UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff

v.

Civil Action No. 1:09-cv-506
Hon. William C. Griesbach

WEALTH MANAGEMENT LLC,
JAMES PUTMAN, and SIMONE FEVOLA,

Defendants, and

WML GRYPHON FUND, LLC;
WML WATCH STONE PARTNERS, L.P.; WML PANTERA PARTNERS, L.P.; WML PALISADE PARTNERS, L.P.; WML L3, LLC;
WML QUETZAL PARTNERS, L.P., and
EMPLOYEE SERVICES OF APPLETON, INC.,

Relief Defendants.

NON-PARTIES WOOD, HAT & SILVER, LLC'S AND JOSEPH AARON'S MEMORANDUM OF LAW IN OPPOSITION TO THE RECEIVER'S MOTION TO ALTER OR AMEND THE COURT'S JUDGMENT OF FEBRUARY 15, 2011

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Non-parties Wood, Hat & Silver LLC ("WHS") and Joseph Aaron ("Aaron"), by and through their attorneys, Seward & Kissel LLP, who have appeared in this action solely for the purpose of opposing the Motion to Compel (Docket Nos. 315, 319), filed by Faye B. Feinstein, as Court-appointed receiver of Wealth Management LLC and its funds (the "Receiver"), respectfully submit this Memorandum of Law in Opposition to "The Receiver's Motion to Alter or Amend the Court's Judgment" of February 15, 2011 that denied the Motion to Compel.

Preliminary Statement

The Receiver casts her motion as one under Fed. R. Civ. P. 59(e) to alter or amend a "judgment." But she does not seek to alter or amend a "judgment" here, as no judgment was issued. An order was issued, and it is not a final order, so Rule 60(b) would not apply either. The Receiver really seeks reconsideration or reargument of an order. Because the Receiver has no sound basis on which to make a reargument motion, she thus styled the instant motion as one to amend a judgment. The motion should be denied on that ground alone.

As to the substance, conceding that she did not comply with 28 U.S.C. § 754 in that she failed to file in California a copy of the complaint and order appointing her as receiver, the Receiver nevertheless asks that the Court vacate, alter or amend its Decision and Order of February 15, 2011 (Docket No. 353) (the "Order"). The Order is correct. The Receiver filed the complaint and appointment order in Delaware, but (i) she never filed the complaint and appointment order in California, which she was required to do under Section 754 (the Receiver must file "in the district court *for each district* in which property is located"), and (ii) she never issued a subpoena from Delaware. The Order correctly held that this Court lacks personal jurisdiction over WHS and Aaron.

The Receiver claims that this Court misinterpreted the relevant law, despite the fact that she did not cite so much as one case in *any* of the three briefs she filed in support of the initial motion to compel (*See* Docket Nos. 316, 319, 338). The Receiver is simply seeking to relitigate a motion, which is not allowed. In any event, the Court did not misinterpret the law, the Order is correct, and the motion should be denied.

Statement Of Facts

The facts underlying the Motion to Compel are set forth more fully in WHS's and Aaron's Memorandum in Opposition to the Receiver's Motion to Compel Discovery (Docket No. 321).

On October 1, 2010, the Receiver issued a subpoena to WHS and Aaron from the United States District Court for the Northern District of California (the "October Subpoena"), where WHS has its principal place of business and Aaron is a domiciliary. The October Subpoena essentially sought all business records and communications related to non-parties the Brown Investment Fund, L.P. and the Baetis Fund, L.P. Following WHS's and Aaron's detailed Objections to the October Subpoena, the Receiver moved, in this Court, for an order compelling WHS and Aaron to produce documents in response to the October Subpoena (Docket No. 315). In the Receiver's supporting brief, she did not address the Court's jurisdiction, cited no case law and, in short, argued that the discovery was necessary so that the Receiver could fulfill her duties (Docket No. 316).

On December 3, 2010, upon learning of the motion to compel, counsel for WHS and Aaron, citing Fed. R. Civ. P. 45(c)(2)(B)(i), advised counsel for the Receiver that WHS and Aaron believed that the Receiver's motion to enforce the October Subpoena, which was issued from the Northern District of California, was filed in the wrong court (Docket No. 319, Ex. C). In response, on December 6, 2010, the Receiver withdrew the October Subpoena. She then

issued a new subpoena (the "December Subpoena"), which was identical to the October Subpoena, except the December Subpoena was issued from the Eastern District of Wisconsin, where neither WHS nor Aaron is located. The Receiver then purported to serve the December Subpoena on WHS and Aaron in the Northern District of California.

On the same day she issued the December Subpoena, the Receiver filed a new motion to compel (Docket No. 319). In the Receiver's so-called supplemental brief, she dedicated one paragraph of her "Introduction" to the Court's jurisdiction. Relying on 28 U.S.C. § 1692, the Receiver concluded that "[b]ecause the receivership estate has a personal property interest in Baetis and Brown (i.e., the limited partnership interests), the Court has the jurisdiction and authority to issue process compelling discovery . . . ." (Docket No. 319, at 5). The remainder of the brief rehashed the same arguments made in the initial motion to compel (*see id.* at 3-4).

Because the new motion to compel was filed even before the December Subpoena was allegedly served on WHS and Aaron (*see* Docket No. 320), WHS and Aaron first responded pursuant to Fed. R. Civ. P. 45 by objecting to the December Subpoena on a variety of grounds, including lack of jurisdiction (Docket No. 322, Ex. B). The parties then fully briefed the motion, with the Receiver filing three briefs in support of the motion to compel (Docket Nos. 316, 319, 338). The motion was ultimately decided on jurisdictional grounds. WHS and Aaron maintain that if this Court had jurisdiction, its substantive objections to the December Subpoena would be meritorious.

In short, this Court concluded as follows:

> [28 U.S.C.] § 754 requires that the complaint and order of appointment must be filed *in each district* in which the receiver expects to invoke the jurisdiction of the appointing court. Here, the receiver is attempting to compel production of documents from

> WHS and Joseph Aaron, who are both domiciled in the Northern District of California. *The receiver has not cited any authority that would allow this Court to exercise personal jurisdiction over non-party California residents merely because she filed certain documents in a Delaware court.*

Order, at 3 (Docket No. 353) (emphasis added). The Receiver concedes that (1) the documents requested by the Subpoena are maintained in the Northern District of California, (2) the Receiver did not file the complaint and order of appointment in the Northern District of California (although she knew from the time of appointment that WHS and Aaron resided there), and (3) the December Subpoena did not issue out of the Northern District of California or Delaware.

Argument

I. Because No "Judgment" Was Issued, the Receiver Has No Basis For Relief Under Fed. R. Civ. P. 59 or 60

In asking the Court for relief under Rule 59(e), the Receiver ignores that the rule is only available to alter or amend a "judgment." The Court did not issue a judgment. The Receiver actually seeks reargument of an order. Nor can the Receiver seek relief under Fed. R. Civ. P. 60, which she does not invoke. Rule 60(b) properly applies only to final orders. The Receiver simply has no basis for the extraordinary remedy she seeks.

Pursuant to Fed. R. Civ. P. 54(a), "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). The Order, which simply decided a motion to compel, is not a "judgment" at all. Similarly, Fed. R. Civ. P. 60(b) provides for relief from "a final judgment, order, or proceeding . . . ." Fed. R. Civ. P. 60(b). The Order is not a final order, as the Court denied a motion to compel on personal jurisdiction grounds. Even if Rule 60(b) jurisdiction could be invoked, it is an "extraordinary remedy that is not designed to address legal errors made by a district court; it is not a substitute for an appeal." *Griffin v. City of Milwaukee*, Case No. 10-C-243, 2011 U.S. Dist. LEXIS 12773, at *7 (E.D.

Wis. Jan. 30, 2011); *see also Eskridge v. Cook Cnty.*, 577 F.3d 806, 809 (7th Cir. 2009) (noting that Rule 60(b) is "designed to address mistakes attributable to special circumstances"). Rule 60(b) relief is appropriate only "under the particular circumstances listed in the text of the rule." *Griffin*, 2011 U.S. Dist. LEXIS 12773, at *7; *see also* Fed. R. Civ. P. 60(b)(1)-(6). Not only does the Receiver not rely on Rule 60(b), she does not list any of the grounds for relief cited therein as a basis for the motion.

Instead, the Receiver asks for relief due to the Court's "manifest error of law." (Docket No. 357, at 3). As the Seventh Circuit has noted, Rule 60(b) is not "the proper avenue to redress mistakes of law [allegedly] committed by the trial judge." *Parke-Chapley Constr. Co. v. Cherrington*, 865 F.2d 907, 915 (7th Cir. 1989). The Receiver has made no argument that she is entitled to relief under any of the enumerated factors in Rule 60(b). On this basis alone, the motion should be denied.

II. Even If It Applied, the Receiver Has Not Met the Standard for Rule 59(e) Relief, Because the Court Has Not Made a Manifest Error Of Law

Should the Court consider the Receiver's arguments under Rule 59(e) – which WHS submits would not be proper – they too are without merit. The Receiver asks the Court to vacate, alter, or amend the Order based on a filing in Delaware. The Receiver argues that because WHS is organized under the laws of Delaware and she made the requisite § 754 filing in Delaware (but no subpoena was issued from Delaware), issuing the December Subpoena from the Eastern District of Wisconsin and then purporting to serve the same on WHS and Aaron in the Northern District of California extends the Court's jurisdiction to compel WHS and Aaron to produce documents located in the Northern District of California. The Receiver is wrong.

The Seventh Circuit recognizes limited grounds upon which a party is entitled to relief on a Rule 59(e) motion. Specifically, with respect to a judgment the moving party "must

clearly establish either a manifest error of law or fact or must present newly discovered evidence." *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995). "A 'manifest error' is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Guardian Pipeline, L.L.C. v. 295.49 Acres*, Case No. 08-C-0028, 2010 U.S. Dist. LEXIS 125485, at *5 (E.D. Wis. Nov. 26, 2010). It is the Receiver who has ignored precedent cited by WHS, not the Court.

Rule 59(e) is not appropriately used to re-litigate issues already decided by the Court. *See Sigworth v. City of Aurora*, 487 F.3d 506, 512 (7th Cir. 2007). As the Seventh Circuit recently noted, succeeding on a Rule 59(e) motion is "a hard row to hoe," because such motions "may not be used to cure defects that could have been addressed earlier." *Fannon v. Guidant Corp.*, 583 F.3d 995, 1002 (7th Cir. 2009); *see also Newbon v. Nehls*, Case No. 09-C-548, 2010 U.S. Dist. LEXIS 43272, at *2 (E.D. Wis. Apr. 5, 2010) ("Nor should such a motion be used to present evidence that was available earlier or attempt to correct a party's own procedural errors.").

As WHS amply covered in its memorandum dated December 30, 2010, and as the Order recognizes, 28 U.S.C. § 1692 does not invoke blanket jurisdiction over every district in the country. The Receiver must first make the requisite filing pursuant to § 754 "'*in each district*' in which the receiver expects to invoke the jurisdiction of the appointing court." Order, at 3 (Docket No. 353) (emphasis added). Notwithstanding that she knew at all times WHS and Aaron were in California, the Receiver did not file in the Northern District of California, which is where she purported to serve non-parties WHS and Aaron, where those non-parties are

domiciled, and where the documents the Receiver seeks are located.[1] The Court correctly interpreted the receivership statutes and the relevant case law, and there is no "manifest error of law." The Receiver's missteps and mistakes do not provide proper grounds for Rule 59(e) relief and the motion should be denied. *See Fannon*, 583 F.3d at 1002; *Sigworth*, 487 F.3d at 512.[2]

The Receiver further argues that because the Court has personal jurisdiction over WHS and Aaron by virtue of the Delaware filing, the Court may compel the non-parties to produce documents in their custody, possession, and control, *wherever* they are located (Docket No. 357, at 5-6). This argument is one never before raised in the motion to compel. On that basis alone, it should be rejected. *See Sigworth*, 487 F.3d at 512 (noting that Rule 59(e) is not the proper vehicle "to advance arguments or theories that could and should have been made before the district court rendered a judgment").

In any event, in an attempt to expand the Court's jurisdiction, the Receiver's argument improperly conflates the Receivership statutes with Rule 45. Section 754 grants a receiver jurisdiction over property situated in districts outside of a court's ordinary jurisdiction, but only after the receiver has filed copies of the complaint and the order of appointment "in the district court *for each district* in which the property is located." 28 U.S.C. § 754 (emphasis added). The Receiver is seeking to use WHS's incorporation in Delaware to get around the fact that she failed to file the complaint and order of appointment in the Northern District of

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[1] Further, the Receiver never issued a subpoena from Delaware and never purported to serve WHS or Aaron in Delaware, which would be required under Rule 45. Proper service of process is a necessary prerequisite to obtaining personal jurisdiction over a party, despite its presence in the state. *See Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

[2] In the event that the Court entertains the Receiver's motion, non-parties Wood Hat & Silver LLC and Joseph Aaron vigorously renew their substantive objections and arguments in response to the motion to compel (Docket No. 321, at 12-20) and respectfully request that the Court issue an order (i) quashing the December Subpoena, and (ii) awarding WHS and Aaron their costs in defending the motion to compel.

California where the property (i.e., the documents) is located. Indeed, the Receivership statute goes on to state that "*[t]he failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.*" *Id.* (emphasis added). Thus, the Receiver's "custody, possession, and control" arguments are unavailing. Accordingly, the motion should be denied.

Conclusion

For the foregoing reasons, non-parties Wood Hat & Silver LLC and Joseph Aaron respectfully request that the Court issue an order (i) denying the Receiver's motion to alter or amend the Court's February 15, 2011 Order in its entirety, and (ii) such other and further relief as this Court deems just and proper.

New York, New York
March 31, 2011

Respectfully submitted,

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