

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:
GREEN HILLS DEVELOPMENT
COMPANY, LLC
*ALLEGED DEBTOR***

INVOLUNTARY CHAPTER 7

CASE NO. 10-03274EE

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Edward Ellington, Judge

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON *CREDIT UNION
LIQUIDITY SERVICES, LLC'S MOTION, PURSUANT TO BANKRUPTCY RULES
9023 AND 9024, FOR NEW TRIAL OR ALTERNATIVELY FOR RECONSIDERATION
TO ALTER OR AMEND THE JUDGMENT [DOCKET NOS. 72 AND 73]***

THIS MATTER came before the Court on the *Motion, Pursuant to Bankruptcy Rules 9023 and 9024, for New Trial or Alternatively for Reconsideration to Alter or Amend the Judgment [Docket Nos. 72 and 73]* (Motion) (#78) filed by Credit Union Liquidity Services, LLC (CULS) and the *Response in Opposition to Credit Union Liquidity Services, LLC's Motion for New Trial or Alternatively for Reconsideration to Alter or Amend the Judgment* (Response) (#82) filed by Green Hills Development Company, LLC (Green Hills).

In the Motion, CULS seeks reconsideration of the *Findings of Fact and Conclusions of Law*

on the (1) *Motion to Dismiss* (#11); (2) *Response to Motion to Dismiss and Memorandum in Support thereof* (#29); (3) *Motion for Summary Judgment* (#30); (4) *Reply in Support of Motion to Dismiss and Response to Strike, in Part, Motion for Summary Judgment* (#38); and (5) *Credit Union Liquidity Services, LLC's: (A) Memorandum Brief Replying in Support of Motion for Summary Judgment [Docket No. 30]; and (B) Combined Objection to Motion to Strike [Docket No. 38] and Memorandum in Support of Objection* (#45 & #46) (**Findings and Conclusions**) (# 72) and the *Final Judgment on the (1) Motion to Dismiss* (#11); (2) *Response to Motion to Dismiss and Memorandum in Support thereof* (#29); (3) *Motion for Summary Judgment* (#30); (4) *Reply in Support of Motion to Dismiss and Response to Strike, in Part, Motion for Summary Judgment* (#38); and (5) *Credit Union Liquidity Services, LLC's: (A) Memorandum Brief Replying in Support of Motion for Summary Judgment [Docket No. 30]; and (B) Combined Objection to Motion to Strike [Docket No. 38] and Memorandum in Support of Objection* (#45 & #46) (**Final Judgment**) (#73) issued by this Court on February 17, 2011. In the alternative, CULS seeks a new trial on the merits of the involuntary petition, which it filed as a sole petitioning creditor against Green Hills under 11 U.S.C. § 303.¹

The Court issued the Final Judgment after a trial held on January 6, 2010, in which the Court denied the *Motion to Dismiss* (#11) filed by Green Hills, denied the *Motion for Summary Judgment* (MSJ) (#30) filed by CULS, and dismissed the involuntary petition on the merits. In the Findings and Conclusions, the Court ruled that CULS was eligible to file the Petition but had failed to demonstrate at trial that Green Hills was generally not paying its undisputed debts as they became

¹ Unless otherwise noted, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code.

due, a necessary element for the entry of an order for relief under § 303(h)(1). In the Motion, CULS challenges the denial of the MSJ and the dismissal of the involuntary petition, but not the denial of the *Motion to Dismiss*. For the reasons that follow, the Court concludes that the Motion is not well taken and should be denied.

FINDINGS OF FACT

I.

The relevant facts leading up to the filing of the involuntary petition (Petition) (#1) against Green Hills by Credit Union Liquidity Services, LLC were set forth in the Findings and Conclusions and will be repeated here only to the extent necessary to provide a context for the Motion.

On or about August 5, 2005, CULS and Green Hills entered into a loan agreement (Loan Agreement) in which CULS agreed to loan Green Hills up to \$14,500,000.00. for the purchase and development of approximately 403 acres of real property in Brandon, Rankin County, Mississippi. In connection with the Loan Agreement, Green Hills executed a promissory note payable to CULS with a maturity date of August 5, 2008. As security for the debt, Green Hills granted CULS a deed of trust on the real property acquired with the loan proceeds. A later amendment of the Loan Agreement reduced the amount of CULS's loan commitment from \$14,500,000.00 to approximately \$13,915,219.00² and extended the maturity date from August 5, 2008, to November 3, 2008.

Although Green Hills made some payments pursuant to the Loan Agreement, it did not satisfy the loan in full. As of the maturity date of November 3, 2008, Green Hills still owed CULS

²Trial Tr. at 17.

a principal balance of approximately \$8,074,348.57.³ Then in June of 2009, Green Hills made an additional principal payment in the amount of \$530,712.00. Therefore, as of the date of the trial, Green Hills had repaid CULS approximately \$5,921,930.36 in principal.⁴

As might be expected, in late 2008 and/or early 2009, the relationship between Green Hills and CULS deteriorated. On March 12, 2009, Green Hills⁵ filed *Plaintiffs' Original Petition* (Complaint) in the District Court of Dallas County, Texas, 191st Judicial District, against CULS (Texas Litigation). The Complaint contained the following causes of action and/or requests for relief against CULS: fraud, rescission/reformation, unconscionability, duress, promissory estoppel, equitable estoppel, breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, unjust enrichment, constructive trust, equitable subordination, permanent injunction, discharge of guarantors, conspiracy, and a request for an award of damages. *See* Trial Ex.1, *Plaintiffs' Original Petition*. As evidenced by the various pleadings filed and hearings held, the Texas Litigation was vigorously contested. *See* Trial Exs.1-11; Trial Ex. 13.

On September 17, 2010, CULS filed the Petition against Green Hills under Chapter 7 of the Bankruptcy Code. At some time in October of 2010, CULS removed the Texas Litigation to the United States District Court for the Northern District of Texas. The Texas Litigation then was referred to the United States Bankruptcy Court for the Northern District of Texas.

³Trial Ex. A, *Affidavit of Marty Caplinger* at 5.

⁴*Id.*

⁵The Complaint was filed by Green Hills, Benjamin O. Turnage, and three other corporations: Heartland Development Company, LLC, Lennox Development, LLC and Provonce Development, LLC. The common link between all of these corporations is Mr. Turnage.

II.

Because CULS raises a procedural issue, the Court will summarize the proceedings that ensued in this case prior to the entry of the Final Judgment, beginning September 17, 2010, when CULS filed the Petition against Green Hills. The Court will also summarize the notices that were provided counsel for the parties at each stage of these proceedings.

On October 19, 2010, Green Hills filed its *Motion to Dismiss* the Petition on the ground that CULS, the sole petitioning creditor, lacked standing to file the Petition. The next day, a notice was sent to counsel for the parties setting a hearing on the *Motion to Dismiss* for November 9, 2010. On that date, counsel for the parties agreed to continue and reset the hearing for December 7, 2010, and the Court issued an order to that effect. *See Order Resetting* (#24). In the meantime, CULS filed its *Response to Motion to Dismiss and Memorandum in Support Thereof* (#29) on November 15, 2010, and a second notice was sent informing counsel for the parties that a hearing on the *Response to Motion to Dismiss* was set for the same day as the hearing on the *Motion to Dismiss*. *See Notice* (#34).

Simultaneously with the *Response to Motion to Dismiss*, CULS filed the MSJ under Rule 56 of the Federal Rules of Civil Procedure.⁶ In its MSJ, CULS alleged that “[t]he undisputed facts and summary judgment evidence in this case justify and warrant the entry of an order for relief under 11 U.S.C. § 303.”⁷ Green Hills filed its *Reply in Support of Motion to Dismiss and Response to and Motion to Strike, in Part, Motion for Summary Judgment* (#38) on December 3, 2010. In its *Motion*

⁶ Federal Rule of Civil Procedure 56 is made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056.

⁷MSJ at 2.

to Strike, Green Hills objected to the MSJ to the extent CULS sought resolution of the issues raised in the Texas Litigation.

At the hearing on December 7, 2010, the parties agreed to set the matter for trial. Accordingly, a *Notice of Trial Setting* was sent informing counsel for the parties that an evidentiary hearing on the *Motion to Dismiss* and the *Response to Motion to Dismiss* was set for January 6, 2011. See *Notice of Trial Setting* (#42). Shortly thereafter, an *Amended Notice of Trial Setting* was sent that informed counsel for the parties that the MSJ was included in the matters set for trial on January 6, 2011. See *Amended Notice of Trial Setting* (#48). A pre-trial conference was held on January 5, 2011, at which time the Court reminded counsel for both parties that the pending MSJ would not obviate the need for trial.⁸ The Court notes that counsel for CULS did not object to the trial date at any time prior to the filing of the Motion under consideration.

The trial was held on January 6, 2011, as scheduled. The matters before the Court were the Petition, the *Motion to Dismiss*, and the MSJ.⁹ CULS was represented at trial by local counsel and by three additional attorneys from the law firm of Fulbright & Jaworski, LLP. The trial record consisted of multiple exhibits, including five exhibits offered into evidence by CULS,¹⁰ and the live

⁸ See Trial Tr. at 12 (“[W]e agreed that I really will not be able to rule on the motion for summary judgment prior to today . . .”).

⁹ Trial Tr. at 3 (“The matter before the Court today, of course, is that petition, and then a motion to dismiss that was filed by the debtor, a motion for summary judgment that was filed by petitioning creditor, and related responses and replies.”).

¹⁰ These five exhibits included: (1) Affidavit of Marty Caplinger; (2) Excerpts of August 12, 2009, deposition of Benjamin O. Turnage; (3) Docket Sheet and Complaint for Judicial Foreclosure; (4) Summary of 2008 and 2009 [Special Assessments] and 2008 and 2009 tax assessments; and (5) Bank of the Ozarks, As Trustee’s Motion to Lift Automatic Stay. Trial Tr. at 11. CULS attached 23 additional exhibits to the Affidavit of Marty Caplinger. *Id.*

testimony of two witnesses, Marty Caplinger, a representative of CULS, and Michael Heilman, counsel for Green Hills in the Texas Litigation.

At the conclusion of trial, the Court took the matters under advisement and offered counsel an opportunity to submit legal briefs.¹¹ On January 18, 2011, CULS submitted the *Post-Trial Memorandum Brief (A) in Support of Motion for Summary Judgment and (B) in Opposition to Motion to Dismiss* (#58). On that same date, Green Hills submitted the *Post-Trial Brief in Support of Motion to Dismiss* (#59). The Court issued its Findings and Conclusions and its Final Judgment on February 17, 2011. CULS filed the Motion on March 3, 2011. Green Hills filed the Response on March 17, 2011.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(1).

II.

In the Motion, CULS seeks relief under Rules 9023 and 9024 of the Federal Rules of Bankruptcy Procedure, which incorporate Rules 59 and 60 of the Federal Rules of Civil Procedure, respectively. Specifically, CULS cites Federal Rule of Civil Procedure 59(a)(2), which states:

(a) In General.

* * * *

(2) Further Action after a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new

¹¹ Trial Tr. at 57.

ones, and direct the entry of a new judgment.

Fed. R. Civ. P. 59(a)(2). The United States Court of Appeals for the Fifth Circuit has held that relief under Rule 59 is not granted “unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done.” *Sibley v. Lemaire*, 184 F.3d 481, 487 (5th Cir.1999).

CULS also seeks relief under Federal Rule of Civil Procedure 60(b)(1), which states that relief from a judgment may be granted for “mistake, inadvertence, surprise or excusable neglect.” Fed. R. Civ. P. 60(b)(1). The Fifth Circuit has recognized that relief under Rule 60(b) is an extraordinary remedy and has cautioned against reopening final judgments lightly. *Castleberry v. CitiFinancial Mortgage Co.*, 230 Fed. Appx. 352, 355 (5th Cir. 2007); *Carter v. Fenner*, 136 F.3d 1000,1007 (5th Cir. 1998) (quoting *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157 , 160 (5th Cir. 1990)). In that same vein, the Fifth Circuit has held that relief is not warranted because of the inadvertent mistake of counsel or his “[g]ross carelessness, ignorance of the rules, or ignorance of the law.” *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 356-57 (5th Cir. 1993).

CULS contends that the Court erred because “it was procedurally improper for the Court to dismiss the Petition without a trial on the merits and because Green Hills does not dispute that it is generally not paying its debts as they become due . . . “ *See* Motion at 3. The Court finds no merit in either one of these contentions. The dismissal of the involuntary Petition on the merits was procedurally proper, and the denial of the MSJ was supported by the weight of the evidence at trial. The Motion, therefore, is not well taken and should be denied.

A.

The Dismissal of the Involuntary Petition on the Merits Was Procedurally Proper.

The timing of the trial and disposition of a petition in an involuntary case is determined by

reference to Rule 1013 of the Federal Rules of Bankruptcy Procedure. Rule 1013(a) provides that the court “shall determine the issues of a contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition, or enter any other appropriate order.” Fed. R. Bankr. P. 1013(a). The purpose of Rule 1013 is “the avoidance, to the extent possible, of the consequences of the involuntary petition in the absence of the entry of an order for relief[,]” which may include “loss of credit standing, a chilling effect on the willingness of creditors and third parties to transact business in the ordinary course, and possible public embarrassment.” *In re Immudyne, Inc.*, 218 B.R. 860, 862 (Bankr. S.D. Tex. 1998) (citing *In re Reid*, 773 F.2d 945, 946 (7th Cir. 1985)). Rule 1013 “recognizes that the interests of both the debtor and the creditors are best served by prompt resolution of the issues raised by an involuntary bankruptcy petition.” 9 *Collier on Bankruptcy* ¶ 1013.02 (16th ed. 2010); *see also* Fed. R. Bankr. P. 1011(d)-(e) (prohibiting counterclaims by alleged debtors and limiting pleadings that may be filed prior to adjudication of the petition in an involuntary case).

By filing the MSJ just prior to the hearing on the *Motion to Dismiss*, CULS jeopardized a prompt resolution of the Petition on the merits as mandated by Rule 1013. At the hearing on December 7, 2010, the Court discussed with counsel for the parties the procedural posture of this case. The Court then decided that the MSJ would be considered simultaneously with a trial on the merits of the Petition. Counsel for CULS did not voice any objection to this approach and certainly did not treat the trial on January 6, 2011, as an oral argument of the MSJ. Rather, counsel for CULS presented an opening statement, introduced exhibits into evidence, cross-examined the live witnesses called by Green Hills, and provided a closing argument. Indeed, in his closing argument, CULS’ attorney stated, “[T]he question, as the Court has noted, is whether an order for relief should be entered in this proceeding” *See* Trial Tr. at 43.

Rule 1013 directs the Court to determine the issues presented in the Petition “at the earliest practicable time,” which is “when there is sufficient information to resolve the conflict before the court.” *In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.*, 779 F.2d 471, 475 (9th Cir. 1985). Here, that time arrived after a trial—in which CULS was represented by four attorneys—and after submission of post-trial briefs.

CULS’ contention that the scope of the evidentiary hearing on January 6, 2011, was limited and did not reach the ultimate merits of the Petition is disingenuous, if not facetious. First, CULS seeks a new trial on the merits of the Petition but also claims that no trial has yet taken place. Second, if the Court had granted CULS the relief it sought, thereby resolving the merits of the Petition in its favor, CULS would not have questioned the scope of the trial. It is the Court’s decision then, and not the process that resulted in that decision, that is the basis for the Motion. Yet, a second chance for CULS to present evidence at trial is not the function of either Rule 59 or Rule 60. *See All West Pet Supply Co. v. Hill’s Pet Prods. Div., Colgate-Palmolive Co.*, 847 F. Supp. 858, 860 (D. Kan.1994) (“[A] party’s failure to present his strongest case in the first instance does not entitle him to a second chance in the form of a motion to amend.”).

B.

The Denial of the MSJ Was Supported by the Weight of the Evidence at Trial.

If an involuntary petition is contested by the alleged debtor, then a court may enter an order for relief against the debtor only where “the debtor is generally not paying his debts as they become due unless such debts are the subject of a bona fide dispute as to liability or amount.” 11 U.S.C. § 303(h)(1). CULS contends that the denial of its MSJ was improper because the weight of the evidence at trial demonstrated that Green Hills was generally not paying its debts as they became due and also because Green Hills conceded the issue by admitting in its *Brief in Support of Motion to*

Dismiss (#12) that the Petition involves a two-party dispute. Motion at 11.

At the end of trial and after considering the post-trial briefs, the Court concluded that CULS had failed to meet its summary judgment burden and denied the MSJ. The denial of the MSJ was tantamount to a finding that the debt asserted by CULS was subject to a bona fide dispute as to liability and, therefore, could not be considered in applying the “generally not paying” test. In reaching this result, the Court followed the Fifth Circuit’s decision in *Subway Equipment Leasing Corp. v. Sims (In re Sims)*, 994 F.2d 210 (5th Cir. 1993). There, the Fifth Circuit embraced the holding of the bankruptcy court in *In re Lough*, 57 B.R. 993 (Bankr. E.D. Mich. 1986). In *Lough*, the bankruptcy court set forth the proper legal standard for analyzing the issue of a bona fide dispute under § 303. The *Lough* standard, which is a modified version of the summary judgment standard, was explained, as follows:

[I]f there is either a genuine issue of material fact that bears upon the debtor’s liability, or a meritorious contention as to the application of law to undisputed facts, then the petition must be dismissed.

Id. at 997.

Here, the Court examined the pleadings, hearing transcripts, and discovery conducted in the pending Texas Litigation between CULS and Green Hills and found “a genuine issue of material fact that bears upon the debtor’s liability.” The basis for this finding is explained in detail in the Court’s Findings and Conclusions and will not be reiterated here. Suffice it to say that the evidence presented at trial supported the presence of a bona fide dispute.

CULS contends that the Court erred by equating its denial of the MSJ to a final judgment on the merits of the Petition. Under the *Lough* standard, however, it is the presence of a dispute, and not its resolution, that defeats an involuntary petition. Thus, the denial of the MSJ was proper and had the added affect of excluding the debt asserted by CULS from the “generally not paying”

analysis.

Having found a bona fide dispute as to Green Hills' asserted debt to CULS, the Court considered whether CULS had shown that Green Hills was generally not paying its *undisputed* debts as they became due. Although CULS demonstrated at trial that Green Hills was not paying its debts to itself and to another creditor, it failed to produce evidence that would allow a proper comparison of all the undisputed debts owed by Green Hills at the time the Petition was filed. The absence of such critical evidence prevented the Court from applying the four-part test formulated in *In re Moss*, 249 B.R. 411, 422 (Bankr. N.D. Tex. 2000) (four factors that courts must consider are "(1) the number of unpaid claims; (2) the amount of such claims; (3) the materiality of the non-payments; and (4) the debtor's overall conduct in her financial affairs"). As a result, the Court dismissed the Petition on the merits.

CULS claims that it was unaware that there was any serious dispute that Green Hills was generally not paying its debts. Motion at 7. CULS's contention demonstrates its failure to properly consider and apply the legal definition of the term "generally not paying." Although there may be no serious dispute that Green Hills was not paying CULS under the Loan Agreement, evidence of the non-payment of a *disputed* debt is insufficient under § 303(h)(1) in order for this Court to declare Green Hills bankrupt. The legislative history of § 303 explains why. Limiting the "generally not paying" analysis to undisputed debts is necessary to prevent creditors from using "the Bankruptcy Code as a club against debtors who have bona fide questions about their liability, but who would rather pay up than suffer the stigma of involuntary bankruptcy proceedings." 130 Cong. Rec. S.7, 618 (daily ed. June 19, 1984) (floor statement of Senator Max Baucus).

Green Hills alluded to this limitation contained in § 303 when it described the Petition as a two-party dispute in its *Brief in Support of Motion to Dismiss*. CULS' contention that this

description constitutes an admission against interest by Green Hills misses the mark. The point Green Hills was making was that the Petition was an attempt by CULS to substitute an involuntary bankruptcy proceeding for a two-party collection suit where the debt asserted by CULS was subject to a bona fide dispute. This Court agrees with Green Hills that such a substitution was improper.

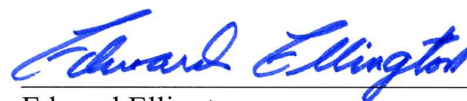
In sum, CULS seeks a second opportunity to supplement the woefully inadequate evidence it presented at trial regarding the financial affairs of Green Hills. However, CULS has not shown that either Rule 59 or Rule 60 permits CULS to relitigate issues already decided at trial. *See Lavespere v. Niagara Machine & Tool Works*, 910 F.2d 167, 173-75 (5th Cir. 1990), *overruled on other grounds, Little v. Liquid Air Corp.*, 378 F.3d 1069, 1076 n.14 (5th Cir. 1994).

CONCLUSION

In conclusion, the Court finds that CULS has not raised any issue justifying a new trial or reconsideration of its Findings and Conclusions or Final Judgment. The Court's ultimate conclusion denying the MSJ and dismissing the Petition on the merits remains unchanged.

A separate judgment consistent with this opinion will be entered in accordance with Rule 9021 of the Federal Rules of Bankruptcy Procedure.

SO ORDERED.



Edward Ellington
United States Bankruptcy Judge

Dated: April 20, 2011

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:
GREEN HILLS DEVELOPMENT
COMPANY, LLC
ALLEGED DEBTOR

INVOLUNTARY CHAPTER 7

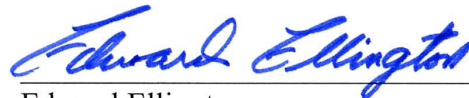
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**FINAL JUDGMENT ON *CREDIT UNION LIQUIDITY SERVICES, LLC'S*
MOTION, PURSUANT TO BANKRUPTCY RULES 9023 AND 9024,
FOR NEW TRIAL OR ALTERNATIVELY FOR RECONSIDERATION
*TO ALTER OR AMEND THE JUDGMENT [DOCKET NOS. 72 AND 73]***

Consistent with the Court's *Findings of Fact and Conclusions of Law on Credit Union Liquidity Services, LLC's Motion, Pursuant to Bankruptcy Rules 9023 and 9024, for New Trial or Alternatively for Reconsideration to Alter or Amend the Judgment [Docket Nos. 72 and 73]* dated contemporaneously herewith,

IT IS, THEREFORE, ORDERED that the *Motion, Pursuant to Bankruptcy Rules 9023 and 9024, for New Trial or Alternatively for Reconsideration to Alter or Amend the Judgment [Docket Nos. 72 and 73]* (#78) filed by Credit Union Liquidity Services, LLC is not well taken and is hereby denied.

SO ORDERED.



Edward Ellington
United States Bankruptcy Judge

Dated: April 20, 2011