

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
KENNETH SHAY KLEIN and	)	CASE NO. 12-31617 HCD
CYNTHIA RUTH KLEIN,	)	CHAPTER 7
DEBTORS.	)	
	)	
	)	
WALL STREET CONSULTING, LLC,	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 12-3052
	)	
	)	
KENNETH SHAY KLEIN and	)	
CYNTHIA RUTH KLEIN,	)	
DEFENDANTS.	)	

Appearances:

Thomas M. Walz, Esq., and Thomas J. Walz, Esq., counsel for plaintiff, Hahn, Walz and Knepp, 509 West Washington Avenue, South Bend, Indiana 46614;

Samuel Hodson, Esq., and Caroline E. Richardson, Esq., counsel for plaintiff, Benesch, Friedlander, Coplan & Aronoff LLP, One American Square, Suite 2300, Indianapolis, Indiana 46282-0028; and

Douglas R. Adelsperger, Esq., counsel for defendants, Skekloff, Adelsperger & Kleven, LLP, 927 South Harrison Street, Fort Wayne, Indiana 46802.

MEMORANDUM OF DECISION

At South Bend, Indiana, on July 16, 2013.

Before the court is the Motion to Alter Judgment timely filed by Wall Street Consultants, LLC (“plaintiff” or “Wall Street”), pursuant to Federal Rule of Civil Procedure 59, made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 9023. For the reasons that follow, the court denies the plaintiff’s Motion to Alter Judgment.<sup>1</sup>

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<sup>1</sup> The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

This court, in its Judgment, granted the Motion to Dismiss Amended Complaint filed by the defendants Kenneth Shay Klein and Cynthia Ruth Klein (“defendants” or “debtors”) and denied the plaintiff’s Motion for Leave to Amend Amended Complaint in Objection to Discharge, filed by Wall Street. In its Memorandum of Decision, the court reasoned that dismissal of the Amended Complaint was warranted on two grounds: The proof of claim filed by the plaintiff was untimely; and the Amended Complaint failed to state a claim upon which relief could be granted under 11 U.S.C. § 523(a)(2)(B). In addition, the court denied the plaintiff leave to amend its Amended Complaint after finding that amendment would be futile.

Wall Street asked the court to alter its Judgment and Memorandum of Decision in two ways: First, the court should have considered the plaintiff’s “Response to Defendants’ Motion to Dismiss [Original] Complaint,” including its appended brief in support (together, “Response”), *see* R. 11, as a response to both dismissal motions, because it presented Wall Street’s arguments against both motions. Second, the court should strike the portion of its decision dismissing Wall Street’s untimely filed proof of claim, in light of the conversion of the debtors’ case from a chapter 11 to a chapter 7 proceeding.

A party asking the court to amend its judgment under Rule 59 must establish clearly “(1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment.” *Cincinnati Life Ins. Co. v. Beyrer*, \_ F.3d \_, 2013 WL 3379344 at \*12 (7th Cir. July 8, 2013) (quoting *Blue v. Hartford Life & Accident Ins. Co.*, 698 F.3d 587, 598 (7th Cir. 2012)). The granting or denial of motions for reconsideration under Rule 59(e) is within the court’s discretion. *See id.*; *see also Heyde v. Pittinger*, 633 F.3d 512, 521-22 (7th Cir. 2011). The court finds that the plaintiff has not sought relief under either of those circumstances.<sup>2</sup>

The plaintiff first asked the court to consider “Plaintiff’s Response to Defendants’ Motion to Dismiss” (R. 11) in a dual capacity: as the response to the original Motion to Dismiss (R. 6) and also as the

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<sup>2</sup> In addition, the court finds that the plaintiff’s motion was not accompanied by a separate supporting brief, affidavits, or other materials, as are required by this court’s local rules. *See* N.D. Ind. L.B.R. B-9023-1(a).

response to the Motion to Dismiss Amended Complaint (R. 14).<sup>3</sup> The reason the plaintiff gave was that the Response “comprehensively set forth Wall Street’s position, with supporting authority, as to the legal bases on which Defendants rely in the Motion to Dismiss Amended Complaint and Brief in Support thereof.” R. 23, p.6. However, the record shows clearly that the Response was filed only as an answer to the original dismissal motion. Once the plaintiff amended its Complaint, the defendants submitted a second Motion to Dismiss, seeking dismissal of the Amended Complaint. The plaintiff did not answer or respond to that second dismissal motion, and it is logically impossible for a “Response” filed on October 15, 2012, to contain responses to a document filed on October 25, 2012.

Wall Street acknowledged that it did not submit a response to the Defendants’ Motion to Dismiss Amended Complaint, but attempted to justify its nonresponse by stating that its “position, as set forth in its initial response to Defendants’ Motion to Dismiss, remained unchanged, and such a response would have been duplicitous.”<sup>4</sup> R. 23 at 4, ¶ 13. However, it is well settled that a party that fails to file a timely response to a motion to dismiss in accord with the court’s local rules has waived its opportunity to oppose the motion. *See* N.D. Ind. L.B.R. B-7007-1(a); *see also* N.D. Ind. L.B.R. B-9014-1(b) (requiring party desiring to oppose a motion to file and serve a timely objection). The plaintiff neither directed the court to its earlier Response nor opposed the second dismissal motion in any way. Nor did it assert that its failure to respond was the result of mistake, excusable neglect, or other circumstances.<sup>5</sup>

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<sup>3</sup> The plaintiff filed an Amended Complaint on October 15, 2012. *See* R. 9, 10.

<sup>4</sup> The court presumes that the plaintiff meant that a response would have been “duplicative.” Black’s Law Dictionary defines a “duplicious person” as “deceitful; double-dealing” and a duplicitous pleading as one “alleging two or more matters in one plea; characterized by double pleading.” *Black’s Law Dictionary*, 9th ed., at 578.

<sup>5</sup> The court points out that, instead of dismissing the Amended Complaint based upon the plaintiff’s waiver, it turned directly to the plaintiff’s Amended Complaint and weighed its sufficiency, accepting all well pled facts as true and drawing all permissible inferences in favor of the plaintiff. It is also noteworthy that a court may consider a motion without a hearing if no objection to the motion is filed. *See, e.g., In re Fort Wayne Foundry Corp.*, 2009 WL 2524493 at \*1-2 (Bankr. Ind. July 23, 2009) (citing 11 U.S.C. § 102(1); N.D. Ind. L.B.R. B-2002-2); *see also Skolnick v. Doria*, 103 F.3d 133 at \*2 (7th (continued...))

The court finds that the plaintiff's choice not to file a responsive pleading to the defendants' Motion to Dismiss the Amended Complaint was a poor strategic decision, and it may not correct that decision by asking the court to alter or amend its judgment. The plaintiff has not presented any newly discovered material evidence; nor has it referred the court to an intervening change in the law, or a manifest error in the law or fact. Moreover, the request simply lacks logic and merit. *See Cincinnati Life Ins. Co.*, 2013 WL 3379344 at \*13 (stating that Rule 59(e) "does not provide a vehicle for a party to undo its own procedural failures") (citation omitted).

The second reason proffered for alteration of the court's Judgment was that the untimely filing of a proof of claim was no longer a valid basis for dismissal of the Amended Complaint, since the conversion of the bankruptcy case created a new deadline for filing proofs of claim. The plaintiff pointed to the fact that the Kleins' bankruptcy case was converted from a chapter 11 to a chapter 7 case on December 19, 2012. Upon conversion of the case, it noted, the deadline for all non-governmental creditors to file a proof of claim was re-established and set at May 6, 2013. Because the court's Judgment and Memorandum of Decision was filed after the case was converted to a chapter 7, the plaintiff insisted, the court's decision that the Wall Street proof of claim was untimely pursuant to 11 U.S.C. § 1111(a) was "improper in light of the conversion of the case and the renewed time period for filing proofs of claim." R. 23 at 5, ¶ 18.

It is of course settled bankruptcy law that, when a bankruptcy case converts from chapter 11 to chapter 7, new bar dates are established for claims and dischargeability complaints.<sup>6</sup> *See Fed. R. Bankr. P.* 1019 (2, 3). However, it is also a bedrock principle that an adversary proceeding is a separate lawsuit within the context of a particular bankruptcy case. *See Zedan v. Habash*, 529 F.3d 398, 402 (7th Cir. 2008) (pointing out that adversary proceedings are conceptually distinct from core matters and that they resolve

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<sup>5</sup>(...continued)

Cir. 1996) (unpublished opinion) (affirming that a party's "deliberate bypass of the opportunity to respond to a motion to dismiss" was a waiver).

<sup>6</sup> The court notes that Wall Street filed its original Claim #44 belatedly but that it timely filed a second claim, Claim #49, on January 25, 2013, after the case was converted to a chapter 7 case.

legal issues that are logically separate from the case). In this case, the self-contained adversary proceeding began and ended in the debtors' chapter 11 case. The litigation came to a close on the bar date for responses to the defendants' motion to dismiss the Amended Complaint.<sup>7</sup> Because no response was filed, the court awaited a possible belated filing from the plaintiff, one that might provide an acceptable excuse for its delay. Nevertheless, the adversary proceeding was taken under advisement three weeks before the Kleins' bankruptcy case was converted to a chapter 7. The plaintiff did not file a response to the second dismissal motion or raise the issue of the debtors' conversion prior to the court's judgment. *See Matter of Reese*, 91 F.3d 37, 39 (7th Cir. 1996) ("A motion under Rule 59(e) is not authorized 'to enable a party to complete presenting his case after the court has ruled against him.'") (quoting *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995)).

The court's issuance of its Memorandum of Decision and Judgment on January 15, 2013, was not affected by the conversion of the debtors' bankruptcy case on December 19, 2012. *See In re Wahlin*, 2011 WL 1063196 at \*4 (Bankr. D. Idaho, Mar. 21, 2011) (stating that litigation "does come to a close; a record is established; and decisions are made on that record"). The conversion of a case is not "newly discovered evidence" under Rule 59(e). *See id.*; *see also In re Henning*, 420 B.R. 773, 785-86 (Bankr. W.D. Tenn. 2009). Nor does the later conversion of the case constitute "legal error" in the record established in this adversary proceeding. *See In re Wahlin*, 2011 WL 1063196 at \*4 (refusing to allow the evidentiary record to be "reopened," in effect, to consider later developments). The plaintiff does not contest the fact that its proof of claim in the not-yet-converted case was filed late. Nor, interestingly, does it now contest the court's ruling that the plaintiff's Complaint cannot constitute an informal proof of claim.

The court concludes that the plaintiff has not clearly established under Rule 59 that this court committed a manifest error of law or fact, or that newly discovered evidence precluded entry of judgment.

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<sup>7</sup> The Motion seeking dismissal of the Amended Complaint was filed on October 25, 2012, and the plaintiff's response to that dismissal motion was required to be filed in this court by November 24, 2012, which was thirty days after the filing of the debtors' Motion. *See* N.D. Ind. L.B.R. B-7007-1(a).

In addition, the court recognizes that the plaintiff has not asked the court to alter or amend the substantive decisions of the court's Memorandum of Decision and Judgment. The plaintiff has not at all challenged the court's dismissal based upon the plaintiff's failure to state a claim under 11 U.S.C. § 523(a)(2)(B) and the untimeliness of the plaintiff's proof of claim. Nor did the plaintiff contest the court's denial of its request for leave to amend the Amended Complaint. Accordingly, the court reaffirms its determinations that the plaintiff cannot prevail under § 523(a)(2)(B) and that the Amended Complaint must be dismissed for failure to state a claim and for failure to file a timely proof of claim.

For the reasons stated above, the Motion to Alter Judgment filed by the plaintiff Wall Street Consultants, LLC, is denied.

SO ORDERED.

/s/ HARRY C. DEES, JR.  
HARRY C. DEES, JR., JUDGE  
UNITED STATES BANKRUPTCY COURT