IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BILLY WAYNE MCCLINTOCK and DIANNE ALEXANDER,

Defendants,

MSC HOLDINGS USA, LLC; MSC HOLDINGS, INC.; and MSC GA HOLDINGS, LLC,

Relief Defendants,

and

PROMISE LAND TRUST, by and through its trustee, Anthony Dupont,

Additional Defendant.

CIVIL ACTION FILE
No. 1:12-cv-04028-SCJ

ORDER

This matter is before the Court on the Promise Land Trust's (hereinafter, the "Trust") Renewed Motion to Partially Set Aside the First Amended

Judgment (Doc. No. [110]) and Second Amended Judgment (Doc. No. [143]), pursuant to Federal Rules of Civil Procedure 60(b)(3) and 60(b)(4). Doc. No. [176].[1]

The Trust specifically moves the Court to vacate: (1) all findings that (i) Defendant Billy Wayne McClintock ("McClintock") was the owner of 5915 Braden Run, Bradenton, Manatee County, Florida (the "Braden Run Property"); (ii) the Trust is McClintock's alter ego; and (iii) the transfer of the Braden Run Property to the Trust was fraudulent or otherwise invalid or improper; and (2) all holdings (i) voiding the transfer of the Braden Run Property to the Trust; and (ii) authorizing the Receiver to take possession of and sell the Braden Run Property. Id. at p. 2. The Receiver has filed a Response in Opposition, to which the Trust has filed a Reply. Doc. Nos. [177]; [178]. This motion is now ripe for review, and the Court rules as follows.

I. LEGAL STANDARD

Rule 60(b)(3) provides that the Court may grant relief from a final judgment "if the moving party proves by clear and convincing evidence that

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[1] All citations are to the electronic docket unless otherwise noted, and all page numbers are those imprinted by the Court's docketing software.

an adverse party has obtained the verdict through fraud, misrepresentation, or other misconduct." Frederick v. Kirby Tankships, Inc., 205 F.3d 1277, 1287 (11th Cir. 2000) (citations omitted); see also Fed. R. Civ. P. 60(b)(3). "To prevail on a motion under Rule 60(b)(3) in the Eleventh Circuit, the movant must establish that: (1) the adverse party engaged in fraud or other misconduct; and (2) this conduct prevented the moving party from fully and fairly presenting its case." Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc., 818 F.3d 1320, 1324 (11th Cir. 2016) (citations omitted).

Rule 60(b)(4) provides that the Court may grant relief from a final judgment that is "void." Fed. R. Civ. P. 60(b)(4). "Generally, a judgment is void under Rule 60(b)(4) 'if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.' A judgment is also void for Rule 60(b)(4) purposes if the rendering court was powerless to enter it." Burke v. Smith, 252 F.3d 1260, 1263 (11th Cir. 2001) (citations omitted).

II. DISCUSSION

In the motion, the Trust first argues that the Receiver obtained the Amended Judgments through misrepresentations and misconduct. Doc. No. [176], p. 11. The Trust states that the Receiver misrepresented to the

Court that McClintock owned the Braden Run Property; that during the operation of the Ponzi Scheme, McClintock transferred real property holdings to alter ego entities to shield him from creditors; and that the Report showed that McClintock owned the property along with the Trust beginning in 2005. Id. Instead, the Trust contends that McClintock does not own, and has never owned, the Braden Run Property; and that the Trust has been the owner of the Braden Run Property since 1999. Doc. No. [176], pp. 11–13.

In response, the Receiver asserts that the Amended Judgments were proper, as "McClintock alone, not any trust, has exclusively owned, controlled, and possessed the [Braden Run Property] at issue, as reflected by both applicable real estate and tax records, as well as insurance covering the property." Doc. No. [177], pp. 1–2 (internal quotation marks omitted). The Receiver further states that the 1999 transfer of the Braden Run Property to the Trust was "fraudulent", as McClintock maintained "exclusive *de facto* control" over both the Trust and the Braden Run Property and retained possession and control of the property and continued to live in it until his incarceration. Id. at pp. 15–16.

Upon review, the Court agrees with the Receiver and finds that, based on the totality of the circumstances, including McClintock's continued

possession and control of the Braden Run property, personal payment of annual real estate taxes for it, his documented ownership of the property, and the fact that McClintock is the sole named insured for the Braden Run Property, the 1999 transfer of the Braden Run Property to the Trust was fraudulent. Accordingly, the Court's entry of the First Amended Judgment (Doc. No. [110]) and Second Amended Judgment (Doc. No. [143]) transferring the Braden Run Property to the Receiver was proper.

The Trust also argues in the motion that the Amended Judgments are void because the Trust was not afforded procedural due process. Doc. No. [176], p. 14. The Trust specifically contends that the Receiver failed to apprise the Trust of the First Motion to Amend the Judgment (Doc. No. [72]), the Substituted First Motion to Amend Judgment (Doc. No. [89]), or the Second Motion to Amend Judgment (Doc. No. [115]). Id. at p. 15. Thus, the Trustee (and McClintock) allegedly had no notice that the Receiver intended to seek relief with respect to the Braden Run Property until after the Court entered the First Amended Judgment. Id. The Trust contends that, as a result, it has been prejudiced by the Receiver's conduct, as it had no opportunity to present evidence on facts in dispute prior to the entry of the Amended Judgments. Id. at p. 16.

As the Receiver correctly points out, however, any allegedly deficient notice is solely attributable to McClintock's attorney, Victor Martinez, who represented McClintock without seeking *pro hac vice* admission from the Court. Doc. No. [177], p. 5. Mr. Martinez actively represented McClintock in this proceeding and signed the Consent Judgment confirming McClintock's culpability and confirming that the Court "shall retain jurisdiction over this matter for the purpose of enforcing the terms of the Order of Permanent Injunction." Doc. No. [9], p. 8. Because he was actively representing McClintock, Mr. Martinez was required to enter an appearance and gain admission to practice before the Court under Local Rule 83.1, which applies specifically to non-resident attorneys and provides for "permission to practice" in particular cases. The Rule states that "any other attorney who signs a subsequent pleading or paper on behalf of a party must file a notice of appearance with the clerk." LR 83.1(D), NDGa. The Rule further warns that a failure to do so "may result in **the attorneys not receiving notices, orders, or other important communications from the Court**." Id. (emphasis added). Mr. Martinez, however, failed to seek *pro hac vice* admission in this proceeding, resulting in

the absence of notice (through the CM/ECF system) of the Receiver's motions and of the Court's Amended Judgments.[2]

The Court further finds that Mr. Martinez's error does not constitute "excusable neglect" under Rule 60(b). Rule 60(b)(1) provides that the Court may grant relief from a final judgment due to a mistake or excusable neglect. See Fed. R. Civ. P. 60(b)(1). In examining a claim of excusable neglect under Rule 60(b)(1), courts often consider four factors: "the danger of prejudice to the [other party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Walter v. Blue Cross & Blue Shield United of Wis., 181 F.3d 1198, 1201 (11th Cir. 1999) (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship., 507 U.S. 380, 395 (1993)). Notably, the Eleventh Circuit has previously held that "miscommunication or clerical error constitutes excusable neglect; attorney's failure to understand plain language of the rule does not." Walter, 181 F.3d at 1202 (discussing Advanced Estimating Sys., Inc. v. Riney, 130 F.3d

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[2] By contrast, Mr. Martinez did seek *pro hac vice* admission before this Court in McClintock's criminal proceeding. See U.S. v. McClintock, No. 1:17-CR-237, Doc. No. [13] (N.D. Ga. Aug. 3, 2017).

996, 999 (11th Cir. 1997). Here, the Court finds that Mr. Martinez's failure to seek *pro hac vice* admission to practice before this Court falls under the "failure to understand the plain language of the rule" and, thus, does not constitute excusable neglect. Accordingly, there is no basis to set aside the Amended Judgments under Rule 60(b)(1).

The Trust's final argument is that the Amended Judgments are void because the Receiver lacked standing to seek relief with respect to the Braden Run Property, which it claims was not purchased with "funds derived from investors in the scheme described in the SEC's Complaint." Doc. No. [176], pp. 17–18. Such an argument is unavailing, however, as the Receiver is authorized to, among other things, "take such action as necessary and appropriate for the preservation of Receivership Assets and Recoverable Assets." Doc. No. [19], p. 4. Because this includes the Braden Run Property, the Receiver has standing to seek relief with respect to this property.

III. CONCLUSION

Accordingly, the Trust's Renewed Motion to Partially Set Aside the First Amended Judgment and the Second Amended Judgment is **DENIED**. Doc. No. [176].

The Trust has also moved for oral argument on its motion. Because the parties' briefing was more than adequate to decide the issues raised in the motion, the Trust's Motion for Oral Argument is also **DENIED**. Doc. No. [179].

IT IS SO ORDERED this 22nd day of July, 2019.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE