UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

	)	CHAPTER 7
	)	
IN RE:	)	CASE NO. 01-63166
	)	
OHIO INDUSTRIES, INC.,	)	JUDGE RUSS KENDIG
	)	
Debtor.	)	
	)	**MEMORANDUM OPINION**
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This matter is before the court on the motion for new trial, to alter, amend, or vacate judgment and for evidentiary hearing, affidavit in support, and time records filed May 27, 2003 by Lisa Afarin, Chapter 11 Trustee (hereafter "Trustee"). No responses of any nature were filed.

Jurisdiction

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(b)(1) and the general order of reference entered in this district on July 16, 1984. The following constitute the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

Facts and Arguments

On February 12, 2003, Trustee filed an application for compensation of $138,345.23 and reimbursement of expenses of $856.55 for the time period October 30, 2001 through February 10, 2003. On May 14, 2003, the court issued a memorandum opinion and order allowing Trustee compensation of $50,000.00 and expenses of $865.55. In response, on May 27, 2003, Trustee filed a motion for new trial, to alter, amend, or vacate judgment and for evidentiary hearing, an affidavit in support, and time records.

Trustee brings her motion pursuant to Federal Rules of Civil Procedure 59 and 60, incorporated through Federal Rules of Bankruptcy Procedure 9023 and 9024. Trustee requests

that the court take additional testimony and evidence, amend the findings of fact and conclusions of law in the memorandum opinion, make new findings of fact and conclusions of law, and direct the entry of a new order.

In support of her motion, Trustee argues that 11 U.S.C. § 330(a)(3) requires the court to consider "all relevant factors" in determining the appropriate compensation to be awarded. Trustee argues that "all relevant factors" includes the time records[1] that she submits in support of her motion. Trustee alleges that these records were not produced previously because it is not established practice for trustees in the Northern District of Ohio to submit time records in support of their applications for compensation.

Additionally, Trustee argues that no objections were lodged to her application for compensation, so the hearing went forward as an oral motion hearing rather than an evidentiary hearing. Therefore, Trustee argues that she did not have the opportunity to respond to the court's objections or factual questions, depriving her of the opportunity to present material evidence and prejudicing her application. Trustee argues that a new hearing will allow her to present material evidence to rebut the court's objections and respond to the court's concerns. Moreover, Trustee argues, the evidence presented at a new hearing will address and overcome her surprise and prejudice and result in material substantive changes to the court's memorandum opinion. Trustee argues that the evidence will demonstrate that a principled relationship exists between the compensation requested and the maximum statutory percentage assessed on all "moneys disbursed or turned over" by Trustee. Trustee asserts that she seeks reasonable compensation, not a maximum percentage, based on the evidence to be presented and the criteria in § 330(a)(3).

Trustee argues that the lodestar analysis results in a miscalculation without a proper determination of Trustee's skill, the nature and difficulty of the work performed, and the value of the services rendered. Trustee asserts that a new hearing is essential to enable the court to evaluate the evidence to determine the applicable hourly rate and whether the compensation requested is reasonable based on the customary compensation charged by comparably skilled practitioners. Trustee argues that defining "comparably skilled practitioners" is not a matter of determining age or professional station but assessing applied skill and demonstrated results based on "actual, necessary services rendered by the trustee." Trustee argues that the receivership obscured the quality and extent of Trustee's efforts.

Law and Analysis

Trustee moves for relief under both Federal Rule of Civil Procedure 59, incorporated through Federal Rule of Bankruptcy Procedure 9023, and Federal Rule of Civil Procedure 60,

[1]Trustee's time records indicate that she spent a total of 522.60 hours on the case.

incorporated through Federal Rule of Bankruptcy Procedure 9024. Whether the motion is addressed as one under Rule 59 or 60 is dependent upon the time between the entering of the judgment and the filing of the motion. Melton v. Melton (In re Melton), 238 B.R. 686, 692 (Bankr. N.D. Ohio 1999) (*citing* Smith v. Hudson, 600 F.2d 60 (6th Cir. 1979)). If the motion is filed within ten days after the judgment is entered, the motion is addressed as one under Rule 59. Id. If it is filed more than ten days later, it is addressed as one under Rule 60. Id. Its address under either does not affect its treatment because the standards governing both Rules 59 and 60 "overlap to a great extent." In re Quality Stores, Inc., 272 B.R. 643, 649, n.11 (Bankr. W.D. Mich. 2002) (*citing* Matter of Barker-Fowler Elec. Co., 141 B.R. 929, 935 (Bankr. W.D. Mich. 1992)).

Both rules are intended to provide relief from judgment only where "exceptional circumstances prevent[] the moving party from seeking redress through the usual channels." Crystalin, L.L.C. v. Selma Properties, Inc. (In re Crystalin, L.L.C.), 293 B.R. 455, 466 (B.A.P. 8th Cir. 2003) (*quoting* Atkinson v. Prudential Property Co., Inc., 43 F.3d 367, 373 (8th Cir. 1994) (citations omitted)). "Exceptional circumstances are not present every time a party is subjected to potentially unfavorable consequences as a result of an adverse judgment properly arrived at. Rather, exceptional circumstances are relevant only where they bar adequate redress." Id. (*quoting* Atkinson, 43 F.3d at 373).

In the case at hand, Trustee filed her motion within ten days of the entering of the order,[2] so the motion is analyzed under Rule 59. Rule 59 provides:

> (a) Grounds. A new trial may be granted to all or any of the parties on all or part of the issues . . . in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the

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[2] The order was entered May 14, 2003. Trustee filed her motion on May 27, 2003. Memorial Day fell on May 26, 2003. Trustee filed her motion within ten days from the entry of the order by virtue of Federal Rule of Bankruptcy Procedure 9006(a) and its instruction that

> the day of the act . . . from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, . . . in which event the period runs until the end of the next day which is not one of the aforementioned days . . . . As used in this rule, "legal holiday" includes . . . Memorial Day.

Fed. R. Bankr. P. 9006(a).

> court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
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> (b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.
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> . . .
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> (e) Motion to Alter or Amend Judgment. Any motion to alter or amend judgment shall be filed no later than 10 days after entry of the judgment.

Fed. R. Civ. P. 59.

I. Motion for New Trial

The decision to grant a new trial under Rule 59(a) is within the discretion of the trial court. Quality Stores, 272 B.R. at 649 (*citing* Davis v. Jellico Community Hosp., 912 F.2d 129 (6th Cir. 1990); Logan v. Dayton Hudson Corp., 865 F.2d 789, 790 (6th Cir. 1989)). Rule 59 does not enumerate the grounds for granting a new trial, however, they are generally known to be "if the verdict is against the weight of the evidence, the damages are excessive, there is newly discovered evidence, or the trial was otherwise unfair." Id. (*citing* 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2805 (1973)). The two grounds for granting a new trial of any applicability to the present case are newly discovered evidence and an unfair hearing.

A. Newly Discovered Evidence

A court should consider five factors in deciding whether to grant a request for a new trial based on newly discovered evidence. Id. at 650.

> A motion for a new trial on the ground of newly discovered evidence [1] must show that the evidence was discovered since the trial; [2] must show facts from which the court may infer reasonable diligence on the part of the movant; [3] must show that the evidence is not merely cumulative or impeaching; [4] must show that it is material; and [5] must show that it is of such character that on a new trial such evidence will probably produce

a different result.

Id. (*quoting* Marshall's U.S. Auto Supply, Inc. v. Cashman, 111 F.2d 140, 142 (10th Cir. 1940) (citation omitted) (numbering added)). "[T]he newly discovered evidence must pertain to facts that existed at the time of the trial." Id. (*citing* 11 Wright & Miller at § 2808; National Anti-Hunger Coalition v. Executive Comm., 711 F.2d 1071, 1075 (D.C. Cir. 1983)).

In the present case, Trustee requests a new hearing at which she can introduce her time records, justify her hourly rate and further expound upon the work she performed in this case. These time records are not newly discovered evidence as they were available prior to the initial hearing on her application for compensation and should have and could have been introduced at that time. Trustee could have justified her hourly rate at the hearing on her application for compensation. Moreover, what was submitted has confirmed the court's previous analysis. The court previously expressed doubt that the hours would come anywhere near the fee requested. These records confirm that as a fact.

B. Unfair Hearing

Whether a court should grant a motion for a new trial based on the unfairness of a hearing is determined on a case-by-case basis. The court could not find a test. *See, e.g.*, Kulling v. Grinders for Industry, Inc., 185 F.Supp. 2d 800 (E.D. Mich. 2002); Conwood Co., L.P. v. United States Tobacco Co., 2000 WL 33176054 (W.D. Ky. 2000); Mi-Jack Products v. Int'l Union of Operating Engineers, 1996 WL 149120 (N.D. Ill. 1996); Dranchak v. Akzo America, Inc., 1995 WL 470245 (N.D. Ill. 1995).

Nothing in the hearing on the initial application for compensation was inherently unfair. Trustee was afforded the opportunity to detail the work she performed in administering this case and was able to respond to the court's questions. In reviewing a request for compensation, the court may "award compensation that is less than the amount of compensation that is requested." 11 U.S.C. § 330(a)(2). The fact that the court did so should not be a surprise. In fact, the compensation could have been lower with the time records in question, the other expenses, and the results achieved. Trustee made a logical and well-balanced decision not to include the time records.

II. Motion to Alter or Amend

In applying Rule 59(e), it is within a trial court's broad discretion to determine whether to grant a motion to alter or amend. Crystalin, L.L.C. , 293 B.R. at 465 (*citing* Hagerman v. Yukon Energy Corp., 839 F.2d 407, 414 (8th Cir. 1988)). Only extraordinary circumstances warrant granting a motion to alter or amend a judgment. Id. (*citing* Dale & Selby Superette & Deli v. United States Dep't of Agric., 838 F. Supp. 1346, 1348 (D. Minn. 1993)). The rule

allows trial courts the opportunity to correct their own errors, "sparing the parties and appellate courts the burden of unnecessary appellate proceedings." Id. (*quoting* Charles v. Daley, 799 F.2d 343, 348 (7th Cir. 1986)).

In reviewing a Rule 59 motion, a court should keep in mind that these motions are not meant to allow a party to bring arguments or present evidence that could have or should have been raised on the first go-around. Melton, 238 B.R. at 693 (*citing* McConocha v. Blue Cross and Blue Shield Mut. of Ohio, 930 F.Supp. 1182, 1184 (N.D. Ohio 1996)). They "are intended to allow for the correction of manifest errors of fact or law, or for the presentation of newly-discovered evidence." In re Nosker, 267 B.R. 555, 564 (Bankr. S.D. Ohio 2001) (*citing* Ohio Sav. Bank. v. Larson (In re Larson), 103 B.R. 896, 897 (Bankr. S.D. Ohio 1989)). And even though evidence may be material, if it was not put into the record at the hearing or via pleadings, then it is now too late to have it made a part of the court's record. *See* Quality Stores, 272 B.R. at 651.

Three grounds exist on which a motion to alter or amend judgment under Rule 59(e) may be based: (1) an intervening change in law; (2) the availability of new evidence; or (3) the need to correct a clear error of law or prevent manifest injustice. Johnson v. Henderson, 229 F.Supp. 2d 793, 796 (N.D. Ohio 2002) (*quoting* In re Continental Holdings, Inc., 170 B.R. 919, 933 (Bankr. N.D. Ohio 1994)). "It is not designed to give an unhappy litigant an opportunity to relitigate matters already decided, nor is it a substitute for appeal." Id.(*citing* Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998)). As the Sixth Circuit Court of Appeals has stated, "Rule 59(e) motions are aimed at *re*consideration, not initial consideration. Thus, parties should not use them to raise arguments which could, and should, have been made before judgment issued. Motions under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence." Id. (*quoting* FDIC v. World Univ. Inc., 978 F.2d 10, 16 (1st Cir. 1992) (emphasis in original) (citations omitted)). No intervening change in law has occurred. The only grounds on which Trustee may be moving to alter or amend the judgment are the availability of new evidence or the need to correct a clear error of law or prevent manifest injustice.

A. Availability of New Evidence

As the court previously discussed, no new evidence has come to light for Trustee. The time records she submits now were available to her prior to the hearing on her application for compensation. Her motion to alter or amend the court's previous memorandum opinion and order must be denied on this basis.

B. Need to Correct Clear Error of Law or Prevent Manifest Injustice

In support of her motion to alter or amend, Trustee argues that 11 U.S.C. § 330(a)(3)

requires the court to consider "all relevant factors" in determining the appropriate compensation to be awarded and that in the absence of a request for time records or an objection to an application for compensation, time records should not be a decisive factor under a § 330(a)(3) analysis. Trustee misses the point. In its memorandum opinion, the court did not consider Trustee's lack of time records as the "decisive" component in awarding less compensation than requested. The court considered time records as an "essential" component of the lodestar standard. The court did consider the other factors of the twelve-factored test set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974) but noted specifically that in a case of this magnitude, time records were essential in determining factor one of the Johnson test. No errors of law were made in this analysis.

Trustee argues that her inability to anticipate and respond to the court's questions and concerns about her requested compensation prejudiced her application for compensation. As previously noted, no manifest injustice has been committed as Trustee's time records were available prior to the hearing on her application for compensation, and she was given ample time to detail the work she performed in administering the case and what was achieved. Trustee's motion must be denied on this basis as well.

Conclusion

No prejudice resulted to Trustee in this case. Instead, Trustee made a tactical choice not to attach her time records to the application for compensation. Trustee's time records indicate that she spent 522.60 hours on this case. This figure, multiplied times a reasonable hourly rate of $150.00, equals $78,390.00.[3] Even assuming Trustee's time records are accurate, this equals less than fifty-seven percent of the requested compensation of $138,345.23 in her application for compensation. This would be (and is) a logical, tactical choice not to introduce time records that are so far from the straight percentage calculation if a lodestar analysis is applied.

The relative inexperience of Trustee makes it necessary to consider the fact that the time records are likely high. Trustee was a new trustee. A brief search of the court's docket finds that the first case Trustee was appointed to as a Chapter 7 Panel Trustee was Case No. 01-63898, which had its initial meeting of creditors scheduled for November 13, 2001. Trustee was appointed the Chapter 11 Trustee in this case on October 30, 2001 before she had even conducted a meeting of creditors in the simplest of consumer bankruptcy cases.

Trustee had many years of direct bankruptcy experience in the court system, but nothing, particularly the protected nature of government service, can prepare one to be a trustee. Education and judgment prepare but do not substitute for experience. Is an expectant parent

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[3] At $175.00 per hour, the compensation requested would be $91,455.00.

totally prepared for a first child because he or she is educated, has lived life, and planned for parenthood? Most real life parents report that their first child rearing experience more resembled the physical comedy of "I Love Lucy" than the dispassionate analysis of the learned literature. It goes the same for a trustee. No preparation for being a trustee substitutes for experience. The court is not being critical, but the time Trustee spent in administering the case is, if anything, high because Trustee had zero experience as a trustee. Similarly, the professional fees and totem pole expenses were high as a result.[4]

The point is this *wasn't* decided on time records. That's what the value analysis was about. The court analyzed what was done, what was accomplished, and what was the cost. If anything, the court's opinion makes sense in light of what we now know.[5]

An order in accordance with this memorandum opinion shall enter forthwith.

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RUSS KENDIG
U.S. BANKRUPTCY JUDGE

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Trustee now argues that the many professionals were unhelpful. *See* Mot. for New Trial, to Alter, Amend or Vacate Judgment and for Evid. Hrg. at ¶ 14. If so, she should not have maintained their involvement. If their involvement was part of a deal with the secured creditors, it was a bad one.

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Trustees can utilize alternatives at the front end of the case to minimize the suspense and risk at the end of a case. A carveout is particularly logical and useful where little will be produced for unsecured creditors. This is one approach among many.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 7
	)	
OHIO INDUSTRIES, INC.,	)	CASE NO. 01-63166
	)	
Debtor.	)	JUDGE RUSS KENDIG
	)	
	)	**ORDER**
	)	
	)	
	)	

Lisa Afarin, Chapter 11 Trustee, filed a motion for new trial, to alter, amend, or vacate judgment and for evidentiary hearing, an affidavit in support, and time records in the within case. No objections were filed.

For the reasons set forth in the accompanying memorandum opinion, the court hereby **DENIES** Trustee's motion.

It is so ordered.

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RUSS KENDIG
U.S. BANKRUPTCY JUDGE

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