UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

In re:	Chapter 7 Case No. 10-14915
VINCENT R. CIUNCI MARY M. CIUNCI	(Not for Publication)
Debtors	

MEMORANDUM AND ORDER
(relating to Doc. #223)

Following an evidentiary hearing held on April 12, 2013, the Court entered a Decision and Order (Doc. #209) on May 3, 2013, denying the Debtors' Motion to Vacate a settlement agreement entered into with New England Framing Contractors & Excavation ("NEF"), memorialized and approved by the Court in a Consent Order entered on January 23, 2013.[1] The Debtors once again seek to vacate the Consent Order and the parties' settlement through the filing of their Motion on May 28, 2013, styled "Debtors' Motion To Request Court Review And Investigation Of Creditor's Scheme To Defraud Debtors For Reconsideration To Vacate Consent Order Of Settlement Agreement" (Doc. # 223). NEF objects to this Motion on the grounds that the Debtors have presented no new evidence or other basis warranting reconsideration of the Court's earlier Decision and Order. The Court concurs with NEF. The Motion must be denied.

JURISDICTION

The Court has jurisdiction over this matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a). This is a core proceeding in accordance with 28 U.S.C. § 157(b)(2)(B).

[1] The background facts surrounding this dispute are fully discussed in this Court's May 3, 2013, Decision and Order and will not be repeated herein.

DISCUSSION

The Debtors' Motion was filed more than fourteen days after entry of both the January 23, 2013, Consent Order and the Court's May 3, 2013, Decision and Order. Thus, the Court must review the Debtors' Motion under FED. R. CIV. P. 60, applicable to this matter pursuant to FED. R. BANKR. P. 9024. The allegations in the Motion, although stated in layman terms,[2] arguably implicate the following grounds for relief under Rule 60:

> (b) … 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:
>
> …
>
> (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;
>
> …
>
> (6) any other reason that justifies relief.

"A party is entitled to relief, under Rule 60(b)(2), … where (1) the evidence has been discovered since the trial; (2) the evidence could not by due diligence have been discovered earlier by the movant; (3) the evidence is not merely cumulative or impeaching; and (4) the evidence is of such a nature that it would probably change the result were a new trial to be granted." *U.S. Steel v. M. Dematteo Constr. Co.*, 315 F.3d 43, 52 (1st Cir. 2002).

The Debtors are not entitled to relief under Rule 60(b)(2). The facts alleged in their Motion pertain predominately to alleged actions of NEF relating to the Purchase and Sales Agreement executed by the Debtors and NEF in 2007 and the ultimate sale of the real estate in

[2] The Debtors are proceeding *pro se* with respect to the Motion and other motions the Debtors have filed pertaining to the settlement with NEF and this Court's Decision and Order of May 3, 2013.

issue by the Chapter 7 Trustee. All of these activities occurred well before the evidentiary hearing on the Debtors' motion to vacate the Consent Order and are not newly discovered facts. Further, the Debtors fail to explain why these alleged new "facts" and additional arguments raised in the current Motion could not have been, with due diligence, discovered and presented by the Debtors at the April 12 evidentiary hearing. The Debtors were represented by able and experienced bankruptcy counsel at the hearing. Both of the Debtors testified and had a full opportunity to present all of the facts they deemed pertinent to their contention that the settlement should be vacated. *See Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 19 (1st Cir. 2002) (affirming the lower court's denial of relief under Rule 60(b)(2), noting that the movant "wholly fails to explain why this evidence could not have been found, well before the entry of judgment, in the exercise of even minimal diligence.").

Relief is also unavailable to the Debtors under Rule 60(b)(3) because "the movant must 'show that the misconduct foreclosed full and fair preparation or presentation of [his] case.'" *Id*. at 21. "[T]he asserted misconduct 'must *substantially* have interfered with the aggrieved party's ability fully and fairly to prepare for and proceed [to judgment].'" *Id*. (emphasis in original). Although the Debtors complain vigorously of actions of NEF that allegedly occurred during 2007 through 2012, including through filings before this Court in the course of the parties' dispute, the Debtors do not allege that such activities substantially interfered with their ability to prepare for trial in January of 2013, when the dispute was to be heard by the Court on the merits. *See id*. at 21-22. ("When a party is capable of fully and fairly preparing and presenting his case notwithstanding the adverse party's arguable misconduct, the trial court is free to deny relief under Rule 60(b)(3).").

Nor is the catchall provision of Rule 60(b)(6) available to the Debtors because the arguments they assert in their current Motion implicate the more specific provisions of Rules 60(b)(2) and (3). *See Simon v. Navon*, 116 F.3d 1, 5 (1st Cir. 1997) ("[A] motion under Rule 60(b)(6) 'is only appropriate when none of the first five subsections pertain ….'"); 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 60.48[1] (3d ed. 2005) (Rule 60(b)(6) "applies only when there are reasons for relief *other* than those set out in the more specific clauses of Rule 60(b) ….") (emphasis in original). Even if the Court were to consider Rule 60(b)(6) applicable, the Debtors would still not be entitled to the relief they seek. "Generally, relief under Rule 60(b)(6) is reserved for 'extraordinary circumstances' that justify 'extraordinary' relief." *E. Savs. Bank v. Lafata (In re Lafata)*, 344 B.R. 715, 726 (B.A.P. 1st Cir. 2006). Here the Debtors present no extraordinary circumstances warranting vacating the binding settlement between the parties.

In short, "Rule 60(b) does not allow [the Debtors] a second chance to convince the court to rule in [their] favor by presenting new explanations, legal theories, or proof." *SEC v. Bilzerian*, 815 F. Supp. 2d 324, 327 (D.D.C. 2011); *see also Marques v. Digital Equip. Corp.*, 637 F.2d 24 (1st Cir. 1980) *quoting* 11 Wright & Miller, Federal Practice and Procedure § 2858 (1973 ed.) (denying relief under Rules 60(b)(1) and (6), noting that "'[a] defeated litigant cannot set aside a judgment … because he failed to present on a motion for summary judgment all of the facts known to him that might have been useful to the court.'").

Finally, while the Debtors plead infirmity of age and unspecified medical conditions that caused them to be under "intense pressure that put them in a fog,"[3] the Court reiterates its prior

[3] Debtors' Memorandum In Support of Motion To Request Court Review And Investigation Of Creditor's Scheme To Defraud Debtors For Reconsideration To Vacate Consent Order Of Settlement Agreement, Doc. #223 at p. 17.

conclusion in its May 3, 2013, Decision and Order that the Ciuncis fully understood the terms of the settlement they were reaching with NEF. The testimony adduced at trial by both Mr. and Mrs. Ciunci and their demeanor evidenced to the Court, and the Court so found, that both Debtors clearly understood the terms of the settlement and entered into the settlement knowingly, willingly, and without duress in order to end the litigation. The Debtors' change of heart does not justify reconsideration of the settlement. *Smith v. ABN Amro Mortg. Group, Inc.*, 434 Fed. Appx. 454, 463-64 (6th Cir. 2011) ("Where the parties enter into a settlement agreement in the presence of the court, such an agreement constitutes a binding contract. Neither a change of heart nor poor legal advice is a ground to set aside a settlement agreement.") (internal quotations omitted).

As an adjunct to their quest to void the settlement, the Debtors also "move this Honorable Court for a review and investigation" of what the Debtor's allege to be NEF's "scheme to defraud debtors …." [4] The Debtors provide no statutory or legal authority in support of this request and the Court is not aware of any such amorphous authority. Indeed, this is a trial court, not a regulatory or investigatory governmental agency. The onus of conducting any such review and investigation is on the Debtors, not the Court.

NEF's Objection is SUSTAINED and the Debtors' Motion to Request Court Review and Investigation of Creditor's Scheme to Defraud Debtors for Reconsideration to Vacate Consent Order of Settlement Agreement is DENIED.

Dated: May 31, 2013

Diane Finkle 05/31/2013

Diane Finkle
United State Bankruptcy Judge

[4]Debtors' Motion, Doc. #223 at p. 1.