ORDERED ACCORDINGLY.

Dated: August 1, 2018

Brenda K. Martin, Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: **MACAVITY COMPANY LLC,** **Debtor.**	Chapter 11 Case No.: 2:17-bk-08474-BKM **MEMORANDUM RE ORDERS DENYING MOTION FOR RECONSIDERATION**

Counsel for Multistate Interests, LLC's ("Multistate") retained Integra Realty Resource ("Integra") as a consulting expert to assist in preparation for a two-day trial in December 2018 on the Debtor's motion for debtor-in-possession financing.[1] On the morning of the trial, the Debtor and Multistate settled. As part of the settlement, the amount of Multistate's allowed fees and costs were to be determined by later agreement. The parties ultimately could not come to terms and requested the Court make such determination. Pleadings from the parties ensued, with Multistate requesting fees and costs of $531,950.15 (Dkt #241; Dkt #252), and the Debtor asking to reduce the fees and costs to no greater than $324,000 (Dkt #247). After reviewing the pleadings and hearing oral arguments by the parties,[2] the Court ruled from the bench, awarding fees and costs of

[1] Debtor's sole asset in this case is approximately 860 acres of real property located in Princeton, Texas ("Property").

[2] The parties asked the Court to decide the matter on the pleadings without an evidentiary hearing.

$399,752.15. The Court thereafter on July 10, 2018 entered the *Order Establishing Allowed Secured Claim* ("Order"; Dkt # 260).

On July 20, 2018, Multistate filed its *Motion for Reconsideration of Order Establishing Allowed Secured Claim and Supplement to Motion to Establish Amount of Fees and Costs to be Added to Allowed Secured Claim* ("Motion for Reconsideration"; Dkt #262).[3] The Motion for Reconsideration urged the Court to reconsider its fee reduction related to Integra, claiming that this portion of the Order was an improper sanction. Multistate also requested an emergency hearing (Dkt # 263) because the sale of the Property was scheduled for July 27, 2018, with bids due on July 25, 2018.[4] Due to Multistate requesting an accelerated hearing, the Court reviewed the pleadings immediately, determined that it would not grant relief, and issued orders denying reconsideration and for an accelerated hearing on July 20, 2018. (Dkt # 267; Dkt # 268). This memorandum sets forth the grounds for denial.

Per FRBP Rule 3008, "[a] party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order." The standards for a Rule 3008 motion filed within the ten-day appeal period is found in Rule 59(a).[5] *In re Consol. Pioneer Mortg.*, 178 B.R. 222, 227 (B.A.P. 9th Cir. 1995), *aff'd sub nom. In re Consol. Pioneer Mortg. Entities*, 91 F.3d 151 (9th Cir. 1996). Rule 59(a) has generally been interpreted to provide three grounds for granting motions under Fed. R. Civ. Proc. 59: (1) manifest error of law; (2) manifest error of fact; and (3) newly discovered evidence. *School Dist. No. 1J Multnomah County, OR v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *In re Gurr*, 194 B.R. 474, 475 (Bankr. D. Ariz. 1996). "The Court will ordinarily deny a motion for reconsideration of an Order absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence." L.R. Civ. P.

[3] Along with the Motion for Reconsideration, Multistate filed the declarations of Scot L. Claus (Dkt #264) and Carolyn J. Johnsen (Dkt # 265; collectively "Declarations").

[4] Multistate, as the second lienholder on the Property, was entitled to credit bid its allowed secured claim and wanted a final amount for its claim.

[5] Fed. R. Civ. P. 59, as made applicable through Fed. R. Bankr. P. 9023.

7.2(g)(1); Fed. R. Bankr. P. 9029(b). A motion under Rule 59 should not be used to ask the Court to rethink what the Court has already thought through, rightly or wrongly. *In re America West Airlines, Inc.*, 240 B.R. 34, 38 (Bankr. D. Ariz. 1999). A hearing under Rule 3008 is required only if the Court is considering granting the motion. ADVISORY COMMITTEE NOTE TO BANKRUPTCY RULE 3008.

The crux of Multistate's argument for reconsideration is found in paragraphs 7[6] and 24[7] of the Motion for Reconsideration where it argues that the Court was "mistaken in the sequence of events surrounding the retention of Integra" which lead the Court to "sanction" Multistate for failing to disclose Integra's appraisal results to the Debtor. These paragraphs demonstrate a fundamental misunderstanding of the Court's ruling. The Court did not sanction Multistate for failing to disclose Integra's appraisal. In fact, the Court generally agrees with Multistate that it had no duty to turn over the results of the appraisal to the Debtor as Integra was employed as a consulting expert, not a trial expert. The Order was not a sanction. Instead, due to the scant information regarding what it learned from Integra, the Court had difficulty assessing the reasonableness of Multistate's fees.

The parties agreed to let the Court rule on the reasonableness of Multistate's fees without further evidence. With what was before it, the Court could not judge the reasonableness of the fees charged by Integra. More to the point, without a better

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[6] Paragraphs 7 reads:

> Multistate believes that the Court was mistaken as to the sequence of events surrounding the retention of Integra by Multistate's counsel, and Integra's role and conduct as a consulting expert. This mistake was critical because it led the Court to reach erroneous conclusions about information possessed by Multistate's counsel (e.g., Integra's written reports that Multistate's counsel did not possess until long after the Settlement had been reached), and further led the Court to conclude that information was inappropriately withheld from the Court or Debtor's counsel.

[7] Paragraph 24 reads:

> In this case, relief is justified under the equities and circumstances of the case. Integra was retained as a consulting expert and remained a consulting *[sic]* at all relevant times. Integra was never identified as a testifying expert. More importantly, the Court has levied what appears to be a sanction for failing to disclose documents and information that Multistate and its counsel did not possess. Again, Multistate's counsel never identified Integra as a trial witness; and in any event, never possessed an Appraisal Report prior to Trial or Settlement. The sparse information it did have was not subject to discovery pursuant to Rule 26. Nevertheless, Multistate provided information it did possess prior to Settlement to Debtor's counsel upon request. Multistate did not deprive the Debtor of any information; it simply did not have it.

understanding of when and what Integra told Multistate, the Court could not evaluate whether Multistate acted reasonably in the days and weeks leading up to the trial while it was claiming that the proposed priming lien put it at risk. The entire fight in this hotly contested matter was whether Multistate would be adequately protected if it were primed. Thus, the value of the Property securing its claim was key. Yet, the Court still does not know what Integra counseled Multistate regarding the value of the Property. The timeline, provided in the Declarations, in which Multistate told Integra it would not be called as a witness and to "stand down," does not assist or change the Court's analysis. If anything, this timeline only strengthens the Court's conviction that its ruling is correct.[8]

To be clear, Multistate had no obligation to share what Integra told it with the Debtor, the Court, or otherwise make this information public. But, if it wanted the Court to find its position – and therefore its fees – reasonable, Multistate needed to share this information with the Debtor and the Court. It did not, so the Court reduced its fees accordingly. Nothing in the Motion for Reconsideration or associated Declarations convinced this Court that its Order was manifestly in error on either the facts or law.

Accordingly, the Court denied the Motion for Reconsideration.

SIGNED AND DATED ABOVE.

. . .

[8] By way of example, if the discussions between Integra and Multistate (presumably aided by the comparables pulled by Integra) revealed that the Property was worth vastly more than Multistate's lien, it might very well have been unreasonable for Multistate to proceed with its fight over adequate protection. Because the Court was not presented with what Multistate learned about the Property value, it could not properly evaluate whether Multistate's actions in proceeding toward trial were reasonable. As Multistate had the burden as to reasonableness, the lack of any such evidence was problematic.

Copies emailed this 1st day of
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