IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

AMERICAN AIRLINES, INC. VS. TRAVELPORT LIMITED, et al.	CIVIL ACTION NO. 4:11-CV-244-Y

APPENDIX OF UNPUBLISHED CASES CITED IN SABRE'S RESPONSE IN OPPOSITION TO AMERICAN AIRLINE'S MOTION FOR RECONSIDERATION OF THE COURT'S NOVEMBER 21, 2011 ORDER

DATED: Jan. 19, 2012

Respectfully submitted,

/s/ Scott A. Fredricks

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document via the Court's CM/ECF system pursuant to the Court's Local Rule 5.1(d) on January 19, 2012.

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Exhibit A

Positive
As of: Jan 18, 2012

GALIEO INTERNATIONAL, L.L.C., Plaintiff/Counter-Defendant, v. RYANAIR, LTD., Defendant/Counter-Plaintiff.

01 C 2210

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2002 U.S. Dist. LEXIS 3317

February 21, 2002, Decided
February 27, 2002, Docketed

DISPOSITION: [*1] Plaintiff's Motion to Dismiss Counts III and IV of Defendant's Amended Counterclaims was granted as to Counts III and IV. Defendant was granted leave to properly replead its good faith claim (Count IV), consistent with Illinois law.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff service provider sued defendant airline for breach of contract. The airline filed counterclaims alleging breach of contract, breach of the implied duty of good faith, and violation of the Illinois Consumer Fraud and Deceptive Practices Act (ICFA). The service provider moved to dismiss the latter two claims for failure to state a claim, *Fed. R. Civ. P. 12(b)(6)*.

OVERVIEW: The airline agreed to pay the service provider booking fees for including the airline on the service provider's computerized reservation system. The servicer provider alleged the airline was wrongfully refusing to pay fees due under the parties' contracts. The airline alleged the servicer provider had used an "incentive scheme" that encouraged subscriber travel agents to book fictitious and highly speculative fares to increase the booking fees owed by the airline. Moving to dismiss two claims, the service provider argued, inter alia, that the Airline Deregulation Act (ADA) preempted the airline's ICFA claim and that Illinois did not recognize an independent claim for breach of the duty of good faith. The court agreed. Regarding the statutory claim, the allegations in the ICFA claim related to airline "services" within the scope of the ADA's preemption clause. Further, application of the ICFA to the parties' dispute would alter the parties' contractual bargain by supplying external norms. Regarding the common law claim, under Illinois law, a party could only assert a claim for breach of the duty of good faith as part of a breach of contract claim.

OUTCOME: The court granted the service provider's motion and, thus, dismissed two of the airline's amended counterclaims. However, the court granted the airline leave to replead its good faith claim consistent with

Illinois law.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims

[HN1] In ruling on a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, the court must assume the truth of all facts alleged in the pleadings, construing allegations liberally and viewing them in the light most favorable to the non-moving party. Dismissal is properly granted only if it is clear that no set of facts which the plaintiff could prove consistent with the pleadings would entitle the plaintiff to relief. The court will accept all well-pled factual allegations in the complaint as true. In addition, the court will construe the complaint liberally and will view the allegations in the light most favorable to the non-moving party. However, the court is neither bound by the plaintiff's legal characterization of the facts, nor required to ignore facts set forth in the complaint that undermine the plaintiff's claims.

Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Charters
Transportation Law > Air Transportation > Commercial Airlines > General Overview

[HN2] The Airline Deregulation Act (ADA) largely deregulated the domestic airline industry. To prevent states from undoing the ADA, Congress included a preemption clause, which provides that a state may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier. *49 U.S.C.S. § 41713(b)(1)*.

Legal Ethics > Legal Services Marketing > Advertising
Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Commercial Airlines > General Overview

[HN3] The plain language of the preemption clause in the Airline Deregulation Act (ADA) expresses a broad preemptive purpose. State provisions that relate to airline rates, routes, or services are preempted by the ADA.

Contracts Law > Breach > General Overview
Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Commercial Airlines > General Overview

[HN4] Where a state statute served as a means to guide and police the marketing practices of the airlines, it is related to airline "rates and services" and is preempted by the Airline Deregulation Act (ADA). However, the ADA does not preempt a plaintiffs' contract claims, which seek recovery solely for the airline's alleged breach of its own, self-imposed undertakings.

Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Commercial Airlines > General Overview

[HN5] Claims under state law are preempted by the Airline Deregulation Act if either the state rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have a significant economic impact upon them.

Governments > Agriculture & Food > Processing, Storage & Distribution
Transportation Law > Air Transportation > Commercial Airlines > Luggage > Handling

[HN6] For purposes of the Airline Deregulation Act, the United States Court of Appeals for the Seventh Circuit has adopted the definition of "services" set forth by the United States Court of Appeals for the Fifth Circuit: Services generally represent a bargained-for or anticipated provision of labor from one party to another. This leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.

Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Commercial Airlines > Reservations
Transportation Law > Air Transportation > Consumer Protection

[HN7] Preemption under the Airline Deregulation Act extends to all of the economic factors that go into the

provision of the quid pro quo for a passenger's fare, including reservation practices.

Transportation Law > Air Transportation > Commercial Airlines > Reservations
[HN8] A customer reservation system is a "service" within the meaning of the Airline Deregulation Act.

Banking Law > Consumer Protection > State Law > General Overview
Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Commercial Airlines > General Overview
[HN9] General consumer fraud law is preempted by the Airline Deregulation Act.

Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Commercial Airlines > General Overview
[HN10] To determine, for purposes of Airline Deregulation Act preemption, whether a state statute will have a significant economic impact on air carriers' rates, routes, or services, courts look to whether application of the state law will alter the parties' contractual bargain by "supplying external norms."

Contracts Law > Breach > General Overview
Contracts Law > Contract Interpretation > Good Faith & Fair Dealing
[HN11] Illinois law does not permit a party to seek an independent claim for breach of the implied obligation of good faith which Illinois law incorporates into all contracts. To bring a claim for breach of the obligation of good faith, a party must include such a claim within a breach of contract claim. Where a party fails to properly plead a claim for good faith within a count for breach of contract, the court should properly dismiss the separate claim for good faith.

COUNSEL: For GALILEO INTERNATIONAL, L.L.C., plaintiff: Kathleen Lynn Roach, Erin Elaine Kelly, Patricia Michelle Petrowski, Daniel Moore Twetten, Sidley Austin Brown & Wood, Chicago, IL.

For RYANAIR LTD., defendant: William G. Schopf, Jr., Patrick Joseph Heneghan, Robert John Palmersheim, Schopf & Weiss, Chicago, IL.

For RYANAIR LTD., counter-claimant: William G. Schopf, Jr., Patrick Joseph Heneghan, Robert John Palmersheim, Schopf & Weiss, Chicago, IL.

For GALILEO INTERNATIONAL, L.L.C., counter-defendant: Kathleen Lynn Roach, Erin Elaine Kelly, Patricia Michelle Petrowski, Daniel Moore Twetten, Sidley Austin Brown & Wood, Chicago, IL.

JUDGES: BLANCHE M. MANNING, U.S. DISTRICT COURT JUDGE.

OPINION BY: BLANCHE M. MANNING

OPINION

MEMORANDUM AND ORDER

Plaintiff/Counter-Defendant Galieo International, L.L.C. ("Galieo") filed an Amended Complaint against Defendant/Counter-Plaintiff [*2] Ryanair, Ltd. ("Ryanair") alleging breach of contract. Ryanair responded by filing four amended counterclaims alleging: breach of contract (Counts I and II); a claim under the Illinois Consumer Fraud and Deceptive Practices Act ("the ICFA") (Count III); and a claim for breach of the implied duty of good faith (Count IV). The current matter is before the Court on Galieo's Motion to Dismiss Counts III and IV of Ryanair's Amended Counterclaims, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons that follow, the motion is GRANTED.

BACKGROUND

[1]

1 The facts set forth in the Background section are taken from Ryanair's Answer and Amended Counterclaims.

In 1993, Galieo, a provider of computerized airline reservation services, and Ryanair, an airline, entered into the Galieo International Global Airline Distribution Agreement ("the Distribution Agreement"). Under the Distribution Agreement, travel agents that subscribe to Galieo's Customer Reservation System ("CRS") would be able to access [*3] Ryanair's schedules, prices, seat availability and book seats on Ryanair flights for their customers. In return for making Ryanair part of Galieo's

CRS, Ryanair agreed to pay Galieo a fee for each booking made on Ryanair through the CRS.

The parties operated under the Distribution Agreement until April 14, 2000, when Ryanair notified Galieo that it was terminating the Distribution Agreement effective July 31, 2000. Ryanair contends that Galieo breached the Distribution Agreement by overbilling Ryanair for payments Ryanair made to Galieo for reservations that were made on the CRS. According to Ryanair, Galieo used an "incentive scheme," whereby Galieo offered travel agents using its CRS services commissions based on the number of fares they booked on Ryanair. Ryanair contends travel agents booked thousands of fictitious and speculative fares which did not result in the issuance of a ticket on a Ryanair flight. Galieo, however, allegedly obtained payment from Ryanair for these bookings. As a result of the "incentive scheme," Ryanair alleges that it was left with "an inordinate number of empty, unpaid seats on [its] flights" and "lost the opportunity to sell many tickets on its flights. [*4] "

Ryanair contends that under the Distribution Agreement, Galieo was required to issue Ryanair credits for payments made for reservations the passengers cancelled prior to the issuance of a ticket. Pursuant to the Distribution Agreement, Ryanair requested that Galieo issue credits for fees charged to Ryanair for reservations that did not result in the actual purchase of a ticket. Ryanair contends that Galieo refused to issue the proper credits under the Distribution Agreement.

Subsequent to notifying Galieo that it was terminating the Distribution Agreement, Ryanair sought assurances from Galieo that it would service reservations booked on Ryanair flights booked on the CRS prior to the termination of the Distribution Agreement, July 31, 2000, but for which travel was not to occur until after that date. Ryanair alleges that Gallieo initially agreed to service reservations for flights set to commence after the termination date. However, Ryanair alleges that Gallieo reversed its earlier position and later stated that it would only service the reservations if Ryanair paid additional fees beyond the fees already paid to Gallieo under the Distribution Agreement.

After refusing to service [*5] reservations after the termination date, Gallieo sent Ryanair an invoice for reservations made on the CRS in May and June of 2000. Ryanair, however, refused to pay these invoices because Galieo allegedly breached the Distribution Agreement by: (1) overbilling Ryanair for reservations that did not result in the actual purchase of tickets; and (2) refusing to service reservations after the termination date.

In response to Ryanair's refusal to pay the May and June invoices, Galieo filed the instant action for breach of the Distribution Agreement. Ryanair responded by filing four amended counterclaims alleging: breach of contract (Counts I and II); a claim under the ICFA (Count III); and a claim for breach of the implied duty of good faith (Count IV). The current matter is before the Court on Galieo's Motion to Dismiss Counts III and IV of Ryanair's Amended Counterclaims, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*.

STANDARD OF REVIEW

[HN1] In ruling on a motion to dismiss pursuant to *Federal Rule of Procedure 12(b)(6)*, the court must assume the truth of all facts alleged in the pleadings, construing allegations liberally and viewing them in the light most favorable to the [*6] non-moving party. See, e.g., *McMath v. City of Gary, 976 F.2d 1026, 1031 (7th Cir. 1992)*; *Gillman v. Burlington N. R.R. Co., 878 F.2d 1020, 1022 (7th Cir. 1989)*. Dismissal is properly granted only if it is clear that no set of facts which the plaintiff could prove consistent with the pleadings would entitle the plaintiff to relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; *Kunik v. Racine County, Wis., 946 F.2d 1574, 1579 (7th Cir. 1991)* (citing *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)*).

The court will accept all well-pled factual allegations in the complaint as true. *Miree v. DeKalb County, 433 U.S. 25, 27 n.2, 53 L. Ed. 2d 557, 97 S. Ct. 2490 (1977)*. In addition, the court will construe the complaint liberally and will view the allegations in the light most favorable to the non-moving party. *Craigs, Inc. v. General Electric Capital Corp., 12 F.3d 686, 688 (7th Cir. 1993)*. However, the court is neither bound by the plaintiff's legal characterization of the facts, nor required to ignore facts [*7] set forth in the complaint that undermine the plaintiff's claims. *Scott v. O'Grady, 975 F.2d 366, 368 (7th Cir. 1992)*.

DISCUSSION

Galieo has moved this Court to dismiss Counts III and IV of Ryanair's amended counterclaim and to strike

Ryanair's request for attorney's fees in Counts I and II. The Court will address each of these arguments. [2]

> 2 Because Ryanair has withdrawn its request for attorney's fees in Counts I and II (Resp. at 2 n.1), the Court will not discuss this contention and denies it as moot.

I. Claims Under the ICFA

Galieo contends that this Court should dismiss Count III (the ICFA claim) because: (A) it is preempted under the Airline Deregulation Act ("ADA"); (B) Ryanair has failed to state a cause of action under the ICFA; (C) the ICFA claim is duplicative of Ryanair's contract claim; and (D) Ryanair has not sufficiently pled standing. Because this Court finds that Count III (the ICFA claim) is preempted under the ADA, the Court will only address the preemption [*8] issue.

Congress enacted the Airline Deregulation Act ("ADA") "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety and price of air services." H.R.Conf.Rep. No. 95-1779, 95th Cong., 2d Sess. 53 (1978), reprinted in, 1978 U.S.C.C.A.N. 3737, 3773. [HN2] The ADA largely deregulated the domestic airline industry. *American Airlines, Inc. v. Wolens, 513 U.S. 219, 222-23, 130 L. Ed. 2d 715, 115 S. Ct. 817 (1995)*. To prevent states from undoing the ADA, Congress included a preemption clause, *Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992)*, which provides that "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier. . . ." *49 U.S.C. § 41713(b)(1)*.

The Supreme Court first visited the scope of the ADA's preemption clause in *Morales, 504 U.S. at 378*, where the court addressed the "Travel Industry Enforcement Guidelines ("the Guidelines")," which were promulgated by the National [*9] Association of Attorneys General to govern the content and format of airline fare advertising. Several states attempted to enforce the Guidelines through their consumer protection laws to stop allegedly deceptive advertising by airlines. Id. Noting that [HN3] the plain language of the preemption clause "expresses a broad preemptive purpose," the court determined that the states' actions "related to [airline] rates, routes, or services," and therefore, held that the fare advertising provisions of the Guidelines were preempted by the ADA. *Id. at 388-89*. The court noted that the Guidelines set "binding requirements as to how airline tickets may be marketed," which "would have [had] a significant impact upon . . . the fares [airlines] charged." *Id. at 390*. The court further noted that the airlines would not have "*carte blanche* to lie and deceive customers" because the Department of Transportation retained the power to prohibit advertisements that did not further competitive pricing. *Id. at 390-91*.

The Supreme Court revisited the scope of the ADA preemption clause in *Wolens, 513 U.S. at 224*, where the court addressed [*10] claims brought in two class actions that arose from changes made by American Airlines to its frequent flyer program. The plaintiffs complained that American Airlines violated the ICFA by modifying its frequent flyer program, devaluing credits that the members of the program had already earned. Id. The Illinois Supreme Court ruled that the lawsuits were not preempted because the frequent flyer program was not "essential" to American Airlines' services, but was only of "peripheral" importance. Id. (quoting *Wolens v. American Airlines, Inc., 147 Ill. 2d 367, 589 N.E.2d 533, 168 Ill. Dec. 133 (Ill. 1992))*.

The United States Supreme Court reversed the Illinois Supreme Court's decision to permit the plaintiffs' consumer fraud claims, but affirmed its holding that the plaintiffs' breach of contract claims were not preempted. The court held that [HN4] the ICFA served as a means "to guide and police the marketing practices of the airlines," and therefore, was related to airline "rates and services" and was preempted by the ADA. 513 U.S. at 228-29. However, the Court held that the ADA did not preempt the plaintiffs' contract claims, which sought "recovery solely for the airline's [*11] alleged breach of its own, self-imposed undertakings." Id.

Following the Supreme Court's decisions in Morales and Wolens, the Seventh Circuit in *Travel All Over the World v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1432 (7th Cir. 1996)* and *United Airlines, Inc. v. Mesa Airlines, Inc., 219 F.3d 605, 609 (7th Cir. 2000)*, held that [HN5] claims under state law are "preempted if *either* the state rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have a significant economic impact upon them." *Mesa, 219 F.3d at 609* (emphasis in original).

Here, Galileo contends that the ADA preempts Ryanair's third amended counterclaim because the ICFA: (1) relates to airline "services"; and (2) will have a significant economic impact upon airline services. The Court will address each of these contentions in turn.

1. Scope of "Services" Under the ADA

To determine whether the application of the ICFA to Galieo's CRS relates to airline "service," the Court first looks to *Travel All Over the World, 73 F.3d at 1433*, where [HN6] the Seventh Circuit adopted the Fifth Circuit's [*12] definition of "services" set forth in *Hodges v. Delta Airlines, Inc., 44 F.3d 334, 336 (5th Cir. 1995)*:

> Services generally represent a bargained-for or anticipated provision of labor from one party to another . . . . [This] leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.

Travel All Over the World, 73 F.3d at 1433 (quoting *Hodges, 44 F.3d at 336*).

Unfortunately, neither Travel All Over the World nor any other decisions in this circuit have specifically addressed whether a CRS is related to airline services. [3] Therefore, the Court will look to courts outside this jurisdiction which have addressed the instant issue. For example, in *Lyn-Lea Travel Corp. v. American Airlines, Inc., 1997 U.S. Dist. LEXIS 21119*, No. CA3:96-CV-2068-BC (N.D. Tex. Dec. 2, 1997), aff'd, *139 F.3d 899 (5th Cir.1998)*, a travel agency filed an action under several theories [*13] of state law stemming from an agreement relating to the use of a CRS system. The district court, following the Hodges's definition of "services," held that claims under the Texas Deceptive Trade Practices Act were preempted because the use of a CRS system had a "connection with the airline's 'rates' and 'services.'" Id. at *20-23, 30. In making this decision, the court noted that under Hodges, [HN7] "preemption extends to all of the economic factors that go into the provision of the quid pro quo for [a] passenger's fare, including . . . reservation . . . practices." Id. at *21 (quoting *Hodges, 44 F.3d at 337*).

> 3 Although the instant issue has not been addressed in this circuit, the Court notes that in Mesa, the Seventh Circuit noted that "because Wolens held general consumer-fraud law preempted, [counter claimants] have big problems." *219 F.3d at 608*.

Likewise, in *Frontier Airlines, Inc. v. United Airlines, Inc., 758 F. Supp. 1399, 1402 (D. Col. 1989)*, [*14] the plaintiff alleged that the defendant airline's marketing of CRS services to travel agents violated Colorado's antitrust and unfair competition statutes. In holding that [HN8] a CRS is a "service" within the meaning of the ADA, the court noted that "CRS services are unique to the airline industry. Centralized reservation systems for competing airlines, which serve functions beyond reservations for a single airline, are unlike services provided in any other industry." *Id. at 1408-09*. Consequently, the court held that the ADA preempted the Colorado statutes. Id.

Here, given the above decisions holding that a CRS is a "service" within the ADA and the Seventh Circuit's broad proposition that [HN9] "general consumer fraud law [is] preempted" by the ADA, *Mesa, 219 F.3d at 608*, this Court finds that Ryanair's third amended counterclaim under the ICFA is preempted by the ADA. Ryanair contends that its ICFA claim stems from its purchase of Galieo's CRS services for Ryanair's "own use in making its flight information available to travel agents and enabling travel agents to book reservations on Ryanair's flights." (Ryanair's Countercl. at P 31) According to Ryanair, [*15] Galieo used an "incentive scheme," whereby Galieo offered travel agents using its CRS services to earn commissions based on the number of fares they booked on Ryanair. (*Id. at PP 33-34*.) Ryanair contends Galieo violated the ICFA by directing these travel agents to book over 29,000 fictitious and speculative fares which were later cancelled but for which Galieo obtained payment from Ryanair. (*Id. at P 41*.) As a result of the "incentive scheme," Ryanair alleges that it was left with "an inordinate number of empty, unpaid seats on [its] flights"(*id. at P 38*) and "lost the opportunity to sell many tickets on its flights." (*Id. at P 46*.) Consequently, based on the above facts alleged by Ryanair, this Court finds that the allegations relating to Ryanair's ICFA claim relate to airline "services" within

the scope of the ADA's preemption clause, and therefore, Count III is preempted by the ADA.

2. Definition of "Significant Economic Impact" Under the ADA

Additionally, Galieo contends that Count III is preempted because application of the ICFA will have a significant economic impact upon airline services. [HN10] To determine whether a state statute will have a significant [*16] economic impact, courts look to whether application of the state law will alter the parties' contractual bargain by "supplying external norms." *Mesa, 219 F.3d at 609*. See also *Travel All Over the World, 73 F.3d at 1432*. In Travel All Over the World, the Seventh Circuit allowed the plaintiffs' claim for compensatory damages pursuant to the Wolens exception, but held that the plaintiffs' claims for punitive damages did not fit into the Wolens exception because, "rather than merely holding parties to the terms of a bargain, [a claim for] punitive damages represent[s] an 'enlargement or enhancement of [the bargain] based on state laws or policies external to the agreement.'" *Travel All Over the World, 73 F.3d at 1432 n.8*.

Similarly, the plaintiff in Lyn-Lea alleged that the defendant had breached an agreement by capping commissions the defendant paid to its travel agents. See *Lyn-Lea, 1997 U.S. Dist. LEXIS 21119* at *25. The court noted that the plaintiff was contractually bound to the agreement, which granted the defendant the right to modify the commission structure at its discretion. *Id. at* [*17] **29-30*. However, citing Wolens, the court declined to allow the plaintiff to "invoke state laws and policies external to the agreement," such as good faith and the Texas Deceptive Trade Practices Act, because these claims were "external" to the parties' original agreement and therefore imposed external requirements upon the defendant airline. *Id. at *30*.

Here, Count III requests that this Court find Galieo's "incentive scheme" constituted a "deceptive trade practice" under the ICFA and award the following damages: (1) damages for the "lost volume of Ryanair passenger seats"; and (2) punitive damages "in an amount sufficient to deter Galieo and other business [sic] from engaging in deceptive and misleading conduct." (Ryanair Countercl. at 24.) These proposed damages and claims rely on the ICFA which is external to the parties' original agreement. If this Court were to apply the ICFA to this action, "rather than merely holding parties to the terms of [their] bargain," the Court would allow Ryanair to enlarge or enhance the original agreement "based on state laws or policies external to the agreement." *Travel All Over the World, 73 F.3d at 1432 n.8*. As noted [*18] above, the parties may not invoke state laws external to the contract, and therefore, this Court finds that Count III is preempted by the ADA for the reasons stated herein.

II. A Claim for Breach of Good Faith Under Illinois Law

Galieo further contends that this Court should dismiss Court IV of Ryanair's amended counterclaim because Ryanair cannot assert an independent claim for breach of good faith under Illinois law.

Galileo is correct in that [HN11] Illinois law does not permit a party to seek an independent claim for breach of the implied obligation of good faith which Illinois law incorporates into all contracts. *Baxter Healthcare Corp. v. O.R. Concepts, Inc., 69 F.3d 785, 792 (7th Cir. 1995)*. To bring a claim for breach of the obligation of good faith, a party must include such a claim within a breach of contract claim. *Solon v. Kaplan, 2001 U.S. Dist. LEXIS 1384, 2001 WL 123769*, at *5 (N.D. Ill. Feb. 13, 2001) (denying motion to dismiss breach of good faith claim that was included in breach contract of count). Where a party fails to properly plead a claim for good faith within a count for breach of contract, the court should properly dismiss the separate claim for [*19] good faith. *Echo, Inc. v. Whitson Co., Inc., 121 F.3d 1099, 1105-06 (7th Cir. 1997)*; *Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough, 1999 U.S. Dist. LEXIS 11229, 1999 WL 528499*, at *9 (N.D. Ill. July 19, 1999).

Here, Ryanair concedes that it cannot state an independent claim for breach of good faith. However, Ryanair contends that its good faith claim is part of a count for breach of contract, and therefore is properly pled. Count IV is titled "BREACH OF CONTRACT (Obligation of good faith)" and incorporates by reference Ryanair's breach of contract claims (Counts I and II). This position is contrary to the Seventh Circuit's interpretation of Illinois law in *Echo, Inc., 121 F.3d at 1105-06*, where the court clearly stated independent claims of breach of duty of good faith are not permitted under Illinois law. Consequently, this Court GRANTS Galieo's motion to dismiss Count IV but grants Ryanair leave to properly replead its good faith claim consistent with Illinois law.

CONCLUSION

For the reasons set forth above, Plaintiff/Counter-Defendant Galieo International, L.L.C.'s Motion to Dismiss Counts III and IV of Ryanair's Amended Counterclaims [*20] [15-1], pursuant to Federal Rule of 12(b)(6), is GRANTED as to Counts III and IV. The Court, however, grants Ryanair leave to properly replead its good faith claim (Count IV) consistent with Illinois law. It is so ordered.

ENTER:

BLANCHE M. MANNING

U.S. DISTRICT COURT JUDGE

DATE: 2-21-02

Exhibit B

Not Reported in F.Supp.2d, 1999 WL 518852 (E.D.La.)
(Cite as: 1999 WL 518852 (E.D.La.))

H

Only the Westlaw citation is currently available.

United States District Court, E.D. Louisiana.
In re: BANK OF LOUISIANA/KENWIN SHOPS INCORPORATED, CONTRACT LITIGATION

No. Civ.A. 97 MDL 1193.
July 19, 1999.

ORDER AND REASONS

DUVAL, J.

***1** Before the Court is a Rule 54(b) Motion to Reconsider Order Dismissing Donald Weiner for Lack of Jurisdiction filed by the Bank of Louisiana ("BOL"). Because of circumstances that have come to light since Donald Weiner ("Weiner") was initially dismissed from this matter in October of 1997, the Court finds that in the interest of justice, fairness, and judicial economy, it must revisit its decision concerning lack of jurisdiction over Weiner. Thus, having reviewed the pleadings, memoranda and the relevant law, the Court finds merit in this motion for the reasons that follow.

Standard for Motion for Reconsideration

BOL has moved for reconsideration of the Court's ruling based on Fed.R.Civ.P. 54(b) which states:

> In the absence of such determination [entering of final judgment pursuant to the rule] and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed.R.Civ.P. 54(b) (emphasis added). Donald Weiner ("Weiner") contends that the Court is constrained by Fed.R.Civ.P. 60(b) [FN1] and argues that the motion is untimely based in part on the one year time limitation contained in Rule 60(b). (See Memorandum in Opposition at 5 n. 7). BOL responds that this limitation does not apply to interlocutory orders based on the Advisory Committee Notes of 1946 of the rule which state:

> FN1. The rule reads in relevant part, "On motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order or proceeding for the following reasons...."

> The addition of the qualifying word "final" emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.

Fed.R.Civ.P. 60(b) (1946 Advisory Committee Notes). Thus, it appears that the Rule 60 time constraint does not bind the Court; however, the Fifth Circuit has made clear that in evaluating a motion for reconsideration, the Rule 60(b) standard is applicable. As the appellate court has stated:

> The federal rules do not recognize a "motion for reconsideration" *in haec verba.* We have consistently stated, however, that a motion so denominated, provided that it challenges the prior judgment on the merits, will be treated as either a motion "to alter or amend" under Rule 59(e) or a motion for "relief from judgment" under Rule 60(b).

Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 173 (5th Cir.1990). Thus, under Rule 60(b), in order to prevail BOL must demonstrate that the evidence in support of its motion to reconsider was not presented in its original motion to upset the settlement due to: "(1) mistake,

> inadvertence, surprise, or excusable neglect; (2) newly discovered evidence ...; (3) fraud..; (4)the judgment is void; (5) the judgment has been satisfied, released or discharged; or (6) any other reason justifying relief for the operation of the judgment." *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347 (5th Cir.1991) citing Fed.R.Civ.P. 60(b) . The district court enjoys considerable discretion when determining whether the movant has satisfied any of these Rule 60(b) standards. *Id.*

***2** As will be explained more fully below, the "new evidence" raised by this motion had not come to light when the Court rendered its dismissal of Donald Weiner. The Court at that time was unaware of his actions and the alleged fraud that he perpetrated against BOL prior to BOL's filing of C.A. No.97–1988. As such, the Court finds that BOL has met the required standard, and the Court will reconsider its previous ruling as there is significant "new evidence." The Court firmly believes that its failure to do so would result in manifest error based on such new evidence.

Background—Procedural and Factual

The facts of this case have been set forth extensively in the numerous rulings of the Court; however, due to the importance of this ruling the Court will reiterate some of its previous findings to support its decision to find that it incorrectly dismissed Weiner. The Court previously ruled in its October, 1997 order that there was no allegation nor proof presented by BOL of any activity on the part of Weiner that would have subjected him to the personal jurisdiction of this Court. Specifically, the Court stated:

> The actions at issue are those taken by corporate entities—D & A, Kenwin, and BOL—through corporate representatives. It is hornbook law that generally actions taken by a person acting on behalf of a corporate entity do not create personal liability or give rise to jurisdiction over that person.
>
> It appears that the corporation ordinarily will insulate the individuals from the court's personal jurisdiction. Thus, jurisdiction over individual officers and employees of a corporation may not be predicated on the court's jurisdiction over the corporation itself, unless the individuals are engaged in activities within their jurisdiction that would subject them to the coverage of the state's long-arm statute. However, if the corporation is not a viable one and the individuals in fact are conducting personal activities and using the corporate form as a shield, a court may pierce the corporate veil and permit the assertion of personal jurisdiction over the individuals.
>
> 4 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil* § 1069 at 370–74 (1987). *See Stuart v. Spademan*, 772 F.2d 1185, 1197 (5th Cir.1985) (jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation).
>
> At this juncture, there is no evidence of any theory which would make Weiner, Sauer, Gins or Rooney personally liable. There are no allegations that the Court should pierce the corporate veil of D & A or Kenwin to create personal liability. The allegations that Weiner and Gins were "aided and abetted by Rooney" and have controlled D & A's actions are insufficient to create personal liability as they were ostensibly acting on behalf of corporate entities. (C.A. No. 97–1988, ¶ 50).

(C.A. 97–1988 Doc. 36 at 26–27) (emphasis added). At the time the Court entered this ruling, it was totally unaware of the actions by Weiner concerning money that was being paid by Kenwin customers at Kenwin shops on BOL accounts that was not sequestered in any manner and indeed was being used at the direction of Weiner by Kenwin. Furthermore, it was uninformed that Kenwin filed for bankruptcy on the day this opinion was rendered.

***3** While many of the facts upon which the Court bases its decision to revisit the jurisdictional

question have been outlined in various orders, the Court will set forth again the chronology that leads it to the inexorable conclusion that it had jurisdiction over Weiner from the beginning of this matter, had the Court been aware of all of the circumstances of this unfortunate relationship between BOL and Kenwin.

On July 31, 1996 D & A was incorporated by Donald Weiner and Arthur Gins. On August 15, 1997 a Management Agreement with Kenwin was signed. D & A becomes the manager of of Kenwin with Weiner at the helm.

On January 20, 1997, BOL contends that it learned that no sales were being processed or credit applications were being submitted from Kenwin to BOL (C.A.No.97–1988, Complaint, Exh. 20) (hereinafter "Complaint"). BOL then requested that all cash payments made by Kenwin customers on BOL accounts be forwarded to BOL. This request was not honored. Furthermore, as will be explained in greater detail in this chronology, the funds never were sequestered as he later admitted to this Court under oath, and such funds were apparently used at the direction of Weiner.

On January 30, 1997, Kenwin hired counsel and demanded materials in order for its own "forensic accountants" to review all of the records. (Complaint, Exh. 22). On February 10, 1997, the first suit, not the above-styled matter, was filed in Jefferson Parish by Kenwin. That case remains in state court. On the same date Kenwin filed suit in New York claiming in that suit breach of contract, conversion, defamation of trade, and tort.

In March of 1997, Kenwin acknowledged in its SEC report that the two pending suits and that it was receiving money on the BOL accounts which was being shown as a liability on its balance sheet in the amount of $462,016. (Complaint, Exh. 33).

BOL had been told that the funds so collected were being sequestered. On April 21, 1997, BOL's counsel wrote to confirm a conversation that allegedly occurred with Kenwin's counsel with respect to these funds. In the letter BOL demanded that the sequestered money be turned over, and noted that BOL considered the sequestration a conversion of its funds. Counsel for Kenwin apparently promised to advise counsel for BOL by that afternoon "(a) of the amount [he had] ascertained belongs to BOL, (b) whether [his] client [would] forward BOL's funds to BOL and (c) whether [his] client [would] disclose the identity of the bank account where the funds [were] presently sequestered." (C.A. No. 97–1988, Complaint, Exh. 23).

On April 22, 1997, in response, the same counsel for Kenwin, apparently on behalf of D & A, claimed that BOL owed D & A $736,175 because of its allegedly superior security interest in the clothing sold under its Consignment Agreement with Kenwin. Under UCC law, D & A gave BOL three days to turn over the subject funds, or face litigation. On the same day, BOL filed C.A. No. 97–1315 here, contending that it never had any knowledge of the other lien and sought a declaration that its security interest primes that of D & A.

***4** On April 28, 1997, D & A filed *D & A Funding Corporation v. Bank of Louisiana*, Index No. 107678/1997 in the Supreme Court of the State of New York, County of New York seeking the amount of money allegedly converted by BOL by through its "diversion" of moneys from the bank accounts by BOL. That case was removed to federal court in the Southern District of New York. On the same day, BOL filed *Bank of Louisiana v. Donald Weiner, Barbara Weiner, Arthur Gins, Edith Gins. D & A Funding Corp., Kenneth Sauer and Christopher s. Rooney*, C.A. No. 97–1988, the instant suit. In this suit, BOL sues Weiner directly for the first time seeking injunctive relief with the respective funds on.

A Motion to Dismiss was filed by various defendants in, *inter alia*, the C.A.No. 97–1315 case then pending in the Eastern District of Louisiana which motion was set to be heard by this Court on

July 23, 1998. On that date, counsel for BOL filed a Motion for Injunctive Relief in the second filed case C.A.No. 97–1988. In addition, Weiner filed a Motion to Dismiss in C.A. No. 97–1988 the ruling upon which the instant motion is based. These various motions and the injunction was set to be heard for August 21, 1998. On the eve of the hearing, counsel for Kenwin sought a continuance of the hearing. It was represented to this Court that as the funds were sequestered, there could be no harm to BOL with respect to such a continuance. In large part because of that representation, the Court continued the hearing believing that the money at issue was safely set aside by Kenwin and was not being spent. At that time, counsel for BOL warned the Court of his belief that the money indeed was not so sequestered. However, relying on the promises of Kenwin's counsel that the money was so protected, the Court continued the hearing on the injunction. On August 20, 1999, the Judicial Panel on Multidistrict Litigation transferred the two other cases that were pending in New York to this district for pre-trial litigation.

On September 22, 1997 a settlement conference was set before Magistrate Judge Africk which occurred on October 1, 1997. At that settlement conference, absolutely no mention was made of any financial difficulties on the part of Kenwin. (Africk Testimony, May 20, 1998 at 12). Also, it is clear that Mr. Weiner was present and participated at his counsel's office during the telephonic negotiations. (Africk Testimony, May 20, 1998 at 10). On October 3, 1997, a hearing on the preliminary injunction was scheduled for hearing on October 3, 1997; however, a stipulation was reached which ostensibly mooted that issue mooting this issue

The negotiations culminated in the entering into of a stipulation whereby each party was to put up a bond for two respective amounts at issue between Kenwin and BOL. BOL agreed to procure a bond in the amount of $785,000, and Kenwin agreed to produce a bond in the amount of $517,000. BOL agreed to dismiss its Motion for Injunctive Relief in the same order.

***5** On October 13, 1997, Weiner executed an affidavit required by the Bankruptcy Rule 1007, two days before the actual filing of the Chapter 11 proceeding. On October 14, 1997, Louisiana counsel for Kenwin faxed a message to counsel for BOL stating that Kenwin was still working at obtaining a bond. [FN2] Then on October 15, 1997, Kenwin, through Donald Weiner filed for bankruptcy.

> FN2. It is neither alleged nor does the Court believe that Louisiana counsel for Kenwin was aware of Kenwin's plans for bankruptcy or that fact that funds were not being sequestered.

On October 15, 1997, the Court rendered its decision on the Motion to Dismiss with respect to Weiner which was quoted *in extenso* above. Obviously, the Court was unaware of any of Weiner's machinations and was ignorant with respect to the economic viability of Kenwin. The Court treated Weiner's actions as a corporate officer where no fraud had occurred, and as such could not find personal jurisdiction.

The Court will not regurgitate its previous findings with respect to the eventual entering into a "stipulation" concerning the "sequestered" funds, and the subsequent debacle culminating in this Court's ordering Weiner to appear to show cause why he should not be held personally in contempt. Suffice it to say that this Court remains convinced of its findings contained in its ruling thereon. (97–MDL–1193, Doc. 100). Nonetheless, it is clear that prior to the filing of C.A. No. 97–1988 on April 28, 1998, Weiner engaged in allegedly fraudulent behavior that impacted directly on BOL and Kenwin was in serious financial difficulty at that time. Consequently, the issue before the Court is whether Weiner's actions would support a finding of personal jurisdiction over Weiner.

Personal Jurisdiction

Burden of Proof

"To meet a challenge to *in personam* jurisdiction prior to trial, 'plaintiff need only make a *prima facie* showing of jurisdiction, so that the allegations of the complaint are taken as true except as controverted by the defendant's affidavits and conflicts in the affidavits are resolved in plaintiff's favor." *Asarco. Inc. v. Glenara. Ltd.,* 912 F.2d 784 (5th Cir.1990), *citing Travelers Indemnity Co. v. Calvert Fire Ins. Co.,* 798 F.2d 826, 831 (5th Cir.1986), *modified on other grounds,* 836 F.2d 850 (1988).

Under both the law of Louisiana and the law of New York, a person may be held personally liable for a fraudulent act committed in his capacity as a corporate officer. *See LoneStar Indus. Inc. v. American Chem., Inc.,* 461 So.2d 1063, 1067 (La.App. 4th Cir.1984) and *Buston Manufacturing Co., Inc. v. Valiant Moving & Storage, Inc.,* 239 A.D.2d 452, 453 657 N.Y.S 2d 450, 451 (N.Y.App.2d Div.1997) . Indeed, under Louisiana law, such personal liability is independent from and does not require the disregard of the corporate entity under the alter ego doctrine. *Lone Star,* 461 So .2d at 1066. Thus, the Court must determine whether these allegations of fraud are sufficient to find personal jurisdiction over Weiner. Indeed, two other district courts in the Fifth Circuit have so found. *S & M Representative Inc. v. Hrga,* 1997 WL 328004 (N.D.Tex. June 10, 1997); *Star Brite Distributing, Inc. v. Gavin,* 746 F.Supp. 633 (N.D.Mis.. 1990). The Court agrees with such their reasoning.

***6** As previously stated in this matter, a federal district court sitting in diversity may exercise personal jurisdiction only to the extent permitted a state court under applicable state law. *Allred v. Moore & Peterson,* 117 F.3d 278, 281 (5th Cir.1997). The Louisiana long-arm statute extends personal jurisdiction to the maximum limits permitted by due process. *Pedelahore v. Astropark, Inc.,* 745 F.2d 346, 348 (5th Cir.), *reh, denied, en banc,* 751 F.2d 1258 (5th Cir.1984). Due process advances a two-pronged test in order for the Court to exercise jurisdiction: (1) the nonresident must have minimal contacts with the forum state and (2) subjecting the nonresident to jurisdiction must be consistent with traditional notions of fair play. *Id.* at 348; *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154 (1945).

Minimum contacts with the forum state can arise incident to either "specific jurisdiction" or "general jurisdiction." "Specific jurisdiction is appropriate when the nonresident defendant's contacts with the forum state arise from, or are directly related to, the cause of action. " *Felch v. Tranportes Lar–Mex Sa Da CV,* 92 F.3d 320 (5th Cir.1996): *Id.* at 324, citing *Wilson v. Belin,* 20 F.3d 644, 647 (5th Cir.), *cert. denied,* 513 U.S. 930 (1994). Indeed, "[a] single act, by the defendant directed at the forum state, therefore, can be enough to confer personal jurisdiction if that act gives rise to the claim being asserted." *Ruston Gas Turbines, Inc. v. Donaldson Co.,* 9 F.3d 415, 417 (5th Cir.1993). Where there is intentional and allegedly tortious actions expressly aimed at Louisiana, the tortfeasor must " 'reasonably anticipate being haled in court there." ' *Calder v. Jones,* 465 U.S. 783, 790, 104 S.Ct. 1482, 1487 (1984) (citations omitted). It is alleged that Weiner committed wrongful acts aimed at Louisiana corporation. Taking the allegations as true, specific jurisdiction is present.

To determine whether exercising jurisdiction comports with "fair play and substantial justice" the Court must look at the following factors:

> (1) the defendant's burden; (2) the forum state's interests; (3) the plaintiff's interest in convenient and effective relief; (4) the judicial system's interest in efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.

Gundle Lining Const. Corp. v. Adams County Asphalt, Inc., 85 F .3d 201, 207 (5th Cir.1996) (citation omitted).

Considering (1) Weiner's control over Kenwin as demonstrated to the Court to date, (2) he will be

present in Louisiana in his corporate capacity for this trial; and (3) at present the same counsel represents both Kenwin and Weiner, the Court cannot find that litigating his personal liability arising out of his actions with Kenwin to be burdensome. The harm that Kenwin and Weiner have allegedly caused is centered in Louisiana. BOL is located in Louisiana, and its personnel and documents will be found here. Thus, this forum would provide BOL with convenient and effective relief. With respect to efficiency, the Judicial Panel on Multidistrict Litigation has found that this is the preferable forum for this litigation. (See Transfer Order, MDL Doc. No. 1193, filed on October 1, 1997). Obviously, then, the shared interest of the several states in furthering fundamental substantive social policies would be served in entertaining jurisdiction over Weiner. Based on all of the foregoing then, the Court must find that it has personal jurisdiction over Weiner and will enter an order granting BOL's Motion to Reconsider.

Leave to Amend: Allegations of the "Alter Ego" Theory of Recovery

***7** The Court would also note that the allegations of BOL with respect to personal liability of Weiner under an "alter ego" theory or by "piercing the corporate veil", regardless of whether New York or Louisiana law applies to that inquiry, might present another basis upon which to lodge personal jurisdiction since under the foregoing analysis, the Court would have to take as true BOL's characterization of the actions of Weiner as set forth in the Evelyn Kelley and Harold Cannon affidavits. *See Asarco. Inc. v. Glenara. Ltd.*, 912 F.2d 784 (5th Cir.1990), *citing Travelers Indemnity Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831 (5th Cir.1986), *modified on other grounds*, 836 F.2d 850 (1988) (conflicts in the affidavits resolved in plaintiff's favor).

When the Court first dismissed Weiner, BOL had not sought to pierce the corporate veil of Kenwin. Since that time, BOL has sought to amend its complaint to raise such allegations; however, it was denied the opportunity because of this Court's previous ruling. Thus, considering the findings of the Court today with respect to personal jurisdiction, the Court will allow BOL to amend its pleadings to assert this cause of action.

The Court would note that the statements contained hearing are not preclusive as to any fact that must be found be a jury. These observations are made in the context of a jurisdictional inquiry. Furthermore, Kenwin still bears the burden of proof as to the liability of Weiner for any of Kenwin's defalcations. Accordingly,

IT IS ORDERED that the Motion for Reconsideration is GRANTED; the Court finds that it has personally jurisdiction over Donald Weiner.

IT IS FURTHER ORDERED that BOL is GRANTED leave to amend its pleadings to comport with the findings in this order.

E.D.La.,1999.
In re Bank of Louisiana/Kenwin Shops Inc., Contract Litigation
Not Reported in F.Supp.2d, 1999 WL 518852 (E.D.La.)

END OF DOCUMENT

Exhibit C

Not Reported in F.Supp.2d, 2009 WL 5195892 (W.D.Tex.)
(Cite as: 2009 WL 5195892 (W.D.Tex.))

Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
W.D. Texas,
San Antonio Division.
J & J SPORTS PRODUCTIONS, INC., Plaintiff,
v.
Jamal TAWIL, Bassam Tawil, and Nizar Tawil, Individually, and as officers, directors, shareholders and/or principals of Keno Investments, LLC d/b/a Randy's Ballroom, and Keno Investments, LLC d/b/a Randy's Ballroom, Defendants.

Civil Action No. SA–09–CV–947–XR.
Dec. 18, 2009.

Julie Cohen Lonstein, Lonstein Law Office, Ellenville, NY, for Plaintiff.

Edward L. Pina, Attorney at Law, San Antonio, TX, for Defendants.

ORDER ON MOTION FOR NEW TRIAL

XAVIER RODRIGUEZ, District Judge.

***1** On this day, the Court considered Defendants' Motion for New Trial and Request for Hearing and Oral Argument. (Docket Entry No. 40). Having reviewed Defendants' motion and Plaintiff's response, Defendants' motion is DENIED. The parties have sufficiently briefed the Court so that it may render a decision on this matter; therefore, Defendants' request for a new trial is DENIED.

Procedural History

The Court summarized the procedural history of this case in its Order on Defendants' motion for reconsideration.

Plaintiff filed suit against Defendants for violations of 47 U.S .C. § 605(a), which prohibits the unauthorized publication or use of the transmission of a communication, and 47 U.S.C. § 553, which prohibits the unauthorized reception, interception, and exhibition of a communications service offered over a cable system. (Pl.'s 1st Am. Compl. ¶¶ 16–33 (June 29, 2009) [Docket Entry No. 8].) Defendants filed a counterclaim "for bringing suit against defendants prior to determining the contractual relationship [Defendants] had with [a third party]." (Def.s' Mot. to Dismiss or in the Alternative for More Definite Statement, Affirmative Defenses, Countercl.s Against Pl. J & J Sports Production, Inc. & Cross-cl.s Against 3d Party Def.s Austin Dish, Direct TV Commercial Retailer d/b/a Direct TV Austin a/k/a DirecTV 13–14 (Aug. 18, 2009) [Docket Entry No. 20]. ("Countercl.s").) They also brought a counterclaim for "disparagement of their good names and business reputations." (*Id.*) Plaintiff filed its Motion to Dismiss pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure. (Pl.'s Mot. to Dismiss Def.s' Countercl. (Sept. 10, 2009) [Docket Entry No. 25].) The Court inadvertently did not consider Defendants' response to Plaintiff's motion, which was filed twenty-two days beyond the deadline to respond to Plaintiff's motion. (*See* Def.s' Resp. in Opposition to Pl.'s Mot. to Dismiss (Oct. 16, 2009) [Docket Entry No. 31].) The Court issued an Order that dismissed Defendants' counterclaims without considering Defendants' response to Plaintiff's motion. (Order on Mot. to Dismiss Countercl .s (Nov. 9, 2009) [Docket Entry No. 36].)

(Order on Mot. for Reconsideration (Nov. 30, 2009) [Docket Entry No. 38].) The Court denied the Defendants' motion for reconsideration on the grounds that Defendants had failed to respond to the motion before the deadline imposed by the Rules of the Western District of Texas, making it unnecessary for the Court to have considered Defendants' response. (*Id.* at 4.) The Court, however, did not summarily dismiss the substance of Defend-

ants' arguments. The Court analyzed Defendants' counterclaims to find that "[e]ven if the Court were to have considered Defendants' response, Plaintiff would still succeed on its motion to dismiss Defendants' counterclaims." (*Id.*) On Defendants' own request, the Court severed the counterclaims from the case and rendered a final judgment so that they may file an interlocutory appeal on the matter. (*Id.* at 7.) On December 10, 2009, Defendants filed their motion for a new trial and requested a hearing and oral argument. (Mot. for New Trial & Req. for Hr'g & Oral Argument (Dec. 10, 2009) [Docket Entry No. 40] ("Mot.").). Plaintiff J & J Sports Productions, Inc. has responded to the motion. (Resp. to Mot. for New Trial (Dec. 17, 2009) [Docket Entry No. 41] ("Resp.").)

Defendants' Motion

***2** Defendants bring their motion "pursuant to Federal Rules of Civil Procedure 54 or in the alternative pursuant to Rule 50(b); (c) ." (Mot. at 1.) Defendants request a new trial on their counterclaims, arguing that due process requires notice of a perceived infirmity in their pleadings and that the Court's reasoning is not supported because "the Court misunderstood the basis for their Counterclaims." (*Id.* ¶¶ 11–12.) They further state that the Court refused to consider their response to J & J Sports Production's motion to dismiss, which clarified their claims. (*Id.* ¶ 12.)

Discussion

Plaintiff correctly points out the procedural defects of the pending motion. "[N]either [Rules] 54 nor 50 provide for Defendants' requested relief. [Rule 54] does not provide for a new trial at all. [Rules] 50(b) and (c) apply to jury trials in which a party has moved for judgment as a matter of law ...." (Resp. at 2–3.) The Court will assume that this is a "motion for reconsideration" of an interlocutory order pursuant to Rule 54(b) or to alter or amend a judgment pursuant to Rule 59(e). Analysis under Rule 54(b) is informed by Rule 59(e), which requires (1) an intervening change in controlling law; (2) new evidence not previously available; or (3) the need to correct a clear or manifest error of law or fact or to prevent manifest injustice. *In re Benjamin Moore & Co.*, 318 F.3d 626, 629 (5th Cir.2002) (discussing requirements of Rule 59(e)); *Dos Santos v. Bell Helicopter Textron, Inc. Dist.*, No. 4:06–CV–292–Y, 2009 WL 2474771, at *3 (N.D.Tex. Aug. 13, 2009) (using Rule 59 to inform analysis under Rule 54); *T–M Vacuum Prods., Inc. v. TAISC, Inc.*, No. C–08–309, 2008 WL 2785636, at *2 (S.D.Tex. July 16, 2008) (same).

The Court will interpret Defendants' motion as alleging the need to correct a clear or manifest error of law or fact or to prevent manifest injustice. The motion amounts to a request for reconsideration of the Court's order on Defendants' motion for reconsideration. In that order, the Court provided the Defendants precisely what they requested in the Motion for Reconsideration ... or for Severance: "that the Court grant a severance and enter a final judgment on these dismissed counterclaims so that the defendants may immediately file an appeal of this matter." (Mot. for Reconsideration of the Court's Order on Pl.'s Mot. to Dismiss Counter–Cl.s or for Severance (Nov. 20, 2009) [Docket Entry No. 36].) In the order on the motion to reconsider, the Court admitted that it did not consider Defendants' response to Plaintiff's motion to dismiss, but recognized that Defendants' failure to respond as required by the Rules of the Court meant that the Court was within its discretion to disregard their response. (Order at 4.)

In any case, to ensure that a decision was rendered on the merits of their arguments, the Court reviewed Defendants' response and evaluated the substance of their counterclaims, noting that they failed to state a claim. (*Id.* at 5–7.) Defendants allege that they were not provided with an opportunity to amend their pleadings. First, Plaintiff's motion to dismiss Defendants' counterclaims placed them on notice that their allegations were potentially infirm. Second, the Court's consideration of a motion pursuant to Rule 12(b)(6) and the parties' arguments before the Court presented no basis for

leave to amend pleadings. Third, the Court granted the relief sought by Defendants in the event that the Court denied their motion for reconsideration.[FN1]

FN1. *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242 (5th Cir.1997) is distinguishable from this case. In *Lowrey*, the Fifth Circuit found that the trial court abused its discretion when it refused to grant an *unopposed motion for leave to amend* filed by Lowrey in response to Texas A & M University System's motion to dismiss. This is not the procedural posture of this case. Here, Defendants failed to respond timely, Defendants' response did not seek leave of the Court to amend pleadings, and Defendants requested that the Court sever and grant judgment on their counterclaims in their motion for reconsideration, which the Court granted. Moreover, unlike *Lowrey*, the Court evaluated the substance of Defendants' claim to find that it was insufficient. "It is not the court's place to speculate or imagine what the [pleading party's] claims may be." *Martin v. U.S. Post Office*, 752 F.Supp. 213, 218 (N.D.Tex.1990), *aff'd*, 929 F.2d 697 (5th Cir.1991) (unpublished table decision). Furthermore, Defendants are not *pro se*, but are represented by counsel who requested the very relief this Court granted. *Cf. Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir.1998) (regarding leniency provided by district courts to *pro se* litigants).

Conclusion

***3** For the aforementioned reasons, Defendants' motion is DENIED.

It is so ORDERED.

W.D.Tex.,2009.
J & J Sports Productions, Inc. v. Tawil
Not Reported in F.Supp.2d, 2009 WL 5195892 (W.D.Tex.)

END OF DOCUMENT

Exhibit D

Not Reported in N.E.2d, 2002 WL 31518175 (Ohio App. 5 Dist.), 2002 -Ohio- 6126
(Cite as: 2002 WL 31518175 (Ohio App. 5 Dist.))

Court of Appeals of Ohio,
Fifth District, Tuscarawas County.
Don KNEUSS, et al., Plaintiffs-Appellees,
v.
Dee RITENOUR, dba Dee's Travel, Defendant-Appellant.

No. 2001AP110097.
Decided Nov. 6, 2002.

Customers sued travel agent for cost of travel package after they missed their flight. The Municipal Court, Tuscarawas County, entered judgment for customers after overruling agent's objections to magistrate's decision and denying new trial motion. The Court of Appeals, Hoffman, P.J., held that Airline Deregulation Act did not preempt Ohio Consumer Sales Practice Act as to business activities of travel agent.

Affirmed.

West Headnotes

[1] Justices of the Peace 231 ⚿164(2)

231 Justices of the Peace
231V Review of Proceedings
231V(A) Appeal and Error
231k164 Return, Statement, Record, or Transcript
231k164(2) k. Necessity, Scope, Contents, and Requisites of Transcript and Bill of Exceptions. Most Cited Cases

Travel agent waived for appellate review any finding of fact of magistrate in action by customers for amount of travel package after they missed their flight; agent did not comply with rule governing objections by failing to provide either transcript of hearing or affidavit of evidence submitted to magistrate to trial court. Rules Civ.Proc., Rule 53(E)(3)(b).

[2] Antitrust and Trade Regulation 29T ⚿132

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk132 k. Preemption. Most Cited Cases
(Formerly 92Hk6 Consumer Protection)

States 360 ⚿18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases

Federal Airline Deregulation Act (ADA) only prohibited states from enforcing any law that regulated airline rates, routes or services, and thus, ADA did not preempt Ohio Consumer Sales Practice Act as to business activities of travel agent, regarding refund of cost of travel package sought by customers after they missed their flight. Federal Aviation Act of 1958, § 105(a)(1), as amended 49 U.S.C.App.(1988 Ed.) § 1381(a); R.C. § 1345.01, et seq.

Appeal from the New Philadelphia Municipal Court, Case No. CVI-9900250.Don Kneuss, Patricia Kneuss, New Philadelphia, OH, for plaintiffs-appellees.

Joseph I. Tripodi, New Philadelphia, OH, for defendant-appellant.

HOFFMAN, P.J.

***1** {¶ 1} Defendant-appellant Dee Ritenour dba Dee's Travel appeals the September 5, 2000 Judg-

ment Entry of the New Philadelphia Municipal Court which overruled her objections to the magistrate's decision and entered judgment in favor of plaintiffs-appellees Don and Patricia Kneuss. Appellant also appeals the October 12, 2001 Judgment Entry which overruled her motion for a new trial.

STATEMENT OF THE CASE AND FACTS

{¶ 2} On August 9, 1999, appellees filed a small claims action for the return of $775.00 used to purchase an airline and hotel travel package. Appellees purchased the travel package from appellant, a travel agent. Appellant arranged the travel package through Continental Airlines and its vacation subsidiary, Certified Vacations. Appellees gave a check to appellant, made payable to Certified Vacations for $750.00 and received airline tickets and hotel vouchers. Appellees did not purchase travel insurance. The ticket package was promptly delivered to appellees and the trip was scheduled for May 18, 1999.

{¶ 3} Unfortunately, on the way to the airport, appellees' car broke down. As a result, appellees missed their flight. Appellees contacted appellant's office and appellant attempted to cancel the trip. Unfortunately, appellant was unable to get either an airline or a hotel refund for appellees from the supplier. Appellant did not receive a fee on this transaction because appellees failed to attend the trip.

{¶ 4} On August 10, 1999, appellees filed a small claim action against appellant. The matter proceeded to trial before a magistrate on January 27, 2000. The magistrate issued his decision on February 4, 2000, finding appellant liable for $750.00 based upon a violation of the Ohio Consumer Protection Law. The trial court adopted the magistrate's decision on the same day.

{¶ 5} On February 10, 2000, appellant filed two objections to the magistrate's decision. Those objections were: 1) That the Decision of the Magistrate is against the manifest weight of the evidence and is unlawful pursuant to Federal Statute, and Supreme Court of the United States. 2) Further, that Federal Law preempts the Ohio Consumer Sales Practice Act and said Brief of Defendant filed in this Cause clearly sets forth the law which the Magistrate has failed to acknowledge, which directly affects this Defendant.

{¶ 6} Via Judgment Entry dated April 7, 2000, the trial court advised appellant that Christine Engstrom was the authorized court stenographer and could be contacted for the preparation of a transcript of the proceedings.

{¶ 7} On September 5, 2000, the trial court overruled appellant's objections to the magistrate's decision. Therein, the trial court stated: The court finds that a transcript of proceedings has not been filed with the court. However, the court views the objection largely to be one of law, in that the defendant claims that Federal law preempts the Ohio Consumer Sales Practices Act. The court overrules this objection and finds that the magistrate's decision should be approved.

***2** {¶ 8} Thereafter, on September 7, 2000, appellant filed a motion for a new trial. Attached to the motion for a new trial was an affidavit from Christine Engstrom which stated appellant had ordered a transcript. However, after listening to a portion of the tape, Ms. Engstrom expressed some doubt as the clarity of the audiotape and agreed to make another attempt to listen to the tape when headphones could be located. Apparently, Ms. Engstrom never located headphones, and therefore, never prepared a transcript. In an October 12, 2001 Judgment Entry, the trial court overruled appellant's motion for a new trial.

{¶ 9} Appellant now appeals the September 5, 2000 Judgment Entry overruling her objections to the magistrate's decision, and the trial court's October 12, 2001 Judgment Entry, which overruled her motion for a new trial. Appellant assigns the following errors for our review:

{¶ 10} I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DIS-

CRETION IN OVERRULING APPELLANT'S MOTION FOR NEW TRIAL DATED SEPTEMBER 7, 2000.

{¶ 11} II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADOPTING A MAGISTRATE'S DECISION WHICH UNLAWFULLY IMPOSED THE 'DEPOSIT RULE' OF OAC 109:4-3-07 UPON APPELLANT, WHICH RULE EXPRESSLY DOES NOT APPLY TO THE FACTS IN THE CASE.

{¶ 12} III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN RULING THAT APPELLANT OWED APPELLEES A REFUND WHEN THE UNCONTROVERTED EVIDENCE ILLUSTRATED APPELLANT HAD COMPLETED HER CONTRACT WITH APPELLEES.

I, II, III

{¶ 13} In appellant's first assignment of error, she maintains the trial court erred in denying her motion for a new trial. In appellant's second assignment of error, she argues the trial court erred in adopting the magistrate's decision finding the deposit rule when the rule applied did not apply to the facts of the case. In appellant's third assignment of error, she contends the trial court erred in finding she owed a refund when the uncontroverted evidence illustrated she had completed the contract with appellees. Because these assignments of error are interrelated, we address them together.

{¶ 14} As noted in the Statement of the Case and Facts, appellant filed objections to the magistrate's decision. For whatever reason, appellant was unable to obtain a transcript of the hearing before the magistrate for the trial court's review.

{¶ 15} Civ. R. 53 provides, in relevant part: "(E)(3) Objections * * * (b) Form of objections. Objections shall be specific and state with particularity the grounds of objection. If the parties stipulate in writing that the magistrate's findings of fact shall be final, they may object only to errors of law in the magistrate's decision. *Any objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available. A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule."* (Emphasis added).

***3** [1] {¶ 16} As noted above, appellant failed to provide a transcript of the magistrate's hearing to the trial court for the trial court's review. While appellant did file an affidavit with his motion for a new trial, we find the affidavit did not comply with Civ. R. 53. The rule requires an affidavit of the evidence submitted to the magistrate, not an affidavit demonstrating why the transcript was unavailable. Therefore, we find the trial court's denial of appellant's motion for a new trial was proper due to appellant's noncompliance with the rule. Appellant cannot circumvent the requirement of providing the trial court with a transcript with a filing of a motion for a new trial.

[2] {¶ 17} Because appellant failed to provide a transcript to the trial court, appellant is now foreclosed from making any argument relative to the magistrate's finding of fact on appeal. However, appellant is still permitted to appeal any objections it raised to the trial court with regard to any conclusion of law reached by the magistrate. Our review of appellant's objections demonstrates the only objection made to the trial court was that the magistrate erred in failing to find that Federal law preempts the Ohio Consumer Sales Practice Act (OCSPA). Any other legal argument is waived on appeal pursuant to App. R. 53. Accordingly, we turn our attention to appellant's sole remaining argument.

{¶ 18} In her memorandum to the trial court, appellant argued the consumer protection statutes of Ohio are preempted by Federal law. Therefore, she could not be found liable under the OCSPA. In support of this proposition, appellant cites *American Airlines Inc. v. Wolens* (1995), 513 U.S. 219,

115 S.Ct. 817, 130 L.Ed.2d 715, 130 L.Ed. 715.

{¶ 19} *Wolens* was a consolidated state court class action brought in Illinois. Plaintiffs therein were participants in an American Airlines frequent flier program and had challenged American's retroactive changes in the program terms and conditions, particularly American's imposition of capacity controls (limits on seats available to passengers obtaining tickets with frequent flier credits) and blackout dates. The plaintiffs alleged application of these changes to the mileage credits previously accumulated violated the Illinois Consumer Fraud and Deceptive Businesses Practices Act and constituted a breach of contract. American answered that the airline Deregulation Act of 1978(ADA) preempted the plaintiffs' claims.

{¶ 20} The Supreme Court held the ADA prohibited states from enacting or enforcing any law or provision having the force or effect of regulating air carriers rates, routes, or services. However, the Supreme Court allowed room for state court enforcement of contract terms set by party themselves. *Wolens* 513 U.S. 219, 115 S.Ct. 817, 819, 130 L.Ed.2d 715, syllabus.

{¶ 21} In the February 4, 2000 Magistrate's Decision, the magistrate found the OCSPA applied to this case. The magistrate stated: [*Wolens*, supra] held that the Airline Deregulation Act (ADA) 92 Stat. 1705 preempted State law with respect to the application of state consumer sales practices statutes against airlines that are regulated by the ADA. The case did not hold that the preemption included business activities of travel agents. This Court concludes that the Ohio Consumer Sales Practices Act does apply to the business activities of travel agent business. Magistrate's Decision at 2.

***4** {¶ 22} We agree with the magistrate the ADA only preempts state law with respect to the application of state consumer sales practices statutes against airlines that are regulated by the ADA. As stated by the magistrate, this contract was between a consumer and a travel agent. Accordingly, we find the trial court properly concluded the appellee's claim was not preempted by federal law.

{¶ 23} For these reasons, each of appellant's assignments of error are overruled.

{¶ 24} The September 5, 2000, and October 12, 2001 Judgment Entries of the New Philadelphia Municipal Court are affirmed.

HOFFMAN, P.J., EDWARDS and BOGGINS, JJ., concur.

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum Opinion, the September 5, 2000, and October 12, 2001 Judgment Entries of the New Philadelphia Municipal Court are affirmed. Costs assessed to appellant.

Ohio App. 5 Dist.,2002.
Kneuss v. Ritenour
Not Reported in N.E.2d, 2002 WL 31518175 (Ohio App. 5 Dist.), 2002 -Ohio- 6126

END OF DOCUMENT

Exhibit E

MANASSAS TRAVEL, INC., Plaintiff, vs. WORLDSPAN, L.P., ET AL, Defendants.

Case No. 2:07-CV-701-TC

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

2008 U.S. Dist. LEXIS 35217

April 30, 2008, Decided
April 30, 2008, Filed

COUNSEL: [*1] For Manassas Travel, Plaintiff, Counter Defendant: Brian W Steffensen, LEAD ATTORNEY, STEFFENSEN LAW OFFICE, SALT LAKE CITY, UT.

For Worldspan L.P., Defendant: James D Gilson, LEAD ATTORNEY, CALLISTER NEBEKER & MCCULLOUGH, SALT LAKE CITY, UT; Aron J. Frakes, Jeffrey J. Bushofsky, Megan E. Thibert-Ind, MCDERMOTT WILL & EMERY (IL), CHICAGO, IL; Paul E. Chronis, PRO HAC VICE, MCDERMOTT WILL & EMERY (IL), CHICAGO, IL.

For Worldspan L.P., Counter Claimant: Aron J. Frakes, LEAD ATTORNEY, Paul E. Chronis, MCDERMOTT WILL & EMERY (IL), CHICAGO, IL; James D Gilson, LEAD ATTORNEY, CALLISTER NEBEKER & MCCULLOUGH, SALT LAKE CITY, UT.

JUDGES: TENA CAMPBELL, Chief Judge.

OPINION BY: TENA CAMPBELL

OPINION

ORDER AND MEMORANDUM DECISION

In this diversity action, Manassas Travel, Inc. ("Manassas") has sued Worldspan, LP ("Worldspan") and Stewart Hall, an account representative of Worldspan, alleging breach of contract, breach of the covenant of good faith and fair dealing, intentional interference with contract, intentional and negligent interference with business relationships, and civil conspiracy. Manassas provides travel services to government agencies and private corporations. [1] Worldspan offers a computerized reservations service [*2] ("CRS"), also called a global distribution system ("GDS"). After the business relationship between Manassas and Worldwide soured, Manassas brought this action.

1 All factual statements in this order are taken from the complaint. Because the agreements between Manassas and Worldwide are at the center of this lawsuit and are referred to several times in the complaint, the court has also, when necessary, considered the agreements themselves.

> But the court has not considered other supplemental materials submitted by the parties and, therefore, does not treat this motion as one for summary judgment.

Worldspan has filed a motion to dismiss [2], raising various arguments in support of their motion, chief among them that the Airline Deregulation Act ("ADA") preempts all Manassas claims. As discussed below, the court grants Worldspan's motion on all claims except the two contract claims (claims one and four).

> 2 In total, Worldspan filed three separate motions in support of dismissing Manassas's claims including an initial motion to dismiss (dkt. # 4), a supplemental motion to dismiss (dkt. # 30), and a post-hearing supplemental brief per the direction of the court. (Dkt. # 61.)

BACKGROUND

In 2001, a [*3] travel agency called N&N Travel and Tours ("N&N") won the bid to become the prime contractor on a large contract with the United States Air Force Education Training Command ("AETC Contract"). Manassas was one of six travel agencies acting as subcontractors on the AETC Contract. All six travel agencies contracted with Worldspan to use Worldspan's GDS in connection with the AETC Contract.

In 2004, N&N assigned its own contract with Worldspan ("The N&N Worldspan Agreement") to Manassas. Manassas claims that although Worldspan knew that Manassas was now to receive all the payments that were earlier due N&N under the N&N Worldspan Contract, Worldspan did not make the payments to Manassas. Manassas alleges that in failing to make the required payments, Worldspan breached the N&N Worldspan Agreement, violated the covenant of good faith and fair dealing and is liable for tortious interference with the Agreement (claims one, two and three of the complaint).

In October 2004, Manassas and Worldspan entered into a second contract ("the New Manassas / Worldspan Agreement"). Manassas alleges that when Manassas sought payment from Worldspan for the payments due under the N&N Worldspan Agreement, Worldspan [*4] wrongfully terminated, and thereby breached, the New Manassas / Worldspan Agreement. Manassas also claims violation of the covenant of good faith and fair dealing and tortious interference with the New Manassas / Worldspan Agreement (claims four, five and six of the complaint). Manassas further alleges that Defendant Stewart Hall, an account executive of Worldspan, disclosed confidential information about Manassas and its business to competitors of Manassas (claim seven). In claim eight, Manassas alleges that the actions of the Defendants were part of a conspiracy.

ANALYSIS

Standard of Review

When reviewing a motion to dismiss, the court assumes the truth of the well-pleaded factual allegations, viewing them in the light most favorable to the plaintiff. *Ridge at Red Rock v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007)*. The complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1969, 167 L. Ed. 2d 929 (2007))*.

Previously Dismissed Claims

In its opposition to Worldspan's motion to dismiss, Manassas acknowledged that its third and sixth claims for relief, alleging tortious interference with contract, should [*5] be dismissed for failure to state a claim. Then, at the hearing, Manassas's counsel acknowledged that Georgia law controlled the interpretation of the N&N Worldspan Agreement and the New Manassas / Worldspan Agreement. Counsel also acknowledged that the associated second and fifth claims (breach of the covenant of good faith and fair dealing) should be dismissed because Georgia law does not recognize breach of the covenant of good faith and fair dealing as a separate cause of action. (Hr'g Tr. 8-10, Mar. 11, 2008); *See also Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1429 (11th Cir. 1990)*. Also at the hearing, the court, relying on *Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982)*, held that the claim for negligent interference with business relationships (claim seven) must be dismissed, although it reserved ruling on the claim of intentional interference pled in that claim. (Hr'g Tr. 10.)

At the close of the hearing, the court directed the parties to submit additional briefing on the issues of preemption under the ADA and the "improper means" element of the claim for intentional interference with business relationships. The court has carefully reviewed

the [*6] briefs and now rules as follows.

ADA Preemption

The ADA prohibits States from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . . ." *49 U.S.C. § 41713(b)(1)*. Worldspan agreed that the breach of contract claims (claims one and four) are not preempted so long as they "stay within the four corners of the parties' contract . . . ." (Worldspan Supplemental Br. Supp. Mot. Dismiss 10 n.5.) But Worldspan contends that to the extent Manassas is seeking extra-contract relief, such as attorneys' fees, exemplary damages and interest, the ADA preempts such relief. *American Airlines v. Wolens, 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995)*, supports Worldspan's argument. There the Court held that the ADA did not preempt a straightforward breach of contract claim: "A remedy confined to the contract's terms simply holds parties to their agreements . . . ." *Id. at 229*. But the Court made clear that any relief that went beyond "the parties' bargain" and was "based on state laws or policies external to the agreement" was preempted. *Id. at 233*.

Other courts have held that in cases alleging breach of contract, claims for punitive [*7] damages are preempted by the ADA. *See Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1432 n.8 (7th Cir. 1996)* (holding that although breach of contract claim itself was not preempted, under *Wolens*, punitive damages, because they are based on state laws or policies external to the contract, were preempted); *Power Standards Lab. Inc. v. Fed. Express Corp., 127 Cal. App. 4th 1039, 1046-47, 26 Cal. Rptr. 3d 202 (Cal. Dist. Ct. App. 2005)* (same). Of course, if Manassas's request for attorneys' fees and interest is based on the agreements themselves, the request would not be preempted. But the parties have not addressed that issue. Accordingly, the court dismisses only the claim for punitive damages, does not dismiss the contract claims themselves, and reserves ruling on the claims for attorneys' fees and interest.

Worldspan also contends that the two remaining claims, intentional interference with business relationships (claim seven) and civil conspiracy (claim eight), are preempted. But the court has decided that those claims must be dismissed on other grounds and therefore will not reach the issue of preemption of counts seven and eight.

Intentional Interference With Economic Relations

In [*8] *Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982)*, the Utah Supreme Court established the elements for the tort of intentional interference with economic relations: (1) the defendant intentionally interfered with the plaintiff's existing or potential economic relations; (2) for an improper purpose or by improper means; (3) causing injury to the plaintiff. *Id. at 304*. The *Leigh* court made it clear that "improper purpose" is established by a showing that the defendant's primary purpose was to injure the plaintiff. *Id. at 307*. Manassas has not alleged that Defendants acted for an improper purpose. The alternative for satisfying factor two of the test is to allege "improper means."

According to Manassas's allegations, Worldspan and Mr. Hall acted, not with the deliberate intent to injure Manassas, but to gain economic benefit. Under Utah law, this is not sufficient to establish the "improper means" element of the tort of intentional interference with business relationships.

Manassas, at the hearing, argued that Worldspan had acted by improper means. [3] Manassas argues that the "improper means" element was met because Defendants breached their fiduciary duty. Manassas contends [*9] that Defendants owed a fiduciary duty to Manassas, which they breached by disclosing confidential information. But the Agreement itself does not have an express agreement creating a fiduciary relationship between the parties. And Manassas did not, nor can it, argue that it alleged any facts indicating a fiduciary relationship between Worldspan and Manassas.

> 3 The court notes that breach of contract and breach of the implied covenant of good faith and fair dealing are not, under Utah Law, improper means. The *Leigh* court stated, "A deliberate breach of contract, even where employed to secure economic advantage, is not, by itself, an 'improper means.'" *657 P.2d at 309*. Accordingly, Manassas may not rely on those acts to establish the tort.

"A fiduciary relationship imparts a position of peculiar confidence placed by one individual in another. A fiduciary is a person with a duty to act primarily for the benefit of another . . . . A fiduciary relationship implies a condition of superiority of one of the parties over the other. Generally, in a fiduciary relationship, the property,

interest or authority of the other is placed in the charge of the fiduciary." *First Sec. Bank of Utah v. Banberry Dev. Corp., 786 P.2d 1326, 1333 (Utah 1989)*. [*10] "There is no invariable rule which determines the existence of a fiduciary relationship, but . . . there must exist a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions, giving to one advantage over the other." *Id.*

Manassas argues that Worldspan stands in a superior position to Manassas. Manassas also states that it entrusted its important and sensitive information to Worldspan. But Manassas does not explain how those statements indicate a fiduciary relationship.

From the allegations, it appears that Manassas provided confidential information to Worldspan as part of an arm's length business transaction. Manassas does not allege any facts supporting its conclusion that Worldspan was placed in a position of peculiar confidence by Manassas or that Worldspan had a duty to "act primarily for the benefit of" Manassas. Moreover, Manassas does not explain or allege how Worldspan stands in a position superior to Manassas.

Accordingly, because Manassas has not alleged either improper purpose or improper means, the court dismisses Manassas's claim for intentional interference with business relations.

Civil [*11] *Conspiracy*

Manassas conceded at the hearing that the unlawful act required for a civil conspiracy was the same unlawful act necessary to prove "improper means" in claim seven. (Hr'g Tr. 22.) Manassas conceded that if claim seven failed, then so would claim eight. (*Id.*) Accordingly, the court holds that because "improper means" was not alleged in claim seven, claim eight must also be dismissed.

ORDER

For the reasons set forth above and at the March 11, 2008 hearing, Worldspan's motion to dismiss (dkt. nos. 4, 30, 61) is GRANTED IN PART and DENIED IN PART as follows:

> 1) Manassas's claims two, three, five, six, seven and eight are DISMISSED.
>
> 2) Although claims one and four remain, the claim for punitive damages is DISMISSED.

The court reserves ruling on the claims for attorneys' fees and interest. [4]

> 4 At the hearing, Worldspan was given leave to file the amended counterclaim. (Hr'g Tr. 36) (granting Worldspan's Motion to Amend/Correct Counterclaim (dkt. no. 28)). Accordingly, Manassas's Motion to Dismiss Worldspan's Counterclaim (dkt. no. 22) is DISMISSED as moot because Worldspan has filed an amended counterclaim. Also, Manassas's Motion to Strike Worldspan's Supplemental Motion to Dismiss (dkt. [*12] no. 47) and Manassas's Motion to Strike Portions of Memo (dkt. no. 50) are DISMISSED as moot based on this order and the outcome of the hearing.

SO ORDERED this 30th day of April, 2008.

BY THE COURT:

/s/ Tena Campbell

TENA CAMPBELL

Chief Judge

Exhibit F

Not Reported in F.Supp.2d, 2006 WL 1365411 (S.D.Miss.), 18 A.D. Cases 89
(Cite as: 2006 WL 1365411 (S.D.Miss.))

H

United States District Court,
S.D. Mississippi,
Hattiesburg Division.
Perry G. MASON, Plaintiff
v.
T.K. STANLEY, INC., Defendants.

No. 2:04CV207-KS-JMR.
May 17, 2006.

Paul B. Caston, Montague, Pittman & Varnado, Hattiesburg, MS, for Plaintiff.

Gary E. Friedman, Saundra Gayle Brown, Phelps Dunbar, Jackson, MS, for Defendants.

MEMORANDUM OPINION AND ORDER

KEITH STARRETT, District Judge.

***1** This matter is before the court on a Motion to Reconsider or in the Alternative for Certification Pursuant to 28 U.S.C. § 1292(b) and Stay Proceedings Pending Appeal filed on behalf of the defendant, T.K. Stanley, Inc., **[# 76]** in response to this court's denial of the defendant's summary judgment motion. The court, having reviewed the motion, the response, the exhibits and the pleadings on file and being fully advised in the premises is of the opinion that the motion is not well taken and should be denied.

The factual background of this litigation is recited in the court's opinion denying summary judgment and will not be repeated here. It is sufficient, for purposes of this order, to state that the plaintiff contends that he was terminated from his employment with the defendant in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, and that the court has ruled that he has presented genuine issues of material fact regarding his claims. The defendant now requests the court revisit that ruling.

As the defendant points out, Federal Rule of Civil Procedure 54(b), makes clear that any "order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." However, courts generally treat motions for reconsideration filed within ten days of the order sought to be reconsidered as a motion to alter or amend a judgment pursuant to Fed.R.Civ.P. 59(e). *See Joe v. Minnesota Life Ins. Co.*, 272 F.Supp.2d 603 (S.D.Miss.2003). A specific ground for granting a motion for reconsideration is "the need to correct a clear error of law or prevent manifest injustice." *Joe*, 272 F.Supp.2d at 604. *See also Atkins v. Marathon LeTourneau Co.*, 130 F.R.D. 625 (S.D.Miss.1990).

In ruling on such a motion, the Fifth Circuit has instructed that "a district court should consider the following nonexclusive list of factors: (1) the reasons set forth by the movant justifying consideration of evidence or arguments that the movant failed to present in the underlying motion (2) the importance of the reconsideration of the underlying motion to the movant's case (3) whether the reasons set forth by the movant justifying the reconsideration were available to the movant before they responded to the underlying motion and (4) the likelihood that the non-movants will suffer unfair prejudice if the motion is reconsidered." *Harrigill v. U.S.A.*, 2004 WL 1595676 (S.D. Miss., June 1, 2004) (citing *Sturges v. Moore*, 73 Fed. Appx. 777, 778 (5th Cir.2003)).

The defendant argues that the court's denial of summary judgment to the defendant appears to turn on two key holdings: (1) that the plaintiff established a fact question regarding whether he could meet the ADA's definition of "disability" because he and his wife testified that from April 25, 2003 to October 31, 2003, the plaintiff was unable to, alone, perform the simplest personal hygiene tasks; and (2) whether because the plaintiff had a "record of impairment," a fact question remained regarding

whether the plaintiff could meet the ADA's definition of "disability."

***2** As stated in the original opinion in this case, the threshold requirement in any ADA claim is that a plaintiff must first establish that he has a disability. *de la Torres v. Bolger,* 781 F.2d 1134, 1136 (5th Cir.1986).

The ADA defines a disability as follows:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). The plaintiff is traveling under subsection (B), a record of impairment, and as part and parcel thereof, he must show that he has a record of an impairment that substantially limits or limited one of more of his major life activities. This is where the court found that the plaintiff had created a jury issue, and the finding the defendant is requesting reconsideration of.

Thus, the defendant's main argument to support its request for reconsideration of the denial of summary judgment is that the court erred as a matter of law in concluding that the plaintiff had presented a fact question regarding whether he was disabled within the meaning of the ADA. Specifically, the defendant contends that the plaintiff cannot meet the definition of having a record of disability because he was not "substantially limited in a major life activity."

To support this argument the defendant cites to a number of Fifth Circuit and district court cases holding that people with temporary or correctible injuries are not generally entitled to ADA protection. In reviewing those cases, the court has concluded that the question of disability under the ADA is very fact intensive in most situations and a finding of coverage under the ADA is generally on a case-by-case basis.

In the bulk of the cases cited by the defendant, there was a failure of proof on the critical element of whether the injured person was substantially limited in a major life activity. Most of the cases under the ADA reviewed by the court deal with a permanent or continuing disability, which is not the case here.

However, the defendant seems intent on reading the statute and case law as requiring that one who claims a "record of such an impairment" be currently suffering from a substantial limitation on a major life activity. To be sure, the cases are less than pellucid on this point. A reading of the statute and relevant authority seem to indicate to this court that one who is seeking ADA protections based on a record of impairment need not continue to suffer from a substantial limitation on a major life activity. In fact, any conclusion to the contrary seems to run directly amiss of the statute and Supreme Court precedent.

Indeed, one who claims the protection of subsection (C), regarded as being impaired, need not suffer from any disability at all. This court agrees with the Seventh Circuit's analysis that § 12102(2)(B) is a "close sibling to the perceived impairment provision of § 12102(2)(C). *Davidson v. Midelfort Clinic, Ltd.,* 133 F.3d 499, 509 (7th Cir.1998). In adding subsections (B) and (C), it is axiomatic that Congress was as concerned with people's perceptions of disabled persons as with the disability itself.

***3** It is this court's opinion, that under the facts of this case, the plaintiff need not be suffering from a permanent impairment that substantially limits a major life activity in order to receive the protection of the ADA. He must show that he has a "record of such an impairment" which substantially limited a major life activity and that such was the reason he was terminated.

The Supreme Court has held that a single hos-

pitalization that substantially limited a major life activity more than twenty years before the offending termination was sufficient to establish a record of impairment. *School Bd. Of Nassau County, Fla. v. Arline*, 480 U.S. 273, 281, 107 S.Ct. 1123, 1127, 94 L.Ed.2d 307 (1987). This court has been shown no Fifth Circuit or Supreme Court case which has specifically held, under the factual scenario presented here, that one must still be suffering from a substantial limitation on a major life activity in order to secure the protection of the record of impairment subsection of the ADA. To graft such a requirement onto the statute would make § 12102(2)(B) superfluous because one suffering from such a limitation would meet the definition of disabled under § 12102(2)(A).

For the foregoing reasons, the defendant's motion to reconsider should be denied. Further, the court finds no reason to delay the ultimate resolution of this matter by certifying it for immediate appeal under 28 U.S.C. § 1292(b). The final pretrial conference in this matter is just days away and trial is less than three weeks away. The motion to certify for immediate appeal should also be denied.

IT IS THEREFORE ORDERED AND ADJUDGED that the defendant's Motion to Reconsider or in the Alternative for Certification Pursuant to 28 U.S.C. § 1292(b) and Stay Proceedings Pending Appeal **[# 76]** is Denied.

SO ORDERED AND ADJUDGED this the 17th day of May, 2006.

S.D.Miss.,2006.
Mason v. T.K. Stanley, Inc.
Not Reported in F.Supp.2d, 2006 WL 1365411 (S.D.Miss.), 18 A.D. Cases 89

END OF DOCUMENT

Exhibit G

Not Reported in F.Supp.2d, 2008 WL 7627805 (S.D.Tex.)
(Cite as: 2008 WL 7627805 (S.D.Tex.))

H
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. Texas,
Houston Division.
PERFORACIONES MARITIMAS MEXICANAS S.A. DE C.V. and Certain Reinsuring Underwriters Subscribing to Reinsurance Contract No. AHE-030044 as Amended to No. AHE-04004, Plaintiffs,
v.
SEACOR HOLDINGS, INC., Grupo TMM S.A. de C.V., and Maritima Mexicana S.A. de C.V., Defendants.

Civil Action No. 4:05-cv-419 (Admiralty).
May 1, 2008.

MEMORANDUM AND ORDER

KEITH P. ELLISON, District Judge.

***1** Pending before the Court is Defendants' Motion for Reconsideration of Order on Defendants' Opposed Motion and Notice to Apply Mexican Law and Order Granting Plaintiffs' Motion and Notice to Apply Article 1913 of the Mexican Civil Code. For the following reasons, Defendants' Motion, Docket No. 239, is **DENIED.**

I. BACKGROUND

On May 10, 2007, the Predecessor Court ruled that Mexican substantive law would apply to this case, but also determined that the Mexican limitation of liability law was procedural and did not apply. On July 26, 2007, the Predecessor Court ruled that Article 1913 of the Mexican Civil Code was substantive law and would, therefore, apply to the case. This Court declined to reconsider the Predecessor Court's Order on Article 1913 on March 25, 2008.

Defendants argue that newly discovered evidence requires reconsideration of the prior orders regarding the application of Mexican law. Defendants point to legislation recently proposed by a Mexican Congressman and Draft Guidelines issued by aninternational sub-committee of the Comité Maritime International on Procedural Rules relating to the Limitation of Liability in Maritime Law. Defendants contend that these documents provide clear evidence that the Mexican limitation of liability law should be considered the substantive law of Mexico. [FN1]

FN1. Mexico has ratified the 1976 Convention on Limitation of Liability in Maritime Claims; the Convention was incorporated into the 1994 Mexican Navigation Act.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 54(b) allows the Court to reconsider "any order or other decision ... that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties." FED. R. CIV. P. 54(b); *see also Matagorda Ventures, Inc. v. Travelers Lloyds Ins. Co.*, 208 F.Supp.2d 687, 688 (S.D.Tex.2001). A motion to reconsider should "clearly establish either a manifest error of law or fact or must present newly discovered evidence. These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir.2005) (citing *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990)).

The doctrine of the law of the case and the principle of judicial comity are also relevant to the Court's reconsideration of an order issued by a predecessor judge. "[W]hen a district judge has rendered a decision in a case, and the case is later transferred to another judge, the successor should not ordinarily overrule the earlier decision." *Loumar*, 698 F.2d at 762 (citing 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4478 (1981)). However, neither

the law of the case doctrine nor the principle of judicial comity "is ... a barrier to the correction of judicial error," *Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir.1983); *see also Gallimore v. Missouri Pac. R. Co.*, 635 F.2d 1165, 1172 (5th Cir.1981) (noting that judicial comity "should give way, if the need should arise, to the interests of justice and economy when those interests would be flouted by rigid adherence to the rule"), and the Court retains discretionary authority to reconsider a predecessor judge's decision, *see Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-18, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.' "); *Loumar*, 698 F.2d at 762 (noting a successor judge's "bountiful discretion" in reviewing a predecessor judge's work, but cautioning "A judge should hesitate to undo his own work. Still more should he hesitate to undo the work of another judge. But until final judgment or decree there is no lack of power, and occasionally the power may properly be exercised." (citing *Peterson v. Hopson*, 306 Mass. 597, 29 N.E.2d 140, 144 (Mass.1940)); *Abshire v. Seacoast Products, Inc.*, 668 F.2d 832, 837-38 (5th Cir.1982) ("The successor judge has the same discretion as the first judge to reconsider the order.").

III. ANALYSIS

***2** The Court must first agree with Plaintiffs that Defendants' motion comes exceptionally late. *See, e.g., Vlasek v. Wal-Mart Stores, Inc.*, No. H-07-0386, 2008 WL 167082, at *1 (S.D.Tex. Jan.16, 2008) ("Motions to reconsider interlocutory orders are left to the court's discretion so long as not filed unreasonably late.") The motion, which addresses a rather complicated area of law, became ripe less than two weeks before trial and almost a year after the Predecessor Court entered its Order.

Furthermore, the new evidence provided by Defendants does not demonstrate that the Predecessor Court's decision was clearly erroneous. Defendants admit that the proposed legislation does not represent an authoritative determination by the Mexican courts or legislature that the limitation law is substantive. The Draft Guidelines on the Procedural Rules Relating to Limitation of Liability in Maritime Law promulgated by an International Sub-Committee of the Comité Maritime International does provide some evidence that individuals intimately familiar with the 1976 Convention consider its provisions to be substantive. *See, e.g.*, Draft Guidelines, § 6.1.(b); § 7.1.(a). The Court also admits that there is a logical appeal to Defendants' expert's argument that the Mexican limitation law, which determines the extent to which a shipowner is liable for a maritime casualty, could be considered substantive law. Nevertheless, Defendant's new evidence does not demonstrate that the Predecessor Court clearly erred when holding that the Mexican limitation law is not substantive as defined by the Supreme Court in *Black Diamond S.S. Corp. v. Robert Stewart & Sons (The Norwalk Victory)*, 336 U.S. 386, 396-397, 69 S.Ct. 622, 93 L.Ed. 754 (1949).[FN2] Defendants' new evidence does not render that analysis clearly erroneous.

FN2. It is possible that the problem lies with *The Norwalk Victory* itself. As one treatise writer explains:

> [T]he substantive-procedural distinction [set forth in Norwalk Victory] has been a source of confusion in limitation cases. The distinction has superficial appeal, but upon analysis it fails to be of much use.... [T]he court misconceived the nature of limitation of liability law relating to shipowners. The limitation statute in whatever country never creates tort or other liability; the creation of the duty that results in liability always proceeds from some other statutory or common law right. In other words, a limitation statute, whether under American law or

> foreign law, does not impose liability, it merely limits liability. Thus, it is difficult to imagine a case in which the 'limitation attaches to the right.'
>
> SCHOENBAUM ON ADMIRALTY § 15-3; *see also* GILMORE AND BLACK, THE LAW OF ADMIRALTY 941-42 (calling *The Norwalk Victory* "an extraordinarily obscure opinion" and referring to its language regarding the substantive and procedural nature of limitations laws as "Justice Frankfurter's baffling hypotheses."); Craig H. Allen, *Limitation of Liability*, 31 J. MAR. L. & COM. 263, 276 (2000) ("Most would agree that Justice Holmes' lex fori choice of law rule in *The Titanic*, and the enigmatic 'attaches-to-the-right' gloss added by Justice Frankfurter in *The Norwalk Victory*, will poorly serve the needs of international maritime litigation in the 21st century and should be replaced with the modern *Lauritzen-Rhoditis* admiralty choice of law approach."); Ruth L. Rickard, *A New Role for Interest Analysis in Admiralty Limitation of Liability Conflicts*, 21 TEX. INT'L L.J. 495, 511 (1984) ("The Norwalk Victory's substance/procedure test provides no helpful principles to guide choice of limitation law, without offering even a scrap of efficiency to commend it.").

III. CONCLUSION

Defendant's Motion, Doc. No. 239, is therefore **DENIED.**

IT IS SO ORDERED.

S.D.Tex.,2008.
Perforaciones Maritimas Mexicanas S.A. de C.V. v. Seacor Holdings, Inc.
Not Reported in F.Supp.2d, 2008 WL 7627805 (S.D.Tex.)

END OF DOCUMENT

Exhibit H

Slip Copy, 2010 WL 1330449 (N.D.Tex.)
(Cite as: 2010 WL 1330449 (N.D.Tex.))

H

Only the Westlaw citation is currently available.

United States District Court,
N.D. Texas,
Dallas Division.
Mark ROTELLA, et al., Plaintiffs,
v.
MID-CONTINENT CASUALTY COMPANY, Defendant.

Civil Action No. 3:08-CV-0486-G.
April 5, 2010.

West KeySummary**Insurance 217 2269**

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2269 k. Insured's Liability for Damages. Most Cited Cases

Insurance 217 3390

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(E) Construction and Effect of Settlement or Release
217k3390 k. In General. Most Cited Cases

Insurer fully performed any duty it might have had to indemnify a custom home builder by executing a settlement agreement with a purchaser. Settlement agreement validly released all of the purchaser's claims against builder for the construction-related damages. Insured was no longer legally obligated to pay any other sum as damages.

Robert R. Cole, Jr., Cole & Cole PC, Dallas, TX, for Plaintiffs.

Aaron L. Mitchell, John C. Tollefson, Lori Murphy, Tollefson Bradley Ball & Mitchell LLP, Dallas, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

A. JOE FISH, Senior District Judge.

***1** Before the court are (1) the third motion for summary judgment of the plaintiffs Mark Rotella and Mark Rotella Custom Homes, Inc. d/b/a Benchmark Custom Homes ("Rotella" or "the plaintiffs") (docket entry 115) and (2) the second motion for summary judgment of the defendant Mid-Continent Casualty Company ("Mid-Continent" or "the defendant") (docket entry 119). For the reasons discussed below, the plaintiffs' motion is denied, and the defendant's motion is granted.

I. *BACKGROUND*

A. *Factual Background*

This is a dispute between an insurer and an insured over the scope of the insurer's duties to the insured under a commercial general liability ("CGL") policy.[FN1] Previous opinions of the court detail the facts of this case; only a summary is provided here. Rotella is in the business of building custom homes. Memorandum Opinion and Order of June 10, 2009 (docket entry 100) ("June 2009 Order") at 1. He built one for Joan Cutting ("Cutting"). *Id.* at 2. Cutting was dissatisfied with her home and with Rotella's services, so she sued him in the 158th Judicial District Court of Denton County, Texas. *Id.; see also* Memorandum Opinion and Order of July 10, 2008 (docket entry 19) ("July 2008 Order") at 2. Cutting's action against Rotella ("the underlying suit") alleged that Rotella had engaged in fraudulent billing practices, that he breached his contract with her, and that her home suffered from numerous construction defects. June 2009 Order at 2. Cutting prevailed in the underlying suit and obtained a judgment for $2,671,187.26 in actual and treble damages, $336,342.59 in attorneys' fees, and $191,189.95 in pre-judgment interest, post-judgment interest, and costs. *See* Amended Order Granting Plaintiff Joan Cutting's Second Motion for Summary Judgment in *Cutting v. Rotella*, cause number 2005-20115-158 ("Underlying Judgment") at 2-3, *located in* Ap-

pendix to Mid-Continent's Brief in Support of Its Motion for Partial Summary Judgment(docket entry 48) ("Defendant's First Appendix") at MID00002-MID00003.

> FN1. "In exchange for premiums paid, CGL insurers typically promise to defend and indemnify their insureds for covered risks." *Zurich American Insurance Company v. Nokia, Inc.*, 268 S.W.3d 487, 490 (Tex.2008).

The present action began as a dispute over whether the CGL policy that Rotella purchased from Mid-Continent obligated Mid-Continent to defend and indemnify Rotella in the underlying suit. This action began in August 2007 when Rotella filed suit against Mid-Continent in state court in Dallas. *See generally* Original Petition, *attached to* Mid-Continent Casualty Company's Notice of Removal ("Notice of Removal") (docket entry 1). His original petition alleges five claims based on four causes of action. The four causes of action are breach of contract, bad-faith insurance practices, deceptive trade practices, and negligent misrepresentation. *See* Original petition at 2-5, *see also* Defendant Mid-Casualty Company's First Amended Answer (docket entry 35) at 3-4. The breach-of-contract cause of action encompasses two claims: that Mid-Continent breached the CGL policy by failing to defend Rotella in the underlying suit ("the duty-to-defend claim"), and that Mid-Continent breached the CGL policy by failing to indemnify Rotella against the underlying judgment ("the duty-to-indemnify claim"). *See* July 2008 Order at 3-4. Removal to this court was effected in March 2008. *See* Notice of Removal at 4.

***2** This action has been winnowed down from the five claims alleged in the original petition to the one claim that remains unresolved: Rotella's duty-to-indemnify claim. In July 2008, the court granted summary judgment in favor of Rotella on his duty-to-defend claim. *See* July 2008 Order at 10-11. In April 2009, Rotella and Mid-Continent entered into a settlement agreement regarding Mid-Continent's liability to Rotella on the duty-to-defend claim. *See* Mid-Continent's Brief in Support of Second Motion for Summary Judgment (docket entry 120) ("Defendant's Motion Brief") at 2; *see generally* Release and Indemnity Agreement, *located in* Mid-Continent Casualty Company's Appendix to Brief in Support of Its Second Motion for Summary Judgment (docket entry 120) ("Defendant's Second Appendix") at MCMSJ00059-MCMSJ00066. The settlement agreement provides that Mid-Continent will pay Rotella $200,000 and in exchange Rotella will release all claims "for or that arise out of attorney's or other legal fees, expenses or costs incurred in or arising out of the underlying lawsuit." Release and Indemnity Agreement at 3, *located in* Defendant's Second Appendix at MCMSJ00061. Four claims remained unresolved after the April 2009 settlement, and three (the claims for bad-faith insurance practices, deceptive trade practices, and negligent misrepresentation) were disposed of by the court's June 2009 order granting partial summary judgment in favor of Mid-Continent. *See* June 2009 Order at 10-22.

Thus, only the duty-to-indemnify claim remains unresolved, and that only partially so. The court's June 2009 order also concluded that Mid-Continent had no duty to indemnify Rotella against part of the underlying judgment. The court determined that the damages awarded against Rotella in the underlying suit could be divided into two parts: one part representing damages for fraud and over-billing, and the other part representing damages for construction-related defects. *Id.* at 5-7. Of the $2,671,187.26 of damages, the court concluded that $2,156,508.99 were damages for over-billing and fraud ("the fraud-related damages"), while $514,678.27 were damages for construction-related defects ("the construction-related damages"). *Id.* The court then granted summary judgment to Mid-Continent on its claim that it had no duty to indemnify Rotella for the fraud-related damages. *Id.* at 7-10. As a result, in the wake of the June 2009 order, all of the issues in this action had been resolved except one: "whether Mid-Continent must

indemnify Rotella for $514,678.27-the amount of actual damages not arising out of Rotella's fraudulent conduct." *Id.* at 22.

That issue is now before the court. Mid-Continent denies that it now has or ever had any duty to indemnify Rotella for the construction-related damages. *See* Mid-Continent Casualty Company's Brief in Support of Its Response to Plaintiffs' Third Motion for Summary Judgment (docket entry 118) at 2, 10-17. Nonetheless, in June 2009 Mid-Continent entered into a settlement with Cutting ("the Cutting settlement agreement") in which it agreed to pay Cutting $190,000 and in exchange Cutting agreed to

> ***3** release[ ], forever discharge[ ], and forever hold[ ] harmless [Mid-Continent] from any and all manner of actions, causes of action, suits, ... judgments, ... [and] claims ... for the following amounts ....
>
> 1. The $514,678.27 in actual damages Cutting incurred as a cost to repair the construction defects and/or property damage; and
>
> 2. The $90,000.00 in attorney's' fees allocable to prosecuting the construction defect and/or property damage claims; and
>
> 3. $36,941.03 in pre-judgment interest and $90,516.07 in post-judgment interest, as well as any costs and appellate attorney's fees, relating to the construction defect and/or property damage claims ....

Partial Release of Claims and Settlement Agreement Between Defendant Mid-Continent Casualty Company and Third-Party Defendant Joan Cutting ("Cutting Release") at 5-6, *located in* Defendant's Second Appendix at MSMSJ00005-MCMSJ00006.

Mid-Continent now moves for summary judgment on the ground that Rotella's duty-to-indemnify claim has been resolved because the Cutting settlement agreement is a valid release of all of Cutting's claims to the construction-related damages. *See* Defendant's Motion Brief at 5-10. Rotella has moved for summary judgment on the ground that the duty-to-indemnify clause in the CGL policy obligates Mid-Continent to pay the construction-related damages directly to Rotella and that this obligation remains unsatisfied. *See* Plaintiffs' Third Motion for Summary Judgment and Supporting Brief (docket entry 115) ("Plaintiffs' Motion") at 3-5, 9. Rotella also contends that various other issues remain unresolved and preclude summary judgment for Mid-Continent. *See* Plaintiffs' Response to Defendant's Second Motion for Summary Judgment and Supporting Brief (docket entry 126) ("Plaintiffs' Response") at 2-9.

B. *Procedural Background*

Both parties have moved for summary judgment. Summary judgment is proper when the pleadings, depositions, admissions, disclosure materials on file, and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c) (2).[FN2] Material facts are those facts that the governing substantive law identifies as having the potential to affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). There is a genuine issue as to a material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Company v. Zenith Radio Corporation*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); see also *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 489 (5th Cir.2001) ("An issue is *'genuine'* if it is real and substantial, as opposed to merely formal, pretended, or a sham.") (emphasis in original). The nonmoving party must show that the evidence is sufficient to support the resolution of a material factual issue in his favor. *Anderson*, 477 U.S. at 249. When ruling on a motion for summary judgment, the court views the evidence in the

light most favorable to the nonmoving party. *Id.* at 255 (citing *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)).

> FN2. The disposition of a case through summary judgment "reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1197 (5th Cir.1986) (footnote omitted).

II. *ANALYSIS*

A. *Mid-Continent's Duty to Indemnify*

***4** The court concludes that Mid-Continent is entitled to judgment as a matter of law on Rotella's duty-to-indemnify claim. When a duty-to-indemnify clause appears in a liability contract such as a CGL policy, "the insurer agrees to cover *liability* for damages. If the insured is liable, the insurance company must pay the damages. In the event a judgment is rendered against the insured, the insurer's liability to pay attaches at that time. The obligation to pay continues until the judgment is satisfied." *Home Owners Management Enterprises, Inc. v. Mid-Continent Casualty Company*, 294 Fed. Appx. 814, 817 (5th Cir.2008) (per curiam) (footnotes and internal quotation marks omitted) (emphasis in original).[FN3] One way that a judgment can be satisfied is by obtaining a valid release from the judgment creditor. See *Rapp v. Mandell & Wright, P.C.*, 123 S.W.3d 431, 434 (Tex.App.-Houston [14th Dist.] 2003, pet. denied) ("If a judgment creditor accepts money in complete satisfaction and release of his judgment, that judgment has no further force or authority."). A release is valid so long as it is a legally enforceable contract. *Vera v. North Star Dodge Sales Inc.*, 989 S.W.2d 13, 17 (Tex.App.-San Antonio 1998, no pet.). The satisfaction of a judgment through the execution of a valid release operates to extinguish the judgment for all purposes. *Reames v. Logue*, 712 S.W.2d 802, 805 (Tex.App.-Dallas 1986, writ ref'd n.r.e.).

> FN3. By contrast, if a similar clause were to appear in an indemnity contract, " 'payment of a claim by the insured [would be] a condition precedent to the insured's right to recover under the indemnity contract.' " *Id.* at 817 n. 13 (quoting 7A COUCH ON INSURANCE § 103:4 (3d ed.1997)

Here, the court finds that Mid-Continent has performed any duty it might have had to indemnify Rotella for the construction-related damages (and associated attorney's fees, interest, and costs) in the underlying suit. Assuming-without so holding [FN4]-that Mid-Continent had a duty to indemnify Rotella for those damages, the court concludes that Mid-Continent satisfied that duty by obtaining a valid release of judgment from Cutting. Because the Cutting settlement agreement validly releases of all of Cutting's claims against Rotella for the construction-related damages, Rotella is no longer obligated to pay that portion of the underlying judgment. See *Rapp*, 123 S.W.3d at 434 ("A release of judgment is an express relinquishment by the judgment creditor of his rights in the judgment; it operates as a bar because the one who might otherwise have asserted the right has expressly surrendered it."). The duty-to-indemnify clause in the CGL policy that Mid-Continent issued to Rotella only requires Mid-Continent to "pay those sums that [Rotella] becomes legally obligated to pay as damages ... to which this insurance applies." *See* Commercial General Liability Coverage Form at 1, *located in* Defendant's First Appendix at MID00010. Because there is no longer any sum that Rotella is legally obligated to pay as damages to which his CGL policy applies, Mid-Continent does not have any unperformed duty to indemnify him.[FN5]

> FN4. Because the court concludes that Mid-Continent satisfied any obligation it might have had to indemnify Rotella by executing the Cutting settlement agree-

ment, the court does not reach the question of whether Mid-Continent in fact had any duty to indemnify Rotella for the construction-related damages.

FN5. The fact that Mid-Continent settled with Cutting instead of paying the full amount of the construction-related damages does not change the analysis. Cf. *Reames*, 712 S.W.2d at 803-05 (holding that where a statute imposed liability on insurance agents for the full amount of coverage due under an insurance policy when the amount due was not paid by the insurer, an insured had no right to recover from an insurance agent the difference between the amount she was due under her policy and the lesser sum she accepted from her insurer as a compromise settlement in "full and complete satisfaction and release" of the amount she was due under her policy) (internal quotation marks omitted).

Rotella argues that Mid-Continent's duty was to indemnify him, not Cutting, and that Mid-Continent cannot perform that duty except by paying him the full amount of the construction-related damages. Plaintiffs' Motion at 3-5. Rotella's theory appears to be that if an insured owes a sum to a judgment creditor, an insurer may not pay that sum directly to the judgment creditor, but instead must route payment through the insured. However, the Supreme Court of Texas has made it clear that a loss that triggers an insurer's duty to indemnify under a CGL policy is the property of the party who suffered the loss, not the party insured by the policy. See *Evanston Insurance Company v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 674-75 (Tex.2008) ("A loss incurred [by an insured] in satisfaction of a settlement belongs to the third party and is not suffered directly by the insured."); *Lamar Homes, Inc. v. Mid-Continent Casualty Company*, 242 S.W.3d 1, 17 (Tex.2007) (noting that "the loss incurred in satisfaction of a judgment or settlement" does not belong to the insured because the loss is "derivative of [the] loss suffered by a third party"). Texas law does not confer on Rotella any entitlement to or interest in receiving payment from Mid-Continent for losses suffered by Cutting.

***5** Rotella relies on *Allstate Insurance Company v. Watson*, 876 S.W.2d 145 (Tex.1994), *see* Plaintiffs' Motion at 5, but *Watson* undercuts his position. *Watson* held only that a third party does not have standing to bring extra-contractual claims against an insurer. *Id.* at 146. After so holding, *Watson* reaffirmed that a third-party judgment creditor of an insured does have standing to bring contractual claims against an insurer. See *id.* at 150 ("[A] third party who has obtained a judgment against an insured is an intended third party beneficiary of the insurance contract and is entitled to enforce the contract."). Because Cutting is the ultimate beneficiary of the duty-to-indemnify clause in the CGL policy Mid-Continent issued to Rotella, Mid-Continent was free to perform its duty to indemnify Rotella by making payment directly to Cutting.[FN6]

FN6. Rotella contends that under the doctrine of voluntary payment, MidContinent's settlement with Cutting is without any legal effect on Mid-Continent's obligation to pay Rotella the full amount of the construction-related damages. *See* Plaintiffs' Response at 5-6; Plaintiffs' Reply to Defendant's Response to Plaintiffs' Third Motion for Summary Judgment and Supporting Brief (docket entry 121) ("Plaintiffs' Reply") at 7-8. This argument presupposes that Rotella has some interest in receiving indemnification other than seeing Cutting's judgment against him satisfied, but as *ATOFINA*, *Lamar Homes*, and *Watson* illustrate, that presupposition is erroneous.

Rotella also contends that Cutting's release of her claims to the construction-related damages is ineffective because the Cutting settlement agreement only releases Cutting's claims to those por-

tions of the attorney's fees and interest awarded in the underlying judgment that Cutting and Mid-Continent believe are attributable to the construction-related damages. *See* Plaintiffs' Reply at 2-3; Plaintiffs' Response at 5. As best the court can tell, Rotella argues that he is at risk of incurring liability for additional amounts of fees and interest if the state court that issued the underlying judgment later determines that the amounts of fees and interest that are allocable to the construction-related damages are actually higher than the amounts recited in the Cutting settlement agreement. But this argument ignores the following language in the Cutting settlement agreement:

> Should the numbers stated above with regard to allocation of attorney's fees ..., [or] any pre-judgment or post-judgment interest, be later determined incorrect, then Cutting and [Mid-Continent] will execute whatever additional documents are reasonably necessary to ensure that the releases of [Mid-Continent] and of the judgment in the [underlying suit] are altered to reflect the correct amounts without payment of additional consideration to Cutting.

Cutting Release at 8, *located in* Defendant's Second Appendix at MSMSJ00008.

No matter how the awards of attorney's fees and interest are eventually allocated between the construction-related damages and the fraud-related damages, the Cutting settlement agreement guarantees that Rotella will not have to pay any amount that is allocated to the construction-related damages. Therefore, the court concludes that Mid-Continent fully performed any duty it might have had to indemnify Rotella by executing the Cutting settlement agreement. As a result, Mid-Continent is entitled to judgment as a matter of law on Rotella's duty-to-indemnify claim.

B. *Rotella's Requests for Reconsideration*

Rotella's motion for summary judgment concludes with a request that "the Court re-evaluate its Memorandum Opinion and Order granting Mid-Continent's Motion for Partial Summary Judgment." Plaintiffs' Motion at 9-10; *see also* Plaintiffs' Reply at 4, 9; Plaintiffs' Response at 6. Properly framed, this is a motion not for summary judgment but for reconsideration. A request that the court reconsider an interlocutory order is governed by Rule 54(b). *See* FED. R. CIV. P. 54(b). "Although the precise standard for evaluating a motion to reconsider under Rule 54(b) is unclear, whether to grant such a motion rests within the discretion of the court." *Dos Santos v. Bell Helicopter Textron, Inc. District,* 651 F.Supp.2d 550, 553 (N.D.Tex.2009) (Means, J.). Such a motion requires the court to determine "whether reconsideration is necessary under the relevant circumstances." *Judicial Watch v. Department of the Army,* 466 F.Supp.2d 112, 123 (D.D.C.2006) (citation and internal quotation marks omitted). Even though the standard for evaluating a motion to reconsider under Rule 54(b) "would appear to be less exacting than that imposed by Rules 59 and 60 ..., considerations similar to those under Rules 59 and 60 inform the Court's analysis." *Dos Santos,* 651 F.Supp.2d at 553. And it is clear under Rules 59 and 60 that "[m]otions for reconsideration have a narrow purpose and are only appropriate to allow a party to correct manifest errors of law or fact or to present newly discovery evidence. *Arrieta v. Yellow Transportation, Inc.,* 2009 WL 129731, at *1 (N.D.Tex. Jan.20, 2009) (Fitzwater, C.J.) (citation and internal quotation marks omitted).

***6** In this case, Rotella has elaborated on only one of his requests for reconsideration. He argues that the court should reconsider its grant of summary judgment to Mid-Continent on his claim for bad-faith insurance practices. Plaintiffs' Response at 6. The court granted summary judgment on the ground that an insurer's refusal to defend its insured in a suit brought by a third party cannot constitute a breach of the insurer's common-law duty of good faith and fair dealing. *See* June 2009 Order at 12. Rotella moves for reconsideration on the ground that there is a statutory cause of action in Texas for an insurer's bad-faith failure to settle a third party's

claim against the insured. *See* Plaintiffs' Response at 6 (citing TEX. INS.CODE § 541.060(a)(2)(A)).

The court concludes that this motion for reconsideration should be denied for two reasons. First, Rotella did not adequately raise this claim in his previous motion for summary judgment. Rotella's brief in support of that motion does contain a long quotation from § 541.060 of the Insurance Code, but the only case discussed in the brief addresses common-law bad-faith claims. *See* Plaintiffs' Second Motion for Summary Judgment and Supporting Brief Only as to Damages (docket entry 28) at 8-10. Mid-Continent treated the claim as a common-law bad-faith claim, *see* MidContinent's Brief in Support of Its Response to Plaintiff's Second Motion for Summary Judgment (docket entry 30) at 18-22, and Rotella never disputed that treatment, *see* Plaintiffs' Reply to Defendant's Response to Plaintiffs' Second Motion for Summary Judgment and Supporting Brief (docket entry 33) at 1-6. The court declines, in the exercise of its discretion, to reconsider a claim which it has not had an earlier opportunity to fully consider. Cf. *Arrieta*, 2009 WL 129731, at *1 (emphasizing that a motion for reconsideration under Rule 59 is "not the proper vehicle for ... advancing theories of the case that could have been presented earlier.") (citation and internal quotation marks omitted).[FN7]

> FN7. Rotella also argues that he has the right to assert against Mid-Continent claims for his own mental anguish, emotional distress, and punitive damages that arose out of Mid-Continent's breach of its common-law duty of good faith and fair dealing. Plaintiffs' Response at 7 (citing *Universe Life Insurance Company v. Giles*, 950 S.W.2d 48, 54 (1997). But the court has already held that Mid-Continent's handling of Cutting's third-party claim did not constitute a breach of that duty. *See* June 2009 Order at 11-12.

Second, even if Rotella had properly raised his statutory bad-faith claim, Mid Continent would have been entitled to summary judgment on that claim because Rotella has failed to raise a genuine issue of fact as to an essential element of his claim. An insurer's failure to make a good-faith attempt at settlement is one element of a claim under § 541.060(a)(2)(A). See *Gulf Insurance Company v. Jones*, 2003 WL 22208551, at *9 (N.D.Tex. Sept.24, 2003) (Lindsay, J.) (reciting the four elements of a statutory bad-faith claim under Article 21.21 § 4(10)(a)(ii), the pre-recodification version of § 541.060(a)(2)(A)), *aff'd*, 143 Fed. Appx. 583 (5th Cir.2005). Rotella argues that "the Court should have granted [his] motion for summary judgment on § 541.060 claims based on Mid-Continent's refusal to settle with Cutting." Plaintiffs' Response at 6. But undisputed evidence shows that Mid-Continent has not just attempted to settle with Cutting, it has completed a settlement with Cutting and successfully obtained a release of all of her claims to the construction-related damages. The undisputed fact of settlement would have caused Rotella's statutory bad-faith claim to fail as a matter of law. Therefore, the court denies Rotella's motion for reconsideration of that claim.

***7** The rest of Rotella's requests for reconsideration are conclusory statements in which he "urges the Court" to "revisit" or "reconsider" various aspects of its June 2009 order. *See, e.g.*, Plaintiffs' Reply at 4. Rotella has not identified any manifest errors of fact or law in that order, presented any newly discovered evidence, or made any attempt to argue that reconsideration is necessary under the circumstances. These requests for reconsideration are also denied.

C. *Rotella's Remaining Arguments*

Rotella advances four other arguments in response to Mid-Continent's motion for summary judgment. The court concludes that none of them defeats Mid-Continent's entitlement to judgment as a matter of law. First, Rotella contends that "there remains an outstanding issue as to attorney's fees on this action." Plaintiffs' Motion at 1. However, Rotella does not provide any additional explanation of

this argument. This unelaborated assertion is not enough to create a genuine issue of fact as to Rotella's entitlement to attorney's fees in this action. See *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.) ("Mere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment."), *cert. denied*, 506 U.S. 825, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). And it is not incumbent upon the court to sift through the record in search of evidence that supports this claim. See *Pita Santos v. Evergreen Alliance Golf Limited*, 650 F.Supp.2d 604, 611 n. 1 (S.D.Tex.2009) (collecting cases).[FN8]

> FN8. In a similar vein, Rotella argues that the April 2009 settlement agreement in which he and Mid-Continent settled his duty-to-defend claim only covered damages for his attorney's fees in the underlying suit and does not bar "causes of action that relate to the [other] damages incurred as a result of [Mid-Continent's] refusal to defend." Plaintiffs' Response at 2-3. Once again Rotella neither elaborates on the cause or amount of those damages nor designates any evidence that substantiates his claim, and once again he has failed to raise a fact issue on this question.

Second, Rotella argues at length that "there is sufficient evidence in this case to raise a question as to the appropriateness of the underlying judgment." Plaintiffs' Motion at 6, 5-9. The significance of this contention is unclear, as Rotella has not stated a demand for relief on this point. But whatever relief he might be seeking, the court cannot provide it. If Rotella seeks an order overturning or staying the enforcement of the underlying judgment, this court's lack of appellate jurisdiction over state-court judgments bars it from entering such an order. See generally *Exxon Mobil Corporation v. Saudi Basic Industries Corporation*, 544 U.S. 280, 283-84, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005) (summarizing the *Rooker-Feldman* doctrine). If he seeks damages against Cutting or Mid-Continent based on their conduct or statements in the underlying suit, he has failed to plead any facts or claims that might entitle him to such relief.

Third, Rotella argues that Mid-Continent is in breach of the agreement settling his duty-to-defend claim. *See* Plaintiffs' Response at 7-9. However, Rotella and Mid-Continent have already litigated the question of whether Mid-Continent breached the parties' settlement agreement by paying the $200,000 settlement into the registry of the 158th Judicial District Court of Denton County, Texas. *See generally* MidContinent's Motion for Summary Judgment in *Cutting v. Mid-Continent Casualty Company*, cause number 2009-20163-158, *located in* Defendant's Second Appendix at MCM-SJ00067-MCMSJ00097. On November 4, 2009, the District Court of Denton County, Texas, granted summary judgment in favor of Mid-Continent on Rotella's claim that Mid-Continent had breached the settlement agreement. *See* Order Granting Mid-Continent Casualty Company's Motion for Summary Judgment in *Cutting v. Mid-Continent Casualty Company*, cause number 2009-20163-158, at 1-2, *located in* Appendix to Defendant Mid-Continent Casualty Company's Supplement to Its Brief in Support of Its Second Motion for Summary Judgment (docket entry 129) at 00001-00002. As a result, the doctrine of claim preclusion bars Rotella from forcing Mid-Continent to re-litigate that claim in this court. See *Igal v. Brightstar Information Technology Group, Inc.*, 250 S.W.3d 78, 86 (Tex.2008) (explaining that, under Texas law, res judicata bars "a second action based on the same claims as were raised or could have been raised" in a prior action between the same parties that a resulted in a valid final judgment on the merits).[FN9]

> FN9. "When a federal court is asked to give res judicata effect to a state court judgment, the federal court must determine the preclusiveness of that state court judgment under the res judicata principles of the state from which the judgment origin-

ates." *Jones v. Sheehan, Young & Culp P.C.*, 82 F.3d 1334, 1338 (5th Cir.1996).

***8** Finally, Rotella argues that he has a viable claim for damages based on Mid-Continent's failure to defend him in the underlying suit because "the amounts of the judgment [in the underlying suit] would have differed drastically" had a Mid-Continent-furnished defense been in place. Plaintiffs' Reply at 5. But Rotella has offered no evidence in support of this claim. It is well-settled that an unsubstantiated allegation such as this one is not enough to create a genuine issue of fact and defeat a moving party's entitlement to summary judgment. See, *e.g.*, *Wallace v. Texas Tech University*, 80 F.3d 1042, 1047 (5th Cir.1996) (citing *Little v. Liquid Air Corporation*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc)).

III. *CONCLUSION*

For the reasons discussed above, Rotella's third motion for summary judgment is **DENIED,** and Mid-Continent's second motion for summary judgment is **GRANTED.**

SO ORDERED.

N.D.Tex.,2010.
Rotella v. Mid-Continent Cas. Co.
Slip Copy, 2010 WL 1330449 (N.D.Tex.)

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