

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re)	Case No. 07-CV-0153
)	
LEVEL PROPANE GASES, INC., et al.,)	
)	Bankruptcy Case No. 02-16172
Debtors.)	
_____)	
WILLIAM H. MALOOF,)	Judge: ANN ALDRICH
)	
Appellant,)	Magistrate Judge: PERELMAN
)	
-vs.)	
LEVEL PROPANE GASES, INC., et al.,)	
)	
Appellees.)	

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

APPELLEES' BRIEF

Michael D. Zaverton (#0038597)
BENESCH, FRIEDLANDER, COPLAN
& ARONOFF LLP
2300 BP Tower
Cleveland, Ohio 44114-2378
Phone: (216) 363-4500
Facsimile: (216) 363-4588
mzaverton@bfca.com
Attorneys for Appellees,
Level Propane Gases, Inc., et al.,
Debtors and Debtors in Possession

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I. INTRODUCTION

The issue before the Court is whether the Bankruptcy Court abused its discretion when it held that William H. Maloof (“Maloof” or “Appellant”) was not entitled to entry of an order under Rule 60(b) of the Federal Rules of Civil Procedure (the “Civil Rules”) vacating a consensual judgment (the “Agreed Order”) entered into by the Debtors (defined below), the Bank Group (defined below) and the Appellant shortly after the commencement of the Debtors’ bankruptcy cases. Level Propane Gases, Inc. (“Level”) and its affiliated debtors and debtors in possession (collectively, the “Debtors” or “Appellees”) in those certain cases under chapter 11 of Title 11 of the United States Code pending in the United States Bankruptcy Court for the Northern District of Ohio and being jointly administered under Case No. 02-16172, maintain that this Court should affirm the decision of the Bankruptcy Court appealed herein. This Court should find that the Bankruptcy Court did not abuse its discretion in determining that the Appellant was not entitled to entry of an order relief under Civil Rule 60(b)(6) or under the “savings clause” of Civil Rule 60(b).

II. STATEMENT OF ISSUES ON APPEAL

Whether the Bankruptcy Court abused its discretion in denying Appellant’s motion to vacate the Agreed Order?

III. STATEMENT OF THE CASE AND RELEVANT FACTS

This appeal arises in the chapter 11 cases of Level and its affiliated debtors and debtors in possession, which cases were commenced on June 6, 2002 (the “Petition Date”) when BT Commercial, Deutsche Bank Trust Company Americas, LaSalle Bank National Association and the Provident Bank filed involuntary petitions for relief under chapter 7 of the Bankruptcy Code against each of Park Place Management, Inc., The Park Place Companies, Inc., Park Place, Inc.,

Over-Flo Lot, Inc., Level, Level Energy Group, Inc. and WHM Emprises, Inc. (collectively, the “Original Debtors”).

The relationship between the Debtors and the Petitioning Creditors dated back to November 30, 1999, when BT Commercial Corporation, as Agent (the “Agent” and together with Deutsche Bank Trust Company Americas, LaSalle Bank National Association and the Provident Bank, the “Lenders”) for the Lenders and each of the Lenders, as lenders, entered into that certain Credit Agreement (the “Credit Agreement”) with each of Level, The Park Place Companies, Inc., Park Place, Inc., Park Place Management, Inc., and Over-Flo Lot, Incorporated (collectively, the “Borrowers”), as borrowers, pursuant to which the Lenders made loans and other financial accommodations (the “Loans”) to the Borrowers. [B.R. 5 – Agreed Order – p.3, para.1].

The Borrowers’ obligations to the Lenders were guaranteed by each of WHM Emprises, Inc. (“WHM”), Level Energy Group, Inc. (“LEG”) and Maloof (collectively, the “Guarantors”). The obligations of the Borrowers and the Guarantors were and remain secured by allegedly valid, perfected and first priority liens on and security interests in all or substantially all of the assets of the Borrowers and the Guarantors, including, without limitation, all of the capital shares of the Borrowers and the Guarantors owned, respectively, by the Guarantors and the Park Place Companies, Inc., as pledged pursuant to several stock pledge agreements executed by the Guarantors and the Park Place Companies, Inc. (collectively, the “Stock Pledges”). [B.R. 5 – Agreed Order – p.3-4, para.1].

Prior to June 6, 2002, certain defaults and Events of Default (as defined in the Credit Agreement) had occurred and were continuing under the Credit Agreement, which Events of

Defaults entitled the Lenders to exercise all of their rights and remedies under the Credit Agreement and the Stock Pledges. [B.R. 5 – Agreed Order – p.4, para. 2].

On June 6, 2002, the Agent issued to the Borrowers, the Guarantors and their respective counsel, by facsimile as provided in the Credit Agreement, a notice of acceleration of the Loans and demand for payment and satisfaction of all outstanding obligations of the Borrowers and the Guarantors under the Credit Agreement. [B.R. 5 – Agreed Order – p.4, para.3].

Immediately following the acceleration of the Loans, the Agent issued, by facsimile, a notice to the Borrowers, the Guarantors and their counsel of the Lenders’ intent to exercise their rights under the Stock Pledges to vote all of the capital shares of the Borrowers and Guarantors. [B.R. 5 – Agreed Order – p.4, para. 4].

Immediately following the Agent’s issuance of the notice of intent to exercise their rights under the Stock Pledges, the Agent voted all of the capital shares of the Borrowers, WHM and LEG to remove all existing directors of the Borrowers, WHM and LEG and to appoint Charles Sweet as the sole director of each of the Borrowers, WHM and LEG. The Agent then immediately issued, by facsimile, a notice to each of the Borrowers, the Guarantors and their counsel of the removal of all directors and the appointment of Mr. Sweet as the sole director of each of the Borrowers, WHM and LEG. Thereafter, Mr. Sweet retained Benesch, Friedlander, Coplan & Aronoff LLP (“Benesch”) as counsel for each of the Debtors. [B.R. 5 – Agreed Order – p. 4-5, para. 5].

Subsequently, also on June 6, 2002, BT Commercial, Deutsche Bank Trust Company Americas, LaSalle Bank National Association and the Provident Bank (collectively the “Petitioning Creditors” or the “Bank Group”) filed involuntary petitions for relief (the “Involuntary Petitions”) under chapter 7 of the Bankruptcy Code (the “Chapter 7 Cases”) against

each of Park Place Management, Inc., The Park Place Companies, Inc., Park Place, Inc., Over-Flo Lot, Inc., Level, Level Energy Group, Inc. and WHM Emprises, Inc. [B.R. 5 – Agreed Order – p.5, para.6].

Concurrent with the filing of the Involuntary Petitions, the Petitioning Creditors also filed an *Emergency Motion for Appointment of Interim Trustee and Related Relief*, in Level’s case, seeking the immediate appointment of a trustee with the sole and exclusive authority to operate Level’s business free from the interference of Mr. Maloof, as necessary to preserve the property and prevent further loss to the Debtors’ estates on the grounds that Mr. Maloof, the principal of the Debtors, had breached his fiduciary duties to the Debtors and caused them significant and irreparable harm. [B.R. 5 – Agreed Order – p. 5, para.6].

Subsequent to these filings, “the Petitioning Creditors, the Debtors, Maloof and their respective counsel entered into discussions to resolve the disputes that occasioned the replacement of the Debtors’ boards of directors and the filing of the Involuntary Petitions in a manner that will preserve and protect the business and assets of the Debtors’ estates, prevent any further loss thereto, and maximize the value of the Debtors as going concerns for the benefit of their estates and creditors.” [B.R. 5 – Agreed Order – p.5, para. 7].

At all times during such negotiations, Mr. Maloof was personally represented by his counsel, Richard A. Baumgart. [B.R. 5 – Agreed Order – p.5, para. 7]. Mr. Baumgart, a prominent, knowledgeable, local bankruptcy attorney with extensive experience in cases under chapter 7 and chapter 11 of the Bankruptcy Code, had been approached by Mr. Maloof in March 2002 to serve as his personal bankruptcy counsel for purposes of preparing a chapter 13 personal bankruptcy to be filed simultaneously with an anticipated chapter 11 filing by the Debtors. [B.R. 2969 – Motion to Vacate – p. 12].

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”). The terms and provisions of the Agreed Order were agreed, acknowledged and consented to by both Mr. Maloof and Mr. Baumgart, his personal counsel, both of whom were signatories to the Agreed Order. [B.R. 5 – Agreed Order – p. 10-11].

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 as of June 17, 2002. On June 17, 2002, this Court entered its *Order Converting Cases to Cases Under Chapter 11 of the Bankruptcy Code*, pursuant to which the Chapter 7 Cases of the Original Debtors were converted to cases under chapter 11 of the Bankruptcy Code.

Subsequent thereto, under the supervision of the Bankruptcy Court and with the active involvement of numerous parties in interest, including Mr. Maloof, the official committee of unsecured creditors appointed by the office of the United States Trustee (the “Committee”), numerous equipment financiers, the Petitioning Creditors, the Equal Justice Foundation (class counsel in a class action lawsuit brought against Level on behalf of its customers in Ohio) and various state attorney generals, the Debtors’ propane distribution business was sold as a “going concern” on July 2, 2003, and their parking lot business was sold as a going concern in January 21, 2004. Every action taken by the Debtors outside of the ordinary course of their businesses – and many actions arguably in the ordinary course of the Debtors business but brought before the Court out of an excess of caution – were approved by the Bankruptcy Court after notice and a hearing.

On or about April 30, 2003, almost a year after the Petition Date, the Court, on motion of the United States Trustee, ordered the appointment of an examiner in these cases. Thereafter, G. Ray Warner was appointed to serve as examiner (the “Examiner”) by the United States Trustee. The Examiner was directed by this Court to investigate:

Allegations . . . which indicate that counsel for the jointly administered Debtors in these cases has misled the Court, the Office of the United States Trustee, and parties in interest and have further failed to provide objective advice regarding the conduct of operations and management of the subject cases. More specifically, the U.S. Trustee asserts that allegations have been made that misconduct and nondisclosure by the Debtors’ counsel have caused unspecified harm to the Debtors’ estates and has prevented the Debtors from exercising their fiduciary obligations.

In furtherance of the aforesaid allegations and pursuant to provisions of §§ 1104(d) and 1196(b) of the Bankruptcy Code, the Examiner’s investigation is to be inclusive of any fact pertaining to the aforementioned allegations, fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the Debtors, or to a cause of action available to the bankruptcy estates of the Debtors.

[B.R. 2972 – Objection – p. 3-4].

On June 6, 2003, the Examiner – after reviewing thousands of pages of documents and conducting 22 sworn and unsworn witness interviews – filed his report with the Court. A report which (a) found, among other things, “no definitive evidence that Benesch engaged in improper communications with the Lenders or their counsel prior to the filing of the involuntary chapter 7 cases or that Benesch had an arrangement, an advance understanding, or a unilateral design to advance the interest of the Lenders at the expense of their then clients,” and “no evidence that Benesch was controlled by the Lenders and/or their counsel.” and (b) concluded that “Benesch . . . competently represented the interests of the Debtors in these cases.” [B.R. 2972 – Objection – p. 4].

On June 4, 2006, Mr. Maloof filed a civil suit in the United States District Court for the Northern District of Ohio, denominated as *William H. Maloof, Individually And As Sole*

Shareholder Or Beneficial Owner Of Level Propane Gases, Inc. And Its Subsidiary Affiliates, Park Place, Inc. And Its Subsidiary Affiliates, and WHM Emprises, Inc. And Its Subsidiary Affiliates v. BT Commercial Corp. Individually And As Agent Of Deutsche Bank Trust Company Americas; Provident Bank; LaSalle National Bank Association, docketed as Case No. 06-CV-01378, asserting a damage claims against the Bank Group for their alleged wrongful acts against the Debtors. [B.R. 2972 – Objection – p.8, n.16].

Subsequently, on June 6, 2006, four years after the Petition Date and three years after the filing of the Examiner’s Report, Appellant filed the *Motion Of William H. Maloof To Vacate The Agreed Order Converting Chapter 7 Proceedings To Chapter 11 Proceedings Entered Into On June 11, 2002 And Motion for Leave To Controvert The Involuntary Bankruptcy Petition Filed June 6, 2002* (the “Motion to Vacate”), seeking relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure, made applicable in bankruptcy by Rule 9024 of the Federal Rules of Bankruptcy Procedure. Appellant asserted therein that the Agreed Order was procured by fraud on the court. Specifically, Appellant alleged that:

at 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. As a further basis to vacate the Agreed Order, the signature of your Movant was procured by fraud and coercion.

(B.R. 2969 – Motion to Vacate, p. 1-2]. The Motion to Vacate incorporated:

by reference, for purposes of economy, the Exhibits in Volume A and the Transcripts in Volume B that constitute the evidence appended to the Examiner’s report of June 6, 2003, Docket No. 1616. Further, your Movant 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. Further the Affidavit of Timothy Conklin and your Movant’s statement under penalty of perjury in offered in additional support

[B.R. 2969 – Motion to Vacate – p. 2]. Additionally, the Motion to Vacate contained a 16 page “Statement of the Facts” notable for the absence of any citation to any evidence to support the “factual” claims asserted therein.

On June 20, 2006, the Debtors filed their objection to the Motion to Vacate, challenging Appellant’s statement of “facts” as:

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 [the Bankruptcy] Court after notice, an opportunity to object and a hearing; (b) its omission of critical facts that contradict or are inconsistent with Mr. 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, prior allegations made by Mr. Maloof and others.

[B.R. 2972 – Objection – p. 5]. The Debtors asserted that the Appellant provided 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, with the first such allegation of document destruction not arising until almost 6 months after the entry of the Agreed Order. [B.R. 2972 – Objection p.5, para. 10]. Looking to the specific requirement of Civil Rule 60(b), the Debtors’ argued that (a) relief from consensual judgments is not favored under Civil Rule 60; (b) where, as here, (i) the Bank Group was exercising its legal rights the Bankruptcy Code and under the Credit Agreement, the various guaranties and the Stock Pledges and (ii) the evidence indicated that Appellant had expressed an intent to commence chapter 11 cases for some or all of the Debtors, Appellant’s claim of duress must fail; (c) that Appellant was not entitled to relief under Civil Rule 60(b)(6) because the relief requested fell within the ambit of subsections (b)(2) and/or (b)(3) of the rule and was not, therefore, a basis for granting relief under Civil Rule 60(b)(6); and that Appellant had failed to satisfy any of the elements necessary to establish fraud upon the Court. [B.R. 2972 – Objection – p. 6-16].

On June 26, 2006, the Appellant filed a response to the Debtors' objection, alleging therein that Appellant's signature on the Agreed Order was a fraud, "being the result of fraudulent assurances made in the very agreement that he signed upon which he had every reason to rely," assurances as to "BFCA's temporary engagement, as to the Movant's absolute rights to financial and other company information, and as to the employment of DSI" [B.R. 2973 – Response to Debtor's Objection – p. 3-4].

On June 26, 2006, a hearing on the Motion to Vacate was held before the Bankruptcy Court.

Subsequent thereto, on July 17, 2006, Appellant filed a supplementary document submission with the Bankruptcy Court. This supplementary document submission consisted of: (a) a sequence of letters and emails dating from April 17, 2002 to July 12, 2002 relating to the pre-petition relationship between Mr. Maloof and Benesch Friedlander Coplan & Aronoff LLP ("BFC&A"), which documents had previously been filed with the Court on June 6, 2003, as part of the evidentiary submissions submitted as part of the Examiner's Report; (b) a sequence of e-mails allegedly from Level's internal e-mail system dated July 25, 2002 allegedly reflecting a violation of a provision of the Agreed Order barring the Debtors from utilizing Newmarket Associates in their chapter 11 cases; and (c) two sequences of e-mails allegedly from Level's internal e-mail system dated January 2003 – one relating to the disposition of empty customer payment envelopes through a donation to a charitable organization and the other relating to a determination not to produce certain confidential customer information in connection with the preparation of responses to discovery requests interposed in post-petition litigation by certain propane tank financiers. [B.R. 2984 – Motion to Vacate – Supplemental Submission in Support).

On August 1, 2006, the Debtors' filed a response to Appellant's supplemental, post-hearing document submission asserting that the materials contained therein did not provide a basis for granting the Motion to Vacate as the materials did not constitute (a) new evidence that would have been unavailable to Mr. Maloof prior to the hearing on the Motion to Vacate or (b) evidence which supported Mr. Maloof's allegations that the Agreed Order had been obtained by a fraud upon the Court. More specifically, Debtors noted that (a) the emails cited by Mr. Maloof with respect to Newmarket Associates, when placed in proper context, did not support his claim that the Debtors had violated their promise in the Agreed Order not to retain John Rudd or Newmarket Associates in their chapter 11 cases and (b) the remaining evidence cited by Mr. Maloof, relating to events that happened months after the entry of the Agreed Order, provided no support for his allegations that the Agreed Order was obtained by fraud on the Court. [B.R. 2990 – Response to Supplemental Document Submissions – p. 6-10].

On November 28, 2006, the Bankruptcy Court issued its Memorandum of Opinion and Order denying the Motion to Vacate. The Bankruptcy Court noted that “[t]he 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.” [B.R. 3039 – Memorandum of Opinion and Order – p. 5]. The Bankruptcy Court determined that Mr. Maloof's Civil Rule 60(b)(6) request for relief was barred by laches. [B.R. 3039 – Memorandum of Opinion and Order – p. 5]. The Court further determined that “[s]ubstantively, Maloof's fraud allegation must fail,” finding that “[n]ot 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 . . . or any other fact upon which the Agreed Order might be voided.” [B.R. 3039 – Memorandum of Opinion and Order – p. 7-8].

Thereafter, Appellant filed his notice of appeal, appealing the Bankruptcy Court's denial of the Motion to Vacate.

IV. STANDARD OF REVIEW

"The court reviews bankruptcy court findings of fact for clear error and conclusions of law *de novo*."¹

A bankruptcy court's findings of fact are not set aside unless clearly erroneous. However, a "bankruptcy court's legal conclusions, drawn from the facts so found, are reviewed *de novo*." Absent either a mistake of law or an abuse of discretion, the bankruptcy court ruling must stand. A bankruptcy court "may abuse its discretion by ignoring a material factor that deserves significant weight, relying on an improper factor, or, even if it [considered] only the proper mix of factors, by making a serious mistake in judgment."²

The granting or denial of a motion under the provisions of Civil Rule 60(b)(6) is a matter addressed to the sound discretion of the trial judge, whose decision will not be reversed except for an abuse of discretion.³ A court abuses its discretion when it "relies on clearly erroneous findings of fact, improperly applies the law, or employs an erroneous legal standard."⁴

V. ARGUMENT

The Bankruptcy Court correctly denied the Motion to Vacate as Appellant was not entitled to relief under any of the enumerated provisions or Civil Rule 60(b) or under the general savings clause thereof. Under Civil Rule 60(b), orders may be vacated on several different grounds:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud. Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable

¹ *Borock v. Mathis (In re Clipper Int'l Corp.)*, 154 F.3d 565, 567 (6th Cir. 1998) (citation omitted).

² *In re Campano*, 293 B.R. 281, 283 (D.N.H. 2003) (citations omitted).

³ *Douglass v. Pugh*, 287 F.2d 500, 502 (6th Cir. 1961) ("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 ruling will not be reversed except for an abuse of discretion on his part").

⁴ *In re Brown*, 342 F.3d 620, 633 (6th Cir. 2003).

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. The Motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.* A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. *This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the Court.*⁵

In 1944, the Supreme Court ruled that an appellate court had the power to vacate a judgment based upon fraud on the court.⁶ This power is expressly preserved within the text of Civil Rule 60(b), which reads that “[t]his rule does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court.”⁷

A. UNDER BOTH THE CIVIL RULES AND APPLICABLE PRECEDENT, APPELLANT WAS NOT ENTITLED TO RELIEF UNDER CIVIL RULE 60(b)(6) ON THE BASIS OF NEWLY DISCOVERED EVIDENCE OR FRAUD, MISREPRESENTATION OR MISCONDUCT OF AN ADVERSE PARTY.

The Motion to Vacate sought relief under Civil Rule 60(b)(6). Civil Rule 60(b)(6) provides that an order may be vacated for “any other reason justifying relief.”⁸ Although Civil Rule 60(b)(6) provides for relief from judgment if there is “any other reason justifying relief from the operation of the judgment,” it does not provide a court with unfettered discretion to set aside a judgment in all cases.⁹

⁵ FED.R.CIV.P. 60(b) (emphasis added).

⁶ *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

⁷ FED.R.CIV.P. 60(b).

⁸ FED.R.CIV.P. 60(b)(6).

⁹ *See United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993) (rule used “sparingly as an equitable remedy to prevent manifest injustice”).

As a “catch-all” provision, Civil Rule 60(b)(6) is narrowly interpreted:

The provision applies only when there are reasons for relief other than those set out in the more specific clauses of Rule 60(b). To read the provision any other way would eliminate the need for the specific provisions and would eliminate the limitations that are imposed on those specific provisions.

There must always be a valid reason justifying relief from a judgment. In fact, the courts always require that there be “extraordinary circumstances” justifying relief. To read the provisions otherwise would permit the discretion vested in a court by Rule 60(b)(6) to be used to make unnecessary inroads into judgments that would otherwise be final, or to transform Rule 60(b) into a substitute for appeals.¹⁰

Moreover, if the reasons offered for the relief from judgment could be considered under one of the more specific clauses of Civil Rule 60(b)(1) – (5), those reasons will not justify relief under Civil Rule 60(b)(6). “Rule 60(b)(6) . . . grants federal courts broad authority to relieve a party from final judgment . . . provided that the motion . . . is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5).”¹¹ In particular, the courts have consistently held that the grounds set forth in clauses (b)(1) to (b)(3) and which require that the motion be made within one year of the entry of the judgment may not be the basis of a Civil Rule (60)(b)(6) motion after the one year period has elapsed.¹² To hold otherwise would render the one year time limit meaningless. Additionally, the one year statute of limitations is in addition to, not in lieu of, the requirement that a motion under Civil Rule 60(b) be made within a reasonable time after the entry of the judgment.

Civil Rule 60(b) expressly provides that a motion under clauses (1) through (3) thereof must be brought within one year of the entry of the judgment. Here, the Agreed Order was

¹⁰ 12 MOORE’S FEDERAL PRACTICE § 60.48[1] (Matthew Bender 3d edition 2006).

¹¹ *Liljeberg v. Health Services Corp.*, 486 U.S. 847, 863, n. 11. (1988); *Warren v. Garvin*, 219 F.3d 111, 114 (2nd Cir. 2000); *United States v. Buck*, 281 F.3d 1336, 1341 (10th Cir. 2002); *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 651 (1st Cir. 1972).

¹² *Pioneer Investment Services Co. v. Brunswick Associates*, 507 U.S. 380, 393 (1993); *McDowell v. Dynamics Corporation of America*, 931 F.2d 380, 384 (6th Cir. 1991); *Smith v. Secretary of Health & Human Services*, 776 F.2d 1330, 1333 (6th Cir. 1985).

entered almost four years prior to the filing of the Motion to Vacate. Therefore, Appellant was procedurally barred from commencing the Motion to Vacate on the basis of newly discovered evidence or fraud, misrepresentation or misconduct of an adverse party.

Consequently, the only remaining provisions of Civil Rule 60(b) available to Appellant were Civil Rule 60(b)(6) and the savings clause which permits a party to bring an independent action for fraud on the court. As to Civil Rule 60(b)(6), the only time requirement is that the motion be brought “within a reasonable time.”¹³ However, as noted above, the Sixth Circuit has held that a movant cannot circumvent the one year limitation imposed on claims encompassed by clauses (1) through (3) by invoking clause (6).¹⁴ Therefore, Appellant was not entitled to relief under Civil Rule 60(b)(6) on the basis of newly discovered evidence or fraud, misrepresentation or misconduct of an adverse party.

B. APPELLANT FAILED TO ESTABLISH FRAUD ON THE COURT UNDER THE SAVINGS CLAUSE OF CIVIL RULE 60(b)(6) AS THE EVIDENCE BEFORE THE BANKRUPTCY COURT DID NOT SUPPORT APPELLANT’S ALLEGATIONS THAT HE HAD BEEN FRAUDULENTLY INDUCED TO SIGN THE AGREED ORDER, THAT FRAUDULENT MISREPRESENTATIONS HAD BEEN MADE TO THE BANKRUPTCY COURT TO OBTAIN ENTRY THEREOF, OR THAT THE IMPARTIAL FUNCTIONS OF THE BANKRUPTCY COURT HAD BEEN CORRUPTED.

Since Appellant could not obtain relief under Civil Rule 60(b)(6), his sole avenue for relief was to characterize the Motion to Vacate as an independent action under the savings clause of Civil Rule 60(b) and the *Hazel-Atlas* line of cases dealing with the issue of “fraud on the court.”¹⁵ Fraud upon the court is distinguished from simple fraud upon an adverse party and is

¹³ FED.R.CIV.P. 60(b)(6).

¹⁴ *McDowell v. Dynamics Corporation of America*, 931 F.2d 380, 384 (6th Cir. 1991); *Smith v. Secretary of Health & Human Services*, 776 F.2d 1330, 1333 (6th Cir. 1985).

¹⁵ The savings clause of Civil Rule 60(b) has no specific time limit and has been employed to address allegations of fraud upon the court. As noted by the leading treatise on federal practice, however, “in practice, courts will likely consider the delays involved in determining whether the fraud in question is of

strictly limited in scope. As concisely described by the United States Court of Appeals for the Second Circuit:

Fraud on the court is “fraud which seriously affects the integrity of the normal process of adjudication.” *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2nd Cir. 1988). It involves “far more than an injury to an individual litigant” or “a case of a judgment obtained [simply] with the aid of a witness who, on the basis of after-discovered evidence, is believed to possibly to have been guilty of perjury.” *Id.* (citations omitted) (alteration in original). The concept embraces “that species of fraud which does or attempts to, defile 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 presented for adjudication.” *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2nd Cir. 1972) (quoting 7 MOORE’S FEDERAL PRACTICE ¶60.33, at 515 (1971 ed.)).¹⁶

Expanding on this concept, the Seventh Circuit has held that:

Fraud on the court involves a particular type of fraud which is “directed to the judicial machinery itself,” and which involves circumstances where the impartial functions of the court have been directly corrupted. The cases where it has been found have involved the most egregious conduct involving “corruption of the judicial process itself,” such as bribery of a judge and improper influence with the court.¹⁷

Hazel-Atlas, for example, involved a deliberately planned and carefully executed scheme to defraud the United States Patent Office and the Third Circuit Court of Appeals. In *Hazel-Atlas*, the plaintiff glass company sought a patent protecting a certain glass-blowing process. The patent officer, however, did not believe that the patent was valid. To help secure the issuance of the patent, Plaintiff’s attorney wrote an article extolling the wonders of the “new” process, got an officer of the glass-worker’s union to sign it, and had it published in a trade journal. This article was thereafter relied upon by the Third Circuit in subsequent litigation involving claimed infringement of the patent. Long after the issuance of the judgment, the

the magnitude to constitute fraud on the court. The greater the delay, the more deference the court is likely to give to the concept of finality of judgments and the proof.” 12 MOORE’S FEDERAL PRACTICE § 60.21[4][g] (Matthew Bender 3d ed. 2006).

¹⁶ *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457 (2nd Cir. 1994).

alleged infringing party discovered both the identity of the true author of the article and that the union official had subsequently been bribed to lie about his lack of true authorship. The Supreme Court reversed the infringement judgment on the ground that it had been fraudulently obtained, stating that:

This is not a simply a case of a judgment obtained with the aid of a witness who, on the basis of after discovered evidence, is believed possibly to have been guilty of perjury. Here . . . we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. . . . This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot be complacently tolerated.¹⁸

The participation of a lawyer for one of the parties in the creation and presentation of the fraudulent evidence relied on by the Patent Office and the Third Circuit was a distinguishing factor in *Hazel-Atlas*, leading subsequent courts to conclude that participation of an officer of the Court in the fraud is either an essential element of fraud on the court contributing to the subversion of the adjudication process or an alternative basis for finding fraud on the Court. Thus, the Sixth Circuit – in a case involving misconduct by overzealous attorneys from the Office of Special Investigations, a unit within the Criminal Division of the Department of Justice – has held that the elements of fraud upon the Court consists of conduct:

1. On the part of an officer of the Court;
2. That is directed to the “judicial machinery” itself;
3. That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth;
4. That is a positive averment or is concealment when one is under a duty to disclose;
5. That deceives the court.¹⁹

¹⁷ *Matter of Whitney-Forbes, Inc.*, 770 F.3d 692, 698 (7th Cir. 1985) (citations omitted).

¹⁸ *Hazel-Atlas*, 322 U.S. at 245-246.

¹⁹ *Demanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993).

As noted by the leading treatise on the Federal Rules of Civil Procedure, however, “misconduct of an officer of the court is an essential element of fraud on the court only if this misconduct precludes proper adjudication by the court.”²⁰ Fraud on the court, therefore, requires more than a showing of misconduct by one of the parties to the suit:

Fraud on the court must be construed narrowly, not only to protect the finality of judgments generally, but specifically to protect the integrity of Rule 60(b)(3), which permits a motion for relief from judgments because of the fraud of a party, but which is limited by a one year period in which the motion may be brought. If fraud on the court were to be given a broad interpretation that encompassed virtually all forms of fraudulent misconduct between the parties, judgments would never be final and the time limitations of Rule 60(b) would be meaningless.²¹

In addition, the moving party must present “clear and convincing” evidence of fraud in order to prevail²² and “all doubts must be resolved in favor of the finality of the judgment.”²³

Appellant goes through great contortions to shoehorn this action into the five elements set forth in *Demanjuk*. Asserting that “[t]he fraud here argued does not go to the judgment itself, but to the manner in which it was procured and to the effect of that Order in preventing the Appellant from presenting his causes or defenses,”²⁴ Appellant alleges that:

(i) The conduct must be by an officer of the Court. Here, the Agreed Order was offered to the Court by the Bank Group’s Attorneys. (ii) The conduct must be directed to the judicial machinery itself. Here, the stipulations cut off the hearing for appointment of a Trustee and precluded a motion and hearing as to a conversion of the case, in which the Court would independently assess the facts bearing on such a conversion. (iii) The representation must be intentionally false, blind to the truth or in reckless disregard for the truth. Here, the signature of the Movant, essential to the Agreed Order, ***a fraud that was no less than a forgery***, was presented to the Court as an essential part of the Agreed Order. (iv) There is a positive averment, or is concealment when one is under a duty to disclose. Here, the Bank Group’s attorneys vouched for the genuineness of the Movant’s signature by presenting the Agreed Order to the Court, while concealing that it had procured the Movant’s signature by deception. (v) The positive averment or

²⁰ 12 MOORE’S FEDERAL PRACTICE § 60.21[4][b] (Matthew Bender 3d ed. 2006)

²¹ *Id.*, at § 60.21[4][c].

²² *Pearson v. First NH Mortg. Corp.*, 200 F.3d 30, 37 (1st Cir. 1999).

²³ *Bulloch v. U.S.*, 763 F.2d 1115, 1121 (10th Cir. 1985)

²⁴ Appellant’s Brief – p. 10 (emphasis in original).

concealment deceives the Court. Here, the Bank Group, through its attorneys, represented that the Agreed Order was the result of a voluntary accord and therefore operational and effective, when in fact it was void as the direct and proximate result of deceit.²⁵

Appellant's contention of fraud on the part of the Bank Group's attorneys are simply unsupported by the record in these cases.

1. **The Agreed Order Was A Consensual Judgment Proffered To The Court By All of the Parties Thereto, Specifically, The Debtors, the Bank Group and the Appellant.**

Appellant's assertion that the Agreed Order was offered to the Bankruptcy Court by the Bank Group's attorneys simply ignores that fact that the Agreed Order was a consensual judgment. As reflected in its very language, the Agreed Order was the end result of intense negotiations among the Bank Group, the Debtors and Mr. Maloof, throughout which, Appellant was personally represented by his counsel. [B.R. 5 - Agreed Order – p. 5, para. 7]. That it was a consensual judgment is evidenced by the signatures of all parties, including Appellant and Appellant's sophisticated and experienced bankruptcy counsel, reflecting their express acknowledgment and consent to the terms and provisions thereof. [B.R. 5 – Agreed Order – p. 10-11]. Thus, the Agreed Order was proffered to the Court by all of the parties who signed it, not by the Bank Group as alleged by Appellant.

Relief from consensual judgments is not favored under Civil Rule 60(b). “Judgments that are rendered following a settlement by the parties are not judgments that result from full litigation on the merits. Nonetheless, unlike judgments rendered following a default, there is no policy favoring setting them aside on a Rule 60(b) motion.”²⁶ As noted by one court:

[W]hen, as in this case, the appellants made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable

²⁵ *Id.*

²⁶ 12 MOORE'S FEDERAL PRACTICE § 60.22[4] (Matthew Bender 3d ed. 2006).

litigation judgment, their burden under Rule 60(b) is perhaps even more formidable than had they litigated and lost.²⁷

Neither does carelessness or a lack of due care on the part of a litigant or the litigant's attorney in negotiating a consent decree provide a basis for relief under Civil Rule 60(b).²⁸ As noted by the Seventh Circuit in explaining why an appellate court is likely to give greater deference to a decision denying relief when a consent judgment is involved:

The deference [shown by an appellate court to a decision denying relief] is never greater than when the underlying judgment is a settlement. The settlement itself is an exercise in compromise rather than resolution of legal issues. The parties compromise on legal and factual matters, and there could be a very substantial range within which the compromise may be reasonable. There is no "right" settlement. When the underlying judgment cannot be "wrong" in the strict sense – though an error could influence the range in which the settlement takes place – a judge's decision to leave well enough alone cannot readily be "wrong" either.²⁹

Appellant, having been represented and advised by his personal counsel – an experienced and sophisticated bankruptcy practitioner – at all times during the negotiation of the terms of the Agreed Order, clearly made an informed decision not to challenge the Bank Group's decision to exercise their rights under the Stock Pledges to remove him and install Charles Sweet as the Debtors' director and to consent to the conversion of the Debtor's cases from cases under chapter 7 of the Bankruptcy Code to chapter 11 of the Bankruptcy Code. Thus, the very fact that the Agreed Order was a consent judgment belies Appellant's assertion that the Agreed Order was proffered to the Bankruptcy Court by counsel to the Bank Group.

2. **The Record Below Did Not Support Appellant's Allegations That Appellant Had Been Fraudulently Induced to Sign the Agreed Order.**

The linchpin of Appellant's fraud on the Court argument is that he was fraudulently induced to enter into the Agreed Order:

²⁷ *United States Steel Corp. v. Fraternal Association of Steelhaulers*, 601 F.2d 1269, 1274 (3rd Cir. 1979).

²⁸ *See, e.g., McLaughlin v. Jung*, 859 F.2d 1310, 1312-13 (7th Cir. 1988).

The Appellant's unknowing stipulation to this fraud was induced by four promises that the Bank Group had no intention of keeping, which promises it promptly broke. These promises were 1) That the Debtors would not engage Benesch, Friedlander, Coplan & Aronoff as permanent counsel for the Debtors; 2) that the Debtors would engage DSI as the Debtors' active financial advisors; 3) that Newmarket Partners, hired by the Bank Group as their on-site representative at the Debtors' place of business would not participate in any management decisions of the Debtors and 4) That the Appellant would be provided weekly financial reports of the businesses. Each of these promises was broken.

[Appellant's Brief – p. 14]. Unfortunately, the evidence before the Bankruptcy Court did not support Appellant's allegations of fraudulent inducement by the other parties to the Agreed Order.

A review of the Motion to Vacate and Appellants' Brief reflects that Appellant assumes and treats the Debtors as the alter egos of the Bank Group for purposes of his argument. Specifically, Appellant contends that the Debtors were controlled by the Bank Group because (a) the Bank Group removed Mr. Maloof from his role as director of the Debtors' boards of directors and replaced him with Charles Sweet, who subsequently selected certain post-petition officers of the Debtors and (b) of an alleged lack of independence of Benesch, Debtors' bankruptcy counsel. Appellant's assumptions with respect to these matters are mere allegations, not established fact. With respect to the independence of Debtors' counsel, the Examiner appointed by the Court in these cases specifically found (a) "no definitive evidence that Benesch engaged in improper communications with the Lenders or their counsel prior to the filing of the involuntary chapter 7 cases or that Benesch had an arrangement, an advance understanding, or a unilateral design to advance the interest of the Lenders at the expense of their then clients," and "no evidence that Benesch was controlled by the Lenders and/or their counsel." and (b) concluded that "Benesch . . . competently represented the interests of the Debtors in these cases." [B.R. 2972 – Objection – p. 4]. Appellant's apparent claims that Debtors' postpetition management breached their

²⁹ *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 831-832 (7th Cir. 1985).

fiduciary duties to the Debtors' estates are, at best, nothing more than unsubstantiated allegations.

a. **The Debtors Retained DSI as Their Financial Advisor as Required by the Terms of the Agreed Order.**

The Agreed Order contained the following provision with respect to Development Specialists, Inc. ("DSI"): "The Debtors shall inquire as to the availability of qualified personnel at Development Specialists, Inc. ("DSI") [and] will file a motion, in accordance with applicable sections of the Bankruptcy Code to engage DSI as financial consultants to the Debtors in the Chapter 11 Cases." [B.R. 5 – Agreed Order – p 8, para. 8]. The docket maintained by the Clerk of Courts in the Debtor's bankruptcy cases reflected that on June 20, 2002, nine days after the entry of the Agreed Order and three days after the entry of the order converting the involuntary chapter 7 cases to cases under chapter 11 of the Bankruptcy Code, the Debtors filed an "Emergency Application for an Order Pursuant to Section 327(a) of the Bankruptcy Code Authorizing the Employment and Retention of Development Specialists, Inc. as Financial Advisor to the Debtors [Docket No. 57], which retention was authorized by order entered on June 26, 2002 [Docket No. 77]. [B.R. 2990 – Response to Supplemental Documentary Submissions – p. 6]. Thus, the Debtors did not breach their promise to engage DSI as their financial advisors in their chapter 11 cases.

b. **Consistent with the Terms of the Agreed Order, The Debtors did not Engage or Re-Engage John Rudd or Newmarket Associates in these Chapter 11 Cases.**

With respect to Newmarket Associates ("Newmarket") and John Rudd, the person retained by the Debtors under the terms of the Fourth Forbearance Agreement with the Bank Group, to serve as their chief restructuring officer, the Agreed Order provided:

The Debtors shall not seek to engage or re-engage John Rudd or Newmarket . . . in the Chapter 11 Cases. In addition, the Debtors and Maloof consent to and shall

not assert conflict of interest or other objections in connection with the Agent's employment, if at all, of Rudd and/or Newmarket as Agent's consultants in these cases. In connection with the Agent's engagement of Rudd and/or Newmarket, Rudd shall treat the information received from the Debtors in a confidential manner and not in any way disclose such information to any individual or person other than the Agent or Petitioning Creditors (including counsel and Rudd's/Newmarket's counsel) without the written consent of the Director or further Court Order.

[B.R. 5 - Agreed Order – p. 8, para. 8).

Appellant's contention that the Agreed Order contained a promise that "Newmarket . . . , hired by the Bank Group as their on-site representative at the Debtors' place of business would not participate in any management decisions of the Debtors," does not, however, comport with the actual language of the Agreed Order. The Agreed Order only (a) barred the Debtors from seeking to engage or re-engage John Rudd or Newmarket in the Debtors' chapter 11 cases, (b) reflected that the other parties thereto would not object if the Bank Group determined to engage John Rudd and/or Newmarket as their financial consultants, and (c) specified that any information that Rudd and/or Newmarket received from the Debtors would be treated as confidential and, absent Court Order would only be disclosed to certain designated parties.

Appellants contention that the Agreed Order provisions regarding Rudd and Newmarket had been violated was predicated solely on a single email sequence from July 25, 2002:

Your Movant also argued from an email sequence between Alan Omori of DSI and Natasha Brandt of the Debtor, on July 25, 2002, in which Patty Geitgey of Newmarket . . . is discussed as a primary participant in the financial management of the Debtor, "Exhibit B," contrary to the assurances set out in the Agreed Order of June 11, 2002 upon which your Movant relied.

[B.R. 2984 – Motion to Vacate – Supplemental Submission in Support – p.2].

This email sequence, placed in its proper context, indicates that the promises with respect to Rudd and Newmarket contained in the Agreed Order were not broken. As reflected in deposition testimony of John Rudd, the Bank Group did indeed subsequently engage Newmarket

as its financial consultant in the Debtor's chapter 11 cases. [B.R. 2990 – Response to Supplemental Documentary Submissions – p. 7}. Further, the email was dated July 25, 2002. As noted in the Debtor's response, the Bankruptcy Court's docket reflected that (a) the Debtors had sought approval of a debtor in possession financing arrangement with the Bank Group on June 18, 2002 [Docket No. 31]; (b) an interim order with respect to the DIP financing arrangement was entered on June 20, 2002 [Docket No. 58]; (c) the interim order was subsequently amended on July 19, 2002 extending the term thereof to July 23, 2002 [Docket No. 144]; and (d) a final order authorizing the debtor in possession financing with the Bank Group (the "Final Order") was entered on July 25, 2002 [Docket No. 166]. The Final Order – entered on July 25, 2002, the same date as the e-mail chain cited by Appellant – granted the Debtors the authority to borrow money in accordance with the terms of a budget. This budget was the result of negotiations among the Debtors and the Bank Group and would have been subject to the approval of the Bank Group. Mr. Rudd's deposition testimony specifically indicates that Patty Geitgey was the Newmarket person on-site at Level Propane monitoring the Debtors' business and operations on behalf of the Bank Group and that her tasks included monitoring the debtor in possession financing projections. The e-mail chain cited by Mr. Maloof is consistent with Mr. Rudd's testimony. Thus, the evidence before the Bankruptcy Court demonstrated that the promises made in the Agreed Order with respect to Rudd and/or Newmarket had not been broken. [B.R. 2990 – Response to Supplemental Document Submissions – p. 7-8].

- c. **Appellant Presented No Evidence to the Bankruptcy Court Demonstrating that the Debtors had Failed to Supply Appellant with Certain Financial Information as Required by the Agreed Order.**

Appellant further contends that he was not provided with weekly financial reports involving the Debtors' businesses as required by the terms of the Agreed Order. The Agreed Order, however, did not contain a promise of weekly financial reports. It merely provided that:

The Director and the Debtors shall transmit to Maloof at his home address financial and other information reasonably requested by Maloof in form and content consistent with the generation of such information by the Debtors in the ordinary course of their businesses. In addition, the Director will be available to discuss with Maloof such information and other matters pertaining to the Debtors.

[B.R. 5 - Agreed Order – p. 7-8, para. 7). In the proceeding below, Mr. Maloof provided nothing more than a bare allegation that this provision of the Agreed Order had been violated. He provided no evidence that the Debtors had refused his reasonable requests for such information nor any evidence that he had sought a bankruptcy court order compelling the Debtors to comply with this provision of the Agreed Order. Moreover, once orders for relief had been entered in the Debtors' bankruptcy cases, the Debtors, as debtors in possession, became obligated, in compliance with the reporting requirements of the Office of the United States Trustee, to file monthly operating reports with the Court. Thus, monthly financial reports on the Debtors' businesses were, as a matter of public record, available for his review. Nothing before the Bankruptcy Court demonstrated that the terms of the Agreed Order dealing with the provision of financial data to Mr. Maloof had been violated.

- d. **The Evidence Before the Bankruptcy Court Established that At The Time The Agreed Order Was Entered Into The Debtors Had Every Intention of Replacing Benesch, Friedlander, Coplan & Aronoff LLP as their Bankruptcy Counsel And That The Subsequent Retention Thereof By The Debtors Followed An Unsuccessful Attempt To Locate Replacement Counsel And A Duly Noticed Hearing Before the Bankruptcy Court.**

The Agreed Order specified that “the Debtors shall not engage Benesch, Friedlander, Coplan & Aronoff LLP (“Benesch”) in accordance with applicable sections of the Bankruptcy

Code, as counsel except for not more than several days to the extent necessary to transition representation of the Debtors in these cases.” As the deposition testimony of Charles Sweet – incorporated by reference in the Motion to Vacate – indicates, at the time of the negotiation of the Agreed Order the Debtors had advised Benesch that their engagement would be on an interim or limited basis:

Q. Backing up to where we were before, with respect to that meeting that you described as the cast of hundreds.

A. Yes.

Q. Without speculating as to what Mr. Maloof’s real reasons may have been, what was Mr. Maloof saying at that meeting with respect to the retention of Benesch? Did he provide any rationale for why he was objecting.

A. He did not provide any rationale that I understood. He - - Bill Maloof was very angry at that meeting. He was very vocal, and a lot of what he was saying really didn’t make a whole lot of sense. It was just, you know, in anger.

What I got from the conversation was that he blamed Benesch for getting into a chapter 7 situation. I didn’t – he didn’t give, to my recollection, any clear reasons why he was to blame for that. Frankly, at the time, I didn’t really care. I thought, as long as I can get through these filings, I can find another law firm and we can move on you know.

Q. Am I correct in my understanding that Jeff Schwartz was at this meeting as well?

A. I believe he was. I am not 100 percent certain of that, but I believe he was.

Q. Did you have any discussions with Jeff Schwartz at that time regarding Mr. Maloof’s concerns?

A. Other than to tell him and to make him aware that we were indeed going to replace him, I don’t believe I ever had any lengthy conversation with him about why Bill felt the way he did.

Q. When you say that we were, indeed, going to replace him, you were saying that you told Mr. Schwartz that the Benesch’s representation would be on an interim basis.

A. That’s exactly right, yes.

[Sweet Deposition Testimony – p. 21, line 14 to p. 23, line 5]. Thus, the evidence before the Bankruptcy Court indicated that at the time of entry into the Agreed Order, the Debtors had notified Benesch that they were being retained on an interim basis and would be replaced once other counsel had been located. In short, contrary to Appellant's assertion, there was no deception nor any intent to deceive Appellant on this point at the time the Agreed Order was entered into.

Moreover, the subsequent decision to seek the retention of Benesch followed an unsuccessful effort to locate replacement counsel and a duly noticed hearing before the Bankruptcy Court:

Q. At some point, the terms of the Benesch engagement changed, though; didn't it?

A. They did.

Q. Could you explain to me how that came about.

A. Certainly. This case has been very difficult from the beginning. There have been a lot of parties who have filed motions and objections, all the way along the line. So it was a very labor-intensive effort for the Debtor's counsel, and for the Debtor.

Benesch was handling, as I said, those early conversions and filings that we needed to do, and it was easily four to six weeks before we were really able to sort of bring our head up for air.

During that period, we did initiate a search. We did start reaching out to law firms in Cleveland large enough to handle this case, recognizing the scope and size of it, and were finding that we were having a great deal of difficulty.

For one reason or other, the vast majority of the, if not all, if I recall all, of the large law firms were conflicted or simply would not have anything to do with this case. Bill Maloof was a very litigious man, so he was well known in town. So we were having difficulty.

We now had four to six weeks or so, it may have been even a bit longer than that, under our belts with Benesch. In my opinion, he was handling the case very well for us, they were handling the case very well for us. The estate was far better off with them as counsel, and I still had no reason to believe that they

should be removed, other than Bill didn't like them and was blaming them for his problems.

So, at some point, we filed a motion with the courts to overturn that earlier ruling and allowing us to retain Benesch for the duration of the case.

[Sweet Deposition – p. 23, line 6 to p. 24, line 23]. The subsequent retention of Benesch, therefore, came only after the Debtors' efforts to obtain replacement counsel had proven unsuccessful and after compliance with the procedures for retention of professionals set forth in the Bankruptcy Code, including notice and a hearing thereon.

Since the record before the Bankruptcy Court did not support Appellant's allegation that the Bank Group and the Debtors had no intention to and had not kept the promises made to Appellant in the Agreed Order, there was no evidence that (a) Appellant had been fraudulently induced into signing the Agreed Order or (b) that attorneys for the Bank Group made any fraudulent misrepresentation to the Court with respect to either Appellant's signature or his voluntary decision to consent to the terms thereof.

Even were the evidence to the contrary, Appellant's argument that he was fraudulently induced to enter into the Agreed Order would clearly fall within the ambit of Civil Rule 60(b)(3) as a fraud by one party upon another and as such would have been subject to the one year statute of limitations applicable to that provision. Under the case law cited above, such a claim would not constitute a basis for relief under Civil Rule 60(b)(6). Fraud between parties is not fraud on the court.³⁰

³⁰ 12 MOORE'S FEDERAL PRACTICE § 60.21[4][c] (Matthew Bender 3d ed. 2006) ("Fraud on the Court may not be established simply by showing some misconduct by one of the parties to the suit"). *Cf. Hazel-Atlas*, 322 U.S. at 246.

3. **Appellant Has Lifted Out Of Context and Twisted the Meaning Of A Snippet Of Language From The Agreed Order To Manufacture An Alleged Misrepresentation To The Bankruptcy Court By Attorney's For The Bank Group.**

The record simply does not support Appellant's allegation that the Bank Group committed fraud upon the Bankruptcy Court by falsely representing to the Bankruptcy Court that the Debtors' cases would be conducted "in a manner that will preserve and protect the businesses and assets of Debtors' estates." A review of the Agreed Order indicates that the Bank Group made no such representation to the Court. It reveals, instead, that Appellant has lifted out of context and twisted the meaning of a snippet of language in the Agreed Order. The language upon which Appellant relies is found in the factual stipulations that Mr. Maloof, the Debtors and the Petitioning Creditors all agreed to:

After the filing of the Involuntary Petitions, the Petitioning Creditors, the Debtors, Maloof and their respective counsel entered into discussions to resolve the disputes that occasioned the replacement of the Debtors' boards of directors and the filing of the Involuntary Petitions in a manner that will preserve and protect the businesses and assets of the Debtors' estates, prevent any further losses thereto, and maximize the value of the Debtors as going concerns for the benefit of their estates and creditors. Maloof was personally represented by counsel throughout these discussions. As a result of these discussions, the parties have agreed to the entry of an agreed order granting the relief set forth below.

[B.R. 5 – Agreed Order – p.5, para.7]. This language is nothing more than a description of the purpose of the negotiations entered into among Appellant, the Debtors and the Petitioning Creditors. Only Appellant's act of lifting this language from its context and twisting its meaning has enabled Appellant to baldly claim that "undisputed evidence demonstrated with particularity that . . . officers of the Court fraudulently represented that the case would be administered "in a manner that will preserve and protect the businesses and assets of the Debtors' estates."³¹

³¹ Appellant's Brief – p. 19.

4. **The Entry Of The Agreed Order And The Subsequent Conversion of the Debtors' Chapter 7 Cases To Cases Under Chapter 11 Of The Bankruptcy Court Did Not Corrupt Or Otherwise Render the Bankruptcy Court Incapable Of Impartially Performing Its Tasks.**

Finally, Appellant argues that the alleged misconduct directed to the judicial machinery itself was that the Agreed Order “cut off the hearing for appointment of a Trustee and precluded a motion and hearing as to a conversion of the case, in which the Court would independently assess the facts bearing on such a conversion.”³² It is true that the agreements of the Bank Group, the Debtors and Appellant embodied in the Agreed Order permitted the parties to avoid litigation over (a) the Bank Group’s exercise of their rights under the Stock Pledges and (b) the Bank Group’s request that the Court appoint an interim trustee to take possession of the property of the Debtors’ estates and to operate the Debtors’ businesses pursuant to section 303(g) of the Bankruptcy Code.³³ That was simply a part of the deal that was struck by the parties to the Agreed Order.

As Appellant notes in his brief, immediately after the filing of the Involuntary Petitions, the parties entered into negotiations “to avoid such an appointment, which might well have lead

³² Appellant’s Brief – p. 11.

³³ Section 303(g) of the Bankruptcy Code provides that:

At any time after the commencement of an involuntary case under chapter 7 of this title but before any order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States Trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor’s accounting for and delivering to the trustee, if there is an order for relief in these cases, such property, or the value, as of the date the debtor regains possession of such property.

11 U.S.C. § 303(g).

to a piece-meal asset liquidation of the [debtors'] businesses.”³⁴ The Agreed Order achieved this result, removing the Debtors’ businesses from the state of limbo between the filing of an involuntary petition for relief and the entry of an order for relief, bringing the Debtors’ estates quickly within the Bankruptcy Court’s jurisdiction and protection and permitting the Debtors to continue operating their businesses in chapter 11.³⁵

Indeed, the record before the Bankruptcy Court indicated that Appellant himself had considered placing some or all of the Debtors in chapter 11 months prior to the filing of the involuntary petitions, directing counsel to commence the preparation of pleadings to effectuate such a filing prior to and during the negotiation of the Fourth Forbearance Agreement with the Bank Group. Appellant had also specifically considered the commencement of chapter 11 cases for the Debtors in an effort to preempt the Bank Group from exercising their stock pledges.³⁶ [B.R. 2969 – Motion to Vacate, para. 28].

Bringing the Debtors’ cases within the jurisdiction of the Bankruptcy Court simply does not constitute an act that corrupted the Bankruptcy Court or rendered it incapable of performing its task of impartial adjudication. Instead, it meant that every action outside of the ordinary

³⁴ Appellant’s Brief – p.2.

³⁵ Under Bankruptcy Code section 303(f), any business of the debtor may continue to operate and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced, notwithstanding Bankruptcy Code section 363, except to the extent otherwise ordered by the court, until an order for relief has been entered. 11 U.S.C. § 303(f). A debtor has the right to controvert an involuntary petition. 11 U.S.C. 303(h). Failure to do so within the time limits imposed by Bankruptcy Rule 1011, will result in entry of an order for relief by default pursuant to Bankruptcy Rule 1013. FED.R.BANKR.P. 1013.

³⁶ Appellant apparently believed that such a preemptive filing for chapter 11 relief would have enabled him to retain his managerial control over the Debtors. The Bank Group’s emergency motion for the appointment of a trustee suggests, however, that a voluntary filing by Mr. Maloof would have been promptly followed by a motion for the appointment of a chapter 11 trustee under Bankruptcy Code Section 1104(a)(1), a provision providing for the appointment of a trustee “for cause, including fraud, dishonesty, incompetence or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case. . . .” 11 U.S.C. § 1104(a)(1). Indeed, had the Agreed Order done nothing more than affirm Charles Sweet as the Debtors’ director with the sole and absolute authority to act on behalf of the Debtors, Mr. Sweet would have had the authority to consent to the entry of orders for relief in

course of the Debtors' businesses was subject to scrutiny and presented to the Court for approval:

Bankruptcy is an "open book" process. Most key decisions, such as rejecting contracts and leases and selling assets, must be implemented through a filing with, and subsequent approval from, the bankruptcy court. The debtor's business plans, results of operations, and strategies will also be fully available to an official committee of creditors appointed to represent the creditors in the case. Other information about the debtor will generally be available to creditors through filings with the bankruptcy court and therefore available to the public at large.³⁷

Here, the Debtors continued operating their businesses following the entry of the Agreed Order. Those businesses were not liquidated on a piece meal basis by a chapter 7 trustee, they were subsequently sold as "going concerns" by the Debtors. Appellants' claim of "fraud" is really nothing more than a reflection of his dissatisfaction with the proceeds that were obtained from the sale of the Debtors' businesses. Appellant believes that the Debtors' propane distribution business was worth \$165 million, the amount of an alleged prepetition offer from Star Gas [B.R. 2969 – Motion to Vacate – para.12] or \$129 million, the amount of a competing offer from Parthenon Capital [B.R. 2969 – Motion to Vacate – para. 14] or the alleged renewed offer from Ferrell Gas in the amount of \$165 million [B.R. 2969 – Motion to Vacate – para. 21], and that such value was lost through the alleged postpetition conduct of the Bank Group, and its alleged minions, that destroyed the enterprise or going concern value of the Debtors' businesses. [Appellant's Brief – p. 18]. Appellant persists in this belief, notwithstanding the fact that in May 2002 – prior to the filing of the Involuntary Petitions, prior to the entry of the Agreed Order and many months before the alleged document spoliation or the alleged spiriting away of physical assets by the Bank Group and/or the Debtors' postpetition management – Parthenon Capital,

³⁷ the Debtors' Chapter 7 Cases and to exercise the Debtors' unfettered right to convert the Chapter 7 Cases to cases under chapter 11 of the Bankruptcy Code pursuant to section 706(a) thereof. 11 U.S.C. § 706(a).
Brad B. Ehrens and Kelly M. Neff, *Confidentiality in Chapter 11*, 47, 48, 22 EMORY BANKR. DEV. J. (Fall 2005).

after completing its due diligence with respect to a possible purchase of the Debtors' propane distribution business, reduced its purchase offer from \$129 million to \$26 million. [B.R. 2972 – Objection, p.5, n.5].

Appellant's dissatisfaction with the results obtained in the Debtors' chapter 11 cases subsequent to their conversion from cases under chapter 7 of the Bankruptcy Code to cases under Chapter 11 of the Bankruptcy Code simply does not constitute evidence demonstrating that the Agreed Order had been obtained by a fraud on the Bankruptcy Court.³⁸

Similarly, actions that allegedly took place months after the entry of the Agreed Order simply do not demonstrate that the Agreed Order was entered through a fraud on the Bankruptcy Court. In *Hazel-Atlas*, the fraudulent actions perpetrated by plaintiff's counsel occurred prior to the issuance of the patent by the Patent Office and this issuance of the infringement judgment by the Third Circuit Court of Appeals.³⁹ In *Gumport v. China Investment Trust and Investment Corporation (In re Intermagnetics America, Inc.)*, a case cited by Appellant, the misconduct, non-disclosure, and bid rigging activities of the Debtor's chief executive officer that formed the basis of the fraud on the court claim had all taken place before the entry of the sale order that was the subject of the challenge under the savings clause of Civil Rule 60(b).⁴⁰ Similarly, in *First Union Nat'l Bank of Florida v. Tenn-Fla Partners (In re Tenn-Fla Partners)*, a case involving revocation of a chapter 11 plan confirmation under section 1144 of the Bankruptcy Code, the debtor in possession's actions – concealing the existence of a potential purchasers' interests in the estate's sole asset prior to the confirmation of the plan, telling bidders to wait until after

³⁸ *Gleason v. Jandrucko*, 860 F.2d 556, 560 (2nd Cir. 1988) (Absent the type of fraud which subverts the integrity of the Court itself the requisite interference with the judicial machinery cannot be established and an independent action for fraud on the court therefore will not lie).

³⁹ *Hazel-Atlas*, 322 U.S. at 240-243.

⁴⁰ *Gumport v. China Investment Trust and Investment Corporation (In re Intermagnetics America, Inc.)*, 926 F.2d 912, 914-915 (9th Cir. 1991).

confirmation and preventing bondholders from knowing property's true market value prior to voting to accept less than half the full value of their claims under the plan – had all occurred prior to the entry of the plan confirmation order.⁴¹ None of the actions alleged by Appellant – the alleged wholesale destruction of corporate records, the alleged wholesale destruction of customer records, the alleged unauthorized sale of customer tanks during the 2002-2003 winter heating season, and the alleged repainting of over one hundred 30,000 gallon propane tanks in “Amerigas White” in April 2003 – relate to conduct prior to the entry of the Agreed Order.⁴² None of the exaggerated claims of officer misconduct asserted by Appellant were supported by credible evidence. Neither was any evidence was presented by Appellant to support its claims that any of the alleged postpetition actions of Debtors’ management were orchestrated by the Bank Group. The Bankruptcy Court correctly held, therefore, that “Substantively, Maloof’s fraud allegations must fail.” [B.R. 3039 – Memorandum of Opinion and Order – p. 7].

C. THE BANKRUPTCY COURT CORRECTLY CONCLUDED THAT THE MOTION TO VACATE WAS BARRED BY THE EQUITABLE DOCTRINE OF LACHES.

The Bankruptcy Court determined that the equitable doctrine of laches applied to the relief sought in the Motion to Vacate. The Bankruptcy Court found that there existed an inexcusable delay in seeking the relief requested by Appellant:

[F]our 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

⁴¹ *First Union Nat'l Bank of Florida v. Tenn-Fla Partners (In re Tenn-Fla Partners)*, 170 B.R. 946, 951-963 (Bankr. W.D. Tenn. 1994).

⁴² Appellant cites only one prepetition action in connection with its allegations that the Bank Group had acted to destroy the going concern value of the Debtors propane distribution business, the alleged determination of Newmarket's Patty Geitgey in the last week of May 2002 to limit propane pickups from the pipeline to 25 loads per week. This allegation presumes that Newmarket was an agent of the Bank Group. The Fourth Forbearance agreement entered into by the Debtors and the Bank Group in Marcy 2004 required the Debtors to appoint a chief restructuring officer. Subsequently, John Rudd of Newmarket had been retained by the Debtors to serve in that capacity. Additional Newmarket personnel, including Ms. Geitgey, were providing Mr. Rudd with support services. Thus, at the time in issue, Ms. Geitgey was a consultant retained by the Debtors and was not an employee or agent of the Bank Group as alleged by the Appellant.

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.

[B.R. 3039 – Memorandum of Opinion and Order – p. 6]. Further, as noted by the Debtors and by the Court, Appellant relied primarily on the evidentiary record established by the Examiner, which record was available three years prior to the filing of the Motion to Vacate. [B.R. 2972 – Objection – p. 12, para. 22; B.R. 3039 – Memorandum of Opinion and Order – p. 2-3].

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.⁴³ The two elements of laches are: (a) a lack of diligence by the party against whom the defense is asserted and (b) prejudice to the party asserting the defense.⁴⁴ It is well, settled, moreover, that prejudice is presumed from unreasonable delay.⁴⁵ Any motion under Civil Rule 60(b), except for Civil Rule 60(b)(4) must be brought within a reasonable time. Relevant to the inquiry of reasonable timeliness is prejudice to the party opposing the motion and more importantly, the basis for the moving party's delay.⁴⁶

Appellant contends that the Bankruptcy Court erred in applying the equitable doctrine of laches in this matter, directing this Court's attention to Civil Rule 8(c) and a line of cases discussing the application of laches as an affirmative defense in a lawsuit. Unfortunately, this action was not commenced as an adversary proceeding, an action that would have implicated the rules in Part VII of the Federal Rules of Bankruptcy Procedure, including Bankruptcy Rule 7008

⁴³ *In re Levy*, 256 B.R. 563 (Bankr. D. N.J. 2000)

⁴⁴ *Costello v. U.S.*, 365 U.S. 265, 282 (1961).

⁴⁵ *See Lyell Theatre Corp. v. Loews Corp.*, 682, F.2d 37, 43 (2nd Cir. 1982); *Daniels v. Brennan*, 887 F. 2d 783, 788-789 (7th Cir. 1989); *Washington v. Waller*, 734 F.2d 1237, 1238 (7th Cir. 1984); *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 651 (9th Cir. 1991); *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986).

which makes Civil Rule 8 applicable in adversary proceedings. Instead, Appellant chose to seek relief by way of a motion, commencing a contested matter under Bankruptcy Rule 9014. Bankruptcy Rule 9014(c) specifically provides, in pertinent part: “*Application of Part VII rules.* Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069 and 7071.”⁴⁷ Thus, Civil Rule 8 was simply not applicable in this matter. Having come to the Bankruptcy Court seeking equitable relief, Appellant cannot deny the Bankruptcy Court’s authority to apply the equitable doctrine of laches as a basis for denying the relief requested in the Motion to Vacate.

As noted by the Bankruptcy Court, four years had passed since the entry of the Agreed Order. During that entire time, Appellant had participated in the administration of the Debtors’ chapter 11 cases before the Bankruptcy Court. Further, as the Motion was predicated primarily on the evidentiary record established by the Examiner, virtually all of the evidence upon which Appellant relied was available to Appellant three years prior to the filing of the Motion to Vacate. With respect to Appellant’s claim of fraudulent inducement, the alleged breach of the promises relating to DSI, Newmarket, the provision of financial information, and the retention of Benesch, the alleged violation of those promises would have been apparent within a relatively short period after the entry of the Agreed Order. Finally, Appellant offered the Bankruptcy Court no explanation for his delay. Under such circumstances and where, as here, no meaningful, substantive evidence of “fraud on the court” was provided, the Bankruptcy Court

⁴⁶ *Matter of Whitney-Forbes, Inc.*, 770 F.2d 692, 697-698 (7th Cir. 1985) (citations omitted).

⁴⁷ FED.R.BANKR.P. 9014(c).

correctly concluded that Appellant's independent action under the savings clause of Civil Rule 60(b) was barred by laches.⁴⁸

VI. CONCLUSION

For the foregoing reasons, the Court should affirm the Bankruptcy Court's Order of November 28, 2006 denying Appellant's Motion to Vacate.

Dated: Cleveland, Ohio
February 19, 2007

Respectfully submitted,

/s/ Michael D. Zaveron
Michael D. Zaveron (OBR #0038597)
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP
2300 BP Tower, 200 Public Square
Cleveland, OH 44114-2378
(216) 363-4500
(216) 363-4588 Facsimile
mzaveron@bfca.com

Attorneys for Appellees,
Level Propane Gases, Inc., *et al.*,
Debtors and Debtors in Possession

⁴⁸ *Whitney-Forbes*, 770 F.2d at 698; *Simons v. U.S.*, 452 F.2d 1110 (2nd Cir. 1971); *Lockwood v. Bowles*, 46 F.R.D. 625 (D.D.C. 1969).

CERTIFICATE OF SERVICE

The foregoing *Appellees' Brief* was filed electronically, this 19th day of February, 2007, and was thereby served electronically on all parties registered with the Court's ECF system.

/s/ Michael D. Zaverton