UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 21-40007
	)	Chapter 11
T & R SERVICE COMPANY	)	
Tax ID/EIN 46-0356387	)	DECISION RE: STEPHENE LEBERT
	)	AND THE MIKESELL LIVING TRUST'S
Debtor.	)	MOTION FOR RECONSIDERATION

The matter before the Court is Stephene Lebert and the Mikesell Living Trust's Motion for Reconsideration (doc. 179) regarding the September 28, 2021 order (doc. 176) denying their Motion for Extension of Time to File Proofs of Claim (doc. 135). For the reasons set forth below, their motion for reconsideration will be denied.

I.

Debtor T & R Service Company filed a chapter 11 petition in bankruptcy. The Bankruptcy Clerk served the notice of the commencement of the case on those parties listed on the creditor mailing list supplied by Debtor. The parties served included Stephanie (sic) Lebert and the Mikesell Living Trust. The notice set forth the deadline for creditors to file a proof of claim. The notice further explained, consistent with 11 U.S.C. § 502(a) and Fed.R.Bankr.P. 3003(c)(2): "If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan." (Italics in the original.) The notice also contained an internet address through which Debtor's schedules could be viewed. Although Debtor had scheduled each of their respective claims as contingent, unliquidated, and disputed, neither Lebert nor the trust filed a proof of claim by the deadline for doing so. Debtor also did not file proofs of claim on their behalf under Fed.R.Bankr.P. 3004.

In its first plan, Debtor proposed to pay Lebert's claim and the trust's claim in

full over time and with interest. The plan also stated each claim was "secured by a Note[,]" although Debtor had scheduled both claims as unsecured and Debtor had not referenced any security document or collateral in its schedules or the plan. Following a hearing, the Court denied confirmation of Debtor's first plan, in part because Debtor proposed to pay Lebert's and the trust's claims, though neither had an allowed claim under § 502(a) due to their failure to timely file a proof of claim, and in part because there was no record showing either had a secured claim.

Debtor soon filed a modified plan. The modified plan no longer expressly identified or treated Lebert's or the trust's claims. Instead, the modified plan stated the class of unsecured creditors would not include creditors whose claims were listed on Debtor's schedules as disputed, contingent, or unliquidated. Consequently, Lebert and the trust would not receive anything on their respective claims. Lebert and the trust filed a Motion for Extension of Time to File Proofs of Claim ("motion to extend time"). They also objected to the modified plan[1] and filed ballots rejecting the modified plan.[2]

In their motion to extend time–which was actually a motion to reopen the time for filing a proof of claim since the original deadline had expired–Lebert and the trust

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[1] In their objection to Debtor's modified plan, Lebert and the trust raised concerns about the modified plan's compliance with several code provisions. They also stated: "Debtor has not scheduled any evidentiary hearings regarding the six claims it has scheduled as disputed, contingent, or unliquidated, consequently all unsecured creditors are entitled to be paid under the plan." They did not cite any authority for this statement. Lebert and the trust also wanted to know why the persons in classes 5 and 6 were treated as secured when the modified plan said they were only secured by a note, and they argued Debtor should have to explain why the individuals in classes 5 and 6 were not included in class 7 as unsecured creditors.

[2] The trust initially filed a ballot accepting the modified plan but later filed an amended ballot rejecting it. An evidentiary confirmation hearing is set for November 15, 2021.

said Debtor's principal, their brother James A. Thompson ("Thompson"), had told them "he intended to pay them in full[,]" so neither filed a proof of claim. They went on to state in their motion that only when they received Debtor's modified plan did they learn their claims were scheduled as contingent, unliquidated, and disputed and they should have filed a proof of claim by the deadline. Citing *Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 388 (1993), they argued their "failure to file timely proofs of claim was excusable neglect because [they had] trusted their brother, who is President of Debtor."

Debtor timely responded to Lebert and the trust's motion to extend time and stated Thompson's conversation with the movants was that

> the intent of the Chapter 11 was for the company to pay some fraction of the obligations owed to them. The representation was that the payment would be more then [sic] if the business was simply closed. The terms of payment would not have been known at the time since no appraisal was completed nor plan projected.

Debtor went on to state Thompson had "made no misrepresentations to Movants as to what was required of them in the Chapter 11, nor discussed any legal requirements."

The Court set an evidentiary hearing on Lebert and the trust's motion to extend time. Several days later, before the first evidentiary hearing, Lebert and the trust filed a brief in support of their motion. They stated:

> [James A.] Thompson is the President of Debtor. Dan Thompson, David Thompson, William Thompson, Jennifer Watson, Stephene Lebert and Mikesell Living Trust (Liz Mikesell) are the six siblings of [James A.] Thompson. Each sibling is selling their one-sixth interest in T & R Service Company back to Debtor by a payment plan. Debtor has given each sibling a promissory note for approximately $142,000.00 dated in November 2019. In Debtor's bankruptcy it has scheduled all of the siblings claims as contingent, unliquidated and disputed. The undersigned has twice requested an explanation from Debtor's counsel

> why all of the sibling's claims are contingent, unliquidated and disputed but has not received a response.

Lebert and the trust argued a debtor's designation of a creditor's claim as disputed, contingent, or unliquidated must be done in good faith. They further stated Debtor had refused to explain why their siblings' claims were scheduled as disputed, contingent, and unliquidated and argued Debtor's scheduling them as such was done in bad faith, as were Thompson's statements to Lebert and Elizabeth Mikesell "that he intended to pay them in full through his bankruptcy plan when his bankruptcy schedules and plan clearly indicate a contrary intent." In the brief, they changed their request for relief and asked the Court to deem their claims as filed because Debtor should not have scheduled the claims as contingent, unliquidated, and disputed. They did not provide authority for this argument. Alternatively, Lebert and the trust requested they be given an extension of time to file their proofs of claim.

An evidentiary hearing on Lebert and the trust's motion to extend time was held September 28, 2021. Lebert acknowledged she received the notice of the commencement of the case in the mail in mid-January 2021 and the notice said she needed to file a proof of claim. Lebert assumed she was a creditor in the case, but twice testified–credibly and without hesitancy–she did not file a proof of claim because she was relying on her note as her claim. Only after her attorney questioned her a third time did Lebert testify she did not file a proof of claim because Thompson "told us he'd pay us." Lebert also testified she did not find out she was not being paid in full until she received the modified plan. She also said she was not fully aware of her other siblings' lawsuit in state court regarding their claims against Debtor until shortly before the evidentiary hearing on the motion to extend time.

On cross-examination, Lebert acknowledged Thompson never advised her to not file a proof of claim and never advised her to not talk to an attorney about the bankruptcy. She again acknowledged she had read the notice of the commencement of the case.

Elizabeth Mikesell[3] acknowledged she received the notice of the commencement of the case in mid-January 2021. She said Thompson reassured her she was going to be paid, and she said the first plan Debtor proposed did provide for payment of the trust's claim. She said she became aware in the spring of 2020 that some of her other brothers had sued Thompson.

Mikesell testified she did not file a proof of claim because she did not "feel like the bankruptcy had a lot to do with us [be]cause it seemed like it was spurred by disputes between other promissory note holders" and she had already renegotiated her note and was receiving payments. She said Thompson contacted her after Debtor's first plan was filed and encouraged her to vote for it. After Debtor's modified plan was filed, Mikesell said she contacted Thompson for clarification. Although the modified plan did not propose to pay the trust's claim, Mikesell said Debtor's attorney had told Thompson that did not mean she could not or would not be paid.[4] She understood that to mean she would be paid on her note.

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[3] Mikesell testified she and her husband set up the Mikesell Living Trust. She often testified as if she and the trust were the same.

[4] As a statement of law, this is correct. A debtor may voluntarily pay creditors whose claims are discharged. 11 U.S.C. § 524(f). Here, it is unclear whether Thompson was telling Mikesell he would personally pay the trust's note or if Debtor would do so. If Thompson was speaking on Debtor's behalf, Debtor could not voluntarily pay the trust until Debtor's required plan payments, including any disposable income obligation, were completed. *See* 11 U.S.C. §§ 1142, 1190(2), and 1191(b), (c), and (d).

On cross-examination, Mikesell acknowledged Thompson never advised her to not file a proof of claim and did not discourage her from contacting an attorney. She said she read the notice of the commencement of the case but not as closely as she should have.

Following the close of evidence and the receipt of argument, the Court entered oral findings and conclusions and denied Lebert and the trust's motion to extend time. Most notably, the Court did not find their failure to timely file proofs of claim arose from excusable neglect because Lebert and Mikesell had not relied on false or misleading statements by Thompson, Debtor's president, when they each decided not to file a proof of claim.

Lebert and the trust now ask the Court to reconsider that decision. In their motion to reconsider, Lebert and the trust quoted *In re Siegler Bottling Co.*, 65 B.R. 117 (Bankr. S.D. Ohio 1986), for the proposition that, as a matter of due process, creditors whose claims are listed as disputed, contingent, or unliquidated must be given specific notice of their right to file a proof of claim and that a failure to provide specific notice constitutes cause under Fed.R.Bankr.P. 3003(c)(3) for a court to order that specific notice of their classification be provided to such creditors. Debtor responded, noting motions to reconsider are frowned upon in this circuit and arguing the Supreme Court's opinion in *Pioneer Investment* supplants the constitutional issues espoused in *Siegler Bottling*. Debtor also argued Lebert and the trust had not made the required showing under Fed.R.Civ.P. 60(b) for them to be given relief from the order denying their motion to extend time.

Before the Court ruled on their motion for reconsideration, Lebert and the trust advanced, through a supplement to the motion, the theory that judicial estoppel

prevents Debtor from objecting to their motion to extend time because, in its original plan, Debtor proposed to treat them each as secured and pay them in full over time.[5] For the first time, Lebert and the trust also cited 11 U.S.C. § 502(j) for the proposition that a "claim that has been allowed or disallowed may be reconsidered for cause."

Debtor responded to the supplement, noting § 502(j) does not apply because the Court's earlier order did not allow or disallow a claim; the Court instead determined the time within which Lebert and the trust could timely file their respective proofs of claim would not be extended or reopened. Debtor also argued judicial estoppel does not apply because Debtor's modified plan is consistent with the schedules, where Lebert's and the trust's claims were listed as disputed, and because at the confirmation hearing on the first plan, the Court concluded they could not be treated in a plan because their claims were scheduled as disputed and neither had timely filed a proof of claim.

II.

In their motion for reconsideration, Lebert and the trust did not identify the statutory provision, the federal rule of bankruptcy procedure, or the federal rule of civil procedure under which they seek relief. Because they did not specify the grounds for the relief sought, the Court was required to examine both Federal Rule of Civil Procedure 59(e) and Federal Rule of Civil Procedure 60(b).[6] *Sanders v. Clemco Indus.*,

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[5] Lebert and the trust also seem to indicate judicial estoppel prevents Debtor from proposing, in its modified plan, to pay them nothing. Confirmation of Debtor's modified plan, however, is not yet before the Court.

[6] Federal Rule of Civil Procedure 59(e) is made applicable to contested matters in bankruptcy cases by Federal Rule of Bankruptcy Procedure 9023. Federal Rule of Civil Procedure 60(b) is made applicable to contested matters in bankruptcy cases by Federal Rule of Bankruptcy Procedure 9024.

862 F.2d 161, 168 (8th Cir. 1988). Upon that examination, the Court notes Lebert and the trust filed their motion for reconsideration within 14 days after the entry of the oral decision and the order, they did not identify any clerical mistake, oversight, or omission, and they did not tailor their legal argument in their motion to any of the several grounds for relief under Fed.R.Civ.P. 60(b). Accordingly, it appears Debtor is seeking reconsideration under Fed.R.Bankr.P. 9023 and Fed.R.Civ.P. 59(e).

Under Fed.R.Civ.P. 59(e), a court may alter or amend an order. A motion under rule 59(e) serves the limited function of correcting a manifest error of law or fact or allowing a party to present newly discovered evidence. *Continental Indemnity Co. v. IPFS of New York, LLC*, 7 F.4th 713, 717 (8th Cir. 2021). Rule 59(e) is not generally used to allow a party to introduce new evidence, tender new legal theories, or raise arguments that could have been raised before the original decision was entered, *id.*, or repeat arguments made and considered by the court, *Markel American Ins. Co. v. Diaz-Santiago*, 674 F.3d 21, 32 (1st Cir. 2012); *In re General Motors Corp. Anti-lock Brake Products Liability Litigation*, 174 F.R.D. 444, 446 (E.D. Mo. 1997) (quotation therein omitted). In short, the rule offers a court a chance to rectify its own mistakes in the period immediately following a decision. *Banister v. Davis*, 140 S.Ct. 1698, 1703 (2020) (quoting *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 450 (1982) (citations therein omitted)). The court is given broad discretion whether to grant or deny the motion. *Continental Indemnity Co.,* 7 F.4th at 717.

III.

In their motion for reconsideration, Lebert and the trust did not, as noted above, identify any manifest error of law or fact in the Court's September 28, 2021 oral decision and the attendant order. Likewise, the Court is unable to discern one on its

own review. Lebert and the trust also did not set forth any newly discovered *evidence* that would be material regarding the Court's application of Fed.R.Bankr.P. 9006(b)(1), as interpreted by *Pioneer Investment*. Instead, in their motion for reconsideration and in their subsequent supplement, Lebert and the trust advanced new legal theories that could have been raised before the evidentiary hearing. Accordingly, Lebert and the trust's motion for reconsideration must be denied. The circumstances presented, through the evidence offered at the September 28, 2021 hearing, clearly showed Lebert chose not to file a proof of claim because she thought her note was her claim and the trust chose not to file a proof of claim because Mikesell thought the bankruptcy did not have a lot to do with her and she already had renegotiated her note. Thompson did not play a role in their decisions not to file proofs of claim. Further, Thompson provided unrebutted testimony regarding why Debtor scheduled all the similarly situated note holders, including Lebert and the trust, as holding claims that were contingent, unliquidated, and disputed[7] and his explanation did not sound in bad faith.

Even if Lebert and the trust had timely advanced their alternate legal theories, the result of the September 28, 2021 hearing would have been the same. The Court respectfully disagrees with the bankruptcy court's decision in *Siegler Bottling*, which is not binding on the Court, in contrast to the Supreme Court's opinion in *Pioneer Investment*. Instead, this Court joins the majority of courts and finds the notice of the commencement of the case, which included the deadline to file a proof of claim, was not constitutionally deficient. *In re Nutri*Bevco, Inc.*, 117 B.R. 771, 778-84 (Bankr.

[7] Debtor scheduled William Thompson's claim "only" as contingent and unliquidated, not as disputed.

S.D.N.Y. 1990) (citations therein). As determined by the Court based on the evidence adduced at the September 28, 2021 hearing, Lebert and the trust each received the notice of the commencement of the case. The notice used by the Bankruptcy Clerk was the official form for such notice. The notice set forth in clear and unambiguous terms the circumstances under which a creditor might be required to file a proof of claim and the consequences of failing to do so. The notice also told creditors how to review Debtor's schedules. Thus, the notice was reasonable and passes constitutional muster. *Id.* Moreover, when all the circumstances are considered, Lebert's and the trust's failure to act upon that notice and take the necessary action to protect their rights arose from their misunderstanding of the law, *i.e.*, they erroneously believed their respective notes were proofs of claim and the bankruptcy did not really affect them. That ignorance or misunderstanding of the law is not excusable neglect. *Hartford Casualty Ins. Co. v. Food Barn Stores, Inc.* (*In re Food Barn Stores, Inc.*), 214 B.R. 197, 200-01 (B.A.P. 8th Cir. 1997) (citing *Pioneer Investment*, 507 U.S. at 390-92).

Judicial estoppel also does not prevent Debtor from contesting Lebert and the trust's motion for reconsideration or their earlier motion to extend time. Though Debtor's original plan proposed to pay Lebert and the trust in full over time as secured claims, the Court denied confirmation of that plan based on the findings and conclusions entered on the record, including the fact that Lebert and the trust did not have allowed claims. That ruling is the law of the case on which Debtor may safely stand. *Allison v. Centris Federal Credit Union* (*In re Tri-State Financial, LLC*), 885 F.3d 528, 533 (8th Cir. 2018) ("Under the law-of-the-case doctrine, 'when a court decides upon a rule of law, that decision should continue to govern the same issues in

subsequent stages in the same case.'") (quoting *Alexander v. Jensen-Carter*, 711 F.3d 905, 909 (8th Cir. 2013) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983))). Debtor has not deliberately changed its position regarding their claims "according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001) (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)).

> [C]ourts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards*, 690 F.2d, at 599. Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," *United States v. C.I.T. Constr. Inc.*, 944 F.2d 253, 259 (C.A.5 1991), and thus poses little threat to judicial integrity. *See Hook*, 195 F.3d, at 306; *Maharaj*, 128 F.3d, at 98; *Konstantinidis*, 626 F.2d, at 939.

New Hampshire, 532 U.S. at 750-51.

Finally, as to Lebert and the trust's reliance on § 502(j) for this Court's ability to reconsider its decision, Debtor is correct that § 502(j) does not apply. The issue at the September 28, 2021 hearing was whether the time in which Lebert and the trust could file proofs of claim should be reopened, not whether they had already-filed claims that should be disallowed.

An order will be entered denying Lebert and the trust's motion for reconsideration.

Dated: November 9, 2021.

BY THE COURT:

Charles L. Nail, Jr.
Bankruptcy Judge

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 21-40007
	)	Chapter 11
T & R SERVICE COMPANY	)	
Tax ID/EIN 46-0356387	)	ORDER DENYING STEPHENE LEBERT
	)	AND THE MIKESELL LIVING TRUST'S
Debtor.	)	MOTION FOR RECONSIDERATION

In recognition of and compliance with the decision entered this day; now, therefore,

IT IS HEREBY ORDERED Stephene Lebert and the Mikesell Living Trust's Motion for Reconsideration (doc. 179) is denied.

So ordered: November 9, 2021.

BY THE COURT:

Charles L. Nail, Jr.
Bankruptcy Judge

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota