SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: June 29, 2017

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

PIONEER HEALTH SERVICES, INC., ET AL.,	**CASE NO. 16-01119-NPO**
	JOINTLY ADMINISTERED
DEBTORS.	**CHAPTER 11**

ORDER DENYING RULE 59 MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER [DKT. # 1794] ON JOINT MOTION OF MED ONE CAPITAL FUNDING, LLC AND FIRST GUARANTY BANK TO (1) COMPEL PAYMENT OF ADMINISTRATIVE CLAIM; AND (2) COMPEL PERFORMANCE OF UNEXPIRED LEASE OF PERSONAL PROPERTY [DKT. #1097]

This matter came before the Court for hearing on May 26, 2017 (the "Hearing"), on the Rule 59 Motion to Reconsider Memorandum Opinion and Order [Dkt. #1794] on Joint Motion of Med One Capital Funding, LLC and First Guaranty Bank to (1) Compel Payment of Administrative Claim; and (2) Compel Performance of Unexpired Lease of Personal Property [Dkt. #1097] (the "Motion to Reconsider") (Dkt. 1825) filed by First Guaranty Bank[1] ("First Guaranty"), as successor to certain interests of Republic Bank, and Response to Rule 59 Motion to Reconsider Memorandum Opinion and Order [Dkt. #1794] on Joint Motion of Med One Capital

[1] Med One Capital Funding, LLC ("Med One") was a co-movant on the underlying motion, but is not a co-movant on the Motion to Reconsider.

Funding, LLC and First Guaranty Bank to (1) Compel Payment of Administrative Claim; and (2) Compel Performance of Unexpired Lease of Personal Property [Dkt. #1097] (the "Response") (Dkt. 1946) filed by the Official Committee of Unsecured Creditors (the "Committee") and Pioneer Health Services, Inc., *et al.* ("Pioneer Health") in the above-referenced bankruptcy case (the "Bankruptcy Case"). At the Hearing, Jordan Montgomery Lewis represented First Guaranty, Darryl S. Laddin represented the Committee, and Craig M. Geno represented Pioneer Health. The Court denied the Motion to Reconsider from the bench. This Order memorializes and supplements the Court's bench ruling.[2]

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (M), and (O). Notice of the Motion to Reconsider was proper under the circumstances.

Facts

The facts are stated fully in the Memorandum Opinion and Order on Joint Motion of Med One Capital Funding, LLC and First Guaranty Bank to (1) Compel Payment of Administrative Claim; and (2) Compel Performance of Unexpired Lease of Personal Property (the "Opinion") (Dkt. 1794) issued by the Court on March 10, 2017. Only a brief summary of the facts necessary for an understanding of the issues raised in the Motion to Reconsider are set forth below.

1. Pioneer Health is the parent company of several hospitals and other healthcare facilities located in Mississippi, Tennessee, Georgia, Virginia, and North Carolina. (Op. at 3).

[2] Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, the following constitutes the findings of fact and conclusions of law of the Court.

2. On December 29, 2011, Pioneer Health entered into the McKesson Master Agreement, Contract No. MA124131219 (the "McKesson Agreement") (Dkt. 1097-1) with McKesson Technologies, Inc. ("McKesson") in anticipation of purchasing for its healthcare facilities software licenses and remote-hosting services that form part of the total package of computer hardware and software known as the "Paragon Hospital Information System" (the "Software") (Dkt. 1097-2 at 2 & 6).

3. In order to finance the acquisition of the Software—at a total cost of approximately $8.5 million—Pioneer Health entered into three (3) agreements with Med One. Two (2) of the agreements, entitled "CONDITIONAL SALES AGREEMENT" (the "Agreements") (Dkt. 1097-2), are substantially identical. The third agreement is memorialized in a letter signed by Pioneer Health, Med One, and McKesson (the "Letter Agreement"). (Dkt. 1097-3).

4. In the Agreements, Pioneer Health is identified as the "CUSTOMER," and McKesson, as the "VENDOR." (Agrs. at 1). Under the heading "EQUIPMENT" appears the description "McKesson - Paragon Hospital Information System." (*Id.*). Under the heading "TERMS AND CONDITIONS" follows seventeen (17) numbered paragraphs. The first numbered paragraph provides:

> For good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, [Med One] . . . hereby sells the equipment described above (the "Equipment") to [Pioneer Health] and [Pioneer Health] hereby purchases the Equipment and agrees to tender payment for the Equipment pursuant to the Installment Payments & Terms outlined above.

(*Id.* ¶ 1). A table entitled "INSTALLMENT PAYMENTS & TERMS" directly above the first paragraph indicates the term of the installment agreement, the total cost of the equipment, and the monthly payments. (*Id.* at 1-2). At the bottom of the table is this sentence: "Title to the Equipment will be transferred to [Pioneer Health] upon completion of all payments set forth above." (*Id.*).

5. Numbered paragraphs three through seven, and numbered paragraphs nine through ten contain the following relevant provisions: "This Agreement is a net sale." (Agrs. ¶ 3). "This Agreement is a fully net, non-cancelable sale that may not be terminated for any reason." (*Id.* ¶ 4). "Upon full completion of the payments set forth above, Med One . . . shall transfer title to [Pioneer Health] via bill of sale." (*Id*. ¶ 5). "[Pioneer Health] hereby grants to Med One . . . a security interest in and to the Equipment" and "authorizes Med One . . . to file UCC-1 Financing Statements." (*Id*.). "[Pioneer Health] shall be responsible for . . . the Equipment." (*Id.* ¶ 6). "[Pioneer Health] shall timely provide adequate and mutually acceptable insurance coverage for such Equipment." (*Id*. ¶ 7). "[Pioneer Health] represents that [it] has selected the equipment and purchases it as is." (*Id*. ¶ 9). "This Agreement is presented subject to review and approval of credit and financial information pertaining to [Pioneer Health]." (*Id.* ¶ 10).

6. Because First Guaranty relies heavily on numbered paragraph 11 of the Agreements in the Motion to Reconsider, it is set forth in full below:

> In the event the Equipment includes software (which [Pioneer Health] agrees shall include all documentation, later versions, updates, upgrades, and modifications) (herein "Software"), the following shall apply: (i) [Pioneer Health] shall possess and use the Software in accordance with the terms and conditions of any license agreement ("License") entered into with the owner/vendor of such Software and shall not breach the License (at Med One's request, [Pioneer Health] shall provide a complete copy of the License to Med One); (ii) [Pioneer Health] agrees that Med One has an interest in the License and Software due to its payment of the price thereof and is an assignee or third-party beneficiary of the License, (iii) as due consideration for Med One's payment of the price of the License and Software and for providing the Software to [Pioneer Health] at a lease rate (as opposed to a debt rate), [Pioneer Health] agrees that Med One is leasing (and not financing) the Software to [Pioneer Health]; (iv) except for the original price paid by Med One, [Pioneer Health] shall, at its own expense, pay promptly when due all servicing fees, maintenance fees, update and upgrade costs, modification costs, and all other costs and expenses relating to the License and Software and maintain the License in effect during the term of this Agreement; and (v) the Software shall be deemed Equipment for all purposes under this Agreement.

(Agrs. ¶ 11).

7. Paragraph 13 of the Agreements grants Med One certain rights with respect to any software included in the Equipment. (Agrs. ¶ 13). If Pioneer Health failed to make payments when scheduled or otherwise defaulted, it "shall immediately (i) delete from its systems all Software then installed, (ii) destroy all copies or duplicates of the Software which were not returned to Med One, and (iii) cease using the Software altogether." (*Id.*). Paragraph 14 contains similar provisions that allow Med One to declare any software license terminated in the event of Pioneer Health's default. (*Id*. ¶ 14).

8. The Letter Agreement, addressed to "Whom it may concern," sets forth a three (3)-way agreement between McKesson, Pioneer Health, and Med One. (Letter Agr. at 1). In it, McKesson agrees to submit directly to Med One all invoices "[w]ith respect to Software, Equipment and Services fees due and payable." (*Id.*). If Med One failed to pay an invoice, Pioneer Health agreed to pay McKesson on written notice from McKesson. The nature of the relationship between Pioneer Health and Med One is described in the Letter Agreement, as follows:

> [Pioneer Health] acknowledges that it has entered into a financing arrangement with [Med One], i.e., the Loan Agreement, dated April 18, 2012 and that in connection with this Agreement, rights and obligations associated with the Software, Equipment and Services are transferred to [Med One] and [Med One] is undertaking to fund the obligations of [Pioneer Health] under the initial Agreement.

(*Id.*). The Letter Agreement grants Med One a self-help remedy in the event Pioneer Health fails to make loan payments:

> [Pioneer Health] acknowledges and agrees in the event of a default under the loan, (whether or not such rights are contemplated in the McKesson Agreement) [Med One] may notify McKesson of [Pioneer Health's] default and McKesson may terminate all equipment maintenance services and software maintenance services provided by McKesson.

(*Id.*).

9. At some point, Med One assigned the Agreements to Republic Bank, but Med One remained as the servicer. (Dkt. 1097 at 5). A UCC-1 Financing Statement (Dkt. 1097-4 at 2-4) listing Republic Bank as the secured party was filed on April 25, 2012. On May 26, 2015, First Guaranty became the successor in interest, and a UCC-1 Financing Statement Amendment (Dkt. 1097-4 at 5) was filed on July 20, 2015, indicating an assignment from Republic Bank. (Op. at 8).

10. On March 30, 2016, Pioneer Health commenced the Bankruptcy Case by filing a voluntary chapter 11 petition (Dkt. 1).

11. On October 4, 2016, Med One and First Guaranty filed the Joint Motion of Med One Capital Funding, LLC and First Guaranty Bank to (1) Compel Payment of Administrative Claim; and (2) Compel Performance of Unexpired Lease of Personal Property (the "Motion to Compel") (Dkt. 1097). In general, they asserted that Med One agreed to pay McKesson approximately $8.5 million for Pioneer Health's acquisition of the Software, Pioneer Health transferred its interest in the Software to Med One "as a third party beneficiary," and Med One "leased" the Software back to Pioneer Health over a term of sixty (60) months. Based on their characterization of the transaction as a "lease" and their contention that Pioneer Health failed to make monthly "lease" payments totaling $1,123,704.00 since the filing of the Bankruptcy Case as of October 4, 2016, they sought immediate payment of post-petition administrative expenses of all "lease" payments that became due after the sixtieth day post-petition, as well as the sum of $187,284.00 per month for Pioneer Health's continued use of the Software. (Mot. to Compel ¶¶ 14, 22, & 25); *see* 11 U.S.C. §§ 365(d)(5), 503(a).

12. On March 10, 2017, the Court issued its Opinion, denying the Motion to Compel on the ground the Agreements were not "true leases" under Utah's version of the Uniform Commercial Code (the "UCC"). UTAH CODE ANN. § 70-1a-203(2). The Court held, in the

alternative, that even if the UCC did not apply, common-law principles would lead to the same result. (Op. at 16).

13. Aggrieved by the Opinion, First Guaranty filed the Motion to Reconsider on March 24, 2017. The Committee and Pioneer Health filed the Response on May 12, 2017.

Discussion

First Guaranty cites Rules 9023 of the Federal Rules of Bankruptcy Procedure and Rule 59 of the Federal Rules of Civil Procedure ("Rule 59") as authority for the relief it seeks in the Motion to Reconsider. Rule 59, which is made applicable by Rule 9023 of the Federal Rules of Bankruptcy Procedure, permits a court to alter or amend its findings of fact in certain circumstances. *Templet v. HydroChem Inc*., 367 F.3d 473, 478 (5th Cir. 2004) (holding that Rule 59 "calls into question the correctness of a judgment") (quotation omitted). A final judgment under Rule 59(e) may be amended if: (1) there is a manifest error of law or fact; (2) newly discovered evidence; or (3) an intervening change in controlling law. *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003) (citing *Rosenzweig v. Azurix Corp*., 332 F.3d 854, 863-64 (5th Cir. 2003)).

In the Motion to Reconsider, First Guaranty contends that the Court committed manifest errors of both fact and law and that reconsideration of the Opinion is necessary to prevent manifest injustice. First Guaranty does not assert that reconsideration is necessary to present newly discovered evidence or that there has been an intervening change in controlling law. The only issue, therefore, is whether the Court misapprehended some material fact or point of law. *Skinner v. Boardages*, No. 1:13CV314-HSO-RHW, 2015 WL 4662447, at *2 (S.D. Miss. Aug. 6, 2015) (citation omitted). In that regard, First Guaranty alleges in the Motion to Reconsider: (1) that the Court misapprehended the nature of the "product" financed in the Agreements and, as a result, looked to the wrong sections of the Agreements in determining the true nature of the transaction

(Mot. to Reconsider ¶ 14); (2) that the Court improperly excluded paragraph 13 from its analysis when it applied the bright-line test under UTAH CODE ANN. § 70-1a-203(2) (Mot. to Reconsider ¶¶ 19-24); and (3) that the Court erred by not applying UTAH CODE ANN. § 70A-2a-103(g), governing "finance leases" (Mot. to Reconsider ¶¶ 25-30). Finally, First Guaranty argues manifest injustice based on the impact of the Court's holding. (Mot. to Reconsider ¶ 31).

At the Hearing, First Guaranty attempted to offer into evidence the testimony of its chief credit officer, Randy Vicknair ("Vicknair") in support of the Motion to Reconsider. According to counsel for First Guaranty, Vicknair would testify that he reviewed the Agreements when First Guaranty acquired them from First Republic and understood at that time that they constituted leases. (Hr'g 1:52:09-1:53:00) (May 26, 2017).[3] The Court sustained the objections of Pioneer Health and the Committee on the ground that Vicknair's testimony would violate the parol evidence rule and, moreover, would conflict with the Court's ruling in the Opinion that it would not consider extrinsic evidence "showing that the Agreements are something other than what they purport to be." (Op. at 19). The Court also was concerned that his testimony constituted unfair surprise and its admission would be prejudicial to Pioneer Health and the Committee.

A. The Court did not misapprehend the nature of the "product."

The Court understood that the Agreements primarily involved remotely-hosted software, not mass market software or consumer software. The Court made an express finding to that effect in the Opinion: "the subject of the Agreements is remotely-hosted Software defined as 'Equipment.'" (Op. at 16). In determining that the UCC applied to the transaction, the Court

[3] Because the Hearing was not transcribed, this reference is to the timestamp of the audio recording.

reasoned that "[a]lthough the Software includes hosting services, those services do not predominate the transaction." (*Id*.).

The Court rejected Med One and First Guaranty's interpretation of the Agreements that would have rendered the first ten numbered paragraphs of the Agreements superfluous. (Op. at 17). The Court correctly held that it had to interpret all of the provisions of the Agreements in relation to one and other, "with a view toward giving effect to all and ignoring none." (*Id*.) (citing *WebBank v. Am. Gen. Annuity Serv. Corp*., 54 P.3d 1139, 1144 (Utah 2002)).

The Court determined that the parties intended paragraph 11 of the Agreements to apply only in the event the "Equipment," as defined in the Agreements, included mass market software, and that such a reading is consistent with the language of the Agreements as a whole and with the McKesson Agreement. Paragraph 11 begins "[i]n the event the Equipment includes software . . . . , the following shall apply . . . ." (Agrs. ¶ 11). Interpreting the Agreements in the manner urged by First Guaranty and Med One would be nonsensical because it would require reading paragraph 11 as "[i]n the event Software includes software." (Op. at 17). The Court, however, did not determine, as First Guaranty asserts, that the subject Software was in fact mass market software or consumer software. (Mot. to Reconsider at 5).

B. The Court correctly applied the bright-line test under Utah law.

The Court did not improperly exclude paragraph 13 of the Agreements when it applied the bright-line test set forth in UTAH CODE ANN. § 70-1a-203(2) in determining that the Agreements are not true leases. Under the bright-line test, a transaction in the form of a lease creates a security interest "if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee" and any one of four additional factors applies. UTAH CODE ANN. § 70-1a-203(2). In the Opinion,

the Court reached the conclusion that the Agreements were not true leases because Pioneer Health did not have a right to terminate the Agreements prior to the expiration of their terms and because Med One agreed to transfer title to the Software to Pioneer Health after all payments were made without having to pay any additional consideration. (Op. at 14-15). These findings were based on paragraphs 4 and 5 of the Agreements, which provide, in pertinent part: "This Agreement is a fully net, non-cancelable sale that may not be terminated for any reason." and "Upon full completion of the payments set forth above, Med One . . . shall transfer title to [Pioneer Health] via bill of sale." (Agrs. ¶¶ 4-5).

First Guaranty argues in the Motion to Reconsider that paragraph 13 of the Agreements "should have controlled the [Court's] analysis" and "carries equal if not greater weight than the other paragraphs of the Agreement[s]." (Mot. to Reconsider ¶ 21). Paragraph 13 provides that "[w]ith regard to Software, at the expiration or **earlier termination** . . . [Pioneer Health] shall immediately (i) delete from its systems all Software then installed, (ii) destroy all copies or duplicates of the Software which were not returned to Med One, and (iii) cease using the Software altogether. Upon its receipt from [Pioneer Health], Med One shall be responsible to return the Software to the owner/vendor/licensor so that [Pioneer Health] shall not be in breach of any software license." (Agrs. ¶ 13). According to First Guaranty, this provision negates the bright-line test because it contemplates the early termination of the Agreements and the return of the Software to McKesson upon completion of the lease payments. (Mot. to Reconsider ¶¶ 22-23).

This argument fails because paragraph 13 of the Agreements, by its own terms, applies only "[w]ith regard to Software," and paragraph 11 defines "Software" as any software that may be included in the Equipment. Unlike paragraphs 4 and 5, which apply unconditionally, paragraph

13 applies only in certain circumstances. First Guaranty offers no explanation for elevating paragraph 13 above all other provisions in the Agreements, notwithstanding its limited application.

Even if paragraph 13 of the Agreements did apply, its early termination provision inures to the benefit of Med One, not Pioneer Health. In the event of early termination of the Agreements, Pioneer Health has multiple obligations to Med One with respect to any Software. Paragraph 13, however, does not grant Pioneer Health the right to terminate the Agreements early and does not contemplate Pioneer Health's exercise of any such right. The second prong of the bright-line test asks whether an agreement is subject to termination by the lessee, to which paragraph 13 does not provide an answer.

C. The Court did not err by failing to consider whether the Agreements are "finance leases."

It is inappropriate for First Guaranty to argue for the first time in the Motion to Reconsider that the Agreements constitute "finance leases" as defined in UTAH CODE ANN. § 70A-2a-103(g). *See Rosenzweig*, 332 F.3d at 873. Neither First Guaranty nor Med One cited UTAH CODE ANN. § 70A-2a-103(g) in the Motion to Compel or the Brief of Med One Capital Funding, LLC and First Guaranty Bank in Support of Motion to (1) Compel Payment of Administrative Claim; and (2) Compel Performance of Unexpired Lease of Personal Property (Dkt. 1657). Near the end of the hearing on the Motion to Compel, counsel for First Guaranty mentioned that the UCC allows for the concept of a finance lease, but he did not argue that the Agreements actually constitute finance leases and he did not cite UTAH CODE ANN. § 70A-2a-103(g). His mention of a finance lease at that hearing is insufficient to allow First Guaranty to argue for the first time in the Motion to Reconsider that the Agreements fall under UTAH CODE ANN. § 70A-2a-103(g).

Rule 59(e) "serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473

(5th Cir. 1989). A Rule 59(e) motion is not the proper "vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet*, 367 F.3d at 479 (citation omitted). In other words, Rule 59(e) does not provide a method for a litigant to redo its failure to present evidence or make legal arguments. *See Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir. 1994); *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988) (holding that court orders "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure").

Regardless, the Agreements are not "finance leases." To qualify as a "finance lease," an agreement must first qualify as a lease. The Court's finding in the Opinion that the Agreements are not true leases forecloses First Guaranty's reliance on UTAH CODE ANN. § 70-2a-103(g). Indeed, the Court held in the Opinion that the totality of the transaction lacked the "most fundamental characteristic of a lease" because Med One did not acquire the right to use or possess the Software. (Op. at 19). In making that determination, the Court rejected Med One and First Guaranty's argument that it acquired a possessory interest in the Software through the Letter Agreement, reasoning that Med One's asserted interest was merely a right to deactivate the Software, which was analogous to a self-help remedy in favor of a secured creditor. (Op. at 20-21). In the context of a properly drafted lease, Med One would have acquired a possessory interest in the Software from McKesson.

D. There is no manifest injustice.

The dissatisfaction of First Guaranty with the consequences of Med One's legal drafting is not manifest injustice. *See FDIC v. Cage*, 810 F. Supp. 745, 747 (S.D. Miss. 1993) (holding that a motion that "merely expresses disagreement with the findings of the Court" is not grounds for a motion to reconsider). The Court has not taken any legal rights away from Med One or First

Guaranty but has merely interpreted the substance of the Agreements and the Letter Agreement, as written.

First Guaranty argues that it would be a manifest injustice to "cut off" Med One's rights as the "lessor" when both Pioneer Health and McKesson have received the benefit of their bargain. (Mot. to Reconsider ¶ 31). The Court disagrees because the "labels used by Med One in the documents provide no pretense of a lease" and "if the transaction is a 'true' lease, Med One did not make that intent clear from the labels it chose." (Op. at 13).

Conclusion

The Court did not make any factual or legal errors, manifest or otherwise, warranting reconsideration of the Opinion. Accordingly, the Court finds that the Motion to Reconsider should be denied.

IT IS, THEREFORE, ORDERED that the Motion to Reconsider is hereby denied.

##END OF ORDER##