



SO ORDERED.

SIGNED this 30 day of May, 2008.

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.**

A handwritten signature in black ink, appearing to read "Richard Stair Jr.", written over a horizontal line.

**Richard Stair Jr.
UNITED STATES BANKRUPTCY JUDGE**

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

In re

Case No. 02-30912

TERESA ANN PERRY
a/k/a TERESA ANN ZIMMERMAN

Debtor

TERESA ANN PERRY

Plaintiff

v.

Adv. Proc. No. 08-3002

EMC MORTGAGE CORPORATION

Defendant

**MEMORANDUM AND ORDER ON
PLAINTIFF'S MOTION TO RECONSIDER ORDER**

Before the court is the Plaintiff's Motion to Reconsider Order (Motion to Reconsider) filed by the Plaintiff on May 9, 2008, asking the court, pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure, made applicable to bankruptcy cases by Rules 9023 and 9024 of the Federal

Rules of Bankruptcy Procedure, to reconsider the Order entered on May 2, 2008, granting the Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment filed on March 13, 2008, and dismissing the Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, applicable herein by virtue of Federal Rule of Bankruptcy Procedure 7012 (Dismissal Order). In its Memorandum on Motion to Dismiss, or in the Alternative, for Summary Judgment (Memorandum Opinion) also filed on May 2, 2008, the court found that the Plaintiff had failed to plead a cognizable claim for violation of the discharge injunction of 11 U.S.C.A. § 524(a)(2) (West 2004) and that it did not have jurisdiction over the post-discharge disputes between the Plaintiff and the Defendant.

Arguing that it would result in a manifest injustice to dismiss her Complaint for being "inartfully drafted" when she now alleges that the post-discharge delinquencies relate back to fees improperly charged or applied during the pendency of her bankruptcy case, the Plaintiff asks the court to reconsider its Dismissal Order and allow her leave to amend the Complaint to clarify the issue as a violation of the automatic stay provisions of 11 U.S.C.A. § 362(a)(3)(West 2004) rather than a violation of the § 524(a)(2) discharge injunction. The Defendant, in the Defendant's Response to Plaintiff's Motion to Reconsider Dismissal of Complaint (Response), filed on May 19, 2008, argues that the Plaintiff has failed to meet the standard to alter or amend an order under Rule 59 and urges the court to deny the Motion to Reconsider. On May 22, 2008, the Plaintiff filed the Reply of Teresa Perry to Response of Defendant to Plaintiff's Motion to Reconsider; however, this document was not authorized by the court nor is it authorized by the court's Local Rules and it was, therefore, not considered.

“A motion to reconsider a judgment is a species of petition to alter or amend that judgment under [Federal Rule of Civil Procedure] 59(e).” *Huff v. Metro. Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982). Rule 59(e) is applicable to bankruptcy cases pursuant to Rule 9023 of the Federal Rules of Bankruptcy Procedure and provides that “[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.” FED. R. CIV. P. 59(e). “Motions to alter or amend [a] judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice.” *Gencorp, Inc. v. Am. Int’l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1998) (internal citations omitted); *see also In re Barber*, 318 B.R. 921, 923 (Bankr. M.D. Ga. 2004) (Rule 59(e) “can only be used in limited circumstances, and should be used sparingly.”). On the other hand, a party may not reargue his case through a motion under Rule 59(e), *In re No-Am Corp.*, 223 B.R. 512, 514 (Bankr. W.D. Mich. 1998), “[n]or should Rule 59(e) be viewed as a means for overcoming one’s failure to litigate matters fully.” *Condor One, Inc. v. Homestead Partners, Ltd. (In re Homestead Partners, Ltd.)*, 201 B.R. 1014, 1018 (Bankr. N.D. Ga. 1996); *see also Mathis v. United States (In re Mathis)*, 312 B.R. 912, 914 (Bankr. S.D. Fla. 2004) (“The function of a motion to alter or amend a judgment is not to serve as a vehicle to relitigate old matters or present the case under a new legal theory . . . [or] to give the moving party another ‘bite at the apple’ by permitting the arguing of issues and procedures that could and should have been raised prior to judgment.”). “Arguments and evidence which could have been presented earlier in the proceedings cannot be presented in a Rule 59(e) motion.” *In re See*, 301 B.R. 554, 555 (Bankr. N.D. Iowa 2003).

In her Motion to Reconsider, the Plaintiff alleges that the Defendant made improper charges during the pendency of her bankruptcy case and that, as a result, her post-discharge payments were being rejected. She also states that this information was included within the Loan Transaction History attached to the Complaint as Exhibit O, although the Complaint itself did not clearly specify this allegation, and that it would result in manifest injustice to dismiss her adversary proceeding, “encourag[ing] mortgage creditors to silently misapply Chapter 13 payments during the pendency of a Chapter 13 case and as soon as a Discharge is entered feel [sic] the mortgage creditor would feel free to resume actions to recover property including foreclosure actions because there would be no enforcement of the Bankruptcy Code.” She does not, however, argue that there has been a clear error of law, newly discovered evidence, or an intervening change in controlling law.

The Plaintiff filed her Complaint on January 4, 2008, expressly averring that

[t]his is an action asking for a finding of contempt and for actual and punitive damages filed by the debtors pursuant to Sections 105, 502 and 524 of the Bankruptcy Code, and Rules 3001(c) and 3001(e) of the Bankruptcy Rules. This action is also filed to enforce an Order entered by the Court on November 15, 2007 declaring the debtor’s mortgage current after completion of her Chapter 13 bankruptcy, and to enforce and implement other Bankruptcy Code provisions and Rules related thereto, and to prevent an abuse of process and to preclude the frustration of the orderly discharge of the debts in this and the previous case and for the adverse impact such violations have on the applicable provisions of Title 11 of the U.S. Code.

COMPL. at ¶ 1. In the request for relief in her Complaint, the Plaintiff expressly asked the court to enter an Order (1) finding the Defendant, EMC Mortgage Corporation, in contempt for violating the discharge injunction of 11 U.S.C.A. § 524(a); (2) finding the Defendant in contempt for violating the November 16, 2007 Order entered by the court declaring the Debtor’s mortgage current through April 2007; and (3) for any further relief the court deems just and proper.

Nowhere within the eight page Complaint is § 362 or the automatic stay mentioned, and all allegations contained in the Complaint specifically refer to post-discharge actions of the Defendant with respect to accepting and then refusing payments made by the Plaintiff after the completion of her bankruptcy case. The fact that the Plaintiff attached a fifty-page loan transaction history to the Complaint evidencing charges made to the Plaintiff's account during the pendency of her bankruptcy case is irrelevant if the Complaint itself does not identify the charges that the Plaintiff believes to be improper and cite to the proper statutory basis under which she is proceeding. It is not the responsibility of the court or a defendant to sort out all possible causes of action that could be ascertained through exhibits to a complaint. It is the responsibility of a plaintiff to clearly state all causes of action and provide the defendant with "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" FED. R. CIV. P. 8(a)(2). Dismissal of her Complaint for failing to state a claim upon which relief could be granted, when it was her responsibility to plead the proper cause of action, does not implicate a manifest injustice under Rule 59(e). Moreover, in response to the Defendant's motion to dismiss, instead of continuing to argue her § 524(a)(2) claims, the Plaintiff could have amended the Complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure, which allows a party to amend a pleading once "as a matter of course at any time before a responsive pleading is served[.]" FED. R. CIV. P. 15(a). Since a motion to dismiss is not a responsive pleading, *see* FED. R. CIV. P. 12(b); *Youn v. Track, Inc.*, 324 F.3d 409, 415 n.6 (6th Cir. 2003), any amended complaint would have related back to the date upon which the original Complaint was filed. *See* FED. R. CIV. P. 15(c).

In her Motion to Reconsider, the Plaintiff also cites to Rule 60 of the Federal Rules of Civil Procedure which provides, in material part, that a court may grant relief from an order or judgment for one of the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct by the opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged or is based upon a reversed judgment; or (6) any reason justifying relief. *See* FED. R. CIV. P. 60(b). In her brief filed in conjunction with the Motion to Reconsider, the Plaintiff refers only to relief under Rule 60(b) “(1) mistake, inadvertence, surprise or neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under [Rule] 59(b); (3) fraud or [6] any other reason justifying relief from operation of a judgment[.]” The court presumes that she is relying only upon those subsections, although she did not, in her Motion to Reconsider or the accompanying brief, set forth the prerequisites necessary for obtaining relief under these subsections of Rule 60(b).

In the Sixth Circuit, a motion under Rule 60(b)(1) is “intended to provide relief to a party in only two instances: (1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order.” *Cacevic v. City of Hazel Park*, 226 F.3d 483, 490 (6th Cir. 2000) (quoting *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999)). Rule 60(b)(6) “applies ‘only in exceptional or extraordinary circumstances’ . . . because ‘almost every conceivable ground for relief is covered’ under the other subsections of Rule 60(b).” *Blue Diamond Coal Co. v. Trs. of*

the UMWA Combined Benefit Fund, 249 F.3d 519, 524 (6th Cir. 2001) (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)).

In this case, neither Rule 60(b)(1) nor (b)(6) are applicable nor does she argue the applicability of (b)(3), and the court has determined *supra* that the Plaintiff's "newly discovered evidence" argument, and thus subsection (b)(2), has no merit. The Plaintiff's Motion to Reconsider is premised solely upon her failure to properly plead § 362(a) as a basis for relief, which cannot be characterized as a mistake. There has been no judicial mistake in application of the law or the facts, and the Plaintiff has not presented any extraordinary circumstances to justify setting aside the dismissal. In short, the Plaintiff did not state a claim upon which relief could be granted in her Complaint and it was properly dismissed under Rule 12(b)(6). She cannot, after the Complaint has been dismissed, now amend it to assert a new cause of action. The Motion to Reconsider is accordingly DENIED.

###