

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED

MAR 25 1998

CHARLENE J. PENNINGTON, CLERK
BY _____ DEPUTY

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

**IN RE:
BUTLER, INC.**

CASE NO. 8709191SEG

**IN RE:
EDDIE BUTLER**

CASE NO. 8809267SEG

EDDIE BUTLER

VS.

ADVERSARY NO. 890939SC

MERCHANTS BANK AND TRUST COMPANY

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This matter is before the Court on the *Amended Motion to Reopen Chapter 7 Case and Adversary* ("Amended Motion to Reopen") filed by the Debtors Eddie Butler and Butler, Inc.

("Butler"), *pro se*.¹ Butler seeks to reopen his bankruptcy cases and adversary proceeding so that he might pursue his *Motion for Relief from Judgment Pursuant to FRCP 60(b)(6)* ("*Motion for Relief from Judgment*"). After considering the *Amended Motion to Reopen* and being fully advised in the premises, the Court holds that Butler's *Amended Motion to Reopen* is not well taken and should be denied. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Butler's complaint filed against the Defendant, Merchants Bank and Trust Company, was originally tried on November 20, 1991, before the Honorable Edward R. Gaines, Bankruptcy Judge for the Southern District of Mississippi. At the conclusion of the trial, Judge Gaines announced his ruling into the record. On January 7, 1992, a written judgment consistent with the November 20, 1991, bench ruling was entered by Judge Gaines and docketed in this adversary proceeding (the "January 7, 1992, order").

On January 16, 1992, an order was entered by Judge Gaines denying a motion for reconsideration filed by Butler. Butler then appealed the January 7, 1992, order to the United States District Court for the Southern District of Mississippi, which affirmed the ruling of Judge Gaines. Butler then appealed the District Court's ruling to the Fifth Circuit Court of Appeals.² On January 5, 1995, the Fifth Circuit entered an order affirming the ruling of the District Court and denied a petition for rehearing on January 13, 1995. Four days later, on January 17, 1995, Butler filed with

¹ The *Amended Motion* was filed by Eddie Butler on behalf of himself, individually, and on behalf of Butler, Inc. Because the *Amended Motion* is being denied on other grounds, the Court is not addressing the issue of an individual representing a corporation in violation of established law.

² While this appeal was pending, Butler's adversary proceeding and the bankruptcy case of Butler, Inc., were transferred to this Court on July 17, 1992.

this Court a Motion for Relief from Judgment, seeking relief from the January 7, 1992, order entered by Judge Gaines. On March 1, 1995, this Court denied the motion on the grounds that it was time barred by the one-year limitation contained in Rule 60(b) of the Federal Rules of Civil Procedure. After Butler's motion for reconsideration was denied, the United States District Court for the Southern District of Mississippi affirmed the Bankruptcy Court ruling on January 24, 1996. In re Butler, Inc. (Butler v. Merchants Bank and Trust Co.), No. 1:95CV402RR (S.D. Miss. Jan. 24, 1996). The Fifth Circuit affirmed on August 8, 1996, and warned that "any further abuse of the appellate process [by Butler] with frivolous motions, petitions and appeals will subject him to serious monetary sanctions." In re Butler, Inc. (Butler v. Merchants Bank and Trust Co.), 95 F.3d 1148 (5th Cir. 1996).

Butler subsequently petitioned the United States Supreme Court for a writ of certiorari. This petition was denied by the United States Supreme Court on April 14, 1997. In re Butler, Inc. (Butler v. Merchants Bank and Trust Co.), ___ U.S. ___, 117 S.Ct. 1448, 137 L.Ed.2d 553, *reh'g denied*, ___ U.S. ___, 117 S.Ct. 2473, 138 L.Ed.2d 228 (1997).

Butler's individual bankruptcy case was closed on September 9, 1991, the adversary proceeding was closed on September 29, 1997, and Butler, Inc.'s bankruptcy case was closed on October 29, 1997. On November 13, 1997, Butler filed his *Amended Motion to Reopen*. In his *Amended Motion to Reopen*, Butler contends that his bankruptcy cases and adversary proceeding should be reopened because he possesses newly discovered evidence which was not available to him during prior proceedings.

CONCLUSIONS OF LAW

11 U.S.C. § 350(b) governs the reopening of a bankruptcy case. That section provides:

(b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

Id. The phrase “or other cause” has been interpreted by several courts, including the Fifth Circuit Court of Appeals, to give the bankruptcy court discretion to reopen a closed estate or proceeding. See Citizens Bank & Trust Co. v. Case, 937 F.2d 1014 (5th Cir. 1991); In re Rosinski, 759 F.2d 539 (6th Cir. 1985); Hawkins v. Landmark Finance Co., 727 F.2d 324 (4th Cir. 1984). “This discretion depends upon the circumstances of the individual case and accords with the equitable nature of all bankruptcy court proceedings.” Citizens Bank, 937 F.2d at 1018.

Butler seeks to reopen his bankruptcy and adversary case so that he might pursue his *Motion for Relief from Judgment Pursuant to FRCP 60(b)(6)*.³ In that Motion, Butler challenges the January 7, 1992, order of Judge Gaines. As the findings of fact demonstrate, Judge Gaines’ order was affirmed on appeal by the District Court and the Fifth Circuit. Butler then sought further review of Judge Gaines’ January 7, 1992, order by filing with this Court a Motion for Relief from Judgment which was denied by this Court on the grounds that it was time barred by the one-year limitation contained in Rule 60(b)⁴ of the Federal Rules of Civil Procedure. After denial of Butler’s motion for reconsideration, the District Court affirmed the Bankruptcy Court, and the Fifth Circuit

³ Although Butler’s bankruptcy cases and adversary proceeding had not been reopened, Butler filed his *Motion for Relief from Judgment Pursuant to FRCP 60(b)(6)* and supporting memorandum brief on December 12, 1997.

⁴ Hereinafter, all Rules refer to the Federal Rules of Civil Procedure unless specifically noted otherwise.

subsequently affirmed the decision. Finally, Butler's petition for a writ of certiorari was denied by the United States Supreme Court.

Butler contends in his *Amended Motion to Reopen* that he possesses newly discovered evidence that was not available to him at the time of trial. Rule 60(b)(2) is the authority applicable to motions involving newly discovered evidence. However, in his current *Motion for Relief from Judgment*, he cites Rule 60(b)(6) as the relevant authority. Both Rule 60(b)(2) and (b)(6) are made applicable to adversary proceedings by Rule 9024 of the Federal Rules of Bankruptcy Procedure. Rule 60 provides an avenue for relief from a judgment or order in certain limited circumstances. "Relief under [subsection (b)(6)], however, should be granted 'only if extraordinary circumstances are present.'" Picco v. Global Marine Drilling Co., 900 F.2d 846, 851 (5th Cir. 1990)(quoting Bailey v. Ryan Stevedoring Co., 894 F.2d 157, 160 (5th Cir. 1990)). Rule 60 states in pertinent part as follows:

Rule 60. Relief from Judgment of Order.

....

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (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); ... (6) any other reason justifying relief from the operation of the judgment.... The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60.

Although Rule 60(b) contains certain time restrictions on when motions for relief from judgment may be filed, Bankruptcy Rule 9024 provides that this time limitation is not applicable to

motions to reopen. Thus, a motion to reopen may be filed at any time and is not subject to the one year limitation contained in Rule 60(b). However, once a case is reopened, a motion for relief from judgment is subject to the time limitations contained in Rule 60(b). Rule 60(b) specifically states that a motion brought pursuant to subsections (1), (2), and (3) of Rule 60(b) must be made within one year after the judgment was entered. The Fifth Circuit Court of Appeals has held that "[t]he one year limitation is not tolled by an appeal." Gulf Coast Building and Supply Co. v. International Brotherhood of Electrical Workers, Local No. 480, AFL-CIO, 460 F.2d 105, 108 (5th Cir. 1972).

Motions based upon Rule 60(b)(6) must be filed within a "reasonable time." "What constitutes "reasonable time" depends on the facts of each case, taking into consideration the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties.' " Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, 1410 (5th Cir. 1994)(quoting Ashord v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981)).

The *Motion for Relief from Judgment* now before the Court was filed almost six years after entry of the January 7, 1992, order and after affirmance in the District Court, the Fifth Circuit and the United States Supreme Court. The nonmovant, Merchants Bank and Trust Company, has expended considerable effort and resources in these lengthy appeals. Additionally, Butler has caused this Court and other courts to expend considerable judicial resources considering the numerous motions and appeals filed by Butler. The Court is of the opinion that Butler is seeking circuitously an appeal of the January 7, 1992, order; an order which has been the subject of two separate appeals, both of which have been lengthy and time consuming.

Although the filing of Butler's *Amended Motion to Reopen* is not subject to any time restrictions, this Court holds that Butler's *Amended Motion to Reopen* should be denied because

Butler's underlying *Motion for Relief from Judgment* is neither timely nor well taken. Therefore, the *Amended Motion to Reopen* is denied.

A separate final judgment will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

THIS the 25th day of March, 1998.


UNITED STATES BANKRUPTCY JUDGE