UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

LOUIS J. OSHIER — Case No. 00-15281 K

Debtor

MARK S. WALLACH, as Trustee
in Bankruptcy for Louis J. Oshier

Plaintiff

-vs- — AP No. 01-1348 K

FIDELITY INVESTMENTS
INSTITUTIONAL OPERATIONS
COMPANY, INC. AND LOUIS J. OSHIER

Defendants

Mark S. Wallach, Esq.
Penney, Maier & Wallach
169 Delaware Avenue
Buffalo, New York 14202

Trustee and Attorney for Trustee

Barry Sternberg, Esq., Wendy J. Christophersen, Esq.
Law Offices of Barry Sternberg
4925 Main Street, Suite 202
Amherst, New York 14226

Attorneys for Debtor

The Debtor's Motion to Vacate the Court's Order of February 1, 2001 (which Motion has by prior Order (dated March 11, 2002) been deemed to be a Motion seeking to be released from the Stipulated Order dated May 22, 2001[1]) is denied for certain reasons argued by the Trustee in his Memorandum filed May 3, 2002[2] and for other reasons, as hereinafter set forth.

1. The May 22, 2001 Order was a stipulated Order. In the absence of a mutual mistake of law (which is not argued here nor would such an argument be supportable here because it was uncertainty as to the law that "drove" the settlement), it is hard to see how any stipulated order could ever be erroneous. Because the May 22, 2001 Order was not "erroneous," no doctrine that acts in abrogation of judicial finality to correct erroneous orders has any application here, and the cited cases in support of such doctrine are inapposite.

2. The May 22, 2001 Order and the February 1, 2001 Order (which was effectively merged into the May 22, 2001 Order) each were "final" ten days after their respective dates of entry. Consequently, no doctrine that addresses interlocutory orders or reconsideration of other orders that are not yet final has any application here, and the cited cases in support of revisiting of such orders are inapposite.

3. As will be discussed further below, the very purpose of the May 22, 2001 Order was the parties' desire to put an end to litigation, given litigation's costs and risks. It was a negotiated compromise that left the Debtor's deferred compensation plan intact and under his

[1] The stipulation resolved a $23,000 dispute by the Debtor's promise to pay $12,000 in two installments of $6,000, approximately eight months apart.

[2] The Court expresses no view as to the arguments made by the Trustee that are not specifically addressed herein.

control, for cash payments totaling less than the face value of the plan. The fact that a different litigant in a different case has since persuaded this writer and a higher court that debtors such as this Debtor have a stronger case than this Debtor thought he had can never, in this writer's view, provide a basis for relief from a settlement. Similarly, the fact that the State, after entry of the May 22, 2001 Order, enacted a statute that is favorable to those situated like the Debtor, and even purports to give that statute retroactive effect to a date preceding the filing of this Debtor's petition, can never be a basis for relief from a settlement; however unlikely the prospect of a statutory solution might have seemed to anyone at the time of the settlement, the Debtor was at all times prior to the settlement free to seek legislative assistance of that sort.

4. Cases that seem to address relief from "consent decrees" generally have no application here. Those cases address only consent decrees that govern future conduct (or "non-conduct," in the case of a "cease and desist" consent order). Although consent decrees usually are settlements, not all settlements govern future conduct. In this writer's view, it is only those decrees that govern future conduct, decrees that are "living decrees," that give rise to a need for modification in light of, *inter alia*, changed circumstances. The cases cited by the Debtor that address continuing decrees are of no application here.

5. Cases that address the need for flexibility to "achieve justice" under Rule 60(b) do not address settlements. This Court agrees with cases that set aside orders in instances where a court granted a form of relief over objection, or by default, which relief turns out to have been unjust. But those cases are not applicable here where the relief the Court granted was a negotiated compromise.

In sum, the May 22, 2001 Order is a special kind of order; the most special and most common kind of order, other than an order by default . It was a settlement order. Rule 60 does apply. But "where the risk of the existence of some fact or legal principle . . . consciously is considered by both parties in agreeing upon the terms of a compromise agreement,[3] and one of the parties turns out to have been mistaken and to have overestimated or underestimated his chances of being correct, the compromise and settlement is not invalid on the ground of mistake. . . . [T]he parties assume the risk of mistake as to matters intended to be resolved by the compromise. . . ." 15A Am.Jur.2d *Compromise and Settlement* § 45 [case authorities omitted] (2000)

If the matter were governed strictly by the ability to undue "prejudice," it is arguable that the Debtor might have relief upon reimbursing the estate for all costs and expenses incident to this matter since the February 1, 2001 Order, if the Court were satisfied that no other prejudice has occurred.[4] But prejudice alone is not the test. Finality serves not only the parties, but the Court's own interest in holding out reliable "orders" as the goal of settlement negotiations. Were this otherwise, then either the Court would be immobilized by thousands of serial hearings regarding the measure of prejudice after settlements have been approved (such as the thousands of "conditional orders" entered here each year in lift-stay proceedings), or there

[3] Here, even the Notice of Hearing to Compromise or Settle expressly recited that "there is possible uncertainty over the state of the law concerning the exemptibility of Deferred Compensation Plans in light of the appeal currently pending in the District Court."

[4] Although the disappointment that creditors suffer as to the amount to be paid from the estate is not "prejudice," see *In re Gold and Silversmith, Inc.*, 170 B.R. 538 (Bankr. W.D.N.Y. 1994) for other ways in which creditors might suffer prejudice.

would be no settlements. (Why bother to negotiate a settlement if the "deal" can be undone simply by curing the prejudice by tendering the costs incident to the "deal"?) Thus Rule 60 is sound policy as applied to orders approving settlements, even where the policy of a "fresh start" and other equitable considerations might be argued to displace Rule 60.

The Debtor's Motion is denied.

IT IS SO ORDERED.

Dated: Buffalo, New York
May 23, 2002

/s/Michael J. Kaplan

U.S.B.J.