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

In re

DALLAS LEE SMITH and
ANDREA JEANETTE SMITH,

Debtors.

No. 03-24203
Chapter 13

M E M O R A N D U M

APPEARANCES:

FELICIA R. COALSON, ESQ.
WILSON & ASSOCIATES, P.L.L.C.
The Meridian
109 Northshore Drive, Suite 302
Knoxville, Tennessee 37919
Attorney for Fairbanks Capital Corporation

JOHN M. GOERGEN, ESQ.
708 East Watauga Avenue
Johnson City, Tennessee 37601
Attorney for Dallas and Andrea Smith

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This chapter 13 case is before the court on the motion filed by Fairbanks Capital Corporation ("Fairbanks') on May 10, 2004, for "an amendment of the court's finding of fact or in the alternative amendment of judgment" entered April 30, 2004, and the response in opposition filed by the debtors on May 19, 2004. For the reasons discussed below, the motion will be denied. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(B).

I.

The debtors Dallas and Andrea Smith filed for bankruptcy relief on November 25, 2003, and an order was entered confirming their proposed chapter 13 plan on January 21, 2004. On December 17, 2003, Fairbanks, which holds a first mortgage on the debtors' residence, filed a secured claim in the amount of $89,181.94 which included an arrearage of $15,066.44, comprised of late payments and numerous late fees, foreclosure fees, and bankruptcy related charges. On February 10, 2004, the debtors filed an objection to the arrearage portion of Fairbanks' claim, contending that several of the charges were improper and that Fairbanks had "failed to give proper notice required under paragraph 17 of the Deed of Trust and paragraph 8 of the Note prior to foreclosure and is therefore not entitled to Foreclosure Fees and Costs under the Deed of Trust." Presumably in response to the objection, Fairbanks filed an amended claim on March 4, 2004, reducing its arrearage claim to $13,719.24. The court set the objection for hearing on March 23, 2004, at which time counsel for the parties advised the court that they were attempting to work through the points of dispute and that the matter needed to be continued. Counsel for Fairbanks suggested setting the matter off for at least a month in order to give her the opportunity to gather the debtors' payment history. The court suggested April 20, 2004, as a continued hearing date and both counsel agreed.

At the April 20 hearing, which was the same date as this court's regular motion docket, counsel for Fairbanks requested that the hearing be continued again as she had failed to bring her file. The debtors opposed the request, noting that they had missed work to attend the hearing as they had done on the previous court date. After weighing the interests of the parties, the court denied the continuance request and proceeded with the hearing.

Prior to the submission of testimony in open court, counsel for the parties met and were able to resolve all disputes except for Fairbanks' entitlement to foreclosure fees. Counsel for Fairbanks conceded that the promissory note and deed of trust required the debtors to be given notice of a default, that notice to the debtors must be by certified mail, and that proper notice was a prerequisite to the recovery of the foreclosure charges. After uncontradicted testimony from the debtors that they had never received notice, by certified mail or otherwise, of a default and of the foreclosure proceedings, this court sustained the debtors' objection to the portion of Fairbanks' claim that sought foreclosure fees and costs in the amount of $3,028.69. An order to this effect was entered on April 30, 2004.

Ten days later, on May 10, 2004, Fairbanks filed the motion which is presently before the court. Fairbanks asserts therein that under Fed. R. Civ. P. 52(b) and 59(a) and (e), amendment of this court's ruling is necessary because of newly discovered evidence and to correct a manifest error of fact. The newly discovered evidence referenced by Fairbanks is what is purported to be a Forbearance Agreement dated July 17, 2003 between the debtors and Fairbanks, wherein the debtors waive their right to notice prior to foreclosure. Fairbanks also submits the affidavit of Verrney Brooks, a mail clerk for Wilson & Associates, P.L.L.C., wherein he states that his records indicate that he mailed a letter by certified mail to the debtor Dallas Smith on October 3, 2003. Fairbanks contends that these items establish that the foreclosure fees which it seeks to recover are proper because the debtors not only waived their right to notice but in addition were given the required notice by certified mail.

In their response filed May 19, 2004, the debtors note that the forbearance agreement was not signed by Fairbanks and contend that to the extent it ever went into effect, it was subsequently breached and nullified by Fairbanks' failure to accept the debtors' payments. In addition, they observe that Mr.

Brooks' affidavit does not establish that the notice of default was delivered to the debtors and that the debtors continue to maintain that notice was not provided. More importantly, the debtors note, neither item of evidence constitutes "newly discovered evidence," but was information which Fairbanks could have submitted at the hearing.

II.

Fed. R. Civ. P. 52(b) provides in part that "[o]n a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly." Similarly, the second sentence of Fed. R. Civ. P. 59(a) states that "[o]n a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of facts and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." These rules are incorporated respectively in bankruptcy cases by Fed. R. Bankr. P. 7052 and 9023. As recognized by most courts, including the Sixth Circuit Court of Appeals, "motions to alter or amend 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. 1999).

As noted previously, Fairbanks contend two of these bases exist in this case: that amendment of this court's April 30, 2004 order is necessary because of newly discovered evidence and to prevent manifest injustice. With respect to the first ground, "[t]o constitute 'newly discovered evidence,' the evidence must have been previously unavailable." *Id*. Fairbanks states in its brief filed in support of its motion that its counsel was not aware of the existence of the forbearance agreement until the April 20

hearing. In this regard, it should be noted that at the hearing counsel for Fairbanks asked the debtor Andrea Smith if she had signed a forbearance agreement with Fairbanks. Ms. Smith admitted that she had, but no questions were asked about the waiver provision and the agreement was not introduced into evidence.

Regardless of when counsel first learned of the agreement, "[t]o support a motion for reconsideration ... based upon newly discovered evidence, the movant is obliged to show not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing." *All Hawaii Tours, Corp. v. Polynesian Cultural Ctr.*, 116 F.R.D. 645, 649 (D. Haw. 1987). Fairbanks has offered no evidence that it has satisfied this standard. To the contrary, Fairbanks presumably had the forbearance agreement in its possession, and because the mail clerk is an employee of its attorney, could have easily obtained the affidavit prior to the hearing. The mere fact that Fairbanks did not bring the evidence to its attorney's attention does not necessitate a new trial or amendment. "If the proffered evidence was available before disposition ..., then as a matter of law the movant is not entitled to reconsideration based upon that evidence." *Id.*

Fairbanks asserts in its brief that this case is similar to *In re Johnson*, 215 B.R. 988 (Bankr. W.D. Tenn. 1997), wherein the court granted a party's motion to reconsider based on affidavit evidence that the party had satisfied the statute of frauds. This case, however, is distinguishable from *Johnson*. In the first *Johnson* decision, found at 213 B.R. 134 (Bankr. W.D. Tenn. 1997), the issue before the court was a legal one, submitted to the court on stipulation of fact: whether the foreclosure on the debtor's property was complete at the time he filed his chapter 13 petition. *Id.* at 135. Once the *Johnson* court determined the

proper standard, that the sale was not final until consideration had been exchanged and the statute of frauds satisfied, the court permitted the creditor to present proof of these conditions in conjunction with the creditor's motion to amend. *In re Johnson*, 215 B.R. at 989-90. By contrast, in the instant case, the issue to be decided by this court has always been a factual one, in dispute from the time the objection was first filed: whether the debtors were given proper notice. This was the issue that was tried on April 20, 2004, and the issue upon which Fairbanks now attempts to offer proof that should have and, apparently could have, been timely submitted at the hearing. "[A] motion made pursuant to Rules 52 and 59 is not intended to routinely give litigants a second bite at the apple ...." *Dale and Selby Superette & Deli v. U.S. Dept. of Agric.*, 838 F. Supp. 1346, 1348 (D. Minn. 1993). Because Fairbanks is simply seeking "a second bite at the apple," based on evidence which is not newly discovered within the meaning of Rules 52 and 59, the proffered affidavit and agreement provide no basis for reconsideration or amendment of this court's previous ruling.

The second basis for Fairbanks' motion is that amendment is necessary to prevent manifest injustice, with Fairbanks again relying on its newly submitted evidence. Fairbanks maintains that a refusal by this court to consider this additional evidence would amount to manifest injustice because "the evidence completely erodes the court's earlier decision that foreclosure fees were improper due to lack of notice." However, as noted in their response, the debtors challenge both the legal validity of the agreement and receipt of the notice. If this evidence had been submitted at the hearing, the debtors could have been questioned about the agreement and the court would have had the opportunity to properly evaluate this proof in the full context of all of the evidence. To consider the evidence at this point, in a piecemeal fashion, would be unfair to the debtors and contrary to the requirement that newly presented evidence, be

in fact, newly discovered.

A motion for amendment of a previous order is an “extraordinary remedy that must be used sparingly because of the interest in finality and in conservation of scarce judicial resources.” *Jimenez v. Pabon Rodriguez (In re Pabon Rodriguez)*, 233 B.R. 212 (Bankr. D.P.R. 1999). The “extraordinary remedy” sought by Fairbanks is simply not warranted by the facts of this case. Fairbanks had access to all of the evidence in this case prior to the hearing. It was its duty to be prepared for the hearing with all of the witnesses and evidence available for presentation. A motion for reconsideration will not be "used as a vehicle to reargue the motion or to present evidence which should have been raised before.” *In re Christie*, 222 B.R. 64, 68 (Bankr. D.N.J. 1998). Accordingly, the court will enter an order denying Fairbanks’ motion in its entirety.

FILED: June 17, 2004

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE