UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re: Case No. 9:14-bk-00965-FMD
Chapter 7

William P. McCuan,

Debtor.
_____/

Regions Bank and
Robert E. Tardif, Jr.,

Plaintiffs,

v. Adv. Pro. No. 9:14-ap-402-FMD

MDG Lake Trafford, LLC, et al.,

Defendants,

and

Jill McCuan, et al.,

Impleaded Third-Party Defendants.
_____/

ORDER DENYING MOTION FOR REHEARING, RECONSIDERATION AND/OR TO ALTER OR AMEND SUMMARY JUDGMENT ORDER

THIS PROCEEDING came on for consideration, without a hearing, of the *Motion for Rehearing, Reconsideration and/or to Alter or Amend Summary Judgment Order* filed by Plaintiffs, Regions Bank and the Chapter 7 Trustee (the "Motion").[1] Having reviewed the Motion and the responses filed by the Impleaded Third-Party Defendants (the "Impleaded Defendants") and Debtor,[2] the Court finds that (1) the Motion raises arguments previously considered by the Court in connection with its *Order on Implead Third Party Defendants' Motion for Summary Judgment*;[3] (2) improperly advances new arguments for the first time; and (3) does not establish that the Court erred in its finding that there were no genuine disputes of material fact. Therefore, the Court will deny the Motion.

A. Procedural History and Basis of Claims for Relief

1. *State Court Litigation and Removal to the Bankruptcy Court*

In April 2009, Regions Bank ("Regions") filed a lawsuit against Debtor in Florida state court,[4] serving Debtor with the summons and complaint on April 13, 2009. Thereafter, Regions obtained a judgment against Debtor in excess of $4 million. On November 18, 2013, the state court entered an order allowing Regions to conduct proceedings supplementary under Fla. Stat. § 56.29[5] and to implead Debtor's wife and the McCuan Irrevocable Trust as third-party defendants (the "Proceedings Supplementary").

On January 29, 2014, Debtor filed for a Chapter 7 bankruptcy. He received a discharge.[6] On May 8, 2014, the Chapter 7 Trustee ("Trustee") removed the Proceedings Supplementary to this Court and joined the action as a party plaintiff. Shortly after the removal, Regions and the Trustee ("Plaintiffs") moved to implead the McCuan Family Trust and McCuan Family, LLC as additional third-party defendants.[7] The Court granted Plaintiffs' motion and Plaintiffs eventually filed a joint amended impleader complaint (the "Complaint") seeking relief under § 56.29.[8] Debtor's wife, the McCuan Irrevocable Trust, the McCuan Family Trust and McCuan Family, LLC, are referred to as the "Impleaded Defendants."

---

[1] Doc. No. 125.
[2] Doc. Nos. 134 and 135.
[3] Doc. No. 123.
[4] Regions actually filed five separate lawsuits against Debtor. The instant proceedings supplementary emanates from the judgment obtained in one of the lawsuits.
[5] Unless otherwise stated, statutory references are to the Florida Statutes.
[6] Case No. 9:14-bk-00965-FMD, Doc. No. 159.
[7] Doc. No. 15.
[8] Doc. Nos. 38 and 60.

2. *Relief Available to Creditors under Fla. Stat. § 56.29*

Under § 56.29, judgment creditors are entitled to examine the judgment debtor and third parties about the location and disposition of the judgment debtor's property. The statute provides for three separate remedies.

First, under § 56.29(5), the court may order any property of the judgment debtor that is not exempt from execution and that is in the hands of any other person to be turned over to the judgment creditor to apply to the judgment debt. The court may also entertain fraudulent transfer claims that the judgment creditor has brought under Chapter 726 of the Florida Statutes[9] and may enter a money judgment against any transferee regardless of whether the transferee has retained the property.

Second, under § 56.29(6), if the defendant held title to personal property within one year before service of process upon him but, at the time of the examination, the defendant's spouse, relative, or any other person on confidential terms with him claims title or a right of possession to the property, the defendant has the burden of proof to establish that the transfer to the recipient was not made to delay, hinder, or defraud creditors. If the court finds that the transfer was made to delay, hinder, or defraud creditors, the court shall order the transfer to be void and direct the sheriff to take the property to satisfy the execution.

It is important to note that relief under § 56.29(6) differs from the fraudulent transfer provisions of Chapter 726 because (i) the look back period is limited to one year before the defendant was served with process in the underlying lawsuit rather than the four-year look back period afforded by § 726.110; and (ii) unlike § 726.105, where the burden is on the creditor to establish that the transfer was made to hinder, delay, or defraud, the burden of proof is on the defendant to establish that the transfer was *not* made to delay, hinder, or defraud.

Last, under § 56.29(9), the court may enter any orders, judgments, or writs required to carry out the purpose of § 56.29, including the entry of money judgments against any impleaded defendant irrespective of whether such a defendant has retained the property transferred.

3. *Allegations of Plaintiffs' Complaint*

The Complaint does not identify the specific provision of § 56.29 under which Plaintiffs seek relief. Rather, Plaintiffs allege Debtor made certain transfers with the intent to hinder, delay, or defraud Regions' judgment collection efforts.[10] The alleged transfers are:

(i) Debtor's September 8, 2008, retitling of three accounts with balances totaling nearly $4,000,000 at Brown Investment and Advisory Trust Company (the "Brown Accounts") from his name to his and his wife's name as tenants by the entireties;

(ii) Debtor's transfer of the retitled Brown Accounts to SunTrust and subsequent transfers of funds for his own personal benefit;

(iii) Debtor's September 2, 2008, retitling of an account of over $387,000 at Branch Banking & Trust (BB&T) from his name to his and his wife's name as tenants by the entireties;

(iv) Debtor's transfer of his ownership interest in Little Harpers, LLC, a Maryland entity valued at approximately $2.4 million, to McCuan Family, LLC. Regions alleged that this transfer occurred between April 9, 2008 and April 9, 2009;

(v) Debtor's transfer of his ownership interest in Lakefront North Investors Limited Partnership, a Maryland

[9] The Florida Uniform Fraudulent Transfer Act.

[10] Doc. No. 60, pp. 5-8.

limited partnership valued at approximately $7.6 million, to McCuan Family, LLC. Regions alleged that this transfer occurred between April 9, 2008 and April 9, 2009;

(vi) Debtor's transfer of his ownership interest in MDG-Patriot, LLC, a Maryland entity valued at $80,000.00, to McCuan Family, LLC; and

(vii) Debtor's transfer of his ownership interest in MJF Associates, LLP, a Maryland limited liability partnership valued at $12,000.00, to JLM Investment Corp.[11]

Plaintiffs prayed that any property owned or belonging to Debtor be turned over to the Trustee, that the Impleaded Defendants be ordered to turn over the assets transferred to them by Debtor, and for judgment to be entered against the Impleaded Defendants, regardless of whether they had retained the transferred assets.[12]

B. Summary Judgment Standard

Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law.[13] If the non-moving party would have the burden of proof at trial to establish an essential element of its claim, the movant on summary judgment can prevail either by showing that the non-moving party has no such evidence or by presenting affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial.[14] Once the moving party satisfies its initial burden on summary judgment, the burden then shifts to the non-moving party to establish with record evidence that a genuine dispute of material fact exists.[15] If the non-moving party cannot satisfy its shifted burden, then summary judgment must be rendered against it.[16]

C. The Court's Summary Judgment Rulings

After a period of discovery and several discovery skirmishes,[17] Debtor and the Impleaded Defendants filed separate motions for summary judgment.[18] The motions did not address all of the issues and transfers alleged in the Complaint. After extensive briefing,[19] the Court conducted a hearing on April 29, 2015.[20] The Court took the motions under advisement and announced its rulings on the record in open court on July 29, 2015.[21]

Although the Court made numerous rulings, the following summary addresses only those rulings that Regions asserts are subject to reconsideration as being clear error.

1. *The Court Lacks Jurisdiction over the Brown Accounts.*

The parties do not dispute that Debtor's three Brown Accounts were maintained at Brown Investment and Advisory Trust Company, which is located outside the state of Florida, in Maryland. The Court, following recent Florida

[11] *Id.*
[12] Doc. No. 60, pp. 9-10.
[13] Fed. R Bankr. P. 7056 (incorporating Fed. R. Civ. P. 56).
[14] *Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994); *Moton v. Cowart*, 631 F.3d 1137, 1141 (11th Cir. 2001) ("The moving party may meet its burden to show that there are no genuine issues of material fact by demonstrating that there is a lack of evidence to support the essential elements that the non-moving party must prove at trial.").
[15] *Id.* at 1141 ("once the moving party has met its initial burden by negating an essential element of the non-moving party's case, the burden on summary judgment shifts to the non-moving party to show the existence of a genuine issue of material fact").
[16] *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 94 (1st Cir. 1996).
[17] Doc. Nos. 46, 47, 54, 55, 56.
[18] Doc. Nos. 91, 92.
[19] Doc. Nos. 100, 102, 103, and 104.
[20] The transcript of that hearing is available. (Doc. No. 118.)
[21] The transcript of the Court's oral ruling is also available. (Doc. No. 115.)

appellate court rulings in *Sargeant v. Al-Saleh*[22] and *Burns v. State Dep't of Legal Affairs*,[23] ruled that Florida courts do not have *in rem* jurisdiction over foreign property, i.e. property located beyond the territorial boundaries of the state of Florida. Thus, the Court found that Regions could not have utilized Florida process to garnish or otherwise execute on the Brown Accounts.

The Court held that although a bankruptcy court has *in rem* jurisdiction in the bankruptcy case extending to all the debtor's assets, wherever located,[24] a bankruptcy court's jurisdiction in a proceedings supplementary brought under § 56.29 is determined and limited by Florida law. Thus, the Court concluded that it had no jurisdiction over the Brown Accounts.

2. *Proceedings Supplementary Cannot Reach Brown Accounts Pledged to SunTrust Bank.*

In addition to its lack of jurisdiction over the Brown Accounts, the Court found that two of the Brown Accounts were fully pledged by Debtor to SunTrust Bank as collateral for loans from SunTrust before Debtor retitled the accounts as tenants by the entirety. Under Florida law, property pledged as collateral for a loan cannot be levied upon by a judgment creditor.[25] Therefore, the Court concluded that the retitling of the Brown Accounts and the subsequent transfers from those accounts were irrelevant.

3. *Claims Relating to Little Harpers and Lakefront Are Time-Barred.*

In order for Plaintiffs to prevail on their § 56.29(6)(a) claims with respect to Debtor's transfer of his interests in Little Harpers, LLC ("Little Harpers") and Lakefront North Investors Limited Partnership ("Lakefront"), Plaintiffs must establish that the transfers took place within the year preceding service of process on Debtor in the underlying state court action. As Debtor was served on April 13, 2009, the transfers must have taken place after April 13, 2008.[26] The assignments of Debtor's interests in Lakefront and Little Harpers (the "Assignments") are dated "as of November 1, 2007." Plaintiffs contend that the Assignments were backdated.

Although Debtor testified at deposition that he did not recall when he signed the Assignments, the Court relied upon the deposition testimony of Debtor's accountant, Ira Sugar, who stated:

> I do know that I did receive copies of these documents [referring to the Debtor's assignments dated as of November 1, 2007] in 2007. So I imagine they were signed in 2007.[27]

In other words, although Mr. Sugar did not identify the specific date on which the Assignments were executed, he testified that he received copies of the Assignments in 2007. Regardless of whether the Assignments were actually signed on November 1, 2007, or some later date in 2007, the testimony establishes that the Assignments were executed in 2007 and prior to April 13, 2008. Therefore, the Court held that the Impleaded Defendants had met their burden of proof on summary judgment and that the burden then shifted to Plaintiffs to prove that the Assignments were executed after April 13, 2008.

Plaintiffs argued that Debtor's deposition testimony that he did not know when he had signed the Assignments was designed to avoid his perjuring himself. In furtherance of their "backdating" argument, Plaintiffs offered (i) the "Resolution(s) to Change Principal Office or

[22] 137 So. 3d 432 (Fla. 4th DCA 2014).
[23] 147 So. 3d 95 (Fla. 5th DCA 2014).
[24] 28 U.S.C. § 1334(e).
[25] *Stengel v. Biggar*, 176 So. 786 (Fla. 1937).

[26] Unlike the Brown Accounts, the Court found that both a Florida court under § 56.29 and the bankruptcy court in removed proceedings supplementary have jurisdiction over Debtor's interests in Lakefront and Little Harpers, both Maryland entities, because a debtor's interest in a limited liability company or limited partnership is an intangible personal property right that "accompanies the person of the owner." *See Wells Fargo Bank, N.A. v. Barber*, 85 F. Supp. 3d 1308, 1314 (M.D. Fla. Feb. 4, 2015) (citing *Beverly Beach Props. v. Nelson*, 68 So. 2d 604, 611 (Fla. 1953)).
[27] Transcript, Doc. No. 102, p. 60, ll 20-22.

Resident Agent" signed by Debtor on behalf of Little Harpers and Lakefront that were filed with the Maryland State Department of Assessments and Taxation on October 7, 2008;[28] and (ii) deeds and associated tax exemption forms dated between July 2010 and January 2011 that Debtor signed on behalf of Little Harpers and Lakefront.[29]

Plaintiffs argued these documents evidence that, as late as 2011, Debtor, by signing documents on behalf of Little Harpers and Lakefront, was acting in a manner inconsistent with the purported Assignments of his interests. However, the Assignments themselves reflect that Debtor was the general manager of McCuan Family, LLC. As the general manager of the recipient and new owner of the Little Harpers and Lakefront interests, Debtor would have had the authority to sign corporate documents on their behalf.

Further, the Court concluded that the deeds and tax exemption forms are irrelevant to this issue because, by February 2009, Regions had notice of the Assignments. Although Debtor's personal financial statement dated October 31, 2007, reflected his interests in Little Harpers and Lakefront,[30] his draft personal financial statement dated October 31, 2008,[31] that Regions acknowledged having received on February 24, 2009,[32] does not reflect those interests.

The Court concluded that, as a matter of law, the documents on which Plaintiffs rely do not refute Mr. Sugar's testimony that he had received the Assignments in November 2007 and thus did not show the existence of a genuine dispute of material fact. Further noting that Debtor's signatures on the Assignments were witnessed by a third party, Christine Richards, and that Plaintiffs had taken no steps to depose her on this issue, the Court found that Plaintiffs had not met their burden and that summary judgment on this issue was appropriate.

D. Standard for Motions for Reconsideration

A motion for reconsideration may be filed under Federal Rules of Civil Procedure 59(e) or 60(b), as incorporated by Federal Rules of Bankruptcy Procedure 9023 and 9024, respectively.[33] Plaintiffs contend in the Motion that it was "clear error" for the Court to grant summary judgment for the Impleaded Defendants on the issues set forth above.

Plaintiffs correctly state that a Rule 59 motion permits the Court to reconsider an order when it learns of "(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice."[34] But as the case cited by Plaintiffs for this proposition, *Lamar Advertising of Mobile, Inc. v. City of Lakeland, Fla.*,[35] noted:

> With regard to the third ground, the Court cautions that any litigant considering bringing a motion to reconsider based upon that ground should evaluate *whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant.* This Court will not reconsider a previous ruling when the party's motion fails to raise new issues and, instead, only relitigates what has already been found lacking.
>
> (citations omitted, emphasis supplied).

Rule 60(b) enumerates specific grounds for reconsideration, including mistake under 60(b)(1) and a catch-all provision for "any other reason that justifies relief" under 60(b)(6). Plaintiffs

[28] Doc. No. 102, pp. 71, 73.
[29] Doc. No. 102, pp. 76-80 and 81-86.
[30] Case No. 9:14-bk-00965-FMD, Doc. No. 136-3, pp. 1-10.
[31] Case No. 9:14-bk-00965-FMD, Doc. No. 136-3, pp. 12-21.
[32] Doc. No. 91-2.

[33] *Rasmussen v. Central Florida Council Boy Scouts of America, Inc.*, 2008 WL 2157152 (M.D. Fla. May 22, 2008).
[34] Doc. No. 125, p. 9 (citing *Lamar Advertising of Mobile, Inc., v. City of Lakeland, Fla.*, 189 F.R.D. 480, 489 (M.D. Fla. 1999)).
[35] 189 F.R.D. 480, 489 (M.D. Fla. 1999).

appear to argue that the Court should reconsider its ruling for an (unstated) "other reason" that justifies relief.[36]

Courts have substantial discretion in whether to grant a motion for reconsideration. Reconsideration has been characterized as "an extraordinary remedy to be employed sparingly."[37] Even if errors have been committed, if the issues are at least arguable, such errors do not constitute the type of clear and obvious error that justice demands be corrected.[38]

E. Analysis of Plaintiffs' Motion for Reconsideration

1. *Plaintiffs' Argument on Jurisdiction Was Previously Considered by the Court.*

Plaintiffs argue that the Court erred in applying the holding of *Sargeant v. Al-Saleh* (that a Florida court in proceedings supplementary does not have jurisdiction over out-of-state assets) to this adversary proceeding. In its summary judgment ruling, the Court considered and rejected this argument. Plaintiffs' argument that the Court ruled incorrectly is not grounds for the Court to reconsider its ruling.

2. *Plaintiffs May Not Raise Issues for the First Time on Motion for Reconsideration.*

Plaintiffs assert that the Court erred in finding that the Brown Accounts had been fully pledged as collateral to SunTrust, so as to render them unavailable for execution by Regions. In so ruling, the Court relied upon record evidence that two of the Brown Accounts were pledged to SunTrust as collateral, thereby placing those two accounts beyond Regions' reach as a judgment creditor under the rational set forth in *Stengel v. Biggar*.[39] For the first time, Plaintiffs now argue that Debtor's pledge of the Brown Accounts to SunTrust was defective or illusory. But Plaintiffs failed to raise this issue in their separately filed oppositions to Debtor's and the Impleaded Defendants' motions for summary judgment.[40]

The Impleaded Defendants pointed to Plaintiffs' failure to address this issue in their reply brief.[41] And at the April 29, 2015 hearing, counsel for the Impleaded Defendants discussed the pledge of the Brown Accounts, cited *Stengel* for the proposition that a pledged asset could not be the subject of proceedings supplementary, and once again pointed out that Plaintiffs had not opposed the summary judgment on this issue.[42] Despite this second reminder, Regions' counsel made no effort at oral argument to distinguish *Stengel* and presented neither facts nor argument that the pledge of the Brown Accounts to SunTrust was defective or illusory.[43] Nor did the Trustee's counsel raise this issue in his presentation.[44]

In *Griswold v. U.S.*,[45] the court held that a party who fails to raise an argument in response to an opposing party's motion for summary judgment cannot raise that argument for the first time in a motion for reconsideration. Likewise, the courts in *National Wildlife Federation v. Souza*[46] and *U.S. v. Barnes*[47] refused to reconsider their summary judgment rulings on the basis of new arguments that could have been presented previously at the summary judgment stage. The Court finds that Plaintiffs, having failed to raise this issue in both their responses to the motions for summary judgment and in their oral argument, may not now raise it through a motion for reconsideration of the Court's ruling on summary judgment.

---

[36] Doc. No. 125, p. 10.
[37] *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D.689, 694 (M.D. Fla. 1994).
[38] *Howard v. Nano*, 2012 WL 3668045 (N.D. Fla. Aug. 25, 2012).
[39] Doc. No. 91-3, p. 1.
[40] Doc. Nos. 100 and 102.
[41] Doc. No. 103, p. 3.
[42] Doc. No. 118, p. 20, ll. 4-25; p. 21, ll. 1-15.
[43] Doc. No. 118, p. 68, ll. 16-25; p. 69; p. 70, ll. 1-7.
[44] Doc. No. 118, p. 78, ll. 24-25; pp. 79-81; p. 82, ll. 1-23.
[45] 1994 WL 264644 (M.D. Fla. Mar. 24, 1994).
[46] 2009 WL 4421254 (S.D. Fla. Nov. 23, 2009).
[47] 2012 WL 3194419 (M.D. Fla. June 5, 2012).

3. *The Court Has Not Erred Because the Record Does Not Establish a Genuine Dispute of Material Fact Regarding Whether Debtor's Transfer of his Interest in Little Harpers and Lakefront Occurred during the Look Back Period.*

Plaintiffs argue that the date of Debtor's transfers of his ownership interests in Little Harpers and Lakefront is a disputed material fact. If this case were to proceed to trial, Plaintiffs would have the burden of proof to establish that the Assignments occurred on or after the one-year look back period under § 56.29(6)(a), which ended on April 13, 2008. But as set forth above, the record evidence is that the Assignments, dated "as of November 1, 2007," were transmitted to Debtor's accountant prior to April 13, 2008, in 2007. Accordingly, the Impleaded Defendants satisfied their summary judgment burden; the burden then shifted to Plaintiffs to establish the existence of a genuine dispute of material fact regarding the date of the Assignments.[48]

As explained above, the evidence offered by Plaintiffs—the corporate resolutions and deeds signed by Debtor on behalf of Little Harpers and Lakefront—is not sufficient to create a genuine dispute of material fact. A mere scintilla of evidence in support of Plaintiffs' position is insufficient to defeat an otherwise proper motion.[49] Accordingly, the Court ruled that Plaintiffs lack the evidence required to satisfy both their shifted burden at the summary judgment stage and their affirmative burden at trial of establishing that the Assignments occurred on or after April 13, 2008. The Court concludes that it properly granted summary judgment on this issue in the Impleaded Defendants' favor and there is no basis to reconsider its ruling.[50]

Accordingly, for the foregoing reasons, it is

ORDERED that the Motion is DENIED.

DATED: November 30, 2015.

/s/ Caryl E. Delano
_____
Caryl E. Delano
United States Bankruptcy Judge

The Clerk's Office is directed to serve a copy of this Order on the parties via CM/ECF.

Alberto F. Gomez, Jr.
Johnson, Pope, Boker, Ruppel & Burns, LLP
Tampa, Florida
Counsel for Debtor, William P. McCuan

Robert F. Elgidely, Esq.
Genovese Joblove & Battista, P.A.
Fort Lauderdale, Florida
Counsel for Trustee/Plaintiff

Alan J. Perlman, Esq.
Roetzel & Andress
Fort Lauderdale, Florida
Counsel for Plaintiff, Regions Bank

Jon D. Parrish, Esq.
Parrish, White & Yarnell, P.A.
Naples, Florida
Counsel for Impleaded Third-Party Defendants

[48] *Hammer v. Slater*, 20 F.3d at 1141 ("once the moving party has met its initial burden by negating an essential element of the non-moving party's case, the burden on summary judgment shifts to the non-moving party to show the existence of a genuine issue of material fact").

[49] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986).

[50] *See Moton v. Cowart*, 631 F.3d 1337, 1341 (11th Cir. 2011) (summary judgment appropriate when moving party demonstrates a lack of evidence to support the essential elements that the non-moving party must prove at trial).