

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

<b>CAPITAL FUNDING, VI, LP,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>CHASE MANHATTAN BANK</b>	:	
<b>USA, N.A.,</b>	:	<b>NO. 01-CV-6093</b>

**MEMORANDUM AND ORDER**

**Legrome D. Davis, J.**

**February 11, 2005**

**I. INTRODUCTION AND PROCEDURAL HISTORY**

By Memorandum and Order of October 18, 2004 (Dkt. No. 52), the Court granted Defendant Chase Manhattan Bank USA, N.A.'s Motion to Exclude Expert Witnesses, as well as Defendant's Motion for Summary Judgment and ordered that judgment be entered in favor of the Defendant (Dkt. No. 53). Presently before the Court is Plaintiff Capital Funding, VI, LP's Motion for Reconsideration of that decision (Dkt. No. 60), which was time-stamped by the Clerk of Court's Office on November 1, 2004, but inadvertently not actually filed and docketed until November 30, 2004, as well as Defendant Chase Manhattan Bank USA, N.A.'s response thereto (Dkt. No. 56), filed November 15, 2004. Plaintiff also filed a Notice of Appeal (Dkt. No. 57) with the Third Circuit on November 16, 2004.

**II. LEGAL STANDARD**

Courts should grant motions for reconsideration sparingly, reserving them for instances where there has been "(1) an intervening change in controlling law, (2) the emergence of new evidence not previously available, or (3) the need to correct a clear error of law or to prevent a manifest injustice." General Instrument Corp of Delaware. v. Nu-Tek Elecs. & Mfg.,

Inc., 3 F. Supp. 2d 602, 606 (E.D. Pa. 1998), aff'd., 197 F.3d 83 (3d Cir. 1999); see also Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986) (“The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.”). Mere dissatisfaction with the court’s ruling is not a proper basis for reconsideration. See United States v. Phillips, 2001 WL 527810, at \*1 (E.D.Pa. May 17, 2001) (citing Burger King Corp. v. New England Hood and Duct Cleaning Co., 2000 WL 133756, at \*2 (E.D.Pa. Feb. 4, 2000)).

### **III. DISCUSSION**

#### **A. Jurisdiction**

The Federal Rules of Civil Procedure do not specifically refer to a motion for reconsideration but such motions, if filed within ten days of judgment, are generally treated as motions to alter or amend judgment under Rule 59(e) of the Federal Rules of Civil Procedure. United States v. McGlory, 202 F.3d 664, 668 (3d Cir. 2000). Under Local Rule of Civil Procedure 7.1(c) and Federal Rule of Civil Procedure 59(e), motions for reconsideration must be filed within ten business days after the entry of the order concerned. See also Local R. Civ. P. 7.1, cmt. 6a (stating that the 10-day period for filing a motion for reconsideration does not include weekends or holidays). Therefore, to be timely, Plaintiff’s Motion had to be filed on or before November 1, 2004, ten business days after the Court’s Order of October 18, 2004.

While, as noted above, Plaintiff’s Motion for Reconsideration was not actually filed until November 30, 2004, given the confusing circumstances surrounding the delay in its ultimately untimely filing, the Court will consider Plaintiff’s Motion for Reconsideration as being filed nunc pro tunc on November 1, 2004, the day it was time-stamped by the Clerk’s

Office. See Cooper v. Price, et al., 2003 WL 57898 at \*2 (E.D. Pa. Jan. 6, 2003) (*Nunc pro tunc* “describes a doctrine that permits acts to be done, after the time they should have been done, with a retroactive effect. Thus, an act nunc pro tunc is an entry made now of something actually previously done to have the effect of the former date, but previously omitted through inadvertence or mistake.”). See also Berkery v. U.S. Parole Comm’n, 992 F. Supp. 777, 778 (E.D. Pa. 1998) (permitting a motion for reconsideration to be filed nunc pro tunc where unfair prejudice would otherwise result); United States v. Moss, 522 F. Supp. 1033, 1035 (E.D. Pa. 1981) (holding that the court could sua sponte permit a nunc pro tunc filing).

The remaining question, then, is whether the Court has jurisdiction over the Motion for Reconsideration in light of Plaintiff’s Notice of Appeal filed on November 16, 2004. A notice of appeal filed while a reconsideration motion is pending does not deprive the district court of jurisdiction over the reconsideration motion. Vaidya v. Xerox Corp., 1997 WL 732464 at \*2 n.2 (E.D. Pa. Nov. 25, 1997). If a party files a notice of appeal after the court enters a judgment—but before it disposes of the Motion for Reconsideration, the notice becomes effective to appeal a judgment or order when the order disposing of the last such remaining motion is entered. See Fed. R. App. P. 4(a)(4)(B)(i); Local R. Civ. P. 7.1, cmt. 6d. Therefore, the Court concludes that the Motion for Reconsideration is properly before this Court.

## **B. TransUnion Credit Report**

As a preliminary matter, Plaintiff avers that its Motion for Reconsideration is to correct clear errors of law and fact. (Plaintiff’s Memorandum of Law in Support of Plaintiff’s Motion for Reconsideration (“Pl.’s Mem.”) at 1.) In its Memorandum of Law Plaintiff asserts five separate grounds on which it argues its Motion should be granted.

Plaintiff first argues that the Court improperly excluded as hearsay unauthenticated TransUnion credit bureau reports attached to its Opposition to Defendant's Motion for Summary Judgment. (Pl.'s Mem. at 2-5.) In order to demonstrate a clear error of law or fact, Plaintiff must show that the reports met the requirements for admission. In its Memorandum, however, Plaintiff does not argue that the credit reports were authenticated when submitted, nor that authentication is not required. Therefore, exclusion of the reports cannot be "clear error."

Instead, Plaintiff argues that Anthony Carabello, one of the owners of Capital Funding, is a "qualified witness" capable of authenticating the document under Federal Rule of Evidence 803(6) and, to that end, attaches to its Motion for Reconsideration an affidavit by Mr. Carabello. It appears, therefore, that Plaintiff is attempting to correct its own error rather than the Court's. In the alternative, if Plaintiff is attempting to offer new evidence, as previously stated, the Court's consideration at this stage is limited to that not previously available. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985) ("The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence."). Plaintiff does not allege that Mr. Carabello's testimony was previously unavailable. Therefore, the Court may not consider such evidence.

Further, Mr. Carabello is not qualified to authenticate the reports. Among other things, Federal Rule of Evidence 803(6) requires a qualified witness to testify whether a report was made "by a person with knowledge," whether it "was kept in the course of a regularly conducted business activity," and whether it "was the regular practice of that business activity to make the particular [report]." Under Federal Rule of Evidence 602, "[a] witness may not testify

to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Plaintiff has not provided sufficient evidence that Mr. Carabello has personal knowledge of the record keeping practice of TransUnion LLC, a company he is neither employed by nor affiliated with, other than as a customer. Accordingly, the Court did not error in excluding the credit reports.

**C. Affidavit of Sharon Sarna-Paulikaitis**

Plaintiff also argues that the Court improperly admitted and relied upon the affidavit of Sharon Sarna-Paulikaitis, a TransUnion employee, as to the contents of TransUnion credit reports because this affidavit was produced after the discovery deadline and the Court denied Plaintiff’s Motion to depose the employee. (Pl.’s Mem. at 5-7.) It is well settled that the Federal Rules of Civil Procedure give district courts broad discretion to limit discovery. New York v. United States Metals Refining Co., 771 F.2d 796, 805 (3d Cir.1985). As the Court indicated in its Memorandum, the discovery period was “difficult and extended.” (Mem. Op. at 3.) Plaintiff has not demonstrated that the Court’s determination to limit discovery after its evaluation of the factors enumerated in Federal Rule of Procedure 26(b)(2) constitutes “clear error.” See Fed. R. Civ. P. 26(b)(2) (“The frequency or extent of use of the discovery methods . . . shall be limited by the court if it determines that: . . . (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit . . .”). The Court was well within its discretion to consider the affidavit without allowing Plaintiff to depose the affiant.

Further, the Court’s did not rely solely on the affidavit in granting summary judgment. While Plaintiff argues that the affidavit was “the basis” for summary judgment (Pl.’s

Mem. at 7), not only did the Court not make any such indication in its Memorandum, but consideration of the affidavit was but one part of several fatal weaknesses in Plaintiff's case that led to the granting of Defendant's Motion for Summary Judgment. Even without the affidavit, which constituted evidence that Plaintiff's interpretation of the TransUnion credit report was wrong, Plaintiff failed to introduce competent evidence of breach, causation, and damages. While the Court must, on a motion for summary judgment, construe facts in a light most favorable to the non-movant, it need not accept as true allegations as to which Plaintiff has provided no competent evidence. Therefore, the Court did not commit clear error of law by considering the affidavit and, even if it had, such error would not be sufficient to overturn the granting of Defendant's Motion for Summary Judgment.

**D. Testimony of Glenn Newman**

Plaintiff next argues that the Court misapplied the standard for summary judgment by excluding the testimony of damages expert Glenn Newman. (Pl.'s Mem. at 7.) In fact, Mr. Newman's testimony was not excluded on summary judgment grounds, but on a Motion to Exclude filed by Defendant (Dkt. No. 36) on March 24, 2004. As the Court noted in its Memorandum, in the face of the Defendant's *Daubert* challenge, under *Paoli II* Plaintiff bore the burden of proving, by a preponderance of the evidence, that the expert testimony was admissible. (Mem. Op. at 6.) For the reasons set forth in the Court's Memorandum, which need not be repeated here, Plaintiff failed to do so. Plaintiff's Motion for Reconsideration does not set forth any basis upon which this Court could conclude that it either exceeded its gatekeeping role with respect to the admission of expert testimony or misapplied the standard of law for evaluation of expert testimony. Therefore, the Court did not commit a clear error of law with respect to the

exclusion of the expert testimony of Glenn Newman.

**E. Carabello Damages Testimony**

Plaintiff further asserts that even if the testimony of Mr. Newman is not admissible, that the Court committed clear error of law by granting summary judgment based, in part, on the fact that without Mr. Newman's testimony Plaintiff had presented no evidence of damages. Plaintiff argues that it can demonstrate damages through the testimony of Anthony Carabello, one of the owners of Capital Funding.

Plaintiff does not dispute the Court's finding that Mr. Newman's testimony was the only evidence Plaintiff presented on the issue of damages. Therefore, Plaintiff's Memorandum fails to demonstrate "clear error." Instead, Plaintiff asserts that new evidence of damages, in the form of proposed testimony by Mr. Carabello, should be considered by the Court. As discussed above, however, Mr. Carabello is not a new, previously unavailable witness and, therefore, the Court may not consider his as-yet-nonexistent testimony regarding damages on a motion for Reconsideration. Therefore, the Court's granting of summary judgment will not be overturned on this ground.

**F. Evidence of Breach**

Finally, Plaintiff challenges the Court's determination that there is no evidence of breach. In doing so, Plaintiff reasserts its argument that breach can be shown by Anthony Carabello's interpretation of TransUnion credit reports, an argument previously discussed and rejected above.

Because Plaintiff has not demonstrated that the Court committed a clear error of law, or that new, previously unavailable evidence has come to light, or otherwise satisfied the

necessary standard for a motion for reconsideration, Plaintiff's Motion is DENIED. An appropriate order follows.

