SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: January 11, 2021

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:

WILLIAM BYRD MCHENRY, JR., **CASE NO. 20-00268-NPO**

DEBTOR. **CHAPTER 7**

ORDER GRANTING MOTION FOR RECONSIDERATION

This matter came before the Court for telephonic hearing on January 6, 2021 (the "Hearing") on the Motion for Reconsideration (the "Motion to Reconsider") (Dkt. 116) filed by the debtor, William B. McHenry, Jr. (the "Debtor"), asking the Court to reconsider the Default Order Granting Relief from Automatic Stay (the "Order Granting Relief") (Dkt. 115) entered in the above-referenced bankruptcy case (the "Bankruptcy Case") on December 22, 2020. No objection to the Motion to Reconsider was filed. At the Hearing, James G. McGee, Jr. ("McGee") appeared on behalf of the Debtor and Amanda M. Beckett[1] ("Beckett") appeared on behalf of the Creditor. The Court granted the Motion to Reconsider from the bench. This Order memorializes and supplements the Court's bench ruling.

[1] Natalie Brown ("Brown"), an attorney with the law firm of Rubin Lublin, LLC (the "Rubin Firm"), is the attorney of record for Bank of America, N.A. (the "Creditor") in the Bankruptcy Case. Brown was unable to attend the Hearing, and Beckett, who is also an attorney associated with the Rubin Firm, served as substitute counsel for the Creditor.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A), (G), and (O). Notice of the Hearing was proper under the circumstances.

Facts

1. The Debtor filed a voluntary petition for relief under chapter 7 of the U.S. Bankruptcy Code on January 24, 2020. (Dkt. 1). On Schedule D: Creditors Who Have Claims Secured by Property, the Debtor disclosed a claim owed to the Creditor in the amount of $45,000.00 secured by a 2017 Ford F-250 (the "Vehicle"). (Dkt. 3 at 1).

2. On November 24, 2020, the Creditor filed a Motion for Abandonment and Relief From Automatic Stay (the "Motion for Relief") (Dkt. 106) seeking relief from the automatic stay imposed by 11 U.S.C. § 362 and the abandonment of the Vehicle from the bankruptcy estate pursuant to 11 U.S.C. § 554. Attached to the Motion for Relief is the Retail Installment Sale Contract-Simple Finance Charge (With Arbitration Provision) indicating that the Creditor financed the original amount of $62,141.63 for the purchase of the Vehicle and that the Debtor agreed to repay the loan in monthly installments of $976.35 beginning April 12, 2018. (Dkt. 106 at 2). According to the Creditor, the Debtor missed four (4) payments of $976.35 for the months of August 12, 2020 through November 12, 2020 for a total delinquency of $3,889.65.[2] (Dkt. 106 at 2).

3. The Bankruptcy Clerk issued the Notice of Hearing and Deadlines (the "Notice") (Dkt. 109) setting January 4, 2021 as the date for a telephonic hearing on the Motion for Relief

[2] The Creditor applied a credit of $15.75 to the Debtor's total delinquency ($3,889.65=($976.35 x 4)-$15.75). (Dkt. 106 at 2).

and December 21, 2020 as the deadline for filing an objection. The Notice provided that "[i]f no response is filed, the Court may consider the Motion [for Relief] and enter an order granting relief before the hearing date." (Dkt. 109).

4. The Debtor did not file a response to the Motion for Relief. After considering the merits of the unopposed Motion for Relief, the Court entered the Order Granting Relief on December 22, 2020. (Dkt. 115). The next day, the Debtor filed the Motion to Reconsider asking the Court to vacate the Order Granting Relief and reset the Motion for Relief for hearing.

5. In the Motion to Reconsider, the Debtor explains why he failed to respond to the Motion for Relief:

> On December 11, 2020, [McGee] discussed this matter with [Brown] telephonically. [Brown] was made aware that the Debtor furnished proof that he made his monthly payment to [the Creditor] each month in question and asked if [the Creditor] would consider withdrawing its motion, as it is now moot. [Brown] requested copies of the Debtor's statements be sent to her via e-mail and that she would research this matter with [the Creditor].

(Dkt. 116 at 2). Thereafter, on December 17, 2020, McGee sent a letter to Brown by U.S. mail and email attaching the Debtor's bank statements ostensibly showing that the disputed payments had been made and requesting that the Creditor withdraw the Motion for Relief (the "December 17th Email"). (Dkt. 116-1). Brown, however, did not respond to the December 17th Email or to McGee's subsequent telephone calls until after the Court had entered the Order Granting Relief. On December 22, 2020, McGee's paralegal sent an email to Brown pointing out the Court's entry of the Order Granting Relief and inquiring as to why the Creditor had not withdrawn the Motion for Relief as moot. (Dkt. 116-2 at 2). Brown responded explaining, "I was out of the office last week. Proof of payments were forwarded to Bank of America yesterday [December 21, 2020,] upon my return." (Dkt. 116-2). Brown continued that she "imagine[d] the [C]ourt entered the Order [Granting Relief] because no response was filed." (Dkt. 116-2). On December 23, 2020,

Angelene Roberts from Brown's law firm notified McGee that the Creditor, after reviewing the Debtor's bank statements and its own internal records, believed that the "loan is still due for August and they will proceed with relief." (Dkt. 116-3).

6. At the Hearing, McGee explained that he did not file a response to the Motion for Relief for two reasons. First, because of his conversation with Brown on December 11, 2020, he believed that the Creditor would withdraw the Motion for Relief once the Debtor furnished proof of the disputed payments. (Hr'g at 9:03:44-9:05:58 (Jan. 6, 2021)).[3] Second, numerous persons in his law office had been absent due to the COVID-19 pandemic, which hampered his ability to file a response. (Hr'g 9:03:23-9:03:44 (Jan. 6, 2021)).

7. Although the Creditor did not file an objection to the Motion to Reconsider, it refused to consent to an order granting the relief requested by the Debtor. Despite the email on December 23, 2020 in which the Creditor acknowledged that the Debtor was past due on only one (1) payment, the Creditor asserted at the Hearing that "we think they owe four payments . . . as of yesterday." (Hr'g at 9:10:09-9:9:11:00 (Jan. 6, 2021)). The Creditor argued at the Hearing that "one payment has come due, another month has come due, so we are still saying that four payments are past due." (Hr'g at 9:10:30-9:11:15 (Jan. 6, 2021)).

Discussion

"[T]he Federal Rules of Civil Procedure do not recognize a general motion for reconsideration." *St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336, 339 (5th Cir. 1997). The Debtor does not cite any particular Bankruptcy Rule or provision of the U.S. Bankruptcy Code as the basis for his Motion for Relief but "avers that to allow [the Creditor] the relief it is seeking would be a gross miscarriage of justice." (Dkt. 116 at 30). A motion asking the

[3] The Hearing was not transcribed. Citations are to the timestamp of the audio recording.

Court to reconsider its decision constitutes either a motion to "alter or amend" under Rule 59(e) of the Federal Rules of Civil Procedure ("Rule 59") (as made applicable to bankruptcy proceedings by Rule 9023 of the Federal Rules of Bankruptcy Procedure) or a motion for "relief from judgment" under Rule 60(b) of the Federal Rules of Civil Procedure ("Rule 60(b)") (as made applicable to bankruptcy proceedings by Rule 9024 of the Federal Rules of Bankruptcy Procedure). *Tex. A&M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 400 (5th Cir. 2003).

Under Rule 59(e), a final judgment may be amended if: (1) there is a manifest error of law or fact; (2) newly discovered evidence; or (3) an intervening change in controlling law. *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003) (citing *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003)). A Rule 59(e) motion to reconsider serves a narrow purpose: "to permit a party to correct manifest errors of law or fact, or to present newly discovered evidence." *Krim v. pcOrder.com, Inc.*, 212 F.R.D. 329, 331 (W.D. Tex. 2002). "To succeed on a motion for relief from judgment based on newly discovered evidence, our law provides that a 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 presented before the original judgment." *Gen. Univ. Sys., Inc. v. Lee*, 379 F.3d 131, 158 (5th Cir. 2004) (quoting *Goldstein v. MCI WorldCom*, 340 F.3d 238, 257 (5th Cir. 2003)) (applying FED. R. CIV. P. 60(b)(2)). Similarly, Rule 60(b) provides that the Court may "relieve a party . . . from a judgment [or] order" for certain specified reasons, including (1) "mistake, inadvertence, surprise, or excusable neglect," and (6) "any other reason that justifies relief." Because the Motion for Reconsideration, filed one day after entry of the Order Granting Relief, satisfied the stringent time requirements of Rule 59(e) and because Rule 59(e) motions provide relief on grounds at least as

broad as Rule 60(b) motions, the Court considers the Motion to Reconsider under Rule 59(e). To that end, the Court turns first to whether evidence of the Creditor's concessions regarding the amount of the delinquency would have produced a different result.

The Motion for Relief alleged that the Debtor owed the Creditor four (4) payments for the months of August 2020 through November 2020. The Creditor claimed a total amount past due of $3,889.65. (Dkt. 106). The Court entered the Order Granting Relief based on these representations of the Creditor. Unknown to the Court, however, the Debtor had contacted the Creditor disputing any unpaid amount. As a result of the Debtor's attempt to resolve this matter, the Creditor admitted in an email dated the day after the Court entered the Order Granting Relief that the Debtor had made at least three (3) of the four (4) disputed payments. (Dkt. 116-3). At the Hearing, the Creditor nevertheless argued that the basis for granting the Motion for Relief had remained unchanged and, therefore, the Motion for Reconsideration should be denied. Specifically, the Creditor argued that before entry of the Order Granting Relief, two (2) payments remained past due, and after entry of the Order Granting Relief, two (2) payments had become due and remained unpaid.

The Court finds that based on the December 23, 2020 correspondence from the Creditor, only one (1) payment for August 2020 allegedly was past due when the Motion for Relief was filed and the Order Granting Relief was entered. The Court would not have signed and entered the Order Granting Relief it if had realized that the allegations in the Motion for Relief were incorrect. Moreover, because the proper inquiry is whether the evidence "would have produced a different result if presented before the original judgment," the Court disregards as irrelevant the evidence relied upon by the Creditor regarding the Debtor's alleged delinquency after the entry of the Order Granting Relief. The Court, therefore, finds that the newly presented evidence in the

Motion to Reconsider regarding the Creditor's concession as to the amount owed provides cause for the Court to reconsider the Order Granting Relief.

The Court next considers whether the Debtor exercised due diligence in obtaining the information from the Creditor. The Court recognizes as a preliminary matter that the Debtor failed to file a timely response to the Motion for Relief. The Court, however, finds that based on the totality of the circumstances the error is excusable.

McGee and Brown discussed the discrepancies in the Debtor's account on Friday, December 11, 2020, and Brown requested that the Debtor send the proof of payments to her for review indicating that the disputed payments had been made. (Dkt. 116). McGee sent Brown the Debtor's bank statements on December 17, 2020. Brown, however, was "out of the office" until December 21, 2020. (Dkt. 116-2). This fact was unknown to McGee, who attempted to contact Brown by telephone and "ke[pt] getting an automated message which indicate[d] the person on the line is unavailable." (Dkt. 116-2). Then, on December 22, 2020, the day after the deadline to file a response to the Motion for Relief had expired and approximately an hour after the Order Granting Relief had been entered, Brown responded to a second email acknowledging receipt of the prior December 17th Email and explaining that "[p]roof of payments were forwarded to [the Creditor] yesterday." (Dkt. 116-2).

It is clear that because of his telephone conversation with Brown on December 11, 2020 and the December 17th Email, McGee understood that there was no need to file a response to the Motion for Relief. Typically, failing to file a response when the ability to do so is within counsel's "reasonable control" does not itself justify relief under Rule 59(e). *Trevino v. City of Fort Worth*, 944 F.3d 567, 571 (5th Cir. 2019). Here, however, McGee's filing of a response was hampered because COVID-19 disrupted the normal operations of his law office, and the Debtor could not

with reasonable diligence have discovered and produced evidence regarding the actual number of missed payments by the response deadline of December 21, 2020 because the Creditor did not make that information available until December 23, 2020. (Dkt. 116-3). The Court, therefore, finds that the Debtor has presented newly discovered evidence that was not available to the Debtor until after the Order Granting Relief had been entered.

Conclusion

Based on the totality of the circumstances, the Court finds that cause exists to reconsider the Order Granting Relief. Although the Debtor did not file a response to the Motion for Relief, his neglect is excusable in part because of the impact of COVID-19 on the normal operations of his law firm. The Creditor acknowledged at the Hearing that the Debtor's bank statements contradicted the allegations set forth in the Motion for Relief. The Court, therefore, finds that the Order Granting Relief should be vacated, the hearing on the Motion for Relief should be reset, and a date should be set for a new response deadline.

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

IT IS FURTHER ORDERED that the Order Granting Relief is hereby vacated.

IT IS FURTHER ORDERED that the Court will hold a telephonic hearing on the Motion for Relief on February 8, 2021, at 1:30 p.m. The Clerk of the Bankruptcy Court will issue a notice of the telephonic hearing on the Motion for Relief with a response deadline.

IT IS FURTHER ORDERED that the Debtor shall file a written response to the Motion for Relief by February 1, 2021.

IT IS FURTHER ORDERED that the automatic stay pursuant to 11 U.S.C. § 362 with regard to the Vehicle shall remain in effect until further order of this Court.

END OF ORDER