

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

LEONARD POZNER,

Plaintiff,

vs.

Case No. 18CV3122

JAMES FETZER,

Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION, VACATION [SIC] & OBJECTION TO POZNER'S VALUATION OF PROPERTY, & DAMAGES FOR ABUSE OF PROCESS

Plaintiff Leonard Pozner, through his attorneys, respectfully requests that this Court deny Defendant Fetzer's Motion for Reconsideration, Vacation [sic] & Objection to Pozner's Valuation of Property, & Damages for Abuse of Process (the "Motion for Reconsideration"). The basis for this denial is set forth below.

ARGUMENT

After considering the parties' written submissions and oral arguments, on June 24, 2022, this Court granted Plaintiff's Motion for Turnover of Property to Satisfy Judgment. On July 8, 2022, the Court signed an Amended Order Granting Plaintiff's Motion for Turnover of Property to Apply Property to Satisfy Judgment (the "Order). Defendant Fetzer's Motion for Reconsideration should be dismissed on procedural grounds because he has not met his burden to show that the Order should be overturned. His motion should also be denied on substantive grounds because he impermissibly uses the motion as a vehicle to make new arguments as to why the Court should have denied Plaintiff's Motion for Turnover of Property to Satisfy Judgment.

I. DEFENDANT FETZER HAS FAILED TO MEET HIS BURDEN TO SHOW THIS COURT’S ORDER SHOULD BE OVERTURNED.

The Court should deny Defendant Fetzer’s Motion for Reconsideration because he has not met his burden to show that either newly discovered evidence exists or that the Court committed a manifest error of law or fact. *See Koepsell’s Olde Popcorn Wagons, Inc. v. Koepsell’s Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 44, 275 Wis. 2d 397, 685 N.W.2d 853. “Newly discovered evidence is not ‘new evidence that could have been introduced at the original summary judgment phase.’” *Bauer v. Wisconsin Energy Corporation*, 2022 WI 11, ¶ 14, 400 Wis. 2d 592, 602, 970 N.W.2d 243, 248 (quoting *Koepsell’s Olde Popcorn Wagons, Inc.*, at ¶ 46).

“Manifest error” error of law or fact is not shown by the disappointment of the losing party. *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). Instead, it is the “wholesale disregard, misapplication, or failure to recognize controlling precedent.” *Id.* Simply put, a movant cannot use a motion for reconsideration as a vehicle for making new argument or submitting new evidentiary materials that could have been submitted earlier after the court has decided. *Bauer*, at ¶ 14. However, Defendant Fetzer’s Motion for Reconsideration does just that.

First, Defendant Fetzer cannot meet the new evidence standard to vacate the Order by arguing that Plaintiff is judicially estopped from exercising his collection remedies under Wis. Stat. § 816.08. Contrary to this standard, Defendant Fetzer’s Motion for Reconsideration merely presented a different argument on why the Court should deny Plaintiff’s Motion for Turnover of Property to Satisfy Judgment. He failed to present any newly discovered evidence that was unknown to him at the time of the Court’s decision. Nor does he show the court why, through reasonable diligence, that he could not have located the information earlier. *See Koepsell’s Olde Popcorn Wagons, Inc.*, at ¶ 48. Thus, the Motion for Reconsideration must be denied because

Defendant Fetzer has not met his burden to show that the motion is supported by newly discovered evidence.

Second, Defendant Fetzer's Motion for Reconsideration does not establish that the Court committed a manifest error of law or fact. Instead, he uses the motion as an opportunity to make a new argument that Plaintiff is judicially estopped from "claiming the Nobody Died books have any value to him." (Motion for Reconsideration at ¶ 3). Stated simply, Defendant Fetzer fails to meet the heightened standard showing that the Court disregarded, misapplied, or failed to recognize controlling precedent in its ruling. *See Koepsell's Olde Popcorn Wagons, Inc.*, at ¶ 44.

No manifest error exists as to the Order simply because Defendant Fetzer is disappointed by this Court's decision. He does not establish that this Court engaged in wholesale disregard of the applicable law for granting turnover motions. To the contrary, his main concern is proving that the Books¹ have no value. As Plaintiff argued at length in his reply brief in support of his Motion for Turnover of Property to Satisfy Judgment, by docketing his Judgment on April 7, 2020, at 11:36 a.m., Plaintiff obtained an unsecured, inchoate interest with regard to Defendant Fetzer's personal property, tangible and intangible, against which to levy. *See Assoc. Bank N.A. v. Collier*, 2014 WI 62, ¶ 23, 355 Wis. 2d 343, 852 N.W.2d 443.

Defendant Fetzer wholly fails to establish that the Court misapplied the controlling precedent set forth in *Assoc. Bank N.A. v. Collier*. As such, his Motion for Reconsideration must be denied because he has not met his burden to show that the Court committed manifest error of law or fact.

¹ Nobody Died At Sandy Hook, 1st Edition (2015); Nobody Died At Sandy Hook, Banned Edition (2015); Nobody Died At Sandy Hook, PDF Edition (2015) (the "PDF Version"); and Nobody Died At Sandy Hook, 2nd Edition (2016), collectively as the "Books."

Third, and as a result of his failure to meet his burden, it is clear that Defendant Fetzer merely disagrees with this Court's Order. Defendant Fetzer already had an opportunity to reply in writing to Plaintiff's Motion for Turnover of Property to Apply Property to Satisfy Judgment, as well as the opportunity to argue the merits during the June 24, 2022, hearing. Defendant Fetzer impermissibly uses his Motion for Reconsideration as a vehicle to make new arguments that he could have submitted before this Court ruled on Plaintiff's turnover motion. *See Bauer*, 2022 WI at ¶ 14. This Court should therefore deny Defendant Fetzer's Motion for Reconsideration solely based on the fact that he has not met his burden.

II. DEFENDANT FETZER'S ABUSE OF PROCESS ARGUMENT LACKS MERIT.

Defendant Fetzer owes Plaintiff a judgment debt. In the years since the Court entered the Judgment, Defendant Fetzer has not willingly paid a dime to reduce the amount of the judgment debt to Plaintiff. Under Wisconsin law, the Court may order any property of the judgment debtor to be applied toward the satisfaction of the judgment. *See Wis. Stat. 816.08*. The Plaintiff's intent regarding the request to apply the Books and Domain Names to the Judgment is irrelevant.

III. DEFENDANT FETZER'S JUDICIAL ESTOPPEL ARGUMENT ALSO LACKS MERIT.

Setting aside the fatal procedural and substantive errors in Defendant Fetzer's Motion for Reconsideration commits, he is wrong to suggest that judicial estoppel applies here.

A party asserting judicial estoppel must show: (1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; and (3) the party to be estopped convinced the first court to adopt its position. *Kolupar v. Wide Pontiac Cadillac, Inc.*, 2007 WI 98, ¶ 24, 303 Wis. 2d 258, 275-76, 735 N.W.2d 93, 102.

Defendant Fetzer fails to establish each of the above elements. Plaintiff has not argued for or obtained a decision that the Books have no value. To the contrary, on June 24, 2022, Plaintiff

argued that the Books' copyrights have a collective value of approximately \$100,000, which is based on Defendant Fetzer's own testimony on royalties he received in 2019. At bedrock, Defendant Fetzer fails to cite to any evidence to support his judicial estoppel argument and he cannot because none exists.

CONCLUSION

In sum, Defendant Fetzer's Motion for Reconsideration fails because he has not met his burden to show this Court's Order should be overturned. Instead, he uses the Motion for Reconsideration to propose new arguments that should have been made in his written submission and argued at the June 24, 2022, hearing. As a result, this Court should deny Defendant Fetzer's Motion for Reconsideration.

Respectfully submitted this 29th day of July 2022.

QUARLES & BRADY LLP

Electronically Signed by Emily M. Feinstein

EMILY M. FEINSTEIN SBN# 1037924

33 E. Main Street, Suite 900

Madison, WI 53703

Telephone: (608) 283-2470

Facsimile: (608) 251-9166

Email: emily.feinstein@quarles.com

Attorneys for Plaintiff