

I.
SUMMARY

Although the Receiver does not wish to add to the amount of litigation in this case, he must point out several misstatements of material fact in the Court's Order. All of those misstatements center around one undisputed but overlooked fact: **the Receiver limited his damages to only the premium escrow amount E&J had to reserve whether or not the Albatross Bonds were valid.** It is undisputed that E&J had to ensure that premiums were deposited in an escrow account. The amount deposited did not depend upon and is not reduced by the bonds that ABC purchased. Since the Receiver is not seeking damages for any amounts E&J might have deposited had it known the Albatross Bonds were fraudulent, the validity of those bonds and DMH Stallard's alleged misrepresentations are irrelevant. As a result, there is no reason to bring DMH Stallard into this lawsuit.

II.
BACKGROUND FACTS

1. ABC Viaticals, Inc. ("ABC") acquired life insurance policies on third parties and sold fractional interests in those policies to investors. It described the product as a "bonded life settlement policy." For each policy, ABC obtained a life expectancy report that supposedly forecast when the insured was likely to die. It also obtained a bond that supposedly guaranteed payment of the death benefit amount if the insured did not die by a date certain (e.g., the life expectancy date plus two years). The life expectancy reports proved to be inaccurate and the bonds were not legitimate.

2. ABC sold interests to investors in a total of 55 policies. Of those, it purchased bonds for 19 policies from a company called Albatross Invest S.p.a. (the "Albatross Bonds"). ABC hired an English law firm called DMH Stallard to conduct due diligence about Albatross

and a partner there named Kit Stenning concluded the Albatross Bonds were legitimate. The parties in this lawsuit agree that conclusion was untrue in every respect.

3. To add legitimacy to its investment, ABC hired an independent trustee and escrow agent to handle investor funds and policy premiums. E&J served as the trustee and escrow agent during a period of time from 2005 to 2006. Those duties were principally handled by Christopher R. Erwin.

4. E&J's obligation to fund the premium escrow account arose from its Trust Agreement with ABC. In relevant part, that agreement required the following:

Trustee shall establish a "Policy Premium Payment Account" into which the Grantor will deposit a sum certain for the payment of premiums on the Policy equal to the term of the bond . . .

(Amended Complaint [Dkt. No. 41] at 5) (emphasis added).¹ Under this agreement, E&J had to ensure that ABC, as the Grantor, deposited the "sum certain" needed to pay premiums for each policy from the date ABC acquired it until its bond maturity date. Attached as Exhibit A is a summary of the Receiver's calculation of those amounts. (Ex. A at Column D.)

5. When the Receiver assumed his duties, there were insufficient funds in the premium escrow account to pay premiums as they became due. The Receiver, therefore, had to secure a line of credit for premiums to keep ABC's policies in force.

6. After ABC's bonds proved to be fraudulent, the Receiver suffered additional out-of-pocket damages by paying premiums on 13 policies after their bonds failed to mature as scheduled. None of those 13 policies were backed by Albatross Bonds and the Receiver does not state any of those amounts as damages in this case. **Instead, the Receiver has limited his**

¹ When E&J opened this "Policy Premium Payment Account" at Bank of America, it called it the "ABC Premium Escrow Account." Throughout this motion, the Receiver will refer to it as the premium escrow account.

damages for the premium escrow deficit to only the amount E&J had to reserve whether or not the bonds were valid.

7. In its Order for leave to bring DMH Stallard into this lawsuit, the Court made the following statements:

a. “. . . Defendants claim that if the E&J escrow accounts were underfunded that it is, at least in part, due to their reliance on Third-Party Defendants to conduct due diligence on their behalf.” (Order [Dkt. No. 101] at 3.)

b. “According to Defendants, if the Albatross Bond had been valid then it would have significantly reduced the amount by which the E&J escrow accounts were allegedly underfunded.” (*Id.*)

c. “. . . the validity of the Albatros [sic] Bond is now in question. As a result, Defendants claim that Third-Party Defendants may be liable to E&J and Erwin for all or part of Plaintiff’s claims against them.” (*Id.*)

d. “. . . as long as Plaintiff is seeking damages for the alleged under-funding of the E&J escrow accounts that Defendants claims against DMH Stallard and Stenning are directly related to Plaintiff’s claims against Defendants. The claims are directly related because Plaintiff claims that Defendants under-funded the E&J escrow accounts, and Defendants claim that if the E&J escrow accounts were under-funded it was due to the actions of Third-Party Defendants.” (*Id.* at 6) (citations omitted.)

8. It appears the Court relied upon a different understanding of the “underfunded” amount than the Receiver used in his calculation of damages. These statements are factually inaccurate and the Court should reconsider its Order based on the damage calculation provided in this motion.

III.
STANDARD OF REVIEW

Motions to reconsider are governed by Federal Rule of Civil Procedure 60. The Court may correct a “mistake arising from oversight . . . whenever one is found in a judgment, order, or other part of the record.” FED. R. CIV. P. 60(a). It may also relieve a party from an order based on mistake, misrepresentation, or any other reason that justifies relief. FED. R. CIV. P. 60(b). Such relief is warranted here because the Order is based upon statements that mischaracterize the Receiver’s damage calculation in this lawsuit.

IV.
ARGUMENTS AND ANALYSIS

The Receiver’s damage calculation already accounts for DMH Stallard’s misrepresentations to E&J and excludes the Receiver’s damages caused by them. The fact is, E&J’s obligation to fund the premium escrow account arose from its Trust Agreement with ABC and not from the Albatross Bonds or from DMH Stallard. (Amended Complaint [Dkt. No. 41] at 5.) The Trust Agreement required E&J to ensure that enough was deposited in the premium escrow account to pay the premiums for each policy until its bond was supposed to mature. (*Id.*) Attached as Exhibit A is a summary listing: (1) each policy; (2) the month ABC acquired it; (3) the month its bond was supposed to mature; (4) the amount needed to pay premiums during that period; and (5) the actual premiums that had been paid when the Receiver took over in November 2006. That summary shows there should have been \$19,937,980.89 in the premium escrow account in November 2006 but, in reality, that account only had \$277,833.57 at that time. The difference between those numbers—\$19,660,147.32—is the premium escrow deficit that was missing when the Receiver took over. It is that amount he seeks to recover from E&J in this lawsuit.

As Exhibit A makes clear, the Receiver is not seeking damages for any amounts E&J might have deposited in the premium escrow account had it known the bonds were fraudulent. The fact that DMH Stallard misstated the Albatross Bonds' legitimacy does not affect the amount E&J should have reserved under the Trust Agreement. (Ex. A at Column D.) By limiting his damage calculation to premiums due through the bond maturity date, the Receiver has already done what E&J hoped to achieve by suing DMH Stallard.

The Receiver provided this damage calculation to E&J at the beginning of the case and described his damages with particularity in written discovery.² Nevertheless, E&J made obvious misstatements about it in the Motion for Leave to sue DMH Stallard. (Defs.' Mot. for Leave [Dkt. No. 55] at 1; Defs.' Am. Compl. [Dkt. No. 55-2] at ¶ 16.) The Court relied on some of those misstatements in its Order. For example, the Court says that:

. . . the validity of the Albatross Bond is now in question. As a result, Defendants claim that Third-Party Defendants may be liable to E&J and Erwin for all or part of Plaintiff's claims against them.

(Order [Dkt. No. 101] at 3.) To the contrary, both the Receiver and E&J agree that the Albatross Bonds are fraudulent. (Defs.' Am. Compl. [Dkt. No. 55-2] at ¶ 14.) The Order also misstates the Albatross Bonds' effect on the Receiver's damage calculation:

Defendants claim that if the E&J escrow accounts were underfunded that it is, at least in part, due to their reliance on Third-Party Defendants to conduct due diligence on their behalf.

* * *

² The summary attached as Exhibit A is based on a more detailed spreadsheet the Receiver produced in written discovery. His interrogatory responses also state his intent to recover: (1) the premium escrow deficit described in this motion; (2) all fees that Defendants received from ABC, including any pre-paid and unearned fees, (3) \$971,815.00 of interest for the line of credit that would have been unnecessary if Defendants had properly funded the premium escrow account; (4) exemplary damages; and (5) the receivership estate's reasonable attorneys fees, pre-judgment interest, and post-judgment interest. In other pleadings, E&J has cited with suspicion a statement that the Receiver might seek "all damages caused by the continuation of the on-going securities fraud in an amount yet to be calculated." (Defs.' Objections [Dkt. No. 99] at 3.) The Receiver has discovered no such damages and amended his discovery responses to remove that statement. (Pl.'s Notice [Dkt. No. 106].)

According to Defendants, if the Albatross Bond had been valid then it would have significantly reduced the amount by which the E&J escrow accounts were allegedly underfunded.

* * *

The claims are directly related because Plaintiff claims that Defendants under-funded the E&J escrow accounts, and Defendants claim that if the E&J escrow accounts were underfunded it was due to the actions of Third-Party Defendants.

(Order [Dkt. No. 101] at 3, 6.) These statements are simply untrue. According to the Receiver's calculations, the amount that E&J "underfunded" the premium escrow account has nothing to do with the Albatross Bonds' validity.

First, the damage calculation is limited to the amount E&J was obligated to deposit whether or not the bonds were valid. The Trust Agreement required E&J to deposit enough to pay premiums for each policy through "the term of the bond." (Amended Complaint [Dkt. No. 41] at 5). It is clear from Exhibit A that the Receiver seeks only that amount from E&J. (Ex. A at Column D.) Although the Receiver paid additional premiums for 13 policies after their fraudulent bonds failed to mature as scheduled, the Trust Agreement did not require E&J to reserve those funds. The Receiver, therefore, does not include them in his damage calculation.

Second, E&J overstates the Albatross Bonds' impact on the premium reserve. When this Court approved the ABC portfolio's sale on October 6, 2008, only 13 policies had passed their bond maturity date. (Order, Cause No. 3:06-CV-2136-P [Dkt. No. 179]; Ex. A at Column C.) Although the Receiver suffered additional out-of-pocket damages in the form of premiums paid after those 13 bonds failed to mature, none of them were Albatross Bonds. (Ex. A at Column A, C.) Consistent with the Court's Order dated October 6, 2008, the Receiver sold the portfolio of policies before any Albatross Bonds even became due. (Order, Cause No. 3:06-CV-2136-P

[Dkt. No. 179]; Ex. A at Column A, C.) Therefore, the Receiver incurred no additional premium obligations as a result of Albatross' fraud or DMH Stallard's representations.

Third, E&J offers only a bald assertion without explaining how valid Albatross Bonds would have "significantly reduced" the premium escrow deficit. (Order [Dkt. No. 101] at 3; Defs.' Reply [Dkt. No. 65] at 5.) That could only be true if (1) the Receiver paid additional premiums on policies after their Albtross Bonds failed to mature as scheduled and (2) if he included those amounts in his damage calculation against E&J. As explained above, neither is true in this case. Instead, the Receiver limits his damages to the amount E&J was obligated to reserve under the Trust Agreement whether or not the Albatross Bonds were valid.

V. CONCLUSION

Since it appears the Court's Order is based on one or more misstatements of fact, the Receiver asks that it reconsider that Order in light of his limited and precise damage calculation. His damages seek the amount E&J had to reserve under the Trust Agreement whether or not the Albatross Bonds were valid. They do not include any damages resulting from DMH Stallard's failure to conduct due diligence or representations it made to E&J.

WHEREFORE, PREMISES CONSIDERED, the Receiver respectfully asks the Court to reconsider its Order [Dkt. No. 101] granting leave to name DMH Stallard and Christopher John William Stenning as additional third-party defendants. Upon doing so, the Court should determine that Order is based on misstatements of fact and enter an Amended Order denying E&J's motion to add them as third-party defendants. He also asks for such other and further relief, general or special, at law or in equity, to which he may show himself entitled.

Respectfully submitted,

**QUILLING SELANDER CUMMISKEY
& LOWNDS, P.C.**

2001 Bryan Street, Suite 1800
Dallas, Texas 75201
Telephone: (214) 871-2100
Fax: (214) 871-2111

By: /s/ Brent J. Rodine
Michael J. Quilling
State Bar No. 16432300
Brent Rodine
State Bar No. 24048770

- and -

BOROD & KRAMER, P.L.C.

Brinkley Plaza
80 Monroe, Suite G-1
Memphis, Tennessee 38103
Telephone: (901) 524-0200
Fax: (901) 523-0043

Bruce S. Kramer
Tennessee Bar No. 7472

ATTORNEYS FOR RECEIVER

CERTIFICATE OF CONFERENCE

On October 28, 2009, the undersigned conferred with Cathlynn Cannon, counsel for Defendant Erwin & Johnson LLP and Defendant Christopher R. Erwin, and it was determined that they oppose the relief requested.

/s/ Brent J. Rodine

CERTIFICATE OF SERVICE

A true and correct copy of this pleading was served upon all interested parties through the Court's electronic filing system.

/s/ Brent J. Rodine
