

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
DRAW ANOTHER CIRCLE, LLC,)	Case No. 16-11452 (JTD)
)	
Debtor(s).)	
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CURTIS R. SMITH, LIQUIDATING)	
TRUSTEE,)	Adv. Proc. No. 17-51041 (JTD)
)	
Plaintiff(s),)	
v.)	
)	
JOEL WEINSHANKER, ALAN VAN)	
ONGEVALLE, CATHY HERSHCOPF,)	
FRANK MARRS, and JEFFREY)	
SHRADER,)	
)	
Defendant(s).)	

MEMORANDUM ORDER

Defendant, Alan Van Ongevalle (“Van Ongevalle”), filed a Motion to Reconsider the Court’s June 13, 2019 Opinion and Order (the “June Opinion”) denying his motion to dismiss Plaintiff’s claim against him for breach of the fiduciary duty of care. (D.I. 48; the “Motion”). For the reasons set forth below, the Court denies the Motion.

I. BACKGROUND

On June 7, 2018, Plaintiff filed the Amended Complaint, alleging various breaches of fiduciary duties against the Defendants.¹ (D.I. 24). On July 20, 2018, Defendants moved to dismiss

¹ Count I: Breach of fiduciary duty against Joel Weinshanker; Count II: Breach of fiduciary duty against Cathy Hershcopf, Jeffery Shrader, and Frank Marrs; Count III: Breach of fiduciary duty against Alan Van Ongevalle; Count IV: Aiding and abetting breach of fiduciary duties against Cathy Hershcopf, Jeffrey Shrader, and Frank Marrs; Count V: Aiding and abetting breach of fiduciary duty against Alan Van Ongevalle; Count VI: Alter ego/piercing the corporate veil against Joel Weinshanker; and Count VII: Attorneys’ fees and costs against all Defendants.

the Amended Complaint. (D.I. 29, 31). The Court granted Defendants' motion to dismiss with respect to counts II, IV, V, and VII. On count I, the Court denied the motion to dismiss with respect to Defendant Weinshanker's fiduciary duty to Hastings and granted the motion with respect to his fiduciary duty to Hastings' creditors. On count III, relevant here, the Court denied the motion to dismiss with respect to Van Ongevalle's fiduciary duty of care and granted the motion with respect to his fiduciary duties of loyalty and obedience. In the June Opinion, the Court declined to dismiss count III in its entirety because it found that the Amended Complaint adequately alleged a claim for a breach of the fiduciary duty of care. Van Ongevalle argues that the Court misapplied Texas law because the Amended Complaint failed to allege fraud or ultra vires conduct as to him, and, therefore, his actions are protected by the business judgment rule. The Court disagrees.

II. STANDARD OF REVIEW

Motions for reconsideration are governed by Bankruptcy Rule 9023, which expressly incorporates Federal Rule 59. Fed. R. Bankr. P. 9023. A motion under Rule 59(e) is properly before the Court where there is: (1) an intervening change in controlling law; (2) an availability of new evidence; or (3) a need to correct a clear error of law or to prevent manifest injustice. *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). A motion for reconsideration should not be used to reargue the facts or the applicable law. *White v. New Century TRS Holdings, Inc. (In re New Century Holdings, Inc.)*, 502 B.R. 416, 421 (Bankr. D. Del. 2013) (emphasis added). Furthermore, a motion for reconsideration should be granted sparingly so as to not waste judicial resources. *Id.* Van Ongevalle's argument maintains that the Court committed a clear error of law by denying the motion to dismiss with respect to the duty of care claim.

III. DISCUSSION

Van Ongevalle argues that the Court misapplied Texas state law regarding his fiduciary duty of care as an officer and director of Hastings. Relying on the Fifth Circuit decision in *Gearhart*, Van Ongevalle asserts that the Amended Complaint failed to allege a breach of the duty of care because it does not allege that he committed an ultra vires act or an act tainted by fraud. Motion at 7. In *Gearhart*, the court articulated its understanding of the duty of care under Texas state law as requiring an officer or director to “handle his corporate duties with such care as an ordinarily prudent man would use under similar circumstances”. *Gearhart Indus., Inc. v. Smith Int’l, Inc.*, 741 F.2d 707, 720 (5th Cir. 1984). The *Gearhart* court goes on to state that under the Texas business judgment rule, courts “will not impose liability upon a non-interested corporate director unless the challenged action is ultra vires or is tainted by fraud”. *Id.* at 721.

Subsequent courts have clarified the application of the business judgment rule under Texas law. *See Brickley v. Scattered Corp. (In re H & M Oil & Gas, LLC)*, 514 B.R. 790, 814-15 (Bankr. N.D. Tex. 2014) (“Texas courts, like other jurisdictions, do not apply the business judgment rule in cases where the challenged corporate decision lacks a business purpose, is tainted by conflict of interest, is so egregious as to amount to a no-win decision, or results from an obvious and prolonged failure to exercise oversight or supervision.” (citing *Resolution Trust Corp. v. Acton*, 844 F.Supp. 307, 314 (N.D. Tex. 1994))).

In the June Opinion, the Court specifically noted that the Amended Complaint alleges that Van Ongevalle “had knowledge of the challenged transactions, and knew they were not in the best interest of Hastings”. June Op. at 21-22. This was in contrast to the allegations against the Non-Weinshanker Defendants where it was claimed that they were without knowledge of Weinshanker’s actions. *Id.* at 20. Applying the business judgment rule to the allegations against

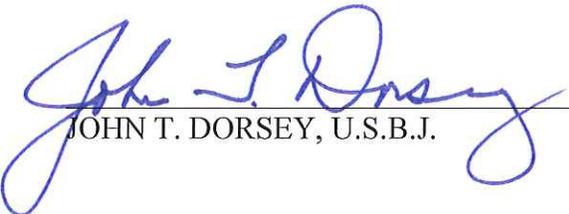
Van Ongevalle, the Court concluded, although not explicitly, that the Amended Complaint adequately alleges that the business judgment rule does not apply to Van Ongevalle because of his alleged direct knowledge of the transactions. Given Van Ongevalle's direct knowledge, Plaintiff has adequately pled facts sufficient for a finding at trial that Van Ongevalle acted without a business purpose, was tainted by conflict of interest, agreed to a no-win decision, or failed to exercise appropriate oversight or supervision.

Accordingly, the Court did not commit a clear error of law regarding the denial of the Motion as to Plaintiff's duty of care claims.

The Motion to Reconsider is, therefore, denied.

SO ORDERED.

Dated: September 30, 2019



JOHN T. DORSEY, U.S.B.J.