IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

Case No 00-40169

In re: **SHELBY YARN COMPANY, EIN 56-2046560,** **Debtor.**	
WAYNE SIGMON, Trustee in Bankruptcy for Shelby Yarn Company, and THE SPECIAL COMMITTEE OF THE FORMER EMPLOYEES OF SHELBY YARN, **Appellants,** **Vs.** **RECOVERY EQUITY INVESTORS, L.P.; RECOVERY EQUITY PARTNERS, L.P.; RECOVERY EQUITY INVESTORS II, L.P.; RECOVERY EQUITY PARTNERS II, L.P.; JEFFREY A. LIPKIN; JOSEPH J. FINN-EGAN; SIDNEY H. KOSANN; NORMA J. KOSANN; AMERICAN GROUP ADMINISTRATORS, INC.; LLOYD H. GOLDSTEIN; C. B. PLANNING SERVICES CORP.; JESS SOFER; JAMES T. POTTER, JR.; WAYNE WALTON; and GMAC COMMERCIAL CREDIT, L.L.C.,** **Appellees.**	**Civil No. 1:03CV147**

THIS MATTER is before the Court on appeal from an Order entered on May 12, 2003, in the United States Bankruptcy Court.

I. STANDARD OF REVIEW

The decision of the Bankruptcy Court is reviewed by a two-step process. Reversal of the findings of fact of the Bankruptcy Court may occur only where the findings are clearly erroneous. ***In re Deutchman*, 192 F.3d 457, 459 (4th Cir. 1999).** The conclusions of law of the Bankruptcy Court are reviewed *de novo*. ***Id.*** Findings of fact are clearly erroneous "when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." ***In re Green*, 934 F.2d 568, 570 (4th Cir. 1991) (citing *In re First Federal Corp.*, 42 B.R. 682, 683 (Bankr. W.D. Va. 1984)).** As stated by the Supreme Court:

> If the [lower court's] account of the evidence is plausible in light of the record viewed in its entirety, the [appellate court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

***Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) (citations omitted).**

In addition, due regard must be given to the opportunity of the Bankruptcy Court to judge the credibility of witnesses. ***In re Tudor Assocs., Ltd., II*, 20 F.3d 115, 119 (4th Cir. 1994); Fed. R. Bankr. 8013.**

II. PROCEDURAL HISTORY

On March 14, 2000, an involuntary petition under Chapter 7 of the United States Bankruptcy Code was filed against Shelby Yarn Company (Shelby Yarn or Debtor). Wayne Sigmon (Sigmon or Trustee) was subsequently appointed as the Chapter 7 Trustee for the Debtor's estate. On August 23, 2001, a motion was filed by O. Max Gardner (Counsel) for the

appointment of a committee of former employees of Shelby Yarn for the purpose of filing an "aggregate or unified proof of claim" on behalf of all former employees and to extend the bar date for such filing until the creation of a committee. **Motion to Appoint a Special Committee of the Former Employees of Shelby Yarn Company, to Allow the Committee to File an Aggregate Proof of Claim for the Former Employees, and to Appoint O. Max Gardner III as Attorney for the Said Special Committee, filed August 23, 2001, *attached to* Appellant's Designation of Record on Appeal.** The motion specified that the Committee was responsible for the payment of Counsel's legal fees. ***Id.*** No other relief was sought in the motion, which was served on numerous parties in the bankruptcy proceeding. ***Id.***

On September 21, 2001, a hearing was held on the motion, along with motions made by the Trustee. In the course of that hearing, Counsel addressed the Bankruptcy Court as follows:

> [I]n connection with the formation of that committee, we had also requested that the Committee be allowed to file a unified proof of claim for all of the employees, that would include all of their back wages, WARN Act claims, medical claims, all as one single claim[.]

Transcription of Hearing: September 21, 2001, *attached to* Appellant's Designation. No parties appeared at that hearing.

On November 6, 2001, the Bankruptcy Court signed an order which had been prepared by Gardner. **Order and Final Judgment, filed November 6, 2001, *attached to* Appellant's Designation.** The order contained the following provisions:

> [T]his Court hereby appoints a Special Committee in this Chapter 7 case *to represent the rights of all of the former employees of Shelby Yarn* . . . .
>
> . . .
>
> [T]his Court hereby *grants to the said Committee standing as a separate and distinct legal entity to pursue claims and causes of action in the name of the Committee and on behalf of all the former employees of Shelby Yarn Company*

> *and the extension of all applicable statute of limitations for a period of two years after the date of entry of the order for relief in this case . . . .*
>
> . . .
>
> [T]his Court hereby appoints O. Max Gardner III as Special Counsel to the said Committee *to be reimbursed at an hourly rate of $240.00 plus expenses incurred from said representation, subject to the approval of all fees and expenses by this court after proper notice and hearing*; and
>
> [T]his Court further hereby *appoints O. Max Gardner III as Special Assistant Counsel to the Chapter 7 Trustee to assist the Trustee in prosecuting any claims or causes of action in which the Committee could or might have any interest, with his fees and expenses to be subject to the approval of the Trustee and this court after proper notice and hearing.*

***Id.* (emphasis added).** The wording in italics was not presented in the motion originally submitted to the Bankruptcy Court for consideration and notice of which was provided. Nor is there anything in the transcript of the hearing showing that these matters were addressed to the Bankruptcy Court.

On April 9, 2002, the Trustee filed an adversary proceeding in the Bankruptcy Court. On September 20, 2002, the undersigned withdrew the reference of that proceeding to the Bankruptcy Court. On November 5, 2002, Sidney H. Kosann (Kosann) moved the Bankruptcy Court to reconsider the appointment of the Committee. **Motion to Reconsider Order Appointing a Special Committee of the Former Employees of Shelby Yarn Company, *attached to* Appellant's Designation.** On January 31, 2003, Bankruptcy Court Judge Wooten conducted a hearing in connection with the motion for reconsideration. **Transcript of Proceedings held January 31, 2003, *attached to* Appellant's Designation.** On February 4, 2003, Judge Wooten determined to consider the motion under advisement due to the fact that Kosann had filed a similar motion in the adversary proceeding which had been removed to this Court. **Order, filed February 4, 2003, *attached to* Appellant's Designation.** On April 15,

2003, the undersigned noted that it could not rule on that motion to reconsider because there was no appeal from the Bankruptcy Court Order appointing the Committee. ***See*** **Memorandum of Opinion, filed April 15, 2003, in Case No. 1:02cv218, at 8 n.5.** As a result of that ruling, Judge Wooten determined that he had jurisdiction to rule on the motion to reconsider. On May 12, 2003, he made the following rulings:

> The [Committee's] attorney submitted to the court an Order that granted the relief requested in the Motion and, in addition, included provisions that: granted the Committee standing as a "separate and distinct legal entity to pursue claims and causes of action;" extended all applicable statutes of limitations for two years after the entry of the order for relief; set an hourly fee for the Committee attorney to be paid by the estate; and appointed the Committee attorney to assist the Trustee in prosecuting claims or causes of action in which the Committee could or might have any interest. . . . The fundamental reasons that the November 6, 2001 order should be amended is that the "Order and Final Judgment " that was entered *did not represent the judgment of the court, and it was entered in error. The order plainly included provisions that were neither plead in the motion nor argued before the court at the hearing on the motion.* Additionally: There was no notice to interested parties of the additional relief provided for in the order. The additional relief grants the Committee powers in excess of what is permitted by Section 705 of the Bankruptcy Code. And, the Bankruptcy Code does not provide for compensation for the attorney for a Chapter 7 committee out of estate funds. . . . More important, *the extra provisions contained in the proposed Order and Final Judgment were added by counsel without discussion with the court.*

Order, filed May 12, 2003, *attached to* Appellant's Designation (emphasis added).

Despite the plain language of the Bankruptcy Court's ruling, Counsel moved to reconsider and that motion, as well, was denied. **Order, filed June 2, 2003, *attached to* Appellant's Designation.** These orders are the subject of this appeal.

III. DISCUSSION

It is clear from the findings of the Bankruptcy Court that Counsel inappropriately added language to a proposed order and now appeals that Court's ruling resulting from such additions. Counsel claims the Bankruptcy Court had no jurisdiction to rule on the motion to reconsider; the motion was untimely and, in the alternative, the Bankruptcy Court committed numerous errors. No discussion is provided to elucidate the claim that the Bankruptcy Court had no jurisdiction and that claim is, therefore, dismissed.

Counsel next claims the motion for relief from the order was untimely because it was brought more than one year from the date of the order. However, relief pursuant to Federal Rule of Civil Procedure 60(b)(6) may be granted by a court for "any other reason justifying relief from the operation of the judgment" and is not subject to the one year limitation. There are few reasons as compelling as ones where an attorney submits a proposed order to a judge containing ordering provisions never discussed with nor presented to that judge.

Counsel also cites this Court's order in the removed adversary proceeding as grounds for reversing the Bankruptcy Court. At the time this Court found the Committee had standing to pursue the adversary proceeding, the Court was unaware that the November 6, 2001, Order signed by Judge Wooten contained ordering provisions never actually granted by the Bankruptcy Court. Therefore, any language contained in the undersigned's ruling was based on an erroneous record; and, indeed, the undersigned subsequently struck that portion of the ruling from the record. It is, at the least, disingenuous to use that language in support of this appeal.

Inexplicably, Counsel also claims that he represents a class. No class action has ever been filed; no class of former employees has ever been approved; Counsel never moved the

Bankruptcy Court to certify a class of any kind. He cannot pursue the issue of a class of former employees when the issue was not adjudicated or raised before the Bankruptcy Court.

The undersigned cannot find that the Bankruptcy Court committed any error or abused its discretion in refusing to appoint a Committee with the powers sought by Counsel. Nor was the Bankruptcy Court in error by refusing to sanction a $240 per hour fee for him to be paid by the bankrupt estate. His representation would be redundant and a drain on the estate, further distancing the former employees from any hope of recovering their benefits. The other grounds raised by Counsel are determined to be without merit.

IV. ORDER

IT IS, THEREFORE, ORDERED that the appeal is hereby **DISMISSED.**

THIS the 24 day of October, 2003.

LACY H. THORNBURG
UNITED STATES DISTRICT COURT JUDGE