

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION**

IN RE

DEVON REIS

**CASE NO. 15-30111
CHAPTER 13**

DEBTOR

ORDER

This case is before the Court on several post-confirmation matters arising between the Creditor Commonwealth Bank & Trust Company (“Commonwealth”) and the Debtor, Devon Reis. The matters, which all relate to Commonwealth’s pursuit of a state-court foreclosure action, include: (1) Debtor’s Motion to Vacate Order (Doc. 56) [ECF No. 64], seeking reversal of the order granting Commonwealth relief from the codebtor stay as to Lauren J. Hilton; (2) Debtor’s Amended Motion for Contempt [ECF No. 68], seeking sanctions against Commonwealth for alleged violations of the automatic stay stemming from the Bank’s actions in the foreclosure action; and (3) Commonwealth’s Motion for Relief from the Stay and for Abandonment of Property from the Estate [ECF No. 70], seeking relief from the stay to allow Commonwealth to conclude the foreclosure proceeding. Commonwealth also filed a Response to each of the Debtor’s motions. [See ECF Nos. 69, 72.]

These issues came before the Court for hearing on December 17, 2015, after which they were taken under submission. Having considered the record and arguments of counsel, it is ORDERED, for the reasons set forth herein, that: (1) Debtor’s Motion to Vacate [ECF No. 64] is DENIED, (2) Debtor’s Amended Motion for Contempt [ECF No. 68] is DENIED WITHOUT PREJUDICE, and (3) Commonwealth’s Motion for Relief from Stay is GRANTED.

Commonwealth obtained a \$191,512.41 judgment against the Debtor and Lauren J. Hilton, a non-filing codebtor, in a foreclosure action in the Shelby County Circuit Court (Case No. 14-CI-00301) on February 5, 2015. [See POC 2-2 at 5-12.] Commonwealth also obtained an Order of Sale directing the Master Commissioner to sell the property at 820 Conner Station Road, Simpsonville, Kentucky 40067-7613 (the “Property”), with the proceeds applied to satisfy the judgment. [Id.] The Debtor resides on the Property and signed the note and mortgage that gave rise to the foreclosure, but he does not have legal title to the Property. [See ECF No. 1 at 7, 10 (listing no real property, but stating, “Debtor may have a claim to the equity in his girlfriend’s home” valued at \$10,000.00).]

The Debtor filed his Chapter 13 bankruptcy petition [ECF No.1] and Plan [ECF No. 2] on March 20, 2015, seeking to protect his codebtor, Ms. Hilton, by making regular payments to Commonwealth through the plan. Commonwealth filed its Objection to Confirmation [ECF No. 14], arguing that the proposed payments to Commonwealth under the Debtor’s plan were insufficient to pay the interest (9.75%) owed pursuant to the state-court Judgment and thus insufficient to protect Ms. Hilton from further collection efforts.

After a contested confirmation hearing on August 20, 2015, the case was set for an evidentiary hearing on October 22, 2015 [ECF No. 47], to address issues related to the confirmation of the Debtor’s Plan raised by Commonwealth and the Chapter 13 Trustee. Following the August 20 hearing, the parties engaged in email discussions during which Debtor’s counsel suggested that Commonwealth withdraw its Objection to Confirmation and file a motion for relief from the codebtor stay to preserve the issue of whether plan payments were sufficient to protect Ms. Hilton while allowing confirmation of the Plan. [See ECF No. 69-1.]

Consistent with the suggestion by Debtor's counsel, Commonwealth filed its Motion for Relief from Codebtor Stay [ECF No. 54] on August 27, 2015, and the motion was granted on September 15, 2015, after no party objected [ECF No. 56]. The September 15 Order provided:

- (A) The Co-Debtor Stay is terminated as to Lauren J. Hilton;
- (B) The real estate located at 820 Conner Station Road, Simpsonville, KY 40067-7613, is not an asset of the estate and is not therefore, subject to the automatic stay provisions, such that the Creditor may exercise its rights as against said property in accordance with state and federal law; and
- (C) That upon sale of property and application of the proceeds, the Creditor shall file a proof of claim within 180 days from the entry of this Order for the deficiency amount, and said proof of claim shall be deemed timely filed.

[*Id.*] Having gained relief from the codebtor stay, Commonwealth filed its Withdrawal of Objection to Confirmation [ECF No. 58] on September 17. The next day, the Chapter 13 Trustee recommended confirmation of the Debtor's Plan. [ECF No. 59.]

The Debtor's Plan was confirmed on September 29. [ECF No. 62.] The Order Confirming Plan specifically notes: "The plan as confirmed is deemed to incorporate by reference all pre-confirmation orders affecting the treatment of claims and liens, and to the extent of any inconsistency between the plan and any order, the terms of the order are deemed to control."

[*Id.*] Under the terms of the confirmed Plan, the Debtor is required to make regular monthly payments of \$3,776.00, of which \$3,166.67 is paid to Commonwealth on account of its claim.

[*See* ECF No. 2.]

1. The Debtor has not justified relief under FED. R. CIV. P. 60(b)(1) or 60(b)(6).

The Debtor filed his motion to vacate the Court's order terminating the codebtor stay on October 30, 2015, seeking relief under FED. R. CIV. P. 60(b), applicable in bankruptcy pursuant to FED. R. BANKR. P. 9024, because counsel failed to object to Commonwealth's request for relief from the codebtor stay. Debtor argues for relief under 60(b)(1) ("mistake, inadvertence, surprise,

or excusable neglect”) and 60(b)(6) (“any other reason that justifies relief”). Nothing in the record suggests such extraordinary relief is appropriate in this case.

“A party seeking relief from judgment under Rule 60(b) must show that its case comes within the provision of the rule.” *Lewis v. Alexander*, 987 F.2d 392, 396 (6th Cir. 1993). “In determining whether relief is appropriate under Rule 60(b)(1), courts consider three factors: ‘(1) culpability—that is, whether the neglect was excusable; (2) any prejudice to the opposing party; and (3) whether the party holds a meritorious underlying claim or defense. A party seeking relief must first demonstrate a lack of culpability before the court examines the remaining two factors.’” *Flynn v. People's Choice Home Loans, Inc.*, 440 F. App'x 452, 457-58 (6th Cir. 2011) (quoting *Gumble v. Waterford Twp.*, 171 F. App'x. 502, 506 (6th Cir.2006)).

Here, the Debtor claims that the failure to object to Commonwealth’s request for relief from the codebtor stay was an excusable mistake of counsel. The Debtor’s papers do not disclose any specific reason for counsel’s failure to act, reciting only case quotes regarding Rule 60(b) relief. At the hearing on its Motion to Vacate, counsel explained that he “mistakenly presumed that [Commonwealth’s Objection to Confirmation and Motion for Relief from Co-Debtor Stay] were all going to be set for the same hearing date,” not realizing that the motion for codebtor stay relief included its own objection period. This explanation is insufficient to justify a finding of excusable neglect. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (“clients must be held accountable for the acts and omission of their attorneys”); *see also Yeshick v. Mineta*, 675 F.3d 622, 629-31 (6th Cir. 2012) (that parties have an affirmative duty to monitor the electronic docket).

The Debtor argues there is no prejudice because the structure was agreed. Commonwealth did not dispute an agreement that it withdraw its objection and file a motion for

relief from the codebtor stay to allow confirmation to proceed. But Commonwealth did not withdraw its objection to confirmation [ECF No. 58] until two days after entry of the order granting relief from the codebtor stay [ECF No. 56]. Thereafter, the Chapter 13 Trustee recommended confirmation of the Debtor's Plan, the evidentiary hearing on confirmation was cancelled and the plan was confirmed. [ECF Nos. 59-61.] These facts suggest there is at least some prejudice to Commonwealth.

The Debtor also has not shown it has a meritorious defense. The Debtor will pay a substantial portion of the mortgage debt during the five-year plan term. But Commonwealth asserts the payments will still leave an approximately \$50,000 balance due, which the Debtor did not dispute. The Debtor argues, without authority, that Commonwealth must wait until after the plan term to try to recover this balance.

The Debtor's argument seems like it might appeal to a creditor as a proposed settlement term. Of course, Commonwealth is not obligated to accept this proposal unless the relief is supported by legal authority. The Debtor did not cite any statute or case law to support this theory. Also, the Debtor does not even have a legal interest in the Property. He only has a claimed equitable interest that he has not done anything to support in the state court foreclosure action or in this proceeding. *See also infra* at Section 2. Based on this, it is impossible to determine how the Debtor can force Commonwealth from halting action against the codebtor.

Excusable neglect also does not justify relief under Rule 60(b)(6). Rule 60(b)(6) requires "extraordinary circumstances" outside the control of the Debtor or his counsel. *Pioneer*, 507 U.S. at 393 (observing that the remedies provided by Rule 60(b)(1) and 60(b)(6) are "mutually exclusive"). Therefore, the Debtor has not provided a basis to vacate the order for relief from the codebtor stay.

2. The Debtor has not shown any violation of the automatic stay by Commonwealth.

The Debtor's Amended Motion for Contempt [ECF No. 68] is devoid of facts or law suggesting that Commonwealth acted in violation of the automatic stay in this case. Aside from a bare assertion that Commonwealth "has taken action in state court without relief from the automatic stay," [ECF No. 68 ¶ 11], the Debtor has failed to identify any specific violation by the Creditor justifying a contempt sanction.

The Debtor only argues that Commonwealth has proceeded with a foreclosure sale of the Property. But even if this Order would have granted the Motion to Vacate, the order for relief from the codebtor stay was still in effect and would have protected Commonwealth from arguments of a violation affecting Ms. Hinton.

The Debtor attempts to argue that the violations apply to him, arguing: "He still enjoys the protections of the automatic stay" and that Commonwealth "should not be allowed to misconstrue and combine the relief order regarding Ms. Hilton so that it also applies to Mr. Reis." But the order for codebtor stay relief specifically provides: "The real estate located at 820 Conner Station Road, Simpsonville, KY 40067-7613, is not an asset of the estate and is not therefore, subject to the automatic stay provisions, such that the Creditor may exercise its rights as against said property in accordance with state and federal law." [ECF No. 56.]

The Debtor admits that he does not own the Property and does not disclose any other legal basis to support his right to continued possession (i.e. a lease, rental agreement, etc.). While he has scheduled a claim to some portion of the available equity in the Property as an asset, he cites no authority to suggest that such a claim, standing alone, gives rise to the broad protections of the automatic stay.

Therefore, the Debtor's Amended Motion for Contempt is denied without prejudice.

3. Cause exists to terminate the stay under 11 U.S.C. § 362(d)(1).

The Debtor's confirmed Plan specifically provides that the Property "is not an asset of the estate and is not therefore, subject to the automatic stay provisions." [ECF No. 56, 62.] *See also* 11 U.S.C. § 1327(a) (a confirmed plan is binding). Further, this Order confirms the order for relief from codebtor stay remains in effect. Therefore, Commonwealth has satisfied its burden to show cause exists for relief from the stay under § 362(d)(1). This relief also appears necessary based on the Debtor's assertion that Commonwealth's foreclosure efforts violate the automatic stay.

Accordingly, Commonwealth is granted relief from the automatic stay.

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.



Signed By:
Gregory R. Schaaf
Bankruptcy Judge
Dated: Monday, December 28, 2015
(grs)