UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: MONTREAL MAINE & ATLANTIC RAILWAY, LTD. Debtor.	Bk. No. 13-10670 Chapter 11

ESTATE REPRESENTATIVE'S OBJECTION TO CLAIMANT'S [SIC] MOTION FOR RELIEF FROM JUDGMENT AND RECONSIDERATION OF TRUSTEE'S THIRD OMNIBUS OBJECTION TO PROOFS OF CLAIM THAT WILL BE SATISFIED UNDER THE CCAA PLAN AND THAT WERE RELEASED UNDER THE PLAN, CERTAIN OF WHICH ADDITIONALLY (A) CONTAIN INSUFFICIENT DOCUMENTATION AND/OR (B) [WERE] LATE FILED

Robert J. Keach, the estate representative (the "Estate Representative") for the post-effective date estate of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), hereby objects (the "Objection") to the *Claimant's [Sic] Motion for Relief from Judgment and Reconsideration of Trustee's Third Omnibus Objection to Proofs of Claim That Will be Satisfied Under the CCAA Plan and that were Released Under the Plan, Certain of Which Additionally (A) Contain Insufficient Documentation and/or (B) [Were] Late Filed* [D.E. 2149] (the "Motion for Relief"), filed by the creditors listed on Schedule A to the Motion for Relief (collectively, the "Moving Creditors"). In support of this Objection, the Estate Representative states as follows:

RELEVANT BACKGROUND

1. On August 7, 2013 (the "Petition Date"), the Debtor filed its chapter 11 petition.

2. On March 20, 2014, the Court entered the *Order Pursuant to 11 U.S.C. Sections 105(a) and 502(b)(9), Fed. R. Bankr. P. 3002 and 3003(c)(3), and D. Me. LBR 3003-1 Establishing Deadline for Filing Proofs of Claim and Procedures Relating Thereto and Approving Form and Manner of Notice Thereof* [D.E. 783] (the "Bar Date Order"), and a

similar order was entered in the CCAA Case. The Bar Date Order set June 13, 2014 as the deadline to file proofs of claim (the "Bar Date").

3. No Moving Creditor objected to entry of the Bar Date Order or complained of not having notice of the Bar Date.

4. On June 13, 2014 (the Bar Date), two of the Moving Creditors—Nancy Guay [Claim No. 303] and Pascale Lacroix [Claim No. 302] (together, the "Timely Moving Creditors")—timely filed proofs of claim. The rest of the Moving Creditors filed claims after the Bar Date, without seeking leave of the Court (collectively, the "Tardy Moving Creditors"). At no time, including in connection with the Motion for Relief, did the Tardy Moving Creditors seek leave—retroactive or otherwise—to late file claims in the Debtor's chapter 11 case.

5. On March 31, 2015, the Trustee filed an initial version of the Plan [D.E. 1384], which contemplated that Derailment Claims like those of the Moving Creditors would be treated under the CCAA Plan.

6. The Plan was confirmed on October 8, 2015 [D.E. 1801] (the "Confirmation Order"), and the confirmation version of the Plan contemplated that Derailment Claims like those of the Moving Creditors would be treated under the CCAA Plan. No Moving Creditor objected to or appeared in connection with confirmation of the Plan. Indeed, all parties—including the Moving Creditors—consented to entry of the Confirmation Order. *See* Conf. Order, at 8.

7. On February 17, 2016, the Estate Representative filed the *Trustee's Third Omnibus Objection to Proofs of Claim That Will be Satisfied Under the CCAA Plan and that were Released Under the Plan, Certain of Which Additionally (A) Contain Insufficient*

Documentation and/or (B) Late Filed [D.E. 1980] (the "Third Omnibus Claims Objection").[1] By the Third Omnibus Claims Objection, the Estate Representative objected to, among others: (a) claims filed by the Timely Moving Creditors on the basis that such claims (i) would be satisfied under the CCAA Plan and were released under the plan and (ii) contained insufficient documentation, *see* Third Omnibus Claims Objection, Ex. B; and (b) claims filed by the Tardy Moving Creditors on the basis that such claims (i) would be satisfied under the CCAA Plan and were released under the plan, (ii) contained insufficient documentation, and (iii) were late filed, *see* Third Omnibus Claims Objection, Ex. C.

8. The Third Omnibus Claims Objection indeed included, *inter alia*, the disclaimer set forth in the Motion for Relief, set forth again below (the "Disclaimer").

> **THIS OBJECTION HAS NO EFFECT ON THE RIGHTS OF CLAIMANTS IN THE CCAA CASE, INCLUDING THE RIGHT TO RECEIVE DISTRIBUTIONS UNDER THE CCAA PLAN, OR ON THE ALLOWANCE OR DISALLOWANCE OF SUCH CLAIMS IN THE CCAA CASE.**

9. No responses to the Third Omnibus Claims Objection were timely filed, and the Moving Creditors never indicated they had any concerns with the relief sought. Moreover, no Moving Creditor appeared at the hearing to consider the Third Omnibus Claims Objection.

10. On April 4, 2016, the Court entered the *Order Sustaining the Trustee's Third Omnibus Objection to Proofs of Claim That Will Be Satisfied Under the CCAA Plan and That Were Released Under the Plan, Certain of Which Additionally (A) Contain Insufficient Documentation and/or (B) Were Late Filed* [D.E. 2121] (the "Third Omnibus Claims Objection Order").

11. The Third Omnibus Claims Objection Order became a final order on April 18, 2016. *See* Fed. R. Bankr. P. 8002.

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Third Omnibus Claims Objection.

12. On April 19, 2016—15 days after entry of the Third Omnibus Claims Objection Order, the Moving Creditors filed the Motion for Relief.

OBJECTION

13. At bottom, the Moving Creditors seek special treatment with regard to the standard to which every other party in this chapter 11 case (and any other case) is held: diligent review of relief requested that affects their rights, and timely action in response. The Tardy Moving Creditors, among other things: (a) missed the Bar Date, (b) failed to subsequently move for relief to late file their claims (as did other parties in this case), (c) failed to respond to the Third Omnibus Claims Objection (as did other parties in this case), (d) failed to appear at the hearing to consider the Third Omnibus Claims Objection (as did other parties in this case), and (e) failed to appeal the order sustaining the Third Omnibus Claims Objection. Likewise, the Timely Moving Creditors, among other things: (w) failed to include sufficient information with their proofs of claim in compliance with the Bar Date Order, (x) failed to respond to the Third Omnibus Claims Objection, (y) failed to appear at the hearing to consider the Third Omnibus Claims Objection, and (z) failed to appeal the Third Omnibus Claims Objection Order. After the deadline to appeal had passed, and without alleging any changed circumstances as the basis for their request, the Moving Creditors filed the Motion for Relief seeking to reform an order of this Court to remedy their lapses throughout the claims resolution process. But for the reasons set forth below, they are not entitled to the relief they seek, and are bound by their actions (or lack thereof). The Motion for Relief should thus be denied.

A. The Moving Creditors Are Not Entitled to Relief from Judgment

14. To begin, it is unclear exactly what relief the Moving Creditors request in the Motion for Relief. The Motion for Relief is titled a motion for, among other things, "relief

from judgment," but that relief is nowhere referenced in the body of the Motion for Relief. In any event, the Moving Creditors are not entitled to relief from judgment under applicable law.

15. Fed. R. Civ. P. 60, which governs relief from judgment and is made applicable to bankruptcy cases by Fed. R. Bankr. P. 9024, provides, in pertinent part:

> (a) *Corrections Based on Clerical Mistakes; Oversights and Omissions.* The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. . . .
>
> (b) *Grounds for Relief from a Final Judgment, Order, or Proceeding.* On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.
>
> (c) *Timing and Effect of the Motion.*
>
> (1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
>
> (2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.
>
> (d) *Other Powers to Grant Relief.* This rule does not limit a court's power to:(1) entertain an independent action to relieve a party from a judgment, order, or proceeding; (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or (3) set aside a judgment for fraud on the court.

16. While Fed. R. Civ. P. 60 is referenced fleetingly in connection with the Moving Creditors' request for reconsideration (addressed below), *see* Mot. for Relief, ¶ 14, it is not cited—let alone applied or satisfied—with respect to the request for relief from judgment

(which, as set forth above, appears only in the title of the motion). Specifically, the Moving Creditors never identify a ground for relief from judgment, as prescribed by Fed. R. Civ. P. 60(b). Having never even addressed, let alone attempted to satisfy, the relevant rule or any applicable case law, the Moving Creditors plainly have not met their burden in demonstrating entitlement to relief from judgment, and such relief should thus be denied.[2]

B. The Moving Creditors Are Not Entitled to Reconsideration of the Third Omnibus Claims Objection Order

17. The Motion for Relief also includes a request for reconsideration of the Third Omnibus Claims Objection Order. *See* Mot. for Relief, ¶ 14. Fed. R. Bankr. P. 3008 and 9024 and Fed. R. Civ. P. 60(b) (made applicable by Fed. R. Bankr. P. 9024) govern reconsideration of orders disallowing claims. In light of these rules and applicable law, the request for reconsideration in the Motion for Relief should be denied because it fails to meet the standard for the relief requested.

18. Fed. R. Bankr. P. 3008 (while not cited in the Motion for Relief) provides, in pertinent part, that "[a] party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate."[3] But "[a] party moving for reconsideration of an order disallowing its claim bears the burden of showing 'cause,' without which there can be no basis for the allowance of a previously disallowed claim according to the equities of the case." Scotiabank de Puerto Rico v. Lorenzo, BAP No. PR 15-011, 2015 WL 4537792, at *5 (B.A.P. 1st Cir. July 24, 2015) (citing Municipality of Carolina v. Baker González (In re Baker González), 490 B.R. 642, 646 (B.A.P. 1st Cir. 2013)), *aff'd sub nom* In re Lorenzo, No. 15-9010, 2016 WL 1275015 (1st Cir. Apr. 1, 2016).

[2] The Estate Representative reserves all rights to more fully oppose any request for relief from judgment should the Moving Creditors brief their entitlement to such relief.

[3] In addition, "[t]he court may decline to reconsider an order of allowance or disallowance w***ithout notice to any adverse party and without affording any hearing to the movant***." Fed. R. of Civ P. 60(b) advisory committee's note (emphasis added).

19. "Cause" under Bankruptcy Rule 3008 may exist "when relief would be justified under [Fed. R. of Civ. P.] 60(b)." Scotiabank, 2015 WL 4537792, at *5 (citing Baker González, 490 B.R. at 651). Fed. R. of Civ. P. 60(b), made applicable by Fed. R. Bankr. P. 9024, provides (as set forth above):

> (b) *Grounds for Relief from a Final Judgment, Order, or Proceeding*. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

20. In addition, "motions for reconsideration [under Bankruptcy Rule 3008] should be granted only upon showing of newly discovered evidence, evidence which could not have been obtained by due diligence at the time of the original hearing and which evidence would have produced a materially different ultimate result." In re Immenhausen Corp., 166 B.R. 449, 451 (Bankr. M.D. Fla. 1994). Motions for reconsideration under Bankruptcy Rule 9008 should not, on the other hand, be used to "avoid the usual rules for finality of contested matters." Matter of Colley, 814 F.2d 1008, 1010 (5th Cir. 1987).

21. As set forth above, the Moving Creditors acknowledge the applicability of Fed. R. of Civ P. 60(b) in the Motion for Relief, *see* Mot. for Relief, ¶ 14, but do not apply it or identify any ground under rule 60(b) that might serve as justification for reconsideration. *See* Scotiabank, 2015 WL 4537792, at *5 (prescribing that the "cause" requisite for reconsideration under Bankruptcy Rule 3008 may exist when relief would be justified under Fed. R. of Civ. P. 60(b)). Moreover, given that the Moving Creditors declined to oppose, appear at the hearing to consider, or appeal the order sustaining the Third Omnibus Claims Objection, the Motion for

Relief appears to constitute just the kind of impermissible attempt to "avoid the usual rules for finality of contested matters" cautioned against by the Fifth Circuit. *See* Matter of Colley, 814 F.2d at 1010. Indeed, the Movants have made no "showing of newly discovered evidence, evidence which could not have been obtained by due diligence at the time of the original hearing and which evidence would have produced a materially different ultimate result," which is ordinarily required before seeking relief under Bankruptcy Rule 3008 in lieu of pursuit of "usual" appeal remedies. *See* Immenhausen, 166 B.R. at 451. Rather, the Moving Creditors appear to have filed the Motion for Relief in attempt to capture a consolation prize—reformation of a final order, after having failed to oppose its entry and having missed the deadline to appeal. The Court should not countenance such efforts to circumvent the procedure prescribed by the Bankruptcy Code and the Bankruptcy Rules.

22. But even putting aside the Moving Creditors' failure to *identify* a ground—let alone demonstrate justification—for reconsideration, or to identify any new evidence or other circumstances that might bode in their favor, the Moving Creditors cannot demonstrate "cause" under Bankruptcy Rule 3008 because the equities of the case weigh heavily against them. *See* Scotiabank, 2015 WL 4537792, at *5 (citing Baker González, 490 B.R. at 646) (relating the equities of the case to demonstration of the "cause" requisite to reconsideration under Bankruptcy Rule 3008). In particular, despite having received notice of the Bar Date Order, the Tardy Moving Creditors late filed their claims—not only without *prior* Court approval to do so, but without even subsequently seeking approval for having late filed the claims.[4] And yet other creditors in this chapter 11 case have done just that. *See*, *e.g.*, D.E. 1820, 1880. Moreover, despite receiving notice of the Third Omnibus Claims Objection, no Moving Creditor contacted

[4] Indeed, the Tardy Moving Creditors do not even include in the Motion for Relief a request for leave to late file their claims. The Estate Representative is not aware of any grounds that the Tardy Moving Creditors might have to justify such request, but reserves all rights to oppose any such request if made.

the Estate Representative about the disallowance of their claims on the grounds that such claims contained insufficient documentation and/or were not timely filed.

23. The Moving Creditors point to the Disclaimer and claim that they "took the [Estate Representative] at his word that the [Third Omnibus] Claims Objection would have no effect on their Claims in the CCAA Case." *See* Mot. for Relief, ¶ 12. The Moving Creditors then ascribe to the Estate Representative an intent not to "allow the Canadian Monitor to rely on the [Third Omnibus Claims Objection] Order." *See* Mot. for Relief, ¶ 13. But while the Moving Creditors were right to "take the [Estate Representative] at his word," they want the Disclaimer to say something that it simply does not, and are incorrect about the Estate Representative's "intent." The Disclaimer does not provide any assurances that claims covered by the Third Omnibus Claims Objection will be *allowed* in the CCAA Case; it simply provides that the Third Omnibus Claims Objection will have *no effect* on the allowance *or disallowance* of claims in the CCAA Case. As for the Estate Representative's "intent," he made no representations that Third Omnibus Claims Objection would not bring to the attention of the Monitor the inadequacies of the Moving Creditors' claims, or afford the Monitor proof thereof. It was the responsibility of each Moving Creditor to have remedied those inadequacies at the correct procedural juncture—not after the order disallowing their claims on those grounds has become final.

24. As set forth above, the Moving Creditors' claims suffer from insufficient documentation, and the Tardy Moving Creditors' claims suffer the additional deficiency of untimeliness. With respect to the insufficient documentation issue, tellingly, the Moving Creditors claim that "the purpose of the April 4[, 2016] meeting with the [] Monitor was to provide detailed information responsive to the 'documentation' concerns raised by the [ ] Monitor . . . ." *See* Mot. for Relief, ¶ 14. But that misses the point: April 4 was well after the

Moving Creditors had missed not one, but *several*, relevant milestones or deadlines to remedy their deficient proofs of claim. As an initial matter, after late filing their claims in 2014, the Moving Creditors could have adduced additional evidence to support their proofs of claim at *any time* leading up to entry of the Third Omnibus Claims Objection, as did at least one other creditor. *See, e.g.*, D.E. 2031 (creditor providing additional information in response to Estate Representative's omnibus objection to claim on the basis of insufficient documentation); D.E. 2042 (Estate Representative withdrawing omnibus objection in response to such additional documentation). But the Moving Creditors sat on their rights, and should not be rewarded at this late stage for failing to take action at so many points during this chapter 11 case.

25. Finally, the Tardy Moving Creditors seek to shirk the deadline set forth in the Bar Date Order on the basis that (a) the untimely claims are really just "clarifications" of timely claims, and (b) the Plan contemplates that the Moving Creditors' Claims will be treated under the CCAA Plan (and thus the U.S. Bar Date Order should not govern). *See* Mot. for Relief, ¶ 15. But if the untimely claims are really just "clarifications," the Moving Creditors can "clarify" their timely claims with the Monitor in connection with resolution of the *timely* claims, and without regard to the tardy ones (in which case the Moving Creditors do not need the relief they seek). And if the Moving Creditors had wanted to divest the Estate Representative of the power (and obligation) to object to claims filed in the Debtor's chapter 11 case (where the Tardy Moving Creditors opted to file their claims, even though they also had the ability to do so in the CCAA Case), the time to have done so was in connection with entry of the Bar Date Order, or at the very least at confirmation of the Plan. But instead, the Moving Creditors remained silent at both stages, and now that they are forced to face the consequences of their failures, they ask this Court to remedy the consequences in a procedurally improper and unjustified manner.

26. As with the component of the Motion for Relief seeking relief from judgment, the Moving Creditors have not met their burden in demonstrating entitlement to reconsideration, and such relief should thus be denied.

C. The Moving Creditors Are Not Entitled to the "Clarification" of the Third Omnibus Claims Objection Order That They Seek

27. The Moving Creditors' request for "clarification" is really not different from their request for reconsideration. *See* Mot. for Relief., ¶¶ 1, 11, 13. For practical purposes, their "clarification" request is a request that the Court reconsider entry of the Third Omnibus Claims Objection Order, and enter a different version of the order conferring rights upon the Moving Creditors to which they are not entitled. For all of the reasons that the Motion for Relief should be denied with respect to the request for reconsideration, so too should the Motion for Relief be denied with respect to the request for "clarification" of the Third Omnibus Claims Objection Order.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Estate Representative requests that the Court deny the Motion for Relief and grant such other and further relief as may be just.

Dated: May 3, 2016

ROBERT J. KEACH, ESTATE REPRESENTATIVE OF THE POST-EFFECTIVE DATE ESTATE OF MONTREAL MAINE & ATLANTIC RAILWAY, LTD.

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