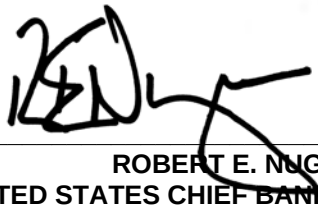
SO ORDERED.

SIGNED this 23 day of February, 2007.



ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
MARK JOSEPH SCHWAIGER,	)	**Case No. 05-16267**
SUSAN DENISE SCHWAIGER,	)	**Chapter 7**
	)	
Debtors.	)	
	)	
SHERYLE L. SCHWAIGER,	)	
	)	
Plaintiff,	)	
v.	)	**Adv. No. 05-5769**
	)	
MARK JOSEPH SCHWAIGER,	)	
	)	
Defendant.	)	

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT

On January 26, 2007 plaintiff Sheryle Schwaiger filed a motion to amend the judgment, or

in the alternative, for relief from the judgment entered in this case (Dkt. 47). Plaintiff seeks relief under Fed. R. Civ. P. 59(e) or Fed. R. Civ. P. 60(b)(1) or (b)(6). Rules 59 and 60 are made applicable to bankruptcy adversary proceedings by Fed. R. Bankr. P. 9023 and 9024. The defendant has filed a response in opposition.

Following a trial on plaintiff's complaint under 11 U.S.C. § 523(a)(15) to except from defendant's discharge his $400 per month property equalization obligation imposed in the parties' divorce, the Court entered judgment in favor of plaintiff partially excepting the debt in the amount of $200 per month. The judgment was entered on January 12, 2007 (Dkt. 43). Notice of the judgment was served electronically upon counsel on January 17, 2007.

Plaintiff contends that the entire debt should be excepted from defendant's discharge. Plaintiff challenges certain findings of fact and submits an affidavit from her attorney with new pleadings and information from the parties' divorce case. Otherwise, plaintiff takes issue with the Court's conclusion that the benefit to defendant outweighs the detriment to plaintiff if a portion of the debt is discharged. In this regard, plaintiff contends the defendant's financial position and lifestyle is vastly superior to the plaintiff's and warrants the conclusion that no part of defendant's obligation should be discharged.

Rule 59(e)

A motion to alter or amend judgment under Rule 59(e) must be filed within ten (10) days after entry of the judgment. Here, entry of the judgment occurred on January 12, 2007.[1] Ten days from January 12 is January 22. Plaintiff filed her motion on January 26, 2007 and it is therefore

[1] *See* Fed. R. Bankr. P. 9021.

untimely.[2] Because plaintiff's motion was not served within ten days of this Court's judgment, the Court must construe it as a motion for relief from judgment under Fed. R. Civ. P. 60(b).[3]

Rule 60(b)(1) and (b)(6)

Relief under Rule 60(b) is discretionary and is warranted only in exceptional circumstances.[4] A litigant must show exceptional circumstances by satisfying one or more of Rule 60(b)'s six grounds for relief from judgment. Plaintiff here relies upon Rule 60(b)(1) – the mistake ground, and Rule 60(b)(6) – the general "catch-all" ground. The sixth ground is only available when the first five grounds are inapplicable.[5]

Plaintiff here contends that the Court misstated the plaintiff's child support obligation in two respects. One, the Court stated that plaintiff's child support obligation of $212 commenced in June of 2005. Two, the Court stated that the plaintiff's child support obligation terminated when their child Michael reached the age of majority.

To demonstrate the Court's error, the plaintiff's attorney attached an affidavit and a copy of

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[2] *See* Fed. R. Bankr. P. 9006(a) (Intermediate weekend days are excluded only when the time prescribed is less than 8 days.).

[3] *Van Skiver v. United States*, 952 F.2d 1241 (10th Cir. 1991)(Motion challenging judgment which is served within ten days of rendition of judgment is ordinarily considered motion to alter or amend judgment under Fed.R.Civ.P. 59(e), whereas motion filed after that time is considered motion seeking relief from judgment under Fed.R.Civ.P. 60(b).). *See also, Dimeff v. Good (In re Good)*, 281 B.R. 689, 698-99 (10th Cir. BAP 2002); *Lopez v. Long (In re Long)*, 255 B.R. 241, 244-45 (10th Cir. BAP 2000).

[4] *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.*, 909 F.2d 1437, 1440 (10th Cir.1990); *Lindberg v. United States*, 164 F.3d 1312, 1322 (10th Cir. 1999).

[5] *Plotner v. AT & T Corp.*, 224 F.3d 1161, 1174 (10th Cir. 2000) (Rule 60(b)(6) relief from judgment for "any other reason" may only be invoked as for causes not covered by one of the five enumerated causes); *Pioneer Inv. Services Co. v. Brunswick Associates*, 507 U.S. 380, 393, 113 S.Ct. 1489, 123 L.Ed. 2d 74 (1993) (The provisions of Rule 60(b)(1) and Rule 60(b)(6) are mutually exclusive.).

a December 2003 Journal Entry entered by the divorce court, establishing an initial child support obligation of $171 effective January 5, 2004.[6] In June of 2005, that child support obligation was modified and increased to $212. Unfortunately for plaintiff, she did not offer the December 2003 Journal Entry at the trial of this matter. The only pleadings from the divorce case offered by plaintiff and admitted into evidence at trial were the Decree of Divorce and incorporated Property Settlement Agreement entered August 16, 2001 (Plaintiff's Ex. 8) and an Order dated May 31, 2005 (Plaintiff's Ex. 9). The Property Settlement Agreement sets forth that plaintiff and defendant had one child, Michael, born February 9, 1989 and that no child support would be paid by plaintiff.[7] The May Order reflects an agreed to monthly child support figure of $212, beginning June of 2005.[8] In short, plaintiff presented no evidence at trial of the $171 child support obligation imposed in 2004. This is not newly discovered evidence. The December 2003 Journal Entry from the parties' divorce case was available and the plaintiff simply failed to present it to the Court at trial.[9] Based upon the evidence presented to the Court, it correctly stated that "[t]his child support obligation [$212 per month] appears to have started in June of 2005 . . .".[10] Rule 60(b) is not available to advance new

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[6] Dkt. 48.

[7] Ex. 8, Property Settlement Agreement, pp. 4, 6.

[8] Plaintiff's Ex. 9.

[9] Plaintiff has also improperly attempted to offer at this late stage the divorce court's determination in 2005 whether the property settlement agreement should be set aside. Plaintiff has attached a portion of a Journal Entry dated June 8, 2005 as Exhibit B to her attorney's affidavit. *See* Dkt. 48. This Journal Entry has no relevance to the issues before this Court and was, in any event, available at the time of trial. Plaintiff chose not to offer it into evidence. The Court suspects it is proffered now to portray defendant in an unfavorable light. This Journal Entry is beyond the matters presented to this Court and will not be considered.

[10] Dkt. 40, p. 3

arguments or supporting facts that were otherwise available for presentation when the matter was first presented.[11] The Court therefore, rejects this basis for the plaintiff's motion for relief from the judgment.[12]

The plaintiff's complaint regarding the Court's recitation of the evidence regarding the termination of plaintiff's $212 child support obligation stands on somewhat similar footing. Contrary to plaintiff's assertion, the Court *did* recognize in its Memorandum Opinion that plaintiff's child support obligation would end when Michael graduated from high school and cited to the May Order (Plaintiff's Ex. 9).[13] However, this was at odds with the testimony at trial. The parties only testified that Michael was 17 at the time of trial.[14] There was no evidence presented as to what high school grade Michael was in and therefore it was unclear whether Michael was a junior or senior in high school at the time of trial. No testimony was provided that pinpointed Michael's graduation date. The Court believed he would turn 18 and graduate in 2007 and that the child support obligation would thus end in 2007. If, as plaintiff is now suggesting, Michael does not graduate from high school until 2008, it simply means that she will have the $212 child support obligation for one additional year. This factual change does not sway the Court's conclusion that a partial

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[11] *Van Skiver,* 952 F.2d at 1243-44.

[12] The Court further notes that even if it had been presented with evidence of the $171 monthly child support obligation that plaintiff presumably paid from January 2004 through May 2005, it would not have changed this Court's ultimate conclusion regarding the balancing test of § 523(a)(15)(B) and granting a partial discharge.

[13] *See* Dkt. 40, p. 4, fn 11. More precisely, the May Order states "[t]hat child support shall end the month the parties' minor child, Michael, graduates from high school or is no longer a bonafide high school student." *See* Plaintiff's Ex. 9.

[14] Given his date of birth, February 9, 1989, recited in the Property Settlement Agreement, Michael turned 18 earlier this month.

discharge of defendant's debt to plaintiff is more beneficial to defendant than it is a detriment to plaintiff. Simply stated, the Court would not reach a different result.

Plaintiff's remaining argument can be summarily disposed of. She complains of certain monthly expenses listed by defendant that she claims are unnecessary, that defendant and his current wife have income far greater than her, and that defendant has substantial retirement funds while plaintiff has none.[15] The Court did consider this evidence and even commented on some of it.[16] The plaintiff's complaints are nothing more than revisiting the evidence and arguments presented at trial. It is not the function of Rule 60(b) to simply revisit arguments which had already been raised and rejected.[17] The claims of error raised by plaintiff here are the types of matters to pursue on appeal. Rule 60(b) is not intended to be a substitute for direct appeal.[18] If Plaintiff is dissatisfied with the outcome reached by the Court after applying the balancing test of § 523(a)(15)(B), her recourse is to appeal.

Plaintiff's motion for relief from the judgment entered January 12, 2007 is DENIED.

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[15] Dkt. 47.

[16] Dkt. 40, p. 5 (monthly net income), p. 6-7 (monthly family expenses and vehicle maintenance), p. 7 (retirement funds).

[17] *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996).

[18] *Id.* at 576.