UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

CENTRAL VERMONT PUBLIC SERVICE CORP.	:	
V.	:	CIVIL NO. 1:02cv187
HAROLD AND EDITH HERBERT	:	

MEMORANDUM OF DECISION

Background

The District Court has jurisdiction over appeals from final judgments of the Bankruptcy Court. 28 U.S.C. § 158(a). On June 21, 2002, the Bankruptcy Court (Brown, B.J.) issued an order denying both the appellant's Motion to Set Aside the Default and its Motion for Relief from a Judgment Order Pursuant to Fed. R. Civ. P. 60(b)(4). See Notice of Appeal (Paper 1). These rulings are final and appealable. See Beller & Keller v. Tyler, 120 F.3d 21, 24 (2d Cir. 1997); United States v. Forma, 42 F.3d 759, 762 (2d Cir. 1994).

This Court will not disturb the Bankruptcy Court's findings of fact unless clearly erroneous. See, e.g., In re Parrotte, 22 F.3d 472, 474 (2d Cir. 1994). Legal determinations, however, are subject to de novo review. Id.; In re Donahue, 232 B.R. 610, 613 (D. Vt. 1999).

Although most facts underlying this appeal are undisputed, the background of this case is complicated by the various corporate entities the appellees created while running

Pico Ski Resort. Compare Brief of Appellant Central Vermont Public Service Corp. (Paper 5) at 3-9 with Brief of Appellees Harold and Edith Herbert (Paper 8) at 4-7. The salient facts are set forth as follows.

In December 1993, Harold and Edith Herbert purchased from The Howard Bank the mortgage and security agreements that encumbered the real estate and personal assets of Pico Ski Resort. In May 1995, they commenced an ultimately successful state court foreclosure action against Pico Ski Resort. In August 1995, the Herberts incorporated Pico Ski Resort as "Pico Mountain, Inc.," becoming its sole shareholders, officers and directors.

The parties agree that, on August 2, 1995, Harold Herbert orally promised Central Vermont Power Service Corp. (hereinafter "CVPS") that Pico's then outstanding utility bill would be paid if CVPS would continue utility service to the resort. Although not dispositive for the purpose of deciding the pending appeal, the parties disagree as to whether Mr. Herbert personally guaranteed payment or whether his promise to pay the arrearage was made in his capacity as a representative of a corporation. See Paper 5 at 4, paras. 6-7; Paper 8 at 4, paras. 6-7. It appears that the outstanding bill was paid on the resort's behalf, and CVPS continued to supply Pico with power through the filing of its Chapter 7

petition on July 22, 1996.

On January 3, 1996, the Herberts acquired title through a Judgment and Decree of Foreclosure and Replevin to all of the real estate, equipment, inventory, accounts receivable, and other assets of Pico Ski Resort. The redemption date expired on January 18, 1996, and the Herberts took possession of the assets on January 19, 1996.

On July 2, 1996, the Herberts formed two other entities, Sherburne Pass Mountain Properties, LLC and Pico Mountain Operating Company, LLC. Subsequently, they conveyed Pico Ski Resort's real estate to Sherburne Pass Mountain Properties, and its tangible and intangible personal property assets to Pico Mountain Operating Company. See Paper 5 at 5, paras. 12-14.

On July 22, 1996, Pico Mountain, Inc. (d/b/a Pico Mountain Resort) filed its Chapter 7 petition. See Appellee's Supplemental Record on Appeal (Paper 4). It scheduled no significant assets and over $2.7 million of unsecured debts. On or about January 21, 1997, CVPS filed a proof of claim for electrical power it had supplied to the resort. As of August 2, 1996, the unpaid utility bill was $214,802,79. See Summary of Schedules (located at Paper 4, Schedule F, p.3).

On December 9, 1996, the Herberts and their affiliated corporations sold the real and personal assets of Pico Ski

Resort to Pico Management Co. and American Skiing Company, Inc. The Herberts directly or indirectly received benefits at the closing totaling nearly $2.5 million. See Paper 5 at 6, para. 18; Paper 8 at 6, para. 18.

According to CVPS, under the Sales Agreement, Pico Management Co. was obligated to pay the outstanding utility bill. Pico Management Co. placed in escrow $214,802.79 of sales proceeds to pay the CVPS bill. The Herberts did not disburse any closing funds to the creditors of Pico Mountain, Inc., including CVPS. See Paper 5 at 6-7, paras. 19-20.

Apparently as a result of the Herberts' transactions, the trustee of the bankruptcy estate of Pico Mountain, Inc., John Canney, investigated causes of action against Harold and Edith Herbert for alleged breaches of fiduciary duty toward the debtor. As a result, the Herberts and the trustee entered into a settlement agreement whereby the Herberts agreed to pay $120,000 or thirty percent, whichever was less, of the allowed unsecured claims against Pico Mountain, Inc.

On or about May 28, 1997, Canney instituted an adversary proceeding in which he asked the Bankruptcy Court to approve his settlement with the Herberts and to enjoin creditors, including CVPS, from attempting any actions against the Herberts on the basis of alter-ego or other derivative liability theory. See U.S. Bankruptcy Court Docket Sheet

(Paper 2) at 1; Verified Complaint for Injunctive Relief, Adv. Pro. 97-1036 (located in Appellant's Record on Appeal, Paper 3). On or about June 16, 1997, the summons and complaint was served on CVPS. See Paper 2 at entry 4. Despite notice of the adversary proceedings, it is undisputed that CVPS did not enter an appearance or otherwise defend the trustee's action to settle claims. See, e.g., Stipulated Order Approving Settlement and Granting Permanent Injunctive Relief (located at Paper 3)(indicating service on attorney of Unofficial Unsecured Creditor Committee on Sept. 29, 1997); see also Letter from Attorney Wolinsky to Attorney Keyes (dated December 15, 1997)(appended to Memorandum contained in Paper 4)("In any event, presuming that you intended to sue our client, Herbert L. Herbert, Central Vermont Public Service would be enjoined from proceeding against him pursuant to the terms of the Stipulated Order Approving Settlement and Granting Permanent Injunctive Relief, entered by the Bankruptcy Court on October 29, 1997, a copy of which is enclosed for your review.").

On October 29, 1997, the Bankruptcy Court (Conrad, B.J.) entered the Stipulated Order Approving Settlement and Granting Permanent Injunctive Relief in Adversary Proceeding No. 97-1036. In pertinent part, the Order enjoins all creditors of the bankruptcy estate who filed proofs of claim against debtor

from commencing or continuing any claim, or suit of any kind against Harold or Edith Herbert. On December 2, 1997, Judge Conrad entered Judgment by Default and ordered that the trustee did not have to serve the defaulting parties, including CVPS, with a copy of the injunction order. But see December 15, 1997 Wolinski letter, supra.

Currently pending in Chittenden Superior Court is Harold Herbert and Edith Herbert v. Pico Management Co. and American Skiing Company, Inc.. In that litigation, the Herberts allege they are entitled to the $214,802.79 which was placed in escrow to pay the CVPS utility bill. They rely on their agreement with the trustee, in which they paid the bankruptcy estate $120,000 in exchange for an injunction and resolution of CVPS' claim for unpaid utility bills. See Paper 5 at 8, para. 25; Paper 8 at 7, para. 25. Because of the agreement and injunction approved by the Bankruptcy Court, CVPS claims it is unable to pursue its third-party creditor action against the Herberts and assert its entitlement to the escrowed funds. According to CVPS, on February 2, 2001, it received a payment of $96,081.00, leaving an unpaid balance of $193,399.00, plus interest. See Paper 5 at 9, para. 30.

On February 13, 2002, CVPS first appeared in the Adversary Proceeding and filed the motions for relief from the default and injunction which underlies this appeal. See Paper

2 at entry 31. After a hearing, Judge Brown issued the following oral ruling:

> [W]ith regard to setting aside the default I'm going to deny that motion on two separate grounds. First of all, I think my reading of Beller & Keller versus Tyler is that the CVPS motion is not timely and the motion would be denied on that grounds [sic]. But additionally with respect to whether or not this judgment that underlies the current motion is actually void, I believe that the motion seeks to set aside the judgment on the grounds [sic] that it's void for failure of subject matter jurisdiction, and I'm going to rule a 60(b)(4) motion cannot be used as a substitute for a party's failure to take a timely appeal from an erroneous ruling on subject matter jurisdiction . . . .
>
> Moreover, a Court need only have an arguable basis for jurisdiction existing in the first place. Under a Second Circuit case from 1986 Nemaiser v. Baker, and also under the Acorn Hotels case and in this case there is arguable jurisdiction, and the rule 60(b)(4) motion therefore must be denied. . . .

Transcript (Paper 57) at 7-8.

Discussion

The main question posed in this appeal is whether CVPS is entitled to pursue relief from a judgment rendered in the adversary proceeding in 1997 when it did not waive its objection to the Bankruptcy Court's alleged lack of subject matter jurisdiction in what it now asserts was a non-core adversary proceeding. See Paper 5 at 17. The short answer is that CVPS' appeal is untimely.

Rule 60(b)(4) permits a court to grant relief from a final judgment where "the judgment is void" for lack of subject matter jurisdiction. See Beller & Keller, 120 F.3d at 23. A party must make its Rule 60(b)(4) motion, however, within a reasonable time after the entry of judgment. Id. at 24. Although CVPS filed a proof of claim, had been served with the adversary proceeding complaint, and was aware of the injunction at issue, it decided not to enter an appearance in the adversary proceeding. CVPS waited over four years to take any action. On its face, CVPS' Rule 60(b)(4) motion was not filed within a reasonable time. See Abondolo v. Faraldi, 234 F.3d 1261 (2d Cir. 2000)(Table)(suggesting the failure to act for more than two years was not a "reasonable time").

Furthermore, "[a] Rule 60(b)(4) motion is, by definition, not a collateral attack. It is a direct attack, brought in the same case and before the same court that entered the offending judgment." In re Acorn Hotels, LLC, 251 B.R. 696, 700 (Bankr. W.D. Tex. 2000)(emphasis omitted). Thus "[t]he Rule may not be used as a substitute for a timely appeal . . . . Since 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances." Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986)(citations omitted).

Even assuming CVPS has argued correctly that the

Bankruptcy Court was without jurisdiction to enter a judgment and injunction affecting its ability to pursue a claim against the Herberts in Chittenden Superior Court, that fact does not lead ineluctably to the conclusion that the judgment must be declared void. See id. at 64 ("Although appellees correctly argue that this case was improperly removed to federal court, it does not logically or necessarily follow that every judgment rendered after an improper removal must be classified as a nullity and therefore void.")(emphasis omitted). A collateral attack on a judgment, such as the one instigated herein by CVPS, is only permissible where the challenged court action involves a "clear usurpation of power" with no arguable underlying jurisdictional basis. Id. at 65. "Short of that standard, Rule 60(b)(4) relief on grounds of voidness for lack of subject matter jurisdiction is not appropriate." Acorn Hotels, 251 B.R. at 703.

As explained by one court,

> [w]hen a court is applying this test, it does not need to decide whether it actually had subject matter jurisdiction. That would be the appropriate question on appeal. It is not an appropriate question under Rule 60(b)(4). A party is not permitted to substitute a Rule 60(b)(4) motion for its own failure to take a timely appeal from a confirmation order that releases a third party unless the party demonstrates there was a "total want of jurisdiction" and/or "a plain usurpation of power" (i.e. "no arguable basis for jurisdiction") when the court granted the release in the confirmation process. Said another way, if there

> was at least an arguable basis in this case for the court's finding that it had subject matter jurisdiction to release McClure in the order confirming the debtor's plan of reorganization, then Rule 60(b)(4) must be denied to RFS. Otherwise, RFS would be permitted to evade the normal rules for perfecting a timely appeal by means of the Rule 60(b)(4) process, which the courts have branded an abusive practice. Our task, then, is to determine whether there was at least an "arguable basis" for the court's exercising jurisdiction to accord McClure a release.

251 B.R. at 702.

The record before the Court demonstrates such an arguable basis. In the bankruptcy context, the concept of a "core proceeding" is given a broad interpretation, with matters related to the administration and distribution of a bankrupt's property among the most obvious "core" functions. See In re U.S. Lines, Inc., 197 F.3d 631, 636-37 (2d Cir. 1999). In addition, matters involving relief between two nondebtors may fall under a bankruptcy court's "related to" jurisdiction. See In re Arrowmill Development Corp., 211 B.R. 497, 502 (Bankr. D.N.J. 1997); see 28 U.S.C. § 1334(b). The Second Circuit has noted: "In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan." In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2d Cir. 1992). Accordingly, Judge Brown correctly concluded that CVPS has not met its burden of demonstrating that Judge

Conrad's actions constituted a usurpation of power. It is not entitled, at this late date, to attack or appeal the Bankruptcy Court's 1997 judgment and injunction pursuant to Fed. R. Civ. P. 60(b)(4).

The judgment of the Bankruptcy Court is AFFIRMED.

SO ORDERED.

Dated at Brattleboro, Vermont, this 3RD day of October, 2002.

J. Garvan Murtha
United States District Judge

United States District Court

District of Vermont

CENTRAL VERMONT PUBLIC SERVICE CORPORATION,

Appellant,

v.

HAROLD AND EDITH HERBERT,

Appellees.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 1:02-CV-187

_____**Jury Verdict.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__**Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Memorandum of Decision (Paper No. 9) filed October 3, 2002, the judgment of the Bankruptcy Court is AFFIRMED.

Date: October 3, 2002

RICHARD PAUL WASKO
Clerk

(By) Deputy Clerk

JUDGMENT ENTERED ON DOCKET
DATE: 10/3/02

AO 72A
(Rev.8/82)

RICHARD PAUL WASKO
CLERK

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF VERMONT
FEDERAL BUILDING
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Civil Action No. 1:02-cv-187 Date October 3, 2002

Central Vermont Public Service Corporation vs. Harold and Edith Herbert

NOTICE TO LITIGANTS

If you wish to appeal the enclosed judgment or order, you must file a Notice of Appeal within 30 days after date of the entry of the judgment or order appealed from (or 60 days if the United States or an officer or agency of the United States is a party). Fed.R.App.P. 4(a)(1). The fee for filing an appeal is $105.00.

If you wish to appeal but are unable to file your Notice of Appeal within 30 days [or 60 days if applicable] after the date of entry shown on line 2 below, then you have an additional 30 days to file a Motion for Extension of Time. The Motion for Extension of Time **must** be filed within the additional 30 days after the date on line 3 below. Every Motion for Extension of Time must contain an explanation which demonstrates "good cause" or "excusable neglect" for failure to file the Notice of Appeal within the time limit required. Fed.R.App.P. 4(a)(5).

PLEASE TAKE NOTICE

1. Judgment or Order filed — October 3, 2002

2. Date of Entry of Judgment or Order on the docket of this court — October 3, 2002

3. Notice of Appeal **MUST** be filed on or before — November 4, 2002

Deputy Clerk