

JUL 05 2017

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. AZ-16-1213-JuLB
)	
REGIONAL CARE SERVICES CORP.,)	Bk. No. 14-01383-BMW
)	
Debtor.)	
)	
SCOTT B. DAVIS, Creditor)	
Trustee of the Regional Care)	
Services Corp.,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM*
)	
ARMANDO BELLOC,)	
)	
Appellee.)	

Argued and Submitted on May 18, 2017
at Phoenix, Arizona

Filed - July 5, 2017

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Brenda Moody Whinery, Bankruptcy Judge, Presiding

Appearances: Michael J. Pankow of Brownstein Hyatt Farber
Schreck, LLP argued for appellant; Kyle J.
Shelton of Shah and Associates, PLLC argued for
appellee.

Before: JURY, LAFFERTY, and BRAND, Bankruptcy Judges.

* 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 8024-1.

1 Regional Care Services Corporation (RCSC), Casa Grande
2 Regional Medical Center (Casa Grande), and other related
3 entities (collectively, Debtors) each filed chapter 11¹
4 petitions, which were jointly administered. Appellee, Armando
5 Belloc (Mr. Belloc), received medical care at Casa Grande.
6 Prior to Debtors' bankruptcy filings, Mr. Belloc commenced a
7 malpractice lawsuit against the physicians and others who had
8 provided him care, but did not name Casa Grande as a defendant.
9 About a year later, Mr. Belloc filed another malpractice
10 lawsuit, this time naming Casa Grande as a defendant along with
11 those previously named. At this time, Mr. Belloc learned that
12 Casa Grande was in bankruptcy and stopped prosecution of the
13 state court lawsuit.

14 He then filed a proof of claim (POC) and a motion for
15 relief from stay in Casa Grande's bankruptcy case. By that
16 time, the claims bar date had passed and Debtors' second amended
17 joint chapter 11 plan had been confirmed. Appellant, Scott B.
18 Davis, the creditor trustee (Creditor Trustee) appointed
19 pursuant to a Creditor Trust Agreement, which was created by the
20 confirmed plan to administer the assets and pay allowed claims,
21 objected to the POC, contending that Mr. Belloc had received
22 notice of the claims bar date and thus his late-filed POC was
23 barred.

24 At a preliminary hearing, Mr. Belloc's attorney asserted

25
26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and "Civil Rule" references are to the Federal Rules
of Civil Procedure.

1 that Mr. Belloc did not receive notice of the claims bar date or
2 of the bankruptcy filing. The bankruptcy court noted that it
3 appeared he had been served, but continued the matter to allow
4 Mr. Belloc's counsel to consider the service issue and to file a
5 motion to allow a late-filed claim if appropriate.

6 On the eve of the continued hearing, Creditor Trustee
7 submitted a declaration from Kathryn Tran (Tran Declaration),
8 the employee of the entity which had prepared the affidavit of
9 service and served notice of the claims bar date on February 14,
10 2014. Attached to that declaration was an affidavit of service
11 and a heavily redacted service list that showed Mr. Belloc's
12 name and address. An affidavit of service was also filed on the
13 public docket on February 14, 2014, but the service list of that
14 affidavit did not show Mr. Belloc's name and address.

15 Counsel for Creditor Trustee argued that Mr. Belloc was
16 served with notice of the bar date and bankruptcy filing, but
17 that due to the federal Health Insurance Portability and
18 Accountability Act (HIPAA), the names and addresses of patients
19 who had potential malpractice claims, including Mr. Belloc, were
20 redacted on the service list which was filed on the public
21 docket. Counsel further represented that the affidavit of
22 service with the attached unredacted service list was filed with
23 the bankruptcy judge's chambers and showed that Mr. Belloc was
24 served. He admitted however that his office had redacted the
25 service list attached to the declaration the night before the
26 continued hearing. Therefore, the service list attached to the
27 declaration was not the unredacted list that had been allegedly
28 filed under seal or delivered to the judge's chambers. Due to

1 the inconsistencies in the record regarding service on
2 Mr. Belloc, the bankruptcy court found that his POC should be
3 deemed timely filed and granted Mr. Belloc's motion for relief
4 from stay to proceed with the state court litigation.

5 Creditor Trustee filed a motion for reconsideration under
6 Civil Rule 59(e) to alter or amend the judgment along with an ex
7 parte motion to file the unredacted affidavit of service and
8 service list, showing Mr. Belloc's name and address, under seal.
9 The bankruptcy court granted the ex parte motion and later
10 issued a ruling and order denying the reconsideration motion
11 since there were no grounds to alter or amend the judgment. The
12 bankruptcy court found that the service list with the unredacted
13 affidavit of service was not newly discovered evidence since it
14 was available to Creditor Trustee at the time of the prior
15 hearing.

16 Creditor Trustee appeals from the bankruptcy court's order
17 denying his motion for reconsideration. For the reasons set
18 forth below, we AFFIRM.

19 I. FACTS²

20 Mr. Belloc received care at Casa Grande. On June 25, 2013,
21 he filed a malpractice complaint in the Arizona state court
22 against the physicians and others at Casa Grande that provided
23 him care (Case No. CV2-01300466).

24 On February 4, 2014, RCSC, Casa Grande and other related
25 entities filed for relief under chapter 11. The cases were

26
27 ² We borrow heavily from the facts set forth in the
28 bankruptcy court's June 29, 2016 decision which denied Creditor
Trustee's motion to alter or amend the judgment.

1 assigned to Judge Hollowell. By order, Debtors' cases were
2 jointly administered under the initial case filed by RCSC.

3 **A. The Bar Date Order**

4 At Debtors' request, the bankruptcy court approved the
5 appointment of Epiq Bankruptcy Solutions, LLC (Epiq) as agent
6 for receiving proofs of claim and providing notices in the case.
7 On February 12, 2014, the bankruptcy court entered an order
8 fixing April 15, 2014, as the deadline for filing proofs of
9 claim (Bar Date Order).

10 Epiq mailed notice of the Bar Date Order to potential
11 creditors on February 14, 2014, and filed an affidavit of
12 service on February 20, 2014, reflecting service of the Bar Date
13 Order as well as notice of the chapter 11 cases (2/17/14
14 Affidavit). Because Debtors were obligated to maintain strict
15 patient privacy under HIPPA, the service list filed on the
16 public docket omitted the names and addresses of patients who
17 might assert personal injury or medical malpractice claims
18 against Debtors. Exhibit B to the 2/17/14 Affidavit is a
19 forty-five page service list which did not include Mr. Belloc's
20 name and address.

21 **B. Confirmation Of Debtors' Plan**

22 On May 15, 2014, the bankruptcy court entered an order
23 confirming Debtors' second amended joint chapter 11 plan of
24 reorganization dated March 28, 2014 (Plan). The Plan provided
25 for the sale of Debtors' assets to Banner Health with the
26 distribution of the sale proceeds to creditors. Secured and
27 priority claims – including secured claims of bondholders – and
28 costs of administration were to be paid on the effective date of

1 the plan or shortly after allowance. The remainder of the sale
2 proceeds were subject to pro rata distribution to general
3 unsecured creditors with reserves for disputed claims in the
4 full face amount of the claim (except that insured personal
5 injury claims required reserves only for the deductible amount).

6 The Plan provided for the creation of a Creditor Trust and
7 appointment of a trustee who would, among other things, analyze,
8 object to and resolve claims, prosecute, abandon, and resolve
9 causes of action, make distributions to holders of allowed
10 claims and wind-down the estates.

11 On June 30, 2014, the bankruptcy court granted Debtors'
12 motion to approve the Creditor Trust Agreement. Pursuant to the
13 agreement, Mr. Davis was appointed Creditor Trustee.

14 **C. Mr. Belloc's POC And First Motion For Relief From Stay**

15 On July 16, 2014, Mr. Belloc filed a new malpractice
16 complaint in the Arizona state court, this time naming Casa
17 Grande as a defendant along with the physicians and others that
18 had provided him care (Case No. CV2-01401737). After this
19 filing, Mr. Belloc learned that Casa Grande was in bankruptcy
20 and stopped prosecuting the case.

21 On August 1, 2014, Mr. Belloc filed a POC in Casa Grande's
22 bankruptcy case, designated as Claim No. 45. On the same date,
23 he filed a motion for relief from stay to continue the state
24 court litigation (First Relief Motion). Creditor Trustee
25 objected, contending that Mr. Belloc's POC was time barred since
26 he was served with the Bar Date Order. Creditor Trustee further
27 argued that Mr. Belloc had not established cause for relief from
28 stay and allowing him to proceed would have an adverse impact on

1 the bankruptcy estate and creditors.

2 On August 19, 2014, Debtors' cases were transferred from
3 Judge Hollowell to Judge Whinery due to Judge Hollowell's
4 retirement from the bench.

5 On October 15, 2014, the bankruptcy court held a
6 preliminary hearing on the First Relief Motion. The court noted
7 that Mr. Belloc missed the bar date and apparently was served.
8 Counsel for Creditor Trustee asserted that Mr. Belloc had
9 received notice of the case and the Bar Date Order as set forth
10 in the 2/17/14 Affidavit. The bankruptcy court continued the
11 hearing to November 18, 2014, to allow Mr. Belloc's counsel to
12 consider the service issue and to file a motion to allow a
13 late-filed claim if appropriate.

14 **D. The November 18, 2014 Hearing**

15 On October 17, 2014, Creditor Trustee's counsel sent a
16 letter to Mr. Belloc's counsel explaining that the filed copy of
17 the 2/17/14 Affidavit and service list would not show any
18 information relating to Mr. Belloc due to HIPPA regulations.

19 On November 5, 2014, Mr. Belloc filed his motion for an
20 order approving the late filing of his POC and for relief from
21 the automatic stay so that he could continue his lawsuit against
22 Casa Grande and the other defendants. The motion denied that
23 Mr. Belloc received notice of the bankruptcy cases or the Bar
24 Date Order. It also contended that the bankruptcy court should
25 permit Mr. Belloc to file a late POC based on his excusable
26 neglect.

27 In opposition, Creditor Trustee argued that Mr. Belloc had
28 provided no basis for the court to consider his late-filed POC,

1 other than his denial that he received the notice of the Bar
2 Date Order. Creditor Trustee next argued that Mr. Belloc
3 provided no evidence to rebut the presumption that the Bar Date
4 Order was mailed to his address and received. Last, Creditor
5 Trustee asserted that the standards for excusable neglect were
6 not met because Mr. Belloc offered no reason for the delay and
7 if his claim were deemed timely filed it would prejudice
8 Debtors' estates.

9 In a supporting declaration, Creditor Trustee explained
10 that the negotiated purchase price for Debtors' assets would
11 result in a full or close to full payout to creditors.
12 According to Creditor Trustee, Debtors solicited votes from
13 creditors based on this analysis. He also declared that
14 Mr. Belloc was served with notice of the Bar Date Order and the
15 bankruptcy cases on February 14, 2014. Finally, he stated that
16 in his opinion, allowing the late-filed POC would cause
17 administration of the Creditor Trust to become impracticable and
18 the ultimate wind-down of the estates unreasonably protracted.

19 On November 17, 2014, the day before the continued hearing,
20 Creditor Trustee filed the declaration of Kathryn Tran (Tran
21 Declaration), a senior consultant of Epiq. She declared that
22 she mailed notice of the Bar Date Order on February 14, 2014, as
23 indicated on the 2/17/14 Affidavit at Exhibit A.³ She further
24 declared that Mr. Belloc was served and that his mail was not
25 returned. Attached as Exhibit B was the 45 page service list.

26
27 ³ The filed proof of service was signed by Christina
28 Siguenza, not Ms. Tran. Nothing in Creditor Trustee's papers
explains this discrepancy.

1 Mr. Belloc's name and address was listed on page 4 of 45.

2 At the November 18, 2014 hearing, the bankruptcy court
3 noted that the 2/17/14 Affidavit at Docket #111 did not show
4 Mr. Belloc. Counsel for Creditor Trustee explained that a list
5 of personal injury claimants was not filed on the public docket
6 but filed under seal or delivered to Judge Hollowell's chambers
7 and that list would reflect service on Mr. Belloc. Counsel also
8 referenced the Tran Declaration and acknowledged that the
9 service list originally attached to the 2/17/14 Affidavit had
10 been altered by his office prior to its filing the night before.
11 Therefore, that service list was not actually the unredacted
12 list that had allegedly been filed under seal or delivered to
13 Judge Hollowell's chambers. Counsel informed the bankruptcy
14 court that he would provide an unredacted version of the list
15 that was filed. The bankruptcy court noted that Judge Hollowell
16 had approved one filing under seal, but the court was not aware
17 of any affidavits of service filed under seal.

18 In the end, the court found that the evidence submitted was
19 not sufficient to show that service was provided to Mr. Belloc.
20 The court further found that even if service was provided, the
21 excusable neglect standard was met. The bankruptcy court deemed
22 the POC timely filed and granted Mr. Belloc relief from stay to
23 proceed in state court. The bankruptcy court entered an order
24 consistent with its ruling on December 8, 2014.

25 **E. Creditor Trustee's Motion For Reconsideration**

26 On December 22, 2014, Creditor Trustee filed an Ex-Parte
27 Motion to File Unredacted Affidavits of Service Under Seal to
28 Comply with HIPAA, which requested authority to file unredacted

1 Affidavits of Service relating to the notice of case filings and
2 the Bar Date Order. The ex parte motion explained that Epiq
3 prepared two affidavits of service - one which was filed with
4 the court that redacted the names and addresses of the 817
5 employees and 16 patients such that there was no evidence of
6 them being served and one unredacted affidavit of service that
7 included the names and addresses of the 817 employees and 16
8 patients. The unredacted affidavit however was never made part
9 of the record under seal or otherwise. The court granted the ex
10 parte motion by order entered on January 15, 2015, and the
11 unredacted affidavit of service was filed under seal the next
12 day.

13 Creditor Trustee also filed a motion for reconsideration
14 under Rule 9023, which incorporates Civil Rule 59, on
15 January 15, 2015. There, he maintained that the bankruptcy
16 court's previous findings regarding service and excusable
17 neglect were made without taking evidence. Creditor Trustee
18 explained that he investigated the service issue further and
19 found that the unredacted copy of the affidavit of service and
20 mailing list, although prepared contemporaneously with the
21 filing of the 2/17/14 Affidavit at Docket #111, was not provided
22 to Judge Hollowell's chambers or filed under seal.

23 Creditor Trustee also informed the court that he learned
24 that Mr. Belloc had previously commenced a lawsuit on his
25 medical malpractice claim well before the bankruptcy filing of
26 Casa Grande, but did not sue the hospital at that time.
27 According to Creditor Trustee, these facts showed that
28 Mr. Belloc made a conscious decision, as opposed to an alleged

1 failure of notice, not to assert a claim against Casa Grande.
2 Creditor Trustee argued: "This new information calls into
3 question [Mr.] Belloc's representations and highlights the need
4 for an evidentiary record in this matter."

5 Creditor Trustee also asserted that he could demonstrate
6 that Mr. Belloc was served with the Bar Date Order and
7 "apologize[d] for the error in describing this point in earlier
8 hearings." Creditor Trustee further argued that the bankruptcy
9 court's decision to rule without taking evidence was erroneous
10 and in this case would result in manifest injustice. Creditor
11 Trustee contended that as offered at the November 18, 2014
12 hearing on this matter, the Epiq claims agent would be available
13 to provide testimony to substantiate both underlying service and
14 the preparation of the full certificate of service with respect
15 to the unredacted service list.

16 Attached to the motion was the letter that was sent to
17 Belloc's counsel, the unredacted Affidavit of Service with
18 Belloc's name and address, and the complaint that Mr. Belloc
19 filed against the defendant-doctors in February 25, 2013.

20 Almost a year and a half later,⁴ on June 29, 2016, the
21 bankruptcy court issued a ruling and order denying Creditor
22 Trustee's motion for reconsideration. The bankruptcy court
23 noted that Creditor Trustee failed to submit a credible
24 affidavit of service to the court prior to the November 18, 2014
25

26 ⁴ The court did not rule on the motion for reconsideration
27 until Creditor Trustee set it for hearing after it went
28 unresolved for more than a year. Meanwhile, the state court
litigation between Mr. Belloc and Debtor progressed.

1 hearing that reflected that Mr. Belloc was served with the Bar
2 Date Order. The court further noted that the 2/17/14 Affidavit
3 filed at Docket #111, "clearly does not list Mr. Belloc as
4 having received notice." The court also observed that the Tran
5 Declaration, while stating that Mr. Belloc was on the service
6 list, attached and referenced the 2/17/14 Affidavit or what
7 looks like it, with the exception that Exhibit B lists
8 Mr. Belloc and contains significant redactions.

9 The court further found that Creditor Trustee had access to
10 the unredacted affidavit of service long before the November 18,
11 2014 hearing, and thus it was not new evidence that would
12 justify the granting of his motion. Finally, the court found
13 that none of the other elements for granting a motion to alter
14 or amend a judgment were met in the case; there was no
15 intervening law or manifest error of law or fact and no manifest
16 injustice to be corrected. In the end, the court concluded that
17 Creditor Trustee failed to meet his burden to establish a basis
18 for altering or amending the order under Civil Rule 59(e). Due
19 to its decision on the notice issue, the court found it
20 unnecessary to address whether the standards for excusable
21 neglect had been met.

22 On July 12, 2016, Creditor Trustee filed a timely notice of
23 appeal of the bankruptcy court's ruling and order denying his
24 motion for reconsideration.⁵

25
26 ⁵ Although the notice of appeal refers only to the order
27 denying Creditor Trustee's motion for reconsideration, the appeal
28 of the order denying a Rule 9023 motion is sufficient to bring up
the merits of both the underlying order and the Rule 9023 motion
(continued...)

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction over this proceeding
3 under 28 U.S.C. §§ 1334 and 157(b) (2) (B). We have jurisdiction
4 under 28 U.S.C. § 158.

5 **III. ISSUES**

6 A. Did the bankruptcy court err in granting Mr. Belloc's
7 Motion to Approve Late-Filed Proof of Claim and for Relief from
8 the Automatic Stay based on the evidence submitted at the
9 November 18, 2014 hearing?

10 B. Did the bankruptcy court err in overruling Creditor
11 Trustee's Motion for Reconsideration?

12 C. Did the bankruptcy court err by not holding an
13 evidentiary hearing?

14 **IV. STANDARDS OF REVIEW**

15 To the extent certain facts regarding service of process
16 are disputed, those facts are reviewed under the clearly
17 erroneous standard. See Keys v. 701 Mariposa Project, LLC
18 (In re 701 Mariposa Project, LLC), 514 B.R. 10, 14 (9th Cir. BAP
19 2014) (citing S.E.C. v. Internet Sols. for Bus. Inc., 509 F.3d
20 1161, 1165 (9th Cir. 2007)). Findings of fact are clearly
21 erroneous if they are "illogical, implausible, or without
22 support in the record." Retz v. Samson (In re Retz), 606 F.3d
23 1189, 1196 (9th Cir. 2010).

24 We review the bankruptcy court's denial of a motion under

25 _____
26 ⁵ (...continued)
27 since the Rule 9023 motion was filed within fourteen days after
28 entry of the underlying order. See Watson v. Shandell
(In re Watson), 192 B.R. 739, 742 n.3 (9th Cir. BAP 1996), aff'd,
116 F.3d 488 (9th Cir. 1997) (table).

1 Civil Rule 59(e) under the abuse of discretion standard.
2 Ta Chong Bank Ltd. v. Hitachi High Techs. Am., Inc., 610 F.3d
3 1063, 1066 (9th Cir. 2010).

4 We also review the bankruptcy court's decision not to
5 conduct an evidentiary hearing under the abuse of discretion
6 standard. Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1139
7 (9th Cir. 2004).

8 Under the abuse of discretion standard, we first "determine
9 de novo whether the [bankruptcy] court identified the correct
10 legal rule to apply to the relief requested." United States v.
11 Hinkson, 585 F.3d 1247, 1261-62 & n.21 (9th Cir. 2009)
12 (en banc). If the bankruptcy court identified the correct legal
13 rule, we then determine under the clearly erroneous standard
14 whether its factual findings and its application of the facts to
15 the relevant law were: "(1) illogical, (2) implausible, or
16 (3) without support in inferences that may be drawn from the
17 facts in the record." Id.

18 V. DISCUSSION

19 **A. The bankruptcy court did not err in granting Mr. Belloc's** 20 **Motion to Approve Late-Filed Proof of Claim and for Relief** 21 **from the Automatic Stay.**

22 There is no question that Mr. Belloc's POC was filed after
23 the claims bar date. The crux of this appeal is whether
24 Mr. Belloc received notice of the Bar Date Order. It is a
25 fundamental principle of due process that known creditors of a
26 debtor are entitled to actual notice of a claims bar date before
27 their claims can be extinguished. City of New York v. New York,
28 N.H. & H.R. Co., 344 U.S. 293 (1953). This is true in
chapter 11 cases even where the creditor may have actual

1 knowledge of the pendency of the bankruptcy. Id. at 297. A
2 creditor in a reorganization has a "right to assume" that he
3 will receive all required notices before his claim will be
4 forever barred. Id.; see also Levin v. Maya Constr. Co.
5 (In re Maya Constr. Co.), 78 F.3d 1395, 1399 (9th Cir. 1996)
6 (known creditors are entitled to official or formal notice of a
7 debtor's bankruptcy filing and claims bar date).

8 **1. The Mailbox Presumption**

9 Rule 9006(e) provides that "[s]ervice of process and
10 service of any paper other than process or of notice by mail is
11 complete on mailing." While the language suggests that actual
12 receipt of the notice may be unnecessary, courts in this Circuit
13 have applied the mailbox presumption to bankruptcy cases to
14 support a finding of receipt. See Moody v. Bucknum
15 (In re Bucknum), 951 F.2d 204, 206 (9th Cir. 1991) (applying
16 presumption to dischargeability of debt complaint); Cuna Mutual
17 Ins. Group v. Williams (In re Williams), 185 B.R. 598 (9th Cir.
18 BAP 1995) (same). In the common law, "proof that a letter
19 properly directed was placed in a post office creates a
20 presumption that it reached its destination in usual time and
21 was actually received by the person to whom it was addressed."
22 Hagner v. U.S., 285 U.S. 427, 430 (1932) (citing Rosenthal v.
23 Walker, 111 U.S. 185, 193 (1884)). "The rule is a key support
24 of the bankruptcy system's notice by mail." In re Williams,
25 185 B.R. at 599. A presumption of receipt is established by a
26 showing of proper mailing. Lewis v. U.S., 144 F.3d 1220, 1222
27 (9th Cir. 1998); Herndon v. De La Cruz (In re De la Cruz),
28 176 B.R. 19, 22 (9th Cir. BAP 1994).

1 **2. Analysis**

2 At the preliminary hearing and the November 18, 2014
3 hearings, Mr. Belloc maintained in his pleadings - albeit not by
4 declaration - that he received no notice of the Bar Date Order.
5 At the November 18, 2014 hearing, the bankruptcy court noted
6 that the 2/17/14 Affidavit and service list filed in the
7 bankruptcy court at Docket #111 did not show Mr. Belloc's name
8 and address. Counsel for Creditor Trustee argued that in order
9 to comply with HIPPA, a redacted affidavit of service was filed
10 on the public docket but he thought an unredacted affidavit of
11 service and service list was filed under seal or with Judge
12 Hollowell's chambers and that this unredacted version would show
13 Mr. Belloc had been served with notice of the Bar Date Order.
14 However, this unredacted version that he spoke about was clearly
15 not the one attached to the Tran Declaration.

16 As the bankruptcy court noted, counsel acknowledged that
17 the service list attached as Exhibit B to the 2/17/14 Affidavit
18 had been heavily redacted by his office the night before it was
19 filed in the bankruptcy court. The bankruptcy court found that
20 the redaction of Exhibit B which contained Mr. Belloc's name and
21 address destroyed the integrity and credibility of the Tran
22 Declaration.

23 Therefore, since there was no corroborating evidence
24 showing that Mr. Belloc had been served with notice of the Bar
25 Date Order, the mailbox presumption did not arise and there was
26 nothing for Mr. Belloc to rebut. While Creditor Trustee
27 complains that Mr. Belloc provided no evidence, it was Creditor
28 Trustee's burden to show that Epiq had served Mr. Belloc by mail

1 with notice of the Bar Date before the presumption of receipt
2 would arise. He failed to meet that burden at the November 18,
3 2014 hearing. No documents or other objective evidence
4 effectively contradicted Mr. Belloc's contention that he did not
5 receive notice of the Bar Date Order. Given the absence of such
6 evidence, we cannot say the trial court's interpretation of the
7 facts is implausible on its face. Accordingly, the bankruptcy
8 court did not err in granting Mr. Belloc's Motion to Approve
9 Late-Filed Proof of Claim and for Relief from the Automatic
10 Stay.

11 **B. The bankruptcy court did not err in denying Creditor
12 Trustee's Motion for Reconsideration.**

13 Creditor Trustee filed his motion for reconsideration under
14 Rule 9023, which incorporates Civil Rule 59(e). Civil
15 Rule 59(e) motions "may not be used to raise arguments or
16 present evidence for the first time when they could reasonably
17 have been raised earlier in the litigation." Marlyn
18 Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873,
19 880 (9th Cir. 2009); Carroll v. Nakatani, 342 F.3d 934, 945
20 (9th Cir. 2003). Civil Rule 59(e) "does not provide a vehicle
21 for a party to undo its own procedural failures [or] allow a
22 party to introduce new evidence or advance new arguments that
23 could and should have been presented to the [bankruptcy] court
24 prior to the judgment." DiMarco-Zappa v. Cabanillas, 238 F.3d
25 25, 34 (1st Cir. 2001). Matters that were not presented in the
26 first instance by a well-represented party are not considered on
27 a motion for reconsideration. See 389 Orange St. Partners v.
28 Arnold, 179 F.3d 656, 665 (9th Cir. 1999). Although Civil

1 Rule 59(e) permits a bankruptcy court to reconsider and amend a
2 previous order, the rule offers an "extraordinary remedy, to be
3 used sparingly in the interests of finality and conservation of
4 judicial resources." Kona Enters., Inc. v. Estate of Bishop,
5 229 F.3d 877, 890 (9th Cir. 2000). "Indeed, a motion for
6 reconsideration should not be granted, absent highly unusual
7 circumstances, unless the [bankruptcy] court is presented with
8 newly discovered evidence, committed clear error, or if there is
9 an intervening change in the controlling law." Id.

10 As the bankruptcy court found, Creditor Trustee presented
11 no newly discovered evidence, nor did he establish that the
12 court had made a manifest error of law or fact. While Creditor
13 Trustee filed the unredacted affidavit of service showing
14 service upon Mr. Belloc, this evidence was not "newly
15 discovered" for purposes of Civil Rule 59(e) if it "could have
16 been discovered with reasonable diligence" at the time of trial.
17 Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d
18 208, 211 (9th Cir. 1987). Creditor Trustee made no showing, or
19 even any argument, why he could not have obtained the unredacted
20 affidavit prior to the November 18, 2014 hearing. Therefore, it
21 was "well within" the bankruptcy court's discretion not to
22 consider it. See Wallis v. J.R. Simplot Co., 26 F.3d 885, 892
23 n. 6 (9th Cir. 1994) (Where the moving party does not make any
24 showing that an affidavit was unavailable at the time of trial,
25 rejection of such a tardy affidavit is "well within" a court's
26 discretion.) Likewise, Creditor Trustee made no showing that he
27 did not nor could not have discovered Mr. Belloc's 2013 lawsuit
28 until after the November 18, 2014 hearing.

1 In short, the court concluded that there was no basis for
2 granting his motion. That conclusion was not an abuse of
3 discretion.

4 **C. The bankruptcy court properly exercised its discretion to**
5 **not hold an evidentiary hearing.**

6 Creditor Trustee also argues that the bankruptcy court
7 erred by not holding an evidentiary hearing. A bankruptcy
8 court's decision on whether to conduct an evidentiary hearing is
9 reviewed for an abuse of discretion. Murphy v. Schneider Nat'l,
10 Inc., 362 F.3d at 1139.

11 As an initial matter, many of Creditor Trustee's
12 contentions regarding an evidentiary hearing are directed
13 towards the bankruptcy court's lack of specific findings
14 regarding Mr. Belloc's excusable neglect. However, in its
15 decision denying Creditor Trustee's motion for reconsideration,
16 the bankruptcy court rested its final decision on the issue of
17 notice and not excusable neglect. Therefore, we consider only
18 whether an evidentiary hearing was warranted on the issue of
19 notice in connection with the November 18, 2014 hearing.⁶

20 Creditor Trustee argues on appeal that he submitted
21

22 ⁶ We observe that Creditor Trustee did not file his motion
23 for reconsideration under Civil Rule 59(a). Under that
24 subsection, a court has the discretion to reopen a judgment if
25 one has been entered, take additional testimony, amend findings
26 of fact and conclusion of law, or make new findings and
27 conclusions. See Civil Rule 59(a). Therefore, we cannot find
28 the bankruptcy court abused its discretion by not holding an
evidentiary hearing in connection with the motion for
reconsideration based on Creditor Trustee's attempt to introduce
evidence to rebut what it considered were "unsupported
conclusions" of the bankruptcy court.

1 evidence that Mr. Belloc was properly mailed notice and that
2 Mr. Belloc offered nothing in return. According to Creditor
3 Trustee, the bankruptcy court gave greater weight to nonexistent
4 evidence from Mr. Belloc than a sworn statement indicating the
5 name and address to which notice was sent: "To have weighed
6 such evidence without an evidentiary hearing was error."
7 Creditor Trustee also maintains that his counsel "offered live
8 evidence twice during the November 18, 2014 hearing." We are
9 not persuaded by these arguments.

10 Civil Rule 43(c), which is applicable to contested matters
11 under Rule 9017, provides: "When a motion relies on facts
12 outside the record, the court may hear the matter on affidavits
13 or may hear it wholly or partly on oral testimony or on
14 depositions." Under this rule, bankruptcy courts have "wide
15 discretion" in deciding whether to take oral testimony at an
16 evidentiary hearing. United Commercial Ins. Serv., Inc. v.
17 Paymaster Corp., 962 F.2d 853, 858 (9th Cir. 1992); accord
18 Garner v. Shier (In re Garner), 246 B.R. 617, 624 (9th Cir. BAP
19 2000). Further, Local Rule 9014-2 sets out the procedures
20 governing hearings on contested matters in the bankruptcy court
21 for the District of Arizona. Local Rule 9014-2(a) states that
22 "all hearings scheduled on contested matters will be conducted
23 without live testimony except as otherwise ordered by the court.
24 If, at such a hearing, the court determines that there is a
25 material factual dispute, the court will schedule a continued
26 hearing at which live testimony will be admitted."
27 Alternatively, subsection (b) of the rule sets forth the
28 procedure for a party to request that the court take live

1 testimony.⁷

2 Here, while counsel for Creditor Trustee made some generic
3 comments during the November 18, 2014 hearing regarding live
4 testimony, he did not invoke the procedures available under
5 Local Rule 9014-2(b) to request that Creditor Trustee be allowed
6 to present live testimony, nor do we see anywhere in the record
7 that an evidentiary hearing was requested before Creditor
8 Trustee filed his motion for reconsideration. Creditor

9

10 ⁷ Subsection (b) provides:

11 (1) Any party filing a motion, application, or objection who
12 reasonably anticipates that its resolution will require live
13 testimony may file an accompanying motion for an evidentiary
14 hearing, stating:

14 (A) The estimated time required for receipt of all
15 evidence, including live testimony;

15 (B) When the parties will be ready to present such
16 evidence;

16 (C) The estimated time required to complete all
17 formal and informal discovery;

17 (D) Whether a Bankruptcy Rule 7016 Scheduling
18 Conference should be held; and,

18 (E) Whether any party who may participate at the
19 evidentiary hearing is appearing pro se.

20

20 (2) The party requesting an evidentiary hearing shall accompany
21 the motion with a form of order.

22

22 (3) Any response to a motion for an evidentiary hearing shall be
23 served and filed within seven days of service of the motion. The
24 time computation and enlargement provisions of Rule 9006 shall
25 not apply to the response deadline, except that the responding
26 party shall have an additional 3 days to respond if the motion is
27 served by mail.

26

26 (4) Based upon the motion and any responses, the court will
27 either finalize the order setting the matter for hearing or
28 request that the parties appear for a Bankruptcy Rule 7016
Scheduling Conference.

1 Trustee's contention that an evidentiary hearing was necessary
2 on the merits, made for the first time after the bankruptcy
3 court had ruled, came too late: he had already waived his right
4 to an evidentiary hearing. In sum, the bankruptcy court did not
5 abuse its discretion by failing to hold an evidentiary hearing;
6 an evidentiary hearing was neither asked for nor required given
7 the evidence presented.

8 **VI. CONCLUSION**

9 For the reasons stated, we AFFIRM.

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