U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 04-15363

Order Denying Motion to Set Aside Order Approving Sale of 10 Leitner Point Road

The relief set forth on the following pages, for a total of 14 pages including this page, is hereby ORDERED.

FILED BY THE COURT
03/26/2008

US Bankruptcy Court Judge
District of South Carolina

Entered: 03/26/2008

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Schuyler Lansing Moore and Yvonne Ridings Moore, Debtors.	C/A No. 04-15363-HB
Moore Family Trust, Debtor.	C/A No. 04-15364-HB Chapter 11 Substantively Consolidated

ORDER DENYING MOTION TO SET ASIDE ORDER APPROVING SALE OF 10 LEITNER POINT ROAD

This matter comes before the Court on the Motion of Arthur Whisnant and Gary J. Hoy, Sr., to Set Aside Order Approving the Sale of 10 Leitner Point Road. The Order Approving Sale was entered on May 18, 2005 and this Motion was filed almost one year later on May 9, 2006.

The Motion asks the Court to set aside the Order Approving Sale pursuant Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60. A hearing was held on this Motion on February 12, 2008, along with cross motions for summary judgment filed in related adversary proceeding number 05-80204-hb. To resolve this matter the parties asked the Court to review the transcripts of hearings held on April 11 and 18, 2005, and March 27, 2006, the Motion to Sell, objections thereto, the Order Approving Sale and various other pleadings on the record in the Chapter 11 cases that led to the adversary proceeding along

with the adversary pleadings.[1] The relevant facts that can be gleaned from the record follow.

FINDINGS OF FACT

This is a core proceeding and the Court has jurisdiction over this matter and all parties hereto. Schuyler Lansing Moore and Yvonne Ridings Moore filed Chapter 11 bankruptcy proceedings in this Court on December 30, 2004. Thereafter they initiated Chapter 11 proceedings for the Moore Family Trust as well. The cases were substantively consolidated on March 31, 2005.

A Notice and Application for Sale of Property Free and Clear of Liens ("Motion to Sell") was filed on March 8, 2005. It proposed a sale of the property in question to Mansions Unlimited, LLC, for $3,200,000 and set forth additional purchase details. The pleadings included the following standard sale notice language: "The court may consider additional offers at any hearing held on this notice and application for sale. The court may order at any hearing that the property be sold to another party on equivalent or more favorable terms." The docket indicates that various responses to the Motion to Sell were filed, including some indicating an intention to make a higher or better offer for the property.

A hearing on the Motion to Sell was held on April 11, 2005. Counsel for the debtors in possession represented to the Court that a competitive bidder had withdrawn its bid prior to the hearing and that they were now dealing with the principals of the initial bidder. [2] However, there were "loose ends" that needed to be tied down. The Court

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[1] These consolidated cases and the related adversary were transferred to the undersigned judge on May 22, 2006.

[2] It is not clearly spelled out in the record, but the Motion to Set Aside alleges that movant herein Arthur Whisnant was a member of Mansions Unlimited, LLC, the original proposed purchaser.

continued the hearing on the Motion to Sell and any responses thereto until April 18, 2005.

On April 18 the proceedings commenced at 9:57 a.m. The parties reported to the Court that discussions with potential purchasers were continuing. The hearing was again continued until 1:00 that afternoon.

At the sale hearing Judge Wm. Thurmond Bishop heard arguments and received testimony regarding whether the sale should be approved and the ability of the purchasers to perform their obligations under the proposed contract for sale. The Court heard testimony from Arthur H. Whisnant, Jr., and Gary J. Hoy, Sr., the potential purchasers, and from Johnny Raymond Hoy. Mr. Whisnant testified first, including this exchange on direct examination:

> Q. How long have you been negotiating to purchase that property, approximately?
> A. About two weeks prior to Christmas. . . . Of '04. . . .
> Q. Would you please . . . advise the Court as to the terms of that contract?
> A. The contract states it's 3.2 million; 750,000 down with a loan to be obtained in the amount of 2.5 million.
> Q. Do you have the, or have you presented any earnest money towards the purchase?
> A. Yes, sir.
> Q. How much is that?
> A. Ten thousand.

Mr. Whisnant's testimony continued on cross examination:

> Q. Mr. Whisnant, I have in my hand the contract dated April 18, 2005 by Gary J. Hoy, Sr. and Art Whisnant, which is four pages in length, and on the last page it bears certain signatures. Do you see those signatures?
> A. Yes, sir. Mine is at the top.
> Q. Okay. And do you know whose signature appears below yours?
> A. Yes, Gary Hoy, Sr. I watched him sign it.

The contract signed by the potential purchasers was introduced into evidence along with a copy of the earnest money check for $10,000. The contract was not signed

by the debtors in possession or any other party on their behalf. One of the provisions of the contract, paragraph 3(C) stated, "$2.5 million Loan amount (type marked below) to be obtained by Purchaser." Mr. Whisnant testified that it was his intention to obtain this loan from Washington Mutual Bank. Mr. Whisnant testified that as he understood it, Washington Mutual had agreed to make a loan sufficient to close the sale and he and Mr. Hoy had done everything necessary to obtain that loan. He identified two documents that supplemented his testimony: a commitment letter and a disclosure letter. Mssrs. Hoy and Hoy, Sr., confirmed the testimony of Mr. Whisnant. The parties to the proceeding then agreed to allow into evidence a copy of a letter faxed to the Court on the day of the hearing dated April 18, 2005 on behalf of the potential purchasers. It said:

> Washington Mutual has approved you for a home loan on the property at 10 Leitner Point Road, Columbia, SC 29210 with a sales price of $3,600,000. Washington Mutual has confirmed the value of the property and you have met all the conditions on the loan in the amount of $2,500,000. Your commitment is valid through May 30, 2005. Please feel free to call me with any questions. . . .

At the beginning of the sale hearing and at the close of evidence counsel for the debtors in possession requested that the sale and contract in question be conditionally approved on that day, but requested that the Court not finalize the matter until the following Friday for the purpose of allowing upset bids by other parties not present in the courtroom. Counsel stated that there would likely be excess in the estate and therefore a possible return to the debtors. Therefore, the debtors were highly motivated to maximize the sales price. Counsel stated:

> I realize that this being conditional on one side of the table affords the people that have spent all day today putting forth their purchase [Hoy and Whisnant] the opportunity to say, "Our offer is contingent on Friday, also," but I have no choice under the circumstances but to put forth to the Court what my client has, is insisting upon.

Thereafter there was some discussion of a break-up fee for Whisnant and Hoy should another purchase offer later be accepted and approved, but counsel for a secured lender and the broker representing Hoy and Whisnant both spoke up to request that, on the contrary, the Court approve the sale on that date and approve Hoy and Whisnant's offer to purchase without further delay or opportunity for upset bid. Mr. Jack Cobb, the real estate broker utilized by Mr. Hoy and Mr. Whisnant, spoke on behalf of his clients as follows:

> We feel that this sale should be confirmed today, right now, and that we should then be able to go to Washington Mutual and say, "Let's get this thing closed." That's the whole objective. We wait until Friday, that's another five days' time. I mean, Mr. Anderson's [counsel for the debtor in possession] asking us to please try to close by May 15th, but yet, we keep pushing the days out that we actually have a final contract.
>
> So it's our view that we need to have this thing confirmed and have it confirmed, now. If that doesn't occur, then my clients definitely should be left completely open to walk away on Friday, change the terms on Friday, come in with a lower price, if they want to, on Friday. I mean, if they don't get a solid, confirmed deal now, then there's no need for them to be bound through Friday, if someone else is going to be able to come in and upset the contract as it is. That's their feel.

The broker continued:

> But, you see, the Court's asking that they be bound to a contract between now and Friday, but yet, they've got nothing. They have no contract at all.
> . . . .
> What we want is for the Court to confirm the sale today, let us proceed on and let us get this transaction closed.

The Court agreed with the arguments made by the secured creditor's counsel and made on behalf of Whisnant and Hoy, and Judge Bishop found that, "I think the burden has been met under the Code, under 363(f), and the sales price exceeds the amount of the liens and so the Court approves the sale."

The Order Approving Sale of 10 Leitner Point Road, Irmo, SC to Arthur H. Whisnant and Gary J. Hoy, Sr., was entered on May 18, 2005.[3] It included the following language: "the Contract of Gary J. Hoy, Sr. and Arthur H. Whisnant is approved, with a purchase price of $3.2 million and a closing date of on or before May 30, 2005, on such terms as described herein." The Court's Order also found as a fact that Whisnant and Hoy had sufficiently demonstrated an ability to close the transaction from a combination of their own funds and a substantial loan from Washington Mutual. The Court found as a fact that "Washington Mutual has represented in writing that all contingencies or conditions set forth in the commitment letter have now been met to the satisfaction of Washington Mutual." No party appeared at the sale hearing on behalf of Washington Mutual. The Court instead reached this conclusion from the record which included testimony of Mssrs. Hoy, Hoy, Sr., and Whisnant and the letter faxed to the Court on April 18, 2005.

In an affidavit dated October 11, 2006 Mr. Cobb related his opinion of the proceedings:

> 6. The contract between Arthur Whisnant and Gary W. Joy, Sr., and the Bankruptcy Estate, had no financing contingencies.
> . . . .
> 8. It was clear from the beginning of negotiations among Arthur Whisnant and Gary W. Hoy, Sr., the creditors of the Chapter 11 case, and the Bankruptcy Estate, that no contract would be acceptable if it had any financing contingencies.
> 9. Arthur Whisnant and Gary W. Hoy, Sr., clearly understood at all times, in my opinion, that the contract, and any agreement for the purchase of any realty from this Chapter 11 Estate could have no financing contingencies.

On May 20, 2005, the Court entered a First Order in Aid of Real Estate Closing relating to the sale. Among other things, it directed the debtors in possession to execute

[3] Various orders and pleadings are entered in either or both of the consolidated cases, No. 04-15363-hb and No. 04-15364-hb.

any and all necessary closing documents. A Second Supplemental Order Regarding Payment at Closing was also entered on May 20, involving among other matters, the amount to be paid to certain lienholders at closing.

The sale did not close and the property was thereafter sold at foreclosure for $2,200,000. The reasons for the failed sale are not clear. Mr. Whisnant's affidavit of February 8, 2008, submitted in support of defendants' motion for summary judgment in the adversary proceeding, merely states that "[h]e subsequently learned that Washington Mutual refused to fund the loan." In a Motion to Set Aside Orders Approving Sale filed by Washington Mutual on March 8, 2006, Washington Mutual alleged fraud on the court by Hoy and Whisnant or at least a mistake in issuance of the Order Approving Sale resulting from Hoy and Whisnant's representation that Washington Mutual had committed to the loan. Hoy and Whisnant denied any wrongdoing in their Memorandum in Opposition thereto filed April 7, 2006 and instead blamed Washington Mutual.[4] Also in that pleading Hoy and Whisnant included the following:

> It is undeniable that this Court made a mistake in relying upon Washington Mutual's April 18, 2005 letter which unequivocally stated that it had verified the value of the Subject Property and was committed to making the loan to Whisnant and Hoy. It is also undeniable that Whisnant and Hoy, the Debtor in Possession, the Trustee and everyone else involved made the same mistake. There is no evidence Washington Mutual made a mistake when it issued the letter, but certainly everything that followed afterwards was based upon that letter. Therefore, for this reason and for this reason only, Whisnant and Hoy would agree that this Court's Order should be vacated.

In their memorandum in support of this Motion to Set Aside filed one month later, Whisnant and Hoy alleged that issuance of the letter itself was a mistake and that it never should have been issued. In summary judgment pleadings, Hoy and Whisnant point out that "Washington Mutual . . . assert[ed] that the representative who sent the letter

[4] Washington Mutual withdrew this motion with the consent of the other parties on June 5, 2006.

[confirming financing] introduced at the hearing did not have the authority to bind Washington Mutual." The brief in support of the present Motion and the Affidavit of Nicholas D. Atria, Hoy and Whisnant's closing attorney, further allege that the Movants tried to close the loan but that a Washington Mutual representative was not cooperative after the hearing and that the loan was subsequently denied without explanation.[5]

Further, in support of their Motion Whisnant and Hoy rely on comments of counsel for Washington Mutual, made on March 27, 2006 long after the foreclosure, that the letter confirming the loan presented as evidence at trial was a "mistake." However, the use of this word "mistake" is muddled by his continuing comments indicating that the failure to make the loan was not the fault of Washington Mutual but rather that fault lies with Hoy and Whisnant, along with Washington Mutual's additional comments and allegations contained in pleadings referenced above and filed in the adversary case. Washington Mutual's counsel stated "had they met the conditions on the loan, then they would have gotten, they would have got the loan."

On July 18, 2005, the Moores initiated a lawsuit, Adversary Proceeding No. 05-80204 pending in this Court, claiming that they have been damaged in the amount of $1,000,000 as a result of a breach of contract by Mr. Whisnant and Mr. Hoy.[6] Mr. Whisnant and Mr. Hoy as defendants filed an Answer denying numerous allegations and including a Third-party Complaint asserting causes of action against Washington Mutual due to its alleged failure to honor the loan commitment. On December 14, 2005 Washington Mutual filed a motion for withdrawal of reference, sending the adversary

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[5] Mr. Atria's Affidavit is Exhibit 7 to Movants' Reply Memorandum filed June 15, 2006.

[6] That lawsuit was initiated by counsel for the debtor in possession, but on September 6, 2006, the Court appointed a litigation trustee now in charge of the case pursuant to the terms of the debtors' confirmed Chapter 11 plan.

case to the United States District Court. Thereafter the District Court returned the adversary case to the Bankruptcy Court for resolution by order entered October 24, 2007, citing the dismissal of Washington Mutual from the adversary case by stipulation, with prejudice. On July 6, 2006, after the filing of this Motion, Mr. Hoy and Mr. Whisnant also filed a Motion to Withdraw Reference as to the Chapter 11 cases, sending them along with this Motion to the United States District Court as well. The District Court issued a Final Order Closing Case on May 7, 2007. That order was filed in the Bankruptcy Court and the Chapter 11 cases were closed. However, on October 11, 2007, the District Court reopened the case and remanded it to the Bankruptcy Court for further proceedings. Upon remand the record did not indicate whether the Motion to Vacate was still pending. On November 30, 2007, on application of the debtors in possession this Court issued a final decree again closing the Chapter 11 cases. The cases were closed at the time the hearing was held on the Motion to Vacate, but no party objected to consideration of the Motion on that ground.

Washington Mutual is no longer a party to the adversary proceeding nor are they actively involved in the issues raised in this Motion.

DISCUSSION AND CONCLUSIONS OF LAW

Whisnant and Hoy move to vacate the Order Approving Sale based on Fed. R. Civ. P. 60(b)(1) (applicable to this case pursuant to Fed. R. Bankr. P. 9024) which permits relief from a final judgment, order or proceeding for reasons including mistake. Their motion argues that this Court's order resulted from the mistaken belief that Washington Mutual had approved Whisnant's and Hoy's home loan.

The decision of whether to grant a motion for relief under the standard set forth in Rule 60(b) lies within the discretion of the trial judge. Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 810 (4th Cir. 1988); Park Corp. v. Lexington Ins. Co., 812 F.2d 894, 896 (4th Cir. 1987); Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 132 (4th Cir. 1992). Relief under Rule 60(b)(1) for mistake, inadvertence, surprise or excusable neglect "is an extraordinary remedy and is granted only in exceptional circumstances." U.S. v. One 1979 Rolls-Royce Corniche Convertible, 770 F.2d 713, 716 (7th Cir. 1985); 3 Penny Theater Corp. v. Plitt Theatres, Inc., 812 F.2d 337, 340 (7th Cir. 1987); C.K.S. Engineers, Inc. v. White Mountain Gypsum Co., 726 F.2d 1202, 1205 (7th Cir. 1984). The burden of establishing proper grounds for Rule 60 relief rests upon the movant. National Bank of Joliet v. W.H. Barber Oil Co., 69 F.R.D. 107, 109 (N.D. Ill. 1975).

Relief from the order was requested almost one year after entry of the order.[7] The order in question is an order under 11 U.S.C. § 363(b), in which the Court approved the terms of a purchase offer after due notice to parties in interest, and authorized the debtor in possession to sell property on certain terms and conditions.[8] Additionally, at the sale hearing at the request of objecting parties and the debtors in possession, the Court allowed an inquiry into the ability of the potential purchasers to close the transaction. As

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[7] The Motion argues that courts have "discretion to set aside orders based on mistakes of parties and third parties. In addition, orders may be set aside based on a mistaken belief by the court or the mistaken reliance on a particular fact by the court." The case cited for that proposition, In re 310 Assocs., 346 F.3d 31 (2nd Cir. 2003), involved a mistake of fact made unilaterally by the bankruptcy court which was timely corrected within the appeal period applicable to the judgment in question. The appeals court held, "[w]e believe that the plain language of Rule 60, the advisory committee's note to the 1946 amendment, and this Court's action in Cappillino all demonstrate that a bankruptcy court has the authority to reopen a judgment based on its own mistake of fact. Given that the bankruptcy court acted well within the time limit to appeal, there is no timeliness issue here." Id. at 35 (citing Cappillino v. Hyde Park Cent. Sch. Dist., 135 F.3d 264 (2nd Cir. 1997)).

[8] Subsequent orders also directed the debtor in possession to execute any and all documents necessary to close the sale.

a result of that inquiry and based on the testimony of Movants and the letter from Washington Mutual, the Court approved the contract submitted by Hoy and Whisnant, without any opportunity for a future upset bid. The evidence presented at the sale hearing clearly supports the findings set out in the Order Approving Sale.[9]

In this case it is evident from the record subsequent to the Order Approving Sale that, despite the evidence at the sale hearing of Washington Mutual's commitment to the loan, the lender did not make the loan in question and the sale did not close. This fact, however, does not lead the Court to automatically conclude that the Order Approving Sale was based on a mistake warranting relief under Rule 60(b)(1). The court can find no evidence to convince it that Judge Bishop's Order of Sale issued on May 18, 2005, was the result of a mistake on the part of the court. The court heard the evidence in question, weighed its credibility, applied the law and issued an order.

It is unclear on this record whether the evidence in question which is alleged to be a "mistake" was incorrect at the moment it was presented to the court, whether it was embellished, or whether subsequently events or additional knowledge may have changed the loan status after the hearing. Simply put, the court cannot determine what party made the alleged mistake, exactly what that mistake was or when it occurred. Any opinion on the part of the court as to what happened with the loan and therefore its impact on the appropriateness of the sale order, if any, would be mere speculation based on

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[9] This case does not involve a mistake on the part of the Bankruptcy Court, but rather an alleged mistake in the evidence presented to the Court. Two other cases relied upon by Movants, in addition to In re 310 Assocs., involve mistakes by the court. See Hoff v. Pappas Transport, Inc., No. 96-C-205, 1996 WL 627685 (N.D. Ill. Oct. 28, 1996) (court entered default order because of party's alleged failure to cooperate in audit; order later vacated under Fed. R. Civ. P. 60(b)(1) where court was mistaken about defendant's actual cooperation in audit) and Bovee v. Coopers & Lybrand C.P.A., 272 F.3d 356, 364-65 (6th Cir. 2001) (judgment should have been set aside under Rule 60(b)(1) and (6) where district court relied upon plaintiffs' original complaint, rather than their amended complaint when ruling on defendants' motion to dismiss.)

unsupported and conflicting allegations from various parties. Based on the record before the court, Movants have not met their burden of establishing proper grounds for the extraordinary relief requested.

Further, the evidence behind Movants' current claims of mistake was enthusiastically offered on behalf of Movants to achieve a result in their favor at the sale hearing. That is, Movants referred to and relied on the Washington Mutual letter and their understanding of the loan status in their pursuit of a final, binding order approving the sale to them. "Generally speaking, a party who takes deliberate action with negative consequences . . . will not be relieved of the consequences [by Rule 60(b)(1)] when it subsequently develops that the choice was unfortunate." Cashner v. Freedom Stores, Inc., 98 F.3d 572, 577 (10th Cir. 1996) (quoting 7 Moore, Federal Practice ¶ 60-22[2], p. 60-182); In re Caldwell/VSR, Inc., 353 B.R. 130, 136 (Bankr. E.D. Va. 2005). "[A] mistake in judgment is not a proper ground for relief. . . ." In re Ridill, 1 B.R. 216, 218 (C.D. Cal. 1979) (citing 7 Moore, Federal Practice § 60.22). In addition, to obtain relief from a judgment or order under Rule 60(b), the setting aside of the judgment must not unfairly prejudice the nonmoving party. In re Eastport Golf Club, Inc., No. 07-00085-jw, 2007 Bankr. LEXIS 2637, at *6 (Bankr. D.S.C. June 26, 2007) (citing Nat'l Credit Union Admin Bd. v. Gray, 1 F.3d 262, 264 (4th Cir. 1993), and Park Corp. v. Lexington Ins. Co., 812 F.2d 894, 896 (4th Cir. 1987)).

On this record Movant has not met its burden of proving that a mistake existed which would warrant issuance of an order under Rule 60(b)(1). The Motion to Set Aside Order Approving the Sale is **DENIED.** The Court will enter a separate order resolving

the cross motions for summary judgment heard along with this matter and pending in the related adversary proceeding.