

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)

CASE NO. 11-80331-CIV-HURLEY/HOPKINS

JONATHAN E. PERLMAN, Esq., as court
appointed Receiver of Creative Capital
Consortium, LLC, et al.,

Plaintiff,

v.

BANK OF AMERICA, N.A.,

Defendant.

**PLAINTIFF’S MOTION FOR CLARIFICATION OF COURT’S ORDER DENYING
MOTIONS FOR RECONSIDERATION [ECF No. 94]**

Plaintiff, Jonathan E. Perlman, Esq., the court-appointed Receiver (the “Receiver” or “Plaintiff”) of Creative Capital Consortium, LLC, and related entities (collectively, the “Receivership Entities”),¹ submits this motion for clarification of the Court’s July 2, 2012 Order Denying Motions for Reconsideration [ECF No. 94]. Specifically, Plaintiff requests clarification and confirmation that the Court’s Order constitutes a Fed. R. Civ. P. 62.1(b) “indicative ruling,” indicating that if the Eleventh Circuit remands, the Court intends to reconsider its dismissal, *with prejudice*, of Plaintiff’s Amended Complaint, and allow Plaintiff to file the proposed Second Complaint.

¹ Creative Capital Consortium, LLC, A Creative Capital Concept\$, LLC, United Investment Club, LLC, Reverse Auto Loan, LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G\$Trade Financial, Inc. and Unity Entertainment Group, Inc.

DISCUSSION

In the early morning of June 21, 2012, Plaintiff filed, under Fed. R. Civ. P. 59(e) and 60(b), Motions for Reconsideration of this Court's May 23, 2012 Order dismissing Plaintiff's complaint, *with prejudice*. [ECF No. 85 at 3 n. 1; ECF No. 84 at 3]. Plaintiff sought reconsideration of the *with prejudice* component of the dismissal order, so that the Receiver could submit an amended complaint providing additional facts that the Court stated in its dismissal order were necessary to allege causes of action against Defendant Bank of America for aiding and abetting breach of fiduciary duty and recovery of fraudulent transfers under the Florida Uniform Fraudulent Transfer Act ("FUFTA"). Plaintiff filed the motion and proposed amended complaint 15 minutes beyond the 28-day filing deadline under Rule 59 (and a corrected motion hours later), but within the time permitted to file a Rule 60(b) motion.² The next day, June 22, because the impending 30-day appeal deadline would expire if the Rule 59 motion were deemed untimely, Plaintiff filed a notice of appeal to the Eleventh Circuit Court of Appeals of the Court's May 23 Order [ECF No. 88].

Under Fed. R. Civ. P. 62.1, though the notice of appeal divested this Court of jurisdiction to actually grant Plaintiff's request for reconsideration under Rule 60(b), the Court maintained jurisdiction to make an "indicative ruling" by indicating that it would grant the motion if jurisdiction were returned, "or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1(a)(3); Fed. R. App. P. 12.1; 11th Cir. R. 12.1-1.³ If this Court did make an indicative

² Motions seeking reconsideration filed after the Rule 59(e) deadline should be considered also as having been brought pursuant to Rule 60(b). *See Mahone v. Ray*, 326 F.3d 1176, 1178 n. 1 (11th Cir. 2003).

³ The Court also maintained jurisdiction to deny the Rule 60(b) motion on the merits. *Mahone*, 326 F.3d at 1880. The Court's Order does not, however, address the merits of Plaintiff's Rule 60(b) motion.

ruling, the Receiver must promptly notify the Eleventh Circuit court clerk and seek a stay of the appeal, so that the Eleventh Circuit may determine whether to remand the case back to this Court for such purposes. Fed. R. Civ. P. 62.1(b); Fed. R. App. P. 12.1; 11th Cir. R. 12.1-1. This Court would then be empowered to decide the motion as a Rule 60(b) motion. Fed. R. Civ. P. 62.1(c).⁴

⁴ Fed. R. Civ. P. 62.1 states as follows:

- (a) **Relief Pending Appeal.** If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
 - (1) defer considering the motion;
 - (2) deny the motion; or
 - (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.
- (b) **Notice to the Court of Appeals.** The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.
- (c) **Remand.** The district court may decide the motion if the court of appeals remands for that purpose.

Fed. R. Civ. P. 62.1.

Companion Federal Rule of Appellate Procedure 12.1 likewise states:

- (a) **Notice to the Court of Appeals.** If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.
- (b) **Remand After an Indicative Ruling.** If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Fed. R. App. P. 12.1.

On July 2 this Court, referencing only Rule 59, entered an order stating that it was denying Plaintiff's motions only because they were filed beyond Rule 59's 28-day deadline, which made "the Court[] simply unable to consider them." [ECF No. 94 at 1-2]. Because the 28-day filing deadline only applies to Rule 59, and not to Rule 60(b), the Court appears to have only denied the Receiver's Rule 59 motion.

In the July 2 Order, however, the Court, consistent with consideration of Plaintiff's alternative Rule 60(b) request, and with a Rule 62.1(b) "indicative ruling," stated:

Had the motions been filed within the deadline, the Court would have been inclined to reconsider its order dismissing Plaintiff's claim with prejudice in light of the new allegations in Plaintiff's proposed Second Amended Complaint. These allegations were first presented to the Court in the motions for reconsideration and go well beyond the conclusory allegations and allegations of suspicious activities and red flags in the First Amended Complaint.

[ECF 94 at 1-2].

Further, in what could have been a reference to the Receiver's motion as a Rule 60(b) motion, the Court noted that Plaintiff "has subsequently filed a notice of appeal, which divests the Court of jurisdiction over aspects of the case involved in the appeal." [*Id.* at n. 1]. That reference to the loss of jurisdiction to the appellate court is germane only to a Rule 60(b) motion filed more than 28 days after judgment, as occurred here, and not to a Rule 59 motion. *See* Fed. R. App. P. 4. In all other respects, however, the Court's July 2 Order appears limited to the Rule 59 aspect of Plaintiff's motion that the Court determined was barred by the 28-day time limit.

Thus, although the Receiver is uncertain whether the Court actually considered the reconsideration motions as Rule 60(b) motions, the Court stated clearly that, if jurisdiction existed, the Court intended to reconsider its order dismissing the complaint *with prejudice*, or that at least a substantial issue existed that it may do so. Because, however, the Order does not explicitly reference Rule 60(b) or the possibility of remand, Plaintiff is unsure whether the Court

intended to enter a Rule 62.1(b) “indicative ruling.”

If, as it appears, the Court did intend to enter an indicative ruling, Plaintiff will immediately notify the Eleventh Circuit, as required, so that the court of appeals may decide whether to remand the matter to this Court. The Receiver will also request a stay of the appeal pending such decision. Alternatively, if the Court did not construe Plaintiff’s motion under Rule 60(b), then Plaintiff respectfully requests such clarification, including whether the Rule 60(b) motion is currently under consideration. If appropriate upon clarification, Plaintiff will immediately file a motion for reconsideration under Rule 60(b), if the Rule 60(b) motion has neither been decided, nor is currently under consideration, and request an indicative ruling under Fed. R. Civ. P. 62.1. *See, e.g., Florida Key Deer v. Fugate*, No. 4:90-cv-10037, 2011 WL6935288 *1 (S.D. Fla. Dec. 30, 2011) (discussing motion for indicative ruling).

For all of the foregoing reasons, Plaintiff respectfully requests that this Court enter an order:

- (1) clarifying that the Court has entered an indicative ruling,
- (2) clarifying that, pursuant to Fed. R. Civ. P. 62.1 and Fed. R. App. P. 12.1, the Court either would grant the Rule 60(b) reconsideration motion if the Eleventh Circuit remands for that purpose, or that the motion raises a substantial issue,⁵ or
- (3) clarifying that the Court has not considered any motion filed under Rule 60(b) and that no motion is currently under consideration by the Court.

⁵ As noted above, such a ruling tracks the language of Rule 62.1(a)(3).

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/W. Barry Blum
Attorney

SERVICE LIST

**JONATHAN E. PERLMAN, ESQ., as court appointed Receiver of Creative Capital Consortium, LLC, et al. v. BANK OF AMERICA, N.A.
CASE NO. 11-80331-CIV-HURLEY/HOPKINS
United States District Court, Southern District of Florida**

W. Barry Blum

bblum@gjb-law.com

David C. Cimo

dcimo@gjb-law.com

Carmen Contreras-Martinez

ccontreras@gjb-law.com

Genovese Joblove & Battista, P.A.

Miami Tower, 44th Floor

100 Southeast 2nd Street

Miami, FL 33131

Telephone: (305) 349-2300

Facsimile: (305) 349-2310

Attorneys for Plaintiff Jonathan E. Perlman, Esq.,

as Court Appointed Receiver of Creative Capital Consortium, LLC, et al.

Served via CM/ECF

Michael R. Josephs

mrj@florida-attorneys.com

The Josephs Law Firm

2699 South Bayshore Drive, 7th Floor

Miami, FL 33133

Telephone: (305) 445-3800

Facsimile: (305) 448-5800

Co-Counsel for Plaintiff Jonathan E. Perlman, Esq.,

as Court Appointed Receiver of Creative Capital Consortium, LLC, et al.

Served via CM/ECF

Joseph E. Culleiton

JCulleiton@ReedSmith.com

Mary J. Hackett

mhackett@reedsmith.com

Dustin Pickens

dpickens@reedsmith.com

Reed Smith LLP

225 Fifth Avenue

Pittsburgh, PA 15222

Telephone: (412) 288-3131

Facsimile: (412) 288-3063

Attorneys for Defendant Bank of America

Served via CM/ECF

Dora Faye Kaufman

dfk@lgplaw.com

J. Randolph Liebler

jrl@lgplaw.com

Juan A. Gonzalez

jag@lgplaw.com

Liebler, Gonzalez & Portuondo, P.A.

44 West Flagler Street

25th Floor

Miami, FL 33130

Telephone: (305) 379-0400

Facsimile: (305) 379-9626

Attorneys for Defendant Bank of America

Served via CM/ECF

10501-002/907v.2