UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)
CASE NO. 9:10-CV-81612

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

Plaintiff,

vs.

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

Defendant.
_____/

WELLS FARGO BANK, N.A.'S REPLY TO RECEIVER'S RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION OF PARTIAL DISMISSAL ORDER AND INCORPORATED MEMORANDUM OF LAW

Defendant, Wells Fargo Bank, N.A., as successor-in-interest to Wachovia Bank, N.A. ("Wells Fargo"), by and through its undersigned counsel and pursuant to Fed. R. Civ. P. 54(b) and 60(b) and S. D. Local Rule 7.1, hereby files its Reply to the Receiver's untimely Response in Opposition to Motion for Reconsideration of Partial Dismissal Order (ECF No. 88)(the "Response"). In support hereof, Wells Fargo states as follows:

The Response is Untimely and Should be Stricken

As a preliminary matter, the Response is untimely and should not be considered by this Court. Wells Fargo filed its Motion for Reconsideration (ECF No. 80) on June 1, 2012 based on the intervening January 11, 2012 Eleventh Circuit Court of Appeals opinion in *Lawrence v. Bank of America*, 455 Fed. Appx. 904 (11th Cir. 2012)("*Lawrence II*") and the District Court's holding on May 23, 2012 in *Perlman v. Bank of America, N.A.*, 2012 WL 1886617 (S.D. Fla. 2012)("*Perlman/BOA*"), wherein the District Court stated that it was following and applying the

guidance and reasoning of the Eleventh Circuit in *Lawrence II* and dismissed all claims in *Perlman/BOA* with prejudice.

Under the auspices that other workload commitments prevented the Receiver from responding to the Motion for Reconsideration, the Receiver sought two (2) extensions of time (ECF No. 81, 85) seeking an extension through July 10, 2012 to respond to the Motion for Reconsideration. However, it is now apparent that the Receiver never had any intention of responding to the merits of the pivotal issues raised in the Motion for Reconsideration and was seeking to avoid confronting those issues altogether.

Specifically, on June 17, 2012, the Receiver filed a Motion for Extension of Time to Respond to the Motion for Reconsideration (the "First Motion for Extension")(ECF No. 81) seeking through July 10, 2012 to serve his response to the Motion for Reconsideration. On June 21, 2012, the Court entered its Order Granting in Part the Receiver's First Motion for Extension (ECF No. 83) and directing the Receiver to file his response to the Motion for Reconsideration by June 26, 2012. On June 23, 2012, counsel for the Receiver advised counsel for Wells Fargo in an e-mail that "the time the Court gave us is not enough given the matters we are dealing with on other fronts" and inquired whether Wells Fargo would agree to an additional two (2) week extension of time to respond to the Motion for Reconsideration. Based upon the Receiver's counsel's representation that other workload commitments of the Receiver's counsel prevented the Receiver from timely completing his Response to the Motion for Reconsideration, Wells Fargo again agreed to the Receiver's requested extension. On June 25, 2012, the Receiver filed his Motion for Extension of Time to the Motion for Reconsideration (the "Second Motion for Extension")(ECF No. 85) again seeking through July 10, 2012 to serve his response to the Motion for Reconsideration.

Instead of filing any response to the Motion for Reconsideration and without any advance notice to Wells Fargo or attempt to confer with Wells Fargo as required by S.D. Local Rule

7.1(a)(3), on June 26, 2012, the Receiver filed his Motion for Leave to Amend (ECF No. 86) in an obvious and improper attempt to avoid confronting the merits of the Motion for Reconsideration. Specifically, the Motion for Leave to Amend states: "Should this Court grant the Receiver's request for leave to file a Second Amended Complaint, the Receiver would respectfully request that this Court deny the pending motion for reconsideration as moot". *See* Motion for Leave to Amend (ECF No. 86), p.2, fn. 1.

The Receiver then failed to timely serve any response to the Motion for Reconsideration by the Court-ordered deadline of June 26, 2012 (ECF No. 83) or the twice-requested deadline of July 10, 2012 (ECF Nos. 81. 85). Rather, without leave of Court to file an untimely response, the Receiver finally filed his Response (ECF No. 88) on the evening of July 16, 2012, well after the Response deadline. The Court should not consider the untimely Response since no further extension was requested and is not warranted, particularly as the Receiver has not been forthcoming as to the true reason why he failed to respond to the Motion for Reconsideration earlier. Indeed, since the Receiver has failed to timely respond to the Motion for Reconsideration, there is sufficient cause to grant the Motion for Reconsideration by default. *See* S.D. Local Rule 7.1(3).

The Motion for Reconsideration is Properly Before This Court and Dictates Dismissal of this Case With Prejudice at this Time

Even if the Court considers the untimely Response, it is still abundantly clear that the Motion for Reconsideration is properly before the Court and the merits of the Motion for Reconsideration warrant the immediate dismissal of this action with prejudice. Pointedly absent from the Response is any substantive argument that allegations of the Amended Complaint (ECF No. 19) or the proposed Second Amended Complaint (ECF No 86-1) meet the current pleading standard for the Receiver's attempted claims as articulated by the Eleventh Court in *Lawrence II* and followed by the District Court in *Perlman/BOA*.

Rather, the Receiver has simply argued that this Court is without jurisdiction to reconsider its prior November 22, 2011 Order at this time to conform to subsequent changes in the law. On this point of law, the Receiver is simply wrong. Indeed, the authority cited by the Receiver in the Response is completely contrary to the Receiver's position in this regard. Specifically, *Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 434 F.Supp.2d 640, 647 (N.D. Iowa 2006), a case cited by the Receiver in the Response, states in pertinent part, as follows:

> "Rule 54(b) provides that, unless the court certifies the order for interlocutory appeal, "any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision *is subject to revision at any time before the entry of judgment* adjudicating all the claims and the rights and liabilities of all the parties." FED.R.CIV.P. 54(b) (emphasis added). This court also noted, "The exact standard applicable to the granting of a motion under Rule 54(b) is not clear, though it is typically held to be less exacting than would be [applicable to] a motion under Federal Rule of Civil Procedure 59(e), which is in turn less exacting than the standards enunciated in Federal Rule of Civil Procedure 60(b)." *Wells' Dairy, Inc.,* 336 F.Supp.2d at 909. Moreover, this court noted that it had repeatedly held that it had the inherent power to reconsider and revise any interlocutory order, such as a summary judgment ruling, up until the time that a final judgment is entered. *Id.* (citing *Kaydon Acquisition Corp. v. Custum Mfg., Inc.,* 317 F.Supp.2d 896, 903 (N.D.Iowa 2004); *Helm Financial Corp. v. Iowa N. Ry. Co.,* 214 F.Supp.2d 934, 999 (N.D.Iowa 2002); and *Longstreth v. Copple,* 189 F.R.D. 401, 403 (N.D.Iowa 1999)). Thus, the court finds that it has authority to reconsider its May 8, 2006, order."

Ideal Instruments, 434 F.Supp.2d at 647.

Likewise, *Martinez v. Bohls Equipment Co.*, 2005 WL 1712214 (W.D.Tex.,2005), another case cited by the Receiver in the Response, expressly stated: "The Court retains the power, however, to revise any interlocutory order at any time prior to the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. FED. R. CIV. P. 54(b)". *Martinez*, 2005 WL 1712214 at *1. Moreover, the *Martinez* Court expressly noted that the time limitations in Fed. R. Civ. P. 59 do not apply to motions for reconsideration of interlocutory orders. *Martinez*, 2005

WL 1712214 at *1. Rather, "[w]ith interlocutory orders, whether a motion for reconsideration has been timely filed or not rests solely on whether or not the motion was filed unreasonably late." *Standard Quimica De Venezuela v. Central Hispano Intern., Inc.*, 189 F.R.D. 202, 205 (D.Puerto Rico,1999). To be certain, the Eleventh Circuit has expressly stated: "As the district court recognized, a district court always has the authority to modify its prior rulings to conform to authoritative changes in the law. *See U.S. v. North Carolina,* 425 F.Supp. 789 (E.D.N.C.1977); Fed.R.Civ.P. 54(b)." *Mosher v. Speedstar Div. of AMCA Intern., Inc.*, 52 F.3d 913, 917 (11th Cir. 1995).

Here, on January 11, 2012, the Eleventh Circuit issued its unpublished ruling in *Lawrence II*, and on May 23, 2012, the District Court dismissed *Perlman/BOA* with prejudice stating that it was following the guidance and reasoning of *Lawrence II*. The January 11, 2012 ruling in *Lawrence II* and the May 23, 2012 ruling in *Perlman/BOA* mark an authoritative change in the law subsequent to the entry of November 22, 2011 Partial Dismissal Order in this case and are controlling on the outcome of this case. Wells Fargo promptly filed its Motion for Reconsideration on June 1, 2012, *nine (9) days* after the District Court issued its ruling in *Perlman/BOA* stating that it was following the guidance and reasoning of *Lawrence II*. Accordingly, this Court unequivocally has the authority to modify its November 22, 2011 Order in this case to conform to the subsequent changes in the law set forth in *Lawrence II* and *Perlman/BOA*.

There is absolutely no purpose in this matter proceeding any further when it is now clear that the allegations in the Amended Complaint (ECF No. 19) and the proposed Second Amended Complaint (ECF No. 86-1) fail to set forth any viable cause of action against Wells Fargo. The Receiver's proposed Second Amended Complaint (ECF No. 86-1) is likewise subject to immediate dismissal for failure to state any cause of action against Wells Fargo in light of the current pleading

standards applicable to the Receiver's attempted claims.[1] Likewise, since the proposed Second Amended Complaint (ECF No. 86-1) adds nothing substantively against Wells Fargo and has the same fatal deficiencies as the Amended Complaint (ECF No. 19), the request for leave to amend in no way renders the instant Motion for Reconsideration (ECF No. 80) moot. Indeed, based upon subsequent rulings in *Lawrence II* and *Perlman/BOA*, it is "incumbent upon this Court, in the interests of equity and judicial economy, to reconsider its partial dismissal of plaintiffs' complaint" and to dismiss this entire action with prejudice at this time. *See e.g. Max M. v. Thompson*, 585 F.Supp. 317, 323 (N.D. Ill. 1984).

Conclusion

The Response is without merit and untimely. This Court should grant Wells Fargo's Motion for Reconsideration (ECF No. 80) and dismiss this entire action with prejudice at this time, and grant such other relief as this Court deems is just and proper.

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[1] Wells Fargo has separately filed a Response in Opposition to the Receiver's Motion for Leave to File Second Amended Complaint (ECF No. 87) on the grounds that the proposed Second Amended Complaint is futile and fails to set forth sufficient allegations to state any viable cause of action against Wells Fargo. To the extent necessary, Wells Fargo incorporates its Response in Opposition to the Receiver's Motion for Leave to File Second Amended Complaint (ECF No. 87) herein.

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 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 or pro se parties 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.

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United States District Court
Southern District of Florida

CASE NO: 10-CV-81612

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