

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

|                          |   |                           |
|--------------------------|---|---------------------------|
| IN RE:                   | : | CHAPTER 11                |
|                          | : |                           |
| 400 WALNUT ASSOCIATES LP | : |                           |
|                          | : |                           |
| DEBTOR(S)                | : | BANKRUPTCY No.10-16094 SR |

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**OPINION**

BY: STEPHEN RASLAVICH, CHIEF UNITED STATES BANKRUPTCY JUDGE.

*Introduction*

Before the Court is 4<sup>th</sup> Walnut's Motion for Reconsideration of this Court's ruling on the Debtor's Motion for Permission to Use Cash Collateral. *See In re 400 Walnut Associates, L.P.*, 2011 WL 915328 (Bankr.E.D.Pa. Feb. 22, 2011) (holding that rents generated from Debtor's property constituted property of the estate and, therefore, cash collateral). The Debtor opposes that request. The matter was heard on April 28 and May 19, 2011. The Court next took the motion under advisement. For the reasons which follow, the Motion will be denied.

*Background*

The Motion is styled as one for reconsideration. 4<sup>th</sup> Walnut explains that the Court erred in failing to address one of its arguments. However, the Movant has all but conceded that the untimeliness of its motion precluded reconsideration.<sup>1</sup> Thereupon, the Movant recharacterized the legal basis for its request as one seeking *relief* from a

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<sup>1</sup>See Transcript of Hearing, 5/19/11 at 4.

judgment or order under F.R.C.P 60(b).<sup>2</sup> The parties were given an opportunity to brief the issue of whether legal error could be the basis for relief under Rule 60. This point would be argued at the May 12, 2011 hearing.

### *The Arguments*

4<sup>th</sup> Walnut makes two argument in support of its request for relief: first, that legal error may constitute a mistake for purposes of Rule 60(b); and second, that other circumstances make it just to grant 4<sup>th</sup> Walnut relief from the Court's cash collateral ruling. See generally 4<sup>th</sup> Walnut's Reply Brief.

The Debtor's response is that legal error does not constitute mistake or inadvertence warranting relief from a judgment. Debtor's Brief in Support of Motion to Strike, 8-14. Neither would legal error constitute an exceptional circumstance justifying the extraordinary relief of setting aside a judgment. *Id.* 14-18.

### *Standard for Relief from Judgment*

Rule 60 provides, in pertinent part, that "on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for ... mistake, inadvertence, surprise or excusable neglect ... or for any other reason that justifies relief." F.R.C.P 60(b)(1), (6). A Rule 60(b) motion forces the court to balance the concerns of finality and justice. *Betterbox Communications Ltd. v. BB Technologies, Inc.*, 300 F.3d 325, 338 (3d Cir.2002). Courts will grant relief under Rule 60(b) only in exceptional circumstances. *Vecchione v. Wohlgemuth*, 558 F.2d 150, 159 (3d Cir. 1977). The Court's ruling on such a request is reviewed on appeal for an abuse

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<sup>2</sup>Made applicable by Bankruptcy Rule 9024.

of discretion. *Curran v. Howmedica Osteonics*, 2011 WL 1555087, at \*1 (3d Cir. Apr. 26, 2011)

### *Mistake*

The movant's first argument in support of relief is based on what it perceives as a mistake on the Court's part. 4<sup>th</sup> Walnut explains that the Court erred in failing to consider the effect of the termination of the Master Lease between it and the Debtor. This argument is based on the Subordination, Non-Disturbance and Attornment Agreement (SNDA).<sup>3</sup> That document established privity as between the lender (4<sup>th</sup> Walnut) and the Debtor's tenant (Greentree) under the Master Lease. Once the Debtor defaulted, the argument goes on, the Master Lease became a direct lease as between 4<sup>th</sup> Walnut and Greentree. The effect of that is to have divested the Debtor of any interest in the rents. 4<sup>th</sup> Walnut's Reply Brief, 2-3

4<sup>th</sup> Walnut relies on the following provisions of the SNDA:

4. Lender's Exercise of Remedies: Non-Disturbance. Subject to Section 4(c) hereof, provided (a) the Master Lessee complies with this Agreement, (b) the Master Lessee is not in default under the terms of the Master Lease and no event has occurred which, with the passage of time or the giving of notice or both, would constitute a default under the Master Lease, (c) the Master Lease is in full force and effect, both as of the date the Lender files a lis pendens, or otherwise commences a Transfer, and at all times thereafter, and (d) the Master Lessee shall be in possession of the Property, no default under the Mortgage and Transfer will disturb the Master Lessee's possession under the Master Lease and the Master Lease will not be affected or terminated thereby, and notwithstanding any such foreclosure or other Transfer of the Property to a Transferee, *the Master Lease will be recognized as a direct lease from Transferee to the Master Lessee upon the Transfer* for the balance of the term thereof.

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<sup>3</sup>4<sup>th</sup> Walnut's Exhibit, L-6

SNDA, L-6, § 4(a) (emphasis added). A “Transfer” is defined as

(a) the *institution of any foreclosure*, trustee’s sale or other like proceeding, (b) the appointment of a receiver for Owner or the Property, (c) the *exercise of rights to collect rents* under the Mortgage or an assignment of rents, (d) the recording by Lender or its successor or assignee of a deed in lieu of foreclosure for the property, or (e) any transfer or abandonment of possession of the Property to the Lender or its successor or assigns in connection with any proceedings affecting Owner under the Bankruptcy Code, 11 U.S.C. § 101, et seq.

*Id.*, § 1 (emphasis added).

A “transfer” which would transform the Master Lease into a direct lease as between 4<sup>th</sup> Walnut and Greentree is defined to take any of five forms. Of those five, 4<sup>th</sup> Walnut contends that a transfer occurred in either of two ways: by Sovereign’s foreclosure action in November 2009 or by 4<sup>th</sup> Walnut’s exercise of its rights under the Assignment of Rents in July 2010. 4<sup>th</sup> Walnut’s Brief in Support of Motion for Reconsideration, 2-3. The effect of either of those events is to divest the Debtor of any interest in the rents. It is that argument which 4<sup>th</sup> Walnut believes the Court failed to consider.

The Court begins with the argument that the foreclosure triggered a transfer. While the record reflects that Sovereign commenced a foreclosure action, it likewise demonstrates that Sovereign decided not to prosecute that action after having met with the Debtor’s representative in January 2010. From that, the Court concludes, a transfer has not occurred.

4<sup>th</sup> Walnut's second example of a transfer; i.e., that it exercised its rights to the rents, is a more complicated question. The record reflects that 4<sup>th</sup> Walnut demanded the rents in July 2010. Its July 2 letters to the Debtor and Greentree informed them both that the Debtor's license to collect the rents was revoked; that future rents should go directly to 4<sup>th</sup> Walnut; and that the delinquent rent balance must be cured by July 16, 2010. The upshot of this was that the Master Lease was henceforth a direct lease as between only 4<sup>th</sup> Walnut and Greentree. That alone, it says, effectively divested the Debtor of any rights to the rents. 4<sup>th</sup> Walnut's Brief, 2-3.

Moreover, 4<sup>th</sup> Walnut adds, it subsequently took action which terminated Greentree's interest as well. After Greentree failed to cure the delinquent rent by the July 16 deadline, 4<sup>th</sup> Walnut sent another letter to Greentree. Its July 22 letter notified Greentree that the Master Lease was terminated altogether. From this, 4<sup>th</sup> Walnut concludes, neither Debtor nor Greentree retained any interest in the rents after July 22, 2010. As this action was taken prior to the date Debtor commenced this bankruptcy case (July 23, 2010), any interest that the Debtor would have otherwise had in the rents would *not* become property of the estate. *Id.*, 3-4.

The operative premise of 4<sup>th</sup> Walnut's argument is that a "transfer" as defined by the SNDA occurred. That transfer, in turn, placed 4<sup>th</sup> Walnut in direct privity with Greentree and divested Debtor of any interest in the Master Lease or the rents. For a transfer to have occurred, however, the SNDA requires 4<sup>th</sup> Walnut to have "exercised its rights to collect the rents under the mortgage or assignment of rents." SNDA, § 1. The February 22 Opinion found that 4<sup>th</sup> Walnut had failed to do just that: 4<sup>th</sup> Walnut had not enforced its interest in the rents prior to bankruptcy. See 2011 WL 915328, at \*6.

While it sent demand letters to the Debtor and Greentree, it did not demand rent from the subtenants, the ultimate source of the rents, *until after the case was commenced*. *Id.* What must necessarily follow is that a “transfer” as defined under the SNDA had not yet occurred. Accordingly, contrary to what is alleged here, the Court *did address* the effect of the July 22 termination of the Master Lease upon the Debtor’s rights in the rents. It specifically found it to have no effect. *Id.*

But even assuming, *arguendo*, that this Court is incorrect and that 4<sup>th</sup> Walnut terminated the Debtor’s interest in the rents as a direct result of the July 22 letter to Greentree, that is not the stuff of a Rule 60(b)(1) request. If, as 4<sup>th</sup> Walnut maintains, the Court erred in not finding that Debtor’s interest in the rents terminated as of July 22, then it was a *legal* error of which the Court is guilty. Legal error, if not challenged under Rule 59, is within the province of appeals. Indeed, Rule 60(b) is not a substitute for an appeal. See *Martinez-McBean v. Gov’t of the Virgin Islands*, 562 F.2d 908, 911 (3d Cir. 1977). The Third Circuit, however, has never expressly ruled on the question of whether legal error may constitute a mistake for purposes of Rule 60(b)(1) relief. See *Page v. Schweiker*, 786 F.2d 150, 155 (3d Cir. 1986) (noting prior holding in *Martinez*, *supra*, that legal error may not be raised as basis for relief under Rule 60(b)(6)). That being said, relatively recent decisions from our Court of Appeals suggest that the argument is not well-made in the Rule 60(b)(1) context. See *James v. V.I. Water & Power Author.*, 119 Fed.Appx. 397, 401 (3d Cir. Jan. 12, 2005) (not precedential) (stating that “[t]he language in *Fiorelli*<sup>4</sup> and *Evans*<sup>5</sup> with respect to legal error and Rule

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<sup>4</sup>*United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir.2003) (remanding incarcerated  
(continued...))

60(b), however, appears to foreclose [the] argument ... that legal error could be addressed under Rule 60(b)(1)"). Because 4<sup>th</sup> Walnut's request for relief under Rule 60(b)(1) is based on legal error, it must be denied.

#### *Other Justifying Circumstances*

Alternatively, if the Court were not to grant relief based on a finding of mistake, then 4<sup>th</sup> Walnut maintains that other circumstances justify relief. Under Rule 60(b)(6), relief may be granted upon a showing of exceptional circumstances. *Coltec Industries, Inc. v. Hobgood*, 280 F.3d 262, 273 (3d Cir. 2002).

As for grounds for relief, 4<sup>th</sup> Walnut asserts prejudice. It explains that any appeal of the February 22 Opinion would not be ruled upon until long after this bankruptcy is completed. 4<sup>th</sup> Walnut's Reply, 8. Thus, it concludes, fairness requires that its request be granted now. *Id.* The Court rejects that argument for two reasons: first, it does not necessarily accept the premise that an appeal will be lengthy. The possibility that the bankruptcy case will conclude before the rent issue is resolved on appeal is possible, but a claim of certainty on that score is speculative. Moreover, that argument still has an insoluble problem; to wit, should this Court grant the relief based on legal error, then it would be arrogating appellate jurisdiction. That is simply impermissible. See *Pridgen v. Shannon*, 380 F.3d 721, 728 (3d Cir. 2004) (quoting *Martinez-McBean*, *supra*, 562

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<sup>4</sup>(...continued)  
petitioner's rule 59(e) motion for determination of timeliness and observing that legal error does not warrant relief under Rule 60(b));

<sup>5</sup>*Smith v. Evans*, 853 F.2d 155, 158 (3d Cir.1988) (explaining that legal error without more cannot justify granting a Rule 60(b) motion, citing *Martinez*, *supra*, 562 F.2d at 912)

F.2d at 912) (holding that legal error does not justify the granting of relief under Rule 60(b)(6)). The motion does not allege any exceptional circumstance which might justify such relief.

Aside from its substantive weakness, the request under subdivision (b)(6) is otherwise precluded. The remedy under Rule 60(b)(6) is mutually exclusive of the other five bases of relief under Rule 60(b). In other words, this “catch-all” provision is unavailable if it based on one or more of the reasons already set forth in the previous five subparagraphs. See *FDIC v. Alker*, 234 F.2d 113, 116-17 & n.5 (3d Cir. 1956); *Shenkan v. Potter*, 2006 WL 840340, at \*2 (W.D.Pa. Mar. 27, 2006); see 11 *Fed. Prac. & Proc. Civ.* § 2864 (2d ed.) (“These cases also certainly seemed to establish that clause (6) and the first five clauses are mutually exclusive and that relief cannot be had under clause (6) if it would have been available under the earlier clauses.”) In this case, 4<sup>th</sup> Walnut has already argued, *supra*, that the Court committed a mistake in rendering what it argues is an erroneous ruling. Once argued as an independent basis for Rule 60(b)(1) relief, it may not be offered, in the alternative, as an example of extraordinary circumstances which would justify relief.

*Summary*

4<sup>th</sup> Walnut's Motion comes too late for reconsideration under Rule 59(e) and without a basis for relief under Rule 60(b). Accordingly, the Motion will be denied.

An appropriate Order follows.

By the Court:

A handwritten signature in black ink, appearing to read "Stephen Raslavich", is written over a horizontal line.

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Stephen Raslavich  
Chief U.S. Bankruptcy Judge

Dated: June 23, 2011

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| IN RE:                   | : CHAPTER 11                |
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| 400 WALNUT ASSOCIATES LP | :                           |
|                          | :                           |
| DEBTOR(S)                | : BANKRUPTCY No.10-16094 SR |

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**ORDER**

**And Now**, upon consideration of the Motion of 4<sup>th</sup> Walnut Associates, L.P. for Reconsideration of this Court's ruling on the Debtor's Motion for Permission to Use Cash Collateral, the Debtor's Response thereto, after hearing held April 28 and May 19, 2011, the submission of briefs, and for the reasons set forth in the preceding Opinion, it is hereby:

ORDERED, that 4<sup>th</sup> Walnut's request for reconsideration or other relief from the Opinion and Order of February 22, 2011 regarding use of cash collateral and ownership of rents is Denied.

By the Court:



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Stephen Raslavich  
Chief U.S. Bankruptcy Judge

Dated: June 23, 2011

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