UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SAN FERNANDO VALLEY DIVISION

In re: Ateco Inc Debtor(s).	CHAPTER 11 Case No.: 1:10-bk-22623-MT Adv No: 1:11-ap-01198-MT
ATECO, Inc Plaintiff(s), v. John F Hebb Defendant(s).	**MEMORANDUM OF DECISION RE MOTION FOR NEW TRIAL** Date: May 15, 2014 Time: 9:30 AM Courtroom: 302

I. Introduction

The Law Offices of John F.L. Hebb (referred to hereinafter as "Hebb" or "Movant") has brought a "Motion for New Trial re (1) Earlier Summary Judgment Decision [doc 221, 11/6/12]; (2) Sanctions [10/3/12]; (3) Trial (11/1/13); (4) Orders Terminating Granted 2004 Exam and Denying Discovery; and (5) Spoliation" ("the New Trial Motion"). This follows the Memorandum of Decision re Trial on (1) Validity of Lien; and (2) Disallowance of Claim no. 4-1 (the "Trial Memo"). Granting a motion for new trial under FRCP 59(a)(2) is appropriate only if the moving party demonstrates (1) a manifest error of fact; (2) a manifest error of law; or (3) newly discovered evidence. Janas v. Marco Crane & Rigging Co. (In re JWJ Contracting Co.), 287 B.R. 501, 514 (B.A.P. 9th Cir. 2002), aff'd, 371 F.3d 1079 (9th Cir. 2004).

The New Trial Motion provides no such grounds and ignores the long procedural history of this dispute in its assignment of error about the lack of an answer in the adversary proceeding, the delay in the 2004 examinations, and the lack of a specific order for the motion to dismiss. It also rehashes arguments already considered in relation to relevant law, billing records, discovery issues and trial evidence. Lastly, the motion attempts to relitigate rulings that were final and issued long ago. Each of these issues is addressed below along with relevant procedural history. This memorandum relates to both the bankruptcy case and the adversary proceeding Ateco v. Hebb, 1:11-ap-01198.

Hebb complains of various procedural errors in the New Trial Motion that appear to also form the basis for a document titled "Notice" and "Further Notice re: Defective Judgment." As these notices were not brought in the form of a motion (see FRBP 9013), and they seem to underlie parts of the motion for new trial, all issues raised therein are addressed as part of the ruling on the New Trial Motion.

II. Procedural History Ignored by New Trial Motion

Many of the issues raised derive from Hebb's disagreement with the case management procedures utilized here. At the beginning of the case, in the very first set of significant hearings, it became clear that the threshold issue to be decided was whether Hebb was a creditor or not. See Hr'g Tr. April 11, 2011 (bankr. doc. no. 80). Debtor alleged it was driven into bankruptcy by the Hebb litigation and argued it could easily reorganize if its position were correct that Hebb had already been paid in full. Hebb argued that he was owed substantial sums and that his claim needed to be decided through arbitration. See, e.g. Hr'g Tr. April 11, 2011.

A. Standing/ Validity of Claim

Because no plan of reorganization could reasonably be proposed or confirmed until this question was decided, the court ordered that it be resolved before moving on to other issues[1]. Where there were few funds left in the debtor after years of litigation, it was important to conserve Debtor's remaining resources and see quickly whether reorganization was even possible. Debtor did indeed attempt to proceed quickly with resolution of this claim and a plan of reorganization, filing a plan and disclosure statement on March 17, 2011, five months after filing bankruptcy. Debtor, in its first status report stated its intention to have a claims objection hearing commence shortly so that the reorganization could continue. Debtor had hired special counsel for the litigation with Hebb and was ready to go forward to resolve this dispute. See Debtor's Initial Chapter 11 Status Report, bankr. ECF doc. no. 21. Over Debtor's objection, the Court put solicitation of that plan in abeyance as the voting on such plan would not have been possible without the largest contested claim resolved. Any claims estimation hearing under 11 U.S.C.§502(c)(1) would likely have taken as long as actually resolving the claim.

[1] At that time, it appeared that the dispute could be resolved within months, leading to a liquidation or a reorganization within eight months. Sadly, that projection sorely underestimated the completely unproductive procedural litigation that ensued.

Hebb brought a motion seeking the return of alleged fraudulent conveyances early on in the case and sought to have that adjudicated before resolving his claim. See "Motion, alternatively, for an order that debtor return the funds to the estate stripped by its two shareholders in the months preceding filing this Chapter 11 case (…)", bankr. ECF doc. no. 170 (the "Fraudulent Transfer Motion"). As no other party had expressed any interest in the fraudulent transfer allegation, and such a trial would have involved a complex set of facts and potentially expert witnesses, the Court also delayed these motions without ruling on whether this should have been brought as an adversary proceeding under 11 U.S.C. § 548 and FRBP 7001(1), stating again that it would **first** decide the question of whether Hebb had a claim against the estate.[2]

Standing is a threshold question in any case and should be decided before extensive litigation on the merits proceeds. Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." In re Veal, 450 B.R. 897, 906 (B.A.P. 9th Cir. 2011). See also Warth v. Seldin, 422 U.S. 490, 498 (1975); City of Los Angeles v. County of Kern, 581 F.3d 841, 845 (9th Cir.2009). Hebb then regularly insisted on having his motions to convert or dismiss and his fraudulent transfer motion decided, despite repeated reminders that standing would be resolved first. Hebb's motion for a new trial continues his attempt to put the cart before the horse.

As described in much greater detail in the "Memorandum re Whether this Case Should be Dismissed" (the "OSC Memorandum"), dated June 27, 2012, efforts at getting this threshold question decided were delayed by Hebb's insistence on arbitration, followed by his failure to pursue the arbitration, and then followed by his failure to submit pleadings and evidence here in a timely manner. This process has now taken three years and six months to decide a very simple question – whether Ateco owes Hebb money for attorney services. This was not multi-district or class action litigation. This was not complex in any way. Yet the effort to marshal evidence and legal theories in any kind of coherent manner required endless hearings here, in the California Superior Court, and on appeal.

B. Consolidation of Objection to Claim with Adversary Proceeding

Movant's position seems to be that the Court erroneously entered partial judgment in the adversary proceeding because the decision was solely as to the objection to claim that was filed in the bankruptcy case. Movant seems to also believe that he is prevented from appealing the ruling sustaining Debtor's objection to his claim because there is no "judgment" in the bankruptcy case. To the extent these are Movant's arguments, they are incorrect.

The filing of an objection to a proof of claim creates a dispute which is a contested matter, normally requiring motion procedure rather than a complaint. Lundell v. Anchor Const. Specialists, Inc., 223 F.3d 1035 (9th Cir. 2000). If an objection to a claim is joined with a demand for relief of the kind

[2] Early in the case, the parties were advised: "I'm ordering all 2004 examinations, discovery requests, everything suspended. I don't want to run a couple-hundred-thousand-dollar case into triple that amount in attorney's fees. That makes no sense. Let's look at it narrowly, clearly, and then decide where to go once it's been briefed properly." Hr'g Tr., April 7, 2011, 20: 13-18. To date, Debtor has run up approximately $208,519 in fees and costs simply to resolve this one dispute while Hebb has represented his own law office. See First, Second, and Third Interim Applications for Compensation, bankr. ECF doc. no. 123 (Nov. 10, 2011); 260 (April 16, 2013); and 345 (Feb. 6, 2014), respectively.

specified in Fed. R. Bankr. P. 7001[3], however, it becomes an adversary proceeding[4]. Here, Debtor had also filed an adversary complaint seeking, among other things, declaratory relief as to the validity of Hebb's claim and his lien on assets of the estate. If a claim objection is filed separately from a related adversary proceeding, the court may consolidate the objection with the adversary proceeding under Rule 7042.[5]

Having found that a part of the adversary complaint and the objection to claim included common issues of fact and law, the objection to claim was consolidated with the identical issue in the adversary complaint. In addition to challenging Hebb's lien and the claim itself, Debtor's adversary complaint alleged numerous causes of action against Hebb for damages. Thus, only the first part of the adversary complaint mirrored the objection to claim. Although the Court consolidated the objection to claim and a portion of the adversary proceeding[6], consolidation of cases does not merge suits into single cause, or change rights of parties, or make those who are parties in one suit parties in another. Cabrini Dev. Council v LCA Vision, Inc., 197 F.R.D. 90 (SDNY 2000), *app dism'd in part, vacated in part, and remanded in part on other grounds*, 292 F.3d 134 (2nd Cir. 2002); see also New York v. Mircosoft, 2002 WL 318565 (D.D.C., Jan. 28, 2002) (holding that, rather than merging the rights of the parties, consolidation is a purely ministerial act which, inter alia, relieves the parties and the [c[]ourt of the burden of duplicative pleadings). All the consolidation did was make it more economical and efficient to reach the common issues.

The Court's treatment of the objection to claim within the adversary was clearly indicated to the parties at the April 7, 2011 hearing on the objection to claim. The ruling was posted on the calendar for every subsequent hearing on the objection to claim that trailed the adversary. The Court also reiterated that it had consolidated the objection to claim with the adversary complaint in subsequent memoranda and hearings held in this case. See Tentative ruling re

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[3] Debtor sought in its complaint a determination of the validity of Hebb's lien and disallowance of Hebb's claim. Rule 7001(2) requires that "a proceeding to determine the validity, priority, or extent of a lien or other interest in property" must be an adversary proceeding. Fed. R. Bankr.P. 7001(2).

[4] Fed.R.Bankr.P. 3007 states, in pertinent part, that, "A party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, but may include the objection in an adversary proceeding."

[5] When this situation arises in the context of a procedurally correct objection to claim, the court may deem the objection filed in the parent bankruptcy case to constitute the complaint in the adversary proceeding. This step was unnecessary in this case, as Debtor had already filed an adversary complaint seeking a declaratory judgment that mirrored the objection to claim.

[6] Fed.R.Civ.P. 42 (applicable through FRBP 7042) states, in pertinent part,

> (a) Consolidation. If actions before the court involve a common question of law or fact, the court may:
> (1) join for hearing or trial any or all matters at issue in the actions;
> (2) consolidate the actions; or
> (3) issue any other orders to avoid unnecessary cost or delay.
>
> (b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.

Objection to Claim no. 4, April 7, 2011, OSC Memoradum, 4:20-27, June 27, 2012 (ECF bankr.doc. no. 175); Motion to Dismiss Adversary Proceeding, Debtor's Supplemental Motion for Summary Judgment, and Status Conference re Complaint for Determination of Validity of Lien and to Disallow Claim, Hr'g Tr. 12-15, July 30, 2013 (ECF adversary doc. no. 80). The Court also indicated at hearings held on March 15, 2013, that it would go to trial on the unsecured portion of the claim. Motion to Dismiss Adversary Proceeding, Debtor's Supplemental Motion for Summary Judgment, and Status Conference re Complaint for Determination of Validity of Lien and to Disallow Claim, Hr'g Tr. 31-35, March 13, 2013 (ECF bankr.doc. no. 258). At the pretrial hearing held on May 13, 2013, the parties parsed which portion of the claim would be tried. The only issues discussed were the objection to claim and the related claims in the adversary complaint. In fact, Hebb has included the adversary proceeding case number and caption in all of his pleadings filed subsequent to consolidation, and in his pending appeal before the Court of Appeals for the Ninth Circuit.

Once the trial was held, both the claim and part of the adversary were resolved, and a final order or judgment was necessary. Rule 54 (a) of the Federal Rules of Civil Procedure sets forth the definition of a judgment. Under Rule 54(a), the term judgment "as used in these rules includes a decree and ***any order*** from which an appeal lies. FED. R. CIV. P. 54(a) (emphasis added). Fed.R.Civ.P. 58(2) then provides, "upon decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign and enter the judgment without awaiting any direction by the court […] Every judgment shall be set forth on a separate document."

Under both these rules, a final judgment is any order, entered as a separate document on the court's docket that signifies the end of litigation and begins the period in which an appeal may be brought. Thus, because the objection to claim and the related causes of action in the adversary proceeding retained their separate characteristics, it was procedurally necessary to enter the Order Sustaining Debtor's Objection to Claim in the bankruptcy case to resolve the pending Objection in the bankruptcy, and to enter the partial judgment in the adversary proceeding to resolve the causes of action that were determined at trial. Movant's "Notice of Defective Judgment" does not alter the court's rulings.

C. Answer to Complaint/Ruling on Motion to Dismiss

Movant also argues that he was not provided an opportunity to file a formal answer to the complaint. Movant contends "it is axiomatic that no hearing on the merits could have proceeded or could have occurred." Movant is essentially arguing that because the Court did not formally deny his MTD until April 29, 2014, he was not permitted nor required to formally answer the complaint. This concern is without basis for a number of reasons.

On April 27, 2011, Movant filed a Rule 12(b) Motion to Dismiss or Transfer Debtor's Adversary Claim to Private Binding Arbitration per the Parties' Written Agreement under the Federal Arbitration Act (the "MTD"). In the MTD, Movant argued solely that the parties had a pre-petition agreement to send the dispute underlying the adversary complaint to private arbitration. At the hearing on the MTD, the Court declined to rule on the MTD until the Court had determined whether Movant had standing to make such a motion. The MTD hearing trailed

other status conferences and substantive hearings for a year. While that was pending, other motions and developments in the proceedings required the Court to rule on the arbitration issue.

On June 27, 2012, the Court issued the OSC Memorandum, ruling that the Federal Arbitration Act did not apply in this case, and that Movant had waived any right he may have had to enforce an arbitration agreement. OSC Memorandum, bankr. ECF doc. no. 175, June 27, 2012. That ruling was affirmed by the Bankruptcy Appellate Panel. Law Offices of John F.L. Hebb v. Ateco, Inc. (In re Ateco), BAP no. CC-12-1386-DKiPa, doc. no. 40 (Aug. 9, 2013). It was an administrative delay because of the volume of repetitive pleadings that no order on the MTD was entered at that time, even though the basis for the MTD was resolved by the OSC Memorandum in 2012. The identical issue raised in the MTD of whether the disputed claim should go to arbitration had been resolved.

Following the MSJ ruling as to the pre-petition satisfaction of Movant's secured claim[7], and that Hebb had waived any right to arbitration, it was time to proceed to trial on the objection to Movant's unsecured claim and the first part of the adversary complaint. This was the remaining dispute concerning whether there was a valid claim before a lengthier trial would be held as to what damages there were if the claim was valid. The trial has now been held on the central dispute in the bankruptcy case. The Court can now proceed to resolving the remaining issues in the adversary action and deciding the chapter 11 reorganization issues.

1. Hebb's Pleadings Have Been Construed to do Substantial Justice

Hebb's theory on the requirement of an answer seeks a return to the long-rejected common law of civil pleading. That approach proceeded through a maze of rigid, and often numerous, stages of denial, avoidance, or demurrer. The former system proved to be excruciatingly slow, expensive, and unworkable, better calculated to vindicate highly technical rules of pleading than it was to dispense justice. 5 C. Wright & A. Miller, Fed. Prac. & Proc. Civ. § 1202 (3d ed.). The Federal Rules of Civil Procedure contemplate a program of simplified pleading. Id. The simplified pleading standard expressed in the rule is reinforced by the mandate in Rule 8(f) that "all pleadings shall be so construed as to do substantial justice."

Debtor filed an objection to Hebb's claim in April 2011. As stated earlier, Debtor raised the validity of the claim in the bankruptcy case, and then sought a declaratory judgment as to the validity of the claim in the adversary proceeding. Movant filed an opposition to the objection to claim, and numerous responsive pleadings in the adversary complaint, including opposition to two motions for summary judgment. Movant has also filed no less than three appeals of this Court's rulings. All of these pleadings provided a more detailed denial and response to that part of the complaint than any answer would have. It was abundantly clear to the Court and all parties that Hebb denied the allegations in the complaint and the position asserted in his claim was essentially his answer. For Movant to now argue that he has not had sufficient notice or opportunity to respond to that part of the complaint, whether by formal answer or other pleading, is specious.

[7] Memorandum of Decision Granting in Part, Denying in Part Without Prejudice re Motion for Summary Judgment, bankr. ECF doc. no. 221.

Movant also effectively consented to trying the issue under Federal Rule of Civil Procedure Rule 15(b), which provides that the issues tried by the express or implied consent of the parties are to be treated as if they had been raised in the pleadings. Movant's responsive pleading as to the merits of the objection to claim and request for declaratory judgment demonstrates that he consented to having a trial on the merits, with the Court having construed his responsive pleadings as an "answer."

The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Conley v. Gibson, 355 U.S. 41 (1957), *abrogated in part* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). The Court will not upset the findings made after a full trial on the merits merely because of an alleged procedural irregularity from which no prejudice resulted.

2. Estoppel

Judicial estoppel arises when a party's inconsistent positions may impose multiple liabilities on an adversary or defeat a legitimate right of recovery. Judicial estoppel is based in the desire to defeat use of intentional self-contradiction as a means of obtaining unfair advantage. New Hampshire v. Maine, 532 U.S. 742, 748 (2001). "[D]etermining whether a litigant is playing fast and loose with the courts has a subjective element and its resolution draws upon the trier's intimate knowledge of the case at bar and his or her first-hand observations of the lawyers and their litigation strategies." E.E.O.C. v. CRST Van Expedited, Inc., 679 F.3d 657, 678 (8th Cir. 2012). A court may raise judicial estoppel on its own. Bethesda Lutheran Homes v. Born, 238 F.3d 853, 858 (7th Cir. 2001).

As described above, Movant filed numerous responsive pleadings in the consolidated proceeding, and appeals from this Court's ruling. Movant also participated in drafting the pre-trial order, prepared a declaration in lieu of direct testimony for trial, and fully participated in a trial on the merits. Movant never raised his concern that he did not file a formal answer to the complaint. To now take the position that his right to respond to Debtor's objection and defend his claim was somehow compromised is inconsistent at best. There is no prejudice to Movant here. Movant does not allege that his answer would have raised any different defenses than the arguments already made in the various responsive pleadings to date. Any determination as to the right of Movant to answer the other causes of action alleged in the complaint is not ripe for consideration as the Court has already advised the parties that the remaining issues in the adversary complaint will be considered at the next hearing.

III. Discovery Complaints

A. Movant's Request for Post-Petition 2004 Examinations

Discovery as to the issue of whether Hebb had a claim against Ateco was not denied because full discovery occurred pre-petition and Movant did not file a formal motion to compel

discovery here. The underlying issue of the validity of any debt due to Hebb and fraudulent inducement had been extensively litigated in Superior Court before the bankruptcy was filed. Two depositions of Peter Petrovsky, the debtor's principle, were taken on July 30, 2009 and August 4, 2009. Movant himself admitted that discovery in the state court action was essentially complete after two years of litigation and the parties were ready to go to trial; they instead agreed to submit to arbitration. Cont'd Hr'g on Motion for Relief from Automatic Stay, April 11, 2011. One year after Movant's admission, the Hon. Maria E. Stratten noted in a hearing held in Los Angeles Superior Court on Hebb's Motion to Reopen the State Court Case that, "… I am going to give you a trial date in July because when you all entered into this stipulation [to arbitrate], you were ready for trial. This file is full of motions in limine. It's full of trial briefs. You are ready to go." Request for Judicial Notice and Declaration of Peter Petrovsky, adversary doc. no. 31, May 2, 2012.

Hebb's complaint about a lack of discovery as to any other issue is premature as all other disputes between these parties were held in abeyance. On December 13, 2010, Hebb filed a Motion for an examination under FRBP 2004 (bankr. ECF doc. no. 38). This motion to examine Debtor's president and accountant and all argument made thereon concerned Ateco's receipt and alleged improper use of $902,080 before it filed bankruptcy. Hebb renewed his 2004 exam request (docket # 113) on July 26, 2011. Again, the issues solely concerned the funds Ateco allegedly spent before filing bankruptcy and Hebb's allegation that it should have been paid to him. None of the sought after discovery related to the validity of Hebb's claim itself.

The discovery concerning what funds Debtor received prepetition was solely relevant to the Fraudulent Transfer Motion that had been held in abeyance pending resolution of the validity of Hebb's claim. Financial records related to the receipt and disbursement of these funds were requested. The Court reiterated in several hearings that before it could entertain Hebb's 2004 motion, it needed to determine whether Hebb was a creditor. Hebb's 2004 exam inquiry and fraudulent transfer issues assumed that Ateco was required to pay Hebb with proceeds received from the Hales litigation – an issue that would not have to be reached unless a valid claim existed from Hebb.

An order granting relief from stay was finally entered on January 17, 2012, (docket #138), yet Hebb did not take any further discovery on the validity of his claim as part of the arbitration or Superior Court action either. See e.g., OSC Memorandum, 8:11 – 9:9, bankr. ECF doc. no. 175. At no point in the three pretrial hearings did Hebb raise the issue of wanting to take yet another deposition of Petrovsky or that he felt disadvantaged because of the earlier delay of the discovery as to the fraudulent transfer theory.

The court normally does not draft pretrial stipulations for the parties. Under Local Rule 7016-1(b), the parties should jointly draft a pretrial stipulation and submit it. Because the parties seemed incapable of producing any joint pleading, the Court required separate submissions by both sides and held a number of lengthy pre-trial hearings to hash out a joint order controlling the trial. At the pre-trial hearings, the Court slowly walked through the points needed for a pretrial order and shepherded the parties through the process of determining what was to be

included. Hebb introduced theories at the hearings that were not in his original submission. To the great frustration of Debtor's counsel, the Court allowed every new point or theory Hebb proposed to be included in the pre-trial order, in an effort to get all remaining theories as to Debtor's liability resolved in the trial. Hebb also represented numerous times that he was ready for trial and knew that he had to submit all trial exhibits by the deadline provided. By the time of the trial on solely the validity of the unsecured claim itself, all discovery and exploration of theories was complete.

IV. Alleged Trial Errors

A. Billing records/ Invoice Abbreviations

Movant also raises concerns about the Court not reviewing abbreviation charts along with billing records. The abbreviation key for billing records was indeed reviewed and considered, and the inability of the Court to understand abbreviations was never a basis for the trial findings. Hebb misapprehends what was at issue at trial. See Pre-Trial Order for Trial on Debtor's Objection to Claim of John F.L. Hebb, adversary ECF doc. no. 83, September 11, 2013. Hebb's arguments on the reasonable value of his services were irrelevant at this stage. The billing records were not examined for purposes of determining the reasonable value of his services. They were referred to solely to explain that Petrovksy's decision to cease further payments appeared to be based on specific concerns he had about the bills and not due to an intentional fraud.

Similarly, the issue of whether or not Hebb's retainer was actually properly modified was not necessary to decide, as the disagreement between Hebb and Petrovsky was relevant to the fraud allegation, regardless of who was right about the retainer agreement.

1. Vella v Hudgins

In his Motion, Hebb argues that the Court has "been relentlessly reminded of the relevant case law, but has steadfastly refused to even refer to it." This misstates the record and is an almost talismanic recitation that has been repeatedly addressed for years. The multiple detailed rulings will reflect the consideration Hebb's legal arguments have received[8]. The Vella case was addressed in the Memorandum of Decision re Order Vacating Order to Show Cause

[8] The Court has issued a total of five detailed rulings in writing addressing every issue raised by Hebb. See (A) Memorandum of Decision re Order Vacating Order to Show Cause, bankr.ECF doc. no. 154, Feb. 27, 2012; (B) Memorandum re Whether this Case Should be Dismissed, bankr.ECF doc. no. 175, June 27, 2012; (C) Memorandum of Decision re Motion for Summary Judgment, adversary ECF doc. no. 56, Nov. 6, 2012; (D) Memorandum of Decision (1) Hebb's Spoliation Motion; (2) Ateco Motion to Exclude Hebb Documents; and (3) Court's Order to Show Cause re Pretrial Compliance, adversary ECF doc. no. 100, Oct. 28, 2013; and (E) Memorandum of Decision re Trial, adversary ECF doc. no. 114, April 9, 2014.

(the "Vacating Memorandum"), bankr. ECF doc. no. 154, February 27, 2012.[9] Hebb's arguments about the amount and quality of his work reverse the logical order of the analysis, i.e., arguing damages before liability was assessed. Had Hebb prevailed at trial, all of the arguments as to the amount of his damages would then have been ripe for consideration. This was not the case.

2. Gutierrez Declaration and Testimony

Hebb was also never denied the ability to subpoena Gutierrez for trial. Hebb omits that he was put on notice that Debtor may not have called all of the witnesses on its list. A party should procure the attendance of any witness it offers in support of its case. The Court even clarified the standard procedures as to how witnesses were to be treated at the May 15, 2013 pretrial conference.

> Court: The problem I have is with not clearly stating who the witnesses are each side is calling. I'm not going to leave it open. This reserving rights – that's over. You have to say… who is going, whose responsibility, to subpoena whom. **So, if you have somebody listed, you have to call them**. If the other side has somebody listed, and they decide not to call them and you were counting on using them for something, you're stuck. You need them on your witness list as well.
>
> …
>
> Court: So, Coleen de Leon, she's on your witness list, Mr. Hebb so you're going to be subpoenaing her?
>
> Hebb: Uh, yes.
>
> Court: Ok. Now, any Debtor witness called is not really your witness. You'll have a right of cross examination of any witness the debtor calls. So there is no need to list that.
>
> Hebb: You say I don't need to list that?
>
> Court: No, because if he calls a witness, you get to cross examine. So, you've got three witnesses?
>
> Hebb: Uh, well yes. With Mr. Petrovsky.
>
> Court: Ok, that will be the case in chief. And then, the defense witness… you're calling Mr. Petrovsky as well.
>
> Krause: Correct…

There were three Gutierrez Declarations proffered in the course of pretrial and trial proceedings. Two Gutierrez declarations were proffered by Hebb in support of his trial theory

[9] The Court stated, "[Hebb] again repeated his requests for a 2004 exam of the debtor's principal, a chapter 11 trustee, or conversion to chapter 7. Hebb once again discussed Vella v. Hudgins, 151 Cal.App. 3d 515 (1984), a case the Court said could only be considered once the merits of his attorneys lien claim are reached."

that Gutierrez and Petrovsky had conspired against him to avoid paying him any fees. Hebb's Trial Exhibits, Ex. 3, declaration dated September 20, 2010; Hebb's Declaration in Lieu of Direct Testimony, Ex. B, bankr. ECF doc. no. 323, October 18, 2013. These exhibits were not objected to by Ateco when Hebb offered them and were admissible under Federal Rule of Evidence 801(d)(2)(C), (D) and (E). The emails from Gutierrez were admitted on the same basis. Another Gutierrez declaration was offered by Debtor, submitted in support of the objection to claim and re-submitted in lieu of direct testimony, which was the one quoted in the Memorandum re Decision at page 8. Declaration of Alejandro Gutierrez in Support of Debtor's Objection to Claim, bankr. ECF doc. no. 61, March 11, 2011, and doc. no. 328, October 28, 2013. The Court did not consider the Gutierrez declaration as evidence for the truth of the matter asserted therein because Ateco did not call him on rebuttal, as was a possibility Ateco listed before trial. The same declaration was also provided in support of the original objection to claim and was part of the operative complaint to be decided.

The Declaration was quoted to support the finding that Petrovsky had begun questioning Hebb's fees because Gutierrez informed Petrovsky that much of what Hebb provided to him was of no value in preparing for trial, and because Petrovsky felt that Gutierrez was garnering results by eschewing Hebb's strategic suggestions. This particular finding was also supported by Petrovsky's declaration and testimony at trial, as well as Hebb's own trial exhibit, an email from Gutierrez to Petrovsky wherein Gutierrez stated:

> We requested a trial continuance to properly prepare for trial. As you well know this case was not even close to trial ready in March of this year. Documents had not been fully produced, documents had not been reviewed, sorted, and inventoried. Depos had not been completed. Depos had not been summarized. Motions, trial briefs, instructions, etc. had not been prepared. The case was at an embryonic stage of preparation. The work we performed was all to get the case ready for trial. […] Preparation takes time. Had the preparation been done before I came into the case, our job would have been less time consuming and less costly.

Hebb's Trial Exhibits, Ex. 35, p. 4.

To the extent that Hebb complains of any prejudice here, he again ignores the issue at trial. The issue was not a question of reasonableness of his services, but a question of what Ateco's actions were and whether they rose to the level of fraudulent inducement. Gutierrez could have been completely mistaken, but Petrovsky's belief in the fact that Hebb's bills were unreasonable would still be probative of a lack of fraudulent intent. The topic described by the Gutierrez Declaration (i.e., that he and Hebb disagreed about Hebb's contributions) was never disputed, and in fact was proffered by Hebb as part of his conspiracy theory. The truth of the matter, i.e., what Hebb's contributions were worth to Gutierrez, was never reached. The Court's ruling as to this issue in the trial was supported by other, independent evidence and the ruling did not, as Hebb characterized, "rely heavily on Gutierrez's 'testimony.'" The quoting of the Gutierrez declaration in two discrete places in the sixteen-page Memorandum was not a manifest error of fact or law warranting an entirely new trial. Furthermore, Hebb has not alleged that any newly discovered evidence would have changed the outcome.

V. Disputes with Prior Rulings

A reconsideration motion should not give a litigant a "second bite at the apple." In re Christie, 222 B.R. 64, 67 (Bankr.D.N.J.1998). See also Sac & Fox Nation of Mo. v. LaFaver, 993 F.Supp. 1374, 1375–76 (D.Kan.1998) ("[P]arty's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion for reconsideration."); In re Hillis Motors, Inc., 120 B.R. 556, 557 (Bankr.D.Haw.1990) (Rule 59 does not "give a disappointed litigant another chance") (internal citations omitted).

Section 502(j) states that "[a] claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case." 11 U.S.C. § 502(j). A motion for reconsideration of an allowed claim may be brought by a party in interest. FRBP 3008. When a motion for reconsideration of claims is filed after the 10-day appeal period has expired, the motion for reconsideration is treated as a Federal Rule of Civil Procedure 60(b) motion. United States Funds, Inc. v. Wylie (In re Wylie), 349 B.R. 204, 209 (B.A.P. 9th Cir. 2006).

Under Rule 60, the moving party is not permitted to revisit the merits of the underlying order; instead, grounds for reconsideration require a showing that events subsequent to the entry of the judgment make its enforcement unfair or inappropriate, or that the party was deprived of a fair opportunity to appear and be heard. Wylie, 349 B.R. at 209. Under Rule 60, the court may relief a party from an order for:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; and
> (6) any other reason that justifies relief.

Fed. R. Bankr. P. 60(b).

A. November 2012 Summary Judgment Ruling

Hebb's argument for reconsideration of the Court's 2012 Summary Judgment ruling and others are an odd addition to the New Trial Motion, as those decisions were final in 2012 and never part of the trial. It took numerous hearings with numerous extensions granted to Hebb to even get Debtor's Motion for Summary Judgment (the "MSJ") heard. Despite no stay being in effect, Hebb chose not to respond to Debtor's MSJ while an appeal was pending and while he was supposed to be pursuing his claim through arbitration. In an effort to cease procedural litigation and finally get to the merits, the Court gave him an extension and a new time to

respond to the MSJ, over Debtor's objection. See Vacating Memorandum, bankr. doc. no. 154, p. 10. Thus, there was ample time to present any law or evidence as part of his response to the MSJ.

Hebb has not explained in his latest pleading how he has any basis to now raise issues from the November **2012** MSJ ruling. The issues to be addressed in the MSJ were stated at the hearing on February 16, 2012, followed by the briefing schedule contained in the OSC Order, issued Feb. 27. 2012. The basis for any secured claim was finally decided in that November 2012 ruling. All of the arguments in the New Trial Motion seek to revisit the merits of the underlying order, and Hebb has not addressed any of the grounds enumerated above that would entitle him to reconsideration at this late stage.

Movant's citation to Segovia, 2008 WL 8462967 (B.A.P. 9th Cir., October 22, 2008), an unpublished opinion, misstates the law and the record related to the review his attorney fees received by the Ventura County Superior Court. Both the unpublished Ninth Circuit Bankruptcy Appellate Panel opinion in Segovia and the unpublished affirmance by the Ninth Circuit Court of Appeal at 346 Fed. Appx. 156, 159 (9th Cir., July 29, 2009) support this Court's summary judgment analysis provided on pages 7 to 9 as to the claimed attorney fees.[10]

Hebb's complaints about the MSJ ruling also appear to, once again, attempt to have this bankruptcy court sit as a court of appeal for the Ventura County Superior Court, something the court may not and will not do. All arguments related to Ventura County Superior Court Judge Kellegrew's award were considered both by him and by this Court in its earlier ruling. Judge Kellegrew carefully considered the reasonableness of the fees. Hebb's lodestar and other fee theories ignore the reasoning already detailed in both the Superior Court's and this Court's previous rulings. Hebb's theory that the Ventura County Superior Court was deceived ignores the fact that he lost on appeal and had an opportunity to prove it was part of his conspiracy theory here and failed to do so.

1. Sanction Motion/Motions to Recuse

The new trial motion also raises a previous motion to recuse which was denied by another judge of this court. Memorandum of Opinion regarding Law Office of John F.L. Hebb's Motion to Disqualify Judge Maureen Tighe, bankr. ECF doc. no. 207, September 10, 2012. A renewed motion to recuse has been filed which has been referred to another judge for disposition. This Court has responded to numerous verbal motions to recuse and indicated that Hebb's appropriate recourse is an appeal, as he disagrees with the factual and legal conclusions drawn from the record.

Hebb repeatedly complains of bias and portrays himself as the wronged party who worked endlessly for years for only $200,000 in fees, yet he fails to acknowledge the patience two different Superior Court judges and this Court have shown in trying to get him to provide the actual evidence in support of his arguments. In deference to his strongly held conviction, this Court refrained from striking his claim as a sanction for delay when requested by Debtor

[10] Memorandum of Decision re Motion for Summary Judgment, p. 7-9, adversary ECF doc. no. 56, Nov. 6, 2012

numerous times over the past two years. See e.g., Vacating Memorandum, p. 10, bankr.doc. no. 154, Feb. 27, 2012. Despite adequate grounds to do so for blatant pretrial violations, the Court declined to dismiss his claim most recently on October 28, 2013. See Memorandum of Decision re (1) Hebb's Spoliation Motion; (2) Ateco Moiton to Exclude Hebb Documents; and (3) Court's Order to Show Cause re Pretrial Compliance, bankr.doc. no. 331, Oct. 28, 2013. The Court has repeatedly tried to resolve this protracted matter once and for all on the merits, even permitting the instant new trial motion to be filed late when Hebb once again waited until the very last minute to file a pleading and once again blamed his delay on an administrative or computer error. See Order Granting Motion to Deem Motion for New Trial Timely Filed, bankr. doc. no. 395, May 9, 2014; and Motion to Deem New Trial Motion Timely Filed, bankr.doc. no. 384, May 7, 2014. These tactics have caused massive and unnecessary fees for Debtor to defend. They have possibly ruined any chance of reorganization.

The emails supporting the claim Hebb alludes to once again in this motion were extensively discussed in the Memorandum of Decision re (1) Hebb's Spoliation Motion; (2) Ateco's Motion to Exclude Hebb's Documents; and (3) Court's Order to Show Cause re Pretrial Compliance (bankr. doc. no. 331; adversary doc. no. 100) and he provides no new information. Hebb's belated attempt to revisit the sanctions ruling still ignores the requirement that specific email communications be identified rather than a broad reference to one exhibit consisting of nine notebooks of emails. Although the record is still not clear that Debtor even received all nine notebooks, the pretrial instructions of March 15, 2013, to list every single exhibit in a chart was still not followed by the time the sanctions hearing was held. Hebb still does not represent that he ever culled specific communications for evidence showing fraudulent inducement. The pattern and theory he argued at trial were considered, and rejected. It is time to move on.

VI. Conclusion

The New Trial Motion, and motion for reconsideration contained therein, and any defective judgment notices are DENIED.

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Date: June 11, 2014

Maureen A. Tighe
United States Bankruptcy Judge