UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Re:	)	**Case No. 1:07CV0153**
	)	
LEVEL PROPANE GASES, INC., et al.,	)	
	)	
Debtors.	)	
	)	
WILLIAM H. MALOOF,	)	**JUDGE ANN ALDRICH**
	)	
Appellant,	)	
	)	
vs.	)	
	)	
LEVEL PROPANE GASES, Inc., et al.,	)	
	)	
Appellees.	)	**MEMORANDUM AND ORDER**

This matter is before the court on appeal (Doc. No. 1) from the Bankruptcy Court for the Northern District of Ohio's denial of a motion to vacate an order. The appellant has also filed a motion to withdraw the reference to the lower court (Doc. No. 13) so that he may move this court to vacate on new grounds. In support of this motion, the appellant has submitted evidence not present in the trial court record, which the appellee has moved to strike (Doc. No. 12). Finally, the appellant moves that the court make a report requesting that the U.S. Attorney investigate violations of chapter 9 (Doc. No. 17). All issues have been fully briefed and are ripe for adjudication. For the following reasons, the court denies Maloof's motions to withdraw the reference, grants Level's motion to strike, and affirms the decisions of the Bankruptcy Court.

I. Background

In late 1999, BT Commercial, Deutsche Bank Trust Company Americas, LaSalle Bank National Association, and the Provident Bank (collectively, "the Bank Group") made loans to Level

Propane Gases, Inc. ("Level" or "Appellee") and affiliated debtors (collectively, "the Debtors"), which were guaranteed by Level and William H. Maloof ("Maloof" or "Appellant") and perfected by liens on all of the assets of the Debtors.

On June 6, 2002, the Debtors defaulted and the Bank Group accelerated all outstanding obligations. It also exercised its right to vote all shares of the Debtors, removing all existing directors and appointing Charles Sweet ("Sweet") as sole director. Sweet immediately retained Benesh Friedland, Coplan & Aranoff LLP ("BFCA") as counsel for each of the Debtors. The Bank Group filed a chapter 7 bankruptcy petition against Level, and requested the appointment of a U.S. Trustee ("the Trustee") in an effort to prevent interference from Maloof, who they believed had breached his fiduciary duties to the Debtors in the preceding months.

After negotiations between the Bank Group, Maloof, and Level, the Bankruptcy Court for the Northern District of Ohio ("the Bankruptcy Court") issued an *Agreed Final Order and Stipulation: (a) Acknowledging the Authority of Charles Sweet as Sole Director of All Debtors; (b) Converting Case to Voluntary Cases Under Chapter 11; and [Granting Other Relief]* ("the Agreed Order"), which was signed by Maloof and his bankruptcy counsel. Sometime thereafter, with the approval of the Trustee, a propane distribution business owned by Level was sold as a going concern.

On April 30, 2003, on a motion of the Trustee, the Bankruptcy Court ordered the appointment of Ray Warner to serve as examiner ("the Examiner"), to investigate whether BFCA misled the Court, the Debtors, and/or Maloof by failing to provide objective advice and/or by committing fraud. A few months later, after reviewing thousands of pages and conducting twenty-

two interviews, the Examiner filed a report finding that there was no evidence that BFCA had committed any wrongdoing.

Despite this finding, Maloof filed a motion to vacate the Agreed Order under Rule 60(b)(6) three years later. On November 28, 2006, the Bankruptcy Court denied the motion after conducting a hearing. It found that the motion was barred by the doctrine of laches, and that the fraud the motion alleged as grounds for relief was not proved by evidence of duress or fraud in the inducement to sign the Agreed Order.

Maloof has filed this appeal, asking this court to reverse the decision of the Bankruptcy Court denying his motion to vacate. He has also filed a motion asking this court to vacate the Agreed Order based on allegations of new evidence and/or fraud on the lower court. In support of the appeal and motion Maloof has filed additional materials that were not included in the record developed before the Bankruptcy Court, which Level has moved to strike.

I. Level's Motion to Strike

It is the burden of the party moving to strike to show the inadmissibility of each piece of evidence offered by the non-movant. *Hardin v. Reliance Trust Co.,* No. 1:04 CV 2079, 2006 WL 2850457, slip op., *1 (N.D. Ohio Sept. 29, 2006). Level has satisfied this burden by demonstrating that the materials contained in Maloof's Appendix and Supplemental Appendix (Doc. Nos. 10, 11) were filed outside the time-limit established by the Federal Rules of Bankruptcy Procedure, and would impermissibly expand the appellate record with evidence not available to the lower court in rendering its decision.

Under Bankruptcy Rule 8006, "the record on appeal shall include the items [designated within 10 days after a notice of appeal has been filed], the judgment, order or decree appealed from,

and any opinions, findings of fact, and conclusions of law of the court." Fed.R.Bankr.P. 8006. The plain language of the Rule establishes that the record on appeal is limited to those documents designated by the parties within the 10-day time limit. Maloof filed his notice of appeal on December 5, 2006, and both parties filed a designation of items by the December 15 deadline. Maloof did not file his Appendix and Supplemental Appendix until March 2007, well outside the time-limit imposed by the Rule.

Even if the court were to allow some flexibility in such filings, an appeal does not present a party with the opportunity to build a new record. "In an appeal from the bankruptcy court, the district court sits in an appellate capacity, and, just as a circuit court is limited to the district court record, so the district court is normally limited to the evidentiary record compiled in the bankruptcy court." *Crefisa Inc. v. Washington Mut. Bank F.A. (In re Colonial Mortg. Bankers Corp.),* 186 F.3d 46, 49-50 (1st Cir. 1999) (internal citations omitted). The material contained in the Appendix and Supplemental Appendix was collected after the judgment of the Bankruptcy Court. The court will not depart from the well-accepted conclusion that this new information should not be permitted as evidence on appeal because it was not presented to the trial court.

Maloof argues, however, that this is an *abnormal* situation, which requires the court to exercise its equitable powers and admit any evidence that might prove a fraud on the lower court. To support this exception notion, Maloof's brief string-cites the following cases: *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 238 (1944); *Root Refining Co. v. Universal Oil Prods. Co.,* 169 F.2d 514 (3d Cir. 1948); *Demjanjuk v. Petrovsky,* 10 F.3d 338 (6th Cir. 1993); and *In re Intermagnetics Am. Inc. v. CITIC,* 926 F.2d 912 (9th Cir. 1991) (collectively, "the *Hazel-Atlas* line"). The brief leaves it to the court to distill a legal principle from the *Hazel-Atlas* line, failing to

quote, pin-cite, or describe the holdings in these cases. Even if the court were to engage in such an exercise, Maloof has failed to provide any citations to the record or recitation of relevant facts to which such a legal principle might be applied. Instead, the brief consists of assertions that "this case involves the use of the bankruptcy court as a screen behind which the lead creditors could exercise their unfettered will," and argues that "evidence of the theft of millions of dollars from the bankruptcy estate by the officers of the court cannot be excluded on the basis of this court's procedural relationship to the offense." The court finds the *Hazel-Atlas* line of cases to stand for the proposition that where fraud on the court can be proved, even a final judgment may be upset in the interests of justice. While the court will fully examine the allegation of fraud on the Bankruptcy Court, the material provided by Maloof in support of his various motions is inadmissible because it was not part of the record of the trial court. Therefore, Level's properly supported motion to strike is granted and the Appendix and Supplemental Appendix are removed from the appellate record.

II. Maloof's Motions to Withdraw the Reference and Vacate

Next, Maloof moves that the court conduct an evidentiary hearing in consideration of a motion to vacate the Agreed Order under Rule 60(b)(2). The court will only entertain these motions if the reference to the Bankruptcy Court is withdrawn under 28 U.S.C. § 157(d), which provides both a discretionary and a mandatory basis for withdrawal as follows:

> The district court *may* withdraw . . . any case . . . on timely motion of any party, for cause shown. The district court *shall* withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organization or activities affecting interstate commerce.

28 U.S.C. § 157(d) (emphasis added).

Maloof argues that he has shown cause by alleging that the Bankruptcy Court harbors some bias against him that will result in a pre-ordained adverse ruling. While there is no evidence suggesting that this is the case, even if it were, Maloof could appeal such a ruling to this court. Indeed, if Maloof's motion is denied even though it is supported by the evidence, this court will likely conclude that the Bankruptcy Court's decision was clearly erroneous. Accordingly, the court declines to exercise its discretion to withdraw the reference in this case.

Maloof argues that this court must withdraw the reference because this case involves both fraud on the court and anti-trust laws, since the underlying scheme he alleges involved the use of the Bankruptcy Court as a tool to gain an anti-competitive advantage. But Maloof's motion to vacate is premised on the allegation that there was fraud on the Bankruptcy Court, which, if proved, would be sufficient by itself for the Bankruptcy Court to grant his motion. The Bankruptcy Court would not be *required* to consider anti-trust issues because the motion to vacate could be granted on the claim of fraud alone. Since no cause has been shown compelling the court to withdraw the reference, and the court is not required to do so, the motion to withdraw the reference is denied and Maloof may only file his motion to vacate in the Bankruptcy Court.

Even if the court were to characterize Maloof's motion to withdraw the reference as a new motion to vacate based on the last sentence of Rule 60(b), which provides that a court may grant relief from a judgment for fraud on the court, the evidence does not support a finding of fraud. Maloof argues that he was fraudulently induced to sign the Agreed Order, that fraudulent misrepresentations had been made to the Bankruptcy Court to obtain entry of the Agreed Order, and that the impartial functions of the Bankruptcy Court were corrupted.

> Fraud upon the court should . . . embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by

> officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct.

Demjanjuk, 10 F.3d at 352 (citation omitted) (recognizing that cases dealing with fraud on the court often turn on whether the improper actions are those of parties alone, or if the attorneys, as officers of the court, are involved); *see also Gleason v. Jandrucko,* 860 F.2d 556, 559 (2d Cir. 1988) (holding fraud on the court involves more than an injury to an individual litigant or a case in which judgment was obtained with the aid of a witness who, on the basis of after-discovered evidence, may have been guilty of perjury); *In re Matter of Whitney-Forbes, Inc.,* 770 F.2d 692, 698 (7th Cir. 1985) (finding fraud on the court only where the impartial functions of the court have been directly corrupted, such as bribery of a judge). The Sixth Circuit has required the movant prove five elements to support a charge of fraud on the court: (1) conduct on the part of an officer of the court; (2) the conduct is directed at the "judicial machinery" itself; (3) the conduct consists of intentionally false statements; (4) the false statements are averments or concealments when under a duty to disclose; (5) the false statements actually deceive the court. *Demjanjuk,* 10 F.3d at 348. Maloof neither argues nor proves this sort of direct corruption of the judicial machinery.

Maloof argues that the Bank Group committed fraud on the court by representing to the Bankruptcy Court that the conversion to chapter 11 administration of the estate was to preserve the business's value as a going concern, despite having "every intention of wrecking the business." Maloof offers as evidence of this fraudulent misrepresentation the undisputed fact that the gas distribution business was sold as a going concern. But this fact, taken alone, is insufficient to support the allegation that the intention of the Bank Group during the negotiations that resulted in the Agreed Order was to "destroy the business." Furthermore, it does not demonstrate that the Bank Group made misrepresentations to the Bankruptcy Court in order to secure the Agreed Order.

In an effort to obtain evidence that *would be* sufficient to support an allegation of a fraudulent misrepresentation made to the Court, an Examiner was appointed to determine if BFCA, the "officers of the court" representing the Bank Group, had corrupted the adjudication process. The Examiner found that BFCA had acted in good faith, competently, and honestly. Like the Bankruptcy Court below, the court accepts the Examiner's findings of fact, since he reviewed many documents and conducted extensive interviews. There is no evidence of the type of deliberately planned and carefully executed scheme to defraud the court that was present in the *Hazel-Atlas* line of cases.

The other allegations of fraud on the court similarly fail to prove that BFCA made false statements to the Bankruptcy Court that prevented the Court from properly administering the proceedings. Additionally, the allegation that Maloof was fraudulently induced to stipulate to the Agreed Order by promises that the Bank Group had "no intention to keep" is, at best, fraud on a party, not on the court, and there is no indication that BFCA knowingly, or with reckless disregard for the truth, made false promises to Maloof. Even without relying on the Examiner's findings of fact, the court finds that there is insufficient evidence to prove fraud on the Bankruptcy Court, and the motion to vacate the judgment under Rule 60(b)'s last sentence is denied.

III. Maloof's Appeal

On appeal, this court reviews the Bankruptcy Court's findings of fact for clear error, giving deference to its factual findings. Fed.R.Bankr.P. 8013; *Boone Coal & Timber Co. v. Polan,* 787 F.2d 1056, 1062 (6th Cir. 1986). The Bankruptcy Court's conclusions of law are subject to *de novo* review. *Id.* "It is settled law that the granting of a motion under the provisions of Rule 60(b)(1), (2) and (6) is a matter addressed to the sound discretion of the trial judge, whose rulings will not be reversed except for an abuse of discretion." *Douglass v. Pugh,* 287 F.2d 500, 502 (6th Cir. 1961)

(citations omitted). A court abuses its discretion when it "relies on clearly erroneous findings of fact, improperly applies the law, or employs an erroneous legal standard." *In re Brown,* 342 F.3d 620, 633 (6th Cir. 2003) (citation omitted). Since the court finds that the Bankruptcy Court did not abuse its discretion, Maloof's appeal of its decisions denying his motion to vacate is affirmed.

A. The Doctrine of Laches

Maloof argues that the Bankruptcy Court erred in its application of the doctrine of laches because it was neither pled nor proved by the non-moving party, relying on Rule 8(c), which provides that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . *laches* . . . and any other matter constituting an avoidance or affirmative defense." Fed.R.Civ.P. 8(c) (emphasis suppled). While Maloof's recitation of the line of cases that requires laches to be pled as a defense is an accurate statement of the law, the language of the rule makes clear that the pleading requirement is necessary only in adversarial proceedings (i.e., "in a pleading to a preceding pleading."). But Maloof's motion to vacate in the Bankruptcy Court targeted the Agreed Order and was not brought within the context of an adversarial proceeding but rather under Bankruptcy Rule 9014(c), which provides that "the following rules shall apply: 7009, 7017, 7021, 7026 . . ." Civil Rule 8(c) is not applicable to a motion on a contested matter because it is only made applicable to bankruptcy proceedings under Bankruptcy Rule 7008, which is not authorized under Bankruptcy Rule 9014(c). Since Maloof came to the Bankruptcy Court motioning for equitable relief from the Agreed Order, rather than in the course of an adversarial proceeding, he cannot deny the Bankruptcy Court's authority to apply the common law equitable doctrine of laches as a basis for denying the relief requested in the motion to vacate.

The decision of the Bankruptcy Court to apply the doctrine in the absence of controlling rules was not an abuse of discretion because its application of the law was not improper. "The test

of laches is prejudice to the other party." *Gutierrez v. Waterman S.S. Corp.,* 373 U.S. 206, 215 (1963) (citation omitted). Prejudice is presumed from unreasonable delay, *Natron Corp. v. STMicroelectronics, Inc.,* 305 F.3d 397, 408-409 (6th Cir. 2002), especially where the Rule invoked to support the motion to vacate requires action be brought within a reasonable time. Fed.R.Civ.P. 60(b)(1)-(3) (imposing one year limit); *McDowell v. Dynamics Corp. of Am.,* 931 F.2d 380, 384 (6th Cir. 1991) (holding that a movant cannot circumvent the one year limitation imposed on claims under clauses (1) through (3) by invoking clause (6)); *see also Whitney-Forbes, Inc.,* 770 F.2d at 697-98 (finding delay outside the Rule 60(b) limits presumptively unreasonable in the context of a bankruptcy proceeding). Maloof's motion to vacate under Rule 60(b)(6) was based upon the evidentiary record established by the Examiner, which had been made available to Maloof three years prior to his filing of the motion to vacate. The Bankruptcy Court found that other allegations by Maloof were unsupported by existing or newly presented evidence. This court finds that the Bankruptcy Court's findings of fact were not clearly erroneous, and the application of the doctrine of laches was appropriate.

B. Rule 60(b)(6)

The Bankruptcy Court found that "Maloof failed to offer any evidence showing fraud" because he "provide[d] no meaningful new evidence to support his claims." Maloof's arguments before the Bankruptcy Court in support of his motion to vacate under Rule 60(b)(6) contain the same allegations as his motion to vacate under Rule 60(b)(2) before this court. Both motions rely on the last sentence of Rule 60(b) that provides for relief from judgment for fraud on the court. By filing the two motions under different clauses of Rule 60(b), Maloof attempts to take two bites at the judicial apple (and in two different courts). This court finds that Maloof has failed to support his allegations of fraud on the judicial machinery in his motion before this court, and therefore finds

that the Bankruptcy Court, having reached the same conclusion on substantially the same allegations and evidence, did not make clearly erroneous findings of fact, and its decision denying Maloof's motion to vacate is affirmed.

IV. Maloof's Request for a Report to the U.S. Attorney

Under 18 U.S.C. § 3057(a), any court, "having reasonable grounds for believing that any violation under chapter 9 of this title . . . has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney." This court does not find any evidence establishing a reasonable ground for believing a report is warranted. Mere allegations that a witness giving testimony under oath before the Examiner was evasive in his answers is insufficient evidence to suggest that a violation was committed or that there should be an investigation into the matter. Therefore, the court declines to grant the request.

V. Conclusion

For the foregoing reasons, the court grants Level's motion to strike that information submitted by Maloof in the Appendix to Appellant's Reply Brief (Doc. No. 10) and the Supplemental Appendix to Appellant's Reply Brief (Doc. No. 11). The court denies Maloof's motion to withdraw the reference to the trial court so that he may file a new motion to vacate, as well as Maloof's request that the court make a report to the U.S. Attorney. The decision of Bankruptcy Court is affirmed. This order is final and appealable.

IT IS SO ORDERED.

/s/Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Dated: August 16, 2007