

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

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

IN RE:

IN PROCEEDINGS UNDER CHAPTER 11
(Jointly Administered)

LEVEL PROPANE GASES, INC., ET AL.

CASE NO.: 02-16172

Debtors,

JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

William H. Maloof's ("Maloof") seeks to vacate an Agreed Order entered on June 6, 2002, which converted the Debtors' involuntary Chapter 7 cases to the above-styled jointly administered Chapter 11 cases. Relief is sought by Maloof under Rule 60(b) of the Federal Rules of Civil Procedure, made applicable to these proceedings under Bankruptcy Rule 9024. Fed. R. Bankr. P. 9024. Maloof also seeks to controvert the filing of the involuntary case, if the motion to vacate is granted. Level Propane Gases, Inc., *et al.* (the "Debtors") filed an objection. The Court has jurisdiction over this matter pursuant to 28 U.S.C § 1334 and General Order No. 84 of this District. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (O).

Following a duly-noticed hearing and an examination of the record, said motion to vacate the Agreed Order is not well-premised and is hereby denied for the reasons that follow. The following constitutes the Court's findings of facts and conclusions of law:

BACKGROUND

These consolidated cases 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 Emprises, Inc. (collectively, the Original

Debtors’). On June 11, 2002, this Court entered the subject 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”) Maloof was a signatory on the Agreed Order.

The Agreed Order was supplemented on June 13, 2002 to clarify that orders for relief granted pursuant to the Agreed Order were to become effective June 17, 2002. On June 17, 2002, this Court entered its *Order Converting Cases to Cases Under Chapter 11 of the Bankruptcy Code*, wherein the subject cases were converted to relief under Chapter 11 of the Bankruptcy Code.

Herein, Maloof seeks to have the Court vacate the Agreed Order, alleging that the conversion was based on fraud. Specifically, Maloof contends that the Bank Group (consisting of Deutsche Bank Trust Company Americas f/k/a Bankers Trust Company, LaSalle Bank National Association, The Provident Bank, and BT Commercial Corporation, as lenders and agent for the Lenders) and the Debtors, collectively, had no intention at the time the Order was signed by them to “preserve and protect the businesses and assets of Debtors’ estates, prevent any further losses thereto . . . as going concerns for the benefit of their estates and creditors” and further misrepresented that the Chapter 7 Involuntary Bankruptcy Petition was filed in good faith. As a further basis to vacate the Agreed Order, Maloof states that his acquiescence was procured by fraud and coercion. If granted, Maloof seeks leave to controvert the Chapter 7 Involuntary Bankruptcy Petition, alleging that the Agreed Order tolled the answer date and that the Agreed Order should be vacated.

Maloof supports his motion by incorporating by reference, the Exhibits in Volume A and the Transcripts in Volume B which constitute the evidence appended to the Examiner’s report of June

6, 2003, Docket No. 1616. Further, he incorporates by reference the Evidentiary Submissions filed in support of his Motion to Reopen Examiner's Report, filed January 31, 2006, Docket 2889, being Docket Nos. 2914, 2926, 2951 and 2952. He tenders an Affidavit of Timothy Conklin and his own statement under penalty of perjury is offered in additional support of these Motions, attached as Exhibits A.

Maloof argues that, pursuant to Rule 60(b)(6), the Stipulated Order entered on June 11, 2002 should be vacated. He contends that the Agreed Order was procured by fraud on the court. Specifically, he alleges that:

[A]t least two parties, the Bank Group and the Debtors, as a class, had no present intention at the time the order was signed by them to .preserve and protect the businesses and assets of Debtors estates, prevent any further losses thereto . . . as going concerns for the benefit of their estates and creditors. and further their representation that the Chapter 7 Involuntary Bankruptcy Petition was filed in good faith.

Maloof further contends that the Bank Group filed an Involuntary Petition against the Debtors, entities that were actually the Banks' alter egos . As such, he argues that he is entitled to answer on behalf of the Debtors having established that the Debtors were in fact, for months prior to the filing of the Involuntary Petition, alter egos of the Bank Group.

The Debtors object to the relief sought by Maloof. They assert that, on June 6, 2003, the Examiner, after reviewing thousands of pages of documents and conducting 22 sworn and unsworn witness interviews, filed his investigative report which found, among other things, no definitive evidence that Benesch engaged in improper communications with the Bank Group or its counsel prior to the filing of the involuntary chapter 7 cases. Nor did the Examiner find that Benesch had

an arrangement, an advance understanding, or a unilateral design to advance the interest of the Bank Group at the expense of its clients. They further argue that no evidence that no evidence was found to show Benesch was controlled by the Bank Group and/or its counsel. The Examiner concluded that Benesch competently represented the interests of the Debtors in these cases.

The Debtors also contend that Maloof's purported statement of facts is remarkable for (a) its failure to recognize that subsequent to the entry of the Agreed Order every major event in these jointly administered Chapter 11 cases has been approved by this Court upon due notice and an opportunity to be heard; (b) its omission of critical facts which contradict or are inconsistent with Maloof's version of events and (c) its failure to acknowledge the contrary conclusions reached by the Examiner after an examination that focused on matters relating to the integrity of the bankruptcy process and matters impacting the Debtors' exercise of their fiduciary duties in response to similar allegations made by Mr. Maloof and others, previously.

Lastly, the Debtors argue that Maloof points to no meaningful new evidence to support his claims except for bare allegations that Debtors' management disposed of or destroyed largely unspecified business and financial records of the Debtors. These charges of alleged spoliation of business records are based primarily on a handful of isolated incidents in which former employees of the Debtors purportedly witnessed the destruction of unspecified documents. A large portion of the allegations, moreover, relate to an incident in March 2003, in which one member of the Debtors' postpetition management cleaned out his office. This incident was thoroughly investigated by the Examiner, who "[b]ased upon the documents reviewed and the witness interviews, . . . found no evidence" that the Debtors destroyed any documents that were responsive to a pending subpoena. Indeed, the first allegation of document destruction does not arise until almost six months after the

entry of the Agreed Order. None of this new purported evidence provides a basis for granting Maloof the relief requested herein.

The dispositive issue before the Court is whether a sufficient basis has been alleged to have the subject Agreed Order vacated pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.

A Rule 60(b) motion may be granted *only for certain specified reasons*:

- 1) mistake, inadvertence, surprise, or excusable neglect;
- 2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- 3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- 4) the judgment is void;
- 5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- 6) *any other reason justifying relief from the operation of the judgment. Fed.R.Civ.P. 60(b).*

Relief under Rule 60(b) is not a matter of right. Rather, it rests in the trial court's sound discretion. *Robb v. Norfolk & Western Ry. Co.* (7th Cir. 1997) 122 F.3d 354, 359; *De la Torre v. Continental Ins. Co.* 15 F.3d 12, 14 (1st Cir. 1994); *Amernational Industries, Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 975 (6th Cir.), *cert. denied*, 501 U.S. 1233 (1991); *Davis v. Jellico Community Hosp., Inc.*, 912 F.2d 129, 132-33 (6th Cir. 1990).

A review of the case history illustrates that four years have passed since Maloof and the other parties entered into the subject Agreed Order. As pointed out in the Memorandum of Opinion and Order denying his motion to reopen the examiner's investigation (which relies on substantially the same evidence), Maloof provides no meaningful new evidence to support his claims here, except for

bare allegations that Debtors' management disposed of or destroyed largely unspecified business and financial records of the Debtors. These charges of alleged spoliation of business records are based primarily on a handful of isolated incidents in which former employees of the Debtors purportedly witnessed the destruction of unspecified documents. These incidents were thoroughly investigated previously by the Examiner appointed by this Court.

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 the case of *Costello v. United States*, 365 U.S. 265, 282, 81 S.Ct. 534, 543, 5 L.Ed.2d 551 (1961), the United States Supreme Court stated that the two elements of laches are: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.

As mentioned, four years have passed since Maloof and the other parties entered into the subject Agreed Order. Maloof was represented by counsel at the time he signed the Agreed Order. It is unrefuted that, Maloof did not seek an adjournment of the meeting which resulted in the signing of the Agreed Order so he could conduct his own investigation. Furthermore, Maloof has participated in the Debtors' bankruptcy case since its inception. At no time prior to this motion did Maloof seek to vacate the Agreed Order he signed, for any reason. Thusly, the doctrine of laches applies to the relief sought herein.

FRAUD ALLEGATION

Substantively, Maloof's fraud allegation must fail. In order for Maloof to prevail on his motion to vacate the agreed order, he may seek to have the Agreed Order voided on the grounds of

fraud, duress or some other fact sufficient to invalidate the subject Agreed Order. While the factors pertaining to such a cause of action may be derived from state law principles and jurisprudence, the particularity requirement contained within Federal Rule of Civil Procedure 9(b)¹ applies equally to common law fraud claims as well. *See Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 177 (5th Cir. 1997)(finding no principled reason why state law fraud claims should escape pleading requirements of federal rules), *cert. denied*, 522 U.S. 966, 118 S.Ct. 412, 139 L.Ed.2d 315 (1997). For this reason, a claim of common law fraud founded upon state law must be addressed with Rule 9(b) in mind. *In re Balko* 348 B.R. 684, 694 (Bankr. W.D. Pa. 2006).

Under Ohio law, a contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will and duress may take the form of unlawful restraint of property or use of wrongful economic compulsion to force a party to yield to demands that would otherwise be rejected. *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 148, n. 31 (6th Cir. 1983), *citing*, *Oskey Gasoline & Royale Co. v. Continental Oil*, 534 F.2d 1281 (8th Cir. 1976); *Lakeside Ave. L.P. v. Cuyahoga Cty. Bd. of Revision*, 75 Ohio St.3d 540, 544-545 (1996).

The Supreme Court of Ohio adopted a three-prong test for duress, to wit: (1) one side involuntarily accepted the terms of another; (2) circumstances permitted no other alternative; and (3) the said circumstances were the result of coercive acts of the opposite party. *Blodgett v. Blodgett*,

¹ Rule 9(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Fed. R. Civ. P. 9(b).

49 Ohio St.3d 243, 246 (1990).

Not only has Maloof failed to offer any evidence showing fraud, duress, or some other fact that is sufficient to void the Agreed Order, he has also failed to allege with any degree of particularity, fraud in the inducement of the Settlement Agreement or any other fact upon which the Agreed Order might be voided. Furthermore, Maloof has not alleged or presented evidence supporting any relationship whatsoever between the alleged fraudulent statements and the Bank Group entering into the Agreed Order, or that the Bank Group examined, considered or reasonably relied upon the alleged fraudulent statements in deciding to enter into the Agreed Order.

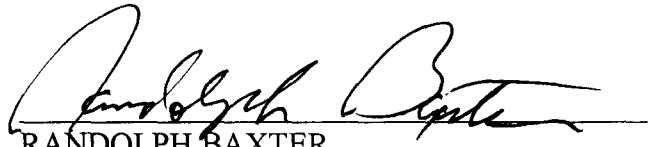
Moreover, Rule 9(b) requires that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Fed.R.Civ.P. 9(b) (as made applicable to this bankruptcy proceeding by Fed. R. Bankr. P. 7009). In *Fonseca v. Columbia Gas Sys., Inc.*, the court determined that “[t]o satisfy the particularity requirement of Rule 9(b), a complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements.” *Fonseca v. Columbia Gas Sys., Inc.*, 37 F.Supp.2d 214, 230 (W.D.N.Y. 1998); *In re World Com, Inc.*, 296 B.R. 115, 123 -124 (Bankr. S.D.N.Y. 2003). Having determined herein that Maloof’s motion fails on other grounds, the Court need not address the requirements of Rule 7009 further.

Accordingly, the motion to vacate the Agreed Order is hereby denied. Each party is to bear

its respective costs.

IT IS SO ORDERED.

Dated, this 28th day of
November, 2006

A handwritten signature in black ink, appearing to read "Randolph Baxter", written over a horizontal line.

RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT