

Motions, Pleadings and Filings

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United States District Court, S.D. New York.
Mark BUTLER, Plaintiff,

v.

PHLO CORPORATION, Defendant.
No. 00 CIV. 1607(NRB).

June 28, 2002.

Patrick W. Begos, Esq., Bronxville, Counsel for Plaintiff.

Samuel L. Newman, Esq., New City, Counsel for Defendant.

MEMORANDUM AND ORDER

BUCHWALD, District J.

*1 Defendant Phlo Corporation ("Phlo") brings this motion to amend the supplemental judgment entered on May 13, 2002. The facts underlying this motion are set forth in our prior decisions in this case. On April 4, 2002, we issued a Memorandum and Order, 2002 WL 523283, denying plaintiff's motion to hold defendant in contempt for violating our July 31, 2001, Memorandum and Order, 2001 WL 863426, which held that Phlo must issue stock options to plaintiff and refund the \$1,000 he paid for 20,000 unregistered shares defendant issued to him pursuant to his Employment Agreement. While denying plaintiff's motion for sanctions, we directed him to submit a supplemental judgment setting out the precise terms for the exercise of his options and for the tender of his unregistered shares. Plaintiff submitted his proposed supplemental judgment on April 25. Defendant did not communicate its opposition the plaintiff's submission until after we signed the supplemental judgment on May 13, 2002. On May 22, 2002, defendant made this motion to amend the judgment under Fed.R.Civ.P. 59(e) and 60(b).

Reconsideration of a decision under Rule 59(e) is only appropriate because of "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest

injustice." Virgin Atlantic Airways, Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir.1992) (internal quotation omitted). Rule 60(b) provides for relief from a judgment in the event of one of the following: 1) mistake, inadvertence, or excusable neglect; 2) newly discovered evidence; 3) fraud; 4) the judgment is void; 5) the judgment has been satisfied, released, discharged, or vacated; or 6) any other reason justifying relief from the judgment. The catch-all provision of Rule 60(b)(6) is to be used only in "extraordinary circumstances." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988).

Defendant sets forth two grounds for amending the judgment: 1) that its failure to oppose the proposed judgment was the result of excusable neglect; and 2) that the judgment is improperly drafted and would require Phlo to violate state and federal laws. We find neither argument persuasive. This motion appears to be yet another delay tactic by Phlo to avoid having to comply with its obligations. [FN1] Given the defendant's history of delay this case, we do not believe that Phlo's justification for its failure to make a timely objection qualifies as excusable neglect under Rule 60(b). See Affirmation of Anne Hovis, ¶ 4.

FN1. We note for the record that, on May 22, 2002, Judge Denny Chin held issued an order holding Phlo and its officers, James and Anne Hovis, in contempt of court for violating his order to pay damages and convey shares to the defendant in that case, arising out of warrants issued to Stevens as part of a financing agreement. *Phlo v. Stevens*, No. 00 CV 3619.

Phlo also argues that the proposed judgment would require it to violate federal securities laws and Delaware state law. As we noted in our April 4 decision, Phlo bears the burden of proving its impossibility defense. 2002 WL 523283, at *3. Despite this burden, Phlo has cited no law in its motion or reply to support its contention that compliance with the supplemental judgment would be practically or legally impossible. [FN2]

FN2. In fact, defendant's motion was not accompanied by any Memorandum of Law but simply an Affirmation by Anne Hovis,

Executive Vice President and General Counsel of Phlo, that provides nothing beyond the same conclusory statements of impossibility that Phlo offered in opposing plaintiff's contempt motion.

*2 It has been almost a full year since we issued our July 31, 2001, Memorandum and Order, during which time defendant has consistently rebuffed plaintiff's attempts to exercise his rights. We find that defendant's motion is simply an attempt to relitigate the issues we have already reached. Defendant has provided no basis on which to grant relief under the extraordinary remedies provided under [Rules 59\(e\)](#) and [60\(b\)](#). Accordingly, defendant's motion is denied.

IT IS SO ORDERED.

Not Reported in F.Supp.2d, 2002 WL 1402007
(S.D.N.Y.)

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