UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376 Chapter 11
Debtors	Substantively Consolidated

APPEARANCES:

COSTIGAN & COMPANY, P.C. Attorneys for Ades and Berg Group Investors 305 Broadway, Seventh Floor New York, New York 10007	WILLIAM F. COSTIGAN, ESQ. Of Counsel
SIMPSON THACHER & BARTLETT Attorneys for Debtors 425 Lexington Avenue New York, New York 10017	KATHRINE MCLENDON, ESQ. Of Counsel
WASSERMAN, JURISTA & STOLZ Attorneys for Official Committee of Unsecured Creditors 225 Millburn Avenue Millburn, New Jersey 07041	HARRY M. GUTFLEISH, ESQ. Of Counsel

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

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

Presently before the Court are two motions filed by William F. Costigan, Esq. on behalf of the Ades and Berg investor groups ("Ades and Berg").[1] In the first motion, filed on June 17, 2003 (the "Motion to Reconsider"), Ades and Berg request the Court, pursuant to Rule 9023 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), to alter or amend the

[1] According to papers previously filed with the Court, the Ades investor group is comprised of 355 BFG investors with allegedly over $16.5 million in Sphere Drake-insured investments, while the Berg investor group consists of 21 BFG investors with allegedly $1,765,000 in Sphere Drake-insured investments. Ades and Berg's Obj., filed March 26, 2003 ("Ades and Berg's 9019 Obj."), at 2-3.

Memorandum-Decision, Findings of Fact, Conclusions of Law and Order entered by the Court on May 22, 2003 pursuant to Fed.R.Bankr.P. 9019 (the "9019 Order") or, alternatively, to provide relief from the 9019 Order pursuant to Fed.R.Bankr.P. 9024.

The 9019 Order authorized Richard C. Breeden, chapter 11 trustee (the "Trustee") of The Bennett Funding Group, Inc. ("BFG") and other substantively consolidated debtors[2] (together with BFG, the "Debtors" or the "Estate"), to enter into a settlement (the "Settlement") with Sphere Drake Insurance plc and Sphere Drake Underwriting Management (Bermuda) (collectively, "Sphere Drake"); Triangle Insurance Management, Ltd. ("Triangle"); Janice Witkowski ("Witkowski"); Lloyd Thompson, Ltd., currently known as JLT Risk Solutions, Ltd. ("Lloyd Thompson"); Sherwood Insurance Services, Inc. ("Sherwood"); Ivan Small ("Small"); certain purchasers and investors in BFG securities (the "BFG Investors"); Dollar Capital Corp. and its bankruptcy estate ("Dollar"); Charles Forman, as chapter 11 trustee for Halpert and Co. ("Halpert"); and the Official Receiver of Bermuda, on behalf of Capital Insurance, Ltd. ("Capital" and together with the Trustee, Sphere Drake, Triangle, Witkowski, Lloyd Thompson, Sherwood, Small, the BFG Investors, Dollar, and Halpert, the "Settling Parties").

Ades and Berg's second motion, filed June 23, 2003, seeks an extension of time to file an a notice of appeal of the 9019 Order pursuant to Fed.R.Bankr.P. 8002(c) (the "8002 Motion" and together with the Motion to Reconsider, the "Motions").

---

[2] On March 29, 1996, BFG, along with Bennett Receivables Corp., Bennett Receivables Corp. II, and Bennett Management and Development Corp., filed voluntary petitions pursuant to chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). On April 19, 1996, American Marine International, Ltd. and Resort Service Co., Inc. filed voluntary petitions pursuant to chapter 11 of the Code and on April 25, 1996, an involuntary case was commenced against Aloha Capital Co. On April 26, 1996, The Processing Center ("TPC") also filed a chapter 11 petition. By Order dated July 25, 1997, the Court substantively consolidated the Debtors' estates.

The Trustee and the Official Committee of Unsecured Creditors (the "Committee") separately filed objections to the Motions. The Court heard oral argument on June 26, 2003 during its regular motion term in Utica, New York, after which the Court provided the parties an opportunity to file memoranda of law. Further argument was heard on July 31, 2003 during the Court's regular motion term in Utica. The matter was submitted on August 22, 2003.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), and (b)(2)(A).

FACTS

The Court will assume the parties' general familiarity with the factual and procedural background of this matter and will only repeat what is essential to deciding the Motions.

I. The Adversary Proceeding

On February 24, 1997, the Trustee brought an adversary proceeding in this Court, in which he alleged tort and contract causes of action against, *inter alia*, Sphere Drake and sought a declaratory judgment providing that the Trustee is the sole and rightful recipient of any proceeds from the reinsurance policy (the "Policy") issued by Sphere Drake to Capital, BFG's captive insurer (the "Adversary Proceeding").[3] *See* Third Amended Complaint, filed Nov. 9,

[3] In a separate policy, Capital insured BFG for any shortfall in the collection of lease receivables that were payable by BFG to BFG Investors. TPC was named as the loss payee on

1999, at ¶¶ 102-10, 125-56. Ades and Berg filed a counterclaim in the Adversary Proceeding against the Trustee, which sought the imposition in their favor of a constructive trust over the Policy proceeds. *See* Ades and Berg's Answer to the Third Amended Complaint, filed February 18, 2000, ¶¶ 69-72. Ades and Berg also filed cross-claims alleging a contract cause of action against Sphere Drake. *See id.* ¶¶ 59-68.

On January 25, 2001, Judge Lawrence E. Kahn of the United States District Court for the Northern District of New York ("Judge Kahn") approved and adopted this Court's recommendation to withdraw the reference of the Adversary Proceeding, thereby enabling it to be adjudicated with an ongoing class action instituted by purchasers of BFG securities against Sphere Drake in the United States District Court for the Southern District of New York (the "SDNY Court") under the title *Becker v. Sphere Drake Insurance plc*, No. 97 Civ. 9485 (JES) (the "Class Action"). *Breeden v. Sphere Drake Ins. plc (In re Bennett Funding Group, Inc.)*, No. 00 CV 01046 (LEK) (N.D.N.Y. Jan. 25, 2001). On December 3, 2001, the SDNY Court dismissed Ades and Berg's cross-claims against Sphere Drake because they lacked standing to individually sue Sphere Drake; the SDNY Court also dismissed Ades and Berg's counterclaim seeking a constructive trust over the Policy proceeds without prejudice and subject to renewal in this Court. *Breeden v. Sphere Drake Ins. plc (In re Bennett Funding Group, Inc. Sec. Litig.)*, 270 B.R. 126, 130 (S.D.N.Y. 2001). The Second Circuit affirmed the SDNY Court's dismissal of Ades and Berg's cross-claims on March 13, 2003. *In re Bennett Funding Group, Inc.*, 60 Fed. Appx. 863, 865 (2d Cir. 2003). In an order dated February 26, 2002, the SDNY Court severed and transferred the Trustee's declaratory judgment action to the Northern District of New York

---

that policy.

for consideration by this Court, leaving the Trustee's claim against Sphere Drake as the only portion of the Adversary Proceeding still remaining before the SDNY Court. *Breeden v. Sphere Drake Ins. plc (In re Bennett Funding Group, Inc. Sec. Litig.)*, No. 01 Civ. 1246 (JES) (S.D.N.Y. Feb. 26, 2002).

On July 30, 2002, Judge Kahn referred the transferred portion of the Adversary Proceeding to this Court. *Breeden v. Sphere Drake Ins. plc*, No. 02 CV 00367 (LEK) (N.D.N.Y. July 30, 2002). This Court ordered the Adversary Proceeding reopened and reinstated on August 16, 2002. *Breeden v. Sphere Drake Ins. plc*, No. 97-70049 (Bankr. N.D.N.Y. Aug. 16, 2002). Ades and Berg moved to renew the constructive trust counterclaim in the Adversary Proceeding on June 25, 2003.

II. The Settlement

The Stipulation and Agreement of Settlement, which sets forth the terms of the Settlement, was filed with the SDNY Court. It provides for an exchange of releases by the Settling Parties and a payment by Sphere Drake to the Trustee of $27,500,000. Stipulation and Agreement of Settlement ("Stipulation") § VII, *in* Trustee's Mot., filed March 13, 2003 (the "9019 Motion"), at Ex. 1. The Trustee estimated the value of the settled claims at $30 million, while Sphere Drake estimated them at less than $10 million. Tr. of March 27, 2003 Hr'g, at 7, 29.

Section IX of the Stipulation requires as a condition to effecting the Settlement this Court's entry of an order, substantially in the proposed form appended to the Stipulation, approving the Settlement and authorizing the Trustee to consummate the Settlement. Stipulation § IX(C) & Ex. J. Section IX also requires as a closing condition the entry by the SDNY Court of final judgments approving the Settlement and terminating the Class Action and the portion of

the Adversary Proceeding over which it retained jurisdiction. Stipulation § IX(A)-(B) & Ex. A & B.

On March 13, 2003, the Trustee filed in the main bankruptcy case the 9019 Motion, which sought an order authorizing him to consummate the Settlement on behalf of the Debtors. 9019 Motion ¶ 1 & at 13-14. The Trustee attached the Stipulation to the 9019 Motion. The 9019 Motion did not refer to any of the exhibits to the Stipulation. Ades and Berg timely filed an objection to the 9019 Motion on March 26, 2003. On May 22, 2003, in the 9019 Order, this Court authorized the Trustee to enter into the Settlement, though it did not enter the proposed order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P.") that was appended to the Stipulation. *In re Bennett Funding Group, Inc.*, No. 96-61376 (Bankr. N.D.N.Y. May 22, 2003). On June 23, 2003, Ades and Berg filed a notice of appeal of the 9019 Order together with the 8002 Motion. In the interim, in an Order dated June 5, 2003, the SDNY Court approved the Settlement, terminated the Class Action, and remanded to this Court jurisdiction over the distribution of the Settlement proceeds. *Becker v. Sphere Drake Ins. plc (In re Bennett Funding Group, Inc. Sec. Litig.)*, No. 97 Civ. 9485 (JES) (S.D.N.Y. June 5, 2003). On November 10, 2003, the Second Circuit dismissed Ades and Berg's appeal of the SDNY Court's Order approving the Settlement. *Ades v. Sphere Drake Ins. plc*, No. 03-7676 (2d Cir. Nov. 10, 2003).

ARGUMENTS

With respect to the Motion to Reconsider, Ades and Berg submit that the Court

should provide relief from the 9019 Order because (1) the Trustee did not provide sufficient notice of the Settlement to the BFG Investors; (2) the Trustee inadequately apprised them of the value of the Estate's claims and failed to provide a comparative allocation model illustrating the amount purchasers of Sphere Drake-insured investments would have received under the Settlement had a special pool been established for their benefit; (3) the Trustee could not impartially negotiate on behalf of the BFG Investors because he was acting under a conflict of interest; and (4) the Settlement is premature because Ades and Berg's counterclaim seeking to impose a constructive trust over the Settlement proceeds has yet to be adjudicated.

The Trustee and the Committee object to the Motion to Reconsider, submitting that Ades and Berg's arguments do not meet the accepted standards for motions decided under Fed.R.Bankr.P. 9024. The Trustee further submits that the BFG Investors received adequate notice, that he provided them with sufficient information on which to evaluate the Settlement, that the closing of the Settlement need not await adjudication of Ades and Berg's counterclaim seeking a constructive trust, and that the allegation that the Trustee consummated the Settlement while under a conflict of interest lacks merit. The Trustee also argues that the Settlement was fair and reasonable, that he provided the Court with a reasonable estimate of the value of the Estate's contract claims against Sphere Drake, and that Ades and Berg could have, but neglected to, request discovery pertaining to the valuation of the contract claims.

With respect to the 8002 Motion, Ades and Berg argue, *inter alia*, that the time to file an appeal of the 9019 Order has not yet begun to run because the Court has yet to execute a certificate pursuant to Fed.R.Civ.P. 54(b) ("Rule 54(b)") affirming the finality of the 9019 Order. Alternatively, if the time to file an appeal began to run as of the 9019 Order's date of entry, Ades and Berg contend that their neglect to timely file is excusable because they were waiting for the

Court to enter a Rule 54(b) judgment for the 9019 Order.

The Trustee and the Committee contend that any requirement to enter a judgment pursuant to Rule 54(b) is not applicable in this proceeding because the parties to the Settlement consider the condition waived and because, otherwise, the Rule 54(b) requirement does not apply to the 9019 Order in view of the flexibility with which courts determine the finality of bankruptcy orders. They also contend that Ades and Berg's neglect to timely file a notice of appeal was within their control and thus not excusable under Fed.R.Bankr.P. 8002(c).

DISCUSSION

I. Timeliness of the Motions

The procedural path that this case has taken has been quite tortuous. However, comprehending it is critical to determining the timeliness of the Motions. Ades and Berg have moved the Court to reconsider the 9019 Order and have filed the 8002 Motion seeking an enlargement of time in which to file an appeal of the 9019 Order. Both Motions are subject to specific statutory deadlines. A motion for relief under Fed.R.Bankr.P. 9023 must be filed within ten days of the entry of the order from which the movant seeks relief, Fed.R.Bankr.P. 9023, while a motion seeking relief under Fed.R.Bankr.P. 9024 must be filed within a "reasonable time" after entry of the order from which the movant seeks relief, but in certain cases this period cannot be longer than one year. *Id.* 9024. Notice of appeals of bankruptcy court orders must be filed within ten days after the entry of such orders; this period may only be enlarged by an additional twenty days if the court makes a finding of excusable neglect. *Id.* 8002(a) & (c).

Ades and Berg question the finality of the 9019 Order, contending that the time to

appeal has not yet begun because the 9019 Order was not rendered final by the entry of a judgment pursuant to Rule 54(b). Thus, Ades and Berg's right to appeal is either (1) *premature* if the running of the time to appeal is awaiting the Court's entry of a Rule 54(b) judgment; (2) *still viable* should the 8002 Motion be deemed timely filed on as of June 23, 2003, on the basis of a finding of excusable neglect; or (3) *extinguished* should the Court find that Ades and Berg's neglect to timely file was inexcusable.

The Motion to Reconsider is also impacted by the finality of the 9019 Order because, insofar as the 9019 Order is considered non-final for lack of a Rule 54(b) judgment, Ades and Berg's motion seeking relief under Fed.R.Bankr.P. 9023 or 9024 would be premature. However, if the Court finds that the 9019 Order was final as of May 22, 2003, then the ten-day period in which Ades and Berg could have filed a motion to alter or amend the 9019 Order under Fed.R.Bankr.P. 9023 would have expired on June 2, 2003,[4] thereby leaving Fed.R.Bankr.P. 9024 as the sole ground on which the Court may reconsider the 9019 Order. *Id.* 9023, 9024.

II. Finality of the 9019 Order

The Court entered the 9019 Order on May 22, 2003. Exhibit J to the Stipulation filed with the SDNY Court consisted of a proposed final order pursuant to Rule 54(b), which was not executed by this Court nor incorporated into the 9019 Order. Stipulation, at Ex. J.

Rule 54(b) applies in adversary proceedings by incorporation into Fed.R.Bankr.P.

---

[4] The last day of the ten-day period in which a notice of appeal may be filed expired on Sunday, June 1, 2003. According to Fed.R.Bankr.P. 9006(a), when the final day of a deadline falls on a weekend or holiday, the deadline is extended to the next business day. Hence, Monday, June 2, 2003, was the last day to file a notice of appeal. Similarly, the last day of the additional twenty-day period provided by Fed.R.Bankr.P. 8002(c) fell on Sunday, June 22, 2003. Thus, Monday, June 23, 2003, is deemed the final day on which the 8002 Motion could have been filed.

7054.[5] A plain reading of Rule 54(b) clearly requires in multi-claim or multi-party actions that the adjudicating court issue a statement that its order is final as to the specific adjudicated claims or parties before such claims or the rights of such parties can be considered finally adjudicated and thus appealable. Fed.R.Civ.P. 54(b); *In re Chateaugay Corp.*, 928 F.2d 63, 64 (2d Cir. 1991); *Orr v. Kinderhill Corp.*, No. 91 CV 00353 (CGC), 1992 U.S. Dist. Lexis 22781, at *2-3 (N.D.N.Y. March 30, 1992). In pertinent part Rule 54(b) provides the following:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed.R.Civ.P. 54(b). The Trustee's purported waiver of the Court's entry of a Rule 54(b) judgment as a condition to effecting the Settlement cannot operate to subvert the mandatory language of Fed.R.Civ.P. 54(b).

The Trustee cites *In re Sonnax Inds.*, 907 F.2d 1280 (2d Cir. 1990), for the proposition that a flexible approach should be employed to determine the finality of decisions in bankruptcy proceedings. *Accord In re Johns-Manville Corp.*, 920 F.2d 121, 126 (2d Cir. 1990). The principle set forth by the Second Circuit in *Sonnax* is sound insofar as it applies to discrete

---

[5] Fed.R.Bankr.P. 7054 also applies to contested matters pursuant to Fed.R.Bankr.P. 9014(c). The Court further notes that the 9019 Order did not arise out of a proceeding involving multiple claims or parties, thereby failing to trigger a duty to enter a judgment in compliance with Fed.R.Bankr.P. 7054.

matters within a larger bankruptcy case. However, *Sonnax* did not contemplate that a multi-claim or multi-party adversary proceeding should be excepted from the dictates of Rule 54(b) as incorporated into Fed.R.Bankr.P. 7054. The Trustee and the Committee positively cite *In re Drexel Burnham Lambert Group*, 960 F.2d 285 (2d Cir. 1992), which held that a settlement order is final if the parties have no further opportunity to object. However, the Second Circuit in *Drexel* did not deal with the issue of whether multi-claim or multi-party adversary proceedings should be subject to the requirements of Fed.R.Bankr.P. 7054 despite the clear language in Rule 54(b) that mandates its application to such proceedings.

Thus, the decisive question is whether the Trustee's 9019 Motion arose in the Adversary Proceeding or if it is a discrete matter within the larger bankruptcy case. The Court finds the latter to be correct. The 9019 Motion was a general motion filed in the Debtors' main case[6] by the Trustee seeking the Court's authorization for him to enter into the Settlement. The Trustee reached agreement with Sphere Drake and the other Settling Parties regarding, *inter alia*, the Trustee's claims against Sphere Drake as advanced in the portion of the Adversary Proceeding before the SDNY Court, not this Court. The Stipulation was captioned and filed in the SDNY Court, which thereafter approved the terms of the Settlement. In light of the procedural posture

of the Adversary Proceeding, this Court was only empowered to analyze the Settlement in the 9019 Order insofar as it related to whether the Court should grant the Trustee the authority to consummate the Settlement. Furthermore, the 9019 Motion and the papers responding to it were filed on the docket of the main case, not the Adversary Proceeding. *See In re Thompson*, 965

[6] The case number assigned to the Debtors' main case, 96-61376, appears on the face of the 9019 Motion. The motion was then docketed in that case.

F.2d 1136, 1140 n.5 (1st Cir. 1992) ("[M]otions to compromise are to be 'filed in the administrative file, as distinguished from the adversary proceeding file, if the compromise comes about in the context of an adversary proceeding.'" (quoting Norton Bankr. L. & Prac. 2d: Bankruptcy Rules 659 (2002-03 ed.)); *In re Masters, Inc.*, 141 B.R. 13, 16 (Bankr. E.D.N.Y. 1992). Though this fact is by no means outcome-determinative, it illustrates the administrative character of the 9019 Motion. More critically, because the 9019 Motion did not involve multiple claims or multiple parties, Fed.R.Bankr.P. 7054's requirement that a court specifically express that an order finally adjudicates the claims or rights decided therein does not apply to the 9019 Motion. Hence, the Court's non-entry of a Rule 54(b) judgment does not render the 9019 Order non-final. As set forth in *Sonnax*, the 9019 Order was final as a discrete matter in the main case.

While the Settlement arose partly out of the Adversary Proceeding, the Court's approval of the Trustee's right to consummate the Settlement is a general case administration matter and is not a matter that would be adjudicated in the Adversary Proceeding. The Court finds it important to point out that a judgment pursuant to Rule 54(b) would be required, for example, for a motion seeking adjudication of a single claim within the Adversary Proceeding because it is still technically a multi-claim dispute.[7] However, that is not the case *sub judice*.

Because the 9019 Order adjudicated a discrete matter within the main case it was a final and appealable order notwithstanding the lack of a statement pursuant to Fed.R.Bankr.P. 7054. Accordingly, the ten-day period for filing an appeal under Fed.R.Bankr.P. 8002 began to run on May 22, 2003 and expired on June 2, 2003. Because Ades and Berg filed the 8002 Motion

[7] The Trustee's request for a declaratory judgment regarding the Estate's right to the Settlement proceeds and Ades and Berg's motion to renew their counterclaim seeking to impose a constructive trust over the Settlement proceeds are the only matters that were referred back to and are still pending before the Court in the Adversary Proceeding.

on June 23, 2003, the final day of the twenty-day enlargement provided by Fed.R.Bankr.P. 8002(c), it will be deemed timely if the Court finds that Ades and Berg's neglect to timely file was excusable. The deadline for filing a motion to alter or amend a judgment or order under Fed.R.Bankr.P. 9023 is also ten days after a court's entry of a judgment or order and thus expired on June 2, 2003 as well. Therefore, the only form for relief from the 9019 Order that the Court can still consider arises solely under Fed.R.Bankr.P. 9024.

III. The Motion to Reconsider

Because the Court has found that Ades and Berg's Motion to Reconsider under Fed.R.Bankr.P. 9023 is untimely, the Court's analysis will proceed under Fed.R.Bankr.P. 9024. *See, e.g., In re Long*, 255 B.R. 241, 245 (10th Cir. BAP 2000); *In re Barger*, 219 B.R. 238, 244 (8th Cir. BAP 1998). Fed.R.Bankr.P. 9024 incorporates Fed.R.Civ.P. 60(b) ("Rule 60(b)"), which in pertinent part provides that a court may vacate a judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (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); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b); *see, e.g., Cody, Inc. v. Town of Woodbury*, 179 F.3d 52, 56 (2d Cir. 1999); *Williams v. New York City Dep't of Corrections*, 219 F.R.D. 78, 83-84 (S.D.N.Y. 2003).

Ades and Berg fail to plead any of Rule 60(b)'s enumerated grounds in the Motion to Reconsider or their supportive memoranda, leaving the Court to speculate on precisely what

basis to decide the Motion to Reconsider. Because the Court cannot divine from Ades and Berg's motion papers any of the bases for relief provided in subsections (1) through (5) of Rule 60(b), the Court will consider the Motion to Reconsider under Rule 60(b)(6), which empowers a court to vacate a judgment for "any other reason justifying relief." *Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir. 2000) (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988)); *Thompson v. County of Franklin*, 127 F. Supp. 2d 145, 149 (N.D.N.Y. 2000).

For the Motion to Reconsider to succeed under Rule 60(b)(6), Ades and Berg must "demonstrate extraordinary circumstances or an extreme and undue hardship." *In re Teligent, Inc.*, No. 01-12974, 2004 WL 42587, at *3 (Bankr. S.D.N.Y. Jan. 8, 2004) (citing *In re Emergency Beacon Corp.*, 666 F.2d 754, 759 (2d Cir. 1981)); *Key Mechanical Inc. v. BDC 56 LLC*, No. 01 Civ. 10173 (RWS), 2002 WL 467664, at *4 (S.D.N.Y. March 26, 2002); *accord DeWeerth v. Baldinger*, 38 F.3d 1266, 1272 (2d Cir. 1994); *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 461 (2d Cir. 1994); *Breedlove v. Cabou*, No. 03 CV 0948, 2003 WL 23000837, at *10 (N.D.N.Y. Dec. 11, 2003). Furthermore, Rule 60(b)(6), though construed broadly to effect substantial justice, *Radack v. Norwegian Am. Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir. 1963), does not provide litigants with a platform from which they can expect relief from adverse judgments on the basis of arguments that could have been or indeed were raised in earlier proceedings. *See Morris v. New York*, No. 91 CV 634, 1995 WL 155953, at *2 (N.D.N.Y. April 5, 1995).

In their objection to the 9019 Motion, Ades and Berg argued (1) that the Trustee's provision of notice was defective; (2) that the Settlement is inadequate; (3) that the Settlement should not be finalized until Ades and Berg's claim for a constructive trust over the proceeds is decided; and (4) that the Settlement negotiations were tainted by the Trustee's conflict of interest,

which arose from his concurrent representation of TPC, the loss payee on the Policy, and BFG, which agreed to indemnify Sphere Drake for payments under the Policy. Ades and Berg's 9019 Obj., at 8-11. Ades and Berg assert substantially similar arguments in the Motion to Reconsider and memoranda supporting it, adding that the Trustee did not provide them with sufficient information with which to evaluate the Settlement. Ades and Berg's Mem. in Support of Mot. for Reconsideration, filed June 17, 2003, at 4-7.

The 9019 Order dismissed Ades and Berg's arguments regarding notice, *Bennett Funding Group, Inc.*, No. 96-61376, at 3 n.4 (Bankr. N.D.N.Y. May 22, 2003), adequacy of recovery, *id.* at 15-16, and the Trustee's conflict of interest. *Id.* Regarding these contentions, Ades and Berg have not provided the Court with sufficient evidence of undue hardship or extraordinary circumstances that would warrant the Court to vacate those portions of the 9019 Order. Moreover, a court should not dole out the extreme remedy of vacating a final order on the basis of previously raised arguments.

Additionally, the Court's consideration of Ades and Berg's constructive trust claim at a later time would not wreak an undue hardship on Ades and Berg and is not an extraordinary circumstance requiring the Court to disturb the 9019 Order. Actually, the opposite is true—consideration of the constructive trust claim requires that the Settlement be finalized because until that happens Sphere Drake will not disburse the Settlement proceeds on which Ades and Berg seek to impose a constructive trust. Thus, assuming *arguendo* that Ades and Berg have a meritorious constructive trust claim, it is imperative that the consummation of the Settlement occur before the Court can provide such relief. Accordingly, the necessary adjournment of Ades and Berg's constructive trust claim cannot be a ground on which the Court should vacate the 9019 Order.

Ades and Berg also submit that the Trustee has not provided the BFG Investors with sufficient information with which to evaluate the Settlement. Specifically, Ades and Berg cite the Trustee's failure to quantify the value of BFG investments that were accompanied by certificates touting the investments' coverage by Sphere Drake. Ades and Berg also dispute the Trustee's estimate of the BFG Investors' claims as $30 million. Both assertions are of no moment. First, the Second Circuit has ruled that the certificate holders have no standing to sue Sphere Drake; thus, their claims effectively have no value. That much became clear on March 13, 2003. Second, the SDNY Court has already determined the Settlement to be fair and reasonable in light of the Trustee's estimate, a finding that this Court has no ability to upset.

In conclusion, the Court cannot find that an undue hardship will result to Ades and Berg should the Court elect not to vacate the 9019 Order; nor does the Court find the existence of extraordinary circumstances in the instant case. On the contrary, the Settling Parties, particularly the Estate, will suffer an undue hardship if the 9019 Order is disturbed. Because the 9019 Order principally authorized the Trustee to enter into the Settlement, vacating it would appear only to strip the Trustee's authority to execute the Settlement on behalf of the Estate's creditors. This would harshly impact the Settlement, which has already been found to be fair and reasonable by the SDNY Court, clearly the court most capable of reaching this conclusion because of its superior knowledge of the case gleaned in the course of its long and intimate involvement in this matter. Furthermore, on November 10, 2003, the Second Circuit dismissed Ades and Berg's appeal of the SDNY Court's Order approving the Settlement. *Ades v. Sphere Drake Ins. plc*, No. 03-7676 (2d Cir. Nov. 10, 2003). More importantly, Ades and Berg will indeed receive a distribution from the proceeds of the Settlement, a prospect that this Court cannot fathom to be an undue hardship or extraordinary circumstance requiring further relief.

The Court notes that Ades and Berg could have opted out of the Settlement long ago if they thought it was so unfair (though that would have been a calamitous choice in light of the Second Circuit's affirmance of the SDNY Court's finding that they have no standing to individually sue Sphere Drake). Because Ades and Berg have failed to prove the extraordinary circumstances or undue hardship necessary to obligate the Court to vacate its 9019 Order, that Order will stand.

IV. The 8002 Motion

The 8002 Motion was filed on June 23, 2003, the last day provided under Fed.R.Bankr.P. 8002(c), which permits, upon a finding of excusable neglect, a twenty-day enlargement of the usual ten-day period in which a notice of appeal may be filed. The prevailing standard for excusable neglect was set forth by the Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 330 (1993).

A. The *Pioneer* analysis

Pioneer requires courts to consider the following factors when determining whether excusable neglect exists:

> [1] the danger of prejudice to the debtor, [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.

Id. at 395; *accord Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003). Judge Thomas J. McAvoy of the United States District Court for the Northen District stated in *In re O.W. Hubbell & Sons, Inc.*, 180 B.R. 31 (N.D.N.Y. 1995), *aff'g* No. 90-02053 (Bankr. N.D.N.Y. Sept. 22, 1994), that *Pioneer* "does not express a requirement that each factor be unmet in order

to find no excusable neglect." *Id.* at 36. The burden of proving the existence of excusable neglect rests with the movant. *See In re XO Communications, Inc.*, 301 B.R. 782, 795 (Bankr. S.D.N.Y. 2003).

Though the Supreme Court set forth a fairly liberal standard in *Pioneer*, it clearly stated that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer*, 507 U.S. at 392; *see In re Agway, Inc.*, No. 02-65877, at 8, 12-13 (Bankr. N.D.N.Y. Dec. 31, 2003). The Second Circuit has also declared that "the equities will rarely if ever favor a party who 'fails to follow the clear dictates of a court rule.'" *Silivanch*, 333 F.3d at 366 (quoting *Canfield v. Van Natta Buick/GMC Truck*, 127 F.3d 248, 250 (2d Cir. 1997)).

1. Prejudice to the Estate

The Estate has been prejudiced to a limited degree by Ades and Berg's tardily filed notice of appeal. While the right to appeal an adverse decision is certainly among the rights afforded all litigants, the Court must note the additional expense in time and effort that the Estate has undertaken in litigating Ades and Berg's 8002 Motion and will continue to expend if the appeal is allowed to proceed. These expenditures will ultimately decrease the amount of funds available to unsecured creditors in the case. Furthermore, the Estate's attempts to consummate the Settlement have been compromised by Ades and Berg's late filing because it has added a layer of uncertainty to the finality of the Settlement and caused an unnecessary delay in the proceedings, time that the Estate could have better spent meeting the conditions of consummation and beginning the process of distributing the Settlement proceeds to the BFG Investors.

2. Reason for delay

Ades and Berg contend that they failed to file a timely notice of appeal of the 9019

Order simply because they were awaiting the Court's entry of a Rule 54(b) judgment. The Trustee and the Committee counter that Ades and Berg's failure to follow the applicable bankruptcy rules pertaining to filing deadlines was within their control and thus not excusable.

The Court agrees with Ades and Berg that their duty to timely file was "within [their] reasonable control" and the duty to create "an appealable paper" was within the control of this Court. Decl. of William F. Costigan, filed June 23, 2003, ¶ 13. Indeed, after the Court created such a "paper" on May 22, 2003, the burden shifted to Ades and Berg to file a notice of appeal—a duty that they failed to timely perform. This Court cannot permit Ades and Berg to ignore the posture of the 9019 Order and instead rely exclusively on the terms of the Stipulation, a contractual document that was filed in and subject to the approval of the SDNY Court. The proposed Rule 54(b) order that was attached to the Stipulation was captioned with the case number assigned by the SDNY Court and, more importantly, was not cited in the 9019 Motion as part of the Trustee's request for relief. In fact, nowhere in the 9019 Motion did the Trustee mention the proposed Rule 54(b) order. If there was any doubt about whether the 9019 Order was finally adjudicated and appealable, Ades and Berg could have easily taken the more diligent course of conduct and filed a notice of appeal before June 2, 2003. Their right to appeal would have been preserved because, on the one hand, the notice of appeal would have ripened upon the prospective entry of a Rule 54(b) judgment had it been required, *see, e.g., Good v. Ohio Edison Co.*, 104 F.3d 93, 95 (6th Cir. 1997); *In re Chateaugay Corp.*, 922 F.2d 86, 91 (2d Cir. 1990), or, on the other, it would have been timely had the 9019 Order been a final order, which indeed it was. Hence, because this course of action was fully available and within the control of Ades and Berg, the Court finds their reason for delay insufficient.

3. Length of delay and its effect on the proceedings

The length of delay—twenty days—was the maximum period of delay allowable under Fed.R.Bankr.P. 8002(c) before the rules bar a court from considering excusable neglect and require it to summarily reject the notice of appeal as untimely. However, the Court cannot conclude that the length of delay alone has adversely affected the underlying proceedings, especially when compared to the far greater length of time that this case has been before the Court and that has gone into the crafting of the Settlement. Nonetheless, length of delay alone does not offset the Court's findings of prejudice and of an inadequate reason for delay.

4. Good faith

The Trustee argues that Ades and Berg's pattern of late filings evinces a lack of good faith. The Court will reject that contention and assume that Ades and Berg tardily filed the 8002 Motion in good faith.

B. Conclusion

Despite Ades and Berg's good faith and the minimal length of delay, the prejudice to the Estate together with Ades and Berg's insufficient reason for delay lead the Court to find that the neglect in this case was not excusable.

Therefore, the Court denies the 8002 Motion.

Accordingly, for the foregoing reasons, the Court denies Ades and Berg's Motion to Reconsider as well as the 8002 Motion to extend the time to file an appeal.

IT IS SO ORDERED.

Dated at Utica, New York

this 9th day of February 2004

_____

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge