SO ORDERED.

SIGNED this 09 day of May, 2006.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	)	
MITCHELL LEE FOSTER and	)	
KATHERINE LOUISE FOSTER	)	**Case No. 00-42068**
	)	**Chapter 13**
Debtors.	)	
	)	
MITCHELL LEE FOSTER and	)	
KATHERINE LOUISE FOSTER	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Adversary No. 05-7020**
	)	
ONYX INVESTMENT, L.L.C.	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

This matter is before the Court on Defendant's Motion to Reconsider.[1] Defendant, Onyx Investment, L.L.C. ("Onyx"), seeks reconsideration of the Court's order entered March 15, 2006[2] granting summary judgment to Debtors. The summary judgment order held that the order confirming Debtors' amended Chapter 13 plan, which plan clearly and unequivocally[3] called for the strip off Onyx's wholly unsecured mortgage lien against certain real property, resulted in that lien being stripped. This matter constitutes a core proceeding, and the Court has jurisdiction to decide it.[4] The Court, after reviewing all pleadings submitted in connection with this motion, denies Onyx's motion.

I. NATURE OF THE CASE

Plaintiffs filed this adversary proceeding seeking to enjoin Onyx from attempting to enforce its lien against certain real property, on the basis that Onyx's lien was stripped upon discharge, and the underlying debt discharged. The Court entered a Memorandum and Order granting summary judgment in favor of Plaintiffs. Onyx has filed a motion for reconsideration challenging most of the Court's findings of fact and conclusions of law.

II. STANDARD FOR MOTION TO ALTER OR AMEND JUDGMENT

Motions to alter or amend a judgment in bankruptcy adversary proceedings are governed by Fed. R. Bankr. P. 9023, which incorporates Fed. R. Civ. P. 59. A motion to alter or amend is intended to correct manifest errors of law or fact, or to present newly discovered evidence under

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[1]Doc. 69.

[2]Doc. 65.

[3]The "stripping" language was also placed into the amended plan using a bold font, which also served to emphasize the provision. *See* Doc. 19 in main case.

[4]28 U.S.C. §§ 157(b) and 1334.

certain circumstances.[5] A motion to alter or amend should not be used as a vehicle for the losing party to rehash arguments previously considered and rejected by the Court.[6]

III. ANALYSIS

A. Onyx's Objections to the Court's Findings of Fact

Onyx asserts the Court was mistaken in making seven findings of fact. Paragraphs 1, 2, 3 and 7 all relate to the underlying ownership and description of the land, and how Debtors acquired and sold off parts of the land. Although these facts may have been exceedingly material had Onyx participated in the Chapter 13 process when Debtors objected to their claim, or if Onyx had timely sought to set aside confirmation at a time when it had, or should have had, knowledge of the plan's provisions, they are not terribly material at this stage of the proceedings. These facts were set out more for background than they are dispositive of the ultimate legal conclusions arrived at by this Court for this proceeding. The Court has again reviewed the findings of fact challenged by Onyx in relation to the way the Court referenced and treated the tracts of land owned by Plaintiffs, along with the conclusions of law and ultimate decision in the Court's prior order, and finds that none of the alleged inaccuracies would have any bearing on the outcome of this case.

In its paragraph four alleging error, Onyx takes exception with the Court's use of the term "properly addressed" when it discussed that Plaintiffs did actually send notice of their bankruptcy and their original Chapter 13 plan to Onyx's assignor, Empire. Onyx does not contest that the notice was mailed in an envelope that contained a complete, valid address for Empire, or that the mailing was never returned as undeliverable to the Court, but rather disputes that the address was the address

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[5] *American Freight Systems, Inc. v. Point Sporting Goods*, 168 B.R. 245 (D. Kan. 1994).

[6] *Id.*

to which Empire would have preferred the notice be sent. The Court, in stating that the envelope was properly addressed, was referring to the fact that the envelope contained a valid and complete address for Empire. The Court recognized that this was not the preferred address for Empire, and was not the address to which Empire requested such correspondence be sent, but still found it clear under its due process analysis that Empire actually received notice of Plaintiffs' bankruptcy through the use of this address.

Onyx fails to even acknowledge the critical evidence, that it used the very Proof of Claim form sent to and received by Empire along with the original plan, which fact is indisputable because of the particularized creditor ID number assigned to Empire. Onyx cannot honestly argue either that Empire did not actually receive the notice of the bankruptcy, or that Onyx, itself, did not have constructive notice of the Fosters' bankruptcy via Empire (if in no other way, than through the receipt of papers from Empire that contained the creditor-specific BNC proof of claim form), and actual notice, when it ran a credit check on debtors immediately before it filed its Proof of Claim in July 2001.

Next, in its fifth paragraph, Onyx quibbles with the Court's characterization of Debtors'/Plaintiffs' amended plan as a clarification of the treatment of Empire's mortgage. The Court disagrees with Onyx's objection and finds that the language in fact did clarify Plaintiffs' position relative to Empire's lien. Notwithstanding the Court's word choice, the bottom line is that whether it was a clarification or a brand new plan is immaterial to the Court's ultimate decision. What Onyx fails to acknowledge is that it had ample opportunity to protect itself from the adverse provisions of the confirmed plan, even after it was confirmed, and elected not to.

Onyx next objects, in its paragraph numbered six, to the Court's finding that the state foreclosure petition made no mention of the bankruptcy. This finding was based on the Court's reading of Exhibit AA, which Onyx, itself, provided to the Court in support of its first brief; Exhibit AA is a copy of that petition. Onyx now admits that the copy of the petition that it provided to the Court as Exhibit AA omitted the only page that did, in fact, mention the bankruptcy. Debtors apparently later attached a corrected copy of the petition, this one including the relevant page. The Court read the title page of that subsequent exhibit, but did not re-read the full text, as Exhibit AA had already been studied and the Court was unaware that this second copy was in any way different from Exhibit AA. After reading page four of Exhibit D to Plaintiff's Response,[7] and now being advised of the addition of the page Onyx previously omitted, the Court agrees that its finding that the petition did not mention the bankruptcy is erroneous, and herein corrects that finding.

That finding, however, is not outcome dispositive. The Court's ultimate finding on this issue was that Onyx failed to timely seek revocation of Debtors' discharge. Onyx argued that its time-barred attempt to seek revocation was saved by the filing of its state court foreclosure petition, filed before the expiration of the one year period, using the "relation back" theory. The Court's original analysis of this argument is incorporated herein by reference, and is also discussed, below.

B. Onyx's Objections to the Court's Conclusions of Law

Simply put, Onyx claims that "The Court's conclusions of law are based upon clearly erroneous findings of fact, and the retroactive ratification of an illegal act using an equitable remedy to overlook a statutory protection involving the usurpation of a fundamental right by allowing the

[7]Doc. 61.

illegal act to impute knowledge to the victim."[8] Onyx first claims that the Court erred in using equitable remedies in favor of Plaintiffs. Onyx implicitly argues that Plaintiffs' failure to obtain relief from stay in the Empire bankruptcy constituted a *per se* violation of Empire's due process rights, and it thus argues that the Court cannot use equitable remedies to absolve Plaintiffs of this due process violation.[9]

The Court finds that Empire was afforded due process, even though the notice it received was in violation of the automatic stay. Due process is afforded with notice reasonably calculated, under all the circumstances, to apprise interested parties of the action and opportunity to object.[10] "Due process requires only that there be notice and a meaningful opportunity to be heard - no more, and no less."[11] Onyx has not provided any, and the Court is unaware of any, precedent to support its contention that due process is automatically violated if a party violates the automatic stay in bankruptcy.

As more fully set forth in the Court's original opinion, the Court finds that both Empire and Onyx had notice of Plaintiffs' bankruptcy, and that Onyx (who has not been in bankruptcy during the relevant time period) had the opportunity to protect itself, if the allegations of fraud now plead by Onyx were actually true, in plenty of time to protect itself from the amended plan's provisions. Empire received notice of the terms of the Chapter 13 plan, albeit in violation of the automatic stay,

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[8]Defendant's Motion to Reconsider, Doc. 69 at p.9.

[9]Although Onyx does not state it is making a *per se* violation argument, it provides no legal analysis as to how effecting service of process on an entity in bankruptcy without obtaining relief from stay would always constitutes a due process violation. Instead Onyx simply states, repeatedly, that this is a due process violation, without explaining how it arrived, or providing any legal basis for arriving, at such a conclusion.

[10]*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

[11]*In re Andersen*, 215 B.R. 792, 795 (10th Cir. BAP 1998) (citing *Turney v. FDIC*, 18 F.3d 865 (10th Cir. 1998)).

but more importantly, Onyx, itself had sufficient notice to act. Thus, the Court finds that there was no violation of Empire's, or Onyx's, due process rights in this case.

Onyx also disagrees with the Court's reliance on *Job v. Calder (In re Calder)*[12] to find that Plaintiffs' failure to seek relief from stay in Empire's bankruptcy—a bankruptcy of which they were unaware--- is not fatal to their attempt to strip Onyx's lien. The Court found in its original opinion, and restates here, that because Onyx failed to timely seek to protect its property interests once it clearly became aware of Plaintiffs' pending bankruptcy, it could not use Plaintiffs' violation of the automatic stay as a shield to protect it from losing the rights it failed to take appropriate steps to protect. Clearly Onyx disagrees with the Court's holding on this matter, which is not surprising given the fact that the Court ruled against Onyx, but Onyx has not raised any new argument that it did not previously raise, or that the Court did not previously consider.

Finally, Onyx raises several additional arguments in its motion for reconsideration in support of its contention that it "had a legal right to rely on the Bankruptcy Code that protected its investments and no legal duty to investigate the Fosters' Bankruptcy to prevent the Fosters from relying on their own illegal and fraudulent acts or omissions." Some of these arguments have been previously addressed by the Court, and will not be rehashed here. However, the Court will address a few of the arguments raised by Onyx.

First, Onyx complains that the Court provided "a long litany" of steps Onyx could have taken to protect itself from this negative outcome. It argues that the Court should not mandate how Onyx elects to run its business, including the suggestion that Onyx should not have sat passively by at a time when it could have timely challenged Debtors' actions. It argues the Court should protect it,

[12]907 F.2d 953 (10th Cir. 1990).

and not Debtors, who admittedly inadvertently violated the automatic stay because they were never notified of Empire's bankruptcy.

What Onyx continues to ignore is that the evidence is clear that Onyx's predecessor did know of the Fosters' bankruptcy, and more importantly, Onyx itself knew of the Fosters' bankruptcy in time to take action to protect itself. Instead, it waited until after Debtors had completed all their plan payments to take any action. Onyx apparently made the business decision to gamble that it need not take timely affirmative steps to respond to the objection to its claim, and it further made the business decision either to not look at Debtors' bankruptcy papers after it received the assignment of Empire's claim, or to take no affirmative steps to protect its interest. Onyx is certainly free to make whatever business decisions it chooses. One would think, however, that in light of the 1999 Tenth Circuit precedent regarding the binding nature of confirmed plans,[13] which law was in existence well before Onyx had to make its business decisions in this case, it might be wise to make those business decisions in line with existing precedent in the Circuit where venue lies for any later dispute.

Third, the Court agrees with Onyx that other parties, including the Trustee, might also have had responsibility to look at whether Debtors properly disclosed what land they owned, and what liens were held against that land. However, unlike Onyx, those parties are not currently before the Court seeking relief. As the Tenth Circuit noted in *Andersen*, this Court "merely conclude[s] that the strong policy favoring finality, coupled with the creditor's complete failure to properly protect

[13] *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253, 1257 (10th Cir. 1999).

its interests during the course of the bankruptcy proceedings...,"[14] unfortunately results in Onyx losing its lien.

Fourth, Onyx is insistent in claiming that the Court can only find that Empire and Onyx had notice of this bankruptcy by "legitimizing an illegal act." The Court disagrees. Again, Onyx conspicuously ignores probably the most pivotal piece of evidence the Court considered, which is that the BNC assigns a creditor-specific identification number on its form proofs of claim, and Onyx used that very proof of claim that its assignor received at the time the bankruptcy was first filed. Further, Onyx received its interest from Empire very shortly after the Fosters' bankruptcy was filed. Onyx had time to prevent this result, but wants to blame everyone but itself for its losses.

The Court is not legitimizing Plaintiffs' failure to comply with the Bankruptcy Code by seeking relief from stay from a bankruptcy of which they had no knowledge. The Court, while recognizing this error, has found that Empire and Onyx did receive notice of this bankruptcy. Accordingly, as between the Fosters, who Onyx now tacitly admits had no notice of the Empire bankruptcy, and Onyx, who most assuredly did have notice of the Fosters' bankruptcy, the Court has found that the Fosters are more deserving of this Court's equity.

Onyx next claims that the Court erred in finding that Onyx's untimely request to revoke Plaintiffs' discharge does not relate back to the filing of the state court foreclosure proceeding. Onyx has presented no persuasive new arguments, new authority, or new evidence on this issue in its motion to reconsider. However, Onyx, in its reply brief, does discuss at length that this Court has the authority to hear cases "related to" state court proceedings. The Court is well aware of the fact that 28 U.S.C. § 1334(b) grants this Court authority to hear matters "related to" Chapter 11

[14] *Id*. at 1260 (emphasis added).

proceedings. The issue before the Court is not, however, whether it has the authority to hear this matter, but rather whether Onyx's untimely motion to revoke Plaintiffs' discharge based upon fraud relates back to the filing of the foreclosure proceeding in state court, which makes no mention of fraud. The Court again finds that Onyx's motion to revoke Plaintiffs' discharge does not relate back to the filing of the state court proceeding, as the two proceedings clearly involve a different occurrence and different facts.

Finally, Onyx suggests that the Court erred in finding that it had notice of Plaintiffs' bankruptcy, and could have learned of the amended plan's unfavorable terms in time to bring a revocation action under 11 U.S.C. § 1328 (e),[15] and argues in support of this proposition that "a case is no longer pending upon entry of the confirmation order." Onyx provides no authority for that proposition, and the Court finds none. The order confirming Plaintiffs' Chapter 13 plan was entered on April 18, 2001, without objection, and the case remained pending until it was closed by the Court on April 11, 2004. Three months after the plan was confirmed, Onyx admits it performed a credit check on Debtors, which confirmed what its assignor, Empire, already knew--that the Fosters had filed this bankruptcy. On July 20, 2001, well within the 180 days allowed by § 1330(a) to seek revocation of an order of confirmation procured by fraud, Onyx filed a proof of claim using Empire's form. As noted by the Court in its prior decision, Onyx had notice and an opportunity to set aside confirmation of the amended Chapter 13 plan, it had notice and an opportunity to reserve the issue regarding its lien by responding to the objection to its claim, it had notice and an opportunity to object to discharge while this case was still pending, and it had notice and an

[15]This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. All statutory references are thus to 11 U.S.C.A. §§ 101 - 1330 (2004), unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are likewise to Fed. R. Bankr. P. (2004), unless otherwise specified.

opportunity to seek revocation of discharge for an entire year after the discharge under § 1328(e), but elected not to take any of those actions. Onyx could have prevented this outcome in a variety of ways, using due diligence, but elected not to do so.

IV. CONCLUSION

After fully considering each argument raised by Onyx in its motion for reconsideration, the Court finds no basis for setting aside or reversing its grant of summary judgment to Plaintiffs, and against Onyx. Onyx's motion for reconsideration is thus denied.

IT IS, THEREFORE, BY THE COURT ORDERED that Onyx's Motion for Reconsideration is denied.

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