

**IN THE UNITED STATES BANKRUPTCY  
COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

IN RE:

Case Nos. 8:96-bk-00805-ALP  
8:96-bk-01200-ALP  
8:96-bk-01201-ALP  
8:96-bk-01202-ALP  
8:96-bk-01203-ALP  
8:96-bk-02134-ALP  
8:96-bk-02135-ALP  
8:98-bk-02136-ALP

OPTICAL TECHNOLOGIES, INC.,  
RECOMM ENTERPRISES, INC.,  
RECOMM OPERATION, INC.,  
RECOMM INTERNATIONAL DISPLAY CORP.,  
LTD.,  
AUTOMATED TRAVEL CENTER, INC.,  
RECOMM INTERNATIONAL DISPLAY, CORP.,  
RECOMM INTERNATIONAL DISPLAY, LTD.,  
RECOMM INTERNATIONAL CORPORATION,

Consolidated Debtors,

\_\_\_\_\_ /

FINOVA CAPITAL CORPORATION,

Plaintiff,

v. Adv. No. 04-00148-ALP

NICHOLS DISCOUNT PHARMACY, INC.  
and MARGARET E. COON,

Defendants,

\_\_\_\_\_ /

**AMENDED ORDER ON MOTION FOR  
SUMMARY JUDGMENT**  
**(Doc. No. 12)**

THE MATTER before this Court is a Motion for Summary Judgment, filed by FINOVA Capital Corporation (Finova), in the above captioned adversary proceeding. This is at least the one hundred twenty-third adversary proceeding filed by Finova and other finance companies described as Lessors in this confirmed Chapter 11 Reorganization case of Optical Technologies, Inc. (Optical) and its affiliates RECOMM International, et al. (Recomm).

It appears from the record, that all of the above mentioned adversary proceedings have the same common thread. In each adversary proceeding, the Lessors sought an injunction permanently prohibiting the Defendants, collectively referred to as Lessees, to assert any defenses in the several suits filed by the Lessors in various state courts. The Lessors in their state court suits filed against the Defendants sought to recover damages based on the alleged breach of the equipment leases.

In eight previous adversary proceedings this Court granted summary judgment in favor of the Defendants. This Court concluded that the Defendants in the above mentioned adversary proceedings were not bound by the Order of Confirmation of the Fourth Amended Plan of Reorganization (the Plan) filed by the Debtors. Therefore, this Court entered its Order granting the Defendants summary judgment because of inadequate notice.

The Lessors, aggrieved by this Court's decision in granting the Defendants summary judgment and rejecting their claims as not sustainable as a matter of law, timely appealed this Court's decision to the District Court for the Middle District of Florida (the District Court). On October 6, 2003, the District Court in a twenty-two page opinion rejected all arguments of the Defendants and reversed this Court's Order granting Summary Judgment in favor of the Defendants and directed this Court to vacate its Order and grant Finova's Motion for Summary Judgment.

In the present instance, the Motion for Summary Judgment under consideration is based on Finova's contention that there are no genuine issues of material fact. Finova further contends that based on the decision of the District Court in their appeals described above, Finova is entitled to summary judgment as a matter of law. In support of its Motion, Finova relies on the following documents:

Affidavit of Ellen Brandt, dated July 19, 2004, (Exhibit A);

Kiosk Lease, dated March 8, 1994, (Exhibit B);

The Fourth Amended Plan filed on January 26, 1998, (Exhibit C);

Order Confirming the Fourth Amended Joint Plan of Reorganization of Debtors, the Official Committee of Creditors and Certain

Leasing Companies Under Chapter 11 of the Bankruptcy Code, dated May 13, 1998, (Exhibit D);

Order on FINOVA Capital Corporation's Motion for Clarification of Confirmation Order, dated September 4, 2001, (Exhibit E);

Certificates of Services, dated April 28, 1998 (Exhibit F);

Statement of the Revised Lease Terms, dated June 30, 1998, (Exhibit G);

Answer of the Defendants to the Petition filed in the Louisiana State Court, (Exhibit H);

Order of the District Court in Adversary Proceeding No. 01-691 Colonial Pacific v Allen, January 25, 2002, (Exhibit J).

Nichols Discount Pharmacy, Inc., and Margaret E. Coon (the Joint Defendants), in opposition to Finova, challenge Finova's contentions that (1) the Joint Defendants were fully aware of the pendency and the progress of the Chapter 11 case of Optical, particularly the contents of the Fourth Amended Plan; (2) its provisions to the Plan intended to deal with the leases which involved Finova; and (3) the Joint Defendants received proper notice of the confirmation hearing.

In opposition of Finova's Motion, the Joint Defendants rely on the Affidavit of Margaret E. Coon (Ms. Coon) and a Memorandum in Support of Motion to Deny and Opposition to Plaintiff's Motion for Summary Judgment (Memorandum) (Doc. No. 23). Counsel for the Joint Defendants contends first, that this case is different from the cases decided by the District Court and, in any event, the decision of the District Court is not binding on the Joint Defendants, and it was wrong. Secondly, this Court had no jurisdiction to grant the relief sought by Finova. Lastly, the Joint Defendants did not receive fair and adequate notice commensurate with due process because the Plan did not identify the Lessees by name; the Third Amended Plan was filed before the Joint Defendants became a party to the Lease; that the Plan did not give an option to the Lessees to decline to participate in the modified leases; the Summary of the Fourth Amended Plan was insufficient and the parties did not learn of the lease terms until it was too late; expired leases could not be modified; there was no assumption of the leases; and

consent was required to modify the lease.

It cannot be gainsaid that the Plan and its provisions which dealt with the relationship of the Participating Lessors, including Finova and the Lessees, such as the Joint Defendants, are the same in all adversary proceedings filed by the Lessees. It is equally true that of all these adversary proceedings have their genesis in suits filed originally by the Lessors in various state courts when the Lessees stopped making payments under the Leases, which were modified pursuant to the relevant provisions of the Plan.

When the Lessees in their Answers to the Complaint raised several sundry defenses, i.e., statute of limitation, laches, fraud, estoppel, et cetera, in the state court litigations, the Lessors filed these adversary proceedings and sought injunctive relief prohibiting the Lessees to raise any defenses. The Lessors claim that, by virtue of the Order of Confirmation of the Fourth Amended Plan, the Lessees are barred to raise any defenses or challenge the validity of the amended Leases.

All issues raised by the Joint Defendants were fully dealt with in the other eight litigations in which the Lessors prevailed as a result of the reversal of this Court's decision by the District Court in which this Court held that the Lessees are not bound by the Order Confirming the Fourth Amended Plan. It is clear from the foregoing that this Court cannot revisit the binding effect of the Order of Confirmation on all Lessees, including the binding effects of the Order on the Joint Defendants.

Based on the foregoing, this Court is satisfied that there are no genuine issues of material fact unless the Affidavit of Ms. Coon is sufficient to put in issue the service of the relevant pleadings on the Joint Defendants to meet the due process required by law. Finova, in support of the issue of the sufficiency of service, put into evidence the Certificate of Services (Exhibit F). According to the Certificate, the following filings were served on the Joint Defendants by first class U.S. Mail: On or after February 12, 1996, the Joint Defendants received notice of the Recomm Bankruptcy Cases. On or after June of 1997, the Joint Defendants received notice of Recomm Bankruptcy Cases as follows: June 23-25, 1995, Exhibit A; June 26, 1997, Exhibit B; June 27, 1997, Exhibit C; June 30, Exhibit D; July 3, 1997; Exhibit E. On or after February 18, 1998, the Joint Defendants received notice of the Recomm Bankruptcy Cases. On or after April 13, 1998, the Joint Defendants received notice of and a correct

copy of Summary of Fourth Amended Joint Plan of Reorganization of the Debtors, the Official Committee of Unsecured Creditors and Certain Leasing Companies Under Chapter 11 of the Bankruptcy Code; and Other Modifying Schedule of Confirmation Related Dates. On or after June 25, 1998, the Joint Defendants received a Notice of Confirmation in the Reconn Bankruptcy Cases. On or after June 30, 1998, the Joint Defendants received a Statement of Revised Lease Terms and Options Under the Fourth Amended Plan.

It is well established and it is no longer debatable that a notice placed in an official receptacle of the U.S. Post Office if properly addressed is presumed to have been delivered to the addressee. See, *In re Torwico Electronics*, 131 B.R. 561, 572 (Bankr. D.N.J. 1991), citing *Hagner v. United States*, 285 U.S. 427, 52 S. Ct. 417, 76 L.Ed. 861 (1932), *rev'd on other grounds sub nom.*; See also, *In re Treister*, 38 B.R. 228 (Bankr. S.D.N.Y. 1984), *In re Robintech, Inc.*, 69 B.R. 663 (Bankr. N.D. Tex. 1987). It is also true that this presumption cannot be overcome by a mere denial of the receipt of such document. *Id.* at 665.

To overcome this presumption Ms. Coon admitted in her Affidavit that she received "some of the bankruptcy filings," including the copy of the Plan, although she states in her Affidavit that she can't remember how she received it. Be that as it may, Ms. Coon's Affidavit falls far short of the degree of proof required to overcome the presumption.

This being the case, this Court is constrained to conclude that there are no genuine issues of material fact and Finova is entitled to a summary judgment unless the Motion for Relief under Rule 60(b) of the Federal Rules of Civil Procedure, which is buried in the Memorandum filed by counsel for the Joint Defendants, is warranted to vacate and nullified the Order Confirming the Fourth Amended Joint Plan of Reorganization of the Debtors, the Official Committee of Unsecured Creditors and Certain Leasing Companies Under Chapter 11 of the Bankruptcy Code, dated September 4, 2000 (Exhibit D) and the Order on Finova Capital Corporation's Motion for Clarification of Confirmation Order, dated September 4, 2001 (Exhibit E).

The Memorandum filed by counsel for the Joint Defendants did not identify in its Motion for Relief under Rule 60(b) of the F.R.Civ.P. in the title and therefore, the Motion was not actually noticed for

hearing. However, this Court on October 27, 2004, heard oral arguments by counsel for the Joint Defendants. Although not very well articulated, it appears as though the Joint Defendants' Motion is based on Section 60(b), Sub-clauses (4)(5)(6) of the F.R.Civ.P. as adopted by the F.R.B.P. 9024 (b)(4)(5)(6).

Sub-clause (4) of F.R.B.P. 9024 (b) of the Bankruptcy Code clearly has no application for the simple reason that both the Order of Confirmation and the Order of Clarifications are final and no longer appealable and, therefore, cannot be attacked collaterally. Sub-clause (5) has several grounds for relief and it is evident that none of them are applicable with the possible exception which permits a relief if "it is no longer equitable that the judgment should have prospective application."

It appears that Finova sought money damages in the various state court litigations based on the breach of the lease, as modified, and the amount sought was for all the remaining lease payments for the balance of the term of the lease. Whether or not Finova will be entitled to recover the lease payments it seeks in the state court litigation is an issue which is not before this Court. However, since Finova stated for the record that it will not seek to bar any defense or claim that relates to time, conduct or events that occurred after the June 30, 1998, Effective Date, the Joint Defendants are free to assert any defense that relates to time, conduct or events that occurred after the June 30, 1998, Effective Date. Thus, it is evident that Sub-clause (5) forms no bases for the relief sought by the Joint Defendants.

This leaves for consideration the ground for relief stated F.R.B.P. 9024 (b)(6). This Rule permits to grant relief from the operation of a judgment "for any other reason justifying relief from the operation of the judgment." This catch-all provision is evidently totally unspecific and its parameters are as wide as logic and commonsense would permit.

As noted earlier, the Joint Defendants' Rule 60(b) Motion was never actually scheduled to be heard and there is nothing in this record which would permit this Court to fairly and properly evaluate to what extent this Motion should be accepted as a ground for relief. For this reason, this Court is satisfied that while Finova's Motion for Summary Judgment should be granted, this Court will defer its ruling on summary judgment until this Court has had an opportunity to rule as to whether or not it is appropriate to grant relief to the Joint Defendants

based on F.R.B.P. 9024(b)(6). In light of the foregoing, it is appropriate to schedule this Motion for hearing with appropriate notice.

Accordingly it is,

ORDERED, ADJUDGED AND DECREED that the ruling on the Motion for Summary Judgment (Doc. No. 12) filed by Finova Capital Corporation be, and the same is hereby, deferred pending the resolution of the right to relief pursuant to F.R.B.P. 9024(b)(6). It is further

ORDERED, ADJUDGED AND DECREED that the Joint Defendants' Memorandum in Support of Defendants' Motion for Relief from Confirmation Order (Judgment) Under Rule 60(b) (Doc. No. 41) shall be set for hearing with appropriate notice.

DONE AND ORDERED at Tampa, Florida, on January 11, 2005.

*s/Alexander L. Paskay*  
ALEXANDER L. PASKAY  
United States Bankruptcy Judge