

ORDERED.

Dated: September 14, 2022



Caryl E. Delano
Chief United States Bankruptcy Judge

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

In re:

Case No. 2:21-bk-00123-FMD
Chapter 13

Gregory Brian Myers,

Debtor.

Gregory Brian Myers,

Plaintiff,

vs.

Adv. Pro. No. 2:22-ap-007-FMD

U.S. Bank, NA, Successor Trustee to Bank of
America, NA, Successor in Interest to LaSalle
Bank NA, as Trustee, on Behalf of the Holders
of the WAMU Mortgage Pass-Through
Certificates, Series 2007-OA4,

Defendant.

**ORDER DENYING PLAINTIFF'S RULE 59(e) MOTION TO RECONSIDER,
ALTER OR AMEND ORDER DISMISSING ADVERSARY PROCEEDING**

THIS PROCEEDING came before the Court without a hearing on Plaintiff's *Rule 59(e) Motion to Reconsider, Alter or Amend Order Dismissing Adversary Proceeding* (the "Motion for Rehearing").¹ For the reasons explained below, the Motion for Rehearing is denied.

A. BACKGROUND

On February 10, 2022, Plaintiff, representing himself pro se, filed a Complaint against Defendant to determine the priority and extent of a lien claimed by Defendant, combined with an objection to Defendant's proof of claim.² On February 11, 2022, the Clerk of Court issued a summons.³ Plaintiff did not file a certificate of service reflecting service of the summons and Complaint on Defendant, and Plaintiff did not appear at pretrial hearings conducted by the Court on June 9, 2022, and August 25, 2022.⁴ On August 26, 2022, the Court entered an order dismissing the Complaint, without prejudice, for lack of prosecution (the "Dismissal Order").⁵

In the Motion for Rehearing, Plaintiff asserts that he did not appear at the pretrial hearings because of his belief that they would be continued pending the outcome of his appeal of an order in his main bankruptcy case (the "Appeal").⁶ In addition, Plaintiff asserts that he is "most concerned" that Defendant will contend that dismissal of the Complaint bars any future claims by Plaintiff against Defendant under the doctrines of res judicata or collateral estoppel.

B. DISCUSSION

Plaintiff filed the Motion for Rehearing under Fed. R. Civ. P. 59(e), as made applicable to this proceeding by Fed. R. Bankr. P. 9023. Reconsideration of an order under Rule 59(e) is an

¹ Doc. No. 18.

² Doc. No. 1.

³ Doc. No. 2.

⁴ Plaintiff is represented by counsel in his bankruptcy case, but represents himself, pro se, in this adversary proceeding. The pretrial hearings were held in conjunction with hearings in the main bankruptcy case; Debtor's counsel appeared at the hearings.

⁵ Doc. No. 12.

⁶ Plaintiff represents himself pro se in the Appeal (Main Case, Doc. No. 226).

extraordinary remedy to be granted sparingly because of the interest in the finality of orders and the conservation of judicial resources. In the Eleventh Circuit, the only grounds for granting a motion for reconsideration under Rule 59(e) are newly discovered evidence or manifest errors of law or fact.⁷ Plaintiff does not contend that he discovered any new evidence that was not known to him before the order was entered, and he has not shown that the Court made a manifest error of law or fact in entering the Dismissal Order.

First, even though Plaintiff was not present at the August 25 hearing, the Court addressed the issue of the pending Appeal. As Plaintiff recognizes in his Motion for Rehearing, the Court found that it had jurisdiction to rule in the adversary proceeding because the Appeal and the adversary proceeding relate to separate issues: the issue in the Appeal involves whether Plaintiff's Chapter 13 Plan provided for Defendant's debt, and the issue in the Complaint is whether Defendant has standing to assert the underlying debt.⁸ Plaintiff does not contend in the Motion for Rehearing that the Court's ruling on jurisdiction was erroneous.

Second, the Dismissal Order was entered solely on the grounds of Plaintiff's failure to prosecute the Complaint and expressly provides that the dismissal is without prejudice. Under Fed. R. Civ. P. 41(b), a dismissal for failure to prosecute operates as an adjudication on the merits "unless the dismissal order states otherwise." A dismissal order "states otherwise" if it expressly provides that the dismissal is without prejudice. It is well-established that an order dismissing a proceeding

⁷ *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting *In re Kellogg*, 197, F.3d 1116, 1119 (11th Cir. 1999)).

⁸ Doc. No. 15, Transcript of August 25, 2022 Hearing, p. 16.

“without prejudice” is not an adjudication on the merits under Rule 41(b) and has no res judicata or collateral estoppel effect on a subsequent claim.⁹

For these reasons, the Court concludes that Plaintiff did not establish that the Court made a manifest error in the Dismissal Order, and therefore has not established grounds for reconsideration under Rule 59(e).

Accordingly, it is

ORDERED that Plaintiff’s *Rule 59(e) Motion to Reconsider, Alter or Amend Order Dismissing Adversary Proceeding* (Doc. No. 18) is **DENIED**.

The Clerk’s office is directed to serve a copy of this order on interested parties via CM/ECF and upon Plaintiff by U.S. Mail.

⁹ *In re Hentges*, 350 B.R. 586, 591-92 (Bankr. N.D. Okla. 2006) (citations omitted). *See also In re William*, 2021 WL 2946141, at *8 (Bankr. N.D. Ga. July 13, 2021) (The “effect of the ‘adjudication on the merits’ contained in Rule 41(b), is that, *unlike a dismissal without prejudice*, a dismissal that is with prejudice bars refiling of the same claim in the same court in which the claim was originally filed.”) (emphasis added).