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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-11-1393-KimkH
)		
HUMBERTO GUZMAN and FIDELIA)	Bk. No.	11-12043-CEB
GUZMAN,)		
)		
Debtors.)		
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HUMBERTO GUZMAN; FIDELIA)		
GUZMAN,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM¹	
)		
RECONTRUST COMPANY,)		
)		
Appellee.)		
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Argued and Submitted on February 24, 2012,
at Pasadena, California

Filed - May 15, 2012

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Humberto and Fidelia Guzman, appellants, argued pro
se; Melissa Robbins Coutts of McCarthy & Holthus,
LLP, argued for appellee, ReconTrust Company.

Before: KIRSCHER, MARKELL, and HOLLOWELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may have
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th
Cir. BAP Rule 8013-1.

1 Appellants, chapter 7² debtors Humberto and Fidelia Guzman
2 ("Guzmans"), appeal an order from the bankruptcy court denying
3 their motion for contempt and an order denying their motion to
4 reconsider. We AFFIRM.³

5 **I. FACTUAL AND PROCEDURAL BACKGROUND**

6 Guzmans filed a chapter 7 bankruptcy on January 21, 2011. In
7 their Schedule A, filed on February 3, 2011, Guzmans reported a
8 fee interest in their residence with a current value of \$100,000
9 and a \$380,000 secured claim against it (the "Property"). Guzmans
10 did not report the secured claim against the Property in their
11 Schedule D, but rather reported it as an unsecured claim in their
12 Schedule F. The "unsecured" claim holder was Bank of America.
13 The chapter 7 trustee filed a no-asset report on March 7, 2011.
14 Guzmans received their discharge on May 12, 2011.

15 On May 16, 2011, Guzmans filed a motion for contempt under
16 § 105, contending that Recon, "a subsidiary of Bank of America,"

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19 ² Unless specified otherwise, all chapter, section and rule
20 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "FRCP."

21 ³ Appellee, ReconTrust Company ("Recon"), filed a Request
22 for Judicial Notice, which includes a copy of Bank of America's
23 recorded deed of trust (f/k/a Countrywide Home Loans Servicing LP)
dated June 13, 2007, and a copy of the recorded Substitution of
Trustee and Assignment of Deed of Trust. Recon did not file
24 anything in opposition to Guzmans' contempt motion or appear at
the hearing. Recon does not deny receiving notice of the contempt
hearing.

25 The Panel is free to take judicial notice of matters of
26 public record. Lee v. City of Los Angeles, 250 F.3d 668, 689-90
27 (9th Cir. 2009). Recon's request is apparently an attempt to
enter documents in the record it inexplicably failed to submit in
28 the bankruptcy court. As such, we DENY Recon's request. In any
event, the documents at issue are not necessary for our
determination of this appeal.

1 violated the discharge injunction by advertising on its website a
2 non-judicial foreclosure sale of the Property. The sale was
3 scheduled for May 19, 2011. Guzmans alleged that they viewed
4 Recon's website on May 14, 2011, and saw the "illegal" scheduled
5 sale. Guzmans argued that because they reported the \$380,000
6 claim as unsecured and no one objected, the debt was discharged on
7 May 12, 2011. Therefore, contended Guzmans, Recon's advertisement
8 violated the discharge injunction. In support of the contempt
9 motion, Guzmans included an undated print-out of the sale
10 advertisement and a declaration stating that they viewed the Recon
11 website on May 14, 2011.

12 Guzmans filed a notice of hearing with their motion but,
13 according to Guzmans, the matter was not calendared. Guzmans
14 contend they appeared at the bankruptcy court on June 22, 2011,
15 for what they thought was a hearing on their contempt motion. At
16 the end of that day's calendar, the court asked Guzmans why they
17 were there. Guzmans explained that their motion was scheduled to
18 be heard that morning. The court informed Guzmans that it had not
19 been calendared. In any event, the court reviewed the moving
20 papers and proceeded to rule on the contempt motion.⁴ Recon did
21 not appear.

22 At the hearing, Guzmans admitted taking out a loan on the
23 Property, that they were not making any payments on it, and that
24 only Recon was trying to foreclose. Guzmans contended that the

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26 ⁴ None of the above dialogue with the bankruptcy court is on
27 the record. This is Guzmans' account of what happened. In its
28 order on the motion to reconsider, the bankruptcy court countered
Guzmans' account of what happened at the June 22 hearing, stating
that the contempt motion was set for hearing, reviewed on the
merits, and denied on the merits.

1 \$380,000 lien against the Property was unsecured because they
2 scheduled it as such, no one challenged it, and no one filed a
3 proof of claim asserting otherwise. According to Guzmans, the
4 \$380,000 debt was discharged on May 12, therefore, a sale set for
5 May 19 violated the injunction. The bankruptcy court explained
6 that simply listing the debt as unsecured did not make it so and
7 did not void Bank of America's deed of trust.

8 The bankruptcy court orally denied the contempt motion. It
9 determined that Recon was entitled to foreclose and that it had
10 not violated the discharge injunction based on the evidence
11 submitted by Guzmans. The court was to prepare the order.

12 On July 5, 2011, Guzmans filed a motion to reconsider the
13 "contempt order," which had not yet been entered. The next day on
14 July 6, 2011, the bankruptcy court entered the contempt order. It
15 did not address the pending motion to reconsider. On July 18,
16 2011, Guzmans filed their notice of appeal of the contempt order.
17 The appeal was ineffective because no order had yet been entered
18 on their timely motion to reconsider. See Rule 8002(b). In
19 response to our February 1, 2012 order, on February 14, 2012, the
20 bankruptcy court entered an order denying the motion to reconsider
21 for Guzmans' failure to establish any grounds to grant it. As a
22 result, Guzmans' premature notice of appeal was deemed timely, and
23 we now have jurisdiction over this matter.

24 **II. JURISDICTION**

25 The bankruptcy court had jurisdiction under 28 U.S.C.
26 §§ 157(b)(2)(O) and 1334. We have jurisdiction under 28 U.S.C.
27 § 158.

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1 Procedurally, an alleged violation of the discharge
2 injunction is pursued, as in this case, by a motion invoking the
3 contempt remedies allowed for in § 105(a).⁵ See Walls v. Wells
4 Fargo Bank, N.A., 276 F.3d 502, 509-10 (9th Cir. 2002). In order
5 to be subject to sanctions for violating the discharge injunction,
6 a party's violation must be "willful." The Ninth Circuit applies
7 a two-part test to determine whether the willfulness standard has
8 been met: (1) did the alleged offending party know that the
9 discharge injunction applied; and (2) did such party intend the
10 actions that violated the discharge injunction? Zilog, Inc. v.
11 Corning (In re Zilog, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006);
12 Hardy v. United States (In re Hardy), 97 F.3d 1384, 1390 (9th Cir.
13 1996). The moving party must prove by clear and convincing
14 evidence that the creditor violated the order. In re Zilog, Inc.,
15 450 F.3d at 1007; In re Bennett, 298 F.3d 1059, 1069 (9th Cir.
16 2002).

17 Notably, and what is important here, the bankruptcy discharge
18 "extinguishes only one mode of enforcing a claim - namely, an
19 action against the debtor in personam - while leaving intact
20 another - namely, an action against the debtor in rem." Johnson
21 v. Home State Bank, 501 U.S. 78, 84 (1991). In other words, a
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23 ⁵ Section 105(a) describes the power of courts and states:

24 The court may issue any order, process, or judgment that
25 is necessary or appropriate to carry out the provisions
26 of this title. No provision of this title providing for
27 the raising of an issue by a party in interest shall be
28 construed to preclude the court from, sua sponte, taking
 any action or making any determination necessary or
 appropriate to enforce or implement court orders or
 rules, or to prevent an abuse of process.

1 creditor may not take any actions to collect from the debtor
2 personally following the discharge, but the discharge does not
3 prevent the creditor from proceeding against the property securing
4 the debt. See id. at 83.

5 **B. Analysis.**

6 **1. The bankruptcy court did not abuse its discretion in**
7 **denying the contempt motion.**

8 At the hearing on the motion for contempt, Guzmans contended
9 that Recon could not foreclose on the Property because their loan
10 was not with Recon. Hr'g Tr. (June 22, 2011) 2:4-12. Guzmans
11 admitted to taking out a purchase money loan on the Property, that
12 they had not been paying on the loan, and that no one other than
13 Recon was trying to foreclose. Id. at 2:13-19. Guzmans further
14 admitted owing approximately \$400,000 on the loan, but claimed the
15 Property's value is now worth less than \$100,000. Id. at 3:13-24.
16 Guzmans argued that the debt to Bank of America was discharged
17 because they had scheduled it as unsecured and no one had
18 challenged it. Based upon the evidence, the bankruptcy court
19 denied the motion determining that Guzmans had failed to prove any
20 violation of the discharge injunction. Id. at 5:7-12.

21 Recon is the trustee of the deed of trust in favor of Bank of
22 America on Guzmans' Property. Guzmans have not denied that Bank
23 of America holds a first deed of trust on the Property. What they
24 do contend is that the debt owed to Bank of America was unsecured
25 and discharged by court order on May 12, 2011. Therefore, argue
26 Guzmans, the bankruptcy court should have granted the contempt
27 motion. We disagree.

28 A secured lien passes through bankruptcy unaffected unless

1 affirmative action is taken to avoid it. Long v. Bullard,
2 117 U.S. 617, 620-21 (1886); Dewsnup v. Timm, 502 U.S. 410, 418
3 (1992); In re Brawders, 503 F.3d 856, 867 (9th Cir. 2007);
4 § 506(d)(2). Guzmans' attempt to turn a secured lien into an
5 unsecured one by listing it as unsecured and disputed in their
6 Schedule F had no effect. Merely scheduling a claim as unsecured
7 does not "avoid" the lien. In any event, as chapter 7 debtors,
8 Guzmans have no ability to avoid or "strip off" Bank of America's
9 lien, which is what appears they were trying to do. Therefore,
10 Bank of America's lien remained secured despite Guzmans' efforts.

11 Furthermore, contrary to Guzmans' contention, no proof of
12 claim had to be filed to preserve Bank of America's secured lien
13 against the Property. In re Brawders, 503 F.3d at 872 (unlike
14 unsecured creditors, secured creditors may ignore the bankruptcy
15 proceedings and look to the lien for satisfaction of the debt);
16 Cen-Pen Corp. v. Hanson, 58 F.3d 89, 93 (4th Cir. 1995)
17 (interpreting § 506(d)(2) to conclude that failure of secured
18 creditor to file a proof of claim is not a basis for avoiding its
19 lien); In re Meadowbrook Estates, 246 B.R. 898, 902 (Bankr. E.D.
20 Cal. 2000)("A secured creditor is not required to file a proof of
21 claim. And if it chooses to not file a claim, its lien will pass
22 through the bankruptcy and remain in place."). Therefore, despite
23 not filing a proof of claim or challenging Guzmans' scheduling of
24 the debt as unsecured, Recon's right to foreclose on the Property
25 (on behalf Bank of America) survived the bankruptcy.

26 Because the discharge injunction did not apply to Recon with
27 respect to foreclosing on the Property, Recon's actions to
28 foreclose could not have violated it. Guzmans offered nothing to

1 show that Recon's actions were an attempt to collect on a debt
2 against them personally. As a result, Guzmans could not prove by
3 clear and convincing evidence that Recon violated the discharge
4 injunction. Accordingly, the bankruptcy court did not abuse its
5 discretion in denying the contempt motion.

6 **2. The bankruptcy court did not abuse its discretion in**
7 **denying the motion to reconsider.**

8 Due to the procedural irregularities in this case, Guzmans
9 did not address in their opening brief how the bankruptcy court
10 abused its discretion by denying their motion to reconsider.
11 Because of the irregularities and Guzmans' pro se status, we
12 review the record to see if it supports the bankruptcy court's
13 denial of the motion. See Balistreri v. Pacifica Police Dep't,
14 901 F.2d 696, 699 (9th Cir. 1988)(we generally construe pro se
15 appellant's briefs liberally). We agree with the bankruptcy court
16 that Guzmans' motion to reconsider fell under Rule 9023, which
17 incorporates FRCP 59(e). A motion under FRCP 59(e) should not be
18 granted, absent highly unusual circumstances, unless the court is
19 presented with newly discovered evidence, committed clear error,
20 or if there is an intervening change in the controlling law.
21 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir.
22 1999). A motion for reconsideration is not for rehashing the same
23 arguments made the first time, or to assert new legal theories or
24 new facts that could have been raised at the initial hearing.
25 In re Greco, 113 B.R. 658, 664 (D. Haw. 1990), aff'd and remanded,
26 Greco v. Troy Corp., 952 F.2d 406 (9th Cir. 1991).

27 Much of what Guzmans raised in the motion to reconsider was
28 merely a rehashing of the same arguments raised in the contempt

1 motion. Guzmans again asserted that a proof of claim had to be
2 filed, that the debt was discharged, and that Recon's foreclosure
3 actions violated the discharge injunction. These arguments were
4 improper and, as we have already stated above, they also lack
5 merit. Guzmans also attempted to contest Recon's standing as the
6 real party in interest to foreclose on the Property. Not only was
7 this a new legal theory that could have been raised before, it
8 goes beyond the scope of the motion for contempt. Accordingly,
9 because Guzmans failed to establish grounds for reconsideration,
10 the bankruptcy court did not abuse its discretion in denying the
11 motion to reconsider.

12 **VI. CONCLUSION**

13 Based on the foregoing reasons, we AFFIRM.
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