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

RICHARD C. BREEDEN, Trustee of
THE BENNETT FUNDING GROUP, INC.

Plaintiff

vs. — ADV. PRO. NO. 98-41254

NELSON FERNANDES

Defendant

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

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

On February 22, 2002, the Court issued a Memorandum-Decision, Findings of Fact, Conclusions of Law, Order ("February 2002 Decision") in Adversary Proceeding 98-41254, in which, *inter alia*, it denied the motion of Nelson Fernandes ("Defendant") seeking dismissal of

the second cause of action based on § 544(b) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") and §§ 271-276 of the New York Debtor & Creditor Law ("NYD&CL"). The Court also denied the Defendant's request for sanctions against the plaintiff, Richard C. Breeden, as trustee for The Bennett Funding Group, Inc., et al. ("Trustee"), including an award of damages for infliction of emotional distress, pursuant to Rule 9011(b) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.").

Presently before the Court is a motion for reconsideration filed by the Defendant on March 22, 2002. Opposition to the motion was filed on behalf of the Trustee on April 22, 2002. The Court advised the parties that it would not hear oral argument on the motion but would issue a written decision based upon the parties' pleadings.

JURISDICTIONAL STATEMENT

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

DISCUSSION

In his motion for reconsideration, Defendant raises for the first time the assertion that the Court lacks subject matter jurisdiction to address the matters raised in the Trustee's complaint. The issue of subject matter jurisdiction over an action or proceeding can be raised at any time. *See Zimmerman v. United States*, 2000 WL 1280908 at *1 (E.D.Calif. 2000). Thus, it is

appropriate that the Court consider whether it had subject matter jurisdiction over that which it previously addressed on the merits in its February 2002 Decision.

Defendant contends that the Court lacked subject matter jurisdiction because of what he perceives to be the lack of nexus between the allegations of the Trustee in his complaint and

> "the accepted S.E.C. argument that the core issue [in the Multi-District Litigation concerning the Bennett Funding Group, Inc. Securities litigation before the District Court for the Southern District of New York] was '**assignments in the leases were sold**' whereby the debtors sold its property interest in the lease. Based on the core issue, there was no pledge, so the payments were not the property of the debtors in order to achieve jurisdiction. . . . The Trustee created a new core issue to gain jurisdiction over investors with assignment dates beyond the statute of limitations in order to go after payments within the limitations period."

See Defendant's Brief in Support of Motion for Reconsideration at 3-4. Defendant argues that "[t]he jurisdiction of the bankruptcy courts to hear cases related to bankruptcy is not without limit, however, and there is a statutory and eventually constitutional, limitation to the power of a bankruptcy court. **For subject matter jurisdiction to exist, therefore, there must be some nexus between the 'related' civil proceeding and the title 11 case.**" *See id.* at Footnote 7.

As best as the Court can determine, the Defendant is contending that there is arguably some nexus between the litigation in the U.S. District Court for the Southern District of New York ("District Court") and the bankruptcy case before this Court. He asserts that this Court is bound by collateral estoppel to accept the S.E.C.'s argument made in the District Court, just as the District Court did, that the lease assignments are securities. *See id.* at 1. He then goes on to argue that the "core" issue identified by the S.E.C. in the District Court litigation "'is not the underlying lease relationship, but rather the transaction in which assignments in the leases were

sold to the plaintiffs.'" *Id.* at 2. Thus, it is Defendant's position that in the instance where the Trustee asserts that the leases were "pledged" rather than "assigned," he is doing so in order to provide the Court with jurisdiction over the adversary proceeding. *See id.* at 3. What the Defendant fails to recognize is that the Court's jurisdiction does not rest on the nature of the "core" issue as identified by the S.E.C. before the District Court; rather, it rests on the nature of the entire adversary proceeding pending before this Court. The Trustee's complaint, *inter alia,* is based on Code §§ 544 and 550 and seeks to avoid certain alleged fraudulent transfers and recover them for the benefit of the estate. Section 157 of Title 28 of the United States Code defines "core proceedings" as including "proceedings to determine, avoid, or recover fraudulent conveyances." 28 U.S.C. § 157(b)(2)(H). It is that which forms the basis for the Court's jurisdiction to address matters arising in the adversary proceeding.

Having concluded that the Court has subject matter jurisdiction with respect to the adversary proceeding herein, the Court must next determine whether or not to grant the Defendant's motion for reconsideration with respect to the denial of the Defendant's motion to dismiss the Trustee's second cause of action and to award sanctions. Reconsideration is within the discretion of the Court. *See Mellon Bank, N.A. as Trustee for First Plaza Group Trust v. U.S. Trustee (In re Victory Markets, Inc.)*, 1996 WL 365675 slip op. at *2, 29 B.C.D. 317, 319 (N.D.N.Y. 1996); *see also Atlantic States Legal Foundation, Inc. v. Karg Bros., Inc.*, 841 F.Supp. 51, 55 (N.D.N.Y. 1993) (citation omitted). 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.'" *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).

In the instant case, the Defendant had two opportunities to ask the Court to reconsider its February 2002 Decision. He could have filed a motion pursuant to Fed.R.Bankr.P. 9023, incorporating by reference Rule 59(e) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), within ten days of entry of the February 2002 Decision seeking to alter or amend it.[1] However, his motion was filed on March 22, 2002, approximately 28 days after the entry of the February 2002 Decision. Therefore, as an alternative, the Court may consider re-examining its February 2002 Decision under Fed.R.Bankr.P. 9024, incorporating by reference Fed.R.Civ.P. 60(b), provided the February 2002 Decision constituted a final judgment. *See In re MMS Builders, Inc.*, 101 B.R. 426, 429 (D.N.J. 1989) (noting that "[t]he language of the rule explicitly restricts its application to *final* judgments, or orders. A 'final' order is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" (citation omitted)); *see also Ferenchak v. Ferenchak (In re Ferenchak),* 3:02-CV-24, slip. op. at 2 (N.D.N.Y. June 5, 2002) (D.J. McAvoy), citing *In re Fugazy Express*, 982 F.2d 769, 775-76 (2d Cir. 1992) (noting that a final judgment is one that "conclusively determines the rights of the parties to the litigation . . .").

The denial of a motion to dismiss or a motion for summary judgment are not "final decisions." *See McGowan v. Global Industries, Inc. (In re National Office Products, Inc.)*, 116

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[1] According to the Defendant's "Certification in Support of Reconsideration," he was hospitalized one day prior to the issuance of the February 2002 Decision and remained in the hospital for seven days. There is no evidence that Defendant requested an extension of time in which to seek reconsideration of the Decision. Despite the fact that the Defendant is representing himself on a *pro se* basis in this matter, the Court is without authority to extend the ten day deadline set forth in Fed.R.Civ.P. 59(e). *See In re Leiter*, 109 B.R. 922, 924 (Bankr. N.D.Ind. 1990).

B.R. 19, 20 (D.R.I. 1990) (describing "an order denying a motion to dismiss bankruptcy court proceedings as 'a common example of what is normally a non-appealable interlocutory order.' (citations omitted). A court's denial of a motion to dismiss does not resolve any portion of the bankruptcy proceeding nor decide any dispositive issue of law. (citation omitted)"). Accordingly, this Court is without jurisdiction to reconsider its February 2002 Decision insofar as the Court denied the Defendant's motion to dismiss the second cause of action of the Trustee's complaint pursuant to Fed.R.Bankr.P. 9024, applicable only to final judgments or orders.

With respect to the Court's denial of Defendant's motion to award sanctions pursuant to Fed.R.Bankr.P. 9011, Defendant alleges that the Trustee's objective in commencing the adversary proceeding was to cause him emotional distress "in order to compel [him] to accept its settlement and to avoid discovery of the Trustee's fraud." Defendant, however, provides the Court with no basis for reconsidering that portion of its February 2002 Decision denying an award of sanctions, pursuant to Fed.R.Bankr.P. 9024. Rule 60(b), incorporated in Fed.R.Bankr.P. 9024, provides for reconsideration of a final judgment or order upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) satisfied or discharged judgment; or (6) extraordinary circumstances which would justify relief. The only factor which appears to have some basis for the relief Defendant now seeks is the sixth. The Court is left with only the question of whether there exist extraordinary circumstances that have arisen that would justify the Court now granting an award of sanctions against the Trustee. According to the Defendant, the commencement of this action against Defendant by the Trustee has caused him a certain amount of distress which, in turn, has manifested itself in certain medical symptoms/conditions. He indicates that the misconduct causing the emotional distress

was not in the Trustee's filing the complaint, but rather in the fact that

> his complaint presented an exhibit that was not a copy of the original assignment. Moreover, the exhibit that he created fails to provide the date, or the type of document that was involved to conceal the fact that it was an assignment since he was pleading pledges, and it overstated the claim. Moreover, the allegations in the complaint conflicted with information that I obtained from the internet.

See Certification in Support of Reconsideration at ¶ 7.

These assertions were before the Court when it rendered its February 2002 Decision and denied the Defendant's motion for sanctions. It is obvious to the Court, having read his papers and listened to him in Court, that the Defendant is an individual of high principles who finds himself morally outraged at what he perceives as the Trustee's misconduct. However, the facts presented to the Court do not support a basis for reconsidering its prior holding and awarding sanctions against the Trustee for seeking to maximize the bankruptcy estate of the Debtors as authorized by the Code.

Based on the foregoing, it is hereby

ORDERED that the Defendant's motion seeking reconsideration of the February 2002 Decision is denied.

Dated at Utica, New York

this 8th day of July 2002

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge