

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE:	§	
	§	Administratively Consolidated under
ABC UTILITIES SERVICES, INC., et al.,	§	Case No. 89-41420-BJH-7
	§	
Debtors.	§	

MEMORANDUM OPINION

Before the Court is Frank A. Wolfe’s Motion for Rule 60(b) Relief From Order Approving Bruce Budner’s Motion to Approve Settlements (Orix Credit Alliance, Inc.) (the “Motion”). This Memorandum Opinion constitutes the Court’s Findings of Fact and Conclusions of Law. FED. R. CIV. P. 52; FED. R. BANKR. P. 7052.

I. Contentions of the Parties

In the Motion, Frank A. Wolfe, Jr. (“Movant” or “Wolfe”) seeks Rule 60(b)(6) relief from a prior Order of this Court approving a settlement agreement between the Debtors’ estates and ORIX Credit Alliance, Inc. (“OCAI”) (the “OCAI Settlement Order”) in order to allow Movant to obtain or retain certain documents initially produced by OCAI, subject to the terms of a Stipulation and Order of Confidentiality (the “State Court Confidentiality Order”), in connection with a state court malpractice lawsuit by the Debtors’ estates against its former attorneys (the “OCAI Documents”). Movant contends that subsequent developments with respect to the OCAI Documents – specifically, a recent decision by the District Court in connection with an appeal from a discovery order of this Court made final by the OCAI Settlement Order – justifies his request for an Order explicitly granting him rights in the OCAI Documents.

OCAI objects to the relief sought by Movant, contending that such relief is not proper under Rule 60(b)(6) because Movant has failed to establish the required “extraordinary circumstances” necessary for relief under that subsection. OCAI also contends that the Motion is an “impermissible collateral attack” on the State Court Confidentiality Order and the prior confidentiality ruling of United States District Court (Solis, J.) adopting that order.

II. Factual and Procedural Background

The relationship and history of disputes between and among Wolfe, the Debtors, and OCAI is complicated. These bankruptcy cases were filed over a decade ago and have resulted in numerous decisions on a variety of related issues from this Court, the District Court, and the Fifth Circuit Court of Appeals. The relevant facts are set forth below.

Movant was the principal and controlling shareholder of the three Debtors: ABC Utilities Services, Inc.; ABC Asphalt, Inc.; and Utilities Equipment Leasing Company, Inc. (collectively, the “ABC Entities,” or the “Debtors”). In April 1989, Wolfe caused the ABC Entities to file for protection under Chapter 11 of the Bankruptcy Code. Subsequently, Joseph Colvin was appointed as the Chapter 11 Trustee for each of the ABC Entities and, after all three cases were converted to Chapter 7, the Chapter 7 Trustee (the “Trustee”).

Prior to their bankruptcy filings, the ABC Entities entered into a series of secured lease and finance transactions with OCAI. After their bankruptcy filings, the ABC Entities (acting either through Wolfe or the Trustee) asserted numerous claims against OCAI. However, over the ten-plus year history of these cases, OCAI succeeded in: (i) obtaining final judgments dismissing all of the claims asserted against it by the ABC Entities; (ii) securing relief from the automatic

stay by final order to execute on its liens; and (iii) obtaining allowed claims against the ABC Entities by final order after objections to its proofs of claim were filed.

After attempting, unsuccessfully, to assert claims against OCAI, Wolfe believed that the ABC Entities should sue their former attorneys for malpractice in the handling of the OCAI claims. Because the Trustee refused to bring those malpractice claims, Wolfe sought, and obtained, permission from this Court to bring such a lawsuit in state court (the “Malpractice Suit”) “on behalf of the estates of the Debtors.” *See* Order Granting Second Amended Motion for Order Permitting Creditor to Initiate Litigation (the “Litigation Order”) (Docket No. 641) at p. 2.¹ The basis for the Malpractice Suit was the contention that counsel for the ABC Entities had impermissible conflicts of interest while representing the ABC Entities in connection with their claims against OCAI, and that the ABC Entities suffered damages as a result of those conflicts. *See* Motion to Approve Settlements and Application of Counsel for an Award of Professional Fees and Reimbursement of Expenses (the “Settlement Motion”) (Docket No. 744) at pp. 2-3.

The Malpractice Suit was filed in state court in February 1996. *See* Plaintiff’s Original Petition (OCAI Exh. 35); *see also* Settlement Motion (Docket No. 744) at p. 4. Although OCAI was not a party to the Malpractice Suit, the ABC Entities sought extensive discovery from OCAI, including production of the OCAI Documents. *See* Settlement Motion (Docket No. 744) at pp.

¹All pleadings or other documents cited to in this Memorandum Opinion are either: (i) attached as an exhibit to Motion for Rule 60(b) Relief From Order Approving Bruce Budner’s Motion to Approve Settlements (Orix Credit Alliance, Inc.) (hereinafter cited to as “Movant’s Exh. ___”); (ii) attached as an exhibit to Witness and Exhibit List of Orix Financial Services, Inc. for Hearing on Motion for Rule 60(b) Relief From Order Approving Bruce Budner’s Motion to Approve Settlements (Orix Credit Alliance, Inc.) (hereinafter cited to as “OCAI Exh. ___”); or (iii) a part of the Court’s file in these cases (hereinafter cited to as “Docket No. ___”).

4-5, 7-8. Eventually, OCAI was ordered by the state court to produce the OCAI Documents under the protection of the State Court Confidentiality Order. *See* State Court Confidentiality Order (OCAI Exh. 36). Among other things, the State Court Confidentiality Order provided that the OCAI Documents were to be “used solely for the prosecution or defense of the claims asserted in the [Malpractice Suit] and shall not be used for any other purpose. . . .” *See id.* at p. 3. The State Court Confidentiality Order further provided that it would “survive the termination of [the Malpractice Suit]” and that upon the termination of the Malpractice Suit, the parties were to “return to OCAI all documents produced by OCAI, including all copies, prints and other reproductions of such information.” *See id.* at p. 4.

OCAI and the ABC Entities had continuing discovery disputes in the Malpractice Suit. *See* Settlement Motion (Docket No. 744) at pp. 4-5, 7-8. While these discovery disputes were pending, the parties to the Malpractice Suit successfully mediated their disputes and in July 1998, a Compromise Settlement Agreement was executed by the parties, subject to this Court’s approval (the “Malpractice Settlement”). *See id.* at pp. 6-7; *see also id.*, Exhibit C. As a result of the Malpractice Settlement, only one issue remained in the Malpractice Suit – the ABC Entities’ motions for sanctions for discovery abuses against OCAI and to lift confidentiality of the OCAI Documents. By letter agreement dated July 23, 1998, OCAI and the ABC Entities agreed to settle their discovery disputes, subject again to this Court’s approval (the “OCAI Settlement”). *See id.* at pp. 6, 8; *see also id.*, Exhibit D.

The state court reviewed and approved the Malpractice Settlement and the OCAI Settlement. Thereafter, on August 20, 1998, Budner filed the Settlement Motion whereby he sought this Court’s approval of the Malpractice Settlement and the OCAI Settlement. *See*

generally Settlement Motion (Docket No. 744). The Settlement Motion contained notice to creditors as required by Local Bankruptcy Rule 9007.1, which notice provides that unless a timely response to the motion is filed, the motion will be deemed unopposed and an order may be entered by the court granting the relief requested. *See* Settlement Motion (Docket No. 744) at p. 12; N.D. Tex. L.B.R. 9007.1. Wolfe filed a response to the Settlement Motion on September 10, 1998. *See* Response of Frank A. Wolfe, Jr. to Bruce A. Budner’s Motion to Approve Settlements (Docket No. 748). In his response Wolfe objected to the proposed settlements “to the extent approval [of the settlements] would arguably bar him or any party in interest from seeking disclosure of [the OCAI Documents].” *See id.* at p. 2. The Settlement Motion was set for hearing on October 7, 1998. *See* Notice of Hearing (Docket No. 749).

After filing his response to the Settlement Motion, Wolfe noticed counsel for the ABC Entities in the Malpractice Suit, Bruce Budner (“Budner”), for deposition and subpoenaed the production of the OCAI Documents at that deposition. *See* Notice of Deposition duces tecum to Bruce A. Budner (Docket No. 753). The Budner deposition was noticed for September 29, 1998 (but was rescheduled by agreement for October 23, 1998). On October 2, 1998, OCAI filed a motion for protective order and to quash the Budner deposition (the “Motion to Quash”) (Docket No. 758).

At the October 7, 1998 hearing on the Settlement Motion, the Court found that while Wolfe was objecting to the OCAI Settlement, he had no objection to the Malpractice Settlement. *See* Order Partially Approving Settlement and Application of Special Counsel for an Award of Professional Fees and Reimbursement of Expenses (the “Malpractice Settlement Order”) (Docket No. 760). Thus, the Court approved the Malpractice Settlement and “reserved for later

determination” the OCAI Settlement. *See id.* Wolfe approved the Malpractice Settlement Order “as to form and substance.” *See id.* at p. 2.

On October 15, 1998, Wolfe filed his response to the Motion to Quash. *See* Response to Emergency Motion of Orix Credit Alliance, Inc. For Protective Order to Prohibit Deposition of Bruce A. Budner and to Quash Subpoena Duces Tecum (Docket No. 762). On October 19, 1998, this Court heard and denied the Motion to Quash. *See* Proceeding Memorandum (Docket No. 769). On October 22, 1998, OCAI sought leave to appeal to the District Court, which proceeding was assigned to the Honorable Jorge Solis. *See* Motion for Leave to File Notice of Appeal (Docket No. 771). At a telephonic hearing on October 23, 1998 (shortly before the scheduled Budner deposition), the District Court denied OCAI’s motion for a stay pending appeal, but ordered that any of the OCAI Documents produced to Wolfe at the deposition would be subject to confidentiality provisions like those contained in the State Court Confidentiality Order. Leave to appeal was ultimately denied on May 25, 1999. *See Orix Credit Alliance, Inc. v. Wolfe (In re ABC Utilities Services, Inc., et al.)*, Case No. 4:98-CV-0937 (N.D. Tex. May 25, 1999).

On September 28, 1999, this Court considered the OCAI Settlement and Wolfe’s objections to that settlement. *See* Proceeding Memorandum (Docket No. 805). On October 22, 1999, this Court entered an order approving the OCAI Settlement, finding that “the settlement agreement between debtors and Orix Credit Alliance, Inc. is fair and equitable and in the best interest of the bankruptcy estate.” *See* Order Approving Sanctions Settlement with Orix (the “OCAI Settlement Order”) (Docket No. 808).

On November 1, 1999, Wolfe filed his Motion for Additional Findings of Fact and asked the Court to “make an explicit finding of fact that the parties agreed that the records could be

made available by the Bankruptcy Court, free of the restrictions of the confidentiality order, and that the Court has done so by its order denying OCAI's motion to quash the deposition." See Motion for Additional Findings of Fact (Docket No. 810) at p. 2. Wolfe's motion for additional findings was denied by Order entered on February 11, 2000. See Order Denying Motion of Frank A. Wolfe, Jr. for Additional Findings of Fact (the "Order Denying Additional Findings") (Docket No. 823).

Once the Order Denying Additional Findings was entered, this Court's prior order denying the Motion to Quash (the Budner deposition and production of the OCAI Documents) became final and OCAI appealed that order to the District Court (McBryde, J.).² See Notice of Appeal (Docket No. 825). On August 17, 2000, the District Court affirmed this Court's denial of the Motion to Quash. See *Orix Credit Alliance, Inc. v. Joseph Colvin, et al. (In re ABC Utilities, Inc., et al.)*, Case No. 4:00-CV-0472-A (N.D. Tex. Aug. 17, 2000) (hereinafter referred to as the "District Court Opinion") (Movant's Exh. A).

By letter dated September 29, 2000, Wolfe's attorney advised OCAI that he had released the OCAI Documents to Wolfe. See Movant's Exhs. B, C. OCAI responded promptly, objecting to any such disclosure as violating, *inter alia*, the terms of the now final OCAI Settlement Order and the State Court Confidentiality Order. See Movant's Exh. C.

On October 6, 2000, Wolfe filed the Motion, seeking Rule 60(b)(6) relief from the OCAI Settlement Order.

²Because Wolfe did not appeal the Order Denying Additional Findings, the OCAI Settlement Order became final and binding upon the parties.

III. Analysis and Authority

Federal Rule of Civil Procedure 60(b), made applicable by Federal Rule of Bankruptcy Procedure 9024, provides a mechanism for awarding relief from judgments or orders in certain circumstances. *See* FED. R. CIV. P. 60(b); FED. R. BANKR. P. 9024. Movant seeks relief under Rule 60(b)(6) which provides that a court may provide relief from a final judgment to a party or a party's legal representative for "any other reason justifying relief from the operation of the judgment." *See* FED. R. CIV. P. 60(b)(6). As noted in *Heirs of H.P. Guerra v. U.S.*, 207 F.3d 763, 767 (5th Cir. 2000), while Rule 60(b)(6) "allows a court to vacate a judgment when it is appropriate to accomplish justice," "[a] court may grant relief under 60(b)(6) only under extraordinary circumstances." *See also* *Government Fin. Servs. One Ltd. Partnership v. Peyton Place, Inc.*, 62 F.3d 767, 773-74 (5th Cir. 1995) ("Relief under this section is granted 'only if extraordinary circumstances are present.'") (citing *American Totalisator Co. v. Fair Grounds Corp.*, 3 F.3d 810, 815-16 (5th Cir. 1993)); *Bailey v. Ryan Stevedoring Co., Inc.*, 894 F.2d 157, 160 (5th Cir. 1990) ("Relief under Rule 60(b)(6) will be granted only if extraordinary circumstances are present.") (citing *Ackermann v. United States*, 71 S.Ct. 209 (1950)); *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 604-05 (5th Cir. 1986) ("Clause (6) [of Rule 60(b)] is a residual clause used to cover unforeseen contingencies; that is, it is a means for accomplishing justice in exceptional circumstances.").

Movant contends that he is entitled to the extraordinary remedy of relief under Rule 60(b)(6) from the OCAI Settlement Order solely as a result of the recent District Court Opinion affirming the order denying the Motion to Quash. *See* Motion at p. 5. Movant does not seek to vacate or set aside the OCAI Settlement Order (which would result in the Debtors' estates being

required to return the \$80,000.00 received from OCAI in connection with that settlement); rather, Movant seeks only to relieve himself from complying with the terms of the OCAI Settlement as approved by the now final OCAI Settlement Order. *See id.*

After a careful review of the District Court Opinion, this Court concludes that Movant failed to establish any extraordinary circumstance that warrants relief under Rule 60(b)(6) from the OCAI Settlement Order. The issue on appeal before the District Court was “whether the bankruptcy court had jurisdiction to deny [OCAI’s] motion to quash [the Budner deposition and production of the OCAI Documents].” *See* District Court Opinion at p. 5. After considering the parties’ (Wolfe’s and OCAI’s) arguments and the record below, the District Court concluded that “the bankruptcy court had authority to allow discovery of the [OCAI] documents held by [Budner]” and thus affirmed this Court’s prior discovery order. *Id.* at p. 7.

Of significance in the context of the Motion, however, is the District Court’s analysis of why Wolfe was entitled to production of the OCAI Documents in connection with Wolfe’s objection to the OCAI Settlement. The District Court noted that

A provision of the settlement agreement was that the documents would be returned to appellant [OCAI] and not used for any purpose by or on behalf of debtors. Wolfe contended that the documents would establish that appellant had defrauded the bankruptcy court by filing a false claim. Whether such a claim could have been pursued would have been a factor for the bankruptcy court to consider in determining whether to approve the settlement.

District Court Opinion at p. 7. Moreover, the District Court specifically rejected OCAI’s contention on appeal that “denial of the motion to quash somehow overruled or modified the confidentiality order,” noting that “[t]here is no support for this statement. The bankruptcy court simply refused to quash a deposition notice with subpoena duces tecum. It did not consider the effect of the confidentiality order imposed by the state court.” *See id.* at p. 6. The District Court

further noted that “the bankruptcy court was not considering the [OCAI] settlement at the time it considered [OCAI’s] motion for protective order and to quash” and that “[a]pproval of the [OCAI] settlement was considered at a separate, later hearing.” *Id.*

There is nothing in the District Court Opinion to suggest that Wolfe is entitled to keep the OCAI Documents permanently. The District Court simply concluded that this Court was correct when it allowed Wolfe to get copies of the OCAI Documents from Budner so that Wolfe could attempt to prove that the OCAI Settlement should not be approved.

Once Wolfe’s objection to the OCAI Settlement was denied, the OCAI Settlement Order was entered, the Order Denying Additional Findings was entered, and the time to appeal those Orders expired, Wolfe was bound to comply with the terms of the approved OCAI Settlement. Under that settlement the State Court Confidentiality Order “remain[ed] in full force and effect and shall survive the dismissal of the matters stated herein and Plaintiffs will not at any time seek or request to modify or vacate the Confidentiality Order.” *See* Settlement Motion (Docket No. 744), Exhibit D at p. 2. The State Court Confidentiality Order makes it clear that the OCAI Documents can only be used in connection with the Malpractice Suit. *See* State Court Confidentiality Order (OCAI Exh. 36 at p. 3) (“Confidential Material . . . may be used solely for the prosecution or defense of the claims asserted in the [Malpractice Suit] and shall not be used for any other purpose.”). OCAI has never agreed that the OCAI Documents would be produced without confidentiality protections and has never agreed that the OCAI Documents could be retained by anyone after the termination of the Malpractice Suit. The OCAI Settlement specifically required the dismissal of the Malpractice Suit and the dismissal of then pending motions in the state court for contempt for discovery sanctions and for relief from the

confidentially order. *See* OCAI Settlement (Docket No. 744), Exhibit D at p. 2. The state court approved the OCAI Settlement as did this Court. *See* Settlement Motion (Docket No. 744); Malpractice Settlement Order (Docket No. 760); OCAI Settlement Order (Docket No. 808).

If this Court were to grant the Motion and order that Wolfe and his counsel are under no obligation to return the OCAI Documents, one of the benefits bargained for by OCAI under the OCAI Settlement (continued confidentiality of the OCAI Documents) is vitiated. OCAI agreed to pay \$80,000.00 to the Debtors' estates in exchange for dismissal of the sanctions motion and continuing confidentiality of the OCAI Documents as provided in the State Court Confidentiality Order. *See* Settlement Motion (Docket No. 744), Exhibit D. Pursuant to the terms of the OCAI Settlement and the underlying State Court Confidentiality Order, OCAI is entitled to have the OCAI Documents, and all copies of such documents, returned to it.

Movant has failed to establish any legitimate interest he may have in retaining the OCAI Documents. Any claims the ABC Entities may have had against OCAI have been finally disposed of pursuant to prior Orders of this Court, the District Court and the Fifth Circuit Court of Appeals. This Court's Order granting relief from the automatic stay in favor of OCAI was entered on April 13, 1992 (Docket No. 462), was not appealed by any party, and is now a final and binding order. This Court's Order overruling Wolfe's objections to OCAI's proofs of claim was entered on October 25, 1996 (Docket No. 733), was not appealed by any party, and is now a final and binding order. Finally, in a decision dated May 15, 1995, the Fifth Circuit affirmed several decisions of the District Court which resulted in the dismissal of all of the ABC Entities' claims against OCAI. *See ABC Asphalt, Inc., et al. v. Credit Alliance Corp., et al. (In re ABC Utilities, Inc.)*, Case No. 93-9120 (5th Cir. May 15, 1995).

Movant has not established: (i) any extraordinary circumstance justifying Rule 60(b)(6) relief from the OCAI Settlement Order; or (ii) any legitimate, continuing need for the OCAI Documents. If a legitimate need arises later, the Court sees no reason why the OCAI Documents would not be subject to discovery at that time. For these reasons, the Motion should be denied.

A separate Order will be entered denying the Motion.

Signed this ____ day of December, 2000.

Barbara J. Houser
United States Bankruptcy Judge

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