

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN THE MATTER OF:	)		
	)		
ALBERTA DIANE JOHNSON	)	CASE NO.	09-15241
	)		
	)		
Debtor	)		

**DECISION AND ORDER DENYING MOTION TO RECONSIDER**

At Fort Wayne, Indiana, on January 23, 2013

On January 14, 2013, the debtor filed a request to reconsider the order of March 12, 2012, which granted the trustee’s motion for authority to dismiss a personal injury claim. See, Order dated March 12, 2012. Paragraph 5 of the trustee’s motion explained that she sought that authority because: “After the lawsuit was filed, and discovery was conducted, it became clear that the vehicle was never tested for defects, and was destroyed before the Debtor contacted Vegeler Law Office to represent her . . .” The debtor’s motion represents that she “has obtained documentation that shows Trustee’s reasons for dismissing the claim were false.” In particular: “Vegeler Law office was contacted on 7/7/2009, Vehicle was destroyed 3/23/2010.” As a result, the debtor wants the court to vacate its prior order so that she would “be allowed to file claim against Tony’s Auto Sales Inc.” It is that motion which is presently before the court.

Debtor’s motion appears to be based on Rule 60(b) of the Federal Rules of Civil Procedure. As such, it is addressed to the court’s discretion, In re Prince, 85 F.3d 314, 324 (7th Cir.1996), and may be considered without a hearing and without requiring a response. See, Dunn v. Truck World, Inc., 929 F.2d 311, 313 (7th Cir. 1991). See also, N.D. Ind. L.B.R. B-9023-1(b). Although the motion does not specify which portion of Rule 60 might apply, based upon the debtor’s statements and given the liberal construction accorded pro se filings, the most relevant portion would be Rule 60(b)(2) – newly discovered evidence – since the motion indicates the debtor has obtained

documentation showing that the facts upon which the trustee's decision was based were not accurate.

A motion filed pursuant to Rule 60(b)(2) must be filed within a reasonable time, not to exceed one year. Even if it is filed within a year, it may still be untimely. Kagan v. Caterpillar Tractor Co., 795 F.2d 601, 610 (7th Cir. 1986). What is a reasonable time depends on the facts and circumstances of each case, including the ability of the movant to learn the grounds relied upon. Kagan 795 F.2d at 610. The court believes the debtor's motion is untimely. The order she wants vacated was entered on March 12, 2012. The debtor was served with notice of the trustee's motion on February 15, 2012 and given a sufficient opportunity to object to it; that notice stated that the trustee wanted to dismiss the claim due to the lack of evidence and was accompanied by a copy of the motion itself, see, Certificate of Service of Notice of Motion, filed Feb. 15, 2012; no objections were ever filed; and the motion was granted soon after the objection period expired, by the court's order of March 12, which was also served upon the debtor. It was not nearly one year later that the debtor chose to question the reasons for the trustee's decision.

The debtor had every opportunity to object to the motion and to question the basis for the trustee's request when it was originally presented to the court, yet did not do so. She was also served with a copy of the order granting the motion and yet did not act. Why she has chosen to wait until now is unexplained. Given the clarity and the simplicity of the reasons for the trustee's desired action, it would seem that the debtor should have been in possession of information that would have called those reasons into question in plenty of time to object to the motion when it was originally filed. Even if that was not the case; if the debtor wanted or needed additional time to investigate the facts on which the trustee's motion was based, she could have filed a timely objection, but she did not. Instead, she let the motion pass without comment and then, nearly a year later, asks the court to revisit the issue. It is far too late to do so.

Even if it the motion timely, the debtor fails to satisfy the grounds for the relief sought. To prevail under Rule 60(b)(2) one must demonstrate not just that new evidence has been discovered which might alter the result, but also that the new evidence could not “with reasonable diligence” have been discovered earlier. Id. See also, Matter of Chicago, Milwaukee, St. Paul & Pacific. R. Co., 78 F.3d 285, 293-94 (7th Cir. 1996). Without “due diligence on the part of the movant” the motion should be denied. Chicago, Milwaukee, St. Paul & Pacific. R. Co., 78 F.3d at 293-94. Assuming that the date on which the vehicle was destroyed would have impacted the trustee’s decision, the debtor has not demonstrated that the date could not “with reasonable diligence” have been discovered earlier. Although she might not have known the precise date on which her vehicle was destroyed, she should have had some estimate, particularly whether it was destroyed before or after she retained counsel. At a bare minimum, she should have known that she lacked precise information and wanted or needed the opportunity to investigate the matter further. Debtor’s motion had to explain both of these things: why the information she now wants the court to consider could not have been obtained sooner and why she failed to inform the court (via an objection to the motion) that she wanted or needed the opportunity to conduct discovery in order to obtain it. Since it does not, it does not demonstrate the necessary reasonable diligence.

The debtor’s motion to reconsider the order of March 12, 2012, granting the trustee’s motion to dismiss the personal injury claim is DENIED.

SO ORDERED.

/s/ Robert E. Grant  
Chief Judge, United States Bankruptcy Court