IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED LAWN MOWER SALES & SERVICE, INC.	:	CIVIL ACTION
v.	:	
CHARLES E. HAGEL, et al.	:	NO. 95-6157

MEMORANDUM AND ORDER

HUTTON, J. June 12, 1997

Presently before this Court is the Plaintiff's Motion for Reconsideration of the Court's May 1, 1997 Order Granting Defendant's Motion to Dismiss the Plaintiff's Complaint (Docket No. 12).

I. BACKGROUND

In 1992, the plaintiff, GB & JE E, Inc.,\[1] purchased United Lawn Mowers Sales & Services, Inc. ("United Lawn") from defendant Charles Hagel. The instant action arises out of the complex provisions of the sales transaction and the subsequent legal altercations between the plaintiff and defendant Hagel, during which defendant Hagel was represented by defendants Mark Slotkin, Esq., Joel Todd, Esq., and Stephen Edwards, Esq., and their law firm, Dolchin, Slotkin & Todd, P.C. On September 28, 1995, the plaintiff filed its complaint with this Court and charged all of the defendants with violating its constitutional rights,

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[1]/ At the time of the purchase, GB & JE E, Inc. assumed United Lawn's name.

wrongful use of civil proceedings, abuse of process, and wrongful execution. In addition, it charged defendant Hagel with defamation and trade libel.

On April 11, 1997, the defendants filed a motion to dismiss the plaintiff's complaint. The plaintiff did not respond to this motion until May 1, 1997, by which time this Court had granted the defendants' motion as uncontested pursuant to Rule 7.1 of the Local Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania.\[2] The plaintiff filed the instant motion for reconsideration with this Court on May 12, 1997. Furthermore, to preserve its right of appeal, the plaintiff filed a notice of appeal with this Court on June 2, 1997.

II. DISCUSSION

A. District Court Jurisdiction

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[2]/ Local Rule 7.1(c) provides as follows:

> Every motion not certified as uncontested, or not governed by Local Civil Rule 26.1(g), shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion. Unless the parties have agreed upon a different schedule and such agreement is approved under Local Civil Rule 7.4 and is set forth in the motion, or unless the Court directs otherwise, any party opposing the motion shall serve a brief in opposition, together with such answer or other response which may be appropriate, within fourteen (14) days after service of the motion and supporting brief. In the absence of a timely response, the motion may be granted as uncontested except that a summary judgment motion, to which there has been no timely response, will be governed by [Federal Rule of Civil Procedure] 56(c). The Court may require or permit further briefs if appropriate.

E.D. Pa. R. Civ. P. 7.1(c).

The Federal Rules of Appellate Procedure allow a party to appeal a district court's decision within thirty days after the entry of the judgment or order. Fed. R. App. P. 4(a). The appealing party may do this by filing a notice of appeal with the clerk of the district court. Fed. R. App. P. 3(a). Once the notice of appeal is filed, however, the district court generally is divested of jurisdiction and thus the ability to rule on pending motions. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982). This is because "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Id. Nevertheless, "[Federal Rule of Appellate Procedure] 4(a)(4) authorizes the district court to entertain post-judgment motions made pursuant to [Federal Rules of Civil Procedure] 50(b), 52(b), and 59. If a timely motion under any of the foregoing rules is made, a prior notice of appeal from the initial judgment is of 'no effect.'"\[3] Allan Ides, The Authority of a Federal District Court

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[3]/ Federal Rule of Appellate Procedure 4(a)(4) provides as follows:

> If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:
>
> (A) for judgment under Rule 50(b);

(continued...)

to Proceed After a Notice of Appeal Has Been Filed, 143 F.R.D. 307, 317 (1992) (footnotes omitted). Moreover, with respect to motions to alter or amend a judgment, "there is no legal distinction between a Rule 59(e) motion timely filed before the filing of a notice of appeal and a Rule 59(e) motion timely filed after the notice of appeal, and . . . in either case, appellate jurisdiction is prohibited by Rule 4(a)(4), Rule 59(e), and Griggs." Venen v. Sweet, 758 F.2d 117, 122 n.6 (3d Cir. 1985) (citations omitted).

B. Motion for Reconsideration Standard

(...continued)

> (B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;
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> (C) to alter or amend the judgment under Rule 59;
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> (D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;
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> (E) for a new trial under Rule 59; or
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> (F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.
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> A notice of appeal filed after announcement or entry of the judgment but before the disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

It is unsettled among the courts how to treat motions to reconsider:

> The [United States] Supreme Court has noted that "[s]uch a motion is not recognized by any of the Federal Rules of Civil Procedure. The Third Circuit has sometimes ruled on such motions under Federal Rule of Civil Procedure 59(e) and at other times under Rule 60(b). A motion to reconsider may, therefore, be treated as a Rule 59(e) motion for amendment of judgment or a Rule 60(b) motion for relief from judgment or order.

Broadcast Music, Inc. v. La Trattoria E., Inc., No. CIV.A.95-1784, 1995 WL 552881, at *1 (E.D. Pa. Sept. 15, 1995). In this case, the Court will treat the instant motion for reconsideration as a motion pursuant to Rule 59(e), rather than as a motion pursuant to Rule 60(b).

Federal Rule of Civil Procedure 59(e) provides in relevant part that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). Generally, a motion for reconsideration will only be granted if: (1) there has been an intervening change in controlling law; (2) new evidence, which was not previously available, has become available; or (3) necessary to correct a clear error of law or to prevent manifest injustice. Reich v. Compton, 834 F. Supp. 753, 755 (E.D. Pa. 1993) (citing Dodge v. Susquehanna Univ., 796 F. Supp. 829, 830 (M.D. Pa. 1992)), aff'd in part, rev'd in part, 57 F.3d 275 (3d Cir. 1995); McDowell v. Interstate Fire & Cas. Co., 817 F. Supp. 538, 541 (M.D. Pa. 1993). Furthermore,

> "With regard to the third ground, . . . 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 disagreement between the Court and the litigant." Motions for reconsideration should not relitigate issues already resolved by the court and should not be used "to put forward additional arguments which [the movant] could have made but neglected to make before judgment."

Compton, 834 F. Supp. at 755 (quotations and citations omitted).

C. Analysis of Plaintiff's Motion for Reconsideration

In the instant case, the Court granted the defendants' motion as uncontested pursuant to Local Rule of Civil Procedure 7.1(c). (See Order of 5/1/97, at 1.) Ten days after the Court issued that order, the plaintiff filed the instant motion, in which it argues that the Court dismissed the complaint prematurely. The plaintiff claims that the defendants filed their motion with the Court and mailed the motion to the plaintiff on or about April 14, 1997. (Pl.'s Mot., at ¶¶ 5-6.) Thus, the plaintiff asserts that the defendants' motion did not become ripe until May 1, 1997, the day the plaintiff filed its response. (Id. at ¶ 11.)

An analysis of the record, however, indicates that the plaintiff has misstated the facts of the case and thus miscalculated the date when its response was due. The Clerk of the Court's records show that the defendants filed their motion to dismiss on April 11, 1997. (See Docket Entry No. 8.) Also, the defendants' attorney explicitly states in the Certificate of Service accompanying the defendants' motion that he served the

plaintiff's attorney with a copy of the motion by regular mail on April 11, 1997. (See Certificate of Service, Docket No. 8.) Although the plaintiff maintains that the motion was mailed with a letter dated April 14, 1997, the plaintiff has not supplied the Court with a copy of same. Furthermore, while the defendants admit in their response that they served their motion by mail, they do not state when they mailed their motion. Thus, based on the evidence in the record, the Court must accept April 11, 1997 as the date of the mailing.

Local Rule 7.1(c) provides that except for summary judgment motions, "any party opposing the motion shall serve a brief in opposition, together with such answer or other response which may be appropriate, within fourteen (14) days after service of the motion and supporting brief. In the absence of a timely response, the motion may be granted as uncontested . . . ." E.D. Pa. R. Civ. P. 7.1(c). In addition, the Federal Rules of Civil Procedure provide that if service is made by regular mail, a party shall have an additional three days to respond to the motion. Fed. R. Civ. P. 6(e). For purposes of the Federal Rules of Civil Procedure, "[s]ervice by mail is complete upon mailing." Fed. R. Civ. P. 5(b).

The record clearly indicates that the defendants served the plaintiff with their motion to dismiss by mail on April 11, 1997. Thus, this Court finds that the plaintiff's response was due on April 28, 1997, seventeen days after the defendants mailed their motion. The plaintiff, however, did not respond to the defendants'

motion until May 1, 1997, three days after its response was due. Consequently, this Court concludes that the May 1, 1997 Order dismissing the complaint conformed with the local rules, and thus was not premature. Nonetheless, the defendants have graciously indicated in their response that they will not oppose the Court vacating the May 1, 1997 Order and reconsidering their motion to dismiss on the merits. (Def.'s Resp., at ¶ 10.) Accordingly, to prevent manifest injustice to the plaintiff, this Court grants the plaintiff's motion.

An appropriate Order follows.

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O R D E R

AND NOW, this 12th day of June, 1997, upon consideration of the Plaintiff's Motion for Reconsideration of Defendants' Motion to Dismiss Complaint (Docket No. 12) and the Defendants' Response thereto (Docket No. 13), IT IS HEREBY ORDERED that this Court's Order of May 1, 1997 (Docket No. 11) is **VACATED**.

BY THE COURT:

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HERBERT J. HUTTON, J.