UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CHRISTOPHER P. HAYNES,

Plaintiff,

v.

JTH TAX, INC. d/b/a LIBERTY TAX SERVICE,

Defendant.

Civil No. 2:17cv144

ORDER

Currently pending before the Court is a Motion for Reconsideration or, in the Alternative, Motion for Leave to File First Amended Complaint (ECF No. 24) brought by Plaintiff Christopher P. Haynes. This motion has been briefed, and is now ripe for decision. For the reasons stated herein, Mr. Haynes' Motion is DENIED.

I. BACKGROUND

Between December 2004 and October 2006, Christopher P. Haynes ("Mr. Haynes" or "Plaintiff") entered into three Franchise Agreements with JTH Tax, Inc., d/b/a Liberty Tax Service ("Defendant" or "Liberty"). ECF No. 14 at 2. Under the Franchise Agreements, Mr. Haynes was "granted the right to own and operate a Liberty tax franchise." ECF No. 1 at 3.

In 2010, Mr. Haynes and Liberty entered into an Area Developer Agreement (the "ADA") for specific markets in Tennessee, Georgia, and North Carolina. ECF No. 14 at 3. Under the ADA, Mr. Haynes was "granted the right to find, solicit and recruit candidates interested in becoming franchisees of Liberty" within specified areas. ECF No. 1 at 4.

On February 8, 2016, the United States filed a Complaint for Permanent Injunction and Other Relief against Mr. Haynes regarding his operation of three Liberty tax franchises in South Carolina. ECF No. 1 at 6. *See also United States v. Christopher Paul Haynes d/b/a/ Liberty Tax Service*, Case No. 3:16cv373-MGL (D.S.C. 2016). The United States accused Mr. Haynes of unlawfully operating his Liberty franchises in violation of 26 U.S.C. §§ 6694, 6695, and 6701. ECF No. 14 at 3. Charges of some specific unlawful acts included "fabricating expenses, deductions, credits, and other adjustments on income tax returns to illegally generate a tax refund or a refundable tax credit from the [Internal Revenue Service]; reporting false or inflated Schedule C business income and expenses and bogus dependents to obtain improper or inflated Earned Income Tax Credits; failing to furnish copies of completed tax returns to customers; and filing income tax returns reporting false filing statuses." *Id.* at 4.

On October 26, 2016, Mr. Haynes agreed to a Consent Motion and Stipulation for Final Judgment of Permanent Injunction and Other Relief (the "Injunction"). ECF No. 1-3. Mr. Haynes consented to "permanent injunctions against his future ownership or operation of, affiliation with, profit from, investment in, and control over any tax preparation/filing business." *Id.* As a condition of the Injunction, Mr. Haynes "was required to surrender his Electronic Filing Identification Number ("EFIN") and to forever refrain from obtaining a new one." *Id.* Mr. Haynes was given "a 153-day window to close on a sale of his rights under the Franchise Agreements and the ADA." *Id.*

On October 27, 2016, Liberty sent Mr. Haynes a Notice of Termination of Franchise Agreements and a Notice of Termination of the ADA. ECF No. 1 at 8. By these letters, Liberty exercised its rights to terminate the Franchise Agreements and the ADA for, "among other things, Plaintiff's multiple material breaches of the Agreements; including loss of EFIN;

material, documented violations of law; failure to provide requested documentation; and repeated failure through substantiated unlawful conduct to operate in a manner that protects Liberty's goodwill, reputation, and Marks." ECF No. 14 at 4–5.

On May 9, 2017, Liberty filed a Motion to Dismiss for Failure to State a Claim. ECF No. 13. This motion was granted by Order dated December 4, 2017. ECF No. 22. On January 2, 2018, Mr. Haynes filed the instant Motion for Reconsideration, or in the alternative, Motion for Leave to File First Amended Complaint. ECF No. 24.

II. LEGAL STANDARD

A. Motion for Reconsideration

Federal Rule of Civil Procedure 59(e) allows parties to file "[a] motion to alter or amend a judgment . . . no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). "A Rule 59(e) motion may only be granted in three situations: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 378 (4th Cir. 2012). "Rule 59(e) motions may not be used, however, to raise arguments which could have been raised prior to the issuance of the judgment . . . ." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998).

Federal Rule of Civil Procedure 60(b) permits a party to seek relief "from a final judgment, order, or proceeding." Fed. R. Civ. P. 60(b). Before a party may seek such relief, he or she must first show "timeliness, a meritorious defense, a lack of unfair prejudice to the opposing party, and exceptional circumstances." *Werner v. Carbo*, 731 F.2d 204, 207 (4th Cir. 1984). Once this showing is made, Rule 60(b) lists specific grounds upon which a court may grant relief from a final judgment. These grounds are:

> (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.

Fed. R. Civ. P. 60(b).

"The remedy provided by the Rule, however, is extraordinary and is only to be invoked upon a showing of exceptional circumstances." *Compton v. Alton S.S. Co. Inc.*, 608 F.2d 96, 102 (4th Cir. 1979). The party seeking such relief "must clearly establish the grounds therefore to the satisfaction of the district court . . . and such grounds must be clearly substantiated by adequate proof." *In re Burnley*, 988 F.2d 1, 3 (4th Cir. 1992).

A motion under Rule 60(b) is not a substitute for appeal. *See Ackermann v. United States*, 340 U.S. 193, 198 (1950). Neither does a motion for reconsideration allow a district court to reconsider its prior ruling with respect to issues addressed in its original order. *See United States v. Williams*, 674 F.2d 310, 312 (4th Cir. 1982) ("To the extent that the post-judgment motion sought to have the district court reconsider its ruling with respect to the [issues addressed in the district court's original order], it [is] clearly improper, because Rule 60(b) does not authorize a motion merely for reconsideration of a legal issue."). "Where the motion is nothing more than a request that the district court change its mind . . . it is not authorized by Rule 60(b)." *Id.* at 313.

B. Motion for Leave to Amend

Federal Rule of Civil Procedure 15 states that a "court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15. "The law is well settled 'that leave to amend a pleading should be denied *only when* the amendment would be prejudicial to the

opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile.'" *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999) (emphasis in original) (citing *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986)). "Although leave to amend should be freely given when justice so requires, a district court has discretion to deny a motion to amend a complaint, so long as it does not outright refuse to grant the leave without any justifying reason." *Stanley v. Huntington Nat. Bank*, 492 F. App'x 456, 461 (4th Cir. 2012). "Delay alone is an insufficient reason to deny leave to amend." *Edwards*, 178 F.3d at 242. "Rather, the delay must be accompanied by prejudice, bad faith, or futility." *Id.*

III. ANALYSIS

A. Motion for Reconsideration

Mr. Haynes does not contend that there has been an intervening change in the controlling law or that new evidence has emerged since this Court issued its Order. Instead, Mr. Haynes relies on assertions that this Court made a "clear error" in granting Liberty's Motion to Dismiss.

Regarding the dismissal of Counts I and III (Breach of the Franchise Agreements and Breach of the Area Developer Agreement), Mr. Haynes asserts that this Court committed clear error dismissing the claims. The alleged errors include: (1) by going beyond the four corners of the Complaint; (2) by relying on an affirmative defense; (3) by taking judicial notice of substantive factual allegations; and (4) by failing to draw any inferences in favor of Mr. Haynes.

As recognized by the Court in its Order, "[a] court may properly consider 'documents incorporated into the complaint by reference, as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic.'" ECF No. 22, n.1. This Court properly considered the Federal Complaint because it was referenced numerous times throughout the Complaint, and because it was integral to the Complaint. The Complaint and the resulting

Final Judgment provided the bases upon which Mr. Haynes sought to bring this lawsuit. Mr. Haynes incorporated both documents by reference and made it integral to his Complaint. The Court properly considered both.

The face of the Complaint clearly alleged facts sufficient to reach the merits of Liberty's affirmative defense. Mr. Haynes admitted that he surrendered his EFIN pursuant to the Injunction. ECF No. 22 at 6. Mr. Haynes further agreed that the Franchise Agreements allowed Liberty the right to terminate without notice or opportunity to cure if Mr. Haynes' EFIN was suspended. ECF No. 22 at 6.

Similarly, regarding the ADA, Mr. Haynes conceded that under its terms, he was prohibited from committing a material violation of law. Mr. Haynes incorporated the Federal Complaint and resulting Injunction in his Complaint. As such, he alleged sufficient facts for this Court to find that Liberty's affirmative defense barred Mr. Haynes' claim. Allowing such claims to go forward despite clear, meritorious affirmative defenses would be a waste of judicial and party resources.

In regards to judicial notice, this Court did not take judicial notice of any substantive fact in the Federal Complaint. The Court did not assume the truth of the allegations set forth in the Federal Complaint, but rather took notice of the existence of the Federal Complaint. Such a fact was sufficient for this Court to find that Liberty had a meritorious affirmative defense that was alleged based upon the face of Mr. Haynes' Complaint.

Finally, this Court drew all reasonable inferences on behalf of Mr. Haynes. Courts are not required to accept "unwarranted inferences, unreasonable conclusions, or arguments." *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013). Even after such inferences, no clear error of law was committed in regards to Counts I and III.

Mr. Haynes asserts that this Court committed clear error in dismissing Counts II and IV (Breach of the Implied Covenant of Good Faith and Fair Dealing). Mr. Haynes cites to the Virginia Supreme Court case of *Charles E. Brauer Co., Inc. v. NationsBank of Va., N.A.*, 251 Va. 28 (1996), and the Eastern District of Virginia cases of *Stoney Glen, LLC v. S. Bank and Trust Co.*, 944 F. Supp. 2d 460, 465 (E.D. Va. 2013) and *Enomoto v. Space Adventures, Ltd.*, 624 F. Supp. 2d 443 (E.D. Va. 2009), for the proposition that Virginia courts have permitted claims for breach of implied covenant of good faith and fair dealing to survive motions to dismiss.

In each case, it was recognized that the implied duty must be raised in a claim for breach of contract, not a claim in tort. *See Charles E. Brauer Co., Inc.* 251 Va. at 33; *Stoney Glen,* 944 F. Supp. 2d at 465; *Enomoto,* 624 F. Supp. 2d at 450. Under Virginia law, there is no separate cause of action for a breach of the duty of good faith and fair dealing. *See Charles E. Brauer Co., Inc.*, 251 Va. at 33 (holding that "while a duty of good faith and fair dealing exists under the [Uniform Commercial Code, or "U.C.C."] as part of every commercial contract, we hold that the failure to act in good faith under [the U.C.C.] does not amount to an independent tort."). In both *Stoney Glen* and *Enomoto*, the elements of such a breach as part of a plaintiff's claim for breach of contract were addressed.

Mr. Haynes has not alleged a breach of contract by breaching a duty of good faith and fair dealing. Instead, Mr. Haynes has attempted to bring this alleged breach in separate claims in tort. This, Mr. Haynes cannot do. Mr. Haynes' Motion for Reconsideration is DENIED.

B. Motion for Leave to Amend

The United States Court of Appeals for the Fourth Circuit has held repeatedly that "a motion to amend filed after a judgment of dismissal has been entered cannot be considered until the judgment is vacated." *Calvary Christian Center v. City of Fredericksburg, Va.*, 710 F. 3d

536, 539 (4th Cir. 2013). Because this Court declines to vacate its former Judgment under either Rule 59(e) or 60(b), this Court lacks the discretion to grant Mr. Haynes' motion. Accordingly, Mr. Haynes' Motion for Leave to Amend is DENIED.

IV. CONCLUSION

For the foregoing reasons, Mr. Haynes' Motion for Reconsideration, or in the alternative, Motion for Leave to File a First Amended Complaint, (ECF No. 24), is DENIED. The Clerk is REQUESTED to forward a copy of this Order to all parties.

IT IS SO ORDERED.

Arenda L. Wright Allen
United States District Judge

April 3, 2018
Norfolk, Virginia