UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
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In re: Chapter 7
Case Nos. 8:13-bk-06864-CED, et al.

Able Body Temporary Services, Inc., et al.,

Debtors.

_____/

Christine L. Herendeen,
As Chapter 7 Trustee,

Plaintiff,

v. Adv. Pro. No. 8:15-ap-118-CED
LEAD CASE

Regions Bank,

Defendant.

_____/

ORDER GRANTING IN PART AND DENYING IN PART REGIONS BANK'S MOTION TO RECONSIDER ORDER ON SUMMARY JUDGMENT

THESE PROCEEDINGS[1] came on for consideration of *Regions Bank's Motion to Reconsider Order Partially Granting Trustee Herendeen's Motion for Partial Summary Judgment* (Doc. No. 161) (the "Motion for Reconsideration"). Defendant Regions Bank ("Regions") seeks reconsideration of this Court's *Memorandum Opinion Granting in Part and Denying in Part Plaintiff's Motions for Partial Summary Judgment* (the "Summary Judgment Order")[2] entered in adversary proceedings filed in the Chapter 7 cases of Rotrpick, LLC ("Rotrpick"), YJNK VIII, Inc. ("YJNK VIII"), Training U, LLC ("Training U"), and YJNK XI CA, LLC ("YJNK XI") (together, the "Summary Judgment Debtors").[3]

For the reasons set forth below, this Court will grant the Motion for Reconsideration in part and deny it in part.

I. RELEVANT BACKGROUND

The facts are set forth in detail in the Summary Judgment Order. A brief summary is as follows.

Frank Mongelluzzi, his wife, and entities they owned (the "Mongelluzzi Entities") maintained numerous bank accounts at Regions (the "Regions Accounts"). In addition, the Mongelluzzis and some of the Mongelluzzi Entities were obligors on loans obtained from Regions in excess of $15 million (the "Regions Loans"). The Summary Judgment Debtors maintained bank accounts at Regions but were not obligated on the Regions Loans.

In 2011, Mr. Mongelluzzi filed a Chapter 11 case, which was converted to a Chapter 7 liquidation case. Angela Welch was appointed as the Chapter 7 Trustee. In 2013, Trustee Welch filed Chapter 7 bankruptcies on behalf of sixteen of the Mongelluzzi Entities, including the Summary Judgment Debtors. Christine Herendeen ("Plaintiff") was appointed as the trustee in the Mongelluzzi Entities' cases.

In January 2015, Plaintiff filed complaints against Regions in the Mongelluzzi Entities' bankruptcy cases (the "Complaints"). Plaintiff seeks to avoid and recover alleged actual and constructive fraudulent transfers under the Florida

[1] The above-captioned adversary proceedings were previously consolidated for administrative and discovery purposes only with Adv. Pro. No. 8:14-ap-653-CED, *see Order Consolidating Adversary Proceedings for Administrative and Discovery Purposes Only* (Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 147), later vacated (Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 587).

[2] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 577.

[3] Adv. Pro. Nos. 8:15-ap-117-CED, 8:15-ap-122-CED, 8:15-ap-123-CED, and 8:15-ap-124-CED.

Uniform Fraudulent Transfer Act, Chapter 726, Florida Statutes, and 11 U.S.C. §§ 544 and 550.

In the Complaints filed in the Summary Judgment Debtors' cases, Plaintiff alleges that Regions was aware of a check-kiting scheme within the Regions Accounts and that, in order to protect its interests and reduce its exposure on the Regions Loans, Regions entered into a forbearance agreement with the Mongelluzzis and some of the Mongelluzzi Entities (the "Forbearance Agreement"). Pursuant to the Forbearance Agreement, on July 15, 2010, Regions applied more than $7.4 million on deposit in the Summary Judgment Debtors' accounts at Regions to the outstanding indebtedness on the Regions Loans. These transfers are defined in the Complaints as the "Other Loan Repayment Transfers" and are referred to in the Summary Judgment Order as the "Subject Transfers."

In May and June 2017, Plaintiff filed almost identical motions for summary judgment in the Summary Judgment Debtors' cases (the "Summary Judgment Motions").[4] Plaintiff sought summary judgment on her constructive fraud claims[5] and on two of Regions' affirmative defenses.

At a June 15, 2017 scheduling conference on the Summary Judgment Motions, the Court asked counsel for the parties for their suggestions regarding a briefing schedule.[6] Regions' counsel responded that Regions needed to conduct some additional discovery; he requested 60 days to respond to the Summary Judgment Motions.[7] The Court directed Regions to complete the discovery it required in order to respond to the Summary Judgment Motions and to file its responses by August 18, 2017.[8]

On October 4, 2017, the Court heard oral arguments on the Summary Judgment Motions. At a January 8, 2018 hearing, the Court announced its ruling granting the motions in part and the Court's intention to enter a written order.[9]

On February 1, 2018, after the Court had announced its ruling but before the Court entered a written order, Regions filed a motion to supplement the record (the "Motion to Supplement").[10] At a hearing on April 2, 2018, the Court denied the Motion to Supplement.[11]

At no time, up to and including the October 4, 2017 oral argument hearing (three and one-half months after the Summary Judgment Motions were filed) or the April 2, 2018 hearing on the Motion to Supplement (six months after the Summary Judgment Motions were filed), did Regions request additional time to conduct discovery. On June 20, 2018, the Court entered the Summary Judgment Order.[12]

II. THE COURT'S SUMMARY JUDGMENT ORDER

The Court denied summary judgment on Plaintiff's constructively fraudulent transfer claims, finding that there are genuine issues of material fact on whether the Summary Judgment Debtors received an indirect benefit from the

[4] Adv. Pro. No. 8:14-ap-653-CED, Doc. Nos. 335, 336, 337, and 360. The Motions for Summary Judgment differed only in the amounts of the Subject Transfers sought to be avoided and in the allegations regarding the existence of a creditor at the time of the Subject Transfers.

[5] Counts IV and VII of the Complaints.

[6] Transcript, Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 354, p. 13, commencing with l. 7.

[7] Transcript, Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 354, p. 14, ll. 4-16.

[8] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 368.

[9] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 489.

[10] Adv. Pro. No. 8:14-ap-653-CED, Doc. Nos. 484 and 485. Regions sought to supplement the record with the affidavit of Greg Hoerbelt, a Regions senior vice president (the "Hoerbelt Affidavit"). The substance of the Hoerbelt Affidavit was that Mr. Hoerbelt was responsible for Regions' relationship with some of the Mongelluzzi Entities (apparently not including the Summary Judgment Debtors), that he had no knowledge of a check-kiting scheme until June 28, 2010, and that he had no knowledge that the Mongelluzzis or Mongelluzzi Entities may have been potentially insolvent.

[11] Transcript, Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 540, p. 26, l. 9.

[12] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 577.

Subject Transfers and whether there was an identity of interests between the Summary Judgment Debtors and other Mongelluzzi Entities such that the Summary Judgment Debtors received an economic benefit from the Subject Transfers.[13] The Court also denied summary judgment on the issue of insolvency, finding that Plaintiff had not established the presumption of insolvency under § 726.103(2), Florida Statutes, or balance sheet insolvency under § 726.103(1).[14]

However, relevant to the Motion for Reconsideration the Court granted summary judgment in Plaintiff's favor on two issues: the existence of a creditor on the date of the Subject Transfers in each of the Summary Judgment Debtors' cases and on Regions' Ninth Affirmative Defense.

(A) The Existence of a "Triggering Creditor" in Training U

The Motion for Reconsideration addresses the "existence of a creditor" issue only in the Training U case.[15] As to Training U, the Court found that proofs of claim filed by Anne Mongelluzzi as trustee of an employee retirement plan and an employee medical plan[16] were evidence of a creditor whose claim arose before the Subject Transfers (a so-called "triggering creditor"). The existence of a triggering creditor satisfies a required element for the avoidance of a fraudulent transfer under § 726.106(1), Florida Statutes. In the Summary Judgment Order, the Court noted that Regions had not contested the existence of these two creditors.[17]

(B) Regions' Ninth Affirmative Defense

In its Ninth Affirmative Defense, Regions alleged that Plaintiff failed to state a claim upon which relief can be granted for constructive fraud because Regions took the transfers in good faith and for reasonably equivalent value.[18] Plaintiff argued in the Summary Judgment Motions that Regions had not taken the Subject Transfers in good faith. Regions' only response to the Summary Judgment Motions on this issue was that Plaintiff had failed to meet her burden.[19]

As set forth in the Summary Judgment Order, the Court found that:

> Regions knew of the check-kiting scheme as of June 28, 2010, and was on inquiry notice of Debtors' possible insolvency; Regions knew that [the Summary Judgment] Debtors were not its borrowers; Regions knew that if [the Summary Judgment] Debtors ended up in bankruptcy, the Subject Transfers could be a fraudulent transfer; Regions knew that its knowledge of the possible avoidance of the Subject Transfers was critical to its defense of an avoidance action; Regions knew that its attorneys recommended structuring the Forbearance Agreement so as to preserve its good-faith defense; Regions knew it was better off "as long as we do not know too much" and that "the more we get into the situation, the more we may develop knowledge that we don't now have;" and finally, Regions knew that "it is better to take the money and have a challenge than not get any of it."
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> Based upon this overwhelming and incontrovertible evidence, the Court concludes that Regions knew exactly what it was doing when it took the Subject

[13] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 577, p. 19.
[14] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 577, pp. 20-21.
[15] Doc. No. 161, ¶ 61.
[16] Case No. 8:13-bk-06896-CED, Claim No. 6-1 of Safe Harbor Employer Services Retirement Plan and Claim Nos. 7-1 and 8-1 of Choice Plus HRA & Buy Up Medical Plans.
[17] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 577, p. 11.
[18] Adv. Pro. No. 8:15-ap-117-CED, Doc. No. 33; Adv. Pro. No. 8:15-ap-122-CED, Doc. No. 34; Adv. Pro. No. 8:15-ap-123-CED, Doc. No. 33; and Adv. Pro. No. 8:15-ap-124-CED, Doc. No. 34.
[19] Case No. 8:14-ap-653-CED, Doc. Nos. 398, 399, 400, and 401.

> Transfers. Regions deliberately chose not to inquire regarding [the Summary Judgment] Debtors' possible insolvency and Regions knew of the possible avoidance of the Subject Transfers. Just like the defendants in *World Vision*, Regions "just did not want to ask too many questions because they did not want to know too much."[20]

In making its ruling, the Court relied primarily on email communications between Regions and its attorneys, which include the following excerpts:

> One critical component is whether Regions had "knowledge of the voidability of the transfer" at the time of the payoff. A transfer is voidable if (a) the transferor is insolvent at the time the transfer is made and (b) the transferor does not receive reasonably equivalent value for the transfer. ***Given our current circumstances, it may be difficult to argue that Regions didn't have knowledge of the voidability of the transfer because assuming the Transferors are insolvent it may be difficult to rebut that Regions didn't have any knowledge that these funds didn't come from the Transferors*** (which would be used by the chapter 7 trustee or chapter 11 debtor as evidence of the Transferors not receiving reasonably equivalent value);
>
> . . .
>
> I think it's important to understand, however, that there is no way I can think of insulating Regions from this risk. ***Its knowledge of the borrowers, and the bank accounts make this a tough issue on the question of knowledge***;[21]
>
> and
>
> And as covered earlier when we were discussing the matter, ***it is better to take the money and have a challenge than not get any of it***.[22]

The Court concluded that Regions lacked good faith in taking the Subject Transfers because it was on inquiry notice of the Summary Judgment Debtors' possible insolvency and the possible avoidance of the subject transfers and that Regions had presented no evidence of a diligent investigation.[23]

III. ANALYSIS

(A) Standard for Motion for Reconsideration

Regions seeks relief under Federal Rules of Bankruptcy Procedure 9023 and 9024, which incorporate by reference Federal Rules of Civil Procedure 59 and 60. Under Rule 59, there are three reasons that would justify a court's reconsideration of prior ruling: (1) an intervening change in controlling law; (2) newly discovered evidence would merit a different result; or (3) reconsideration is needed to correct a clear error of law or fact or to prevent manifest injustice.[24] Newly discovery evidence is also grounds for reconsideration under Rule 60. Regions argues that newly discovered evidence and the Court's clear legal error warrant reconsideration here.

Motions for reconsideration are not vehicles for disappointed parties to re-litigate previously decided issues by raising new theories[25] or to present evidence that could have been raised earlier.[26] Nor should a motion for reconsideration be used to make new arguments on matters not

[20] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 577, pp. 25-26 (citations omitted).
[21] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 577, p. 5 (citations omitted).
[22] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 577, p. 6 (citations omitted).
[23] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 577, pp. 25-26.
[24] *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999) (citing *In re Inv'rs Fla. Aggressive Growth Fund, Ltd.*, 168 B.R. 760, 768 (Bankr. N.D. Fla. 1994)).
[25] *In re Waczewski*, 2005 WL 1330691, at *1 (Bankr. M.D. Fla. June 1, 2005).
[26] *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005).

previously raised by counsel.[27] Reconsideration of a previous order is an "extraordinary remedy, to be employed sparingly."[28] Courts have discretion in whether to grant a motion for reconsideration and a court's denial of a motion for reconsideration is reviewed for abuse of discretion.[29]

(B) Regions' Motion for Reconsideration

(1) Triggering Creditor as to Training U

Regions correctly argues that the Court erred in holding that Regions did not contest the existence of the retirement and benefit claims in the Training U case.

In the Summary Judgment Motion filed as to Training U,[30] Plaintiff contended that Proof of Claim Nos. 6-1, 7-1, and 8-1[31] (claims related to unfunded employee benefit plans) were evidence of the existence of a creditor as of the date of the Subject Transfers. In its response, Regions pointed out that Plaintiff had previously objected to these claims in the Training U case, and the Court had entered an order sustaining the objection and disallowing the claims.[32] Plaintiff evidently forgot about her objections and the disallowance of the claims.[33] Likewise, the Court overlooked Regions' response on this issue in the Training U case.

Plaintiff appears to concede this point in her response to the Motion for Reconsideration.[34] But Plaintiff argues that another creditor, CNA Insurance Company, which filed identical proofs of claim in the amount of $2,797,508.00 in each of the Mongelluzzi Entities' bankruptcy cases,[35] including in the Training U case,[36] (the "CNA Claim") qualifies as the triggering creditor.

There has been no objection to the CNA Claim. Under Federal Rule of Bankruptcy Procedure 3001(f), a proof of claim constitutes *prima facie* evidence of the validity and amount of the claim. However, the Court previously analyzed the merits of the CNA Claim when Plaintiff cited to it as evidence of the Summary Judgment Debtors' insolvency. As the Court stated in the Summary Judgment Order,

> With respect to the CNA claims, the Court notes that they rose from a settlement agreement between CNA and some of the Mongelluzzi Entities – ***but not with [the Summary Judgment] Debtors***. The only apparent connection between CNA and [the Summary Judgment] Debtors is that the signatories to the settlement agreement assigned as collateral for payments due under the settlement agreement any amounts and rights that the signatories and their affiliated entities held in two premium

[27] *In re Nascarella*, 492 B.R. 327, 335 (Bankr. M.D. Fla. 2013).
[28] *In re Woide*, 2017 WL 960771, at *1 (M.D. Fla. Mar. 13, 2017) (quoting *Mannings v. Sch. Bd. of Hillsborough Cty.*, 149 F.R.D. 235, 235 (M.D. Fla. 1993)).
[29] *Alexander v. HarperCollins Publishers, Inc.*, 132 F. App'x 250, 251 (11th Cir. 2005); *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005).
[30] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 337.
[31] Case No. 8:13-bk-06896-CED.
[32] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 399.
[33] Case No. 8:13-bk-06896-CED, Doc. Nos. 138 and 139.
[34] Doc. No. 170, p. 15.
[35] Able Body Temporary Services, Inc., Case No. 8:13-bk-06864-CED, Claim No. 23-1; Professional Staffing – A.B.T.S., Inc., Case No. 8:13-bk-06866-CED, Claim No. 40-1; Westward Ho II, LLC, Case No. 8:13-bk-06867-CED, Claim No. 8-1; Westward Ho, LLC, Case No. 8:13-bk-06868-CED, Claim No. 12-1; YJNK II, Inc., Case No. 8:13-bk-06869-CED, Claim No. 13-1; YJNK XI CA, LLC, Case No. 8:13-bk-06875-CED, Claim No. 7-1; ABTS Holdings, LLC, Case No. 8:13-bk-06879-CED, Claim No. 11-1; Able Body Gulf Coast, Inc., Case No. 8:13-bk-06881-CED, Claim No. 17-1; Cecil B. DeBoone, LLC, Case No. 8:13-bk-06883-CED, Claim No. 5-1; Preferable HQ, LLC, Case No. 8:13-bk-06891-CED, Claim No. 11-1; Rotrpick, LLC, Case No. 8:13-bk-06894-CED, Claim No. 9-1; USL&H Staffing, LLC, Case No. 8:13-bk-06897-CED, Claim No. 12-1; Organized Confusion, LLP, Case No. 8:13-bk-06888-CED, Claim No. 8-1; YJNK III, Inc., Case No. 8:13-bk-06899-CED, Claim No. 12-1; and YJNK VIII, Inc., Case No. 8:13-bk-06902-CED, Claim No. 10-1.
[36] Case No. 8:13-bk-06896-CED, Claim No. 5-1.

> fund accounts under policies issued by another insurance company.[37]

Given that the CNA Claim does not facially state a basis for a claim against Training U, the Court concurs with Regions that reconsideration on the issue of a triggering creditor in the Training U case is appropriate.

(2) Regions' Ninth Affirmative Defense

As the Court understands the Motion for Reconsideration, Regions seeks reconsideration of the Court's ruling on its Ninth Affirmative Defense on three grounds. First, Regions argues that the Court committed clear error because, before the Court can rule on Regions' good faith, the Court must first find that Regions could have discovered the Summary Judgment Debtors' insolvency through a diligent investigation. Regions argues that its duty to conduct a diligent investigation does not arise until Plaintiff has proven insolvency. Second, Regions argues that the Court should not have granted summary judgment while discovery is ongoing. And third, Regions contends that it has discovered new evidence—in the form of deposition testimony—to support its position that the Summary Judgment Debtors were not insolvent and that Regions could not perform a diligent investigation. In support of its Motion for Reconsideration, Regions offers the deposition testimony of two of its former employees and of the former CFO of a Mongelluzzi Entity, Preferable People.

The Court will address each of Regions' arguments in turn.

(a) The Court Correctly Applied the Law on Good Faith and the Summary Judgment Standard.

Although Regions' only response to the Summary Judgment Motion as to Regions' Ninth Affirmative Defense was that Plaintiff failed to meet her burden,[38] Regions now contends that the Court misapplied the law because the Court's ruling on Regions' good faith requires that the Court first find that the Summary Judgment Debtors were insolvent on the date of the Subject Transfers. It is not appropriate to raise new arguments on reconsideration that could have been raised before.[39] Even so, the Court correctly applied the law on Regions' good-faith defense.

Regions, as the nonmoving party on summary judgment, bore the burden of proof on its affirmative defense. Plaintiff's burden on summary judgment was either to show that there is an absence of evidence to support Regions' affirmative defenses or to show that Regions will be unable to prove its affirmative defense at trial.[40]

The Court found that Plaintiff met her burden through the following uncontroverted facts: Regions knew of the check-kiting scheme as of June 28, 2010;[41] Regions knew that the Summary Judgment Debtors were not its borrowers; Regions knew that if the Summary Judgment Debtors ended up in bankruptcy, the Subject Transfers could possibly be avoided as a fraudulent transfer; Regions knew that its knowledge of the possible avoidance of the Subject Transfers was critical to its defense of a potential avoidance action; Regions knew that its attorneys recommended structuring the Forbearance Agreement so as to preserve its good-faith defense; Regions knew it was better off "as long as we do not know too much" and that "the more we get into the situation, the more we may develop knowledge that we don't now have;" and finally, Regions knew that "it is better to take the money and have a challenge than not get any of it."[42]

Regions offered nothing to counter these facts. Instead, Regions argues that the Court

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[37] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 577, p. 21 (emphasis added).

[38] Case No. 8:14-ap-653-CED, Doc. Nos. 398, 399, 400, and 401.

[39] *In re Waczewski*, 2005 WL 1330691, at *1.

[40] *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-1116 (11th Cir. 1993).

[41] Heren_00304166 to Heren_0030499 (filed under seal pursuant to the *Amended Confidentiality Protective Order*, Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 282).

[42] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 335, Ex. D.

should not have ruled on its lack of good faith without first finding that the Summary Judgment Debtors were insolvent. Regions also argues that it could not make a diligent inquiry as to solvency because the Summary Judgment Debtors were not Regions' borrowers and were only account holders. But Regions overlooks the language of 11 U.S.C. § 550. Under § 550(b)(1), the trustee may not recover against a transferee that "takes for value, . . . in good faith, ***and without knowledge of the voidability of the transfer avoided***."[43] The Court's ruling was based upon the "overwhelming and incontrovertible evidence" that Regions knew exactly what it was doing when it took the Subject Transfers. The Court found that "Regions deliberately chose not to inquire regarding [the Summary Judgment] Debtors' possible insolvency and ***Regions knew of the possible avoidance of the Subject Transfers***."[44]

The Court's ruling is consistent with the case law on the good faith affirmative defense. For example, in *Cuthill v. Kime (In re Evergreen Sec., Ltd.*), [45] the court held:

> To determine whether a transferee acted in good faith for purposes of section 548(c), the court must look at what the transferee objectively "knew or should have known," and conclude that the transferee did not act in good faith because it had sufficient knowledge to place it on inquiry notice of the ***voidability of the transfer or the debtor's insolvency***.[46]

The Court recognizes that the issue of Regions' good faith will not arise unless Plaintiff is able to establish the Summary Judgment Debtors' insolvency. But Regions' lack of good faith is not an element of Plaintiff's case-in-chief. For these reasons, the Court did not commit clear error in its ruling on Regions' Ninth Affirmative Defense.

[43] Emphasis added.
[44] Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 577, p. 26 (emphasis added).
[45] 319 B.R. 245 (Bankr. M.D. Fla. 2003).
[46] 319 B.R. at 254 (emphasis added).

(b) The Court Did Not Err in Granting Summary Judgment Before the Close of Discovery.

Regions argues that it was manifest error for this Court to enter its ruling on summary judgment prior to the close of discovery.

Although courts have held that summary judgment is premature in the early stages of discovery,[47] these Summary Judgment Debtors' cases were not in the "early stages of discovery." Plaintiff filed the Summary Judgment Motions over two years after filing the Complaints. And Regions overlooks the fact that most of the information it needed to respond to the Summary Judgment Motions was in its own possession, as evidenced by the depositions of Mr. Cohn and Mr. Woomer, *Regions' own employees.*[48]

Federal Rule of Civil Procedure 56(b), incorporated by Fed. R. Bankr. P. 7056, states that "a party may file a motion for summary judgment *at any time* until 30 days after the close of discovery."[49] If Regions had needed time to conduct additional discovery to respond to the Summary Judgment Motions, it could have filed a motion under Rule 56(d). Rule 56(d) provides upon a showing of cause, the court may: "(1) defer considering the [summary judgment] motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order."[50]

But Regions did not file a motion under Rule 56(d). In fact, when Regions was asked about a briefing schedule for the Summary Judgment Motions, its own attorney stated that Regions needed 60 days to complete discovery, which the Court allowed.[51] And at no point between the dates the Summary Judgment Motions were

[47] *Oller v. Ford Motor Co.*, 939 F. Supp. 817, 819 (M.D. Fla. 1996); *Blumel v. Mylander*, 919 F. Supp. 423, 428 (M.D. Fla. 1996).
[48] Doc. Nos. 161, 171.
[49] Fed. R. Civ. P. 56(b) (emphasis added).
[50] Fed. R. Civ. P. 56(d).
[51] Transcript, Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 354, p. 14, ll. 4-16.

filed,[52] and the date that the Court entered the Summary Judgment Order, over a year later,[53] did Regions request additional time to conduct discovery.[54]

Regions' argument that it needs time to conduct additional discovery to address the issues raised on summary judgment is too little, too late. The Court did not commit clear error in ruling on summary judgment before the close of discovery.

(c) The Deposition Testimony is Not Newly Discovered Evidence.

Both Federal Rule of Civil Procedure 59 and Rule 60(b) permit relief from an order if a party obtains newly discovered evidence. To obtain relief, the party must demonstrate that the evidence was discovered after trial or ruling on the merits, that due diligence was shown, and that the evidence was neither cumulative nor impeaching but actually material and likely to produce a new result.[55]

Regions contends it has newly discovered evidence in form of deposition testimony of Regions' own employees, Ronald Cohn, deposed by Plaintiff in March 2018,[56] and Chris Woomer, deposed by Plaintiff in July 2018,[57] and that of Robert Pierce, the former chief financial officer of one of the Mongelluzzi Entities[58] (Preferable People), deposed by Regions in May 2018.[59]

In short, Ronald Cohn testified that he was one of Regions' relationship managers for Preferable People (a Mongelluzzi Entity); that Regions was stymied in its efforts to conduct a field examination of Preferable People's financial condition by Mr. Pierce; and that Mr. Pierce requested continuous delays of the audit due to Preferable People's on-going refinancing efforts.[60] Chris Woomer was Mr. Cohn's supervisor. Mr. Woomer testified that Regions had been told that its loans to Preferable People would be refinanced,[61] and that because Regions had received inquiries from various banks about the refinance effort, as well as a term sheet,[62] Regions did not conduct a field examination.[63]

Preferable People's former CFO, Robert Pierce, testified at his deposition that he had limited familiarity with the business of Training U. When asked about Training U's liabilities, Mr. Pierce testified that he could not imagine that Training U liabilities would have exceeded the amount in its accounts at Regions on the date that Regions effected the set offs (the Subject Transfers). He also testified that the liabilities of YJNK VIII may have been a "wash if there was no equity" as it was a "pass-through entity,"[64] Mr. Pierce testified that he has no knowledge as to whether Rotrpick or YJNK XI's liabilities that exceeded their assets on the date of the set offs.[65]

First, evidence or knowledge cannot be "newly discovered" if it is in the possession of a party's own employee prior to the entry of an order on summary judgment. "The law is clear that evidence which was available to a party during the pendency of a motion for summary judgment may not later be introduced on a motion to reconsider."[66] The Eleventh Circuit in *Taylor v. Texgas Corp.*[67] recognized that "[t]he mere fact that [a company] is a large company does not excuse it from informing its employees of the identity of its legal opponents and from requiring its employees to report any dealings with those opponents to the company's counsel." The facts to

[52] May 17, 2017, and June 29, 2017.
[53] June 20, 2018.
[54] Ironically, this Court's docket reflects a plethora of discovery disputes between the parties, the vast majority relating to Plaintiff's efforts to obtain discovery from Regions.
[55] *Branca v. Sec. Ben. Life Ins. Co.*, 789 F.2d 1511, 1512 (11th Cir. 1986).
[56] Doc. No. 173.
[57] Doc. No. 174.
[58] Doc. No. 175.
[59] *See* note 8 *supra.* Although Regions filed the Hoerbelt Affidavit with the Motion to Supplement, it is not included in the Motion for Reconsideration.
[60] Doc. No. 173, pp. 23-35.
[61] Doc. No. 174, pp. 98, 108.
[62] Doc. no. 174, p. 159.
[63] Doc. No. 174, pp. 98-118, 160.
[64] Doc. No. 175, p. 210.
[65] Doc. No. 175, pp. 208-211.
[66] *Prieto v. Storer Commc'ns, Inc.*, 152 F.R.D. 654, 655 (M.D. Fla. 1994).
[67] 831 F.2d 255, 259 (11th Cir. 1987).

which Mr. Cohn and Mr. Woomer testified were known to them in 2010 when the events they described occurred. These facts were available at the commencement of these adversary proceedings, and they were available to Regions while the Summary Judgment Motions were pending. Regions has offered no explanation as to why it did not talk to its own employees during the years that these adversary proceedings have been pending, instead of waiting for Plaintiff to take their depositions. The deposition testimony is not newly discovered evidence that would justify reconsideration.

Second, Federal Rule of Civil Procedure 60 requires the moving party on a motion for reconsideration to demonstrate that the evidence could not have been discovered earlier with "reasonable diligence." Reasonable diligence means what a litigant *could have* reasonably discovered or proffered—not what the litigant actually discovered.[68] Although the depositions took place in 2018, the facts testified to all related to the events that occurred in 2010. Regions has presented no facts that show why the information revealed during the depositions could not have been discovered before summary judgment.

Last, the deposition testimony does not establish the existence of an issue of fact as to whether Regions accepted the Subject Transfers in good faith such that it would be likely to produce a new result. The testimony of the Regions' employees is consistent with this Court's ruling that Regions was on inquiry notice of the Summary Judgment Debtors' potential insolvency, yet failed to conduct any investigation prior to the July 15, 2010 date of the Subject Transfers. And none of the deposition testimony addresses Regions' knowledge of the voidability of the Subject Transfers, knowledge that is spelled out in Regions' communication with its own attorneys.

Likewise, Regions' argument that Mr. Pierce's testimony "bolstered" evidence of the Summary Judgment Debtors' solvency would not have affected the Court's ruling. The Court has already determined there are questions of fact as to insolvency and denied Plaintiff's request for summary judgment on the insolvency issue.

[68] *Aliff v. Joy Mfg. Co.*, 914 F.2d 39, 44 (4th Cir. 1990).

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED that the Motion for Reconsideration is **GRANTED** on the issue of the existence of a creditor as of the date of the Subject Transfers as to Training U and **DENIED** as to the Court's ruling in the Summary Judgment Order as to Regions' Ninth Affirmative Defense.

DATED: September 4, 2018.

/s/ Caryl E. Delano

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Caryl E. Delano
United States Bankruptcy Judge