IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL J. QUILLING, Receiver for ABC VIATICALS, INC., and Related Entities	§ §	
	§	
Plaintiff,	§	
	§	
v.	§	No. 3:07-CV-1153-P
	§	
ERWIN & JOHNSON, LLP, and CHRISTOPHER R. ERWIN,	§ §	
	§	
Defendants.	§	

ORDER

Now before the Court is Defendants' Motion for Reconsideration of February 25, 2008 Order, filed March 10, 2008. Plaintiff filed his Response on March 31, 2008. Defendant then filed its Reply on April 15, 2008. After reviewing Defendant's Motion, the evidence, and the applicable law, the Court GRANTS in PART and DENIES in PART Defendant's Motion for Reconsideration.

I. Background and Procedural History

Defendants filed his Rule 12(b)(1), 12(b)(6), and 9(b) Motions to Dismiss on September 24, 2007. This Court issued an Order on February 25, 2008 denying in part and granting in part Defendants' Motions. Specifically, the Court dismissed Plaintiff's claims for breach of contract against Defendant Erwin and aiding and abetting breach of fiduciary duty claim against both Defendants. (Doc. No. 21.) Further, the Court denied Plaintiff's request for leave to amend. (*Id.*)

Defendant now moves the Court to reconsider this holding based on its arguments that:

(1) the decisional framework for a factual attack on standing required Plaintiff to prove both a particularized injury and a causal link by a preponderance of the evidence; (2) at no time did Erwin & Johnson, LLP ("E&J") or Erwin act as ABC Viatical, Inc.'s ("ABC") legal counsel; (3) the law of California, not Texas, should apply the claims at issue in this case; (4) trusts are not susceptible to harm independent from the harm to investors and thus, are not severable from the investors; (5) Erwin in his capacity as partner of E & J is protected from liability under California limited liability partnership statutes; and (6) with respect to Plaintiff's aiding and abetting corporate waste claim, since the money allegedly wasted belonged to the investors and not ABC, ABC has no claim for damage to the corporation. (Pl.'s Mot. at 2-4.) Plaintiff contests all of Defendants' arguments. The Court will address Defendants' arguments in turn.

II. Legal Standard

A court "'has the inherent power to modify, vacate, or set aside interlocutory orders when the interests of justice require and will often accept such motions in the interest of substantial justice.'" *Group Dealer Serv., Inc. v. Southwestern Bell Mobile Sys.*, 2001 WL 1910565, *3 (W.D. Tex. Sept. 19, 2001) (citing Fed. R. Civ. P. 54(b) and *Baustian v. Louisiana*, 929 F. Supp. 980, 981 (E.D. La. 1996) (noting that courts often accept motions for reconsideration of judgments "as being in the interest of substantial justice"). Motions for reconsideration have a narrow purpose and are only appropriate to allow a party to correct manifest errors of law or fact or to present newly discovered evidence. *Texas Instruments, Inc. v. Hyundai Elecs. Indus. Co.*, 50 F. Supp. 2d 619, 621 (E.D. Tex. 1999) (citations omitted). Reconsideration has been permitted in cases where new evidence was discovered or where there was a change in the law.

See Acme Printing Ink Co. v. Menard, Inc., 891 F. Supp. 1289, 1295 (E.D. Wis. 1995) (granting reconsideration where case had remained pending before court for several years, and in the interim, new evidence was discovered and case law changed); *Summer Del Caribe, Inc.*, 821 F. Supp. at 574, 578 (granting reconsideration where the court's ruling on an issue was inconsistent with decisions of other courts addressing same issue as well as with Congressional intent); *Gridley v. Cleveland Pneumatic Co.*, 127 F.R.D. 102, 103-104 (M.D. Pa. 1989) (granting reconsideration on basis of newly discovered evidence). A ruling should only be reconsidered where the moving party presents substantial reasons for requesting reconsideration. *Baustian*, 929 F. Supp. at 981; *Louisiana v. Sprint Communications Co.*, 899 F. Supp. 282, 284 (M.D. La. 1995).

III. Discussion

A. Attorney-client or trustee/escrow agent

Defendant asks the Court to reconsider its February 25, 2008 Order and clarify that the relationship between E & J and ABC was strictly that of a trustee/escrow agent and a grantor, and not that of attorney-client. (Mot. at 7.) In his Response, Plaintiff argues that Defendants' argument is an exercise in semantics and that the outcome of the Court's Order does not change even if Defendants were strictly construed as escrow agents as opposed to legal counsel. The Court agrees that it erroneously characterized Defendants' relationship with ABC as attoreny-client. Instead, the pleadings establish that the relationship was that of escrow agent/trustee and grantor. However, Plaintiff is correct that this does not change the outcome of the Court's previous order.

The Court referred to the relationship between ABC and Defendants as that of attorney-client in its February 25, 2008 Order. The first time the Court referred to the relationship, the Court was considering Plaintiff's standing to bring a claim for breach of fiduciary duty against Defendants. The Court relied on the relationship between ABC and Defendants to determine that Erwin had a fiduciary duty towards ABC and the investor trusts, and thus, concluded that Plaintiff has standing to sue Defendant Erwin. In the capacity of Defendants as trustees/escrow agents, that result still does not change. Thus, the outcome of the February 25, 2008 Order on Plaintiff's breach of fiduciary duty claim remains the same.

B. California law applies to all claims

Defendants asks the Court to reconsider its Order and rule that California law governs all the claims in this suit. Plaintiff argues that Defendants' choice of law argument is not ripe for reconsideration because neither party has briefed the issue with enough specificity to satisfy Local Civil Rule 7.1(d) and thus, the Court does not need to make a final determination at this point. (Resp. at 4.) The Court disagrees with Plaintiff.

Plaintiff had his opportunity to contest Defendants' briefing in their Motion for Reconsideration and chose not to contest the briefing. In addition, the application of a particular state's law necessarily bears on the proper analysis of Plaintiff's claims. In this case, the parties agreed to the application of California law in the trust and escrow agreements. (Defs.' Rule 12(b)(1) Mot., Ex. A and B.) Thus, the Court concludes that California substantive law governs the claims asserted by Plaintiff and GRANTS Defendants' Motion for Reconsideration with respect this issue.

However, even if the Court is to apply California law to the only claim in which the Court applied Texas law, the breach of fiduciary duty claim, the Court's conclusion that the claim should not be dismissed does not change. For that reason, the Court does not find it necessary to modify the Order on this issue.

C. Defendants' lack of standing argument

Defendants argue that Plaintiff was required to submit evidence in support of the assertions in the Complaint in order to survive a 12(b)(1) motion to dismiss for lack of standing and the standard the Court should have applied was preponderance of the evidence. (Mot. at 6.) The Court agrees with Defendants' construction of the law. A district court may decide a rule 12(b)(1) motion to dismiss "on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996) (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). The Fifth Circuit distinguishes between a "facial" attack and a "factual" attack upon a complaint under Rule 12(b)(1). *See Patterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). If a defendant files a 12(b)(1) motion, the attack is presumptively facial and the Court need look only to the sufficiency of the allegations in the complaint, which are presumed to be true. *See id.* If, however, the defendant supports the motion with affidavits, testimony, or other evidentiary materials, as the Defendants have done here, then the attack is factual and the burden shifts to the plaintiff to prove subject matter jurisdiction by a preponderance of the evidence by also submitting facts through some evidentiary method. *See*

id. Regardless, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of her claim that would entitle her to relief. *Home Builders Ass'n of Miss. Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998).

Using this standard, the Court concludes that Defendants' Motion to Dismiss should still be denied. The crux of Defendants' argument in the Rule 12(b)(1) Motion to Dismiss is that Defendants did not harm ABC because the actions of Defendants alleged in the Complaint are actions that were authorized by the contracts entered into by ABC and E & J. (Defs.' 12(b)(1) Mot. at 10-11.) Thus, Defendants argue, ABC did not suffer harm because of Defendants' conduct, rather ABC suffered harm by its own actions. (*Id.* at 11.) However, the evidence offered by Defendants does not disprove Plaintiff's allegation that Defendants knowingly underfunded the premium escrow account. (Compl. at 8.) In addition, the evidence offered by Defendants does not address Plaintiff's allegations that ABC investor funds were commingled by E & J and E & J allowed Keith LaMonda to use the account as its own piggy bank. (*Id*. at 9.) Finally, the bank statement which shows that ABC transferred $500,000 to E & J is uncontroverted for the position that E & J was compensated for escrow services provided to ABC. The law is clear that a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of her claim that would entitle her to relief. *Home Builders Ass'n of Miss. Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998). The Court is not certain that Plaintiff cannot prove facts to support his claims, and thus, the Court does not change its ruling from the February 25,

2008 Order.

D. Defendants' argument on standing to sue on behalf of the investor trusts.

Defendants argue that to the extent that the Court holds that Plaintiff has standing to sue on behalf of the investor trusts, "the Court's appointment exceeds Article III's standing boundaries." (Mot. at 11.) The Court relies on ABC's standing to show that Plaintiff has standing in this case. To the extent that the Court has referred to the investor trusts, the Court has referred to them because Plaintiff, in his capacity as trustee for those trusts, has standing to institute actions for recovery of trust property. For that reason, the Court DENIES Defendants' Motion for Reconsideration on this point.

E. Defendants' limited liability argument

Defendants argue that Erwin, in his capacity as partner of E & J is protected from liability under California limited liability partnership statutes. Though it is true that Erwin is not liable for E & J's tortious conduct, it is clear that Erwin is liable for his own tortious conduct. The Court has already determined that Plaintiff has standing to assert claims against Erwin, and hence the Court DENIES Defendants' Motion for Reconsideration on this point.

F. Defendants' argument with respect to Plaintiff's aiding and abetting corporate waste claim

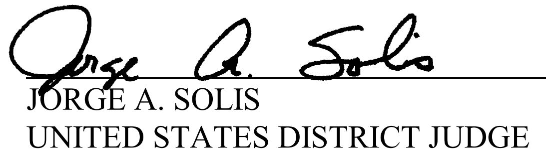
With respect to Plaintiff's aiding and abetting corporate waste claim, Defendants argue that since the money allegedly wasted belonged to the investors and not ABC, ABC has no claim for damage to the corporation. The Court does not find any merit in this argument and Defendants do not cite to any law for their proposition. Thus the Court DENIES Defendants' Motion for Reconsideration on this point.

IV. Conclusion

For the reasons stated herein, the Court hereby GRANTS in PART and DENIES in PART Defendants' Motion for Reconsideration of February 25, 2008 Order. Specifically, the Court vacates any reference it made to an attorney-client relationship and finds that the relationship between ABC and the Defendants was one of escrow agent/trustee and grantor. In addition, the Court vacates the reference to Texas substantive law with respect to its analysis of Plaintiff's breach of fiduciary duty claim and finds that California substantive law governs Plaintiff's claims. The Court DENIES Defendants' Motion for Reconsideration on all of Defendants' other arguments.

IT IS SO ORDERED.

Signed this 23rd day of June 2008.



JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE