

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: THOMAS W. OLICK and
KATHRYN OLICK,
Debtors

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CIVIL ACTION

03-6723

Memorandum and Order

YOHN, J.

February _____, 2005

Debtor, Thomas W. Olick,¹ appeals from an order of the bankruptcy court issued November 14, 2003, wherein the bankruptcy court denied debtor's motions to vacate and amend orders issued on March 1, 2001 and January 16, 2003 (or for a new trial)² and to disallow payments to William C. House, P.C., in excess of those payments provided for House under the debtor's confirmed Third Amended Plan.³ The bankruptcy court dismissed these motions on the

¹ Debtor filed for bankruptcy with his wife Kathryn, but these two motions were signed only by Thomas Olick; Kathryn did not sign them. Therefore, throughout this brief I only refer to the debtor as "Olick."

² The bankruptcy court interpreted Olick's 9023 motion as a request to alter or amend the judgment, but Olick maintains that he requested a new trial.

³ House rendered services as general counsel to the debtors in their bankruptcy case. At the root of these appeals is a dispute between the debtors and their former counsel concerning the date of House's termination and the amount of compensation to which he is entitled. For the specific facts of this case, *see* 2002 U.S. Dist. LEXIS 4559, Civ. No. 01-1606, 01-1607 (March 19, 2002).

merits and because they were not timely filed. Bankruptcy opinion at 2 (Olick Tab 4).

Recent Procedural History

On March 19, 2002, I affirmed the bankruptcy court's March 1, 2001 order with respect to its approval of House's creditor claim and its determination that House's fee application was reasonable for the time period from August 29, 1997 through March 24, 1998. But I remanded the matter to the bankruptcy court for a clarification of the factual basis of its statement regarding House's volunteer status after March 24, 1998. I ordered that if on remand the bankruptcy court found that House's services were not volunteered after March 24, 1998 and that House is entitled to compensation through December 7, 1998, the bankruptcy court was to make a determination as to the reasonableness of House's fee application for the time period extending from March 24, 1998 through December 7, 1998.

On March 29, 2002, the debtor appealed the order to the United States Court of Appeals for the Third Circuit. The Third Circuit dismissed the appeal on November 12, 2002 for lack of jurisdiction, explaining that the matters were not merely ministerial: "whether [House] is entitled to compensation for legal services rendered between March 1998 and December 1998 cannot be decided without further fact-finding." House Brief, Exh. F at 1.

On January 9, 2003, Olick filed a motion ("Debtor's Rule 9024 Motion") asking the bankruptcy court to amend its March 1, 2001 order, at which time the bankruptcy learned of the Third Circuit's dismissal of the debtor's appeal and found the matter on remand ripe for

disposition.⁴

On January 16, 2003, the bankruptcy court turned to the matter on remand: whether House was entitled to compensation from March 25, 1998 through December 7, 1998. After reviewing the evidence on the record, the bankruptcy court issued an order concluding that it erred when it found that House acted as a volunteer after March 24, 1998. The court found that House was entitled to be compensated for the services he rendered and reimbursed for the expenses he incurred from March 25, 1998 through December 7, 1998. The court also found that House's rate, expenses, and time spent during this period were reasonable. Bankruptcy opinion at 3 (Olick Tab 4).

On January 27, 2003, Olick filed another motion ("Debtor's Rule 9024 and 9023 Motion") asking the bankruptcy court to vacate its order of January 16, 2003.

The bankruptcy court held a hearing on both of these motions on July 10, 2003,⁵ and after briefing issued a decision on November 14, 2003, denying both of these motions. Olick Tab 4. As discussed below, the bankruptcy court explained that the 9024 motion appealing the March 1, 2001 order was untimely, and that the 9023 and 9024 motion with reference to the January 16, 2003 order was untimely and without merit.

Presently before this court is Olick's appeal from the November 14, 2003 order.

⁴ Olick filed an earlier 9024 motion on January 18, 2003 when Olick's appeal from the March 1, 2001 order was pending in this court. The bankruptcy court denied the motion because it lacked jurisdiction to grant the requested relief because of the pending appeal.

⁵ A hearing on these motions was originally scheduled for February 13, 2003, but was continued several times.

The Bankruptcy Court's Reasoning

Rule 9024 Motions (filed January 9, 2003 and January 27, 2003)

The bankruptcy court explained that the 9024 motion, filed on January 9, 2003, was denied because it was filed too late.⁶ Pursuant to Fed. R. Civ. P. 60(b),⁷ “the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.” Rule 60(b) provides that “[t]he motion shall be made within a reasonable time, and for [fraud] . . . not more than one year after the judgment, order, or proceeding was entered or taken.” Fed. R. Civ. P. 60(b). The bankruptcy court found that the 9024 motions, filed January 9, 2003 and January 27, 2003, were untimely because they were filed nearly one year and nearly eleven months after judgment was entered on March 1, 2001.

The court acknowledged that Olick filed an earlier 9024 motion on January 18, 2002, seeking relief from the March 1, 2001 order.⁸ Yet, the bankruptcy court explained that it still could not accept Olick's first filing on January 18, 2002 as timely, because Olick still waited over ten months to file his motion, which, even though he did not exceed the maximum one-year period, was an unreasonable amount of time. Bankruptcy opinion at 3 (Olick Tab 4). The court reasoned that the facts that formed the basis for Olick's motion were known to the Olick prior to

⁶ This reasoning also applies to the 9024 motion filed on January 27, 2003 (Olick's “B.R. 9024/9023 motion”).

⁷ Bankruptcy rule 9024 makes Fed. R. Civ. P. 60 applicable to bankruptcy cases.

⁸ The bankruptcy court denied this motion on February 8, 2002 for lack of jurisdiction because appeal was still pending with this court at the time he filed his motion. Olick did not appeal the bankruptcy court's order entered February 8, 2002 denying appellant's January 18, 2002 motion for relief from the March 1, 2001 order.

March 1, 2001. *Id.*

The bankruptcy court also dismissed Olick's 9024 motion on the merits. *Id.* at 9. Fed. R. Civ. P. 60(b) provides that "the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding 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). Fed. R. Civ. P. 60(a) provides relief where there is a clerical error.⁹ Olick specifically claimed that he was entitled to relief because House committed fraud (reason 3), but the bankruptcy court found that debtor failed to establish that he is entitled to relief on any of these grounds. Bankruptcy opinion at 9-10.

Olick relied on the affidavit of William Young to support of his Rule 9024 motion, based on claims that House had committed fraud. Yet, the bankruptcy court explained that Young's affidavit could not be considered because he was not made available for cross examination.

⁹ "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court." Fed. R. Civ. P. 60(a).

Bankruptcy opinion at 4 n. 5. Moreover, the court found that the information in his affidavit was available to the debtor at the time of the March 1, 2001 order and the January 16, 2003 order.

Additionally, the court noted that Rule 60(b) “cannot be used to indirectly extend the time in which to appeal or to allege new grounds to support an appeal which were in existence at the time the appeal was taken.” *Id.* at 10. The court found that the debtor was in possession of all of the facts he alleged in support of his Rule 9024 motion at the time he pressed his original motion for reconsideration¹⁰ and at the time he appealed the March 1, 2001 order. For these reasons, the bankruptcy court dismissed the debtor’s 9024 motions.

Rule 9023 Motion (filed January 27, 2003)

The bankruptcy court found Olick’s 9023 motion was filed too late.

Pursuant to Fed. R. Civ. P. 59,¹¹ Olick had ten (10) days to file his motion after the March 1, 2001 order, the date judgment was entered: “Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.” Fed. R. Civ. P. 59(e). The bankruptcy court concluded that Olick’s motion was untimely because he filed his January 27, 2003 motion a year and almost eleven months after the March 1, 2001 order.

The bankruptcy court also denied Olick’s 9023 motion on the merits. The court explained that a party seeking to alter or amend judgment under Rule 59(e) must establish one of the following: 1) that there has been an intervening change in the law; 2) that there is new evidence that was not available when the court entered judgment; or 3) that there is a need to correct a

¹⁰ This motion was denied in the March 1, 2001 order.

¹¹ Bankruptcy rule 9023 makes Fed. R. Civ. P. 59 applicable to bankruptcy cases.

clear error of law or to prevent manifest injustice. *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). The bankruptcy court found that Olick made no allegations of the first two grounds and did not meet his burden of proving the third. Bankruptcy opinion at 4 (Olick Tab 4).

In response to Olick's argument that there was no hearing prior to the January 16, 2003 order, the bankruptcy court explained that a hearing was not necessary because the matter was on remand with specific instructions for the court to clarify the factual basis for its conclusion that House was a volunteer after March 24, 1998. *Id.* at 4-5. The bankruptcy court maintains that the record was "already fully developed" because hearings had been held on April 15, 1999, June 8, 2000, and June 28, 2000. *Id.* at 6. The bankruptcy court explained that it was "simply directed . . . to engage in further fact finding based on the record that was already in existence" and that neither the Third Circuit or this court directed the bankruptcy court to hold another hearing. *Id.*

Finally, Olick argued that his third amended plan precludes any award of compensation greater than the amount that the plan provided for and has the effect of *res judicata* as to all issues decided or which could have been decided at the hearing on confirmation. *Id.*

Addressing this argument, the bankruptcy court found that House did not have any claim entitled to priority when the plan was confirmed on January 25, 1999 because House's fee application was approved on January 20, 2000, *after* the debtor's plan was confirmed. *Id.* at 7 n.

8.¹² The bankruptcy court found that if the third amended plan did not include the fee application

¹² The court explained that pursuant to 11 U.S.C. § 507(a)(1), fee applications are entitled to priority treatment as an administrative expense. At the time the Third Amended Plan was confirmed, however, House's fee application had not yet been awarded. The debtor's plan was confirmed January 25, 1999, but House's fee application was not awarded until January 20, 2000. As such, there was no administrative expense awarded to House that would have been entitled to

approved on January 20, 2000, and did not account for all (present and future) claims entitled to priority, it would fail to comply with the requirements of §1322(a), which mandate that a plan must provide for full payment of all claims entitled to priority. *Id.* at 8. Therefore, the court concluded that the confirmation of the plan could not have any *res judicata* effect on House's claim for compensation. *Id.* at 9.¹³

Issues on Appeal

Olick filed a notice of appeal with this court on November 20, 2003

He asks this court to find 1) that his 9024 and 9024/9023 motions were timely filed;¹⁴ 2) find that the confirmation of the plan has a *res judicata* effect on House's claims because House failed to appeal the bankruptcy court's January 25, 1999 order denying his objections to the confirmation and confirming the debtor's third amended plan;¹⁵ 3) that Olick was denied due process because he was not afforded another hearing on remand and because the Third Circuit

priority.

¹³ Section 1322(a) requires that the plan must provide for full payment of all claims entitled to priority under Section 507 unless the holder of such a claim agrees to different treatment. The bankruptcy court noted that debtor conceded that House's allowed claim and fee are entitled to priority treatment under Section 507. The court also noted that House did not agree to "different" treatment. The bankruptcy court found that pursuant to *In re Szostek*, 866 F.2d 1405, 1411 (3d Cir. 1989), the plan must comply with section 1322(a).

¹⁴ Olick does not include this issue among his numbered issues, but raises it within the text of his brief at 23 *et seq.*

¹⁵ Olick presents this issue as three separate issues (1-3 in his brief).

directed further fact-finding;¹⁶ 4) that the approval of a bankruptcy attorney's fee application should be revoked, reversed or reconsidered because Young's third affidavit, dated July 8, 2003, is evidence that House committed fraud and that the bankruptcy court should have considered this affidavit;¹⁷ and 5) that the approval of House's fee application should be revoked, reversed and/or reconsidered because the fee application was improperly submitted, supported, and/or prepared as required by the local bankruptcy rules of the Eastern District of Pennsylvania.¹⁸ Olick's Brief at 5 *et seq.* Each of these arguments is addressed below.

Standard of Review

The district court, sitting as an appellate tribunal, applies a clearly erroneous standard to review the bankruptcy court's factual findings and a *de novo* standard to review its conclusions of law. *In re Siciliano*, 13 F.3d 748, 750 (3d Cir. 1994). A finding of fact is clearly erroneous if a reviewing court has a "definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The factual determination of the bankruptcy court will be accepted unless that determination is either "completely devoid of minimum evidentiary support" or "bears no rational relationship to the supportive evidentiary data." *Hoots v. Pennsylvania*, 703 F.2d 722, 725 (3d Cir. 1983). Mixed questions of fact and law require a mixed standard of review, under which the court reviews findings of historical or

¹⁶ Olick does not include this issue among his numbered issues, but raises it within the text of his brief at 20 *et seq.*

¹⁷ This issue is numbered in Olick's brief as his fourth issue.

¹⁸ This issue is numbered in Olick's brief as his fifth issue.

narrative fact for clear error but exercises plenary review over the bankruptcy court's "choice and interpretation of legal precepts and its application of those precepts to the historical facts."

Mellon Bank N.A. v. Metro Communications, Inc., 945 F.2d 635, 642 (3d Cir. 1991). When reviewing a decision that falls within the bankruptcy court's discretionary authority, the district court may only determine whether or not the lower court abused its discretion. *See In re Top Grade Sausage*, 227 F.3d 123, 125 (3d Cir. 2000). "An abuse of discretion exists where the [lower] court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *Int'l Union, UAW v. Mack Trucks, Inc.*, 820 F.2d 91, 95 (3d Cir. 1987).

I must exercise plenary review over the bankruptcy court's "choice and interpretation of legal precepts and its application of those precepts to the historical facts." *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 641-42 (3d Cir. 1991), *cert. denied*, 503 U.S. 937 (1992); *see also Chemetron Corp. v. Jones*, 72 F.3d 341, 345 (3d Cir. 1995), *cert. denied*, 517 U.S. 1137 (1996).

DISCUSSION

1. Whether Olick's 9023 and 9024 motions were timely filed

Olick argues that the bankruptcy court improperly found that his 9023 and 9024 motions were not timely filed. Olick Brief at 23. I will address each of these motions in turn.

Rule 9023 motion

According to the bankruptcy court, in his 9023 motion of January 27, 2003, Olick invoked Rule 59(e) and petitioned this court to *alter or amend* the March 1, 2001 and the January

16, 2003 orders. Characterized by Olick, he filed this motion under Rule 59(b) seeking a *new trial and relief* from the orders. Regardless of whether he has filed his 9023 motion under Rule 59(e) to alter or amend the orders,¹⁹ or under Rule 59(b) for a new trial, Olick's petition was untimely.

Bankruptcy Rule 9023 makes Fed. R. Civ. P. 59 applicable to bankruptcy cases. Rule 59(b) governs the grant of a new trial, and provides that “[a]ny motion for a new trial *must be filed no later than 10 days after entry of the judgment.*” Fed. R. Civ. P. 59(b)(emphasis added). Similarly, Federal Rule of Civil Procedure 59(e) provides that “[a]ny motion to alter or amend the judgment shall be filed no later than 10 days after entry of the judgment.” Fed. R. Civ. P. 59(e)(emphasis added). In either case, both motions must be made within ten days of the judgment.

Olick's January 27, 2003 motion was untimely because it was filed one year and almost eleven months after entry of the final order on March 1, 2001.²⁰ The ten-day time period may not be extended by the district court and “cannot be circumvented regardless of excuse.” *Stradley v. Cortez*, 518 F.2d 488, 492 (3d Cir. 1975). Pursuant to Federal Rule of Civil Procedure 6(b), the court “may not extend the time for taking any action under Rules 59(b), (d) and (e) except to the extent and under the conditions stated in them.” Fed.R.Civ.P. 6(b). “[T]he ten day period is jurisdictional and ‘cannot be extended in the discretion of the court.’” *Smith v. Evans*, 853 F.2d

¹⁹ The bankruptcy court interpreted his earlier petition as a motion to amend the final order.

²⁰ Olick argues that he filed his motion within ten days of the court's January 16, 2003 order; however, this is not the final order from which Olick seeks relief. Olick Brief at 24. Olick ultimately seeks relief from the March 1, 2001 order.

155, 157 (3d Cir. 1988). Because it is untimely, I may not grant Olick's 9023 motion under Rule 59.

Olick claims that Rule 9023 does "not limit relief to a period of one year after discovery of fraud upon the court." Olick Brief at 25. Yet, there is no special provision in Rule 59 allowing for more time based on the requested relief. Olick had ten days to file his motion, no matter the reason for the request.

Olick also argues that the March 1, 2001 order was not a final order. Olick Brief at 32. Instead, he contends that the order was not final until January 16, 2003. Olick maintains that his January 27, 2003 motion was filed within ten days from entry of the final judgment.

Olick has no legal basis for this argument. The March 1, 2001 order was final because it ended the litigation in bankruptcy court on the merits. *M.A. ex re. E.S. v. State-Operated School Dist. of Newark*, 344 F.3d 335, 343 (3d Cir. 2003). Olick filed an appeal in this court on April 3, 2001 and cross-appeals were filed on the basis of the finality of the March 2001 order. Olick argues that the judgment was not final because it was later remanded and on remand the bankruptcy court entered an order to alter the award. Yet, for purposes of filing a timely motion for a new trial pursuant to 59(b), remanding does not change the finality of the March 1, 2001 order. *New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d 1162, 1180 (3d Cir. 1991)("We know of no case that says that an order that is 'final' when an appeal is taken can be rendered non-final by a later decision of the appellate court"). Moreover, the ten-day requirement under Rule 59 cannot be "suspended during the pendency of an appeal" because the time for seeking relief under Rule 59 is *before* an appeal is made from a judgment or order. Fed. R. App.

P. 4(a)(4)(iv), (v); USC Bankruptcy R. 8002(b)(2),(3).²¹ Thus, the March 1, 2001 order was final and Olick failed to file his motions within the requisite ten-day time period.

Rule 9024 Motions

Olick also raises several arguments in support of the timeliness and the merits of his 9024 petitions filed January 9, 2003 and January 27, 2003.

Olick contends that House committed fraud.²²

Rule 60(b) provides relief from judgment where there is mistake, newly discovered evidence, or fraud.²³ Rule 60(b) requires that any motion brought thereunder “shall be made *within a reasonable time*,” and adds that where fraud is the basis for the motion, the motion must

²¹ Under Federal Rule of Appellate Procedure 4(a)(4), the time to file an appeal runs from the entry of the order disposing of motions made under Rule 59. Thus, these motions must be made and disposed of *before* filing an appeal. The deadlines for these motions are not, as Olick argues, suspended during the pendency of an appeal.

²² In support of his assertions, Olick offers Young’s third affidavit dated July 8, 2003, and contends that the bankruptcy court improperly refused to consider this evidence.

²³ Rule 60(b) provides that “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; . . . (3) *fraud*; . . . (4) the judgment is void; (5) the judgment has been satisfied; . . . or (6) any other reason justifying relief from the operation of the judgment. *The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.*” Fed. R. Civ. P. 60(b) (emphasis added).

To prevail on a Rule 60(b)(3) motion, the moving party must establish that the adverse party engaged in fraud or other misconduct and that the misconduct prevented the moving party from fully and fairly presenting the case.” *Walker v. Spiller*, 2002 U.S. App. LEXIS 9067 (3d Cir. 2002). Rule 60(b) “does not confer upon the district courts a ‘standardless residual of discretionary power to set aside judgments.’” *Moolenaar v. Government of Virgin Islands*, 822 F.2d 1342, 1346 (3d Cir., 1987). Instead, the remedy provided by Rule 60(b) is “extraordinary, and special circumstances must justify granting relief under it.” *Id.*

be made “*not more than one year after* the judgment, order or proceeding was entered or taken.” Fed. R. Civ. P. 60(b)(emphasis added).

Both of Olick’s motions of January 2003 were filed well over one year after the March 1, 2001 order. Therefore, I find that these two motions were untimely filed.

Olick also contends that his first 9024 motion, dated January 18, 2002, was filed only ten months after the bankruptcy court entered its order on March 1, 2001. Olick Brief at 24-25. The bankruptcy court found that even accounting for Olick’s first motion filed January 18, 2002,²⁴ the petition was not filed within a reasonable time because ten months was an unreasonable amount of time, especially given that Olick based his motion on information he could have obtained before the March 1, 2001 order. Like the bankruptcy court, I find that the information in Young’s third affidavit could have been obtained earlier.²⁵ Under the language of Fed. R. Civ. P. 60(b), the court has discretion to determine reasonableness. The one-year filing period is a maximum, and it is within the court’s discretion to determine reasonableness, even if a motion is made before the one-year period expires. Olick waited ten months to file a motion under Rule 60(b) asserting fraud, yet the evidence he based his motion on was within his reach when the order was entered on March 1, 2001. Through the exercise of reasonable diligence he could have obtained this information. Therefore, I find that even his January 18, 2002 motion was untimely.

²⁴ The bankruptcy court denied Olick’s first 9024 motion on February 8, 2002, for lack of jurisdiction.

²⁵ Olick also attempts to argue that he filed this first motion, dated January 18, 2002, only six months after the court disposed of House’s three motions for reconsideration or a new trial on July 24, 2001. *Id.* at 25. Olick argues that he “could not file a B.R. 9024 motion until the court concluded hearings on House’s motions” on July 24, 2001. *Id.* This argument is without merit. The date of the final order is March 1, 2001; this is the relevant date for a determination of timeliness.

Next, Olick argues that the filing of his last two 9024 motions (from January 2003) was delayed until jurisdiction could be “returned to the bankruptcy court” on November 12, 2002, after Olick’s appeal to the Third Circuit was denied for lack of jurisdiction. Olick Brief at 25. Olick filed his second 9024 motion on January 9, 2003, which, if the court accounts for the intervening holidays, he argues was within approximately one month of the bankruptcy court “obtaining jurisdiction.” *Id.* Olick argues that the “running time for filing these motions [was] suspended during the pendency of the . . . appeals” and that he could not have filed the motions with the bankruptcy court “during the period it ‘did not have jurisdiction.’” *Id.*

Yet, under Rule 60(b), the deadline for filing a motion is not suspended during the pendency of an appeal. An appeal does not toll the one-year period within which to bring a Rule 60(b) motion. *Moolenaar v. Government of the Virgin Islands*, 822 F.2d 1342, 1346 n. 5 (3d Cir. 1987). Olick should have filed his motions within the requisite time after the March 1, 2001 order, but he failed to do so. Therefore, I find that Olick’s argument is unavailing and that he failed to file timely motions under 60(b).

2. Whether the confirmation order has a *res judicata* effect

First, Olick argues that the court erred by denying the debtors’ 9023 and 9024 motions because it revoked the confirmation order. Olick contends that the confirmation order, dated January 25, 1999, confirming the third amended plan, was a final order, and that even though House made objections to the plan, he did not appeal the order that denied his objections to the confirmation order, and therefore the confirmation order has a *res judicata* effect. Olick’s Brief at 9. Olick argues that under 11 U.S.C. §1330(a), it was too late for the bankruptcy court to revoke

the confirmation order because House did not request revocation within 180 days from the date of the order and because there was no demonstration of fraud. *Id.* at 11-14.²⁶ He relies on the principle of finality discussed by the Supreme Court in *Stoll v. Gottlieb*, 305 U.S. 165 (1938).

House maintains, however, that the bankruptcy court was correct in finding that the confirmation of debtors' plan had no *res judicata* effect on House's ability to recover on his priority claim because the plan failed to comply with the requirements of §1322(a) in so far as it failed to provide for the payment of House's compensation claim. House Brief at 25.²⁷ House argues that the bankruptcy court's reliance on *Escobedo*, a case from the Seventh Circuit, was proper,²⁸ but that it need not have relied on this authority because pursuant to §1327, in the

²⁶ 11 U.S.C. § 1330(a) provides: "On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud."

²⁷ 11 U.S.C. § 1322 provides that

"(a) The plan shall--

(2) provide for the full payment . . . of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim"

11 U.S.C. § 507 provides that "administrative expenses allowed under [11 U.S.C.] section 503(b)" shall have first priority.

11 U.S.C. § 503(b)(2) allows for administrative expenses including "compensation and reimbursement awarded under [11 U.S.C.] section 330(a)."

11 U.S.C. § 330(a)(1) provides that "after notice to the parties in interest and the United States Trustee and a hearing . . . the court may award to . . . a professional person employed under section 327 or 1103--(A) reasonable compensation for actual, necessary services rendered by the . . . attorney . . . ; and (B) reimbursement for actual, necessary expenses." Under 11 U.S.C. § 327, "the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons . . . to represent or assist the trustee in carrying out the trustee's duties."

²⁸ *Escobedo* is a case from the Seventh Circuit. *Matter of Escobedo*, 28 F.3d 34 (7th Cir. 1994). The Seventh Circuit relied on the Third Circuit's distinction between §1322(a) (imposing mandatory requirements) and §1325 (a discretionary rule) and found that the plan at issue was

language of the Third Circuit, the issue of House’s compensation was ultimately not “an issue that was decided or which could have been decided at the hearing on confirmation.” House Brief at 28.²⁹ House argues that no determination had been made on House’s fee application when the confirmation hearing was held (*and* that no determination could have been made) such that the confirmation order could not have had a *res judicata* effect on his fee application. *Id.*³⁰ The bankruptcy court found that the plan could not have provided for House’s compensation claim at the time of confirmation because House did not have any claim entitled to priority when the plan

invalid for failing to meet the requirements of §1322(a), despite confirmation.

The bankruptcy court relied on this decision for the proposition that compliance with § 1322(a) is mandatory and noncompliance with this order is a legitimate basis for nullification. Olick points to *Pardee*, the Ninth Circuit’s criticism of *Escobedo*.

²⁹ In making this argument, House relies on the specific language of the Third Circuit summarizing the rule of finality as expressed in § 1327(a): “a confirmation order is *res judicata* as to all issues decided or which could have been decided at the hearing on confirmation.” This language first appeared in *In re Szostek*, 886 F.2d 1405, 1408 (3d Cir. 1989) and was later quoted by the Third Circuit in *Donaldson v. Bernstein*, 104 F.3d 547, 554 (3d Cir. 1997). The actual text of §1327 employs different language: “The provisions of a confirmed plan bind the debtor and each creditor, *whether or not the claim of such creditor is provided for by the plan*, and whether or not such creditor has objected to, has accepted, or has rejected the plan.”

³⁰ House noted that the confirmation hearing for debtor’s third amended plan was on January 21, 1999, but the first hearing on House’s fee application was not until April 15, 1999. Before the confirmation hearing, House argued that the hearing should be adjourned pending determination of the fee application, but the bankruptcy court denied this objection. Based on this information, House argued that it was apparent that the issue of House’s compensation was not decided at the confirmation hearing

House also points out that notice and a hearing are required for the award of an attorney’s administrative expenses. 11 U.S.C. § 503(b). Yet, notice of the confirmation hearing was mailed on January 7 and 8, almost two weeks before House filed his fee application on January 21, 1999. Thus, it is apparent that the confirmation hearing was not intended to address House’s fee application. House Brief at 28.

was confirmed.³¹ The bankruptcy court noted that pursuant to § 1322(a)(2), in order to be confirmed a plan *must* account for priority claims.³² Thus, the court found that in so far as the issue of House's compensation was concerned, the confirmation of the third amended plan was invalid because it did not account for these claims. Because compliance with § 1322(a) is mandatory, the bankruptcy court found that the plan has no *res judicata* effect on the omitted priority claims, even though, as Olick claims, House failed to appeal the denial of his objections to the plan.

Upon *de novo* review, I find that the Third Circuit's emphasis on the distinction between the mandatory requirements of §1322(a) and the discretionary rule of §1325 supports House's argument and the bankruptcy court's decision that a plan may not be confirmed if it does not comport with the requirements of § 1322(a).

I do note that House relies heavily the Third Circuit's language that paraphrases § 1327 to argue that House's fee application *was not decided and could not have been decided* at the confirmation hearing, but that the language from the statute itself, when viewed in its actual context, does not have the same meaning. The language of § 1327 provides that a confirmed plan binds the debtor *whether or not the claim of the creditor is provided for by the plan*. The language of the § 1327 seems to preclude without exception any revocation after 180 days, whether or not claims *were* included, not based on whether or not they *could have* been included

³¹ The hearing on House's fee application was held April 15, 1999, after the bankruptcy court confirmed the plan on January 25, 1999, and thus House was entitled to priority claims several months after the plan was confirmed.

³² The Third Circuit has found that the provisions of §1322(a) are mandatory. *In re Szostek*, 886 F2d 1405, 1411 (3d Cir. 1989).

as suggested by House. Still, it seems that the Third Circuit has made clear in *Szostek* that the requirements of § 1322(a) are mandatory.

Thus, even though the language of 11 U.S.C. § 1327 states that a confirmed plan is final *whether or not the claim of such creditor is provided for by the plan*, the Third Circuit's explanation of § 1327 and the distinction made in *Szostek* suggest that in order to be confirmed, plans must comply with the mandatory requirements of §1322(a).

3. Whether Appellant Was Denied Due Process

Next, Olick argues that the bankruptcy court erred when it found that a hearing on remand was not necessary. Olick Brief at 20. The bankruptcy court explained that it did not hold a hearing because the matter was on remand with specific instructions for the court to clarify the factual basis for its conclusion that House was a volunteer after March 24, 1998. Bankruptcy opinion at 4-5. The bankruptcy court maintains that the record was “already fully developed” by the hearings held on April 15, 1999, June 8, 2000, and June 28, 2000. *Id.* at 6. The court explained that neither this court nor the Third Circuit directed the bankruptcy court to hold a hearing; instead, it was “simply directed . . . to engage in further fact finding based on the record that was already in existence.” *Id.*

Olick also claims that the bankruptcy court violated due process when it failed to do additional fact finding as directed by the Third Circuit's order dismissing his appeal for lack of jurisdiction. Olick Brief at 20. Each argument is addressed below.

Right to a Hearing

Olick contends that he was denied his right to a hearing before entry of the January 16, 2003 order. Olick argues that the bankruptcy court “prevented a fair hearing” on his 9024 motion, filed January 9, 2003,³³ because it did not conduct hearings or accept briefs on his motion. Olick Brief at 33. Specifically, he contends that had the court “permitted submission of evidence or briefs, the Debtors would have had an opportunity to present live and/or affidavit testimony of Warren Young at an earlier date.” *Id.*

I find that the issue on remand—the status of House as a volunteer after March 24, 1998—was deliberated by the parties prior to remand because the parties raised this issue on cross-appeal. Olick Brief at 20-21 (citing from hearing transcripts, which indicate that this issue was the subject of questioning). Thus, Olick had an opportunity to be heard on the issue before entry of the January 16, 2003 order. The bankruptcy court noted that the “record on this narrow issue . . . had already been fully developed at the hearings we held on April 15, 1999, June 8, 2000 and June 28, 2000.” Bankruptcy opinion at 6. Moreover, as discussed below, it is within the court’s discretion to allow affidavits. Therefore, I find that Olick was not denied due process because the bankruptcy court did not hold a separate hearing to address his January 9, 2003 motion.

Further Findings of Fact

Olick claims that the Third Circuit, in its dismissal of the debtor’s appeal, instructed the bankruptcy court to make further findings of fact. Specifically, Olick argues that the Third

³³ Olick mistakenly identifies the motion by the wrong date as his 1/9/02 motion. Olick Brief at 33. The January 9 motion was filed in 2003.

Circuit directed the bankruptcy court to conduct another hearing when it stated that “whether Appellee is entitled to compensation for legal services rendered between March 1998 and December 1998 *cannot be decided without further fact finding*” (emphasis added). House maintains, however, that this statement was not a ruling on what the bankruptcy court was required to do with the matters remanded by this court. House Brief at 39. I agree.

In the first instance, I find that the Third Circuit was merely explaining that resolution of the matter on remand relied on the bankruptcy court’s clarification of facts such that the Third Circuit could not exercise jurisdiction at the time Olick appealed the order for remand.³⁴ The Third Circuit’s statement should not be interpreted as a directive to conduct further fact-finding.

I also find that there is no indication, from Olick or elsewhere, that the record is in need of further development. The bankruptcy court found that the “record on this narrow issue which was the subject of Judge Yohn’s remand order *had already been fully developed* at the hearings we had held on April 15, 1999, June 8, 2000 and June 28, 2000.” Bankruptcy opinion at 6. Olick does not point to incomplete evidence to show that the bankruptcy court could not conclude on the already-developed record whether House acted as a volunteer after March 24, 1998. Nor does Olick challenge any specific findings that the bankruptcy court made on remand. Therefore, I conclude that the bankruptcy court did not err, and I will deny Olick’s request.

4. Whether Young’s Third Affidavit is Evidence of Fraud that the Bankruptcy Court

³⁴ I specifically remanded the case so that the bankruptcy court could “*clarify* the factual predicate upon which its statement that House acted as a volunteer after March 20, 1998 is based.” *In re Olick*, Civ. No. 01-1606, 01-1607, 2002 U.S. Dist. LEXIS 4559 at *11 (E.D. Pa. March 19, 2002) (emphasis added).

Should Have Considered

Next, Olick argues that the bankruptcy abused its discretion by refusing to consider William Young's affidavit dated July 8, 2003. Olick Brief at 43.³⁵ The bankruptcy court found that the affidavit could not be considered because Young was not made available for cross examination. Bankruptcy opinion at 4 n. 5 (Olick Tab 4). The bankruptcy court also concluded that the evidence was not new because the information contained in Young's affidavit could have been obtained by the debtor at the time the March 1, 2001 and the January 16, 2003 orders were entered. *Id.* Olick challenges both of these determinations.

No Opportunity to Cross-Examine Young

Pursuant to Fed. R. Civ. P. 59(c), "when a motion for a new trial is based upon affidavits, they shall be filed with the motion."³⁶ The bankruptcy court has the discretion to hear a motion on affidavits when the motion is based on facts that do not appear on the record. Fed. R. Civ. P. 43(e). Courts may decline to accept affidavits on motions when the maker of the affidavit is

³⁵ The affidavit from Young allegedly undermined House's testimony regarding how long he spoke with Young about Olick's bankruptcy. House testified that he spent 1 1/3 hours discussing the matter; however, Young testified it was only 5 minutes. Based on this evidence, Olick alleged that House's fees are "fraudulent, inflated, and should not be allowed," Olick Brief at 42, and argued to the bankruptcy court that the approval of House's fee application must be revoked because there is evidence that House's fee claims are fraudulent. Olick Brief at 41.

³⁶ House presents additional arguments which further support the bankruptcy court's decision regarding Young's July 8 affidavit.

First House argues that Olick failed to file the affidavit as required by Rule 59(c), and that he did not introduce it until a hearing on his motions held July 10, 2003, more than six months after the motions were filed. Olick Brief at 34; House Brief at 30 n. 40.

House also argues that the affidavit could not provide a basis for relief from the January 16, 2003 order because the issue determined by that order was the issue on remand: whether House was a volunteer after March 24, 1998. House's Brief at 30 n. 40. Young's affidavit does not address this issue.

unavailable for cross-examination. *Hussey v. Chase Manhattan Bank*, 2004 WL 220851 at *2 (E.D. Pa. 2004). I find that the bankruptcy court did not abuse its discretion, especially in light of Young's unavailability. Young resides in Oklahoma, and he is not a party to the proceedings; therefore, he is not subject to compulsory process by the bankruptcy court. *Id.* at 31.

Additionally, according to House, Young refused to attest to or answer questions about the basis on which he made the statements in his 2003 affidavit when approached by House. House Affidavit at ¶¶ 35-38.

Olick argues that the debtors timely produced Young's affidavit and that House "had every opportunity to produce evidence which contradicted that evidence" but that House "negligently failed to obtain further testimony from Young." Olick Brief at 44, 47. Olick maintains that "House never made any attempt to cross examine Young by deposition, interrogatories or live testimony." Olick Brief at 47. Yet, Young could not be compelled to do so because he was not a party and was not subject to the process of the bankruptcy court. Therefore, I find that it was reasonable that the bankruptcy court did not consider Young's July 8, 2003 affidavit based on Young's unavailability.

Olick also maintains that the parties agreed to and the bankruptcy court approved of their agreement to have Young testify by affidavit. Olick Brief at 25, 29, 33, 45, 47-48. He maintains that the parties had an agreement to allow Young to testify by affidavit and that the court selectively allowed only those affidavits that supported House's position. *Id.* at 45. It is true that the bankruptcy court admitted Young's March 16, 2000 affidavit and his June 7, 2000 affidavit on the basis of the parties' agreement at the June 8, 2000 hearing that the affidavits would be admitted as long as both the affidavit and supplemental affidavit were submitted. House Brief at

33 n. 44. Yet there is no indication in the record, as Olick suggests, that this agreement was meant to extend to the July 8, 2003 affidavit, made some three years later. *Id.* Therefore, I find that the bankruptcy did not abuse its discretion by refusing to consider William Young's affidavit dated July 8, 2003.

Affidavit Not New Evidence

Olick argues, contrary to the bankruptcy court's findings, that Young's July 8, 2003 affidavit was not available prior to the entry of the March 1, 2001 order because the contents related to House's allegedly false testimony at the so-called "second trial" (the hearing on House's first motion to reconsider the March 1, 2001 order). Olick Brief at 43. Olick apparently obtained the July 8, 2003 affidavit to respond to House's allegedly false testimony given at the June 8, 2000 hearing. Yet, Olick does not deny that the *information* contained in the affidavit was available to him before the March 1, 2001 order.

Based on the "new" evidence of fraud, the affidavit of July 8, 2003, Olick moved for relief from the bankruptcy court's decision under Fed. R. Civ. P. 59 and 60(b) within ten days after entry of the January 16, 2003 order. Olick Brief at 41. He sought to introduce the July 8, 2003 affidavit on July 10, 2003.

Rule 60(b) authorizes relief from a final judgment or order on the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial." Fed. R. Civ. P. 60(b)(2). The moving party has the burden of proving that "the new evidence could not have been discovered before trial through the exercise of reasonable diligence." *Compass Technologies Inc. v. Tseng Laboratories, Inc.*, 71 F.3d 1125, 1130 (3d Cir. 1995).

Olick failed to meet this burden, and it is clear that through the exercise of reasonable diligence he could have obtained the information to respond to House's testimony from the June 8, 2000 hearing in time to move for a new trial. In his first two affidavits, dated March 16, 2000 and June 7, 2000, Young discussed a conversation he had with House. The duration of this conversation later became a subject of dispute at the June 8, 2000 hearing when House testified that his conversation with Young lasted over an hour. Olick bases his motions for a new trial on "new" evidence that House committed fraud (by claiming that he worked more hours for Olick than he actually did), yet Olick had access to House's allegedly fraudulent testimony in time to move for a new trial. He also could have obtained the information in Young's July 8, 2003 affidavit in time to move for a new trial.

Olick also argues that he could not have submitted the July 8, 2003 affidavit any earlier because he was "surprised" by the second affidavit introduced at the June 8, 2000 hearing. Olick Brief at 43. He claims that House submitted the affidavit "without prior exchange of documents." *Id.* Olick contends that the second affidavit was a "surprise" and was "introduced by ambush" and that because he did not have prior notice that House was going to submit this affidavit, he could not submit the July 8, 2003 affidavit any earlier. *Id.* at 43. House notes, however, that even after the June 8, 2000 hearing, and the introduction of the "surprise" second affidavit, Olick had three weeks from that time (until the hearing scheduled for June 28, 2000) to seek additional testimony from Young. House Brief at 35-36 n. 47. Yet, Olick failed to do so.

Olick further contends that he did not have the opportunity to produce Young's July 2003 affidavit until the court denied his January 18, 2002 motion. Yet, this argument does not address the relevant inquiry. It may well have been that Olick's procedural opportunities to present this

information were limited; however, Olick has failed to meet his burden to demonstrate that the information contained in the affidavit was not available to him through the exercise of reasonable diligence before the entry of the March 1, 2001 order. Olick has offered no evidence to show that he could not have discovered the information contained in Young's July 8, 2003 affidavit with reasonable diligence. Therefore, I find that the bankruptcy court's conclusion was reasonable, that evidence upon which Olick based his motion was not "new."

5. Whether House's fee application met the requirements of the Local Bankruptcy Rules

Finally, Olick argues that because House's application was for compensation *in excess* of \$50,000, his application was improperly submitted because he filed his application pursuant to L.B.R. 2016-2(a), which is a request for compensation for *\$1,500 or less* in a Chapter 13 bankruptcy case. Olick argues that any order allowing the claim is void *ad initio*. Olick Brief at 46. Yet, L.B.R. 2016-2 was not effective until February 1, 1999, twelve days after House filed his fee application on January 20, 1999. *Id.* The rule House filed his application under was the rule in effect before February 1, 1999 that provided instructions for applications requesting professional compensation in *excess of \$500*. Thus, Olick's argument is meritless.

Olick also asserts that House's claim was unsupported by proper documentation after the debtors requested on several occasions that House produce documentation that supported his claim. *Id.* Olick maintains that once House withdrew his claim on April 9, 2003, the bankruptcy court had no authority to allow payments on the withdrawn claim.

House maintains that because Olick did not raise these issues in his January 9, 2003

motion or in his January 27, 2003 motion, they may not be considered on appeal absent exceptional circumstances, which do not exist here. House Brief at 45 (citing *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, 273 F.3d 337, 344 n. 3 (3d Cir. 2001)). “It is the general rule that a federal appellate court does not consider an issue not passed upon below.” *Selected Risks Ins. Co. v. Bruno*, 718 F.2d 67, 69 (3d Cir. 1983) (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). This is a rule of discretion rather than jurisdiction, such that an appellate federal court may hear issues not previously raised only when prompted by *exceptional circumstances*. *Id.* House maintains that Olick “had ample opportunity to raise previously any issue concerning compliance with Local Bankruptcy Rules” but that he failed to do so. House Brief at 45. I find that no exceptional circumstances exist and, therefore, will not consider this issue.

CONCLUSION

I conclude that the bankruptcy court properly found that Olick’s motions were untimely and on the basis of his untimeliness, I will deny Olick’s appeal from the November 14, 2003 order of the bankruptcy court denying his motions under Bankruptcy rules 9023 and 9024 for relief from the March 1, 2001 and January 16, 2003 orders. Even if his motions were timely, I conclude that the plan failed to comply with the requirements of § 1322(a) such that confirmation cannot have a *res judicata* effect; Olick has failed to demonstrate that he was denied due process when he was not afforded another hearing on remand and when the bankruptcy did not conduct additional fact-finding; the information in Young’s third affidavit, dated July 8, 2003, was not new evidence and Olick could have obtained this information before the March 1, 2001 order through reasonable diligence; and House’s fee application was in compliance with the local

bankruptcy rules of the Eastern District of Pennsylvania. Thus, I would also deny Olick's motions on the merits, and I will affirm the bankruptcy court's decision.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: THOMAS W. OLICK and
KATHRYN OLICK,
Debtors

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CIVIL ACTION

03-6723

Order

And now, this ____ day of February, 2005, after consideration of the brief of the Appellant (not docketed); the brief of William House (Doc. #10); and the appellant's reply (Doc. #12), it is hereby ORDERED that the order of the bankruptcy court of November 14, 2003 denying appellant's motions filed on January 9, 2003 and January 27, 2003 is AFFIRMED.

William H. Yohn, Jr., Judge