



SO ORDERED.

SIGNED this 04 day of August, 2005.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)
)
DENNIS S. KINDSVATER and,) **Case No. 03-13561**
KATHY L. KINDSVATER,) **Chapter 11**
)
Debtors.)
_____)

**ORDER GRANTING SUNFLOWER BANK'S
MOTION FOR RECONSIDERATION**

Sunflower Bank moves for the Court's reconsideration of its May 6, 2005 Order ("Valuation Order") on the valuation of Dennis Kindsvater's 50% stock ownership in Kindsvater, Inc. After an evidentiary hearing held March 29, 2005 on the valuation issue, the Court briefly took the matter under advisement before announcing its ruling from the bench on April 12, 2005. The parties memorialized that ruling in the Valuation Order.¹ The debtors object to Sunflower Bank's motion.

¹ Dkt. 174.

Background

Debtors commenced their chapter 11 case on July 2, 2003. Debtors filed their disclosure statement on August 16, 2004 and later filed their liquidation analysis as an attachment thereto. Debtors included Dennis' stock in Kindsvater, Inc. in their liquidation analysis as a non-exempt asset and valued the same at \$288,220.² Sunflower Bank ("Bank") objected to the debtors' valuation of the Kindsvater, Inc. stock. The valuation issue was set over for an evidentiary hearing to determine the value of the stock for purposes of the liquidation test in contemplation of the debtors filing their amended plan and a confirmation hearing being held.³ That evidentiary hearing was held on March 29, 2005 and resulted in the Valuation Order now at issue.

Motions for Reconsideration

The federal rules do not contemplate motions for reconsideration.⁴ Therefore, courts treat motions for reconsideration which draw into question the correctness of the trial court judgment as a motion "to alter or amend the judgment" under Fed. R. Civ. P. 59(e).⁵ A motion for reconsideration is timely filed if filed within ten days after entry of the judgment of the trial court.⁶ Fed. R. Bankr. P. 9023 adopts Fed. R. Civ.

² Dkt. 124.

³ See Pretrial Order, Dkt. 155.

⁴ *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991); *In re Curry and Sorensen, Inc.*, 57 B.R. 824, 827 (9th Cir. BAP 1986).

⁵ *In re 6 & 40 Investment Group*, 752 F.2d 515, 516 (10th Cir. 1985); *In re Edelman*, 237 B.R. 146, 151 (9th Cir. BAP 1999); *In re Barger*, 219 B.R. 238, 244 (8th Cir. BAP 1998) (Courts have generally viewed any motion which seeks a substantive change in a judgment as a Rule 59(e) motion if it is made within ten days of the entry of the judgment challenged.).

⁶ *In re 6 & 40 Investment Group*, 752 F.2d at 516; Fed. R. Bankr. P. 8015.

P. 59. The Bank filed its Motion for Reconsideration on May 10, 2005, within ten days after this Court entered the Valuation Order. Thus, the Court has jurisdiction to hear the Bank's motion and will treat it as a Rule 59(e) motion.

Motions to alter and amend judgment serve a limited purpose. Such motions are only appropriate when a court has misapprehended the facts, a party's position, or controlling law.⁷ It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.⁸ Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law; (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.⁹

The Valuation Order

In making the bench ruling upon which the Valuation Order is founded, the Court concluded that the valuation methodology employed by the debtors' expert, Gregory Sevier, CPA, was more likely to yield an accurate valuation of the stock interest. Mr. Sevier testified, and his expert report stated, that in valuing the stock of Kindsvater, Inc., he considered two methods of income-based valuation as well as an asset-based valuation. Mr. Sevier determined that the Capitalization of Earnings approach should be assessed 25% weight in valuing the stock. He assessed 50% weight to the Discounted Cash Flow approach, and 25% weight to the Asset-Based approach. He testified that he did not attribute any value to notes owed by the stockholders, Dennis Kindsvater and his brother, to Kindsvater, Inc. for the purchase

⁷ See *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

⁸ See *Servants of Paraclete*, 204 F.3d at 1012; *Van Skiver*, 952 F.2d at 1243.

⁹ See *Servants of Paraclete*, 204 F.3d at 1012; *Brumark Corp. v. Samson Resources, Corp.*, 57 F.3d 941, 948 (10th Cir. 1995).

of the stock. He considered the notes uncollectible. He testified that he was unaware that the notes were secured by the stock itself. In fact, they are.¹⁰ After considering his report and testimony, the Court adjusted the Asset-Based component of his analysis to include the face value of the notes which increased the value of the stock overall.

Sunflower Bank complains that if the stock value is to be included in Asset-Based component, it should also be included in the Discounted Cash Flow and Capitalization of Earnings components as an enhancement to the value of “non-operating assets.” In considering this Motion, the Court has reviewed the transcript of the testimony from the March 29 hearing. Mr. Sevier stated that the value of any non-operating assets should be added to whatever “Operating Value” either income-based method might yield. And, as the Bank points out, Mr. Sevier specifically testified on cross-examination that if he were to determine that the notes were collectible, their value would rightly be included in the “Non-operating assets” and should therefore have been added back into both income-based components as well as to the asset-based component. In light of Mr. Sevier’s testimony, the Court agrees that the income-based components should also have been adjusted by the value of the notes. The Court believes that this is the only logical conclusion to reach because the notes are not operating assets of the company. While the cash flow and earnings analyses serve to value the product of the operation, *i.e.*, revenue or income, an accurate valuation of the equity as a whole requires that the value of any non-operating assets also be included in those

¹⁰ The liquidation analysis attached to the amended disclosure statement dated November 4, 2004 reflects that Dennis Kindsvater’s secured debt is in the amount of \$304,042.29. *See* Dkt. 133, Ex. E. Kindsvater, Inc.’s proof of claim filed in this case asserts Dennis Kindsvater’s secured notes are in the principal amount of \$303,699.49 as of July 1, 2004.

calculations. Debtors have supplied no real basis upon which this Court should rule otherwise.

This Motion meets the third Rule 59(e) standard that a court's order may only be altered or amended if the court concludes it has made a clear error or if alteration or amendment is necessary to prevent a manifest injustice. While the Court would prefer to have been right the first time, it is now clear to the Court that adjusting only the asset-based component constituted clear error which this Court has the capacity to remedy by altering its previous judgment as follows.

As previously found, the Court attributes a value of \$608,592 to the stockholder notes to Kindsvater, Inc. Therefore, referring to the Capitalization of Earnings portion of Mr. Sevier's March 12, 2005 report, the original \$787,163 value should be increased by \$608,592 to \$1,395,755. Likewise, the original Discounted Cash Flow value of \$1,243,867 should also be increased by \$608,592 to \$1,852,459. As previously found, the Asset-Based value should have been increased from \$1,110,905 by \$608,592 to \$1,719,497. Utilizing Mr. Sevier's formula of attributing 50% weight to Discounted Cash Flow and 25% weight each to the Capitalization of Earnings and Asset-Based approaches, the Court finds that the weighted average of the three approaches is \$1,705,043 which, adjusted for Mr. Sevier's 35% lack of control discount (\$596,765), leaves a value of \$1,108,278 for 100 percent of the stock, or **\$554,139** for Dennis Kindsvater's 50% stock interest.

The Bank's Motion is GRANTED and the Valuation Order is modified as set forth above.

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