NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re LAU CAPITAL FUNDING, INC., Debtor. NANCY KNUPFER, CHAPTER 7 TRUSTEE Plaintiff, vs. HSA RESIDENTIAL MORTGAGE SERVICES OF TEXAS, INC., a Delaware Corporation, AIG INTERNATIONAL GROUP, INC., and DOES 1 through 20, inclusive Defendants.	Case No. LA 99-37171 ~~ES~~ RN Adversary No.: AD 02-01413 ~~ES~~ RN Chapter 7 **MEMORANDUM DECISION ON PLAINTIFF NANCY KNUPFER, CHAPTER 7 TRUSTEE FOR LAU CAPITAL FUNDING, INC.'S MOTION FOR REHEARING**

On July 20, 1999, Lau Capital Funding ("LCF" or "debtor") filed a voluntary Chapter 11 petition. The debtor voluntarily converted to Chapter 7 on November 2, 1999. On March 12, 2002, the Chapter 7 Trustee, Nancy Knupfer ("Trustee" or "plaintiff"), initiated an adversary action against HSA Residential Mortgage Services of Texas, Inc. ("HSA", "RMST" or "defendant"), alleging breach of contract, avoidance, turnover, fraud, conversion, goods sold and

delivered, declaratory relief, waste, and special relief. Thereafter, defendant filed a motion for summary judgment on all of the Trustee's claims. In response, the Trustee filed a cross-motion for partial summary adjudication on the breach of contract and conversion claims. The defendants' motion for summary judgment and the Trustee's motion for partial summary adjudication came on for hearing on December 2, 2004. On February 15, 2005 and February 16, 2005, respectively, the Court entered its Memorandum Decision and Order on the cross-motions, granting summary judgment to the defendants on all of the Trustee's claims, except the fraud claim. Meanwhile, the Trustee had filed, on December 22, 2004, a motion for adverse inference due to concealment of discovery and/or spoliation of evidence and for sanctions ("Motion for Adverse Inference"). Judge Erithe A Smith heard the motion on May 17, 2005, at which time she denied the motion without prejudice. An order denying the Motion for Adverse Inference was issued on June 13, 2005.

Following the Court's Memorandum Decision and Order on the cross-motions, the Trustee filed a Motion for Rehearing Respecting the Court's February 16, 2005 Order ("Motion for Rehearing" or "Motion") on February 28, 2005. Specifically, the Trustee seeks reconsideration of the Court's decision to grant summary judgment to defendants on the Trustee's breach of contract, avoidance, and turnover claims. The Court heard oral arguments on the Motion for Rehearing on September 14, 2005.

The Court hereby issues this memorandum in support of its decision.

I. Motions for Reconsideration

The Trustee purports to bring this Motion for Rehearing under Bankruptcy Rule 8015. However, Rule 8015 is the incorrect rule procedurally, as the plain language dictates that it

applies only to judgments of the district court or the bankruptcy appellate panel ("BAP"). Rule 8015 is utilized when a case has already been appealed either to the district court or the BAP and a party wants reconsideration of a decision rendered by one of those courts. See, e.g., In re Fowler, 394 F.3d 1208 (9th Cir. 2005). Because this case has not yet been appealed to either the district court or the bankruptcy appellate panel, Rule 8015 is inapplicable.

This Motion for Reconsideration should have been brought under Bankruptcy Rule 9023 or Bankruptcy Rule 9024, which incorporate Federal Rules of Civil Procedure 59(e) and 60(b), respectively. In re Fuller, 950 F.2d 1437, 1442, (9th Cir. 1991); Taylor v. Knapp, 871 F.2d 803, 805 (9th Cir. 1989). Rule 59(e) states that "[a]ny motion to alter or amend a judgment must be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). Meanwhile, Rule 60(b) allows a party to obtain relief from a judgment or order for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct by an adverse party; (4) a void judgment; (5) a satisfied or discharged judgment; and (6) "any other reason justifying relief from the operation of the judgment." Fed. R. Bankr. P. 9024; Fed. R. Civ. P. 60(b); American Ironworks & Erectors Inc. v. North American Construction Corp., 248 F.3d 892, 899 (9th Cir. 2001); Fuller v. M.G. Jewelry, 950 F.2d 1437, 1442 (9th Cir. 1991). Whether the Motion for Reconsideration was brought under Rule 59(e) or 60(b), the motion would be equally subject to Local Bankruptcy Rule 9013-1(d):

> Whenever any motion for an order or other relief has been made to the court and has been denied in whole or in part, or has been granted conditionally or on terms, and a subsequent motion is made for the same relief in whole or in part upon the same or any allegedly different state of facts, it shall be the continuing duty of each party and attorney seeking such relief to present to the judge to whom any subsequent motion is made, a declaration of a party or witness or certified statement of an attorney setting forth the material facts and circumstances surrounding each prior instance including, . . . (1) [w]hen and to what judge the

> motion was made; (2) [w]hat ruling or decision or order was made thereon; and (3) [w]hat new or different facts and circumstances are claimed to exist which did not exist, or were not shown, upon such prior motion.

LBR 9013-1(d).

When a party filing a motion for reconsideration does not specify whether relief is requested under Rule 59(e) or Rule 60(b), a court will deem the motion a 59(e) motion to alter or amend judgment if it is filed within 10 days of entry of judgment. American Ironworks & Erectors Inc. v. North American Construction Corp., 248 F.3d 892, 899 (9th Cir. 2001); Venable v. Haislip, 721 F.2d 297, 299 (10th Cir. 1983); Western Industries, Inc. v. Newcor Canada Ltd., 709 F.2d. 16, 17 (7th Cir. 1983) ("Post-judgment motions filed within 10 days should where possible be construed as Rule 59(e) motions to avoid otherwise endless hassles over proper characterization."). Consequently, a motion for reconsideration filed after 10 days of entry of judgment will be construed as a Rule 60(b) motion for relief from judgment or order. See, e.g., Sanders v. Clemco Industries, 862 F.2d 161, 169 (8th Cir. 1988). Because Rule 59(e) motions must be filed within 10 days of entry of judgment, the Trustee's Motion for Reconsideration, which was filed on February 28, 2005, twelve days after the Court's entry of the February 16, 2005 Order, will be treated as a Rule 60(b) motion.[1]

[1] A separate analysis of the Motion under Rule 59(e) is not necessary. Motions for reconsideration pursuant to Rule 59(e) may be granted when there are "highly unusual circumstances," such that the court is presented with newly discovered evidence, the court committed clear error, or when there has been an intervening change in the relevant law. Fed. R. Bankr. P. 9023; 389 Orange Street Partners, 179 F.3d 656, 665 (9th Cir. 1999). The Trustee's arguments for reconsideration would fall under the categories of newly discovered evidence and that the court committed clear error. "Under both rules [59 and 60] if [the evidence] was in the possession of the party before the judgment was rendered it is not newly discovered." 11 Wright & Miller § 2859 (1973). Additionally, the Court considers the merits of the Trustee's arguments based on clear error when it analyzes the Motion under 60(b)(6). Consequently, the Court's discussion in this Memorandum adequately addresses the possible argument that the Motion should have been considered a Rule 59(e) motion.

II. The Breach of Contract Claim

At the center of the dispute between the parties is an Asset Purchase Agreement ("Agreement") regarding a list of 18 LCF customers that LCF sold to HSA during LCF's reorganization efforts in Chapter 11 bankruptcy. The question presented to the Court on summary judgment was whether the Agreement required HSA to enter into relationships with all 18 LCF customers on the purchased list. In the Memorandum Decision, the Court granted summary judgment in favor of defendants, ruling that there had been no breach of contract because the terms of the Agreement manifested that HSA had the sole discretion to decide with which, if any, of the 18 customers on the list it wished to do business.

The Trustee's arguments regarding reconsideration of summary judgment granted to defendants on the breach of contract claim most closely correspond to Rules 60(b)(2), based on "newly discovered evidence," and 60(b)(6), based on "any other reason justifying relief from the operation of the judgment." The Trustee first argues that reconsideration on the breach of contract claim is warranted because the Court failed to employ the proper summary judgment standard to view all evidence and inferences in the light most favorable to the Trustee, as the non-moving party. As a second argument for reconsideration, the Trustee offers credit committee meeting minutes that allegedly had not been previously considered by the Court on summary judgment.

A. Rule 60(b)(6)

Although the language of Rule 60(b)(6) suggests wide latitude for the court to grant a motion for reconsideration, the Supreme Court has interpreted the provision rather narrowly. In Pioneer Investment Services Co., Brunswick Associates Ltd. Partnership, 507 U.S. 380, 393 (1993), the Supreme Court expressed that relief under Rule 60(b)(6) would only be granted to a

party showing "extraordinary circumstances" for failing to bring a timely appeal. See also Klapprott v. United States, 335 U.S. 601 (1949); Ackermann v. U.S., 340 U.S. 193, 197 (1950) (holding that petitioner did not allege circumstances extraordinary enough to justify failure to appeal and therefore did not show cause for relief under Rule 60(b)(6)); In re Pacific Far East Lines, Inc., 889 F.2d 242, 250 (9th Cir. 1989); Twentieth Century-Fox Film Corp v. Dunnahoo, 637 F.2d 1338, 1341 (9th Cir. 1981). "Rule 60(b)(6) was not intended to provide relief for error on the part of the court or to afford a substitute for appeal." Title v. United States, 263 F.2d 28, 31 (9th Cir. 1959); see also Atkins v. Fiberglass Representatives, Inc., 134 B.R. 936, 938-39 (9th Cir. BAP 1992). The Trustee's Motion essentially argues that on summary judgment the Court erred in that it did not construe all facts and reasonable inferences in the light most favorable to the Trustee. Instead of presenting "extraordinary circumstances" that prevented the Trustee from using the normal appeals process, the Trustee merely argues for reconsideration on the merits of the case. Such arguments challenging the Court's ruling are to be made on appeal, pursuant to the procedure prescribed by Bankruptcy Rule 8002, not through Rule 60(b)(6) motions for reconsideration. For these reasons, the Motion is improper and the Trustee has not advanced a cognizable claim under Rule 60(b)(6).

Even considering the merits of the Motion, the claim that the Court erred, reconsideration of the Court's summary judgment ruling on the breach of contract claim is still denied. While the Court must draw inferences in favor of the non-moving party, only "justifiable inferences" are to be weighed in the non-moving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Parol evidence is generally inadmissible to vary, alter or add to the terms of an integrated written instrument. Cal. Civ. Code §§ 1625, 1856; Casa Herrera, Inc. v. Beydoun, 32 Cal.4th 336 (2004). However, extrinsic evidence is admissible if the terms of the contract are

"reasonably susceptible" to an interpretation being advocated. Casa Herrera, 32 Cal.4th at 343; Pacific Gas & Elec. Co. v. G.W. Thomas Drayage Rigging Co., 442 P.2d 641, 644 (1968).

After reviewing all the evidence submitted by the Trustee in connection with this Motion, as well as the evidence that was submitted on the original cross-motions for summary judgment, the Court finds that the contractual language of the Agreement is clear and is not "reasonably susceptible" to the Trustee's interpretation. The Trustee failed to show that there was a genuine issue left for trial. No evidence was produced to contradict the explicit terms of the contract. The plain language of the Agreement is unambiguous. HSA had the sole discretion to decide with which, if any, of the 18 LCF customers to do business.

On summary judgment, the Court did, in fact, apply the correct legal standard and construed all reasonable inferences in the Trustee's favor. At most, the credit committee meeting minutes reflect negotiations between the parties. There is no evidence, beyond mere speculation, that any negotiated terms or conditions were actually incorporated into the contract. The Court must make all "justifiable" and "reasonable" inferences, however, the Trustee wants the Court to admit evidence that supports her theory in the most indirect and tangential manner. Even if admitted, the Trustee's evidence is too weak to overcome the unequivocal language of the contract. The Court reaches the same conclusion it reached on the motion for summary judgment. Because the terms of the Agreement clearly indicate that HSA was not obligated to enter into contractual relationships with any of the customers, HSA could not be liable for breach of contract in failing to enter relationships with all 18 LCF customers. The Trustee's Motion under Rule 60(b)(6) is not justified.

B. Rule 60(b)(2)

The Trustee proffers evidence, various credit committee meeting minutes, which were allegedly absent from the record on the motion for summary judgment, as a second reason for reconsideration of the breach of contract ruling. However, new evidence is not a basis upon which to bring a motion for reconsideration. The new evidence brought before the court must also be newly discovered.

The movant on a motion for reconsideration based on newly discovered evidence must prove that (1) although the evidence existed at the time of trial, it could not have been discovered through due diligence in time to move for a new trial under Rule 59(b) and (2) the evidence is so strong in nature that it would have affected the court's ruling. Coastal Transfer Co. v. Toyota Motor Sales, 833 F.2d 208, 211 (1987); Jones v. Aero/Chem Corp., 921 F.2d 875, 878 (1990). The Trustee wholly fails on the first element because the additional evidence submitted with this Motion was already in the Trustee's possession at the time of the hearing on summary judgment. "Evidence is not 'newly discovered' under the Federal Rules if it was in the moving party's possession at the time of trial . . . ." Coastal Transfer Co., 833 F.2d at 212; see also Engelhard Industries, Inc. v. Research Instrumental Corp., 324 F.2d 347, 352 (9th Cir. 1963). The Trustee had these documents in her possession for at least a year and a half before the hearing on the summary judgment motion, as demonstrated by the fact that she had marked them as exhibits during the deposition of HSA's Ray Brown, which was taken on May 13, 2003. Failing to come forward and present evidence in the Trustee's possession at the time the Court ruled on the cross-motions for summary judgment is not a legitimate basis for requesting reconsideration. Furthermore, as discussed above, the additional, extrinsic evidence presented with this Motion is too weak to contravene the explicit terms of the Agreement and affect the Court's prior ruling.

Thus, the Trustee's Motion also does not satisfy the second element. The Trustee's Motion does not fulfill the Rule 60(b)(2) requirements for newly discovered evidence.

The Trustee's repeated allegations in this Motion, as well as in her Motion for Adverse Inference, that defendants possess further documents to manifest the parties' intent that HSA enter relationships with all 18 customers on the list are unfounded and tenuous. Although defendants' arguments that they have produced all credit committee meeting minutes is persuasive (see Declaration of William L. Stern in Support of Defendants' Second Motion for Summary Judgment, ¶¶ 6-7), a resolution of this fact is neither necessary nor proper at this procedural junction. To successfully defeat summary judgment and cause the case to proceed to trial, the Trustee is required to present some basis upon which the Court can draw reasonable inferences. Neither the evidence in support of the summary judgment motion nor the spoliation motion raises a reasonable inference that evidence exists that would change the clear language of the contract. The Trustee improperly used the mere *possibility* of a favorable ruling in the Motion for Adverse Inference as support for this Motion for Reconsideration, but provided no real evidentiary support.

Reconsideration of the Court's granting summary judgment in favor of defendants on the breach of contract claim is denied.

III. The Avoidance and Turnover Claims

On Summary Judgment, the Court determined that both the Trustee's avoidance and turnover claims were barred by the expiration of a two-year statute of limitations. In this Motion, the Trustee argues, without citing to any rule that allows it, that reconsideration on the avoidance and turnover claims is warranted because the doctrine of equitable estoppel applies to

mandate preclusion of defendants' statute of limitations defense. Courts may apply equitable estoppel against the defendant when active steps are taken to prevent plaintiff from acting in time to protect a claim. Santa Maria v. Pacific Bell, 202 F.3d 1170, 1176 (9th Cir. 2000). However, "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984).

As discussed previously, reconsideration motions should not be used as a substitute for an appeal or to argue Court error. Title, 263 F.2d at 31; Atkins, 134 B.R. at 938-39. The Trustee has alleged no "extraordinary circumstances" to justify the failure to timely appeal the Court's order. In addition, the Court thoroughly considered, on the motion for summary judgment, the Trustee's allegations of defendants' fraud and the possible application of the doctrine of equitable estoppel. The Trustee's arguments and the facts presented in support of equitable estoppel regarding the defendants' failure to seek bankruptcy approval, failing to make payments to the estate, failing to notify the court or the U.S. Trustee of the Agreement, and withholding information unavailable to the Trustee, were all examined and rejected by the Court in the defendants' motion for summary judgment. The Court already scrutinized every piece of evidence the Trustee presented as to whether the defendants took affirmative steps to prevent discovery of the Trustee's claim. As the Court ruled previously on summary judgment, the evidence produced is insufficient to show that HSA affirmatively hid the claim, even when resolving all disputed facts in the Trustee's favor. See Memorandum Decision, p. 17, line 1 ("The Trustee has provided no evidence that HSA affirmatively hid the claim . . . . Even resolving all disputed facts in favor of the Trustee and drawing all inferences in her favor, these are insufficient facts to demonstrate that HSA covered up this transfer from the Trustee.").

The Trustee does not assert any new facts or arguments and does allege any "extraordinary circumstances." Furthermore, on the merits of the Motion, the Trustee has failed to demonstrate that the Court committed clear error in choosing not to invoke equitable estoppel principles. Therefore, the Court has no basis upon which to grant reconsideration of the Court's grant of defendants' summary judgment on the avoidance and turnover claims.

The Court notes that in the Trustee's Reply brief, the Trustee seems to request reconsideration as to all claims for which defendants were granted summary judgment. Additionally, the Trustee raises an entirely new argument: The Court erred in granting summary judgment on the Trustee's conversion claim because AGF was not a party to the Agreement between HSA and LCF, and therefore, AGF could not be shielded from tort liability. It is improper to raise new legal arguments for the first time in a Rule 60(b) motion for reconsideration that could have been made before judgment was entered. Dial One of the Mid-South, Inc. v. Bellsouth Telecommunications, Inc., 401 F.3d 603, 606-07; Knapp v. Miller, 873 F.Supp. 375, 379-80 (Bankr. D. Nev. 1994). "Rule 60(b) does not allow a defeated litigant a second chance to convince the court to rule in his or her favor by presenting new explanations, legal theories, or proof." Jinks v. AlliedSignal, Inc., 250 F.3d 381, 385 (6th Cir. 2001). This legal theory could have been offered on summary judgment. Therefore, the Court refuses to entertain it at this late stage. The Trustee is barred from raising new arguments in a Rule 60(b) motion for reconsideration and may not request more relief in a reply brief than was requested in the original Motion for Reconsideration.

Although it is within the Court's discretion, the Court chooses not to impose sanctions for the Trustee's violation of LBR 9013-1(d).

CONCLUSION

For the foregoing reasons, the Court's grant of defendants' motion for summary judgment on the breach of contract, avoidance, and turnover claims will stand. The Trustee's Motion for Reconsideration of the Court's February 16, 2005 Order is denied.

DATED: February 22 , 2006

/s/
MAUREEN A. TIGHE
United States Bankruptcy Judge

CERTIFICATE OF SERVICE BY MAIL

I certify that a true copy of this **MEMORANDUM DECISION ON PLAINTIFF NANCY KNUPFER, CHAPTER 7 TRUSTEE FOR LAU CAPITAL FUNDING, INC.'S MOTION FOR REHEARING** was mailed on FEB 22 2006 to the parties listed below:

Maurice R. Mitts
Mitts, Milavec & Spade, LLC
1835 Market Street, Suite 1500
Philadelphia, PA 19103

William L. Stern
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

Robert A. Hessling
Nancy Knupfer
Danning, Gill, Diamond & Kollitz, LLP
2029 Century Park East, Third Floor
Los Angeles, CA 90067

Dated: FEB 22 2006

Jewell M. Williams
DEPUTY CLERK