

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MASSACHUSETTS - WORCESTER**

IN THE MATTER OF: . Case #96-10123
V & M. MANAGEMENT, INC. . Worcester, Massachusetts
Debtor . **November 19, 2004**
10:38 a.m.

**TRANSCRIPT OF:
FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE COURT RE:
(#839) MOTION TO ALLOW LATE-FILED ADMINISTRATIVE CLAIM OF
ALPHONSE MOURAD
BEFORE THE HONORABLE JOEL B. ROSENTHAL, JR., J.U.S.B.C.**

APPEARANCES:

For Alphonse Mourad: ALPHONSE MOURAD, Pro Se

Via Telephone: JOHN SIMON, KIMBERLY LUCKETT,
ELIZABETH MOURAD, PAUL MOORE,
STEPHEN GRAY, MARY UDOGI.

Electronic Sound Recording Operator: Leah DiDonato

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1 (At Tape #2, Index #250. Time 10:38 a.m.)

2 MS. MAGEROWSKI: V&M Management, Incorporated. Case
3 #96-10123. Do you want me to do a roll call?

4 THE COURT: Yes, do a roll call.

5 MS. MAGEROWSKI: John Simon, Kimberly Luckett,
6 Elizabeth Mourad, Paul Moore, Stephen Gray, Mary Udogi.

7 THE COURT: Mr. Mourad's not on the line? Oh.

8 MS. MAGEROWSKI: Mr. Mourad is here.

9 THE COURT: Oh, I'm sorry.

10 (Pause)

11 THE COURT: Hello?

12 FEMALE VOICE: Yes?

13 MR. SIMON: Yes, it's John Simon.

14 MS. MAGEROWSKI: Please be seated.

15 THE COURT: All right. Court is in session. Let
16 the record also show that Mr. Mourad -- Alphonse Mourad is in
17 the courtroom.

18 All right, those of you who are on the telephone,
19 press your Mute button if you want to talk. I don't want to
20 hear you. Thank you.

21 (Voices on telephone still talking)

22 THE COURT: The parties that are on the telephone,
23 please press your Mute button so I don't have to listen to you
24 fidgeting and fiddling. Thank you.

1 (Voices on telephone still continuing)

2 THE COURT: Can the people on the telephone hear me?

3 FEMALE VOICE: Yes, sir. Yes, sir.

4 THE COURT: I don't want to hear you. Do you
5 understand?

6 VOICES: Yes, sir. Yes. Yes, sir.

7 THE COURT: So sit quietly, stop fiddling and
8 shuffling papers. If you have a Mute button on your phone,
9 press it. If not, make sure the people around you are quiet.
10 And I'm hearing lawyers talking, and I don't want to hear that.

11 (Voices on telephone continuing)

12 THE COURT: All right, we're here today on the
13 matter of V&M Management, Inc. Bankruptcy Case 96-10123.
14 Particularly, we're here on the motion to allow administrative
15 claim of Alphonse Mourad, late. This is docket #839.

16 (Voices on telephone continuing)

17 THE COURT: Can you hear who that is?

18 MS. MAGEROWSKI: I don't know. It's either Paul
19 Moore or Stephen Gray or John Simon.

20 THE COURT: Well, tell them --

21 MR. SIMON: It's not John Simon.

22 MR. MOORE: Judge, it's Paul Moore. It's not me. I
23 had my phone on Mute.

24 MR. GRAY: And it's not Stephen Gray. I have my
25 phone on Mute.

1 MS. MAGEROWSKI: It sounded like a male. I'm sorry.

2 THE COURT: All right -- this is the oral decision
3 of the Court. After reviewing all the relevant pleadings,
4 listening to the testimony, the arguments of the moving party,
5 and counsel to the Trustee, and considering all the evidence,
6 the demeanor and credibility of the witnesses --

7 (Interruption for another person on the phone)

8 THE COURT: Who's that?

9 MALE VOICE: Hello?

10 FEMALE VOICE: Yes?

11 MALE VOICE: I -- I want to hear Judge R-O-S-E-N-T-H-
12 A-L.

13 FEMALE VOICE: No, you've got the wrong person. I'm
14 trying to listen to the Judge.

15 (MALE VOICES ON PHONE IN FOREIGN LANGUAGE/ENGLISH DIALOGUE)

16 THE COURT: ARE WE READY NOW TO LISTEN AND STOP
17 TALKING???!!! Thank you!

18 This is a core proceeding. This Court has the
19 authority to enter final orders. The case is being handled
20 under the general reference of all bankruptcy cases in this
21 District to this Court.

22 The following constitute my findings of fact and
23 conclusions of law under *Federal Rule of Bankruptcy Procedure*
24 7052.

25 According to the Bankruptcy Appellate Panel there

1 were two issues to be decided by this Court on remand: One
2 was, should Mr. Mourad be allowed to file a late claim? And
3 two, if so, has he met his burden of proving the elements of
4 his claim?

5 With respect to late claims, under *Federal Rule of*
6 *Bankruptcy Procedure* 9006(b), the excusable neglect standard as
7 espoused by the Supreme Court in ***Pioneer Investment Services***
8 ***vs. Brunswick Associates, Ltd.***, 507 U.S. 3080, is applicable,
9 and that imposes a two-step test to determine whether excusable
10 neglect exists. First, whether neglect exists to leave undone
11 or unattended and especially through carelessness; and two,
12 whether neglect is excusable. That's an equitable test, taking
13 into account all relevant circumstances surrounding the party's
14 omission.

15 Mr. Mourad was negligent in not filing his proof of
16 claim in a timely fashion. The uncontroverted testimony was
17 that his accountant discussed the potential sale and the ball
18 park taxable gain estimates with the Trustee's accountant long
19 before the sale was concluded and the tax returns and K-1 was
20 filed and provided to Mr. Mourad.

21 Mr. Mourad was actively involved in the bankruptcy
22 case and well aware of the quote, "pass-through" end quote,
23 nature of a sub-S corporation. He was also well aware of the
24 Trustee's activities concerning the operations of the project
25 and the collection of financial information in anticipation of

1 the filing of the corporate tax returns.

2 The disclosure statement and plan which were
3 ultimately approved and confirmed provided the information on
4 tax consequences. Mr. Mourad acknowledged that he chose not to
5 read these documents.

6 Based upon all the facts and circumstances, this
7 Court is not satisfied that Mr. Mourad's negligence was
8 excusable, and I thus so find.

9 Recognizing, however, that some Court on appeal might
10 not agree with my finding that the claim should not be allowed
11 to be filed late, based possibly upon Mr. Mourad not being an
12 attorney or accountant, and based on his allegation that he
13 filed his motion very shortly after he says, but I do not
14 accept, he learned of the tax issue, I will proceed to make
15 further findings on the second issue remanded to this Court by
16 the BAP. That is, the substance of his negligence claim
17 against Stephen Gray for negligent administration of the
18 estate, causing allegedly Mr. Mourad's taxes to increase.

19 I -- the Court perceived the debtor's position to be
20 difficult and therefore was extremely lenient with the debtor
21 on evidentiary rulings, and permitted -- and I permitted many
22 items of purported evidence over objection, with the object of
23 giving the debtor every chance to prove his case, to no avail.
24 The debtor's case fell far short of establishing a basis for
25 finding of the Trustee's negligence.

1 I let the debtor tell his story and to testify and
2 argue in parallel and at the same time, and much extraneous
3 evidence came into the record because of that. I regret that,
4 but I felt that was the best and fairest way to let Mr. Mourad
5 tell his story.

6 The substance of the claim against the Trustee is
7 negligence, and to prove negligence Mr. Mourad had to prove
8 each of the following elements: That the Trustee owed him a
9 duty of reasonable care; that the Trustee breached the duty;
10 and that Mr. Mourad was injured as a result of the Trustee's
11 alleged breach.

12 A Chapter 11 Trustee's duties are set forth in
13 Section 1106 of the Bankruptcy Code and include many of the
14 duties of a Chapter Trustee whose obligation is to maximize
15 distribution to creditors. The duties include filing a Chapter
16 11 plan as well as all tax returns, quote, "in light of the
17 condition of the debtor's books and records, and the
18 availability of such information," end quote.

19 In this case, the Trustee carried out those duties,
20 among others, and as a result of a plan that involved the sale
21 of the debtor's real estate, was confirmed in September, I
22 believe, of 1997. Inherent in any order confirming a Chapter
23 11 plan are findings that the plan has been proposed in good
24 faith and is in the best interest of creditors. In fact, the
25 docket in this case indicates the plan was confirmed over the

1 objection of Mr. Mourad, who also sought to have confirmation
2 delayed until after a, quote, "final award of tax credits," end
3 quote, was issued.

4 To the extent that Mr. Mourad now complains that the
5 sale and plan were tainted and therefore should not have been
6 approved, his argument is too late. The relevant orders have
7 long since become final, and his chance to object was
8 unsuccessful. The Court cannot and will not disturb those
9 final orders.

10 Mr. Mourad has failed to allege, much less prove,
11 that the Trustee owed him a duty different from the ones Mr.
12 Mourad unsuccessfully asserted during the confirmation process.
13 Mr. Mourad alleges evidence of misconduct; however, the sitting
14 Judge back in November -- excuse me -- December 4th of 1998,
15 overruled those objections, and that order has become a final
16 order.

17 Mr. Mourad's argument that the Trustee owed him a
18 duty are based on several erroneous assumptions. First, he
19 argues that he and not the Bankruptcy Trustee was the owner of
20 V&M during the bankruptcy. He refers to the Trustee as "only
21 the manager," and therefore had an obligation to file for a tax
22 credit for the benefit of Mr. Mourad. This argument is wrong
23 because Section 541 makes the debtor's property -- namely the
24 housing units owned by V&M -- property of the estate and thus
25 of the Trustee in his representative capacity.

1 Upon the filing of debtor's bankruptcy, Mr. Mourad
2 was only an equity holder in a bankrupt company. He was only
3 an interest holder who could not receive any distribution until
4 all creditors were paid in full. Moreover, the uncontroverted
5 testimony is that the Trustee would not have been eligible for
6 the tax credit. The Trustee is not in the business of
7 developing or rehabilitating properties. It was the existence
8 of the buyer to whom the property was ultimately sold that
9 enabled -- and the buyer's track record that resulted in the
10 issuance of these tax credits.

11 Second, Mr. Mourad argues the Trustee owed him a duty
12 to timely file tax returns. This Court finds that the Trustee
13 did file timely tax returns. Mr. Mourad agreed with the
14 Trustee's accountant, Craig Jalbert, that the debtor's records
15 were in deplorable condition. As Mr. Jalbert testified, he had
16 to reconstruct the records in order to file the tax returns,
17 and he did so in a way that timely and reasonable, given the
18 state of the records.

19 Third, Mr. Mourad argues the Trustee did not maximize
20 the amount he brought into the estate. For this reasons set
21 forth already, this argument is simply wrong.

22 I conclude that the Trustee was not negligent -- and
23 that Mr. Mourad and his associates could not gain sufficient
24 votes for the plan. That was their deficiency and not the
25 fault of the Trustee.

1 I have searched the record and found nothing that Mr.
2 Gray did wrong. I may not agree with everything he did, but
3 that's not up to me. That's his judgment as Trustee. I've
4 searched for some duty, some negligence, and I found no duty
5 that was breached.

6 The sale of the real estate and the confirmation of
7 the plan upon which Mr. Mourad seems to base his claim, at
8 least in part, were approved by the Court over Mr. Mourad's
9 objections. They did not constitute a breach. To the extent
10 that Mr. Mourad has alluded to some nefarious scheme between
11 the Trustee, the buyer of the property, and perhaps others, he
12 has not proved any such impropriety. There was simply no duty
13 the Trustee breached which Mr. Mourad could now be compensated.

14 Mr. Mourad's case is essentially that he's been
15 harmed economically because he has a tax obligation resulting
16 from the sale of the debtor's assets. I might mention here
17 that subsequent to the hearing, at the close of the evidentiary
18 hearing the Court received a copy of the --

19 (Sounds on telephone)

20 THE COURT: PLEASE STOP TALKING!!!!!!

21 Mr. Mourad's case is essentially that he's been
22 harmed economically, but based on the Court of Appeals decision
23 that I became aware of after the close of the evidentiary
24 hearing, the Tax Court has been affirmed by the Court of
25 Appeals.

1 I -- Mr. Mourad seems to have misinterpreted Judge
2 Kenner's findings that --

3 (Voices on telephone)

4 THE COURT: Would you please stop talking while I'm
5 trying to render my decision.

6 Mr. Mourad seems to have misinterpreted "site
7 control" for "ownership."

8 (More voices on the telephone)

9 THE COURT: I apologize to the people that are
10 trying to make sense out of what I am saying. I have
11 competition on the phone line. PLEASE STOP TALKING.

12 Can you tell who it is?

13 (More voices on the telephone).

14 THE COURT: Mr. Mourad chose, however, to elect to
15 have V&M treated as a sub-chapter S corporation for tax
16 purposes.

17 (More voices on the telephone, foreign language)

18 THE COURT: WHOEVER IS SPEAKING ON THIS LINE, PLEASE
19 BE QUIET! This is Judge Rosenthal speaking. I am trying to
20 finish dictating my findings. Quiet, please.

21 Mr. Mourad chose and elected to have V&M treated as a
22 sub-chapter S corporation for tax purposes. Plus, as the sole
23 shareholder of the company, he received all of the benefits and
24 all of the tax burdens. Mr. Mourad knew or should have known
25 of the tax consequences of his actions. It was not the

1 Trustee's duty to advise or protect him from the consequences,
2 tax or otherwise, of his actions. Mr. Mourad apparently never
3 revoked his sub-chapter S election.

4 I find that Mr. Mourad has not sustained his burden
5 of proof on negligence. All that has been proved is that Mr.
6 Mourad at best misunderstood the tax consequences of his
7 situation and that Mr. Mourad was convinced that there was a
8 vast conspiracy against him, and improprieties by court
9 functionaries and others, but he has proved none of that.

10 (More voices on the phone, which have been continuing)

11 THE COURT: The -- these are the only two matters
12 that have been remanded to me by the Bankruptcy Appellate
13 Panel. I therefore disallow the motion, Docket #839, which was
14 filed on September 19th, 1998 requesting the allowance of the
15 filing of a late claim and the allowance of administrative
16 claim, and I do that because I find that Mr. Mourad has not
17 sustained his burden of proof in these proceedings, and an
18 appropriate order denying the motion will be entered on the
19 docket today.

20 That concludes my findings and rulings. Thank you.

21 Yes, that concludes the hearing. Yes, you can disconnect.

22 I'll give you the order in chambers.

23 (End at Tape #1, Index #1075. 10:51 a.m.)

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I certify that the foregoing is a true and accurate transcript from the electronically sound recorded record of the proceedings.

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