



SO ORDERED.

SIGNED this 18 day of August, 2008.

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

A handwritten signature in black ink, appearing to read "R. 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. 00-32361

DAVID A. LUFKIN
a/k/a DAVID A. LUFKIN, ATTORNEY

Debtor

WILLIAM T. HENDON, TRUSTEE

Plaintiff

v.

Adv. Proc. No. 01-3059

DAVID A. LUFKIN

Defendant

**MEMORANDUM AND ORDER
ON MOTION TO RECONSIDER**

Before the court is the Motion to Reconsider filed by the Defendant on July 28, 2008, asking the court, pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Rules 9023 and 9024, respectively, of the Federal Rules of Bankruptcy

Procedure, to reconsider the Order entered on July 17, 2008, granting in part and denying in part the Plaintiff's Motion for Partial Summary Judgment. Pursuant to the July 17, 2008 Order, the court sustained the Plaintiff's objection to the Defendant's discharge under 11 U.S.C.A. § 727(a)(5) (West 2004), but denied the Plaintiff's request for summary judgment under 11 U.S.C.A. § 727(a)(3) (West 2004).¹ In its Memorandum on Plaintiff's Motion for Partial Summary Judgment (Memorandum Opinion) accompanying the July 17, 2008 Order, the court found that the Plaintiff had satisfied his burden of proving that the Defendant had in his client trust account, prior to the filing of his bankruptcy case, client funds which were not paid to clients and were not in the Defendant's accounts at the time his petition was filed, and that the Defendant failed to satisfactorily explain and/or account for the disposition of those funds.

Arguing that his law firm was a separate legal entity, under the supervision of a receiver from December 1999, and its transactions are not relevant to his individual bankruptcy case, the Defendant asks the court to reconsider its decision, find that there are genuine issues of material fact, and allow the adversary proceeding to move forward to trial currently scheduled for September 29 and 30, 2008. In the Plaintiff's Response to Defendant's Motion to Reconsider (Response) which was filed by the Plaintiff on July 31, 2008, the Plaintiff argues that the record establishes the Defendant was operating and controlling all aspects of his law firm at the time of the events relied upon by the court to sustain his objection to discharge under § 523(a)(5), and the Defendant's failure to sufficiently explain the dissipation of assets cannot be imputed to the court-appointed receiver who was unable to provide the Plaintiff with adequate documentation thereof.

¹ By this adversary proceeding, the Plaintiff also seeks a denial of the Debtor's discharge under 11 U.S.C.A. § 727(a)(2)(A) and (4)(D) (West 2004), but did not seek summary judgment on these grounds.

“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) 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).² “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

² Here, because the court’s ruling on the Plaintiff’s Motion For Partial Summary Judgment was not fully dispositive of all issues, the July 17, 2008 Order is interlocutory and the ten (10) day filing period on Rule 59(e) is not yet in play. *See Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 118 Fed. Appx. 942, 946 (6th Cir. 2004). The court will nonetheless dispose of the Motion to Reconsider.

proceedings cannot be presented in a Rule 59(e) motion.” *In re See*, 301 B.R. 554, 555 (Bankr. N.D. Iowa 2003).

In his Motion to Reconsider, the Defendant avers that in response to the Plaintiff’s Motion for Partial Summary Judgment (Motion for Partial Summary Judgment) filed on March 14, 2008, he “spent a substantial amount of time documenting for the record that the law firm in which [he] was a member was in [sic] a corporation[and] that law firm was placed into a separate receivership in Knox County Chancery Court and that the receivership dealt with all of the assets and business records of that entity.” MOT. TO RECONSIDER at ¶ 3. Along those lines, he also states that in the six months prior to the commencement of his bankruptcy case, all business records and assets of the law practice were in the hands of a third party, the receiver, arguing that the assets of the law firm were not scheduled in his personal bankruptcy statements and schedules, and he was not in town when the receiver took possession of the firm’s assets and records. The Defendant also states that “[t]he fact that the Plaintiff simply did not want to review the funds on deposit in [the firm’s] accounts to determine where the funds were paid and how they were paid subsequent to December 1999 by the receiver or by the law firm prior to the receivership is not a basis to assert the Defendant failed to provide for the whereabouts of such funds.” MOT. TO RECONSIDER at ¶ 7. Finally, he argues that the Plaintiff did not meet “his burden to explain he had reviewed the bank records of the [Defendant] and whether such records did or did not reveal the disbursement of funds” and there was a clear error of law by the court in granting the Motion for Partial Summary Judgment and denying discharge based upon the Defendant’s failure to explain the disposition of funds. MOT. TO RECONSIDER at ¶ 5.

The Defendant's focus in support of his Motion to Reconsider is his contention that he, personally, was not responsible for the funds that were paid into his law firm's accounts and that any misappropriation or loss of those funds cannot, therefore, be imputed to him, such as to deny his discharge under § 727(a)(5). The court disagrees and finds that the Defendant has not shown clear error of law, presented newly discovered evidence, evidenced an intervening change in controlling law, or demonstrated that the July 17, 2008 Order is manifestly unjust.

Although the Plaintiff's Complaint, filed on April 27, 2001 as amended on June 29, 2001, objected to the Defendant's discharge under 11 U.S.C.A. § 727(a)(2)(A), (3), (4)(D), and/or (5), his Motion for Partial Summary Judgment only addressed § 727(a)(3) and (5). The record relied upon by the court consisted of the following: (1) Plaintiff's Statement of Undisputed Material Facts incorporating as exhibits thereto the Amended Complaint, the Answer, the Affidavit of Mary Katherine Trowbridge, a Transcript of Proceedings dated December 7, 1999, in Case No. 27339(L), styled *Assetcare, Inc. v. Lufkin, et al.*, in the Chancery Court for Sullivan County, Tennessee, the Affidavit of Brent Semple, the Affidavit of Suzanne Mechlem, the Affidavit of William T. Hendon, Trustee, the Defendant's Statement of Financial Affairs, Summary of Schedules, Schedule B - Personal Property, and Declaration Concerning Debtor's Schedules filed August 11, 2000, a transcript of the Deposition of David A. Lufkin, Sr. taken January 11, 2008, and the Stipulation Regarding Testimony of Lori Lufkin; (2) the Defendant's Statement of Undisputed Facts; and (3) the Defendant's Response to Plaintiff's Statement of Undisputed Material Facts, incorporating two excerpts from the deposition of Mary Trowbridge.

Of these exhibits, the Affidavits of Mr. Semple, president of C. Garth Semple & Associates, Inc., and Ms. Mechlem, an employee in the legal department of General Revenue Corporation, both former clients of the Defendant's, focused primarily upon money collected on behalf of their respective companies by the Defendant which was never disbursed to them. The court went into considerable detail in the Memorandum Opinion and will not restate that evidence here; however, it will reiterate that the Affidavits and the documents attached thereto evidenced a scheme perpetrated by the Defendant of misinformation in his firm's records and mishandling of monies belonging to his clients. Furthermore, the events outlined by Mr. Semple and Ms. Mechlem in their Affidavits occurred prior to December 1999, with the exception of one payment of \$358.40 which was received by General Revenue Corporation on May 22, 2000. *See* MEM. OP. at 16-19.

The Defendant argues that his law firm was a separate corporate entity and that he was not personally responsible for monies deposited into his firm's trust account but not remitted to clients. It is undisputed and the record reflects that, prior to December 1999, the Defendant engaged in the practice of law and operated a law practice under the names of David A. Lufkin, David A. Lufkin, Attorney, David A. Lufkin, P.C., and Lufkin, Henley & Connor, PLLC. MEM. OP. at 4 (citing COMPL. at ¶ 4; ANS. at ¶ 4). This is further confirmed by Ms. Trowbridge, the former financial officer for the Defendant and his law firm entities, *see* TROWBRIDGE AFF. at ¶ 4, and reflected by a deposit slip for the Tennessee Bar Foundation Iolta Account for David A. Lufkin, P.C., Mgmt. Member of Lufkin Henley & Conner, PLLC (Trust Account) attached as a collective exhibit to the Affidavit of Mary Trowbridge. MEM. OP. at 15-16; TROWBRIDGE AFF. at ¶¶ 7, 10; COLL. EX. B. Nevertheless, the record also reflects that "[i]rrespective of the name of the firm at the time, [the

Defendant] controlled the day-to-day operation of the business, including all financial aspect[s] of the practice, including deposits, withdrawals, disbursements to clients, and payroll[.]” TROWBRIDGE AFF. at ¶ 4, and that she performed her duties under the personal supervision and direction of the Defendant. MEM. OP. at 14; TROWBRIDGE AFF. at ¶¶ 2-3.

Under Tennessee law, professional corporations, which “may render professional services . . . only through individuals licenced or otherwise authorized . . . to render the services[.]” TENN. CODE ANN. § 48-101-607(a) (2002), are governed by statute, that, with respect to the issue of personal liability, are unambiguous. “Each individual who renders professional services as an employee of a domestic or foreign professional corporation is liable for such individual’s own negligent or wrongful acts or omissions to the same extent as if that individual rendered the services as a sole practitioner.” TENN. CODE ANN. § 48-101-621 (2002). The same holds true with respect to limited liability companies. *See* TENN. CODE ANN. § 48-217-101(a)(3) (2002) (stating that notwithstanding the absence of personal liability for actions or obligations of the LLC or other members and/or employees, “a member, holder of financial interest, governor, manager, employee or other agent may become personally liable in contract, tort, or otherwise by reason of such person’s own acts or conduct.”). The Defendant cannot hide behind the legal fiction that David A. Lufkin, P.C. and/or Lufkin, Henley & Connor, PLLC are separate entities in order to escape liability nor can he escape culpability for his own actions by attempting to lay blame at the feet of a court-appointed receiver or his former financial officer.

Furthermore, the Defendant mistakenly characterizes the Plaintiff’s burden of proof under § 727(a)(5) by asserting that he “simply did not want to review the funds on deposit in [the] accounts

[which had been seized by the receiver] to determine where the funds were paid and how they were paid subsequent to December 1999 by the receiver or by the law firm prior to the receivership[.]”

MOT. TO RECONSIDER at ¶ 7. The Plaintiff’s initial burden of proof under § 727(a)(5) required merely that he demonstrate that “(1) at a time not too remote from the bankruptcy, the Defendant owned identifiable assets; (2) on the day that he commenced his bankruptcy case, the Defendant no longer owned the particular assets in question; and (3) his schedules and/or the pleadings in the bankruptcy case do not offer an adequate explanation for the disposition of the assets in question.”

MEM. OP. at 12-13 (citing *Schilling v. O’Bryan (In re O’Bryan)*, 246 B.R. 271, 279 (Bankr. W.D. Ky. 1999)). The court found and the record reflects that the Plaintiff established that \$14,415.23 which should have been paid to Mr. Semple and \$13,573.17 which should have been paid to General Revenue Corporation were deposited into the Defendant’s trust account but never remitted. MEM. OP. at 20; SEMPLE AFF. at ¶ 4; MECHLEM AFF. at ¶¶ 7-10; TROWBRIDGE AFF. at ¶ 7. Additionally, it is Ms. Trowbridge’s undisputed testimony that in November and December 1999, the Defendant deposited more than \$70,000.00 into his trust account, *see* TROWBRIDGE AFF. at ¶ 11, but these funds were not in his possession on June 14, 2000, when his involuntary bankruptcy petition was commenced, and the Defendant has not offered any explanation, in his statements and schedules or otherwise, as to their dissipation.

The Defendant also cites to Rule 60 of the Federal Rules of Civil Procedure in his Motion to Reconsider, which states, in material part, that “the court may relieve a party . . . from a final judgment, order, or proceeding[.]” FED. R. CIV. P. 60(b). The Order entered on July 17, 2008, however, is interlocutory, and by its very terms, Rule 60 does not apply. *See also Newton v.*

Herskowitz (In re Gatlinburg Motel Enters., Ltd.), 119 B.R. 955, 968 (Bankr. E.D. Tenn. 1990)

(“Interlocutory orders and judgments are . . . not within the restrictive provisions of 60(b)[.]”).

In short, the underlying record relied upon by the court and outlined in the July 17, 2008 Memorandum Opinion supports the denial of the Defendant’s discharge under § 727(a)(5). Accordingly, the Motion for Reconsideration is DENIED.

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