

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

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**IN RE**

**Janet A. Williams**

**Case No. 00-14911**

**Chapter 11**

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**MEMORANDUM OPINION AND ORDER  
(1) DENYING DEBTOR'S MOTION TO APPOINT DEBTOR IN POSSESSION and  
(2) DENYING DEBTOR'S MOTION TO SET ASIDE ORDER APPOINTING TRUSTEE AND  
ORDER APPROVING SALE OF REAL PROPERTY**

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The Court conducted a hearing pursuant to FED. R. BANKR. P. 9014 on the following matters on April 2, 2002:

1. Debtor's "Motion to Appoint Debtor in Possession;"
2. "Objection to Debtor's Motion to Appoint Debtor in Possession" filed by the United States Trustee;
3. "Objection to Debtor's Motion to Appoint Debtor in Possession" filed by B & H Investments, Inc.;
4. "Objection to Debtor's Motion to Appoint Debtor in Possession" filed by Trustee Marianna Williams;
5. Debtor's "Motion to Set Aside Order Appointing Trustee and Order Approving Sale of Real Property;"
6. "Objection to Debtor's Motion to Set Aside Order Appointing Trustee and Order Approving Sale of Real Property" filed by United States Trustee;
7. "Objection to Debtor's Motion to Set Aside Order Appointing Trustee and Order Approving Sale of Real Property" filed by B & H Investments, Inc.;
8. Debtor's "Motion to Use Cash Collateral;"
9. "Objection to Debtor's Motion to Use Cash Collateral" filed by the United States Trustee;
10. "Objection to Debtor's Motion to Use Cash Collateral" filed by B & H Investments, Inc.;
11. Debtor's "Motion to Allow Filing of Disclosure Statement and Plan of Reorganization by Debtor in Possession;"
12. "Objection to Motion to Allow Filing of Disclosure Statement and Plan of Reorganization by Debtor in Possession" filed by Trustee Marianna Williams;
13. "Objection to Motion to Allow Filing of Disclosure Statement and Plan of Reorganization by Debtor in Possession" filed by B & H Investments, Inc.;

Resolution of these matters is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

### **FINDINGS OF FACT**

Janet Williams, (“debtor” or “Janet Williams”), originally filed a chapter 13 petition for bankruptcy relief on December 27, 2000, as a pro se debtor. Her case was converted to chapter 11 on February 7, 2001. Based partially on the debtor’s pro se status, the United States Trustee filed a “Motion for the Appointment of Chapter 11 Trustee” on March 5, 2001. The Court granted that motion on March 14, 2001, and Marianna Williams, (“trustee” or “Marianna Williams”), was appointed as the chapter 11 trustee.

On November 15, 2001, Marianna Williams filed an application to sell approximately 20 acres of land on Cooper Anderson Road in Jackson to King Bradley for \$3,300.00 per acre. On December 13, 2001, Marianna Williams filed a Disclosure Statement and a Proposed Chapter 11 Plan of Reorganization. The Court granted the trustee’s motion to sell on January 14, 2002, and authorized Marianna Williams to pay a 10% commission to the real estate broker and one-half of the survey and closing costs. The disclosure statement and plan filed by the trustee in December 2001 are still pending before the Court.

On January 9, 2003, Janet Williams filed (1) an application to employ William Cohn as her attorney, (2) a Chapter 11 Proposed Plan of Reorganization, (3) a Disclosure Statement, and (4) a Motion to Use Cash Collateral. The Court granted Janet Williams’ application to employ William Cohn on January 15, 2003.<sup>1</sup> On January 21, 2003, Janet Williams filed (1) a “Motion to Appoint Debtor in Possession,, (2) a “Motion to Set Aside Order Appointing Trustee, Order Approving Sale of Real Property and other related orders,” and (3) a “Motion to Allow Filing of Disclosure Statement and Plan of Reorganization by Debtor in Possession.” The United States Trustee, B & H Investments and Marianna Williams all filed objections to these motions.

At the hearing on the Debtor’s “Motion to Set Aside Order Appointing Trustee, Order Approving Sale of Real Property and other related orders,” the debtor alleged that it would be more profitable to place a mobile home park on the property than it would be to sell the property to King Bradley. Currently, there are five single-wide mobile homes and one double-wide mobile home on the property.

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<sup>1</sup>The United States Trustee filed an objection to this order on January 29, 2003. As a result, an “Amended Order Authorizing Employment of Attorney for Debtor” was filed in this case on April 2, 2003. Pursuant to the order, “Mr. Cohn shall cause an affidavit of Anthony Nixon to be filed wherein Mr. Nixon states that he does not now and will not seek in the future to be treated as a creditor of the above-referenced bankruptcy estate.” Said affidavit was to be filed within 10 days of April 2, 2003. In the event that the parties did not file such an affidavit, the order provided that the Court would reset the matter to consider the U.S. Trustee’s objection to the order authorizing Mr. Cohn’s employment. Said affidavit was never filed, therefore, the Court will reset the U.S. Trustee’s objection to the order authorizing Mr. Cohn’s employment.

As support for her argument that a mobile home park would be more beneficial to the estate, the debtor submitted a letter from the Madison County Building Department stating that she had received all the required permits and had met all the zoning requirements for placing mobile homes on the property. Additionally, the debtor’s advisor, Anthony F. Nixon, testified that he would make improvements to the mobile homes and the property. Nixon also testified that he would assist the debtor with her chapter 11 plan payments. To date, the debtor has failed to make any payments to creditors during the entire pendency of her case.

To refute the debtor’s argument that the mobile home park would be more profitable, Humboldt Bank of Dyer submitted a March 31, 2003, letter addressed to the debtor from the City of Jackson planning commission. Attached to the letter is an opinion by the Jackson City Attorney regarding debtor’s use of the land. According to the city attorney’s opinion, the property at issue was annexed by the city on August 5, 1999. Since that time, the mobile homes currently on Janet Williams’ property have been in violation of the RS-1 (Single-Family Residential District) city ordinance. Although the city attorney opines that the mobile homes currently on the property could qualify as a legal nonconforming use, he concludes that the debtor would not be permitted to add any additional structures to the property. The city attorney also stated that Janet Williams’ current use of the property is unlawful.

## **II. CONCLUSIONS OF LAW**

### **A. Debtor’s Motion to Set Aside Order Appointing Trustee and Debtor’s Motion to Appoint Debtor in Possession**

Section 1104 of the Bankruptcy Code provides that “at any time after the commencement of the case but before confirmation of a plan, on request of a party in interest,” a Court may appoint a chapter 11 trustee. 11 U.S.C. § 1104(a). If a trustee is appointed, the debtor ceases to be a debtor-in-possession. Fed. R. Bankr. P. 2012(a). If, however, the court terminates the appointment of the trustee pursuant to 11 U.S.C. § 324(a), the debtor may once again be a debtor-in-possession. 9 Am. Jur. 2d Bankruptcy § 364.

Section 324(a) of the Bankruptcy Code provides that “[t]he court, after notice and a hearing, may remove a trustee, other than the United States trustee, or an examiner, for cause.” The term “for cause” is not defined by the Bankruptcy Code. As a result, courts must determine the meaning on a case by case basis. *In re Reed*, 178 B.R. 817, 821 (Bankr. D. Ariz. 1995). Courts faced with the task of so defining “for cause” have generally found that:

Causes for removal include situations in which the trustee is found to be incompetent or unwilling to perform the duties of a trustee; the trustee is not disinterested or holds an interest adverse to the estate; the trustee violates the fiduciary duty to the estate; and where the trustee is guilty of misconduct in office or personal misconduct.

3 Collier on Bankruptcy ¶ 324.02 (15<sup>th</sup> ed. revised 2003) (footnotes omitted). Typically, courts will not remove a trustee absent actual fraud or injury. *Id.*

In the case at bar, the debtor did not offer any proof that Marianna Williams is incompetent or unwilling to perform the duties of a trustee. The debtor did not offer any proof that Marianna Williams is disinterested, holds an interest adverse to the estate, or has violated a fiduciary duty to the chapter 11 estate. In fact, Janet Williams has not even alleged that Marianna Williams has committed an act which even comes close to satisfying § 324's “for cause” requirement. As a result, the Court has no other option but to deny the debtor’s motions.

#### **B. Debtor’s Motion to Set Aside Order Approving Sale of Real Property**

A party has ten days after the date of entry of an order to appeal. 28 U.S.C. § 158 and FED. R. BANKR. P. 8002. 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). Rule 60(b) attempts to balance the interest in stability of judgments (i.e., the policy of res judicata) with the interest in seeing that judgments not become instruments of oppression and fraud. In the Sixth Circuit, courts must apply Rule 60(b) "equitably and liberally . . . to achieve substantial justice." *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 844-45 (6<sup>th</sup> Cir. 1983). A decision to grant or deny a Rule 60(b) motion is within the discretion of the trial court. *See, for example, In re Roxford Foods, Inc.*, 12 F.3d 875 (9<sup>th</sup> Cir. 1993).

Because none of the grounds in the first five subsections of Rule 60(b) has been alleged by the debtor nor proven at the hearing, the only subsection under which Janet Williams may succeed in having the order approving the sale 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 (6<sup>th</sup> Cir. 1990) (citations omitted); *See also Mallory v. Eyrich*, 922 F.2d 1273, 1280 (6<sup>th</sup> Cir. 1991); *Hopper v. Euclid Manor Nursing Home, Inc.* 867 F.2d 291, 294 (6<sup>th</sup> Cir. 1989); *Pierce v. United Mine Workers*, 770 F.2d 449, 451 (6<sup>th</sup> 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).

In the case at bar, Janet Williams has alleged that the order approving the sale of the land should be set aside because her proposed use of the land would be more profitable to the estate than the trustee’s approved sale. The Court finds that such an allegation does not rise to the level of Rule 60(b)’s extraordinary circumstances. The evidence presented at the hearing in this matter was far from conclusive. The debtor offered a letter stating that her placement of mobile homes on the property was in compliance with the Madison County Building Department. The Humboldt Bank of Dyer offered a contradictory letter from the City of Jackson Planning Commission. Even if the debtor were correct in her allegation that making a mobile home park on the land would net more proceeds to the estate in the long run than the sale to King Bradley, the estate would have to expend resources to resolve the matter with the City Planning Commission. Such a path would certainly eat away at any additional monies the estate may (or may not) net from the development of the land.

**ORDER**

It is therefore **ORDERED** that:

1. The Debtor’s “Motion to Appoint Debtor in Possession” is **DENIED** and the objections thereto are **SUSTAINED**;
2. The Debtor’s “Motion to Set Aside Order Appointing Trustee and Order Approving Sale of Real Property” is **DENIED** and the various objections thereto are **SUSTAINED**;
3. The Debtor’s “Motion to Use Cash Collateral” and the various objections thereto are **MOOT**;
4. The Debtor’s “Motion to Allow Filing of Disclosure Statement and Plan of Reorganization by Debtor in Possession” and the various objections thereto are **MOOT**.

**IT IS SO ORDERED,**

**BY THE COURT,**

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**G. HARVEY BOSWELL**  
**United States Bankruptcy Judge**

**Date: June 3, 2003**

cc:

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