IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:	In Proceedings Under Chapter 7
HEARTLAND FOOD AND DAIRY DISTRIBUTORS, INC.,	Case No.99-40832
Debtor(s).	
LAND-O-SUN DAIRIES, L.L.C.	
Plaintiff(s),	Adv. No.99-4122
v.	
HEARTLAND FOOD AND DAIRY DISTRIBUTORS, INC., WILLIAM E. CROSS, and TIM A. PRIBBLE,	
Defendant(s).	

OPINION

This case is before the Court on two related matters: (1) a motion for reconsideration filed by Land-O-Sun Dairies, L.L.C. (L.L.C. or plaintiff), asking the Court to reconsider its order of September 1, 2000, in which the Court dismissed L.L.C.'s complaint as barred by the doctrine of res Judicata, and (2) an affidavit of attorney Daniel Bradley submitted by L.L.C. following entry of the Court's order dismissing L.L.C.'s complaint. Upon review of the motion for reconsideration, the Court finds that, with one exception, it raises no issues not previously considered or ruled upon by the Court. As to all

issues previously determined, the Court stands by its decision of September 1, 2000.

A full recitation of the history of this case is set forth in this Court's opinion of September 1, 2000. For the sake of brevity, only facts pertinent to the newly raised matters will be outlined here.

In 1997, Land-O-Sun Dairies, Inc. (Inc.), a corporation separate from but related to L.L.C., filed suit against defendants Heartland Food and Dairy Distributors, Inc., William E. Cross and Tim A. Pribble in Illinois state court. On March 6, 1998, the presiding judge, Honorable Don Foster, entered an order in which he denied Inc.'s request to amend its complaint to substitute L.L.C. as plaintiff and dismissed Inc.'s complaint because Inc. lacked legal capacity to sue in Illinois. This order was never appealed.

On March 9, 1998, L.L.C. filed a new complaint against the defendants in state court that was virtually identical to the earlier dismissed complaint filed by Inc. The defendants responded to the new lawsuit on April 7, 1998, filing a motion to dismiss on grounds wholly unrelated to the res judicata effect of the March 6, 1998, order dismissing the first lawsuit.[1]

[1]In their motion to dismiss, the defendants argued: (1) although L.L.C. referred to itself as a corporation throughout the complaint, it lacked legal capacity to sue in Illinois

The plaintiff moved to amend the complaint on April 15, 1998, to correct the problems raised in the motion to dismiss. On April 17, 1998, Judge Foster ruled on both motions, granting and denying each in part, and allowing the plaintiff further time to amend the complaint to "cure the pleading insufficiencies" that remained.

After the plaintiff amended the complaint, the defendants, on October 16, 1998, filed a motion to dismiss the amended complaint raising, for the first time, the res judicata effect of the March 6, 1998, order dismissing the first lawsuit.[2] In an order filed on October 24, 1998, Judge Foster granted the motion and dismissed the amended complaint "[f]or the reasons stated in [d]efendants' [m]otion." However, at a hearing conducted on November 20, 1998, a different judge, Honorable Leo

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because, contrary to state law, its name contained no indicia of corporate status; (2) the allegations of the complaint, and exhibits attached to the complaint to prove the existence of a contract between the plaintiff and the defendants, reflected that L.L.C. was a stranger to the alleged contract; and (3) the plaintiff failed to state a cause of action for breach of contract.

[2]Although the bulk of the defendants' motion to dismiss centered on their res judicata argument, the defendants also argued that the complaint failed to state a cause of action for breach of contract; that it failed to allege sufficient facts to show that L.L.C., rather than Inc., was the true party to the alleged contract; and that, as to two counts, it failed to allege facts to support personal liability on the part of Cross and Pribble.

Desmond, vacated the order of dismissal as having been entered in error. Judge Desmond then proceeded to deny defendants' motion to dismiss and, in a written order entered on December 1, 1998, set forth his determination that there had been no prior adjudication on the merits and that the complaint stated a cause of action.

The second lawsuit was subsequently removed to this Court. At the time of removal, a motion by the defendants for reconsideration of Judge Desmond's order was pending. In opposing the defendants' motion in this Court, the plaintiff contended that Judge Foster's dismissal of the first lawsuit was qualified by his statement that L.L.C. should file a new complaint in its own name. There was, however, no support for L.L.C.'s contention in the record. Accordingly, the Court scheduled an evidentiary hearing to consider the defendants' motion and, at that time, specifically directed the parties to provide the Court with transcripts of any state court hearings bearing upon (1) the March 6, 1998, dismissal order and (2) "the judge's statement that [L.L.C.] could proceed with filing a lawsuit on its own behalf." (Order and Notice, June 23, 2000, at 2.)

At the evidentiary hearing conducted July 12, 2000, plaintiff's counsel advised the Court that no transcripts

existed of the state court hearings. Counsel stated that although he did not represent plaintiff in the first lawsuit and was not present at the hearing on March 6, 1998, he had contacted plaintiff's former counsel but was unable to obtain any transcripts. Accordingly, counsel declared, 'what you have is what you get as far as the pleadings and orders of the [state] court [are concerned]." Following counsel's assertion, in further argument, that the judge at the March 6, 1998, hearing told plaintiff to "just refile your lawsuit," this Court specifically admonished counsel that it didn't "have anything in the record to indicate that's what the state court judge said at all."[3] Plaintiff's counsel had no response to the Court's statement and did not at that time or at any time after the hearing on July 12, 2000, seek leave of Court to present alternative means of proof concerning Judge Foster's purported statement at the March 6, 1998, hearing.

On September 1, 2000, the Court entered its order granting defendants' motion for reconsideration and dismissing L.L.C.'s complaint on res judicata grounds. In its accompanying opinion, the Court noted that it "might have ruled differently" had

[3]By contrast, defendants' counsel, who was present at the March 6, 1998, hearing, told the Court that she did not recall Judge Foster "advising [the plaintiff] how to correct [its] problem."

counsel for L.L.C. “present[ed] evidence of the state court judge's alleged statement [at the March 6, 1998, hearing] that L.L.C. could file a new complaint following dismissal of the complaint filed by Inc.” Land-O-Sun Dairies, L.L.C. v. Heartland Food and Dairy Distrib., Inc., Adv. No. 99-4122, slip op. at 14 (Bankr. S.D. Ill. September 1, 2000).

Plaintiff then filed the present motion for reconsideration, arguing, for the first time, that Judge Foster's April 17, 1998, order allowing L.L.C. to amend its complaint proved that he did not intend his earlier order of March 6, 1998, to be an adjudication on the merits. Plaintiff's motion prompted this Court, on September 13, 2000, to request a copy of a particular state court order referred to in the court's minutes of the second lawsuit. On September 20, 2000, plaintiff submitted a copy of the pertinent order.[4] In addition, without seeking or obtaining leave of court, plaintiff attached to its response the affidavit of attorney Daniel Bradley, who represented plaintiff in the first lawsuit and was present at the March 6, 1998, hearing. Mr. Bradley's affidavit was offered to prove that Judge Foster had orally qualified his March 6, 1998, dismissal order.

The Court turns initially to the propriety of raising new

[4]This order, entered by Judge Desmond on December 1, 1998, was part of the record already. The Court requested a copy to clarify certain minutes of court in the state court lawsuit.

arguments and introducing evidence for the first time in a motion for reconsideration.[5] Rule 59(e) of the Federal Rules of Civil Procedure governs motions for reconsideration. In applying this rule, courts have consistently limited the scope of matters to be addressed on reconsideration, allowing such motions only to correct manifest errors of law or fact and to consider newly discovered evidence. See Moro v. Shell Oil Co., 91 F. 3d 872, 876 (7th Cir. 1996); King v. Cooke, 26 F. 3d 720, 726 (7th Cir. 1994), cert. denied, 514 U.S. 1023 (1995). This limitation is designed to ensure finality and to prevent the practice of a losing party examining a decision and then "plugging the gaps" of an adverse ruling with additional evidence. Nakano v. Jamie Sadock, Inc., No. 98 Civ. 515, 2000 WL 1010825 at *1 (S.D.N.Y. July 20, 2000); see Navarro v. Fuji Heavy Industries, Ltd., 117 F.3d 1027, 1032 (7th Cir. 1997), cert. denied, 522 U.S. 1015 (1997). Thus, a litigant may not use a motion for reconsideration to advance new arguments or introduce evidence that could have been presented to the court prior to judgment. Moro v. Shell Oil Co., 91 F. 3d at 876.

Contrary to the policies governing Rule 59(e) motions,

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[5]Rule 59(e), setting forth the time for filing a motion "to alter or amend judgment," is made applicable to bankruptcy proceedings by Rule 9023 of the Federal Rules of Bankruptcy Procedure. See Fed. R. Civ. P. 59(e); Fed. R. Bankr. P. 9023.

plaintiff here asks the Court to reconsider its decision based on a new argument concerning Judge Foster's April 1998 order, as well as an affidavit offered to prove that Judge Foster orally qualified his March 1998 order dismissing the first lawsuit. Both plaintiff's argument and its proffered evidence could have been presented prior to the Court's ruling on September 1, 2000.

Regarding the affidavit, plaintiff was on notice before the evidentiary hearing on July 12, 2000, that the Court wanted proof of Judge Foster's alleged oral qualification of the March 6, 1998, dismissal order. The Court's concern with the absence of proof on this matter was reiterated during the hearing itself. Yet no evidence was offered on this point, either at the hearing on July 12, 2000, or during the nearly two-month interval before the Court ruled on September 1, 2000.

Considering the numerous opportunities plaintiff had prior to the Court's ruling to substantiate its allegation concerning Judge Foster's dismissal of the first suit, the Court finds that the affidavit of former counsel submitted well after the Court's decision comes too late. Plaintiff has provided no explanation for its failure to present such affidavit earlier, and no reason is apparent given counsel's statement at the July 12, 2000, hearing that he had been in contact with plaintiff's former counsel in an effort to obtain transcripts of the March 6, 1998,

hearing. After this Court, at the July hearing, emphasized the lack of any evidence concerning the March 6, 1998, hearing, plaintiff's counsel neither sought an extension of time to obtain such evidence nor sought leave of court to present alternative means of proof. Instead, plaintiff waited until after the Court's adverse ruling on September 1, 2000, to attempt to provide the needed evidence.[6]

This is not an instance of evidence that was newly discovered following entry of judgment, but rather an attempt to get "two bites at the apple." Navarro v. Fuji Heavy Industries, 117 F. 3d at 1032; see Moro v. Shell Oil Co., 91 F. 3d at 876. Indeed, if courts were required, on a motion for reconsideration, to consider evidence "newly presented but not newly discovered," there would be two rounds of evidence in many cases. Navarro at 1032. In this case, it is evident that the policies of finality of judgment and the need to bring litigation to an end, which underlie the limitation on motions for reconsideration, justify the Court's refusal to consider the affidavit of Daniel Bradley at this time. Accordingly, the Court

[6]Although the affidavit of Daniel Bradley was submitted along with plaintiff's response to the Court's order of September 13, 2000, the affidavit was in no way responsive to the Court's order.

will strike the affidavit as being beyond the scope of a motion for reconsideration and will not consider it in ruling on the plaintiff's motion.[7]

The Court notes in passing that, even if it were to consider the affidavit submitted by plaintiff, the affidavit would be inadequate as evidence of Judge Foster's alleged qualification of the March 6, 1998, dismissal order. Many of the statements of attorney Bradley contained in the affidavit are conclusory and merely set forth Mr. Bradley's "understanding" and "belief" of what Judge Foster intended. Plaintiff would have been better served if counsel had sought to recreate a record pursuant to the accepted methods for providing a statement of proceedings when a transcript is unavailable.[8] In any event, in the absence

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[7]The Court likewise will not consider the affidavit of defendants' counsel, Pamela Lacey, which was filed on September 27, 2000, to counter the allegations made in the affidavit of Daniel Bradley concerning the March 6, 1998, hearing.

[8]According to the rules governing appellate procedure in federal courts, when the transcript of a hearing is unavailable, the appellant should prepare a statement of the proceedings by the best available means, including recollection, and then serve the statement on the appellee, who may object or propose amendments. The statement and any objections or amendments must then be presented to the trial court for settlement and approval. See Fed. R. App. Proc. 10(c). "[A] mere recital of what happened at an unrecorded proceeding, even if in the form of an affidavit, is not a substitute for a [Rule] 10 (c) determination." Barilaro v. Consol. Rail Corp., 876 F.2d 260, 263 (1st Cir. 1989).

of timely and adequate evidence, the Court finds no basis upon which to determine that Judge Foster orally qualified his March 6, 1998, dismissal order.

In its motion for reconsideration, plaintiff additionally asserts, for the first time, that Judge Foster's April 17, 1998, order allowing L.L.C. to amend its complaint showed that he did not intend his March 6, 1998, order dismissing plaintiff's case to be an adjudication on the merits. According to plaintiff's newly advanced argument, had Judge Foster intended the March 6, 1998, dismissal order to operate in this fashion, he would not have entered the April 17, 1998, order that allowed the plaintiff to proceed with the second lawsuit by amending the complaint. As in the case of the affidavit, plaintiff offers no explanation why this argument was not presented prior to the Court's ruling on September 1, 2000. All of the facts underlying the argument were of record earlier, and plaintiff could and should have raised this point in a timely fashion. To consider plaintiff's contention now would be to allow the plaintiff a second round of argument.

Even if the Court were to consider the merits of plaintiff's argument regarding the April 17, 1998, order, plaintiff does not prevail. The crux of plaintiff's argument is that the Court should examine events that transpired after entry of the March

6, 1998, dismissal to divine Judge Foster's intent at the time that he entered the order. However, Rule 273 of the Illinois Supreme Court does not permit such an inquiry. It states:

> Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits.

Ill. Sup. Ct. R. 273, Ill. Comp. Stat. Ann. (West 1993) (emphasis added). While this Court was willing, prior to judgment, to permit the plaintiff to introduce proof that Judge Foster had qualified the March 6, 1998, order through contemporaneous, oral statements, it is not prepared to engage in a highly conjectural postmortem.

Indeed, the type of analysis that plaintiff suggests does not advance its position. Res judicata is an affirmative defense that, if not raised, is waived. See, e.g., Village of Maywood Bd. of Fire and Police Comm'rs v. Dep't of Human Rights, 69S N.E. 2d 873, 879 (Ill. App. Ct.), appeal denied, 705 N.E. 2d 451 (Ill. 1998); American Nat'l Bank & Trust Co. of Chicago v. Village of Libertyville,645 N.E. 2d 1013,1016 (Ill. App. Ct.), appeal denied, 652 N.E. 2d 338 (Ill. 1995). At the time Judge Foster

entered the April 17, 1998, order, the defendants had not yet asserted the defense. It is doubtful that Judge Foster, when presented with the second lawsuit, would have raised sua sponte the res judicata effect of the earlier dismissal. In addition, when the defendants did assert the defense, following the plaintiff's amendment of the complaint, Judge Foster entered the order of October 24, 1998, dismissing the complaint based, at least in part, on the application of the res judicata doctrine. Although the October 24, 1998, order was vacated subsequently by Judge Desmond, it offers stronger proof than the coountervailing April 17, 1998, order that Judge Foster intended the March 6, 1998, dismissal to be an adjudication on the merits.

Accordingly, for the reasons stated, the Court finds that the plaintiff's motion for reconsideration should be denied.

SEE WRITTEN ORDER.

ENTERED: NOVEMBER 7, 2000

/s/ KENNETH J. MEYERS
UNITED STATES BANKRUPTCY JUDGE