

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re

Case No. 8:05-bk-29393-KRM
Chapter 13

BRIAN HERON,

Debtor.

ORDER DENYING DEBTOR'S MOTION
FOR REHEARING OR RECONSIDERATION

THIS CASE came on for consideration of the debtor's Motion for New Trial, Evidentiary Hearing, Findings and/or Rehearing, including the Affidavit of Brian Heron in Support of Motion (the "Motion for Rehearing"), filed on April 27, 2007 (Document No. 136). The debtor also filed an Affidavit on May 2, 2007 (Document No. 137). Creditor, Charles A. Smith, filed a Motion to Strike on May 4, 2007 (Document No. 139).¹

The debtor seeks a new trial of his earlier Motion for Reconsideration of Order Denying Confirmation and Dismissing Case with Prejudice, which was heard and denied on April 11, 2007 (Document No. 124).

The Court has carefully considered the debtor's arguments; for the reasons stated below, the Motion for Rehearing is denied.

BACKGROUND

The debtor is an attorney who was not a member of the Florida Bar at the time of his bankruptcy filing. He filed a voluntary petition under Chapter 13, *pro se*, on October 14, 2005, in an attempt to stave off judgment enforcement by creditor Charles A. Smith ("Smith").² In this case, the debtor has alternately appeared *pro se* and through counsel.

The Court has dismissed this Chapter 13 case three times, but has reinstated it twice. The first

¹ On May 4, 2007, the debtor filed his Emergency Motion to Respond [sic] to same (Document No. 140).

² It appears that the debtor and creditor Smith have a history of litigation going back eighteen or more years. Smith has filed a claim based on four final judgments against the debtor entered in California, totaling \$117,451.57.

dismissal occurred on December 1, 2005 (Document No. 12), for the debtor's failure to cure certain filing deficiencies after notice. The case was reinstated on January 25, 2006, after the debtor cured the deficiencies (Document No. 20).

The case was dismissed again following a hearing, on October 25, 2006, on confirmation of the debtor's Chapter 13 plan and on Smith's Motion to Dismiss or Convert the case to Chapter 7 (Document No. 90). The debtor's schedules stated that his sole source of income was "assistance from third parties" in the amount of \$300 per month. The schedules also showed disposable income of \$27.25, an amount insufficient to fund the proposed plan, which specified a payment of \$50.00 per month. The debtor owns non-exempt real property in Canada with a value greater than the amount that the debtor then proposed to pay to unsecured creditors.

The Court found that the debtor failed to meet the statutory requirements of who may be a debtor as set forth in 11 U.S.C. § 109(e), since he did not have "regular income." The Court also found that the Chapter 13 plan was not feasible and failed meet the liquidation test required by 11 U.S.C. § 1325(a)(4).

On December 13, 2006, the Court heard the debtor's second motion for reconsideration and reinstatement (Document No. 92) and Smith's objection to same.³ The debtor proffered that his financial circumstances had changed, due to income from work as an attorney. He agreed, pending further court order, to begin making monthly plan payments to the trustee of \$4,050.00 per month.

The case was reinstated by Order dated December 22, 2006 (Document No. 105), which required the debtor to pay \$4,050.00 per month, beginning on January 15, 2007, and to file an amended plan, amended budget (reflecting his new source of income), and schedules I and J within thirty days. The debtor subsequently failed to make the required plan payments and failed to file the amended plan, budget, or schedules as required.

At still another hearing, on February 21, 2007, to consider confirmation of his plan, the debtor appeared *pro se*. He proffered that he was unable to timely remit the January plan payment because it had been made by a personal check from a third party, rather than by a cashier's check or money order as is required by the

³ On the debtor's consent, this Court also considered and granted counsel's motion to withdraw and allowed the debtor twenty (20) days to obtain substitute counsel.

Preconfirmation Order to pay Trustee (Document No. 30); the debtor was unable to obtain a replacement check because the third party had died. The debtor conceded that this payment was a “loan” from a friend.⁴ The debtor gave no explanation as to why he did not timely file an amended plan, budget, and schedules. Accordingly, by order dated February 28, 2007, the Court dismissed the case again, but with prejudice for 180 days, pursuant to 11 U.S.C. §109(g), for the willful failure of the debtor to abide by the Court’s prior orders (Document No. 120).

The debtor’s third motion for reconsideration and reinstatement (Document No. 122) came on for hearing on April 11, 2007. This time, the debtor appeared through new counsel, Kelley M. Petry, who announced that she was making a “limited” appearance after having filed an amended plan, budget, and schedules just prior to the hearing.

After considering the argument of counsel for the debtor, counsel for creditor Smith, and counsel for the Chapter 13 Trustee, the Court denied the debtor’s motion for reconsideration, finding no new evidence or bases to overturn the Court’s decision that this case should be dismissed.

DISCUSSION

The debtor now asserts that the Court should reconsider its prior ruling because of the following new evidence: (1) the debtor was ready to make the January plan payment at the April 11, 2007, hearing; (2) the debtor failed to make the January payment due to his error in attempting to submit to the Trustee a personal check of a third party, rather than a cashier’s check or money order; (3) creditor Smith is in contempt by unlawful attempts to enforce his judgments against the debtor; (4) the debtor now derives income from work as an attorney; and (5) ineffective assistance of counsel.

The Court will consider the debtor’s pleading as a motion to alter or amend judgment, pursuant to [Rule 59\(e\)](#) of the Federal Rules of Civil Procedure, made applicable by Rule 9023 of the Federal Rules of Bankruptcy Procedure, since it was filed within ten days after entry of the order. See *In re Mathis*, 312 B.R. 912, 914 (Bankr. S.D. Fla. 2004).

Reconsideration of an order under [Rule 59\(e\)](#) “is an extraordinary remedy to be employed sparingly.” *Id.* (citing [Sussman v. Salem, Saxon & Nielsen, P.A.](#), 153 F.R.D. 689, 694 (M.D. Fla. 1994); accord [Taylor Woodrow Construction Corp. v. Sarasota/Manatee Airport Authority.](#), 814 F.Supp. 1072, 1073 (M.D. Fla. 1993)). “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.” *Id.* (citing [Mincey v. Head](#), 206 F.3d 1106 (11th Cir. 2000), and quoting [In re Halko](#), 203 B.R. 668, 671-72 (Bankr. N.D. Ill. 1996)).

Courts may grant relief under Rule 59(e) to (1) account for an intervening change in controlling law, (2) consider newly available evidence, or (3) correct clear error or prevent manifest injustice. *Id.* (citations omitted). The Court, however, is not persuaded that any of the arguments advanced by the debtor are sufficient to relitigate the dismissal of this case.

The fact that the debtor was ready to tender \$4,050.00 at the time of the April 11, 2007 hearing is irrelevant. By that time, the payments for January, February, and March, totaling \$12,150.00, were due. If the debtor had tendered payment of \$4,050.00 on April 11, 2007, he would still not have been in compliance with the December 2006 order. The debtor’s excuse for nonpayment to the Trustee and his attempt to recharacterize his source of funds from services performed, after having stated that his funding was from a “loan” was considered at the April 11, 2007 hearing. All of this calls into question the debtor’s credibility. There is no “new evidence” for consideration now. The debtor’s lack of credibility was the issue at that hearing.

Evidence regarding whether Smith is unlawfully enforcing his judgment is irrelevant to an inquiry of the debtor’s failure to make payment to the Trustee and to comply with other obligations imposed on him by orders of this Court. The Court is unpersuaded by the debtor’s argument that he was not effectively represented by counsel at the April 11, 2007, hearing since it is the debtor’s prior failure to comply with orders of the Court which ultimately led to dismissal of this case.

By way of review, the debtor’s failure to comply with the Notice of Deficient Filing issued on October 19, 2005 (Document No. 4), led to the first dismissal of this case. The debtor also failed to comply with the Preconfirmation Order (Document No. 30) by failing to timely remit payment to the Trustee in the form of a cashier’s check or money order. The debtor further

⁴ “Loans” to a debtor to support plan payments are not “regular income.” Thus, the debtor is ineligible to be a Chapter 13 debtor. 11 U.S.C. § 109(e). Moreover, the debtor’s explanation that the “lender” had recently died raised substantial doubts about feasibility.

failed to make payment to the trustee as required by the December 22, 2006 order. The debtor did not timely amend his Chapter 13 plan, budget, and schedules I & J, as required by that order. This case has been little more than a device to delay Smith, rather than an effort to pay the claims of creditors pursuant to a plan.

The Court has twice reinstated this case in an attempt to give the debtor an opportunity to achieve compliance. For whatever reason, the debtor has demonstrated a clear pattern of neglect in achieving confirmation of a plan. The Court has considered the debtor's Motion for Rehearing, together with the record, and finds that it is without merit and, therefore, should be denied. Accordingly, it is hereby

ORDERED:

1. The Motion for Rehearing (Document No. 136) filed by the debtor on April 27, 2007, as amended and supported by the document filed on May 2, 2007 captioned Affidavit of Brian Heron in Support of Motion for New Trial, Evidentiary Hearing, Findings and/or Rehearing to Reconsider Order Denying Confirmation and Dismissal (Document No. 137) is denied.

2. Creditor's Motion to Strike the debtor's filed documents by creditor, Charles A. Smith (Document No. 139) is denied as moot.

3. The debtor's Emergency Motion to Respond to Creditor's Motion to Strike (Document No. 140) is denied as moot.

DONE and ORDERED in Tampa, Florida, this 29th day of May, 2007.

/s/ K. Rodney May
K. RODNEY MAY
United States Bankruptcy Judge

Copies Furnished To:

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