THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 94-11143
	)	
ZANE R. TOLLIS,	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

This closed Chapter 11 case is before the Court on the Motion of Terry Tollis and Cynthia McCarty to vacate the Final Decree, or in the alternative, to Reopen the Case (the "Motion"). (Docket 216, 217). One Chapter 11 creditor, William J. Ockington, supports the Motion. (Docket 231). (Mr. Tollis, Ms. McCarty, and Mr. Ockington are collectively referred to as the "Movants"). These other parties in interest object to it: Thomas and Andrea Sech, the Internal Revenue Service, National City Bank, and Michael Moran and Monterey Estate Homes, Inc. (Docket 220, 223, 226, 227, 231). Lee Kravitz, the Debtor's Chapter 11 counsel, filed a Response taking no position as to whether the Motion should be granted. (Docket 222).

JURISDICTION

This Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern district of Ohio. This is a core proceeding under 28 U.S.C. § 157 (b)(2)(A).

FACTS

The Court held a hearing on October 2, 1998.[1] The Movants did not present any evidence at that time, choosing instead to treat these requests as issues of law. There are, however, certain undisputed facts based on the Chapter 11 file and prior Orders of this Court that are relevant to this dispute. They are:

Zane R. Tollis ("the Debtor" or "Mr. Tollis") filed a Chapter 11 petition on March 18, 1994. The confirmation process appears to have been long and complicated.[2] The docket indicates that multiple plans and disclosure statements were filed. (Dockets 66, 67, 89, 103, 133, 143, 157, 158, 170). Ultimately, the Debtor filed a Fifth Amended Chapter 11 Plan which was confirmed by an Order entered on June 13, 1996. (Docket 170, 171). The confirmed plan provided for Mr. Tollis' ongoing operation, development, and sale of real estate and condominiums and for plan funding to be derived from these operations.

Approximately one year post-confirmation, the Court issued an Order to Show Cause why the case should not be closed because it "appeared that the estate [was] fully administered and ready for closing." (Docket 212). On July 9, 1997, the Debtor's Chapter 11 counsel responded with a Motion for Final Decree. (Docket 212, 213). The motion stated that Mr. Tollis had recently died, but the parties intended to continue under the confirmed plan. The Court granted the motion and entered an Order of Final Decree, followed by the clerk's office closing the case on July 16, 1997. (Docket 214; See Docket Entry for 7/16/97).

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[1] A Response in support of the Motion filed by the Unsecured Creditors Committee was withdrawn after the hearing. (Docket 224, 228).

[2] This case was pending before a different bankruptcy judge until December 1, 1995.

Terry Tollis and Cynthia McCarty filed their Motion on July 10, 1998. Although the record from the hearing is not entirely clear, it appears that both Ms. McCarty and Terry Tollis are related to the Debtor. Terry Tollis is a scheduled creditor in the Chapter 11 case and Ms. McCarty is the administratrix of Mr. Tollis' probate estate.

Additional facts are set forth below.

DISCUSSION

The Motion requests an order vacating the Final Decree on the ground that it was not properly entered. Alternatively, the Motion asks that the case be reopened to address issues which have arisen since plan confirmation. William J. Ockington, a creditor, supports these requests.[3] The opposing parties challenge: (1) the Movants' standing to request relief; and (2) the propriety of the relief requested.

I. Standing

Some parties initially questioned whether the Movants have standing to bring this Motion. Under 11 U.S.C. § 1109(b), a creditor has a right to "be heard on any issue in a case under this chapter." By the end of the hearing, the parties agreed that Terry Tollis is a Chapter 11 creditor with standing. Following the hearing, Mr. Ockington, also a creditor, joined in the request for relief. As a result, standing is no longer an issue.[4]

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[3] Mr. Ockington's Response incorporates the Motion and does not make any additional arguments.

[4] The issue of Ms. McCarty's standing is moot because the other two Movants unquestionably have standing.

II. Motion to Vacate

A.

The Movants ask that the Final Decree be vacated under Federal Rule of Civil Procedure 60(b), which applies in bankruptcy cases under Bankruptcy Rule 9024. Fed. R. Bankr. P. 9024. They request relief based on the fact that Mr. Tollis died before the Final Decree was entered. The Movants argue that as a result of his death, (1) the Debtor's counsel did not have authority to request entry of the Final Decree; and (2) the case should have been further administered after consideration of Bankruptcy Rule 1016. Fed. R. Bankr. P. 1016. The responses in opposition to the Motion do not specifically address these arguments. Instead, the objecting parties contend that they have relied on the confirmed plan, finality in the Chapter 11 case is imperative, and the Movants have not met their burden of showing that the Final Decree should be vacated or the case reopened.

B.

The closing of a Chapter 11 case and entry of a final decree are governed by 11 U.S.C. § 350(a) and Bankruptcy Rule 3022. Fed. R. Bankr. P. 3022. Section 350(a) of the Bankruptcy Code provides:

> After an estate is fully administered and the court has discharged the trustee, the court shall close the case.

Under Bankruptcy Rule 3022 :

> After an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case.

The Bankruptcy Code does not define when an estate is "fully administered." An Advisory Note (1991) to this Rule provides some guidance:

> Entry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed. Factors that the court should consider in determining whether the estate has been fully administered include: (1) whether the order confirming the plan has become final, (2) whether deposits required by the plan have been distributed, (3) whether the property proposed by the plan to be transferred has been transferred, (4) whether the debtor or the successor of the debtor under the plan has assumed the business or management of the property dealt with by the plan, (5) whether payments under the plan have commenced, and (6) whether all motions, contested matters, and adversary proceedings have been finally resolved.

"[A] court should not keep [a] case open only because of the possibility that the court's jurisdiction may be invoked in the future." *In re Jay Bee Enters., Inc.*, 207 B.R. 536, 538 (Bankr. E.D. Ky. 1997).

Bankruptcy Rule 9024 provides that Rule 60 of the Federal Rules of Civil Procedure applies generally in bankruptcy cases and specifically to motions to reopen a case. Under Rule 60, a court may relieve a party from an order based on: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation or misconduct of an adverse party; (4) judgment is void; (5) judgment has been satisfied, released, or discharged; and (6) any other reason justifying relief. Fed. R. Bankr. P. 9024. A motion under this Rule must be filed within a reasonable time. See Fed. R. Bankr. P. 9024. The party seeking to set aside the judgment has the burden of proof. *Miller v. Owsianowski* (*In re Salem Mortgage Co.*), 791 F.2d 456 (6th Cir. 1986).

The Movants in this case did not identify which provision of Rule 60(b) supports their request. They argue that the Final Decree should be vacated because it was entered based on a motion that the Debtor's counsel allegedly lacked authority to bring. (Motion ¶ 7). They also allege that the plan was not fully administered at the time that the case was closed, which might be a claim of "mistake" under Rule 60(b)(1). (Motion ¶ 8). The Movants have not made even a prima facie case to support this contention because they have not proven (or even identified) any manner in which the case was not fully administered within the meaning of Bankruptcy Rule 3022. Instead, the record indicates that at the time the Final Decree was entered: (1) the order confirming the Debtor's plan was final; (2) no party has disputed that the Debtor assumed the business under the plan terms and started making payments; and (3) all motions, contested matters, and adversary proceedings had been finally resolved. Once the case was fully administered, it was ready to be closed under the Bankruptcy Rules. Closing was accomplished through entry of the Final Decree; the Rule specifically provides that such a decree can be entered by the Court either on motion of a party in interest or on the Court's own motion. Fed. R. Bankr. P. 3022. The Debtor's motion was not, therefore, a necessary prerequisite to the entry of the Final Decree and the question of whether the Debtor's counsel had authority to file it is irrelevant.[5] There is nothing in the Rule to indicate that the death of a debtor precludes the Court from closing a case and the Movants have not cited any authority to that effect. Under the

[5] The Court notes that the representations in the motion filed by Mr. Kravitz are accurate: it clearly stated that Mr. Tollis had died and no party in interest takes issue with the statement that the parties intended to proceed under the plan. There is, then, no argument that the request for entry of a final decree misled the Court or any party.

circumstances, Mr. Tollis' death did not bar the entry of the Final Decree or the closing of the case. Furthermore, because the estate had been fully administered, the closing was appropriate.

The Movants also cite Bankruptcy Rule 1016 as a basis for vacating the Final Decree, again without linkage to any particular section of Rule 60(b). Fed. R. Bankr. P. 1016. Bankruptcy Rule 1016 states that in the event of a debtor's death or incompetency:

> if a reorganization . . . is pending under Chapter 11 . . . the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.

The Movants contend that this Rule required the Court to consider whether dismissal was appropriate when Mr. Tollis died. They do not, however, explain how this issue is relevant to the present situation because they do not argue that the case should have been dismissed. Instead, they suggest that the case should have been further administered "albeit with some minor [unspecified] emendations to the plan of reorganization in order to provide for the somewhat changed circumstances." (Motion ¶ 6).

The language of Bankruptcy Rule 1016 is permissive and does not appear to contemplate the situation that existed in this case. At the time of the Debtor's death, the estate had been fully administered in accordance with the terms of the confirmed plan. There is no factual support for the argument that the case should have been further administered or that the plan could have been modified at that point in its history. While further administration was not appropriate, neither was dismissal in the absence of a cogent argument either then or now that dismissal was the better course. The focus of Bankruptcy Rule 1016 is that a Chapter 11 case should proceed as if the debtor's death had not occurred, to the extent that is possible. That is the result reached in

this case. This Rule did not prevent entry of the Final Decree and the closing of this case and does not provide a basis for relief from judgment under Rule 60(b).

An additional reason exists to deny the Movants' request for relief under Rule 60(b). A request for relief from judgment must be made within a reasonable time.[6] "What constitutes 'reasonable time' depends on the facts of each case, taking into consideration the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the other parties." *Richard v. Allen,* 1996 WL 102419 at *1 (6th Cir. March 7, 1996), quoting *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981). The burden is on the party requesting relief to demonstrate that the delay in filing a Rule 60(b) request is justified. *Id.*

Mr. Tollis died in June of 1997, the Final Decree was entered on July 10, 1997, and the case was closed on July 16, 1997. Ms. McCarty, as administratrix of Mr. Tollis' probate estate, obviously knew of his death. Terry Tollis, as a Chapter 11 creditor, knew of the bankruptcy case. In any event, neither one claims ignorance either of the death or the status of the bankruptcy case. Despite this, the Movants waited one year to seek relief from the Final Decree. To the extent they believed that: (1) dismissal was required; or (2) closing the case was inappropriate based on Mr. Tollis' death, they have not explained their delay in bringing that issue to the Court's attention. *Cf. Hawkins v. Eads (In re Eads)*, 135 B.R. 380 (Bankr. E.D. Cal. 1991) (party in interest in a Chapter 11 case had a duty to inform the court of the debtor's death). The parties opposing the relief contend that they will be prejudiced if their rights are re-examined

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[6] A motion to reopen a case under the Bankruptcy Code is not subject to the one-year limitation set out in Rule 60(b). Fed. R. Bankr. P. 9024(1).

and disturbed and the Movants have not demonstrated that this is not so. In light of these facts, the request to vacate the Final Decree was not brought within a reasonable time.

The Movants did not establish either a basis for relief under Rule 60(b) or that their motion was timely. The Motion to vacate the Final Decree is denied for those reasons.

III. Motion to Reopen

Alternatively, the Movants request that the case be reopened under Bankruptcy Rule 9024 and 11 U.S.C. § 350(b). They suggest that reopening is appropriate because claims have been filed in Mr. Tollis' probate case which differ from the way in which they are treated under the confirmed plan and that "it is incongruous to expect the Probate Court . . . to conform its practice to the statutory framework of the Bankruptcy Code and to enforce the orders of the Bankruptcy Court." (Motion at ¶ 9, Docket 216, 217). The Movants did not identify the claims at issue and there is no evidence regarding the existence or extent of this problem. Indeed, their counsel stated at the hearing that the Motion had been brought, at least in part, to cause the IRS to conform to the plan, but that on further investigation there was no dispute regarding the IRS.

At the hearing, the Movants attempted to assert an additional basis for reopening the case. They indicated that an impediment to completion of the plan had recently surfaced. Specifically, they argued that Thomas Sech is asserting a lien on property held in the name of Tollis Construction Company, a non-debtor entity, and that it is necessary to litigate the validity of that lien in this Court. The factual context of this dispute is not in evidence, but it appears that Mr. Sech filed a cognovit judgment in state court and the Movants have filed a motion to vacate

that judgment. In addition, the Movants' counsel alluded to "other post-petition issues which have arisen in this case."[7]

The parties opposing the reopening collectively argue that this case has been finalized and the confirmed plan speaks for itself and is binding on the Debtor, his probate estate, and creditors alike. They believe that the plan's terms can be enforced in probate court by objecting to inappropriate claims and that this Court lacks jurisdiction to assist in that process.

Under 11 U.S.C. § 350(b):

> A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

The party requesting relief has the burden of demonstrating that cause exists. *In re Cloninger*, 209 B.R. 125 (Bankr. E.D. Ark. 1997). See also *Rosinski v. Boyd (In re Rosinski)*, 759 F.2d 539 (6th Cir. 1985) (debtor required to advance some justification for the reopening). The decision whether to reopen a bankruptcy case is committed to the sound discretion of this court. *Rosinski v. Boyd (In re Rosinski)*, 759 F.2d 539 (6th Cir. 1985).

Under the circumstances presented, the Court does not believe that cause exists to reopen this Chapter 11 case. With respect to the request that the case be reopened to deal with inconsistent probate claims, there is no evidence or even specific statements of counsel that such claims exist. In any event, the confirmation of the Debtor's plan operates as a final judgment in the bankruptcy proceedings. *Sanders Confectionery Prods. v. Heller Fin., Inc.*, 973 F.2d 474 (6th Cir. 1992). The plan terms control the rights and obligations of the parties to it under 11 U.S.C.

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[7] The Movants do not address who would act on behalf of the deceased Debtor in the event of re-opening the case.

§ 1141(a). *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458 (6th Cir. 1991). As a result, the parties to the confirmed plan are free to pursue their rights and remedies regarding the plan obligations in the Probate Court claims resolution process. In fact, it would be inappropriate for this Court to interject itself in that matter.[8] *Querner v. Querner (In re Querner)*, 7 F.3d 1199 (5th Cir. 1993). The Movants have also failed to establish that this case should be reopened to deal with Mr. Sech's lien rights. They did not introduce any facts to support a determination that cause to reopen exists based on this issue. Any dispute between Mr. Sech and the Movants can and should be determined in the state forum in which it is currently pending.

CONCLUSION

For the reasons stated, the Motion to Vacate the Final Decree or to Reopen the Case is denied. A separate judgment will be entered in accordance with this Memorandum of Opinion.

Date: 14 December 1998

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Martin Stone, Esq.
Lee Kravitz, Esq.
Julie Rabin, Esq.
David Simon, Esq.
Kevin Duffy, Esq.
Anita Gill, Esq.
Thomas Pavlik, Esq.
Dean Wyman, Esq.

By: Joyce L. Gordon, Secretary
Date: 12/14/98

[8] Certain objectors suggest that the Court lacks jurisdiction to grant the Motion. The Court declines to decide that issue.

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In re:	)	Case No. 94-11143
	)	
ZANE R. TOLLIS,	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the Memorandum of Opinion filed this date,

IT IS ORDERED that the Motion to Vacate the Final Decree, or in the alternative, to Reopen the Case is denied.

Date: 14 December 1998

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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