



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: August 7, 2015

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:

**DANIEL JAMES HUSSER, SR. AND
NIKI PALERMO HUSSER,**

CASE NO. 14-02084-NPO

DEBTORS.

CHAPTER 7

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

This matter came before the Court for hearing on August 3, 2015 (the "Hearing") on the Motion for Relief from Judgment (the "Motion for Relief") (Dkt. 73)¹ filed by Daniel James Husser, Sr. ("Daniel Husser") and Niki Palermo Husser (together, the "Debtors") and the Trustee's Response to Motion for Relief from Judgment (the "Response") (Dkt. 82) filed by the standing chapter 7 trustee, Eileen N. Shaffer (the "Trustee"), in the Bankruptcy Case. At the Hearing, Robert M. Peebles, III represented the Debtors, and the Trustee represented herself. At the conclusion of the Hearing, the Court ruled from the bench and denied the Motion for Relief. This Order memorializes and supplements that bench ruling.

¹ Citations to the record are as follows: (1) citations to docket entries in the above-styled bankruptcy case (the "Bankruptcy Case") are cited as "(Dkt. ____)" and (2) citations to docket entries in adversary proceeding number 14-00078-NPO (the "Adversary") are cited as "(Adv. Dkt. ____)".

Jurisdiction

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

Facts

1. On June 30, 2014, the Debtors filed a voluntary petition for relief (the “Petition”) (Dkt. 1) under chapter 7 of the Bankruptcy Code.
2. On July 14, 2014, the Debtors filed their statements and schedules (the “Statements and Schedules”) (Dkt. 9). The Debtors did not list any real property on Schedule A–Real Property (“Schedule A”) (Dkt. 9 at 3) or Schedule C–Property Claimed as Exempt (“Schedule C”) (Dkt. 9 at 8). On the Statement of Financial Affairs (“SOFA”) (Dkt. 9 at 21-28), the Debtors disclosed a pre-petition transfer to the Husser Family, LP of certain real property described as “The West Half of the Southwest Quarter of the Northeast Quarter, and all that part of the Southeast Quarter of the Northwest Quarter lying East of the county road, containing 60 acres, more or less, in Section 25, Township 4 North, Range 5 East, Amite County, Mississippi” (the “Amite County Property”). The Debtors did not refer to Husser Family, LP or Husser Asset Management, LLC anywhere else in the Statements and Schedules.
3. On October 16, 2014, the Trustee initiated the Adversary against the Debtors by filing the Complaint to Set Aside a Fraudulent Conveyance (the “Complaint”) (Adv. Dkt. 1). In the Complaint, the Trustee asked the Court to set aside the transfer of the Amite County Property

pursuant to 11 U.S.C. § 548² on the ground the Debtors had fraudulently transferred the Amite County Property to the Husser Family, LP, a limited partnership in which Husser Asset Management, LLC is the general partner. (Adv. Dkt. 1, Ex. B). The Trustee further alleged that Husser Asset Management, LLC is a limited liability company in which the debtor Daniel Husser is its manager/member. (Adv. Dkt. 1, Ex. A).

4. On December 31, 2014, the Court entered the Agreed Order (the “Agreed Order”) (Adv. Dkt. 12) in the Adversary, transferring the Amite County Property to the Trustee for liquidation and distribution to the Debtors’ creditors in the Bankruptcy Case.

5. On January 27, 2015, the Debtors filed amended versions of Schedule A and Schedule C in the Bankruptcy Case. (Dkt. 54). On Schedule A–Real Property–Amended, the Debtors listed the Amite County Property³ as an asset of the estate, and on Schedule C–Property Claimed as Exempt–Amended, the Debtors claimed a homestead exemption of \$75,000.00 under

² Hereinafter, all code sections refer to the United States Bankruptcy Code (the “Code”) found at title 11 of the United States Code unless otherwise noted.

³ Although the Debtors’ description of the real property listed in the amended schedules does not mirror the description of the Amite County Property provided in the SOFA or the exhibits attached to the Agreed Order, both the Trustee and the Debtors assert that the description refers to the Amite County Property that was the subject of the Adversary. Therefore, the Court will refer to the property the Debtors added to the amended versions of Schedule A and Schedule C as the “Amite County Property.”

MISS. CODE ANN. § 85-3-21.⁴

6. On February 3, 2015, the Trustee filed the Trustee's Objection to Debtors' Amended Exemptions (the "Objection") (Dkt. 59). At the hearing held on the Objection on March 9, 2015 (the "Exemption Hearing"), the Trustee argued that the Debtors could not claim a homestead exemption on the Amite County Property pursuant to MISS. CODE ANN. § 85-3-21 because they did not own the Amite County Property on the date they filed the Petition. *See Berry v. Dobson*, 10 So. 45 (Miss. 1891) (holding that homestead right is founded on ownership of some assignable interest in the property).

7. The Debtors filed the Response to Trustee's Objection to Debtor's [*sic*] Amended Exemptions (Dkt. 62) asserting that they held a sufficient ownership interest in the Amite County Property to satisfy the requirements for a homestead exemption under MISS. CODE ANN. § 85-3-21 because: (1) the Agreed Order that granted the Complaint reverted ownership of the Amite County Property to the Debtors retroactive to the date the Debtors had transferred the Amite County Property to the Husser Family, LP and (2) the Debtors had always maintained an assignable interest in the Amite County Property, notwithstanding the transfer, by virtue of their exclusive control of Husser Asset Management, LLC and Husser Family, LP.

8. On April 10, 2015, the Court entered the Order Sustaining Trustee's Objection to

⁴ Mississippi's homestead exemption law provides, in pertinent part:

Every citizen of this state . . . being a householder shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence by him, or her, but the quantity of land shall not exceed one hundred sixty (160) acres, nor the value thereof, inclusive of improvements, save as hereinafter provided, the sum of Seventy-five Thousand Dollars (\$75,000.00).

MISS. CODE ANN. § 85-3-21.

Debtors' Amended Exemptions (the "Exemption Order") (Dkt. 64). Relying on § 522(g),⁵ the Court found that the Debtors could claim the Amite County Property as exempt homestead under Mississippi law only if the transfer was involuntary and the Debtors did not conceal the property. 11 U.S.C. § 522(g); *Law v. Siegel*, 134 S. Ct. 1188, 1196 (2014) (noting that the Code "sets forth a number of carefully calibrated exceptions and limitations, some of which relate to the debtor's misconduct"). Unless the Debtors satisfied the requirements of § 522(g), it was unnecessary for the Court to consider the requirements of MISS. CODE ANN. § 85-3-21. The Court then concluded that the Debtors' transfer of the Amite County Property was not involuntary because the Debtors transferred the Amite County Property to the Husser Family, LP by a warranty deed, Daniel Husser is the manager/member of Husser Asset Management, LLC (and Husser Asset Management, LLC is the general partner of Husser Family, LP), and the Debtors themselves alleged that the transfer of the Amite County Property was "initiated and effectuated as a means of estate planning." (Dkt. 62 at ¶ 5). Accordingly, the Court ruled in the Exemption Order that the Debtors may not claim the Amite County Property as exempt homestead pursuant to § 522(g) and sustained the Objection. The Debtors did not appeal the Exemption Order.

⁵ Section 522(g) provides in relevant part:

Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if—

(1) (A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property

11 U.S.C. § 522(g)(1).

9. On July 2, 2015, the Debtors filed the Motion for Relief seeking reconsideration of the Exemption Order on grounds of newly discovered evidence under Rule 60(b)(2) of the Federal Rules of Civil Procedure (“Rule 60”), as made applicable by Rule 9024 of the Federal Rules of Bankruptcy Procedure.⁶ The Debtors maintain in the Motion for Relief that the Trustee provided inaccurate information to the Court at the Exemption Hearing about the “true” value of the Amite County Property that led the Court mistakenly to assume that “only about sixty (60) percent of the Debtors’ total liabilities would be paid in full” from the proceeds of the sale of the Amite County Property. They contend in the Motion for Relief that the “true” value of the Amite County Property is its listing sales price of \$266,205.00, as set forth in an appraisal conducted after the Exemption Hearing, rather than the Trustee’s estimated value of only \$159,000.00, and, thus, the sale of the Amite County Property could generate proceeds sufficient to pay all creditors in full and even a surplus. The Debtors ask the Court to reconsider the Exemption Order because the Court was “likely influenced by the inaccurate value.” They seek an amendment to the Exemption Order recognizing the Debtors’ homestead exemption.

Discussion

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 of the Federal Rules of Civil Procedure (“Rule 59”) as a motion to alter or amend the order under Rule 59; otherwise, it should

⁶ In the first paragraph of the Motion for Relief, the Debtors cite not only Rule 60(b)(2) but also Rule 60(b)(3), which includes as grounds for relief “fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party.” FED. R. CIV. P. 60(b)(3). Because the Debtors did not mention Rule 60(b)(3) in the Motion for Relief anywhere other than in the first paragraph and did not refer to Rule 60(b)(3) at the Exemption Hearing, the Court considers the Debtors’ request for relief solely under Rule 60(b)(2).

be treated as a Rule 60 motion. *Harcon Barge Co. 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). Because the Debtors filed the Motion for Relief more than fourteen (14) days after the Exemption Order, but less than one (1) year, and because the Debtors do not cite Rule 59 in the Motion for Relief, the Court considers the Motion for Relief under the standards of Rule 60(b).

Rule 60(b) authorizes a court, in its discretion, to grant relief from an order or judgment for “newly discovered evidence that, with reasonable diligence, could not have been discovered in time for a new trial under Rule 59(b).” The Fifth Circuit Court of Appeals has held that “[t]o succeed on a motion brought under 60(b)(2) based on newly discovered evidence, the movant must demonstrate (1) that it exercised due diligence in obtaining the information and (2) the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment.” *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 999 (5th Cir. 2001) (citation omitted).

Near the end of the Exemption Hearing, the Court asked the Trustee about the estimated value of the Amite County Property. The Trustee responded that she had not yet obtained an appraisal of the Amite County Property because she did not want to incur the expense before the

Court ruled on the Objection.⁷ She believed, however, that she had seen an appraisal that had valued the Amite County Property at \$159,000.00.⁸ Although the Debtors assert that the Court was likely influenced by this belief, there is no mention of the value of the Amite County Property in the Exemption Order. Moreover, it is apparent from a review of the Exemption Order that the Court's decision to sustain the Trustee's Objection was based squarely on the failure of the Debtors to satisfy the requirements of § 522(g), not on the value of the Amite County Property or the percentage amount of the unsecured debt that might be paid from the sale proceeds. In the Court's inquiry under § 522(g), the value of the Amite County Property was simply immaterial. Because correcting the Trustee's verbal estimate of the value of the Amite County Property would not change the result reached by the Court in the Exemption Order, the Court concludes that the Motion for Relief should be denied.

Additionally, the Court concludes that the Motion for Relief should be denied because the Debtors have not shown that the "true" value of the Amite County Property constitutes "newly discovered evidence" that the Debtors could not obtain before the Exemption Hearing through the exercise of due diligence. As the Trustee pointed out in the Response, the Debtors could have obtained an appraisal of the Amite County Property before the Exemption Hearing but chose not to do so.

⁷ Tr. at 1:18:26. The Exemption Hearing was not transcribed. References to the arguments are cited by the timestamp of the audio recording.

⁸ Tr. at 1:18:30.

Conclusion

For the above reasons, the Court concludes that the Motion for Relief should be denied.

IT IS, THEREFORE, ORDERED that the Motion for Relief is denied.

##END OF ORDER##