IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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| In Re: | ) | |
| | ) | |
| BCI PANCAKE HOUSE et al., | ) | Chapter 11 |
| | ) | Case Nos. 95-205 through |
| Debtor. | ) | 208 (JKF) |
| | ) | |
| BCI PANCAKE HOUSE et al., | ) | |
| | ) | |
| Appellant, | ) | C.A. No.02-97-GMS |
| | ) | |
| v. | ) | Adversary No. 96-198 |
| | ) | |
| MORRIS, JAMES, HITCHINS & WILLIAMS, et al., | ) | |
| | ) | |
| Appellee. | ) | |

**MEMORANDUM AND ORDER**

## I. INTRODUCTION

On November 7, 1996, the appellants, BCI Pancake House, Inc., Blue Coat Inn, Inc., Patriot Enterprises LLC, and Hospitality Organizational Management Enterprises, Inc. (collectively, "BCI"), filed the above-captioned adversary proceeding alleging legal malpractice. In an order entered on November 27, 2001, Judge Fitzgerald concluded that: (1) the law firm defendants, Morris, James, Hitchens and Williams, did not commit malpractice, and (2) the alleged conduct of the defendants was not the proximate cause of any harm to the plaintiffs. The Clerk of the District Court docketed BCI's appeal on February 6, 2002. On June 3, 2002, the court dismissed the appeal for failure to prosecute.

Presently before the court is BCI's motion for reconsideration of the court's June 3, 2002 order. For the following reasons, the court will deny this motion.

## II. STANDARD OF REVIEW

As a general rule, motions for reconsideration should be granted only "sparingly." *See Karr v. Castle*, 768 F. Supp. 1087, 1090 (D. Del. 1991). In this district, these types of motions are only granted if it appears that the court has patently misunderstood a party, has a made a decision outside the adversarial issues presented by the parties, or has made an error not of reasoning, but of apprehension. *See, e.g., Shering Corp. v. Amgen, Inc.*, 25 F. Supp. 2d 293, 295 (D. Del. 1998); *Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1240 (D. Del. 1990) (citing *Above the Belt, Inc. v. Mel Bonhannan Roofing, Inc.*, 99 F.R.D. 101 (E.D. Va. 1983)); *see also Karr*, 768 F. Supp. at 1090 (citing same). Moreover, even if the court has committed one of these errors, there is no need to grant a motion for reconsideration if it would not alter the court's initial decision. *See Pirelli Cable Corp. v. Ciena Corp.*, 988 F. Supp. 424, 455 (D. Del. 1998).

## III. DISCUSSION

On June 3, 2002, the court entered an order dismissing the present action for failure to prosecute. In support of that order, the court noted that BCI had failed to file its opening brief within fifteen days of the date the appeal was docketed. Nor had BCI sought an extension of time in which to file its brief. Moreover, although BCI's brief in opposition to the motion to dismiss for failure to prosecute was due on May 24, 2002, it failed to timely file that brief as well. Finally, the court found that dismissal was warranted because BCI had a history of indifference to its obligation to the court and the Bankruptcy Court.

BCI now requests that the court reconsider its order for two reasons. First, BCI maintains that it addressed the motion to dismiss for failure to prosecute by way of a declaration in opposition which was docketed on June 1, 2002. Second, BCI argues that the attorney of record, Henry A.

Heiman, ("Heiman"), has been ill and unable to assist the lead counsel, Gregory A. Sioris ("Sioris"), in the prosecution of this appeal. Based on these facts, BCI now requests that the court reopen the appeal. It further requests that the court place the appeal on an indefinite stay until such time as Heiman is able to proceed with the appeal.[1] The court will address each of these contentions in turn.

The court does not dispute that BCI filed an untimely opposition to the motion to dismiss for failure to prosecute. Nor does the court dispute that it was unaware that BCI planned to file this opposition at the time it began the process of granting the motion to dismiss. Nevertheless, even had the court become aware of the declaration in time to halt its decision-making process, the court's initial decision would remain unchanged.

Specifically, the declaration fails to adequately address BCI's procedural defaults in this case. Indeed, the declaration merely states that, because Heiman has become "indisposed" due to a medical condition, he was unable to assist Sioris in the timely prosecution of the appeal. It further states that, had the court issued a scheduling order, Sioris would have contacted the court regarding Heiman's condition. The court concludes that neither of these arguments explain Heiman's and Sioris' absolute failure to contact the court for approximately four months. Of particular concern to the court in this regard is Sioris' attempt to place the onus on the court to contact the parties. Bankruptcy Rule 8009 is clear on the time limitations for filing opening briefs on appeal. Nowhere in that unambiguous language does it allow for the parties to unilaterally decide to ignore its mandates. *See In re Stephenson*, 1996 U.S. Dist. LEXIS 1774, *4 (S.D.N.Y. Feb. 20, 1996) (rejecting the argument that waiting for a scheduling order mitigated failing to adhere to Rule 8009's

[1]Sioris and Heiman estimate that they will be prepared to file BCI's brief in thirty to sixty days. They further suggest that they will inform the court when they can actually proceed.

filing requirements).

Thus, the uncontested fact remains that BCI has failed to file its opening brief, in a timely fashion or otherwise. It further failed to timely file its brief in opposition to the motion to dismiss. The court will not now sanction BCI's utter disregard for the court's time and docket management concern by permitting it to continue to execute untimely filings at its convenience. Accordingly, because consideration of BCI's untimely declaration would not have changed the court's ruling, the court declines to vacate its June 3, 2002 order on this ground. *See Pirelli*, 988 F. Supp. at 445.

BCI next urges the court to reconsider its ruling solely because Heiman has been ill and thus unable to assist the lead counsel in preparing the case. However, as discussed above, Heiman and Sioris had an affirmative duty to inform the court of these circumstances and to request an extension of time in which to file BCI's opening brief. Instead, Heiman and Sioris opted to wait for approximately four months before contacting the court.[2] Regardless of Heiman's ill health, the court will not put its imprimatur on such behavior.

## IV. CONCLUSION

For these reasons, IT IS HEREBY ORDERED that:

1. BCI's motion for reconsideration (D.I. 15) is DENIED.

Dated: June 18, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

[2]Furthermore, in his May 28, 2002 and June 14, 2002 declarations, Sioris fails to address why he, as lead counsel in this case, was unable to fulfill his obligation as an attorney without Heiman's aid.