UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

NEW LONDON TOBACCO MARKET, INC. and FIVEMILE ENERGY, LLC,	)	
Plaintiffs,	)	
	)	**Docket No. 6:12-cv-0091-GFVT**
v.	)	
KENTUCKY FUEL CORPORATION and JAMES C. JUSTICE COMPANIES, INC.	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO ALTER OR AMEND OR RECONSIDER

This Memorandum is submitted by the Plaintiffs to respond to Defendants' Motion to Alter or Amend or Reconsider this Court's 2019 Memorandum Opinion and Order [D.E. 445] (the "Motion").

I. PRELIMINARY STATEMENT

This at least the *fifth* motion to alter or amend or reconsider filed by these Defendants. *See* D. E. 212 (Motion to Alter or Amend [re: order granting default]); D.E. 232 (Motion to Alter or Amend/Motion for Interlocutory Appeal [re: punitive damages]); D.E. 304 (Motion to Set Aside Default); D.E. 441 (Motion to Reconsider, or, in the Alternative, for an Extension of Time [re: order striking defendants' objections]); D.E. 447 (Motion to Alter or Amend or to Reconsider September 2019 Memorandum Opinion and Order). This Motion is no more valid than its four predecessors. It does not meet the standard required for motions under Rule 59 or 60 and does not even attempt to show that it does. The Plaintiffs therefore will not engage in an

extended discussion of the substantive issues. They will, however, include a brief discussion to show that the motion is not only substantively deficient but that it is, in fact, utterly frivolous.

II. DISCUSSION

A. The Proper Legal Standard

An appreciation for the strict legal standards for motions under Rules 59 and 60 – which the Defendants do not discuss – is important because those standards illustrate the inadequacies of Defendants' Motion.

1. The Rule 59 Standard

As this Court has held, "Motions to alter or amend a judgment will be granted only when there 'is a clear error of law, newly discovered evidence, an intervening change in controlling law or to prevent manifest injustice'." *Taylor v. Univ. of the Cumberlands*, No. 6:16-cv-109-GFVT, 2018 U.S. Dist. LEXIS 186911, at *5 (E.D. Ky. Oct. 31, 2018) (citing *GenCorp. Inc. v. American Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999)). Although the defendants pay lip service to these bare elements, they ignore how stringent they are in practice and eschew any attempt to apply them to their arguments. Courts have said that "Amending or altering a final judgment is an 'extraordinary' measure and motions requesting such amendment are 'sparingly granted.'" *Id.* (*citing Marshall v. Johnson*, No. 3:07-cv-171-H, 2007 U.S. Dist. LEXIS 29881, at *2 (W.D. Ky. April 19, 2007); *see also Paul T. v. Fifth Third Mtg. Co.*, 388 B.R. 795, 805 (B.A.P. 6th Cir. 2008) (relief under Rule 59 is an "extraordinary remedy and should be granted sparingly because of the interests in finality and conservation of scarce judicial resources.").

To show a clear error of law under Rule 59, the moving party must demonstrate, not just that errors were made, but that these errors were so egregious that an appellate court could not affirm the district court's judgment. *United States v. Shelton*, No. 5:16-003-DCR, 2018 U.S.

Dist. LEXIS 217348, at *2 (E.D. Ky. Dec. 28, 2018) (internal citation omitted). A showing of manifest injustice is equally stringent. Although no general definition of manifest injustice has been developed for purposes of Rule 59(e), this Court has noted that, "What is clear from case law, and from a natural reading of the term itself, is that a showing of manifest injustice requires that there exist a fundamental flaw in the court's decision that without correction would lead to a result that is both inequitable and not in line with applicable policy." *Hazelrigg v. State*, No. 5:13-cv-148-JMH, 2013 U.S. Dist. LEXIS 96843, at *3 (E.D. Ky. July 11, 2013) (internal citation omitted).

In addition to those general principles, there are two related limits on Rule 59 motions that are especially relevant here. First, as this Court has held, (1) "Rearguing the merits of a petitioner's claims is not an appropriate use of a motion to alter or amend." *Taylor*, 2018 U.S. Dist. LEXIS 186911, at *5-6. Second, the Defendants "may not raise arguments under Rule 59(e) that they failed to raise prior to the district court's order." *Id.*; *accord Hazelrigg*, 2013 U.S. Dist. LEXIS 96843, at *2 ("A party may not use a Rule 59(e) motion as a vehicle either to re-hash old arguments or to advance positions that he or she could have argued earlier but did not."); *Adkins v. Kroger Ltd. P'ship I*, No. 5:18-156-DCR, 2018 U.S. Dist. LEXIS 211631, at *7 (E.D. Ky. Dec 17, 2018) ("…a motion for reconsideration cannot be used to raise legal arguments that could have been raised before the Court issued its decision.").

2. The Rule 60 Standard – Federal Rule of Civil Procedure 60(b) sets forth the grounds for relief from a final judgment, order or proceeding:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

The Defendants have not attempted to show how any part of Rule 60 applies to the facts of this case. Indeed, they have not even stated which sub-part they rely upon. The Motion should be denied for those reasons alone. However, the case law is clear that "Rule 60(b)(1) is intended to allow ***clear*** errors to be corrected without the cost and delay of an appeal." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 490 (6th Cir. 2000) (emphasis added). In addition, "Rule 60 was not intended to relieve counsel of the consequences of decisions deliberately made, although subsequent events reveal that such decisions were unwise." *Id.* at 491. As we shall show below, that precept governs much of the present Motion.

In addition, like Rule 59, "Rule 60(b) does not allow a defeated litigant a second chance to convince the court to rule in his or her favor by presenting new explanations, legal theories, or proof." *Millhouse v. Jones*, No. 18-125-DLB, 2018 U.S. Dist. LEXIS 130347, at *10 (E.D. Ky. Aug. 2, 2018) (*citing Jinks v. Allied Signal, Inc.*, 250 F. 3d 381, 385 (6th Cir. 2001)). As discussed below, those principles also doom the arguments in the present Motion.

B. The Defendants' Motion Fails to Meet the Applicable Legal Standard.

The above legal standards clearly bar the Defendants' Motion without the need to wade into the merits of each argument once again. The rule that motions to alter or amend cannot be used simply to re-argue issues previously argued precludes any consideration of Defendants' arguments that the judgment for unpaid retainer fees, lost tonnage royalties and its argument that punitive damages should not be awarded. The Defendants' present argument about unpaid

retainer fees and lost tonnage royalties and much of their argument about punitive damages are virtually identical to arguments that they made before the Magistrate Judge and in their Objections to his Report and Recommendation.

In addition, the principle that motions to alter or amend cannot be used to raise new arguments that the Defendants could have raised earlier bars Defendants' remaining claims. Their due process claims were not raised before the Magistrate Judge and were not argued in their Objections to his Report and Recommendation. In addition, the Defendants' contention that a 1:1 ratio of punitive to compensatory damages is excessive is a new argument that they never raised previously. Those arguments therefore are also barred.

Finally, Defendants' discussion of the "Legal Standard" in their supporting Memorandum shows that their arguments do not comply with the requirements of Rule 59. In the concluding sentence of their "Legal Standard" they say: "In this case, the aspect of the Opinion and Order discussed *infra* were based upon certain errors of fact and law and is therefore appropriate for review and reconsideration." D.E. 447-1 at 3. The error in that statement is shown by the only case that Defendants cite in support of the legal standard, *Curry v. Eaton Corp.*, Nos. 08-5973 and 08-6369, 400 Fed. Appx. 51, 2010 U.S. App. LEXIS 19704 (6th Cir. 2010). As *Curry* states, Rule 59 is not intended to correct "errors of law," but only "a ***clear*** error of law." 2010 U.S. App. LEXIS 19704, at **58-59 (emphasis added) (internal citation and quotation marks omitted). Similarly, the "errors of fact" for which the Defendants now argue are insufficient to trigger Rule 59 relief. *Curry* makes clear that the standard is not "errors of fact" but only factual review based upon "newly discovered evidence." The Defendants have not shown or even alleged this.

C. The Defendants' Due Process Claim Is Substantively Frivolous.

In addition to not having been raised previously, Defendants due process claims are beyond frivolous. They begin by reciting certain "boilerplate" statements about due process, none of which has any remote application to this case. Their first proposition illustrates the frivolous character of their motion: They claim that they did not have an "opportunity to be heard." D.E. 447-1 at 5. At the risk of stating the obvious, these Defendants were given a three-day damages hearing, preceded by pre-hearing briefing and other procedural protections, which was followed by extensive post-hearing briefing. They then filed Objections to the Magistrate Judge's Report and Recommendation. Those Objections were carefully considered by this Court, as evidenced by the fact that this Court modified some of the recommendations by the Magistrate Judge. Now, these same Defendants complain that the Court has violated their Constitutional rights because "[t]he fundamental requirement of due process is the opportunity to be heard." *Id.* at 3.

Defendants' due process arguments then deteriorate into a series of *ad hoc* complaints that can generally be categorized as (i) attempts to re-litigate the award of default judgment (which they have done so many times previously that we have lost count), (ii) complaints about the results of deliberate tactical decisions that they made while litigating this case.

Thus, they argue that default judgment is too harsh a remedy and that the imposition of default judgment is somehow a due process violation. They cite no cases that support this argument. They claim that there was no bad faith in Mr. Justice's failure to appear for his deposition [D.E. 447-1 at 4], even though the Court has previously concluded that there was. *See* D.E. 206 at 18. They argue that a default judgment for discovery misconduct is not appropriate unless it "is due to willfulness, bad faith or fault." D.E. 447-1 at 4-5. Yet, they omit the key fact

that this Court has found precisely that: "The record amply supports a finding of bad faith and contumacious conduct for many reasons." D.E. 189 at 16. They conclude the first portion of this argument by claiming that "the entry of default judgment was an unnecessarily harsh response to Defendants' actions and omissions." D.E. 447-1 at 5. How many times do we have to re-litigate the issue of default judgment before these Defendants recognize that it is the law of this case?

The Defendants then turn to complaints about the result of deliberate tactical choices they made during the litigation of this case. Thus, they argue that they were denied procedural due process because they were not able to cross examine the Independent Arbiter, Mr. Conway. *Id.* at 6. They again omit a key fact: They had ample opportunity to depose Mr. Conway before the discovery cut-off and they deliberately chose not to do so. They never even requested his deposition. Had they deposed Mr. Conway, after his death they could have then used his deposition at the hearing. As both the Plaintiffs and the Court have pointed out previously, these Defendants will never acknowledge that their problems are their own fault, the result of their own deliberate tactical decisions. D.E. 345 at 6-7 ("The record indicates Defendants simply chose not to make any timely expert disclosures. In a telling argument, they now claim no experts were needed to respond to the disclosures then in-hand from Plaintiffs. . . . That is precisely the type of strategic decision in discovery that has consequences.").

Similarly, the Defendants' contend that the court also denied them their Constitutional procedural due process rights because the Magistrate Judge admitted the Independent Arbiter's Report into evidence and then considered that evidence. D.E. 447-1 at 6. Once more the Defendants omit a key fact (there is a pattern here): They do not tell the Court that they agreed to the admissibility of the Report. The Scheduling Order required the parties to file objections to

exhibits by November 27, 2018 (pursuant to that Order, the parties had previously exchanged proposed exhibits). D.E. 373 at 1. The Independent Arbiter's Report was designated as Px. 1B. D. E. 390. ***The Defendants did not object to this exhibit.*** The only objections to exhibits they made were to Px. 13-15, which were exhibits pertaining to the New Lead transaction. *See* D.E. 399. At the beginning of the hearing the Defendants even had another chance to object. After the hearing began, the Magistrate Judge directed counsel for the parties to designate on the record which exhibits were unopposed and which were the subject of objections. During this process, the Defendants never objected to the admissibility of the Report. *See* D.E. 423 at 42. Now, these same Defendants claim that the Court's consideration of an exhibit, which they agreed should be admitted into evidence, has somehow become a violation of the Constitution of the United States. We are at a loss for words to describe how improper this is.[1]

D. There is No Basis for Reconsideration of the Damages Awarded.

1. There is no basis for reconsidering the award for unpaid retainer fees.

Defendants' argument about the award for unpaid retainer fees does not even attempt to fit it under any of the considerations of either Rule 59 or 60. Indeed, Defendants tacitly acknowledge that they are just re-arguing their Objections to the Report and Recommendation: "Defendants respectfully submit that the law cited by them in response to the Report and Recommendation amply demonstrates that the obligation to pay retainer fees ceased at least as early as the filing of the original Complaint in this matter . . . ." D. E. 447-1 at 7. That statement shows on its face that this is an improper Motion. The Defendants then proceed to re-argue the

[1] These arguments by Defendants are so extreme, so unsupported factually and legally, that the Plaintiffs should not have to be spending money to respond to them. For that reason, the Plaintiffs have served a Rule 11 motion on Defendants' counsel, which they will file if the Defendants do not withdraw the present Motion.

points previously considered and rejected by the Magistrate Judge and this Court. For that reason, the Plaintiffs are loath to re-hash the same arguments for the umpteenth time. We therefore refer the Court to D.E. 396 at 4-5, D.E. 428 at 11-13, and D.E. 433 at 18. In a nutshell, (i) The continuing liability for retainer fees is established by the allegations in the Amended Complaint and the default judgment in this case. D.E. 437 at 8. (ii) The consideration for the Defendants' promise to pay monthly retainer fees in the Fourth Amendment was "previously performed services" as well as "anticipated future services." Px. 1A, ¶ 9 at p. 6. Defendants' arguments that Mr. Brownlow did not perform any services after this suit was filed, although false, is immaterial, because pursuant to ¶ 9 of the Fourth Amendment he was entitled to the monthly retainer fees until Kentucky Fuel terminated that provision, which it never did. (iii) The Fourth Amendment specifies how Kentucky Fuel can terminate its obligation to pay monthly retainer payments – all it had to do was give 30 days prior written notice and Kentucky Fuel never did that. (iv) Notwithstanding the Defendants' representations, Mr. Brownlow did not breach the retainer agreement by refusing to do any work for Defendants after this suit was filed.[2] *See* D.E. 428 at 11-12 and D.E. 433 at 16. The fact that every entry on his log of contacts (Px. 10) did not pertain to such services or that no services were required or requested in some months, is immaterial.

2. There is no basis for reconsidering the award for lost tonnage royalties.

The Defendants devote seven pages to re-arguing their position about the Independent Arbiter's award. Their argument are just a re-hash of their prior arguments and therefore inappropriate for a motion to alter or amend. Plaintiffs therefore will eschew a substantive

[2] The Defendants' seek to ignore this evidence, claiming that "the contract language and the evidence are of no real relevance in light of the case law." D.E. 447-1 at 8.

discussion of this issue, which would add unduly and unnecessarily to the length of this Memorandum. Instead, Plaintiffs will confine their response to the following brief points:

- Defendants fail to mention the evidence and arguments contrary to their position. Plaintiffs therefore incorporate by reference the arguments in their Post-Hearing Memorandum, D.E. 428 at 26-36. Two short examples follow.
  - The Magistrate Judge correctly found that language in prior drafts of the Fourth Amendment that was omitted was weighed against their arguments about the intent of the covenant to mine. D.E. 437 at 18-19.
  - The Magistrate Judge properly noted that the Defendants had previously represented that Fivemile was a good mining opportunity and that the Defendants had even sought dismissal of the damages claim based on their argument that current mining operations on the Fivemile Properties would fully compensate Plaintiffs. *Id.* at 24.
- Defendants ignore the carefully reasoned opinion of Magistrate Judge Ingram on this issue in his Report and Recommendation, D.E. 437 at 14-23 and D.E. 445 at 9-11.
- Defendants ignore the fact that this issue involved factual disputes and that the Magistrate Judge's factual findings are simply not to their liking.

3. There is no basis for reconsidering the punitive damages award.

Like all their other arguments, Defendants' arguments about punitive damages do not address how they relate either to Rule 59 or Rule 60. The Defendants' supporting Memorandum shows that these arguments are just another effort to set aside the default judgment. This Court first held that punitive damages would be awarded on September 30, 2014. D.E. 206 at 19-20. The Court and Magistrate Judge have previously rebuffed numerous efforts by the Defendants to persuade them to reverse that ruling. Undeterred, the Defendants are now trying the same thing again, pleading that the "punitive damages should be reduced, ***if not eliminated***." D.E. 447-1 at 17 (emphasis added). The Defendants also argue that the 1:1 ratio is too high and that a 1:10 ratio should be substituted. *Id.* at 18. They offer no support for this argument except their own *ipse dixit* opinion. *Id.* at 18. The factors that they say should be considered (at D.E. 447-1 at 17) have previously been analyzed in detail by the Court. *See* D.E. 437 at 51 and D.E. 445 at 15. The Defendants also argue that the default judgment itself was punitive and that punitive

damages therefore should be imposed at a lesser ratio. D.E. 447-1 at 16. They cite no authority for that proposition.

This the first time the Defendants have ever suggested a different ratio or amount as an appropriate punitive damages award. In their Objections to the Report & Recommendation [D.E. 439] the Defendants did not object to the 1:1 ratio; nor did they suggest any alternative amount (other than $0). Rather, they argued that it was wrong to award ***any*** punitive damages because they were "unwarranted." *Id*. at 32-36.

One final matter merits mention: The Defendants again attempt to re-litigate the facts supporting the default judgment with the false argument that Mr. Justice's failure to appear for his deposition was "inadvertent" and that it really was the fault of Plaintiff's counsel who unreasonably refused to accommodate his schedule, "went silent" and "refus[ed] to cooperate" before "pouncing." D.E. 447-1 at 2, 16.

Mr. Justice tried this same tactic at the trial and cross-examination quickly revealed it for the false testimony that it was. Mr. Justice gave his sworn testimony based upon hearsay and without knowing the facts. He testified that his non-appearance was caused by Plaintiffs' counsel, Mr. Lucas, because he allegedly was not "professional," did not extend routine courtesies when he supposedly failed to respond to Mr. Dudley's request to postpone his deposition and "refused to even communicate." D.E. 424 at 61, 65-66; 96-98. On cross-examination Mr. Justice tried to claim "personal knowledge" of all this, but was forced to admit that it was all based on what he says his former counsel, Mr. Dudley supposedly told him. *Id.* at 96. (He also attempted to blame the absent Mr. Dudley.) Mr. Justice admitted that he had not seen any of the letters and emails that Mr. Lucas sent to Mr. Dudley concerning the deposition. *Id.* at 98-100; 108-09. He was not aware that Mr. Lucas had offered to take the depositions in

Roanoke, Virginia, where the Defendants' offices are located. *Id.* at 100; D. E. 150-1, ¶ 2 and Ex. 1 thereto. He was not aware that the Defendants did not respond to that offer. D.E. 424 at 100-02. He was not aware that Mr. Lucas agreed to postpone all the depositions by one day, to accommodate their schedule. *Id.* at 107-09. He had never seen Mr. Lucas' letter of November 4, 2013, confirming that agreement to depose Mr. Justice on November 7, instead of November 6. D. E. 424 at 108-09, 112; D.E. 150-1, ¶ 4 and Ex. 4 thereto. Mr. Justice was not aware that Mr. Lucas was not told that he would not appear until after 6:00 p.m. the day before his deposition was to begin. D.E. 424 at 109. He was not aware that no one told Mr. Lucas why he was not appearing. *Id.* at 109-10. *See also* D.E. 428 at 19-22. These Defendants just make it up.

III. CONCLUSION

For the reasons stated above the Court should deny Defendants' Motion.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt on this 30th day of October, 2019.

/s/ John A. Lucas