SO ORDERED.

SIGNED this 22 day of December, 2006.

Dale L. Somers
Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	
RAFTER SEVEN RANCHES, L.P.,	**CASE NO. 05-40483**
	CHAPTER 12
DEBTOR.	

MEMORANDUM AND ORDER DENYING DEBTOR'S MOTION TO RECONSIDER COURT'S ORDER ENTERED ON NOVEMBER 14, 2006

The matter before the Court is the Debtor's Motion to Reconsider the Court's Order entered herein on November 14, 2006 and to Declare the Sale of the SE/4 of 25-22-31 Completed on October 31, 2006 to be Ineffective because it Violated the Agreement Between the Parties (hereafter Motion to Reconsider). The Debtor, Rafter Seven Ranches, L.P. (hereafter "Debtor"), appears by William E. Metcalf. Creditor WNL Investmnet, LLC (hereafter "WNL") appears by Timothy H. Girard, Woner, Glenn, Reeder, Girard & Riordan, PA. Purchaser Duane Koster appears by Robert L. Baer, Cosgrove, Webb & Oman. There are no other appearances.

On October 25, 2006, at the request of Debtor, the Court held an emergency hearing on the Debtor's Motion to Interpret the Agreement between WNL and the Debtor (Motion to Interpret). The agreement referenced in Debtor's motion is a Settlement Agreement made effective January 10, 2006 between Debtor, WNL, and others,[1] the relevant terms of which were incorporated into and approved by the Court in the Stipulated and Agreed Order Approving Settlement Involving Rafter Seven Ranches, LP and WNL Investment, L.L.C., filed on February 27, 2006 (hereafter "Agreement"). Debtor sought an order of the Court that the Agreement prohibited WNL from holding a scheduled and noticed auction sale of two quarter section of property on the same day, October 31, 2006. The Motion to Interpret was denied orally following the admission of evidence and hearing the arguments of counsel. The Court found that the Agreement permitted the sale of two quarter sections on the same day, provided the parcels were auctioned separately. The auction sale was held as scheduled, and Duane Koster was the purchaser. An order memorializing the oral ruling, entitled Journal Entry of Order Denying Debtor's Motion to Interpret the Agreement between WNL (hereafter "Order of Denial"), was filed on November 14, 2006.

Debtor timely filed a motion to reconsider the Order of Denial based upon newly discovered evidence. WNL and Duane Koster have objected. For the following reasons, the Court denies the Motion to Reconsider and declines to declare the sale ineffective.

Debtor's motion is pursuant to Bankruptcy Rule 9023, which provides that Fed. R. Civ. P. 59 applies in cases under the Code. Under subsection (e) of Rule 59, a motion to alter or

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[1] The additional parties were : Michael J, Freisen, the general partner of the Debtor; the MDF Trust under Agreement dated April 17, 1984, Michael J. Freisen, Trustee; and the RAF Trust under Agreement dated April 17, 1984, Michael J. Freisen, Trustee.

amend a judgment may be filed within 10 days after entry. Such a motion is appropriate only to "correct manifest error of law or to present newly discovered evidence."[2] The basis for Debtor's motion is newly discovered evidence. Debtor contends that the transcript of the January 10, 2006, hearing at which the court approved the oral settlement between the Debtor and WNL, which transcript was not in Debtor's counsel's possession at the time of the hearing on the Motion to Reconsider, shows error in the Court's denial of the Motion to Interpret.

The relevant chronology of events is as follows. On January 9, 2006, WNL's motion for relief from stay came on for trial. WNL asked that it be allowed to proceed with a pending state court action to quiet title in three tracts of real property which Debtor claimed to own. Before trial commenced, the parties announced that they had reached agreement under which, WNL was deemed the owner of the land, and, if the obligation of Debtor to WNL in the agreed amount of $240,000 was not satisfied by July 15, 2006, the three quarter sections would be sold by WNL in a specified order until the proceeds were sufficient satisfy the claim. The agreement was to be reduced to writing and an agreed order submitted resolving the motion for relief from stay and other pending issues between Debtor and WNL. After further hearing on January 27, 2006, during which the parties reported on their progress and sought the assistance of the Court, the Agreement was memorialized in a written settlement agreement effective January 10, 2006, and the essential terms were incorporated into the stipulated order entered by the Court on February 27, 2006. In September, the first quarter section was sold for $113,600, less than the $240,000 claim. WNL arranged for auction sale of quarter sections two and three to occur on October 31, 2006, with the tracts to be sold separately, one following the other.

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[2] *Adams v. Reliance Standard Life Ins. Co.,* 225 F.3d 1179, 1186 n.5 (10th Cir. 2000).

On October 19, 2006, Debtor became aware of the scheduled auction. On October 20, 2006. Debtor negotiated a private sale of the two properties to Duane Koster, but WNL declined to agree to the sale in lieu of the scheduled auction. On October 23, 2006, Debtor filed the Motion to Interpret, in which Debtor contended that the Agreement, that stated "WNL shall sell one quarter section of the Real Estate at a time," required the two tracts be sold on separated days and prohibited the planned sale of the two tracts, one after the other, on the same day. WNL objected, and an evidentiary hearing was held. Michael Friesen testified, and exhibits were admitted. It was Debtor's position that the phrase of the Agreement that the property be "sold one quarter section .. . at a time" was ambiguous. The evidence relied upon testimony was Mr. Friesen's "understanding" of the Agreement and the fact that the first tract had been sold separately from the other two. Much of Mr. Friesen's testimony was directed to the manner in which sale of the third tract, which is the homestead tract, could be avoided or purchased by him if the sale of the third quarter section were delayed until an unspecified amount of time after the sale of the second tract.

The Court identified the issue as interpretation of a negotiated settlement reduced to writing where both parties and Mr. Friesen had input in the drafting process. After considering the evidence and the exhibits, the Court concluded that the clear and unambiguous language provided that the three pieces were to be sold in parcels as provided in the auction notice, not in one unit. The Debtor provided no evidence to the contrary. The fact that WNL sold one tract separately in September by itself was found not to indicate the interpretation of the Agreement urged by Debtor, as this timing of the sale can just as easily be interpreted as undertaken for a different reason relating to the value of the properties. Mr. Friesen's "understanding" was

rejected as controverting the clear written language. The Court held that certainty and finality must prevail, and the Agreement was certain.

The auction sale occurred on October 31, 2006, and Duane Koster was the successful bidder on both tracts. On about November 1, 2006, transcripts of the hearings on the settlement agreement held on January 10 and January 27, 2006 were filed, having been requested by WNL's counsel on October 20, 2006, the date when WNL was requested to approve the private sale negotiated by Mr. Friesen.

The journal entry denying the Motion to Interpret was filed on November 14, 2006, and within 10 days the Debtor filed a motion to alter or amend. The basis for the motion is Debtor's "possession of new evidence not available for the October 25, 2006 hearing," namely the transcript of the January 10, 2006 which had been ordered by WNL's counsel. In the motion, counsel for Debtor recites the history of the request for the transcript and states it was not available to him until November 6, 2006. Based upon that transcript, Debtor reasserts that the Agreement is ambiguous and also argues that because the parties did not intend the construction of the Agreement found by the Court, that there was a mutual mistake so the contract is not binding. Arguments are presented that the adverse impact of the sale of both tracts on the same day was significant.

The standard for granting a motion to alter or amend is very strict, and typically Rule 59(e) motions are denied.[3] Such motions "cannot be used to relitigate old matters or to raise

[3]11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2810.1 (2nd ed. 1995).

arguments or present evidence that could have been raised prior to the entry of judgment."[4] As stated by the Tenth Circuit, "[t]he purpose for such a motion is the correct manifest errors of law or to present newly discovered evidence."[5] "New evidence in the context of Rule 59(e) refers to evidence newly discovered after the hearing."[6] "In other words, if the evidence could have been introduced earlier, it is not considered newly discovered."[7] The Tenth Circuit has stated:

> In order to supplement a Rule 59(e) motion [filed after entry of summary judgment] with additional evidence such as an affidavit by an expert, the movant must show either (1) that the evidence is newly discovered or (2) if the evidence was available at the time summary judgment was granted, that counsel made a diligent yet unsuccessful attempt to discover the evidence.[8]

In the similar circumstance of a motion for a new trial under Rule 59, the First Circuit affirmed denial of a motion based upon "new information" contained in the transcript of the pre-trial conference at which counsel for the movant was present.[9] The court stated:

> Authority's [movant's] counsel raises the issue of "new information" found in the transcript of a pre-trial conference held on April 21, 1981, a conference at which he was present, as the basis for his motion. . . . To constitute newly discovered evidence for which a new trial may be granted under Rule 59, the evidence must not have been known to the movant at the time of trial;

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[4] *Id.*

[5] *Webber v. Mefford*, 43 F.3d 1340,1345 (10th Cir. 1994), *quoting Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 cir. 1992).

[6] *Prop. Technologies, Ltd. v. TelNet Corp. (In re Prop. Technologies, Ltd.)*, 296 B. R. 701, 706 (Bankr. E.D. Va. 2002).

[7] *Id.*

[8] *Webber v. Mefford*, 43 F.3d at 1345.

[9] *D. Frederico Co., Inc. v. New Bedford Redevelopment Auth.*, 723 F.2d 122 (1st Cir. 1983).

> moreover this lack of knowledge must have been excusable. . . . We do not believe that information presented at a conference in which [movant's] attorney was a participant can qualify as newly discovered evidence as previously defined. When counsel quotes himself as part of the passage cited in support of his motion, it is difficult to understand how such ignorance could be alleged to have been excusable.[10]

Rafter Seven's motion relies upon the transcript of the January 10, 2006 hearing at which the settlement was announced, as being newly discovered evidence within the meaning of Rule 59(e).[11] The court finds the transcript does not constitute newly discovered evidence for purposes of Rule 59(e). Counsel for the Debtor, Mr. Freisen who testified at the hearing on the Motion to Interpret, and WNL's counsel were all present at that hearing and would have been competent to testify about what transpired. In addition, the voice recording of the January 10, 2006 hearing

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[10] *Id.*, 723 F.2d at 130.

[11] The portion of the transcript relied upon is p. 33, line11 to p.34, line7 as follows:

MR. METCALF [counsel for Debtor] . . . if $240,000 is not paid by July 15th that triggers an unencumbered right of WNL to sell the real estate one tract at a time. The tracts were listed in order of priority to sell by Mr. Girard, and Tract Number one is sold and they don't have $240,000 by that time Tract Number Two is sold. If they don't have $240,000 by that time when Tract Three is sold. And the sale will be -

THE COURT: And they can sell them at 2:00 o'clock, 2:30 and 3:30.

MR. METCALF: Well, I think they have to see how much they get from the first one.

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MR. METCALF: Whatever, I mean that's going to be – they're only going to advertise one auction at a time, okay? We're not going to have - we're not going to circumvent the intent of this deal by doing that. . . .

MR. GIRARD [counsel for WNL]: This, by the way Judge, what we agreed, one at a time.

MR. METCALF: Yeah, one at a time.

. . .

MR. GIRARD: If we could have got an agreement to stack them up in our increments we'd have done that, but no, it's one at a time, one sale at a time and then go with the next one, depending on what the balance is.

could have been obtained and used as evidence at the October 25, 2006 hearing. Such recordings are easily obtained in the Topeka Court. The fact that Debtor's counsel knew of the ease with which the evidence could have been obtained is shown by the transcript of the January 27, 2006 hearing on the issue of the settlement agreement, where the courtroom deputy informed counsel for both the Debtor and WNL on the record that a CD could be obtained that same day for a fee of $26.[12] The Motion contains no showing of diligence in attempting to obtain a transcript prior to the October 23, 2006 hearing. Indeed it appears that Debtor's counsel first became aware of the content of the transcript after it had been received because of the request of WNL's counsel. The most that Debtor can show is that the transcript, which does include discourse favorable to Debtor's position, was not in the possession of Debtor's counsel at the time of the October 25 hearing. This is an insufficient basis to alter or amend the judgment.

In addition, if the "newly discovered" evidence could be considered, it would be most relevant to argument the Agreement should be set aside because it contains a mutual mistake when not requiring that the sale of each parcel be on a different day. This theory was not presented at the October 25 hearing. In addition, Debtor's reply brief for the first time requests the remedy of reformation of the Agreement. A Rule 59(e) motion is not a vehicle for raising new grounds for relief or theories not presented submitted before judgment was entered. To the extent the transcript supports Debtor's contention that the Agreement is ambiguous, that issue was presented and decided adversely to Debtor. A Rule 59(e) motion is not to be used to retry issues previously determined. A motion to alter or amend is available to correct manifest errors of law; there was no manifest error made when denying the Motion to Interpret.

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[12] Transcript, January 27, 2006, p.8, line 23 to p. 9, line 24.

In addition, the Court finds that justice would not be served by granting a new hearing on the Motion to Interpret. A different ruling on the motion would be of no consequence unless the Debtor could have an opportunity to purchase section three. The auction had been held, and the successful bidder at the auction has objected to the motion to alter or amend. Debtor suggests the Court should use its authority under 11 U.S.C. § 105 to set aside the sale of the third tract as not complying with the Agreement. Debtor provides no authority for such use of § 105 to declare invalid a sale of non-estate property in which the Debtor claimed an interest where the sale was expressly approved by the Court and a stranger to the bankruptcy was the purchaser. The Court's own research has not found any similar case. Although bankruptcy courts have enjoined actions which would unduly impair reorganization, they do so only when the need is high to counterbalance the impairment of the rights of third parties.[13] This is not such a case.

For the foregoing reasons, the Court denies the Debtor's Motion to Reconsider the Court's Order entered herein on November 14, 2006 and to Declare the Sale of the SE/4 of 25-22-31 Completed on October 31, 2006 to be Ineffective because it Violated the Agreement Between the Parties.

IT IS SO ORDERED.

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[13] 2 *Collier on Bankruptcy* ¶ 105.03[2] (Alan N. Resnick & Henry J. Sommer, eds-in-chief 15th ed. Rev. 2006).