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

CASE NO. 10-81612-CIV-HURLEY/HOPKINS

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

Plaintiff,

v.

WELLS FARGO BANK, N.A, as successor-in-interest to Wachovia Bank, N.A.,

Defendant.
_____/

RECEIVER'S RESPONSE IN OPPOSITION TO WELLS FARGO'S MOTION FOR RECONSIDERTION OF PARTIAL DISMISSAL ORDER

Plaintiff, Jonathan E. Perlman, Esq., the court-appointed Receiver (the "Receiver") of 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., (collectively, the "Receivership Entities"), files this Response to the Motion for Reconsideration of Order Granting in Part Defendant's Motion to Dismiss and Denying Defendant's Motion to Strike (ECF No. 52) and Incorporated Memorandum of Law filed by Defendant Wells Fargo Bank, N.A, as successor-in-interest to Wachovia Bank, N.A. ("Wells Fargo") [ECF No. 80] and states as follows:

PRELIMINARY STATEMENT

The Plaintiff is the duly appointed and acting receiver of the Receivership Entities. On December 21, 2010, the Receiver filed his Complaint in this lawsuit seeking monetary damages,

the avoidance of fraudulent transfers and other relief against Wells Fargo in regard to its role as one of the banks used in the multi-million dollar Ponzi scheme that is the subject matter of this receivership action. [ECF No. 1]. On April 5, 2010, the Receiver filed a First Amended Complaint as a matter of right without leave of Court. [ECF No. 19]. By Order dated November 11, 2011, the Court granted in part Wells Fargo's Motion to Dismiss the First Amended Complaint ("Partial Dismissal Order"). [ECF No. 52]. On June 1, 2012, Wells Fargo filed its motion for reconsideration of this Court's Partial Dismissal Order based upon the Court's Order of Dismissal entered in a separate lawsuit pending by the Receiver against Bank of America involving the Receivership Entities as the result of the 11th Circuit decision in *Lawrence v. Bank of America, N.A*, 455 Fed. Appx. 904 (11th Cir.2012) ("Motion for Reconsideration"). [ECF No. 80]. On June 25, 2012, the Receiver filed an unopposed motion for extension of time within which to respond to Wells Fargo's Motion for Reconsideration. [ECF No. 85]. On June 26, 2012, the Receiver filed his Motion for Leave to File a Second Amended Complaint, which is currently pending before the Court.[1] [ECF No. 86].

The grounds cited in Wells Fargo's Motion for Reconsideration are inapplicable to the procedural posture of this case. Specifically, Rule 54(b) addresses the ability of the courts to render final judgments as to separate claims and parties, rather than wait for adjudication of the entire case. Likewise, Rule 60 is applicable only to *final* judgments and orders. To the extent that Rule 59 is applicable as is often cited by courts in this Circuit when ruling upon a motion for reconsideration and which Wells Fargo does not cite, its provisions clearly impose a 28 day time

[1] This Court has not ruled on the Motion for Extension of Time likely in light of the Receiver's pending Motion for Leave to File a Second Amended Complaint. Notwithstanding, the Receiver files this brief response to the Motion for Reconsideration and concurrently files his Reply in Response to Wells Fargo's Opposition to the Receiver's Motion for Leave to File Second Amended Complaint, prior to the deadline for filing same, to allow the Court to resolve the pending motions expeditiously.

limitation, which Wells Fargo long ago surpassed. Finally, the Receiver requests that the Court first consider the Receiver's pending Motion for Leave to File a Second Amended Complaint; should the Court grant the motion, the Motion for Reconsideration would be rendered moot.

For the reasons set forth above, as more fully argued by the Receiver in the Memorandum of Law below, Wells Fargo's Motion for Reconsideration should be denied.

MEMORANDUM OF LAW

I. The Motion For Reconsideration Is Untimely

Wells Fargo cites Rule 54(b) of the Federal Rules of Civil Procedure as providing the requisite predicate for the Motion for Reconsideration. Rule 54(b) "provides an exception to the general rule that a final judgment is proper only after the rights and liabilities of all the parties to the action have been adjudicated." *Ebrahimi v. City of Huntsville Board of Education*, 114 F.3d 162, 165 (11th Cir. 1997). Indeed, the "purpose of Rule 54(b) is to codify the historic practice of prohibiting piecemeal disposition of litigation and permitting appeals only from final judgments, except in the infrequent harsh case in which the district court properly makes the determinations contemplated by the rule." *Southeast Banking Corp. v. Bassett*, 69 F.3d 1539, 1547 n. 2 (11th Cir.1995). This Rule is meant to address the court's power to render final adjudication as to part of the claims and/or parties presented by a multiple claim/party action. Read in its entirety, Rule 54(b) simply preserves the status of non-finality when the court issues orders or decisions which are not intended to render such final judgment.

To the extent that Rule 54(b) might empower a court to reconsider a non-final order, the case law, as cited herein, imposes upon the court and the parties the limitations set forth in Rule 59(e), which requires that motions for reconsideration must be filed within 28 days of the contested order. See *Fred Lurie Assocs., Inc. v. Global Alliance Logistics, Inc.*, No. 05-22881-CIV, 2006 WL 3626296 (S.D. Fla. Aug. 15, 2006).

The time constraints established by Rule 59(e) have been strictly enforced by the courts. In *Grant v. Miami Dade County School Board*, 2008 WL 2656278 (11th Cir. 2008), the Eleventh Circuit upheld the district court's denial of the defendant's motion for reconsideration as being untimely filed a mere ***eight days*** after the ten day expiration period under Rule 59(e). Indeed, in a case involving a motion to reconsider a final judgment, the Eleventh Circuit held that Rule 6(b)(2) ***expressly prohibited*** the granting of any extensions of time to file a motion pursuant to Rule 59(e), and therefore any purported extension was inoperative in tolling the time for filing an appeal. *Green v. Drug Enforcement Administration*, 606 F.3d 1296, 1300 (11th Cir. 2010).

The Partial Dismissal Order was entered on November 11, 2011; the time for Wells Fargo to seek reconsideration therefore expired on December 9, 2011. The filing of the Motion for Reconsideration is late by ***nearly seven months*** and therefore should be denied as untimely filed pursuant to Rule 6(b)(2) and Rule 59(e).[2]

II. Fed. R. Civ. P. 60(b) Is Inapplicable to a Motion for Reconsideration of a Non Final Order

Wells Fargo also cites Rule 60(b) of the Federal Rules of Civil Procedure as providing another procedural authority for the Motion for Reconsideration, citing the court's decision in *Max M. v. Thompson*, 585 F. Supp. 317 (N.D. Ill. 1984) for support.

The Eleventh Circuit has held that "[a] motion for reconsideration made after final judgment falls within the ambit of either Rule 59(e) (motion to alter or amend a judgment) or Rule 60(b) (motion for relief from judgment or order)." *Region 8 Forest Serv. Timber Purchases Council v. Alcock*, 993 F.2d 800, 806 n. 5 (11th Cir.1993), *citing Inglese v. Warden*,

[2] See also *Martinez v. Bohls Equipment Co.*, 2005 WL 1712214 (W.D. Tex. 2005) (holding that "[m]otions to reconsider interlocutory orders are left to the Court's discretion **so long as not filed unreasonably late."** (emphasis added)). In *Martinez*, the Court denied a motion for reconsideration as untimely when reconsideration was sought of a ruling issued over four months after the court's ruling.

687 F.2d 362, 363 n. 1 (11th Cir.1982); *Woodham v. American Cystoscope Co.*, 335 F.2d 551, 554-55 (5th Cir.1964). Clearly by the express language of the Rule and the case law, Rule 60(b) can only be invoked upon final adjudication.

III. The Receiver's Motion for Leave to Amend Should Be Decided Prior to the Motion for Reconsideration

Pending before this Court is the Receiver's Motion for Leave to File a Second Amended Complaint. Should the Court grant the Receiver's motion, the Motion for Reconsideration will be moot. As the Motion for Reconsideration is intended to revisit the issues determined by the Partial Order of Dismissal, it is entirely appropriate for the Court to allow the Receiver to include additional factual allegations in support of his claims via an amended complaint. In facts similar to the instant case, the court in *Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 434 F. Supp. 2d 640 (N.D. Iowa 2006) permitted the filing of an amended complaint before entertaining the merits of a motion for reconsideration. As the court stated:

> [T]he defendants' only objection to the proffered amendment is that the court should rule on the defendants' motion to reconsider and to stay before considering, if at all, whether to grant Ideal's motion for leave to amend its Complaint. The court does not find that objection to be persuasive, because the Eighth Circuit Court of Appeals has recognized that it is appropriate to allow an amendment that attempts to cure defects or deficiencies previously identified by the opposing party, even after a motion to dismiss is granted, if the amendment is offered in a timely manner. (citation omitted). **Here, [the plaintiff] has proffered its amendment after the claims in question *survived* the defendants' motion to dismiss, but the amendment is, nevertheless, clearly intended to address the implications of the court's ruling**[.] Under the circumstances, the court finds that justice requires that [the plaintiff's] motion to amend its Complaint be granted. (citation omitted).

Id. at 635-636 (emphasis added).

The *Ideal* court further ruled that granting the plaintiff's motion to amend rendered the opposing party's motion for reconsideration moot.

> The defendants . . . assert . . . that a ruling on their motion to reconsider

> would moot [the plaintiff's] motion to amend. . . . [T]he defendants have matters the wrong way around. The Eighth Circuit Court of Appeals has held that it was "plainly erroneous" for a district court to ignore a proffered amended complaint that addressed deficiencies in an original complaint identified in a motion to dismiss and, instead, to grant the motion to dismiss the original complaint, then deny the motion to amend the complaint as moot. (citation omitted). As the court observed, "If anything, [the plaintiff's] motion to amend the complaint rendered moot [the defendant's] motion to dismiss the original complaint." (citation omitted).

Id. at 646.

In his Motion for Leave to File a Second Amended Complaint and reply thereto, the Receiver has offered a justifiable rationale for the filing of an amended complaint. In the interest of fairness and efficiency, the Court should rule on the merits of that motion prior to considering Wells Fargo's Motion for Reconsideration.

CONCLUSION

For all of the foregoing reasons, Wells Fargo's Motion for Reconsideration should be denied.

Dated: July 16, 2012
Miami, Florida

Respectfully submitted,

By: s/ David C. Cimo

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2012, the foregoing document was electronically filed 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, 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/David C. Cimo
Attorney

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