UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

JAY NATHAN BRESSLER,
and ELISA LYNN BRESSLER,

Debtors.
_____/

Case No. 02-62754
Chapter 7
Judge Thomas J. Tucker

COMERICA BANK,

Plaintiff,

v.

JAY NATHAN BRESSLER,

Defendant.
_____/

Adv. Pro. No. 03-4279

OPINION DENYING DEFENDANT'S "MOTION FOR RELIEF FROM ORDER"

This matter is before the Court on Defendant Jay Nathan Bressler's ("Bressler's") "Motion For Relief from Order," filed on March 24, 2005. Based on alleged "newly discovered evidence," Bressler seeks relief from an order the Court entered on March 11, 2005. For the reasons stated in an opinion of the same date,[1] the March 11, 2005 Order (1) granted Plaintiff Comerica Bank's motion for partial summary judgment, to the extent it sought denial of Bressler's discharge under 11 U.S.C. §§ 727(a)(3) and (a)(5); and (2) dismissed without prejudice Comerica's claims that Bressler should be denied a discharge under 11 U.S.C.

---

[1] *See Comerica Bank v. Bressler* (*In re Bressler*), 321 B.R. 412 (Bankr. E.D. Mich. 2005).

§§ 727(a)(2), (a)(4), and (a)(7) and Comerica's claims to except its debt from discharge under 11 U.S.C. §§ 523(a)(2), (a)(4), and (a)(6).[2]

The Court construes Bressler's motion, at least in part, as a motion for rehearing or reconsideration. The Court concludes that the motion fails to demonstrate a palpable defect by which the Court and the parties have been misled, and that a different disposition of the case must result from a correction thereof. *See* L.B.R. 9024-1(c) (E.D.M.).

The motion also seeks relief based on Fed.R.Civ.P. 60(b)(2), made applicable in bankruptcy proceedings by Fed.R.Bankr.P. 9024. The Court concludes that Bressler has failed to allege or demonstrate the required elements for relief under Rule 60(b)(2). That rule provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).[3]

Bressler has failed to allege or show that the evidence he now seeks to present is "newly discovered" within the meaning of Rule 60(b)(2). The evidence is a set of unauthenticated letters, all dated March 17, 2005, from various casinos at which Bressler allegedly gambled: Motor City Casino; MGM Grand Detroit Casino; Greektown Casino; MGM Grand Hotel & Casino in Las Vegas; MGM Mirage Player Club. Bressler alleges that these letters are "proof of his losses which equal the amount stated in his petition." ("Motion for Relief From Order" at 1

---

[2] In light of the Court's decision that Bressler's discharge should be denied under §§ 727(a)(3) and (a)(5), the Court found it unnecessary to consider the merits of Comerica's other claims.

[3] Fed.R.Civ.P. 59(b), made applicable in bankruptcy proceedings by Fed.R.Bankr.P. 9023, provides: "Any motion for a new trial shall be filed no later than 10 days after entry of the judgment."

¶ 7.)[4] The letters state that they are only estimates of gambling activity, do not denote actual winnings or losses, and are not an accurate accounting of gambling activity. And the letter from MGM Mirage Player Club states that it "does not include slot tournament winnings, giveaway party winnings, race and sports book activity, poker activity or keno activity."

To constitute "newly discovered evidence" within the meaning of Civil Rule 60(b)(2), "the evidence must have been in existence at the time of trial, but if it was in the possession of the party before the judgment was rendered it is not newly discovered and does not entitle the party to relief." 11 Wright, Miller & Kane, Federal Practice & Procedure, Civil 2d § 2859 (West 1995).

> There can be no Rule 60(b)(2) relief for evidence which has only come into *existence* after the trial is over, for the obvious reason that to allow such a procedure could mean the perpetual continuation of all trials. "Newly discovered evidence" under Rule 60(b) refers to evidence of facts in existence at the time of the trial of which the aggrieved party was excusably ignorant.

Prostrollo v. University of South Dakota, 63 F.R.D. 9, 11 (D.S.D. 1974) (citation omitted.)

While the authorities just cited speak of evidence in existence at the time of "trial," the same reasoning applies in cases where the moving party suffered an adverse judgment without a trial, *e.g.*, on a motion for summary judgment. Thus, (1) Bresslers' alleged "newly discovered evidence" must have been in existence at the time of the hearing on Comerica's motion for partial summary judgment; and (2) Bressler must have been "excusably ignorant" of the evidence

---

[4] The Court granted summary judgment denying Bressler's discharge under 11 U.S.C. §§ 727(a)(3) and (a)(5), in part, based on Bressler's failure to provide "*any* details, documentation, or corroborating evidence" to support Bressler's allegation that he lost "about $700,000 from gambling in 2001 and 2002." *See Comerica Bank v. Bressler*, 321 B.R. at 418 (italics in original).

at that time. If Bressler does not meet these requirements, he cannot obtain relief under Rule 60(b)(2).

The date on each of the letters — March 17, 2005 — shows that they were not in existence at the time of the hearing on Comerica's motion for partial summary judgment, or even on the date of the Court's March 11, 2005 summary judgment Order. Therefore, the letters cannot constitute "newly discovered evidence" under Rule 60(b)(2).

Bressler's motion is further deficient because he has failed to allege any facts to show that he did not discover, and with "due diligence" could not have discovered, the existence and availability of records of his gambling activity before the hearing on Comerica's motion, or before the Court's March 11, 2005 decision. *See Questrom v. Federated Department Stores, Inc.,*192 F.R.D. 128, 131 (S.D.N.Y. 2000), *aff'd*., 2001 WL 40768 (2nd Cir. Jan. 16, 2001)(finding that the party seeking relief from summary judgment based on newly discovered evidence did not act with "due diligence" where "[t]he precise argument [the party sought] to answer was made during oral argument, and [the party] elected to stand pat for six months thereafter while the Court invested the time and effort required to decide the motion"); *see also* 11 Wright, Miller & Kane, Federal Practice & Procedure, Civil 2d § 2859 (West 1995) ("[Fed.R.Civ.P. 60(b)(2)] speaks of 'due diligence' and the moving party must show why he did not have the evidence at the time of the trial or in time to move under Rule 59(b).") Bressler's only explanation of why he did not discover the evidence earlier is that when Comerica sought discovery from him,

> [Bressler] did seek information to support his losses but was told by the casinos that this information was not available. . . . [Bressler] was misinformed because the casino does not keep

> records of the Sports Book losses but does keep records of it's gambling table losses.

("Motion For Relief From Order" at 1 ¶¶ 5-6.) Bressler fails to explain, however, why he could not have discovered the existence and availability of these records before the summary judgment hearing, or, even before the Court's March 11, 2005 summary judgment decision. The only thing that changed after entry of the March 11, 2005 Order is that Bressler apparently inquired further of the casinos. That inquiry could have and should have been made before the hearing on Comerica's motion for partial summary judgment, and long before the Court expended the time and effort necessary to reach a decision and issue a written opinion on the matter.

Finally, even if the casino letters met the requirement of being "newly discovered evidence" under Fed.R.Civ. P. 60(b)(2), they would not justify relief. The letters state on their face that they are incomplete estimates and are not "accurate." As really nothing more than speculation, the letters clearly are insufficient to justify setting aside the March 11, 2005 Order. "A Rule 60(b)[(2)] motion will be granted only if there is newly discovered evidence sufficient to justify setting aside the original judgment." *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 498 (8th Cir. 2001)(citation omitted).

For these reasons, Bressler's Fed.R.Civ.P. 60(b)(2) motion must be denied. The Court will enter an Order consistent with this opinion.

Date: May 19, 2005

/s/ Thomas J. Tucker
Thomas J. Tucker
United States Bankruptcy Judge

cc: Morris B. Lefkowitz
John P. Tragge

For Publication