



IT IS ORDERED as set forth below:

Date: April 27, 2013

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

In re

MORAN LAKE CONVALESCENT
CENTER, LLC,

Debtor.

Case No. 10-43405-MGD

Chapter 7

In re

GEORGE DALYN HOUSER,

Debtor.

Case No. 10-43407-MGD

Chapter 7

TRACEY L. MONTZ, solely in her capacity as
Chapter 7 Trustee in Bankruptcy,

Plaintiff,

v.

Consolidated Adversary Proceeding
Nos. 11-4067 & 11-4068

HEALTHCARE REALTY & DEVELOPMENT,)
LLC; RHONDA FAYE HOUSER, JACQUELINE)
EMMELINE KYDD HOUSER; THE KYDD)
GROUP, LTD.; PAMELA GAYLE HOUSER;)
LOUISE KELLEY HOUSER; and ALFRED)
JOHN DAMUS,)
Defendants.)

Lead Adversary Case No.
11-4067-MGD

ORDER DENYING MOTION FOR RECONSIDERATION

Before the Court is the Motion for Reconsideration of Court's Order Dated March 15, 2013 ("Motion") filed by H. Nasif Mahmoud ("Movant"). Docket No. 82. The Chapter 7 Trustee filed a Response in Opposition to the Motion. Docket No. 83. The Order which Movant asks the Court to reconsider entered Final Judgment in favor of the Trustee against the Defendants in this adversary proceeding and their counsel, George Houser and Movant, in the amount of \$48,549.92. Although not stated explicitly, the Motion only seeks relief as to Movant and not as to George Houser and the Defendants.

I. Background

On June 21, 2012, September 4, 2012, and December 21, 2012, the Court entered Orders directing Defendants and their counsel, including Movant, to pay Trustee's fees and expenses.¹ Docket Nos. 32, 59, 71. On December 20, 2012, Trustee filed a Motion for Order on (I) The Motion to Enforce; (II) Approving Trustee's Fees for the Second Motion to Enforce; and (III) for Entry of Judgment in the Total Amount of Awarded Fees and Costs ("Motion for Final Judgment"). Docket No. 70. On January 22, 2013, Movant filed a Motion to Dismiss Attorney Mahmoud ("Motion to

¹ The June 21, 2012 Order did not include an award against George Houser and Movant. The Court's November 7, 2012 Order, however, increased the award to cover all of Trustee's fees and expenses in this case against Defendants and George Houser and Movant. Docket No. 66.

Dismiss”). Docket No. 74. The Motion to Dismiss effectively sought a ruling allowing Movant to withdraw as counsel in the adversary proceeding retroactively, as Movant argued that he was never Defendants’ (including George Houser) counsel. Both the Motion for Final Judgment and the Motion to Dismiss came on for hearing on March 12, 2013. The Motion to Dismiss was denied by Court Order on March 13, 2013. Docket No. 78. The Court entered final judgment against Defendants and their counsel, including Movant, on March 15, 2013 (“Final Judgment Order”). Docket No. 79. It is this Final Judgment Order for which Movant now seeks reconsideration.

II. Analysis

The Court notes that Movant did not file an objection to the Motion for Final Judgment and that a motion to reconsider is procedurally improper. Rather than asserting any grounds for relief provided for under the Federal Rules of Civil Procedure, Movant argued that the Court should reconsider the Final Judgment Order on the basis of fraud, lack of actual notice and impossibility. The Court will construe the Motion as one under Federal Rules of Civil Procedure 59(e) and 60(b), made applicable to this proceeding by Federal Rules of Bankruptcy Procedure 9023 and 9024, respectively.

The Eleventh Circuit has stated that a Rule 59 motion can only be granted where there is “newly-discovered evidence or manifest errors of law or fact.” *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999). Furthermore, Rule 59 cannot be used “to relitigate old matters, raise argument[s] or present evidence that could have been raised prior to the entry of judgment.” *Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005). Mahmoud has not asserted any newly discovered evidence or manifest errors of law or fact. Furthermore, he has essentially raised again the issues he asserted at the hearing on the Motion to Dismiss.

“Fraud” as asserted by Movant is different from the “fraud” contemplated by Rule 60(b)(3).

The Eleventh Circuit has stated that “[t]o obtain relief from a final judgment based upon fraud under Rule 60(b)(3), the moving party must prove by clear and convincing evidence that the adverse party obtained the verdict through fraud, misrepresentations, or other misconduct. The moving party must also demonstrate that the conduct prevented them [sic] from fully presenting his case.” *Solomon v. Dekalb County, Ga.*, 154 Fed.Appx. 92, 94 (11th Cir. 2005) (quoting *Waddell v. Hendry County Sheriff’s Office*, 329 F.3d 1300, 1309 (11th Cir. 2003)). Here, Movant has not asserted that the adverse party – Trustee – obtained the judgment by fraud, but rather that Movant’s client, George Houser, perpetrated a fraud on this Court in asserting that Movant was his legal counsel. The Court notes that although Movant argues that he did not receive actual notice of this proceeding, the record shows and Movant admitted at the hearing on the Motion to Dismiss, that he received constructive notice.² The Court will not vacate its judgment when the basis for Movant’s request could have been brought to the Court’s attention, by Movant, prior to judgment being entered. Lastly, Movant offered no evidence to support his claim of fraud and certainly did not satisfy the clear and convincing standard. This alleged fraud does not satisfy the requirements for relief under Rule 60(b)(3).

The grounds for relief under Rule 60(b)(1), (2), (4) and (5) do not apply on their face. Thus, Rule 60(b)(6), which provides for relief from a final judgment for “any other reason that justifies relief” is the only possibly applicable provision. F.R.B.P. 60(b)(6). A Rule 60(b)(6) motion “must demonstrate that the circumstances are sufficiently extraordinary to warrant relief.” *Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006) (quoting *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1317 (11th Cir. 2000)). Movant has not asserted any extraordinary circumstances warranting relief. He has not alleged any new facts, and the legal arguments he has made are insufficient. As discussed

² Movant makes no argument that actual notice is required and that constructive notice is legally insufficient.

above, Movant's fraud argument fails. Movant also argued lack of actual notice but did not explain why the constructive notice, which he received, was insufficient. Lastly, Movant asserted that it was "impossible" for him to represent a client on trial in Minneapolis while also representing Defendants in the discovery dispute leading to the Final Judgment Order. The Court fails to see, as a factual matter, why this is an impossibility, and Movant points to no rule prohibiting him from such dual representation. At any event, this asserted ground for relief does not constitute an extraordinary circumstance warranting relief.

III. Conclusion

Movant has failed to meet its burden to show that relief is warranted under either Rule 59(e) or 60(b). Consequently, the Motion for Reconsideration will be denied.

ORDERED that the Motion for Reconsideration of Court's Order Dated March 15, 2013 is **DENIED**. The clerk shall serve a copy of this Order upon the Chapter 7 Trustee, counsel for the Chapter 7 Trustee and the parties on the attached distribution list.

END OF DOCUMENT

Distribution List

H. Nasif Mahmoud
McKinzie, Wilkes & Mahmoud
6772 Blantyre Blvd.
Stone Mountain, GA 30087

H. Nasif Mahmoud
McKinzie, Wilkes & Mahmoud
8717 Forest Avenue
Gary, IN 46403