

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

CHRISTOPHER T. BORN, M.D. : CIVIL ACTION
 :
 v. :
 :
 WILLIAM IANNAcone, M.D., :
 ROBERT DALSEY, M.D., :
 LAWRENCE DEUTSCH, M.D. :
 JOHN CATALANO, M.D., and :
 THE COOPER HEALTH SYSTEM :
 d/b/a COOPER HOSPITAL/ :
 UNIVERSITY MEDICAL CENTER : NO. 97-5607

MEMORANDUM AND ORDER

HUTTON, J.

December 7, 1998

Presently before this Court is the Plaintiff's Motion for Reconsideration (Docket No. 35) and Defendant The Cooper Health System's response thereto (Docket No. 36). For the reasons stated below, the Plaintiff's Motion is **GRANTED**.

I. BACKGROUND

On June 4, 1997, Plaintiff Christopher T. Born, M.D. filed a complaint against various Defendants with violations of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 2 (1994), the Federal Trade Commission Act, 15 U.S.C. § 11 (1994), the False Claims Act, 31 U.S.C. § 3730 (1994), and with numerous violations of New Jersey law, in connection with a transaction in which The Cooper Health System ("Cooper") acquired University Orthopaedic Specialists ("UOS"), and South Jersey Medical Management Company

("SJMMC") and allegedly excluded Dr. Born from his medical practice. On September 30, 1998, this Court dismissed the Plaintiff's False Claims Act and Qui Tam Claim of his Amended Complaint because of the Plaintiff's failure to submit a timely response to the Defendants' Motions to Dismiss. The Plaintiff now moves for reconsideration.

II. DISCUSSION

A. Motion for Reconsideration Standard

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) it is 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 270 (3d Cir. 1995); McDowell Oil Serv., Inc. 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).

B. Analysis of Plaintiffs' Motion for Reconsideration

In the instant case, the Court granted the Defendants' motion to dismiss Count IV of the Plaintiff's Amended Complaint as uncontested, pursuant to Local Rule of Civil Procedure 7.1(c). See Mem. and Order dated Sep. 30, 1998, by Honorable J. Hutton, Christopher T. Born, No. CIV.A. 97-5607 at 18. Nine days after the Court issued that Order as computed in accordance with Rule 6(a) of

the Federal Rules of Civil Procedure, the Plaintiff filed the instant motion, in which he argues that "the Court dismissed Count IV based on the Court's apparent mistaken belief . . . that Cooper's Motion to Dismiss Count IV was uncontested, when, in fact, Plaintiff had timely filed and served a Memorandum in Opposition to Cooper's Motion to Dismiss on May 18, 1998. Thus, the Plaintiff asserts that he made a timely response, and that the Defendants' motions should not have been granted as uncontested. (Pl.'s Mem. in Supp. of Mot. for Recons. at 2.)

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). The Defendant concedes that it was served with a copy of the Plaintiff's Memorandum in Opposition on May 20, 1998. The Defendant argues, however, that service on counsel is not the test for effective opposition under the rules; rather, he asserts the opposing papers had to be filed with the Court.

Rule 5(d) of the Federal Rules of Civil Procedure provides that "[a]ll papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service

. . . ." Fed. R. Civ. P. 5(d). Rule 5(e) teaches us that "[t]he filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the paper to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk" Fed. R. Civ. P. 5(e).

To this Court's knowledge, on May 18, 1998, the Plaintiff never filed the Memorandum in Opposition to Defendants' Motion to Dismiss with the clerk of court nor did this Court receive a courtesy copy of the Memorandum in Opposition. In fact, no evidence suggests that the Plaintiff later attempted to file this memorandum. The only entries for the entire month of May 1998, are as follows:

- (1) May 8, 1998, Docket No. 26 - Motion by Defendant Cooper Health to Dismiss Plaintiff's Qui Tam Claim;
- (2) May 11, 1998, Docket No. 27 - Brief by Plaintiff in Opposition to Cooper's Motion to Dismiss or Transfer for Improper Venue;
- (3) May 11, 1998, Docket No. 28 - Affidavit by Plaintiff in Support of Opposition to Defendants' Motions to Dismiss; and
- (4) May 11, 1998, Docket No. 29 - Brief by Plaintiff in Opposition to Individual Defendants' Motion to Dismiss Amended Complaint.

Accordingly, this Court finds that the September 30, 1998, Order dismissing the complaint conformed with the local rules, and thus was not premature.

Nonetheless, given that dismissing a plaintiff's action is a 'drastic' measure and should be used only as a 'last resort,'" Austin v. Nissan Motor Corp., U.S.A., No. CIV.A.95-1464, 1996 WL 117472, at *3 (E.D. Pa. Mar. 12, 1996) (citing Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994)), and to prevent manifest injustice to the Plaintiff, this Court will vacate the portion of its earlier Order dismissing Count IV of the Plaintiff's Amended Complaint.

An appropriate Order follows.

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O R D E R

AND NOW, this 7th day of December, 1998, upon consideration of the Plaintiff's Motion for Reconsideration (Docket No. 35) and Defendant The Cooper Health System's response thereto (Docket No. 36), IT IS HEREBY ORDERED that the Plaintiff's Motion is **GRANTED**.

(1) this Court's Order dated September 30, 1998 (Docket No. 34) dismissing Count IV of the Plaintiff's Amended Complaint is vacated;¹ and

(2) the Defendant has fourteen (14) days from the date of this Order to file its reply brief to the Plaintiff's Motion in Opposition to the Defendants' Motion to Dismiss.

BY THE COURT:

HERBERT J. HUTTON, J.

¹This Order vacates only the portion of the September 30, 1998, Order dismissing Plaintiff's False Claims Act and Qui Tam Claim (Count IV of the Plaintiff's Amended Complaint).