STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 27739

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY d/b/a CAROLINA HEALTHCARE SYSTEM and THE CAROLINA HEALTHCARE FOUNDATION, INC.,

Plaintiff,

v.

WACHOVIA BANK, NATIONAL ASSOCIATION d/b/a WACHOVIA GLOBAL SECURITIES LENDING and METROPOLITAN WEST SECURITIES, LLC d/b/a WACHOVIA GLOBAL SECURITIES LENDING,

Defendants and Third-Party Plaintiffs,

v.

SUMMIT STRATEGIES GROUP,

Third-Party Defendant.

ORDER ON MOTION FOR RECONSIDERATION AND LEAVE TO AMEND

THIS MATTER is before the Court on Plaintiff's Motion for Reconsideration and Leave to Amend (the "Motion"). Plaintiff seeks reconsideration of this Court's October 6, 2009 Order, in which the Court dismissed Plaintiff's breach of fiduciary duty claims against Defendants. It draws the Court's attention to newly discovered facts. For the reasons and with the reservations set forth below, the Court hereby GRANTS the Motion.

I.

RULE 54(b)

There is little guidance from the appellate courts on reconsideration motions under Rule 54(b) of the North Carolina Rules of Civil Procedure, which states:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when

> multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. *Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties*.

N.C. R. Civ. P. 54(b) (2009) (emphasis added). When "our appellate courts have not addressed" a particular rule of civil procedure, "the Court may look to federal cases interpreting the analogous Federal Rule of Civil Procedure." *Speedway Motorsports Int'l Ltd. v. Bronwen Energy Trading, Ltd.*, 2009 NCBC 3 ¶ 37 (N.C. Super. Ct. Feb. 18, 2009), http://www.ncbusinesscourt.net/opinions/2009_NCBC_3.pdf (citing *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989)). Given the similarity between the North Carolina Rules and the Federal Rules with respect to Rule 54(b),[1] this Court will look to federal decisions for guidance.

The decision to modify an interlocutory ruling is within the sound discretion of the trial court.[2] *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003). Rule 54(b), however, "does not set out any standard for reconsideration

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[1] Rule 54(b) of the Federal Rules of Civil Procedure provides:

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54(b) (2009).

[2] This Court recognizes that reconsideration of a final judgment is "an extraordinary remedy which should be used sparingly." *Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998); *AGV Sports Group, Inc. v. Protus IP Solutions, Inc.*, No. 08-3388, 2010 U.S. Dist. LEXIS 37404, at *6 (D. Md. Apr. 15, 2010). However, the Court's October 6, 2009 decision is interlocutory and not final. Interlocutory decisions "are not subject to the same 'strict standards'" that apply to reconsiderations of final judgments. *Carolina Power & Light Co. v. 3M Co.*, No. 5:08-CV-460-FL, 2010 U.S. Dist. LEXIS 72162, at * 23–24 (E.D.N.C. July 19, 2010).

of interlocutory orders"; it simply provides that "they are 'subject to revision at any time before the entry of judgment.'" *Akeva LLC v. Adidas Am., Inc.*, 385 F. Supp. 2d 559, 565 (M.D.N.C. 2005). Notwithstanding the absence of a statutory standard, most courts adhere "to a fairly narrow set of grounds on which to reconsider their interlocutory orders." *Id.* Most courts will limit reconsideration of interlocutory orders to the following situations: "(1) where there has been an intervening change in controlling law; (2) where there is additional evidence that was not previously available; or (3) where the prior decision was based on clear error or would work manifest injustice." *Id.* at 566.

Why do courts choose to adhere to such limited guidelines? The reasons are obvious. Public policy favors a prompt and efficient resolution to litigation, and rearguing matters already heard defeats these goals and wastes client, firm, and judicial resources. *See id.* at 565.

II.
DISCUSSION

This Court will exercise its discretion and reconsider its prior Order under the guiding principles articulated in *Akeva* and other federal decisions. *See, e.g.*, *Baytree Assocs. v. Dantzler, Inc.*, No. 3:07-CV-16, 2008 U.S. Dist. LEXIS 46660, at * 9–10 (W.D.N.C. May 22, 2008); *see also Praxair, Inc. v. Airgas, Inc.*, 1999 NCBC 9 ¶ 8 (N.C. Super. Ct. Oct. 20, 1999), http://www.ncbusinesscourt.net/opinions/1999%20NCBC%209.htm (applying the same principles in a North Carolina state court decision). For example, has there been an intervening change in controlling law? Are newly discovered facts available? Was there a clear error of law? Is there a need to prevent injustice? This Court also will consider any potential prejudice to the party that previously prevailed on the motion now being reconsidered. Under these guiding principles, this is a close case.

Plaintiff cites no intervening change in controlling law.[3] Instead, Plaintiff presents a new legal argument in support of its motion to reconsider. Specifically, Plaintiff contends that a federally registered investment advisor is a fiduciary as a matter of law. (Pl.'s Br. Supp. at 21.) In making this new argument, Plaintiff relies on *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), and *Morris v. Wachovia Securities, Inc.*, 277 F. Supp. 2d 622 (E.D. Va. 2003). Reliance on those cases is not misplaced. However, in its original briefing on the Rule 12(b)(6) motion, Plaintiff failed to bring those cases or Metropolitan's status as a federally registered investment advisor to the Court's attention. It is not the responsibility of courts to construct arguments or provide rationales that the parties overlook. *See U.S. v. Duke Energy Corp.*, 218 F.R.D. 468, 474 (M.D.N.C. 2003) (citation omitted). The Court is troubled by the fact that those two cases (and Metropolitan's status as a federally registered investment advisor) could have been brought to the Court's attention during the original briefing.

Motions for reconsideration do not serve as an avenue for a party to "present a better and more compelling argument that the party could have presented in the original briefs." *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 402 F. Supp. 2d 617, 619 (M.D.N.C. 2005). Generally, when a party "fails to present his strongest case in the first instance," he loses the "right to raise new theories or arguments in a motion to reconsider." *Duke Energy Corp.*, 218 F.R.D. at 474. Nonetheless, had Plaintiff presented this newly raised argument initially, it would have affected the Court's decision. Metropolitan's status as a federally registered investment advisor provides the strongest case for asserting clear error of law in the Court's October 9, 2010 Order. However, the fact that a party did not make its strongest and best case on prior submissions will not, standing alone, justify reconsideration.

Plaintiff also contends that it has newly discovered facts to support its breach of fiduciary duty claim which justify revision and amendment of the pleadings. The

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[3] Although Plaintiff does not cite "change in controlling law" as a basis for reconsideration (Pl.'s Br. Supp. at 3 n.1), it does introduce a new argument based on Defendant Metropolitan West Securities, LLC's ("Metropolitan") status as a federally registered investment advisor which warrants discussion and consideration.

"new" facts fall into two categories. First, Plaintiff argues that Metropolitan's status as a federally registered investment advisor, which would create a fiduciary duty as a matter of law, was a fact that was not available until discovery. Defendants believe this argument is without merit and contend that Plaintiff could have discovered this fact earlier through the exercise of due diligence.

Second, Plaintiff points to new facts that came out during discovery which it argues show that the Court erred in not finding a special relationship of trust and confidence between the parties. Plaintiff relies on testimony from Defendants' own witnesses to support the following contentions: (1) Defendants exercised significant discretion over Plaintiff's investments; (2) Plaintiff did not have the power to approve or veto any such investments; and (3) Plaintiff relied on Defendants for investment advice. In this case, such testimony would undercut the facts on which the Court based its dismissal.[4]

This Court is not inclined to encourage parties to conduct discovery on claims that have already been eliminated in hopes of finding grounds for reconsideration. Litigation is complex and expensive enough as it is without conducting discovery on claims that have already been dismissed. Furthermore, viewing Plaintiff's position charitably, many of the "new" facts adduced could have related to Plaintiff's breach of contract claim as well as its breach of fiduciary duty claim.

However, the newly discovered facts, if true, would have impacted the Court's earlier decision. These new facts contradict the facts on which the Court previously relied. The Court, therefore, will set aside the concerns expressed herein and hold fast to its ultimate responsibility—reaching "the correct judgment under law." *Am. Canoe Ass'n*, 326 F.3d at 515. Accordingly, this Court will exercise its discretion and revise its prior order (1) to reflect that the dismissal of Plaintiff's breach of fiduciary

[4] The Court is less persuaded by Plaintiff's evidence concerning a lack of oversight by its Investment Oversight Committee. That evidence was obtained through Plaintiff's own witnesses and could have been specifically pled in the original Complaint.

duty claim is without prejudice and (2) to permit amendment of the Complaint as requested.[5]

With respect to potential prejudice, this Court is concerned about the timing of the Motion. Defendants proceeded with discovery, deposed Plaintiff's witnesses, and retained experts based on the Court's prior dismissal. They have not conducted discovery on a potential breach of fiduciary duty claim.[6] Plaintiff, in contrast, has obviously proceeded to conduct discovery on the previously dismissed fiduciary duty claim and had its expert opine on that issue.

In order to address any potential prejudice to Defendants, the Court will allow Defendants ninety (90) days from the date of this Order in which to conduct discovery on the fiduciary duty claim. Plaintiff, on the other hand, both by filing its amendment and by admission in its brief, has conducted its discovery on the breach of fiduciary duty claim and should need no more discovery. Upon completion of the discovery provided for in this Order, Defendants shall notify Plaintiff's counsel and the Court that such discovery is complete. Defendants shall then have fifteen (15) days to file its expert reports or any amendments to previously filed expert reports. The Court will issue a new scheduling order upon receipt of Defendants' notice.

Plaintiff's amended complaint is deemed filed as of today, and Defendants shall have thirty (30) days to file an answer to the Amended Complaint.

IT IS SO ORDERED, this 26th day of July, 2010.

/s/ Ben F. Tennille
The Honorable Ben F. Tennille
Chief Special Superior Court Judge
for Complex Business Cases

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[5] The Court reaches this outcome based on the combination of Metropolitan's status as a federally registered investment advisor and the new facts concerning Defendants' control over investment decisions and failure to communicate material information to Plaintiff. In reaching this decision, the Court is not determining that a fiduciary relationship exists. That matter will be determined at a later date. The Court is only permitting amendment of the Complaint.

[6] The Court notes, however, that the facts related to Plaintiff's breach of contract claim will be part of the overall set of facts necessary to defend against a breach of fiduciary duty claim.