IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI MERIDIAN DIVISION

IN RE: **CHAPTER 11**

AUSTIN DEVELOPMENT CO. **CASE NO. 9100018MC**
MOTION NO. 940992

Hon. J. C. Bell P. O. Box 566 Hattiesburg, MS 39401	Chapter 11 Trustee
Hon. Thomas E. Schwartz P. O. Box 16057 Hattiesburg, MS 39404-6057	Atty. for Trustee
Hon. Thomas L. Webb P. O. Box 2009 Meridian, MS 39302-2009	Atty. for Sowashee Venture
Hon. Pat Scanlon P. O. Box 23059 Jackson, MS 39225-3059	Atty. for EB, Inc.
Mr. Austin D. Check P. O. Box 3271 Meridian, MS 39503	*Pro se*

Edward Ellington, Judge

OPINION AND ORDER ON *OBJECTION AND MOTION FOR REHEARING AND MOTION FOR STAY*

This matter came before the Court on the *Objection and Motion for Rehearing and Motion for Stay* filed by Austin D. Check, *pro se*. The Court having considered same and being otherwise fully advised

in the premises, finds that the objection should be granted in part and denied in part.

DISCUSSION

On January 2, 1991, Austin Development Co. (Debtor) filed a petition for relief under Chapter 11 of the Bankruptcy Code. Austin Development Co. was one of Mr. Austin D. Check's (Check) four corporations which he put into bankruptcy in late 1990 and early 1991. In addition to his four corporations, Check also filed a personal bankruptcy petition. Therefore, there are now pending before this Court a total of five related bankruptcy proceedings initiated by Check (the Check bankruptcies). On July 22, 1992, J. C. Bell was appointed Trustee in this bankruptcy.

On July 29, 1994, the Court held a trial on the following matters:

(1) *Eastover Bank's Motion to Lift Stay and For Other Relief* filed by EB, Inc., formally named Eastover Bank for Savings (M940992).

(2) *Response to EB's Motion to Lift Stay and For Other Relief* filed by Sowashee Venture.

(3) *Response to Sowashee Venture Response to Eastover Bank's Motion to Lift Stay and For Other Relief* filed by Austin D. Check.

(4) *Response to EB's Motion to Lift Stay and For Other Relief* filed by Austin D. Check.

(5) *Motion for Stay* filed by Austin D. Check.

(6) *Objection and Motion for Re-hearing on Agreed Order* filed by Austin D. Check.

The pleadings numbered one through four all clearly relate to pleading number one, EB, Inc.'s (EB) motion to lift the automatic stay.

As to pleading number five, the *Motion for Stay*, the Court overruled Check's motion to the extent that he was seeking a stay of the proceedings which were set for trial at that time. The Court accepted the remaining portion of Check's *Motion for Stay* as an additional response or objection by him to EB's motion to lift the stay. The parties then submitted testimony and evidence on their respective positions regarding EB's motion to lift the stay.

On the piece of property which is the subject of EB's[1] motion to lift the stay, the Debtor held a long-term ground lease that it had obtained from Sowashee Ventures (Sowashee). The Debtor granted EB a deed of trust on this long-term ground lease. Improvements in the form of a movie theater were made on the property by the Debtor. The Debtor subleased the movie theater to R & S Theaters. The Debtor assigned this sublease and the theater's income stream to EB as additional collateral.

In its motion to lift the stay, EB was seeking to have the stay lifted in order to foreclose its deed of trust on the Debtor's leasehold interest in the long-term ground lease. In addition, EB was seeking to have the stay lifted in order to simultaneously

---

[1]All of the transactions which are the subject of this proceeding took place between the Debtor and Eastover Bank for Savings. Eastover Bank for Savings is now conducting business as EB, Inc.

foreclose the assignment it had been granted from the Debtor on the theater sublease and the theater's income stream.

After considering all testimony and evidence presented, the Court found that *Eastover Bank's Motion to Lift Stay and For Other Relief* should be granted. The Court overruled the objections to the motion based upon the Fifth Circuit Court of Appeals' ruling in an appeal that arose from this bankruptcy case and that involved the same property on which EB now seeks to have the stay lifted, In the Matter of Austin Development Company, 19 F.3d 1077 (5th Cir. 1994).

In Austin Development, the Fifth Circuit found that when the Debtor failed to timely assume or reject the long-term ground lease with Sowashee "the lease was breached and Austin was required to surrender the premises." Austin, 19 F.3d at 1084. The Fifth Circuit went on to state:

> Because the lease did not terminate upon its deemed rejection, Eastover retained rights in it against Sowashee as a third-party beneficiary of ¶21 of the Austin-Sowashee lease. The extent of Eastover's rights, an issue not adjudicated below, should be decided in state court, because **after rejection the debtor's estate had no remaining interest** in the outcome of that controversy which is not "related to" the bankruptcy as is required for federal jurisdiction. 28 U.S.C. § 1334(b).

Austin, 19 F.3d at 1084. (emphasis added). For these reasons, the Court granted EB's motion to lift the automatic stay.

Pleading number six, *Objection and Motion for Re-hearing on Agreed Order*, was an objection filed by Check to an order which was entered on June 16, 1994. The Trustee did not join in Check's

objection. The June 16, 1994, order pertained to the disposition of funds received from R & S Theaters on its sublease. These funds were being held in escrow by the attorney for Sowashee pending the disposition of the appeal from this bankruptcy. Again based upon the Fifth Circuit's opinion in Austin, the Court found that Sowashee and EB were the only parties that held an interest in the funds. Unless and until reversed by the U. S. Supreme Court, the Court ordered the funds to be turned over to EB. The Court found that pursuant to the 5th Circuit's opinion the Debtor's estate no longer has an interest in the funds. For all of the above reasons, the Court overruled Check's objection and denied his motion for re-hearing.

On August 5, 1994, orders were signed in accordance with the Court's oral findings rendered on July 29, 1994.

On August 15, 1994, Check filed an *Objection and Motion for Rehearing and Motion for Stay*. Check filed this pleading as "Austin D. Check, et al Debtors as applies, PRO SE." Check's pleading addresses the six orders listed below which were entered on August 5, 1994:

(a) *Order Lifting Stay*
(b) *Final Judgment* (On the order lifting stay.)
(c) *Order Denying Check's Motion for Rehearing*
(d) *Order Denying Motion for Stay*
(e) *Order Denying Motion for Rule 2004 Examination*
(f) *Order* (This order withdrew Sowashee's motion for a rule 2004 exam of EB.)

In his pleading, Check states several arguments to support his position.

Having briefly detailed the Court's reasoning from which the above listed orders arose, the Court will now address Check's *Objection and Motion for Rehearing and Motion for Stay* filed on August 15, 1994.

Check does not cite a code section or a rule number in his pleading. An *Objection and Motion for Rehearing and Motion for Stay* is not formally designated in the Federal Rules of Bankruptcy Procedure or the Federal Rules of Civil Procedure. The Fifth Circuit has held that a motion which:

> [C]hallenges 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). Under which Rule the motion falls turns on the time at which the motion is served. If the motion is served within ten days of the rendition of judgment, the motion falls under Rule 59(e); if it is served after that time, it falls under Rule 60(b).

Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167, 173 (5th Cir. 1990), cert. denied, ___ U. S. ___, 126 L. Ed.2d 131, 114 S.Ct. 171 (1993)(footnotes omitted). "(A) motion that 'calls into question the correctness of a judgment should be treated as a motion under Rule 59(e), however it is styled.'" Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., 784 F.2d 665, 669-70 (5th Cir. 1986)(en banc), cert. denied, 479 U.S. 930, 107 S.Ct. 348, 93 L. Ed.2d 351 (1986)(footnote omitted). *See also* Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285, 288 (5th Cir. 1989); In the Matter of Aguilar, 861 F.2d 873, 875 (5th Cir. 1988); Finch v. City of Vernon, 845 F.2d 256, 258-59 (11th Cir. 1988); In re Branding Iron Steak House, 536 F.2d 299, 301 (9th Cir. 1976).

The orders to which Check is objecting were all entered on August 5, 1994. Check filed his objection on August 15, 1994. Applying the "bright-line rule" established by the Fifth Circuit in Harcon Barge, the pleading filed by Check will be considered as a motion to alter or amend a judgment pursuant to Federal Rule of Civil Procedure 59(e).

Federal Rule of Bankruptcy Procedure[2] 9023 makes Federal Rule of Civil Procedure 59 applicable in contested matters. This proceeding is a contested matter pursuant to Rule 9014. Fed. R. Civ. P. 59(e)[3] states:

> **Rule 59. New Trials; Amendment of Judgments.**
>
> **(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

"A party may properly use a motion to alter or amend a judgment under Fed R Civ P Rule 59(e) to request the trial court to correct errors of law or mistakes of facts in its judgment." 3 Shepard's Editorial Staff, Motions In Federal Court, 2 Ed. § 9.54 (footnote omitted). Rule 59(e) may be utilized:

> --to vacate an order, such as an order of dismissal, or a grant of summary judgment.
> --to make minor alterations of the judgment.
> --to grant relief requested but not considered in the original judgment.
> --to correct errors of law.

---

[2]Hereinafter, all Rules refer to the Federal Rules of Bankruptcy Procedure unless specifically noted otherwise.

[3]All future references to "Rule 59" refer to Federal Rule of Civil Procedure 59 as made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 9023.

> --to vacate a judgment because the court lacked subject matter jurisdiction.
>
> . . . .
>
> If properly raised, a motion to alter or amend a judgment is not limited to the issues expressly raised therein, but the effect of such a motion is to open up the judgment for a correction of any other error which may have intervened in entry of the judgment.

25 Fed Proc, L. Ed. § 58:42 (footnotes omitted).

As evident above, a motion to alter or amend may be utilized to correct a judgment for a wide variety of errors, but its use is not limitless. A motion to alter or amend a judgment under Rule 59(e) "is not available for motions seeking--

--the complete reversal of a judgment simply because it is erroneous.

. . . .

--to present additional evidence or legal theories not brought forward previously." Id.

"A motion under Fed R Civ P Rule 59(e) to alter or amend a judgment is addressed to the sound discretion of the trial court." 3 Shepard's Editorial Staff, Motions in Federal Court, 2 Ed. §9.59 (footnote omitted). The Fifth Circuit has held that a court "has considerable discretion in deciding whether to . . . [grant a motion] under Rule 59(e). However, its discretion is not without limit. The court must strike the proper balance between two competing imperatives: (1) finality, and (2) the need to render just decisions on the basis of all the facts." Edward H. Bohlin Co., Inc. v. Banning Co., Inc., 6 F.3d 350, 355 (5th Cir. 1993).

The Court does not find that its July 29, 1994, oral findings were unjust or unfounded. The Court rendered its decision on the matters before it after considering all of the facts, evidence and testimony presented at the trial. The granting of Check's objection would cause EB to suffer unfair prejudice by requiring EB to relitigate issues on which the Court has already ruled. Check is simply unhappy with the result and is simply attempting to obtain another bite at the apple. "A motion brought under Rule 59(e) is not a procedural folly to be filed by a losing party who simply disagrees with the decision; otherwise, the Court would be inundated with motions from dissatisfied litigants." In re Stoecker, 143 B.R. 118, 147 (Bankr. N.D. Ill. 1992), rev'd on other grounds, 5 F.3d 1022 (7th Cir. 1993).

To achieve finality of these particular issues in this case, Check's objection will be denied as to all of the orders entered on August 5, 1994, with the exception of the order denying Check's motion for a 2004 examination.

After reviewing the transcript of the July 29, 1994, hearing, the Court finds that it did not order Check's motion for a 2004 examination filed on July 15, 1994, to be denied, but rather stated that it would consider the motion at a later date. Therefore, the Court grants Check's request to alter the *Order Denying Motion for 2004 Examination* entered on August 5, 1994. That order should be set aside. The Court will enter a separate order holding the July 15, 1994, request for a 2004 examination in abeyance as was decided at the hearing held on August 9, 1994, on the United States

Trustee's *Motion to Convert to Chapter 7* and Check's July 26, 1994, *Motion for 2004 Examination*.

IT IS THEREFORE ORDERED that the *Objection and Motion for Rehearing and Motion for Stay* is hereby denied as it applies to the following orders entered on August 5, 1994: *Order Lifting Stay; Final Judgment* (On the order lifting stay.); *Order Denying Check's Motion for Rehearing; Order Denying Motion for Stay* and *Order* (This order withdrew Sowashee's motion for a rule 2004 exam of EB.)

IT IS FURTHER ORDERED that the *Objection and Motion for Rehearing and Motion for Stay* is hereby granted as to the August 5, 1994, *Order Denying Motion for Rule 2004 Examination* and the order is hereby set aside. A separate order shall be entered holding the July 15, 1994, request for a 2004 examination in abeyance.

SO ORDERED this the 2nd day of September, 1994.

UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI MERIDIAN DIVISION

IN RE: **CHAPTER 11**

AUSTIN DEVELOPMENT CO. **CASE NO. 9100018MC**

ORDER HOLDING JULY 15, 1994, MOTION FOR 2004 EXAMINATION FILED BY AUSTIN D. CHECK IN ABEYANCE

THIS MATTER came before the Court on the motion for 2004 examination which is contained in Austin D. Check's July 15, 1994, *Response and Objection to Motion to Convert to Chapter 7 With Motion for 2004 Examination*, and the Court having considered same finds that the motion for 2004 examination should be held in abeyance.

IT IS THEREFORE ORDERED that the motion for 2004 examination which is contained in Austin D. Check's July 15, 1994, *Response and Objection to Motion to Convert to Chapter 7 With Motion for 2004 Examination* is hereby held in abeyance.

SO ORDERED this the 2nd day of September, 1994.

UNITED STATES BANKRUPTCY JUDGE