

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MASSACHUSETTS - WORCESTER**

IN THE MATTER OF:	.	Case #96-10123
	.	
V & M. MANAGEMENT, INC.	.	Worcester, Massachusetts
	.	June 3, 2004
Debtor	.	1:40 p.m.

**TRANSCRIPT OF PRE-TRIAL CONFERENCE ON:
(#839) MOTION TO ALLOW LATE-FILED ADMINISTRATIVE CLAIM OF
ALPHONSE MOURAD
BEFORE THE HONORABLE JOEL B. ROSENTHAL, JR., J.U.S.B.C.**

APPEARANCES:

<u>For Alphonse Mourad:</u>	LESTER E. RIORDAN, ESQ. 81 Washington Street, Suite 8 Salem, MA 01970
<u>For Stephen Gray, Trustee:</u>	JENNIFER L. HERTZ, ESQ. Duane Morris, LLP 470 Atlantic Avenue Suite 500 Boston, MA 02210

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1 (At Tape #1, Index #2720. 1:40 p.m.)

2 MS. MAGEROWSKI: Please be seated. V&M Management,
3 Incorporated. Case #96-10123. Please identify yourselves for
4 the record.

5 MS. HERTZ: Good afternoon, Your Honor. Jennifer
6 Hertz on behalf of Stephen Gray, the creditor Trustee.

7 MR. RIORDAN: Good afternoon, Your Honor. Les
8 Riordan, attorney for Alphonse Mourad.

9 MS. HERTZ: Your Honor, also --

10 MR. MOURAD: Alphonso, Mourad -- I'm sorry. My
11 name is Alphonse Mourad.

12 THE COURT: Would you sit behind the bar, please,
13 sir?

14 MR. MOURAD: Pardon?

15 THE COURT: Sit behind the bar, please, sir. Yes,
16 Ms. Hertz.

17 MS. HERTZ: Your Honor, also with me is Craig
18 Jalbert of the accounting firm of Verdolino & Lowey, and
19 although he's not a lawyer admitted to practice, I would ask
20 that he be allowed to sit with me at counsel table.

21 THE COURT: I think. I just asked Mr. Mourad to
22 sit behind the bar.

23 MS. HERTZ: Okay.

24 MR. RIORDAN: Your Honor, I just would note. My
25 appearance is very new to this case. Mr. Mourad has been

1 representing himself pro se, and at this point I don't think
2 we'll need his assistance here, but has essentially been
3 assisting with the preparation. Thank you.

4 THE COURT: Thank you. All right, we're here on a
5 pre-trial conference today. Now apparently the parties have
6 the feeling that I'm going to hear a motion for a judgment on
7 the pleadings? Is that -- looking at the papers, that seems to
8 be what people would expect to be arguing today, is that
9 correct?

10 MS. HERTZ: Your Honor, I haven't -- I haven't
11 received any notice from the Court that it was scheduled for a
12 hearing. I think -

13 THE COURT: Neither -- and nor have -- that's
14 because we haven't set one.

15 MS. HERTZ: So --

16 THE COURT: Okay, so you're not prep -- all right.

17 MS. HERTZ: We're prepared to argue it, but it
18 certainly isn't something that I was aware was on the Court's
19 calendar today.

20 THE COURT: What about you, Mr. Riordan?

21 MR. RIORDAN: I'm prepared to argue the motion, Your
22 Honor.

23 THE COURT: Well, you tell me -- I'm not -- have you
24 seen Mr. Riordan's response?

25 MS. HERTZ: Yes, Your Honor. We received it

1 yesterday afternoon.

2 THE COURT: Well, let's talk about Mr. Rior -- Mr.
3 -- You may sit down, Ms. Hertz. Let's talk about your
4 response. Why should I even let it be filed? Why shouldn't I
5 strike it? You filed the motion with the assent of the other
6 side to extend the time to file this.

7 MR. RIORDAN: Mmhmm.

8 THE COURT: You asked for and were granted a motion
9 to file it by June 1st. It arrived in this courthouse - it was
10 opened in the mail on June 3rd -- it was stamped in at 12:13
11 today, so it's two days late, you didn't ask for permission.
12 Why shouldn't I just strike it and throw it in the waste
13 basket.

14 MR. RIORDAN: Well, Your Honor, I would say this. I
15 -- we filed it via mail on June 1st. We faxed over a copy,
16 and --

17 THE COURT: Faxed over a copy where?

18 MR. RIORDAN: To opposing counsel.

19 THE COURT: Why didn't you fax-file it here? You
20 know how to do it. You filed the motion to extend by fax.

21 MR. RIORDAN: Your Honor, I would agree with you,
22 and I would ask you just to recognize this. I have never
23 practiced in the Bankruptcy Court before. I am --

24 THE COURT: Do you know what date it was two days
25 ago?

1 MR. RIORDAN: Your Honor --

2 THE COURT: It was June 1st.

3 MR. RIORDAN: Your Honor --

4 THE COURT: That's the day it was. You don't file
5 papers by mail. If they're due here on the 1st, they're due
6 here on the 1st.

7 MR. RIORDAN: Your Honor --

8 THE COURT: Who do you think you are?

9 MR. RIORDAN: Your Honor, if I incorrectly filed it
10 by mail, you have my apologies.

11 THE COURT: File a motion for a late filing and I'll
12 consider it.

13 MR. RIORDAN: All right.

14 THE COURT: And tell me why it was late.

15 MR. RIORDAN: It apparently was late, Your Honor,
16 because --

17 THE COURT: What do you mean "apparently"? It
18 couldn't get her until the 1st. You didn't mail it until the
19 1st.

20 MR. RIORDAN: It was late because I misread the Rule
21 and felt that I could file it. I am not that familiar with the
22 Bankruptcy Court.

23 THE COURT: What Court lets you -- considers it
24 filed when you drop it in the mail?

25 MR. RIORDAN: All Massachusetts State Courts, Your

1 Honor.

2 THE COURT: Well, you're in the Federal Court now.

3 Are you a member of the Federal Court Bar?

4 MR. RIORDAN: I made a mistake, Your Honor.

5 THE COURT: Are you a member of the --

6 MR. RIORDAN: Yes.

7 THE COURT: -- Federal Court Bar?

8 MR. RIORDAN: Yes, Your Honor.

9 THE COURT: You better get the Rules, counsel.

10 Under that podium there is a gray book. You see it?

11 MR. RIORDAN: Yes, Your Honor.

12 THE COURT: You see it? "Local Rules."

13 MR. RIORDAN: Yes, Your Honor.

14 THE COURT: Take it and read it and don't come back
15 here until you know and understand them. File a motion for
16 leave to file late. I will schedule it then. When -- I'll
17 schedule an argument on this motion, if I choose to, after I've
18 seen your motion.

19 Are we ready for trial on this? I've got joint pre-
20 trial statements -- I've got pre-trial statements. Are we
21 ready to schedule a trial today for sometime in the near
22 future?

23 MR. RIORDAN: Your Honor, and again, I would ask
24 some indulgence. I had recently entered an appearance in this
25 case primarily to help Mr. Mourad with his tax case before the

1 First Circuit. I have looked over the files. There's a
2 tremendous amount of material to resolve. I'm a tax attorney
3 without much background in bankruptcy, and in looking over the
4 materials that I see in the file -- I do not see any discovery,
5 I do not see automatic disclosure or anything of that nature.

6 THE COURT: The time for that is past, counsel.
7 This matter is ripe for trial, as far as I can tell.

8 MR. RIORDAN: Well, Your Honor, I would simply
9 request that you provide Alphonse Mourad, who has been
10 conducting this as *pro se*.

11 THE COURT: For how many years, counsel?

12 MR. RIORDAN: Pardon?

13 THE COURT: For how many years has he been *pro se*?

14 MR. RIORDAN: Many. Many.

15 THE COURT: So you think on the eve of trial, by
16 filing and appearance I'm going to slow this case up --

17 MR. RIORDAN: No, Your Honor --

18 THE COURT: -- to give you an opportunity?

19 MR. RIORDAN: -- I'm not doing that, but I would ask
20 this Court to recognize that what I am doing as an attorney,
21 hopefully that this Court would appreciate. What I want to do
22 is move the case forward. What I want to do is make sure that
23 Mr. Mourad has appropriate representation, and I hope this
24 Court appreciates and is proud of the way I conducted myself in
25 this case. If I make a mistake, I'll stand up and take

1 obligation. Mr. Mourad should be entitled to pursue
2 discovery. He is entitled to automatic disclosures under the
3 Rule. I will do everything possible to work with this Court
4 and to carry out my duties and obligations. If the Court feels
5 he's not entitled to discovery under the peculiar facts of this
6 case, then I can only ask for it.

7 I will do what I can to move this to conclusion.

8 THE COURT: Was there a pre-trial order in this
9 case, counsel?

10 MR. RIORDAN: Apparently there's a pre-trial order
11 in this case, which was issued by Judge Kenner, Your Honor.

12 THE COURT: Ms. Hertz, is the time for discovery
13 passed under the pre-trial order?

14 MS. HERTZ: Your Honor, it's long since passed. The
15 pre-trial order entered on October 31st of 2001.

16 THE COURT: And discovery, I presume, was allowed
17 for some 60, 90, 120 days after that?

18 MS. HERTZ: If you'll indulge me for one moment,
19 Your Honor.

20 THE COURT: Sure.

21 MS. HERTZ: I'll find it.

22 [Pause]

23 MS. HERTZ: Your Honor, per the pre-trial order, the
24 pre-trial statements were due on February 15th and April 12th.

25 A further pre-trial --

1 THE COURT: What year?

2 MS. HERTZ: 2002.

3 THE COURT: Okay.

4 MS. HERTZ: A further pre-trial statement as to Mr.
5 Mourad's rebuttal evidence was due on or before June 4th, 2002,
6 and that essentially the extent of the order. I'm happy to
7 pass it up to you.

8 THE COURT: No, I'm sure it's here. I just -- I
9 know I've seen it. I just couldn't put my hands on it.

10 MR. RIORDAN: In short, Your Honor, the order didn't
11 address discovery. Certainly, automatic --

12 THE COURT: Wait -- then you better pass it up if
13 you think it didn't address discovery. Let me see it.

14 [Pause]

15 THE COURT: I disagree, counsel. This case should
16 have been ready for trial back when these -- when this order
17 was complied with, and, Mr. Mourad, you may give this back to
18 Ms. Hertz. This matter was a -- excuse me, a plaintiff's pre-
19 trial statement was filed in February of 2002 listing exhibits
20 and whatever, and your filing an appearance doesn't obviate the
21 fact that this case should be, as far as the Court's concerned,
22 ready for trial.

23 MR. RIORDAN: Your Honor, I don't dispute that.
24 What I'd like to be able to do is assist Mr. Mourad in the
25 Court to enable his ability to present his case, nothing more.

1 I think Your Honor is absolutely right that the commitment on
2 counsel should be it to move it to trial as quickly as
3 possible. I don't think extensive discovery is required. I
4 think automatic disclosure should be made.

5 I'm not asking for a significant amount of time. All
6 I'm asking for the Court is the opportunity, after all this
7 time, to allow the Court to hear the facts of the case and make
8 its decision, and I will work towards that. I have a lot of
9 work to do, on what I --

10 THE COURT: You know, you --

11 MR. RIORDAN: -- essentially would think is -- I
12 would tell the Court is a *pro bono* basis, but I would ask the
13 Court to at least recognize that Mr. Mourad has had certain
14 claims. He's had -- he's had, you know, a storied history that
15 I'm sure Your Honor is aware with. Let's provide the proper
16 forum. He can come to you, present his case, and you can
17 rule.

18 THE COURT: Well, that's why we're here. We're here
19 to -- as on a pre-trial. There's one pending motion apparently
20 for -- on a cross-motion for judgment on the pleadings, which I
21 will deal with in short order, and then we're going to have a
22 trial. We're not going to have discovery. Discovery is long
23 -- years ago passed. Years ago; not weeks ago, not by a little
24 bit; by years, and I'm not going to reopen this case. This is
25 a '96 case, and it should be ready for trial.

1 Ms. Hertz, do you have anything to add to that? I
2 assume you're prepared to go forward in trial.

3 MS. HERTZ: We're prepared to go forward, Your
4 Honor. I would add that this case has been remanded on two
5 very slim and narrowed-down issues that I'm afraid, based upon
6 Mr. Mourad's counsel's response is that he's attempting to sort
7 of -- I don't know -- exponentially storm out of control with
8 various and related tax issues.

9 I think that this case is ripe for judgment on the
10 pleadings, and that's why we moved for it. Alternatively, I
11 think that it could be equally disposed of via summary
12 judgment. If you would require evidence, we could submit
13 affidavits.

14 But certainly, if you would rather go the trial
15 route, we can do that. But I think that the -- you know, the
16 record of this case and the various opinions out there --

17 THE COURT: Well, the only -- when you say --

18 MS. HERTZ: -- make it somewhat easily disposed of.

19 THE COURT: -- "the various opinions," I'm aware of
20 the remand from the BAP on the issue of -- was it negligence?
21 And --

22 MS. HERTZ: And the late-filed administrative claim.

23 THE COURT: The late-filed administrative claim.

24 MS. HERTZ: And I think coupled with the Tax Court
25 opinion which we attached as Exhibit A to our cross-motion and

1 motion for judgment on the pleadings, addresses the issue as to
2 the purported negligence of Mr. Gray in administering the
3 estate.

4 THE COURT: Are you aware of the limited scope of
5 what we're going to -- what's left in this case, counsel?

6 MR. RIORDAN: Your Honor, I'm aware of the BAP's
7 decision. I think that we can focus on some of the issues that
8 are presented. Obviously it's related to alleged negligence
9 relating to the handling of the tax.

10 Let me give Your Honor one example. Subsequent to
11 the BAP's decision Mr. Gray signed the tax return for 1999 for
12 the S-corporation. The corporation, we can present evidence,
13 did not exist as of 1998. This is after the opinion, and we
14 view this as this is essentially a new claim that has arisen
15 out of the same issues.

16 THE COURT: Have you filed a new claim?

17 MR. RIORDAN: Your Honor, I have not -- other than
18 -- and I think Your Honor knows this, other than what my -- my
19 notice of appearance and my involvement in the response, I
20 haven't filed anything.

21 THE COURT: Well, if you think you have claims that
22 are not barred by a statute of limitations or a bar date,
23 they're not -- they've not been brought yet. They're not part
24 of what I'm hearing.

25 MR. RIORDAN: Well, maybe this --

1 THE COURT: And as far as I know this case was
2 closed except for these few outstanding matters. Am I correct?

3 MS. HERTZ: That's correct, Your Honor.

4 THE COURT: Didn't Judge Kenner issue an order to
5 that effect?

6 MS. HERTZ: Yes, Your Honor. She entered a final
7 decree.

8 THE COURT: So if you think you've got other claims,
9 counsel, you better figure out what you're going to do about
10 them, because I'm not hearing them as -- in the context of this
11 matter.

12 MR. RIORDAN: Well, Your Honor, I think the claims
13 are timed. They're related to the issue of negligence.

14 THE COURT: But if they're not filed, counsel,
15 they're not part of the record. You're not writing on a clean
16 slate here.

17 MR. RIORDAN: I -- Your Honor, I understand, but
18 you're -- you know, I'm asking this Court for a certain amount
19 of time to review this voluminous material, for a certain
20 amount of time to ask if I can take limited discovery, and what
21 you're saying to me is, you're saying, "Mr. Mourad should have
22 done this all a long time ago," which I accept.

23 THE COURT: Well, if there are new claims that not
24 time-barred or barred procedurally, then I'm not making any
25 rulings that apply to those claims. They're not before me.

1 MR. RIORDAN: But --but how -- how is the position
2 that Your Honor is taking now and knowing the history of this
3 case, and I even have the opportunity to address those claims
4 (unclear) --

5 THE COURT: You've got all the time you want on
6 those claims.

7 MR. RIORDAN: Your Honor, our view about the conduct
8 of the Trustee subsequent to the claims which arose are
9 material to this issue. We believe that whether a claim or not
10 -- those issues are material. We -- we -- all that opposing
11 counsel did was attach a Tax Court decision to -- to --

12 THE COURT: I'm not ruling on her motion now. You
13 understand that.

14 MR. RIORDAN: Well --

15 THE COURT: What I'm suggesting to you is, there was
16 a -- this matter was adjudicated by Judge Kenner. She entered
17 a final order. It was re -- that final order, as I recall, was
18 affirmed in most instances, but one or two issues were remanded
19 to her for further hearings, consistent with the BAP's
20 decision. That's all I'm hearing.

21 MR. RIORDAN: Well, I understand, Your Honor, and
22 what appears to be have been remanded was -- was the issue
23 relative to Mr. Argument's (sic) -- Mr. Mourad's argument
24 that Mr. Gray's negligence in relation to the preparation of
25 the tax return and his dealing with the tax credits were at

1 issue in this case. That seems to be what the Appellate
2 decision said.

3 THE COURT: Well, you may be right. I'll have to go
4 back and read it again.

5 MS. HERTZ: I think, Your Honor, that could very
6 easily narrowed by reading Mr. Mourad's motion to allow
7 administrative claim late, with the subject matter of which is
8 what -- has been remanded, and those particular claims, I --
9 based on my plain reading of that particular motion, are not
10 present.

11 MR. RIORDAN: Well, Your Honor, I would just say
12 that referring to the plain text of the bankruptcy decision,
13 once again we would ask you, Your Honor -- we will do
14 everything possible to bring this case to a fair and just and
15 final conclusion.

16 Certain things may have to be done to do that. I
17 would ask for sufficient time, because I think without --
18 particularly at my late entry, I'm not in the position to help
19 Mr. Mourad. You know, if it's Your Honor's position that his
20 litigation in this case prior to my entering the case as
21 counsel has locked him into something, I think the best thing
22 to do is to let Mr. Mourad proceed; but in order for me to
23 provide him with the assistance I can, I have to become
24 familiar with the case, I have to make a determination as to
25 whether any issues need to be explored on an evidentiary basis,

1 and I have to make decisions that other -- other attorneys
2 would make in the normal course of action. An additional three
3 to six months I don't think is unfair or burdensome on the
4 Court.

5 THE COURT: I think it's ridiculous, counsel.

6 MR. RIORDAN: Well, Your Honor --

7 MS. HERTZ: I totally --

8 THE COURT: You chose to enter your appearance.

9 MR. RIORDAN: And I've en --

10 THE COURT: You entered your appearance when there
11 was already a pre-trial hearing scheduled, counsel. What does
12 that mean?

13 MR. RIORDAN: Your Honor, if Your Honor would
14 prefer, I withdraw, because --

15 THE COURT: No, I'm not -- I don't prefer you to do
16 anything; but if you think that I'm going to take this matter,
17 which was ripe for trial and was ripe for trial two years ago,
18 and roll it out for another three to six months --

19 MR. RIORDAN: Your Honor -- just -- a trial request
20 was made two years ago. This Court did not move a finger to
21 give Mr. Mourad and trial, and now you're -- this Court is
22 taking the position, knowing the history of this case?

23 THE COURT: Counsel, you raise your finger again --

24 MR. RIORDAN: I apologize, Your Honor.

25 THE COURT: Just count to ten.

1 MR. RIORDAN: I apologize, Your Honor.

2 THE COURT: Take a deep breath, counsel. Take a
3 deep breath.

4 MR. RIORDAN: Your Honor, all's -- all I ask for is
5 that the Court act consistently and fairly in bringing this
6 case to a conclusion. I can only do so much. I will do what I
7 can.

8 THE COURT: Well, discovery is over, counsel, so I
9 don't know what you're going to do, think you're going to do in
10 the next three to six months. What I'm going to do is I'm
11 going to order that both parties file whatever memos they want
12 to file with me with respect to what they believe the issues
13 are before me. Now that's not going to take you three to six
14 months. And any further memos that they want to file with
15 respect to this cross-motion to judgments on the pleadings, and
16 I will schedule a hearing. I'll do it right now. I will hear
17 the motion -- the judgment -- cross-motion for judgments on the
18 pleadings sometime probably in July, and then we'll go from
19 there.

20 MR. RIORDAN: All right.

21 [Pause]

22 THE COURT: All right. I'm going to continue this
23 pre-trial to July 21st at 9:30 a.m. At that same time I will
24 hear the cross-motions for judgment on the pleadings. I'm
25 directing that both parties file such memos as they wish to

1 file by July 14th on the following issues:

2 (1), what matters they believe are before this Court
3 for adjudication, and (2), any further memos they want to file
4 on the judgment on the pleadings motion. At the conclusion of
5 the judgment on pleadings motion, if the case is still open, we
6 will discuss trial dates and duration, so you should bring your
7 calendars and also do some thinking as to how long you think
8 this case may take at trial.

9 Anything further? Thank you.

10 MS. HERTZ: Thank you, Your Honor.

11 (End at Tape #2, Index #4430. 2:01 p.m.)

12 * * * * *

13 I certify that the foregoing is a true and accurate
14 transcript from the electronically sound recorded record of the
15 proceedings.

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