

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

IN RE

Parks Farms, Inc.

CASE NUMBER 00-12468

Chapter 11

**MEMORANDUM OPINION AND ORDER RE
MOTION TO SET ASIDE AGREED ORDER AS TO CASE CREDIT &
MOTION TO COMPEL DEBTOR'S COMPLIANCE WITH AGREED ORDER**

The Court conducted a hearing on the Debtor's "Motion to Set Aside Agreed Order as to Case Credit" and Case Credit's "Motion to Compel Debtor's Compliance with Agreed Order" on March 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

Parks Farms, Inc., filed their Chapter 11 bankruptcy petition on July 14, 2000. On September 22, 2000, Case Credit Corporation ("Case Credit") filed a "Motion to Terminate Automatic Stay, to Compel Assumption or Rejection of Lease Agreements, to Compel Performance of Lease Obligations and for Adequate Protection" ("stay motion"). Case Credit is a creditor of the Debtor by virtue of eight (8) Retail Installment Contracts and six (6) Equipment Leases, all of which relate to farming equipment.

On October 11, 2000, a preliminary hearing was conducted on the stay motion. As reflected in the Interim Order that was entered on October 25, 2000, the Court ordered Debtor to supply Case Credit's counsel with a list of equipment which the Debtor proposed to retain and a proposal for adequate protection. The Order further instructed the Debtor to immediately surrender any equipment it did not propose to retain. The Debtor filed its Proposal of Adequate Protection as to Case Credit on October 31, 2000, in which the Debtor proposed to retain all of the equipment.

On December 20, 2000, an Agreed Order resolving Case Credit Corporation's stay motion ("Agreed Order") was approved and entered by the Court. Pursuant to the terms of the Agreed Order, the Debtor assumed the six (6) equipment leases. Case Credit, in turn, agreed to lease modifications which extended the terms of the leases, lowered the annual lease payments and adjusted the annual payment due dates to a date requested by the Debtor. The modified leases, as set forth in the Agreed Order, are as follows:

1. Account No. 0000144,00051 ("Lease No. 1"), lease of a Shelbourne Stripper Header: "Debtor's assumption of Lease No. 1 is approved subject to a consensual modification thereto whereunder Debtor shall make three (3) annual lease payments of \$3,989.39 each beginning January 31, 2001, and the Termination Value shall be \$3,989.39 with a new Termination Date of January 31, 2004."
2. Account No. 0000144,00050 ("Lease No. 2"), lease of various pieces of equipment: "Debtor's assumption of Lease No. 2 is approved subject to a consensual modification thereto whereunder Debtor shall make four (4) annual lease payments of \$159,068.91 each beginning January 31, 2001, and the Termination Value shall be \$159,068.91 with a new Termination Date of January 31, 2005."
3. Account No. 0000144,00052 ("Lease No. 3"), lease of various pieces of equipment: "Debtor's assumption of the Lease No. 3 is approved subject to a consensual modification thereto whereunder Debtor shall make four (4) annual lease payments of \$135,305.87 each beginning January 31, 2001, and the Termination Value shall be \$135,305.87 with a new Termination Date of January 31, 2005."
4. Account No. 0191750,0004 ("Lease No. 4"), lease of a 1433 Sunflower Disk Harrow: "Debtor's assumption of Lease No. 4 is approved subject to a consensual modification thereto whereunder Debtor shall make three (3) annual lease payments of \$5,069.13 each beginning January 31, 2001, and the Termination Value shall be \$5,069.13 with a new Termination Date of January 31, 2004."
5. Account No. 0000144,00056 ("Lease No. 5"), lease of two Case IH 4391T Power Units and one Case IH 4390T Power Unit: "Debtor's assumption of Lease No. 5 is approved subject to a consensual modification thereto whereunder Debtor shall make four (4) annual lease payments of \$4,516.69 each beginning January 31, 2001, and the Termination Value shall be \$4,516.69 with a new Termination Date of January 31, 2005."
6. Account No. 0253050,00003 ("Lease No. 6"), lease of two Case IH 1084 8-row Corn Heads: "Debtor's assumption of Lease No. 6 is approved subject to a consensual modification thereto whereunder Debtor shall make six (6) annual lease payments of

\$10,852.30 each beginning January 31, 2001, and the Termination Value shall be \$5,000.00 with a new Termination Date of June 21, 2006."

Also pursuant to the Agreed Order, Case Credit modified the Retail Installment Sale Contracts by extending the maturity date of the Contracts, lowering the annual payments and adjusting the annual payment due dates to a date requested by the Debtor. The Debtor consented to the terms and conditions of the modified contracts. The contracts, as set forth in the Agreed Order, are as follows:

1. Account No. 0000144,00040 ("Contract No. 1") secured by a Case IH 8950 Magnum Tractor: "Case Credit shall have a secured claim in the amount of \$55,864.45 to be paid at the rate of 9.75% per annum in four (4) annual installments of \$16,700.66 each beginning January 31, 2001."
2. Account No. 0000144,00048 ("Contract No. 2") secured by a Case IH 5240 Hi-Clear Maxxum: "Case Credit shall have a secured claim in the amount of \$27,976.43 to be paid at the rate of 10.25% per annum in five (5) annual installments of \$7,060.28 each beginning January 31, 2001."
3. Account No. 0000144,00049 ("Contract No. 3") secured by a 14P4A Scoop-All Scraper, two (2) Shelbourne-Reynolds RX721HC Strip Headers, and a Killbros Heavy Duty Trailer: "Case Credit shall have a secured claim in the amount of \$65,343.13 to be paid at the rate of 9.75% per annum in five (5) annual installments of \$16,343.13 each beginning January 1, 2001."
4. Account No. 0000144,00053 ("Contract No. 4") secured by an SP-C17 Miskin Dirtpan, a DMI Field Cultivator, 496 Disk Harrow, a 4700 CIH and 1010 JD Field Cultivator, a DMI Tigermate II, a Glenco Field Cultivator, an 875 25' Landoll Tilloll, and an 875 30' Landoll Tilloll: "Case Credit shall have a secured claim in the amount of \$79,295.08 to be paid at the rate of 9.25% per annum in six (6) annual installments of \$16,908.88 each beginning January 31, 2001."
5. Account No. 0000144,00054 ("Contract No. 5") secured by a 2008 Landoll Cultivator and a 390 Killbros Grain Wagon: "Case Credit shall have a secured claim in the amount of \$19,740.80 to be paid at the rate of 9.75% per annum in five (5) annual installments of \$4,930.03 each beginning January 31, 2001."
6. Account No. 0191750,0006 ("Contract No. 6") secured by a Modern Flow 364 Sprayer: "Case Credit shall have a secured claim in the amount of \$149,737.36 to be paid at the rate of 9.00% per annum in five (5) annual installments of \$36,611.58 each beginning January 31, 2001."
7. Account No. 0000144,00055 ("Contract No. 7") secured by an SR 20M Rhino Mower: "Case Credit shall have a secured claim in the amount of \$11,186.33 to be paid

at the rate of 10.5% per annum in six (6) annual installments of \$2,474.58 each beginning January 31, 2001."

8. Account No. 0000144,00057 ("Contract No. 8") secured by a 2155 Cotton Picker and a 2055 Cotton Picker: "Case Credit shall have a secured claim in the amount of \$150,896.21 to be paid at the rate of 9.5% per annum in six (6) annual installments of \$32,385.97 each beginning January 31, 2001."

The Agreed Order further provided that the Debtor was to maintain adequate physical damage insurance on the collateral at all times and to maintain both liability and adequate physical damage insurance on the leased equipment at all times. Paragraph 19 of the Agreed Order set forth the following:

Should Debtor default as to any of the terms and conditions of this Agreed Order, or the terms of the original Contracts or Leases subject to the modifications made herein, Case Credit may give written notice to Debtor and Debtor's undersigned counsel whereupon Debtor shall have fifteen (15) days to cure the default(s) or the automatic stay shall be terminated as to Case Credit, its Collateral, the Leases, the Leased Equipment and the proceeds thereof without further notice, hearing or order in which event Debtor shall voluntarily surrender the Collateral and Leased Equipment to Case Credit's designated representative.

During the pendency of Case Credit's stay motion, the Debtor filed a "Motion to Assume Lease Agreements with Case Credit" ("Debtor's Lease Motion) and a "Complaint to Determine if Indebtedness are [sic] Lease Agreements or Purchase Agreements" ("Debtor's Complaint"). Consistent with the December 20, 2000, Agreed Order, agreed orders were entered wherein Debtor's lease motion was deemed resolved by the Agreed Order and Debtor's complaint was dismissed with prejudice.

In its stay motion, Case Credit had raised lack of insurance as grounds for termination of the automatic stay. In the interim order, Debtor was required to provide proof of insurance to Case Credit. The Certificate of Insurance provided by Debtor's insurance agent in response to the Interim Order did not list all of the equipment and the equipment listed was not accurately described. By letter dated October 30, 2000, Case Credit's counsel sent a letter to Debtor's counsel (with a copy to Debtor's insurance agent) requesting proof of insurance as to all of the equipment and providing a detailed

description of all of the equipment. Subsequently, Case Credit's counsel was advised by Debtor's insurance agent that Debtor's coverage had been canceled. On December 11, 2000, and December 13, 2000, Case Credit's counsel sent letters to Debtor's counsel and Debtor requesting proof of insurance. On December 20, 2000, Case Credit's counsel served Debtor and Debtor's counsel with a copy of the Agreed Order. At that time, Case Credit gave written notice to Debtor and Debtor's counsel that Debtor was in default of the provisions of the Agreed Order requiring Debtor to maintain insurance coverage on the collateral and leased equipment. On January 18, 2001, Case Credit's counsel sent a letter to Debtor and Debtor's counsel indicating that Debtor had failed to timely cure its insurance default under the Agreed Order and demanding surrender of the Collateral and Leased Equipment. Debtor refused to surrender the equipment as required by the Agreed Order.

Under the Agreed Order, Debtor was to make its first annual payment under the modified contracts and modified leases on January 31, 2001. When Debtor failed to make the annual payments, Debtor's counsel sent a letter to Debtor and Debtor's counsel giving notice of default and an opportunity to cure. Debtor failed to timely cure its payments.

On January 10, 2001, the Debtor filed a "Motion to Set Aside" the Agreed Order resolving Case's motion for relief from the automatic stay. At the hearing on its motion, the Debtor stated to the Court that it had entered into the agreed order with Case Credit with the expectation that it would be able to make all the payments to Case Credit from money it would receive from its crops. That money did not come in as expected and the Debtor is now unable to make the payments to Case Credit.

On March 5, 2001, Case Credit filed a "Motion to Compel Debtor's Compliance with Agreed Order." As of the March 14th hearing, Park Farms had not cured any of the defaults nor had it

surrendered any of the collateral to Case. Park Farms also has not provided Case Credit with proof that the collateral and leased equipment is fully insured.

On March 20, 2001, Parks Farms filed a "Proposal of Settlement Regarding the Debtors Motion to Set Aside Prior Agreed Order." With regard to the equipment leases, the Debtor proposes to amend the first payment due dates for leases 1 and 5 from January 31, 2001, to March 28, 2001. The Debtor proposes to reject leases 2, 3, 4, and 6. With regard to the Retail Installment Contracts, the debtor proposes to surrender the collateral for contracts 5, 6 and 8 and to honor contracts 1, 2, 3, 4 and 7, as amended, as follows:

- Contract No. 1: Amend payment schedule from four annual payments to one lump sum payment to be made by March 28, 2001.
- Contract No. 2: Amend first payment due date from January 31, 2001, to March 28, 2001.
- Contract No. 3: Surrender all equipment in connection with the note with the exception of the 14P4A Scoop-All Scraper. Amend first payment due date from January 31, 2001, to March 28, 2001.
- Contract No. 4: Surrender all collateral in connection with the note with the exception of the DMI Field Cultivator.
- Contract No. 7: Amend first payment due date from January 31, 2001, to March 28, 2001.

II. CONCLUSIONS OF LAW

The Debtor in this case has filed a "Motion to Set Aside the Agreed Order as to Case Credit." Pursuant to 28 U.S.C. § 158 and FED. R. BANKR. P. 8002, a party has ten days after the date of entry of an order to appeal. If a party fails to appeal an order within this ten day period, the order becomes final and the party must file a "Motion to 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 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). In the case at bar, the Debtor did not allege any of these grounds specifically. The only justification offered by the Debtor for setting aside the agreed order was that it was not going to have the money to make the January 31, 2001, payments to Case Credit. Given this reasoning, the Court will address the Debtor's motion under Rule 60(b)(1) and (2).

At the time of entering into the agreed order with Case Credit on December 20, 2000, the Debtor apparently anticipated having \$450,000.00 on hand to make the January 31, 2001, payments to Case Credit. Three weeks after entering into the order, the Debtor filed its motion to set aside and alleged that the money was not going to come in from its crops as expected.

The Court can appreciate the difficulties which face farmers. Oftentimes a harvest does not yield the profits that were so desperately hoped for and needed. As a result, money that a farmer was depending on to make payments to creditors is simply not there. The Court understands this reality. What the Court does not understand, however, is how a Debtor can so poorly misjudge what their finances will be in three weeks time. On December 20, 2000, Parks Farms anticipated having nearly half-a-million dollars by the end of January with which to pay Case Credit for farming equipment. Three weeks after this agreement was entered into, Parks Farms "suddenly" realized its farming operation was not going to bring in enough money to make the payments. Mind you, during this time Parks Farms had remained in possession of all of the collateral and had been presumably using it in its farming operations.

It is also interesting to note that by the time Parks Farms filed the motion to set aside, it had received notice from Case Credit that it was in default of the agreed order by failing to provide proof of insurance on the equipment. Although the agreed order provided that the automatic stay would be lifted if a default was not cured within fifteen days, Parks Farms has still not provided Case Credit with proof of insurance nor has it made any payments to Case Credit.

The Sixth Circuit Court of Appeals has held that:

Rule 60 was not intended to relieve counsel of the consequences of decisions deliberately made, although subsequent events revealed that such decisions were unwise.

Federal's, Inc. v. Edmonton Investment Co., 555 F.2d 577, 583 (6th Cir. 1977). In the case at bar, the Debtor made two deliberate decisions on December 20, 2000: (1) to keep various pieces of farming equipment; and (2) to pay Case Credit approximately \$450,000.00 on January 10, 2001, for the equipment. By January 10, 2001, the Debtor realized this had been an unwise decision. Had a catastrophic event, such as a tornado or blizzard, occurred between December 20, 2000, and January 10, 2001, or had the time between entering into the agreed order and filing the motion to set aside been greater than three weeks, the Court may be willing to believe that the agreed order should be set aside pursuant to Rule 60(b)(1) or (2). No such event occurred in this case nor has the Debtor offered any other proof which would support a setting aside of the agreed order based on Rule 60(b)(1) or (2). The Debtor simply stated that by January 10, 2001, it realized it was not going to have the money to make the payments. As a result of this lack of proof, the Court finds that the agreed order may not be set aside pursuant to Rule 60(b)(1) or (2).¹

¹Because the debtor's motion to set aside does not qualify under Rule 60(b)(1) or (2), the only other possible subsection under which the Debtor may succeed in having the agreed order set aside is Rule 60(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

Because the December 20, 2000, agreed order cannot be set aside, Case Credit's motion to compel debtor's compliance is granted. The Debtor is hereby compelled to perform its obligations as set forth in the agreed order immediately. By entering into the agreed order on December 20, 2000, the Debtor assumed all six of the equipment leases and is obligated to perform under their terms as set forth in the agreed order. The Debtor is also obligated on the retail installment contracts and is compelled to perform under their terms as set forth in the agreed order.

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)).

Because the Court has already found that the Debtor's assertion that it does not have the money to make the payments to Case Credit does not rise to the level of "mistake, inadvertence, surprise or excusable neglect" or "newly discovered evidence," the Court cannot grant the Debtor's motion under Rule 60(b)(6). If a reason does not rise to the level of (b)(1) or (2), it certainly cannot meet (b)(6)'s "above and beyond" standard. As a result, the Court holds that the December 20, 2000, agreed order between the Debtor and Case Credit cannot be set aside under Rule 60(b)(6) either.

III. ORDER

It is therefore **ORDERED** that the Motion to Set Aside Agreed Order as to Case Credit is **DENIED**.

It is **FURTHER ORDERED** that the Motion to Compel Debtor's Compliance with Agreed Order is **GRANTED**.

It is so ordered.

By the Court,

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

Date: April 3, 2001