UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re	)	
	)	
RONALD D. GEDDA,	)	Case No. 6:13-bk-02238-KSJ
	)	Chapter 7
Debtor.	)	
	)	

ORDER DENYING SURETY BANK'S MOTION FOR RECONSIDERATION

Creditor, Surety Bank, seeks reconsideration my Order denying Surety's Motion for Order Determining that Proof of Claim was Timely Filed.[1] In the underlying motion,[2] Surety sought to have its late-filed claim considered timely filed under § 726(a)(2)(C) of the Bankruptcy Code.[3] The Court conducted an evidentiary hearing[4] and found Surety failed to demonstrate sufficient excusable neglect to permit the late-filed claim to be considered timely. Surety now asserts reconsideration is necessary to correct clear and manifest injustice. After reviewing Surety's Motion for Reconsideration[5] and the Debtor's Response,[6] the Court denies Surety's request for reconsideration.

Surety filed its proof of claim on August 8, 2013—24 days after the July 15, 2013 claims filing deadline of July 15, 2013.[7] Surety then filed its motion seeking to have its claim deemed timely filed[8] to avoid having the claim subordinated behind timely-filed claims pursuant to

[1] Doc. No. 67.
[2] Doc. No. 29.
[3] All references to the Bankruptcy Code are to 11 U.S.C. § 101 *et seq.* Although Surety did not cite to a single statute or case supporting its request, § 726(a)(2)(C) of the Bankruptcy Code is the only statutory basis available to treat Surety Bank's claim on par with other timely filed general unsecured claims.
[4] The hearing was held on April 7, 2014.
[5] Doc. No. 72.
[6] Doc. No. 74.
[7] Claim 6-1. Surety's $932,391.02 claim stems from two state court deficiency judgments entered against Gedda. The deficiency judgments precipitated Gedda's bankruptcy filing.
[8] Doc. No. 29.

§ 726(a)(3) of the Bankruptcy Code. Surety argued its claim should be deemed timely filed because Surety never received the Notice Fixing Time for Filing Claims (the "Notice").[9] Surety argued: (1) the zip code listed for Surety on the Notice was incorrect, and (2) Gedda sent a notice Nord L. Johnson, an attorney who Gedda knew no longer represented Surety.[10]

After an evidentiary hearing on the motion, the Court issued its oral ruling finding: (i) the Notice was sent to Surety's physical address which is the correct address for the Bank, (ii) Surety had *actual* knowledge of the bankruptcy case as evidenced by the Suggestion of Bankruptcy filed in the pending state court proceedings involving the Debtor and Surety Bank and the attendance of Surety's attorney at the 341 hearing held on April 11, 2013, and (iii) Surety produced no testimony showing when or how it eventually received notice of the claims filing deadline. Surety simply failed to establish excusable neglect, as delineated by *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*,[11] to justify classifying Surety's claim as timely. The Court therefore ruled the claim is properly treated as a subordinate claim under § 726(a)(3).[12]

Surety now asks the Court to reconsider this ruling.[13] Under Federal Rule of Civil Procedure 59(e),[14] a motion for reconsideration must "demonstrate why the court should

[9] Doc. No. 7. See also the Certificate of Notice (Doc. No. 8) providing the Notice was mailed to "Surety Bank, 990 N Woodland Blvd, Deland, FL 32720-2766."

[10] The notice sent to Nord Johnson was sent *in addition* to the notice sent directly to Surety at its central office.

[11] *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (U.S. 1993).

[12] For a claim to be allowed as timely filed under § 726(2)(C) the creditor must show that it "did not have notice or actual knowledge of the *case* in time for timely filing of a proof of claim." 11 U.S.C. § 726(2)(C) (emphasis added). Surety clearly had notice of the case, as evidenced by its attorney's attendance at the 341 meeting held long before the claims bar date. *See Ford Bus. Forms, Inc. v. Sure Card, Inc.*, 180 B.R. 294, 297 (S.D. Fla. 1994) ("[S]ection 726 subordinates claims of creditors who filed late despite having "notice or actual knowledge of the case.").

[13] Doc. No. 72.

[14] Surety incorrectly characterizes its motion for reconsideration as a Rule 60 motion; it is properly treated as a motion to alter or amend under Rule 59(e). The style of the motion is not controlling; courts are free to consider a motion for reconsideration as made under either rule, depending on the substance of the motion and the type of relief sought. *See e.g., Mays v. U.S. Postal Serv.*, 122 F.3d 43, 46 (11th Cir. 1997); *Lucas v. Florida Power & Light Co.*, 729 F.2d 1300, 1302 (11th Cir. 1984). "Rule 59 applies to motions for reconsideration of matters encompassed in a decision on the merits of the dispute, and not matters collateral to the merits." *Lucas*, 729 F.2d at 1301. *See also Travelers Casualty & Surety Co. v. Thorington Elec. & Const. Co.*, 2010 WL 743138, at *1 (Bankr. M.D. Ala. 2010) (citing *Finch v. City of Vernon*, 845 F.2d 256, 258 (11th Cir. 1988)) (If a party's motion seeks reconsideration of a substantive aspect of the underlying judgment, "Rule 59 is the appropriate vehicle . . . .").

reexamine its prior decision, and 'set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.'"[15] "A motion for reconsideration cannot be used 'to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.'"[16] "Courts have recognized three grounds for justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear and manifest injustice. The court will not reconsider when a motion does not raise new issues, but only relitigates what has already been found lacking."[17]

Surety bases its Motion for Reconsideration on the need to correct clear and manifest injustice and argues three points warrant reconsideration: (1) Gedda made a false statement at the evidentiary hearing, (2) Gedda failed to notify Surety's *current* attorney in the state court proceedings of the bankruptcy claims deadline, and (3) the facts presented at the hearing rebutted any presumption that Surety received the claims deadline notice.[18] All of these arguments either reargue points raised at the evidentiary hearing or seek to raise new arguments and evidence that Surety could have raised but did not.

Moreover, none of these arguments hold any weight. Surety has not put forth any new facts showing excusable neglect in failing to timely file its proof of claim. A "creditor who receives actual knowledge of the bankruptcy is put on inquiry notice of the proceedings. It then becomes the creditor's duty to inquire as to the bar date for filing a nondischargeability complaint or proof of claim."[19] "[S]ection 726 subordinates claims of creditors who filed late

[15] *United States v. Kiester (In re Envirocon Int'l Corp.)*, 218 B.R. 978, 979 (M.D. Fla. 1998) (quoting *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294 (M.D. Fla. 1993)).
[16] *Kight v. IPD Printing & Distributing, Inc.*, 427 F. App'x 753, 755 (11th Cir. 2011) (quoting *Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005)).
[17] *Envirocon*, 218 B.R. at 979-980 (citing *Kern-Tulare Water Dist v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986) and *Government Personnel Services, Inc. v. Government Personnel Mutual Life Insurance Co.*, 759 F. Supp. 792 (M.D. Fla. 1991)).
[18] Doc. No. 72.
[19] *In re Layman*, 131 B.R. 495, 497 (M.D. Fla. 1991).

despite having 'notice or actual knowledge of the case.'"[20] Section 726 subsections (a)(2)(C) and (a)(3) "could not be any clearer in their treatment of tardily filed claims."[21] Congress specifically chose to subordinate a creditor's late-filed claim if it had actual knowledge of the bankruptcy case.[22]

The record clearly shows Surety had actual and timely knowledge of the Gedda bankruptcy case. Surety's bankruptcy attorney attended and participated in the Debtor's 341 hearing. Surety's state court proceedings against Gedda specifically were stayed because of the bankruptcy. Surety was under inquiry notice of the claims bar date.[23] The fact that Gedda served Surety's prior attorney in addition to directly serving Surety with a notice of the claims bar date is irrelevant. Although the Court sympathizes with Surety, the statute is clear and does not afford any avenue to allow a late-filed claim under § 727(a)(2)(C) when a creditor has actual knowledge of the bankruptcy case and simply failed to timely file a claim. The Court stands by its prior decision. Surety failed to demonstrate any error, much less any clear or manifest injustice. Accordingly, it is

ORDERED that Surety Bank's Motion for Reconsideration (Doc. No. 72) is denied.

DONE AND ORDERED in Orlando, Florida, March 6, 2015.

KAREN S. JENNEMANN
Chief United States Bankruptcy Judge

Raymond Rotella, Attorney for the Debtor, is directed to serve a copy of this Order on interested parties and file a proof of service within 3 days of entry of the Order.

[20] *Ford Bus. Forms, Inc. v. Sure Card, Inc.*, 180 B.R. 294, 297 (S.D. Fla. 1994).
[21] *Matter of Osman*, 164 B.R. 709, 713 (Bankr. S.D. Ga. 1993).
[22] *See id.* ("The legislative history to section 726(a) only supports this construction.").
[23] *Cf. In re Alton*, 837 F.2d 457, 460-61 (11th Cir. 1988) (interpreting nearly identical language in 11 U.S.C. § 523(a)(3)(b) and holding that the creditor "received actual written notice of the bankruptcy proceeding, a notice adequate 'to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections.'" (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950))).