

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division**

FILED
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Date 12-13-04

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Southern District of Georgia **POB**

In the matter of:)
)
LARRY C. BREWER)
LINDA B. BREWER)
)
Debtors)

Chapter 7 Case
Number 02-21105

**ORDER DENYING DEBTORS' MOTION TO RECONSIDER
DEBTORS' EMERGENCY MOTION TO POSTPONE
THE SALE OF THE FOREST PARK PROPERTY**

On October 26, 2004, the Debtors filed an emergency motion to postpone the Trustee's sale of four (4) tracts of land located in Forest Park, Clayton County, Georgia, known as the "Forest Park Property" on the grounds that the Trustee had sufficient funds on hand to pay the claims in this case and, therefore, did not need the funds that would be generated from the sale of this property. After conducting a telephonic conference on October 29, 2004, the Court denied the Debtors' motion. On November 15, 2004, the Debtors filed a motion to reconsider said motion. A hearing on Debtors' motion to reconsider was conducted on December 7, 2004. After considering the evidence presented and the argument by counsel for all interested parties, the Court enters the following Findings of Fact and Conclusions of Law:

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Pipkin

FINDINGS OF FACT

1) On August 16, 2004, the Trustee filed a motion to approve the sale of the

Forest Park Property for the sum of \$425,000.00.

2) Within the time permitted, the Debtors filed an objection to the sale upon the following grounds:

- A. Inadequacy of price;
- B. The funds that would be generated from said sale were not necessary to pay the claims in this bankruptcy case.

3) A hearing on the Trustee's motion to approve the sale of the Forest Park Property and the Debtors' objection thereto was held on October 6, 2004. At that time counsel for the Debtors indicated that their objections to the sale would be resolved if the Trustee could obtain a gross sales price of at least \$485,000.00. The Debtors did not argue any other basis for their objection of the proposed sale at this hearing.

4) On October 7, 2004, the Court entered an Order authorizing the Trustee to accept bids on the subject property, and outlining the bidding process, which was to take place on October 26, 2004, in Atlanta, Georgia, and further directing that the bidding start at \$485,000.00.

5) On October 26, 2004, the Debtors filed an Emergency Motion to Postpone the Sale of the Forest Park Property on the grounds that the funds that would be derived from such sale were not necessary to pay the claims in this bankruptcy case.

6) On October 26, 2004, without knowledge of the Debtors' filing of the

aforesaid emergency motion, the Trustee conducted the bidding process outlined and approved in the Court's Order dated October 7, 2004. Immediately following the bidding process, the Trustee entered into a contract for the purchase and sale of the Forest Park Property to the highest bidder for the sum of \$520,000.00.

7) On October 28, 2004, the Trustee reported to the Court that the auction conducted on October 26, 2004, had produced a contract for the purchase and sale of the Forest Park Property at a price of \$520,000.00 and requested the Court to approve the same.

8) On October 29, 2004, the Court conducted a telephonic conference to consider the Debtors' Emergency Motion to Postpone the Sale of the Forest Park Property, and the Trustee's motion to approve the \$520,000.00 contract. After hearing the argument by counsel for the respective parties, the Court overruled the Emergency Motion to Postpone the Sale of the Forest Park Property on the face of the Motion. On that date, the Court also signed an Order approving the sale of the Forest Park Property for the sum of \$520,000.00, said Order being filed of record on November 5, 2004.

9) On November 15, 2004, the Debtors filed the instant motion seeking reconsideration of the emergency motion to postpone the sale of the Forest Park Property.

10) At the present time, tax claims and unsecured claims in this case total approximately \$1,373,567.30. The Trustee has on hand the approximate sum of \$373,637.00. The sale of the Forest Park Property would net an additional \$465,000.00 for the Trustee. Thus, if the sale of the Forest Park Property is consummated, the Trustee would then be holding funds totaling approximately \$838,637.00.

CONCLUSIONS OF LAW

The Debtors have not filed a motion for reconsideration of this Court's Order entered October 7, 2004, authorizing the Trustee to accept bids on the Forest Park Property, or the Court's Order dated October 29, 2004, and filed of record on November 5, 2004, approving the sale of the Forest Park Property for the sum of \$520,000.00. Accordingly, both of these Orders are still valid and enforceable. Thus, the only issue before the Court is the Debtors' Motion for Reconsideration of the Debtors' Emergency Motion to Postpone the Sale of the Forest Park Property, which was premised solely upon the grounds that the funds that would be derived from such sale are not necessary to pay the claims in this case.

Motions to reconsider an order in bankruptcy are treated as motions to alter or amend a judgment under Federal Rule of Civil Procedure 59(e), made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 9023, or as a motion for relief from judgment under Federal Rule of Civil Procedure 60, made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 9024. In re Screen, Ch. 13 Case No. 04-40615, 2004 WL 2201246, at * 3 (Bankr. S.D. Ga. Aug. 30, 2004)(Davis, J.)(citing Aguiar v. Interbay Funding, LLC (In re Aguiar), 311 B.R. 129, 135 n.9 (B.A.P. 1st Cir. 2004)). The Court will analyze this Motion for Reconsideration under Rule 59 as the Debtors did not allege any of

the grounds for relief listed in Rule 60.¹

Reconsideration of a judgment is an extraordinary remedy which should be exercised sparingly. Groover v. Michelin N. Am., Inc., 90 F.Supp.2d 1236, 1256 (M.D. Ala. 2000). There are three primary grounds justifying reconsideration of a judgment: 1) an intervening change in controlling law; 2) the availability of new evidence; 3) the need to correct clear error or manifest injustice. Estate of Pidcock v. Sunnyland Am., Inc., 726 F.Supp. 1322, 1333 (S.D. Ga. 1989)(Edenfield, J.). See also Taylor Woodrow Const. Corp. v. Sarasota/Manatee Airport Auth., 814 F.Supp. 1072, 1072 (M.D. Fla. 1993)(“When issues have been carefully considered and decisions rendered, the only reason which should commend reconsideration of that decision is a change in the factual or legal underpinning upon which the decision is based.”).

In their Motion to Reconsider, Debtors assert that the funds generated by the

¹Rule 60(b) states in pertinent part:

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 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 ..., 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 (6) any other reason justifying relief from the operation of the judgment.

Based on a strict reading of Rule 60(b), it appears that clause (6) may apply here. However, relief under Rule 60(b)(6) is limited to extraordinary circumstances such as when “orders were entered with no notice to movant, undiscovered fraud of a third party, or when a movant’s health or incarceration prevented participation.” In re Brunson, Ch. 13 Case No. 03-20019, slip op. at 6 n.2 (Bankr. S.D. Ga. Oct. 12, 2004)(Davis, J.)(citing In re Babcock, 258 B.R. 646, 650 (Bankr. E.D. Va. 2001)).

sale of the Forest Park Property will not be necessary to resolve the creditors' claims in this case because there is sufficient money already in the estate to satisfy the claims. This is the argument that the Debtors made in their original Emergency Motion to Postpone the Sale of the Forest Park Property. The Debtors did not assert a change in controlling law or the availability of new, undiscoverable evidence of any import in this case. Further, they did not argue that the Court made clear error in entering the order allowing the sale of the Forest Park property. The Movant must show more than mere disagreement with the Court's Order to justify reconsideration of the Order.

Moreover, it is apparent from the evidence that, in fact, the Trustee will need the funds generated from the sale of the Forest Park Property to pay the claims in this case. The evidence demonstrated that tax claims and unsecured claims in this case presently total \$1,373,567.30. The Debtors' main argument is that the Georgia Department of Revenue claim in the sum of \$414,133.16 and the Ricky DeBuc claim in the amount of \$200,583.71 should come out of the instant case inasmuch as they are identical to claims filed in the related HMH Motor Services, Inc. Chapter 7 case. While there was evidence that only \$75,000.00 of the Ricky DeBuc claim would be paid in the HMH Motor Services, Inc. case, if one assumes that both of the aforesaid claims, totaling approximately \$614,716.00, would come out of this case in their entirety, there would still be remaining claims in the instant case totaling approximately \$758,851.00. To this sum, of course, the Trustee would be entitled to add administrative expenses, tax liabilities and attorney's fees.

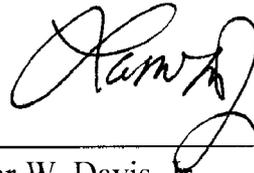
The sale of the Forest Park Property would net approximately \$465,000.00. This sum added to the \$373,637.00 presently held by the Trustee would equal only \$838,637.00. Thus, based upon the available figures and the evidence presented, it is clear to the Court that, contrary to the assertions of the Debtors, the Trustee most certainly does need the funds that will be generated from the sale of the Forest Park Property to pay the claims in the instant case. Although there is a slight chance that the Trustee could pay all claims in full without the entire \$465,000.00, he clearly cannot do so without receiving the majority of these funds.

Moreover, the multiple assumptions one must make to reduce the claims to that point are highly speculative, involving the prospective disallowance or reduction of thousands of dollars of claims, the likelihood of which is doubtful. The Trustee has a fiduciary duty to administer all assets necessary to pay claims. He has a sale pending which must be consummated to fulfil that duty, and he has correctly urged the Court to overrule this motion.

Accordingly, the Court concludes that the Debtors' contentions in this matter are without merit, the Debtors failed to show that any of the grounds justifying reconsideration of the judgment are present, and the Debtor's Motion to Reconsider is denied.

ORDER

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that the Debtors' Motion for Reconsideration of the Emergency Motion to Postpone the Sale of the Forest Park Property is DENIED.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 13th day of December, 2004.