UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:	)	
	)	
Roasters Corporation,	)	Case No. 98-80704C-11D
Roasters Franchise	)	Case No. 98-81049C-11D
Corporation,	)	
	)	
Debtors.	)	
	)	

ORDER

These jointly administrated cases came before the court on February 29, 2000, for hearing upon a motion for reconsideration filed by K.C.M. Enterprises, Inc., 21-21 Broadway Enterprises, Inc., and Kevin C. Melilli ("Claimants"). Ronald H. Kauffman appeared on behalf of the Claimants and John A. Northen appeared on behalf of Mark Gillis, Trustee for Roasters Corporation and Roasters Franchise Corporation, the Debtors. Having considered the motion and other matters of record in this case, and having heard the arguments of counsel, the court has concluded that the motion should be denied.

On July 23, 1998, Claim No. 411 was filed on behalf of the Claimants. Following an objection to the claim being filed by the Debtors, a hearing was held in the bankruptcy court on May 3, 4, and 5, 1999, regarding Claim No. 411. On January 28, 2000, a memorandum opinion was filed and an order was entered which

sustained the Debtors' objection and disallowed Claim No. 411. The motion now before the court seeks "reconsideration" of the order entered on January 28, 2000. The basis for the motion is the assertion that the court did not provide a decision or the basis for a decision on the claim for tortious interference, which was one of the causes of action included in Claim No. 411. The motion seeks relief from this failure pursuant to Rules 52 and 59 of the Federal Rules of Civil Procedure and Rules 3008, 7052, 9023 and 9024 of the Federal Rules of Bankruptcy Procedure.

The assertion that the order did not provide a decision regarding the claim for tortious interference ignores the plain language of the memorandum opinion and order. The last page of the memorandum opinion states that an order will be entered "disallowing entirely Claim No. 411 . . . ." The order which was entered contemporaneously with the memorandum opinion then states that Claim No. 411 "is disallowed." The order was intended to deny all of the claims included within Claim No. 411, and this is unmistakably clear from the memorandum opinion and order.

The alternative ground for the motion is that the court did not provide the basis for the decision on the tortious interference portion of the claim. The substance of this contention is that the court failed to make findings of fact and conclusions of law

regarding the denial of the tortious interference claim. Although the memorandum opinion, as filed, did not include the findings and conclusions regarding the denial of the tortious interference portion of the claim,[1] the Claimants are not entitled to reconsideration of the order disallowing Claim No. 411.

An objection to a proof of claim gives rise to a contested matter which is subject to Rule 9014 of the Federal Rules of Bankruptcy Procedure. Under Bankruptcy Rule 9014, unless the court orders otherwise, Bankruptcy Rule 7052 is applicable to contested matters. In the present case, the court did not order otherwise, and, therefore, Bankruptcy Rule 7052 is applicable to the contested matter involving Claim No. 411. Bankruptcy Rule 7052, in turn, incorporates Rule 52 of the Federal Rules of Civil Procedure, which means that Federal Rule 52 is applicable to the matter now before the court.

Rule 52(a) provides that in actions tried without a jury the court is to make specific findings of fact and conclusions of law.

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[1]Attached as Exhibit A are findings and conclusions pertaining to the tortious interference portion of the claim which were prepared prior to the filing of the memorandum opinion. These findings and conclusions inadvertently were omitted from the final draft of the memorandum opinion. However, notwithstanding the omission of these findings and conclusions from the memorandum opinion, the order disallowing Claim No. 411 entirely correctly reflects the ruling of the court regarding Claim No. 411.

Rule 52(b) provides the procedure to be followed where, as in the present case, a party contends that the court has not complied with the requirements of Rule 52(a). The procedure specified in Rule 52(b) is a motion requesting that the court make additional findings and conclusions. Rule 52 thus appears to be the applicable rule for the actual relief sought in the motion now before the court. However, Rule 52(b) provides that the motion must be filed "not later than 10 days after entry of judgment . . . ." The Claimants did not comply with this requirement, since the motion was not filed until February 10, 2000, which was thirteen days after entry of the order denying Claim No. 411. Because the filing deadline under Rule 52(b) cannot be extended,[2] the Claimants are barred from obtaining any relief pursuant to Rule 52. See Cange v. Stotler & Co., 913 F.2d 1204, 1212 (7th Cir. 1990); Bright v. Bechtel Petroleum, Inc., 780 F.2d 766, 772 (9th Cir. 1986); Gribble v. Harris, 625 F.2d 1173, 1174 (5th Cir. 1980).

Rule 59 contains the same ten-day deadline as Rule 52. An

[2]Bankruptcy Rule 9006(b)(2) specifically provides that the court may not enlarge the time for taking action under Rules 7052 or 9023, which incorporates Federal Rule 59. A very similar provision is contained in Federal Rule 6(b) which forbids enlarging the time for taking action under Rules 52(b), 59(b), (d), and (e).

extension of the deadline in Rule 59 is prohibited by the same rules that prohibit an extension with respect to Rule 52. It follows that the Claimants may not obtain any relief under Rule 59 as a result of the late filing of the motion. See United States Leather, Inc. v. H&W Partnership, 60 F.3d 222, 225 (5th Cir. 1995); Cavaliere v. Allstate Ins. Co., 996 F.2d 1111, 1113 (11th Cir. 1993); Samuels v. American Motor Sales Corp., 969 F.2d 573, 578 (7th Cir. 1992); Long Island Radio Co. v. NLRB, 841 F.2d 474, 478 (2d Cir. 1988).

Federal Rule 60 is applicable in this case pursuant to Bankruptcy Rule 9024. However, it is well settled that parties may not circumvent the time requirements of Rule 52 and 59 by filing a motion under Rule 60. See Hahn v. Becker, 551 741, 745 (7th Cir. 1977); PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 898 (2d Cir. 1983); Thompson v. Toyota Motor Corp., 157 F.R.D. 10, 11 (D.N.J. 1994); Ring v. R.J. Reynolds, Inc., 1985 WL 892, *1 (N.D. Ill. April 19, 1985). Claimants therefore may not obtain under the guise of Rule 60 relief which is properly the subject of a Rule 52 or a Rule 59 motion. Rule 52(b) provides the means for a party to request amended or additional findings of fact and conclusions of law. In the present case, the fact that this relief may not be obtained under the applicable rule does not entitle Claimants to

proceed under Rule 60 for such relief. In short, Rule 60 is not expanded or rewritten because of an untimely Rule 52 motion. Rule 60(a) provides for the correction of "clerical mistakes" in judgments and orders or errors in judgments or orders arising from oversight or omission. However, if a judgment or order reflects the intent of the court when the judgment or order was entered, an error is not a Rule 60(a) clerical mistake or error. "Rule 60(a) applies when 'the court intended one thing but by merely clerical mistake or oversight did another' and does not apply in cases of an error of substantive judgment." Kant v. Apfel, 133 F.3d 915, 1997 W.L. 796159 (4th Cir. 1997)(unpublished decision). See also In re Frigitemp Corp., 781 F.2d 324, 327 (2d Cir. 1986)(Rule 60(a) applies when "judgment simply has not accurately reflected the way in which the rights and obligations of the parties have in fact been adjudicated."); United States v. Griffin, 782 F.2d 1393, 1396-97 (7th Cir. 1986)("If the flaw lies in the translation of the original meaning to the judgment, then Rule 60(a) allows a correction; if the judgment captures the original meaning but is infected by error, then the parties must seek another source of authority to correct the mistake."); West Va. Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702, 705 (5th Cir. 1954)(Rule 60(a) applies when the "judgment does not embody what

the court intended and the record justified").

The order which was entered in the present case on January 28, 2000, was intended to disallow "entirely" Claim No. 411, and did so in language which made that clear. No mistake or error of the type encompassed by Rule 60(a) has occurred in this case and Claimants therefore are entitled to no relief under Rule 60(a).

Under Rule 60(b) relief from a judgment may be granted based upon the various grounds enumerated therein. Claimants have offered no evidence nor pointed to anything in the record in this case which establishes any of the grounds contained in Rule 60(b). Therefore, no relief is available under Rule 60(b).

Bankruptcy Rule 3008 provides that a party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The rule requires that the court enter an "appropriate order" after a hearing on a motion for reconsideration. A motion for reconsideration brings into play § 502(j) of the Bankruptcy Code which provides that a claim that has been allowed or disallowed may be reconsidered "for cause." If the court decides to reconsider an allowed or disallowed claim, § 502(j) provides that the reconsidered claim may be allowed or disallowed "according to the equities of the case." Section 502(j) thus appears to contemplate a two-step process. The court first

decides whether the party seeking reconsideration has shown "cause." If so, and the court decides to reconsider the claim, then the second step contemplated under § 502(j) is that the court decide whether the reconsidered claim should be allowed or disallowed, which is to be determined "according to the equities of the case."

In the present case, the court first will decide whether to reconsider the disallowance of Claim No. 411. As the parties seeking reconsideration, the burden is upon Claimants to show that reconsideration should be granted, i.e., it is incumbent upon Claimants to show "cause" for reconsideration. Absent a showing of "cause", a motion for reconsideration should not be granted. In re Lambeth Corp., 227 B.R. 1, 7 n.10 (B.A.P. 1st Cir. 1998); In re Chattanooga Wholesale Antiques, Inc., 930 F.2d 458, 463 (6th Cir. 1991); Casell v. Shawsville Farm Supply, Inc., 208 B.R. 380, 382 (W.D. Va. 1996). However, neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure define the meaning of "cause" as used in § 502(j). The cases which have considered the meaning of "cause" as used in § 502(j) seem to agree that such a determination is a matter which falls within the discretion of the bankruptcy court. See, e.g., In re Mathiason, 16 B.R. 688, 689 (Bankr. E.D. Mo. 1995). Whether "cause" for reconsideration of an

order exists is a determination which must be made on a case-by-case basis based upon the particular facts and circumstances of the case in which the issue arises. The circumstances which may constitute cause for reconsideration include, but are not limited to, the following: (1) whether the court patently misunderstood a party; (2) whether the court has made a decision outside the adversarial issues presented by the parties; (3) whether the court has made an error not of reasoning but of apprehension; or (4) whether there is a controlling or significant change in the law or facts since the submission of the issue to the court. See Olson v. United States, 162 B.R. 831, 833 (D. Neb. 1993)(citing Above the Belt, Inc. v. Bohannan Roofing, Inc., 99 F.R.D. 99 (E.D. Va. 1983)). Having considered the circumstances in the present case, the court has concluded that cause for reconsideration of the order disallowing Claim No. 411 has not been shown.

None of the four factors mentioned in Olson v. United States, supra, is present in this case. There has been no showing that the court patently misunderstood the Claimants, that the court went outside the adversarial issues raised by the parties, that the court made an error not of reasoning but of apprehension or that there has been a controlling or significant change in the law or the facts since the entry of the order sustaining the objection to

Claim No. 411. Nor have Claimants shown any other circumstances constituting cause for reconsideration.[3]

For the foregoing reasons, the court has concluded that the motion for reconsideration of the order entered on January 28, 2000, disallowing Claim No. 411 should be denied.

IT IS SO ORDERED.

This 14 day of March, 2000.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

[3]Where, as in the present case, the motion under Rule 3008 is filed more than ten days after the entry of judgment, some courts have resorted to Rule 60 to determine if cause exists to reconsider a claim. See, e.g., In re Colley, 814 F.2d 1008, 1010 (5th Cir. 1987); In re Kleenmaster Indus., Inc., 106 B.R. 628, 630-31 (B.A.P. 9th Cir. 1989); In re Costello, 136 B.R. 296, 299 (Bankr. M.D. Fla. 1992). Since the court already has concluded that Claimants are entitled to no relief under Rule 60, these decisions require no further analysis at this point.

CLAIM FOR TORTIOUS INTERFERENCE

Under Florida law the elements of a claim for tortious interference with a business relationship are (1) the existence of a business relationship; (2) intentional and unjustified interference with that relationship by the defendant; and (3) damages to the claimant as a result of the defendant's interference with the business relationship. See Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So.2d 812 (Fla. 1994); Hall v. Burger King, 912 F.Supp. 1509 (S.D. Fla. 1995). A claimant must establish all three of these elements in order to prevail.

Claimants contend that they had a contract, or at least a protected business interest, regarding the sell of K.C.M.'s restaurants to Linda's Chicken. The offer and amended offer to purchase submitted by Linda's Chicken (CX-73 and 74) were subject to a number of conditions, including approval by the Board of Directors of Linda's Chicken and satisfactory completion of a due diligence review. Both Peter Weissbrod, Chief Executive Officer of Linda's Chicken, and Richard Goldberger, Linda's Chairman of the Board, testified that no contract with Claimant was ever submitted to the Board of Directors for approval, nor did Linda's Chicken ever satisfactorily complete its due diligence review. Mr. Weissbrod testified that approval by the Board of Directors was necessary to enter into an "actual contract" and that such Board approval was never obtained. Mr. Goldberger also testified that approval by the Board was necessary to create a binding contract and that such approval was never obtained. As such, the letter agreement relied upon by claimant arguably amounted to no more than an agreement to agree rather than an enforceable agreement. See TLZ Properties v. Kilburn-Young Asset Management Corp., 937 F.Supp. 1573 (M.D. Fla. 1996). However, under Florida law, an action for intentional interference is permitted even though it is predicated on an unenforceable agreement if the jury finds that an understanding between the parties would have been completed had the defendant not interfered. See Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So.2d 812, 814 (Fla. 1994). It follows that Claimants are not barred from relief simply because no enforceable agreement existed between K.C.M. and Linda's Chicken. However, because Claimants failed to establish the remaining elements of a claim for tortious interference, no recovery may be had under the claim for tortious interference with business relationship.

In support of the second element of the claim for tortious interference, Claimants rely upon a telephone conversation between Gregory Dollarhyde and Peter Weissbrod which Claimants contend constituted an unjustified and intentional interference with the contract or business relationship between K.C.M. and Linda's Chicken. Claimants also argue that Roasters interfered with their ability to secure food products from a supplier during the negotiations with Linda's Chicken.

With regard to the telephone conversation, the only competent witnesses to the contents of the conversation would be Mr. Dollarhyde and Mr. Weissbrod. Evidence was offered only by Mr. Weissbrod by deposition. Mr. Weissbrod testified that despite the telephone conversation, he remained interested in the K.C.M. restaurants and continued to negotiate with Mr. Melilli, continued to conduct due diligence and collect financial information related to the restaurants, and made an independent determination as to the value of the restaurants owned by K.C.M. The court finds no unjustified or intentional interference resulted from the telephone conversation.

With regard to the communications between Roasters and Sygma, a supplier of food to Claimants, Claimants contend that Roasters attempted to prevent Sygma from delivering any food products to Claimants. However, the evidence showed only that Roasters advised Sygma that the K.C.M. franchises had been terminated and that Claimants no longer were entitled to purchase proprietary products or to receive any special pricing available to Roasters' franchisees. A September 16, 1994 memorandum from Roasters to Sygma specifically stated "[you are not prohibited from selling other products to Mr. Melilli at any prices you desire." Roasters was authorized by the franchise agreements with K.C.M. to protect its proprietary items, including food products, and Claimants were obligated at the termination of the franchise agreements to refrain from using such proprietary items. For interference to be actionable, it must be "unjustified" and "so long as improper means are not employed, activities taken to safeguard or promote one's own financial and contractual interest are entirely non-actionable." See Ethyl Corp. v. Balter, 386 So.2d 1220, 1225 (Fla. Dist. Ct. App. 1980). Claimants failed to demonstrate by the greater weight of the evidence that Roasters engaged in any act of unjustified interference involving Claimant's food suppliers or that Roasters otherwise interfered with the efforts to sell the K.C.M. restaurants to Linda's Chicken.

Finally, Claimants failed to prove that any act by Roasters involving Linda's Chicken caused damage to Claimants. Recovery for tortious interference requires the claimant to demonstrate causation—that is, the claimant must prove "an understanding between the parties that would have been completed had the defendant not interfered." See Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So.2d 812, 814 (Fla. 1995). The evidence showed that Linda's Chicken made an independent business determination that it did not wish to purchase the K.C.M. restaurants based upon information obtained by Linda's Chicken during its due diligence review. Mr. Weissbrod testified that, based upon the due diligence review, he had concluded that the earlier offers were too high. Richard Goldberger testified that, after the due diligence review, he told Mr. Melilli that he did not want to discuss the potential purchase of the restaurants because the valuation of the properties by Linda's Chicken was being reduced by the information being disclosed during the due diligence review. The court finds from all of the evidence that the decision of Linda's Chicken to withdraw from negotiation with Claimants was based upon economic information learned by Linda's Chicken during its due diligence review and that there was no showing that any act of Roasters caused Linda's Chicken to withdraw from the negotiations. Thus, Claimant failed to prove this element of the tortious interference claim as well.