

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF GEORGIA
 ATLANTA DIVISION

IN RE:	:	CASE NO. 02-95383
	:	
LEROY GRIFFIN,	:	
	:	
Debtor.	:	CHAPTER 7
_____	:	
DAVIS ELLIOTT and CHARLES GRAY,	:	
	:	
Plaintiffs,	:	ADVERSARY PROCEEDING
	:	NO. <u>02-9403</u>
v.	:	
	:	
LEROY GRIFFIN, ET AL,	:	
	:	
Defendants.	:	JUDGE BIHARY

ORDER

This adversary proceeding is before the Court on motions filed by each of the *pro se* plaintiffs to reconsider the Order entered on November 24, 2003. The plaintiffs pled the complaint as an objection to discharge and an objection to the dischargeability of certain alleged debts. This is a core proceeding under 28 U.S.C. § 157 (b)(2)(I) and (J).

The procedural history relevant to the plaintiffs' motions to reconsider is as follows. Defendant Leroy Griffin filed a Chapter 7 bankruptcy case on May 22, 2002.

On September 23, 2002, plaintiffs Davis Elliott and Charles Gray filed a twenty-one page complaint against Mr. Griffin, Barbara Griffin and a number of other defendants.¹ The complaint objected to debtor Leroy Griffin's discharge in bankruptcy under § 727 of the Bankruptcy Code, sought a determination that any debt owed be declared nondischargeable under § 523 of the Bankruptcy Code, and sought a determination of debt owed. Defendants did not file an answer to the complaint, and plaintiffs filed a request for clerk's entry of default and motion for default judgment against defendants Leroy Griffin, Barbara Griffin and Aberdeen General Recovery, Inc. The Clerk entered default against these three defendants on November 26, 2002, and the Court held a hearing on the motion for default judgment on January 6, 2003.

On January 8, 2003 the Court entered an Order granting a default judgment on plaintiffs' request that debtor not be allowed a discharge. The January 8, 2003 Order also stated, in pertinent part, as follows:

The complaint also alleges certain claims against defendants for damages. While a default judgment regarding defendant's liability is proper and is hereby GRANTED, Fed R. Civ. P. 55 incorporated by Fed. R. Bankr. P. 7055 requires the Court to hold a hearing to determine the amount of damages. Plaintiffs have not liquidated their damages claim, and thus the Court must conduct a hearing in order to determine the proper amount of monetary damages. This hearing will be set by separate Order.

1

The defendants were named in the complaint as follows: "Leroy Griffin and Barbara Griffin, Personally, and d/b/a Aberdeen General Recovery, Inc., *formerly* Recovery Management Services, Inc. and Premier Delivery Systems, Inc. and John and Jane Does 1-10 as their names are made known."

The Court initially set the hearing on damages for April 3, 2003. However, plaintiffs contended they did not have documents requested in discovery and filed a number of motions including a motion to seize assets, motions for contempt and motions for sanctions. The United States Trustee made an appearance, undertook to investigate the allegations of concealed and missing assets, and submitted a report on August 15, 2003. Plaintiffs filed a 42-page response to the United States Trustee's Report, taking exception to it and contending that it "rose to the level of gross negligence" and was a "legal fraud." The Court then reset the trial on damages for November 20, 2003.

After a bench trial on damages held on November 20, 2003, the Court entered its findings of fact and conclusions of law orally on the record pursuant to Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52(a). The Court entered a brief Order on November 24, 2003, memorializing the Court's ruling and directions. The Court found that plaintiff Davis Elliott was entitled to a judgment in the amount of \$14,820.00 against Leroy Griffin and a judgment in the amount of \$4,820.00 against Barbara Griffin. Plaintiff Davis Elliott filed a motion asking the Court to amend the order and the judgment to include an amount he claims is owed based on the balance due on monies advanced on certain accounts receivable, and he then filed a "petition to amend his motion to reconsider" to request that additional evidence be considered on his claim for attorney's fees.

The Court found that plaintiff Charles Gray had not presented any evidence to support a damage award, but gave Mr. Gray additional time (1) to review and obtain copies of documents held by the United States Trustee and (2) to file a motion to consider any new evidence contained in the documents held by the United States Trustee that might support a damage award. Mr. Gray's motion to reconsider seeks \$70,000.00 for what he alleges is due him as salary, and 7% of the revenue of Aberdeen General Recovery, Inc.

Defendants filed a response to the motions of both plaintiff Elliott and plaintiff Gray through new counsel on March 18, 2004. On March 29, 2004, plaintiffs filed a joint reply to defendants' response, and on April 13, 2004, plaintiffs filed another pleading entitled "Plaintiffs' Response in Opposition to Defendants' Answer to Motion for Reconsideration and Constitutional Demand." After considering the plaintiffs' motions, the defendants' response, the supplements, replies and the record in this case, the Court concludes that Mr. Elliott's motion should be granted in part and denied in part, and that Mr. Gray's motion should be denied.

I. Plaintiff Elliott's Motion to Reconsider

Plaintiff Elliott claims that he entered into an agreement on January 3, 2001, with Recovery Management Services, Inc. ("RMS"). RMS was in the car repossession business. The agreement was signed by plaintiff Charles Gray, not defendant Leroy Griffin, on behalf of RMS. Mr. Elliott claims that he purchased accounts receivable of

RMS pursuant to this agreement and that he advanced sums for these accounts receivable to RMS. He further claims that defendant Leroy Griffin wrongfully dissolved RMS and that at the time of the dissolution, RMS owed Mr. Elliott a balance of \$10,973.43 on the accounts receivable financing. Mr. Elliott further claims that defendants Leroy and Barbara Griffin converted these accounts receivable for their own use. At the conclusion of the trial, the Court found that the evidence presented did not support a judgment that Leroy and Barbara Griffin had converted accounts receivable in the amount of \$10,973.43.

In Mr. Elliott's motion to reconsider, he argues that the evidence which would have supported a conversion of the accounts was in the possession of the Griffins and that it was their refusal to produce these documents that resulted in the lack of an evidentiary basis for the damage award on the conversion claim. In the defendants' response to Elliott's motion to consider, they argue that it is Charles Gray, not the Griffins, who has secreted documents.

The documentary evidence was not presented at trial with any coherence. However, after reviewing the documentary evidence again, the Court concludes that the documents do show that there was some \$10,973.43 owed by RMS to Mr. Elliott for monies provided to RMS to purchase accounts receivable. While there was no showing at the trial on damages that accounts receivable were converted, Count Three of the complaint alleges that Barbara and Lee Griffin converted assets of RMS including the

accounts receivable, and defendants never filed an answer. Since Mr. Elliott established at trial the amount pertaining to the accounts receivable claim, he in effect proved the damages on his defaulted conversion claim. Accordingly, the Order of November 24, 2003 is amended to increase by \$10,973.43 the amount of the judgment in favor of Mr. Elliott against both defendants Leroy and Barbara Griffin.

Plaintiff Elliott also filed a request to supplement his motion to reconsider, asking the Court to review an additional exhibit, a statement of legal fees from counsel Kathleen Womack dated December 16, 2003. At the trial on November 20, 2003, Mr. Elliott had asked the Court to award attorney's fees. His general exhibit listing his claims asked for \$6,000.00 in attorney's fees, but he presented receipts at the trial from Kathleen Womack totaling \$3,000.00. At the conclusion of the trial, the Court found that the evidence presented with respect to attorney's fees was insufficient to support a damage award, as Mr. Elliott had presented no evidence to establish that any of the legal work performed by Ms. Womack related to the enforcement of the agreement referenced in the complaint. In his petition to supplement his motion to reconsider, Mr. Elliott submits a statement dated December 16, 2003, after the trial on damages, listing services rendered by Ms. Womack from April 3, 2002 to September 5, 2002.

Mr. Elliott's supplemental request to reconsider the denial of his claim for attorney's fees must be denied. Mr. Elliott does not cite to any procedural rule in his motion for leave to file a supplement. However, motions to reconsider filed more than

ten (10) days after the entry of the order or judgment are considered as motions for relief under Fed R. Civ. P. 60(b) as incorporated by Fed. R. Bankr. P. 9024. *Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc.*, 169 F.R.D. 680, 684 (M.D. Fla. 1996). Mr. Elliott's supplement was filed more than ten (10) days after the Order, and thus the Court must analyze the motion under Rule 60(b) which provides in pertinent part:

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.

Fed. R. Civ. P. 60(b) (2004). "Motions made under Rule 60(b) are within the sound discretion of the trial court." *Turner v. Sec'y of the Air Force*, 944 F.2d 804, 807 (11th Cir. 1991). While evidence created after a trial can be newly discovered under Rule 60(b)(2) if it is based on facts that were in existence prior to trial, the moving party must show it could not have obtained the evidence prior to trial through the exercise of due diligence. *U.S. Xpress Enters., Inc. v. J.B. Hunt Transp., Inc.*, 320 F.3d 809, 815 (8th Cir. 2003); *Mitchell v. Shalala*, 48 F.3d 1039, 1041 (8th Cir. 1995); *Frankel v. ICD Holdings, S.A.*, 939 F.Supp. 1124, 1127 (S.D.N.Y. 1996). 12 MOORE'S FEDERAL PRACTICE 3D

§ 60.42[3][a] (1997). Parties may not use Rule 60(b)(2) to supplement evidence presented at trial with newly created evidence that could have been prepared and presented at the trial. *Frankel*, 939 F.Supp., at 1127, *see also In re: Wright*, 186 B.R. 394, 396 (Bankr. D. Md. 1995).

In the instant case, Mr. Elliott has made no showing of why he could not have obtained information on the new exhibit prior to trial. All of the facts in the statement of services were in existence at the time of the November, 2003 trial. Mr. Elliott has not demonstrated due diligence to obtain and present evidence of the actual legal work performed on his behalf by Ms. Womack, and his motion to reconsider based on this exhibit is denied.

Mr. Elliott also argues in his pleading filed on March 29, 2004, and again in his second supplement filed on April 13, 2004, that he is entitled to a default judgment on his conversion claim in the amount of \$10,973.43, and that it was error for the Court to have scheduled a trial on damages on this claim. The Court has reviewed the *pro se* complaint and concludes that this argument has no merit. In the body of the complaint, plaintiff Elliott states that he is entitled to recover \$10,973.43, but in the prayer for relief he claims he is owed \$12,000.00 for converted accounts receivables. The Court cannot enter a default judgment amount when the complaint claims inconsistent amounts of damages in the body and the prayer for relief. *See KPS & Assoc., Inc. v. Designs by FMC, Inc.*, 318 F.3d 1, 18-19 (1st Cir. 2003). In addition, the complaint does not contain

sufficient facts or supporting documentation to support a particular dollar amount for the claim on converted accounts receivables. *See Anheuser Busch, Inc. v. Philpot*, 317 F.3d 1264, 1266 (11th Cir. 2003); *see also United States v. Dimucci*, 879 F.2d 1488, 1497 (7th Cir. 1989). In this case, it was appropriate and necessary to conduct a hearing on damages, since the amounts claimed in the complaint could not be properly ascertained from figures contained in the complaint itself or from any of the attachments to the complaint.

In summary, Mr. Elliott's motion to reconsider is granted insofar as the judgment will include an award of \$10,973.43 and denied with respect to his claim for attorney's fees.

II. Plaintiff Gray's Motion to Reconsider

The evidence at trial showed that Mr. Gray and Mr. Griffin had a very vague and undefined business relationship, but Mr. Gray did not meet his burden of proof in establishing any damages. Mr. Gray had claimed in the complaint that he was the chief financial officer and 50% owner of RMS. He claimed that Mr. Griffin wrongfully dissolved RMS and converted checks and other assets of RMS. The only mention of damages in the complaint for Mr. Gray is in the prayer for relief where he asks for:

Money Damages, an amount to be determined by the jury for Creditor Charles Gray both actual and prospective. Actual damages \$70,000, Prospective damages 7% of gross incoming revenues of Aberdeen General Recovery, Inc., starting on February 21, 2002.

Mr. Gray claimed at trial that the \$70,000.00 was for fourteen (14) months of a monthly salary of \$5,000.00, but Mr. Gray had no documents to support any agreement with anyone that he was to receive a \$5,000.00 monthly salary from any of the defendants. His testimony that he worked for RMS for fourteen months and never received or took any monies from the business or from Mr. Griffin was not credible. Mr. Griffin's testimony, on the other hand, that he made payments to Mr. Gray in cash and that Mr. Gray wanted to be paid in cash so that he would not have to pay taxes was credible. Simply put, there was no credible evidentiary basis upon which to award a judgment against any of the named defendants for any salary claimed by Mr. Gray. Furthermore, there were no allegations in the complaint that defendants improperly failed to pay him any salary.

The second part of Mr. Gray's claim is that he believes that he is entitled to half the converted assets of RMS or half of the profits of Aberdeen General Recovery, Inc. At trial, Mr. Gray failed to present any proof upon which the Court could determine any damage award. Since Mr. Gray claimed that he had been unable to obtain copies of documents in the possession of counsel for the United States Trustee, the Court gave Mr. Gray more time to review the documents. The Order entered on November 24, 2003 provided, in pertinent part, as follows:

Plaintiff Charles Gray failed to present sufficient evidence to support any damage award. However, at the hearing Mr. Gray complained that he had been unable to obtain copies of documents the defendants produced that were held in the United States Trustee's office. After hearing from counsel and the United States Trustee on this matter, the Court orders Mr. Gray access to those documents on **December**

1, 2003, at 10:00 A.M. in the Office of the United States Trustee, and Mr. Gray may request and obtain copies of those documents which he reasonably believes relate to his alleged claim for damages. Mr. Gray shall have until the close of business **December 23, 2003** to file and properly serve a motion for reconsideration, but such a motion may only be based on new evidence contained in those documents held by the United States Trustee which Mr. Gray had heretofore been unable to copy. A motion to reconsider based on any other evidence will not be considered. Any other request for relief in plaintiff's complaint or various motions to compel is hereby DENIED.

On December 23, 2003, Mr. Gray filed a motion for reconsideration essentially arguing that the Court was mistaken as to the Griffins' credibility and that both the Griffins and the United States Trustee had withheld documentation from him or failed to copy requested documentation which, if available, would have established Mr. Gray's right to a significant damage award. He argues that he should be entitled to significant damages unless the Griffins can provide documentary evidence to corroborate Barbara Griffin's testimony that she contributed start-up funds to establish Aberdeen Recovery Services, Inc.. In the defendants' response, they argue that there is no evidence to support Mr. Gray having contributed \$100,000.00, even though no one has ever made this contention. Neither Mr. Gray's brief nor the response filed by defendant's new counsel is at all helpful. It is obvious that the parties dislike and distrust one another, but the fact remains that Mr. Gray has still not presented any evidence to support a damage award, and he is not entitled to a money judgment in this case.

Finally, in the April 13, 2004 paper filed by plaintiffs, they seem to suggest that the damages issues should be retried before a jury. This argument is without merit. A party who knowingly participates in a bench trial without objecting has waived the right to a jury trial even if the party had previously submitted a timely jury demand. *Fillmore v. Page*, 358 F.3d 496, 503 (7th Cir. 2004); *Wilcher v. City of Wilmington*, 139 F.3d 366, 379 (3rd Cir. 1998); *Royal Amer. Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1018 (2nd Cir. 1989); 8 MOORE'S FEDERAL PRACTICE 3D § 38.52[4][a] (1997); *see also Sailor v. Hubbell, Inc.*, 4 F.3d 323 (4th Cir. 1993). Although it appears that plaintiffs asked for a jury trial in their complaint, they participated in the November 20, 2003 bench trial without objection, they did not raise any issue of a jury demand at the November 20, 2003 trial, nor did they raise this issue in their motions for reconsideration. Plaintiffs waited until they filed a "supplement" on April 13, 2004, five (5) months after the bench trial, to suggest that they should have presented their damages claim to a jury. Plaintiffs' failure to raise a timely objection to the Court's conducting a bench trial constituted a waiver of their jury demand, and plaintiffs' motion to reconsider on this issue is denied.²

2

It would also appear that neither the plaintiffs nor defendants have a constitutional right to a trial by jury on the issue of damages after a default. *Dierschke v. O'Cheskey*, 975 F.2d 181, 185 (5th Cir. 1992); *Partay v. Northwest Publishing, Inc., et al*, 931 F.Supp. 865, 870 (S.D. Ga. 1996); 8 MOORE'S FEDERAL PRACTICE 3D § 38.34[5] (1997). Moreover, while Fed. R. Civ. P. 55(b)(2) does protect a right to trial by jury conferred by a statute of the United States, plaintiffs do not assert a claim against these defendants under any statute of the United States.

In accordance with the above reasoning, Mr. Elliott's motion to reconsider is granted in part and denied in part, and Mr. Gray's motion to reconsider is denied. Mr. Elliott is entitled to a judgment against defendant Leroy Griffin in the amount of \$25,793.43 and to a judgment against defendant Barbara Griffin for \$15,793.43. The debtor Leroy Griffin has already been denied any discharge of his debts by the Court's previous Order of January 8, 2003, and the judgment in favor of Mr. Elliott against Mr. Griffin is not and will not be discharged or affected by Mr. Griffin's bankruptcy. Mr. Gray has not established any basis to award a money judgment against the debtor or the other named defendants in this case. A judgment in accordance with this Order will be entered.

IT IS SO ORDERED, this 10th day of May, 2004.


JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

DISTRIBUTION LIST

Davis Elliott

3446 Buford Highway, NE
Apartment D-8
Atlanta, GA 30329

Charles Gray

897 Edgewood Ave. N.E.
Atlanta, GA 30307

Leroy Griffin

Barbara Griffin

54 Waverly Way
Atlanta, Georgia 30307

Richard Genirberg

Genirberg Law Office
1299 Battle Creek Road
Suite 210-B
Jonesboro, Georgia 30236-7990

Thomas Dworschak

Office of the United States Trustee
Room 362, U.S. Courthouse
75 Spring Street
Atlanta, GA 30303