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U.S. BANKRUPTCY COURT

New Mexico

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Case Name: Romero v. Gonzales
Case Number: 03-01303-s
Document Number: 35

Docket Text:
Memorandum Opinion and Order Denying Motion To Reconsider (Related Doc # [32]) (jeb)

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
MARY ROMERO,
Debtor. No. 7-03-13011 S

MARY ROMERO,
Plaintiff,
v. Adv. No. 03-1303 S

MICHAEL ANTHONY GONZALES,
Defendant.

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER, TO AMEND OR MAKE ADDITIONAL FINDINGS OF FACT, AND TO REOPEN EVIDENCE

This matter is before the Court on Plaintiff's Motion to Reconsider, to Amend or Make Additional Findings of Fact, and to Reopen Evidence ("Motion")(doc 32), Defendant's Response (doc 33), and Plaintiff's Memorandum in Support of Motion (doc 34).[1] The Judgment Plaintiff seeks the Court to reconsider or amend was entered on February 10, 2006 (doc 31), with an accompanying Memorandum Opinion (doc 30). The Motion was filed on February 17, 2006. Any motion filed within ten days of the entry of a judgment that questions the correctness of the judgment is properly treated as a Rule 59(e) motion, regardless of how it is styled or construed. Phelps v. Hamilton, 122 F.3d 1309, 1323-24 (10th Cir. 1997).

[1]This is a core proceeding. 28 U.S.C. § 157(b)(2)(I). All statutory references are to the Bankruptcy Code as it existed before the changes of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Motions under Rule 59(e) to alter or amend a judgment should be granted only to present newly discovered evidence or to correct manifest errors of law. Id. At 1324. See also Adams v. Reliance Standard Life Ins. Co., 225 F.3d 1179, 1186 n. 5 (10th Cir. 2000)(Same.)

The Motion does not allege newly discovered evidence. Rather, it asks the Court to reopen the record to take additional evidence of facts that existed at the time of trial and that could have been introduced at that time.

The Motion alleges that the Court erred in not awarding damages for Plaintiff's loss of equity in her former residence because the four elements of section 523(a)(2)(A) were met. Plaintiff's Motion, page 3, identifies the four elements of section 523(a)(2)(A) as being:

a. The debtor made a false representation.
b. The debtor knew the representation was false when made.
c. The debtor intended to deceive the creditor; and
d. The creditor relied on the representation to his or her detriment.

Plaintiff cites Fowler Bros. v. Young (In re Young), 91 F.3d 1367 (10th Cir. 1996) for these elements, and acknowledges that under Field v. Mans, 516 U.S. 59 (1995) the creditor's reliance need only be "justifiable" rather than "reasonable." However, Plaintiff essentially concedes (Motion, page 3) the Young test is a five part test:

> The debtor made a false representation; the debtor made the representation with the intent to deceive the

> creditor; the creditor relied on the representation; the creditor's reliance was reasonable[2]; and the debtor's representation caused the creditor to sustain a loss.

Young, 91 F.3d at 1373 (emphasis added.) See also Chevy Chase Bank FSB v. Kukuk (In re Kukuk), 225 B.R. 778, 784 n.5 (10th Cir. B.A.P. 1998)(Listing the five elements of Young, noting how Field modified it, and suggesting that the Restatement (Second) of Torts (1976) § 525[3] is a more accurate test.); Missouri v. Audley (In re Audley), 275 B.R. 383, 388 (10th Cir. B.A.P. 2002)(Five part test, including causation.)

The problem in this case is not that the Court awarded incorrect damages, as claimed in Plaintiff's Memorandum, but rather that the Defendant's representations regarding the real property did not cause Plaintiff's damages. "However, what Ms. Romero's losses were that were caused by the misrepresentations is less obvious. Concerning 1833 Patrick, it appears clear that Ms. Romero was not and would not have been able to maintain the property." Memorandum Opinion, p. 13. Although the Court did

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[2]As noted above, after Field v. Mans the reliance need only be justifiable.

[3]Restatement (Second) of Torts (1976) § 525 defines "misrepresentation" as:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

(Emphasis added.) Kukuk, 225 B.R. at 783-84.

find the other elements of a section 523(a)(2)(A) claim with respect to the real property, the Court could not find that the misrepresentations caused any damages to Plaintiff.

Plaintiff argues that under John Deere Co. v. Gerlach (In re Gerlach), 897 F.2d 1048, 1051 (1990) discharge is an "all or nothing proposition"[4] and that, once fraud was proven the entire debt that flowed from the fraud should be nondischargeable. First, fraud was not proven; Plaintiff did not prove by a preponderance of the evidence that the misrepresentations caused her losses. Second, to the extent that Gerlach stands for the proposition that causation is not required, it was overruled by Field, 516 U.S. at 66 ("No one, of course, doubts that some degree of reliance is required to satisfy the element of causation inherent in the phrase 'obtained by'...") and at 66-67 (Stating that if § 523(a)(2)(A) had no reasonableness requirement for reliance there would be no causal connection between the misrepresentation and the transfer of value, eliminating scienter from the notion of fraud.)

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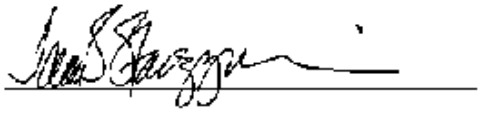
[4]Gerlach cites Birmingham Trust Nat'l Bank v. Case, 755 F.2d 1474, 1477 (11th Cir. 1985) for the proposition that discharge is an "all or nothing" proposition. Case was decided under former law, before section 523(a)(2) was amended to include the words "to the extent obtained by." See Pub L. No. 98-353, 98 Stat. 333 (1984). The Eleventh Circuit Court of Appeals has since commented that the Case result was superceded by statute. Griffith v. United States (In re Griffith), 206 F.3d 1389, 1394 (11th Cir.), cert. denied, 531 U.S. 826 (2000). Therefore, there is a real question regarding Gerlach's continuing persuasiveness.

The Court has reviewed the Memorandum Opinion issued in connection with the Judgment, and believes that there is no manifest error of law. The Motion for Reconsideration should be denied.

IT IS ORDERED that Plaintiff's Motion to Reconsider, to Amend or Make Additional Findings of Fact, and to Reopen Evidence is denied.



Honorable James S. Starzynski
United States Bankruptcy Judge

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