UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

In re:	)	
	)	
Cox Motor Express of Greensboro, Inc.,	)	Case No. 14-10468
	)	
Debtor.	)	
	)	
	)	
	)	
James C. Lanik	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 15-02023
	)	
James W. Smith, Jr.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM ORDER DENYING MOTION TO RECONSIDER

THIS ADVERSARY PROCEEDING comes before the Court on the Motion to Reconsider [Doc. #49] (the "Motion to Reconsider") and Brief/Memorandum of Law in Support [Doc. #51] filed by James C. Lanik (the "Trustee") on August 15, 2016. The Trustee requests that the Court reconsider its August 9, 2016, Order Granting Summary Judgment in Part and Denying in Part [Doc. #44] under

Fed. R. Civ. P. 59(e), made applicable to this adversary proceeding through Fed. R. Bankr. P. 9023. For the reasons set forth herein, the Motion to Reconsider will be denied.

As an interlocutory order, the proper Federal Rule of Civil Procedure to move for reconsideration of the entry of partial summary judgment is under Fed. R. Civ. P. 54(b),[1] rather than Rule 59(e). See Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 514 (4th Cir. 2003) (" . . . an order of partial summary judgment is interlocutory in nature.") (citing 11 Moore's Federal Practice § 56.40[3] (Matthew Bender 3d ed.)); Saint Annes Dev. Co. v. Trabich, 443 F. App'x 829, 832 (4th Cir. 2011) (finding that Rule 59(e) only applies to final judgments and Rule 54(b) was the proper rule for reconsideration of partial summary judgment).[2]

The court in TomTom, Inc. v. AOT Sys. GmbH, 17 F. Supp. 3d 545, 546 (E.D. Va. 2014), summarized the standard under Rule 54(b) as follows:

[1] Rule 54 of the Federal Rules of Civil Procedure is made applicable to this adversary proceeding by Fed. R. Bankr. P. 7054.

[2] Defendant argues in his response that Rule 59(e) is inapplicable to the Court's Order because it is not a final order adjudicating all claims in this case. In his reply, the Trustee argues that the Court's determination that the Defendant successfully rebutted the presumption of insolvency affects a substantial right that is immediately subject to appeal. Therefore, the Trustee contends that it is appropriate for the Court to apply the standards of Rule 59(e). The Court need not determine whether the Trustee is entitled to relief under Rule 59(e) because the Court declines to exercise its discretion to reconsider the order under the more lenient standards of Rule 54(b) for the reasons set forth herein.

> Under this rule, a district court "retains the power to reconsider and modify its interlocutory orders ... at any time prior to final judgment." Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 514–15 (4th Cir. 2003). The resolution of motions to reconsider pursuant to Rule 54(b) is "committed to the discretion of the district court," which may be exercised "as justice requires." Id. at 515. The Fourth Circuit has made clear that the standards governing reconsideration of final judgments are not determinative of a Rule 54(b) motion, but some courts have appropriately considered those factors in guiding the exercise of their discretion under Rule 54(b). Thus, these courts generally do not depart from a previous ruling unless "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." Am. Canoe Ass'n, 326 F.3d at 515 (quoting Sejman v. Warner–Lambert Co., Inc., 845 F.2d 66, 69 (4th Cir. 1988)). Such problems "rarely arise and the motion to reconsider should be equally rare." Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983). Motions to reconsider asking a court to "rethink what the Court had already thought through—rightly or wrongly" should not be granted. Id.

TomTom, Inc., 17 F. Supp. 3d at 546 (footnotes omitted).

The Trustee's main argument for reconsideration is that the amount of two debts on the Debtor's bankruptcy schedules were listed as "unknown," and therefore the schedules were not reliable evidence to rebut the presumption of insolvency under 11 U.S.C. § 547(f), especially in light of a later proof of claim filed by one of the listed creditors, the amount of which would have rendered the debtor insolvent if it had been listed on the schedules as claimed. Based on these facts, the Trustee

argues that the reflection of solvency in the Debtor's schedules was insufficient to rebut the presumption of solvency under 11 U.S.C. § 547(f) at summary judgment.

The Trustee does not argue that there has been any new evidenced produced or a change in controlling authority. Instead, he argues that he is entitled to relief from the Court's prior order because the Court's reliance on the schedules and its failure to consider the proof of claim constitute clear error and a manifest injustice. In TFWS, Inc. v. Franchot, 572 F.3d 186, 191 (4th Cir. 2009),[3] the Fourth Circuit considered the standard required to constitute clear error and manifest injustice, and determined that "[a] prior decision does not qualify for this third exception by being just 'maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'" Id. at 194 (citing Bellsouth Telesensor v. Info Sy. & Networks Corp., 1995 WL 520978, *5 n.6 (4th Cir. 1995)). "It must be 'dead wrong.'" Id. (quoting Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988)).

The Court has broad discretion in deciding whether to reconsider an interlocutory order. See Am. Canoe Ass'n, 326

[3] The court in Franchot was considering whether to grant relief from a prior order under the doctrine of law of the case. In determining whether to depart from the law of the case, the Court applied the same three part test set forth in TomTom, the third prong of which is clear error and manifest injustice. Id.

F.3d at 514–15. Nevertheless, the Court is guided in exercising its discretion by applying the three part test set forth above. Id. Neither the fact that the amount of two potential debts were listed as unknown, nor the Court's failure to consider the potential effect of a later filed proof of claim on the solvency reflected in the schedules, rises to clear error or manifest injustice when the Trustee did not present either of these arguments or documents to the Court on summary judgment.

The Defendant clearly was relying on the initial showing of solvency on the Debtor's schedules to rebut the presumption of insolvency of the Debtor. See e.g., Defendant's Memorandum in Opposition to Plaintiff's Motion to Exclude Evidence [Doc. # 41], p. 4 ("The schedules filed with this case show solvency, not insolvency. Assets in the amount of $2,089,014.75 and liabilities in the amount of $1,925,882.54 are asserted. (Summary of schedules).").[4] Despite Defendant's stated reliance on the schedules, this is the first time, in either pleadings or oral argument, that the Trustee has argued that these "unknown"

[4] At oral argument, the Court asked Defendant upon what evidence he relied to rebut the presumption of insolvency, and the Defendant responded that he specifically relied upon the Debtor's bankruptcy schedules. See Audio Transcript of May 17, 2016 hearing at 51:45-54:50. The Court gave Plaintiff an opportunity to respond to the Defendant's arguments. Id. at 1:04:00 et seq. Instead of arguing as he does now that the schedules were incomplete because two debts were listed as "unknown," the Trustee merely argued that the values of certain assets in the schedules were overinflated. Id. at 1:11:30. Any argument that the assets were overvalued, however, is the type of factual dispute that is inappropriate for the Court to resolve on summary judgment.

amounts or the later filed proof of claim affect the solvency reflected in the schedules. If the Trustee contended that the two debts listed as "unknown" in the schedules rendered the schedules insufficiently reliable to rebut insolvency, or if he wanted the Court to consider certain later filed proofs of claim outside the record presented by the parties at summary judgment, he should have raised these issues and presented this evidence at the latest at the hearing on summary judgment.

At the hearing on the Motion to Reconsider, the Trustee expressed concern that the Court's ruling would create an incentive for debtors and their insiders to list items on their Schedules as "unknown" in order to rebut the presumption of insolvency in any future preference actions against insiders. To be clear, the Court does not establish a per se rule today that listing asset values or debt amounts as "unknown" on the Debtor's schedules will create a successful rebuttal of the presumption of insolvency so long as the remaining itemized values reflect balance sheet insolvency. Nevertheless, as reflected in the Court's memorandum opinion, solvency reflected in the schedules can be sufficient to rebut the presumption under 11 U.S.C. § 547(f). See Memorandum Opinion [Doc. # 43], p. 28 (and cases cited therein). Conversely, the presence of an unknown or unliquidated debt on the schedules does not per se render the schedules insufficient to rebut the presumption of

insolvency. If that were so, schedules almost never would be sufficient to rebut insolvency. It is extremely rare to see schedules that do not include at least some "unknown" or unliquidated liabilities, and a bright line rule on the sufficiency of the schedules to rebut the presumption would be inappropriate. If the Trustee believed that the unknown amounts rendered schedules in this case insufficient to rebut solvency, he could have and should have made that argument at summary judgment. See Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1988) ("Rule 59(e) may not be used to raise new arguments or present novel legal theories that could have been raised prior to judgment.").

Nothing in this ruling or the Court's prior memorandum opinion should be construed to prevent the Trustee from relying on the information in the schedules or the filed proofs of claim, among any other admissible evidence,[5] to establish

[5] The Court ruled in this case that the evidence of Debtor's operations, tax returns, and book values were insufficient to conclusively establish insolvency for purposes of summary judgment. The Trustee cited Lawson v. Ford Motor Co. (In re Roblin Indus.), 78 F.3d 30, 36 (2d Cir. 1996), for the proposition that book values "are, in some circumstances, competent evidence from which inferences about a debtor's insolvency may be drawn." See Trustee's Reply Brief in Response to Defendant's Memorandum of Law [Doc. 37], pp. 6-7. Nevertheless, the court in Lawson was considering a factual finding of insolvency after a two day non-jury trial. Id. at 33. Although the Court can consider such evidence, draw inferences, and make findings of insolvency based upon tax returns and book values at trial in this case, it is inappropriate to do so at summary judgment, in which context the Court must construe facts in each instance in a light most favorable to the non-moving party, drawing all justifiable inferences in its favor. Murrell v. Ocean Mecca Motel, Inc., 262 F.3d 253, 255 (4th Cir. 2001); see also St. Paul Reinsurance Co., Ltd. V. Rudd, 67 Fed.Appx.190, 196, 2003 WL 21387200, *4 (4th Cir. 2003) ("It is generally inappropriate for a court to make findings

insolvency at trial, but the Trustee has not put forth a proper basis for the Court to reconsider the previous entry of partial summary judgment.

It is therefore ORDERED, ADJUDGED, and DECREED that the Motion to Reconsider is Denied.

[End of Document]

---

of fact in summary judgment proceedings. Instead, the court is obliged to accept and view the facts in the light most favorable to the non-movant.").

PARTIES TO BE SERVED

James C. Lanik
Chapter 7 Trustee
P.O. Box 1550
High Point, NC 27261

James W. Smith, Jr.
4601 Schoolway Drive
Greensboro, NC 27406

Norman B. Smith
Smith, James, Rowlett & Cohen, LLP
Suite 310
101 S. Edgeworth St.
Greensboro, NC 27401

William P. Miller
Bankruptcy Administrator
101 South Edgeworth Street
Greensboro, NC 27401