

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.08-81565-Civ-Hurley/Hopkins

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

CREATIVE CAPITAL CONSORTIUM, LLC,
A CREATIVE CAPITAL CONCEPTS, LLC, and
GEORGE L. THEODULE,

Defendants.

**ORDER DENYING NON-PARTY WACHOVIA BANK, N.A.'S MOTION TO VACATE
OR MODIFY ORDER GRANTING RECEIVER'S MOTION TO COMPEL (DE 244)**

THIS CAUSE has come before this Court upon an Order referring all discovery matters to the undersigned United States Magistrate Judge for final disposition. (DE 78). This Court has before it non-party Wachovia Bank, N.A.'s Motion to Vacate or Modify Order Granting Receiver's Motion to Compel. (DEs 241, 244). For the reasons that follow, this Court **DENIES** the Motion to Vacate. (DE 244).

BACKGROUND

On April 13, 2010, Jonathan E. Perlman, Receiver herein, filed a Motion to Compel non-party Wachovia Bank, N.A., ("Wachovia") to produce documents which were the subject of a subpoena duces tecum issued in April of 2009. (DE 233, pg. 1). After Wachovia failed to respond within the allotted time, this Court granted the Motion to Compel by default on May 4, 2010. (DE 241). Wachovia's Motion to Vacate followed on May 19, 2010. (DE 244).

DISCUSSION

In support of the Motion to Vacate, Wachovia cites Rules 59 and 60. (DE 244, pgs. 1, 7). Wachovia also argues that its Motion to Vacate should be granted because (1) the Receiver failed to confer in good faith prior to filing the motion because he only sent an e-mail to counsel for Wachovia, Mr. Rosenblatt, and failed to place a telephone call; (2) had the Receiver called counsel for Wachovia, he would have learned that Mr. Rosenblatt was no longer working for Wachovia; (3) Wachovia never received a copy of the Receiver's Motion to Compel via United States mail; (4) Wachovia only learned of the existence of the Motion to Compel when the Receiver called Wachovia to notify it of the existence of the court's order granting the Motion; (5) Wachovia has been attempting to gather the documents called for by the subpoena; and, (6) Wachovia may seek to assert objections to production of certain documents based on privilege or the Bank Secrecy Act. (DE 244, pgs. 1-8).

Wachovia's reliance on Rules 59 and 60 is misplaced.

Rule 59, entitled "New Trial; Altering or Amending a Judgment," applies to motions for new trial or motions to alter or amend a final judgment. *See* Fed. R. Civ. P. 59, Advisory Committee Notes, 1995 Amendments (referring to new time limits applicable to motions for a new trial, motions to alter or amend a judgment, and affidavits opposing a new trial motion). Given the fact that the underlying order is a discovery order, and no trial or final judgment is at issue, Wachovia has failed to show how Rule 59 applies herein.

Rule 60, entitled "Relief from a Judgment or Order," generally provides for relief from a final judgment or order based on clerical mistake or other circumstances enunciated in Rule 60(b). *See* Fed. R. Civ. P. 60(a), (b) (2009). According to Rule 60(b), a court may grant relief from a final judgment or order based on "(1) mistake, inadvertence, surprise, or excusable

neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.”

However, Rule 60(b) does not apply to the underlying discovery order which Wachovia seeks to vacate. Indeed, Rule 60(b) “by its terms [is] limited to ‘final’ judgments or orders [and] is inapplicable to interlocutory orders.”¹ *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 571-72 (7th Cir. 2006) (citing *Kapco Mfg. Co. v. C & O Enterprises, Inc.*, 773 F.2d 151 (7th Cir. 1985); *Penn West Associates, Inc. v. Cohen*, 371 F.3d 118, 124-25 (3d Cir. 2004); *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000)). According to the Advisory Committee notes to Rule 60, “interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.” Fed. R. Civ. P. 60(b), Advisory Committee Notes, 1946 Amendments. *See also Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1469 (4th Cir. 1991) (“Rule 60(b) affords relief only from a judgment, order, or proceeding which is *final* . . . Rule 60(b) was not available for relief from an interlocutory order”).

Courts have also concluded that Rule 60 does not apply to discovery orders. *See Franzone v. Massena Memorial Hosp.*, 189 F.R.D. 220, 223 (N.D.N.Y. 1999) (noting that its order requiring production of discovery materials was not entitled to remedies provided by Rule 60)

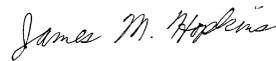
¹ An interlocutory order is one “which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties” and does “not terminate the action as to any of the claims or parties.” *Fayetteville Investors*, 936 F.2d at 1469.

(citing *Torres v. Chater*, 125 F.3d 166, 168 (3rd Cir. 1997) (noting that a discovery order is an interlocutory order to which Rule 60 does not apply)). Because the Order at issue herein is a discovery order which did not terminate any claims or parties, it was an interlocutory order² to which Rule 60 does not apply.

Moreover, even if Rule 60(b) were applicable, notwithstanding Wachova's factual assertions outlined above, this Court concludes that Wachovia has not demonstrated any basis under Rule 60(b) which would warrant vacatur.

Accordingly, it is **HEREBY ORDERED AND ADJUDGED** that Non-party Wachovia Bank, N.A.'s Motion to Vacate or Modify Order Granting Receiver's Motion to Compel is **DENIED**. (DE 244).

DONE and ORDERED in Chambers this 2 day of June, 2010, at West Palm Beach in the Southern District of Florida.



JAMES M. HOPKINS
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record
Amy S. Rubin, counsel for Wachovia Bank, N.A.

² An interlocutory order is one "which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties" and does "not terminate the action as to any of the claims or parties." *Fayetteville Investors*, 936 F.2d at 1469.