2016) ("If the alleged incident entails a mistake, then it must be excusable, meaning that the party was not at fault." (citing *Pioneer*, 507 U.S. at 394)), *aff'd,* 923 F.3d 907 (10th Cir. 2019).

Debtor complains that his former counsel failed to keep him informed that a claims bar date had been set, failed to inform him that DLJ Mortgage had filed a proof of claim, failed to consult with Debtor before filing the Claims Objection, failed to inform Debtor of DLJ Mortgage's filings in the bankruptcy case, and failed to obtain discovery from DLJ Mortgage.

Debtor's suggestion that ineffective assistance of counsel entitles him to relief under Rule 60(b)(1) is unavailing. This is not the type of attorney conduct that demonstrates an attorney acted without authority sufficient to justify relief under Rule 60(b)(1). An attorney "acting without authority" is generally limited to the following situations: 1) where counsel has entered his or her appearance on behalf of a party without the party's knowledge or consent; or 2) where counsel has settled or agreed to terminate an action absent client consent. *Macias,* 300 F.R.D. at 545 n.10 ("The cases in which the Tenth Circuit has found a lack of authority appear to fall

into two categories: (i) cases in which the attorney entered an appearance without the client's knowledge . . . ; and (ii) cases in which the attorney's actions terminate the litigation . . . .") (citations omitted). An attorney acts without authority by settling or agreeing to dismissal "because decisions to terminate the litigation are ordinarily left to the client." *Id.* None of the actions or failures to act Debtor complains his former counsel committed fall into either of the two narrow categories sufficient to justify relief under Rule 60(b)(1). Debtor's former counsel did not enter his appearance without Debtor's knowledge, nor did Debtor's former counsel agree to settle the Claims Objection or dismiss this bankruptcy case.[17]

Where a party "voluntarily chose [the] attorney as his representative in the action, . . . he cannot now avoid the consequences of the acts or omissions of this freely selected agent." *Pioneer*, 507 U.S. at 397 (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962)). For this reason "attorney negligence or oversight rarely warrants relief from judgment." *Kellogg v. Schreiber (In re Kellogg),* 197 F.3d 1116, 1120 n.3 (11th Cir. 1999). *See also Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004) ("As a general rule, parties are bound by the actions of their lawyers, and alleged attorney malpractice does not usually provide a basis to set aside a judgment pursuant to Rule 60(b)(1)."). Nor is mere carelessness by a litigant or his counsel generally sufficient to obtain relief under Rule 60(b)(1). *In re Woods*, 173 F.3d 770, 779 (10th Cir. 1999) ("Rule 60(b)(1) relief is generally not available for the mere carelessness of a party . . . ." (citing *Pelican Prod.*, 893 F.2d at 1146)). Finally, to the extent Debtor seeks relief under Rule 60(b)(1) based on his former counsel's alleged litigation mistakes, Debtor has failed

[17] Debtor complains that his former counsel's inadvertence led to the dismissal of a prior bankruptcy case. *See* Rule 60(b) Motion, ¶ 23. However, dismissal of Debtor's prior bankruptcy case has nothing to do with the allowance of DLJ Mortgage Capital's claim.

to demonstrate that any alleged failures were the result of excusable neglect under the *Pioneer* standards.[18]

Rule 60(b)(2)

Rule 60(b)(2) provides for relief from a final judgment or order based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(e)." Fed.R.Civ.P. 60(b)(2), made applicable to bankruptcy cases by Fed.R.Bankr.P. 9024. "For newly discovered evidence to provide a basis for a new trial under Rule 60(b)(2), the moving party must show '(1) the evidence was newly discovered since the trial; (2) [the moving party] was diligent in discovering the new evidence; (3) the newly discovered evidence could not be merely cumulative or impeaching; (4) the newly discovered evidence [is] material; and (5) that a new trial[ ] with the newly discovered evidence would probably produce a different result.'" *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1290 (10th Cir. 2005) (quoting *Graham v. Wyeth Lab.*, 906 F.2d 1399, 1416 (10th Cir. 1990)).[19]

The only "newly discovered evidence" Debtor claims under the Rule 60(b)(2) section of the Rule 60(b) Motion "is a payment notification to prior servicer Nationstar Mortgage ("Nationstar") for October 2011 billing (See Exhibit A)."[20] Even if Debtor acted diligently in discovering this evidence, such evidence not material because it would not produce a different result. The Foreclosure Judgment fixed the amount of the claim and has preclusive effect. *See*

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[18] *Pioneer* considered whether a party's neglect of a deadline is excusable, and held:

> With regard to determining whether a party's neglect of a deadline is excusable . . . the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pioneer, 507 U.S. at 395.

[19] *See also Dronsejko v. Thornton*, 632 F.3d 658, 670 (10th Cir. 2011) (same).

[20] Rule 60(b) Motion, p. 4.

Dosari v. McCormick (In re McCormick), Adv. No. 19-00313, 2020 WL 1466764, at *3 (Bankr. D. Md. Mar. 23, 2020) ("Where a creditor previously liquidated its claim, claim preclusion applies in bankruptcy proceedings to conclusively establish the existence, amount, and validity of the claim." (citing *Sanders v. Crespin (In re Crespin)*, 551 B.R. 886, 897 (Bankr. D.N.M. 2016))). Similarly, federal issue preclusion law applies "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." *Melnor, Inc. v. Corey (In re Corey)*, 583 F.3d 1249, 1251 (10th Cir. 2009) (quoting *Arizona v. California*, 530 U.S. 391, 414 (quoting Restatement (Second) of Judgments § 27, at 250 (1982))). The Foreclosure Judgment was entered in the State Court Action after a trial on the merits that actually determined the amount of the debt owing under the note and mortgage. Debtor cannot attack the amount of the debt fixed by the Foreclosure Judgment through a motion under Rule 60(b)(2) filed in the bankruptcy court based on newly discovered evidence. Debtor's remedy is to appeal the Foreclosure Judgment, which Debtor has represented to the Court he has done, or seek relief from the judgment in State Court if such relief is available.[21]

Rule 60(b)(3)

Rule 60(b)(3) will relieve a party from a final judgment or order if there has been "fraud, . . . misrepresentation, or misconduct by an opposing party." Fed.R.Civ.P. 60(b)(3), made applicable to bankruptcy cases by Fed.R.Bankr.P. 9024. "[T]he party relying on Rule 60(b)(3) must, by adequate proof, clearly substantiate the claim of fraud, misconduct or misrepresentation." *Zurich N. Am.,* 426 F.3d at 1290 (citing *Wilkin v. Sunbeam,* 466 F.2d 714, 717 (10th Cir. 1972)).

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[21] *See, e.g.,* Amended Objection to Motion for Issue/Claim Preclusion (Doc. 105) (asserting that the Foreclosure Judgment cannot have preclusive effect because Debtor has taken an appeal from that judgment).

Debtor alleges that DLJ Mortgage misled the Court by a) filing Claim 6-1 which "falsely stat[ed] their singular claim to be 497,457.45"; b) representing through counsel that DLJ Mortgage is secured for the full amount of the claim; c) failing to provide required discovery; d) omitting the payment history regarding a payment from October 2011; e) making a claim under note and mortgage it was not entitled to enforce; and e) making charges to the loan not permitted by the loan documents. Debtor has not established by adequate proof that DLJ Mortgage or its counsel acted fraudulently, made any misrepresentations to this Court or otherwise engaged in the type of misconduct that would satisfy the standards of Rule 60(b)(3).

DLJ Mortgage's proof of claim is based on the Foreclosure Judgment, which is attached to its proof of claim. The Foreclosure Judgment grants judgment in favor of DLJ Mortgage and Selene Finance in the amount of $442,555.93, plus interest accruing from May 7, 2016 at the rate of 3.5% per annum until the date of the foreclosure sale. The proof of claim is in the amount of $497,457.45. An attachment to the proof of claim states the in rem claim amount consists of the judgment amount of $442,555.93 plus interest at the rate of 3.5% from May 16, 2016 in the amount of $54,901.52. Because the proof of claim is based on a judgment entered in May 2016, it was not necessary for DLJ Mortgage to attach to the claim a payment history from October 2011. Nor was it necessary for DLJ Mortgage to attach documents that provided evidentiary support of entry of the Foreclosure Judgment. Finally, DLJ Mortgage only included in the amount of its proof of claim the amount of the Foreclosure Judgment, including post-judgment interest accrued pursuant to the Foreclosure Judgment.

Debtor has presented nothing that would indicate that DLJ Mortgage substantially interfered with Debtor's ability fully and fairly to prepare and proceed to the final evidentiary hearing on the Claims Objection. *See Zurich,* 426 F.2d at 1290 (relief under Rule 60(b)(3)

requires that "the challenged behavior must *substantially* have interfered with the aggrieved parti's ability fully and fairly to prepare for and proceed at trial." (quoting *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999))). Other than complaining that DLJ Mortgage did not provide required discovery, and asserting that Debtor's former counsel failed to heed Debtor's instructions to make discovery demands on DLJ Mortgage, Debtor has not identified with any specificity what discovery DLJ Mortgage failed to provide. DLJ Mortgage responds by stating that Debtor had access to all discovery and exhibits from the State Court Action and this bankruptcy case. Although a failure to provide discovery can constitute misconduct under Rule 60(b)(3), such relief "usually requires the violation of a specific discovery request or order." *Zurich*, 426 F.3d at 1292. Debtor has fallen far short of meeting that standard.

DLJ Mortgage is entitled to rely on the Foreclosure Judgment and its preclusive effect in filing Claim No. 6-1. Moreover, as discussed below, Debtor forfeited his argument that DLJ Mortgage's claim is limited to 50% of the amount awarded in the Foreclosure Judgment. In sum, Debtor has failed to establish fraud, misrepresentation or other misconduct by DLJ Mortgage justifying relief under Rule 60(b)(3)

B. Debtor forfeited the argument that DLJ Mortgage is only entitled to 50% of the amount asserted in its proof of claim

Debtor argues in the Rule 60(b) Motion that DLJ Mortgage's claim should be limited to 50% of the amount of its proof of claim if the claim is allowed at all. At the status conference held on the Rule 60(b) Motion the Court inquired into the preclusive effect of the Foreclosure Judgment on that issue and asked for documentary submissions by the parties to aid the Court in interpreting the Foreclosure Judgment relative to the issue. After further review, the Court has concluded that Debtor forfeited the issue by not objecting to the amount of DLJ's Mortgage's

proof of claim other than to ask that the claim be disallowed in its entirety based on lack of standing.

"[A] party who fails to present his strongest case in the first instance generally has no right to raise new theories or arguments in a motion to reconsider." *In re Barnikow*, 211 B.R. 176, 177 (Bankr. M.D. Pa. 1997). As noted by the Tenth Circuit, a motion for reconsideration is not an appropriate vehicle to "advance arguments that could have been raised in prior briefing." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). *See also Martinez v. Mortg. Elec. Registration Sys., Inc. (In re Martinez)*, 455 B.R. 755, 760 (Bankr. D. Kan 2011) ("Such motions [for reconsideration] are not appropriate if the movant only wants the Court to . . . hear new arguments or supporting facts that could have been presented originally." (quoting *Zhou v. Pittsburg State Univ.*, 252 F. Supp. 2d 1194, 1199 (D. Kan. 2003))). When a party fails to timely raise an argument, the party forfeits that argument. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011) ("[I]f the theory simply wasn't raised before the district court, we usually hold it forfeited."); *Arnold v. Arnold (In re Arnold)*, BAP No. CO-15-031, 2016 WL 1022350, at *5 (10th Cir. BAP Mar. 15, 2016) (unpublished) ("When a party neglects to specifically raise an issue before the trial court, that issue is generally held forfeited.").

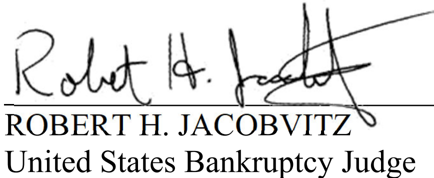
Because Debtor forfeited the issue of whether DLJ Mortgage's claim should be limited to 50% of the amount of its proof of claim if the claim is allowed at all, the Court will disregard the additional materials the parties submitted to the Court following the status conference, which address that issue.

C. Other requested Rule 60(b) relief

The Court has reviewed Debtor's other arguments in support of his request for Rule 60(b) relief from the Order Allowing Claim of DLJ Mortgage, including but not limited to, his

assertions that DLJ Mortgage a) committed unfair acts or practices by not honoring a HAMP modification to which he asserts a prior servicer had agreed, and 2) committed deceptive acts or practices by making misrepresentations to the Jacobses regarding their payment obligation and the status of their loan and by omitting historical payments made to the previous servicer, and finds such arguments have either been forfeited, are precluded by claim preclusion, or otherwise are meritless. The Court also concludes, consistent with its earlier memorandum opinion and order denying Rule 60(b) relief from the Stay Relief Order (Docs. 228 and 229), that Debtor's renewed request to vacate the Stay Relief Order as part of the instant Rule 60(b) Motion is without merit.

WHEREFORE, IT IS HEREBY ORDERED, that the Rule 60(b) Motion is DENIED.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: May 10, 2022

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