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IT IS SO ORDERED.

Dated: December 6, 2024



Beth A. Buchanan

Beth A. Buchanan
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re)	
)	
VILLAGE GATE, LLC)	Case No. 24-10180
)	Chapter 11
Debtor-in-Possession)	Judge Buchanan
)	
)	

DECISION AND ORDER DENYING FUNDING REALTY, LLC’S MOTION FOR RECONSIDERATION OF THE COURT’S ORDER OF DISMISSAL [Docket Number 195]

[This opinion is not intended for publication or citation.]

This matter is before this Court on *Funding Realty, LLC’s Motion for Reconsideration of the Court’s Order of Dismissal* [Docket Number 195] (“Motion to Reconsider”); the *Objection of Pioneer Automotive, LLC to Motion for Reconsideration of Order of Dismissal* [Docket Number 199] (“Objection”); and *Funding Realty, LLC’s Reply in Support of Motion for Reconsideration of the Court’s Order of Dismissal* [Docket Number 200] (“Reply”).

Funding Realty, LLC (“Funding Realty”), a creditor and secured lender, asks this Court to reconsider the order dismissing Debtor Village Gate, LLC (“Debtor”)’s bankruptcy case. Funding Realty does not contest this Court’s conclusion that the bankruptcy petition was filed by the Debtor in bad faith but, instead, requests that this Court reconsider its conclusion that dismissal, rather than conversion to a case under chapter 7, is in the best interests of creditors and the estate. For the reasons that follow, this Court concludes that Funding Realty has not demonstrated the type of extraordinary circumstances that would warrant reconsideration pursuant to Rule 60(b)(6). Accordingly, Funding Realty’s Motion to Reconsider is denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 17, 2024, this Court entered its Order of Dismissal [Docket Number 192] and Memorandum Opinion [Docket Number 191] granting the United States Trustee (“UST”) and Pioneer Automotive LLC (“Pioneer”)’s motions to dismiss the Debtor’s chapter 11 bankruptcy case. In the Memorandum Opinion, this Court determined that “cause” had been established in the form of evidence supporting that the Debtor had engaged in misconduct aimed at evading Pioneer’s attempts to collect on its prepetition judgment and lien.

Upon cause being established, and in accordance with the requirements of 11 U.S.C. § 1112(b), this Court then analyzed whether it was in the best interests of creditors and the bankruptcy estate to dismiss the case, convert it to one under chapter 7, or appoint an examiner or chapter 11 trustee. Pioneer argued for dismissal so that Pioneer, Funding Realty and the Debtor could return to the parties’ state court litigation initiated prior to the bankruptcy filing, including a foreclosure proceeding initiated by Funding Realty with respect to the Debtor’s real property. Funding Realty, on the other hand, supported conversion to chapter 7 asserting that what could be accomplished in state court could also be accomplished in bankruptcy court by a chapter 7 trustee.

While these parties advocated for a specific outcome, this Court noted that none of the parties analyzed which outcome would be in the best interests of creditors and the estate. Conducting its own analysis with the evidence presented at the hearing, this Court concluded that dismissal was in the best interests of creditors and the estate. Funding Realty was, in its own words, under-secured with regard to the Debtor's only significant asset, its real property. Consequently, this Court determined there would be no benefit to unsecured creditors upon a conversion nor even the funds to administer a chapter 7 case. The analysis led this Court to the conclusion that dismissal would most favor creditors and the estate by returning all parties to their prepetition status and by allowing the Debtor to continue to operate for the benefit of its creditors and tenants while Pioneer, Funding Realty and the Debtor resolved their respective disputes in state court.

In its Motion to Reconsider, Funding Realty raises for the first time an offer to surcharge its collateral,¹ in order to fund the administration of a chapter 7 case. Funding Realty notes that Pioneer has questioned the application of payments from the Debtor towards Funding Realty's liens as well as the extent, validity and priority of Funding Realty's liens, in both the state court foreclosure proceeding as well as an adversary proceeding in the Debtor's bankruptcy case. Funding Realty asserts that this Court, rather than the state court, is in a better position to handle these disputes and determine the validity, priority and extent of Funding Realty's liens. If Pioneer's theory is correct and Funding Realty's liens may be limited or avoided, then those transfers may be collected for the benefit of all creditors and not just Pioneer. Funding Realty asserts that it would be willing to surcharge its collateral to cover the reasonable costs, expenses and compensation to permit an independent review by a chapter 7 trustee to determine whether to proceed with an adversary proceeding against Funding Realty on behalf of the bankruptcy estate.

¹ Funding Realty states that its collateral includes a substantial amount of rental income, approximately \$60,000 a month, although approximately half is used by the Debtor for continuing operations.

Pioneer objects to Funding Realty's request to reconsider the Order of Dismissal. Pioneer asserts that Funding Realty's offer to surcharge its collateral should have been raised at the dismissal hearing. Funding Realty's failure to do so is not a basis for reconsideration. In addition, Pioneer questions whether Funding Realty's offer to surcharge the Debtor's rental income above that needed for the Debtor's continued operation would be sufficient to cover the costs of litigating the parties' disputes in bankruptcy court and administer a chapter 7 case. Furthermore, Pioneer argues that vacating the Order of Dismissal to pursue the litigation in bankruptcy court would be prejudicial to Pioneer in the form of additional costs, attorney fees and delays from starting over with the discovery, and motion practice that has already been concluded in the state court litigation. Pioneer notes that there is nothing left to do in the foreclosure action other than a bench trial that would have already occurred had it not been for the Debtor's bankruptcy filing. Pioneer asserts that Funding Realty's request for conversion is nothing more than an attempt to avoid state court litigation that had progressed to the eve of trial at the time the Debtor filed its bankruptcy petition.

II. LEGAL ANALYSIS

Funding Realty requests reconsideration and the setting aside of the Order of Dismissal pursuant to Federal Rule of Civil Procedure ("Rule") 60(b) incorporated into bankruptcy proceedings through Federal Rule of Bankruptcy Procedure 9024. Rule 60(b) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding" for six enumerated reasons including, among others: mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial; or fraud. Fed. R. Civ. P. 60(b)(1) – (6). Funding Realty specifically seeks relief under subsection (6) for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6).

Relief under Rule 60(b) is “circumscribed by public policy favoring finality of judgments and termination of litigation.” *Blue Diamond Coal Co. v. Trustees of UMWA Combined Ben. Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (citation omitted). “This is especially true in the application Rule 60(b)(6), which applies ‘only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule.’” *Id.* (citation omitted); *Bluewater Toxicology, LLC v. Curare Laboratory, LLC (In re Curare Laboratory, LLC)*, 2023 Bankr. LEXIS 1576, at *15, 2023 WL 4044473, at *6 (B.A.P. 6th Cir. June 16, 2023). Because “almost every conceivable ground for relief is covered” under the other subsections of Rule 60(b), courts are to apply Rule 60(b)(6) relief only in “unusual and extreme situations where principles of equity mandate relief.” *Blue Diamond Coal*, 249 F.3d at 524 (citation omitted) (emphasis in original); *see also Curare Laboratory*, 2023 Bankr. LEXIS 1576, at *15, 2023 WL 4044473, at *6 (noting that relief under subsection (b)(6) is “rarely justified”).

The high bar for relief under Rule 60(b)(6) is demonstrated in *Curare Laboratory*, which involved a bankruptcy court’s order of dismissal of a chapter 11 case based on the debtor’s petition being filed without proper corporate authority. *Curare Laboratory*, 2023 Bankr. LEXIS 1576, at *1, 5-8 and 15-16, 2023 WL 4044473, at *1-3 and 6. At no time prior to the dismissal hearing did the debtor attempt to rectify the deficiency by taking action to ratify the bankruptcy filing. *Id.* However, after the case was dismissed, a document was executed purporting to ratify the bankruptcy filing and, subsequently, the debtor filed a motion seeking to set aside the dismissal order and reinstate the bankruptcy case pursuant to various sections of Rule 60(b), including Rule 60(b)(6). *Id.* The bankruptcy court granted the motion to set aside the dismissal and entered an order reinstating the bankruptcy case. *Id.*

On appeal, the Sixth Circuit Bankruptcy Appellate Panel (“BAP”) concluded that the bankruptcy court’s decision to set aside the dismissal order and reinstate the case was in error. 2023 Bankr. LEXIS 1576, at *15-16, 2023 WL 4044473, at *6. The BAP determined that the bankruptcy court’s justification for granting reconsideration, that the debtor had not shown a reckless disregard for the proceedings and the parties would not be prejudiced, did not present the type of extraordinary circumstances that justify setting aside the dismissal under Rule 60(b)(6). *Id.* Instead, the debtor’s attempt to cure the deficiency in its filing and request reconsideration only after losing and the dismissal order being entered presented a very ordinary circumstance: a strategic decision that proved to be misguided or a legal approach that turned out to be unsuccessful. *Id.* Such misguided decisions do not equate to extraordinary circumstances warranting relief from a final judgment. *Id.* (concluding that, “[i]f every losing party could rely on Rule 60(b)(6) to undo faulty strategic decisions, the whole concept of finality in judgments would go out the window”).

Similarly, Funding Realty’s Motion for Reconsideration does not present the type of extraordinary circumstances warranting the setting aside of this Court’s Order of Dismissal. Funding Realty had the opportunity to present evidence in support of its position favoring conversion to chapter 7 over dismissal, an analysis required under 11 U.S.C. § 1112(b), during the dismissal hearing. Its decision not to present its surcharge offer until after the Order of Dismissal was entered does not equate to extraordinary circumstances mandating relief pursuant to Rule 60(b)(6).

Even if this Court were to consider Funding Realty’s offer to surcharge its rental income collateral, it remains highly speculative that conversion to chapter 7 would benefit creditors and the bankruptcy estate. First, it is unknown if the rents will be sufficient to cover the costs of

maintaining the going-concern value of the shopping center, which is the Debtor's only significant physical asset, plus the additional costs to investigate and litigate the extent and validity of liens relating to that property. Significantly, there is no pro forma budget for a prospective chapter 7 case. It is unclear if the categories of expenses agreed to in the context of the chapter 11 case will translate to a chapter 7 case. For example, will the chapter 7 trustee need to hire a property manager? If so, will the property management and leasing broker fees allocated in the chapter 11 cash collateral budget be sufficient to cover the fees of a disinterested property manager/broker at market rates? Are there other property management expenditures that a chapter 7 trustee might incur that may not have been applicable in the context of the chapter 11 case?

What about professional fees? The monthly budget for professional fees in the chapter 11 case was \$5,500. Is that more or less than what may be required in the chapter 7 case?

The Court recognizes that there is a \$32,000 "cushion" in the budget represented by the adequate protection payments that were being held for the benefit of Funding Realty in the chapter 11 case that may soften the blow from variances between a chapter 11 budget and a chapter 7 budget. However, it is not clear from the Motion to Reconsider whether Funding Realty is offering to make the full amount of the rents available on a monthly basis to fund the fees and expenses of the chapter 7 case (subject of course to court approval regarding the reasonableness of the fees and expenditures), or just that portion of the rents that it agreed to in the chapter 11 cash collateral budget.

The overall benefit to creditors likewise remains unsure. As Funding Realty notes in its Reply in support of reconsideration, the value of the shopping center, is "substantially 'under water'" [Docket Number 200, p. 2]. The approximate value of the shopping center based on an appraisal by Raymond A. Jackson, who testified as an expert witness at the dismissal hearing, is

\$1,350,000. The asserted claims against the property total close to \$4 million, consisting of claims by Pioneer (proof of claim #2 in the amount of \$719,861.86), Funding Realty (proof of claim #3 in the amount of \$3,171,205.96), and the Hamilton County Treasurer (proof of claim #4 in the amount of \$67,600.60 and proof of claim #5 in the amount of \$6,129.99). In contrast, there were only six unsecured claims,² totaling roughly \$15,500, that were timely filed or allowed based on the schedules in the chapter 11 case.³

Funding Realty and Pioneer each challenge the amount and/or validity of the other's claim. It is impossible for this Court to predict with any degree of certainty that litigation in a chapter 7 case of these competing secured claims would ultimately provide for any return to unsecured creditors and/or chapter 11 administrative creditors, let alone a meaningful return that would warrant conversion of this case.

This Court recognizes and appreciates Funding Realty's offer to surcharge its collateral and address what it likely considered a significant factor in this Court's rationale for dismissing this chapter 11 case as opposed to converting the case to chapter 7. But, the unaddressed questions and concerns that this Court outlined above illustrate why it is inadvisable for this Court to grant the Motion to Reconsider after the close of evidence at the dismissal hearing.

For these reasons, this Court concludes that Funding Realty has failed to establish the type of exceptional or extraordinary circumstances required under Rule 60(b)(6) to set aside the Order of Dismissal. Accordingly, Funding Realty's Motion to Reconsider [Docket Number 195] is DENIED.

² Excluding the \$55,000 related-party claim of RE Equity Invetor [sic] Management LLC for management services, which was scheduled by the Debtor as non-contingent, liquidated, and undisputed.

³ In addition to these general unsecured claims, Funding Realty asserts there could be potential unpaid administrative claims from the chapter 11 estate that may be allowable if this case were converted to chapter 7.

SO ORDERED.

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