

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Bk. No. 99-11087-JMD
Chapter 11

Shepherds Hill Development Co., LLC,
Debtor

Anthony F. Balzotti, Dawn Balzotti,
Michael Balzotti, Thomas Iarrobino,
Ann Burgess, and Edmond J. Ford, Trustee,
Plaintiffs

v.

Adv. No. 00-1087-JMD

RAD Investments, LLC and
Robert A. Dianni,
Defendants

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MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On May 24, 2001, the Plaintiffs' Motion for Reconsideration (the "Motion") was filed by Anthony F. Balzotti, Dawn Balzotti, Michael Balzotti, Thomas Iarrobino, and Ann Burgess (collectively the

“Plaintiffs”).¹ The Plaintiffs were seeking reconsideration of the Court’s May 15, 2001 Memorandum Opinion and Order dismissing the above captioned adversary proceeding on grounds that the Court did not have jurisdiction over the matter. See Balzotti v. RAD Invs., LLC (In re Shepherds Hill Dev. Co., LLC), 2001 BNH 026. For the reasons discussed below the Motion is denied.

II. FACTS²

On April 2, 1999, Shepherds Hill Development Co., LLC (the “Debtor”) filed a Chapter 11 bankruptcy petition in this Court. The Debtor and several of the Plaintiffs attempted to find new investors or to sell its development project to a third party. By November of 1999 an interested buyer had been identified and a purchase and sale agreement had been signed, subject to approval by the Court. The Debtor sought Court approval for bidding procedures and an order authorizing the sale. Shortly thereafter, on December 3, 1999, the Plaintiffs, along with the other parties, filed a Motion to Dismiss the case. See Bkr. Doc. No. 45.³ The Plaintiffs sought to have the case dismissed so they could sell their membership interests to RAD Investments, LLC and its sole managing member Robert Dianni (the “Defendants”) for \$19,000,000.00. Attached to the Motion to Dismiss was a copy of the agreement for the sale of the membership interests signed by the Plaintiffs and Robert Dianni as the managing member of RAD Investments, LLC (the “RAD Agreement”). The Debtor was not a party to the RAD Agreement.

Specifically, the RAD Agreement called for the transfer of \$10,000,000.00 of the proceeds to an

¹ The Plaintiffs along with Pamela Dritt also constitute the members of the Debtor. For the purposes of clarity, when referring to the sale of membership interests later in this opinion the term Plaintiffs will be used even though the Plaintiffs do not constitute the entire group of persons who were selling their membership interests.

² The facts recited in this opinion will be those specifically related to the claims raised by the Plaintiffs in the Motion. For a more extensive recitation of the facts of this case see the Court’s May 15, 2001 Memorandum Opinion and Order. 2001 BNH 026.

³ In this opinion the term “Bkr. Doc.” refers to the docket in the main bankruptcy case, Bk. No. 99-11087-JMD.

escrow agent. The escrow agent was to use the money to pay the claims of all creditors holding timely filed, undisputed claims against the Debtor. The escrow agent was also to establish a separate account in which 125% of the amount of all disputed claims was to be placed until such time as the Court determined the allowed amount of such claims. After payment of all allowed claims, the escrow agent was to disburse any remaining funds to the Plaintiffs on account of the sale of their membership interests. The obligation of the Defendants under the RAD Agreement to purchase the Plaintiffs' membership interests, however, was subject to dismissal of the Chapter 11 proceeding.

By January 24, 2000, the RAD Agreement had collapsed due to the alleged failure of the Defendants to transfer to the Plaintiffs the money necessary to obtain dismissal of the Chapter 11 proceeding. In the absence of money necessary to pay creditors' claims, the Motion to Dismiss was denied. See Bkr. Doc. No. 72. On June 30, 2000, the Plaintiffs commenced this adversary proceeding against the Defendants seeking damages for breach of the RAD Agreement, negligent misrepresentation and detrimental reliance, violation of the New Hampshire Unfair Business Practices Act, and violation of the common law covenants of good faith and fair dealing. See Adv. Doc. No. 1.⁴

III. DISCUSSION

A. Motion for Reconsideration

A "motion for reconsideration" is not a motion that is recognized by the Federal Rules of Civil Procedure ("Rule"). In re Rodriguez, 233 B.R. 212, 218-19 (Bankr. D.P.R. 1999) (citations omitted). "The federal courts have consistently stated that a motion so denominated which challenges the prior judgment on the merits will be treated as either a motion 'to alter or amend' under Rule 59(e) or a motion for 'relief from judgment' under Rule 60(b)." Id. "Which rule applies depends essentially on the time a motion is served. If a motion is served within ten days of the rendition of judgment, the motion ordinarily

⁴ In this opinion the term "Adv. Doc." refers to the docket in this adversary proceeding, Adv. No. 00-1087-JMD.

will fall under Rule 59(e). If the motion is served after that time, it falls under Rule 60(b).” Id.

In this particular case, the Motion was filed within ten days of the court’s ruling. See Adv. Doc. No. 79. Accordingly, the Court will treat the motion as one filed under Rule 59(e), as it has been made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 9023. In order to be successful on a Rule 59(e) motion, a moving party must establish a manifest error of law or fact or must present newly discovered evidence. See Landrau-Romero v. Banco Popular de Puerto Rico, 212 F.3d 607, 612 (1st Cir. 2000).

Although not specifically stated in their Motion, the Plaintiffs appear to claim that the Court made a manifest error of law in rendering its decision. The Plaintiffs claim that the Court failed to recognize that the Debtor was a third-party beneficiary to the RAD Agreement, and as such, made a manifest error of law in determining that the Court did not have jurisdiction over the proceeding.

B. Third-Party Beneficiary

The Plaintiffs assert that the Debtor was a third-party beneficiary to the RAD Agreement. As previously mentioned, the Plaintiffs argue that due to the Debtor’s status as a third-party beneficiary the Court has jurisdiction over this matter.

A third-party beneficiary relationship exists if (1) the contract calls for a performance by the promisor which will satisfy some obligation owed by the promisee to the third party, or (2) the contract is so expressed as to give the promisor reason to know that a benefit to a third party is contemplated by the promisee as one of the motivating causes of his making the contract.

Tamposi Assocs., Inc. v. Star Market Co. Inc., 119 N.H. 630, 633 (1979) (citations omitted). “A benefit to a third party is a ‘motivating cause’ of entering into a contract only where the promisee intends ‘to give the beneficiary the benefit of the promised performance.’” Grossman v. Murray, 144 N.H. 345, 348 (1999) (quoting Restatement (Second) of Contracts § 302(1)(b) (1981)).

“Unless the performance required by the contract will *directly* benefit the would-be intended beneficiary, he is at best an incidental beneficiary.” Pub. Serv. Co. of New Hampshire v. Hudson Light and Power Dep’t, 938 F.2d 338, 342 (1st Cir. 1991) (citations omitted) (quoted by Grossman, 144 N.H. at

348).⁵ An incidental beneficiary is one who is neither the promisee of the contract nor the party to whom service will be rendered, but instead is one who will derive a benefit from performance of the contract. Pub. Serv., 938 F.3d at 343 n.12.

The Plaintiffs claim that the Debtor is a third-party beneficiary because the RAD Agreement calls for the Defendants to satisfy an obligation owed by the Plaintiffs to the Debtor. The Court disagrees. The Plaintiffs did not owe any obligation to the Debtor. The Plaintiffs were simply equity holders of the Debtor. The Plaintiffs were not obligated to pay the creditors of the Debtor. As a limited liability corporation, creditors of the Debtor had no recourse against the Plaintiffs and the Plaintiffs were under no obligation to pay such creditors. The Plaintiffs were only interested in paying the Debtor's creditors so that the Chapter 11 proceeding could be dismissed, which was a condition precedent to the Defendants' obligation to purchase their membership interests. The Plaintiffs owed no obligation to the Debtor and, therefore, the Plaintiffs have failed to establish that the Debtor was a third-party beneficiary under the first element in Tamposi.

The Plaintiffs also contend that the Debtor is a third-party beneficiary under the second element in Tamposi. While not clearly articulated, the Plaintiffs seem to claim that because the RAD Agreement specifically mentioned payment of the Debtor's creditors, the Defendants knew that one of the motivating causes for the Plaintiffs entering into the RAD Agreement was the payment of the Debtor's creditors. The Court rejects the Plaintiffs' argument for two reasons.

First, under the standard set forth in Grossman, in order to be a motivating cause the promisee had to intend to give the beneficiary the benefit of the performance. In this case, the Plaintiffs are clearly the promisee, but the beneficiary of the promise was not the Debtor. The beneficiaries of the RAD Agreement

⁵ Although Public Service involved Massachusetts law concerning third-party beneficiaries, Massachusetts third-party beneficiary law follows the third-party beneficiary rules of the Restatement (Second) of Contracts. See Pub. Serv., 938 F.2d at 341. The Supreme Court of New Hampshire has also relied upon the Restatement (Second) of Contracts when rendering its decisions in third-party beneficiary cases. See Grossman, 144 N.H. at 348. Accordingly, the Court finds citation to Public Service appropriate in this case.

were the unsecured creditors that were to receive payment in full of their claims. The creditors were the parties that were to directly benefit from fulfillment of the terms of the RAD Agreement. Although the Debtor may have benefitted from the RAD Agreement, the Debtor was neither the promisee nor the party to whom performance was to be rendered. As such, the Debtor was only an incidental beneficiary of the RAD Agreement.

Second, even assuming for the sake of argument that the Debtor was a beneficiary of the RAD Agreement, the Court cannot find that the payment of the Debtor's creditors was a motivating cause for the Plaintiffs entering into the RAD Agreement. The rule as set forth in Tamposi requires that a benefit to a third party be one of the motivating causes for the promisee (the Plaintiffs) entering into the contract. Tamposi, 119 N.H. at 633. Paying the Debtor's creditors was not one of the motivating causes the Plaintiffs had when they entered into the RAD Agreement.

The Plaintiffs entered into the RAD Agreement for the purpose of selling their equity interests in the Debtor. The Debtor's bankruptcy proceeding imposed no legal impediment to the sale of their membership interests. The Defendants, however, would only purchase the Plaintiffs' equity interests if the Debtor were no longer a Chapter 11 debtor. Therefore, the Plaintiffs were required to obtain dismissal of the Debtor's bankruptcy case in order to satisfy a condition precedent imposed by the Defendants. Under section 1112(b) of the Bankruptcy Code, a Chapter 11 case will only be dismissed if it is in the best interests of creditors and the estate. In this case, the Plaintiffs knew that it was highly unlikely that the bankruptcy proceeding would be dismissed unless the Debtor's creditors were paid in full. See, e.g., In re Kingbrook Dev. Corp., 37 Bankr. Ct. Dec. (LRP) 218 (Bankr. W.D.N.Y. 2001).

The Court finds that none of the motivating causes for the Plaintiffs entering into the RAD Agreement was the payment of the Debtor's creditors. The Plaintiffs entered into the RAD Agreement in order to sell their equity interests. As a condition precedent to the Defendants' obligation to purchase such interests, the Plaintiffs were required to obtain dismissal of the Debtor's Chapter 11 case. The Plaintiffs' motivation in agreeing to pay the Debtor's creditors from their sale proceeds was to satisfy a condition

precedent imposed by the Defendants. Accordingly, the Debtor was not a third-party beneficiary of the RAD Agreement under the second element of Tamposi.

C. Jurisdiction Over Third-Party Beneficiaries

Assuming for the moment, that the Debtor was a third-party beneficiary of the RAD Agreement rather than an incidental beneficiary, the Court still would not have jurisdiction over this matter.

Bankruptcy courts are not courts of general jurisdiction. Bankruptcy courts are courts of limited jurisdiction, and this proceeding goes beyond the jurisdiction of this Court.

As the Court pointed out in its May 15, 2001 Memorandum Opinion and Order, the Supreme Court has clearly indicated in its decision in Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982), that bankruptcy courts are courts of limited jurisdiction. See Balzotti v. RAD Invs., LLC (In re Shepherds Hill Dev. Co., LLC), 2001 BNH 026 at 5-7. If third-party beneficiary status were enough to confer jurisdiction upon the Court in this case, the Court would be acting contrary to the spirit, if not the letter, of the Supreme Court's decision in Marathon. If the Court permitted the Plaintiffs in this case to create jurisdiction by claiming that the Debtor is a third-party beneficiary, it would at worst give bankruptcy courts virtually unlimited jurisdiction over non-core matters, and at best, jurisdiction would only be limited by the creativity of any party in interest or their counsel. Accordingly, even if the Debtor were an third-party beneficiary of the RAD Agreement the Court finds that it would not have jurisdiction over the matter.

IV. CONCLUSION AND ORDER

As the Plaintiffs have failed to present newly discovered evidence and have failed to establish that the Court made a manifest error of fact or law in rendering its previous decision in this matter, the Plaintiffs have failed to meet their burden under Rule 59(e) and the Motion is **denied**.

This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DATED this 7th day of June, 2001, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge