

ENTERED ON

FEB 23 2004

DOCKET

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
TRIMBLE HOUSE CORPORATION)	CASE NO. 99-64716
)	
Debtor)	

)	
TAMARA M. OGIER, Trustee)	
)	
Plaintiff)	
v.)	ADVERSARY PROCEEDING
)	NO. 01-6103
REGIONS BANK; HENRY TEEL,)	
RICHARD ZORN; LIGHTIDEAS, LLC;)	
JAMES K. McGOVERN)	
)	
Defendants)	

ORDER

By order entered October 8, 2003, Defendants' motions for summary judgment were granted. That order concluded that Plaintiff had failed to present sufficient evidence to support her claims for relief or to demonstrate a dispute of material fact. The discovery period having ended in September, 2002, Plaintiff's failure to present evidence in support of her claims for relief entitled Defendants to summary judgment against Plaintiff.

On November 10, 2003, Plaintiff filed a Motion to Reconsider and Set Aside Summary Judgment Order. Plaintiff states that she relies upon Federal Rules of Civil Procedure, Rule 76.38(2). No such rule exists. Defendants have filed responses to Plaintiff's motion for reconsideration. Plaintiff filed no reply.

No provision in the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") nor the Bankruptcy Local Rules¹ specifically provides for reconsideration of orders entered by the court. Motions may, however, be filed pursuant to Bankruptcy Rule 9023, which incorporates FRCP 59(e) [motion to alter or amend judgment], Bankruptcy Rule 9024, which incorporates FRCP 60(b) [motion for relief from judgment or order], and Bankruptcy Rule 7052, which incorporates FRCP 52(b) [motion to amend findings]. Motions for reconsideration are addressed in BLR 9023-1, which provides:

Motions for reconsideration shall not be filed as a matter of routine practice. Whenever a party or attorney for a party believes it is absolutely necessary to file a motion to reconsider an order or judgment, the motion shall be filed with the Clerk of Court within 10 days after entry of the order or judgment. Responses shall be filed not later than ten days after service of the motion. Parties and attorneys for the parties shall not file motions to reconsider the Court's denial of a prior motion for reconsideration.

Bankruptcy Rule 9006(b)(2) does not permit enlargement of the time limits in Bankruptcy Rules 9023 and 7052. Therefore, as Plaintiff's motion was filed more than ten days after entry of the order granting Defendants' motions for summary judgment, they were untimely filed and this court lacks jurisdiction to consider Plaintiff's motion under those rules. *Wright v. Preferred Research, Inc.*, 891 F.2d 886 (11th Cir. 1990).

Pursuant to Bankruptcy Rule 9024, a movant may seek relief from a judgment or order if the motion is filed within a reasonable time. A movant may obtain such relief from a judgment or order for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;

¹ The local rules for the Bankruptcy Court for the Northern District of Georgia may be found at www.ganb.uscourts.gov.

- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under [Bankruptcy] Rule [9023];
- (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.

Plaintiff's motion for reconsideration does not set forth any facts which would allow reconsideration under the reasons number 1 through 5. Therefore, Plaintiff must show some "other reason justifying relief from the operation of the judgment."

A motion for reconsideration should not be used to relitigate issues already decided or as a substitute for appeal. *In re Oak Brook Apartments of Henrico County, Ltd.*, 126 B.R. 535 (Bankr. S.D. Ohio 1991). Such a motion is frivolous if it raises no new evidence or new legal arguments to explain why the court should change the original order. *Magnus Electric v. Masco Corp.*, 871 F. 2d 626 (7th Cir. 1989). *Unioil v. E.F. Hutton & Co.*, 809 F. 2d 548 (9th Cir. 1986). Motions for reconsideration cannot be used to raise arguments which were or could have been raised before judgment was issued. *O'Neal v. Kennamer*, 958 F. 2d 1044 (11th Cir. 1992).

Plaintiff's motion for reconsideration neither presents any new evidence nor suggests that such evidence exists. Plaintiff's motion for reconsideration presents no new legal theories. Plaintiff reargues the facts and legal theories presented initially in her response to Defendants' motions for summary judgment. Plaintiff urges the court to substitute inference

and supposition for evidence. As stated in the October 8, 2003 order, however, FRCP 56(e), incorporated in Bankruptcy Rule 7056, provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing . . . genuine issue for trial.

The October 8, 2003 order details Plaintiff's failures of proof, which will not be repeated here. Plaintiff has not augmented her allegations and denials with any affidavits or other evidence or even the proffer of such evidence. Therefore, Plaintiff's motion is insufficient to warrant reconsideration.

In Plaintiff's statement of facts, *inter alia*, Plaintiff stated, "Plaintiff's counsel expected that the period for Discovery would continue and coincide with the Defendants' motions for summary judgment and that the sole issue was damages." Plaintiff presented no explanation of this statement and no evidence to support it. The docket shows the last order extending discovery was entered August 7, 2002. No further motions requesting extension of discovery were filed and no further orders extending discovery were entered. Additionally, the relevance of Plaintiff's expectation regarding discovery is unclear, except as a nebulous suggestion that Plaintiff "expected" to be able to engage in discovery to uncover facts and evidence to support her claims.


Also contained in Plaintiff's statement of facts was the following representation:

During the Discovery period, the law firm of the Plaintiff's Counsel underwent substantial and unexpected change, with one partner suffering a heart attack and another leaving to start a practice of his own. Additionally, the firm hired and trained eight secretaries, three bookkeepers and three associates. Given these unfortunate and hectic circumstances, the Plaintiff's Counsel was unable to conduct thorough Discovery.

Again, the relevance of this representation is unclear. If circumstances prevented Plaintiff from engaging in discovery, an appropriate motion to extend discovery and to extend the time for responding to Defendants' motions for summary judgment, or both, could have been filed, but no such motions were filed. If evidence exists to support Plaintiff's position, the filing of the motions for summary judgment impressed upon her the obligation either to produce that evidence or to ask for more time. She did neither. Relating her attorney's personal or professional difficulties at this late date does not establish grounds for reconsideration. Accordingly, it is hereby

ORDERED that Plaintiff's motion for reconsideration is denied.

IT IS SO ORDERED, this the 20th day of February, 2004.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE