UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376 Chapter 11
Debtors	Substantively Consolidated

APPEARANCES:

KATTEN, MUCHIN & ZAVIS Attorneys for Heller Financial, Inc. and Heller Financial Leasing, Inc. 525 West Monroe Street Chicago, Illinois 60661-3693	MARK K. THOMAS, ESQ. Of Counsel
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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This matter is before the Court by way of a motion filed by Heller Financial, Inc. and Heller Financial Leasing, Inc. (collectively "Heller") on June 2, 1997 ("Heller's Motion"). Pursuant to Rules 59(a), 59(e), and 60(b)(1) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), incorporated by reference in Rules 9023 and 9024 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), Heller seeks partial reconsideration of the Court's Memorandum-Decision, Findings of Fact, Conclusions of Law and Order entered on May 23,

1997 ("Heller Decision").[1] Specifically, Heller requests reconsideration of the Court's ruling with respect to its analysis of some of the leases of equipment in Heller's portfolios which the Court found did not constitute chattel paper as the equipment was not identified by serial numbers. Heller also requests reconsideration by the Court of its ruling allowing the Trustee[2] to retain certain monies collected in connection with the leases in Heller's portfolios.

Opposition to the Bank's motion was filed by the Trustee on July 2, 1997 ("Trustee's Opposition"). Similar opposition was filed by the Official Committee of Unsecured Creditors on July 2, 1997. ("Committee's Opposition").

Heller's Motion was heard on July 8, 1997, in Syracuse, New York. At the hearing, Heller asserted that despite the fact that it had fully briefed the issue, the Court declined to rule on the extent of Heller's liens. Heller maintained that its security interest in the leases extended to *all* proceeds and, therefore, took issue with the Court's decision to allow the Trustee to retain possession of non-Schedule A payments.[3] Heller also asked for clarification of that portion of

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[1] For purposes of this decision, the Court will assume a familiarity with the Heller Decision, including the background set forth therein concerning Heller's transactions with The Bennett Funding Group, Inc. ("Debtor" or "BFG").

[2] Voluntary petitions were filed under chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code") by four corporate entities, including BFG, on March 29, 1996 ("Petition Date"). On April 18, 1996, Richard C. Breeden ("Trustee") was appointed trustee by the U.S. Trustee pursuant to Code § 1104 and said appointment was approved by the Court the same day. By Order dated July 25, 1997, the Court substantively consolidated the Debtors' estates.

[3] An amortization schedule of monthly payments ("Schedule A payments") to Heller was attached to promissory notes executed by the Debtor with respect to four transactions. Each assignment executed by the Debtor in connection with the transactions also included a list which identified the monthly lease payment. In addition to the Schedule A payments earmarked for Heller, the Leases in its portfolios also included monies to pay for the servicing of the equipment, taxes due on the equipment, late fees, etc. ("non-Schedule A payments").

the Heller Decision which allowed the Trustee to retain possession of approximately $600,000[4] in alleged preferences pursuant to Code § 502(d) pending the outcome of the adversary proceeding commenced by the Trustee pursuant to Code § 547.

Following the oral argument, the Court concluded that neither of the foregoing requests were appropriate for reconsideration. As Heller acknowledged, the Court in its discretion had opted not to address the issue of the extent and validity of Heller's liens with respect to non-Schedule A payments. Furthermore, Heller's arguments that Code § 502(d) does not permit affirmative relief of the kind granted by the Court was previously addressed in a decision rendered on January 8, 1997. *See In re Bennett Funding Group, Inc.*, Case No. 96-61376-79 (Bankr. N.D.N.Y. Jan. 8, 1997) ("Section 502(d) Decision"). In the Section 502(d) Decision, the Court ruled that it would not permit actual litigation of the Trustee's avoidances actions within the context of the hearings on the lift stay motions filed by Heller and a number of other banks. *See id.* at 10. The Court indicated that it would adopt the approach suggested by *In re Pappas*, 55 B.R. 658 (Bankr. D. Mass. 1985) and allow the Trustee to file a complaint specifying the dates and amounts of the alleged preferential transfers for consideration in the context of the hearings on the Banks' lift stay motions. *See id.* at 9-10.

At the hearing on July 8, 1997, the Court reserved its decision on the principal issue of whether the Court, once it determined that the 138 leases listed in Heller's Exhibit 28 were not

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[4] In the fifth decretal paragraph of the Heller Decision, the Court permitted the Trustee to withhold payments totaling $202,238.58. At the hearing, Heller's counsel pointed out that this figure represented the payments received by Heller for one month and that $606,715.74, representing the amount paid to Heller during the 90 days prior to the filing of the Debtor's petition, was actually being withheld by the Trustee.

chattel paper, should have concluded that they were accounts[5] for which Heller had properly perfected its security interest by filing proper financing statements.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(A), (G) and (O).

FACTS

On May 23, 1997, this Court issued the Heller Decision following an evidentiary hearing on March 24, 1997 ("Evidentiary Hearing"). *See In re The Bennett Funding Group, Inc.*, No. 96-61376 (Bankr. N.D.N.Y. May 23, 1997). In the Heller Decision the Court granted Heller's motion to modify the automatic stay to recover certain collateral consisting of equipment leases and the lease payments received by the Trustee in connection with its four transactions with the Debtor. Heller now requests that the Court reconsider its determination that certain of the leases identified in Exhibit 28[6] did not constitute chattel paper because the serialized equipment listed

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[5] An account is to be distinguished from chattel paper in that there is no requirement that the right to payment evidenced by an account be for *specific* leased goods. With an exception not applicable here, a security interest in an account can be perfected only by filing of a financing statement. *See* New York Uniform Commercial Code § 9-302.

[6] In the Heller Decision the Court identified the exhibit as Exhibit 27. Upon re-examination of the exhibits provided at the evidentiary hearing on March 24, 1997, the Court finds that that particular exhibit was identified as "Exhibit 28."

in the leases was not identified with serial numbers. Based on the Court's assertion that some lessees might be in possession of multiple pieces of equipment of the same manufacturer and model thus making it impossible to identify the equipment subject to Heller's alleged security interest. Heller asserts that only 7 of the 134 leases listed in Exhibit 28 involve multiple pieces of equipment for which there might be some confusion in identification. Heller also argues that even if the 134 leases do not constitute chattel paper, they constitute accounts in which Heller properly perfected its security interest.

The Trustee opposes Heller's motion, arguing that "Heller has completely ignored the rules of procedure and failed to identify even a single issue worthy of reconsideration." *See* Trustee's Opposition at 2. The Trustee asserts that Heller has failed to identify or satisfy the standards for reconsideration. The Trustee contends that Heller should not be permitted another "bite of the apple" by rehashing arguments and presenting new fall-back positions. *See id.* at 3-4. Similar arguments are made by the Committee, which asserts that Heller's motion is "woefully deficient." *See* Committee's Opposition at 4. Furthermore, the Trustee and the Committee make the argument that the Court should not be required to advance an argument that Heller did not make prior to the Evidentiary Hearing, namely that the leases, if determined not to be chattel paper, are accounts.

DISCUSSION

Whether or not to grant a motion for reconsideration is within the discretion of the Court. *See Victory Markets*, 1996 WL 365675 at *2, 29 B.C.D. at 319; *see also Atlantic States Legal*

Foundation, Inc. v. Karg Bros., Inc., 841 F.Supp. 51, 55 (N.D.N.Y. 1993) (citation omitted). Fed.R.Civ.P. 59 allows a court to alter or amend a prior judgment for purposes of correcting "manifest errors of law or misapprehension of fact", *see In re DEF Investments, Inc.*, 186 B.R. 671, 680 (Bankr. D. Minn. 1995) (citations omitted), or presenting newly discovered evidence. Fed.R.Civ.P. 59. In seeking such relief, a party must rely on one of three grounds: "(1) there is an intervening change in the controlling law; (2) new evidence not previously available comes to light; or (3) it becomes necessary to remedy a clear error of law or to prevent injustice." *Victory Markets*, 1996 WL 365675 at *2, 29 B.C.D. at 319 (citations omitted). At the same time, a party seeking relief is cautioned against using the motion to "re-litigate issues previously decided by the Court, or to attempt to 'sway the judge' one last time." *See id.* (citation omitted). The fact that a party may disagree with the Court's interpretation of the law is not a ground for reconsideration. As noted by the district court in *In re Sherrell*, 205 B.R. 20 (N.D.N.Y. 1997), "[t]he standards for reconsideration are strict 'in order to avoid repetitive arguments on issues that have already been fully considered by the Court.'" *See id.* at 21 (citation omitted). The motion is not a "forum for new theories or for 'plugging the gaps of the last motion with additional materials.'" *See id.* at 21-22 (citations omitted). Heller has not alleged any intervening change of controlling law, nor has it suggested that there is any new evidence not previously available that the Court should consider. As was pointed out in the Heller Decision, "Heller's counsel was placed in the unenviable position of being 'first off the block'" in connection with the "Hearing by Declaration" established by the Court in an effort to expedite the hearing of the motions for relief from the automatic stay filed by various financial institutions. *See* Heller Decision at 24. Subsequent to Heller's Evidentiary Hearing, the Court held a number of other

evidentiary hearings in which similar facts were presented and for which decisions were rendered, and in two instances, the Court allowed reconsideration. *See, e.g., Marine Midland Bank v. The Bennett Funding Group, Inc. (In re Bennett Funding Group, Inc.)*, No. 96-61376, Adv. Pro. 96-70061 (Bankr. N.D.N.Y. Aug. 11, 1997) ("Marine Reconsideration Decision") and *In re Bennett Funding Group, Inc.*, No. 96-61376 (Bankr. N.D.N.Y. March 23, 1998) ("Wilber National Bank Reconsideration Decision"). In the latter two decisions, the Court recognized the possibility that although some of the leases in the banks' portfolios were not chattel paper because they did not identify serialized equipment by serial number and, therefore, were not for "specific goods," the leases, nevertheless, were accounts. *See* Marine Reconsideration Decision at 58 n.23 and Wilber National Bank Reconsideration Decision at 54 n.17. In order to prevent a manifest injustice, the Court will reconsider that portion of the Heller Decision which found that the leases identified in Exhibit 28 were not chattel paper and, therefore, Heller was not entitled to the lease payments derived therefrom.

Although not argued at the hearing on July 8, 1997, in its motion Heller takes issue with the Court's conclusion that leases for serialized equipment were required to be identified not only by model number but also by serial number if they were to be considered chattel paper. In the Heller Decision the Court hypothesized the possibility that some lessees might have more than one piece of equipment of the same manufacturer and model number, making it difficult to identify the collateral of a particular bank. Heller points out that only 7 of the 134 leases identified by the Court were for the rental of multiple items of equipment. Therefore, it argues that at least with respect to each of the other 127 leases identified in Exhibit 38, all of which were for the rental of a single item of equipment, the Court should consider modifying its conclusion

that without serial numbers the leases were not chattel paper.

The Court must deny Heller's request in this regard. The Court did not envision having to analyze each piece of equipment in the hands of each lessee on a case-by-case basis in order to determine whether a particular lease constitutes chattel paper. The fact that 127 of the 134 leases were for single pieces of equipment does not rule out the possibility that the same lessees may have equipment that is not leased from the Debtor and, in fact, may even be owned by the lessees. Furthermore, the fact that the lessee may have leased only a single piece of equipment under a particular lease in Heller's portfolio does not rule out the possibility that a similar piece of equipment was leased under a different lease found in another portfolio assembled by the Debtor and assigned to another bank. Under the circumstances, without identification by serial number, the possibility exists that one would be unable to determine which piece of equipment was subject to the Heller's security interest.

However, the Court concludes that although Heller did not assert that its leases might be accounts, the Court should have considered the possibility that the leases represented alternative forms of personal property, whether general intangibles, as suggested by Heller, or accounts. Because the Court found that Heller had perfected its security interest in the majority of its leases by filing proper financing statements with both the Onondaga County Clerk's office and the New York Secretary of State's office, the Court concludes that Heller perfected its security interest in the 134 leases identified in Exhibit 28 because they were accounts. To find otherwise, particularly in light of the fact that Heller was the initial party to participate in the "Hearing by Declaration" and in light of the Court's findings in subsequent decisions in this case, would, in the opinion of the Court, constitute a manifest injustice. Therefore, the Court will grant Heller's

Motion to the extent of allowing it to recover the lease payments associated with the 134 leases identified in Exhibit 28.

Based on the foregoing, it is hereby

ORDERED that Heller's Motion is granted to the extent that it seeks reconsideration of that portion of the Heller Decision which found that Heller had failed to perfect its security interest in the 134 leases identified in Exhibit 38; it is further

ORDERED that the automatic stay is hereby modified to the extent that the Trustee is required to turn over to Heller that portion of the segregated account that represents Schedule A payments collected on Heller's 134 leases as identified in Exhibit 38 within thirty (30) days of the date of this Order, and to turn over on a monthly basis as of the date of this Decision all Schedule A payments collected on those leases in which Heller has established a perfected security interest consistent with the discussion herein without prejudice to Heller's right to assert a claim for interest and attorney's fees at the time of confirmation or a plan or at such other time as the Court may deem appropriate; it is further

ORDERED that the Trustee, utilizing The Processing Center, shall continue to service and collect on the 134 leases subject to Heller's security interest and shall also continue to provide Heller with monthly reports which shall detail and support said collections; it is further

ORDERED that pursuant to Code § 506(c), the Trustee shall be permitted to deduct from the remittance of monthly Schedule A payments already collected, as well as those to be collected, the cost of servicing/collecting on the leases at the rate of $6.31 per lease per month, subject to being adjusted upon a later order of the Court with the proviso that if monthly collection on any single lease is not sufficient to pay Heller the full amount of its Schedule A

payment, the rate for servicing that particular lease will be reduced proportionately;[7] and it is finally

ORDERED that the Trustee shall provide Heller with a monthly accounting which shall indicate the manner in which the amount of the monthly check has been calculated by the Trustee.

Dated at Utica, New York

this 9th day of April 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[7] For example, if the Schedule A payment to be made to Heller on a single lease is $100 and the Trustee has sufficient collections to permit the payment of $80.00, or 80% of what is due Heller , then the Trustee shall deduct only $5.05 (80% x $6.31) from the Schedule A payment of $80 for that particular lease.