UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

A. W. LAWRENCE & CO., INC.	CASE NO. 97-11300
Debtor	Chapter 11

A. W. LAWRENCE & COMPANY, INC.

Plaintiff

vs. ADV. PRO. NO. 97-91313

SHARON A. BURSTEIN, GLEASON, DUNN, WALSH & O'SHEA, LAWRENCE INSURANCE GROUP INC., LAWRENCE GROUP, INC. and ALBERT W. LAWRENCE

Defendants

APPEARANCES:

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

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

Currently before the Court is the March 8, 2001 Motion ("Burstein Motion") by Defendant Sharon A. Burstein ("Burstein") pursuant to Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") 7052, 9023 and 9024, incorporating by reference Federal Rules of Civil Procedure ("Fed.R.Civ.P.") 52, 59 and 60, respectively, seeking to alter, amend or set aside an Order entered on February 27, 2001 ("Order") and a Judgment entered on March 5, 2001 ("Judgment") in the instant Adversary Proceeding by U.S. Bankruptcy Judge John J. Connelly, who formerly presided over this Proceeding. The subject Order and Judgment found Burstein liable for the receipt of a pre-petition fraudulent transfer and awarded the Debtor A.W. Lawrence and Company, Inc. ("Debtor" or "AWL") $41,250 plus interest in recovery of such transfer. On March 23, 2001, the Debtor filed opposition to the Burstein Motion ("Debtor's Opposition") generally contending that Burstein's intent in making the instant Motion was to relitigate issues previously determined before Judge Connelly and alleging that the Motion was not made in good faith and was lacking in merit. On March 27, 2001, Burstein filed a responsive affidavit ("Burstein Reply") and on that date the parties appeared before this Court for limited oral argument.

Following oral argument, the Court continued Burstein's Motion to May 22, 2001, and afforded the parties until May 14, 2001 to submit supplemental memoranda of law on the issue of whether Fed.R.Bankr.P. 7052, 9023 and 9024 are the appropriate procedural vehicles to bring certain of the issues raised in Burstein's Motion before this Court. On March 14, 2001, the Debtor filed Supplemental Opposition ("Debtor's Supplemental Opposition") pursuant to the

Court's March 27, 2001 directive. Burstein filed a Reply Memorandum ("Burstein Supplemental Reply") on May 22, 2001, the adjourned date for oral argument and over a week after the date which the Court set as the deadline for such memoranda. Both the Debtor's Supplemental Opposition and the Burstein Reply were largely, if not wholly, dedicated to the merits of the Burstein Motion rather than to the procedural issue which this Court certified for further argument. Following oral argument on May 22, 2001, the Court determined that the Burstein Motion was procedurally proper and a determination of its merits was submitted for written decision on that date.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the parties and subject matter of this Adversary Proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(a), (b)(1) and (b)(2)(E) and (H). Pursuant to Fed.R.Civ.P. 63, incorporated by reference in Fed.R.Bankr.P. 9028, the Court herein certifies familiarity with the record and has determined that Burstein's Motion may be decided and this Adversary Proceeding may be completed without prejudice to the parties. *See* Fed.R.Civ.P. 63 ("[i]f a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties."); *see generally, United States Gypsum Co. v. Schiavo Bros., Inc.*, 668 F.2d 172, 177 (3d Cir. 1981); *Mergentime Corp. v. Washington Metropolitan Area Transit Authority,* 166 F.3d 1257, 1263 (D. D.C. 1999).

FACTS

On November 21, 1996, Burstein was awarded a state court jury verdict in the amount of $502,619 against Albert W. Lawrence, Lawrence Insurance Group, Inc. and Lawrence Group, Inc., jointly and severally (collectively "the Lawrence entities"), resulting from her successful prosecution of a claim for wrongful termination against those entities, one or more of which was Burstein's former employer. *See* Transcript of Hearing, *A.W. Lawrence & Co., Inc. v. Burstein (In re A.W. Lawrence & Co., Inc.)*, Ch. 11 Case No. 97-11300, Adv. Pro. No. 97-91313, at 6 (Bankr. N.D.N.Y. December 17, 1998, Connelly, J.)("Record I"). Following a flurry of post-judgment motion practice, including a motion by the Lawrence entities to set aside the judgment and a cross-motion by Burstein to set aside a portion of the jury verdict as inadequate, the Lawrence entities filed a notice of appeal on January 2, 1997. *See* Record I, at 7. In mid-January 1997, Burstein and the Lawrence entities entered into a settlement agreement purporting to settle all outstanding claims, counterclaims, continued litigation and appeals. *See id.* Pursuant to the settlement agreement, the Lawrence entities were to pay Burstein a total of $300,000 in satisfaction of the jury award to be paid in three installments as follows: $200,000 on or before January 17, 1997, $50,000 on or before February 10, 1997 and $50,000 on or before February 24, 1997. *See id.* On January 17, 1997, the Lawrence entities paid Burstein the first installment of $200,000 pursuant to the negotiated settlement. *See id.* at 8. On February 10, 1997, Barbara C. Lawrence, a director of the Debtor, drew a check on her personal "Active Assets Account" with Dean Witter Reynolds, Inc. in the amount of $50,000 made payable to the Debtor. *See* Record I, at 11; Burstein Reply, Exhibit C to Exhibit E. Rather than being deposited into one of the

Debtor's corporate accounts, the $50,000 check was simply indorsed by Peter G. Diana, the "Comptroller of Financial Reporting" of the Debtor, over to Burstein and Gleason, Dunn, Walsh & O'Shea ("GDWO"), Burstein's attorneys in the state court wrongful termination suit, representing the Lawrence entities' second scheduled payment under the negotiated settlement. *See A.W. Lawrence v. Burstein (In re A.W. Lawrence & Co., Inc.)*, Ch. 11 Case No. 97-11300, Adv. Pro. No. 97-91313, slip op., at 2 (Bankr. N.D.N.Y. February 8, 2001, Connelly, J.). The Debtor contends that Barbara Lawrence's $50,000 payment to the Debtor was consideration for the transfer of ownership of a certain sail boat known by the vessel name "The Escapade." *See* Record I, at 11, 19. Barbara C. Lawrence has stipulated in a separate adversary proceeding that the $50,000 was, in fact, in consideration of the transfer of the Escapade, as more fully discussed in note 2, *infra*. Burstein maintains that the $50,000 check had no relationship to the Escapade. *See* Burstein Reply, at ¶¶ 5, 11-17.

On February 28, 1997, the Debtor and various related entities and principals including Lawrence Group, Inc. ("LGI"), Lawrence Healthcare Administrative Services, Inc. ("LHAS"), Albert W. Lawrence and Barbara C. Lawrence filed for protection under Chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). The final $50,000 payment pursuant to the negotiated settlement was never made and on or about June 10, 1997, Burstein filed a proof of claim against LGI in the full judgment amount of $502,619. *See* Record I, at 12. On June 12, 1997, the Debtor commenced the instant Adversary Proceeding seeking recovery of the February 10, 1997 payment to Burstein under theories of fraudulent conveyance (Code § 548) and/or preferential transfer (Code § 547). *See id.* at 12. On September 9, 1998 the Debtor filed an amended complaint seeking additional recovery of the January 17, 1997 payment of $200,000.

See id. at 12.

On March 5, 1998, U.S. Bankruptcy Judge Barry S. Schermer, who originally presided over this Adversary Proceeding, authorized the United States Trustee to appoint an examiner to investigate and trace the funds, which ultimately became the subject transfers, in order to determine if the funds paid to Burstein were actually funds of the Debtor at all and, thus, as a threshold matter, subject to avoidance. *See* Preliminary Report of Examiner, *A.W. Lawrence & Co., Inc. v. Burstein (In re A.W. Lawrence & Co., Inc.)*, Ch. 11 Case No. 97-11300, Adv. Pro. No. 97-91313, at 1-2 (Bankr. N.D.N.Y. April 1, 1998)("Examiner's Preliminary Report"), *quoting* Transcript of Hearing, *A.W. Lawrence & Co., Inc. v. Burstein (In re A.W. Lawrence & Co., Inc.)*, Ch. 11 Case No. 97-11300, Adv. Pro. No. 97-91313 (Bankr. N.D.N.Y. March 5, 1998, Schermer, J.); *see also*, Record I, at 12 (The examiner was appointed to "investigate issues relating to the flow of funds into and out of the various AWL and Company accounts."). On or about March 31, 1998, Patrick Scott Reid ("Examiner") was appointed Examiner pursuant to Judge Schermer's authorization. *See* Examiner's Preliminary Report, at 2. In his Preliminary Report, the Examiner found, *inter alia*, that while admittedly he was unfamiliar with the separate adversary proceeding between Barbara C. Lawrence and the Debtor regarding ownership of the Escapade, "it is the Examiner's understanding that the $50K check was tendered to AWL in consideration for AWL's transfer of the Escapade to Barbara Lawrence." *See* Examiner's Preliminary Report, at 3. Furthermore, the Examiner opined that while "[t]he Escapade is the subject of a separate adversary proceeding[]...[t]he resolution of that proceeding may determine whether the transfer of the vessel to Barbara Lawrence is voidable and if so, the disposition of the $50,000 payment made by Barbara Lawrence." *See id.* at 3, n.3. In his Final Report, the

Examiner concluded that "[t]he resolution of the issues concerning the Escapade," namely whether the $50,000 payment by Barbara C. Lawrence on February 10, 1997 was, in fact, in consideration for transfer of ownership of the Escapade, "should determine which party ultimately funded the $50K Check."[1] *See* Final Report of Examiner, *A.W. Lawrence & Co., Inc. v. Burstein (In re A.W. Lawrence & Co., Inc.)*, Ch. 11 Case No. 97-11300, Adv. Pro. No. 97-91313, at 3 (Bankr. N.D.N.Y. May 19, 1998).

On September 25, 1998, GDWO, in its own right as an intervening party-in-interest by virtue of its alleged charging lien on Burstein's wrongful termination award, and Burstein, now represented by attorney Marc S. Ehrlich, Esq., each filed separate motions for summary judgment against the Debtor. On that same date, the Debtors and LGI, as an intervening interested party, each also filed separate motions for summary judgment against Burstein and GDWO. On December 17, 1998, Judge Connelly, who was now presiding over this Proceeding, ruled on the various summary judgment motions and orally issued the following conclusions of law on the record as to the fraudulent conveyance cause of action:

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[1]For the sake of clarity, an abbreviated chronology of the adversary proceeding regarding ownership of the Escapade is necessary: On or about May 28, 1997, the Debtor commenced an adversary proceeding against Barbara C. Lawrence seeking to avoid the transfer of the Escapade to her as a fraudulent transfer ("Escapade adversary proceeding"). On or about June 9, 1997, Barbara C. Lawrence interposed counterclaims seeking recovery of the $50,000 payment and/or recoupment or setoff in the event the Court ordered turnover of the Escapade. In April 1998 then-presiding Judge Schermer authorized the sale of the Escapade and the resulting proceeds, some $35,626.13, were ordered to be placed in escrow pending resolution of the Escapade adversary proceeding. In August 1999 the Debtor and Barbara C. Lawrence settled the Escapade adversary proceeding. The parties stipulated in the settlement that the $50,000 check tendered by Barbara C. Lawrence to the Debtors on February 10, 1997, was, in fact, in consideration for the transfer or purported transfer of the Escapade to Barbara C. Lawrence. Furthermore, the Debtors and Barbara C. Lawrence agreed to apportion equally between them the proceeds of the sale of the Escapade as well as any recovery the Debtor may obtain as a result of the prosecution of the instant Adversary Proceeding. *See* Burstein Reply, Exhibit D.

> Fraudulent conveyance law protects creditors from last minute diminutions of the pool of assets in which they have interests; Bond and Financial Services v. European American Bank, 838 F.2d 890 (1988).
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> Recently, the United States Supreme Court in BFP v. Resolution Trust Corporation, 511 U.S. 531, reiterated the elements that must be established to prove a constructive fraudulent transfer. The Court stated that Bankruptcy Code Section 548 permits avoidance if the trustee can establish that the debtor had an interest in the property, that a transfer of that interest occurred within one year of the filing of the petition, that the debtor was insolvent at the time of the transfer or became insolvent as a result thereof, and that the debtor received less than reasonable equivalent value in exchange for such transfer.
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> The Court held that it must be established that each of these three transactions at issue meet each of the four requirements as described in the BFP v. Resolution Trust Corporation case.[2]

See Record I, at 14-15. With regard to the subject of the instant Motion, namely the second settlement payment of $50,000, the Court determined that summary judgment in favor of the Debtor was inappropriate on the fraudulent conveyance cause of action given the outstanding question as to the Debtor's interest in the $50,000 in the first instance. Judge Connelly opined that

> [The Debtor] may have an interest in the second settlement of $50,000 delivered on February 10th, 1997. The check was drawn from Barbara Lawrence's account made payable to AWL and Company, then signed over to the judgment creditors. In consideration, AWL and Company transferred, or purported to transfer,...the sail boat known by the vessel name Escapade.
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> However, GDW[O] and Burstein offer evidence that

[2]For the sake of clarity, the Court notes that the "three transactions" referred to are the January 17, 1997 payment to Burstein of $200,000 which was actually funded with two separate transfers in the amount of $150,000 and $50,000, respectively, and the $50,000 transfer on February 10, 1997.

> Barbara Lawrence would often write checks to cover cash shortfalls and to pay intermediate needs and GDW[O] suggests that these funds should be characterized not as AWL and Company's own funds. In fact, in the preliminary report of the examiner, the examiner notes that the Escapade is the subject of a separate adversary proceeding and the resolution of those issues may assist in understanding whether the transfer will ultimately be avoidable by AWL and Company as a fraudulent conveyance.
>
> In any event, there are issues of material facts regarding the sail boat transfer and AWL and Company's interest in the sail boat that prevents this Court from granting summary judgment to AWL and GDW[O] and Burstein regarding this $50,000 payment. As discussed above, AWL and Company has not established an interest in any of the transfers. As a result, this Court need not address the remaining requirements of 548.

See Record I, at 19-20. Moreover, Judge Connelly left the Debtor with the following directive:

> AWL and Company should show that it had the requisite interest in the property, transferred that interest to Barbara Lawrence for the benefit of judgment creditors, transferred that interest within one year of filing its Bankruptcy petition, and was insolvent at the time of the transfer and did not receive reasonable equivalent value for the transfer, then it is possible this transaction constituted a fraudulent conveyance.

Record I, at 25. Regarding these elements, as enumerated by Judge Connelly, the record reflects that Judge Connelly opined that "it is undisputed that all of the transfers in question were made within 90 days of the judgment debtor's Bankruptcy petitions....[and] GDW[O] and Burstein probably received more than they would have received in a Chapter 7 liquidation [because the]...judgment debtor's liability far exceed assets." *See id.* at 22; *see also*, Transcript of Hearing, *A.W. Lawrence & Co., Inc. v. Burstein (In re A.W. Lawrence & Co., Inc.)*, Ch. 11 Case No. 97-11300, Adv. Pro. No. 97-91313, at 7 (Bankr. N.D.N.Y. April 27, 1999, Connelly, J.)("Record II")("There is no dispute that the [January 17, 1997] transfer...occurred within 90 days of the

bankruptcy.").

With regard to the preferential transfer cause of action, Judge Connelly granted summary judgment in favor of Burstein and GDWO finding that there simply could not have been a preferential transfer to a creditor of the Debtor avoidable under Code § 547 for the simple reason that Burstein and GDWO were not "creditors" of the Debtor since the Debtor was not one of the named parties against whom the wrongful termination award was entered such that a transfer from that entity to Burstein could be preferential.[3] *See* Record I, at 21.

On September 27, 1999, the Debtor filed a motion *in limine* seeking to exclude from trial evidence relating to the elements of fraudulent conveyance upon which the Court had previously ruled had been satisfied in this Proceeding. The Debtor argued that due to Judge Connelly's findings of fact and conclusions of law in the December 17, 1998 decision, quoted *supra*, the sole issue to be addressed at trial is whether the Debtor was insolvent at the time of the transfer of the February 10, 1997 $50,000 check to Burstein. *See* Debtor's Memorandum of Law In Support of Motion *in Limine*, at 1. In this regard, the Debtor contended that because the Court had already determined that *all* of the subject transfers to Burstein occurred within 90 days of the filing of the Debtor's petition, evidence relating to whether the transfer occurred within one year of the date of the filing of the petition should necessarily be excluded for the purposes of the fraudulent transfer cause of action. *See id.* at 2; *see also*, Record I, at 22 ("[I]t is undisputed that all of the transfers in question were made within 90 days of the judgment debtor's Bankruptcy petitions...").

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[3]Code § 547(b) defines a preferential transfer as "any transfer of an interest of the debtor in property...to or for the benefit of a creditor...for or on account of an antecedent debt...made while the debtor was insolvent...made on or within 90 days before the date of the filing of the petition...that enables such creditor to receive more than such creditor would receive if...the case were a case under chapter 7 of this title..." Code § 547(b).

Furthermore, the Debtor contended that because the Court determined in its December 17, 1998 decision that Burstein was not a creditor of the Debtor, any transfer to her from the Debtor was merely gratuitous in nature and evidence relating to whether the Debtor received reasonably equivalent value for the transfer should additionally be excluded because, as Judge Connelly had indicated, it was a transfer to Burstein by an entity which bore no obligation to her. *See* Debtor's Memorandum of Law In Support of Motion *in Limine*, at 5-6. Finally, the Debtor argued that the resolution of the Escapade adversary proceeding discussed in note 2, *supra*, was dispositive of whether the Debtor actually had an interest in the $50,000 check indorsed over to Burstein. To this end, the Debtor contended that because all parties to the Escapade adversary proceeding stipulated that the Debtor owned the Escapade and transferred the same to Barbara C. Lawrence in consideration for the transfer of the $50,000 check from her Dean Witter account, the Debtor's ownership in the $50,000 check was not a triable issue and evidence to the contrary should additionally be excluded. *See id.* at 9-11.

On October 1, 1999 Judge Connelly, in ruling on the Debtor's motion *in limine* held that

> At this juncture...three of the four section 548 elements have been met to this Court's satisfaction. (1) that the debtor has an interest in the $50,000 that was transferred to Burstein and Gleason law firm, (2) the transfer occurred within one year of the filing of the petition by the Debtor, (3) that the Debtor received less than the reasonable equivalent...value in exchange. The only remaining issue for trial is whether the debtor was insolvent at the time of the transfer or became insolvent as a result thereof, and to that effect the motion is – the motion *in limine* is granted.

See Transcript of Hearing, *A.W. Lawrence & Co., Inc. v. Burstein (In re A.W. Lawrence & Co., Inc.)*, Ch. 11 Case No. 97-11300, Adv. Pro. No. 97-91313, at 19 (Bankr. N.D.N.Y. October 1, 1999, Connelly, J.)("Record III").

On October 8, 1999, the Debtor moved for summary judgment on the sole remaining

issue, namely the Debtor's insolvency at the time of the $50,000 transfer to Burstein. In support of its summary judgment motion, the Debtor submitted affidavits from James P. Faughnan, Jr., ("Faughnan") the current President of the Debtor and Peter G. Diana ("Diana"), the aforementioned Comptroller of Financial Reporting of the Debtor at the time of the transfer. Both Faughnan's and Diana's affidavit generally asserted that it is "indisputable" that the Debtor was insolvent on the date of the February 10, 1997 payment to Burstein. Specifically, Diana asserted in his affidavit that "[t]he assets and liabilities of [the Debtor] were materially the same on February 10, 1997 as they were on February 28, 1997" when the Debtor filed its Chapter 11 petition and schedules reflecting total assets of approximately $1.4 million and total liabilities of nearly $6 million. *See* Affidavit of Peter G. Diana in Support of Debtor's Motion for Summary Judgment ("Diana Affidavit"), at ¶ 12. Diana additionally asserted in his affidavit that "[a]t all times during the months of January and February, 1997, the liabilities of [the Debtor] exceeded its assets." *See id.* Annexed to the Diana Affidavit was the Debtor's "trial balance," a document purporting to list the Debtor's assets and liabilities for February 28, 1997, which document also indicated total assets on February 28, 1996 in the amount of approximately $8.7 million and liabilities exceeding $33 million, a fact which Diana asserts had not materially changed any time in the 12 months preceding the filing of the Debtor's bankruptcy petition. *See id.*, at ¶ 13; *see also, id.* at Exhibit H.

In opposition to the Debtor's summary judgment motion, Burstein filed a cross-motion for summary judgment on October 19, 1999. In her cross-motion, Burstein asserted that summary judgment in favor of the Debtor was inappropriate because material issues of fact existed as to the Debtor's insolvency at the time of the transfers based on the Debtor's own financial

statements and schedules. In this regard, Burstein asserted that because the Debtor's bankruptcy schedules, the affidavits of both Faughnan and Diana and the trial balance all reflected competing figures as to the Debtor's assets and liabilities, the Debtor's summary judgment motion could not be sustained. For instance, Burstein argued that the Debtor's own bankruptcy schedules indicated liabilities of approximately $6 million whereas the trial balance indicated liabilities exceeding $33 million. In addition, the Debtor's bankruptcy schedules valued assets in the amount of $1.4 million whereas Faughnan's Affidavit indicated an asset value of $2.5 million and still the trial balance indicated total assets valued at $6.8 million. Furthermore, Burstein asserted that the trial balance submitted in support of the Diana Affidavit was inappropriate because it was not previously offered as an exhibit in violation of the Court's trial Scheduling Order of June 24, 1999[4] and because the trial balance constituted only 4 pages of an allegedly 43-plus page document.[5]

On October 22, 1999, Judge Connelly heard oral argument on the respective parties' motions for summary judgment.[6] At that time, Judge Connelly determined that the liabilities of the Debtor at the time the petition was filed, some 18 days prior to the transfer, were

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[4]On June 24, 1999 a Scheduling Order was entered in this Proceeding setting this matter for trial on September 19, 1999 and requiring the exchange of all exhibits by September 17, 1999.

[5]The Court notes that in her cross-motion Burstein dedicated no less that ten paragraphs to advancing her argument that the Debtor had yet to establish an ownership interest in the $50,000 check. However, on October 1, 1999, Judge Connelly granted the Debtor's motion *in limine* on that very issue and limited the remaining issue for trial to the question of the Debtor's insolvency at the time of the transfer.

[6]The Court notes that Judge Connelly summarily denied Burstein's cross-motion for summary judgment as untimely and treated it as opposition to the Debtor's motion for summary judgment.

approximately $5 million. Judge Connelly stated

> I refer to the – record of this case, and I will accept the determinations of Judge Littlefield [presiding over the Debtor's bankruptcy case] that the allowed claims – claims that were proper against this estate on the date that this case was filed were four million and some odd dollars [$4,960,497.83]. That's – that's the amount that this Court will use in this equation for the liabilities in this company.

See Transcript of Hearing, *A.W. Lawrence & Co., Inc. v. Burstein (In re A.W. Lawrence & Co., Inc.)*, Ch. 11 Case No. 97-11300, Adv. Pro. No. 97-91313, at 20 (Bankr. N.D.N.Y. October 22, 1999, Connelly, J.)("Record IV"). In light of this finding, Judge Connelly denied the Debtor's motion for summary judgment and ordered the matter set for trial solely on the issue of the value of the Debtor's assets, ruling that "I am satisfied that the Court – this Court has already determined the liability side of this equation." *See id.* at 24; *see also*, *id.* at 25 ("So, the trial will be limited to testimony and evidence regarding the assets of this.").

On November 15, 1999, the Debtor moved pursuant to Fed.R.Civ.P. 59(e) and Fed.R.Bankr.P. 9023 for reconsideration of Judge Connelly's denial of its summary judgment motion. Following oral argument on November 30, 1999, the Court issued an Order on April 12, 2000, denying the Debtor's motion and setting the remaining issue of asset valuation for trial.

The one-day trial on the issue of the value of the Debtor's assets at the time of the transfer was conducted on June 16, 2000. Judge Connelly commenced the trial placing the parties under advisement, once again, that

> [o]n April 12, 2000 this Court entered an order denying [the Debtor's] motion for summary judgment and denying Sharon Burstein's motion for summary judgment. The Court set a date for a trial and most importantly stated that the trial will be limited to the sole issue as to the value of the assets at the time of the transfer

> of the property. Consequently, pursuant to this Court's order, I will only entertain evidence regarding the assets of [the Debtor] as it related to Bankruptcy Code Section 548 Insolvency. This Court will not revisit the other elements subsumed under Section 548.

See Transcript of Trial, *A.W. Lawrence & Co., Inc. v. Burstein (In re A.W. Lawrence & Co., Inc.)*, Ch. 11 Case No. 97-11300, Adv. Pro. No. 97-91313, at 9 (Bankr. N.D.N.Y. June 16, 2000, Connelly, J.)("Record V").

Diana testified at trial that as Controller of Financial Reporting for, among others, the Debtor, it was his responsibility to prepare financial reports, monthly financial statements, profit and loss statements and project cash flow and that he was primarily responsible for maintaining balance sheets for the Debtor. Diana further testified that the trial balance submitted with the Diana Affidavit in support of the Debtor's October 8, 1999 summary judgment motion was not an incomplete document as it relates to the Debtor because, of the entire 43 plus page document, the only portion of which contains financial information pertaining to the Debtor are the four pages submitted with the Diana Affidavit. During direct examination by the Debtor, Diana testified that "[t]he Lawrence Companies were in a steady decline beginning in 1993 or 4 and I'm not aware of any event – I don't recall any events that would have changed the financial situation on February 10th versus February 28th. There was a long decline beginning in 1993 and that date [February 10, 1997] is so close to the bankruptcy filing [February 28, 1997], it's unlikely any material change would have resulted." *See* Record V, at 23. Diana additionally testified that the value of the Debtor's assets as scheduled in its bankruptcy case, $1.4 million, was to a certain extent inflated based on the fair value of the assets listed on the trial balance. In addition, after an itemized review of the fair value of the assets reflected on the trial balance and the income

statement submitted with the Debtor's schedules, Diana answered in the affirmative the Debtor's inquiry, "Mr. Diana, in your opinion as of February 10, 1997, did the liabilities of AW Lawrence & Company which this Court has determined to have been approximately $5 million. Did those liabilities exceed the fair value of the company's assets as of that date?" *See id.*, at 47. Furthermore, on cross-examination, Diana testified that in 1996 the Debtor was or could have been a profitable concern but that the raiding of its assets by subsidiaries of its parent corporations depleted its holdings and left the Debtor in financial disarray by December 1996.

Following Diana's testimony, Faughnan, who was appointed President of the Debtor post-petition, testified that upon his appointment on April 11, 1997, he undertook an investigation regarding the financial state of the Debtor including reviewing the Debtor's books and records, interviewing employees and preparing bankruptcy schedules. Faughnan generally affirmed on direct examination the Debtor's deteriorating financial state in the months leading up to the filing of the Debtor's bankruptcy petition in February 1997. At the close of the Debtor's proof, Burstein moved for judgment as a matter of law pursuant to Fed.R.Civ.P. 52(c), incorporated by reference in Fed.R.Bankr.P. 7052. Judge Connelly denied Burstein's motion and, when Burstein failed to produce any witnesses or evidence, Judge Connelly took the matter under submission and afforded the parties the opportunity to submit post-trial memoranda of law.

On September 8, 2000, the Debtor submitted a post-trial brief and Burstein submitted a memorandum of law in support of its motion for judgment as a matter of law. It should be noted that Judge Connelly had previously denied Burstein's motion for judgment as a matter of law at the close of the June 16, 2000 trial. Judge Connelly, nonetheless, entertained Burstein's motion as a post-trial memorandum in support of her position. In her post-trial memorandum of law,

Burstein generally asserted that the Debtor failed to carry its burden to establish insolvency and that the Debtor's interest in pending litigation regarding the sale of stock to another entity is sufficient to merit a finding of solvency or at least to stay a determination as to the Debtor's insolvency until the final resolution of that litigation.[7] In addition, Burstein asserted that the admission of the four-page trial balance was error because admission of the trial balance violated the Court's June 24, 1999 Scheduling Order, an objection which was overruled at trial at the time the trial balance was admitted into evidence, and secondly because it violated the best evidence rule, an objection raised by Burstein for the first time in her post-trial memorandum of law. On September 22, 2000, the Debtor submitted its reply brief and Burstein submitted her reply memorandum, at which time Judge Connelly took the matter under submission.

On February 8, 2001, Judge Connelly issued a Memorandum-Decision. In his decision, Judge Connelly found Diana's testimony "informative and credible" and "very persuasive" and outlined his reasons for finding so. *A.W. Lawrence & Co., Inc. v. Burstein (In re A.W. Lawrence & Co., Inc.)*, Ch. 11 Case No. 97-11300, Adv. Pro. No. 97-91313, slip op. at 2-3 (Bankr. N.D.N.Y. February 8, 2001, Connelly, J.)(internal quotation omitted). In addition, Judge Connelly accepted Diana's testimony that the trial balance was the "best document that exists to reflect the assets of the Corporation in February 1997" and that it "represented all the accounts for the company." *Id.* at 3 (internal quotation omitted). Judge Connelly additionally found Faughnan a "highly credible and knowledgeable witness" and again outlined his reasons for finding so. *Id.* at 4. Judge Connelly deferred to Faughnan's position with the Debtor and

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[7]Burstein asserted that the total recovery in the pending stock litigation could far exceed $30 million, of such recovery the Debtor is entitled to 8.288%. *See* Burstein's Memorandum of Law in Support of Motion for Directed Verdict, at 26.

experience as a licensed insurance consultant as to the reliability of the trial balance and the deteriorated state of the Debtor's solvency on and around the date of the subject transfer.

In considering the two witnesses produced by the Debtor as "highly credible and knowledgeable with respect to the outstanding issue of valuation," weighed against the failure of Burstein to produce any witnesses, Judge Connelly found, by a preponderance of the evidence, that the value of the assets of the Debtor at the time of the transfer were approximately $1 million. *See id.* at 6. In addition, Judge Connelly ruled that "[i]n her submissions, Ms. Burstein also reargues her objection to the admission of the trial balance into evidence. At trial, this Court admitted the trial balance into evidence over Ms. Burstein's objection. The Court finds that there is no basis for Ms. Burstein to reargue her objection in the post-trial submissions." *Id.* at 9-10.

On February 27, 2001, Judge Connelly entered the Order granting the Debtor a judgment against Burstein in the amount of $50,000, plus costs and disbursements, less a credit of $8,750 representing a partial payment received by the Debtor from GDWO on the $50,000 payment to Burstein.[8] On March 5, 2001 the Judgment was entered against Burstein in the amount of $41,250, plus interest at the rate of 6.052% and costs in the amount of $583.55. Immediately following entry of the Judgment, Judge Connelly retired from active status on the federal bench and Burstein's filing of the instant Motion precipitated assignment of the matter to this Court for consideration.

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[8]On November 30, 1999, Judge Connelly approved a settlement between the Debtor and GDWO, providing that GDWO would pay the Debtor $8,750 of the some $16,666 one-third contingency fee it received from Burstein from the February 10, 1997 $50,000 payment. In consideration, GDWO agreed to waive any claim it may have against the Debtor's estate. As more fully discussed *infra*, the parties do not contest that the amount credited to Burstein in the Order and subsequent Judgment should properly be $16,666.66.

ARGUMENTS

In her motion, Burstein alleges five grounds upon which the Order and Judgment are "clearly erroneous" and should be amended, set aside or altered and/or why a new trial should be ordered, namely that the Order and Judgment,

> (1) award judgment in an amount certain against the defendant when the court limited the trial to the sole purpose of valuing the assets of plaintiff, (2) they refer to facts not found in the decision and, (3) adopt findings which were not in evidence before the court and (4) adopt findings of fact based upon prejudicial error concerning the admission of documentary evidence in violation of the federal rules of evidence and a prior order of the court, and (5) are prejudicial, and contains manifest errors of law and fact.

Burstein Motion, at ¶ 2. To this end, Burstein sets forth two categories of arguments, those contesting the overall factual basis of the Order and Judgment and those contesting the procedural admission of the trial balance.

In the first category of arguments, Burstein contends that by ordering judgment in a sum certain, the Order and Judgment went beyond the scope of the trial and Judge Connelly's February 8, 2001 Memorandum-Decision. In this regard, Burstein argues that because the sole purpose of the trial was to determine the assets of the Debtor at the time of the transfer, the resulting Order and Judgment could not order anything beyond that limited issue. Thus, Burstein contends, the Order and Judgment are not supported by any proof or evidence produced at trial or the facts in the record. Regarding the trial balance and the testimony derived therefrom, Burstein argues that the February 8, 2001 Memorandum-Decision "recites findings of fact which were clearly erroneous since based upon improper evidence and errors of law." *See* Burstein Motion, at ¶ 11.

In this regard, Burstein contests the weight that Judge Connelly afforded the testimony of Diana and Faughnan as well as the admission of the trial balance over Burstein's objection. Burstein asserts that she was prejudiced by the admission of the trial balance because the entire document from which the trial balance was extrapolated was not admitted or provided to her, because admission of the trial balance violated the Court's June 24, 1999 Scheduling Order, because no proper foundation was ever laid for the admission of the trial balance and because admission of the trial balance violates the best evidence rule. Burstein asserts that "[b]ased upon the erroneous findings of fact, the order and judgment which contradict the decision, the judicial errors concerning the admission of documents, the manifest errors of law and fact, all of which severely prejudice," she is entitled to relief from the Order and Judgment and to a new trial. *See* Burstein Motion, at 28.

In response, the Debtor argues that Burstein's Motion is devoid of merit and "is clearly an effort to reargue and relitigate issues that have already been decided by the Court." *See* Debtor's Opposition, at ¶ 9. In this regard, the Debtor contends that relief pursuant to Fed.R.Civ.P. 52, 59 and 60 are unavailable to Burstein because such relief is not intended to afford an unsuccessful litigant the opportunity to relitigate issues before the tribunal that had already decided the same. In addition, the Debtor maintains that Burstein's argument that the Order and Judgment went beyond the limited scope of trial is simply disingenuous because, as Burstein is aware, all other issues regarding the fraudulent conveyance action had previously been ruled on by the Court. Furthermore, the Debtor asserts that Burstein is not entitled to the relief sought as she has "failed to show any manifest error of law or clear error of law warranting an alteration of the Order or Judgment or a new trial." *See id.* at ¶ 14.

In response to the Debtor's Opposition, Burstein, while renewing her objection to the admission of the trial balance, further contends that the Court's failure to allow her to be heard and/or admit evidence relating to the transfer of the Escapade to Barbara C. Lawrence was prejudicial error and that manifest errors exist as to the Court's calculation of the amount recoverable in the instant Proceeding. To this end, Burstein advances two separate arguments. First, Burstein argues that because the Escapade was sold for $37,063.81, of which the Debtor received one half, and the Debtor received $8,750 from GDWO in settlement of its claims against the estate, Burstein can only be obligated for the difference between the $50,000 check and the sum already recovered by the Debtor, namely $4,186.19. Second, Burstein argues that while GDWO settled its claims and paid the estate $8,750, Burstein should be credited with $16,666.66. This is so because, of the $50,000 payment to Burstein in February, 1997, GDWO retained one-third, or $16,666.66, in satisfaction of its contingency fee for that portion of the negotiated settlement, with the balance paid to Burstein. In this regard, Burstein contends the Debtor should not be allowed to recover more than $33,333.34, the amount Burstein actually received from the February 10, 1997 payment.

In response to Burstein's Reply, the Debtor concedes that "[b]ased on the language of the Stipulation" between the Debtor and GDWO, the appropriate sum credited to Burstein should be $16,667 rather than $8,750, as indicated in the Order and Judgment. *See* Debtor's Supplemental Opposition, at ¶ 13. In this regard, the Debtor agrees that the Order and Judgment should be amended to the extent necessary to reflect the mathematical inaccuracy contained therein. However, the Debtor maintains its position with regard to the balance of Burstein's arguments, namely that Burstein is attempting to relitigate issues previously determined by the Court and that

such arguments are disingenuous and without merit.

Finally, in response to the Debtor's Supplemental Opposition, Burstein alleges that "the merits of the motion can bee seen by the fact that A.W. Lawrence now concedes at Paragraph 13 of its opposition that there was a mistake in the prior order..." referring to the Debtor's concession regarding the amount properly credited to Burstein vis-a-vis the GDWO settlement with the Debtor. *See* Burstein Supplemental Reply, at ¶ 2. In addition, Burstein generally renews her earlier contentions that the Debtor's interest in the $50,000 check from Barbara C. Lawrence has never been established and that there are mathematical errors with regard to the sum recoverable by the estate via the instant Proceeding.

DISCUSSION

Pursuant to Fed.R.Civ.P. 59, incorporated by reference in Fed.R.Bankr.P. 9023, a court may order a new trial as "to all or any of the parties and 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..." Fed.R.Civ.P. 59(a)(2). For the purposes of a motion for reconsideration pursuant to Fed.R.Civ.P. 59, such reasons "are governed by the grounds for relief set forth in Rule 60(b)." Norton Bankr. Rules Pamphlet 2000-2001 Ed., at 662. Fed.R.Civ.P. 60(b), incorporated by reference in Fed.R.Bankr.P. 9024, recognizes six grounds upon which such relief may be ordered: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence...; (3) fraud..., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged...; or (6) any other

reason justifying relief from the operation of the judgment." Fed.R.Civ.P. 60(b). Such relief is an extraordinary remedy and should be invoked only upon a movant's showing of exceptional circumstances. *See Daniggelis v. Eastern Air Lines, Inc. (In re Ionosphere Clubs, Inc.)*, 103 B.R. 501, 502 (Bankr. S.D.N.Y. 1989). Alternatively, on a motion pursuant to Fed.R.Civ.P. 59(e), "the court may open the judgment...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." *Id.* Four possible grounds exists upon which relief from a judgment may be based pursuant to Rule 59(e): "(1) an intervening change in controlling law; (2) the availability of new evidence not previously available; (3) the need to correct a clear error of law or fact; and (4) to prevent manifest injustice." *Hester Industries, Inc. v. Tyson Foods, Inc.*, 985 F.Supp. 83, 84 (N.D.N.Y. 1997), *citing Atlantic States Legal Foundation v. Karg Bros.*, 841 F.Supp. 51, 53 (N.D.N.Y.1993). As a general rule, any motion that questions the accuracy of a judgment, such as one to reconsider, vacate, set aside or reargue, is functionally a motion under Rule 9023, whatever the movant labels it. *See* 10 L. KING, COLLIER ON BANKRUPTCY, ¶ 9023.04, at 9023-6 (15th ed. rev. 2001). Such a motion "can only be granted if the movant presents newly discovered evidence that was not available at the time of the trial, or there is evidence in the record that establishes a manifest error of law or fact. *Hollis v. City of Buffalo*, 189 F.R.D. 260, 263 (W.D.N.Y. 1999)

Fed.R.Civ.P. 52(b), incorporated by reference in Fed.R.Bankr.P. 7052 states, in pertinent part, that "[o]n a party's motion...the court may amend its findings – or make additional findings – and may amend the judgment accordingly..." Fed.R.Civ.P. 52(b).[9] Upon a motion '[u]nder

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[9]Fed.R.Civ.P. 52(a), incorporated by reference in Fed.R.Bankr.P. 7052 states, in pertinent part, that

> In all actions tried upon the facts without a jury...the court shall

Rule 52(b) a court may amend its findings of fact in order to correct manifest errors of law or fact, to present newly discovered evidence, or to clarify the record for appeal." *Hollis v. City of Buffalo*, 189 F.R.D. 260, 262 (W.D.N.Y. 1999)(citations omitted).

Thus, "[t]he principles governing alteration or amendment of judgments are similar to those that apply to requests for new trial." 6A Bankr. L. Ed. § 59:624, at 470 (CBC 1998). Such determinations are committed to the sound discretion of the court whose order is subject to the motion and will not be overturned on appeal absent an abuse of discretion. *See McCarthy v. Manson*, 714 F.2d. 234, 237 (2d Cir.1983); *Mellon Bank, N.A. v. U.S. Trustee (In re Victory Markets, Inc.)*, 1996 WL 365675 (N.D.N.Y. 1996); 10 L. KING, COLLIER ON BANKRUPTCY, ¶ 9023.01[2], at 9023-4 (15th ed. rev. 2001)("a motion for a new trial is addressed to the discretion of the court, [and its] rulings are subject to reversal only when the order is made under mistake

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> find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered...Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses...It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court...or appear in a[]...memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

Fed.R.Civ.P. 52(a). The language of Fed.R.Civ.P. 52(a) instructing that "due regard shall be given" to the trial court's determinations as to credibility of witnesses requires that where the courts findings are based on its determinations as to the credibility of witnesses, greater deference must be given to the trial court's findings. *See* 10 L. KING, COLLIER ON BANKRUPTCY, ¶ 7052.02, at 7052-4 (15th ed. rev. 2001)(footnotes omitted). "In such cases, there can virtually never be clear error, unless the testimony is contradicted by extrinsic evidence or is internally inconsistent." 10 L. KING, COLLIER ON BANKRUPTCY, ¶ 7052.02, at 7052-4 (15th ed. rev. 2001)(footnotes omitted).

of law or if the court failed to exercise, or abused, its discretion."). A motion to reconsider is not meant as a means to afford a litigant the opportunity to re-litigate decided issues or to readdress "issues that have already been fully considered by the Court." *Sherrell v. Fleet Bank of New York*, 205 B.R. 20, 21 (N.D.N.Y. 1997) *quoting New York News Inc. v. Newspaper and Mail Deliverers' Union of New York*, 139 F.R.D. 294, 294-95 (S.D.N.Y.1991), *aff'd*, 972 F.2d 482 (2d Cir.1992); *See also Mellon Bank, N.A. v. U.S. Trustee*, 29 Bankr. Ct. Dec. at 317. Nor should such a motion "be used as a second opportunity to advance arguments already rejected, or to present evidence which was available but not previously introduced." *Capitol Vial, Inc. v. International Bioproducts, Inc.*, 1998 WL 238620, 1 (N.D.N.Y. 1998)(footnote omitted).

In the first instance, the parties agree, and this Court does not dispute, that the mathematical construct provided for in the Order and Judgment is erroneous and to that end, the Court will exercise its authority pursuant to Fed.R.Civ.P. 59(e) to correct what the Court has determined is a clear error of fact. The parties have agreed that of the subject payment to Burstein, some $16,666.67 was paid to GDWO in satisfaction of its claimed one-third contingency fee to that payment. In satisfaction of the settlement of claims by and between GDWO and the Debtor in this Proceeding, the Debtor accepted $8,750, representing a negotiated settlement. In that regard, the estate's principal recovery from Burstein should not be greater than that which was transferred to her, namely $33,333.33 Thus, the Court herein will amend the Order and Judgment to reflect the estate's recovery as $33,333, plus interest and costs, rather than $41,250, plus interests and costs.

Next, the Court will, without extensive discussion, dispose of grounds (1), (2), (3) and, to the extent not disposed of above, (5) cited by Burstein and quoted *supra* at page 17, as grounds

for the relief sought herein. Those grounds generally assert that the Order and Judgment from which reconsideration and/or relief are sought are erroneous and went beyond the factual findings of the Court found in Judge Connelly's February 8, 2000 Memorandum-Decision upon which the Order and Judgment are allegedly based. This argument is contrary to the record.

The record of the various stages of litigation of the instant Proceeding reveals a conscious design by Judge Connelly to issue rulings, both factually and legally, as to each elemental requirement of the Debtor's *prima facie* case for fraudulent conveyance. Furthermore, the record indicates that Burstein is fully aware that Judge Connelly did, in fact, make appropriate and extensive factual findings on the record in open Court on September 25, 1998, October 1, 1999, October 22, 1999 and in his Memorandum-Decision on February 8, 2001. Burstein would have this Court believe that Judge Connelly's issuance of the Order and Judgment was either a legal contrivance by the Debtor or an ambush by judicial fiat. However, this notion is belied by the fact that since the Debtor's September 27, 1999 motion *in limine* Burstein has attempted to reargue these very same issues time and again in spite of Judge Connelly having ruled on them on October 1, 1999. By virtue of the instant Motion, Burstein is once again advancing the same arguments that the Court has rejected at various times and in various forms over the last approximately three years. It will suffice to say that the happenstance of Judge Connelly's retirement will not afford Burstein the opportunity to re-litigate arguments previously rejected by this Court.

Finally, Burstein contends that the admission of the trial balance was "manifest error and prejudicial to the defendant..." on two grounds, namely that it violated federal evidentiary tenets and because its admission violated the Court's own scheduling order. Burstein Motion, at ¶ 14.

Burstein's contentions on evidentiary grounds are three-fold, namely that admission of the trial balance violated the Federal Rules of Evidence ("Fed.R.Evid."), that no proper foundation was laid for its admission and that only four pages of an allegedly 43-plus page document was produced and admitted.

The Court would be remiss not to note that it took great pains to understand the unintelligible argument advanced by Burstein that admission of the trial balance violated the Federal Rules of.Evidence. In this regard, Burstein argues in her original Motion that

> FRCP Rule 1001.1 and 1001.2 require an original document to be produced. Rule 1004 allows an original not to be required to be produced "if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." There was absolutely no proof by the debtor that originals had been lost and indeed debtors own witness admitted that he didn't know where they were and also admitted that no search had been made for them.

Burstein Motion, at ¶ 25. The Court will attempt to point out all of the intricate inadequacies of this argument and attempt to ferret out the nature of this objection prior to rejecting it. First and foremost is that the Court is unaware of Federal Rule of Civil Procedure 1001.1, 1001.2 or 1004 and can only assume that these references are actually to Fed.R.Evid. 1001, 1002 and 1004. Second, while Fed.R.Evid. 1002 provides, in pertinent part, that an original document is required to prove the content of a writing, there was absolutely no *voir dire* as to the authenticity of the document when it was presented at trial, nor did Burstein object to its admission on the grounds that the trial balance was not an original. Third, there is absolutely nothing in the record which would indicate that the trial balance submitted into evidence was not an original within the meaning of Fed.R.Evid. 1001. *See* Fed.R.Evid. 1001(3)("If data are stored in a computer or

similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original'."). Finally, in Burstein's Reply to the Debtor's Opposition she states that "[i]t is not that she objects to a copy rather than an original of the trial balance being produced, but rather that there was an objection to only four pages being produced..." in contravention of her original argument. Burstein Reply, at ¶ 25. Without further comment, reconsideration is not merited on these grounds.

Regarding the foundation for the admission of the trial balance, the record of the June 16, 2000 trial reflects that the trial balance was admitted into evidence upon the testimony of Diana. Diana testified that at the time the trial balance was prepared, he was the Controller of Financial Reporting, that he prepared various financial data for the Debtor and that he was primarily responsible for maintaining balance sheets for the Debtor. Diana further identified the four-page trial balance as a print-out of the "programmed trial balance package that was in place at the Lawrence Group of Companies" during his tenure as Controller and that it was maintained in the ordinary course of business. Record V, at 10, 12. Diana additionally testified that he had seen the document before in his capacity as Controller, supervised the maintenance and creation of it and "used it to compile financial information at the time of performing [his] job." *Id.* at 11-12. At the time of trial, Burstein failed to *voir dire* Diana as to the authenticity of the trial balance and has offered no argument regarding the lack of foundation for its admission that this Court would characterize as substantive. Judge Connelly found this credible foundation as to the trial balance and because this Court has found no error in that regard, it is not inclined to grant the relief sought on foundational grounds. *See generally*, Record V, at 17 ("Exhibit 25 [trial balance], sufficient foundation has been laid for it. It's received in evidence.")

Next Burstein argues that the admission of 4 pages of an alleged 43-plus page document was erroneous and prejudicial. Diana testified on direct examination that in his capacity as Controller, he was familiar with the "full" or consolidated trial balance, that is, a compilation of data for each of the numerous companies operating as a parent or subsidy within the Lawrence network of companies. Record V, at 13. Diana testified, over the objection of Burstein, that all of the companies used a "consolidated ledger package" that would produce individual trial balances for each of the companies into a single document, namely the consolidated trial balance. Record V, at 14. Furthermore, Diana testified that the four-page trial balance contained all the information in the consolidated trial balance pertaining to the Debtor, the remainder pertaining to various other Lawrence companies. Upon objection by Burstein at trial, counsel for the Debtor asserted that it had possession only of the four pages offered, largely due to the fact that these were the only pages that were relevant to the Debtor.

In his February 8, 2001 Memorandum-Decision, Judge Connelly found that

> Contrary to Ms. Burstein's contention, pages 1-39 [of the consolidated trial balance] were not needed for cross-examination or for any other relevant purpose because, as Mr. Diana confirmed, the other pages had nothing to do with AWL. Mr. Diana testified that he was familiar with the full trial balance, and that the other pages contained trial balance information for other corporations. As noted above, Mr. Diana was responsible for the preparation and maintenance of the trial balance.

In re A.W. Lawrence & Co., Inc., supra, slip op. at 10. The effect of Judge Connelly's ruling in this regard was primarily that the four-page trial balance ***was*** the "entire" document, that is to say that the four pages were a complete document as related to the Debtor's assets and liabilities. Secondarily, the ruling was one of relevancy, finding that the consolidated trial balance was not

relevant for the limited purposes of trial.

Although nowhere in her pre-trial, trial or post-trial arguments does Burstein cite the appropriate Rule, her objection generally rests on Fed.R.Evid. 106, referred to in common law as the "doctrine of completeness". *See Phoenix Assoc. III v. Stone*, 60 F.3d 95, 102 (2d Cir. 1995). That Rule states, in pertinent part, that "[w]hen a writing...or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing...which ought in fairness to be considered contemporaneously with it." Fed.R.Evid. 106. The Rule 106 "fairness" standard "gives courts enormous discretion to determine whether a proponent should be required to introduce the whole (or all relevant parts) of a document, or be precluded from introducing any of it." 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 106.02[1], at 106-9 (2d ed. 1999). Moreover, the Rule "requires the court to examine the writing...to determine whether it is sufficiently complete or whether the proponent should be required to introduce at the same time other parts of the writing..." 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5077, at 364-365 (1977). From a relevancy standpoint, the Second Circuit Court of Appeals, quoting the U.S. Supreme Court, has held that where one party makes use of a particular portion of a document, the balance of the document is *ipso facto* relevant to the extent required to avert a misunderstanding or distortion of the partial portion used. *See Phoenix Assoc. III v. Stone*, 60 F.3d 95, 102 (2d Cir. 1995), *quoting Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988). From an admissibility standpoint, the Second Circuit Court of Appeals has interpreted the Fed.R.Evid. 106 fairness standard "to require that a document be admitted when it is essential to explain an already admitted document, to place the admitted document in context,

'or to avoid misleading the trier of fact.'" *Phoenix Assoc. III v. Stone*, 60 F.3d 95, 102 (2d Cir. 1995), *quoting United States v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982)(other citations omitted). However, "[t]he completeness doctrine does not, however, require the admission of portions of a statement that are neither explanatory of nor relevant to the admitted passages." *U.S. v. Jackson*, 180 F.3d 55, 73 (2d Cir. 1999), *citing U.S. v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982).

There are several fallacies to the argument advanced by Burstein that Judge Connelly's admission of the four-page trial balance was error. Primarily, as noted *supra*, Judge Connelly found as a matter of fact that the four-page trial balance constituted an entire document and not, as Burstein asserts, a portion of an entire document. It is clear from both the hearing and trial transcripts that Judge Connelly found that the financial information recorded on the four-page balance and the credibility of the witnesses who testified as to the document's veracity outweighed the simple fact data for other unrelated Lawrence entities was collected, along with that of the Debtor, on the consolidated trial balance.

Secondarily, as noted in the February 8, 2001 Memorandum-Decision, Judge Connelly found as a matter of law that the consolidated balance was irrelevant for the limited purposes of trial. As noted *supra*, extraneous material not relevant to admitted material will not be scrutinized under Rule 106's standard of fairness. *See U.S. v. Jackson*, 180 F.3d 55, 73 (2d Cir. 1999), *citing U.S. v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982).

Lastly, Burstein stated at trial that "[a]t the time of the oral argument [on October 22, 1999] I asked Mr. Heller to provide me with a copy of all 43 pages. He stated on the record that he would provide it if it existed. I followed up with a letter dated October 27 again asking in writing for a copy of the entire document to Mr. Heller and I never received it." Record V, at 16.

The Fed.R.Civ.P. provide litigants with adequate procedural grounds with which to deal with uncooperative adversaries. *See e.g.*, Fed.R.Civ.P. 26(c) and 37(a). Among these procedural remedies, however, is not Burstein's chosen avenue, namely to request a document and seek judicial intervention when such document is not forthcoming only after sitting on her rights for over 8 months. If Burstein sought discovery of the consolidated trial balance, she clearly chose an inappropriate time and improper method to compel the same. *See e.g., Stauch v. City of Columbia Heights*, 212 F.3d 425, 430 n.6 (8th Cir. 2000)(District Court did not err in allowing plaintiff to admit only a portion of a chapter of the city code into evidence when "[n]othing prevented the [defendant] from offering the rest of [the c]hapter...itself.").

Finally, Burstein contends that admission of the four-page trial balance was erroneous and prejudicial because it violated the June 24, 1999 Scheduling Order entered in this Proceeding by Judge Littlefield. The subject Scheduling Order provided for the submission and exchange of all trial exhibits by September 17, 1999. However, the Scheduling Order anticipated a trial date of September 29, 1999, some nine and one-half months prior to when it actually occurred. Again, without citing the appropriate Rule, Burstein's objection in this regard largely rests on Fed.R.Civ.P. 16, incorporated by reference in Fed.R.Bankr.P. 7016, which states, in pertinent part, "[i]f a party or party's attorney fails to obey a scheduling or pretrial order..., the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just..." Fed.R.Civ.P. 16(f). While in the past this Court has expressed that it is sound judicial policy to adhere to Scheduling Orders, *see e.g., In re Geder*, Ch. 7 Case No. 99-63340, slip op. (Bankr. N.D.N.Y. April 5, 2001, Gerling, C.J.); *Zube v. Serdula (In re Serdula)*, Ch. 7 Case No. 97-63650, Adv. Pro. No. 99-80072A, slip op. (Bankr. N.D.N.Y. June 15, 2000, Gerling, C.J.), such

procedural determinations are best left to the sound discretion of the trial judge and will not be disturbed on appeal absent "a definite and firm conviction that the...court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Jobin v. Lalan (In re M & L Business Mach. Co., Inc.)*, 167 B.R. 219, 222 (D. Colo. 1994), *quoting McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991).

Judge Connelly found as fact that Burstein had obtained a copy of the trial balance no later than October 8, 1999 and her familiarity with the document itself was fully dispositive of any argument that its admission violated the Scheduling Order. By October 1999, Burstein was fully aware that the trial balance would be offered into evidence by the Debtor. Furthermore, Burstein was dilatory in enforcing her rights relative to the trial balance by either making a motion to preclude the use of the trial balance or to compel production of the consolidated trial balance. Burstein, armed with the knowledge that the trial balance would be used at trial, took no action, save for a single letter to the Debtor on October 27, 1999, to seek production of the consolidated balance. Not having received the same, Burstein waited until trial to raise the issue. In this regard, this Court finds no error or prejudicial result in Judge Connelly's decision to allow admission of the trial balance given the circumstances at the time of trial.

Based on foregoing, it is hereby

ORDERED, that the Order entered on February 27, 2001, and Judgment entered on March 5, 2001, in the instant Adversary Proceeding shall be amended to the extent necessary to reflect the entry of judgment against Burstein in the amount of $33,333, plus interest at the rate of 6.052% and costs in the amount of $583.55, and it is further

ORDERED that Burstein's Motion pursuant to Fed.R.Bankr.P. 7052, 9023 and 9024,

incorporating by reference Fed.R.Civ.P. 52, 59 and 60, respectively, seeking to alter, amend or set aside the Order and Judgment is denied in all other respects.

Dated at Utica, New York

this 12th day of September 2001

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge