UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	)	
	)	
E-Z Serve Convenience Stores, Inc., et al.,	)	Case No. 02-83138
	)	
Debtors	)	
	)	
	)	
Louisiana Lottery Corporation	)	
	)	
v.	)	Ad. Proc. No. 03-9018
	)	
CIT Group Business Credit, Inc., and E-Z Serve Convenience Stores, Inc., thru its Trustee, Richard Hutson	)	

MEMORANDUM OPINION

This matter came before the court on April 6, 2004 after notice to all parties in interest, upon the Motion by Defendant CIT Group Business Credit, Inc. to Amend the Judgment and Memorandum Opinion entered on February 20, 2004. Anne Le Cour Neeb appeared on behalf of the Louisiana Lottery Corporation, John A. Northen appeared on behalf of the Trustee, and Kenneth R. Keller appeared on behalf of CIT Group Business Credit, Inc.

FACTS

On February 10, 2003, the Louisiana Lottery Corporation (the "Lottery") filed the present action to recover all lottery ticket proceeds removed from E-Z Serve Convenience Stores, Inc., ("E-Z Serve") by CIT Group Business Credit, Inc., ("CIT"). These proceeds were removed pursuant to a financing agreement entered into between CIT and E-Z Serve on September 23, 1999 (the "Financing Agreement"). In the Complaint, the Lottery alleges that E-Z Serve held

lottery ticket proceeds in trust for the Lottery, as provided by the Louisiana Lottery Act. See La. Rev. Statute 47:9055. The Lottery contends that CIT gained possession of the lottery ticket proceeds in breach of this trust and seeks a judgment against CIT ordering the return of all lottery ticket proceeds. On May 16, 2003, the parties entered into a joint scheduling memorandum pursuant to which discovery was completed by September 16, 2003.

After the completion of discovery, on October 31, 2003, CIT filed a motion for summary judgment and a supporting brief. In its brief, CIT stated that it provided loans to E-Z Serve under a revolving line of credit secured by a first lien on receivables, inventory and cash. All lottery proceeds were commingled with other cash received in the operation of the business, and CIT had no knowledge of the Louisiana statute purportedly creating a trust in the lottery proceeds. Among other things, CIT argued that it was entitled to judgment as a matter of law on certain theories, including: (i) equitable estoppel bars the Lottery from asserting the existence of a trust; (ii) there was no breach of trust; (iii) to the extent there was a breach of trust, the Lottery consented to the breach; and (iv) CIT is a bona fide purchaser ("BFP") of the trust assets. CIT relied upon the depositions of John Carruth (Vice President & General Counsel of Lottery), Robert Newman (Vice President of CIT), Mark King (Chief Financial Officer of E-Z Serve), and Steven Haft (former Vice President and Treasurer of E-Z Serve).

On October 31, 2003, the Lottery also filed a motion for summary judgment and a brief. In its brief, the Lottery stated that the retailer agreement (the "Retailer Agreement") between the Lottery and E-Z Serve required that a retailer maintain a separate account for lottery proceeds. In accordance with the Retailer Agreement, E-Z Serve set up an account from which the proceeds of the Lottery were swept weekly. The Lottery argued that at no time during the period

when E-Z Serve was an authorized retailer for the Lottery did E-Z Serve notify the Lottery that is was unable to control its cash deposits from the sale of lottery tickets. As for CIT's trust argument, the Lottery argued that E-Z Serve held lottery proceeds in trust for the Lottery and that the fact that funds passed through an account over which CIT had a lien does not defeat the trust. The Lottery attached an application to sell lottery tickets and the Rule 2004 examination of Mark King.

On November 28, 2003, CIT filed a response to the Lottery's motion for summary judgment. CIT disputed the amount of the lottery proceeds, whether the lottery proceeds were subject to a trust, whether the transfer was a breach of trust, and whether CIT had actually received proceeds of the unsettled tickets.

On December 2, 2003, the Court held a hearing on the motions for summary judgment. The evidence reflected that the Lottery proceeds were commingled in depository accounts that were transferred to a blocked account and applied to CIT loans. CIT then funded E-Z Serves' operating account and E-Z Serve transferred money from the operating account into various accounts, including accounts established for Lottery proceeds. The evidence showed that, just before E-Z Serve filed bankruptcy, CIT stopped advancing money to E-Z Serve and E-Z Serve was unable to fund the Lottery account. The Lottery did not receive payment of its proceeds. The Lottery argued that the proceeds were never property of E-Z Serve, and therefore, CIT wrongfully seized funds which were held in trust by E-Z Serve. The Lottery further argued that Louisiana law provides that the proceeds from the sale of lottery tickets constitute a trust fund until paid.

At the summary judgment hearing, CIT advanced four arguments. First, CIT argued that

the Lottery was equitably estopped from asserting the existence of a trust since it knowingly operated in violation of Louisiana law. Second, CIT argued that the trust was not breached because it operated as intended. The terms of the trust were established by the parties' course of dealings. Since the trust was designed to operate through funding by CIT, CIT neither received trust property in breach of trust nor did E-Z Serve's financial arrangements breach the trust. Rather, normal collection and payment practices were followed at all times. Third, CIT argued that the Lottery consented to the breach of the trust because it knew of the breach from the failure to set up a segregated account and thereafter elected not to enforce that requirement. Fourth, CIT argued that it is a BFP because it gave value for the Lottery proceeds without notice of the breach of trust. CIT had no reason to believe that the ongoing course of dealings among the parties constituted a breach of trust.

On December 3, 2003, the Lottery filed a supplemental memorandum in opposition to CIT's motion for summary judgment. The Lottery argued that it was not estopped from asserting the existence of the trust because the Louisiana statute does not require the segregation of lottery funds. Further, the actions of retailers cannot dictate the existence of a trust or a fiduciary relationship. The Lottery again asserted that it did not know that the proceeds were first forwarded to CIT and then released back to E-Z Serve based on a daily valuation of its inventory. The Lottery argued that lottery proceeds were never property of the estate and could not be used as collateral. Finally, the Lottery argued that CIT is not a BFP because the trust was held for the benefit of the State of Louisiana and not an individual; since E-Z Serve did not own the res of the trust, the proceeds could never be subject to "sale" to a BFP.

On February 20, 2004, this Court entered a Memorandum Opinion and Order. As a

preliminary matter, the court found that all of the essential elements of a trust are present, and based upon the language of the Lottery Act and the Lottery Contract, the court finds that all proceeds received by the Debtor from the sale of lottery tickets were held in statutory trust for the Louisiana Lottery. The court then addressed CIT's four affirmative defenses. On the estoppel defense, the Court stated that CIT produced no evidence that the Lottery routinely acts contrary to the Louisiana statute; in fact, the evidence shows that the Lottery required E-Z Serve to have a separate account from which proceeds would be swept. As to CIT's argument that there was no breach of trust, the Court stated that a finding of waiver is only appropriate upon a showing that the trust beneficiary had actual knowledge of the conduct that was contrary to the terms of the contract and statutory fiduciary obligations. The evidence indicates that the Lottery had no actual knowledge of any conduct by CIT that was contrary to the terms of the statute. With regard to CIT's defense that the Lottery consented to the breach of the trust, the Court found that CIT produced no evidence that the Lottery consented to a breach of the trust and no evidence that the Lottery had knowledge that E-Z Serve was not immediately placing proceeds in the lottery account. On CIT's BFP argument, the Court found that pursuant to the Restatement (Second) of Trusts, when property is subject to a trust, a third party takes subject to the trust unless he has purchased for value and without notice. The court found that a genuine issue of fact exists as to whether CIT had constructive notice of a breach of trust.

On February 27, 2004, CIT filed a motion for reconsideration pursuant to Federal Rule of Civil Procedure 59 and Bankruptcy Rule 9023. CIT argued that language in the Memorandum Opinion can be construed as granting partial summary judgment to the Lottery regarding the legal sufficiency of CIT's four affirmative defenses and that to the extent that the Memorandum

Opinion constituted a ruling on CIT's affirmative defenses, the ruling was based on errors of fact and law and should be amended to clarify that CIT may prove its affirmative defenses at trial. CIT correctly stated that with respect to the affirmative defenses, the Lottery is the moving party, so CIT is entitled to all reasonable inferences. CIT argues that the Court did not apply this standard to the Lottery's motion for summary judgment regarding the defenses. In fact, CIT argues, the Court improperly placed a higher burden of proof on CIT.

In its motion for reconsideration, CIT pointed out that CIT offered the deposition of John Carruth, which stated the Lottery neither knew nor cared whether the funds were commingled, despite the statute. Carruth also stated that the Lottery did not enforce the bond requirement of the statute. CIT argued that this creates an issue on whether the Lottery can rely on the statute to enforce a trust against CIT. CIT reargued that the terms of the Retailer Agreement say nothing of a trust requirement and do not prohibit commingling of funds; CIT asserted that the Lottery provided no evidence that E-Z Serve was aware of a trust. Before the Court can determine whether there was a breach of trust, CIT argued, the Court must establish which duties E-Z Serve (i.e., the trustee) owed to the Lottery, and that such an issue cannot be resolved "from the Louisiana Lottery's point of view." CIT reargued that the requirement of a sweep account is not consistent with the Louisiana statute and that, if there is an issue of fact regarding the trustee, there is also an issue of fact regarding breach of the trust.

CIT correctly stated that when the Court found that the Lottery was unaware that E-Z Serve's banking arrangements violated the statute, it effectively granted partial summary judgment to the Lottery by stating that CIT's affirmative defenses of estoppel, consent, and waiver fail as a matter of law. CIT argued that its evidence was circumstantial, not direct, but

that the material issue before the Court is the actual knowledge that can be imputed to the Lottery; absent testimony of the Lottery, circumstantial evidence is the only way for CIT to prove its case, and CIT argued that it submitted extensive circumstantial evidence that the Lottery violated the statute routinely. CIT simply reargued its case but offered nothing new.

On April 6, 2004, the Court held a hearing on CIT's motion to amend. CIT again argued, as to its defenses, that there were issues of fact that should be litigated at trial. CIT repeated the arguments made in its brief. CIT argued that it has evidence other than the affidavits that were offered. CIT maintained that it was not required to offer a "smoking gun" affidavit. CIT pointed out that, as to the Lottery's motion for summary judgment, CIT is the nonmoving party and has met its light burden; the contract with the Lottery says nothing of a trust. The Court pointed out that the contract incorporates the statute, which has the trust language. CIT argued, without proof, that no statute was ever provided to E-Z Serve. The Court took the matter under advisement.

DISCUSSION

Rule 59(e) of the Federal Rules of Civil Procedure, made applicable to this adverary proceeding by Bankruptcy Rule 9023, simply states: "Any motion to alter or amend a judgment shall be filed no later than 10 days after the entry of the judgment." A Rule 59(e) motion should be granted only in one of three circumstances: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. Pacific Life Ins. Co. v. American Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir.1998). The rule permits a court to correct its own errors, "sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." Russell v.

Delco Remy Div. of Gen. Motors Corp., 51 F.3d 746, 749 (7th Cir.1995). As a general rule, reconsideration of a judgment is "an extraordinary remedy which should be used sparingly." Pacific Life Ins. Co. v. American Nat'l Fire Ins. Co., 148 F.3d at 403 (quoting Wright et al., Federal Practice and Procedure § 2810.1, at 127-28 (2d ed. 1995)).

In this case, both CIT and the Lottery moved for summary judgment. Even when both parties simultaneously argue that there are no genuine issues of material fact, this does not establish that a trial is unnecessary. The mere fact that both parties seek summary judgment does not constitute a waiver of a full trial. Cram v. Sun Insurance Office, Ltd., 375 F.2d 670, 673 (4th Cir. 1967) ("The fact that both sides moved for summary judgment does not establish that there is no issue of fact and require that judgment be granted for one side or the other. Neither party, by moving for summary judgment, concedes the truth of the allegations of his adversary other than for purposes of his own motion.").

There is no question that a court has the power to enter summary judgment on its own initiative for a party that did not file a motion for summary judgment. Massey v. Congress Life Ins. Co., 116 F.3d 1414, 1417 (11th Cir. 1997); Alfa Leisure, Inc. V. King of the Road, 314 F. Supp.2d 1010, 1013 (C.D. Cal. 2004)("Even when there has been no cross-motion for summary judgment, a district court may enter summary judgment against a moving party if that party has had a 'full and fair opportunity to ventilate the issues involved in the matter.'").

Summary judgment should not be entered *sua sponte* unless the court provides the parties with notice and a fair opportunity to present evidence. United States v. Hoyts Cinemas Corporation, 380 F.3d 558, 569 (1st Cir. 2004); Tranzact Technologies, Ltd. v. Evergreen Partners, Ltd., 366 F.3d 542, 549 (7th Cir. 2004).

Actual notice that a court is considering a *sua sponte* award of summary judgment for one party may not be necessary if the other party had reason to believe that the court might reach the issue and received a fair opportunity to put its best foot forward. Gibson v. Mayor and Council of the City of Wilmington, 355 F.3d 215, 223 (3d Cir. 2004). Many courts, including the Fourth Circuit, have recognized exceptions to the "notice" requirement of Rule 56(c), including (1) the presence of a fully developed record, (2) the lack of prejudice, and (3) a decision based on a purely legal issue. Id. at 224; Amzura Enterprises, Inc. V. Ratcher, 18 Fed. Appx. 95, 104 n.8 (4th Cir. 2001)(2001 WL 1023112)(unpublished opinion)("We recognize that the ten-days-notice rule might not apply where the district court is already considering a properly noticed motion for summary judgment from the moving party and decides to enter summary judgment *sua sponte* in favor of the nonmovant on an issue identical to that which it is already considering, even absent a cross-motion, because '[t]he threat of procedural prejudice is greatly diminished if the court's *sua sponte* determination is based on issue identical to those raised by the moving party.'"); Laughlin v. Metropolitan Washington Airports Authority, 149 F.3d 253, 261 (4th Cir. 1998)("The district court, while it clearly has an obligation to notify parties regarding any court-instituted changes in the pending proceedings, does not have an obligation to notify parties of the obvious.").

In this case, CIT briefed the affirmative defenses, and discovery was completed before the Court ruled on summary judgment. In fact, at the time of the summary judgment ruling, CIT had briefed its affirmative defenses three times (i.e., on October 31, 2003; November 28, 2003; and December 16, 2003). CIT cannot claim to be surprised that the Court was considering such a ruling nor can CIT claim that it did not have an opportunity to present evidence in support of its affirmative defenses. Moreover, CIT appeared to argue that its evidence was circumstantial and

that it had no other evidence. No prejudice can be claimed.

Mere speculation, unsupported by facts in the record, is insufficient to create a genuine issue of material fact and falls short of what is required to survive summary judgment. American Road Service Co. v. Consolidated Rail Corp., 348 F.3d 565, 569 (6th Cir. 2003); Johnson v. McKee Baking Co., 398 F. Supp. 201, 206 (W.D. Va. 1975), affirmed, 532 F.2d 750 (4th Cir. 1976)("Mere general allegations, therefore, will not prevent the award of summary judgment.").

Many courts, including the Fourth Circuit, have ruled that when a party has filed a motion for summary judgment, the opposing party is under an obligation to respond to that motion in a timely fashion and to place before the court all materials it wishes to have considered when the court rules on the motion. Kipps v. Ewell, 538 F.2d 564, 566 (4th Cir. 1976)("When a motion for summary judgment is properly supported by affidavits, the adverse party may not rest upon the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial.").

There is no question that CIT had the burden of presenting all of the evidence that it could muster in support of its motion for summary judgment. CIT's failure to demonstrate that there were material facts in controversy was fatal to CIT's affirmative defenses. See General Universal Systems, Inc. v. Lee, 379 F.3d 131, 145 (5th Cir. 2004). CIT certainly had ample opportunities to present such evidence. See Casper v. Neubert, 489 F.2d 543, 548 n.2 (10th Cir. 1973) (when defendant's response to plaintiffs' motion for summary judgment included a statement that defendant should be granted summary judgment, plaintiffs were entitled to an opportunity to present opposing affidavits and to submit proofs opposing the motion, but when the district court gave both parties the opportunity to file further briefs and entertained a motion for

reconsideration and amendment of the judgment and plaintiffs made no claim that additional affidavits or proofs of any sort could be developed, the court did not err in granting summary judgment against plaintiffs).

As the nonmoving party, CIT is entitled to have all reasonable inferences drawn in its favor. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-61, 90 S.Ct. 1598, 1609-10, 26 L.Ed.2d 142 (1970). Under Fed.R.Civ.P. 56(e), however, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings" but instead "must set forth specific facts showing that there is a genuine issue for trial." This obligation is particularly strong when the nonmoving party bears the burden of proof on the issue at trial. Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1129 (4th Cir. 1987); citing Celotex Corp. v. Catrett, 477 U.S. 332, 106 S.Ct. 2548, 2553 (1986). Nevertheless, "only *reasonable* inferences can be drawn from the evidence in favor of the nonmoving party." Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 469 n. 14, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (emphasis in original) (internal quotations omitted).

As noted above, CIT asserted four affirmative defenses. With regard to equitable estoppel, waiver, and consent, a common issue lies at the heart of these three defenses: the Lottery's knowledge of E-Z Serve's financial practices. CIT admits that it has no direct evidence demonstrating that the Lottery knew that E-Z Serve was commingling lottery proceeds. Indeed, CIT has failed to present any evidence that suggests the Lottery possessed such knowledge. This lack of evidence reeks of the "mere speculation" that will not save an issue from summary judgment. Despite making all inferences in favor of CIT, the Court was unable to conclude that the Lottery's knowledge remained a genuine issue of material fact.

Finally, CIT argued that CIT is a BFP of the trust assets. While not reaching the availability or validity of this defense, the Court did not rule against CIT on this issue. As such, the Court will not reconsider this issue pursuant to CIT's Motion to Amend Judgment.

CONCLUSION

In its motion, CIT merely reargues the validity of its affirmative defenses. CIT has not offered any new arguments or legal theories, nor presented newly uncovered evidence. Nothing has been offered that merits reconsideration of the court's decision; therefore, CIT's motion to amend must be denied.

This the 6 day of October 2004.

Catharine R. Carruthers

Catharine R. Carruthers
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
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	)	
CIT Group Business Credit, Inc., and E-Z Serve Convenience Stores, Inc., thru its Trustee, Richard Hutson	)	
	)	

ORDER DENYING MOTION FOR AMENDMENT OF JUDGMENT

Pursuant to a Memorandum Opinion forthcoming, it is hereby ORDERED that CIT's Motion for Amendment of Judgment entered on February 20, 2004 is DENIED.

This the 30 day of September 2004.

Catharine R. Carruthers
United States Bankruptcy Judge