Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: June 4, 2015

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

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE:

BYRON HALL, **CASE NO. 14-13529-NPO**

DEBTOR. **CHAPTER 13**

ORDER DENYING MOTION TO REINSTATE CASE

There came before the Court the Motion to Reinstate Case (the "Reinstatement Motion") (Dkt. 44) filed by Michael W. Boyd ("Boyd"), counsel for the debtor, Byron Hall (the "Debtor"), in the above-referenced bankruptcy case (the "Bankruptcy Case"). No response to the Reinstatement Motion was filed. Having considered the matter and being fully advised in the premises, the Court finds as follows:

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), (E), and (O). Notice of the Reinstatement Motion was proper under the circumstances.

Facts

1. The Debtor filed a voluntary petition for relief (the "Petition") (Dkt. 1) under

chapter 13 of the Bankruptcy Code[1] on September 19, 2014. Under § 1326(a)(1), the Debtor was required to commence making plan payments to the standing chapter 13 trustee, Locke D. Barkley (the "Trustee"), within thirty (30) days after filing the Petition.

2. On October 6, 2014, the Debtor filed a proposed chapter 13 plan (the "Plan") (Dkt. 11). In the Plan, the Debtor proposed to pay $1,108.00 per month to the Trustee, who, in turn, would pay the Debtor's creditors. Also in the Plan, the Debtor proposed to pay Boyd's attorney's fees as an administrative claim. With regard to the amount of those fees, the Disclosure of Compensation of Attorney for Debtor(s) (the "Disclosure") (Dkt. 9) under § 329(a) indicates that the Debtor had agreed to pay Boyd $3,200.00[2] for his services and that the Debtor had not paid any portion of this amount before the filing of the Disclosure. Because the Plan was never confirmed, Boyd has not been paid any of his fees.

3. On November 12, 2014, the Trustee filed the Trustee's Motion to Dismiss (the "Motion to Dismiss") (Dkt. 18) asking the Court to dismiss the Bankruptcy Case because of the Debtor's failure to appear at the § 341(a) meeting of creditors and because of his failure to commence plan payments in a timely manner. After a hearing, the Court denied the Trustee's Motion to Dismiss in the Order Denying Motion to Dismiss (Dkt. #18) (the "Order Denying Dismissal") (Dkt. 25) on several conditions, including that the Bankruptcy Case would be dismissed without further notice or hearing should the Debtor become more than sixty (60) days

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

[2] The $3,200.00 "no-look" fee is the standardized fee in chapter 13 cases established by the Amended Standing Order Regarding Use of "No-Look" Fee in Awarding Reasonable Compensation and Reimbursable Expenses to Attorneys of Debtors in Chapter 13 Cases (effective Aug. 1, 2014), *available at* http://www.msnb.uscourts.gov.

delinquent in his chapter 13 plan payments, calculated from January 1, 2015.

4. On April 13, 2015, the Final Order of Dismissal (the "Dismissal Order") (Dkt. 41) was entered on the motion *ore tenus* of the Trustee under § 1307(c) after the Debtor became sixty (60) days delinquent in his chapter 13 plan payments. *See* 11 U.S.C. § 1307(c)(4) (failure to commence making plan payments prior to confirmation constitutes a ground for dismissal of case). Apparently, at the time of dismissal, the Trustee held a balance of some amount paid by the Debtor pre-confirmation. The Dismissal Order does not provide for the disposition of those funds and, more specifically, does not mention payment of Boyd's attorney's fees.

5. After the dismissal of the Bankruptcy Case, Boyd filed the Motion for Compensation for Attorney (the "Motion for Compensation") (Dkt. 42) on April 14, 2015 asking the Court to instruct the Trustee to disburse $1,500.00 of the money withheld by her in payment of his attorney's fees. Boyd does not attach to the Motion for Compensation an itemization of the fees he allegedly earned during the course of the Bankruptcy Case. Although the Bankruptcy Case was dismissed before confirmation of the Plan, Boyd maintains that $1,500.00 is a reasonable fee "considering the substantial amount of time expended in this case." (*Id.*).

6. On April 20, 2015, Boyd filed the Reinstatement Motion asking the Court to reinstate the Bankruptcy Case "in order to file a Motion for Compensation." (Dkt. 44). The Reinstatement Motion does not indicate whether the Debtor agrees to the reinstatement of the Bankruptcy Case or whether he intends to cure the arrearage under the Plan. It thus appears that the reinstatement of the Bankruptcy Case is sought to authorize compensation to Boyd from monies presumably held by the Trustee.

Discussion

Boyd does not cite the legal basis for the relief he requests in the Reinstatement Motion. *See* KEITH M. LUNDIN & WILLIAM H. BROWN, CHAPTER 13 BANKRUPTCY 4th ed. § 340.1, ¶ 1, http:/www.ch13online.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.[3] *Dehart v. Lampman (In re Lampman)*, 494 B.R. 218, 222 (Bankr. M.D. Pa. 2013). The effect of the Dismissal Order 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); *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). Importantly, the "property of the estate" in the Bankruptcy Case included the Debtor's post-petition wages earned from services performed before the Dismissal Order. 11 U.S.C. § 1306(a). Thus, in its current posture, all property of the estate was revested in the Debtor upon entry of the Dismissal Order.

Reinstating the Bankruptcy Case generally would require the Court "to place [the Bankruptcy Case] again in a former state or position." BLACK'S LAW DICTIONARY 1477 (10th ed. 2014). To accomplish this result, the Court, therefore, would have to vacate the Dismissal Order so that the property of the estate, including post-petition wages, could be "returned" to the Trustee for payment to Boyd. *Lampman*, 494 B.R. at 222 (listing bankruptcy cases in which courts have

[3] Although the Code does not provide for the "reinstatement" of a bankruptcy case, the "reopening" of a bankruptcy case is addressed in § 350(b). Under § 350(b), a closed case may be reopened "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b); *see* FED. R. BANKR. P. 5010 ("A case may be reopened on motion . . . pursuant to § 350(b) of the Code."). Here, however, the Debtor's Bankruptcy Case has not yet been "closed."

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 Court uses the term "returned" although it is unknown whether the Trustee, who did not respond to the Reinstatement Motion, has yet disbursed some or all of the funds to the Debtor. Moreover, vacating the Dismissal Order would reimpose the automatic stay under § 362, which raises issues of fairness to other parties in interest who may have acted in reliance on the Dismissal Order. *See Sewell v. MGF Funding, Inc. (In re Sewell)*, 345 B.R. 174, 179 (B.A.P. 9th Cir. 2006).

Boyd apparently opposes the return of the funds to the Debtor under § 349(b)(3) because of the risk of nonpayment of his attorney's fees. As noted previously, Boyd received no payments through the Plan pursuant to § 1322(a)(2) because no confirmation took place.[4] Now that the Bankruptcy Case has been dismissed, Boyd wants the money held by the Trustee to be used to pay his fees before they are returned to the Debtor.

By seeking reinstatement of the Bankruptcy Case, Boyd implicitly recognizes that § 1326(a)(2) does not apply under these circumstances because he filed the Motion for

[4] Following the confirmation of a plan, the standing chapter 13 trustee makes an initial payment to the attorney for the debtor of $100.00 plus additional payments equal to 15% of funds received by the trustee until the fee is paid to the debtor's attorney. *See* Standing Order Payment of Attorney Fees in Chapter 13 Cases (effective Aug. 1, 2014), *available at* http://www.msnb.uscourts.gov.

Compensation *after* the dismissal of the Bankruptcy Case.[5] Section 1326(a)(2) governs the disposition of funds when no confirmation occurs: "If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b)." 11 U.S.C. § 1326(a)(2). This provision of § 1326(a) includes an exception for those administrative expenses that have been previously allowed by the Court. Because the Court had not yet approved Boyd's fee under § 330(a)(4)(B) when the Bankruptcy Case was dismissed, his claim is not a previously allowed administrative expense claim within the meaning of § 1326(a)(2). Moreover, Boyd does not argue that "cause" exists within the meaning of § 349(b)(3) to modify the mandate that the funds be returned to the Debtor. The Court thus concludes that Boyd's request to reinstate the Bankruptcy Case 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 ("Rule 59" or "Rule 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. 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

[5] It is thus unnecessary for the Court to discuss the interplay between § 349(b) and § 1326(a)(2).

date of the proceeding." FED. R. CIV. P. 60(c). Boyd filed the Reinstatement Motion less than fourteen (14) days after the Dismissal Order. For this reason, the Court considers the Reinstatement Motion under the standards of Rule 59.

There are three grounds that support a motion to alter or amend a judgment under Rule 59(e): (1) an intervening change in controlling law; (2) new evidence not previously available; and (3) the need to correct a clear or manifest error of law or fact or to prevent manifest injustice. *Williams v. Miss. Action for Progress, Inc*., 824 F. Supp. 621, 623-24 (S.D. Miss. 1993); *see Tex. Comptroller of Pub. Accounts v. Transtexas Gas Corp. (In re Transtexas Gas Corp*.), 303 F.3d 571, 581 (5th Cir. 2002) (Rule 59(e) motion calls into question the correctness of a judgment). Thus, a motion for reconsideration is appropriate when a court has misapprehended the facts, a party's position, or the controlling law. Boyd, however, does not allege a change in the law, new evidence, or clear error. Rather, he suggests that entry of the Dismissal Order constituted manifest injustice because it did not include an award of attorney's fees.

The Court finds that the possibility of a dismissal was made known to Boyd when the Order Denying Dismissal was entered on December 22, 2014. At that time, the risk of nonpayment of attorney's fees through the Plan also became known. It cannot be manifestly unjust to dismiss the Bankruptcy Case before the Court's approval of Boyd's fees when the dismissal was identified as a potential outcome in the Order Denying Dismissal. For the above reasons, the Court concludes that the Bankruptcy Case should not be reinstated under these facts where the Dismissal Order was entered before Boyd filed the Motion for Compensation and the sole reason asserted for reinstatement is the distribution of attorney's fees. In reaching this conclusion, the Court does not suggest that the $1,500.00 fee requested by Boyd is unreasonable

"based on a consideration of the benefit and necessity of such services to the [D]ebtor." 11 U.S.C. § 330(a)(4)(B). A cursory review of the docket in the Bankruptcy Case shows that Boyd prepared and filed the Petition, bankruptcy schedules, and Plan (Dkts. 1, 9-11) and that he attended a hearing on the Motion to Dismiss. The Court, however, may not determine the reasonableness of the fees requested by Boyd when there are insufficient grounds under Rule 59 to vacate the Dismissal Order.

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

##END OF ORDER##