

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

Holmes International, Inc.,

Case No. 91-12984

Debtor.

Chapter 11

**MEMORANDUM OPINION AND ORDER RE
MOTION TO REOPEN CASE**

The Court conducted a hearing on the Debtor's Motion to Reopen Case on February 14, 2001. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

On November 25, 1991, an involuntary Chapter 11 bankruptcy petition was filed against the debtor, Holmes International, Inc., ("Holmes"). At the time of this filing, Holmes was a manufacturer of towing equipment. In October 1992, Holmes' secured lenders, Congress Financial Corporation and First Tennessee Bank received relief from the automatic stay, repossessed, and foreclosed on all the debtor's assets. There were no other assets remaining in the case at that time. The case was dismissed on January 11, 1993.

On January 16, 2001, the debtor filed a "Motion to Reopen Case" under 11 U.S.C. § 350. As grounds for this motion, Holmes asserts that they have just discovered approximately \$22,579.00 in an annuity contract fund with Penn Mutual Life Insurance Company. The fund was property of the debtor during the pendency of its case. At the time Holmes' Chapter 11 case

was dismissed, the debtor's attorneys were owed in excess of \$27,932.19. The debtor requests that the case be reopened so that its attorneys may file a fee application and disbursement of the money in the annuity contract fund.

On February 9, 2001, the Commissioner of the Tennessee Department of Revenue, ("TDOR"), filed an objection to the motion to reopen. TDOR alleges that it never received notice of the debtor's Chapter 11 filing in 1991 and, as a result, did not file a claim in the case; however, TDOR does appear on the debtor's matrix. On September 27, 1993, TDOR recorded tax liens against the debtor in both Hamilton and Dyer counties.

II. CONCLUSIONS OF LAW

A. 11 U.S.C. § 350

The debtor in this case has filed a motion to reopen its previously-dismissed chapter 11 case under 11 U.S.C. § 350. Section 350(b) of Title 11 of the United States Code allows a court to reopen a case which was closed "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b); FED. R. BANKR. P. 5010. Under current caselaw, only those cases which are closed after being fully administered are entitled to being reopened under § 350(b). As the 9th Circuit Court of Appeals recognized in the case of *In re Income Property Builders, Inc.*, a case which is dismissed is fundamentally different from a case which is closed:

11 U.S.C. § 349, treating the effects of a bankruptcy, obviously contemplates that on dismissal a bankrupt is reinvested with the estate, subject to all encumbrances which existed prior to bankruptcy. After an order of dismissal, the debtor's debts and property are subject to the general laws, unaffected by bankruptcy concepts. After dismissal a debtor may file another petition for bankruptcy unless the initial petition was dismissed with prejudice.

On the other hand, a bankruptcy is normally closed after the bankruptcy

proceedings are completed. At that time the debts of the bankrupt are usually discharged and the proceeds of debtor's nonexempt assets divided among creditors. A bankruptcy is reopened under 11 U.S.C. § 350(b), not to restore the prebankruptcy status, but to continue the bankruptcy proceeding. The word "reopened" used in Section 350(b) obviously relates to the word "closed" used in the same section. In our opinion a case cannot be reopened unless it has been closed. An order dismissing a bankruptcy case accomplishes a completely different result than an order closing it would and is not an order closing. (Citations omitted).

Armel Laminates, Inc. v. Lomas & Nettleton Co. (In re Income Property Builders, Inc.), 699 F.2d 963, 965 (9th Cir. 1983). As the 9th Circuit's reasoning clearly points out, a case which is dismissed is not one which is fully administered and, thus, may not be reopened under § 350(b).¹

Although the debtor's case may not be "reopened" under § 350(b), the order of dismissal may be set aside pursuant to FED. R. BANKR. P. 9024. This rule incorporates Fed. R. Civ. P. 60 and provides that a party may receive relief from a "final judgment, order or proceeding" for several reasons, including:

- (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

¹In "Debtor's Attorneys' Response to Objection by the Tennessee Department of Revenue to Motion to Reopen Case," counsel for debtor alleges that the Seventh Circuit case of *Matter of Statistical Tabulating Corp., Inc.*, 60 F.3d 1286 (7th Cir. 1995) stands for the proposition that Chapter 11 dismissals are somehow different from those under Chapters 7 or 13. Insofar as the Seventh Circuit case deals with a bankruptcy case which had a pending appeal in an adversary proceeding at the time the case was dismissed, the Court finds debtor's attorneys' reference to the case to be without merit.

equitable that the judgment should have prospective application; or,
(6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b)(1)-(6). Because none of the grounds in the first five subsections of Rule 60(b) has been alleged by the debtors nor proven at the hearing, the only subsection under which the debtor may succeed in having the order of dismissal set aside is subsection (b)(6).

In addressing what type of case is proper for Rule 60(b)(6) relief, the United States Supreme Court has held that only those situations involving “extraordinary circumstances” will be granted such relief. *Ackermann v. U.S.*, 304 U.S. 193, 199 (1950). The Sixth Circuit has been strict in applying this “extraordinary circumstances” test to Rule 60(b)(6) motions:

We have held that Rule 60(b)(6) should apply “only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule. . . . Courts, however, must apply subsection (b)(6) 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.”

Olley v. Henry & Wright Corp., 910 F.2d 357, 365 (6th Cir. 1990) (citations omitted); *See also Mallory v. Eyrich*, 922 F.2d 1273, 1280 (6th Cir. 1991); *Hopper v. Euclid Manor Nursing Home, Inc.* 867 F.2d 291, 294 (6th Cir. 1989); *Pierce v. United Mine Workers*, 770 F.2d 449, 451 (6th Cir. 1981), cert. denied, 474 U.S. 1104, 106 S.Ct. 890, 88 L.Ed. 925 (1986). These cases are unanimous in holding that something above and beyond those situations enumerated in Rule 60(b) must exist before a party may be successful in having their judgment set aside under the catch-all provision of subsection (b)(6). *Fuller v. Quire*, 916 F.2d 358 (6th Cir. 1990); *Hopper*, 867 F.2d at 294; *Critical Care Support Servs. v. United States (In re Critical Care Support Servs.)*, 236 B.R. 137 (E.D.N.Y. 1999) (“ . . . Rule 60(b)(6) may only be invoked when the

asserted grounds for relief are 'not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5).'

" quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)).

Unlike several other clauses of Rule 60, clause (b)(6) does not apply an absolute time limitation period to motions made pursuant to it. F.R.Civ.P. 60(b)(6). Clause (b)(6) only requires that such motions be made within a reasonable time. *Fuller*, 916 F.2d at 360; *In re A.H. Robins Co., Inc.*, 197 B.R. 488 (E.D. Va. 1994); *Woodhaven*, 139 B.R. at 751; *Olle*, 910 F.2d at 357. Whether or not a Rule 60(b)(6) motion is filed within a reasonable time will "ordinarily depend[] on the facts of a given case including the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling equitable relief." *Olle*, 910 F.2d at 365.

In the case at bar, the debtor has just discovered the money in the annuity contract fund. Although the case was dismissed eight years ago, the fund was property of the estate at the time the Chapter 11 case was active. Had the money been discovered at that time, it would have been available to pay the administrative expenses of the estate, of which the attorneys' fees are a part. No evidence was presented to the Court that there was a delay between discovery of the money and the filing of the motion. Additionally, the money which has now been discovered is in an annuity contract fund which served as a retirement benefit plan for the debtor's employees. The only reason the money has now been discovered is because all monies due and owing to the employees under the plan have now been paid and nothing further is owed to any employee under the retirement and pension plan.

Although TDOR has alleged they did not file a proof of claim in Holmes' case because they did not receive notice of the case, no proof of the lack of notice was presented at the hearing. The only evidence the Court can therefore rely on is the matrix which included TDOR. Despite this dispute over the notice, TDOR would likely not have received any money in the Holmes case. Pursuant to § 507 of the Bankruptcy Code, administrative expenses are paid before any other expenses of the estate, including secured and unsecured claims.

Finally, the Court finds that by granting the "Motion to Set Aside," Holmes' attorneys may be able to recover fees and expenses they incurred in representing the debtor throughout the pendency of its case. Holmes' attorneys represented the debtor for approximately thirteen months in a Chapter 11 case. Representing a Chapter 11 debtor involves substantial amounts of time and work. Consent orders were entered into, Motions to Lift the Automatic Stay were filed and heard, and collateral was surrendered. If the Court were to deny the debtor's motion and, therefore, foreclose the possibility of recovery of the attorneys' fees, it would be akin to stating that attorneys' roles in the bankruptcy process are inconsequential. That is a statement this Court is not eager to make.

III. ORDER

It is therefore **ORDERED** that the debtor's "Motion to Reopen Case" is **AMENDED** to "Motion to Set Aside the Dismissal."

It is **FURTHER ORDERED** that the debtor's "Motion to Set Aside the Dismissal" is **GRANTED**.

It is so ordered.

By the Court,

**G. Harvey Boswell
United States Bankruptcy Judge**

Date: March 15, 2001