UNPUBLISHED OPINION

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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re	)	Bankruptcy Case No. 86C-02732
	)	
CFS FOX RIVER, LTD.,	)	Chapter 11
	)	
Debtor.	)	MEMORANDUM OPINION

This matter comes before the Court on two motions by secured creditors for post-dismissal relief: (1) a motion by Consolidated Partners, Ltd. for sanctions, allowance of superpriority and administrative claims, or in the alternative motion to modify order dismissing case; and (2) a motion by Zion's First National Bank ("Zion's") for modification of order dismissing case and for sanctions. The Court commenced a hearing on these matters on February 26, 1987. At that hearing, the Court took some testimony, and then heard the arguments of counsel regarding whether this Court has jurisdiction to hear these matters and to grant the movants the relief they seek, as well as the propriety of the Court entertaining these motions. The Court then continued this matter without date and took these preliminary issues under advisement. For the reasons set forth herein, the Court concludes that it is unadvisable for the Court to consider these motions and they accordingly will be denied.

FACTUAL BACKGROUND

In March of 1984 Zion's was appointed Indenture Trustee for the benefit of certain individuals and entities who received promissory notes of the debtor. As security for the notes, the debtor assigned its interest in certain subscription notes which it had received from its limited partners upon the formation of the partnership. Zion's alleges in its motion that the debtor has collected a substantial portion of the proceeds of the subscription notes which should have been paid to Zion's. In order to collect these proceeds, Zion's filed an action in state court against the debtor and its general partner.

Consolidated Partners is the holder of a deed of trust in an apartment complex which the debtor operates in Marietta, Georgia. It had scheduled a foreclosure sale of the property for July 1, 1986.

The debtor filed its chapter 11 petition on June 30, 1986. On July 30, 1986, Consolidated Partners filed its notice, pursuant to § 546(b) of the Bankruptcy Code, asserting an interest in the rents from the apartment complex. On August 7, 1986 a meeting of creditors was scheduled, pursuant to § 341 of the Code. Since the debtor had not timely filed its bankruptcy

schedules and statement of affairs, the hearing officer expressed his intent to have the case dismissed under this Court's Standing Order No. 19.[1]

Pursuant to the procedure set forth in that standing order, Zion's filed an objection on the ground that dismissal would not be in the best interest of creditors and that the case should be converted to one under chapter 7 or that a chapter 11 trustee

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[1] Standing Order 19, issued by this Court in March 1985 provides in part:

> it is ORDERED that a voluntary case shall be dismissed where:
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> . . .
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> 3. the Statement of Affairs, Schedules . . . are not timely filed.
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> . . .
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> The resulting Order of Dismissal shall be issued without a hearing, except as provided below, and the Clerk of the Court is directed to prepare and enter the same. . . .
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> If, at the Meeting of Creditors, any party-in-interest objects to dismissal . . . said dismissal shall be stayed. The objecting party shall set a hearing and give notice to the debtor, the debtor's attorney, the trustee, and any other party-in-interest appearing at the Meeting of Creditors. If no hearing on the objection is held within ten (10) days after the Meeting of Creditors, the Clerk of the Court is directed to enter the order of dismissal unless the [C]ourt orders otherwise.

should be appointed. However, at the time of the hearing on its objection, Zion's requested that the matter be continued without date.

On September 10, 1986, Consolidated Partners filed a series of motions: (1) a motion for relief from the automatic stay; (2) a motion to dismiss the case with prejudice; (3) a motion for an accounting relating to its cash collateral; and (4) a motion for an order prohibiting the use of cash collateral. A hearing was held on those motions on reduced notice time. As a result of that hearing, Consolidated Partners was granted relief from the automatic stay and the debtor was ordered to file its statement and schedules within 15 days. The Court further ordered that if the debtor failed to do so, its case would be dismissed with prejudice to refiling for a period of 180 days. The Court made no ruling regarding the use of cash collateral.

On September 30, 1986, the debtor and Consolidated Partners entered into a stipulation regarding the use of cash collateral, which forms much of the basis of the motion presently before the Court. That stipulation provides that rents were to be deposited in a segregated account and that the debtor could use this cash collateral in connection with the operation and management of the property. The debtor thereby granted Consolidated Partners a superpriority administrative expense, pursuant to § 507(b), for the funds so expended after September 17, 1986.

The stipulation also contains certain accounting and supervisory provisions. The last paragraph of the stipulation provides:

> 9. If the Debtor's case is dismissed prior to the expiration of the cash collateral authorization granted hereby, the Debtor shall maintain accounts as set forth in paragraphs 3 and 6 of this stipulation, shall obtain approvals for payments as required by paragraph 4 of this stipulation, and shall account to Consolidated Partners as required by paragraph 5 of this stipulation.

Since dismissal of this case was imminent pursuant to the Court's prior order, a proposed order for approval of the stipulation was submitted to the Court on an ex parte basis. The order was executed October 19, 1986.[2] This case was dismissed on October 24, 1986 for failure to file statement of affairs and schedules of assets and liabilities.

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2 The order executed by the Court contains this additional language:

> if the Debtor's case is dismissed during the period in which the Stipulation as approved by this Order remains in effect, the Debtor shall comply with requirements under the Stipulation regarding maintaining accounts, obtaining approval for payments, and regarding accounting to Consolidated Partners.

This appears to be an affirmative order of the Court which Consolidated Partners is urging the Court to enforce under § 105. However, in light of the manner in which the stipulation and order were presented to it, and the lack of general notice, the Court concludes that this language must be construed as only specific approval by the Court of the last paragraph of the stipulation between the parties.

In its present motion Consolidated Partners alleges that the debtor has violated the terms of the stipulation and it seeks the following relief:

(1) Sanctions against the debtor "such as granting a superpriority in favor of Consolidated Partners for all cash collateral expended in the operation of the Property";

(2) Ordering payment to Consolidated Partners of a super-priority claim for moneys expended between September 17, 1986 and October 10, 1986 "pursuant to the Cash Collateral Stipulation and Order approving the Cash Collateral Stipulation";

(3) Ordering payment of Consolidated Partners' administrative claim in the amount of $149,793.00; and

(4) Requiring the debtor to remit to Consolidated Partners surplus rent which it has collected.

Zion's has requested similar relief in its motions.

I. POST-DISCHARGE BANKRUPTCY RELIEF

Portions of the relief prayed for by the parties are pursuant to bankruptcy concepts which arise exclusively under the Bankruptcy Code. Upon dismissal, the Court believes those legal concepts, rights, and powers are no longer operative.

Chapter 11 of the Bankruptcy Code provides for an orderly repayment of all or part of debtor's obligations through a court-confirmed plan of reorganization. As part of that process, the

Code provides for prioritized payment of claims of administration. 11 U.S.C. §§ 503, 507, 1129(a)(9). Generally those claims are allowed and paid on a pro rata basis. See, In re American Resources Management Corp., 51 B.R. 713 (Bkrtcy. D. Utah 1985); In re IML Freight, Inc., 52 B.R. 124 (Bkrtcy. D. Utah 1985). However, in certain defined instances, the Code provides for the payment of certain administrative claims ahead of all others. See, 11 U.S.C. §§ 364(c)(1); 364(d); and 507(b). Likewise, the Code under § 363(a) and § 363(c)(2) gives preferential protection to a secured creditor's "cash collateral" as that term is defined there.

Based on these provisions, Consolidated Partners has asked this Court to order the debtor to pay its "administrative claim" and even to grant it a "superpriority" claim for the "cash collateral" which was improperly expended during the administration of the case. Consolidated Partners' request misconstrues the nature of these concepts and the effect of the dismissal of the bankruptcy case.

Section 349 of the Bankruptcy Code governs the effect of a dismissal. That section provides in part:

> (b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title--
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> (1) reinstates--
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> (A) any proceeding or custodianship superseded under section 543 of this title;

> (B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
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> (C) any lien voided under section 506(d) of this tile;
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> (2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and
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> (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

The purpose of this section is clearly set forth in the Legislative History:

> Subsection (b) specifies that the dismissal reinstates proceedings or custodianships that were superseded by the bankruptcy case, reinstates avoided transfers, reinstates voided liens, vacates any order, judgment, or transfer ordered as a result of the avoidance of a transfer, and revests the property of the estate in the entity in which the property was vested at the commencement of the case. The court is permitted to order a different result for cause. The basic purpose of the subsection is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case.

House Report No. 95-595, 95th Cong., 1st Sess. 337-38 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 48-9 (1978).

However, as noted by Consolidated Partners, the Court "for cause may order otherwise." The Legislative History recognizes this exception to the general rule, and states that "[w]here there is a question over the scope of the subsection, the court will make the appropriate orders to protect rights acquired in reliance on the bankruptcy case." Ibid.

The Court concludes in this case, however, that to "order otherwise" in the manner requested by Consolidated Partners would have the effect of turning the statute on its head. A superpriority administrative expense is a concept which penetrates the heart of the reorganization process. The Code grants priority treatment to those who are willing to, or required to, deal with the debtor as it seeks rehabilitation under the bankruptcy system. It would be incongruous to allow this movant to successfully seek dismissal of the bankruptcy case while allowing it nonetheless to retain those specific rights and powers under the Bankruptcy Code which were designed to protect and compensate creditors during the pendency of the operation of the automatic stay. Such relief is as inappropriate as granting a debtor's motion to dismiss its case while simultaneously maintaining the effect of the automatic stay. Consolidated Partners has sought its remedy of dismissal and must now look to its rights under non-bankruptcy law for further relief.

Notwithstanding § 349 and the foregoing analysis, Consolidated Partners argues that the Court has "inherent power to award administrative claims" and that it has "continuing jurisdiction over proceedings arising in bankruptcy cases." It has cited four cases to the Court in support of those propositions. Beneficial Trust Deeds v. Franklin (In re Franklin), 802 F.2d 324 (9th Cir. 1986); In re Bienert, 48 B.R. 326 (N.D. Iowa 1985); Wesley Medical Center v. Wallace (In re Wallace), 46 B.R. 802 (W.D. Mo. 1984); Dahlquist v. First National Bank in Sioux City, Iowa (In re Dahlquist), 751 F.2d 295 (8th Cir. 1985). The Court has reviewed this authority but does not believe it supports the position asserted by the movants herein.

In Beneficial Trust Deeds v. Franklin, supra, the court of appeals distinguished an earlier opinion of that court in a manner in which, in the opinion of this Court, correctly sets forth the parameters of the "inherent power" of the bankruptcy court to construe and enforce orders following dismissal of the underlying bankruptcy case. The case involved a debtor who had undertaken 5 bankruptcy filings within an 18 month period of time. Beneficial Trust entered into an agreement with the debtor in the second case that the stay would be lifted and that this relief from the stay would be "effective as against any subsequent filings." The agreement was approved by the Court,

although the order was entered after the second petition was dismissed, the debtors had filed their third petition, and the foreclosure sale had been conducted. Beneficial Trust then filed an ex parte application in bankruptcy court to determine the validity of their foreclosure sale. The bankruptcy judge ruled that, in light of the stipulation, the automatic stay was not imposed upon the debtor's third bankruptcy filing. On appeal, the debtors argued that the bankruptcy court did not have jurisdiction to determine the validity of the stipulation and the subsequent foreclosure sale since the second petition had been dismissed. In rejecting that argument, the Court noted:

> Simply put, bankruptcy courts must retain jurisdiction to construe their own orders if they are to be capable of monitoring whether those orders are ultimately executed in the intended manner. Requests for bankruptcy courts to construe their own orders must be considered to arise under title 11 if the policies underlying the Code are to be effectively implemented.

802 F.2d at 326. The court then distinguished an earlier opinion of the 9th Circuit, upon which the debtors had relied.

> [Armel Laminates, Inc. v. Lomas & Nettleton Co. (In re Income Property Builders, Inc.), 699 F.2d 963 (9th Cir. 1982)], the debtors did not seek an interpretation of a prior order of the bankruptcy court but instead sought new relief from the bankruptcy court independent of its prior rulings, relief in the nature of a new stay that could only be granted while a bankruptcy case was pending. There was no underlying bankruptcy case in Income Properties so there could be no new relief. In this case, Beneficial Trust seeks no new relief that requires the reopening of

> the underlying bankruptcy proceeding. It seeks only an interpretation of the bankruptcy court's prior order.

802 F.2d at 327 (emphasis supplied).

The relief sought by the movants goes far beyond the power contemplated in Franklin simply to construe prior orders. Consolidated Partners has not asked the Court to construe the meaning of the order of dismissal (or even the order approving the stipulation), in order that it might pursue its remedies in another proceeding. Rather the movants seek new relief in the form of a money judgment against the former debtor. That is the type of new relief which the 9th Circuit in Income Properties held was unavailable post-dismissal.

The second case cited by the movants is In re Bienert, supra. In that case, prior to dismissal, and a part of the dismissal proceedings, the parties had agreed that the debtor would make an assignment of certain PIK program payments and that the court would then dismiss the chapter 11 case. In that context the court found that it had the inherent power to enforce the settlement agreement. Again, this case is distinguishable from the motions which the movants are asking this Court to entertain. In Bienert, the motions which the court was willing to entertain post-confirmation involved the settlement for dismissal per se. It was inherent in the dismissal itself, not an order which was superseded by the dismissal. Absent the

settlement in that case, there would have been no dismissal. This analysis is apparent when one closely examines the cases which that court cited for the proposition that the court "had the inherent power (read jurisdiction) to enforce the settlement agreement . . . even when the case had been dismissed."[3] Both cases involved stipulations for dismissal of patent infringement actions. Bienert does not support movants' claim that the Court possesses inherent power to grant them new affirmative relief.

Wesley Medical Center v. Wallace (In re Wallace), supra, involved $25,000.00 which had been paid into the registry of the court. Jurisdiction in that case was based not on its jurisdiction of cases filed under title 11, but rather upon its exclusive jurisdiction of property "in its custody."

> [The payment of the $25,000.00 into the court registry] gave the court jurisdiction to determine the proper disposition of the monies which had been paid into its custody. A court of equity, such as the bankruptcy court, always has jurisdiction to determine the proper recipients of a fund of money in its custody.

46 B.R. at 804. There is no assertion in the present case that the Court has property in its custody which would extend its jurisdiction in this case.

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3 48 B.R. at 328. See, Bergstrom v. Sears, Roebuck & Co., 532 F.Supp. 923, 934 (D. Minn. 1982); Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1371 (6th Cir. 1976), cert. denied, 429 U.S. 862 (1976).

The last case cited by Consolidated Partners is Dahlquist v. First National Bank in Sioux City, Iowa (In re Dahlquist), supra. That case involved interim compensation for the debtors' attorneys. The bankruptcy court approved their fees. The bank appealed and while the appeal was pending the bankruptcy case was dismissed. The court of appeals ruled that the dismissal did not moot the appeal. In distinguishing its ruling from an earlier case in which it held as moot an appeal of a cash collateral order, the court of appeals stated:

> [4] the principle which we find operative in these cases and others is this: while the dismissal of a bankruptcy action indicates discontinuation of the attempt to restructure the debtor's financial affairs under the auspices of a federal court, it does not necessarily moot all issues collateral or ancillary to the bankruptcy proceedings. Dismissal of the underlying bankruptcy proceeding may indicate that no case or controversy remains with respect to issues directly involving the reorganization of the estate, but it does not necessarily indicate that no controversy exists with respect to any collateral or ancillary issues.
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> In the instant appeal, no issue directly related to any decision by the Bankruptcy Court in reorganizing the estate is presented, such as the cash collateral order held by this Court in Dahlquist I to be moot. The only issue presented is that of reasonable compensation for the attorneys who represented the debtors. We believe the question of reasonable compensation as presented in this appeal is an ancillary

> matter and that it has not been rendered moot by the dismissal of the underlying bankruptcy proceeding.

751 F.2d at 298 (emphasis supplied).

It is not necessary for this Court to decide the outer parameters of those issues which "directly involve the reorganization of the estate" which, under the analysis of Dahlquist, would properly be the subject of continued jurisdiction following dismissal of the case. As noted previously, it is the conclusion of this Court that allowance of superpriority administrative claims arising from cash collateral issues is inherent in the reorganization process. Moreover, Dahlquist itself recognizes that cash collateral issues are not "ancillary matters" which would give rise to continuing jurisdiction.

As their final basis for continuing jurisdiction, the movants argue that the Court has inherent power to enforce its own orders. Once again, this argument misconstrues the necessary effect of an order of dismissal. During the process of the administration of a bankruptcy case the Court renders many decisions and issues numerous orders upon which parties are entitled to rely and which they may enforce. These include orders allowing and disallowing claims; orders setting aside certain liens and encumbrances; orders enjoining creditors from collection activities; orders regulating foreclosure proceedings;

orders requiring the debtor to submit reports, information and documents; orders requiring the debtor to submit to examination; and orders requiring the debtor to make interim adequate protection payments. However, an order dismissing the case is intended to supersede those orders, consistent with the objective of dismissal as set forth in § 349 and that section's Legislative History. Following dismissal, creditors are relegated, as far as practicable, to their remedies under non-bankruptcy law. Of course, as noted in the Franklin case, the Court has jurisdiction to construe the meaning and intent of its orders which have continued vitality after dismissal of the case.

II. RELIEF UNDER RULE 60(b)

Finally, the movants take the position that the Court may modify its order for relief from stay and dismissal under Federal Rule of Civil Procedure 60(b) and Bankruptcy Rule 9024. Consolidated Partners argues that by failing to comply with the cash collateral stipulation, the debtor has committed misconduct which would justify the Court "in abandoning and modifying its previous order in order to adjudicate cash collateral issues presently before the court."

Rule 9024 incorporates Federal Rule of Civil Procedure 60(b), with certain exceptions which are not germane to these proceedings. Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding 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); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Although the Court may well have jurisdiction to consider these motions, the Court believes it is inappropriate to do so. These movants have remedies under applicable state law. However, to the extent they seek relief which is not available under state law, those issues are mooted by the dismissal as set forth in Part I of this opinion.

Counsel for the debtor may file an appropriate order consistent herewith and in accordance with Local Rule 13.

DATED this 1 day of December, 1987.

BY THE COURT:

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE