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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-22498
	)	
DAVID A. VIZNICKY and JANE B. VIZNICKY,	)	Chapter 7
	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren
	)	
MARVIN A. SICHERMAN, TRUSTEE,	)	Adversary Proceeding No. 04-1129
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ALMALLAD, INC., et al.,	)	**MEMORANDUM OF OPINION AND ORDER**
	)	
Defendants.	)	

On June 6, 2004, the court entered a $30,000.00 judgment in this adversary proceeding in favor of the plaintiff trustee against the defendants. The clerk's office then closed the case. On December 9, 2004, the trustee filed a motion under bankruptcy rule 7064 to appoint a receiver to manage and sell the defendants' business property so that the trustee might apply that money to the judgment. The court denied the motion on the ground that the rule cited deals with prejudgment issues. (Docket 20).

The trustee now moves to alter or amend that order under bankruptcy rule 9023. *See* FED. R. BANKR. P. 9023 (incorporating FED. R. CIV. P. 59). The trustee again asks that a receiver be appointed, this time under bankruptcy rule 7069 and Ohio Revised Code § 2735.01, to manage and sell the defendants' property. Alternatively, the trustee asks for leave to amend the motion to rely on the new legal basis.

Federal rule 59(e) sets out the time limits for filing a motion to alter or amend a judgment, but does not state any standards to apply to such a motion. Under Sixth Circuit law, "[m]otions under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). This motion does not allege or establish either ground for relief and is denied.

Similarly, the trustee has not established grounds for leave to amend the motion to assert a new legal argument. A party generally asks for leave to amend a motion to add or alter legal arguments *before* the court renders its opinion. Here, the trustee moved for relief, the court denied it, and now the trustee wants to revise his motion to make a new argument. The trustee has not cited any authority for the proposition that after a court has rendered a final judgment, the losing party may turn back time to raise a new ground for the motion. The only related authority the court located is to the contrary. *Id.* (A party "should not use [a rule 59(e) motion] to raise arguments which could, and should, have been made before judgment issued."). The motion to amend is, therefore, also denied.

Further, and alternatively, even if there were a basis for either part of the motion, the trustee has not established that the court should grant the relief requested. Bankruptcy rule 7069 provides:

> (a) IN GENERAL. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable . . . .

FED. R. BANKR. P. 7069 (incorporating FED. R. CIV. P. 69). Under this rule, a federal court may enforce a monetary judgment in accordance with the practice and procedure of the state in which the court is held. The trustee asks that a receiver be appointed under Ohio revised code § 2735.01, which states that a receiver may be appointed "[a]fter judgment, to carry the judgment into effect[.]" Ohio Rev. Code § 2735.01(C). The moving party must initially show by clear and convincing evidence that the appointment, as an extraordinary remedy, is necessary to preserve the movant's rights. *See Milo v. Curtis*, 651 N.E.2d 1340, 1343 (Ohio Ct. App. 1994); *Maynard v. Cerny*, 2004 WL 383995 (Ohio Ct. App. 2004). After such a showing, the court has the discretion to appoint a receiver if the circumstances warrant it. *Id.*

The trustee has not made allegations that satisfy the required preliminary showing. The motion asserts merely that he "has a judgment in this case against the Defendants, and is now seeking to enforce and carry the judgment into effect. Thus, pursuant to O.R.C. § 2735.01, a receiver should be appointed." The judgment is an asset of the estate and the trustee is responsible for collecting such assets. *See* 11 U.S.C. §§ 541, 704(1). The motion does not provide a factual or legal basis for concluding that the appointment of a receiver to manage property of a third party non-debtor is necessary to preserve the trustee's right to collect this asset.[1] Thus, the court need not go on to consider whether this is an appropriate case in which to exercise its discretion.

[1] The court assumes without deciding that it has the power to appoint a receiver in an adversary proceeding notwithstanding the prohibition against appointing a receiver in a case. *See* 11 U.S.C. § 105(b).

The trustee's motion to alter or amend judgment or, in the alternative, for leave to amend the motion to appoint a receiver is, therefore, denied.

IT IS SO ORDERED.

Date: 24 Mar 2005

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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