

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

IN RE:

IN PROCEEDINGS UNDER CHAPTER 11

LEVEL PROPANE GASES, INC., et. al.,

CASE NO. 02-16172

Debtors.

BILL WILHELM,

Plaintiff,

ADV. PROC. NO. 09-1116

v.

MARK UHRICH,
PLAN ADMINISTRATOR,

JUDGE RANDOLPH BAXTER

Defendant.

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is the Defendant Plan Administrator's Motion to Dismiss the above-styled adversary proceeding. Plaintiff Bill Wilhelm, a prepetition lessor, opposes the Motion. The Court acquires core matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), 28 U.S.C. § 1334, and General Order Number 84 of this District. After conducting a duly-noticed hearing on the matter, and considering the pleadings filed by the respective parties, the following findings of fact and conclusions of law are rendered:

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Plaintiff timely-filed the instant adversary proceeding on March 30, 2009, seeking, *inter alia*, to revoke confirmation of Level Propane's liquidation plan pursuant to 11 U.S.C. § 1144. Defendant

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NORTHERN DISTRICT OF OHIO
CLEVELAND

moves to dismiss the instant adversary proceeding pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to bankruptcy matters under Bankruptcy Rule 7012, Federal Rules of Bankruptcy Procedure.

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These above-styled consolidated cases, which are pertinent to Plaintiff's complaint, were commenced on June 6, 2002 by the filing of involuntary petitions for relief under Chapter 7 of the Bankruptcy Code (the Chapter 7 cases) against Park Place Management, Inc., The Park Place Companies, Inc., Park Place, Inc., Over-Flo Lot, Inc., Level Propane Gases, Inc., Level Energy Group, Inc. and WHM Enterprises, Inc.. On June 11, 2002, this Court entered an Agreed Final Order and Stipulation: a) Acknowledging the authority of Charles Sweet as Sole Director of All Debtors; b) Converting Cases to Voluntary Cases under Chapter 11; c) Granting Order for Relief Under Chapter 11; d) Ordering Joint Administration of all Cases; and e) Granting Other Relief (the "Agreed Order"). Plaintiff prosecuted no appeal with respect to the Agreed Final Order converting the cases to voluntary cases under Chapter 11.

The sale of the Debtors' propane distribution business to Eaglerock was approved by Court order entered on June 27, 2003. The sale closing occurred on July 2, 2003, at which time Eaglerock assigned all of its rights under the asset purchase agreement to its assignee, Horizon Propane, LLC. Plaintiff filed no objection to the sale and prosecuted no appeal of said order.

On September 18, 2003, this Court approved a compromise between the Debtors and Plaintiff with respect to certain claims he made against the estate, based on an alleged prepetition lease obligation in the amount of \$370,000.00. No appeal of said compromise order was perfected.

The Court approved the Amended Disclosure Statement on July 18, 2008. Plaintiff filed no objection to the Amended Disclosure Statement and no party appealed the Court's order approving the Amended Disclosure Statement. On October 9, 2008, this Court entered an order confirming the Debtors' Joint Plan of Liquidation. Plaintiff did not file an objection to the Debtors' Plan, nor did it file any appeal of this Court's order confirming the Debtors' plan.

Plaintiff filed a four-count complaint in the underlying adversary proceeding. In count one, Plaintiff seeks to revoke confirmation of the Debtors' plan pursuant to 11 U.S.C. § 1144 because the plan proponents allegedly made false representations to the Court with respect to the source of funding for the plan and because the entire course of these proceedings was allegedly predicated on a fraudulent scheme perpetrated by certain of Level Propane's secured lenders (the "Bank Group") to disguise the going concern value of Level Propane and to oust one William Maloof, the former sole shareholder, from control. In his second, third and fourth counts, Plaintiff seeks injunctive relief from enforcement of certain prior orders entered by this Court, specifically: 1) June 11, 2002 agreed order converting cases to voluntary cases under Chapter 11; 2) June 27, 2003 order approving the sale of Level Propane Gases; and 3) September 18, 2003 order approving settlement agreement between Debtors and Plaintiff resolving certain claims between the parties.

The dispositive issue for the Court is whether Plaintiff states a claim for which relief can be granted pursuant to Rule 12(b)(6), 11 U.S.C. § 1144 and for injunctive relief with respect to enforcement of certain prior orders entered by this Court.

Defendant moves to dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.P., which provides:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(6) failure to state a claim upon which relief can be granted.

The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief if all the facts and allegations in the complaint are taken as true. See *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993)(citing *Nishiyama v. Dickson County*, 814 F.2d 277, 279 (6th Cir. 1987)). “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Rippy v. Hattaway*, 270 F.3d 416, 419 (6th Cir. 2001).

To survive a motion to dismiss under Rule 12(b)(6), "a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir.1988) (citations and internal quotation marks omitted). Accordingly, “[a] motion to dismiss under Rule 12(b)(6) will be granted if the complaint is without merit due to an absence of law to support a claim of the type made or of facts sufficient to make a valid claim, or where the face of the complaint reveals that there is an insurmountable bar to relief.” *Davis v. DCB Financial Corp.*, 259 F.Supp.2d 664, 669 (S.D. Ohio 2003)(citing *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697 (6th Cir. 1978). The defendant bears the burden to prove that no claim has been stated. *Gould Electronics, Inc. v. U.S.*, 220 F.3d 169, 178 (3d Cir. 2000).

Plaintiff's Complaint

Count One: Action to Revoke Confirmation

11 U.S.C. § 1144 provides that:

On request of a party in interest at any time before 180 days after the date of the entry of an order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud.

The parties do not dispute that the Sixth Circuit has set forth the standard for determining an action to revoke confirmation in *Tenn-Fla Partners v. First Union National Bank of Florida*, 226 F.3d 746 (6th Cir. 2000). In order to succeed in revocation of a confirmation order, the movant must be able to prove: 1) that a plan proponent made a representation regarding compliance with § 1129 of the Bankruptcy Code that was materially false; 2) that the plan proponent knew the representation was false, believed it to be false, or made the representation with reckless disregard for the truth; 3) that the representation was made with the intent to induce the court to rely on it; 4) that the representation was in fact relied upon by the court; and 5) that as a result of the reliance, the confirmation order was entered. *Id.* at 750.

Herein, Plaintiff fails to state a claim for which relief can be granted under 11 U.S.C. § 1144. First, Plaintiff alleges that Defendant made material misrepresentations with respect to certain litigation pending in state court, the resolution of which could yield proceeds to the estate. Specifically, Plaintiff alleges that Defendant characterized the lawsuit, *Level Propane Gases, Inc. v. Squire, Sanders and Dempsey*, as an asset of the estate when “the proponents of the Plan knew that there was scant evidentiary support for the claim” and that Defendant “induced the Court to rely on the claim as a source of such funding. (Complaint, ¶ 33). This allegation is inaccurate. The

Amended Disclosure Statement states, in pertinent part, that “the net recovery in the SS&D litigation, **if any**, will be distributed to holder of certain holders of certain Allowed Claims.” (Amended Disclosure Statement at 22, ¶ U)(emphasis added). Clearly, the Court could not have relied on any proceeds from the SS&D litigation as a basis for confirming the plan.

Second, Plaintiff alleges that the Defendant “knew that the settlement of Level Propane v. Himmelman et. al., Adv. Proc. Case No. 04-1300, in this Court was subject to appeal [by William Maloof]. . . . They further failed to disclose the merits of the appeal, . . . instead dismissed the merits by assuring this Court that the settlement would be affirmed on appeal.” Obviously, this Court is aware of its prior orders, inclusive of the order overruling Mr. Maloof’s objection to the settlement and his appeal thereof. The record before the Court on confirmation, the Amended Disclosure Statement and the Confirmed Plan do not reflect any assurances by Defendant about the resolution of said appeal. Accordingly, this cannot be a basis for fraud upon the Court in connection with the confirmation of the plan.

Finally, the majority of Plaintiff’s complaint reiterates allegations previously made by Mr. Maloof in objection to the Debtors’ Disclosure Statement and on at least six different occasions with respect to a fraudulent scheme perpetrated by the Bank Group to disguise the going concern value of Level Propane in order to gain control of the company. In fact, counsel for Plaintiff stated at the hearing on this matter that the information regarding the alleged fraud in these proceedings came from Mr. Maloof.

Specifically, Plaintiff alleges that Defendant “knew of the schemes to fraudulently seize and maintain control of Level Propane and Park Place, and further knew of the steps taken to conceal the fraudulent schemes No mention of the schemes set forth above were set out in either the

Disclosure Statement, the Motion for Approval of the Liquidation Plan or at any point in open Court.” (Complaint, ¶ 31). Plaintiff’s allegation is simply false. The alleged fraud was mentioned on more than one occasion in open court during the confirmation proceedings. First, William Maloof objected to the Disclosure Statement on the basis that:

The proposed Disclosure Statement . . . fails to provide adequate information for the reason that it has not addressed the issues of fraud upon the court, which includes the document despoliation, the compromises of the customer database and the customer tank, and the waylaying of millions of dollars in customer payments to Level Propane prior to the sale of its going concern assets in 2003, see the Motion to Vacate (Docket Item No. 3140, as amended). . . . Without a full iteration of the frauds committed, it is sufficient to say that courses pursued by the lead creditor in these proceedings, generally referred to as the Bank Group . . . has as their achieved object the seizure of the going concern of the Debtors, particularly Level Propane Gases, Inc., in order to deliver the going concern to Amerigas, L.P. As set out by the [Second] Motion to Vacate, these parties choked off every other avenue of relief for the businesses, so that the only buyer left was Horizon Propane, Amerigas, L.P.’s straw man.

(Maloof Objection, Docket No. 3306).

At the May 27, 2008 hearing on Debtors’ Disclosure Statement, the Court instructed Debtors to amend the Disclosure Statement to include the accounting method used. Then on July 7, 2008, Mr. Maloof filed an objection to the Amended Disclosure Statement, which stated:

In light of the [sic] his recently filed R. 60(b)(2) Motion to Vacate, Docket Item No. 3348, shareholder, incorporating its arguments, hereby objects to the Disclosure Statement as proposed, because it fails to disclose the substantial dispute concerning the fraud upon this Court by which these bankruptcy proceedings initiated and have been advanced and depended upon to this date.

(Maloof Objection, Docket No. 3370). The Court approved the Amended Disclosure Statement on July 18, 2008 and overruled Mr. Maloof’s objection. No party appealed the Courts’ order.

In paragraphs 9-31 of the complaint, Plaintiff reiterates the allegations made by Mr. Maloof in his objections to the Disclosure Statement and pleadings incorporated therein. Plaintiff then states

that “No mention of the schemes set forth above were set out in either the Disclosure Statement, the Motion for Approval of the Liquidation Plan or at any point in open Court.” (Complaint at ¶ 31). It is unclear to the Court how Plaintiff can allege that the “schemes” were never “set out . . . in open Court,” when the Court duly considered the allegations of fraud in connection with the objections to the Disclosure Statement filed by Mr. Maloof and on at least six prior occasions thereto.

Applying the language of § 1144 to Plaintiff’s complaint shows that Plaintiff fails to state a claim upon which relief can be granted. Section 1144, by its terms, is discretionary, in that it states that a Court “may” revoke confirmation if, and only if, such order was procured by fraud. Clearly, this Court did not rely on any alleged material misrepresentations by Debtors’ counsel at the confirmation hearing with respect to the alleged fraudulent scheme. The Court duly considered Mr. Maloof’s objections which detailed the alleged fraudulent scheme and found such allegations to be without merit. *Tenn-Fla Partners*, 226 F.3d at 750 (court may revoke order of confirmation where it finds that it relied on material misrepresentations by plan proponents in connection with confirmation hearing).

The cases relied on by Plaintiff in support of his opposition to dismissal are distinguishable. First, Plaintiff relies heavily on *United States v. Kostoglou*, 73 B.R. 596 (Bankr. N.D. Ohio 1987) for the proposition that the fraud under § 1144 which will satisfy revocation of confirmation “is by no means limited to fraud in the hearings leading to confirmation of the plan, but to the entire bankruptcy proceeding.” (Plaintiff’s Opposition at 4). The very alleged fraudulent conduct in *Kostoglou*, however, was false testimony **at the confirmation hearing** from the Debtor with respect to the value of certain property. *Id.* at 598. Therein, the Internal Revenue Service filed an adversary proceeding alleging that “Debtors, with the intent to deceive and defraud creditors, knowingly

misrepresented the values of their various real estate holdings to the Court in connection with the confirmation of their Chapter 11 Plan and that the Court relied upon those misrepresentations and was thereby induced to confirm the Plan.” *Id.*

Furthermore, *In re Coffee Cupboard*, 119 B.R. 14 (E.D.N.Y. 1990) is not applicable herein because that case involved a motion to reopen a case after the Debtor materially defaulted on the obligations pursuant to the confirmed plan. Finally, Plaintiff references *In re Tenn-Fla Partners*, 170 B.R. 946 (Bankr. W.D. Tenn. 1994). Therein, the court revoked confirmation of the debtors’ plan where it concluded that “the court knows that it would not have confirmed the debtor’s plan had the court known that the debtor knew of an immediate \$2,300,000 equity return to the insiders of the debtor.” *Id.* at 969. In that case, the court confirmed a plan wherein the partners of Tenn-Fla purchased a piece of estate property in Orlando for \$9,885,000. The partners then sold the same property for \$12,443,547 ten days after confirmation.

In the case at bar, there was no sale of property in connection with the confirmed plan. The Debtors’ assets were sold more than five years ago and, accordingly, there were no representations with respect to the value of these asset in connection with confirmation of the plan. Plaintiff has cited to no cases, and the Court is aware of none, where actions that allegedly occurred more than five years prior to confirmation served as a basis for revocation under § 1144.

Counts Two through Four

In counts two through four, Plaintiff seeks an injunction from enforcement of certain previous orders entered by this Court, including, 1) June 11, 2002 agreed order converting cases to voluntary cases under Chapter 11; 2) June 27, 2003 order approving the sale of Level Propane Gases; and 3)

September 18, 2003 order approving settlement agreement between Debtors and Plaintiff resolving certain claims between the parties.

As stated above, Plaintiff never sought an appeal of any of these orders, all of which were entered more than five years ago. Accordingly, the relief sought by Plaintiff is barred by the doctrine of laches. Under the doctrine of laches, a court may dismiss an action where there exists inexcusable delay in instituting an action, resulting in prejudice to the non-moving party. *In re Levy*, 256 B.R. 563 (Bankr.D.N.J. 2000). In *Costello v. United States*, 365 U.S. 265, 282 (1961), the United States Supreme Court stated that the elements of laches include 1) lack of diligence by the party against whom the defense is asserted, and 2) prejudice to the party asserting the defense. Herein, Plaintiff has waited more than five years to seek enforcement of orders approved by this Court. This Court has confirmed the Debtors' plan and there are no other assets to be disposed. There are no other pending matters to be resolved other than those being prosecuted by Maloof and the two creditors, Bill Wilhelm and Maxus Capital, who seek to revoke confirmation. These latter parties acknowledged during the hearings on Defendant's Motion to Dismiss their respective complaints to revoke confirmation that the information for the basis of their complaints was supplied by Maloof.

Nor did Plaintiff object to the confirmation of Debtors' plan. Pursuant to § 12.10.2, of the confirmed plan, Plaintiff is barred from prosecuting causes of action inconsistent with the provisions of the plan. Furthermore, pursuant to the Confirmation Order, ¶ J, actions that arose prior to the Effective Date of the plan are barred. Pursuant to 11 U.S.C. § 1141(a), "the provisions of a confirmed plan bind the debtor . . . and any creditor, . . . whether or not the claim or interest of such creditor . . . is impaired under the plan and whether or not such creditor . . . has accepted the plan."

Confirmation of a plan of reorganization “constitutes a final judgment in bankruptcy proceeding” and is binding upon creditors. *Sanders Confectionery Products, Inc., v. Heller Financial Inc.*, 973 F.2d 474, 480 (6th Cir. 1992).

The Bankruptcy Code “contains a strong preference for final resolution of all claims involving the debtor . . . To release creditors . . . from the bonds of res judicata would allow them to launch collateral attacks on confirmed plans, undermining the necessary ability of bankruptcy courts to settle all of the claims against the debtor.” *Id.* at 480-81. Herein, Plaintiff is attempting to do exactly what § 1141(a) seeks to prevent, a collateral attack on the Debtors’ confirmed plan. Plaintiff has been silent in these proceedings, having filed no objection to the Debtors’ plan of reorganization and, accordingly, is hereby barred by the doctrine of finality from prosecuting this action.

Finally, Plaintiff has failed to plead the elements necessary for such relief. In order to be entitled to injunctive relief, a party must show that

1) it has suffered an irreparable injury; 2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; 3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and 4) the public interest would not be disserved by a permanent injunction.

Ebay Inc. v. Mercexchange, L.L.C., 547 U.S. 388. Plaintiff’s complaint lacks any allegations in this regard and, accordingly, Plaintiff fails to state a claim for which injunctive relief can be granted.

Accordingly, Defendant's Motion to Dismiss is well-premised and is hereby granted.
Plaintiff's opposition thereto is hereby overruled and the Plaintiff's complaint is dismissed.

IT IS SO ORDERED.

Dated, this 24th day of
June, 2009


JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT