

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re: Nicole Energy	:	
Services, Inc.,	:	
	:	
Debtor,	:	
	:	
v.	:	Case No. 2:06-cv-0162
	:	
Larry J. McClatchey,	:	JUDGE SMITH
Trustee for Nicole	:	
Energy Services, Inc.,	:	MAGISTRATE JUDGE KEMP
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
Nicole Energy Marketing,	:	
Inc., et al.,	:	
	:	
Defendants.	:	

**OPINION AND ORDER**

This matter is before the Court on Freddie L. Fulson's expedited motion for re-clarification of the May 19, 2009 order which denied two motions for withdrawal of the reference filed on behalf of himself and/or Nicole Energy Marketing, Inc. The Court will treat the motion for re-clarification as a motion to alter or amend judgment.

**I. STANDARD OF REVIEW**

A motion to alter or amend pursuant to Fed.R.Civ.P. 59(e) is designed only to "correct manifest errors of law or fact or to present newly discovered evidence." Phelps v. Hamilton, 122 F.3d 1309, 1324 (10<sup>th</sup> Cir. 1997); Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986). Accordingly, a Rule 59(e) motion may be made for one of only three reasons: (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become

available; or (3) it is necessary to correct a clear error of law or to prevent manifest injustice. See Berridge v. Heiser, 993 F.Supp. 1136, 1146-47 (S.D. Ohio 1997) (citing Firestone v. Firestone, 76 F.3d 1205 (D.C. Cir. 1996)).

A motion for reconsideration or to alter or amend is not a vehicle to reargue the case or to present evidence which should have been raised in connection with an earlier motion. See Database America v. Bellsouth Advertising & Pub. Corp., 825 F.Supp. 1216, 1219-20 (D.N.J. 1993); 11 Charles Alan Wright, Arthur Miller and Mary Kay Kane, Federal Practice and Procedure, §2810.1 (2d ed. 1995) (Motions to alter or amend judgment cannot be used to "relitigate old matters, or to raise arguments or present evidence that could have been raised prior to entry of judgment."). "A party seeking reconsideration must show more than a disagreement with the court's decision, and 'recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden.'" Database, 825 F.Supp. at 1220.

## II. DISCUSSION

Mr. Fulson first questions why the Court refused to address his claims under the Civil Rights Act of 1866. The sole matter before this Court was whether to withdraw the reference pursuant to 28 U.S.C. §157(d). The adversary proceeding before the bankruptcy court involved a related series of transactions between a number of entities owned or controlled by Mr. Fulson, including the debtor, Nicole Energy Services, Inc. Rather than attempting to unravel these transactions, the chapter 7 trustee for the debtor sought substantive consolidation of the debtor's estate with several of the other entities. As an alternative remedy, the trustee requested that the bankruptcy court undo certain alleged preferences and fraudulent transfers between the debtor and one or more of the defendant companies. As far as this Court can tell, there were no claims for violation of Mr.

Fulson's civil rights pending in the adversary proceeding. For this reason, any such claims Mr. Fulson may have against the trustee are not properly before the Court.

Mr. Fulson next points out that he is not a party to the involuntary chapter 7 case filed earlier this year against Nicole Energy Marketing, Inc. While this may be true, the order for relief entered by the bankruptcy court operates as a stay of all proceedings against the debtor. See 11 U.S.C. §362(a). Because Nicole Energy Marketing, Inc. is one of the defendants in the trustee's substantive consolidation action, the adversary proceeding was subject to the automatic stay.

Mr. Fulson also seeks an explanation of the relationship between the adversary proceeding and the proceedings involving confirmation of the trustee's plan of liquidation in the chapter 11 case of Nicole Energy Services, Inc. The Court mentioned the hearing on confirmation scheduled in the bankruptcy court for May 20, 2009, because of the trustee's stated belief that his claims in the adversary proceeding likely would be addressed in the context of his liquidating plan. The Court is now advised that the bankruptcy court, in fact, confirmed the trustee's liquidating plan on September 9, 2009.

Lastly, Mr. Fulson complains that the Court violated its own rules when it denied his motions for withdrawal of the reference despite the fact that the motions were not opposed. Local Rule 7.2(a)(3) provides that the failure to file a memorandum in opposition may be cause for the Court to grant the motion, but does not require that the Court grant every unopposed motion. Based on Mr. Fulson's memoranda, the record of proceedings before the bankruptcy court, and the applicable law, the Court declined to withdraw the reference.

### **III. CONCLUSION**

Based upon the foregoing, Mr. Fulson has failed to show that

the Court committed a clear error of law in deciding his motions for withdrawal of the reference. Accordingly, his motion for re-clarification (doc. 18) is **DENIED**.

**IT IS SO ORDERED.**

/s/ George C. Smith  
George C. Smith  
United States District Judge