SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: September 21, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

EARNESTINE J. DUBOSE, **CASE NO. 12-02660-NPO**

DEBTOR. **CHAPTER 13**

ORDER GRANTING MOTION FOR
RECONSIDERATION AND FOR ACCOUNTING

This matter came before the Court for hearing on September 7, 2016 (the "Hearing"), on the Motion for Reconsideration and for Accounting (the "Motion") (Dkt. 115) filed by Ernestine J. Dubose, the debtor (the "Debtor"), and the Response to Debtor's Motion for Reconsideration and for Accounting (the "Response") (Dkt. 122) filed by First Tower Loan, LLC ("Tower Loan") in the above-styled chapter 13 bankruptcy case (the "Bankruptcy Case"). At the Hearing, Jim Arnold ("Arnold") appeared on behalf of the Debtor and Stacey Moore Buchanan ("Buchanan") appeared on behalf of Tower Loan. After fully considering the matter, the Court finds as follows:

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). Notice of the Motion was proper under the circumstances.

Facts

1. The Debtor initiated the Bankruptcy Case by filing a voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code on August 16, 2012 (the "Petition") (Dkt. 1).

2. The Debtor filed her Chapter 13 Plan (the "Plan") (Dkt. 7) contemporaneously with the Petition. In the Plan, the Debtor indicated that she owed mortgage arrears to Tower Loan totaling $4,351.50. (Plan at 1). The Debtor also proposed to make ongoing monthly mortgage payments of $735.00 through the Plan. (*Id.*).

3. Tower Loan filed its original Proof of Claim (the "First POC") (Bankr. Cl. 12-1) on October 15, 2012. In the First POC, Tower Loan provided that it had a claim in the total amount of $28,639.99, secured by real estate. (First POC at 1). Tower Loan filed an amended Proof of Claim (the "Second POC") (Bankr. Cl. 12-2) on January 15, 2016, stating that it had a claim in the total amount of $36,793.44, secured by real estate. (Second POC at 2). The Second POC indicated that the arrearage amount was $5,694.80. (*Id.*).

4. The Debtor filed the Objection to Amended Proof of Claim of Tower Loan (Claim #12) (the "POC Objection") (Dkt. 96) on February 9, 2016. In the POC Objection, the Debtor argued that the deadline to file proofs of claim was December 17, 2012, and that the Second POC was time-barred and should be disallowed. (POC Obj. at 1).

5. Tower Loan filed the Response of Tower Loan of Mississippi to Debtors' [*sic*] Objection to Amended Proof of Claim (the "Response to POC Objection") (Dkt. 99) on February 26, 2016. In the Response to POC Objection, Tower Loan admitted that it claimed a higher amount in the Second POC than in the First POC. According to Tower Loan, the First POC was "inadvertently filed for a payoff amount on the basis that the claim would be paid over the life of

the plan. However, the debt is being paid as a mortgage, which Tower Loan discovered in auditing the account and through conversations with the Trustee's office." (Resp. to POC Obj. at 1). Tower Loan also argued that the Second POC was timely filed because it relates back to the First POC, which was timely filed. (*Id.*).

6. Tower Loan filed a second amended Proof of Claim (the "Third POC") (Bankr. Cl. No. 12-3) on April 25, 2016, indicating that it had a claim for "Money Loaned" in the amount of $36,793.44, secured by real estate. (Third POC at 2). The Third POC[1] indicated that the total amount of arrearage was $10,370.08. (*Id.*).

7. The parties resolved their disputes and the Agreed Order on Objection to Amended Proof of Claim of Tower Loan (Claim #12) (#96) (the "Agreed Order") (Dkt. 111) was entered on June 21, 2016. In the Agreed Order, the parties agreed that the Second POC would be allowed in the total amount of $36,793.44 and that the Debtor would continue to make the regular monthly mortgage payments "until the note matures on May 15, 2016." (Agreed Order at 1). "The remaining amount of debt of $4,675.28 shall be added to the arrearage and shall be repaid over the remaining life of the plan at a rate of 0%. Tower [Loan] shall file an amended POC to reflect the adjusted arrearage amount." [2] (*Id.*). The Agreed Order further provided that the "monthly escrow shall be paid in the amount of $103.79 per month." (*Id.*).

8. On July 5, 2016, the Debtor filed the Motion. In the Motion, the Debtor stated that

[1] Throughout the pleadings, the parties referred to the First POC, the Second POC, and the Third POC collectively as "Claim #12." For the sake of clarity, the Court will hereinafter refer to the First POC, the Second POC, and the Third POC collectively as the "POC."

[2] Although the Agreed Order provided that Tower Loan would file an amended proof of claim, Tower Loan did not file another proof of claim. The Third POC, which was filed on April 25, 2016, was the last proof of claim Tower Loan filed in the Bankruptcy Case.

she opened an account with Tower Loan before she filed the Petition. (Mot. at 1). According to the Debtor, her monthly payments were in the amount of $735.00, and she commenced payment on June 15, 2011. (*Id.*). At the time she filed the Petition, the Debtor claimed that she had paid a total of $7,306.56 to Tower Loan, "as per [the First POC], of the approximate amount due of $10[,]290.00 (June 2011- July []2012) [, a] difference of $2,983.44, as the approximate arrearage amount." (*Id.*). The Debtor further argued that in the Plan, she "included additional months to allow for confirmation of said plan and proposed to pay $4[,]351.50 arrearage through September 2012." (*Id.* at 2). According to the Debtor, after the parties entered into the Agreed Order, she discovered "discrepancies in details." (*Id.* at 3). As a result, she requested that the Court reconsider the Agreed Order and require Tower Loan to provide to the Court a detailed accounting of the alleged arrearage. (*Id.* at 3).

9. In the Response, Tower Loan claimed that despite the fact that the parties entered into the Agreed Order, the "Debtor is now asking for [] reconsideration of the Order to which it agreed and to re-litigate the issues addressed in it." (Resp. at 1). Further, "[Tower Loan] denies that only $1,489.79 is owed on the account and asserts the arrearage amount was adjusted pursuant to the [Agreed Order]." (*Id.* at 2).

10. At the Hearing, the Debtor testified that she originally borrowed $28,373.39 from Tower Loan, and, including interest, the total amount she owed to Tower Loan was $44,100.00. (Hr'g at 10:04:20-10:04:27).[3] The Debtor stated that she paid Tower Loan $7,306.56 before she filed the Petition and $38,734.60 after she filed the Petition, for a total of $46,041.16. (Hr'g at 10:04:44-10:05:10). Including the payments she made to Tower Loan for June, July, and August,

[3] All citations to the Hearing are to the timestamp on the official recording of the Hearing.

the Debtor testified that she has paid Tower Loan a total of $48,111.16, which exceeds the amount she actually owed Tower Loan by $4,011.16. (Hr'g at 10:05:23). The Debtor further testified that she had been unaware Arnold had entered into the Agreed Order until she received it in the mail. According to the Debtor, when she subsequently received a copy of the Third POC in the mail, she called Arnold to inquire about the information contained in the Third POC and informed him that she wished to object because she did not owe Tower Loan any further payments. The Debtor agreed that she owed $5,000.00 in arrears, but stated that the total amount she paid to Tower Loan included that arrearage.

11. At the Hearing, Buchanan offered no evidence to contradict the Debtor's testimony, and no one from Tower Loan testified. Buchanan argued that even if the Court does reconsider the Agreed Order, the Third POC is correct as filed. Arnold argued that because Buchanan offered no evidence in support of Tower Loan's position, and offered no evidence or testimony to contradict the Debtor's testimony, the Motion should be granted. According to Arnold, after the parties entered into the Agreed Order, the Debtor discovered that she does not owe Tower Loan any more money, which constitutes cause for the Court to reconsider the Agreed Order.

Discussion

Pursuant to § 502(j),[4] the Court may reconsider an allowed or disallowed claim "for cause." 11 U.S.C. § 502(j). "A reconsidered claim may be allowed or disallowed according to the equities of the case." *Id.* Upon an appropriate motion for reconsideration, Federal Rule of Bankruptcy Procedure 3008 provides that "[a] party in interest may move for reconsideration of an

[4] Hereinafter, all code sections refer to the Bankruptcy Code found in title 11 of the U.S. Code unless indicated otherwise.

order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order." FED. R. BANKR. P. 3008. "By the express terms of section 502(j), the reconsideration of a claim cannot upset proper distributions already made to holders of other allowed claims." 4 COLLIER ON BANKRUPTCY ¶ 502.11[2] (16th ed. 2016). Unless the allowance or disallowance of a claim has come to a final resolution through an adversary proceeding, "it has been said that a motion for reconsideration of a claim presented before the order closing the estate should be timely" because § 502(j) does not contain a time limitation for bringing a motion to reconsider. 4 COLLIER ON BANKRUPTCY ¶ 502.11[3]. Furthermore, it is within the Court's discretion whether to reconsider a claim that has been previously allowed or disallowed, and if the Court does choose to reconsider, it may, after reconsideration, "allow or disallow the claim, increase or decrease the amount of a prior allowance, accord the claim a priority different from that originally assigned it, or enter any other appropriate order." *Id.* (quotation omitted).

In determining whether to reconsider a claim, § 502(j) provides that the Court must consider the equities of the case. Although the Bankruptcy Code does not indicate what constitutes "cause according to the equities of the case" so that the claim should be reconsidered, it is "an adaptable standard which reflects bankruptcy laws' roots in equity jurisprudence." 4 COLLIER ON BANKRUPTCY ¶ 502.11[5] (citations omitted). The movant's stated grounds for reconsideration do not have to be sufficient to require disallowance of the claim; "[i]t would appear that cause is shown if the grounds for the request warrant reconsideration without necessarily concluding that there is merit to them." *Id.*

Courts, including the Fifth Circuit Court of Appeals, "have likened the 'cause' standard set

forth in § 502(j) with the substantive requirements of Rule 9024 of the Federal Rules of Bankruptcy Procedure and Rule 60(b) of the Federal Rules of Civil Procedure." *Breauxsaus v. First Miss. Cap. Corp. (In re Breauxsaus),* 304 B.R. 273, 290 (Bankr. N.D. Miss. 2003); *see also Taylor v. Traina (In re Westeen),* No. CIV.A. 99-1333, 2000 WL 354369, at *4 (E.D. La. Mar. 30, 2000); *In re Wilkinson*, 457 B.R. 530, 538 (Bankr. W.D. Tex. 2011). In fact, Fifth Circuit precedent *requires* the Court to apply Rule 60(b) of the Federal Rules of Civil Procedure ("Rule 60(b)") when a claim has actually been litigated. *Ruth v. LVNV Funding, Inc.* (*In re Ruth*), 473 B.R. 152, 162 (Bankr. S.D. Tex. 2012) (citing *Colley v. Nat'l Bank of Tex. (In re Colley),* 814 F.2d 1008, 1010 (5th Cir. 1987)). On the other hand, "if the parties have not litigated the merits of a proof of claim, Rule 60 is inapplicable and the bankruptcy court has wide discretion pursuant to § 502(j) to determine whether 'cause' exists for reconsidering the allowance of a claim." *In re Jack Kline Co.,* 440 B.R. 712, 741 (Bankr. S.D. Tex. 2010). "[I]f no party objects to the allowance of a claim, then the merits of the claim will not be deemed litigated 'until the conclusion of the case,'" but the "court's allowance or disallowance of a proof of claim is a final judgment." *In re Ruth,* 473 B.R. at 162 (citation omitted). In the Bankruptcy Case, the parties did litigate the merits of the POC. Tower Loan filed several proofs of claim, to which the Debtor objected. The parties subsequently entered into the Agreed Order, which was approved by the Court, allowing the POC. Under Fifth Circuit precedent, this constituted actual litigation of the merits of the POC. Unlike the debtors in *In re Ruth* and *In re Jack Kline Co.,* the Debtor in the Bankruptcy Case did object to the POC, and the Court approved the Agreed Order granting Tower Loan an allowed proof of claim. Accordingly, because the parties litigated the validity of Tower Loan's claim,[5] the Court

[5] Courts have held that a claim is not "litigated" when no party objects to the allowance of

will look to Rule 60 in determining whether to grant the Motion.

Federal Rule of Bankruptcy Procedure 9024 incorporates Rule 60(b), except in certain circumstances that are inapplicable in the Bankruptcy Case. Rule 60(b) provides that on appropriate motion:

> [T]he court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered . . . (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . . ;or (6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b). Although neither party cited Rule 60(b) and the Debtor did not argue that a particular provision of Rule 60(b) warranted reconsideration of the Agreed Order, it is clear that Rule 60(b)(3)-(5) is inapplicable. The Debtor made it clear through her testimony at the Hearing that she did not review the Agreed Order prior to Arnold signing it. Buchanan did not offer any evidence to refute the Debtor's contention. Arnold stated that after he signed the Agreed Order, the Debtor informed him that she had overpaid and did not owe the amount alleged by Tower Loan. Thus, it appears that the only plausible provisions of Rule 60(b) that could be satisfied so that the Motion should be granted are Rule 60(b)(1), (2), or (6).

I. Rule 60(b)(1)

Under Rule 60(b)(1), the Court may reconsider an order for "mistake, inadvertence, surprise, or excusable neglect." FED. R. CIV. P. 60(b)(1). It appears that neither the "mistake" prong nor the "surprise" prong of Rule 60(b)(1) is applicable. There was no mistake made

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a claim and, therefore, the claim is deemed allowed. *In re Ruth*, 473 B.R. at 162; *In re Wilkinson*, 457 B.R. at 539; *In re Westeen*, 2000 WL 354369, at *4-5. "Although a claim is 'deemed allowed' if no party in interest objects, such a determination is not final until the conclusion of the case." *In re Jack Kline Co.*, 440 B.R. at 741.

because the Debtor does not allege that Arnold mistakenly signed the Agreed Order, for example, or allege any other facts that would indicate a mistake was made. Similarly, Arnold did not ask the Debtor for information regarding the amount of the POC. It appears from the Debtor's testimony that she possessed the documentation and evidence regarding her payment history before Arnold signed the Agreed Order; she just did not have the knowledge or opportunity to provide it to Arnold. Because neither the "mistake" prong nor the "surprise" prong is applicable, the Court will determine whether either of the remaining two (2) prongs may be applicable.

The Fifth Circuit has held that "[i]mplicit in the fact that Rule 60(b)(1) affords extraordinary relief is the requirement that the movant make a sufficient showing of unusual or unique circumstances justifying such relief." *Pryor v. U.S. Postal Serv.,* 769 F.2d 281, 286 (5th Cir. 1985). The Fifth Circuit has also held that Rule 60(b)(1) relief is generally inappropriate when a party demonstrates "[g]ross carelessness, ignorance of the rules, or ignorance of the law." *Edward H. Bohlin Co. v. Banning Co.,* 6 F.3d 350, 356 (5th Cir. 1993). The "inadvertence" prong allows a court to reconsider an order "if a party or attorney has failed to complete some required action despite exercising due diligence." *In re Wilkinson,* 457 B.R. at 540. However, "a court will deny relief on a determination that the facts and circumstances demonstrate a lack of diligence in pursuing or defending action." *Id.* "The determination of due diligence is a fact question." *Contreras v. Chavez,* 420 F. App'x 379, 381 (5th Cir. 2011) (quotation omitted). The standard for determining whether a party exercised due diligence "is the ordinary prudent person standard." *Saenz v. Keller Indus. of Tex., Inc.,* 951 F.2d 665, 667 (5th Cir. 1992). "[L]ack of due diligence may be found as a matter of law if the [party] offers no excuse for his failure to [take action], or if the [party's] excuse conclusively negates diligence." *Id.* (citation omitted).

In the Bankruptcy Case, Arnold could have discovered that the Debtor believed the POC amount asserted by Tower Loan was incorrect by exercising due diligence. The Debtor testified that she called Arnold when she received the Agreed Order and Third POC, which indicates she would have explained the discrepancy to Arnold had he inquired. At the Hearing, the Debtor also possessed a folder of documentation she could have given to Arnold to support her claim that she owed no further payment to Tower Loan. The Court finds that a lawyer's failure to discuss fully a proposed agreed order with his client prior to agreeing to it constitutes a lack of due diligence. Accordingly, the Court is unable to conclude that Arnold's mistake in approving the Agreed Order was inadvertent.

For the reason stated above, the Court is also unable to determine that the Agreed Order the Debtor now wishes the Court to reconsider is based on "excusable neglect." Courts have found that it is an abuse of discretion for a court to grant a motion under Rule 60(b)(1) "when the reason asserted as justifying relief is one attributable solely to counsel's carelessness with or misapprehension of the law or the applicable rules of court." *In re Pinewood Homes, Inc.*, No. 06-10385, 2007 WL 4368065, at *3 (Bankr. S.D. Tex. Dec. 13, 2007) (quoting *Lowe v. Citibank (S.D.), N.A. (In re C. Lynch Builders, Inc.)*, Adv. No. 07-5018-C, 2007 WL 2363029, at *7 (Bankr. W.D. Tex. Aug. 15, 2007)). Because the fault in approving the Agreed Order when the terms may not have been accurate ultimately lies with Arnold, the Court would abuse its discretion if it were to grant the Motion based on "excusable neglect." Accordingly, because the Agreed Order was not approved by mistake, inadvertence, surprise, or excusable neglect, the Court cannot grant the Motion pursuant to Rule 60(b)(1).

II. Rule 60(b)(2)

Rule 60(b)(2) would allow the Court to grant the Motion based on "newly discovered evidence which by due diligence could not have been discovered . . . ." FED. R. CIV. P. 60(b)(2). Rule 60(b)(2) is a two-prong test, and both of the following prongs must be satisfied in order for relief to be granted: the movant must demonstrate "(1) that it exercised due diligence in obtaining the information; and (2) that the evidence is material and controlling and clearly would have produced a different result if present before the original judgment." *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 639 (5th Cir. 2005) (citation omitted). "A judgment will not be reopened if the evidence is merely cumulative or impeaching and would not have changed the result." *Id.* at 640.

While the "newly discovered" evidence regarding the POC amount may be material and could change the result of the Agreed Order, as the Court previously discussed in Section I above, Arnold did not exercise due diligence before entering into the Agreed Order. Had he discussed the Agreed Order with the Debtor, she would have informed him that she believed the substance of the Agreed Order to be incorrect. Because Arnold did not exercise due diligence in contacting his client, gathering information, and obtaining evidence before entering into the Agreed Order, the Court cannot grant the Motion under Rule 60(b)(2).

III. Rule 60(b)(6)

The Fifth Circuit has "construed a successful motion for relief pursuant to Rule 60(b)(6) as one where the claim for relief is based on extraordinary circumstances and not falling within any of the preceding categories." *Hinojosa Engin., Inc. v. Lopez (In re Treyson Dev., Inc.),* Adv. No. 15-7014, 2016 WL 1604347, at *14 (Bankr. S.D. Tex. Apr. 19, 2016) (citing *Williams v. Thaler*, 524 F. App'x 960, 963 (5th Cir. 2013); *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012).

Pursuant to Rule 60(b)(6), "federal courts have broad authority to relieve a party from a final judgment upon terms as are just, provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *In re Treyson Dev. Inc.*, 2016 WL 1604347, at *15 (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862-63 (1988)). The "any other reason" language of Rule 60(b)(6) is "commonly referred to as a 'grand reservoir of equitable powers to do justice.'" *Adams v. Thaler,* 679 F.3d 312, 319 (5th Cir. 2012) (quoting *Rocha v. Thaler,* 619 F.3d 387, 400 (5th Cir. 2010)).

The Court finds that, under the specific facts of the Bankruptcy Case, the Motion should be granted pursuant to Rule 60(b)(6). As the Court previously concluded, Rule 60(b)(3)-(5) is inapplicable, and neither Rule 60(b)(1) or Rule 60(b)(2) is satisfied. Further, based upon her uncontroverted sworn testimony, the Debtor did not review the Agreed Order prior to Arnold agreeing to it. Upon receiving a copy of the Agreed Order and the Third POC, the Debtor testified that she immediately contacted Arnold because she believed that she did not owe Tower Loan any further payment. Tower Loan offered no evidence, no documents, and no testimony to support its opposition to the Motion. The Court finds that based on the unusual circumstances of the Bankruptcy Case, denying the Motion would yield an inequitable result. Assuming the Debtor's document review was accurate, she has overpaid Tower Loan by approximately $4,000.00. Requiring her to overpay further would be inequitable and would jeopardize the "fresh start" afforded to her by the Bankruptcy Code. Accordingly, the Court finds that Rule 60(b)(6) is satisfied, and the Motion should be granted.

Conclusion

Because the Agreed Order allowed the POC, the merits of the POC were "actually

litigated" so that Rule 60(b) applies to the Motion under § 502(j). Therefore, one (1) of the six (6) enumerated provisions of Rule 60(b) must be satisfied in order for the Court to grant relief. The Court finds that Rule 60(b)(6) is satisfied. If the Court were to deny relief, it would cause an inequitable result for the Debtor, who did not review the Agreed Order prior to its entry. The Court finds that these unusual facts warrant a finding of "extraordinary circumstances" entitling the Debtor to relief. In sum, the Debtor met her burden of showing that the Court should reconsider the Agreed Order. The Court lacks sufficient information or evidence, however, that would allow it to determine the amount of the POC. The Court, therefore, finds that (1) the Motion should be granted; (2) Tower Loan should have fourteen (14) days from the date of this Order in which to submit an accounting that supports the Third POC; and (3) the Debtor should have fourteen (14) days from the date Tower Loan submits its accounting in which to respond. If necessary, the Court will then set the matter for hearing by separate notice.

IT IS, THEREFORE, ORDERED that the Motion is hereby granted.

IT IS FURTHER ORDERED that Tower Loan shall have fourteen (14) days from the date of this Order in which to submit an accounting supporting the Third POC.

IT IS FURTHER ORDERED that the Debtor shall have fourteen (14) days from the date Tower Loan files its accounting in which to file a response.

##END OF ORDER##