

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

AMERICAN CANDY COMPANY,

Case No. 01-13291-MAM-11

Debtor.

AMERICAN CANDY COMPANY,

Plaintiff,

v.

Adv. No. 02-01264

BENZER ENTERPRISES INC.

D/B/A AMS GIFTS,

Defendant.

**ORDER DENYING AMERICAN CANDY COMPANY'S
MOTION TO ALTER OR AMEND JUDGMENT**

R. Scott Williams and Meredith Jowers Lees, Birmingham, Alabama, Attorneys for
American Candy Company
Christopher Kern, Mobile, Alabama, Attorney for Benzer Enterprises Inc.

This matter is before the Court on the motion of American Candy Company ("ACC") to alter or amend the Court's order dismissing ACC's adversary proceeding against Benzer Enterprises Inc. ("Benzer"). The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is denying ACC's motion.

FACTS

ACC filed a chapter 11 bankruptcy case in this Court on June 29, 2001. Prior to filing bankruptcy, ACC was a candy manufacturer located in Selma, Alabama. It made candy

products, including a popular line of licensed Disney items, and sold them to retail distributors. Benzer was one of ACC's customers. Benzer does business under the name of AMS Gifts and operates several gift shops located in Orlando, Florida. It largely serves the influx of tourists visiting Disney World and other Orlando area attractions. Benzer is co-owned by Mr. Arvind Nandu and his wife. Mr. Nandu is originally from Bombay, India. He has been living in the United States for 12 years.

ACC filed an adversary proceeding complaint against Benzer alleging that Benzer failed to remit payment for an order it placed. Benzer filed an answer in which it denied that ACC provided the products referenced in the complaint; Benzer further denied owing ACC any payment for the products. The Court held a trial on ACC's complaint on June 16, 2003.

The Court heard testimony from witnesses for both parties. Roy Gomes, ACC's vice president for sales and marketing, testified that ACC received a handwritten fax order from Benzer on July 8, 2002. Mr. Gomes stated that the order appeared to be from Benzer based on past orders that Benzer had placed with ACC. ACC introduced a copy of the order into evidence. Mr. Gomes testified that he did not have the original order but he believed the original should be in ACC's records in Selma, Alabama. Mr. Nandu testified that neither he nor anyone at Benzer placed an order with ACC on or around July 16, 2003. He stated that the order was much larger than any order Benzer previously placed with ACC. Mr. Nandu also testified that he did not recognize the handwriting on the order.

Benzer introduced 3 letters into evidence that Mr. Nandu sent to ACC to support Benzer's assertion that it never placed the disputed order with ACC. In his letters to ACC, Mr. Nandu stated that Benzer did not place an order with ACC. He requested that ACC provide him

with proof that the products were delivered to Benzer. ACC did not dispute that it received Mr. Nandu's letters.

After the trial of the adversary proceeding, the Court dismissed ACC's complaint against Benzer. In its oral order, the Court stated that it found the testimony and evidence submitted by the parties to be in equipoise. The burden of proof rested with the plaintiff, ACC. The Court found that ACC failed to meet its burden of proof to prove that Benzer ordered and received the products at issue by a preponderance of the evidence. ACC filed a motion to alter or amend the Court's judgment on July 3, 2003.

LAW

A motion to alter or amend judgment may be brought pursuant to Federal Rule of Civil Procedure 59(e). Fed. R. Bankr. P. 9023. "Rule 59(e) does not set forth any grounds for relief and the district court has considerable discretion in reconsidering an issue;" *Sussman v. Salem, Saxon & Nielson*, 153 F.R.D. 689, 694 (M.D. Fla. 1994) (citing to *American Homes Assur. Co. v. Glenn Estess & Associates Inc.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985) however, "the courts have delineated three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; (3) the need to correct clear error or prevent manifest injustice." *Id.* (citing to *Decker Coal Co. v. Hartman*, 706 F.Supp. 745, 750 (D. Mont. 1988) (quoting *All Hawaii Tours v. Polynesian Cultural Center*, 116 F.R.D. 645, 649 (D. Haw. 1987), *rev'd on other grounds*, 855 F.2d 860 (9th Cir. 1988)). ACC cites the second ground, the availability of new evidence, in its motion to alter or amend this Court's judgment.

Case law holds that "evidence is 'unavailable,' so as to justify its late submission by way of a motion under Rule 59(e), only if it could not, in the exercise of reasonable diligence, have

been submitted before.” *Javetz v. Board of Control, Grand Valley State University*, 903 F. Supp. 1181, 1191 (W.D. Mich. 1995) (citing numerous other similar cases). In its motion to alter or amend, ACC states that “[b]ased on the Court’s ruling regarding the authenticity of [the disputed order], ACC researched all of its voluminous paperwork and found another order from Benzer (Plaintiff’s Motion to Alter or Amend Judgment at 3), as well as “other proofs of delivery evidencing the prior orders shipped to and received by Benzer.” (*Id.* at 4).

The Court finds that ACC’s “newly discovered” evidence is not “new.” It has been in ACC’s possession throughout the pendency of this adversary proceeding. When ACC introduced a copy of the disputed order into evidence, Mr. Gomes testified that the original was likely in ACC’s records in Selma, Alabama. After the Court found that ACC failed to meet its burden of proof, at least in part due to questions regarding the authenticity of the disputed order, ACC searched through its records and produced the documents it now wants to the Court to consider. Although the Court acknowledges ACC’s efforts to produce additional proof now, it finds ACC did not exercise “reasonable diligence,” *Javetz* at 1191, to obtain the documents prior to the Court’s order dismissing its complaint.

At the hearing on ACC’s motion, counsel for ACC suggested that the Court should allow ACC to submit its “newly discovered” evidence based on equity grounds because it was surprised at the adversary proceeding when Mr. Nandu testified that he never placed or received the disputed order. The Court is unpersuaded by ACC’s equitable argument. Mr. Nandu sent 3 letters to ACC explaining his position that he never placed nor received the disputed order. He requested a proof that Benzer placed and received the order. ACC did not dispute that it

received his letters. ACC cannot claim that it was surprised by Mr. Nandu's assertions at the adversary proceeding when they are the same assertions he made in his letters.

Although the Court has "considerable discretion," *Sussman* at 694, in determining whether to reconsider its order dismissing ACC's complaint, it must decline to do so in this instance. In considering a Rule 59(e) motion, the Court must balance "the need to uphold the finality of decisions made, and the need to render just decisions on the basis of all the pertinent facts." *Javetz* at 1191. The evidence ACC seeks to introduce, if considered by the Court, would likely impact the credibility of Mr. Nandu's testimony. However, Mr. Nandu's letters to ACC indicated that he disputed ever placing or receiving the disputed order. ACC should have been ready to offer proof that Mr. Nandu placed the order at the adversary proceeding. The Court will not consider the additional proof it offers now.

IT IS ORDERED that American Candy Company's motion to alter or amend this Court's previous order is DENIED.

Dated: August 14, 2003


MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE