UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	
	)	CHAPTER 11
YOUNGSTOWN OSTEOPATHIC HOSPITAL ASSOCIATION,	)	CASE NO. 99-40663
Debtor.	)	JUDGE RUSS KENDIG
YOUNGSTOWN OSTEOPATHIC HOSPITAL ASSOCIATION,	)	ADV. PRO. NO. 02-6118
Plaintiff,	)	
vs.	)	**MEMORANDUM OF DECISION**
JAMES V. VENTRESCO, JR., D.O., et al.,	)	
Defendants.	)	

This matter is before the court upon the motion for reconsideration of the memorandum opinion and order, entered July 18, 2003, granting in part and denying in part the motion for leave to serve requests for production of documents filed by Defendants James V. Ventresco, Jr., D.O., Harold L. Sandrock, D.O., Ned A. Underwood, D.O., David R. DelliQuadri, D.O., Edward M. Hobbs, D.O., Tracy L. Neuendorf, D.O., Michael P. Stanich, D.O., Peter Bottar, D.O., Keith Henson, D.O., Richard Wise, D.O., Samuel H. Copperman, Esq., Steven B. Copperman, William B. Boyer, Rev. Morris W. Lee, Raymond Fine, Esq., Eugene B. Fox, Esq. and Joseph Ross (hereafter collectively "Board of Trustees").[1] Plaintiff Youngstown Osteopathic Hospital Association (hereafter "YOHA") filed a memorandum in opposition to the motion for reconsideration to which Board of Trustees replied and YOHA responded.[2]

JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b), the general

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[1] On May 5, 2003, counsel for Board of Trustees filed a notice of suggestion of death of Defendant Hon. Joseph E. O'Neill. (Dkt. #96, Notice).

[2] Defendants John C. Weir and Michael Suhadolnik (hereafter "Weir and Suhadolnik"), who supported Board of Trustees on its motion for leave to serve requests for production of documents, did not participate in the briefing on the motion for reconsideration.

order of reference entered in this district on July 16, 1984, and the District Court order entered June 28, 2002.[3] The following constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

FACTS

Board of Trustees filed a motion for leave to serve requests for production of documents requesting that Youngstown Osteopathic Hospital produce the following documents:

> 1. The Hospital Acquisition Reports (4th Edition, 1998, and 8th Edition, 2002) as referenced in Dr. Rosen's report;
> 2. YOH's[4] Federal Income Tax Returns for 1990 through 2000, in addition to any other tax records relied upon by Dr. Rosen;
> 3. The 1999 FBI investigation documents identified by Dr. Rosen;
> 4. All work files of Dr. Rosen, including an electronic copy of his valuation damage model;
> 5. Patient census data for YOH for 1991 through 2000;
> 6. Any documents identifying economic concessions provided by YOH, including rate reductions in contracts, and any concessions given to employees, labor unions, health and welfare funds, etc.;
> 7. YOH's audited financial statements from 1991 through 2000, to the extent that they have not already been put forth in this case;
> 8. YOH's internal audit reports for 1991 through 2000, to the extent that they have not already been put forth in this case.

(Dkt. #99, Mot. for Leave, Ex. C.). In its memorandum opinion and order entered July 18, 2003, the court denied Board of Trustees' motion for leave to serve requests for production of documents insofar as it related to request numbers 1 through 3 and 5 through 8. The court granted Board of Trustees' motion as to request number 4 and ordered that YOHA produce all work files of Dr. Rosen, including an electronic copy of his valuation damage model.

In response, Board of Trustees filed a motion for reconsideration. YOHA filed a memorandum in opposition to which Board of Trustees replied and YOHA responded.

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[3] The court detailed the procedural history leading to the entry of the June 28, 2002 District Court order in its memorandum opinion entered July 18, 2003.

[4] This is the abbreviation the parties use for YOHA.

ARGUMENTS

In its motion for reconsideration, Board of Trustees argues that the court's findings of fact on three issues were erroneous. First, Board of Trustees argues that the court's finding that it did not undertake discovery was inaccurate. Board of Trustees asserts that it actively participated in discovery for more than a year. Board of Trustees argues that it requested, more than six months prior to the discovery deadline, documentation from YOHA supporting its claim for damages by virtue of a letter Richard C. Haber, counsel for Board of Trustees, sent to Beth Slagle, counsel for YOHA to which YOHA failed to respond. With the exception of limited financial records relative to a new theory of recovery set forth in the report of Harvey S. Rosen, Ph.D. (hereafter "Rosen"), YOHA's expert, Board of Trustees argues that it is currently in the possession of all the documents it needs to proceed to trial. Board of Trustees argues that prior to the production of Rosen's report, Board of Trustees relied upon YOHA's answers to the interrogatories propounded upon it by Weir and Suhadolnik. Board of Trustees asserts that it believed that YOHA intended to prove its damages based on a transactional basis. In particular, Board of Trustees points to YOHA's calculation of damages in its answer to Weir and Suhadolnik's First Set of Interrogatories:

> Funds provided to HealthSecure, Inc. in or about the amount of $327,837.86 plus interest and/or income that should have been earned and realized thereon.
>
> Funds prrrovided to HealthSecure Jackson Milton in or about the amount of $139,439.47 plus interest and/or income that should have been earned and realized thereon.
>
> Funds provided to HealthSecure Clinical Staffing in or about the amount of $557,796.80 plus interest and/or income that should have been earned and realized thereon.
>
> Funds provided to Pathways Center for Geriatric Staffing in or about the amount of $107,839.24 plus interest and/or income that should have been earned and realized thereon.
>
> Funds provided to National Healthcare Solutions in or about the amount of $223,465.40 plus interest and/or income that should have been earned and realized thereon.
>
> Funds provided to Pathways Boynton Beach in or about the amount of $58,583.77 plus interest and/or income that should have been earned and realized thereon.
>
> Funds provided to Riverlake Homehealth in or about the amount

> of $232,264.07 plus interest and/or income that should have been earned and realized thereon.
>
> Funds provided to Pathways Center for Geriatric Psychiatry, Inc. totaling in excess of $2,900,000 and/or income that should have been earned and realized thereon.
>
> YOH was further damaged and its assets were further improperly depleted as a result of relationships with REMCO, Tiffany Medical Center, Cardiopulmonary, Inc., CPSI, and Diversified Therapy.
>
> Additionally, YOH suffered damages in the form of opportunity costs, lost investment income, damage to creditworthiness, damage to business reputation, lost patients, all of which were the direct result of the conduct of the Defendants as alleged throughout the Complaint.
>
> Ultimately, the Defendants [sic] conduct forced YOH into bankruptcy and caused the complete depletion of all YOH assets.

(Dkt. #109, Mot. to Recon., Ex. C. at p. 19-21). Therefore, Board of Trustees argues that there was no way for Board of Trustees to anticipate that it would need to examine tax returns, patient census data, financial statements, or audit reports dating back to 1991. Board of Trustees argues that the documents were available before for inspection by Board of Trustees, so they should be available now. Further, Board of Trustees argues that YOHA's interrogatory response that "[d]amages suffered by YOH are in the process of being calculated and YOH's effort to obtain information responsive to this Interrogatory is ongoing and discovery is continuing," (*id.*), require it to supplement its discovery responses. Moreover, Board of Trustees asserts that it would have been an unnecessary waste of resources for Board of Trustees to duplicate the discovery efforts of Weir and Suhadolnik, so it did not propound separate discovery requests upon YOHA.

Second, Board of Trustees argues that the finding that Judge Bodoh opted out of the requirement of Rule 26 to engage in initial discovery disclosures was erroneous. Board of Trustees cites to Judge Bodoh's adversary case management initial order in support of its argument.

Third, Board of Trustees argues that the court erred in finding that the documents relied upon by Rosen in issuing his report constitute "fact" discovery and not "expert" discovery. Board of Trustees contends that Federal Rule of Civil Procedure 26 entitles it to the discovery of all material Rosen relied upon in issuing his report.

In response, YOHA argues that the motion for reconsideration raises arguments upon which the court has already ruled. These arguments include that Board of Trustees engaged in discovery in the case, that the adversary case management initial order did not contemplate opting out of Rule 26 initial disclosures, that the documents relied upon by Rosen are expert discovery and not fact discovery, and that the documents were available previously, so they should be available now as well.

Additionally, YOHA argues that Board of Trustees seeks to advance arguments that it could have introduced in its motion for leave to serve requests for production of documents but failed to do so. YOHA argues that these arguments include that Judge Bodoh did not verbally advise the parties that compliance with Rule 26 was waived, that documents were requested by Board of Trustees but not produced by YOHA, that YOHA's method of proposed production of documents was inappropriate, and that YOHA failed to properly supplement its discovery responses. YOHA argues that these arguments present no facts unavailable to Board of Trustees at the time of filing its original motion, it cites no new law or changes in the law supporting the arguments, and no manifest injustice needs to be prevented.

YOHA argues that even if the court reconsiders its previous ruling, the underlying grounds for Board of Trustees' arguments lack merit. YOHA argues that it offered its documents to Board of Trustees during the discovery period, but Board of Trustees failed to take it up on its offer. Additionally, YOHA argues that the letter Board of Trustees' counsel sent to YOHA's counsel was merely a response to a settlement demand and not a discovery request, quoting language in the letter that it was "for settlement purposes pursuant to Federal Rules of Evidence." (Mot. for Recon., Ex. A.). Moreover, YOHA argues, it is under no obligation to produce Rosen's report under Rule 26 as it is required to do so only within ninety days before a trial of this matter. Additionally, YOHA argues that the parties were not required to provide initial discovery disclosures under Rule 26 as Judge Bodoh orally advised the parties that compliance with the voluntary disclosure provisions of that rule were not required. In support, YOHA attached an exhibit to its memorandum in opposition, produced by Joshua R. Lorenz, co-counsel for YOHA, that detailed the statements Judge Bodoh made during the initial pretrial conference. (Pl's Memo. in Opp. To Defs' Mot. for Recon., Ex. 1).

Board of Trustees replies to YOHA's memorandum in opposition by arguing that Judge Bodoh's statements that Rule 26 initial disclosures need not be made did not mean that they never had to be made. Instead, Board of Trustees argues that Judge Bodoh determined that it would be burdensome for YOHA to sift through the boxes of documents in its possession for documents that appeared to be relevant but had not been fully explored in discovery. Board of Trustees assert that YOHA has unfairly shifted this burden to Board of Trustees now. Board of Trustees argues that while it may have been unreasonable for YOHA to meet its burden of disclosure at the outset, when its theory of damages had not been fully explored, now that YOHA's expert has issued his report, its theory of damages should be solidified, and the supporting documents should be made available for review. Again, Board of Trustees argues that documents made available previously should be available now.

In YOHA's sur-reply to Board of Trustees' reply, YOHA argues that Board of Trustees misinterprets the statements Judge Bodoh made at the initial pretrial conference. YOHA argues that the discovery exempted from initial disclosure under Rule 26 was to be produced through the normal course of discovery instead. YOHA argues that when it made the thirty-five boxes of documents in its possession available to Board of Trustees, it did so in compliance with Judge Bodoh's instructions.

ANALYSIS

I. Standard of review

Board of Trustees does not specify the Federal Rule of Bankruptcy Procedure under which it requests relief on its motion for reconsideration. "Although a motion for reconsideration is not mentioned in the Federal Rules of Civil Procedure, it is often treated as a motion made under Rule 59(e)." Johnson v. Henderson, 229 F.Supp. 2d 793, 795-96 (N.D. Ohio 2002) (*citing* McDowell v. Dynamics Corp. of America, 931 F.2d 380 (6th Cir. 1991); Shivers v. Grubbs, 747 F. Supp. 434 (S.D. Ohio 1990)). Federal Rule of Civil Procedure 59, incorporated through Federal Rule of Bankruptcy Procedure 9023, and Federal Rule of Civil Procedure 60, incorporated through Federal Rule of Bankruptcy Procedure 9024, are generally the rules under which motions for reconsideration are brought. 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). Further, "[a motion for reconsideration] is not designed to give an unhappy litigant an opportunity to relitigate matters already decided, nor is it a substitute for appeal." Johnson, 229 F.Supp. 2d at 796 (*citing* Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998)).

In the case at hand, Board of Trustees filed its motion in excess of ten days after the

entering of the order,[5] so the motion is analyzed under Rule 60. Rule 60(b) provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. 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. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in

Fed. R. Civ. P. 60(b) (emphasis added).

Given that Board of Trustees contends that the court made erroneous findings of fact in its memorandum opinion entered July 18, 2003, the court will assume that Board of Trustees moves for relief under subsection (1) of Rule 60(b). A party seeking relief from an allegedly erroneous finding of fact may do so under 60(b)(1), which provides relief from judgments in the event of a mistake. Fed. R. Civ. P. 60(b)(1). "The Rule applies to errors made by judicial officers as well as the parties." Wesco Products Co. v. Alloy Automotive Co., 880 F.2d 981, 985

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[5] The order was entered July 18, 2003. Board of Trustees filed its motion for reconsideration on July 30, 2003. Board of Trustees filed its motion in excess of ten days after 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."

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

(7th Cir. 1989); *see also* Barrier v. Beaver, 712 F.2d 231, 234 (6th Cir. 1983) ("There is authority for the view that the word 'mistake' as used in Rule 60(b)(1) encompasses any type of mistake or error on the part of the court."). "It is well settled that the granting of a motion to set aside a judgment under Rule 60(b)(1) is matter addressed to the sound discretion of the trial court." Miller v. Owsianowski (In re Salem Mortgage Co.), 791 F.2d 456, 459 (6th Cir. 1986). Relief under 60(b) is "warranted only upon a showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust." 3 Penny Theater Corp. v. Plitt Theaters, Inc., 812 F.2d 337, 340 (7th Cir. 1987) (*quoting* Margoles v. Johns, 798 F.2d 1069, 1073 (7th Cir. 1986)).

II. Discussion

None of the arguments Board of Trustees advances in support of its contention that the court erred in its findings of fact on three issues warrant the extraordinary relief it requests. Board of Trustees alleges that the first mistake of fact committed by the court is "that Board of Trustees did not actively engage in any form of discovery practice prior to the discovery deadline running," (dkt. #106, Memo. of Dec., p. 8-9), asserting that it participated in discovery for more than a year. Board of Trustees argues it was not the lack of participation in the discovery process, as the court characterized it, that lead to its motion for leave to serve requests for production of documents but its surprise at the "new theory of recovery" set forth in Rosen's report. (Dkt. #109 Mot. to Recon., p. 3). Board of Trustees argues that this theory of damages ran counter to that set forth in YOHA's response to Weir and Suhadolnik's discovery request.

This argument lacks merit. YOHA's response *to Weir and Suhadolnik's discovery request*, submitted in June of 2001, states that:

> Additionally, YOH suffered damages in the form of opportunity costs, lost investment income, damage to creditworthiness, damage to business reputation, lost patients, all of which were the direct result of the conduct of the Defendants as alleged throughout the Complaint.
>
> Ultimately, the Defendants [sic] conduct forced YOH into bankruptcy and caused the complete depletion of all YOH assets.

(Dkt. #109, Mot. to Recon., Ex. C. at p. 19-21). Clearly, this covers the business valuation of damages undertaken by Rosen. Additionally, Board of Trustees should have been on notice of this theory of damages by virtue of the broad counts alleged in YOHA's complaint. (Dkt. #1, Comp.). Additionally, it was not Board of Trustees who raised this argument in support of its motion for leave to serve requests for production of documents but its co-defendants Weir and Suhadolnik. It is puzzling to raise this point in support of its motion for reconsideration when Board of Trustees failed to raise the argument in the first place.

Board of Trustees contends that the second mistake of fact made by the court is that Judge Bodoh opted out of the Rule 26 requirement to engage in initial discovery disclosures. This argument is likewise without merit. It is clear that Judge Bodoh intended that the need to comply with the initial disclosure requirements of Rule 26 would be too burdensome to YOHA and that that information could be produced during the normal course of discovery.

> In response to a question by Beth A. Slagle concerning the mandatory disclosure provisions of F.R.C.P. 26, Judge Bodoh stated that in a case as complex as the current dispute, requiring production of these disclosures at the outset imposes an extreme burden upon the plaintiff. Accordingly, YOH will not have to comply in the manner and within the time provisions as specifically stated in F.R.C.P. 26. Judge Bodoh further explained that the information typically produced pursuant to the initial disclosure requirements under F.R.C.P. 26 will in fact be produced by YOH through the course of normal discovery. However, considering the complexity of the case, it would be unfair to require YOH to attempt to comply with F.R.C.P. 26 at this stage of the proceedings.

(Dkt. #108, Pl's Memo. in Opp. to Defs' Mot. for Recon., Ex. A at p. 3-4). The fact that YOHA subsequently made the documents in its possession available to Board of Trustees shows that it complied.

The third error of fact that Board of Trustees alleges the court made was that the documents relied upon by Rosen in issuing his report constitute "fact" discovery and not "expert" discovery. This argument was fully addressed in the court's memorandum of decision.

The other arguments raised by Board of Trustees do not support its contention that the court made a mistake of fact under Rule 60(b)(1) but are raised for the first time in its motion for reconsideration or in support thereof. Accordingly, they will not be considered.

CONCLUSION

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

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RUSS KENDIG
U.S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 11
YOUNGSTOWN OSTEOPATHIC HOSPITAL ASSOCIATION,	)	CASE NO. 99-40663
Debtor.	)	JUDGE RUSS KENDIG
YOUNGSTOWN OSTEOPATHIC HOSPITAL ASSOCIATION,	)	ADV. PRO. NO. 02-6118
Plaintiff,	)	**ORDER**
vs.	)	
JAMES V. VENTRESCO, JR., D.O., et al.,	)	
Defendants.	)	

This matter came before the court on the motion for reconsideration filed by Defendant Board of Trustees (hereafter "Board of Trustees").

For the reasons stated in the foregoing memorandum of decision, Board of Trustees' motion for reconsideration is hereby **DENIED**.

It is so ordered.

_____
RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of August 2003, the above Memorandum of Decision and Order were faxed and sent via regular U.S. Mail to:

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