

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:14-bk-08659-FMD
Chapter 7

Pasquale B. Narcisi, II,

Debtor.

Marjorie and Norman Aamodt,

Plaintiffs,

v. Adv. Pro. No. 9:15-ap-058-FMD

Pasquale B. Narcisi,

Defendant.

**ORDER DENYING PLAINTIFFS'
MOTION FOR RECONSIDERATION**

THIS PROCEEDING came on for consideration, without a hearing, of *Plaintiffs' Motion for Reconsideration of Final Judgment of October 15, 2015* (Doc. No. 46) (the "Motion"). Plaintiffs state six arguments in support of the Motion and ask this Court to reconsider its *Memorandum Opinion and Order on Plaintiffs' Amended Motion for Summary Judgment* (Doc. No. 37) (the "Summary Judgment Order") and the corresponding *Final Judgment* (Doc. No. 41). As discussed, below, the Motion does not meet the standard for a motion for reconsideration. Therefore, the Court will deny the Motion.

A. Standard for Motions for Reconsideration

The Eleventh Circuit Court of Appeals, whose decisions are binding on this Court, has stated that motions for reconsideration that focus on the merits of the dispute, call into question the correctness of the judgment, and are filed within the time period to file an appeal are treated as a

motion for a new trial or to alter or amend a judgment under Federal Rule of Civil Procedure 59(e).¹ Because Plaintiffs cite numerous purported grounds of gross error, the Court deems the Motion, which was filed within the 14-day appeal period, to have been filed under Federal Rule of Civil Procedure Rule 59(e), which is incorporated by Federal Rule Bankruptcy Procedure 9023. To the extent the Motion is deemed to have been filed under Federal Rule of Civil Procedure 60, the standard for reconsideration is generally the same.²

To prevail on the Motion, Plaintiffs must demonstrate that the Court committed clear legal error that would result in a manifest injustice, that there has been an intervening change in controlling law, or that new evidence is available that could not have been presented prior to the entry of judgment.³ A motion for reconsideration should not be used to reiterate arguments previously made but is appropriate when the court has patently misunderstood a party or made an error not of reasoning but of apprehension.⁴ "Such problems rarely arise and the motion to reconsider should be equally rare."⁵ Motions for reconsideration are viewed with disfavor. Courts have discretion in whether to grant a motion for reconsideration, and the court's denial of a motion for reconsideration is reviewed for an abuse of discretion.⁶

B. Background

Because the facts of this case were fully discussed in the Summary Judgment Order, the Court will not repeat them in detail here. Briefly, thirty years ago, Plaintiffs contracted with Defendant to conduct an auction of their personal

¹ *Finch v. City of Vernon*, 845 F.2d 256, 258-59 (11th Cir. 1988).

² *Howard v. Nano*, 2012 WL 3668045 (N.D. Fla. Aug. 25, 2012) (noting that a Rule 60(b)(1) motion is typically granted to correct only a mistake of law or fact).

³ *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002).

⁴ *Id.*

⁵ *Id.* (internal citation omitted).

⁶ *Alexander v. HarperCollins Publishers, Inc.*, 132 F. App'x 250, 251 (11th Cir. 2005).

property. They were to receive a minimum of \$25,000 from the auction proceeds. When they received less than the \$25,000 from Defendant, they sued him in Pennsylvania state court. In 1994, Plaintiffs obtained a judgment against Defendant in the amount of \$61,326.67, including accrued interest, for breach of the auction agreement due to his failure to conduct the auction on the agreed terms.

When Defendant filed his Chapter 7 bankruptcy, Plaintiffs filed a complaint to determine that their claim was excepted from discharge under 11 U.S.C. § 523(a)(4) as a debt incurred by fraud while acting in a fiduciary capacity. Plaintiffs then filed a motion for summary judgment, seeking judgment against Defendant on that theory as well as on newly stated grounds of embezzlement and larceny under 11 U.S.C. § 523(a)(4).

The Court treated the motion for summary judgment on the newly stated grounds as a motion for leave to file an amended complaint; the Court found that the larceny claim related back to the facts originally alleged in Plaintiffs' complaint, but that the embezzlement claim relied upon facts not previously alleged. Therefore, the Court granted the deemed "motion for leave to amend" as to the larceny claim and denied it as to the embezzlement claim.

After consideration of Plaintiffs' claims for fraud and larceny under 11 U.S.C. § 523(a)(4), the Court concluded that there was no likelihood that Plaintiffs would prevail on their claims and granted summary judgment in Defendant's favor. This timely filed motion for reconsideration followed.

C. Plaintiffs' Motion for Reconsideration

Plaintiffs' arguments in support of their Motion are discussed as follows.

1. *Plaintiffs Argue that the Court Erred by Overlooking Pennsylvania's Auctioneer Licensing and Trading Assistant Registration Act.*

Plaintiffs contend that the Court overlooked Pennsylvania (the state where the subject auction occurred and the underlying lawsuit was filed) statutes governing the licensure of auctioneers and the duties of auctioneers in conducting auctions. Plaintiffs contend that these statutes, including the requirement that an auctioneer post a bond, created a fiduciary relationship between them and Defendant.

The Court has reviewed the Auctioneer Licensing and Trading Assistant Registration Act (the "Act").⁷ An auctioneer's obligation to post a bond is addressed in § 734.13 of the Act. Section 734.13(a) requires an auctioneer to post a bond as a pre-condition to the issuance of a license by the State Board of Auctioneer Examiners (the "Board"). Section 734.13(b) states that:

The condition of the bond shall be that the licensee . . . will comply with and abide by the provisions of this act and will pay to . . . any person or persons any and all money that may come due . . . the person or persons from a licensee. . . under and by virtue of this act.

Section 734.13(c), entitled "Action on bond," states that:

If any person is aggrieved by the misconduct of any licensee . . . and recovers judgment against the licensee . . . , the person may, on any execution issued under the judgment, maintain an action upon the bond of the licensee . . . in any court having jurisdiction of the amount claimed.

It is clear from the statutory text that the requirement to post a bond is regulatory in nature. Section 734.13 provides a nominal source of recovery if a party who contracted with an

⁷ See Pennsylvania Statutes, Title 63, Chapter 21A, §§ 734.1 – 734.34. In their Motion, Plaintiffs cite to P.L. 1080, No. 89, Cl. 63, dated October 8, 2008; that citation refers to the 2008 public law that amended the text of certain statutory provisions within the Auctioneer Licensing and Trading Assistant Registration Act.

auctioneer suffers a loss and obtains a judgment against the auctioneer. Section 734.13(c) clarifies that the bond serves as an easy source for execution by such a judgment holder. But the regulatory requirement to post the bond creates no fiduciary relationship between an auctioneer and any of the auctioneer's future clients, let alone the type of fiduciary relationship contemplated by 11 U.S.C. § 523(a)(4).

The Court reviewed the other provisions of the Act to ascertain whether a fiduciary relationship is created under the Act. Many of the statutes that comprise the Act address the regulatory and administrative functions and powers of the Board. For example, § 734.20 governs the Board's authority (and when a written complaint is filed, its obligation) to investigate alleged wrongful conduct of an auctioneer and to impose penalties if the investigation results in certain findings. The statute itself, however, does not impose fiduciary duties on auctioneers.

The only three statutes that appear to address directly the obligations that an auctioneer owes to the parties with whom he has contracted are §§ 734.16, 734.17 and 734.21. Sections 734.16 and 734.17, however, provide further support for the Court's conclusion that the relationship between an auctioneer and his client is contractual in nature, not fiduciary.

Section 734.17 is entitled "Contracts for conduct of transaction." It requires auctioneers to enter into written contracts with the owners of the property being sold prior to the auctioneer's conducting an auction or transaction. The parties' contract must contain the terms and conditions upon which the auctioneer agrees to conduct the sale. However, those terms are contract-specific, and the statute does not set forth certain prescribed or proscribed conduct. It simply requires the existence of a written contract.

Section 734.16 governs an auctioneer's duty to keep records and requires the auctioneer to maintain a record of, among other things, the written contract required by § 734.17. Auctioneers must also provide receipts for all transactions. These requirements appear to be for the benefit of

the Board, primarily, to facilitate an investigation that might be commenced under § 734.20.

Section 743.21 requires an auctioneer to account for all monies received. While, in theory, this duty to account could rise to the level of a fiduciary relationship, Plaintiffs have not alleged that Defendant failed to account for all monies he received. Rather, they complain that Defendant conducted the auction in a manner that was contrary to their agreement, resulting in Plaintiffs' receiving less than the amount promised by Defendant. For example, in Mrs. Aamodt's affidavit filed with her complaint, she stated:

9. Mr. Narcisi admitted that he had already sold many of our pieces as "Friday night sales."
10. We observed that Mr. Narcisi sold our items at public action without attempting to work up the bid.
11. The amounts Mr. Narcisi obtained for the closets and cupboards were far lower than he and other dealers/auctioneers had estimated.⁸

Having reviewed all relevant portions of the Act, the Court concludes that the Act itself does not create the type of fiduciary relationship between the Plaintiffs and Defendant referenced in 11 U.S.C. § 523(a)(4). The concept of a "fiduciary" under the Bankruptcy Code is substantially narrower than the concept of a "fiduciary" under state law.⁹ For purposes of an exception to discharge, the traditional meaning of "fiduciary," including relationships involving confidence, trust, and good faith, are far too broad.¹⁰ Instead, there must be an express or technical trust, which exists when there is a segregated trust *res*, an identifiable trust beneficiary, and trust-like duties that are established by contract or statute.¹¹ Because the Act does not create a fiduciary relationship as

⁸ Doc. No. 1, p. 4.

⁹ *In re Pupello*, 281 B.R. 763, 767 (Bankr. M.D. Fla. 2002).

¹⁰ *Id.*

¹¹ *Id.*

required for a finding of non-dischargeability under 11 U.S.C. § 523(a)(4), the Court finds that it need not reconsider its ruling.

2. Plaintiffs Argue that the Court Erred in Finding Defendant Did Not Commit Fraud.

Plaintiffs next argue that the Court erred in not finding for them on their fraud claim. They assert that all the elements of fraud exist and that the Court acknowledged these elements in the Summary Judgment Order. Unfortunately, it appears that Plaintiffs may have misread the Court's Summary Judgment Order; page 10 of the Summary Judgment Order merely sets forth a verbatim recitation of Plaintiffs' argument in their summary judgment motion.¹²

It is important to note that Plaintiffs specifically filed their complaint under 11 U.S.C. § 523(a)(4), which requires that the alleged fraud occur while Defendant was acting in a fiduciary capacity. Plaintiffs failed to plead a claim under 11 U.S.C. § 523(a)(2)(A), which excepts from discharge debts to the extent obtained by false pretenses, a false representation, or actual fraud. Notwithstanding their failure to plead a claim under 11 U.S.C. § 523(a)(2)(A), the Court still analyzed Plaintiffs' fraud claims in its Summary Judgment Order.

The allegations supporting Plaintiffs' fraud claim, as set forth in their motion for summary judgment are: that Defendant "could only have conducted the auction in a less than vigorous manner, ('carelessly'), because he intended to do so, whereas [Plaintiffs], understandably, took [Defendant] at his word," and that Defendant's fraud is shown by:

- (1) Narcisi's false statement of material fact by promising an auction of their items on a date certain and guarantee to pay the Aamodts a minimum of \$25,000, net, . . . and (2) Narcisi's intent to falsify by guarantee of \$25,000, net, after appraisal of approximately \$20,000, . . . and (3) Narcisi's intent to deceive the

¹² Doc. No. 37, p. 10.

Aamodts as shown by his immediate disposal of most of the Aamodts items by private sales for approximately \$2,000, . . . and (4) the Aamodts' justifiable reliance on Narcisi due to his agreement to auction their items near Philadelphia and guarantee of a minimum payment of \$25,000, net,¹³

As explained in the Summary Judgment Order, each of Plaintiffs' allegations supports a claim for breach of contract, not for fraud. There is no basis for the Court to reconsider its ruling.

3. Plaintiffs Argue That the Court Erred in Finding that Defendant Did Not Commit Larceny.

The Court ruled that Defendant did not commit larceny as a matter of law because he did not unlawfully obtain Plaintiffs' property. Plaintiffs have acknowledged that they voluntarily turned over possession of their property to Defendant so that he could conduct an auction in accordance with their agreement.¹⁴ The voluntary nature of the turnover of the property to Defendant means that the taking of the property was not unlawful.¹⁵ Defendant's failure to conduct the auction as agreed does not constitute larceny.

4. Plaintiffs Argue that the Court Erred Because of Bias or Prejudice against Them.

Plaintiffs assert that the Court has shown bias or prejudice against them and in favor of Defendant because it has not found that Defendant committed fraud or larceny. But an adverse ruling does not demonstrate bias or prejudice.¹⁶

¹³ Doc. No. 30, p. 10-11.

¹⁴ Doc. No. 1, p. 3 (Affidavit of Mrs. Aamodt, ¶ 7).

¹⁵ *In re Pupello*, 281 B.R. at 768 (larceny requires the original taking of the property in question to be unlawful; where plaintiffs voluntarily turned property over to defendant, there can be no finding of larceny).

¹⁶ *See Rigaud v. Broward Gen. Med. Ctr.*, 404 F. App'x 372, 374 (11th Cir. 2010) (adverse rulings do not constitute pervasive bias); *Busse v. Lee County, Fla.*, 2010 WL 427418, at *1 (M.D. Fla. Feb. 1, 2010) (adverse rulings against a party's position are not grounds for recusal).

Plaintiffs' disagreement with the Court's ruling is not a proper basis for a motion for reconsideration.

The Clerk's Office is directed to serve a copy of this Order on Plaintiffs and Defendant via U.S. Mail.

5. *Plaintiffs Argue that the Court Erred in Not Finding Defendant's Defalcation.*

Plaintiffs' final argument is that the Court failed to address their defalcation argument. But the exception to discharge under 11 U.S.C. § 523(a)(4) for defalcation while acting in a fiduciary capacity requires Defendant to have acted in a fiduciary capacity when the defalcation occurred.¹⁷ Because the Court has already concluded that Defendant did not act in a fiduciary capacity, Plaintiffs' claim for defalcation fails. There is no basis for the Court to reconsider its ruling.

D. Conclusion

The only substantive issue raised by Plaintiffs in their Motion was their drawing the Court's attention to the Pennsylvania statutes governing auctions to support their contention that a fiduciary relationship existed between them and Defendant. But, as the Court has found, those statutes do not themselves create a fiduciary relationship between an auctioneer and his client. The balance of the issues raised by Plaintiffs consists of re-arguments of issues that the Court carefully considered in entering summary judgment in Defendant's favor.

Accordingly, it is

ORDERED that the Motion is **DENIED**.

DATED: November 30, 2015.

/s/ Caryl E. Delano

Caryl E. Delano
United States Bankruptcy Judge

¹⁷ *McDowell v. Stein*, 415 B.R. 584, 594 (S.D. Fla. 2009) (parsing the language of the statute).