

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

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

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

Plaintiff,

vs.

BANK OF AMERICA, N.A.,

Defendant.

**DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO STRIKE THE
RECEIVER'S UNTIMELY RULE 59(e) MOTIONS FOR RECONSIDERATION**

Defendant Bank of America, N.A. ("Bank of America"), by and through its undersigned counsel, hereby files this Motion to Strike because Plaintiff's (the "Receiver's") Motion for Reconsideration [DE 84] and Corrected Motion for Reconsideration [DE 85] (the "Motions for Reconsideration") were untimely filed and therefore must be dismissed. The Receiver's failure to comply with the filing deadline renders the motions untimely, compels denial of the motions and precludes this Court from reviewing the motions on the merits. In support of this motion, Bank of America states as follows:

RELEVANT BACKGROUND

On May 23, 2012, this Court granted Bank of America's Motion to Dismiss the Receiver's Amended Complaint with prejudice. [DE 82]. The same day, this Court also entered final judgment against the Receiver and in favor of Bank of America. [DE 83].

On June 21, 2012, twenty-nine (29) days after this Court's final judgment was entered, the Receiver filed an untimely motion for reconsideration, requesting various relief. [DE 84].

Moreover, the Receiver's original untimely motion was not signed by counsel. Later that day, counsel filed a "corrected" motion for reconsideration, requesting identical relief.¹ [DE 85].

ARGUMENT

A. The Receiver's Motions For Reconsideration Are Untimely And Thus Should Be Stricken.

Under Federal Rule 59(e), a motion to alter or amend a judgment must be filed "no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). Because the time period for filing a Rule 59(e) motion is mandatory and jurisdictional, the twenty-eight day deadline *cannot* be altered, waived or amended by the court. Fed. R. Civ. P. 6(b)(2); *Brandau v. Warden, FCC Coleman - Medium*, No. 11-14858, 2012 WL 1370908, at *2 (11th Cir. Apr. 20, 2012); *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1129 (11th Cir. 1994) ("Timeliness constitutes a jurisdictional dimension central to both the notice of appeal and the motion for reconsideration. Just as an untimely filed notice of appeal cannot invoke a circuit court's jurisdiction, an untimely filed motion to alter or amend cannot invoke a trial court's jurisdiction"); *see also id.* at 1128 ("Rule 6(b) forbids a court to enlarge the time within which a Rule 59(e) motion may be served"); *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111 (11th Cir. 1993) (stating that the three additional days for service do not apply to a motion for reconsideration). Accordingly, failure to comply with the filing deadline specifically set forth in Rule 59(e) compels denial of the motion.

Here, the Court entered final judgment on May 23, 2012. [DE 83]. Thus, to the extent that the Receiver was inclined to move to reconsider the judgment, the Receiver's deadline for

¹ In his "corrected" motion, the Receiver essentially admitted that his original motion for reconsideration was untimely filed, and requested that his Rule 59(e) motion be construed, in the alternative, as a Rule 60(b) motion. The request is an improper attempt to avoid a jurisdictional deadline, and should be denied. The Receiver thereafter filed a Notice of Appeal on June 22, 2012 and referenced the untimely filing of its pending motion for reconsideration. [DE 88, n.1].

filing said motion was June 20, 2012. Yet, the Receiver waited and filed his motion for reconsideration after the deadline – on June 21, 2012. [DE 84, 85].

Further, the Receiver’s misstep cannot be explained by the Receiver’s failure to grasp the rigid filing deadline. To the contrary, the Receiver’s own prior briefing – in its opposition to the Bank’s motion to dismiss – proves that the Receiver is well aware of the twenty-eight day deadline that is associated with a Rule 59(e) motion for reconsideration. *See* [DE 76, pp. 6-7] (motions for reconsideration “must be filed within 28 days of the contested order”).²

Indeed, the Receiver all but acknowledges in his “corrected” motion for reconsideration that his Rule 59(e) motion was untimely. [DE 85, p. 2 n.1]; *see also* Notice of Appeal [DE 88, n.1] (acknowledging the same). In an effort to save his motion, the Receiver attempts to circumvent the missed Rule 59(e) deadline by requesting that the motion be construed, in the alternative, as a Rule 60(b) motion. [DE 85]. However, as explained below, this request, without more, cannot save the Receiver from the jurisdictional barrier and his motion is properly stricken as an out-of-time Rule 59(e) motion for reconsideration.

B. The Receiver Cannot Circumvent The Jurisdictional Time Restraints Of A Rule 59(e) Motion For Reconsideration By Artfully Requesting Alternative Relief Under Rule 60.

Although the Receiver incorporates an alternative request for relief from judgment under Rule 60, he does not – and cannot – provide any rationale to substantiate the application of this Rule.

The Receiver alleges that discovery yielded additional evidence that would bolster his claims and thus serve as the basis for this Court granting the Receiver leave to file a second

² This Court did not address the Receiver’s prior argument regarding the deadline for a Rule 59 (e) motion because it was not applicable to Bank of America’s Rule 12(b)(6) motion to dismiss.

amended complaint. [DE 76, p. 7]. Importantly, to the extent that the Receiver's basis for reconsideration, and the basis for his motion for leave to amend, is predicated on any newly discovered evidence, Rule 60(b) only applies to evidence that could not have been discovered within twenty-eight days of the Court's entry of final judgment. *See* Fed. R. Civ. P. 60(b) ("newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)"). Further, the Eleventh Circuit has made it abundantly clear that "where a party attempts to introduce previously unsubmitted evidence on a motion to reconsider, the court should not grant the motion absent some showing that the evidence was not available during the pendency of the motion." *Mays v. U.S. Postal Service*, 122 F.3d 43, 46 (11th Cir. 1997).

Here, the Receiver's alleged newfound evidence was derived from documents and/or deposition testimony that was elicited well in advance of the requisite Rule 60(b) deadline. [DE 76, p. 7]; *see also* [DE, p. 12] ("The facts and circumstances the Receiver has alleged in the proposed Second Amended Complaint are based upon the testimony of BOA employees . . ."). Indeed, through his own admission, the Receiver's newly discovered evidence arose not only prior to the expiration of the requisite twenty-eight-day deadline, but during the pendency of the Bank's motion to dismiss. The Receiver cannot be permitted to rely on Rule 60 as a last-ditch effort to assert evidence that could have been presented to the Court prior to the disposition of the case. *See Mays*, 122 F.3d at 46. Thus, the Receiver's attempt to recast his motion as a Rule 60(b) motion is unwarranted and inappropriate.

CONCLUSION

As previously set forth, no amount of artful pleading by the Receiver can save his motions from Rule 59(e)'s twenty-eight-day jurisdictional barrier. Accordingly, Defendant Bank

of America, N.A. respectfully requests that this Court grant Bank of America, N.A.'s motion to strike the Receiver's motions for reconsideration [DE 84, 85] as untimely and deny the Receiver's motions for reconsideration.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(3)

I HEREBY CERTIFY that on June 28, 2012, in accordance with Local Rule 7.1(a)(3), Dora F. Kaufman, counsel for Defendant, conferred with Carmen Contreras-Martinez, counsel for the Receiver, and inquired as to whether the Receiver would consent to the filing of this Motion. Counsel for the Receiver advised that the Receiver opposes this Motion.

Date: June 28, 2012

Respectfully submitted,

/s/ Juan A. Gonzalez

Mary J. Hackett
(*pro hac vice*)
mhackett@reedsmith.com
Joseph E. Culleiton
(*pro hac vice*)
jculleiton@reedsmith.com
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222
Telephone: 412-288-3131
Facsimile: 412-288-3063

Juan A. Gonzalez
Florida Bar No. 375500
jag@lgplaw.com
J. Randolph Liebler
Florida Bar No. 507954
jrl@lgplaw.com
Dora F. Kaufman
Florida Bar No. 771244
dfk@lgplaw.com
LIEBLER, GONZALEZ & PORTUONDO, P.A.
Courthouse Tower - 25th Floor
44 West Flagler Street
Miami, FL 33130
Telephone: (305) 379-0400
Facsimile: (305) 379-9626

Counsel for Defendant Bank of America, N.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 2012, I electronically caused the foregoing document to be 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 via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Juan A. Gonzalez

Juan A. Gonzalez

SERVICE LIST

David C. Cimo, Esq.
David P. Lemoie, Esq.
Carmen Contreras-Martinez, Esq.
GENOVESE JOBLove & BATTISTA, P.A.
100 Southeast 2nd Street, 44th Floor
Miami, Florida 33131

Attorneys for Plaintiff

Michael R. Josephs, Esq.
THE JOSEPHS LAW FIRM
2699 South Bayshore Drive, 7th Floor
Miami, Florida 33133

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
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_____ /

ORDER

THIS CAUSE, having come before the Court by Defendant Bank of America, N.A.'s Motion to Strike the Receiver's Untimely Rule 59(e) Motions for Reconsideration and the Court having considered the Motion and other pertinent portions of the record, and good cause appearing, it is hereby

ORDERED AND ADJUDGED that:

1. Bank of America, N.A.'s Motion to Strike the Receiver's Untimely Rule 59(e) Motions for Reconsideration is GRANTED.
2. The Receiver's Motion for Reconsideration [DE 84] is DENIED.
3. The Receiver's Corrected Motion for Reconsideration [DE 85] is DENIED.

DONE AND ORDERED in Chambers at West Palm Beach, Florida on this _____ day
of _____, 2012.

DANIEL T. K. HURLEY
UNITED STATES DISTRICT JUDGE

Copies to:
All counsel of record