UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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PHILIPS LIGHTING COMPANY,
a division of Philips Electronics North America Corporation,

Plaintiff,

- against-

BARRY A. SCHNEIDER,

Defendant.
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ORDER
05-cv-4820 (SLT) (MDG)

TOWNES, United States District Judge:

This matter is currently before the Court on remand from the Second Circuit Court of Appeals. Defendant Barry A. Schneider ("Defendant" or "Schneider") has filed a second motion, pursuant to Rule 60 of the Federal Rules of Civil Procedure, to vacate this Court's order granting Plaintiff Philips Lighting Company ("Plaintiff" or "Philips") summary judgment in connection with a 1985 agreement in which Schneider agreed to personally guarantee certain debts of Eltron Supply, Ltd. ("Eltron").

BACKGROUND

I. Factual History

In 1962, Barry Schneider and his family founded Eltron, a New York corporation engaged in the business of providing national distribution of electrical products. Philips' predecessor served as one of Eltron's distributors. (Docket No. 87, Barry Decl. at ¶ 6.) Two identical agreements, dated March 14, 1985, one signed by Barry and one signed by his brother, Theodore Schneider, provide, in part:

> For value received and the further consideration of any credit North American Philips Lighting Corporation (hereinafter "Oligee") may extend hereunder, (I) (We) (hereinafter "Guarantor(s)") do hereby absolutely and unconditionally guarantee the full and punctual payment to Obligee of all indebtedness which

> Eltron Supply Ltd. Inc. ... (hereinafter "Obligor") has incurred or may incur for the purchase of merchandise from Obligee, together with all expenses of collection and reasonable counsel fees incurred by Obligee by reason of default in payment of such indebtedness. The liability of the undersigned Guarantors hereunder shall not be affected by the amount of credit extended hereunder, nor by any change in the form of said indebtedness, by note or otherwise, nor by any extension of credit hereunder, of default in payment, of change in form, of renewal or extension of any of said indebtedness, or of any matter with respect hereto, is expressly waived. This guaranty shall continue in full force and effect until such time as Obligee shall receive from the undersigned Guarantors written notice of revocation, and such revocation shall not in any way relieve the undersigned from liability for any indebtedness incurred prior to the actual receipt by Obligee of said notice.
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> [Philips] shall have the right to proceed against Guarators, or any of them, immediately upon default by the Obligor in payment or performance of any obligations and shall not be required to take any action or proceedings of any kind against the Obligor or any other party liable for the Obligor's debts or obligations or any security which Obligee may hold.

(Docket No. 1, Compl., Exs. 1 & 2) (hereinafter "Agreement(s)").[1]

Barry Schneider contends that in 1998, when he retired from Eltron, he conveyed all his interest in Eltron to his brother, Theodore, in return for his brother's assumption of all of Barry's

[1] The terms "guarantee" and "surety" are often used in case law interchangeably, although they differ subtly. As explained in the Restatement (Third) of Suretyship & Guaranty, "A 'surety' is typically jointly and severally liable with the principal obligor on an obligation to which they are both bound, while a 'guarantor' typically contracts to fulfill an obligation upon the default of the principal obligor. The provisions of a particular guaranty or suretyship contract, however, will often blur much of this distinction. Although there are important differences between the two mechanisms that should not be obscured, these differences relate to the duties contractually imposed on the secondary obligor by the secondary obligation and not to the nature of the rights inherent in suretyship status." Restat 3d of Suretyship & Guaranty, § 1, Comment c.

To avoid confusion, the Restatement takes a functional approach to the nomenclature. The "Restatement avoids use of the terms 'guarantor' and 'surety.' Rather, it refers to the 'secondary obligor' who has liability to the 'obligee' on the 'secondary obligation' and the 'principal obligor' whose liability to the obligee is based on the 'underlying obligation.' The obligation of the principal obligor is always the 'underlying obligation'; similarly, the obligation of the secondary obligor is always the 'secondary obligation.'" *Id.* at Comment c. Where, as here, "principal obligor and the secondary obligor are both liable on the same contract (as is the case, for example, when the secondary obligor 'cosigns' for the principal obligor) that contract creates both the underlying obligation and the secondary obligation." *Id.* This Court follows this approach.

obligations. (Docket No. 87, Barry Decl. at ¶¶ 7-9.) The 1998 contract memorializing this sale provides, in its entirety:

> This will confirm that Barry A. Schneider ("Seller") has this day sold to Theodore L. Schneider ("Purchaser") fifty (50) shares of common stock of Eltron Supply Ltd. (the "Corporation") represented by stock certificate No. 2 of the Corporation for the sum of one ($1.00) dollar, the receipt whereof is hereby acknowledged. Barry A. Schneider hereby resigns as an officer and as a director of the Corporation effective immediately upon the execution of this memorandum. IN WITNESS HEREOF the parties hereto have executes this memorandum as of the 3rd day of December, 1998.

(Docket No. 43-3, Rule 60 Motion, Ex. C.)

On December 16, 2002, Eltron filed for Chapter 11 Bankruptcy. (Docket No. 33, Def.'s Ex. D). Eltron owed Philips money for certain merchandise that Philips had delivered to Eltron. (Docket No. 30-2, Pl.'s 56.1 Stmt. at ¶ 4.) Accordingly, Philips was scheduled in Eltron's bankruptcy proceedings as one of Eltron's unsecured creditors. (*Id.* at ¶ 16.) In its complaint dated October 7, 2005, Plaintiff sought $578,635.14 plus interest and costs from Schneider. (Compl. at ¶ 10). In the bankruptcy, Plaintiff had settled certain preferential transfer claims with Eltron's estate and stipulated, on July 20, 2005, to seek a reduced amount, $468,635.14, from Eltron's bankruptcy estate. (Docket No. 78-6, Philips Stipulation, at 4.) Defendant, in his Local Rule 56.1 counterstatement of undisputed facts, did "not dispute, for the purposes of this motion" (Docket No. 33-6, Def.'s 56.1 Stmt. at ¶ 5), that "[a]s of October 3, 2002, a balance was due and owing by Eltron to Plaintiff in the principal amount of $578,635.14." (Docket No. 30-2, Pl.'s 56.1 Stmt. at ¶ 5). On July 2, 2004, the Bankruptcy Court approved Eltron's Chapter 11 reorganization plan (the "Plan"). As part of the Plan, Plaintiff was scheduled to receive distributions from Eltron; in December 2005, Plaintiff received $46,863.51. (Docket No. 86-8, Arroyo Decl. Ex. 8.) Plaintiff received an additional $ 9,372.70 in either October, (Def.'s Rule 60 Br. at 15), or July, (Pl.'s Rule 60 Opp'n at 26), of 2007.

As part of the bankruptcy proceedings, Theodore agreed to pay $400,000 into Eltron's bankruptcy estate, and in exchange, be released from any claims that arose against him from his having been employed by and having managed Eltron. (Docket No. 33-4, Def.'s 56.1 Stmt. at ¶¶ 12-13.)

II. Procedural History

On October 11, 2005 Philips commenced this action against Schneider under the Agreement to recover on debts owed to Philips by Eltron.[1] On the advice of his father, Schneider hired John T. Brennan, Esq. to represent him in the instant action. (Docket No. 87, Barry Decl. at ¶ 20.) Brennan had represented his brother in Eltron's bankruptcy proceedings. (Docket No. 78-7, Theodore Stipulation, at 7). On March 16, 2007, Brennan, on behalf of Defendant, filed Schneider's fully-briefed motion for summary judgment. On March 26, 2007, Plaintiff filed its fully-briefed cross-motion for summary judgment.

On April 15, 2008, Plaintiff's counsel wrote to the Clerk of Court and explained that:

> "[M]ail addressed to John T. Brennan, Esq., the attorney for defendants, could not be delivered to him at the address provided in the referenced case. [Plaintiff's counsel] requested that the Post Office notify [Plaintiff's counsel] of Mr. Brennan's new mailing address. In response, the Post Office notified [Plaintiff's counsel] by letter dated April 8, 2008 that Mr. Brennan's office has moved, and that no forwarding address was left with the Post Office. ... [A] telephone company recording [advised Plaintiff's counsel] that the telephone number for his office is no longer in service, and that no additional information is available. As a result, [Plaintiff's counsel was] unable to communicate with [his] adversary by mail or telephone.

(Docket No. 35, Lttr from Philips to Clerk of Court.) On September 23, 2008, this Court entered the following Order on ECF:

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[1] Plaintiff's lawsuit, as initially filed, also named as a defendant Theodore Schneider. Pursuant to a stipulation of dismissal so ordered by this Court, all claims against Theodore Schneider were dismissed with prejudice and he is no longer a party to this lawsuit. (Docket No. 14.)

> ORDER: In considering the parties' cross-motions for summary judgment, this Court has reviewed the Bankruptcy Court's order confirming the second amended plan of liquidation. However, before this Court can decide these cross-motions, the parties must address one issue, specifically, whether the Bankruptcy Court solicited acceptances of and objections to the plan by individual creditors, and, if so, whether the plaintiff objected to the plan. The parties are hereby ordered to electronically file their responses to this question no later than 5:00 p.m. on Friday, September 26, 2008.

In response, on September 26, 2008, Plaintiff's counsel wrote to the Court and explained that "In the bankruptcy case of Eltron Supply Ltd., case no. 02-25984-DEM, on April 28, 2004, the Bankruptcy Court directed the solicitation of acceptances by all known creditors, and ordered that objections to plan confirmation shall be filed by June 3, 2004. Plaintiff did not file an objection to confirmation of the plan." (Docket No. 38, Lttr from Philips to this Court.)

In a September 30, 2008 memorandum and order ("2008 SJ Order"), this Court granted Plaintiff's motion for summary judgment and denied Defendant's motion. (Docket No. 39.) Accordingly, on October 10, 2008, judgment was entered against Defendant. Schneider contends that he first learned about this Court's 2008 Order on June 11, 2009, when he was personally served by Plaintiff with a subpoena attempting to enforce the judgment. (Docket No. 87, Barry Decl. at ¶¶ 24-25.)

On July 2, 2009, Defendant, represented by new counsel, filed a motion to vacate the judgment pursuant to Federal Rule of Civil Procedure 60(b) and stay execution of the judgment pending the outcome of his motion ("First Rule 60 Motion"). (Docket No. 42.) Defendant argued that vacatur was warranted because: (1) following the close of briefing on the parties' cross-motions for summary judgment, Defendant's counsel "disappeared;" (2) the Court overlooked Defendant's limited guaranty defense; (3) Plaintiff and its counsel misrepresented and omitted facts material to the motions for summary judgment, specifically facts related to Eltron's bankruptcy; and (4) Plaintiff, knowing that Defendant's counsel had disappeared, did

not inform Defendant that summary judgment had been entered against him until months later, thereby depriving Defendant of an opportunity to seek timely reconsideration of the decision or pursue an appeal.

In a September 8, 2009 memorandum and order ("2009 Rule 60 Order"), the Court denied Defendant's motion. The Court concluded that in light of the fact that Defendant's lawyer had disappeared only after the briefing period on the motions for summary judgment had closed, Defendant had not been prejudiced by the disappearance. The Court further concluded that whatever additional facts and arguments Defendant sought to present to the Court came too late, given that the motions were fully briefed and that Defendant was required to make such arguments in the cross-motions for summary judgment. (Docket No. 55.)

Defendant appealed this decision and, in an October 12, 2010 summary order, the Second Circuit remanded the matter to this Court. The Second Circuit directed this court to (1) address whether Defendant was prejudiced by the disappearance of his attorney; (2) address whether the timing of when he first received notice of the Court's 2008 SJ Order affected his rights in any respect relevant to his Rule 60 motion; and (3) clarify certain factual ambiguities in the record that could bear on the amount of damages awarded to Plaintiff. *Philips Lighting Co. v. Schneider*, 395 Fed. App'x 796, 798-99 (2d Cir. Oct. 12, 2010). After post-appeal discovery, Defendant filed its post-appeal motion for relief from judgment pursuant to subsections (b)(1), (b)(3), (b)(5), (b)(6), and (d)(3) of Rule 60 of the Federal Rules of Civil Rule ("Post-Appeal Rule 60 Motion"). (Docket No. 83.)

LEGAL STANDARD

A. Rule 60(b)

Rule 60(b) permits a court, in its discretion, to rescind or amend a final judgment or order for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence ...;

(3) fraud ..., misrepresentation, or other misconduct of an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; ... or

(6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

Defendant moves under subsections (b)(1), (b)(3), (b)(5), and (b)(6). A motion under subsection (b)(1) is the vehicle for correcting legal errors or factual misunderstandings by the Court. *United Airlines, Inc. v. Brien*, 588 F.3d 158, 175 (2d Cir. 2009). Subsection (b)(3) provides relief from judgment procured by the fraudulent conduct of an opposing party, and requires the movant to "show that the fraudulent conduct complained of prevented [him] from fully and fairly presenting his case," *State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 176 (2d Cir. 2004) (internal quotation marks omitted), by demonstrating either intentional misconduct or "[inadvertent] concealment [that] precluded inquiry into a plausible theory of liability, denied [movant] access to evidence that could well have been probative on an important issue, or closed off a potentially fruitful avenue of direct or cross examination." *Thomas v. City of New York*, 293 F.R.D. 498, 503-04 (S.D.N.Y. 2013) (citations omitted). Subsection (b)(5) permits, *inter alia*, relief when a judgment is satisfied by someone

other than the judgment debtor, such as when a joint-tortfeasor satisfies part of the judgment. *See Torres-Troche v. Municipality of Yauco*, 873 F.2d 499, 501 n.7 (1st Cir. 1989) ("Rule 60(b)(5) should serve as the basis for a motion to correct, regardless of the time at which a judgment is satisfied[, in order to prevent a] ... plaintiff [from] recover[ing] twice."); *BUC Int'l Corp. v. International Yacht Council Ltd.*, 517 F.3d 1271, 1274-1275 (11th Cir. 2008) ("[M]otions seeking credit for settlement amounts obtained against joint tortfeasors are appropriately brought under Rule 60(b)(5)."); *Conte v. Gen. Housewares Corp.*, 215 F.3d 628 (6th Cir. 2000) (reducing judgment by amount of settlement with joint tortfeasor). Finally, subsection (b)(6), the catch-all provision, authorizes relief for "any other reason that justifies relief," where a movant demonstrates either "extraordinary circumstances" or that "judgment may work an extreme and undue hardship." *In re Emergency Beacon Corp.*, 666 F.2d 754, 759 (2d Cir. 1981) (internal citations omitted); *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012). Such relief "is only available if Rules 60(b)(1) through (5) do not apply." *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 109 (2d Cir. 2012).

A motion pursuant to Rule 60(b) must generally be supported by "highly convincing" evidence, and the movant must "show good cause for failure to act sooner" and "that no undue hardship [will] be imposed on" the non-moving party. *Kotlicky v. U.S. Fid. & Guar. Co.*, 817 F.2d 6, 9 (2d Cir. 1987). As relevant here, a motion under subsections (b)(1) and (b)(3) must be made no more than one year after entry of judgment, while a motion under subsections (b)(5) and (b)(6) must be made within a reasonable time. Fed. R. Civ. P. 60(c).

Rule 60(b) "strikes a balance between serving the ends of justice and preserving the finality of judgments." *Nematzer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986) (citations omitted). The Second Circuit has cautioned that Rule 60(b) may "not be used as a substitute for a timely

appeal" and that cases should not "be lightly reopened." *Id.* Thus, a Rule 60(b) motion cannot be granted where the moving party merely seeks to relitigate an issue already decided. *Competex, S.A. v. Labow*, 783 F.2d 333, 335 (2d Cir. 1986) ("Rule 60(b) is not a substitute for appeal ... [and the movant] may not relitigate the bases for the ... judgment entered."); *Mastini v. American Tel. & Tel. Co.*, 369 F.2d 378 (2d Cir. 1966) (A motion for relief from judgment is properly was denied when the movant attempts to use the motion to relitigate the merits of claim); *Maldonado v. Local 803 I.B. of T. Hlth. & Welfare Fund*, 490 F. App'x 405, 406 (2d Cir. 2013) (summary order) (same) (citing *Zerman v. Jacobs*, 751 F.2d 82, 85 (2d Cir. 1984) (dismissing an appeal from the denial of a Rule 60(b) motion where the appellant "continue[d] to relitigate the same issue that the district court [previously] decided")). Likewise, a Rule 60(b) motion cannot be used to raise new claims or defenses or present new arguments that could have been raised earlier. *United States v. Ctrami*, 563 F.2d 26, 33 (2d Cir. 1977) ("[C]ourts should not encourage the reopening of final judgments or casually permit the relitigation of litigated issues out of a friendliness to claims of unfortunate failures to put in one's best case."); *Westport Ins. Corp. v. Goldberger & Dubin, P.C.*, 255 F. App'x 593, 595 (2d Cir. 2007) (summary order) ("New arguments based on hindsight regarding how a movant would have preferred to have argued its case do not provide grounds for Rule 60(b) relief."); *Meteor Ag v. Fed. Exp. Corp.*, 08 CIV. 3773 (JGK), 2009 WL 3853802, at *3 (S.D.N.Y. Nov. 18, 2009) ("New arguments may not be raised in a motion for ... relief under Rule 60(b))(citing *Nemaizer*, 793 F.2d at 62). Whether to grant a Rule 60(b) motion is within the discretion of the district court. *Nemaizer*, 793 F.2d at 61-62.

B. Rule 60(d)

Rule 60(d)(3) permits a court to "set aside a judgment for fraud on the court." "The requirements for relief under Rule 60(d)(3) are stringent and narrow." *Anderson v. New York*, 07 CIV. 9599 SAS, 2012 WL 4513410, at *4 (S.D.N.Y. Oct. 2, 2012); Moore's Federal Practice § 60.21(4)(c) (explaining that broadly interpreting fraud-on-the-court doctrine under Rule 60(d)(3) would render meaningless the remedies and time limitations prescribed by Rule 60(b)).

The Second Circuit has explained that:

> Fraud upon the court as distinguished from fraud on an adverse party [under Rule 60(b)(3)] is limited to fraud which seriously affects the integrity of the normal process of adjudication. Fraud upon the court should embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases. Fraud upon the court must be established by clear and convincing evidence.

King v. First Am. Investigations, Inc., 287 F.3d 91, 95 (2d Cir. 2002) (internal quotation marks, citations and alterations omitted). Thus, relief from judgment under Rule 60(d) is only available when necessary "to prevent a grave miscarriage of justice." *United States v. Beggerly*, 524 U.S. 38, 47 (1998). "Examples of conduct that" reaches this high standard "include bribery of a judge, jury tampering, or hiring an attorney for the sole purpose of improperly influencing the judge." *United States v. Bennett*, No. S197CR639, 2004 WL 736928, at *2 (S.D.N.Y. Apr. 5, 2004). "'Further, the fraud, misrepresentation or conduct must have actually deceived the court. If a court's judgment was not influenced by the conduct at issue, the judgment should not be set aside." *In re Old Carco LLC*, 423 B.R. 40, 52 (Bankr. S.D.N.Y. 2010) (citing *United States v. Smiley*, 553 F.3d 1137, 145 (8th Cir. 2009)). There is a one year statute of limitations for claims brought under Rule 60(d)(3).

DISCUSSION[2]

The Second Circuit remanded to this Court for consideration of the following issues:

> Possible Prejudice: "[R]econsider whether Schneider was prejudiced by the disappearance of his lawyer"; "[D]etermine when Schneider first received notice of the summary judgment decision, and ... consider whether the timing of the notice affected his rights in any respect relevant to his Rule 60 motion."; Consider Defendant's Rule 60 arguments, including whether this Court erred with respect to (1) Schneider's failure to submit a timely claim in the bankruptcy and (2) "Schneider's argument that he was released in full because he had conveyed all his interest in Eltron to his brother in 1998, in return for his brother's assumption of all obligations."
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> Judgment Amount: Address "whether the amount of the judgment is based on mistakes or omissions."

Philips Lighting, 395 Fed. App'x at 798-99.

The disappearance of an attorney during the pendency of an action resulting in prejudice to the litigant is grounds for granting relief from judgment. *See Vindigni v. Meyer*, 441 F.2d 376, 377-78 (2d Cir. 1971) (where, unbeknownst to plaintiff, his attorney disappeared after filing complaint and, aware of the attorney's disappearance, the Court and defendant nevertheless pressed on, plaintiff was relieved from judgment for failure to prosecute); *United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977) (where, plaintiffs' attorney failed to oppose the government's motion for summary judgment because of his mental illness, plaintiffs were relieved from default judgment). The Second Circuit directed this Court to consider whether Schneider experienced any prejudice as a result of his attorney's absence. Schneider's attorney disappeared after the close of summary judgment briefing. Schneider contends that, as a result, he did not receive notice of the October 10, 2008 decision granting Plaintiff's motion for

[2] As an initial matter, this Court observes that the parties' papers are heavy on hyperbole and rhetoric. In a case where one attorney vanished mid-representation and another is accused of intentionally deceiving the Court, such excessive rhetoric is particularly inappropriate and undermines the decorum and integrity of the judicial process.

summary judgment until June 11, 2009.[3] Schneider asserts that this was the first he heard of this Court's decision. (Docket No. 87, Barry Decl. at ¶¶ 24-25.) As a result, Schneider did not have an opportunity to file a timely motion for reconsideration or appeal and did not have an opportunity to respond to the Court's question, posed to the parties via ECF on September 23, 2008. Thus, he will have suffered prejudice if any of the arguments his attorney would have raised in a timely motion for reconsideration or in response to the Court's September 23, 2008 inquiry would have been resolved in his favor. As such, in determining what possible prejudice Schneider suffered as a result of his attorney's disappearance, this Court will consider the merits of Defendant's Post-Appeal Rule 60 motion as though it was filed promptly after judgment was entered.

Defendant's Post-Appeal Rule 60 arguments can be broken into two categories: ones that address the liability portion of this Court's summary judgment order, and ones that go to the amount of damages awarded to Plaintiff. Specifically, Defendant asserts that, in addition to ***responding to this Court's September 23, 2008 query***, had Schneider's attorney not disappeared, on reconsideration he could have:

(i) corrected this Court's misapprehension of Barry's role (or lack thereof) in the Eltron Bankruptcy proceedings, ... – a fact which ... would have precluded the Court from summarily declining ... to consider the effect of the Eltron discharge on Barry's liability under the Guaranty;

(ii) pointed out that summary judgment in favor of Philips was inappropriate in light of the issues of material fact concerning, among other things, ***Barry's limited guaranty defense*** [and defense that ***his brother assumed all of his obligation in 1998***]; and

(iii) at the very least, advised the Court that the Judgment amount was based upon an ***improper and inflated claim for damages.***

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[3] There is no need to ascertain precisely when Schneider learned of the 2008 SJ Order because the precise date is immaterial to this Court's analysis. Accordingly, the Court will accept as true Defendant's contention that he did not learn of the 2008 SJ Order until June 2009.

(Def's Rule 60 Br. at 36) (emphasis added). This Court will address each of these purported grounds for finding prejudice in turn.

I. Was Defendant Prejudiced by His Attorney's Failure to Respond to the Court's September 23, 2008 Query As a Result of His Disappearance?

In his summary judgment briefing, Schneider argued that the confirmation of Eltron's bankruptcy plan and Theodore's release (without a reservation of rights against Schneider) affected a complete release of Schneider, pursuant to Gen. Oblig. Law § 15-105(1). On September 23, 2008, this Court directed the parties to "address one issue, specifically, whether the Bankruptcy Court solicited acceptances of and objections to the plan by individual creditors, and, if so, whether the plaintiff objected to the plan." In response, on September 26, 2008, Plaintiff's counsel explained that, yes, "In the bankruptcy case of Eltron Supply Ltd., case no. 02-25984-DEM, on April 28, 2004, the Bankruptcy Court directed the solicitation of acceptances by all known creditors, and ordered that objections to plan confirmation shall be filed by June 3, 2004," and no, "Plaintiff did not file an objection to confirmation of the plan." (Docket No. 38.) Based, in part, on this response, this Court determined that Philips had affirmatively released Theodore from his share of the liability under the Agreements. Thus, this Court concluded that Gen. Oblig. Law § 15-105(1) did, indeed, release Schneider from responsibility on half of the obligation that he and his brother shared. Relying on, *inter alia*, *Cove Hollow Realty Corp. v. 1426 Third Ave. Corp.*, 198 A.D.2d 42, 43 (N.Y. App. Div. 1st Dept. 1993), this Court held that by virtue of Plaintiff's release of Theodore, Barry was relieved of one-half (1/2) of his obligation. This Court found the situation analogous to the situation in *Cove*, in which the Appellate Division of the New York Supreme Court held that, after one of three co-sureties was released, the liability of the remaining sureties had to be "reduc[ed] ... by the percentage, one third, attributed to the release of the co-surety." *Id.* Similarly here, this Court held that

Plaintiff's release of Theodore reduced Defendant's liability by one half. Thus, the answer provided by Plaintiff inured to Defendant's benefit – decreasing the amount owed on the obligation because Plaintiff had released Defendant's co-obligor. In any event, the Court's question (whether *Plaintiff* had objected to the Plan) was directed at Plaintiff and was fully addressed by Plaintiff. Defendant's counsel could not have answered this Court's question differently. Thus, Defendant suffered no prejudice as a result of his attorney's disappearance shortly before this question was posed by the Court.

II. Would this Court have Granted a Reconsideration Motion Directed at this Court's Observation that Schneider Failed to File a Timely Proof of Claim in Eltron's Bankruptcy Proceedings?

In its 2008 SJ Order, this Court declined to reach the issue of the effect of Eltron's release on Defendant's obligation. This Court observed that Eltron's 2004 bankruptcy plan had long ago been confirmed and Schneider had failed to file a timely notice of claim. It is out of this mole-hill of an observation that Defendant attempts to make a mountain. Defendant's Rule 60 motion is directed at this Court's observation that Barry "failed to file a timely notice of claim" in Eltron's bankruptcy. Defendant explains that Barry did not "fail," but rather he did not object because he was not on notice of the bankruptcy. Defendant argues that, had Schneider's attorney not disappeared, on reconsideration he could have:

> corrected this Court's misapprehension of [Schneider's] role (or lack thereof) in the Eltron Bankruptcy proceedings, and made clear that Barry had not received notice of the Bankruptcy proceeding, much less the bar date for claims, and consequently did not have the opportunity to object to confirmation of Eltron's discharge Plan – a fact which, if timely brought to the Court's attention, would have precluded the Court from summarily declining, as it did, to consider the effect of the Eltron discharge on Barry's liability under the Guaranty.

(Def.'s Rule 60 Br. at 36) (emphasis in original). To reiterate, Defendant contends that prejudice flows from this Court's failure to "consider the effect of Eltron's discharge on Barry's liability under the Guaranty." (*Id.*)[4]

On summary judgment, Schneider argued, first, that confirmation of Eltron's bankruptcy plan and Theodore's release (without a reservation of rights against Schneider) affected a complete release of Schneider, pursuant to Gen. Oblig. Law § 15-105(1), and second, that the "confirmation order and release of Theodore Schneider completely obliterated" his rights of subrogation, indemnification and/or contribution, in violation of the doctrine of *strictissimi juris* – the rule that a guarantor's liability is strictly construed and cannot be altered without his consent. (Docket No. 29, Def.'s SJ Br. at 11.) In opposition, Plaintiff responded that the release of Eltron in bankruptcy could not release Schneider, either under Gen. Oblig. Law § 15-105(1) or under a theory of *strictissimi juris*, because "11 U.S.C. § 524(e) provides, in part, that 'discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any

[4] The Second Circuit instructed this Court to clarify certain factual issues. The Circuit observed, in dicta, that: "The district court also concluded that Schneider failed to submit a timely claim in the bankruptcy proceeding, but because Schneider was not a creditor, it does not appear that he was obliged to submit a claim." *Philips Lighting Co. v. Schneider*, 395 F. App'x 796, 799 (2d Cir. 2010). The Bankruptcy Code defines a "creditor" as any "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C.A. § 101(10)(A). A claim, in turn, is very broadly defined to include, *inter alia*, a contingent right to payment or an equitable remedy. 11 U.S.C.A. § 101(A). Under this definition, a secondary obligor is an unsecured creditor in the primary obligor's bankruptcy because the secondary obligor has a right of subrogation or indemnification against the primary obligor. *See In re Suprema Specialties, Inc.*, 370 B.R. 517, 527-28 (S.D.N.Y. 2007) *aff'd*, 309 F. App'x 526 (2d Cir. 2009) (explaining that a surety's right of subrogation puts it on the same footing as the obligee – that of unsecured creditor); *see also Indian Motorcycle Associates, Inc. v. Drexel Burnham Lambert Group., Inc. (In re The Drexel Burnham Lambert Group., Inc.)*, 157 B.R. 532, 535 (S.D.N.Y. 1993) ("[A]n unconditional guaranty evidences a known contingent claim as defined under bankruptcy law."); *In re Manville Forest Products Corp.*, 225 B.R. 862, 868 (Bankr. S.D.N.Y. 1998) *subsequently aff'd*, 209 F.3d 125 (2d Cir. 2000) ("indemnity rights constituted a contingent claim...."). In any event, as directed by the Second Circuit, this Court clarifies that Schneider withdrew this argument and thus, he suffered no prejudice as a result of this Court's conclusion that he did not file a timely proof of claim in Eltron's bankruptcy.

other entity for such debt.'" (Docket No. 31, Pl.'s Opp'n Br. at 11.) In response, after initially arguing that he was not liable on the Agreement as a result of both (1) Eltron's confirmation order and (2) the release of Theodore, Defendant withdrew his arguments as to Eltron's confirmation order. Instead, he expressly limited his brief to the effect that the releases between, on one hand, his co-obligor, Theodore, and on the other, the obligee, Plaintiff, and the primary obligor, Eltron. (Docket No. 29, Def.'s SJ Br. at 11). In opposition to Plaintiff's cross-motion for summary judgment, Defendant's counsel stated that:

> ***Mr. Schneider has never argued that Eltron's discharge from bankruptcy affected a release of his obligations under the guarantee.*** No where [*sic*] in the defendant's opening memorandum is this argument articulated. What defendant did argue is that the Eltron discharge order, the document that contains ***the release of Theodore Schneider***, effectuated such a release as a matter of law. In light of the fact that plaintiff's arguments about §524(a) are not directed to any argument made by defendant, they truly have no import on these motions.

(Docket No. 33-6 at 11) (emphasis added). By this clarification, Defendant withdrew any objections to the loss of his rights of subrogation or indemnification from the principal obligor, Eltron, as a result of discharge of its obligations in bankruptcy.

Because Defendant expressly limited his motion to the effect that the release ***of his brother*** had on his rights, this Court declined to consider the effect of Eltron's discharge on Schneider's obligations. This Court concluded that the release of his brother did not result, as Schneider argues, in "irreparable prejudice ... absolving him of liability," (Def.'s Rule 60 Br. at 28), because Schneider's contribution rights were not "obliterated" by Theodore's release in the bankruptcy court; rather, per Gen. Oblig. Law § 15-105(a), Schneider could not seek contribution because his brother already paid/was released from his half of the obligation. Consequentially, this Court halved Schneider's liability obviating any need for contribution. Accordingly, Defendant's Post-Appeal Rule 60 motion directed at the effect of Eltron's

discharge, even if timely, would have been denied, because that issue was expressly withdrawn. Thus, Defendant's delay in filing a Rule 60 motion due to his attorney's disappearance did not prejudice Defendant.

Had Defendant not withdrawn his argument that the discharge of Eltron's debts in bankruptcy required his discharge, he nevertheless would not have prevailed. "A guarantee agreement is to be construed like other contracts in order to give effect to the parties' intentions." *Caldor, Inc. v. Mattel, Inc.*, 817 F. Supp. 408, 410-11 (S.D.N.Y. 1993) (citation omitted). A guarantor "cannot be held responsible to guarantee a performance different from that which he intended or specified in the guaranty." *Id.* (quotation omitted). The possibility that Eltron, the principal obligor, may default on its obligations and/or file for bankruptcy is the very reason that Plaintiff demanded a personal guarantee from Eltron's executives. Moreover, as Plaintiff argued, prompting Defendant to withdraw his argument, the Bankruptcy Code provides that the "discharge of a debt of the debtor does not affect the liability of any other entity ... for such debt." 11 U.S.C. § 524(e); *see also In re S. Side House, LLC*, 470 B.R. 659, 673 (Bankr. E.D.N.Y. 2012) (explaining that "while a bankruptcy case may result in the discharge of the debtor's obligations or impair the claim of a creditor, a non-debtor guarantor's liability is not modified by the bankruptcy process, and the creditor retains its rights against the non-debtor guarantor outside of the bankruptcy case."); *Credit Suisse First Bost. Mortg. Capital v. Cohn*, 2004 WL 1871525, at *8 (S.D.N.Y. Aug. 19, 2004) (finding that a debtor's discharge did not affect the liability of a non-debtor guarantor); *Orix Credit Alliance, Inc. v. Hamrick*, 90 CIV. 7012 (JFK), 1992 WL 84458, at *3 (S.D.N.Y. Apr. 13, 1992) (rejecting arguments that "rights of indemnity and subrogation were prejudiced by [debtor's] filing a Chapter 11 petition, and that plaintiff's consent to release part of its claim against the debtor discharges [guarantor]

defendant's liability under the guaranty" because a "creditor's participation in bankruptcy proceedings does not result in a discharge of the guarantor of the debtor.").

Schneider now argues that (1) Eltron's release in bankruptcy without a reservation of rights against him automatically relieved him of his obligations under the Agreement and (2) he was released from his obligation because the "obliteration" of his rights of indemnification impermissibly altered his risks under the Agreement. It is true that generally, an "obligee's release of the principal discharges the obligations of the [secondary obligor]," *120 Greenwich Dev. Associates, LLC v. Reliance Ins. Co.*, 01 CIV.8219(PKL), 2004 WL 1277998, at *10 (S.D.N.Y. June 8, 2004), however that general rule has no application when the discharge in in bankruptcy, *Union Trust Co. of Rochester v. Willsea*, 275 N.Y. 164, 166-67, 9 N.E.2d 820, 820-211 (1937) (although, generally "payment or satisfaction of the principal obligation discharges the guarantor[,] ... the liability of one who is a guarantor or surety for a bankrupt shall not be altered by the discharge of such bankrupt"), and moreover, "a guarantor can consent in advance to remain liable even after such a release," *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 188 F.3d 31, 34-35 (2d Cir. 1999) (citations omitted). Here, the discharge of the principal debtors was in bankruptcy, thus it had no effect on Schneider's obligations. Moreover, the Agreement provided that Schneider would remain "absolutely and unconditionally" liable on Eltron's debts, and permitted Plaintiff to "proceed against [Schneider] immediately upon default by [Elton]" without first "tak[ing] any action or proceedings of any kind against [Eltron]." (Docket No. 1, Compl., Ex. 1). Thus, Schneider agreed to be independently and unconditionally liable on Eltron's debts, even if they were discharged in bankruptcy. *See First New York Bank for Business v. DeMarco*, 130 B.R. 650, 654 (S.D.N.Y. 1991) ("Absolute and unconditional guaranties ... are consistently upheld by

New York courts. Indeed, unconditional guaranties have been held to foreclose, as a matter of law, guarantors from asserting any defenses or counterclaims."); *HSH Nordbank Ag New York Branch v. Swerdlow*, 672 F. Supp. 2d 409, 418-19 (S.D.N.Y. 2009), *aff'd sub nom.*, *HSH Nordbank AG New York Branch v. St.*, 421 F. App'x 70 (2d Cir. 2011) ("Where a guaranty states that it is 'absolute and unconditional,' guarantors are generally precluded from raising any affirmative defense."); *Korea First Bank of N.Y. v. Cha*, 259 A.D.2d 378, 687 N.Y.S.2d 124, 125 (1st Dep't 1999) (same). Moreover, although "[a]s a general principal of New York law, any alteration of the terms of an underlying contract, for whose performance a guarantor is bound, and without the guarantor's consent, will release the guarantor from his or her obligations," *United Natural Foods, Inc. v. Burgess*, 488 F. Supp. 2d 384, 390-91 (S.D.N.Y. 2007), that rule has no application here because Schneider's rights were not altered by the Plan. Any attempt by Eltron to immunize itself from Schneider's indemnification claims was unsuccessful because Eltron failed to notify Schneider, a creditor, of the bankruptcy. A debtor who fails to give notice to known potential creditors risks that its obligations to those creditors will not be discharged *See Adam Glass Serv., Inc. v. Federated Dep't Stores, Inc.*, 173 B.R. 840, 842-43 (E.D.N.Y. 1994) (explaining that when a creditor does not receive sufficient notice in a bankruptcy proceeding, due process prevents discharge of the creditor's claims); *see also Daewoo Int'l (Am.) Corp. Creditor Trust v. SSTS Am. Corp.*, 02 CIV. 9629 (NRB), 2003 WL 21355214, at *2 (S.D.N.Y. June 11, 2003) ("[I]f actual notice is not afforded [to a known creditor], the known creditor's claims cannot be discharged."); *In re Nuttall Equip. Co., Inc.*, 188 B.R. 732, 735 (Bankr. W.D.N.Y. 1995) ("There is abundant authority to the effect that prepetition claims against a corporate Chapter 11 debtor are not discharged under 11 U.S.C. § 1141(d)(1) if the debtor knew of the claim and did not schedule the creditor and if the creditor, therefore, never

received the notices required by statute."). Accordingly, even if Schneider had not expressly withdrawn his argument concerning Eltron's discharge, he would not have prevailed on this argument and thus suffered no prejudice as a result of his attorney's disappearance prior to bringing a timely motion for reconsideration.

III. Would this Court have Granted a Reconsideration Motion Based on Defendant's Purported Limited Liability Defense?

In his Post-Appeal Rule 60 Motion, Defendant recites (in his facts section) that:

> Because of the anticipated large volume of purchases by Eltron in order to fulfill [a 1984 contract with the State of New York], Philips required the Schneider brothers to execute limited personal guarantees of Eltron's purchases during the duration of its State contract. ... However, once Eltron's contract with the State of New York was fulfilled, the Guarantees were to become null and void.

(Def.'s Rule 60 Br. at 8). Defendant repeatedly faults this Court's summary judgment order with "completely overlook[ing]" Defendant's "limited guaranty" argument, although Defendant does not further elaborate on this argument. (Def.'s Rule 60 Br. at 47). This Court has scoured the parties' original briefing on the cross-motions for summary judgment and a "limited guarantee" argument is nowhere to be found. Indeed, Defendant's February 9, 2007 Statement of Undisputed Facts Pursuant to Local Rule 56.1 makes no mentioned of a limited guarantee, and instead explains that Schneider and his brother agreed to be "jointly and severally liable to [Plaintiff] ... during the existence of the guarantee." (Docket No. 33-4 at ¶ 4), and Plaintiff "released [Defendant's brother] completely from his obligations under the guarantee," in 2004, implying that the guarantee continued to exist until at least 2004 (*Id.* at ¶ 23.) Schneider points to "multiple places in the record indicating that Brennan preserved this argument" – namely (1) his motion seeking vacatur of a default judgment and the Court's July 24, 2006 Order granting that motion, and (3) "his Brief in support of Barry's motion for summary judgment (Docket Entry No. 33-4, p.2)." (Def.'s Rule 60 Br. at 48). However, that Schneider raised the possibility

that the guarantee was limited in an earlier motion to vacate a default judgment is of no event because he abandoned the argument by failing to raise it in the cross-motions for summary judgment. Although Schneider cites to page 2 of his brief in support of summary judgment as raising this argument, that argument is not raised. Indeed, at no point in that brief or in his opposition to Plaintiff's cross-motion, does he even insinuate that the guarantee was intended to be limited. As this Court explained in its order denying Defendant's First Rule 60 Motion, this Court will not entertain Schneider's "limited guarantee" argument because it could have been, but was not, made on summary judgment. (Dk. 55 at 4-5.)

Even if this Court were to consider Defendant's "limited guarantee" argument, the argument would fail. In *Marine Midland Bank, N.A. v. Brunswick Grp., Inc.*, 83 CIV. 7070 (JFK), 1985 WL 174 (S.D.N.Y. Jan. 8, 1985), defendants personally guaranteed the debts of a company that subsequently went into bankruptcy. They argued that the parties had intended their liability to be limited, although the guarantee agreements provided for "unconditional" liability. The court found that "the Guaranty is so clearly phrased that there can be no genuine dispute as to its meaning [to] ... unambiguously create irrevocable and unconditional liability ... as guarantors of the pertinent loans." *Id.* at *5. The court explained that "applicable case law is consistent in holding that when the parties to an agreement have clearly and unambiguously set forth their intentions in written guaranties, 'no need exists to resort to other means of interpretation, and effect must be given to the parties' intent as indicated by the language itself.'" *Id.* (citations omitted). So too here, the Agreement unambiguously created obligations that could not terminate until Plaintiff released them. (Docket No. 1, Compl., Exs. 1 & 2) (Schneider agreed to "absolutely and unconditionally guarantee the full and punctual payment to Obligee of all indebtedness which [Eltron] ... has incurred" and "[t]his guaranty shall continue in full force

and effect until such time as Obligee shall receive from the undersigned Guarantors written notice of revocation, and such revocation shall not in any way relieve the undersigned from liability for any indebtedness incurred prior to the actual receipt by Obligee of said notice.") Thus, because the language of the Agreement does not leave room for interpretation, there is no open question of fact whether the Agreement was of a limited nature. Accordingly, even if this argument were raised in a timely Rule 60 motion, it would have been denied and thus, Schneider suffered no prejudice as a result of his attorney's disappearance.

IV. Would this Court have Granted a Reconsideration Motion Based on his Brother's Alleged 1998 Assumption of Defendant's Obligations?

The Second Circuit observed that this Court did not address "Schneider's argument that he was released in full because he had conveyed all his interest in Eltron to his brother in 1998, in return for his brother's assumption of all obligations." As this Court already explained in response to Defendant's First Rule 60 Motion, this argument was not raised in the summary judgment papers. (Dkt 55 at 4-5.) It was raised, for the first time, in Defendant's First Rule 60 Motion. Even if the argument was properly before the Court, the Agreement provides that it "shall continue in full force and effect until such time as Obligee shall receive from the undersigned Guarantors written notice of revocation, and such revocation shall not in any way relieve the undersigned from liability for any indebtedness incurred prior to the actual receipt by Obligee of said notice," (Compl. Ex. 1.) Plaintiff denies ever receiving such notice of revocation. If, indeed, at some point in 1998, Theodore promised to indemnify Schneider, Schneider may be able to pursue his rights under that promise. This, however, presents no basis for relief from his obligations to Plaintiff.

V. Prejudice Resulting from Inflated Damages

Defendant seeks to correct the judgment pursuant to subsection (b)(5) of Rule 60 to reflect the July 19, 2005 settlement between Plaintiff and the Eltron's bankruptcy trustee and to reflect certain payments Plaintiff has or is scheduled to receive from Eltron's estate in satisfaction of Eltron's underlying debts to Plaintiff. Specifically, in Eltron's bankruptcy proceedings, on July 19, 2005 Plaintiff stipulated with Eltron's bankruptcy trustee that Eltron owed it only $468,635.14. Plaintiff nevertheless pressed for $578,635.14 from Defendant in the instant action. Additionally, Plaintiff agreed to receive distributions in the amount of $56,236.21 in satisfaction of that amount.[5]

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[5] Defendant also moves to reopen the judgment pursuant to subsections (b)(3) and (d)(3) of Rule 60 with respect to the amount of damages based on the alleged fraud perpetrated by Plaintiff in failing to advise this Court that Plaintiff's recovery from Defendant may be offset by the settlement with and distributions from Eltron. However, it was not Plaintiff's obligation to inform the Court that Defendant might be entitled to a reduction in damages. *See Scherer v. City of New York*, 03 CIV. 8445 (RWS), 2007 WL 2710100, at *6-7 (S.D.N.Y. Sept. 7, 2007) (concluding that, where defense counsel informed the Court of limitations on the City's legal indemnification obligations but omitted information about the City's actual practice, counsel's conduct was of "questionable intent [but] ... did not rise to the level of outright misrepresentation or misconduct ... [in part because] it was not the Defendants' duty to admit or provide ... an evidentiary basis for the Plaintiffs."); *State Street Bank*, 374 F.3d at 176 (concluding that concealing a letter that was "already present in the movant's files" did not justify relief from judgment under subsection (b)(3) of Rule 60). Schneider's attorney was familiar with Eltron's bankruptcy, and it was permissible for Plaintiff's counsel to assume that he had made a "tactical decision to defend on another ground." *Kupferman v. Consol. Research & Mfg. Corp.*, 459 F.2d 1072, 1080-81 (2d Cir. 1972) (concluding it was not "fraud upon the court" for plaintiff's attorney not to disclose a release in favor of the defendant although "[i]f this had been a criminal case, such non-disclosure by a prosecutor ... would almost certainly have afforded ground for collateral attack" because in a civil case, although such conduct did not meet "the highest standards of professional conduct," it did not amount to fraud). In *Kupferman*, the Second Circuit observed that "it is all too easy to fall into the error of condemning conduct with the aid afforded by the bright glare of hindsight ... [but counsel for plaintiff] had to make his decision [about whether to disclose the release to the Court] without [the] benefit of [knowing whether defendant's counsel had investigated the existence of a release.] He could hardly have supposed that so experienced a lawyer as [his adversary] would have failed to [investigate the possibility of a release]." *Id.*

New York does not permit for double recovery. *Zarcone v. Perry*, 78 A.D.2d 70, 79, 434 N.Y.S.2d 437, 443 (1980), *aff'd*, 55 N.Y.2d 782, 431 N.E.2d 974 (1981). Accordingly, Rule 60(b)(5) may be utilized to correct a judgment to prevent double recovery. *See, e.g.*, *Torres-Troche v. Municipality of Yauco*, 873 F.2d 499, 501 (1st Cir. 1989) (finding, on Rule 60(b)(5) motion, that award should be offset by previous settlement to prevent double recovery); *Sunderland v. City of Philadelphia*, 575 F.2d 1089, 1090-91 (3d Cir. 1978) (finding district court erred in denying Rule 60(b)(5) motion because "a district court does not have discretion to require two satisfactions, and the opposing party has suffered no prejudice from the moving party's delay in raising the satisfaction issue.") To the extent that Eltron's underlying obligations, and thus Schneider's corresponding secondary obligation, has been reduced through settlement and/or payments by Eltron, Schneider's obligations should also be reduced.

It is of no event that some of the reductions in Eltron's underlying obligation occurred before the instant judgment was entered and thus could have been raised on summary judgment. *See Gibbs v. Maxwell House, A Div. of Gen. Foods Corp.*, 738 F.2d 1153, 1155 (11th Cir. 1984) (Rule 60(b)(5) encompasses the power to declare a judgment satisfied "when damages are paid before trial or a tortfeasor or obligor has paid the judgment debt."); *Johnson Waste Materials v. Marshall*, 611 F.2d 593 (5th Cir. 1980) (finding post-trial evidence that established that the plaintiffs were due less than awarded to them at trial required reduction in award irrespective of the fact that "evidence was neither newly discovered nor secured through due diligence" because the purpose of the rule is to prevent a windfall); *see also AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 579 F.3d 1268, 1272-73 (11th Cir. 2009) (same).[6]

[6] This Court finds the line of cases following *Willits v. Yellow Cab Co.*, in which the Seventh Circuit denied a Rule 60(b)(5) motion because defendant failed to raise the defense at trial, unpersuasive. 214 F.2d 612 (7th Cir. 1954); *United States v. Stonehill*, 959 F.2d 243 (9th

The Second Circuit has directed this Court, on remand, to clarify whether the "judgment is based on mistakes or omissions ... by conducting a hearing or directing the parties to submit additional factual materials." *Philips Lighting Co.*, 395 F. App'x at 799. Accordingly, the parties are directed to provide the Court **within 30 days of the date of this Order** with evidence reflecting the amounts and dates of any payments that Plaintiff has or will receive, from the Eltron bankruptcy estate, or from any other source, that may reduce the amount that Plaintiff can recover from Defendant.

* * *

This Court concludes, for the foregoing reasons, that the disappearance of Schneider's attorney did not deprive Defendant of any viable Rule 60 argument relating to Defendant's liability. As a result, there was no prejudice resulting from his attorney's disappearance and thus no "extraordinary circumstances" justifying relief from judgment. However, because the Court was not apprised of certain payments that Plaintiff received from Defendant's co-obligor and the principal obligor's bankruptcy estate reducing the underlying obligation, further factual development is necessary to assess the appropriate amount of damages.

This result is not, as Schneider implores, inequitable or a miscarriage of justice. While Brennan's conduct was certainly inexcusable, Schneider is not entirely absolved of

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Cir. 1992) (citing *Willits*). This Court finds much more persuasive the reasoning of the First Circuit in *Torres-Troche*, explaining that:

> Rule 60(b)(5) should serve as the basis for a motion to correct, regardless of the time at which a judgment is satisfied. The Rule should not be interpreted so strictly that it forecloses a litigant from alerting a court to the prior satisfaction of a final judgment. ... Where, as here, the party settling is contractually bound to pay a certain portion of any judgment entered against the nonsettling party, the fact that such payment is made *prior to* the judgment should not operate to allow the plaintiff to recover twice.

873 F.2d at 501 n.7.

responsibility. There is evidence that Brennan had disappeared as early as April 2007, but that Schneider only learned of this when he was notified of this Court's 2008 SJ Order on June 11, 2009. By his own admission, knowing that a summary judgment motion had been filed on his behalf, he did not contact his attorney or the Court for over two years – conduct that is not entirely reasonable. (Docket No. 87, Barry Decl. at ¶¶ 24-25); *Cf Shim Cho v. Tomczyk*, 05CV5570(JFB)(JMA), 2007 WL 3254294, *2-3 (E.D.N.Y. Nov. 2, 2007) (finding plaintiff's failure to stay in contact with attorney justifies dismissal with prejudice for failure to prosecute). Litigants before this Court, particularly sophisticated ones such as Schneider, are expected to exercise reasonable diligence in maintaining contact with their attorneys and staying abreast of developments in their cases. Accordingly, no "extraordinary circumstances" justify relief. *In re Emergency Beacon Corp.*, 666 F.2d at 759.

CONCLUSION

For the foregoing reasons, Defendant's Post-Appeal Rule 60 Motion as to liability on the grounds of any mistake, inadvertence, surprise, or excusable neglect, or any misconduct by Plaintiff, or on the grounds that judgment has been satisfied or released, or that any other reason justifies relief is **DENIED**. The parties are directed to provide this Court with additional factual evidence concerning damages within 30 days of the date of this Order. This Court **RESERVES DECISION** on the branch of Defendant's Post-Appeal Rule 60 Motion as to the amount of damages until the Court reviews the aforementioned additional evidence.

SO ORDERED.

/s/(SLT)

SANDRA L. TOWNES
United States District Judge

Dated: July 2, 2014
Brooklyn, New York