

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL CASE NO.: 12-13436-EE

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

Appellant,

v.

BANK OF AMERICA, N.A.,

Appellee.

_____ /

RULE 12.1 NOTICE TO CLERK OF COURT

Appellant, Jonathan E. Perlman, Esq., the court-appointed Receiver of Creative Capital Consortium, LLC and related entities (the “Receiver”), pursuant to FED. R. APP. P. RULE 12.1, notifies the Clerk of this Court of the pendency of a motion related to, and the possibility of, an “indicative ruling” having been issued by the district court under the circumstance described herein.

1. This appeal is from an order dismissing the Receiver’s second amended complaint with prejudice and final judgment entered on May 23, 2012. [ECF Nos. 82, 83]. The Receiver is filing this notice to

the Clerk pursuant to FED. R. APP. P. 12.1 in an abundance of caution to keep the Court informed of the proceedings below.

2. On June 21, 2012 at approximately 12:15 A.M., the Receiver filed a motion for reconsideration of the May 23 Order, pursuant to FED. R. CIV. P. 59(e), and alternatively under FED. R. CIV. P. 60(b). [ECF No. 84]. The Receiver filed a corrected motion for reconsideration later that same day. [ECF No. 85].

3. On July 2, 2012, the district court entered an order denying the Receiver's two motions for reconsideration on the basis that both were filed after the 28-day time limit for filing motions under FED. R. CIV. P. 59. [ECF No. 94]. A copy of the July 2 Order is attached as EXHIBIT A to this Notice. The district court's July 2 Order did not reference the motions as having been filed or considered under FED. R. CIV. P. 60(b).

4. The district court's July 2 Order includes what the Receiver construes to be an "indicative ruling" under FED. R. CIV. P. 62.1. The July 2 order, however, does not specifically reference FED. R. CIV. P. 62.1 or expressly refer to an indicative ruling. Specifically, the district court stated that:

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.

5. The district court also noted in its July 2 Order that the Receiver "has subsequently filed a notice of appeal, which divests the Court of jurisdiction over aspects of the case involved in the appeal." That reference to the pendency of this appeal further suggests that the court would reconsider its ruling dismissing the Receiver's claims with prejudice if it had jurisdiction to do so. [ECF No. 94 at n. 1].

6. On July 10, 2012, the Receiver filed in the district court a Motion for Clarification of Court's Order Denying Motions for Reconsideration [ECF No. 94] requesting that the district court clarify (1) whether it considered the Receiver's motions for reconsiderations under Fed. R. Civ. P. 60(b); (2) whether the Court in fact intended to issue an indicative ruling under FED. R. CIV. P. 62.1; or (3) whether the district court considered the motions for reconsideration only to be filed under FED. R. CIV. P. 59. [ECF No. 103]. A copy of the Receiver's Motion for Clarification is attached as EXHIBIT B to this Notice.

7. As noted in the Motion for Clarification, if the Court did not intend its July 2 order to be an “indicative ruling” under FED. R. CIV. P. 62.1, the Receiver intends to file a motion seeking an indicative ruling in the district court and an accompanying motion under FED. R. CIV. P. 60(b).

8. In that instance, the Receiver will request a stay of this appeal from this Court under 11TH CIR. R. 12.1-1.

Dated this 11th day of July, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on July 11, 2012, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the forgoing 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, by e-mail and by mail those counsel or parties who are not authorized to receive electronically Notices of Electronic Filings.

By: /s/ W. Barry Blum
Attorney

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EXHIBIT “A”

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

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

JONATHAN E. PERLMAN,

Plaintiff,

v.

BANK OF AMERICA, N.A.,

Defendant.

**ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING AS
MOOT MOTION TO STRIKE AND MOTION FOR EXTENSION OF TIME**

THIS CAUSE is before the Court upon Plaintiff's Motion for Reconsideration [ECF No. 84] and Corrected Motion for Reconsideration [ECF No. 85] filed pursuant to Fed. R. Civ. P. 58(3), and Defendant's corresponding Motion to Strike [ECF No. 89] and Motion for Extension of Time to File an Opposition to the Motions for Reconsideration [ECF No. 90].

The Court granted Defendant's motion to dismiss with prejudice and entered final judgment on May 23, 2012. Under 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." Under Rule 6(b), the Court may not extend this deadline. *See also Green v. Drug Enforcement Admin.*, 606 F.3d 1296, 1299 (11th Cir. 2010). Thus, any motion for reconsideration must have been filed by June 20, 2012.

Plaintiff filed the instant motions for reconsideration in the early morning of June 21, 2012. Thus, the motions are untimely, and the Court is without jurisdiction to extend the deadline. 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

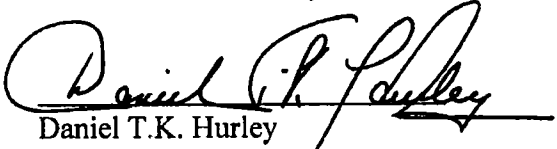
proposed Second Amended Complaint. These allegations were first presented to the Court in the motions for reconsideration and go well beyond the conclusory allegations and allegations of suspicious activities and red flags in the First Amended Complaint. However, because Plaintiff did not file the motions for reconsideration within the twenty-eight-day deadline specified in the Rules, the Court is simply unable to consider them, and they must therefore be denied.¹

Because the Court is denying the motions for reconsideration for want of jurisdiction, the Court will deny as moot Defendant's motion to strike and motion to extend the deadlines to oppose the motions for reconsideration.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Plaintiff's Motion for Reconsideration [ECF No. 84] and Corrected Motion for Reconsideration [ECF No. 85] are **DENIED**.
2. Defendant's Motion to Strike [ECF No. 89] and Motion for Extension of Time to File an Opposition to the Motions for Reconsideration [ECF No. 90] are **DENIED AS MOOT**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this ^h29 day of June, 2012.


Daniel T.K. Hurley
United States District Judge

Copies provided to counsel of record

¹In addition, the Court notes that Plaintiff has subsequently filed a notice of appeal, which divests the Court of jurisdiction over aspects of the case involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

EX. “B”

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
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