IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: STEVEN JACK KIKUT, Debtor **No. 5:09-bk-71717**
Ch. 7

ORDER DENYING DEBTOR'S MOTION TO ALTER OR AMEND

Before the Court is the *Debtor's Motion to Alter or Amend Judgment*, timely filed on December 26, 2017, pursuant to Federal Rule of Bankruptcy Procedure 9023, which incorporates Federal Rule of Civil Procedure 59. The motion concerns the Court's December 11, 2017 order denying the debtor's *Motion For Contempt For Violation of Discharge Order*. To prevail, the debtor would had to have proven by clear and convincing evidence that the creditors, Ocwen Loan Servicing, LLC [Ocwen] and Fay Servicing LLC [Fay], (1) had knowledge of the debtor's discharge and (2) willfully violated the discharge order by continuing collection activities. Without addressing the second element, the Court denied the debtor's motion for failure to prove by clear and convincing evidence the first element: that the creditors had knowledge of the debtor's discharge.

A motion under Rule 59 "affords relief only in extraordinary circumstances." *In re Crystalin, L.L.C.*, 293 B.R. 455, 465 (B.A.P. 8th Cir. 2003). The Eighth Circuit has recognized that a motion for reconsideration of a court's order serves the limited function of correcting "manifest errors of law or fact or to present newly discovered evidence" and should not be used "to tender new legal theories for the first time." *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988) (citing with approval *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.), as amended, 835 F.2d 710 (7th Cir. 1987)); *Innovative Home Health Care, Inc. v. P.T.–O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998) (same). It is against this legal background that the Court reviews the debtor's motion.

In his motion to alter or amend, the debtor raises three arguments: (1) that the Court erred by considering sua sponte the "affirmative defense of agency law" in its order denying the debtor's motion, (2) that the Court did not consider that the creditors had constructive notice of the debtor's discharge based on their actual notice of the debtor's bankruptcy, and (3) that the Court should have imputed actual knowledge of the debtor's discharge based on the knowledge of the mortgage holder, Bank of America (an argument that appears to directly contradict his first argument).

The debtor's first and third arguments are based on the law of agency. The debtor's first argument is that the Court made a manifest error of law when it applied the legal theory of agency law without any party raising or arguing agency. According to the debtor, "agency law is an affirmative defense not claimed by either defendant and therefore is waived." The debtor argues that because of the Court's "*sua sponte* grant of the affirmative defense of agency" in its order, the debtor did not have an opportunity to rebut the "defense."

The Court respectfully disagrees with the debtor's characterization of the Court's recital of agency law as "granting" an affirmative defense in favor of the creditors. Affirmative defenses are listed generally in Federal Rule of Bankruptcy Procedure 7008, which incorporates Federal Rule of Civil Procedure 8. Although the Court understands the list is not exhaustive, "agency" is not one of the eighteen enumerated affirmative defenses. Further, a motion for contempt for violation of the discharge injunction would be a contested matter under Federal Rule of Bankruptcy Procedure 9014. Rule 9014 does not incorporate Rule 7008, nor does a motion under Rule 9014 even require a response within which an affirmative defense would be raised. Fed. R. Bankr. P. 9014. The Court's finding that Bank of America's knowledge of the debtor's discharge was not imputed to the agent servicers was simply a conclusion of law based on the evidence presented to the Court by the parties and not the "granting" of an affirmative defense in favor of the creditors.

In the alternative, while first arguing that the Court overreached by applying agency law to the evidence presented, the debtor later argues that "actual knowledge should be imputed upon the defendants, OCWEN specifically, based on knowledge by the Mortgage Holder, Bank of America, whom they received transfer of the loan servicing from." That imputation of knowledge is precisely what the Court addressed in its order when discussing the established agency relationship between both Ocwen and Fay: "the knowledge of Bank of America is not imputed to its servicer." Despite his first argument that the Court resorted to agency law sua sponte without it being raised by the defendants, it is the debtor and not the defendants or the Court that would have to establish that an agency relationship existed between Bank of America and its servicers before knowledge could be imputed. That relationship was, in fact, established with the introduction of stipulated exhibits. The parties introduced as Stipulated Exhibit 9, a document identified as a Transfer Notice dated September 12, 2012. Page three of that document is titled *Notice of Assignment, Sale, or Transfer of Servicing Rights* and states clearly that the servicing of the debtor's mortgage loan is being transferred from Bank of America to Ocwen effective October 1, 2012. Similarly, the parties' Stipulated Exhibit 10 transfers those servicing rights from Ocwen to Fay, establishing an agency relationship between Fay and Bank of America.

By authorizing Ocwen to service Bank of America's mortgage loan, an agency relationship was created between Bank of America and Ocwen. *See Black's Law Dictionary* 64 (7th ed. 1999) (an agent is defined as "[o]ne who is authorized to act for or in place of another"). Under Arkansas law, an agency cannot be presumed but must be proven. *Oliver Const. Co. v. Erbacher*, 234 S.W. 631, 632 (Ark. 1921). In this instance, the notices of assignment, sale, or transfer the parties introduced as stipulated exhibits are part of the record and establish and prove the agency relationship between Ocwen, then Fay, and Bank of America. Based on the proven agency relationship, the Court looked to the law in the Eighth Circuit to determine whether Bank of America's knowledge of the debtor's discharge was or could be imputed to either of its agents. It was not and could

not have been. *Siharath v. Citifinancial Serv., Inc.* (*In re Siharath*), 285 B.R. 299, 304 (Bankr. D. Minn. 2002); *see also S.O.G.-San Ore-Gardner v. Missouri Pacific R.R. Co.*, 658 F.2d 562, 567 (8th Cir. 1981) ("it is well settled that an agent may rely upon the representations of his principal and that the principal's undisclosed knowledge is not imputed to him").

Finally, and for the first time, the debtor raises the issue of constructive notice and the argument that the creditors should have investigated the status of the debtor's bankruptcy when the debtor informed them that he had filed bankruptcy. This argument does not serve to correct an alleged manifest error of law or fact or present newly discovered evidence; rather, it simply appears to be raising a new legal theory in an attempt to prove the first element of the debtor's case. Regardless, while checking the bankruptcy court's records may be prudent, "failure to do so does not necessarily constitute a violation of a court order warranting a finding of contempt. In order for a party to be held in civil contempt for violating a court order, the party must have actual knowledge of that order." *In re Waswick*, 212 B.R. 350, 353 (Bankr. D.N.D. 1997) (citing *Hazen v. Reagan*, 16 F.3d 921, 924 (8th Cir 1994) ("Before a party can be held in contempt for violating a court order, he must have actual knowledge of the order and the order must be 'sufficiently specific to be enforceable.'" (quoting *Finney v. Ark. Bd. of Corrections*, 505 F.2d 194, 213 (8th Cir. 1974))).

In this case, the Court has no proof that either Ocwen or Fay had actual knowledge of the debtor's discharge. The debtor testified that he told the creditors that he had filed bankruptcy but never testified that he advised them that he had received a discharge. Nor did his previous bankruptcy counsel testify that he ever told Ocwen or Fay the debtor had received a discharge. Nor did either Ocwen or Fay receive a copy of the Court's order discharging the debtor when it was issued. Although the debtor testified that he was attempting at various times to refinance his residence after he received his discharge, he did not prove by clear and convincing evidence that Ocwen or Fay had actual knowledge

that the debtor had received a discharge. The debtor's theory of constructive notice based on the debtor telling Ocwen and Fay that he had filed bankruptcy is a theory that, perhaps, could have been raised at trial but it is not properly before the Court now. *Hagerman*, 839 F.2d at 414 ("A motion to alter or amend judgment cannot be used to raise arguments which could have been raised prior to the issuance of judgment.").

Accordingly, and for the reasons stated above, the debtor's motion to alter or amend the Court's judgment is respectfully denied.

IT IS SO ORDERED.

Ben Barry
United States Bankruptcy Judge
Dated: 01/12/2018

cc: Theresa L. Pockrus and Paul E. Gregory, attorneys for the debtor
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James Michael McPherson, attorney for Fay Servicing
Steven Kikut, debtor
U.S. Trustee