

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

IN RE

Harvey Miller,

Case No. 00-13888

Debtor.

Chapter 11

**MEMORANDUM OPINION AND ORDER RE
(1) MOTION FOR RELIEF FROM ORDER ON SALE OF PROPERTY AND/OR FOR
RECONSIDERATION OF ALLOWED CLAIM FILED BY JANIECE WRIGHT and
(2) DEBTOR'S OBJECTION THERETO**

The Court conducted a hearing on Janiece Wright's Motion for Relief from Order on Sale of Property And/or For Reconsideration of Allowed Claim on May 30, 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.

On March 28, 2001, the parties in this matter entered into an agreed "Order on Motion to Sell Certain Property Free and Clear of All Liens" which provided for the sale of property at 633 Humboldt Road, Jackson, TN. Paragraph 2 of that order provides, in part, that "[t]he administrative expenses of Debtor's attorney fees may also be paid from the proceeds of the sale . . ." Mark L. Hayes signed the order as the representative of Janiece Wright. Michael T. Tabor signed the order as the representative of the debtor.

At all times during pendency of this case, Douglas Wilkerson and W. Lewis Jenkins have represented Janiece Wright. Mark L. Hayes is an associate of Wilkerson and Jenkins. Wilkerson and Jenkins were the attorneys who negotiated the March 28, 2001, order with Michael Tabor. According to them, the provision regarding Michael Tabor's attorney's fees was not agreed to during the negotiations. Because Mark Hayes was not involved in the negotiations, he was not aware of this addition by Tabor to the order; therefore, he mistakenly signed off on the order.

Federal Rule of Civil Procedure 60(b), made applicable to bankruptcy proceedings by

FED. R. BANKR. P. 9024, provides that a party may obtain relief from a final order for "(1) mistake, inadvertence, surprise, or excusable neglect; . . ." FED. R. CIV. P. 60(B). The Sixth Circuit has stated that Rule 60(b)(1) is:

"intended to provide relief to a party in only two instances: (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 judgement or order."

Cacevic v. City of Hazel Park, 226 F.3d 483, 490 (citing *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999).

In the case at bar, an associate of the attorneys who negotiated the March 28th order mistakenly signed off on the order. Had Wilkerson or Jenkins been available to sign the order, they would have noticed the addition of the provision for payment of attorney fees and would not have signed the order. The March 28th order was intended by the parties in this matter to be an agreement with regard to the entire issue of Janiece Wright's claim. If the debtor's attorney is allowed to collect his attorney's fees from the proceeds of the sale before Wright is paid on her claim, the March 28th order will nullify the entirety of the agreement into which Wright's attorneys entered. This Court finds that these facts satisfy FED. R. CIV. P. 60(b)(1) and the Sixth Circuit's interpretation thereof. The March 28th order will be set aside. The parties may enter into a new "Order on Motion to Sell" the property on Humboldt Road. Said order may provide for payment of attorney's fees only after Janiece Wright is paid.

ORDER

It is therefore **ORDERED** that the March 28, 2001, "Order on Motion to Sell Certain Property Free and Clear of All Liens" is **SET ASIDE**.

It is so ordered.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: June 22, 2001