NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

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In re: POLYCEL LIQUIDATION, INC.
f/k/a Polycel Structural Foam, Inc.,

Chapter 7
Case No. 00-62780 (RTL)

Debtor.
- -X

OPINION

APPEARANCES:
DRINKER BIDDLE & REATH LLP
A. Dennis Terrell, Esq.
Michael P. Pompeo, Esq.
(Attorneys for Polycel Structural Foam, Inc. f/k/a KNJCO, Inc.)

SCARINCI & HOLLENBECK, LLC
Joel R. Glucksman, Esq.
Frank P. Kapusinski, Esq.
(Attorneys for Pool Builders Supply of the Carolinas, Inc.)

RAYMOND T. LYONS, U.S.B.J.

This is a dispute over ownership of certain commercial molds (the "Molds") that were used by Polycel Liquidation, Inc., (f/k/a Polycel Structural Foam, Inc.) (the "Debtor") in manufacturing pool panels. Polycel Structural Foam, Inc., (f/k/a KNJCO, Inc.) (the "Buyer") contends that it purchased the Molds from the Debtor free and clear of all claims, liens, encumbrances and interests pursuant to this court's order entered on December 3, 2001 (the "Sale Order"). Pool Builders Supply of the Carolinas, Inc. ("Pool Builders") contends that it is the true owner of the Molds because

the Debtor never held title to the Molds and Pool Builders did not receive notice of the sale. Pool Builders seeks relief from the Sale Order because its property was taken without due process. Pool Builders' motion is granted under Fed. R. Civ. P. 60(b)(4) because the approval of the Debtor's sale to the Buyer of the Molds, which the Debtor did not own, deprived Pool Builders of its property without due process. To that extent, the order approving the sale is void.

JURISDICTION

This court has jurisdiction over this motion for relief from the order entered December 3, 2001, under 28 U.S.C. § 1334, 28 U.S.C. § 157 and the Standing Order of Reference by the United States District Court dated July 23, 1984, referring all bankruptcy cases to this court. In addition, the District Court suggested that the interpretation or modification of the Sale Order should be by the bankruptcy court and has reversed and remanded this court's order of June 22, 2004. This is a core proceeding dealing with the sale of property of the estate under 28 U.S.C. § 157(b)(2)(N).

FINDINGS OF FACT

Pool Builders sells swimming pool supplies and related goods, including prefabricated swimming pool panels which form the interior surface of in-ground pools. It has been in business since 1976, and has its principal place of business in Charlotte, North Carolina. Pool Builders contracted, at various times, to have molds made that could subsequently be used to fabricate plastic panels for swimming pools. The following is a list of the molds, the name of the mold-maker, the year built, and the cost.

Molder	Year	Cost
Delta Molds	1984	$72,000
L.B. Mach'ry	1988	$45,000
Delta Molds	1986	$68,000
Delta Molds	1988	$62,000
Delta Molds	1984	$36,000
Delta Molds	1988	$10,000
Art Mold	1995	$60,000
		$353,000

The Debtor was a manufacturer of large sized structural foam molded parts. The Debtor operated four molding plants, occupying approximately five hundred thousand square feet, with two molding plants in separate locations in Somerville, New Jersey, one in Winchester, Kentucky and one in Liberty, Ohio. The Debtor's headquarters were located in Somerville, New Jersey.

Prior to 1991, Pool Builders used fabricators other than the Debtor to make pool panels using the Molds. In 1991, Pool Builders started doing business with the Debtor and transferred the Molds to the Debtor. In 1998, the Molds were located at the Debtor's factory in Kentucky. In 2001, the Molds were moved to the Debtor's New Jersey plant. From 1991, through the closing of its sale of substantially all its assets to Buyer in 2001, the Debtor manufactured pool panels ordered by Pool Builders using the Molds. The Molds are unique and only suitable for making pool panels for Pool Builders. Unless Pool Builders orders product, the Molds are useless to the Buyer.

The Debtor was the subject of an involuntary chapter 7 petition filed on November 7, 2000, in the United States Bankruptcy Court for the Eastern District of Kentucky. The case was converted to a voluntary chapter 11 and transferred to United States Bankruptcy Court for the District of New Jersey. The Debtor continued to operate its business as a debtor-in-possession.

Pool Builders was one of the Debtor's customers and not listed as a creditor in the Debtor's Schedules. Pool Builders never received formal notice of this bankruptcy case from the Debtor, the court, the creditor's committee, or otherwise. In late 2000 or early 2001, Pool Builders learned from a supplier that the Debtor was in a chapter 11 proceeding. Matt Morgan, the president of Pool Builders, contacted the Debtor to ascertain whether the Debtor would be able to supply products to Pool Builders in the future. Mr. Morgan also requested confirmation of ownership and the location of Pool Builders' Molds. The Debtor's officers and employees understood that the Molds were owned by Pool Builders and Charles Koczan, the Debtor's Vice President, confirmed the same in a letter to Pool Builders dated January 12, 2001. Mr. Koczan wrote:

> "The following molds are in our possession and stored at the Polycel Structural Foam, NJ East facility, 60 Readington Road, Somerville. . . . The above molds are the property of Pool Builders Supply."

Pool Builders did not file an appearance in this bankruptcy case.

In August 2001, the Debtor began negotiations with Mr. Kurt Joerger regarding the possible sale of its New Jersey manufacturing facilities and related assets which resulted in a letter of intent dated September 7, 2001. A detailed inventory of the Debtor's machinery, equipment, vehicles, furniture and fixtures had been done and made available to Mr. Joerger. It valued the physical assets at $5.7 million in liquidation. The Molds are not mentioned on the appraisals.[1] On September

[1] Mr. Joerger testified that he contacted the Debtor's major customers to let them know he was negotiating to buy the business and to gain comfort that the customers would continue to do business with his company after the sale. Mr. Joerger said he spoke with Mr. Morgan of Pool Builders, which accounted for about 6% of the Debtor's sales. Mr. Morgan denies that such a conversation took place. Having heard the testimony of both men and having observed their demeanor the court finds that Mr. Morgan is more credible and his memory more accurate. The court finds that Mr.

10, 2001, the Debtor filed a motion (the "Sale Procedure Motion") seeking: "(1) authorization to sell a substantial portion of its assets pursuant to 11 U.S.C. §§ 363(b) and 365; (2) approval of the form, manner and content of the proposed notice of sale; and (3) approval of an 'expense reimbursement' and bidding procedures." In the Sale Procedure Motion, the Debtor stated that it intended to sell "the Debtor's business as a going concern, which includes its accounts receivable, inventory, certain of its machinery and equipment, mold and tools, parts, leases for the premises in which the Debtor operates its two manufacturing facilities in New Jersey … to an entity to be formed and controlled by Joerger … under terms and conditions set forth [in the letter of intent] as well as other material terms and conditions yet to be negotiated which will be embodied in a mutually acceptable definitive agreement to be negotiated." Pool Builders received no notice of the Sale Procedure Motion nor of the hearing on the sale. This court granted the Sale Procedure Motion on September 25, 2001. Thereafter the parties entered into an Asset Purchase Agreement dated November 6, 2001 (the "Asset Purchase Agreement").

Pursuant to the Asset Purchase Agreement, Buyer agreed to purchase and Debtor agreed to sell the Debtor's business property as follows:

> 1.1 Acquired Assets. Upon the terms, and subject to the conditions of this Agreement, on the Closing Date (as defined below) the Sellers shall sell, assign, transfer, convey and deliver to Purchaser, and Purchaser shall purchase from Sellers, all of the right, title and interest of Sellers in and to certain tangible and intangible assets and rights used in connection with the ownership and operation of the Business (such assets, properties and rights being referred to herein as the "Acquired Assets"). All of the

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Joerger did not speak with Mr. Morgan prior to the sale.

> Acquired Assets, including those related to the Bankruptcy Case shall be sold, assigned, transferred, conveyed and delivered to Purchaser free and clear of all claims, encumbrances, security interests, mortgages, pledges, restrictions, charges and liens of any kind (collectively, the "Liens"), and shall include, without limitation, the following assets, properties and rights:
> . . .
>
> (d) Additional Property. Additional property ('the Additional Property') consisting of the following: . . . (iii) all molds, nozzles and related tools, including those set forth on Schedule 1.1(d) (iii) [; and]
> . . .
>
> (k) Molds. All molds, current and historical, located in any of the Kentucky Premises, Ohio Premises and New Jersey Premises subject to the rights of third party persons who can prove an unencumbered ownership interest in same, including, without limitation, Backyard Products. Such third party persons and the molds to which they might claim an ownership interest in are listed on Schedule 1.1(k).

Schedule 1.1(d) (iii) states, "See attached list of all molds, nozzles and related tools." No such list was attached to the Asset Purchase Agreement admitted into evidence. This is consistent with Mr. Joerger's testimony that when he visited the New Jersey plant before sale there were 1500 to 2000 molds in total disarray with no list. Schedule 1.1(k), entitled "List of Molds encumbered by third parties and a list of such third parties", states "None."

The Debtor represented and warranted in paragraph 4.7 of the Asset Purchase Agreement that it had "good and marketable title to all of the Business' personal property . . . . Upon consummation of the transaction contemplated by this Agreement, Purchaser shall acquire title to all of the Acquired Assets free and clear of all such liens, claims and encumbrances whatsoever."

At the Sale Hearing, the Debtor received multiple bids and a competitive auction

ensued, at the conclusion of which the Buyer was the highest bidder in the amount of $5,500,000.00. Mr. Joerger valued the business primarily on the potential cash flow. He did very little due diligence on the physical assets.

On December 3, 2001, this court entered the Sale Order that had the following findings:

> M. [Buyer] is a purchaser and an assignee of the Acquired Assets, as fully described in the [Asset Purchase] Agreement, pursuant to §§ 363 and 365 of the Bankruptcy Code, in good faith, and [Buyer] is entitled to the protections set forth in § 363(m) of the Bankruptcy Code. In the event [Buyer] consummates the transactions contemplated by the [Asset Purchase] Agreement, then, absent a stay, the reversal or modification on appeal of this order or any other order authorizing the sale and assignment contemplated by this Order shall not affect the validity of the sale and assignment, to [Buyer] of the interests and property be so sold and transferred.
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> N. Proper, timely, adequate and sufficient notice of the Motion, the Sale Hearing, the Notice Order and Notice of Sale have been provided, and no other or further notice thereof or of the entry of this Order is necessary or required.

The Sale Order further provided:

> 3. The sale and assignments herein shall be free and clear of all liens, claims, interests, encumbrances and other charges, (collectively, the "Liens"), pursuant to §§ 363(b) and (f) of the Bankruptcy Code with all Liens to attach to the proceeds of the sale. . . .
> . . .
> 9. [Buyer] is a good faith purchaser and is entitled to the protections set forth in §363(m) of the Bankruptcy Code.
> . . .
> 11. The sale and assignment pursuant to the [Asset Purchase] Agreement is not a fraudulent transfer within the meaning of the Bankruptcy Code and any other applicable state or federal law and cannot be avoided or set aside under any applicable law.

Pool Builders received no notice of the Sale Order. Following sale, the Debtor's case was converted to chapter 7. The proceeds of sale went almost exclusively to a secured creditor.

At the time of the sale, the Molds were located at the Debtor's New Jersey facilities. The Molds were not labeled as being owned by Pool Builders. Pool Builders did not file any protective UCC-1 statements recording its interests in the Molds.

The Debtor's attorney, who was directly responsible for the Asset Purchase Agreement, testified that he believed the Debtor was selling all of the molds in its possession as part of the Asset Purchase Agreement. He prepared the schedules to the Asset Purchase Agreement, including Schedule 1.1(d)(iii) and Schedule 1.1(k), and sent them to the Debtor for review. No detailed list of molds, etc. referred to in Schedule 1.1(d)(iii) was ever produced and nothing was attached to the Asset Purchase Agreement.[2] He was not aware that anyone other than the Debtor held an interest in any of the molds in the Debtor's possession. If the Debtor had told him that it had molds that belonged to someone else, he would have listed them in Schedule 1.1(k) to the Asset Purchase Agreement. Instead, Schedule 1.1(k) states "none". He did not intend to enable the Debtor to sell anything it did not own.

In the Spring 2002 and 2003, Pool Builders placed orders with the Buyer for pool panels and related parts for approximately $500,000 per year. Pool Builders knew in 2002, that

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[2] The District Court stated as an uncontested fact, "Schedule 1.1(d)(iii) specifically references molds used to make panels. (Polycel Br. at 5.)" *Polycel Structural Foam, Inc. v. Pool Builders Supply of the Carolinas, Inc*., No.04-4029, slip op. at 3 (D.N.J. filed Apr. 29, 2005). No such evidence was produced at the hearing in bankruptcy court. Apparently the Buyer's assertion of that fact to the District Court was unfounded.

Joerger owned Buyer and Buyer was manufacturing the goods ordered by Pool Builders.

Mr. Morgan stated in his affidavit and reaffirmed in his testimony at the hearing:

> 13. In the spring of 2003, Polycel's charges for production of pool panels using the Pool Builders Supply Molds and Jig increased significantly. As a result, Pool Builders Supply considered moving its business to another molder/fabricator, and I requested that Polycel prepare the Pool Builders Supply Molds and Jig for pick-up by Pool Builders Supply. In response, Kurt Joerger of Polycel called me to persuade me to keep doing business with Polycel. During the conversation, he asked me if I was ever sure that the molds were mine. I told him that I knew the molds were mine, and I resented him making that comment.
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> 14. After the conversation, I faxed Mr. Joerger a copy of Mr. Koczan's January 12, 2001 letter.[3] Polycel never responded to the letter. Pool Builders Supply and Polycel were able to negotiate an order for 2003.
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> 15. In 2004, Polycel raised its prices again, and Pool Builders Supply decided to take its molds to another molder/fabricator for the production of its pool panels. On February 13, 2004, Pool Builders Supply sent Polycel a letter asking Polycel to prepare all of the Pool Builders Supply Molds and attachments for shipping. Pool Builders Supply sent a follow-up letter on February 18, 2004 requesting that the molds and jig be prepared for Pool Builders Supply to pick up on February 24, 2004.

Ownership of the Molds came into dispute in 2004 when Buyer and Pool Builders could not agree to a price on pool panels. As a result, Buyer filed an action with the United States District Court for the District Court of New Jersey on February 27, 2004, seeking a declaration that it was the rightful owner of the Molds by virtue of the Sale Order. Pool Builders moved for a preliminary injunction for a return

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[3] Mr. Joerger denies having received the fax with a copy of Mr. Morgan's letter. The court finds that Mr. Morgan's testimony is correct and that the fax was sent and received.

of its Molds.

The District Court denied Pool Builders' motion on March 23, 2004, finding that Pool Builders failed to sufficiently establish a likelihood of success on the merits of its claim or irreparable harm. The District Court observed that the issue before it centered on whether the Bankruptcy Court could reopen its Sale Order and urged the parties to bring the issue before the Bankruptcy Court. Accordingly, the District Court administratively stayed the Buyer's action against Pool Builders pending determination as to the interpretation of the Sale Order.

Pool Builders moved before this court, on April 28, 2004, "to clarify or modify or in the alternative to vacate, to the limited extent that [Pool Builders'] ownership rights are affected," the Sale Order ("Clarification Motion"). This court granted the Clarification Motion and determined that the Debtor could not sell assets it did not own. Furthermore, this court interpreted the Sale Order as merely approving a sale of the Debtor's right, title and interest in the assets and stated that the court never intended to authorize the Debtor's sale of Pool Builders property. Although the issue of the historical ownership of the Molds was contested in the District Court, Pool Builders presented a *prima facia* case that it owned the Molds prior to the sale, therefore, the court ordered the transfer of immediate possession of the Molds from Buyer to Pool Builders upon Pool Builders' posting of a bond in the event the Buyer was able to establish that the Debtor owned the Molds at the time of sale. ("Clarification Order").

Buyer appealed the Clarification Order. On appeal the District Court held that "the Sale Order is unambiguous on its face, pertains to the [M]olds at issue, and as a final order, it properly transferred ownership of the [M]olds to [Buyer]." *Polycel Structural Foam, Inc. v. Pool*

Builders Supply of the Carolinas, Inc., No.04-4029, slip op. at 19 (D.N.J. filed Apr. 29, 2005).

Further, the District Court held,

> "The Sale Order, in the form of a final order, transferred ownership rights of the [M]olds to [Buyer] pursuant to the sale of substantially all of the Debtor's assets as part of the bankruptcy proceeding. The Rules of Civil Procedure do not permit a court to 'clarify' a final order where that change affects substantive rights of the parties. Such a request to clarify a final order constitutes a Rule 60(b) motion for relief from the operation of judgment. Therefore, the only mechanism by which Pool Builders can now attack the validity of the Sale Order is a Rule 60(b) motion to set aside the judgment."

Polycel, No. 04-4029, slip op. at 21. The District Court reversed[4] this court's Clarification Order and remanded the matter for findings of fact and conclusions of law applying Rule 60(b)(4), (5) or (6), and section 363(m) of the Bankruptcy Code. Following remand, the parties engaged in extensive discovery and the court held an evidentiary hearing on February 3, 2006.

DISCUSSION

Property Law Outside Bankruptcy

When this dispute between Pool Builders and the Buyer first came to this court on April 28, 2004, it was unclear who held title to the Molds prior to the sale. Discovery has eliminated any doubt. Pool Builders paid over $350,000 for the design and fabrication of the Molds and held title at all times prior to the sale. The Buyer does not contest this. Pool Builders merely gave possession of the Molds to the Debtor so it could make pool panels for Pool Builders. This was consistent with industry

[4] Despite reversal of the Clarification Order Pool Builders kept possession of the Molds and the Buyer has not sought to regain possession in the meantime. According to Mr. Morgan the Molds need major repairs before they can be used again.

practice whereby the customer procures a mold and the molder uses it to produce a product.

"Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. United States*, 440 U.S. 48, 54 (1979) quoted in *Folger Adam Security, Inc. v. DeMatteis/Magregor JV*, 209 F.3d 252, 267 (3d Cir. 2000) (Stapleton, J. concurring). Under New Jersey state law the sale of goods, such as the Molds, is governed by Article 2 of the Uniform Commercial Code, N.J.S.A. 12A:2-101, et seq. U.C.C. § 2-403(1) provides: "A purchaser of goods acquires all title that the purchaser's transferor had or had power to transfer . . . ." Under this general rule, the Buyer acquired no title to Pool Builders' Molds because the Debtor had no title to the Molds and did not have the power to transfer title. *Touch of Class Leasing v. Mercedes-Benz Credit of Canada, Inc.*, 591 A.2d 661 (N.J. Super. App. Div. 1991). The exception to the general rule that empowers a merchant to transfer the title of one entrusting goods to the merchant (U.C.C. § 2-403(2)) does not apply here because the Debtor was not a merchant who dealt in molds and the Buyer was not a buyer in the ordinary course of business. Thus, under the U.C.C. title to the Molds remained in Pool Builders. The Buyer has not asserted the contrary. The Buyer claims title to the Molds based upon the Sale Order as interpreted by the District Court.

Estoppel

The Buyer argues that Pool Builders should be estopped from asserting its title because Pool Builders failed to label the Molds with its name or file a UCC-1 financing statement of its ownership. The U.C.C. expressly preserves general principles of law, including estoppel. U.C.C. § 1-103. In

Tumber v. Automation Design & Manufacturing Corp., 324 A.2d 602 (N.J. Super. Law Div. 1974) an owner who leased machinery to a user of the equipment anticipating future sale was estopped to claim ownership against a good faith purchaser who acquired the equipment from the lessee. Due to the complicated, intertwined and poorly documented relationship between the true owner and the lessee, and the apparent authority conferred on the lessee, the court found the true owner estopped to assert title against the purchaser. As between the innocent purchaser and the owner, the court found that the owner facilitated a fraud by the seller and should suffer the loss in equity.

The situation here is far different. Pool Builders' relationship with the Debtor was uncomplicated and standard in the industry.[5] Pool Builders, as customer, spent over $350,000 to acquire molds and delivered them to the Debtor solely for the purpose of fabricating molded parts for Pool Builders. It did nothing wrongful that facilitated the Debtor's sale of assets that the Debtor did not own. There is no reason to estop Pool Builders from claiming ownership of the Molds that rightfully belong to it.

Rule 60(b) Motion

A sale order is a final order, appeal from which is to be taken within ten days of its entry. Fed. R. Bankr. P. 8002. Having failed to appeal within ten days, Pool Builders instead moves pursuant to Federal Rule of Civil Procedure 60(b) for relief from the sale order. Rule 60(b) is applied to

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[5] In fact, after purchasing the Debtor's business the Buyer returned molds to several other customers at their request and never asserted ownership until after this dispute with Pool Builders. The Buyer, apparently, treated Pool Builders differently in order to retain that business since the Molds are useless to Buyer except to produce goods for Pool Builders. Subsequent to the dispute with Pool Builders, the Buyer gave another customer a hard time, but eventually returned that customer's molds in exchange for a token payment.

bankruptcy cases by virtue of Bankruptcy Rule 9024. Fed.R.Civ.P. 60(b)(4) allows for relief from a final judgment or order if the judgment is deemed void. Motions under Rule 60(b) "shall be made within a reasonable time." Fed.R.Civ.P. 60(b). The District Court stated that this limitation "does not apply to Rule 60(b)(4) and such motions may be made at any time." *Polycel*, No. 04-4029, slip op. at 13, *citing United States v. One Toshiba Color T.V.*, 213 F.3d 147, 157 (3d Cir.2000); *see also In re U.S. Metalsource Corp*., 163 B.R. 260, 267 (Bankr.W.D.Pa.1993) (Because of the nature of a Rule 60(b)(4) motion, "[c]ourts have indicated that [it]...can be brought at any time."). A judgment may be void where a court "acted in a manner inconsistent with the due process of law." *In re U.S. Metalsource*, 163 B.R. at 267. As the District Court recognized, "lack of notice to an interested party...may constitute a due process violation and justify deeming a judgment void under Rule 60(b)(4)." *Polycel*, No. 04-4029, slip op. at 14. The question that remains is whether the sale order here is void for lack of procedural due process.

Buyer argues Rule 60(b)(4) should not apply based on the doctrine of laches. It is the Buyer's contention that because Pool Builders knew of the bankruptcy and knew that Buyer was acquiring the Debtor's assets, by not having objected, Pool Builders "slept on its rights" and should be precluded from challenging the sale at this time. The fact remains that Pool Builders did not know that the Buyer challenged its ownership rights in the Molds until 2004. It is irrelevant that Pool Builders continued to do business with the Buyer where Pool Builders was unaware of the Buyer's claim of ownership and did not previously know of any reason to challenge the Sale Order.

Due Process

The Debtor moved to sell substantially all of its assets to the Buyer free and clear of any liens, claims, encumbrances, and interests. The sale was approved by this court on December 31, 2001. Long after the sale, Pool Builders discovered the Debtor and the Buyer intended Pool Builders' Molds were part of the assets sold free and clear. There is no evidence that Pool Builders received prior notice of the sale.

Outside the ordinary course of business, property of a bankruptcy estate may be sold only after "notice and a hearing." 11 U.S.C § 363(b)(1). The due process requirement of the Fifth Amendment of the United States Constitution applies to bankruptcy proceedings. *In re Marcus Hook Dev. Park, Inc*., 143 B.R. 648, 660 (Bankr.W.D.Pa.1992), *citing Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 332, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985). As stated by the First Circuit, "[n]otice is the cornerstone underpinning Bankruptcy Code procedure." *In re Savage Indus., Inc.*, 43 F.3d 714, 720 (1st Cir.1994).

The Bankruptcy Code mandates "parties in interest" be given adequate notice and an opportunity to be heard before their interests may be adversely affected.[6] 11 U.S.C. § 363(b);

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[6]Particulars of the notice requirements are set forth more fully in the Bankruptcy Rules. The issue in this case is the lack of notice, not the adequacy, so these rules will not guide this determination. Nevertheless, a short recitation follows. Rule 6004 requires notice of a sale be given in accordance with Rule 2002 and if the sale is free and clear of liens and other interests, it be made in accordance with Rule 9014.

Rule 2002(a)(2) provides that "parties in interest" are entitled to notice by mail of "a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice." Rule 2002(c) further provides that the contents for a notice of sale "shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections...[t]he notice...is sufficient if it generally describes the property." Rule 2002 notice is designed, primarily, to allow creditors to scrutinize a sale of assets to make sure it is an arms-length transaction for fair value. *In re*

Fed.R.Bankr.P. 6004(a). The term "parties in interest" encompasses creditors and "any entity whose pecuniary interests might be directly and adversely affected by the proposed action." *In re Savage Indus.*, 43 F.3d at 720. This notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Folger Adam Sec. Inc. v. DeMatteis/MacGregor J.V.*, 209 F.3d 252, 265 (3d Cir.2000), *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, 94 L. Ed. 865, 70 S. Ct. 652 (1950). The due process notice requirement therefore provides a party in interest its day in court. *In re Marcus Hook*, 143 B.R. at 660 , *citing In re Fauchier*, 71 B.R. 212, 215 (9th Cir. BAP 1987). "The obvious purpose of this mandatory prior notice is to satisfy constitutional requirements where one's interest in property will be adversely affected as a result of judicial action." *In re Marcus Hook*, 143 B.R. at 660.

Pool Builders' status as an interested party affords it the protections of due process, which, as stated previously, requires "notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314-15. At the very least, Pool Builders was entitled to notice of the sale and of the fact that the buying and selling parties contemplated Pool Builders' ownership interest in the Molds would pass to the Buyer.

Abbotts Dairies of Pa., Inc., 788 F.2d 143 (3d Cir.1986).

Rule 9014 provides that "reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought."

Rules 6004 and 9014 (relating to contested matters) are designed to give those whose interests in property may be affected, notice and an opportunity to object, to accord them due process.

The burden is on the trustee or debtor in possession to prove proper notice. *In re Savage Indus.*, 43 F.3d at 720-21. Pool Builders claims it received no written notice of the bankruptcy case itself, nor of the asset sale. No proof to the contrary has been offered. And while it is undisputed that Pool Builders learned of the bankruptcy proceedings from another supplier prior to the execution of the sale, this is not sufficient knowledge to satisfy the due process requirements. *See e.g., In re Marcus Hook*, 143 B.R. at 660 ("Although due process is a highly flexible concept...[a]t the very least, the interested party must be reasonably apprised that the contemplated action is directed against *its* interest") (emphasis in the original).

Section 363(m)

Relevant to the Buyer's argument that a sale cannot be undone is § 363(m) of the Code, which protects good faith purchasers from the effects of a reversal on appeal of the authorization to sell: "[t]he reversal or modification on appeal of an authorization under subsection (b) . . .of this section of a sale . . . of property does not affect the validity of a sale . . . to an entity that purchased . . . such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale . . . were stayed pending appeal." The policy rationale behind § 363(m) is "not only [to afford] finality to the judgment of the bankruptcy court, but particularly to give finality to those orders and judgments upon which third parties rely." *In re Abbotts Dairies of Pa., Inc*., 788 F.2d 143, 147 (3d Cir.1986). The benefit of a sale order is to protect the purchaser who would otherwise not take a risk in purchasing assets that could later be challenged by other parties. It is important to note here, that this is not an appeal of an order, rather it is a Rule 60(b) motion for relief from an order. As such, the limitations of § 363(m) are not applicable. *In re Edwards*, 962 F.2d 641, 644 (7th Cir.1992) ("section 363(m) merely protects the bona fide purchaser during the period–that is, pending appeal–in which he otherwise would have no protection against the rescission of a judicial order approving the sale, and does not address the scope of collateral relief. *In re Met-L-Wood* [*Corp*., 861 F.2d 1012, 1018], holds that collateral relief from an order approving a bankruptcy sale is governed by the standards of Rule 60(b) of the civil rules, applied to bankruptcy proceedings by Bankruptcy Rule 9024, and this implies that some of those orders can be set aside after the time for appeal has run and any stay pending appeal has expired."). This court nevertheless considers the Buyer's § 363(m) argument since it pertains to the important policy of finality in bankruptcy cases.

The Buyer cites to several cases for the proposition that the failure to obtain a stay of an order under § 363(m) will prevent a challenge to the finality of a sale or lease, making the substantive questions equitably moot, without any further considerations. This court is not persuaded that these cases govern the issue here. The Third Circuit authority cited by the Buyer is distinguishable. *Pittsburgh Food & Beverage, Inc. v. Rannallo*, did not involve due process concerns. 112 F.3d 645 (3d Cir.1997). Rather, the debtor, in an involuntary case, was seeking to undo the court approved sale arguing that the asset was not property of the estate and therefore § 363(m) did not apply. *Pittsburgh Food*, 112 F.3d at 646. In support of its position, the Buyer also cites *In re Sax* for the same proposition. 796 F.2d 994 (7th Cir.1986). Neither of these cases involved due process concerns and it is worth noting that in a footnote the *Sax* Court states: "[creditor] has not argued that § 363(m) violates due process rights nor otherwise challenged the validity of § 363(m)." *In re Sax*, 796 F.2d at 998 n.8. Although dicta, this indicates that the court may believe § 363(m) has its limits and a sale challenged for a due process violation may not require that a stay of an order be obtained. *Id.*

Another Third Circuit case relied on by the Debtor is *In re Rickel Home Centers*, which also did not involve a violation of due process notice requirements. 209 F.3d 291 (3d Cir.2000). The lease at issue was challenged because the landlord claimed the Debtor leased the premises to a third party in violation of the use provisions, but the court never reached the merits because, in the interests of finality, under § 363, failure to obtain a stay of order approving the sale rendered the appeal moot. *In re Rickel*, 209 F.3d at 302-3. Again, this idea of equitable mootness does not carry the same

weight in light of due process challenges as it does where a party simply argues it did not believe § 363(m) applied, and therefore did not abide by it in the appeal stage.

Finally, the Debtor cites *In re Edwards*, where the Seventh Circuit determined that a bankruptcy sale would not be undone even where the mortgagee did not receive prior notice of the sale. 962 F.2d 641. Balancing the concerns of deprivation of property without notice against the policy of finality in bankruptcy sales and a bona fide purchaser's ability to obtain good title, the Seventh Circuit determined the interests of finality weighed stronger. *Id.* at 645. This court is inclined to disagree with the reasoning of the Seventh Circuit, and instead follows the more persuasive line of cases that recognize the importance of affording parties their due process rights over the interest of finality in bankruptcy sales. *See In re Ex-Cel Concrete Co., Inc*., 178 B.R. 198, 204-5 (9t Cir.1995) ("[w]e...respectfully disagree with *Edwards* to the extent that it allows considerations, such as the exigent needs of the bankruptcy system or the innocence or good faith of third parties involved in bankruptcy sales, to justify departures from due process standards in adjudicating property rights.").

Although this court agrees that the interest of finality is an important part of ensuring participation in bankruptcy sales, this cannot trump constitutionally mandated due process requirements for notice and an opportunity to be heard. Despite the finality of an order and despite the failure to obtain a stay of the order, it may be subject to attack where a court "acted in a manner inconsistent with due process of law." *In re U.S. Metalsource Corp*., 163 B.R. at 267; *see also* 3 *Collier on Bankruptcy* ¶ 363.11 (15th ed. 2006) (despite the concern for finality in bankruptcy sales, "section 363(m) has been held not to protect even an otherwise good faith purchaser when no notice is given to the lienholder"). As one court has noted, "ample authority exists for the principle that sales within the

scope of § 363(b)(1), of which no proper notice was provided, may be set aside." *In re Fernwood Markets*, 73 B.R. 616, 619 (Bankr.E.D.Pa. 1987); *citing M.R.R. Traders, Inc. v. Cave Atlantique, Inc*., 788 F.2d 816, 818 (1st Cir.1986); *In re First Baptist Church, Inc*., 564 F.2d 677, 679 (5th Cir.1977); and *In re Stanley Eng'g Corp*., 164 F.2d 316, 318 (3d Cir.1947), cert. denied, 332 U.S. 847, 68 S.Ct. 351, 92 L.Ed. 417 (1948); *In re Rounds*, 229 B.R. 758, 765 (Bankr.W.D.Ar.1999) ("Failure to give notice is by far the most frequent mistake or infirmity held to warrant vacating a confirmed sale.").

Remedy

Based on the facts and evidence before this court, it is clear that the Debtor failed to provide notice to Pool Builders, as required by § 363(b), in violation of its due process rights. Through the Rule 60(b) motion filed by Pool Builders, this court may set aside the sale order as void. However, rather than simply setting aside the transaction, this court chooses to adhere to the approaches of those courts in considering due process violations of § 363(b) that have "fashioned remedies based upon the unique factual matrices underlying the respective controversies." *In re Cavalieri*, 142 B.R. 710, 716 (Bankr.E.D.Pa. 1992). In *Cavalieri*, where Debtor failed to provide notice to the creditor before sale of the automobile, the court determined the remedy would be fashioned on the following considerations: (1) good faith of the purchaser; (2) interest of the Debtor's estate in retaining the asset; (3) the interest of the creditors and interested parties who did not receive notice of the sale; and (4) the Debtor's unauthorized actions. 142 B.R. at 717.

Considering those factors here, the court finds: (1) the Buyer executed the sale in good faith, unaware that the Debtor did not have ownership rights in the Molds that were included in the sale; (2) voiding the sale and returning Pool Builders' molds to the Debtor's estate would not benefit the estate

as the Debtor is out of business; (3) Pool Builders has a strong interest in regaining ownership of its Molds as they are a significant part of the company's assets, costing over $350,000.00, and were taken with no opportunity to object; (4) the Debtor had no right to sell the Molds of Pool Builders, its interest was merely possessory; additionally, (5) the Buyer has no use for the Molds, other than to make products for Pool Builders, as the Molds are unique and not usable for other customers. In weighing these factors, this court determines the most appropriate remedy is not to avoid the entire sale, but only insofar as it pertained to the Molds of Pool Builders. This restores Pool Builders valid ownership interest in the Molds; allows the Buyer the benefit of its bargain in the assets sale with only a minimal reduction in a $5.5 million sale; and leaves the Debtors' estate with no more or less assets than it would have if the sale had been left untouched. Pool Builders regained possession of its Molds following this court's Clarification Order and the Buyer has not sought to regain possession despite the reversal of the Clarification Order by the District Court. By voiding the title given to the Buyer in the Sale Order, the remedy restores title to Pool Builders and leaves possession with Pool Builders, where it has been since June 2004.

CONCLUSION

The Sale Order dated December 3, 2001, deprived Pool Builders of its property rights in the Molds since it transferred title to the Buyer without notice to Pool Builders nor an opportunity to be heard. To that extent, the Sale Order is void and Pool Builders is entitled to relief under Fed. R.Civ. P. 60(b)(4) and Fed. R. Bankr. P. 9024. As a remedy, the court will void the Buyer's title in the Molds and leave possession of the Molds in Pool Builders. The balance of the Sale Order will not be disturbed.

DATED: April 18, 2006 /S/ ***Raymond T. Lyons***, U.S.B.J.