UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MEGAN-RACINE ASSOCIATES, INC.	CASE NO. 92-00860
Debtor	Chapter 11

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Before this Court is a motion filed by Megan-Racine Associates, Inc. ("Debtor") pursuant to Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") 9024 seeking a reconsideration of this Court's February 14, 1996 Memorandum-Decision, Findings of Fact, Conclusions of Law and Order ("February 14th Order") which compelled the Debtor to move to assume or reject its Gas Supply Contract ("gas contract") with TransCanada Gas Marketing Limited (TransCanada") within 120 days of the entry of the February 14th Order.

The Federal Deposit Insurance Corporation ("FDIC"), Kraft General Foods ("Kraft") and the Unsecured Creditors Committee ("Committee") supported Debtor's motion, while TransCanada filed papers in opposition to the motion and was joined in that opposition by Niagara Mohawk Power Corporation ("NIMO").

The Court heard oral argument on the Debtor's motion at Syracuse, New York on March 19, 1996, and the matter was submitted for decision as of that date.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and the

subject matter of this contested matter pursuant to 28 U.S.C. §§1334(b), 157(a), (b)(1), (b)(2)(A) and (O).

FACTS

The factual background for the instant motion is fully set forth in the Court's February 14, 1996 Order. See In re Megan-Racine Associates, Inc., Case No. 92-00860, Slip op. (Bankr.N.D.N.Y. February 14, 1996). Familiarity with the foregoing decision is assumed and the facts therein are incorporated by reference. The Court, therefore, will only recite those facts that are pertinent to the instant motion and that were not set forth previously.

On February 2, 1996, this Court issued its Memorandum-Decision, Finding of Fact, Conclusion of Law and Order, inter alia, denying the application of NIMO to terminate so called 6¢ payments to the Debtor and directing NIMO to turnover all escrowed funds to the Debtor ("6¢ Order"). On February 7, 1996, NIMO filed a Notice of Appeal of the 6¢ Order and moved for a stay pending an appeal in this Court. That motion was denied by a Memorandum-Decision, Findings of Fact, Conclusions of Law and Order dated February 15, 1996 ("Stay Denial Order").

Pursuant to Fed.R.Bankr.P. 8005, NIMO immediately sought a stay pending appeal from the United States District Court for the Northern District of New York ("District Court"). As of the date of the argument of this motion no order had been issued by the District Court finally granting or denying a stay.

ARGUMENTS

Debtor argues that the 120 day period, fixed by the Court in the February 14th Order, in which to move to assume or reject the gas contract will be extremely prejudicial since the uncertain outcome of the appeal of the 6¢ Order and the pending adversary proceeding commenced by NIMO against the Debtor and the FDIC to terminate the power purchase agreement will directly bear on the Debtor's decision to assume or reject the gas contract. Debtor asserts that if it rejects the gas contract before the outcome of the pending litigation with NIMO is concluded, it will give TransCanada a pre-petition claim of approximately $48 million and leave Debtor without a gas supplier. Conversely, if Debtor assumes the gas contract, it will have to cure approximately $3 million in alleged pre-petition breaches and will elevate TransCanada's contract claims to administrative priority status, thus prejudicing general unsecured creditors in the event NIMO is successful in the litigation and Debtor is forced to convert to Chapter 7.

Debtor opines that the only reason TransCanada filed its motion to compel assumption or rejection of the gas contract pursuant to §365 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") that resulted in the February 14th Order was to protect itself from a so-called "lagtime" claim which would result from natural gas sold and delivered to the Debtor, payment for which is to be received 30 days or more thereafter. At oral argument, Debtor and the FDIC agreed that TransCanada's lagtime claim would be paid out of cash collateral, allegedly subject to the security

interest of the FDIC, if TransCanada would consent to an extension of the time to assume or reject its gas contract beyond the 120 day limit.

The FDIC suggests that the Court reconsider its February 14th Order due to the unanticipated events involving NIMO's appeal of this Court's 6¢ Order. The parties had anticipated a decision from the District Court on or before March 4, 1996, on NIMO's request for stay pending appeal of the 6¢ Order, but as of the argument of this motion no stay had been granted or denied by the District Court. Consequently, some thirty-four days had elapsed since the February 14th Order and the record on appeal of the 6¢ order had not been fully designated, no briefing schedule had been issued and no date had been fixed to argue the appeal. The FDIC also opined that if NIMO is unsuccessful in its appeal of the 6¢ Order to the District Court, it would almost certainly file an appeal to the U.S.Court of Appeals for the Second Circuit ("Second Circuit").

Kraft observed that the February 14th Order at page 9 specifically referenced giving the parties "an opportunity to determine the significance of the December 14 [Federal Energy Regulatory Authority] order and its impact on the NIMO adversary proceeding." Additionally, "such relief limits TransCanada's doubt concerning [its] status vis-a-vis the estate" (citations omitted). Kraft argues that this Court apparently anticipated a resolution of the appeal of the 6¢ Order, as well as the NIMO adversary proceeding, within the 120 days. However, that prospect, at least with regard to the 6¢ Order, is now not realistic.

TransCanada asserts that the Court may not reconsider its decision pursuant to Federal Rules of Civil Procedure ("Fed.R.Civ.P.") 60(b), which is incorporated by reference in Fed.R.Bankr.P. 9024, absent extraordinary circumstances and the current status of the appeal of the 6¢ Order pending before the District Court is not an extraordinary circumstance since all of the parties were aware of NIMO's litigious nature and the probability that an appeal would be taken from the Court's 6¢ Order.[1]

TransCanada asserts that Debtor has always been aware of TransCanada's significant contract rejection claim and that TransCanada has always been willing to negotiate that claim. As for the administrative claim that will arise out of the contract's assumption vis-a-vis its impact on unsecured creditors if the case converts, TransCanada suggests that the case will be administratively insolvent due to the FDIC's alleged secured position, and it is not likely that unsecured creditors will be impacted one way or the other. Finally, TransCanada contends that assumption of the gas contract is the only logical way for the Debtor to proceed. NIMO supports TransCanada by simply observing that it is not beyond the realm of possibility that both the dispute giving rise to the 6¢ Order and the adversary proceeding will be resolved before early June 1996.

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[1] NIMO filed its notice of appeal of the 6¢ Order on February 7, 1996, one week prior to the Court's February 14th Order.

DISCUSSION

It is clear that Debtor's motion for reconsideration can only be maintained, if at all, pursuant to Fed.R.Civ.P. 60(b)(6) and Fed.R.Bankr.P. 9024. Fed.R.Civ.P. 60(b)(6) has been described as a catch-all provision which serves as a "'grand reservoir of equitable power to do justice in a particular case'". See Nissan v. Lundy, 975 F.2d 802, 806 (per curiam) (11th Cir. 1992) (quoting Compton v. Alton Steamship Co., 608 F2d 96, 106-107 (4th Cir. 1979).

As Judge Learned Hand observed long ago in In re Pottasch Bros. Inc., 70 F2d 613, 616 (2nd Cir. 1935), there was no reason why a referee's orders "should be as immutable as the Twelve Tables, once the ink is dry." Clearly, however, the ability to reconsider one's order is not without limitation. The moving party must demonstrate exceptional circumstances as this rule allows for extraordinary judicial relief. See Nemaizer v. Baker, 793 F.2d 58, 63 (2nd Cir. 1986). Whether a movant meets its burden so as to be entitled to relief from a judgment or order lies within the sound discretion of this Court. See Altman v. Connolly, 456 F.2d 1114, 1116 (per curiam) (2nd Cir. 1972) (citation omitted); In re Wells Motors, Inc., 133 B.R. 303, 308 (Bankr.S.D.N.Y. 1991).

It is apparent from Debtor's motion papers that it does not contend that the Court's need to reconsider is grounded upon "extraordinary circumstances", but rather that the February 14th Order was "extremely prejudicial to the Debtor and its creditors." (See Debtor's Motion for Reconsideration at ¶7).

While the Second Circuit has acknowledged that where the judgment works an extreme and undue hardship Fed.R.Civ.P. 60(b)(6) reconsideration may lie (see Matarese v. LeFevre, 801 F.2d 98, 106 (2nd Cir. 1986)), it also cautions that a Fed.R.Civ.P. 60(b)(6) motion "may not be used as a substitute for an appeal." Id. at 107.

It is clear that when this Court entered its February 14th Order it was aware of NIMO's appeal of its 6¢ Order, as well as its pending adversary proceeding in this Court seeking to avoid its power purchase agreement with Debtor. The outcome of both the contested matter and the adversary proceeding are dependant, at least in part, on the December 14, 1995 order of the FERC. The Court selected a timeframe of 120 days in the belief that both the appeal of the 6¢ Order and the resolution of the adversary proceeding could be accomplished within that timeframe. [2] It has now become abundantly clear, as pointed out by the FDIC at oral argument, that the appeal of the 6¢ Order will in all likelihood not be resolved before mid-June due to circumstances that were not apparent to the Court at the time it issued the February 14th Order.

Without considering the merits of the parties' current arguments in support of or in opposition to this motion, the Court believes that unanticipated extraordinary circumstances have occurred which cause the Court to reconsider its February 14th

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[2] As pointed out at oral argument, both NIMO and the FDIC believe that the adversary proceeding is susceptible to summary judgment motions which have been filed with the Court and are to be argued on April 2, 1996.

Order. In reconsidering, the Court will not extend the time constraints set forth in the February 14th Order, at this juncture. It will, however, grant to the Debtor the opportunity to seek an extension of that timeframe upon a timely motion setting forth appropriate grounds.

IT IS SO ORDERED.

Dated at Utica, New York
this 1st day of April 1996

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge