

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

In the matter of: )  
)  
W. PHILIP WYRICK and )  
CLARE P. WYRICK )  
(Chapter 11 Case 97-41559) )  
)  
*Debtors* )  
)  
W. PHILIP WYRICK and )  
CLARE P. WYRICK )  
)  
*Plaintiffs* )  
)  
v. )  
)  
SIDNEY L. BLIVICE )  
and )  
ALPHA ENERGY CORPORATION )  
)  
*Defendants* )

Adversary Proceeding  
Number 98-4032

**FILED**  
at 3 O'clock & 35 min P M  
Date 2/5/01

MICHAEL F. MCHUGH, CLERK  
United States Bankruptcy Court  
Savannah, Georgia *MB*

**MEMORANDUM AND ORDER**

Wiley A. Wasden, III, Chapter 11 Trustee, filed a Motion for Relief from Judgment pursuant to Bankruptcy Rule 9024 seeking relief from the February 24, 1999, Order dismissing this adversary proceeding. In the event the Court denies the Motion for Relief from Judgment, the Trustee filed an Alternative Motion to Add Party Plaintiff

seeking to add Clare Petroleum, Inc. as a party plaintiff to the adversary proceeding. Defendant Sidney L. Blivice and Alpha Energy Corporation filed a brief in opposition to both motions. The Court took the matter under advisement. After careful consideration of the motions, briefs, and applicable law, the Court enters the following findings of fact and conclusions of law.

### FINDINGS OF FACT

On February 1, 1991, Clare Petroleum, Inc. filed Articles of Incorporation in the Office of the Secretary of State of Texas. The directors and sole shareholders of the corporation were W. Philip Wyrick and Clare P. Wyrick. On February 2, 1993, the charter or certificate of authority of the corporation was forfeited due to the corporation's failure to file a franchise tax return and/or to pay state franchise taxes.

On June 2, 1997, W. Philip Wyrick and Clare P. Wyrick ("Debtors") filed for protection under chapter 11 of the Bankruptcy Code. Subsequently, on February 20, 1998, the Debtors filed this adversary complaint against Sidney Blivice and Alpha Energy Corporation ("Defendants") seeking to recover on an alleged promissory note.<sup>1</sup> Defendants filed an answer to the complaint which set forth several defenses and asserted a counterclaim for breach of contract and reimbursement of expenses. The Court held a

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<sup>1</sup>Debtor Philip Wyrick passed away on April 6, 1998, during the pendency of this adversary proceeding.

trial on February 4, 1999. At the conclusion of the presentation of the Debtors' evidence, Defendants moved to dismiss the adversary proceeding on the ground that the Debtors were not the real party in interest to prosecute the action. Defendants asserted that the alleged promissory note was in the name of Clare Petroleum, Inc., thus the Debtors could not recover on the corporation's cause of action. Defendants alleged that the Debtors failed to submit evidence proving that they succeeded to the rights of Clare Petroleum, Inc. and had the capacity to sue on the promissory note. The Court granted Defendants' motion to dismiss. Subsequently, on February 24, 1999, the Court entered an Order and Judgment dismissing the Adversary Complaint and Counterclaim on the ground that the Debtors were not the real party in interest .

On October 1, 1999, Debtors filed their first Motion for Relief from Judgment under Federal Rule of Civil Procedure 60(b)(2) asserting newly discovered evidence. The Court entered an Order denying that motion on December 15, 1999 on the ground that the records produced as newly discovered evidence failed to meet the standards under Rule 60(b)(2) to show due diligence and that they would likely produce a different result at trial. When the first Motion for Relief from Judgment was filed, Clare Petroleum's dissolution was not completed. However, Mrs. Wyrick had begun the process of reinstatement and dissolution of Clare Petroleum, Inc. On December 10, 1999, the Secretary of State of Texas reinstated Clare Petroleum, Inc. Once the corporation was

reinstated, Mrs. Wyrick filed of Articles of Dissolution for the corporation. The Secretary of State of Texas issued a Certificate of Dissolution of Clare Petroleum, Inc. on December 14, 1999. The Articles of Dissolution provided that the assets of the corporation were distributed to its shareholders.

On February 28, 2000, the Court appointed Wiley A. Wasden, III, to serve as trustee in the pending chapter 11 case. Subsequently, on August 15, 2000, the Trustee filed the pending Motion for Relief from Judgment and the Alternative Motion to Add Party Plaintiff. The Trustee seeks relief from the February 24, 1999, Order dismissing this adversary proceeding pursuant to Bankruptcy Rule 9024 which incorporates Federal Rule of Civil Procedure 60(b). The Trustee argues that he is entitled to relief under subclause (b)(6) of Rule 60 because the order dismissing the adversary was without prejudice and the Debtors now own the claim against Defendant and are the real party in interest. The Trustee argues that the substantial change in circumstances supports exceptional and extraordinary relief under Rule 60(b)(6). Defendants argue that this second Motion for Relief from Judgment is a continuation of the first Motion for Relief from Judgment which asserted newly discovered evidence and was previously denied by this Court. Defendants also argue that the Alternative Motion to Add Party Plaintiff should be denied because the claim is barred by the statute of limitations.

On November 30, 2000, the Court confirmed the chapter 11 plan and entered an Order of Distribution. That Order provided that the estate's claim against Defendants Sidney Blivice and Alpha Energy Corporation was abandoned to the Debtors.

## CONCLUSIONS OF LAW

### Rule 60 Relief

In determining whether the Debtors should obtain relief under Rule 60(b)(6), the Court is guided by a number of important principles. First, perhaps, is the principle that motions granting relief under this section must be filed within a reasonable time and are only to be granted when there are exceptional or extraordinary circumstances demonstrated. *See Drake v. Dennis (In the matter of Dennis)*, 209 B.R. 20 (Bankr. S.D.Ga. 1996)(other citations omitted); *Whitaker v. Columns, Inc. (In re Olympia Holding Corp.)*, 216 B.R. 1004 (Bankr. M.D.Fla. 1998). Motions under Rule 60(b) are addressed to the sound discretion of the trial court and will be reviewed only on an abuse of discretion standard. "Nevertheless, the discretion of the [trial] court is not unbounded, and must be exercised in light of the balance that is struck by Rule 60(b) between the desideratum of finality and the demands of justice." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5<sup>th</sup> Cir. 1981). That Court delineated a number of factors which should be utilized in the trial court's consideration of these motions:

- (1) That final judgments should not lightly be disturbed;
- (2) that the Rule 60(b) motion is not to be used as a substitute for appeal;
- (3) that the rule should be liberally construed in order to achieve substantial justice;
- (4) whether the motion was made within a reasonable time;
- (5) whether, if the judgment was a default or a dismissal in which there was no consideration of the merits, the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense;
- (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense;
- (7) whether there are intervening equities that would make it inequitable to grant relief; and
- (8) any other factors relevant to the justice of the judgment under attack.

Id. Perhaps the most important of these eight factors in the case at bar is factor number five (5) which is "whether if the judgment was a default or a dismissal in which there was no consideration of the merits, the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense." Id. In this case, the litigation was prosecuted in the

individual name of the Debtors, Philip and Clare Wyrick. In the midst of the trial, a motion to dismiss based on the contention that the Wyricks individually were not the real parties in interest was made and was granted by the Court. Mrs. Wyrick believed, and it was contended on her behalf quite strongly, that Clare Petroleum, Inc. had been dissolved and, that as a surviving shareholder in the corporation, she had individual standing to bring the action. This contention was also asserted on the motion for reconsideration which this Court denied, citing Texas precedent, because at the time the first motion was filed, no dissolution had occurred.

Following dismissal of the case, Mrs. Wyrick has undertaken to correct the somewhat technical procedural impediments so as to vest in herself individually the cause of action which was formerly held by the now dissolved corporation, Clare Petroleum, Inc. This motion was brought by the Chapter 11 Trustee in behalf of Mrs. Wyrick and the creditors in her case after she corrected the deficiencies and became the real party in interest. It was filed within a reasonable time following appointment of the Trustee, the Court's denial of the Motion to Reconsider, and the reinstatement and dissolution of Clare Petroleum, Inc. As noted above, the trial was commenced, but not concluded on the merits. Thus, it was neither a default judgment nor can it be deemed to be a judgment on the merits since the real party in interest defense barred the Debtors from collecting any judgment against the Defendants. This defense was asserted mid-trial and

dismissal was granted by the Court solely on the procedural ground.

While finality is of paramount importance in the law, I find the type of extraordinary circumstances exist here which justify setting aside the judgment and permitting Mrs. Wyrick to proceed and have her case determined on the merits. *See generally* Eising v. Locke (In re Wescot Int'l, Inc.), 236 B.R. 27 (N.D.Cal. 1999) (Court granted relief under Rule 60(b)(6) because the amount of the judgment was found to be unreasonable in proportion to the original obligation and resulted in what amounted to an unconscionable penalty); *Contra* Toole v. Baxter Healthcare Corp., 2000 WL 1839209 (11<sup>th</sup> Cir. 2000) (Discovery of emergence of new scientific evidence did not warrant setting aside judgment when the evidence was not exclusively favorable to the movant and was cumulative or impeaching of other evidence in the case); *See also* African Methodist Episcopal Church, Inc. v. Ward, 185 F.3d 1201 (11<sup>th</sup> Cir. 1999) (No relief granted to individual defendants who adamantly refused to respond to service of summons. Default judgment, however, found not to have impacted rights of church for which individual defendants served as trustees.) Denial of this Motion would amount to penalizing Debtor for mere oversight of a technical corporate registration requirement of Texas law of which she was entirely unaware during her husband's lifetime.

## Jurisdiction

The second issue is whether the Court retained jurisdiction over this adversary proceeding after confirmation of the chapter 11 plan and abandonment of the claim to the Debtors. As outlined in the Findings of Fact, the chapter 11 plan was confirmed on November 30, 2000, and the Order of Distribution provided that the estate's claim against the Defendants was abandoned to the Debtors. The abandonment of this claim was part of a negotiated agreement with creditors to confirm the chapter 11 plan.

The Eleventh Circuit Court of Appeals has found that the bankruptcy case and related adversary proceedings are two distinct proceedings. In the case of Fidelity & Deposit Company of Maryland v. Morris (In re Morris), 950 F.2d 1531 (11<sup>th</sup> Cir. 1992), the Eleventh Circuit concluded:

. . . that the dismissal of an underlying bankruptcy case does not automatically strip a federal court of jurisdiction over an adversary proceeding which was related to the bankruptcy case at the time of its commencement. The decision whether to retain jurisdiction over the adversary proceeding should be left to the sound discretion of the bankruptcy court or the district court, depending upon where the adversary proceeding is pending.

Id. at 1534. The Eleventh Circuit recognized three factors to be considered in determining whether jurisdiction should be retained: (1) judicial economy; (2) fairness and convenience

to the litigants; and (3) the degree of difficulty of the related legal issues involved. Id. at 1535 (other citations omitted). Although the Morris case addressed the effect of dismissal of the underlying bankruptcy case on an adversary proceeding, it provides guidance for the Court in the case at bar where the chapter 11 plan has been confirmed by the Court and has reached substantial consummation.

In applying Morris, a major consideration is the effect of the abandonment of this claim by the Trustee to the Debtors as part of the confirmed plan. As previously stated, the abandonment of this claim was negotiated as part of the confirmation of the chapter 11 plan. Pursuant to 11 U.S.C. Section 554, the trustee may abandon the estate's interest in property. In general, the effect of abandonment of an asset by the trustee is to divest the court of jurisdiction over the asset. See Sherrell v. Fleet Bank of New York (In re Sherrell), 205 B.R. 20, 22 (D.C. N.Y. 1997). However, the Seventh Circuit Court of Appeals in the case of In re Xonics, Inc. noted that the bankruptcy court could retain jurisdiction over the abandoned asset if the outcome of the matter could have some effect on the bankruptcy case. Elscint, Inc. v. First Wisconsin Financial Corp. (In re Xonics, Inc.), 813 F.2d 127, 131-32 (7<sup>th</sup> Cir. 1987). In the case at bar, the abandonment was intertwined with the consummation of the chapter 11 plan. Part of the consideration flowing to Debtor was her retention of this claim. In exchange for this and other consideration the Debtor did not oppose confirmation. All creditors consented to

confirmation knowing that Mrs. Wyrick would retain this claim as her property. Because it was so intertwined in the give and take between the parties, leading to settlement, it is more appropriate for the Court to retain jurisdiction than when an asset is jettisoned from the estate in a liquidation case.

Generally, "[j]urisdiction is determined as of the date of the complaint." Fietz v. Great Western Savings (In re Fietz), 852 F.2d 455, 457 n.2 (9<sup>th</sup> Cir. 1988). Some courts which have considered the effect of abandonment of a claim by a trustee during the pendency of an adversary proceeding have found that the court did not lose jurisdiction of the claim. In the case of Painter v. First Federal Savings and Loan Association of South Carolina (In re Painter), 84 B.R. 59 (Bankr. W.D. Va. 1988), the creditor asserted that the effect of the trustee's abandonment of a debtor's claim for damages under the Truth in Lending Act was to remove the claim from the jurisdiction of the court because the claim was no longer property of the estate. The Painter court noted that the abandonment was to the debtor and stated, "[t]his court finds no basis for holding that the abandonment of property of the estate moot[s] a claim in a pending adversary proceeding or remove[s] the determination of that claim from the jurisdiction of this court." Id. at 62. In the case of Dunmore v. USA (In re Dunmore), 254 B.R. 761 (Bankr. N.D. Calif. 2000), the Court addressed the jurisdictional effect of a trustee's abandonment of an adversary proceeding initiated by the debtor for a recovery of a tax refund. The debtor, on the day of trial,

sought to have the matter transferred back to the district court asserting that the bankruptcy court lost jurisdiction after the trustee abandoned the estate's interest in the tax refund claim. The Dunmore court stated, "[t]he trustee's subsequent abandonment of the tax refund claims did not divest the court of jurisdiction. . . . While subsequent abandonment may be a factor in favor of abstention, it does not automatically divest the court of jurisdiction." Id. at 763. The court found that it retained jurisdiction because the dispute could still have some effect on the bankruptcy case after abandonment. Id.

In light of the fact that jurisdiction is not automatically lost, and the broad discretion vested in me, I conclude I should retain jurisdiction of this adversary proceeding. Judicial economy is served by the Court which has presided over this matter for several years seeing it to conclusion, rather than thrusting that burden on a brand-new forum with no background in this litigation. Fairness and convenience to the litigants is served by continuing the litigation in the forum when the issues have already been joined and where the Debtor resides. Finally, abandonment of the claim was a negotiated term agreed upon by the parties to this case, and approved by the Court as part of a delicate balance of interests necessary to bring the Chapter 11 case to confirmation. Debtor's potential recovery on this claim clearly affects the final consummation of the plan.

Finally, the Trustee and his counsel have been relieved of their duties to

prosecute this claim, as a result of its abandonment to Mrs. Wyrick. As such, Mrs. Wyrick must personally secure counsel to continue to pursue this adversary proceeding. The Court will grant Mrs. Wyrick a reasonable time to employ counsel to represent her in this adversary proceeding and to permit counsel time for review and preparation. A scheduling conference will be assigned during the April term of Court.

Accordingly, it is ORDERED that the Trustee's Motion for Relief from Judgement is granted. The previous Order of this Court dismissing the adversary proceeding on real party in interest grounds is set aside and vacated. The Trustee's Alternative Motion to Add Party Plaintiff is moot. The Clerk is hereby directed to assign a scheduling conference in this adversary proceeding on

Monday, April 9, 2001  
at 2:00 o'clock p.m.  
Bankruptcy Courtroom 228  
United States Courthouse  
Savannah, Georgia

At the same date and time a status conference will be conducted in the Chapter 11 case to determine if entry of a Discharge is now appropriate.

  
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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 5<sup>th</sup> day of February, 2001.