

FILED

at _____ O'clock & _____ min. _____ M

NOV 7 2006

United States Bankruptcy Court
Columbia, South Carolina (30)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

BHB ENTERPRISES, LLC d/b/a Tycoon's
Gallery of Games,

Debtor.

Stanley H. McGuffin, Chapter 11 Trustee, for
the Debtor BHB Enterprises, LLC, d/b/a
Tycoon's Gallery of Games,

Plaintiff,

v.

Harold Barman, Evelyn Barman, Norman
Barman, Michael Baumhaft, Sandra
Baumhaft and Universal Video, Inc.,

Defendants.

Case No. 97-01975-W
Adv. Pr. No. 97-80227-W
Chapter 11

ENTERED

NOV 7 2006

D.L.L.

Judgement Number:
06-94

AMENDED JUDGMENT

Pursuant to the attached Order on Trustee's Motion to Alter or Amend Pursuant to FRCP 60(a) and FRBP 9023, this Amended Judgment is effective as of October 1, 1998, the date of entry of the original judgment in this adversary proceeding. The Amendments to the original Judgment contained herein relate only to the amount of the damages found against the defendant Michael L. Baumhaft in the Sixth Cause of Action as more specifically set forth below. Accordingly, based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court originally entered on October 1, 1998, the Judgment is entered as follows:

On the Trustee's Objection to the Proof of Claim of Michael Baumhaft ("Claim"), Trustee's Objection to the Claim is sustained, and the Claim is reduced to \$266,312.50, after

deducting the claim of Dr. Kohlenburg, and is subordinated to the payment of all administrative and unsecured claims. The claim of Norman Barman is disallowed in its entirety.

On the Trustee's First and Second Claim for Relief, against Sandra Baumhaft, the Court rules that the Trustee may disregard the corporate identity of BHB Enterprises, LLC and recover from Sandra Baumhaft the amount necessary to pay all administrative and unsecured claims in full.

On the Trustee's Third Claim for Relief, against Sandra Baumhaft, the Court find that Sandra Baumhaft breached her fiduciary duty, and that the Trustee is entitled to judgment against Sandra Baumhaft in the amount necessary to pay all administrative and unsecured claims in full, as an alternative recovery to the Trustee's First and Second Claim for Relief.

On the Trustee's Fourth and Ninth Claims for Relief, the Court rules that the claim of Norman Barman will be subordinated to the claims of all the Debtor's other creditors pursuant to §510(c)(1). The Court further rules that the claim of Michael Baumhaft will be subordinated, pursuant to §510(a) and §510(c)(1) to the claims of all the Debtor's unsecured creditors.

On the Trustee's Sixth Claim for Relief, against Michael Baumhaft for breach of contract, the Court finds that Trustee is entitled to judgment in the amount necessary to pay all secured, administrative and unsecured claims in full, \$607,424.00.

On the Trustee's Seventh Claim for Relief, against Michael Baumhaft for specific performance, the Court finds that Trustee is entitled to judgment against Michael Baumhaft for specific performance as an alternative recovery to the Trustee's Sixth Claim for Relief.

On the Trustee's Tenth Claim for Relief, against Michael Baumhaft, Sandra Baumhaft, Norman Barman and UVI, the Court finds that Trustee is entitled to turnover of the estate assets, including all records of the Debtor, in the possession or control of Michael Baumhaft, Sandra

Baumhaft, Norman Barman and UVI, and therefore orders said Defendants to turnover the enumerated assets within ten (10) days of the entry of this Order or, after said ten (10) days, failing the Defendant's compliance herewith, judgment in favor of the Plaintiff in the amount of \$85,978.58.

On the Trustee's Eleventh Claim for Relief, against Michael Baumhaft, Sandra Baumhaft, Norman Barman and UVI for conversion of assets of the estate, the Court finds that Trustee is entitled to judgment against Michael Baumhaft, Sandra Baumhaft, Norman Barman and UVI in the amount of \$85,978.58.

On the Trustee's Fifteenth and Sixteenth Claim for Relief, against Michael Baumhaft for post petition transfers, the Court finds that the Trustee is entitled to judgment against Michael Baumhaft in the amount of \$12,000.00, as an alternative recovery to a portion of the Trustee's Tenth Claim for Relief.

On the Trustee's Seventeenth, Twentieth, Twenty First, Twenty Second Claims for Relief, against Michael Baumhaft, Norman Barman, Sandra Baumhaft, and UVI, for accounting, the Court finds that Trustee is entitled to the relief requested, and therefore orders:

- a. Michael Baumhaft, Norman Barman, and UVI to account to the Trustee for the Lost Profits;
- b. Michael Baumhaft and Norman Barman to account to the Trustee for the revenues generated by said defendant's additional enterprises, as well as to provide the Trustee with a detailed list of all additional enterprises;
- c. Michael Baumhaft, Norman Barman, Sandra Baumhaft, and UVI, to account to the Trustee for all income and expenses of the Debtor;

d. Norman Barman, to account to the Trustee for the proceeds of the David Linville loan; and

e. said Defendants to provide all accountings within ten (10) days of the entry of this Order.

On the Trustee's Eighteenth and Twenty Ninth Causes of Action, as to Michael Baumhaft, Norman Barman, and UVI, the Court finds that the Trustee is entitled to turnover of revenues of the Debtor now or formerly in the possession or control of Michael Baumhaft, Norman Barman and UVI, including, but not limited to, the proceeds from the Linville Loan [\$4,000.00], revenues from the Golf Course Route Machines [\$56,000.00], and lease payments for the Golf Course Route Machines [\$12,675.00], and therefore orders said Defendants to turnover the enumerated assets within ten (10) days of the entry of this Order.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
November 7, 2006

FILED

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Columbia, South Carolina (30)

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Baumhaft and Universal Video, Inc.,

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Case No. 97-01975-W

Chapter 11

Adv. Pro. No. 97-80227-W

ENTERED

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D.L.L.

ORDER ON TRUSTEE'S MOTION FOR RELIEF PURSUANT TO
RULE 60(a) AND BANKRUPTCY RULE 9024

This matter came before the Court on the motion of the Chapter 11 Trustee, Stanley H. McGuffin ("Trustee"), seeking relief pursuant to Rule 60(a) of the Federal Rules of Civil Procedure and Bankruptcy Rule 9024 to correct a discrepancy between the Judgment and the Order issued in the above referenced adversary proceeding ("Motion"). The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1334. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O). The Court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Bankr. P. 7052.¹

¹ To the extent that any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent that any Conclusions of Law constitute Findings of Fact, they are also adopted as such.

FINDINGS OF FACT

1. On March 5, 1997 an involuntary chapter 11 petition was filed against BHB Enterprises, LLC ("Debtor") and an order of relief was entered on April 30, 1997.
2. Trustee was appointed as the chapter 11 trustee in this case on May 23, 1997.
3. Trustee filed this adversary on July 24, 1997 seeking, among other forms of relief, damages from Michael L. Baumhaft ("Baumhaft") for violating a contractual agreement with Debtor. This cause of action against Baumhaft is the Sixth Cause of Action in Trustee's complaint.
4. A trial was held on this matter in 1998 on August 5, 6, and 7. Following trial, the Court weighed the testimony and other evidence presented by the parties and ultimately rejected Baumhaft's defenses to the Sixth Cause of Action. The Court found that Trustee was entitled to damages from Baumhaft in the amount of \$607,424.00 under the Sixth Cause of Action. To reflect the ruling of the Court, the Court entered a detailed, 42 page order on October 1, 1998 ("Order"). See McGuffin v. Barman (In re BHB Enterprises, LLC), C/A No. 97-01975, Adv. Pro. No. 97-80227-W, slip op. at 29-35, 1998 WL 2016842 (Bankr. D.S.C. Oct. 1, 1998). The Order specifically itemizes the Trustee's damages under the Sixth Cause of Action.
5. Concurrent with the entry of the Order, the Court entered a judgment on October 1, 1998 ("Judgment") to reflect the relief granted Trustee in the Order.²
6. The Judgment is inconsistent with the Order and the findings of this Court following trial in that the Judgment states with regard to the Sixth Cause of Action that "Trustee is entitled to judgment in the amount necessary to pay all administrative and unsecured claims in full, \$303,712.00." The Judgment does not reflect all damages awarded by the Court.

² The Judgment and Order were principally prepared by counsel for Trustee.

7. Following the administration of Debtor's assets, Trustee filed a Final Report on July 16, 2003 seeking to close Debtor's bankruptcy case. Among the outstanding assets listed by Trustee in the Final Report were judgments he obtained during the course of the bankruptcy. Trustee disclosed that these judgments may be collectable in the future and sought authority to distribute any collection in accordance with the terms of the plan confirmed on June 16, 1998.

8. The Court entered the Final Decree on September 2, 2003, reserving jurisdiction pursuant to 11 U.S.C. § 1142.

9. Collection of the Judgment remained dormant following its entry due, in significant part, to Baumhaft's conviction for a RICO offense in 1999, for which he served a sentence in a federal penitentiary. Additionally, collection was delayed by the automatic stay triggered when Baumhaft was the subject of an involuntary Chapter 7 petition filed on October 4, 1999. Baumhaft was eventually denied a discharge in the Chapter 7 proceeding.

10. After extensive investigation, the Trustee resumed collection proceedings in 2005 against Baumhaft, after his release from prison and close of his bankruptcy case, by filing litigation in the Eastern District Court of Michigan, the jurisdiction of Baumhaft's current residence and business activities. Trustee's pending litigation against Baumhaft and certain others, Case Number 05-74809, alleges common law and RICO fraud claims and is pending before the Honorable Arthur J. Tarnow. A separate supplementary proceeding is also pending in that court and assigned to Judge Tarnow under Case Number 06-X-50135.

11. During those collection proceedings, Trustee became aware of the discrepancy between the enumerated adversary liabilities in the Order and the amount stated in the Judgment. The Judgment purportedly states, but in fact does not accurately reflect, the full amount of liabilities assessed in the Order. As a result of the ambiguity, Baumhaft is asserting in the

Michigan proceedings that his current obligation pursuant to the Order is approximately \$450,000.00 (\$303,712.00 plus interest), rather than approximately \$900,000.00 (\$607,424.00 plus interest). Trustee has determined that future recoveries against Baumhaft are likely and therefore requested this Court review the record and correct the error in the Judgment so that the full amount of the liabilities assessed against Baumhaft be properly reflected in the Judgment and collection in full may occur.

12. Trustee filed the Motion on August 29, 2006. The Motion sought, in part, to waive the reopening of Debtor's bankruptcy case. By separate order entered September 6, 2006, the Court granted Trustee's request to waive the reopening of Debtor's bankruptcy.

13. Baumhaft filed a late objection to the Motion on September 25, 2006. Baumhaft asserts that the Motion should be denied because: 1) the bankruptcy case is closed and the Court lacks jurisdiction; 2) Rule 60(a) is not the appropriate method to amend the Judgment; 3) Trustee unduly delayed in filing Motion; 4) Baumhaft is willing and able to pay the Judgment according to its terms; 5) amendment of the judgment will not benefit the estate and 6) Trustee's employment of Robert Horvath to collect the judgment is impermissible.

CONCLUSIONS OF LAW

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, as this matter arises in, arises under, and relates to a matter under Title 11. As discussed in the Order, the Court's findings under the Sixth Cause of Action also involves a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O). Pursuant to § 1142 and Fed. R. Bankr. P. 3020(d), the Court retains the authority after confirmation to issue orders necessary to administer the estate. This order is an order necessary to administer the estate in as much as it clarifies the rights of Trustee

under the prior Order and sets forth Baumhaft's liability to the estate so that Trustee may fully collect all monies due the estate under a prior decision of this Court.

Baumhaft asserts that the case must be reopened pursuant to § 350 and Fed. R. Bankr. P. 5010. The Court finds no reason to reopen the adversary proceeding or main case to address the narrow issue raised by Trustee. As stated in the Notes of Advisory Committee to Rule 5010 of the Rules of Bankruptcy Procedure, a court may act without reopening the case where the court is correcting clerical errors in judgments, orders, or other parts of the record therein caused by oversight or omission pursuant to Rule 9024. See Bankruptcy R 5010. This Court is correcting a clerical error in a judgment pursuant to Bankruptcy Rule 9024, and therefore it is not necessary to reopen case. See In re Green, C/A No. 03-05607-W, slip op. (Bankr. D.S.C. Apr. 1, 2005) (finding that the reopening of a chapter 11 bankruptcy case is not necessary to confer jurisdiction on the court).

Baumhaft's argument that Rule 60(a) relief is inappropriate misstates the law.³ Under Rule 60(a), the court may correct errors created by mistake, oversight, or omission, that cause the record or judgment to fail to reflect what was intended at the time of trial. Warner v. City of Bay St. Louis, 526 F.2d 1211, 1212 (5th Cir. 1976) (citations omitted); Turja v. Turja, 118 F.3d 1006, 1009, at n. 2 (4th Cir. 1997); Polaroid Corp. v. Eastman Kodak Co., 1991 WL 4087 (D. Mass Jan. 11, 1991). In order for an error to be clerical, there must be some inconsistency between what was expressed during the proceedings and what the judgment reflects. United States v. Cotton, 235 F. Supp. 2d 989, 990 (7th Cir. 2002); see also Curry v. Curry, 14 A.D.3d 646, 647 (N.Y. App. Div. 2005) (holding "a judgment or order must conform strictly to the court's decision.... Where there is an inconsistency between a judgment or order and the decision upon which it is based, the decision controls"). Further, a court may also invoke Rule 60(a) to resolve

³ Baumhaft's arguments were not supported by evidence or applicable case law.

an ambiguity in its original order to more clearly reflect its contemporaneous intent and ensure that the court's purpose is fully implemented. Burton v Johnson, 975 F.2d 690, 694 (10th Cir. 1992) (citing Panama Processes, S.A. v. Cities Service Co., 789 F.2d 991, 993 (2nd Cir.1986); McNickle v. Bankers Life and Cas. Co., 888 F.2d 678, 682 (10th Cir.1989)). A court is not permitted, however, to clarify a judgment pursuant to Rule 60(a) to reflect a new and subsequent intent because it perceives its original judgment to be incorrect. Id. (citing Panama Processes, 789 F.2d at 994-95). "Rather, the interpretation must reflect the contemporaneous intent of the district court as evidenced by the record." Id.

Baumhaft asserts that Trustee's Motion seeks to correct a substantive matter, thereby creating new rights, and Rules 59(e) and 60(b) are the appropriate mechanism for making such a correction. However, the adversary liabilities assessed against Baumhaft were comprehensively set forth in the Court's multi-page Order entered on October 1, 1998 and were documented by the record. In 1998, the Court assessed Baumhaft's liabilities based on the Trustee's Sixth Cause of Action at \$607,424.00; however, by clerical mistake the Judgment entered reflected a lesser amount. The Court's intent was, and is, clear; the record in the adversary proceeding and the Order entered find Baumhaft's liability in the amount of \$607,424.00. See Dura-Wood Treating Co. v. Century Forest Indus., 694 F.2d 112, 114 (5th Cir. 1982) (noting that Rule 60(a) is designed to remedy errors in the recitation of the order of the court). The lesser amount in the Judgment was a scrivener's mistake, as it is inconsistent with the Order and what was expressed during the proceeding. See Cotton, 235 F.Supp.2d at 990. Rule 60(a) allows the Court to correct the mistake in the Judgment to ensure that the Court's purpose is fully implemented. The fact that the correction greatly changes the amount stated in the Judgment does not remove the matter from the scope of Rule 60(a). See Polaroid, 1991 WL 4087 at * 5 (reducing an award by

36 million dollars pursuant to Rule 60(a)). Therefore, the Court finds the mistake in the Judgment should be corrected to reflect the Court's actual intent as expressed in the adversary Order, which was based on the record established in the adversary proceedings.

While there has been an eight year delay since the Judgment was entered and this motion made, Rule 60(a) corrections are allowed at any time to effect the actual intent of a trial court as reflected by the record. United States v. Mosbrucker, 340 F.3d 664, 666 (8th Cir. 2003) (granting Rule 60(a) motion to correct a mistake in a judgment entered five years earlier); see also Wallace v. Mulholland, 957 F.2d 333, 335 at n. 2 (7th Cir. 1992) (finding that correction of clerical errors may be done at any time and even after a judgment is affirmed on appeal). Additionally, the Court finds that much of the delay has been attributable to the acts of Baumhaft, namely Baumhaft's conviction for a RICO offense in 1999, Baumhaft's sentence to a federal penitentiary, his bankruptcy filing, and his attempts to thwart the Trustee's efforts. Therefore, the Court finds that the Trustee's Motion is timely and relief can be granted pursuant to Rule 60(a).

Baumhaft's remaining objections to the Motion are off-point and overruled. Amendment to the Judgment will benefit the estate. Trustee asserted at the hearing on the Motion that collection of the additional amount due under the Order will increase the distribution to unsecured creditors by 7 to 10%. Even if there was no benefit to the estate, Rule 60(a) relief may nevertheless be granted to correct a discrepancy between an order and a judgment. See Polaroid, 1991 WL 4087 at * 5. Correction of the Judgment is also not a fruitless exercise as Baumhaft suggests. Baumhaft's subordinated unsecured claim against the estate represents only a fraction of the claims against the estate; thus Baumhaft is not paying more under the Judgment only to receive that money back in full as a creditor of the estate. Finally, Baumhaft's arguments

related to his willingness to pay the amount reflected in the Judgment, whether the Trustee obtained Court approval to employ an attorney to collect the Judgment, assertions of professional misconduct against the attorney employed by Trustee, and the Trustee's collection methods are irrelevant in determining the current Motion. These arguments have no bearing on whether or not the Court can or should correct an error in the Judgment pursuant to Rule 60(a).⁴

THEREFORE, IT IS HEREBY ORDERED, that the Trustee's Motion is granted as provided herein; and it is further

ORDERED, that an Amended Judgment be entered consistent with the terms set forth herein which includes the following paragraph effective October 1, 1998:

that on the Trustee's Sixth Claim for Relief, against Michael Baumhaft for breach of contract, the Court finds that Trustee is entitled to judgment in the amount necessary to pay all administrative and unsecured claims in full, \$607,424.00 consistent with the terms set forth herein above;

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
November 7, 2006

⁴ The Court would additionally overrule each of Baumhaft's objections pursuant to SC LBR 9014-4(a) as being untimely.