

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](mailto:mzaverton@bfca.com)  
Attorneys for Appellees,  
Level Propane Gases, Inc., et al.,  
Debtors and Debtors in Possession

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 2

II. STATEMENT OF ISSUES ON APPEAL ..... 2

III. STATEMENT OF THE CASE AND RELEVANT FACTS ..... 2

IV. STANDARD OF REVIEW ..... 12

V. ARGUMENT ..... 12

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. .... 13

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..... 15

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..... 19

2. The Record Below Did Not Support Appellant’s Allegations That Appellant Had Been Fraudulently Induced to Sign the Agreed Order. .... 20

a. The Debtors Retained DSI as Their Financial Advisor as Required by the Terms of the Agreed Order. .... 22

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. .... 22

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..... 24

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. ....   | 25 |
| 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.....                                       | 29 |
| 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. .... | 30 |
| C. THE BANKRUPTCY COURT CORRECTLY CONCLUDED THAT THE MOTION TO VACATE WAS BARRED BY THE EQUITABLE DOCTRINE OF LACHES. ....  | 34 |
| VI. CONCLUSION.....   | 37 |

**TABLE OF AUTHORITIES**

**State Cases**

|   |        |
|---|--------|
| <i>Borock v. Mathis (In re Clipper Int’l Corp.)</i> , 154 F.3d 565, 567 (6th Cir. 1998) .....   | 12     |
| <i>Bulloch v. U.S.</i> , 763 F.2d 1115, 1121 (10th Cir. 1985) .....   | 18     |
| <i>Costello v. U.S.</i> , 365 U.S. 265, 282 (1961).....   | 35     |
| <i>Daniels v. Brennan</i> , 887 F. 2d 783, 788-789 (7th Cir. 1989) .....  | 35     |
| <i>Demanjuk v. Petrovsky</i> , 10 F.3d 338 (6th Cir. 1993) .....  | 17, 18 |
| <i>Douglass v. Pugh</i> , 287 F.2d 500, 502 (6th Cir. 1961) .....   | 12     |
| <i>First Union Nat’l Bank of Florida v. Tenn-Fla Partners (In re Tenn-Fla Partners)</i> , 170 B.R. 946, 951-963 (Bankr. W.D. Tenn. 1994).....         | 33, 34 |
| <i>Gleason v. Jandrucko</i> , 860 F.2d 556, 560 (2nd Cir. 1988).....  | 16, 33 |
| <i>Gumport v. China Investment Trust and Investment Corporation (In re Intermagnetics America, Inc.)</i> , 926 F.2d 912, 914-915 (9th Cir. 1991)..... | 33     |
| <i>Hazel-Atlas Glass Co. v. Hartford-Empire Co.</i> , 322 U.S. 238 (1944) .....   | passim |
| <i>Henderson v. Duncan</i> , 779 F.2d 1421, 1423 (9th Cir. 1986) .....  | 35     |
| <i>In re Brown</i> , 342 F.3d 620, 633 (6th Cir. 2003) .....  | 12     |

|   |        |
|---|--------|
| <i>In re Campano</i> , 293 B.R. 281, 283 (D.N.H. 2003).....   | 12     |
| <i>In re Levy</i> , 256 B.R. 563 (Bankr. D. N.J. 2000) .....  | 35     |
| <i>Liljeberg v. Health Services Corp.</i> , 486 U.S. 847, 863, n. 11. (1988).....   | 14     |
| <i>Lockwood v. Bowles</i> , 46 F.R.D. 625 (D.D.C. 1969).....  | 37     |
| <i>Lubben v. Selective Serv. Sys. Local Bd. No. 27</i> , 453 F.2d 645, 651 (1st Cir. 1972) .....                                  | 14     |
| <i>Matter of Whitney-Forbes, Inc.</i> , 770 F.3d 692, 698 (7th Cir. 1985).....  | 17, 36 |
| <i>McDowell v. Dynamics Corporation of America</i> , 931 F.2d 380, 384 (6th Cir. 1991) .....                                      | 14, 15 |
| <i>McLaughlin v. Jung</i> , 859 F.2d 1310, 1312-13 (7th Cir. 1988).....   | 20     |
| <i>Metlyn Realty Corp. v. Esmark, Inc.</i> , 763 F.2d 826, 831-832 (7th Cir. 1985) .....  | 21     |
| <i>Morris v. Morgan Stanley &amp; Co.</i> , 942 F.2d 648, 651 (9th Cir. 1991).....  | 35     |
| <i>Pearson v. First NH Mortg. Corp.</i> , 200 F.3d 30, 37 (1st Cir. 1999) .....   | 18     |
| <i>Pioneer Investment Services Co. v. Brunswick Associates</i> , 507 U.S. 380, 393 (1993) .....                                   | 14     |
| <i>See Lyell Theatre Corp. v. Loews Corp.</i> , 682, F.2d 37, 43 (2nd Cir. 1982).....   | 35     |
| <i>Smith v. Secretary of Health &amp; Human Services</i> , 776 F.2d 1330, 1333 (6th Cir. 1985).....                               | 14, 15 |
| <i>Transaero, Inc. v. La Fuerza Area Boliviana</i> , 24 F.3d 457 (2nd Cir. 1994).....   | 16     |
| <i>United States Steel Corp. v. Fraternal Association of Steelhaulers</i> , 601 F.2d 1269, 1274 (3 <sup>rd</sup> Cir. 1979) ..... | 20     |
| <i>United States v. Alpine Land &amp; Reservoir Co.</i> , 984 F.2d 1047, 1049 (9th Cir. 1993) .....                               | 13     |
| <i>United States v. Buck</i> , 281 F.3d 1336, 1341 (10th Cir. 2002) .....   | 14     |
| <i>Warren v. Garvin</i> , 219 F.3d 111, 114 (2nd Cir. 2000).....  | 14     |
| <i>Washington v. Waller</i> , 734 F.2d 1237, 1238 (7th Cir. 1984).....  | 35     |
| <i>Whitney-Forbes</i> , 770 F.2d at 698; <i>Simons v. U.S.</i> , 452 F.2d 1110 (2nd Cir. 1971) .....                              | 37     |
| <b>Statutes</b>   |        |
| 11 U.S.C. § 1104(a)(1).....   | 31     |
| 11 U.S.C. § 303(f).....   | 31     |
| 11 U.S.C. § 303(g).....   | 30     |

11 U.S.C. § 706(a) ..... 32

**Other Authorities**

12 MOORE’S FEDERAL PRACTICE § 60.21[4][c] (Matthew Bender 3d ed. 2006) ..... 28

12 MOORE’S FEDERAL PRACTICE § 60.21[4][b] (Matthew Bender 3d ed. 2006) ..... 18

12 MOORE’S FEDERAL PRACTICE § 60.21[4][c] (Matthew Bender 3d ed. 2006) ..... 18

12 MOORE’S FEDERAL PRACTICE § 60.21[4][g] (Matthew Bender 3d ed. 2006)..... 16

12 MOORE’S FEDERAL PRACTICE § 60.22[4] (Matthew Bender 3d ed. 2006)..... 19

12 MOORE’S FEDERAL PRACTICE § 60.48[1] (Matthew Bender 3d edition 2006) ..... 14

Brad B. Ehrens and Kelly M. Neff, *Confidentiality in Chapter 11*, 47, 48, 22 EMORY BANKR.  
DEV. J. (Fall 2005) ..... 32

**Rules**

FED.R.BANKR.P. 1013..... 31

FED.R.BANKR.P. 9014(c) ..... 36

FED.R.CIV.P. 60(b)..... 13

FED.R.CIV.P. 60(b)(6)..... 13, 15

## 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 . . . .

