IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re	
WILLIAM H. JARVIS,	No. 03-21476
	Chapter 11
Debtor.	

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This case is before the court on the debtor's motion pursuant to Fed. R. Bankr. P. 9023 to alter and amend the court's order entered April 28, 2004, and motion for stay pending a ruling by the court on the motion to alter or amend. For the following reasons, the motions will be denied. This is a core proceeding. *See* 11 U.S.C. § 157(b)(2)(G).

I.

On April 22, 2004, a hearing was held on an amended motion for relief from automatic stay and adequate protection[1] filed by the Estate of W.D. Harless and Evelyn Harless (collectively, "Harless") with respect to two pieces of real property owned by the debtor, acreage in Duffield, Virginia and the Davis Marina located in Sullivan County, Tennessee. At the conclusion of the hearing, the court granted the motion as to the Davis Marina property but denied the stay request as to the Virginia property. An order reflecting this ruling was entered April 28, 2004. The debtor's motion to alter or amend filed on May 7, 2004, asks the court to revisit that decision based on two arguments:

> 1. The Creditor failed to carry its burden of proof that the Debtor had no equity in the Davis Marina pursuant to 11 U.S.C. § 362(d)(2)(A); and
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> 2. That the Marina is necessary for a more effective reorganization of the Debtor under the *Timbers* standard.

The court will address these issues in the order presented.

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[1]The Harless' amended motion incorporates both the original motion for relief from automatic stay filed by Harless on August 14, 2003, and a renewed motion for relief filed by Harless on October 24, 2003. After the filing of the original motion, an agreed order tendered by the parties was entered September 18, 2003, which allowed the debtor until November 1, 2003, to "market the boat dock or attempt to refinance it." That order also provided that in the meantime the debtor would make monthly adequate protection payments to Harless in the amount of $1,580. The Harless' renewed motion asserted, *inter alia*, that the debtor had not made any adequate protection payments. Thereafter, another agreed order tendered by the parties was entered November 18, 2003, which provided for continuation of the monthly adequate protection payments. The renewed motion was then continued from time to time on the court's docket at the parties' request until they eventually asked that a final hearing be scheduled for April 22, 2004. Harless then filed the amended motion on March 30, 2004, and the debtor filed his response thereto on April 21, 2004.

II.

Rule 59(e) of the Federal Rules of Civil Procedure, made applicable by Fed. R. Bankr. P. 9023, allows a court to consider a "motion to alter or amend a judgment." The Sixth Circuit Court of Appeals has held that "a court should grant such a motion only 'if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice.'" *Keenan v. Bagley*, 262 F. Supp. 2d 826, 830 (quoting *GenCorp, Inc. v. Am. Int'l Underwriters Co*., 178 F.3d 804, 834 (6th Cir. 1999)). The rule "is not designed to give an unhappy litigant an opportunity to relitigate matters already decided, nor is it a substitute for an appeal." *Sherwood v. Royal Ins. Co. of Am.*, 290 F. Supp. 2d 856, 858 (N.D. Ohio 2003)(citing *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)). Although the debtor does not expressly state that a "clear error of law" was made by the court or that "newly discovered evidence" should now be considered, it appears that these are the grounds upon which his motion to alter or amend rests. The debtor, of course, bears the burden of showing "that alteration or amendment of the original judgment is appropriate." *Regions Bank v. Wachovia Bank, NA (In re Goldberg)*, 248 B.R. 209, 211 (S.D. Ga. 2000).

III.

The debtor's first issue is that Harless failed to carry the burden of proof that the debtor had no equity in the Davis Marina property because the computation of the amount owed by the debtor on the Davis Marina property was incorrect. Section 362(d)(2) of the Bankruptcy Code provides that relief from the automatic stay shall be granted "with respect to a stay of an act against property ... if (A) the debtor does not have any equity in the property; and (B) such property is not necessary to an effective

reorganization." "[T]he party requesting such relief has the burden of proof on the issue of the debtor's equity in the property" and "the party opposing such relief has the burden of proof on all other issues." 11 U.S.C. § 362(g). In reaching its decision that the debtor had no equity in the property, the court found the value of the Davis Marina property to be in a range of $250,000 to $290,000,[2] an amount less than the sum of the real property taxes owed on the property and the debtor's obligation to Harless which is secured by a deed of trust on the property.

Exhibit 6 introduced at trial by Harless reflects that the balance owed on the Davis Marina property as of April 18, 2004, was $307,818.39. The debtor challenges the balance because it includes insurance payments totaling $9,398, attorney fees in the amount of $13,139.35, and delinquent property taxes in excess of $11,916.67. Although the court noted in its opinion that this amount was uncontroverted by the debtor at trial, the debtor now states that these "three additional items in [the Harless'] claim ... are disputed ... on both legal and evidentiary grounds."

Concerning the insurance payments totaling $9,398, the debtor asserts that Harless was "unable to provide any evidence at trial that it had ever paid any insurance." To the contrary, Carolyn Barnett

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[2]The finding was based on an appraisal of the Davis Marina property by John Bullington in the amount of $250,000, a written offer of $275,000 for the property, and an oral offer of $290,000. Although the debtor opined that the value of the property was in excess of $500,000, this testimony was belied by the fact that the property had been on the market for over seven months without any offers in excess of $290,000.

Although the debtor questioned the appraisal because it only valued the fee simple interest in the property and not the "going concern" value of the marina business, the debtor's own appraiser testified that those values would not differ if the business were not turning a profit. The debtor's monthly operating reports evidence that the marina has never made a profit since the filing of the case and in fact has posted losses each month before accounting for depreciation. Moreover, the adequate protection payments have not even been deducted as an expense for the marina in the monthly operating reports.

testified upon direct examination that she was familiar with the Harless' books and records; that the debtor had refused requests to provide a certificate of insurance for the Davis Marina property; and therefore Harless had expended $9,398 in premium payments to purchase casualty insurance for the property. During cross-examination, debtor's counsel asked her if she had canceled checks to show those payments to which she replied, "We do at home, but not here today."

The debtor also argues that the letter from the Harless' insurance agent made a part of Exhibit 6 is "rank hearsay" and "not evidence of any kind and certainly not evidence of proof of payment." Because no objection to the "hearsay" nature of the letter was made by debtor's counsel at trial, the letter is competent evidence. *See, e.g., Belmont Indus., Inc. v. Bethlehem Steel Corp.*, 62 F.R.D. 697, 702 (E.D. Pa. 1974)("hearsay not objected to at the time it is being elicited becomes competent evidence"). *See also* FED. R. EVID. 103 ("Error may not be predicated upon a ruling which admits ... evidence unless a substantial right of the party is affected, and ... a timely objection or motion to strike appears of record ...."). In any case, even if the letter is considered as competent evidence, the court still has Ms. Barnett's unrefuted testimony that $9,398 had been expended by Harless to purchase insurance on the property.

Finally, the debtor argues that the deed of trust for the Davis Marina property, introduced at trial by Harless as Exhibit 4, "shows that the parties agreed no insurance coverage was required" because "[t]he paragraph has been stricken through where the required amount of insurance coverage normally appears." The deed of trust provides in pertinent part as follows:

> And Grantor agrees to keep the buildings on said property insured in some solvent company to be approved by said Trustee or the holder of said notes, in at least the sum of $_____, which policy shall be assigned by standard mortgage clause for the benefit of the debt herein secured.

.....

> And said Grantor covenants to promptly pay for all insurance on said property ..., and should Grantor fail to insure the same or pay the insurance, ... the holder of the said notes shall take out such insurance, ... and any sum so paid shall with interest from the day of payment, become part of the debt secured by this deed ....

Although there does appear to be a line in the blank for the amount of coverage and no amount is inserted therein, none of the textual language of the deed of trust is stricken through. Furthermore, the debtor's argument in this regard ignores the subsequent paragraph which specifically allows the holder of the note to "force place" insurance on the property. More importantly, the debtor never testified that he was not required to carry insurance on the property even when questioned by the court on the insurance issue. In fact, in an agreed order entered November 18, 2003, the debtor agreed to provide Harless with "evidence of insurance" on the property. "Rule 59(e) motions are aimed at *re* consideration, not initial consideration [and] parties should not use them to raise arguments which could, and should, have been made before judgment issued." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)(quoting *FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992)). If the debtor did not believe that he was required to carry insurance on the property, he could and should have raised this matter during the hearing. For these reasons, the debtor's argument that the insurance payments should not be included in calculating the balance owed to Harless is without merit.

Concerning the inclusion of attorney fees in the amount of $13,139.35, the debtor argues that the fees should not have been included in calculating the amount of the Harless' claim because "the creditor who bears the burden of proof on equity issues failed to provide any evidence that the alleged attorney fees were actually paid." To the contrary, Ms. Barnett testified that the fees had been paid and that canceled

checks existed which proved as much. The debtor also asserts that the deed of trust does not require the payment of attorney fees, only costs actually advanced. However, the debtor acknowledges that the promissory note which is secured by the deed of trust provides for the recovery of a "reasonable attorney's fee" associated with collection of the note.

The debtor states that "[i]t would be inappropriate for the Court to add attorney's fees to Creditor's Claim before a ruling as to the reasonableness of those fees are included in Creditor's claim." The debtor further complains that "[n]o itemization of Creditor's attorney fees was included in Creditor[']s proof" and therefore the attorney fees should not be included. As to the reasonableness of the fees and the lack of itemization, debtor's counsel had the opportunity to cross-examine Ms. Barnett on these issues and chose not to do so. "[T]he function of a motion pursuant to Rule 59(e) 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. 1991). Again, this was a matter which could and should have been raised during the hearing. Accordingly, the debtor's contention that the court should not have considered attorney fees as a part of the balance owed to Harless is without merit.[3]

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[3] As a general rule, the amount of a creditor's claim is typically determined as of the petition date and includes the principal amount of the obligation plus all matured prepetition interest, fees, costs, and charges owing as of the petition date. *See* 4 COLLIER ON BANKRUPTCY ¶ 506.04[1] (15th ed. rev. 2004). The evidence submitted at trial did not indicate whether any of the attorney fees and insurance costs were incurred by Harless prepetition. Any fees and costs that were incurred postpetition may still be included in Harless' allowed secured claim to the extent the creditor is oversecured, as addressed later in this memorandum. Because the sum of the note balance, interest, attorney fees and insurance costs exceed the value of the collateral and thus will not be included in the Harless' allowed secured claim, much of the discussion herein regarding the allowability of fees and costs is arguably moot.

Concerning the inclusion of delinquent property taxes in the amount of $15,914.32, the debtor states that "when Debtor's counsel attempted to verify these numbers with the Sullivan County Trustee and the Clerk and Master, the total only amounted to $11,916.67 (see Exhibit "A" attached)." Rule 59(e) may not be utilized to submit evidence that was previously available or that could have been submitted with the exercise of reasonable diligence." *Davis v. Bagley*, 2002 WL 193579, *1 (S.D. Ohio 2002)(*citing, inter alia, McClendon v. B&H Freight Servs. Inc.*, 910 F. Supp. 364, 11 (E.D. Tenn. 1995)("Evidence brought to a court's attention under Rule 59(e) must have been previously 'unavailable.'")). There can be no question that the amount of delinquent property taxes was a figure previously available to the debtor. In fact, as owner of the property, the debtor should have known the amount of delinquent taxes owed. In any event, the debtor neither challenged the $15,914.32 figure when Ms. Barnett testified concerning the delinquent property taxes nor did the debtor instead testify that the amount was $11,916.67 as reflected in his Exhibit "A".[4] For these reasons, the court finds the debtor's proffered amount of delinquent property taxes does not constitute "newly discovered evidence" and therefore may not be considered by the court.

Finally, the debtor argues, based on 11 U.S.C. § 506(b),[5] that a secured creditor's claim is limited to the balance owed as of the bankruptcy filing, reduced by the debtor's postpetition adequate protection payments which serve to create equity in the property in favor of the debtor. Thus, according to the debtor,

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[4]It is also worth noting that the Exhibit "A" attached to the debtor's motion to alter and amend would be inadmissable in the face of an objection because it is not submitted by sworn affidavit or supported by certified copies of the property tax records.

[5]11 U.S.C. § 506(b) provides as follows:

> To the extent that an allowed secured claim is secured by property the value of which ... is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

because Harless was owed $265,510.56 when this chapter 11 was filed and has been paid $11,060 in adequate protection payments, its current secured claim is only $253,765.02.[6]

The debtor has misconstrued § 506(b). While the amount of a creditor's claim is typically determined as of the petition date, § 506(b) permits a secured creditor to add allowed postpetition interest, fees, costs, or charges to the amount of its secured claim, up to the value of the collateral. *See Rake v. Wade*, 508 U.S. 464, 471 (1993)("Under § 506(b) the holder of an oversecured claim is allowed interest on his claim to the extent of the value of the collateral ... [and] such interest accrues as part of the allowed claim from the petition date until the confirmation or effective date of the plan."). Because the balance owed Harless on the date of the petition was less than the $290,000 maximum value of the property as determined by the court, Harless is entitled to receive the difference, *i.e.*, $24,294.98, in postpetition interest, fees, and costs provided for by the parties' agreement. The adequate protection payments made by the debtor may be applied by Harless to the payment of this oversecured amount rather than its prepetition claim. *See In re Vest Assocs.*, 217 B.R. 696, 705 (Bankr. S.D.N.Y. 1998)("An oversecured creditor may allocate adequate protection payments to postpetition interest to the extent of its oversecurity.")(citing, *inter alia, Nantucket Investors II v. Cal. Fed. Bank (In re Indian Palms Assocs., Ltd.)*, 61 F.3d 197, 202 (3d Cir. 1995)(adequate protection payments allocated first to postpetition interest in amount of equity cushion which existed on petition date and then to balance of claim)). When the remaining balance of Harless' claim is added to the delinquent real property taxes which constitute a first lien on the property, it is clear that the liens exceed the value of the debtor's property. Accordingly,

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[6]The debtor's calculation in this regard appears to be in error. Subtracting $11,060 from $265,705.02 leaves a balance of $254,645.02, rather than $253,765.02.

the debtor's argument under § 506(b) must be rejected. *See In re Garsal Realty, Inc.*, 98 B.R. 140, 154-55 (Bankr. N.D.N.Y. 1989)(adding postpetition interest, attorney fees and other costs to oversecured claim for equity determination under § 362(d)(2)(A)); *In re Kertennis*, 40 B.R. 895, 899 (Bankr. D.R.I. 1984)(including postpetition interest and taxes to determine if equity existed for purpose of § 362(d)(2) motion). *See also In re Broomall Printing Corp.*, 131 B.R. 32, 37 (Bankr. D. Md. 1991) (creditor entitled to postpetition interest as part of secured claim up to value of property).

IV.

The debtor's remaining issue is that the Davis Marina property "is necessary for a more effective reorganization of the Debtor under the ***Timbers*** standard." The debtor had the burden of proving that the property was "necessary to an effective reorganization." *See* 11 U.S.C. § 362(d)(2)(B) and (g). The United States Supreme Court has stated that "[w]hat this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 375-76 (1988).

In his memorandum, the debtor admits that he "can reorganize without the Marina," but argues that the property is necessary for a "more effective" reorganization because it "provides the Debtor with needed cash flow and helps to smooth out some of the business cycles in his other business." The debtor also states that the "inventory will have to be liquidated for pennies on the dollar further diminishing Debtor's unsecured collateral" and resulting in "a blow to the projected dividend of the unsecured claimants." Finally, the debtor asserts that "a foreclosure sale could impact the unsecured claimants in a negative way

further diluting the unsecured dividend."

The only evidence offered on this issue by the debtor at the hearing was his testimony that he needed either the equity out of the property or the income from the property in order to make his plan successful. This court's ruling that the Davis Marina property was not necessary for the debtor's reorganization was based on the fact that the debtor's previous plan of reorganization surrendered the property to Harless and that the marina had not made a profit at any time during the bankruptcy case even though the debtor had been in chapter 11 over a year. This evidence along with the lack of equity in the property belied the debtor's contention that the property is needed to reorganize. Nothing in the debtor's current motion or memorandum convinces the court that its previous ruling was in error.

V.

In accordance with the foregoing, the court will enter contemporaneously with the filing of this memorandum opinion an order denying the debtor's motion to alter or amend. The order will also deny as moot the debtor's motion for stay pending a ruling by the court on the motion to alter or amend.

FILED: May 27, 2004

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE