

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

The Rule 60 motion by the Debtor is denied because it seeks to vacate the wrong order. It seeks to vacate the turnover order of February 1, 2001, as if this Court's Order of May 22, 2001, approving a compromise of the earlier turnover demand may be ignored.

In fact, if the May 22, 2001 Order was a "stipulated" order or a "consent" order as a matter of law, then the present proceedings fall into a very well-recognized process with very well-recognized governing principles - - a request to be relieved from a court-approved stipulation.

In the Court's view, the Debtor must first either establish that the May 22nd Order was not a stipulated order. In the alternative (if it was a stipulated order), then the Debtor must establish grounds for relief from that Order before he may seek to vacate the February 1 Order.

This is because the February 1 Order was clearly subsumed into and vacated by the May 22 Order that relieved the Debtor of the February 1 turnover command, and only if the Debtor is relieved of the effect of the May 22 Order is the February 1 Order revived and subject to re-examination on its merits.

Perhaps more importantly, when one examines the well-settled principles that address relief from a court-ordered stipulation, one finds therein ample opportunity for the Debtor to make all of the arguments of law and equity the Debtor would have this Court consider. See, for example, 47 Am.Jur.2d *Judgments* §§ 750-751 *et seq.*, 806. (In addition to grounds of mutual mistake and lack of consent, a court may modify on grounds of fraudulent misrepresentation, gross disparity, coercion, change in law or circumstance. *But cf.* 47 Am.Jur.2d *Judgments* § 851 (a change in the judicial view of the law is not “any other reason” justifying relief from a final judgment order.¹))

Thus, the present denial of Debtor’s Rule 60 motion is without prejudice in three regards. Firstly, it is without prejudice to renewal of the Rule 60 motion if the Debtor establishes that the May 22, 2001 Order was not a stipulated order or consent order as a matter of law. Secondly, if the May Order is determined to have been a stipulated order or consent order, then the present denial of the Rule 60 motion is without prejudice to the Debtor making all of the same arguments he currently makes, but in the context of what the Court will deem to be a request by the Debtor to be relieved of the effect of that May 22 Order. Lastly, if the May 22

¹Note that this section also addresses what this Court did in *In re Beverly Johnson*, 254 B.R. 641 once the Court decided *In re Maurer*, 286 B.R. 339. In *Johnson* the judgment never became final and the Court after deciding *Maurer* vacated the order in *Johnson*.

Order is determined to be a stipulated order or consent order, and if the Debtor is successful in obtaining leave from that Order, then the Debtor may renew the Rule 60 motion with regard to the February 1, 2001 Order, since that Order would then be deemed to have been revived by the grant of relief from the May 22, 2001 Order.

For now, the Court deems all of the matters before it to constitute, in the aggregate, a request by the Debtor to have the May 22, 2001 Order declared not to be a court-approved stipulation, or, in the alternative, a request that the Court grant the Debtor relief from that stipulated order.

The Court invites briefs from the Debtor in either or both of those regards at this time. The Debtor may have until April 15, 2002, to do so and the Trustee will have 20 days thereafter in which to reply.

All of the pending matters are hereby restored to the calendar for tracking purposes only on **May 15, 2002 at 11:30 a.m.**

IT IS SO ORDERED.

Dated: Buffalo, New York
March 11, 2002

/s/ Michael J. Kaplan

U.S.B.J.