

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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April 5, 1990

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Re: Robert Allen & Elsie J. Bak
d/b/a Bak Construction Company
Chapter 11 386-00049
Adversary 88-3003

Dear Counsel:

The Court has before it United States Fidelity & Guaranty Company's motion for relief from this Court's order entered February 5, 1990. That order decreed that First Fidelity Bank of Murdo was entitled to certain pipe that was abandoned by Baks at the Estelline Project site, and was based upon a stipulation of facts entered into by USF&G and First Fidelity Bank. The stipulation stated that First Fidelity possessed a valid perfected security interest in Baks' inventory including the pipe, when in fact no such perfected security interest existed. USF&G moved for relief from the judgment as it pertained to the pipe, claiming that the stipulation was based upon a mistake or misrepresentation as to First Fidelity's secured status in Bak's inventory. Counsel for First Fidelity, conceded that the stipulation was incorrect insofar as it related to the existence of a perfected security interest in favor of First Fidelity in Baks' inventory.

Bankruptcy Rule 9024 states that Rule 60 of the Federal Rules of Civil Procedure applies in bankruptcy cases, with certain exceptions not applicable here. Under Rule 60(b), relief from a final judgment may be granted due to:

Re: Robert & Elsie Bak
April 5, 1990

Page 2

(1) mistake, inadvertence, surprise, or excusable neglect;

. . .

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

. . .

(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.

First Fidelity never possessed a perfected security interest in the pipe left at the project site, and the assertion to the contrary in the stipulation of facts appears to be an innocent mistake. Under the circumstances, the Court concludes that sufficient cause exists to relieve USF&G from the Court's earlier judgment. Further, on the basis of the facts as they now stand, and as a corollary to the holding in *Aetna Casualty & Surety Co. v. J.F. Brunken & Son, Inc.*, 357 F.Supp. 290 (D.S.D. 1973), the Court concludes that First Fidelity's unperfected security interest in the pipe is subordinate to USF&G's interest by virtue of its payment and performance bonds.

The Court thus will grant USF&G's motion for relief and will amend its order to provide that USF&G is entitled to the pipe in question.

Very truly yours,

Irvin N. Hoyt
Chief Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

IN RE:)	
ROBERT ALLEN BAK and)	CASE NO. 386-00049
ELSIE JEAN BAK,)	
d/b/a/ BAK CONSTRUCTION COMPANY,)	ADVERSARY NO. 88-3003
)	
Debtors,)	CHAPTER 11
)	
FIRST FIDELITY BANK OF MURDO,)	
)	
Plaintiff,)	
)	
vs.)	
)	
UNITED STATES FIDELITY &)	ORDER GRANTING RELIEF
GUARANTY; ROBERT BAK; ELSIE)	FROM JUDGMENT AND
BAK; THE CITY OF ESTELLINE,)	AMENDING ORDER
SOUTH DAKOTA; THE ESTELLINE)	ENTERED FEBRUARY 5, 1990
WASTE WATER TREATMENT PROGRAM,)	
)	
Defendants.)	

Pursuant to the letter decision filed in this matter and executed this same date

IT IS HEREBY ORDERED that United States Fidelity & Guaranty Company's motion for relief from judgment of this Court's order entered February 5, 1990, is granted.

IT IS FURTHER ORDERED that this Court's judgment entered February 5, 1990, be amended by deleting the last paragraph thereof;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that United States Fidelity & Guaranty Company is entitled to certain pipe that was abandoned by the debtors at the construction site for the Estelline Project, which pipe was later incorporated therein.

Dated this 5th day of April, 1990.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk