

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

|                                   |   |                       |
|-----------------------------------|---|-----------------------|
| IN THE MATTER OF                  | ) |                       |
|                                   | ) |                       |
| PACE AMERICAN ENTERPRISES, INC.,  | ) | CASE NO. 11-33416 HCD |
|                                   | ) | CHAPTER 7             |
|                                   | ) |                       |
| DEBTOR.                           | ) |                       |
|                                   | ) |                       |
|                                   | ) |                       |
| REBECCA HOYT FISCHER, TRUSTEE,    | ) |                       |
|                                   | ) |                       |
| PLAINTIFF,                        | ) |                       |
| vs.                               | ) | PROC. NO. 12-3002     |
|                                   | ) |                       |
| KEN-MAC METALS, A DIVISION OF     | ) |                       |
| THYSSENKRUPP MATERIALS, NA, INC., | ) |                       |
|                                   | ) |                       |
| DEFENDANT.                        | ) |                       |

Appearances:

Rebecca Hoyt Fischer, Esq., counsel for Trustee, Laderer & Fischer, P.C., 401 East Colfax, Suite 305, South Bend, Indiana; and

Anne E. Simerman, Esq., Cathleen M. Shrader, Esq., and Thomas P. Yoder, Esq., counsel for defendant, Barrett & McNagny LLP, 215 East Berry Street, Fort Wayne, Indiana 46802.

MEMORANDUM OF DECISION

At South Bend, Indiana, on July 18, 2013.

Before the court is the Defendant’s Motion to Alter or Amend Judgment, filed by Ken-Mac Metals, a Division of Thyssenkrupp Materials, NA, Inc. (“Ken-Mac” or “defendant”). Rebecca Hoyt Fischer, chapter 7 Trustee (“Trustee” or “plaintiff”) filed a Response, and the defendant filed a Reply. The court then took the matter under advisement. For the reasons that follow, the court denies Ken-Mac’s Motion to Alter or Amend Judgment.

The defendant's Motion, timely filed 14 days after the court's Judgment, is governed by Rule 59(e) of the Federal Rules of Civil Procedure, made applicable in bankruptcy cases by Rule 9023 of the Federal Rules of Bankruptcy Procedure. A party asking the court to amend its Judgment under Rule 59 must establish clearly "(1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." *Cincinnati Life Ins. Co. v. Beyrer*, \_\_\_ F.3d \_\_\_, 2013 WL 3379344 at \*12 (7th Cir. July 8, 2013) (quoting *Blue v. Hartford Life & Accident Ins. Co.*, 698 F.3d 587, 598 (7th Cir. 2012)). The granting or denial of motions for reconsideration under Rule 59(e) is within the court's discretion. *See id.*; *see also Heyde v. Pittinger*, 633 F.3d 512, 521-22 (7th Cir. 2011).

The defendant asked the court to alter or amend its Judgment in several ways. First, it asserted that the Judgment was ambiguous. Ken-Mac requested that the Judgment should be amended to state explicitly that the court had made no precise damage determination.

The court finds, first, that the defendant has not pointed to any newly discovered material evidence, an intervening change in the law, or a manifest error in the law or fact. The court further finds that the Judgment is not ambiguous. *See* R. 38. It granted the Trustee's Motion for Partial Summary Judgment and denied the defendant's Motion for Partial Summary Judgment. It entered partial summary judgment on Count I, pursuant to 11 U.S.C. §§ 544, 548 and 550. It further held that the value of the pre-petition transfer of the Metal to Ken-Mac was recoverable for the benefit of the bankruptcy estate. The court neither stated nor suggested a value or damage amount. Moreover, in the Memorandum of Decision the court explicitly acknowledged that the parties had agreed to mediate or to settle the issue of damages. *See* R. 37 at 6.

The court concludes that there is no determination of valuation or of damages in the Judgment or Memorandum of Decision and therefore no need to alter or amend the court's decision with regard to that request for clarification.

Ken-Mac's second claim was that the court committed a manifest error of law. In its view, the court's determination that the debtor Pace American Enterprises, Inc. ("Pace" or "debtor") did not receive

reasonably equivalent value for the Metal was manifest error. It argued that the decision should be altered to reflect that Pace did receive reasonably equivalent value – in fact, a dollar-for-dollar reduction in debt in exchange for Ken-Mac’s repossession of the Metal. It sought these amendments to the court’s ruling:

Ken-Mac requests that this Court alter or amend its Memorandum of Decision and the Judgment to hold the following: (1) that Pace’s debt was satisfied in exchange for the transfer of the Metal to Ken-Mac, and that such satisfaction constituted reasonably equivalent value; (2) that, accordingly, the Trustee failed to meet her burden of establishing all of the requisite elements of constructive fraudulent transfer; (3) that the Trustee is not entitled to recover the value of the pre-petition transfer of the Metal for the benefit of the bankruptcy estate; and (4) that Ken-Mac is entitled to judgment on the Trustee’s constructive fraudulent transfer claim.

R. 42 at 10-11. In essence, it asked the court to reverse its ruling in favor of the Trustee and against Ken-Mac under 11 U.S.C. § 548(a)(1).

In its Brief, Ken-Mac began its explanation of the court’s manifest error by stating that the debtor, with the rights of a consignee, under the UCC is treated as a purchaser who takes subject to a purchase money security interest. It then argued:

It follows, then, as a matter of law, that Ken-Mac retained the rights of a seller with a retained security interest – *i.e.*, the right to receive payment for the Metal in accordance with the parties’ contract, and to exercise its rights under the UCC upon Pace’s default. *See* Ind. Code § 26-1-9.1-601.<sup>1</sup>

*Id.* at 7. It insisted that Ken-Mac, as seller, was not paid by Pace, and thus had a claim for payment against Pace under the Supply Agreement. It explained that a debt existed in favor of Ken-Mac once the goods were delivered and Pace had a property interest in the Metal, and before Ken-Mac repossessed the Metal.<sup>2</sup> It then asserted that the debt was extinguished once Ken-Mac repossessed the Metal, and that “the absence of a debt

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<sup>1</sup> The Supply Agreement signed by Ken-Mac and Pace stated that Ohio law, rather than Indiana law, governed the contract. It also established that the parties’ relationship was one of consignment, not merely a buyer-seller relationship.

<sup>2</sup> This statement (and the subsequent ones built upon it) is factually incorrect. The “Consigned Inventory” section of the Supply Agreement makes clear that Pace owed nothing to Ken-Mac for the consigned Metal held in inventory until Pace opened a banded skid or coil and notified Ken-Mac of the withdrawal from inventory. At that time, a debt was created and Ken-Mac could send an invoice for all withdrawals. *See* R. 37 at 2-3. Ken-Mac’s premise of its argument – that Pace owed Ken-Mac “once the goods were delivered” is wrong under the terms of the Agreement.

or claim for damages” was proven by the fact that Ken-Mac neither sent Pace an invoice for the Metal nor asserted a claim for payment or damages. *See id.* at 9. It concluded that, “whatever the amount of the debt that arose upon the transfer of the interest to Pace, that same amount was then satisfied upon Ken-Mac’s repossession of the Metal. . . . Value was given by Ken-Mac to Pace, and it is axiomatic that the value was reasonably equivalent.” *Id.* at 10.

This argument had been presented by Ken-Mac in its earlier briefs and was considered by the court in its Decision. In particular, the court summarized Ken-Mac’s position as follows:

. . . Ken-Mac insists it gave value, “reasonably equivalent value,” in exchange for the transferred Metal through the satisfaction of the debt Pace would owe to Ken-Mac. It claims that, if the Metal belonged to Pace, Ken-Mac’s transfer of the Metal back to itself “was at least a dollar-for-dollar credit on Pace’s obligation” when Pace bought the Metal. R. 32 at 8. If, on the other hand, Pace had no interest in the Metal until it used the Metal, Ken-Mac’s removal of the unused Metal was a re-taking of its own property, and it cannot be a fraudulent transfer. *See id.* at 6; *see also* R. 34 at 8.

R. 37 at 14.

The court finds that the argument in this Motion to Alter is merely a repetition, a rehashing of the defendant’s previous arguments in its summary judgment briefs, and as such is impermissible in a Rule 59 motion. *See Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996). A Rule 59 motion is meant to enable a court to correct its own errors, but not to allow the movant to relitigate its case by repeating earlier arguments or by raising evidence or arguments that should have been presented earlier. *See In re Bauman*, 465 B.R. 495, 507 (Bankr. N.D. Ill. 2012).

A “manifest error” is not demonstrated by the disappointment of the losing party. It is the “wholesale disregard, misapplication, or failure to recognize controlling precedent.” Contrary to this standard, [the movant’s] motions merely took umbrage with the court’s ruling and rehashed old arguments.

*Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000), *cert. denied*, 531 U.S. 1152 (2001) (citation omitted). The court finds that the argument fails here, in the Motion before it, just as it did in the earlier partial summary judgment Decision.

Ken-Mac's "manifest error" argument was intended to have a domino effect: If the defendant won the argument concerning reasonably equivalent value, it believed that the court would alter its Judgment and reasoning to find that the Trustee had failed to meet her burden under § 548(a) and that the Trustee was not entitled to recover the value of the pre-petition transfer of the Metal for the bankruptcy estate. However, none of the defendant's arguments clearly established a manifest error of law or fact, and therefore the motion to alter or amend the court's Judgment could not succeed.

Having considered whether the defendant has established clearly any of the criteria for a Rule 59(e) motion, the court determines that the defendant has provided no basis for altering or amending its decision. It also concludes that its Judgment and Memorandum of Decision of March 21, 2013, are succinct and clear. As a result, it denies the defendant's Motion.

Accordingly, the Defendant's Motion to Alter or Amend Judgment, filed by Ken-Mac Metals, a Division of Thyssenkrupp Materials, NA, Inc., is denied.

SO ORDERED.

/s/ HARRY C. DEES, JR.  
HARRY C. DEES, JR., JUDGE  
UNITED STATES BANKRUPTCY COURT