

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

In re:

Case No. 3:06-bk-2474-PMG
Chapter 7

EZ PAY SERVICES, INC.,
a/k/a EZ Pay Health Care,
a/k/a EZ Pay Dental,
a/k/a EZ Pay Medical,

Debtor.

ALTERNATIVE DEBT PORTFOLIOS, L.P.,
a Delaware Limited Partnership,
and ALTERNATIVE DEBT PORTFOLIOS, LLC,
a Nevada Limited Liability Company,

Plaintiffs,

vs.

Adv. No. 3:06-ap-333-PMG

E-Z PAY SERVICES, a Nevada Corporation,
MYDDS.COM, a Nevada Corporation,
and DEBRA DISTLER,

Defendants.

**ORDER ON MOTION FOR CLARIFICATION
AND LIMITED RECONSIDERATION OF THIS
COURT'S ORDER ON (1) EX PARTE MOTION
FOR ORDER TO SHOW CAUSE WHY
DEFENDANT SHOULD NOT BE HELD IN
CONTEMPT FOR VIOLATING EX PARTE
TEMPORARY RESTRAINING ORDER AND (2)
THIRD MOTION FOR ORDER TO SHOW CAUSE
WHY MS. DISTLER SHOULD NOT BE HELD IN
CONTEMPT FOR VIOLATING RESTRAINING
ORDER**

THIS CASE came before the Court for hearing on May 2, 2008, to consider the Motion for Clarification and Limited Reconsideration of this Court's Order on (1) Ex Parte Motion for Order to Show Cause Why Defendants Should not be Held in Contempt for Violation of Ex Parte Temporary Restraining Order, and (2) Third Motion for Order to Show Cause Why Ms. Distler Should not be Held in Contempt for Violating Restraining Order. (Doc. 106).

The Motion for Clarification and Limited Reconsideration was filed by the Plaintiffs, Alternative Debt Portfolios, L.P. and Alternative Debt Portfolios, LLC (collectively, ADP).

On March 19, 2008, the Court entered an Order on (1) Ex Parte Motion for Order to Show Cause Why Defendants Should not be Held in Contempt for Violating Ex Parte Temporary Restraining Order and (2) Third Motion for Order to Show Cause Why Ms. Distler Should not be Held in Contempt for Violating Temporary Restraining Order (the Order). (Doc. 100).

In the Order, the Court concluded that:

Debra Distler violated the Ex-Parte Temporary Restraining Order initially entered by the State Court in Nevada on July 19, 2006, and extended pursuant to stipulation and by Order of the Bankruptcy Court in Nevada, by writing the letters dated July 25, 2006, and February 25, 2007, and by distributing them to medical providers who had contracted with the Debtor. The violations constitute acts of contempt.

(Doc. 100, p. 24).

Based on the finding that Debra Distler (Distler) violated the Temporary Restraining Order (TRO), the Court awarded compensatory damages in favor of ADP, and against Distler, in the amount of \$254,867.50. (Doc. 100, p. 24). The amount awarded as compensatory damages was based on the charges billed by Duvera Financial, ADP's billing company, for the "excess management time" caused by Distler's violations. (Doc. 100, pp. 18-23).

In the Motion currently before the Court, ADP seeks clarification or reconsideration of the Court's Order with respect to three issues. The Court will address each issue separately.

1. The Chapter 7 estate is not liable for the damages awarded to ADP.

First, ADP seeks the entry of a modified Order determining that the Chapter 7 estate of EZ Pay Services, Inc. is jointly liable with Distler for the compensatory damages awarded to ADP as a result of Distler's violations of the TRO. The Court finds that the estate is not liable for the award.

The evidence established that Distler authored and distributed the letters dated July 25, 2006, and February 25, 2007, in violation of the TRO originally entered in Nevada. Distler apparently served as the Debtor's Chief Executive Officer (CEO) at the time that the letters were written.

The evidence did not establish, however, that Distler's authorship and circulation of the letters fell within the scope of her duties as the Debtor's CEO, or that the authorship and distribution of the letters was in the Debtor's financial interest. On the contrary, the evidence established that Distler acted independently and without regard to her obligations to the corporation when she authored the letters.

Generally, a corporate officer's conduct is not imputed to the corporation if the officer's conduct is adverse to the corporation. Beck v. Deloitte & Touche, Deloitte, Haskins & Sells, Ernst & Young, L.L.P., 144 F.3d 732, 736-37 (11th Cir. 1998). Under general agency principles, as applied in the corporate context, an officer's actions are not imputed to the corporation where the officer is acting in his own behalf, and not in any official or representative capacity. In re Parmalat Securities Litigation, 383 F.Supp.2d 587, 597 (S.D.N.Y. 2005).

In this case, Distler knew that the TRO had been entered against both Distler and the Debtor, as co-defendants in the lawsuit initiated by ADP in Nevada. Distler did not contest the validity or lawfulness of the TRO. (Doc. 100, p. 12). Instead, Distler engaged in conduct that violated the TRO by authoring and distributing the two letters.

Distler did not hold herself out as a representative of the Debtor when she wrote the first letter. Instead, the first letter was purportedly written by an un-named dentist addressing his "fellow" dentists. (Order, Doc. 100, p. 12). In other words, as asserted by ADP in its Post-Trial Brief, Distler authored the letter while "posing as an anonymous dentist." (Doc. 95, p. 2). The letter was written on Distler's home computer, using software registered in Distler's name. (Order, Doc. 100, pp. 13-14).

With respect to the second letter, Distler apparently knew that the content of the letter conflicted with the terms of the TRO, but claimed that she erroneously believed that the TRO was not in effect when she circulated the letter. (Order, Doc. 100, p. 15). As discussed in the Order, such a belief does not excuse her violation of the TRO. (Order, Doc. 100, pp. 17-18).

Distler's conduct in knowingly and deceptively violating an injunction that was directed to both Distler and to the Debtor was clearly outside the scope of her responsibilities as a corporate officer. By exposing the Debtor to the risks associated with violating a valid Court Order, Distler engaged in conduct that was inconsistent with the financial interest of the Debtor. Under these circumstances, Distler's conduct should not be imputed to the Debtor. The Chapter 7 estate of EZ Pay Services, Inc. is not jointly liable with Distler for the compensatory damages awarded to ADP.

2. ADP did not establish its entitlement to an award of the attorney's fees that it incurred in defending the lawsuits.

Second, ADP seeks the entry of an amended Order providing for an additional award of compensatory damages in the amount of \$548,112.76. ADP claims that this amount represents the attorney's fees and costs that it incurred in defending the lawsuits triggered by Distler's letters.

In the Order, the Court determined that ADP did not sufficiently establish its entitlement to an award based on the fees and costs. (Doc. 100, pp. 18-22).

Specifically, the Court found that the only evidence presented by ADP to establish the claim was the generalized, unsupported testimony of Eric Gangloff, as managing director of ADP, that at least fourteen lawsuits

had been filed, and that ADP had spent almost \$700,000.00 in attorney's fees to defend the actions. No evidence was presented, however, to identify the lawsuits, or to show ADP's agreements with the attorneys who were retained to represent it in the lawsuits. (Doc. 100. p. 21).

ADP does not appear to assert that the evidence admitted at the final evidentiary hearing on the motions establishes the claimed award of \$700,000.00. Instead, in its Motion for Clarification or Reconsideration, ADP provides certain information regarding eight adversary proceedings that were transferred to the Bankruptcy Court, and five additional proceedings that were dismissed in their original venue. (Doc. 106, pp. 7-12). Further, ADP attached an exhibit to its Motion for Clarification or Reconsideration, which consists of a list of law firms engaged by ADP, and the amount that ADP claims that it paid to each firm, which amounts total \$548,112.76. (Doc. 106, Exhibit A).

The filing of the exhibit represents the first time that the fee information appears in the record of this proceeding. No evidence regarding the identity of the law firms, the services that they performed, or the amount paid to each, was presented at the trial. Any determination at trial regarding the amount of the fees incurred would have been "mere speculation or conjecture." Leadsinger, Inc. v. Cole, 2006 WL 2266312, at 16 (S.D.N.Y.).

"The Eleventh Circuit Court of Appeals has described a motion for reconsideration as falling within the ambit of either Federal Rule of Civil Procedure Rule 59(e) (motion to alter or amend a judgment) or Federal Rule of Civil Procedure Rule 60(b) (motion for relief from judgment)(citation omitted). . . . The purpose of a motion for reconsideration is to correct manifest errors of law, to present newly discovered evidence, or to prevent manifest injustice. (citation omitted)." In re Waczewski, 2008 WL 595926, at 1 (M.D. Fla.)(Emphasis supplied).

In this case, the Court finds that ADP has not satisfied the standard required for reconsideration of the compensatory damages awarded in the Order. The final evidentiary hearing of the motions was properly noticed, and occurred on two separate days in June and July of 2007. ADP had a full opportunity to litigate its claims, and to present its evidence relating both to the motions.

The information that ADP now seeks to introduce was available to ADP at the time of trial. ADP knew the identity of the attorneys that it had retained a year earlier to defend the lawsuits, and it knew the amounts that those attorneys had charged for their services as of the trial date. The information attached to ADP's Motion for Clarification and Reconsideration is not "newly discovered" evidence within the meaning of Rule 60(b). See In re Asbestos Litigation, 173 F.R.D. 87, 90 (S.D. N.Y. 1997)(The moving party must show that the evidence is "truly newly discovered or could not have been found by due diligence.").

Further, the presentation of evidence on the motions was closed and the hearing was concluded on July 27, 2007, and ADP submitted its Post-Trial Brief on September 17, 2007. (Doc. 95). At the hearing on its Motion for Reconsideration, however, ADP appeared to request that the Court schedule further proceedings so that it could present additional evidence to establish its claim for attorney's fees. The Court denies ADP's request, because the evidence that it seeks to introduce is not newly-discovered information, as set forth above. Additionally, ADP has not provided a compelling explanation for its failure to present the evidence at trial.

In summary, ADP did not establish at trial that it is entitled to an award of compensatory damages based on the attorney's fees that it incurred in defending the lawsuits. ADP should not now be permitted to present evidence to support its claim for attorney's fees, because the information that it seeks to present is not "newly discovered evidence" within the meaning of Rule 60(b) of the Federal Rules of Civil Procedure, and because the post-trial introduction of the information is not necessary to prevent manifest injustice.

3. ADP is entitled to the entry of a separate Final Judgment consistent with the Order.

Finally, ADP asks the Court to enter a separate Final Judgment in its favor for the amount awarded to it in the Order.

Rule 52(c) of the Federal Rules of Civil Procedure, as made applicable to this proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure, provides:

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

...

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

F.R.Civ.P. 52(c). Further, Rule 54(b) of the Federal Rules of Civil Procedure, as made applicable by Rule 7054 of the Federal Rules of Bankruptcy Procedure, provides:

Rule 54. Judgment; Costs

...

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of

a judgment adjudicating all the claims and all the parties' rights and liabilities.

F.R.Civ.P. 54(b)(Emphasis supplied).

In this case, on March 19, 2008, the Court entered an Order on (1) Ex Parte Motion for Order to Show Cause Why Defendants Should not be Held in Contempt for Violation of Ex Parte Temporary Restraining Order, and (2) Third Motion for Order to Show Cause Why Ms. Distler Should not be Held in Contempt for Violating Temporary Restraining Order. (Doc. 100). The Order contains the Court's findings of fact and conclusions of law with respect to ADP's Motions. The Court determines that there is no just reason for delay, and that a Final Judgment should be entered in favor of ADP, and against Distler, consistent with the Order entered on March 19, 2008.

Conclusion

ADP filed a Motion for Clarification and Limited Reconsideration of this Court's Order (1) determining that Debra Distler violated the TRO initially entered by the State Court in Nevada, and (2) awarding compensatory damages to ADP in the amount of \$254,867.50. (Doc. 106). The Court grants ADP's Motion in part, and denies the Motion in part, as set forth in this Order.

First, the Motion should be denied to the extent that ADP seeks the entry of a modified Order determining that the Chapter 7 estate of EZ Pay Services, Inc. is jointly liable with Distler for the compensatory damages awarded to ADP. Distler's conduct should not be imputed to the Debtor, because she was not acting as a representative of the Debtor when she violated the TRO, and because the violations were adverse to the Debtor's financial interest.

Second, the Motion should be denied to the extent that ADP seeks an additional award of compensatory damages based on the attorney's fees that it incurred in defending the lawsuits triggered by Distler's violations. ADP did not establish its entitlement to the additional award at the final evidentiary hearing on the motions. It should not now be permitted to present evidence to support the additional award, because the proffered information is not "newly discovered evidence" within the meaning of Rule 60(b) of the Federal Rules of Civil

Procedure, and because the post-trial introduction of the information is not necessary to prevent manifest injustice.

Finally, the Motion should be granted to the extent that ADP seeks the entry of a separate Final Judgment awarding it the sum of \$254,867.50, consistent with the Court's Order entered on March 19, 2008.

Accordingly:

IT IS ORDERED that:

1. The Motion for Clarification and Limited Reconsideration of this Court's Order on (1) Ex Parte Motion for Order to Show Cause Why Defendants Should not be Held in Contempt for Violating Ex Parte Temporary Restraining Order and (2) Third Motion for Order to Show Cause Why Ms. Distler Should not be Held in Contempt for Violating Restraining Order, filed by Alternative Debt Portfolios, LLC and Alternative Debt Portfolios, L.P., is granted in part and denied in part as set forth herein.

2. The Motion is granted to the extent that ADP seeks the entry of a Final Judgment in favor of ADP, and against Debra Distler, based on the compensatory damages awarded to ADP in the amount of \$254,867.50. A separate Final Judgment shall be entered consistent with the Order entered on March 19, 2008.

3. The Motion is denied to the extent that ADP otherwise seeks the reconsideration or modification of the Order entered on March 19, 2008.

DATED this 30th day of May, 2008.

BY THE COURT

/s/ Paul M. Glenn
PAUL M. GLENN
Chief Bankruptcy Judge