SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: April 4, 2014

**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:**

**INEZ ALESIA PORTER,** **CASE NO. 13-02186-NPO**

**DEBTOR.** **CHAPTER 13**

**ORDER DENYING AMENDED MOTION TO REINSTATE**

There came on for hearing on March 25, 2014 (the "Hearing"), the Amended Motion to Reinstate (the "Reinstatement Motion") (Dkt. 48) filed in the above-referenced bankruptcy case (the "Bankruptcy Case") by Schwartz & Associates, P.A. (the "Schwartz Firm"), the law firm retained by the Debtor, Inez Alesia Porter (the "Debtor"), to represent her in a personal injury claim. No written response was filed to the Reinstatement Motion. The following attorneys appeared at the Hearing: Jessica Elizabeth Murray of the Schwartz Firm; J. Thomas Ash ("Ash"), the Debtor's former bankruptcy counsel; and Catoria Martin, counsel for James L. Henley, Jr., the chapter 13 trustee (the "Trustee").

**Jurisdiction**

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. These are core proceedings under 28 U.S.C. § 157(b)(2)(A) and (O). Notice of the Reinstatement Motion was proper under the circumstances.

## Facts

1. The Debtor sustained personal injuries in a two-car accident on October 2012, and retained the Schwartz Firm to pursue a claim against the other driver (the "2012 Tort Claim").

2. On July 16, 2013, the Debtor filed a voluntary petition for relief under chapter 13 of the U.S. Bankruptcy Code (Dkt. 1).

3. The Debtor listed a "[p]ossible lawsuit" of "unknown" value in Schedule B – Personal Property ("Schedule B") (Dkt. 6) of her bankruptcy schedules. (*Id.*). She did not describe the nature of the "[p]ossible lawsuit" or identify the Schwartz Firm as her attorney, but all counsel at the Hearing agreed that the "[p]ossible lawsuit" and the 2012 Tort Claim are the same.

4. The Debtor filed her proposed chapter 13 plan on July 26, 2013. (Dkt. 7). The meeting of creditors under 11 U.S.C. § 341[1] took place on August 27, 2013. (Dkt. 11).

5. The Trustee filed the Trustee's Motion to Dismiss (Dkt. 18) on August 29, 2013. That same day, the Court signed an Agreed Order (Dkt. 19) dismissing the Bankruptcy Case, without further notice or hearing, if the Debtor became more than sixty (60) days behind in her plan payments. (*Id.*).

6. In the Order Confirming the Debtor's Plan, Awarding a Fee to the Debtor's Attorney and Related Orders (the "Confirmation Order") (Dkt. 27), the Court confirmed the Debtor's proposed chapter 13 plan, with certain amendments (the "Plan") (Dkt. 27 at 4-6). The confirmed Plan, entered on October 3, 2013, required the Debtor to pay the Trustee $529.00 per month for sixty (60) months. (*Id.*). Most of these payments (exclusive of certain fees) would be disbursed during the life of the Plan to the Debtor's secured creditors. Her unsecured creditors,

[1] Hereinafter, all statutory references are to the U.S. Bankruptcy Code (the "Code"), 11 U.S.C. § 101 *et seq.*

whose claims totaled approximately $46,792.61, would receive only a one percent (1%) *pro rata* distribution.

7. The Schwartz Firm settled the 2012 Tort Claim in November 2013. Only then did the Schwartz Firm become aware of the Bankruptcy Case.

8. About one (1) month later, on December 27, 2013, the Debtor filed a Motion to Dismiss (the "Dismissal Motion") (Dkt. 36) her Bankruptcy Case. The Dismissal Motion stated simply "[t]hat debtor seeks to have said case dismissed." (Dis. Mot. ¶ 1).

9. The Court entered the Order of Dismissal (the "Dismissal Order") (Dkt. 37) on December 30, 2013. *See* 11 U.S.C. § 1307(b) ("On request of the debtor at any time . . . the court shall dismiss a case under this chapter."). No appeal was filed from the Dismissal Order.

10. On January 31, 2014, one (1) month after entry of the Dismissal Order, the Schwartz Firm filed the Reinstatement Motion. In the Reinstatement Motion, the Schwartz Firm asks the Court to "reinstate" the Bankruptcy Case "so that they can obtain bankruptcy court approval regarding a settlement reached . . . in the amount of $11,116.00 plus Medical Payments in the amount of $1,000.00." (Rein. Mot. ¶ 3). This proposed settlement resolves the 2012 Tort Claim.

11. The Debtor did not appear at the Hearing.

12. Ash, the Debtor's former bankruptcy counsel, opposed the Reinstatement Motion at the Hearing. According to Ash, he filed the Dismissal Motion on the Debtor's behalf because the Debtor wished to deal directly with her creditors. He had no reason to believe that the Debtor had changed her mind since then. Ash questioned whether it was appropriate for the Schwartz Firm to file the Reinstatement Motion without the Debtor's apparent consent. Notably,

he also stated that the Debtor had not authorized him to oppose the Reinstatement Motion on her behalf.

13. The Trustee supported the Reinstatement Motion at the Hearing. Indeed, it was the Trustee who asked the Schwartz Firm not to disburse the settlement money and seek reinstatement of the Bankruptcy Case. The Trustee's objective was to prevent the Debtor from spending the settlement money until the Trustee could determine whether the settlements funds constituted property of the Debtor's chapter 13 estate.

14. As of the Hearing, the settlement funds remain in possession of the Schwartz Firm, and no portion has been disbursed to the Debtor.

**Discussion**

The Reinstatement Motion does not cite the legal basis for the relief requested. *See* KEITH M. LUNDIN & WILLIAM H. BROWN, CHAPTER 13 BANKRUPTCY 4th ed. § 340.1, ¶ 1, http:/www.chapter13online.com (noting that bankruptcy cases are reinstated when the legal authority for doing so is not always apparent). There is no provision in the Code governing the "reinstatement" of a bankruptcy case. *Dehart v. Lampman (In re Lampman)*, 494 B.R. 218, 222 (Bankr. M.D. Pa. 2013). The "reopening" of a bankruptcy case, however, is addressed specifically in § 350(b). Under § 350(b), a bankruptcy court may reopen a closed case "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b);[2] *see*

[2] Section 350 reads, in full:

> (a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.
>
> (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

11 U.S.C. § 350.

FED. R. BANKR. P. 5010 ("A case may be reopened on motion . . . pursuant to § 350(b) of the Code.").

At first glance, § 350(b) would seem to support the relief sought by the Schwartz Firm because the statute provides a mechanism for reopening a case to allow the Trustee to administer assets of the estate. Upon closer look, it becomes clear that § 350(b) does not apply under these facts because the Debtor's Bankruptcy Case was never "closed."[3] *See Armel Laminates, Inc. v. Lomas & Nettleton Co. (In re Income Prop. Builders, Inc.)*, 699 F.2d 963, 965 (9th Cir. 1982) (holding that the word "reopened" in § 350(b) must be read in connection with the word "closed" in § 350(a)). Even if it were closed, § 350(b) would not apply because the Debtor's personal injury claim was identified in Schedule B before the Debtor voluntarily dismissed her Bankruptcy Case. 3 COLLIER ON BANKRUPTCY ¶ 350.03[1] (16th ed. 2013) (reopening under § 350(b) permits the administration of *newly discovered* assets that were unscheduled during the case and unknown to the trustee).

Regardless, the most relevant reason for rejecting application of § 350(b) is because the Schwartz Firm asks the Court to "reinstate" the Bankruptcy Case, not "reopen" it. The distinction is important. The effect of the dismissal of the Debtor's Bankruptcy Case under § 349 was to "revest the property of the estate in the entity in which such property was vested immediately before the commencement of the case." 11 U.S.C. § 349(b)(3). It also effectively

[3] There is a split of authority as to whether § 350(b) even applies to a case closed after a dismissal. *See In re King*, 214 B.R. 334, 335 (Bankr. W.D. Tenn. 1997) (holding that § 350(b) does not apply to a dismissed case that has been subsequently closed because a dismissed case terminates for reasons other than the full administration of the estate); *In re Garcia*, 115 B.R. 169, 170 (Bankr. N.D. Ind. 1990) (same). *But see In re Ross*, 278 B.R. 269, 272-73 (Bankr. M.D. Ga. 2001) (holding that a dismissed case that is subsequently closed may be "fully administered" and subject to being reopened under § 350(b)). Because the Bankruptcy Case was dismissed, not closed, when the Reinstatement Motion was filed, that issue is not before the Court.

terminated the Debtor's Plan.[4] *Wells Fargo Bank, N.A. v. Oparaji (In re Oparaji)*, 698 F.3d 231, 238 (5th Cir. 2012) (holding that purpose of § 349(b) is to undo the bankruptcy case as far as is practicable). By "reopening" the Bankruptcy Case under § 350(b), the Bankruptcy Case would not be restored to its status prior to the Dismissal Order but would merely continue in its same posture. *Diviney v. NationsBank of Tex. (In re Diviney)*, 225 B.R. 762, 770 (B.A.P. 10th Cir. 1998) (discussing the different consequences that flow from "reinstating" a case and "reopening" a case), *abrogated on other grounds by Johnson v. Smith (In re Smith)*, 501 F.3d 1163 (10th Cir. 2007). Hence, if the Trustee is to administer the settlement proceeds as property of the Debtor's estate, the Dismissal Order must be set aside. *Lampman*, 494 B.R. at 222 (listing bankruptcy cases in which courts have treated a motion to reinstate as a request to vacate an order of dismissal); *Diviney v. NationsBank of Tex. (In re Diviney)*, 211 B.R. 951, 962-68 (Bankr. N.D. Okla. 1997) ("Although couched as a motion to reinstate, the motion can only be considered a motion to vacate the Dismissal Order."), *aff'd*, 225 B.R. 762 (B.A.P. 10th Cir. 1998), *abrogated on other grounds by Johnson v. Smith (In re Smith)*, 501 F.3d 1163 (10th Cir. 2007).

The setting aside of a final order or judgment is governed by Rule 9023 or 9024 of the Federal Rules of Bankruptcy Procedure ("Rule 9023" or "Rule 9024"). Rules 9023 and 9024, respectively, incorporate most of the provisions of Rules 59 and 60 of the Federal Rules of Civil Procedure.

According to the Fifth Circuit Court of Appeals, courts should consider a motion for relief from a final order filed within the time permitted by Rule 59 as a motion to alter or amend the order under Rule 59; otherwise, it should be treated as a Rule 60 motion. *Harcon Barge Co.*

[4] The Confirmation Order reflects this effect on the Plan: "All property shall remain property of the estate and shall vest in the debtor only upon dismissal, discharge or conversion." (Dkt. 27 at 2).

*v. D&G Boat Rentals, Inc.*, 784 F.2d 665, 668 (5th Cir. 1986). Rule 59 requires that a motion be filed no more than fourteen (14) days after entry of the order. FED. R. CIV. P. 59. Rule 60(c) provides a longer period for seeking relief from a final order than Rule 59. Rule 60(c) requires that a motion under Rule 60(b)(1)-(5) be filed "no more than a year after the entry of the judgment or order or the date of the proceeding." FED. R. CIV. P. 60(c). The Debtor filed the Reinstatement Motion more than fourteen (14) days, but less than one (1) year, after the Dismissal Order.[5] For this reason, the Court considers the Reinstatement Motion under the standards of Rule 60.

Rule 60(b) authorizes a court, in its discretion, to grant relief from an order or judgment for five (5) specific reasons: "mistake, inadvertence, surprise, or excusable neglect" (Rule 60(b)(1)); "newly discovered evidence" (Rule 60(b)(2)); "fraud . . . , misrepresentation, or misconduct by an opposing party" (Rule 60(b)(3)); "the judgment is void" (Rule 60(b)(4)); and "the judgment has been satisfied, released, or discharged" (Rule 60(b)(5)). The last ground for relief in Rule 60(b)(6) is a catchall provision that allows a court to set aside a final judgment because of "any other reason that justifies relief." FED. R. CIV. PROC. 60(b)(6)

The Reinstatement Motion does not refer to Rule 60 or any other authority and, consequently, does not identify which of the Rule 60(b) grounds might apply. As to that inquiry, the following facts and procedural history of the Debtor's Bankruptcy Case are undisputed: the Debtor sustained personal injuries in a car accident and retained the Schwartz Firm to pursue the 2012 Tort Claim; she initiated her Bankruptcy Case on July 16, 2013; she submitted her proposed chapter 13 plan and disclosed the existence of a "[p]ossible lawsuit" in Schedule B on

[5] Prior to the Reinstatement Motion, the Debtor filed a Motion to Reopen/Reinstate (Dkt. 42) on January 23, 2014. Even if the Reinstatement Motion is related back to this earlier date, it still was filed more than fourteen (14) days from the date of the Dismissal Order.

July 26, 2013; the § 341 meeting of creditors took place on August 27, 2013; she signed an Agreed Order with the Trustee agreeing to the dismissal of her Bankruptcy Case, without further notice or hearing, if she became delinquent in her plan payments more than sixty (60) days; the Court confirmed her chapter 13 Plan on October 3, 2013; the Schwartz Firm settled the 2012 Tort Claim in November, 2013, the Debtor voluntarily filed the Dismissal Motion on December 27, 2013; the Court entered the Dismissal Order on December 30, 2013; and the Schwartz Firm filed the Reinstatement Motion on January 31, 2014.

With respect to Rule 60(b)(1) and (3), there are no facts in the above history that suggest that the Bankruptcy Case was dismissed by mistake, inadvertence, surprise, excusable neglect, or fraud. FED. R. CIV. P. 60(b)(1),(3). Although the Trustee argued at the Hearing that the Dismissal Order entered on December 30, 2013 came as a surprise, the Debtor's disclosure of a "[p]ossible lawsuit" in Schedule B, filed on July 26, 2013, should have led the Trustee to inquire further. The Trustee had the opportunity to question the Debtor about the "[p]ossible lawsuit" at the meeting of creditors on August 27, 2013. (Dkt. 11). For reasons that are unclear to the Court, the Trustee took no action before the Debtor's voluntary dismissal of the Bankruptcy Case.

As to Rule 60(b)(2), (4), and (5), there are no facts indicating that the Dismissal Order is void or that new evidence was discovered after its entry. FED. R. CIV. P. 60(b)(2),(4). As to Rule 60(b)(4), the Debtor disclosed the "[p]ossible lawsuit" in Schedule B shortly after she initiated her Bankruptcy Case. FED. R. CIV. P. 60(b)(4). Rule 60(b)(5), pertaining to the satisfaction or release of judgments, is facially inapplicable.

Having found that the facts fail to show sufficient grounds for setting aside the Dismissal Order under the specific categories of Rule 60(b)(1)-(5), the Court turns to the only remaining

ground under Rule 60, which is the "any other reason that justifies relief" provision under Rule 60(b)(6). In considering that ground for relief, the Court is mindful that the Fifth Circuit has consistently held that "relief under Rule 60(b) is considered an extraordinary remedy . . . [and that] '[t]he desire for a judicial process that is predictable mandates caution in reopening judgments.'" *Carter v. Fenner*, 136 F.3d 1000, 1007 (5th Cir. 1998) (quoting *Bailey v. Ryan Stevedoring Co., Inc.*, 894 F.2d 157, 160 (5th Cir. 1990)).

The Court does not find any extraordinary circumstances that would warrant Rule 60(b)(6) relief. At the Hearing, the Trustee asserted the possibility that the Debtor planned at the outset to dismiss her Bankruptcy Case once the Schwartz Firm succeeded in negotiating a settlement of the 2012 Tort Claim. In this way, the Debtor could benefit from the protections afforded by the automatic stay under § 362 during the pendency of her Bankruptcy Case and keep the settlement funds to the detriment of her unsecured creditors. The Trustee was unable to present any evidence supporting this theory at the Hearing. To the contrary, the facts showed that the Debtor acted within her rights under the Code to dismiss her Bankruptcy Case voluntarily. *See* 11 U.S.C. § 1307(b) ("On request of the debtor at any time . . . the court shall dismiss a case under this chapter). *But see Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007) (holding that a chapter 7 debtor's right to convert to a chapter 13 case is subject to an exception for bad faith conduct).

In a similar vein, there are constitutional and practical concerns that weigh against reinstatement. If the Court were to reinstate the Bankruptcy Case, the Debtor would be forced back into a chapter 13 case involuntarily. Yet Congress intended chapter 13 to be voluntary, due to the constitutional prohibition on involuntary servitude in the Thirteenth Amendment. *But see*

*Jacobsen v. Moser (In re Jacobsen)* 609 F.3d 647, 659 (5th Cir. 2010) (upholding a court's discretion to deny a debtor's bad-faith request to dismiss a chapter 13 case under § 1307(b)).

There are also practical matters that the Reinstatement Motion does not address that render reinstatement problematic. Rule 60 requires that the evidence show that "a fair probability of success on the merits exist[s] if the [Dismissal Order] were to be set aside." *Fed. Savs. & Loan Ins. Corp. v. Kroenke*, 858 F.2d 1067, 1069 (5th Cir. 1988). How will the Debtor cure the arrearage under the Plan? Will she be able to complete all Plan payments?

The Court concludes that the Bankruptcy Case should not be reinstated based on the facts presented here. Under different facts, however, the Court might reinstate a chapter 13 case dismissed prior to completion of a plan, but not closed, under Rule 60(b). For example, if the plan had been near completion and the Debtor herself had asked for reinstatement, the Court might reach the opposite result. *See, e.g.*, *Aubain v. LaSalle Nat'l Bank (In re Aubain)*, 296 B.R. 624 (Bankr. E.D.N.Y. 2003) (reinstating dismissed case in 57th month of chapter 13 plan under Rule 60(b)(6) after debtor paid remaining amount due). Under these facts, where the Plan was in its fourth month, the Dismissal Order was entered at the Debtor's request, the only reason asserted for reinstatement is the distribution of settlement proceeds, and the Debtor's consent to reinstatement of her chapter 13 Bankruptcy Case was not clearly given, the Court finds that the standards of Rule 60(b) have not been met and concludes that the Reinstatement Motion should be denied.

IT IS, THEREFORE, ORDERED that the Reinstatement Motion hereby is denied.

##END OF ORDER##