IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

JUAN CASTILLO, ET AL., **Plaintiffs,** **v.** **ST. CROIX BASIC SERVICES, INC., ET AL.,** **Defendants.**	**SX-09-CV-299** **ACTION FOR DAMAGES** **JURY TRIAL DEMANDED**

ORDER

THIS MATTER is before the Court on Plaintiffs' Motion to Reconsider the Court's September 8, 2009 Order (hereinafter, "Motion to Reconsider"), filed on December 22, 2009. On January 4, 2010, Defendant St. Croix Basic Services, Inc. (hereinafter, "SCBS") and Defendant Basic Industries, Inc. (hereinafter, "BI") filed a Joint Opposition to Plaintiffs' Motion to Reconsider. On January 14, 2010, Plaintiffs filed a Reply to Defendants' Opposition to their Motion to Reconsider. On January 21, 2010, Defendant St. Croix Basic Services, Inc. and Defendant Basic Industries, Inc. filed a Joint Motion to Strike Plaintiffs' Reply to Defendants' Opposition to Motion to Reconsider and Lee J. Rohn's January 13, 2010 Affidavit, and for Sanctions Pursuant to Fed. R. Civ. P. 11.

FACTS

On July 30, 2009, Defendant SCBS filed a Motion for Judgment on the Pleadings contending that the statute of limitations had run on Plaintiffs' claims. On August 26, 2009, Plaintiffs filed a Notice to the Court that the parties had agreed to an Extension of Time through September 2, 2009 for Plaintiffs to file their response to said motion. On September 2, 2009, Plaintiffs filed their Opposition to Defendant SCBS's Motion for Judgment on the Pleadings. The Clerk's Office did not forward Plaintiffs' Opposition to Defendant SCBS's Motion for Judgment on the Pleadings to the Court's Chambers until after the September 8, 2009 Order was

filed. Plaintiffs' Opposition was forwarded after its entry in eNACT on September 11, 2009.[1] However, on September 8, 2009, Judge Ross had granted Defendant SCBS's Motion for Judgment on the Pleadings[2] and dismissed Plaintiffs' Complaint against Defendant SCBS.

STANDARD OF REVIEW

Local Rule of Civil Procedure 7.3 codifies longstanding Third Circuit precedent; it provides:

> A party may file a motion asking the Court to reconsider its order or decision. Such motion shall be filed within ten (10) days after the entry of the order or decision unless the time is extended by the Court. Extensions will only be granted for good cause shown. A motion to reconsider shall be based on:
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> (1) Intervening change in controlling law;
> (2) Availability of new evidence, or;
> (3) The need to correct clear error or prevent manifest injustice.

LRCi 7.3; *see Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985).

The purpose of a motion for reconsideration is to "correct manifest errors of law or fact or to present newly discovered evidence." *WorldCom Technologies, Inc., v. Intelnet Int'l, Inc.*, 2001 WL 118957, *2 (E.D.Pa. 2001) (quoting *Harsco Corp.* 779 F.2d at 909). Such motions are not substitutes for appeals, and are not to be used as "a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not." *Bostic v. AT&T of the Virgin Islands*, 312 F.Supp.2d 731, 733 (D.V.I. 2004).

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[1] **Attachment 1** - A copy of the eNACT Scan Cover Sheet reflects entry of Plaintiffs' Opposition to Defendant SCBS's Motion for Judgment on the Pleadings on September 11, 2009.
Attachment 2 - A copy of the eNACT Scan Cover Sheet reflects entry of Plaintiffs' Opposition to Defendant BI's Motion for Judgment on the Pleadings on September 11, 2009.

[2] In Plaintiffs' Motion to Reconsider, Plaintiffs mistakenly refer to this said Motion as Defendants' Motion to Dismiss.

ARGUMENT

Plaintiffs' based its Motion to Reconsider upon LRCi. 7(3), to wit: the need to correct clear error and to prevent manifest injustice. Plaintiffs argue the following:

> On December 18, 2009, in open court, Judge Ross made a statement to Plaintiffs and Daryl Barnes, Esq. concerning Defendant SCBS's Motion for Judgment on the Pleadings. Judge Ross indicated that he had originally thought that Plaintiffs did not file an Opposition to Defendant SCBS's Motion for Judgment on the Pleadings, and thereby granted Defendant SCBS's Motion for Judgment on the Pleadings and dismissed Plaintiffs' Complaint against it. However, upon reviewing the record, Judge Ross discovered that Plaintiffs did in fact file a timely Opposition against Defendant SCBS's Motion for Judgment on the Pleadings. But due to delays in the Clerk's Office, the Court did not receive until after the September 8, 2009 Order. Thereby, Judge Ross invited Plaintiffs to file this Motion to Reconsider.

Defendant SCBS and Defendant BI argues the following in their Joint Opposition to Plaintiffs' Motion to Reconsider:

I. Plaintiffs' Motion to Reconsider is untimely

Plaintiffs had ten (10) days to file their Motion for Reconsideration after the September 8, 2009 Order. Plaintiffs filed their Motion for Reconsideration on December 22, 2009, more than two (2) months later.

II. The Court lacks jurisdiction to extend the time limit for the Plaintiffs to file a Motion to Reconsider

According to LRCi 7.3, "[E]xtensions will only be granted for good cause shown." However, the *Bostic* Court stated that entry of a final appealable order deprives

the trial court issuing that order of jurisdiction to extend the deadline for filing a motion to reconsider its ruling. 312 F.Supp.2d, at 733-34. The *Bostic* Court further explained:

> The Scope of Local Rule 7.4[3], like any local procedural rule adopted by a district, is limited by the relevant Federal Rules of Civil Procedure governing the situation in which it is applied. *See Anchorage Assocs. v. V.I. Bd. of Tax Review,* 922 F.2d 168 (3d Cir.1990) (holding that Local Rule 6(i) regarding motions for summary judgment must be interpreted in a manner consistent with Federal Rule 56). It is commonly applied in two procedurally distinct contexts: first as to "judgments," as that term is used in the federal rules, Fed. R. Civ. P. 54(a) ("judgment" "includes a decree and any order from which an appeal lies"), and second as to "any order or other form of decision... which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties." Fed. R. Civ. P. 54(b). The rule must bend differently to conform to the Federal Rules governing each context.
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> In the first context-when a litigant uses Local Rule 7.4 as a vehicle to alter or amend a final and appealable judgment-the parties, and the court, must be mindful of the restrictions contained in Fed. R. Civ. P. 59, among others. Under Section 59(e), for instance, "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). This "ten day period is jurisdictional, and 'cannot be extended in the discretion of the district court.' " *de la Fuente v. Central Electric Cooperative, Inc.,* 703 F.2d 63, 65 (3d Cir.1983) (per curiam) (quoting *Gribble v. Harris,* 625 F.2d 1173 (5th Cir.1980) (per curiam)); *United States v. The Schooner Windspirit,* 32 V.I. 285, 288, 161 F.R.D. 321, 323-24 (D.Vi.1995). Thus, while Local Rule 7.4 purportedly allows the district court to extend the ten day limit in which to file a 7.4 motion for "good cause shown," when applied to a judgment, the power to grant such an extension lies beyond the jurisdiction of a district court. 312 F.Supp.2d, at 733-34.

Defendant SCBS and Defendant BI contends that the September 8, 2009 Order is final; Plaintiffs have recognized the finality of the Order dismissing the case when they appealed it on September 18, 2009. Plaintiffs' filing of a notice of appeal divested this Court of jurisdiction over a motion to reconsider. *See Phillips v. Corestates Bank, N.A.,* 33 F.Supp.2d 419, 421 (D.V.I., 1999). "As a general rule, the timely filing of a notice of appeal is an event of a jurisdictional significance, immediately conferring jurisdiction in a

[3] LRCi 7.4 was subsequently renumbered to LRCi 7.3.

Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal." *Venen v. Sweet,* 758 F.2d 117, 120 (3d Cir. 1985).

III. Assuming, *arguendo*, that Plaintiffs filed timely, Plaintiffs' have not presented any grounds to justify reconsideration

Defendant SCBS and Defendant BI argues that Plaintiffs failed to present any of the grounds listed in LRCi 7.3 to justify reconsideration; Plaintiffs merely argues that the Court's failure to agree with their position requires reconsideration "to correct clear error and to prevent manifest injustice." Defendant SCBS and Defendant BI sees no error or injustice resulting from the Court ruling on a pending motion without any response from the adverse party. LRCi 7.1(d)(3)[4] provides that, "[N]othing herein shall prohibit the Court from ruling without a response or reply when deemed appropriate." Furthermore, Defendant SCBS and Defendant BI notes that Plaintiffs raised the same arguments they raised in Plaintiffs' Opposition to Defendant SCBS's Motion for Judgment on the Pleadings.[5]

IV. Assuming, *arguendo*, that Plaintiffs filed timely, Plaintiffs' have not presented any evidence to support the Motion

Defendant SCBS and Defendant BI argues that Plaintiffs failed to provide any evidence in support of their Motion to Reconsider. LRCi 7.1(d)(3)[6] provides that, "[W]hen allegations of fact not appearing of record are relied upon in support of a

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[4] The Court would like to point out that the correct citation is LRCi 7.1(e)(3).
[5] In the event that the Court grants Plaintiffs' Motion to Reconsider, Defendant SCBS and Defendant BI requests the opportunity to present additional authority in response to the arguments made by Plaintiffs in their Opposition to Defendant SCBS's Motion for Judgment on the Pleadings.
[6] The Court would like to point out that the correct citation is LRCi 7.1(d)(3). It provides that "A party shall file a response within ten (10) days after service of the motion. For good cause shown, parties may be required to file a response and supporting documents, including brief, within such shorter period of time as the Court may specify, or may be given additional time upon request made to the Court."

motion, response or reply, all affidavits and other pertinent documents shall be filed before the hearing of the motion." The evidence contained in affidavits, like any other kind of evidence, must be in an admissible form. *See Transo Envelope Co. v. Murray Envelope Co.*, 227 F.Supp. 240, 242 (D.C.N.J. 1964).[7] Plaintiffs did not provide any affidavits or documentations. Defendant SCBS and Defendant BI states that sincere beliefs of Plaintiffs are inadmissible hearsay and also lack foundation. Fed. R. Evid. 602;[8] Fed. R. Evid. 802.[9]

Plaintiffs argue the following in their Reply to Defendant SCBS and Defendant BI's Opposition to Plaintiffs' Motion to Reconsider:

I. Plaintiff's Motion to Reconsider is timely filed at the request of Judge Ross

Plaintiffs disagree with Defendant SCBS and Defendant BI's position that their Motion to Reconsider was filed untimely under LRCi 7.3 and Fed. R. Civ. P. 59(e) due to a jurisdictional restriction against the court extending the time. It is well-settled that a court has discretion to correct its own errors and spare appellate courts from the burden of unnecessary proceedings. *See Charles v. Daley,* 799 F.2d 343, 348 (7th Cir. 1986). Plaintiffs state that, despite the jurisdictional quandary presented by LRCi 7.3 and Fed. R.

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[7] The Court would like to point out that the direct quote from the *Transo Envelope Co.* Court in the relevant section is the following:

> "The Kiessling affidavit sets forth no specific facts, based on personal knowledge, that in any way support these allegations. An affidavit which simply recites that the affiant has been 'apprised' of certain information, without more, is entitled to no weight on this motion." 227 F.Supp., at 242.

[8] Fed. R. Evid. 602 provides,

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

[9] Fed. R. Evid. 802 provides,

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Civ. P. 59(e), their Motion to Reconsider is still timely because the Court should consider their Motion to Reconsider under Fed. R. Civ. P. 60(b). Fed. R. Civ. P. 60(b) does not have the same time restrictions as LRCi 7.3 and Fed. R. Civ. P. 59(e). *See Shirley Smith v. V.I. Port Auth., et al.*, 2009 U.S. Dist. LEXIS 96384 (D.V.I., 2009).. In *Shirley Smith*, the District Court of the Virgin Islands declared that Ruled 60(b) applies only to motions for relief from "a final judgment, order, or proceeding." *Id.* Plaintiffs point out that that is what they are seeking in their Motion to Reconsider, relief from a final order. The *Shirley Smith* Court noted that the plaintiff had filed her motion for reconsideration under the wrong rule but held that, "the Court must focus on 'the function of the motion, not its caption' to determine which Rule applies." 2009 U.S. Dist. LEXIS 96384 (The court treated the plaintiff's motion for reconsideration under the more applicable Rule rather than what the plaintiff had initially captioned the motion under.). Plaintiffs argue the same reasoning should be applied in this case and request the Court to treat their Motion to Reconsider under the more applicable Fed. R. Civ. P. 60(b).

In addition, Plaintiffs point out that Judge Ross acknowledged the Clerk's Office's error and invited Plaintiffs to file the Motion to Reconsider in open court. Plaintiffs contend that Defendant SCBS and Defendant BI improperly argued that Judge Ross's observations and instructions as hearsay and that Plaintiffs failed to provide evidence of the Clerk's Office's error with any affidavits despite Judge Ross's admission of the same. Plaintiffs hereby attach an affidavit of their counsel, Lee Rohn, describing the discussion by Judge Ross in open court.

II. Plaintiffs may seek relief under Fed. R. Civ. P. 60(b)

Fed. R. Civ. P. 60(b) permits a party to see relief from a judgment or order on several applicable grounds, including "mistake, inadvertence..." or "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(1) and (b)(6). Moreover, Fed. R. Civ. P. 60(c)(1) provides: "A motion under Rule 60(b) must be made within a reasonable time—and for reasons [(b)](1), (2) and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Plaintiffs argue that its Motion to Reconsider would be appropriate under either Fed. R. Civ. P. 60(b)(1) or 60(b)(6). Consequently, the Court should find their Motion to Reconsider timely filed under Fed. R. Civ. P. 60(b).

The determination to grant or deny relief under Rule 60(b) is within the sound discretion of the court. *Lasky v. Continental Products Corp.*, 804 F.2d 250, 256 (3d Cir. 1986). In *Lasky,* the Third Circuit noted that some relevant factors that a district court may use in the disposition of a Rule 60(b) motion include "whether the movant had a fair opportunity to present his claim or defense." 804 F.2d, at 256, fn10. In this case, Judge Ross did not have an opportunity to consider Plaintiffs' Opposition to Defendant SCBS's Motion for Judgment on the Pleadings. Thus, Plaintiffs argue that the Court should take this factor into account since they have not had a fair opportunity to present their claims. Moreover, Plaintiffs contend that Rule 60(b)'s interest in providing substantial justice is triggered here because the error was not within the Plaintiffs' control.[10]

[10] In the event that the Court grants Defendant SCBS and Defendant BI's request for the opportunity to respond to Plaintiffs' Opposition to Defendant SCBS's Motion for Judgment on the Pleadings, Plaintiffs request an opportunity to file a Reply to their response.

In Defendant SCBS and Defendant BI's Joint Motion to Strike Plaintiffs' Reply to their Opposition to Plaintiffs' Motion to Reconsider and Lee Rohn's January 13, 2010 Affidavit, they argue that Plaintiffs' Reply and Lee Rohn's Affidavit contain untrue allegations and statements of fact. Plaintiffs' Reply states the following:

> "The filing of the Appeal brought the matter to Judge Ross's attention, and Judge Ross, in open court *and in front of Basic Defendants' counsel*, acknowledged that the court had dismissed the Complaint without benefit of Plaintiffs' legal arguments opposing the Motion for Judgment on the Pleadings." *Emphasis added.*

In Lee Rohn's Affidavit, it states that this colloquy occurred on December 18, 2009, in the presence of Daryl Barnes. Defendant SCBS and Defendant BI's counsel, George Logan, Esq., was not present during such colloquy between Judge Ross and Plaintiffs' counsel. Daryl Barnes is not Defendant SCBS and Defendant BI's counsel, nor is he a member of George Logan's firm, Nichols, Newman, Logan, and Grey, P.C. Lee Rohn's Affidavit also states:

> "Judge Ross stated that he dismissed the matter based on his belief that the Plaintiffs did not file an Opposition. Upon receiving the Notice of Appeal, Judge Ross reviewed the record and discovered that Plaintiffs had, in fact, timely opposed the Defendants' Motion for Judgment on the Pleadings and learned of the mistake in the Clerk's Office."

Defendant SCBS and Defendant BI claims that the context seems to imply that the Motion for Judgment on the Pleadings was filed by Daryl Barnes, on their behalf. The Motion for Judgment on the Pleadings was in fact filed by George Logan. And as stated previously, George Logan was not present for the alleged colloquy. Defendant SCBS and Defendant BI claims that Lee Rohn's Affidavit is nothing more than inadmissible hearsay concerning statement allegedly made by Judge Ross. The evidence contained in affidavits, like any other kind of evidence, must be in an admissible form.[11] *Transo*, 227 F.Supp., at 242. Therefore,

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[11] The Court would like to point out that the direct quote from the *Transo Envelope Co.* Court in the relevant section is the following:

Defendant SCBS and Defendant BI requests the Court to strike Plaintiffs' Reply and Lee Rohn's Affidavit for presenting untrue and misleading information and statements as material facts. Fed. R. Civ. P. 11(b). Additionally, they ask the Court to award the costs and fees of this Motion to Strike to them as a sanction under Fed. R. Civ. P. 11. On January 21, 2010, Defendant SCBS and Defendant BI also filed a Joint Request for Leave to File Additional Papers with the Court pursuant to LRCi 7.1(a).[12]

DISCUSSION

In this case, Plaintiffs argue that the Court should grant their Motion to Reconsider based on LRCi 7.3(3), to wit: the need to correct clear error or prevent manifest injustice, and request the Court to vacate the September 8, 2009 Order and reinstate their Complaint against Defendant SCBS. However, upon Defendant SCBS and Defendant BI pointing out the jurisdictional quandary presented by LRCi 7.3 and Fed. R. Civ. P. 59(e), Plaintiffs ask the Court to consider their Motion to Reconsider under Fed. R. Civ. P. 60(b).

Fed. R. Civ. P. 60(b)(6) provides: "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: any other reason that justifies relief." Fed. R. Civ. P. 60(c)(1) provides: "A motion under Rule 60(b) must be made within a reasonable time..." In this case, the Court entered its September 8, 2009 Order with the belief that Plaintiffs did not file an Opposition to Defendant SCBS's Motion for Judgment on the Pleadings. However, after an examination of the record, Judge Ross discovered that Plaintiffs did in fact file a timely Opposition to Defendant SCBS's

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"The Kiessling affidavit sets forth no specific facts, based on personal knowledge, that in any way support these allegations. An affidavit which simply recites that the affiant has been 'apprised' of certain information, without more, is entitled to no weight on this motion." 227 F.Supp., at 242.

[12] Defendant SCBS and Defendant BI notes that, although they believe they are entitled to bring an independent Motion pursuant to Fed. R. Civ. P. 11 to strike Plaintiff's Reply and Lee Rohn's Affidavit, they included this Joint Request in the event that the Court deems any portion of their Motion to fall within LRCi 7.1(a).

Motion for Judgment on the Pleadings. But due to the Clerk's Office's delay, the document did not reach the Court prior to its September 8, 2009 Order. The delay was caused by the Clerk's Office; Plaintiffs were not at fault. Therefore, this is a valid reason to justify relief of Plaintiffs from the September 8, 2009 Order. Additionally, Plaintiffs were not aware of this error at that time, and consequently did not file a Motion to Reconsider. Instead, Plaintiffs appealed the September 8, 2009 Order to the Supreme Court of the Virgin Islands.

Plaintiffs only became aware of the error, that the Court entered the September 8, 2009 Order without the benefit of Plaintiffs' Opposition to Defendant SCBS's Motion for Judgment on the Pleadings, when Judge Ross mentioned it in open court on December 18, 2009.[13] Upon knowledge and Judge Ross's invitation to file a motion, Plaintiffs filed their Motion to Reconsider on December 22, 2009. Plaintiffs are not at fault for not filing the Motion to Reconsider until now. Only a little over three (3) months have passed between the September 8, 2009 Order and Plaintiffs' Motion to Reconsider. Additionally, Plaintiffs filed their Motion to Reconsider within four (4) days of learning of said error. This certainly qualifies as filing within a reasonable time. By granting Plaintiffs' Motion to Reconsider, the Court is merely reinstating Plaintiffs' Complaint against Defendant SCBS. The Court is not ruling on Defendant SCBS's Motion for Judgment on the Pleadings at this juncture. Defendant SCBS will have a chance to respond to Plaintiffs' Opposition to its Motion for Judgment on the Pleadings. Accordingly, the Court finds that there is a basis to grant Plaintiffs' Motion to Reconsider under Fed. R. Civ. P. 60(b).

[13] Judge Ross mistook Daryl Barnes to be a member of Defendant SCBS and Defendant BI's counsel's firm and that is why he discussed this matter in front of him and Plaintiffs in open court.

CONCLUSION

For the reasons stated above, it is hereby:

Ordered that Plaintiffs' Motion to Reconsider the Court's September 8, 2009 Order is Granted. It is further:

Ordered that the Court's September 8, 2009 Order is Vacated. It is further:

Ordered that Defendant SCBS and Defendant BI's Joint Motion to Strike Plaintiffs' Reply to their Opposition to Plaintiffs' Motion to Reconsider and Lee Rohn's January 13, 2010 Affidavit and for Sanctions Pursuant to Fed. R. Civ. P. 11 is Denied. It is further:

Ordered that Defendant SCBS and Defendant BI's Joint Request for Leave to File Additional Papers with the Court is Denied. It is further:

Ordered that Plaintiffs' Complaint against Defendant SCBS is reinstated. It is further:

Ordered that Defendant SCBS will have ten (10) days within the entry of this Order to file a Reply to Plaintiffs' Opposition to its Motion for Judgment on the Pleadings. It is further:

Ordered that Plaintiffs' request for an opportunity to Respond to Defendant SCBS's Reply to their Opposition is Denied.

DONE and so ORDERED this 9th day of February, 2010.

ATTEST:
Venetia Harvey-Velazquez
Clerk of the Court

By: _____
Deputy Clerk

Dated: 2/9/10

EDGAR D. ROSS
Senior Sitting Judge