UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 03-25461
	)	
DEACONESS HOSPITAL, LLC, *et al.,*	)	Chapter 11
	)	(jointly administered)
Debtors.	)	
	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

The official committee of unsecured creditors, JP Morgan Chase Bank, N.A. (successor to Bank One N.A.), and GE HFS Holdings, Inc. moved to appoint a chapter 11 trustee, which the court granted by order dated April 18, 2005.[1] The debtors now move for relief from that order.[2] They argue that the court erred in drawing an inference from a factual finding and that without that inference the legal result would have to be different. They also argue that they should be allowed to present additional evidence. The parties who moved for the trustee to be appointed oppose the motion.[3] For the reasons stated below, the debtors' motion is granted in part and denied in part.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered 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).

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[1] Docket 897, 898.

[2] Docket 899.

[3] Docket 905, 906.

THE DISPUTED PART OF THE OPINION

The memorandum of opinion includes this finding of fact:

> Postpetition, Dr. Saad, Joyce Saad, Deaconess Hospital, LLC, Indoga, Inc., Pearlview Square, Medab, Inc., and Parma Day Medical, Inc. sued Bank One in state court asking that Bank One be enjoined from exercising warrants of attorney in the debt instruments to obtain cognovit judgments and be compelled to arbitrate the disputes.[4]

The opinion cites exhibit 26, the amended state court complaint which shows on its face that on February 11, 2004 (several months postpetition), attorney Robert Kracht filed the amended complaint with those named plaintiffs against Bank One requesting the stated relief. Based on this finding, the opinion states:

> The Bank One litigation is particularly curious because Dr. Saad caused the debtors to be plaintiffs, but he did so without court authority. Also, all of the plaintiffs in that case were represented by attorney Robert Kracht, who represented Dr. Saad personally in the bankruptcy cases. This was not only unauthorized, but a clear conflict of interest.

THE POSITIONS OF THE PARTIES

The debtors make three arguments. First, they claim that the court erred in inferring from exhibit 26 that attorney Kracht had represented the debtors postpetition. They then dispute the legal conclusion flowing from that inference that a conflict existed and describe it as having been made by "mistake or inadvertence." The debtors admit that exhibit 26 shows that attorney Robert Kracht, who represented George Saad, M.D. personally in these cases, filed an amended state court complaint naming the debtors as plaintiffs after the debtors filed their chapter 11 cases and that the amended complaint still includes them in that capacity. They argue, however, that

[4] Docket 897.

the parties moving to appoint a trustee did not contend that this was a conflict of interest. They say there was no such argument because the parties knew that attorney Kracht included the debtors in the caption by mistake after he had been instructed not to take any action on behalf of the debtors. Thus, although the document shows that attorney Kracht took unauthorized action, the debtors state he did not mean to do so and did not in fact do so other than by erroneously naming the debtors in the amended complaint. The debtors filed affidavits in support. From this point, the debtors go on to argue that the disputed finding is the "keystone" to the court's decision to appoint a chapter 11 trustee and that without the keystone, "an arch collapses" and the court must reach a different decision. Their second argument is that the moving parties did not present any evidence of the costs related to a chapter 11 trustee. And the third argument is that the debtors should be permitted to present evidence that the motion for summary judgment filed by GE HFS in an adversary proceeding is without merit.

The committee, GE HFS, and Bank One oppose the motion. They contend that the challenged finding is not significant (nor inaccurate based on the document as introduced into evidence), that in any event the opinion does not rest on the finding, and that the other issues raised by the debtors do not fall within the standards for altering or reconsidering a judgment.

DISCUSSION

The debtors rely on federal rules of civil procedure 59(e) and 60(b)(1), (2) and (6), both of which are incorporated into the bankruptcy rules. *See* FED. R. BANKR. P. 9023 and 9024. Under rule 59(e), motions to alter or amend a judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. *Gencorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). Rule

60(b)(1), (2), and (6) provides that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . 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); . . . or (6) any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(B).

I. The Disputed Inference

The debtors state that the movants offered the state court amended complaint into evidence to show that George Saad, M.D., the debtors' principal, asserted claims against Bank One. The court did make such a finding, which the debtors do not dispute. Neither do the debtors dispute that the exhibit shows on its face that attorney Robert Kracht filed the amended complaint postpetition, naming the debtors as plaintiffs. The debtors do dispute the inference the court drew from these undisputed facts, namely that this showed a conflict of interest on the part of Dr. Saad, who directed the filing of the state court action.

The debtors have shown by affidavits that this particular inference is not accurate. The debtors are, therefore, entitled to relief only in the form of an amended memorandum of opinion which deletes the inference. The court finds that this inference was by no means the "keystone" to its memorandum of opinion and judgment and that no other relief from the judgment is justified as the remaining facts fully support the conclusions reached by clear and convincing evidence.

II. The debtors' other arguments

The debtors' other arguments are not persuasive. The debtors had a full and fair opportunity to present evidence and arguments on the issues of cost and the pending summary

judgment motion. A motion to alter or amend a judgment "is not an opportunity to re-argue a case . . . Thus, parties should not use them to raise arguments which could, and should, have been made before judgment issued." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). Similarly, these points do not warrant relief under rule 60(b).

CONCLUSION

For the reasons stated, the debtors' motion for relief is granted in part and the court will enter an amended memorandum of opinion and judgment. The court will enter a separate order reflecting this decision.

Date: 21 April 2005

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerks office email and the Bankruptcy Noticing Center

THIS OPINION IS NOT INTENDED FOR PUBLICATION

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	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the debtors' motion for relief from the order entered on April 18, 2005 is granted in part and the court will issue an amended memorandum of opinion and order granting the joint motion for the appointment of a chapter 11 trustee. (Docket 899).

IT IS SO ORDERED.

Date: 21 April 2005

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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