UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re: No. 97-10709
Chapter 11

NOXSO CORPORATION

Debtor

MEMORANDUM AND ORDER

Now before the court is another motion by Edward S. Farmer. The motion asks the court to set aside the court's order that allowed the sale of the debtor's assets, including the Noxso process for removing pollutants from flue gases. This is Mr. Farmer's second attempt to have the order set aside. Mr. Farmer filed his first motion seeking to set aside the sale on December 6, 2000. On February 20, 2001, the court denied the motion. Mr. Farmer attempted to appeal that order, but the district court dismissed the appeal on the ground that it was filed after the deadline set by the rules. Mr. Farmer then filed the current motion, which is styled a motion for rehearing.

This court treated Mr. Farmer's first motion as a motion under Rule 60(b) for relief from a judgment. *Fed. R. Bankr. P.* 9024; *Fed. R. Civ. P.* 60(b). Mr. Farmer has identified the motion now under consideration as a motion under Rule 60(b).

Mr. Farmer's current motion relies on the same factual allegations as his first motion, but recasts them into a different legal theory – concealment. He argues that the debtor's

board of directors and the debtor's lawyers concealed from the court the board's lack of authority and the failure to give adequate notice to shareholders of the proposed sale.

Mr. Farmer's theory seems to be that the debtor's board and lawyers obtained approval of the sale by concealing their knowledge that the board was not legally constituted and that shareholders did not receive adequate notice of the proposed sale. The argument against the board's authority was based on the failure to hold elections. The argument as to adequate notice had three points: (1) omission of important facts, (2) failure to allow shareholders adequate time to propose a different plan, and (3) failure to give notice to major shareholders. *See, e.g.*, Docket Nos. 454, 460-1, 461-1, 466–468.

Mr. Farmer and other shareholders filed numerous pleadings asserting the board's lack of authority and lack of adequate notice to shareholders *before the court decided to allow the sale*. These problems were not concealed from the court when it decided to allow the sale. Indeed, when the court decided to allow the sale, it necessarily ruled against Mr. Farmer and the other shareholders on these very issues. Thus, there was no concealment that might justify relief under Rule 60(b).

Mr. Farmer alleges that other facts were concealed from the court in order to obtain approval of the sale. He contends that the debtor's board and its lawyers concealed violations of federal securities regulations. These allegations rest primarily on the board's alleged lack of authority, but Mr. Farmer also alleges failure to report the sale of a convertible debenture after creditors filed the involuntary petition against the debtor. Mr. Farmer's first Rule 60(b) motion included these allegations. Docket No. 514 & Exhibits.

An order denying a Rule 60(b) motion does not necessarily prevent the moving party from obtaining relief based on a second Rule 60(b) motion. If the court's order denying the

first motion did not deny relief on the grounds stated in the second motion, then the second motion must be considered separately. *United States v. Cirami*, 563 F.2d 26 (2d Cir. 1977).

Mr. Farmer's second motion does not meet this test. It is an attempt to re-argue the same problems that were alleged in his first motion. This court's decision on the first motion decided against Mr. Farmer on the issues raised by the second motion, and therefore, the second motion must be denied. *Servants of Paraclete v. Does*, 204 F.3d 1005 (10th Cir. 2000); *Sea-Land Services, Inc. v. Ceramica Europa II, Inc.*, 160 F.3d 849 (1st Cir. 1998); *Stangel v. United States (In re Stangel)*, 68 F.3d 857 (1st Cir. 1995); *Harrison v. Clemente*, 93 F.Supp.2d 856 (N. D. Ohio 2000). Accordingly,

It is ORDERED that the Motion for Rehearing filed by Edward S. Farmer on July 23, 2001, is DENIED.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P.* 7052.

ENTER:

BY THE COURT

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R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 10-2-01]