UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

DISH NETWORK L.L.C., SLING TV L.L.C., and NAGRASTAR LLC,	§	Case No. 3:21-cv-00218
Plaintiffs,	§	
v.	§	
ALEJANDRO GALINDO, ANNA GALINDO, MARTHA GALINDO, and OSVALDO GALINDO, individually and collectively d/b/a NITRO TV,	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT

Plaintiffs DISH Network L.L.C. and NagraStar LLC respond to Defendants' motion to undo the Court's November 30, 2022 order authorizing the U.S. Marshal to levy and sell the residential property located at 311 Scenic View, Friendswood, Texas ("Friendswood Property"). (Doc. 60.) The Court correctly determined that the Friendswood Property was purchased using wrongfully acquired funds and therefore no homestead protection could attach. (Doc. 53, "Order.") Reconsideration should be denied because Defendants attempt to raise arguments that were previously available to Defendants, but were not asserted and thus waived by Defendants. Even if considered, Defendants' arguments lack merit and for that separate reason reconsideration should be denied.

I. THE COURT'S ORDER

The Court entered default judgment against Defendants on June 9, 2022, finding them "liable for operating an illegal streaming service called Nitro TV, through which the defendants pirated the plaintiffs' television programming and sold that content to Nitro TV's subscribers." (Doc. 53 at 1.) The Court awarded $100,363,000 in statutory damages against Defendants. (*Id.*) Defendants do not challenge the Court's default judgment.

Defendants instead take issue with the Court's post-judgment Order authorizing the sale of the Friendswood Property in partial satisfaction of the judgment. Plaintiffs showed that "[D]efendants' bank accounts – previously holding millions of dollars – have all been closed or drained." (*Id.* at 1-2.) Plaintiffs also established that "[o]ne particular account, a Paymentech account held by judgment-debtor Martha Galindo, received over $5,000,000 in payments from the defendants' scheme" and that "Martha used Paymentech-account funds to purchase the Friendswood Property in judgment-debtor Alejandro Galindo's name for $925,913.18." (*Id.* at 2.)[1] Defendants were served with Plaintiffs' motion on October 17, 2022, but did not file a response. (Doc. 46.) On November 30, 2022, the Court ordered the sale of the Friendswood Property, finding that "[o]ver ninety-nine percent of the funds Martha used to buy the Friendswood Property are directly traceable to the Paymentech account she used to collect payments from Nitro TV customers" and thus "the Friendswood Property does not warrant homestead protection." (Doc. 53 at 3.)

Defendants move under Rule 59(e) for reconsideration of the Order "to prevent a clear error or manifest injustice." (Doc. 60 at 2.) Defendants are also appealing the Order.

[1]Defendants are family members – Alejandro Galindo, his wife Anna Galindo, his mother Martha Galindo, and brother Osvaldo Galindo. (Doc. 45-1 ¶ 3.)

(Doc. 57.) Defendants moved the Fifth Circuit to stay the sale of the Friendswood Property – making essentially the same arguments raised here – and that motion was denied. (Fifth Circuit Docs. 4, 13.) Defendants' motion for reconsideration should likewise be denied as there are no grounds warranting the extraordinary remedy of reconsideration and, even if reconsidered, the Court's Order allowing the sale of the Friendswood Property is supported by the undisputed facts and well-established Texas law.

II. RECONSIDERATION OF THE COURT'S ORDER SHOULD BE DENIED

"Rule 59(e) 'serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.'" *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004) (quoting *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir.1989)). "[S]uch a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised." *Id.* Reconsideration "is an extraordinary remedy that should be used sparingly." *Id.*; *see S. Constructors Grp., Inc. v. Dynaelectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993) (discussing "standards applicable to Rule 59(e)–which favor the denial of motions to alter or amend"). The Court's Order should not be reconsidered for several reasons.

First, Defendants' arguments could have been raised prior to the Court ordering the sale of the Friendswood Property and therefore do not justify reconsideration. Put simply, Defendants are attempting to distinguish one of several cases that Plaintiffs cited in their motion to sell the Friendswood Property, *Deluxe Barber Sch., LLC v. Nwakor*, 609 S.W.3d 282 (Tex. App.—Houston [14th Dist.] 2020, pet. denied), which the Court in turn cited in the Order. (Doc. 60 ¶¶ 10-13.) Defendants were served with Plaintiffs' motion to sell the

Friendswood Property and could have raised arguments attempting to distinguish the facts in *Deluxe Barber* by filing a response. (Doc. 46 [service by mail to Defendants' last known addresses including the Friendswood Property]; *see* Ex. 1 [process server affidavit showing motion was also affixed to front door of the Friendswood Property].) Defendants' belated arguments do not warrant reconsideration. *See Templet*, 367 F.3d at 479 (stating Rule 59(e) "is not the proper vehicle for . . . arguments that could have been offered or raised"); *see also Banister v. Davis*, 140 S. Ct. 1698, 1702-03 (2020) (commenting that Rule 59(e) does not allow a court "to address new arguments or evidence that the moving party could have raised before the decision issued"); *see also Parks v. Hinojosa*, No. 4:21-cv-00111-O, 2021 WL 2783989, at *3 (N.D. Tex. July 2, 2021) (denying Rule 59(e) motion and holding that plaintiff waived his arguments for reconsideration by failing to oppose defendant's motion to dismiss).

Second, even if Defendants' arguments are considered, Defendants fail to establish that the Court committed a manifest error of law or fact in the Order. *See Wease v. Ocwen Loan Servicing, L.L.C.*, 852 F. App'x 807, 809 (5th Cir. 2021)("[A] 'manifest error' is an obvious error that 'is plain and indisputable, and that amounts to a complete disregard of the controlling law.'"). The Court held that "the homestead-exemption protection does not attach when a property is purchased with wrongfully acquired funds." (Doc. 53 at 3; citing *Deluxe Barber* among other cases). Defendants "do not dispute" the law in *Deluxe Barber*, but argue that the Court erred because the funds used to purchase the Friendswood Property were not "wrongfully acquired." (Doc. 60 ¶¶ 10-11.) The Court correctly found that such funds were wrongfully acquired because they were traced directly to the infringing Nitro

TV service that gave rise to the Court's judgment in this case. (Doc. 53 at 3.) *See Crawford v. Silette*, 608 F.3d 275, 270-80 (5th Cir. 2010) (affirming district court's order finding no homestead protection under analogous Florida laws, and distinguishing instances involving judgment creditors where homestead protection was held to apply, because in that case, as here, "the *fraudulently obtained* funds can be traced directly into the homestead").

The funds that Martha used to purchase the Friendswood Property were wrongfully acquired because the funds are payments that Defendants received from customers of their Nitro TV service – customers that paid Defendants to receive television programming that Defendants stole from Plaintiffs and thereby avoided paying the requisite subscription fee to Plaintiffs. (Doc. 45 at 8-9.) Indeed, the statutory damages the Court previously awarded for Defendants' violations of federal law are intended to disgorge Defendants' ill-gotten gains and compensate Plaintiffs for the revenue lost due to Defendants' infringing activity. (*Id.* at 8.) Defendants will be unjustly enriched if allowed to shield the wrongfully acquired funds in the Friendswood Property. (*Id.* at 9.) *Crawford*, 608 F.3d at 279-80 (emphasizing homestead laws should not be applied where "the party claiming the homestead exemption would be unjustly enriched").

Defendants' argument that only 99% of the funds used to purchase the Friendswood Property were shown to come from Defendants' infringing Nitro TV service also does not justify reconsideration. (Doc. 60 ¶ 12.) There was $5.4 million transferred from Martha's Paymentech account to her Chase business checking account. (Doc. 45 at 5.) The funds used to purchase the Friendswood Property were traced back to that Chase account. (*Id.* at 6.) More than 99% of the funds deposited into Martha's Chase account during the two-year

period leading up to the purchase of the Friendswood Property came from her Paymentech account used exclusively to receive payments from Nitro TV customers. (*Id.* at 5-6.)

If Defendants contend that some portion of the $925,913.18 that Martha paid for the Friendswood Property came from funds other than the $5.4 million transferred from her Paymentech account, Defendants have the burden to trace the funds to a source unrelated to their infringing Nitro TV service. *See Admar Int'l v. Intelex, Ltd.*, No. 07-cv-0080-JRG, 2020 WL 12991123, at *1 (E.D. Tex. Mar. 19, 2020) ("In general, the judgment creditor has the initial burden of tracing assets to establish they are property of the judgment debtor and then the burden shifts to the judgment debtor to show that . . . the property is exempt from execution under state law."); *see also Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 227 (Tex. 1991) ("All unaccounted for cash is presumed to be in the possession of the debtor; simply asserting 'I spent it' is unacceptable."). Defendants make no attempt to show the Friendswood Property was purchased with funds other than those attributable to their Nitro TV service and thus reconsideration of the Order on this basis should be denied.

Finally, reconsideration is unwarranted because Defendants fail to demonstrate the Friendswood Property was their homestead. The Friendswood Property was not designated as a homestead for tax purposes according to the Galveston County property records filed with the Court. (Doc. 45 at 6, Ex. 12.) Defendants contend "[t]he Friendswood Property is Defendants' homestead," but provide no evidence to support the argument. (Doc. 60 ¶ 7.) In fact, Defendants' argument is contradicted by property tax records showing that Martha (who paid for the Friendswood Property) and Osvaldo claimed a homestead exemption on other properties at the time the Friendswood Property was acquired and continue to claim

homestead protection over them. (Doc. 45 at 9.) Defendants Alejandro and Anna sold their homestead several months after the Friendswood Property was purchased and deposited the funds into Anna's bank account. (*Id.*) Defendants have not established the Friendswood Property is their homestead, either individually or collectively as asserted in Defendants' motion, and therefore reconsideration of the Order authorizing the sale of the Friendswood Property should be denied. *See In Re Morgan*, 848 F. App'x 629, 631 (5th Cir. 2021) ("Under Texas law, an individual who seeks homestead protection has the initial burden to establish the homestead character of his property."); *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 160 (Tex. 2015) (finding that a court cannot assume facts to support a claim of homestead and residing in a home is not sufficient to establish a homestead, especially where, as here, the claimant owned other residential property).[2]

III. CONCLUSION

Defendants fail to show entitlement to the extraordinary remedy of reconsideration. Defendants' motion to alter or amend the Court's Order authorizing the U.S. Marshal to levy and sell the Friendswood Property and apply the proceeds towards the satisfaction of Plaintiffs' judgment should be denied in all respects.

Dated: January 17, 2023.

Respectfully submitted,

HAGAN NOLL & BOYLE LLC

s/ Timothy M. Frank
Timothy M. Frank (attorney-in-charge)
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[2]The Friendswood Property is now designated as a homestead according to the Galveston County property tax records – a designation that was made sometime after October 3, 2022, the date of the exhibits Plaintiffs filed with the Court showing no homestead was claimed on the Friendswood Property. The Galveston County Appraisal District informed Plaintiffs' counsel that the homestead designation was made on December 6, 2022 – after the Court entered its Order.

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CERTIFICATE OF SERVICE

I certify that on January 17, 2023, Plaintiffs' Response to Defendants' Motion to Alter or Amend Judgment was electronically filed with the Clerk of the Court using the CM/ECF system, which will provide notice to Defendants' counsel of record.

s/ Timothy M. Frank
Timothy M. Frank (attorney-in-charge)