UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

IN RE	)	
	)	**Delaware Case No. 08-12687**
DBSI, INC., et al,	)	
	)	**Chapter 11**
Debtor.	)	
______________________________	)	
	)	
JAMES R. ZAZZALI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adv. No. 12-06056-TLM**
	)	
MARTY GOLDSMITH,	)	
	)	
Defendant.	)	
______________________________	)	

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION, DOC. NO. 360

INTRODUCTION

On October 17, 2018, this Court issued a Memorandum of Decision (the "Decision") containing its findings of fact, conclusions of law, and direction for submission of a proposed form of judgment following Phase II of the trial in the

instant adversary proceeding. Doc. No. 357.[1] On October 31, 2018, the defendant, Marty Goldsmith ("Goldsmith"), filed a "Motion for Amended or Additional Findings" presumably under Civil Rule 52(b)[2] as incorporated by Rule 7052.[3] Doc. No. 360 ("Motion"). On November 6, 2018, Goldsmith supplemented the Motion with his "Notice of Errata to Motion for Amended or Additional Findings." Doc. No. 362. The plaintiff and chapter 11 trustee, James Zazzali ("Zazzali"), filed a brief in opposition on November 8, 2018. Doc. No. 363. On November 15, 2018, the Court held a hearing and thereafter the Motion was taken under advisement. Doc. No. 366.

DISCUSSION AND DISPOSITION

Rule 52(b) gives the "court an opportunity to correct manifest errors of law

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[1] Phase I of the trial in this matter dealt with the valuation of property referred to as the Tanana Valley Property and was resolved by this Court's November 8, 2017 oral ruling. Doc. Nos. 267, 268. Phase II dealt with the avoidability of transfers made to Defendant under §§ 548 and 544 and the extent to which Plaintiff could recover from Defendant for the benefit of the bankruptcy estate under § 550.

[2] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, all Rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037, and all Civil Rule references are to the Federal Rules of Civil Procedure, Rules 1–86.

[3] While the Motion itself does not cite to Civil Rule 52(b), Goldsmith's counsel referenced Rule 7052 when docketing the Motion and creating the ECF docket entry. Civil Rule 52(b) provides:

(b) **Amended or Additional Findings**. On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

or fact at trial, or in some limited situations, to present newly discovered evidence." 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2571 (3d. ed. 2018). The rule "does not allow an unsatisfied party to relitigate old issues, advance new theories, or get a rehearing on the merits." *Owen v. Lundstrom (In re Owen)*, No. 04-06181, 2006 WL 2548787, *1 (Bankr. D. Idaho Aug. 31, 2006) (citing *Gutierrez v. Ashcroft*, 289 F.Supp. 2d 555, 561 (D.N.J. 2003)). "Rulings on motions to amend findings are committed to the sound discretion of the district court and will not be disturbed absent an abuse of that discretion." 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2582 (3d. ed. 2018).

Here, per its title, the Motion requests "amended or additional findings." However, the Motion does not ask the Court to amend any specific, existing factual findings. Nor does it ask the Court to make any additional factual findings. Instead, Goldsmith seeks to amend or alter the Court's *decision* that judgment will be entered in favor of Zazzali. In his Motion, Goldsmith repeatedly asks the Court to "direct entry of judgment" on his behalf, "alter [its] conclusion[s]," and to "reconsider its decision" in this case. *See, e.g.*, Doc. No. 360 at 2, 6, 13, 14. Further, Goldsmith submitted "Proposed Revisions to Text of Memorandum Decision" during oral argument on the Motion, the contents of which confirm Goldsmith is asking the Court to re-think its analysis and change its conclusions.

See Doc. No. 366. The proposed revisions delete most of the "Conclusion" section of the Court's Decision, supplanting it with Goldsmith's alternative conclusion that would result in judgment on his behalf. *Id.* Thus, despite the Motion's title, it is perhaps better characterized as a request for the Court to alter or amend judgment under Civil Rule 59(e), made applicable through Rule 9023.

Notwithstanding this confusion, the Court will first consider the Motion under Civil Rule 52(b). Since Goldsmith's Motion does not point to new evidence not previously considered by this Court, it is an implicit invitation for this Court to consider whether it made a "manifest error of law or fact at trial."

Goldsmith argues that "there is no basis in law or equity for the court to exercise its power to restructure the transfers in this case," and that "construing the transaction as a single transfer cannot be sustained." Doc. No. 360 at 2, 6. In support of these arguments, Goldsmith attempts to distinguish the cases relied on by this Court, suggesting the Court improperly invoked its equitable powers to evade a strict application of federal law when it "restructured" the transfers into a single transaction. *Id.* at 2–6.

After reviewing Goldsmith's various arguments and proposed "amendments" to the Decision, the Court concludes it has not made a clear or manifest error of law or fact as contemplated under Civil Rule 52(b). The Court spent months considering the positions advanced by the parties, the testimony of

the witnesses, and the documentary evidence presented at trial. After carefully considering the law applicable to the transfers under the Code, the Court held that the transfers must be analyzed as component parts of a serially-amended contractual whole, as memorialized by the parties' purchase and sale agreement and its subsequent written modifications, which purchase and sale agreement was ultimately closed by the parties. The Court did not invoke its equitable powers under §105(a) to reach that result. In short, the findings of fact and conclusions of law contained in the Decision were based on the evidence, including the credibility of the witnesses who testified at trial and the Court's interpretation of controlling legal authorities. A motion under Civil Rule 52(b) is not the proper vehicle for re-arguing issues already considered by this Court, and the Motion, to the extent it relies on Civil Rule 52(b), will be denied.

As discussed, the Motion is in substance one to alter or amend the judgment under Civil Rule 59(e), even though a judgment has not yet been entered. The Motion, therefore, is premature. However, as the standards under that Civil Rule are similar to those applied to Civil Rule 52(b), the Court will address it now.

Under Civil Rule 59(e), "a party may move the court to alter or amend its judgment, so long as: (1) the court is presented with newly discovered evidence, (2) the court committed clear error or the initial decision was manifestly unjust, or (3) there is an intervening change in controlling law." *Owen*, 2006 WL 2548787,

at *2 (quoting *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1064 (9th Cir. 2005)); *accord Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009); *Caroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2013). The Motion may not be "used to cure procedural or evidentiary inadequacies, advance arguments that should have been presented at trial or reargue contentions already presented." *Owen*, 2006 WL 2548787, at *2. As this Court has previously explained:

> [A]rguments that the Court was in error on the issues it considered and resolved should be directed to an appellate court. Motions to reconsider are not vehicles by which to make the same arguments as earlier made (even if hopefully more persuasively), or to raise arguments that should have been made but were not.

In re Tonnemacher, No. 15-20803, 2015 WL 8489036, *2 (Bankr. D. Idaho Dec. 10, 2015); *accord In re Sterling Mining Co.*, No. 09-20178, 2009 WL 2705825, *2 (Bankr. D. Idaho Aug. 24, 2009). A motion under Civil Rule 59(e) "will not be granted 'absent highly unusual circumstances,' and reconsideration of a judgment or order after its entry by the court 'is an extraordinary remedy which should be used sparingly.'" *Wallace v. Hayes (In re Wallace)*, No. 12-07035, 2013 WL 782721, *2 (Bankr. D. Idaho Feb. 27, 2013) (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1254 n.1 (9th Cir. 1999)). For these purposes, a manifest error of law or fact "must be one 'that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record.'" *Id.*

(quoting *In re Oak Park Calabasas Condo Ass'n*, 302 B.R. 682, 683 (Bankr. C.D. Cal. 2003)).

The Court's analysis of the Motion under Civil Rule 59(e) tracks closely with the foregoing analysis under Civil Rule 52(e). The Motion does not point to new evidence not previously considered by the Court. Neither does it claim there has been any intervening change in the law controlling the outcome of the case since the Decision was issued. As such, the Court is left to consider whether it committed clear error or perpetrated a manifest injustice in issuing its Decision.

As noted, Goldsmith argues the Court committed a clear error, resulting in manifest injustice, when it considered the transfers as part of the same transaction for the purposes of applying § 550. Goldsmith also claims the Court erred when it valued the Tanana Valley Property as of February 2007 rather than April 2006.

After review, the Court concludes it has not committed a clear error or perpetrated manifest injustice under Civil Rule 59(e). No highly unusual circumstances exist that require the Court to grant the extraordinary remedy of an amended judgment under Civil Rule 59(e). Goldsmith's arguments regarding alleged errors in the Court's Decision should be directed to an appellate court once a judgment is entered.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Amended or Additional

Findings, Doc. No. 360, will be denied. A separate order will be entered.

DATED: November 21, 2018

TERRY L. MYERS
CHIEF U. S. BANKRUPTCY JUDGE