

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

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**IN RE**

**Joseph E. & Deborah C. Roberts,**

**Case No. 01-31968**

**Debtors**

**Chapter 11**

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**MEMORANDUM OPINION AND ORDER  
RE DEBTOR'S "MOTION TO SET ASIDE ORDER OF  
DISCHARGE OF CHAPTER 11 CASE"**

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The Court conducted a hearing pursuant to FED. R. BANKR. P. 9014 on the debtor's "Motion to Set Aside Order of Discharge" on September 16, 2003. Resolution of this 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**

The facts in this case are not in dispute. The debtors, Joseph and Deborah Roberts, ("Roberts" or "debtors") filed their chapter 11 petition on August 9, 2001.<sup>1</sup> Throughout the course of the case, the debtors filed a total of four proposed plans. The first plan was filed on October 10, 2001; a "revised" plan was filed on November 20, 2001; a second "revised plan" was filed on January 28, 2002; and, an "alternative to revised plan" was filed on February 21, 2002. The February 21, 2002, "alternative to revised plan" was confirmed on May 24, 2002. The debtors filed their final report on September 23, 2002. The Court issued a final decree and an order closing the case on September 26, 2002. The debtor's attorney filed an amended final report and account on September 30, 2002.

On February 10, 2003, the debtors filed a chapter 7 petition with the Court, case no. 03-22318. On June 24, 2003, the Roberts filed a motion to reopen the instant case, case no. 01-31968, and set aside the chapter 11 discharge. In their motion to reopen, the debtors asked the Court to dismiss this case or to convert it to chapter 7 in order for their subsequently filed chapter 7 case to proceed to discharge. The Court granted the debtors' motion to reopen this case on September 16, 2003. The Court took the debtors' motion to set aside the discharge under advisement on the same day.

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<sup>1</sup>On September 27, 2001, the Court issued an order granting joint administration of this case, case no. 01-31968, and case nos. 01-31967 and 01-34064.

## **II. CONCLUSIONS OF LAW**

Section § 727(a)(8) prohibits a debtor from receiving a discharge under chapter 7 of the Bankruptcy Code if the debtor has received a discharge under chapter 11 within the previous six years. 11 U.S.C. § 727(a)(8). Because of this prohibition, the Roberts must have their chapter 11 discharge in this case set aside in order to be eligible to receive a discharge under chapter 7. If the Court finds that such set aside is appropriate, the debtors will then be able to convert this case to chapter 7 pursuant to 11 U.S.C. § 1112(a).

In a chapter 11 case, confirmation of the plan acts as a discharge. 11 U.S.C. § 1141(d)(1); *In re Townsend*, 187 B.R., 230, 232 (Bankr. W.D. Tenn. 1995). As a result, the Court must set aside the final confirmation order in order to set aside the discharge. There are four possible ways for a court to set aside a final confirmation order:

1. Revocation of the order under 11 U.S.C. § 1144;
2. Modification of the plan under 11 U.S.C. § 1127(b);
3. Relief from the order under Fed. R. Bankr. P. 9024; or
4. Relief under § 105 of the Bankruptcy Code.

*Carter v. Peoples Bank and Trust Co. (In re BNW, Inc.)*, 201 B.R. 838, 844 (Bankr. S.D. Ala. 1996). Section 1144 of the Bankruptcy Code deals with situations in which the debtor procured their chapter 7 discharge through fraud. That is not at issue in this case. Section 1127(b) allows a debtor to modify their chapter 11 plan as long as it has not been substantially consummated.<sup>2</sup> Because the Roberts are not seeking to modify their plan, but are instead seeking to convert or dismiss the case, § 1127(b) is not applicable. The Court does find, however, that Fed. R. Bankr. P. 9024 provides an avenue for setting aside the confirmation order in this case.

FED. R. BANKR. P. 9024 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);

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<sup>2</sup>“Substantial consummation is an issue . . . only to the extent it allows (or prevents) modification of [a] plan. Section 1127(b) is the only place in the Code the term is used.” *Carter*, 201 B.R. at 845. Whether or not the debtor’s plan has been substantially consummated is only important if a debtor is seeking to modify their plan.

- (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).

In the case at bar, the Roberts proposed a chapter 11 plan which they anticipated was feasible. This feasibility depended on the debtors’ corporation continuing to operate and generate income. Unfortunately for the Roberts, the chapter 11 reorganization did not have its desired effect and their corporation ceased operating. The Court finds that this failure justifies the setting aside of the confirmation order. The Roberts’ goal in originally filing chapter 11 was to reorganize and continue operating. At the time of confirmation of their chapter 11 plan, the Roberts had every intention of following through with the plan. Despite these intentions, however, their chapter 11 reorganization attempts failed. For this reason, the Court finds it is appropriate to set aside the final confirmation order pursuant to Fed. R. Bankr. P. 9024.

**ORDER**

It is therefore **ORDERED** that the debtor’s “Motion to Set Aside Order of Discharge” is **GRANTED**. It is further **ORDERED** that the debtor’s case is hereby **CONVERTED TO CHAPTER 7**.

**IT IS SO ORDERED,**

**BY THE COURT,**

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

**Date:**

cc:

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