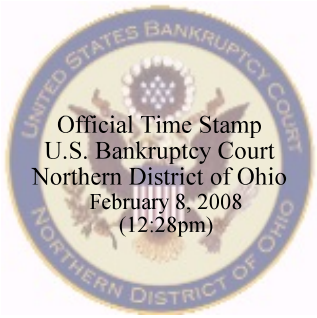
(NOT FOR COMMERCIAL PUBLICATION)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 05-15262
	)	
REGIONAL DIAGNOSTICS, L.L.C., et al.,	)	Chapter 11
	)	Jointly Administered
Debtors.	)	
	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

James Zelch, M.D., Mark Zelch, and Nancy Westrich, M.D. (the Zelch claimants) move for relief from a stipulated order which allowed more than $15 million in claims filed by Gleacher Mezzanine Fund I, L.P., Gleacher Mezzanine Fund P, L.P., and BancBoston Investments, Inc. (the banks).[1] Robert Morris, the creditor trustee under the debtors' confirmed plan, and the banks oppose the motion. For the reasons stated below, the motion is granted.[2]

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).[3]

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[1] The Zelch claimants' reply brief states that Regional Health Services, Inc., JVZ Partners Limited, and JZ Investment Corp. join in the motion. *See* docket 680 at 4. The record does not, however, reflect their joinder as the motion and supporting briefs are signed by counsel for the Zelch claimants only and Regional Health Services, JVZ Partners, and JZ Investment did not file a separate joinder.

[2] Docket 662, 664, 665, 677, 678, 679, 680.

[3] This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

FACTS

The parties stipulated to these facts:[4]

The Chapter 11 Cases

1. On April 20, 2005 (the "Petition Date"), Regional Diagnostics, L.L.C. (Regional Diagnostics), Regional Diagnostics Holdings, L.L.C., and TR Radiology, Inc. (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). The Debtors' estates are jointly administered under Case No. 05-15262.

2. On June 17, 2005, Regional Diagnostics filed its Schedule F listing BancBoston Investments, Inc. as having a claim in the amount of $9,732.52, and "Gleacher Partners, LLC" as having a claim in the amount of $14,174,710.00. Neither claim was scheduled as disputed, contingent or unliquidated.

3. On January 23, 2006 the Debtors filed their Second Amended Disclosure Statement With Respect to Second Amended Joint Plan of Liquidation . . . (the "Disclosure Statement") and their Second Amended Joint Plan of Liquidation . . . (the "Plan").

4. The Disclosure Statement at Page 19 states in a table setting forth the treatment of claims for "Class 4(b) Subordinated Lender Claims Estimated Allowed Claim: Approximately $15,788,768.21."

5. The Plan provides in Section 1.68 "'Subordinated Lender Claim' means a Claim arising under or as a result of the Senior Subordinated Loan Agreement, dated June 27, 2003, by and among RDI as borrowers and Gleacher Mezzanine LLC and Banc Boston [sic] Investments, Inc. as Co-Arrangers." In Section 1.69 the Plan states: "'Subordinated Lenders' means BancBoston Investments, Inc. ('BBI'), Gleacher Mezzanine Fund I, L.L.P. ('GMF I) and Gleacher Mezzanine Fund P.L.P. ('GMF P' and together with GMF I, 'Gleacher')."

6. On February 8, 2006, the Court entered its Order . . . approving the Disclosure Statement.

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[4] Docket 676 (footnote omitted).

7. On April 7, 2006, the Court entered its Order (the "Confirmation Order") . . . confirming the Plan.

8. Pursuant to the Plan and Confirmation Order, the Creditors Trustee was appointed to administer the Creditors' Trust (as defined in the Plan) in accordance with the Plan and that certain Creditors Trust Agreement which was authorized and approved by the Confirmation Order. *See* Confirmation Order ¶¶ 9-10.

9. The Confirmation Order provides in part that:

> [T]he Creditors Trustee may use, acquire and dispose of Creditors Trust Assets and compromise or settle any Claims, including Disputed Claims, without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules unless otherwise expressly imposed by the Plan, the Creditors' Trust Agreement or this Confirmation Order.
> Confirmation Order ¶ 11(c) (using terms defined in the Plan).

10. The Plan provides in part that:

> Authority to Prosecute Objections. On and after the Effective Date, only the Creditors Trustee shall have the authority to file objections to Claims and to settle, compromise, abandon, withdraw, litigate to judgment or take such other actions with respect to objections to Claims .... The Creditors Trustee may settle or compromise any Disputed Claim without approval of the Bankruptcy Court.
> Plan § 9.2(b).

The Banks' Claims

11. The Disclosure Statement listed claims 'arising under or as a result of" the Subordinated Loan Agreement as an "Estimated Allowed Claim" of "[a]pproximately $15,788,768.21." *See* Disclosure Statement at 19 and Plan § 1.68 (definition of "Subordinated Lender Claim").

12. By motion dated July 13, 2005 . . . (the "Bar Date Motion"), the Debtors requested that the Court set September 30, 2005 (the "Bar Date") as the deadline for filing prepetition proofs of claim in the Debtors' chapter 11 cases. The Court established September 30, 2005 as the Bar Date by granting the Bar Date Motion in an electronic docket entry dated August 4, 2005.

13. The Banks filed proofs of claim, each dated September 28, 2005, for general unsecured claims in the following amounts: (1) Gleacher Mezzanine Fund I, L.P. ("Gleacher I") - $5,818,143.80 ("Claim #151"); (2) Gleacher Mezzanine Fund P, L.P. ("Gleacher P" and collectively with Gleacher I, "Gleacher") - $2,077,908.50 ("Claim #152"); and BancBoston Investments, Inc. ("BancBoston") - $7,892,715.91 ("Claim #153," and together with Claim ##151 and 152, the "Claims").

14. Pursuant to the Plan, the last day for filing objections to general unsecured claims was 120 days after the Effective Date (as defined in the Plan). Plan § 1.13 (definition of "Claims Objection Deadline"). Pursuant to the Confirmation Order, the Effective Date of the Plan was April 21, 2006. On June 29, 2006, the Court entered its Order extending the time for filing objections to general unsecured claims to no later than 240 days after the Effective Date . . . [.] Thus, the deadline for the Creditors Trustee to object to claims was December 17, 2006.

15. On December 15, 2006, the Creditors Trustee filed his Objection to Claims . . . and Request to Reduce, Reclassify, or Allow Same (the "Claims Objection") . . . . In the Claims Objection, the Creditors Trustee objected to the Claims, stating that "[b]ased upon [his] review, [he] determined that the claims set forth on Exhibit A hereto either lack sufficient supporting documentation, are inconsistent with the Debtors' pre-petition books and records, and/or are not supported in whole or in part by the Debtors' pre-petition books and records." *See* Claims Objection at 3 & Exhibit A thereto.

16. On December 15, 2006, the Creditors Trustee filed his Notice of Claims Objection . . . [.]

17. The Banks filed no response to the Claims Objection.

18. A hearing on the Claims Objection was held on January 18, 2007. The Banks did not appear at the hearing.

19. On January 22, 2007, the Court entered its Order (the "Claims Order") . . . allowing the BancBoston claim (#153) in the amount of $9,732.52 and disallowing the Gleacher I claim (#151) and the Gleacher P claim (#152) in their entirety.

20. On August 17, 2007, the Court entered the Stipulated Order. The Stipulated Order was entered into between the Creditors Trustee, Gleacher I, Gleacher P and BancBoston and recites that "the

[Creditors] Trustee, Gleacher and BancBoston agree that the Claims should be allowed in their entirety." Stipulated Order at 2.

21. The Stipulated Order provides in part that:

> The Claims Order is hereby modified as follows: (a) [Claim #151] is allowed in its entirety, in the amount of $5,818,143.80; (b) [Claim #152] is allowed in its entirety, in the amount of $2,077,908.50; and (c) [Claim #153] is allowed in its entirety, in the amount of $7,892,715.91. Stipulated Order at 2.

22. No notice of the proposed entry of the Stipulated Order was given to parties prior to its entry.

23. On September 11, 2007, the Zelch Claimants filed their Motion for Relief from Judgment.

24. On September 24, 2007, the Banks filed their Opposition to the Motion for Relief from Judgment . . . [.]

25. On September 24, 2007, the Creditors Trustee filed his brief in [o]pposition to the [m]otion . . . [.]

THE POSITIONS OF THE PARTIES

The Zelch claimants argue that the Stipulated Order should be vacated under federal rule of civil procedure 60(b)(3), (4) and (6) because its entry was procedurally deficient. The trustee and the banks oppose relief on two grounds. First, they challenge the movants' standing. Second, they argue that the facts do not support relief under rule 60(b) because the confirmed plan gave the trustee complete authority and discretion to resolve the banks' claims in any manner he chose.

DISCUSSION

A. Standing

The trustee and the banks acknowledge that movant Nancy Westrich is a creditor, but argue that the Zelch claimants lack standing because two of them, James Zelch and Mark Zelch, are not creditors. Nancy Westrich's status alone, however, resolves this issue.

As a creditor, Dr. Westrich is a party in interest in these chapter 11 cases. Bankruptcy code § 1109(b) gives her a right to appear and be heard on any issue. 11 U.S.C. § 1109(b). The section has been interpreted to mean that "anyone who has a legally protected interest that could be affected by a bankruptcy proceeding is entitled to assert that interest with respect to any issue to which it pertains, thus making explicit what is implicit in an *in rem* proceeding - that everyone with a claim to the *res* has a right to be heard before the *res* is disposed of since that disposition will extinguish all such claims." *In re James Wilson Assocs.*, 965 F.2d 160, 169 (7th Cir. 1992). Dr. Westrich has an interest in whether the banks' claims are allowed because those claims will affect the amount she receives under the plan. *See United States v. Sterling Consulting Corp. (In re Indian Motorcycle Co.)*, 289 B.R. 269, 281 (B.A.P. 1st Cir. 2003) (noting that a bankruptcy claimant that was not a party to an agreed order had standing to seek relief under rule 60(b)); *see also* FED. R. BANKR. P. 3008 (providing that a party in interest may move to reconsider an order allowing or disallowing a claim). This gives Dr. Westrich standing to challenge the Stipulated Order.

B. Relief from Judgment–Rule 60(b)

Rule 60(b) provides that a court may relieve a party from a final judgment or order for these reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;

> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b) (made applicable by FED. R. BANKR. P. 9024).[5] The rule is intended "to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." *Barrier v. Beaver*, 712 F.2d 231, 234 (6th Cir. 1983).

C. The Motion

The Zelch claimants request relief under rule 60(b)(3), (4) and (6). For the reasons discussed below, the court finds that relief under rule 60(b)(6) is appropriate under the circumstances.

1. Rule 60(b)(6)

Rule 60(b)(6) provides that a party may obtain relief from the operation of a judgment based on any reason justifying relief, other than those expressly stated in (b)(1) through (5). This is a very narrow provision that must be applied "only 'as a means to achieve substantial justice when 'something more' than one of the grounds contained in Rule 60(b)'s first five clauses is present.'" *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (quoting *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989)). "The 'something more' . . . must include unusual and extreme situations where principles of equity *mandate* relief." *Id.* (emphasis in original). "[T]he decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the 'incessant command of the court's conscience that justice be

[5] Bankruptcy rule 9024 incorporates civil rule 60 with some modifications not relevant here.

done in light of all the facts.'" *Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 529 (6th Cir. 2001) (quoting *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984)). A court has more reason to be liberal in reopening a judgment when the merits of the case were not considered than it does when a judgment is entered after a trial on the merits. *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 364 (6th Cir. 2001). Rule 60(b)(6) has been cited as an appropriate basis to vacate an order which a judge did not intend to enter. *See Montco, Inc. v. Barr (In re Emergency Beacon Corp.)*, 666 F.2d 754 (2d Cir. 1981).

This is one of those rare cases that presents "something more" than one of the specific grounds set out in rule 60(b)(1) through (5). The Claims Order gave BancBoston an allowed claim of $9,732.52 and disallowed the Gleacher I and Gleacher P claims in their entirety. The Stipulated Order changed that dramatically by allowing the banks more than $15 million in claims. Stated differently, the Stipulated Order, in effect, granted the trustee and the banks relief from the Claims Order under which the banks would get next to nothing, and entered a new order allowing them a large claim. This procedure is contrary to the bankruptcy rules which provide that relief from judgment is available only by motion stating the grounds. *See* FED. R. CIV. P. 60(b) (providing for relief from a final order "on motion"); FED. R. BANKR. P. 9013 (providing that a "request for an order . . . shall be by written motion, unless made during a hearing"); *see also United States v. Pauley*, 321 F.3d 578, 581 (6th Cir. 2003) (noting that a court cannot grant relief from judgment under rule 60(b) *sua sponte* and that relief from an order must be based on a party's motion). Another way to view this is that the trustee and the banks were asking the court to reconsider the claims disposition and on reconsideration to allow the claims in the higher amount. That procedural route does not, however, fix the problem because the rules again

require that the issue be raised by motion. FED. R. BANKR. P. 3008 (providing that "[a] party in interest may move for reconsideration of an order allowing or disallowing a claim").

Additionally, entry of the Stipulated Order without an accompanying motion stating an appropriate basis for relief is contrary to this court's standard practice. *See* LOCAL BANKR. R. 9013-1(a) (providing that a motion "shall be accompanied by a memorandum in support"). The court would not have entered the Stipulated Order had the parties alerted the court that the order had the effect of granting them relief from the Claims Order. If that had been known, the court would have considered the merits of whether the relief should be granted and would have addressed the issue of appropriate service. *See* FED. R. BANKR. P. 9013 (providing that the court may direct a moving party regarding service when service is not specified by the rules, or where service is not otherwise required). The court is not suggesting that the trustee and the banks set out to hoodwink anybody. Nevertheless, equity requires that this multi-million dollar judgment, entered other than on the merits and using a very flawed procedure, be vacated.

The trustee and banks argue that the confirmed plan would have permitted the trustee to allow the banks' claims without any court order; therefore, it does not matter what procedure the trustee followed here. Regardless of how the trustee *might* have approached the issue, the fact is that he asked the court to enter an order and, by doing so, gave up whatever unilateral rights he might otherwise have had. The trustee and banks also contend that even if the Stipulated Order is set aside, the Zelch claimants will not be able to substantively challenge the trustee's decision to allow the banks' claims. This misses the point. The problem here is that the court entered a Stipulated Order, without notice, that it would not have entered had it known the circumstances. Equity requires that the parties be restored to their original positions. Neither the trustee nor the banks will suffer legal prejudice from this decision. If the trustee wishes, he can move either for

relief under rule 60(b) or for reconsideration of the Claims Order under bankruptcy rule 3008. The Zelch claimants may then respond if they wish.

The bank and the trustee are correct in one respect: the Zelch claimants are being sticklers about an issue that parties often choose to ignore. That, no doubt, is because of the hard feelings between the Zelch claimants and the debtors that have characterized this proceeding, particularly in the early stages. As the court has suggested informally to the parties, they may want to re-evaluate whether it is in their economic best interest to continue this approach.

2. Rule 60(b)(1) through (5)

As noted above, relief under rule 60(b)(6) is only available under circumstances not dealt with in the other provisions of rule 60(b), and that is the situation here.

Rules 60(b)(2) and (5) do not apply on their face.

Rule 60(b)(1) provides for relief based on "mistake, inadvertence, surprise . . . ." This rule is intended to provide relief in only two circumstances: "'(1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order.'" *Cacevic v. City of Hazel Park*, 226 F.3d 483, 490 (6th Cir. 2000) (quoting *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999)). The court does not believe that what happened here is the type of mistake that rule 60(b)(1) was intended to cover.

Rule 60(b)(3) provides for relief based on fraud, misrepresentation, or misconduct. The party challenging the order must prove by clear and convincing evidence that the adverse party committed a purposeful bad act. *Jordan v. Paccar, Inc.*, No. 95-3478, 1996 WL 528950, at *6 (6th Cir. Sept. 17, 1996). The stipulated facts show only that the trustee and the banks submitted the Stipulated Order to the court without a motion and that it was entered. While this is a

procedural irregularity, there was no evidence that the parties acted in bad faith in presenting the Stipulated Order to the court.

Rule 60(b)(4) provides for relief from an order or judgment that is void. "A judgment is void under 60(b)(4) 'if the court that rendered it . . . acted in a manner inconsistent with due process of law.'" *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995) (quoting *In re Edwards*, 962 F.2d 641, 644 (7th Cir.1992)). "The fundamental elements of procedural due process are notice and an opportunity to be heard." *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). A due process analysis addresses two questions. "'[T]he first asks whether there exists a liberty or property interest which has been interfered with by the State, the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.'" *Liberte Capital Group, LLC v. Capwill*, 421 F.3d 377, 383 (6th Cir. 2005) (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)) (alteration in original). A property interest may be created by statute, a formal contract, or a contract implied based on the circumstances. *Id.* Where a protected interest exists, the amount of process required "depends, in part, on the importance of the interests at stake." *Id.* Neither the confirmed plan nor the bankruptcy rules makes clear exactly who is entitled to notice under the facts presented. Relief is not, therefore, available under rule 60(b)(4).

CONCLUSION

For the reasons stated, the Zelch claimants' motion for relief from judgment is granted and the Stipulated Order is vacated. This ruling does not preclude the trustee or the banks from requesting relief from, or reconsideration of, the Claims Order by appropriate motion. A separate order reflecting this decision will be entered.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 05-15262
	)	
REGIONAL DIAGNOSTICS, L.L.C., et al.,	)	Chapter 11
	)	Jointly Administered
Debtors.	)	
	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion entered this same date, the motion of James Zelch, M.D., Mark Zelch, and Nancy Westrich, M.D. for relief from the stipulated order entered on August 17, 2007 allowing claim numbers 151, 152 and 153 (docket 658) is granted and the stipulated order is vacated. (Docket 662).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge