CONSUMER BANKRUPTCY

Motions for Reconsideration in Bankruptcy Court

By Craig D. Robins

You've just lost a motion in Bankruptcy Court and you really want to pursue the matter further; what are your options? Obviously, one choice is to file an appeal. However, another possibility is to bring a motion for reconsideration.

Judge Alan S. Trust, sitting in the Central Islip Bankruptcy Court, recently issued a decision denying such a motion in a Chapter 11 case, but in doing so, he provided a discussion of the essential elements needed to prevail. *In re: CCS.com.USA, Inc*., (E.D.N.Y., Case No. 8-17-77476-ast, Aug. 23, 2018). Even though this case was one under Chapter 11, the concepts apply to consumer bankruptcy practitioners as well.

In this case a creditor filed a motion to dismiss. The judge gave the parties until Feb. 21, 2018 to file opposition or supplemental papers, and further advised them that the court would hold a ruling conference to advise the parties of the court's decision on March 7, 2018.

The conference was adjourned to the next day because the court had closed due to a snowstorm. However, the debtor did not file its papers until the evening of March 8, 2018, which was *after* the court held the ruling conference in which the judge rendered his decision. Needless to say, Judge Trust issued an order dismissing the case. Two weeks later, the debtor filed a very short, two-page motion "to vacate the dismissal order," and this motion did not contain any references whatsoever to case law or statutory authority.

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An important lesson to learn from this case is that if you are going to seek relief from the court, you should do it the right way. In his discussion, Judge Trust first noted that the debtor failed to specify a legal basis for relief and that he was deeming the application to be a motion to reconsider pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure.

Technically there is no "motion for reconsideration" in the Federal Rules of Civil Procedure. Any motion that draws into question the correctness of the judgment is functionally a motion under Bankruptcy Rule 9023 (which adopts Rules 59(e) and 60(b)), whatever its label. Thus, a motion to "reconsider," " for clarification," to " vacate," to "set aside," or to " reargue " is a motion under Rule 9023.

FRCP Rule 60(b) provides that the court may relieve a party from a final judgment, order, or proceeding for the following reasons: mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; the judgment is void; the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or any other reason that justifies relief.

FRCP Rule 59(e) provides that a motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Judge Trust pointed out that these motions are not vehicles for "taking a second bite at the apple." The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked. Facts that are not in the record of the original hearing are not considered to be facts that the court "overlooked."

The burden of proof is on the movant. The court stated that in order to prevail on this motion, the movant must satisfy the following three elements: "First, there must be "highly convincing" evidence supporting the motion; second, the moving party must show good cause for failing to act sooner; and third, the moving party must show that granting the motion will not impose an undue hardship on the other party. Judge Trust stated that it is axiomatic that relief under Rule 60(b) is invoked only upon a showing of exceptional circumstances.

Even though the debtor failed to articulate a basis for relief, Judge Trust determined that the motion for reconsideration was one seeking relief for "mistake, inadvertence, surprise, or excusable neglect."

The court quoted one of Chief Judge Carla E. Craig's decisions in which she

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stated, "The term 'mistake' as used in Rule 60(b)(1) refers to an excusable litigation mistake or a court's substantive mistake in law or fact. Excusable neglect is an 'elastic concept,' that considers all relevant circumstances, including prejudice to the non-movant, length of the delay, potential impact on judicial proceedings, reason for the delay (including whether it was within the control of the movant), and whether the movant acted in good faith."

A movant must point to facts or case law that the court overlooked in rendering the prior order. In this case, Judge Trust held that the debtor failed to do so. The judge stated that the motion to reconsider seemed to be a request for a "do-over" of the motion to dismiss, and the debtor failed to provide the court with any facts or case law that warrant this.

As a practical pointer, courts often disfavor motions for reconsideration, so think carefully before bringing such a motion. Since you have already lost once, the odds are against you unless you can demonstrate that the court made a clear mistake of law or that one of the other factors exist.

As a second practical pointer, don't do what this debtor did, which was to file its opposition to the pending motion *after* the court rendered its decision, and in clear disregard of the judge's directives for filing papers. That can only make you look foolish.

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