

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:)	
)	
William Oliver Campbell,)	Case No. 13-81123
)	
Debtor.)	
)	
)	
)	
Charles M. Friedman and)	
Luceil L. Friedman)	
)	
Plaintiffs,)	
)	
v.)	Adversary No. 14-09009
)	
William Oliver Campbell,)	
)	
Defendant.)	
)	

ORDER

This case came before the Court on the Motion to Reconsider filed on March 9, 2015 (“Motion to Reconsider”) [Doc. # 59] by Plaintiffs Charles M. Friedman and Luceil L. Friedman (“Plaintiffs”), seeking to have the Court reconsider its Order Denying Plaintiffs’ Motion to

Amend on March 4, 2015 (“Motion to Amend”) [Doc. # 56]. The Motion to Reconsider was filed under Federal Rule of Bankruptcy Procedure 9024, adopting the standards set forth in Federal Rule of Civil Procedure 60(b), and requests that the Court vacate its prior Order denying the Plaintiffs’ request to amend their complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure to add the Debtor’s non-filing spouse as a defendant.

BACKGROUND

Defendant William Oliver Campbell (“Defendant” or “Debtor”) filed a voluntary Chapter 7 bankruptcy petition on September 5, 2013 [Bankr. No. 13-81123, Doc. # 1] (“Petition”) and listed his wife, Kimberly Jo Campbell, as non-filing spouse. The Debtor is the sole shareholder and only officer of Select Forest Products, Inc. (“SFP”) [Adv. Pro. No. 14-09009, Doc. # 1, ¶ 10]. Plaintiffs Charles M. Friedman and Luceil L. Friedman (together, “Plaintiffs”) were listed as creditors holding a claim for breach of contract and fraud in claim litigation from 2012 on Debtor’s Schedule F in the amount of \$40,000. Plaintiffs timely filed a motion to extend time to file a complaint on December 6, 2013 (the “Motion to Extend Time”) [Doc. #18]. The Motion to Extend Time was granted on January 10, 2014, giving the Plaintiffs up to and including February 8, 2014 to file a complaint (“Order Granting Motion to Extend Time”) [Doc. # 21]. Plaintiffs initiated this adversary proceeding by filing a Complaint against the Defendant on February 7, 2014, alleging breach of contract and fraudulent misrepresentation (the “Complaint”) [Bankr. No. 13-81123, Doc. # 27; Adv. Pro. No. 14-09009, Doc. # 1].

On April 29, 2014, the Court entered a Scheduling Order (the “Scheduling Order”) [Doc. # 16]. The Scheduling Order provided that any motions to amend must be filed on or before June 6, 2014. On September 18, 2014, three months after the deadline to amend the Complaint as provided in the Scheduling Order, the Plaintiffs filed their original motion to amend their

complaint to add the Debtor's non-filing spouse as a party defendant ("Original Motion to Amend") [Doc. # 29]. The Court conducted a hearing on the Original Motion to Amend in October of 2014 and denied the motion at the October hearing for reasons set forth on the record, including that the Plaintiffs had not shown good cause to modify the Scheduling Order.

On March 3, 2015, the Plaintiffs filed their second motion to amend the Complaint to add the Debtor's non-filing spouse as a party defendant. [Doc. # 56] (the "Second Motion to Amend"). The Court denied the Plaintiffs' Second Motion to Amend, by Order dated March 4, 2015 (the "Order Denying Second Motion to Amend") [Doc. # 57] for the reasons set forth in that Order.

Since the petition date, Defendant has at least partially responded to discovery initiated by the Plaintiffs, Doc. # 28-46,¹ and has submitted testimony at the Chapter 7 creditor's meeting on October 11, 2013. In addition, Plaintiffs have submitted to the Court transcripts of pre-petition depositions taken for Plaintiffs' suit in State Court, Friedman vs. Select Forest Products, 12 CVS 823, in evidence as exhibits to their Complaint [Adv. Pro. No. 14-09009, Doc. # 3, 4].

DISCUSSION

Rule 60(b)(1) provides relief from an order of the court on the basis of "mistake, inadvertence, surprise, or excusable neglect." Fed.R.Civ.P. 60(b)(1). In order to prevail on a motion pursuant to 60(b), the movant must have: (1) a meritorious defense on the underlying action or motion; (2) and must be able to establish one or more grounds for relief as set forth under 60(b). In re Johnson, 336 B.R. 712, 714 (Bankr. M.D.N.C. 2006). Additionally, the

¹ On December 12, 2014, the Plaintiffs filed their motion to compel responses to outstanding discovery [Doc. # 44] (the "Motion to Compel"). At the request of the parties, the Court continued the hearing on the Motion to Compel several times before finally hearing the matter after the parties were unable to resolve the dispute. On April 6, 2015, the Court found that certain of the Defendant's responses to discovery were wholly inadequate, and entered its Order compelling certain responses to discovery. [Doc. # 65] (the "Order Compelling Discovery").

movant must show that the opposing party would not be unfairly prejudiced by having the judgment set aside. Id.

The Plaintiffs previously have moved this Court to for leave to amend the Complaint to add the Debtor's non-filing spouse. As set forth in the Order Denying Second Motion to Amend, although Rule 15(a) generally states that leave to amend shall be freely granted when justice requires, when a scheduling order has been entered, the scheduling order cannot be modified except upon a showing of good cause pursuant to Federal Rules of Civil Procedures 16(b). DeWitt v. Hutchins, 309 F.Supp. 2d 742, 748 (M.D.N.C. 2004). While newly discovered evidence can constitute "good cause" for granting a motion to amend the scheduling order, the newly discovered evidence must not have been known or available to the moving party "in the exercise of due diligence" prior to the deadline for filing a motion to amend as set forth in the Scheduling Order. Id. (citing Studio Frames, Ltd. v. Village Ins. Agency, Inc., No. 1:01CV876, 2003 WL 1785802, at *2 (M.D.N.C. Mar.31, 2003)).

Here, to be entitled to relief under Rule 60(b), the Plaintiffs must show as a threshold matter that they would be entitled to amend their Complaint to add the Debtor's non-filing spouse if the Court were to vacate its prior Order and consider the relief requested. Johnson, 336 B.R. at 714. In support of their request, the Plaintiffs assert that they have obtained additional information in discovery that further solidifies their previous argument that the Debtor's non-filing spouse is liable for the liabilities of Select Forest Products, Inc. ("SFP"), through piercing the corporate veil, and for the alleged fraud in this case. The Plaintiffs argue that new facts regarding the extent to which the Defendant's wife participated in the fraudulent conduct at issue provide grounds for granting the Motion to Amend to add Kimberly Jo Campbell as Defendant. Specifically, Plaintiffs cite: (1) a partial response to interrogatories received on January 6, 2015,

in which the Defendant identified his wife as a person with knowledge of the dispute or events that would in any way relate to the adversary proceeding; and (2) records produced on January 6, 2015, that show the Defendant's wife have control of the expenditures from corporate checking accounts for SFP.

Specifically, the Plaintiffs allege that Defendant's statements during a deposition taken on February 4, 2013, intentionally downplayed the role that the Debtor's non-filing spouse, Kimberly Jo Campbell ("Ms. Campbell"), had in SFP, and that such statements mislead the Plaintiffs from investigating Kimberly Jo Campbell's role in the alleged fraud until after Plaintiffs received answers to the interrogatories. [See Complaint, Exhibit A, p. 10]. Plaintiffs, however, stated clearly and firmly in the Complaint that the Plaintiffs were of the belief that Kimberly Jo Campbell did in fact play a role in the alleged fraud:

While Campbell has testified that his wife typed the invoice and erroneously stated that the maple flooring was Canadian Maple . . . and that she does not have any knowledge of the type of wood that was installed in the Plaintiffs' Home, Campbell's Statement of Financial Affairs and Amended Statement of Financial Affairs . . . clearly indicate that his wife was an employee of Select for a number of years, drawing income from 2011, 2012 and 2013. She is listed as an eight (8) year employee of Select as a Bookkeeper who was paid a gross sum of \$200.00 on a biweekly basis. Campbell's testimony at his § 341 Meeting of Creditors indicates that his wife was directly responsible for Select's accounting and accounts payable and as such, she knew or should have known the type of wood Select ordered for each customer. She had a substantial level of control over Select's finances and billing practices.

Complaint, at ¶ 23. Furthermore, in the Original Motion to Amend, the Plaintiffs asserted that there was sufficient factual support garnered at or prior to the October 11, 2013 meeting of creditors in the Debtor's bankruptcy case to demonstrate that Ms. Campbell was liable for the alleged fraud and for the obligations of SFP as an alter ego. Specifically, the Plaintiffs alleged in the Original Motion to Amend:

Debtor's and SFP's bankruptcy schedules specifically reference that Kimberly Jo Campbell is/was a full-time employee of SFP, in direct contradiction to Debtor's deposition testimony given in the Friedman's suit.

During an October 11, 2013 Rule 341 Meeting of Creditors before the bankruptcy trustee was assigned to Debtor's and SFP's case, Debtor testified under oath in response to direct questioning from Luceil Friedman that he had no knowledge of any questions relating to SFP's billings, checks written and received by SFP, had no knowledge of SFP's accounts being used to pay his personal household expenses, any bookkeeping questions or financial transactions of SFP because he was not the person who performed the accounting functions for SFP. Debtor further testified that his wife, Kimberly Jo Campbell was solely responsible for SFP's finances and bookkeeping and any such questions regarding these subjects should be addressed to her.

* * *

However, Debtor's sworn 341 Meeting testimony before the bankruptcy trustee opens the door for the Friedmans' previous allegations directed to the Debtor only, to also include the potential liability on the part of Mrs. Campbell, if she did in fact conduct all financial transaction [sic] of SFP as testified by Debtor.

In further support of the Friedmans [sic] motion to amend their Adversarial Proceeding, the Friedmans previously subpoenaed SFP's bank records. Those bank records from 2012 evidence Kimberly Jo Campbell was authorized to write and sign checks out of SFP's corporate accounts, which further supports the Friedmans' allegations that Mr. and Mrs. Campbell used SFP as their alter ego and a conduit of and for themselves, including, but not limited to the use of SFP's corporate account(s) to pay for their personal expenses, improvements to the Campbell residence, and the purchase of gifts for Campbell family members.

* * *

Based upon Debtor's October 11, 2013 sworn testimony during the 341 Meeting and the continued 341 Meeting before the bankruptcy trustee, it now appears that Kimberly Jo Campbell was directly responsible for SFP's accounting, accounts receivable and accounts payable. In such a capacity, Kimberly Jo Campbell knew or should have known the type of wood SFP ordered/purchased for use in the Friedmans Home, the type and quality of wood SFP ordered and used in the Friedmans' Home, the type of wood flooring and price billed to the Friedmans, that the wood flooring actually used to complete the Friedmans' flooring was not as described in the invoices issued to the Friedmans that Debtor has previously admitted Mrs. Campbell typed and that a different wood was in fact being used in the completion of the Friedmans' flooring.

Based upon Debtor's October 11, 2013 testimony before the bankruptcy trustee, Kimberly Jo Campbell had a substantial level of control over SFP's finances and

billing practices such that there is significant evidence she may be the party liable to the Friedmans for previously alleged fraudulent acts related to SFP' invoicing that is the subject of this Adversarial Proceeding. It also makes it likely Mary Jo Campbell jointly proceeded with Debtor to defraud the Friedmans, or was an active participant in the actions that the Friedmans allege constitute fraud.

Prior to the October 11, 2013 meeting of creditors, the Friedmans were unaware of the extent to which Kimberly Jo Campbell allegedly participated in various accounting functions and billings for SFP and Debtor.

Original Motion to Amend, ¶¶ 16-17, 20-21, 23, 24.

The Plaintiffs now contend that the January 6 interrogatories may have produced new facts that further support the argument that Kimberly Jo Campbell was actively a part of or had knowledge of the alleged fraud. Nevertheless, the Plaintiffs clearly have contended all along that there were sufficient facts known to them no later than October 11, 2013, to support the proposed claims against Ms. Campbell. As stated in the Second Order Denying Motion to Amend:

Even if additional facts have been discovered that the Plaintiffs assert further solidify their contention that the non-filing spouse is liable for the obligations of the corporation, the Plaintiffs plainly contend that the facts set forth in the Original Motion to Amend—all of which were known no later than the 341 Meeting—were sufficient to support such claims and were available prior to the deadline [to amend the pleadings] in the scheduling order.

Second Order Denying Motion to Amend, p. 3. These additional pieces of evidence that the Plaintiffs contend further support what they have contended all along do not constitute cause to modify the Scheduling Order. Therefore, the new facts derived from interrogatories are not the type of newly discovered evidence that was not known or available to the moving party “in the exercise of due diligence” prior to the deadline for filing a motion to amend as set forth in the Scheduling Order. Moreover, amending the Complaint to add a defendant would further unjustly delay the administration of this case.

To be clear, this Order is a denial of a motion to vacate the previous order denying the Plaintiffs' motion to amend the complaint, and not a ruling on the substance of the underlying

claims. As set forth in the Second Order Denying Motion to Amend, the Plaintiffs are free to pursue their claims against Ms. Campbell and/or SFP in the state court action that has been pending against the parties since 2012. The Plaintiffs argue that they should not be forced to litigate these identical claims in two fora. First, the putative claims asserted against Ms. Campbell are not identical or coextensive with the dischargeability claims asserted against the Debtor in this adversary proceeding. As stated by the Court on the record at the hearing on the Motion to Compel, the Plaintiffs continue to misunderstand the nature and extent of the claims and damages that are at issue in this dischargeability proceeding. The claims in this no-asset case are based solely upon the alleged fraudulent misrepresentations by the Debtor. There are no claims asserted in this adversary proceeding against the Debtor for breach of contract or breach of warranty or workmanship, nor would such claims be appropriate in this no-asset case in which the Debtor already has received his discharge. The sole issues in this case are whether there is a claim for fraud, and, if so, the amount of damages arising from that fraud that should be excepted from the Debtor's discharge. In contrast, the claims against the non-filing spouse (and/or against SFP) extend to piercing the veil, contract damages, warranty claims, and any other claims that might be asserted against her or SFP under state law. Second, even if the claims substantially overlapped factually or legally, this is not the proper forum, nor is this the proper adversary proceeding to assert those claims against a non-debtor. Third, it is entirely too late in the process to add defendants in this case, and allowing such an amendment would unjustly and unnecessarily delay administration of this adversary proceeding and the Debtor's bankruptcy case.

Finally, even if the Plaintiffs could have demonstrated that they should have been allowed to amend their complaint to add the non-filing spouse, the relief requested in the motion

to vacate would not be granted as there is no basis under Rule 60(b) for reconsidering the prior order. Plaintiffs claim grounds for relief under 60(b)(1) exist due to mistake on the part of Plaintiffs' counsel. Plaintiffs' counsel alleges that, in an effort to timely file a second motion to amend such that the Court could consider the motion prior to a hearing scheduled for March 5, 2015, the submitted motion was hastily filed a draft of the motion that failed to identify with clarity or specificity the new facts that would provide the Court with a basis for finding good cause to amend. [Doc. # 59, ¶ 3-6]. This type of negligent mistake or carelessness does not provide a basis for relief from a judgment or order. See Ben Sager Chemicals Int'l, Inc. v. E. Targosz & Co., 560 F.2d 805 (7th Cir. 1977) (court denied granting relief from a default judgment on the grounds that counsel was preoccupied with personal matters); and Rodgers v. Wood, 910 F.2d 444 (7th Cir. 1990) overruled on other grounds by Directv, Inc. v. Barczewski, 604 F.3d 1004, 1005 (7th Cir. 2010)) (attorney's mistake in pleading one defense due to a distraction in pursuing other defenses was not grounds for relief).

For the foregoing reasons, the Motion to Reconsider is DENIED.

[END OF DOCUMENT]