UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: PAT HALTON FORE, III **CASE NO. 04-51460 SEG**

CHAPTER 13

OPINION

Before the court is the debtor's motion to alter or amend order dismissing the chapter 13 proceeding and the opposition thereto filed on behalf of the Chapter 13 Trustee, Warren A. Cuntz, Jr. Having considered the matter, the court concludes that the motion should be denied.

I. FACTUAL BACKGROUND

1. Pat Halton Fore, III ("Fore") filed a petition for relief under Chapter 13 of Title 11 of the United States Code on March 31, 2004.

2. Warren A. Cuntz, Jr., the Standing Chapter 13 Trustee, filed a combined objection to confirmation, motion to convert to Chapter 7, or alternatively, motion to dismiss the Chapter 13 proceeding.

3. On January 25, 2005, the court rendered its opinion and order concluding that Fore was not eligible to be a debtor in a chapter 13 proceeding and dismissing the proceeding.[1]

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[1] **The court held in its prior opinion that:**

> **The debts owed by Fore to ICW and ACC are noncontingent because the debtor's liability was established prior to the bankruptcy filing pursuant to the language of the indemnity agreements and the debt amounts are liquidated because those amounts are easily ascertainable from the surety companies and constitute prima facie evidence of the amount of liability, regardless of the debtor's dispute or the existence of pending lawsuits filed by the sureties. Upon this**

4. On February 7, 2005, Fore filed a motion to alter or amend the order dismissing the Chapter 13 proceeding. The Trustee responded arguing that the motion was untimely, failed to state a claim upon which relief can be granted and failed to provide all interested parties with requisite notice and opportunity to be heard. The debtor takes the position that although the motion was not filed within the 10 day period set out in Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59, the motion may be considered pursuant to Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60.

5. The parties submitted the matter to the court for consideration on the pleadings and legal authorities cited therein.

II. CONCLUSIONS OF LAW

The matter before the court is a core proceeding pursuant to 28 U.S.C. § 157. The court has jurisdiction over the parties and the subject matter pursuant to 28 U.S.C. § 1334 and § 157.

Bankruptcy Rule 9023 provides, in pertinent part, as follows:

> **Rule 9023. New Trials; Amendments of Judgments.**
> **Rule 59 FR Civ P applies in cases under the Code, except as provided in Rule 3008.**
>
> **Rule 59 New Trials; Amendments of Judgments.**
> **. . . .**

> **basis, the amount of debt owed by Fore exceeds the debt limitations established by 11 U.S.C. § 109(e) for noncontingent, liquidated, unsecured debt and Fore is not eligible to be a debtor under chapter 13 of the Bankruptcy Code. The court concludes that Fore's chapter 13 proceeding should be dismissed.**

In re Fore, **No. 04-51460SEG, slip op. at 6-7 (Bankr. S.D.Miss. Jan. 25, 2005).**

> **(e) Motion to Alter or Amend a Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.**

Federal Rule of Bankruptcy Procedure 9023, Federal Rule of Civil Procedure 59(e).[2]

The debtor's motion is styled "Debtor's Motion to Alter or Amend Order Dismissing Chapter 13 Proceeding," and contains a subtitle in the body styled "Motion for Reconsideration." The motion was filed on Monday, February 7, 2005. The 10 day period for filing a motion to alter or amend pursuant to Bankruptcy Rule 9023 expired on Friday, February 4, 2005. Therefore, Fore's motion to alter or amend was not timely filed under Bankruptcy Rule 9023.[3] Furthermore,

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[2] Prior to 1995 this rule provided that the motion shall be "served" no later than 10 days after entry of the judgment. The rule was changed to provide that it shall be "filed" no later than 10 days after entry of the judgment. *See, Advisory Committee Notes* to Federal Rule of Civil Procedure 59 regarding 1995 Amendments. This accounts for language referring to the time of service rather than the time of filing found in Advisory Committee Notes to the Bankruptcy Rules, as well as in cases decided prior to the time of the amendment, that may have been relied upon by debtor's counsel.

[3] Courts have adopted what is referred to as a bright line rule indicating that a motion for reconsideration of a judgment may 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) based upon the time at which the motion is filed. In *Shepherd v. International Paper Co.,* 372 F. 3d 326 (5th Cir. 2004), the Fifth Circuit indicated:

> **[S]uch a motion [for reconsideration] may be considered either a Rule 59(e) motion to alter or amend judgment or a Rule 60(b) motion for relief from judgment or order. . . If the motion is filed within ten days of the judgment or order of which the party complains, it is considered a Rule 59(e) motion; otherwise, it is treated as a Rule 60 (b) motion. *Id. . . .***
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> **Because plaintiffs' motion for reconsideration was filed more than ten days after the district court's order dismissing the suit, it is treated as a Rule 60(b) motion.**

***Id.* at n.1. *See also, Anglin v. Local Union 1351,* 102 Fed. Appx. 367 (5th Cir. 2004). In another case, the Circuit Court stated the following:**

enlargement of this 10 day period is not permitted under Rule 9006(b):

> **Rule 9006. Time.**
> **. . .**
> **(b) Enlargement.**
> **. . .**
> **(2) Enlargement Not Permitted. The court may not enlarge the time for taking action under Rules 1007(d), 2003(a) and (d), 7052, 9023 and 9024.**

Federal Rule of Bankruptcy Procedure 9006(b)(2). *See, Ellis v. Ellis (In re Ellis),* 72 F. 3d 628 (8th Cir. 1995)(enlargement of the ten days allowed for filing a Rule 59(e) motion is expressly prohibited by Rule 9006(b)(2)); *Krim v. Firstcity Liquidating Trust,* 1999 WL 202533 (N.D.Tex. 1999)(the deadline is jurisdictional). Therefore, the motion may not be considered under Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59(e) and must be denied to the extent that it requests Rule 59(e) relief because it was not timely filed.

Fore urges that the motion may be considered under Rule 60. Federal Rule of Bankruptcy Procedure 9024 makes applicable Rule 60 of the Federal Rules of

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> **Recognizing that Federal Rules of Civil Procedure 59 and 60 may be used to correct similar errors, this Circuit has established a bright line rule for distinguishing Rule 59 motions from Rule 60 motions. If a motion is served within ten (10) days following the entry of judgment and draws into the question the correctness of the judgment, it will be treated as a Rule 59 motion for purposes of determining the timing of notices of appeal from the judgment.**

***Government Financial Services One Limited Partnership v. Peyton Place, Inc.,* 62 F. 3d 767, n.6 (5th Cir. 1995). *Cf. McArthur v. Crown Cork & Seal,* 54 Fed. Appx. 793 (5th Cir. 2002)(Circuit stated that the relief sought should be determined by substance and not a label and concluded that substance of the motion for reconsideration was more appropriate for a Rule 60(b) motion); *Britt v. Whitmire,* 956 F. 2d 509 (5th Cir. 1992)(no matter how it is labeled the motion is treated as one under Rule 59(e) if it calls into question the correctness of a judgment and seeks to alter or amend it).**

Civil Procedure with exceptions as specified therein. That rules provides the following:

> **Rule 9024. Relief from Judgment or Order.**
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> **Rule 60 FR Civ P applies in cases under the Code . . .**
> **Rule 60 Relief from Judgment or Order.**
> **(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other partes of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.**
> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party, (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken . . . .**

Federal Rule of Bankruptcy Procedure 9024; Federal Rule of Civil Procedure 60.

There has been no allegation of clerical mistake and relief from the judgment under Rule 60(a) is not available to the debtor under the facts of this case. *See, Britt v. Whitmire,* 956 F. 2d 509 (5th Cir. 1992)(Rule 60(a) does not apply to a motion seeking correction of an error of "substantive judgment" or an error that affects

substantial rights of parties). In considering whether relief may be available to the debtor under Rule 60(b), the court notes that in *Halicki v. Louisiana Casino Cruises, Inc.,* 151 F. 3d 465 (5th Cir. 1998), *cert. denied,* 526 U.S. 1005 (1999), the Fifth Circuit stated the following:

> **[A] court may treat an untimely Rule 59(e) motion to alter or amend the judgment as if it were a Rule 60(b) motion if the grounds asserted in support of the Rule 59(e) motion would also support Rule 60(b) relief . . . Here, the grounds Halicki asserted in her rule 59(e) motion – new evidence and mistake – would also support a rule 60(b) motion.**

***Id.* at 470. *See also, Nisson v. Lundy,* 975 F. 2d 802 (11th Cir. 1992)(motion for reconsideration may be treated as Rule 60(b) motion if grounds stated would be a basis for Rule 60(b) relief).**

In his motion, the debtor "re-asserts and incorporates all of the arguments, matters and facts previously set forth" on the motion to dismiss and claims that the debts owed to Insurance Company of the West and American Casualty Company of Reading, PA are contingent and unliquidated. *See Debtor's Motion to Alter or Amend Order Dismissing Chapter 13 Proceeding* at 1-2. In his motion, the debtor makes various assertions relating generally to issues concerning offset, accounting of monies paid, reduction of liquidating damages, reasonableness, good faith, fair dealing and other matters. The debtor also claims in his motion, without specifying a subsection of Rule 60(b), that he is presenting new evidence not available at the time the initial response to the motion to dismiss was prepared.

In *Government Financial Services One Limited Partnership v. Peyton Place, Inc.,* 62 F. 3d 767 (5th Cir. 1995), the Fifth Circuit stated:

> **Under Rule 60(b)(2) a court may relieve a party from a final judgment on the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." "To succeed on a motion brought under 60(b)(2) based on newly discovered evidence, the movant must demonstrate (1) that it exercised due diligence in obtaining the information and (2) 'the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment.'". . .**

Id. **At 770-71. The court is of the opinion that the matters raised do not constitute newly discovered evidence that would justify relief from the judgment under Rule 60(b)(2). Even if the matters were considered to be newly discovered matters that could not have by due diligence been discovered before the judgment, such would not entitle the debtor to relief under Rule 60 (b)(2) because the evidence is not material, or controlling and it would not have produced a different result. The matters raised by the debtor for the most part were previously raised or similar to issues previously raised and considered by the court in its prior decision on the motion to dismiss. Although the matters including defenses and counterclaims may be relevant or material in actual litigation on the claims, the court's prior decision on eligibility to be a Chapter 13 debtor was not a determination on the merits of these claims, nor did it preclude such litigation.**

To the extent that the debtor may be intending to seek relief under Rule 60(b)(1) or Rule 60(b)(6), the court further concludes that relief under these subsections would also be improper. In *Hill v. McDermott, Inc.,* 827 F. 2d 1040 (5th Cir. 1987); *cert. denied,* 484 U.S. 1075 (1988), the Court stated:

> **Rule 60(b)(1) does allow relief from final judgments on account of "mistake," and, in this circuit, the rule may be invoked for the correction of judicial error, but only to rectify an obvious error of law,**

> **apparent on the record. Thus, it may be employed when the judgment obviously conflicts with a clear statutory mandate or when the judicial error involves a fundamental misconception of the law.**

Id. **at 1043. The debtor does not argue these points and the court concludes that this section is not applicable to these facts. In addition, the catch all ground for relief contained in Rule 60(b)(6) is not argued nor applicable under these facts.** ***See, Government Financial Services One Limited Partnership v. Peyton Place, Inc.,*** **62 F. 3d 767 (5th Cir. 1995)(relief under 60(b)(6) is granted only if extraordinary circumstances are present). Other grounds for relief under Rule 60(b) have not been urged by the debtor.**

The court concludes that the debtor's motion to alter or amend order dismissing Chapter 13 proceeding should be denied whether as an untimely Rule 59(e) motion or as a Rule 60(b) motion.

An order will be entered consistent with these findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58. This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

DATED this the 19th day of July, 2005.

/s/ Edward R. Gaines
EDWARD R. GAINES
UNITED STATES BANKRUPTCY JUDGE

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