IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

IN RE: WILLIE OUSLEY AND
MARY OUSLEY

CHAPTER 13
CASE NO. 8601453WC

Hon. Wanda Abioto
7120 Tchulahoma Road
Southaven, MS 38671

Attorney for the Debtors

Hon. David Usry
188 E. Capitol Street
Suite 500, One Jackson Place
Jackson, MS 39201

Assistant United States Attorney

Hon. Harold J. Barkley
P.O. Box 4476
Jackson, MS 39296-4476

Chapter 13 Trustee

MEMORANDUM OPINION

This matter came on for trial on the *Motion to Reopen Cause 8601453WC Pursuant to Rule 5010 of the Bankruptcy Rules of Procedure and to Set Aside Judgement Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and for Reconsideration* (*"Motion to Reopen"*) of Willie Ousley and Mary Ousley (the "Ousleys") along with the *Trustee's Response to Motion to Reopen Case* and the *Objection to Debtor's Motion to Reopen Cause No. 8601453WEE, to Set Aside Judgment and for Reconsideration* ("Objection") of the United States of America ("FmHA"). In their *Motion to Reopen*, the Ousleys contend that the case should be reopened and an *Agreed Order* of April 14, 1989 (the "1989 Order"), should be set aside. The Ousleys argue that the 1989 Order was procured through fraud, misrepresentation, and conspiracy on the part of their former attorney, the Trustee, and the United States of America, and as a result, the judgment is void.

After considering the evidence presented at trial along with the arguments of counsel, this Court holds that the *Motion to Reopen* of the Ousleys is not well taken and should be denied. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On December 14, 1979, the Ousleys purchased a home in Sharkey County, Mississippi, and executed a first deed of trust in favor of the Farmers Home Administration ("FmHA"), an agency of the United States of America. Thereafter, the Ousleys became delinquent in their home mortgage payments, and the delinquency continued until they sought protection by filing their first joint Chapter 13 bankruptcy petition. That case was ultimately dismissed and the Ousleys filed a second joint Chapter 13 petition on August 1, 1986. During the life of the second case, the Chapter 13 Trustee filed three motions to dismiss the case or convert to a Chapter 7 case because of the Ousley's failure to fund the bankruptcy plan. After the second motion to dismiss was filed and the plan was modified, the United States of America filed a *Motion for Abandonment and for Relief from Automatic Stay*.

The parties resolved the *Motion for Abandonment* and an *Agreed Order*, which was signed by Mr. and Mrs. Ousley, the Ousleys' attorney, the Assistant United States Attorney, and the Chapter 13 Trustee, was entered on April 14, 1989. The *Agreed Order* provided in pertinent part:

. . . .

2. The stay relief requested by FmHA is hereby denied, however the stay shall be automatically lifted in the future upon the Trustee's filing of a Motion to Dismiss for failure to fund the plan.[1]

3. The subject real property contains no equity for the Estate and is hereby ordered abandoned.

4. FmHA shall take the necessary steps to give Debtors proper credit for any IRS income tax refunds offsets received by it.

Agreed Order of April 14, 1989. Subsequently, the Ousleys became delinquent in their plan payments, and the Chapter 13 Trustee, on June 30, 1989, filed a *Motion to Dismiss* for failure to pay into the Chapter 13 Plan. As a result of the agreed language contained in paragraph two of the *Agreed Order* of April 14, 1989, the stay automatically lifted as to FmHA. On October 4, 1989, as a result of the *Motion to Dismiss* filed by the Trustee, the Ousley's second bankruptcy case was dismissed for failure to fund the plan.

The Ousleys subsequently filed bankruptcy three more times. In the most recent bankruptcy case, Case No. 9603110, the FmHA filed a *Motion for Determination that Automatic Stay Does Not Apply and Had No Effect on Foreclosure.* After a trial on the Motion and the Answer of the Ousleys, this Court held that pursuant to the *Agreed Order* of April 14, 1989, upon the Chapter 13 Trustee's filing of a motion to dismiss for failure to fund the plan, the automatic stay lifted to allow the FmHA to enforce its lien.[2] This Court further held that once the stay lifted, it remained lifted

---

[1] This provision is known as a "drop dead" clause. A "drop dead" clause " 'allows a creditor to exercise its state law remedies upon default of a debtor under a plan without seeking further permission from the bankruptcy court.' " Mendoza v. Temple-Inland Mortgage Corp., 111 F.3d 1264, 1269 (5th Cir. 1997)(*quoting* In re Kennedy, 177 B.R. 967, 975 (Bankr. S.D. Ala. 1995)).

[2] In re Willie and Mary E. Ousley, No. 9603110WEE (Bankr. S.D. Miss. Nov. 22, 1996).

unless reinstated by the Court. This not having occurred, the filing of the new bankruptcy case did not operate to reinstate the automatic stay as to the FmHA and therefore, did not affect the foreclosure on the subject property. The Ousleys appealed this Court's decision, but the appeal was dismissed by United States District Judge David Bramlette on the basis that the notice of appeal was untimely and therefore, the District Court did not have jurisdiction to hear the appeal.[3]

Prior to initiating Bankruptcy Case No. 9603110, the Ousleys filed a *Complaint to Quiet Title* in state court. The FmHA removed the action to federal court and on April 10, 1996, an *Agreed Final Judgment of Dismissal* was entered in District Court which dismissed the FmHA as a defendant and allowed the FmHA to proceed with foreclosure of the subject property. This *Agreed Judgment* was agreed to and signed by the Ousley's attorney.[4] The FmHA foreclosed on the subject property on August 19, 1996. Thereafter, on April 18, 1997, the Ousleys filed a *Motion to Set Aside Judgment* with the District Court, in which they argued that the *Agreed Final Judgment of Dismissal* was void because it was signed without their consent and because it violated the automatic stay. On March 13, 1998, District Judge Bramlette denied the Ousleys' *Motion to Set Aside Judgment.*[5] In his Order, Judge Bramlette found that the stay had been lifted as to the subject property since 1989 pursuant to the *Agreed Order* of April 14, 1989, when the Chapter 13 Trustee filed a motion to dismiss for failure to fund the plan. He also found that because the Ousleys' *Motion to Set Aside*

---

[3] Willie Ousley and Mary Ousley v. United States of America, No. 5:97CV16BrS (S.D.Miss. Sept. 15, 1997).

[4] The attorney who represented the Ousleys in this District Court action was not the same attorney who represented the Ousleys at the time the *Agreed Order* of April 14, 1989, was entered.

[5] Willie Ousley and Mary Ousley v. United States of America, No. 5:95CV149BrN (S.D.Miss. March 13, 1998).

Judgment was not filed within a reasonable time, it was untimely. The Ousleys did not appeal Judge Bramlette's Order.

Prior to Judge Bramlette's denial of their *Motion to Set Aside Judgment*, the Ousleys filed their *Motion to Reopen* in this Court on April 7, 1997, arguing that the *Agreed Order* of April 14, 1989, was void. The *Motion to Reopen* was tried before this Court on May 28, 1998.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157.

II.

11 U.S.C. § 350(b) governs the reopening of a bankruptcy case. That section provides:

> (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.

Id. The phrase "or for other cause" has been interpreted by several courts, including the Fifth Circuit Court of Appeals, to give the bankruptcy court discretion to reopen a closed estate or proceeding. See Citizens Bank & Trust Co. v. Case, 937 F.2d 1014 (5th Cir. 1991); In re Rosinski, 759 F.2d 539 (6th Cir. 1985); Hawkins v. Landmark Finance Co., 727 F.2d 324 (4th Cir. 1984). "This discretion depends upon the circumstances of the individual case and accords with the equitable nature of all bankruptcy court proceedings." Citizens Bank, 937 F.2d at 1018.

The Ousleys seek to reopen their 1986 bankruptcy case to challenge the *Agreed Order* of April 14, 1989. In their *Motion to Reopen* and supporting *Memorandum of Law*, the Ousleys rely

upon Rule 60(b)(4) and (b)(6) of the Federal Rules of Civil Procedure,[6] which is made applicable by Rule 9024 of the Federal Rules of Bankruptcy Procedure. Rule 60 provides an avenue for relief from a judgment or order in certain limited circumstances. "Relief under [subsection (b)(6)], however, should be granted 'only if extraordinary circumstances are present.' " Picco v. Global Marine Drilling Co., 900 F.2d 846, 851 (5th Cir. 1990)(quoting Bailey v. Ryan Stevedoring Co., 894 F.2d 157, 160 (5th Cir. 1990)). Rule 60 states in pertinent part as follows:

> **Rule 60. Relief from Judgment of Order.**
>
> . . . .
>
> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void; . . . (6) any other reason justifying relief from the operation of the judgment. . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60.

Although Rule 60(b) contains certain time restrictions on when motions for relief from judgment may be filed, Bankruptcy Rule 9024 provides that this time limitation is not applicable to motions to reopen. Thus, a motion to reopen may be filed at any time and is not subject to the one year limitation contained in Rule 60(b). However, once a case is reopened, a motion for relief from judgment is subject to the time limitations contained in Rule 60(b).

Motions based upon Rule 60(b)(6) must be filed within a "reasonable time." " 'What constitutes "reasonable time" depends on the facts of each case, taking into consideration the interest

---

[6] Hereinafter, all Rules refer to the Federal Rules of Civil Procedure unless specifically noted otherwise.

in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties.' " Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, 1410 (5th Cir. 1994)(quoting Ashord v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981)). The Ousleys have been aware of the effect of the April 14, 1989, *Agreed Order* for more than nine years. The *Agreed Order* has been the subject of numerous motions and appeals in both this Court and in District Court. This Court therefore finds relief is not warranted pursuant to Rule 60(b)(6) because the Ousleys' motion was not filed within a reasonable time.

The second basis for the Ousleys' *Motion to Reopen* is Rule 60(b)(4). Although motions based upon Rule 60(b)(4) seem to be subject to the "reasonable time" limitation contained in Rule 60(b), the Fifth Circuit has stated that "there is no time limit on an attack on a judgment as void." Briley v. Hidalgo, 981 F.2d 246, 249 (5th Cir. 1993). The Fifth Circuit further stated that a "void judgment cannot acquire validity because of laches on the part of the judgment debtor." Id.

A judgment is void "only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." New York Life Ins. Co. v. Brown, 84 F.3d 137, 142 (5th Cir. 1996). "Ordinarily all that due process requires in a civil case is proper notice and service of process and a court of competent jurisdiction; procedural irregularities during the course of a civil case, even serious ones, will not subject the judgment to collateral attack." Id.

The Ousleys do not contest the jurisdiction of this Court over the subject matter or of the parties, but rather they contend that the judgment is void because they were denied due process of law when the "drop dead" provision was added to the 1989 Order. They further contend that the provision was added through fraud, misrepresentation and conspiracy on the part of their former

attorney, the Chapter 13 Trustee, and the United States of America. The validity of drop dead clauses has been expressly recognized by the Fifth Circuit. Mendoza v. Temple-Inland Mortgage Corp., 111 F.3d 1264, 1269 (5th Cir. 1997). Finding that a natural reading of the Bankruptcy Code does not preclude the inclusion of a drop dead clause in an order modifying a stay, the Fifth Circuit stated that "[b]ecause of the equitable nature of bankruptcy in seeking a balance between debtors and creditors, bankruptcy courts should be afforded the latitude to fashion remedies they consider appropriate under the circumstances, including 'drop dead' orders, as long as the bankruptcy court follows the Bankruptcy Code's statutory mandate." Id. at 1270.

The Court finds that the drop dead provision added to the subject order was valid and did not cause the judgment to be void. The Court further finds that the Ousleys failed to present credible evidence that the drop dead provision was added to the 1989 Order as the result of fraud, misrepresentation or conspiracy on the part of their attorney, the Chapter 13 Trustee, or the United States of America. Mr. and Mrs. Ousley are intelligent and competent adults who understood, or were capable of understanding, the meaning of the 1989 Order they agreed to and signed. Both Mr. and Mrs. Ousley completed high school and Mr. Ousley also completed three years of college.

Based upon the foregoing, the Court finds that the *Motion to Reopen* should be denied because the request to set aside the *Agreed Order* of April 14, 1989, is not well taken. Both this Court and the District Court have previously considered the effect of the *Agreed Order* and found that the stay lifted upon the filing by the Chapter 13 Trustee of a motion to dismiss for failure to fund the plan. Relief is not warranted under Rule 60(b)(6) because the motion was not filed within a reasonable time. The Ousleys have also failed to prove that the *Agreed Order* was void and that it should be set aside. Accordingly, the *Motion to Reopen* is denied.

In the FmHA's *Objection* to the Ousleys' *Motion to Reopen*, the FmHA requested this Court to award it attorney fees and costs for having to respond to the Ousleys' motion. This request was renewed at the conclusion of the trial on the Ousleys' *Motion to Reopen*. The Court holds that the request of the FmHA should be denied without prejudice at this time. The FmHA may renew this request by motion after the Court's judgment denying the *Motion to Reopen* becomes final.

A separate judgment will be entered in accordance with Rule 9021 of the Federal Rules of Bankruptcy Procedure.

THIS the 4th day of June, 1998.

UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

IN RE: WILLIE OUSLEY AND
MARY OUSLEY

CASE NO. 8601453WC

JUDGMENT

Before the Court for its consideration is the *Motion to Reopen Cause 8601453WC Pursuant to Rule 5010 of the Bankruptcy Rules of Procedure and to Set Aside Judgement Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and for Reconsideration* ("*Motion to Reopen*") filed by Willie Ousley and Mary Ousley. Consistent with this Court's opinion dated contemporaneously herewith, the Court finds that the *Motion to Reopen* is not well taken and should be denied. The Court also finds that the request for attorney fees and costs of the FmHA should be denied without prejudice at this time. The FmHA's request may be renewed by motion after this judgment becomes final.

This judgment is a final judgment for the purposes of Rule 9021 of the Federal Rules of Bankruptcy Procedure.

IT IS THEREFORE ordered and adjudged that the *Motion to Reopen* is hereby denied.

IT IS FURTHER ORDERED and adjudged that the FmHA's request for attorney fees and costs is denied without prejudice.

SO ORDERED this the 4th day of June, 1998.

UNITED STATES BANKRUPTCY JUDGE