UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

IN RE:

ANTHONY G. WRIGHT **CASE NO. 12-21054**

DEBTOR

MEMORANDUM OPINION AND ORDER

The Debtor in this chapter 13 case moved in his plan to value U.S. Bank's collateral under 11 U.S.C. § 506(a). Like many such debtors, the Debtor served the plan by regular mail, despite the motion contained in his plan. The plan was then confirmed without objection from U.S. Bank. After initially seeking stay relief, U.S. Bank moved to vacate the confirmation order under Federal Rule of Civil Procedure (referred to as "Federal Rule") 60(b), arguing that due process required an adversary proceeding to value its collateral. Five months later, and after several continuances, U.S. Bank dramatically changed its arguments in support of its motion to vacate, claiming that the Court lacked personal jurisdiction over U.S. Bank to decide the § 506(a) motion because Debtor did not serve his plan under Federal Rule of Bankruptcy Procedure (referred to as "Bankruptcy Rule") 7004, and that the inadequacy of Debtor's notice of his § 506(a) motion violated due process.

If U.S. Bank had pressed its personal jurisdiction arguments earlier, the Court would have considered them; however, the Court need not address personal jurisdiction because it finds that U.S. Bank has waived it. As to U.S. Bank's due process arguments, the Court holds that U.S. Bank's actual notice of the plan satisfied its due process right to service, and that Debtor's motion was clear enough to put U.S Bank on notice that the value of its claim would be decided at confirmation.

Facts

On May 25, 2012, the Debtor filed a voluntary chapter 13 petition and plan. The Debtor served his plan to U.S. Bank at a general address by regular mail, without attention to an officer of the bank. U.S. Bank does not deny that it received actual notice of the plan. On May 29, 2012, a bar date notice was sent from this Court to U.S. Bank and other creditors, informing them of the confirmation hearing date, the date of the § 341 hearing, and the deadline to object to confirmation.

The Debtor's plan[1] included a motion to value U.S. Bank's collateral under § 506(a) at $11,000.00, on a claim of $72,000.00. No creditor filed an objection to the plan, and on August 6, 2012, the plan was confirmed. A month later, on September 6, 2012, counsel for U.S. Bank filed an entry of appearance and a proof of claim. Two months later, on November 7, 2012, U.S. Bank filed a motion for stay relief, complaining that for several months it hadn't received the Debtor's contractual mortgage payments – payments which were not due pursuant to the plan. Debtor filed objections to U.S. Bank's proof of claim and motion for stay relief, noting that they were inconsistent with the provisions of the confirmed plan.

In response, on December 13, 2012, U.S. Bank filed a motion to vacate the plan [Doc. 30] (the "Federal Rule 60(b) Motion"). In that motion, U.S. Bank argued that the plan violated 11 U.S.C. § 1322(b)(2), and that due process required an adversary proceeding to determine the amount and extent of its claim. The motion did not mention personal jurisdiction. On the same date, U.S. Bank filed a response to Debtor's objection to its claim, again arguing that due process required an adversary proceeding to value its collateral, and again failing to raise personal jurisdiction.

[1] Debtor's plan is in the form required for use in this District. KYEB-LBR 3015-1.

After several continuances (requested by U.S. Bank), U.S. Bank filed a memorandum in support of its motion to vacate on May 6, 2013 [Doc. 46]. Abandoning its initial argument that due process required an adversary proceeding, U.S. Bank instead argued that a § 506(a) valuation request commences a contested matter, and therefore the Debtor's plan (containing a § 506(a) motion) had to be served on the bank pursuant to Bankruptcy Rule 7004(h), which governs the service of motions commencing contested matters on insured depository institutions. That rule requires service by certified mail, addressed to an officer. U.S. Bank argued that because the plan was not served in accordance with Bankruptcy Rule 7004(h), this Court lacked personal jurisdiction over U.S. Bank to grant Debtor's § 506(a) motion, rendering this Court's Confirmation Order void under Federal Rule 60(b)(4), applicable in bankruptcy via Bankruptcy Rule 9024.

Second, U.S. Bank argued that the Confirmation Order was void because the bank was denied due process, on two grounds. First, it argued that due process requires notice under Bankruptcy Rule 7004, even where, as here, a creditor receives actual notice. Second, it argued that the plan was not clear enough to put it on notice that the value of its secured claim would be decided at confirmation, and thereby deprived the bank of notice.

Finally, U.S. Bank argued that the Confirmation Order should be set aside under Federal Rule 60(b)(3) because it was obtained by fraud. Specifically, it argued that the Debtor fraudulently obtained a clean title to his mobile home, allowing him to treat U.S. Bank as secured only up to the value of the real estate on which that mobile home sits.

Analysis

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Venue is proper pursuant to 28 U.S.C. § 1409.

I. Bankruptcy Rule 9024 – Federal Rule 60(b)(4)

A judgment is only void under Federal Rule 60(b)(4) if the court that granted it acted without jurisdiction over one of the parties, the subject matter, or if the judgment "is premised . . . on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010); *see also* 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedures § 2862 (3d ed. 2011). U.S. Bank principally argues that the Confirmation Order should be set aside as void under Federal Rule 60(b)(4) contending both that the Court lacked personal jurisdiction over U.S. Bank to grant Debtor's § 506(a) motion, and that U.S. Bank was denied due process.

It is important at the outset to distinguish between the requirements of personal jurisdiction and those of due process, although both go to the asserted inadequacy of Debtor's service of his plan. Personal jurisdiction requires, among other requirements not at issue here, service of process in compliance with a statute or rule authorizing service of process. Due process, on the other hand, requires adequate *notice*, both in the means of delivery and in the content of notice.

A. Personal Jurisdiction

U.S. Bank argues that this Court lacked jurisdiction over U.S. Bank to grant Debtor's § 506(a) motion because the motion was not served in accordance with Bankruptcy Rule 7004(h). This argument must be evaluated in context. U.S. Bank first raised its personal jurisdiction argument eight months after its initial appearance in the case, six months after it filed a motion for stay relief, and five months after it filed the Federal Rule 60(b)(4) Motion currently before the Court – a filing in which it did not raise personal jurisdiction. All this participation in the case prior to raising a personal jurisdiction defense requires the Court to consider whether claims based on a lack of personal jurisdiction have been waived.

Personal jurisdiction, unlike subject matter jurisdiction, is waivable. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents . . . an individual right, it can, like other such rights, be waived."). Unlike prejudgment waiver of personal jurisdiction, which is governed by Federal Rule 12(h), no Federal Rule directly addresses the postjudgment waiver of personal jurisdiction. Nevertheless, numerous circuits have held that postjudgment motions for relief may be treated just like responsive pleadings are under Federal Rule 12(h), i.e. that an initial postjudgment motion that does not raise personal jurisdiction waives it. *See O'Brien v. R.J. O'Brien & Assocs, Inc.*, 998 F.2d 1394, 1398-1401 (7th Cir. 1993) (holding that a defendant who raised personal jurisdiction in a motion to vacate waived personal jurisdiction by failing to raise it in a prior motion to vacate filed just one month prior); *American Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1107-08 (9th Cir. 2000) (holding that the defendant's first filing to the court in that case, a Federal Rule 55 motion to set aside a default judgment, waived personal jurisdiction by not raising it); *In re Worldwide Web Systems, Inc.*, 328 F.3d 1291, 1299-1301 (11th Cir. 2003) (holding that a defendant waived his insufficient service of process argument by failing to include it in his Federal Rule 60(b) motion to the bankruptcy court); *Swaim v. Moltan Co.*, 73 F.3d 711, 717-18 (7th Cir. 1996) (holding that a defendant forfeited his personal jurisdiction argument by not raising it in his Federal Rule 60(b) motion); *Ladder Man, Inc. v. Mfr's Dist. Servs., Inc.*, 234 F.3d 1268 (6th Cir. Oct. 31, 2000) (table decision) (holding same). These courts reason that an initial postjudgment motion that fails to raise personal jurisdiction constitutes a waiver in the same way as an initial responsive pleading that fails to raise it. Both signal consent to the court's jurisdiction over the party.

Moreover, in cases where a party does not appear until after judgment is entered, certain types of participation in the litigation can waive personal jurisdiction, even if that party's first motion for relief from judgment does raise personal jurisdiction. The Sixth Circuit has held

that personal jurisdiction can be waived by conduct in one of two ways: either by acting in such a way as to give the opposing party "a reasonable expectation that it will defend the suit on the merits," or by "causing the court to go to some effort that would be wasted if personal jurisdiction is later found lacking." *Gerber v. Riordan*, 649 F.3d 514, 519 (6th Cir. 2011) (internal quotation marks omitted) (citation omitted).

In this case, there can be little doubt that U.S. Bank has waived any argument that the confirmation order is void because the Court lacked jurisdiction over U.S. Bank. First, the Federal Rule 60(b) Motion did not raise personal jurisdiction. Its primary argument was that the lack of an adversary proceeding violated due process.[2] The motion never mentioned personal jurisdiction. Moreover, while the motion mentions "the burden of providing adequate notice *and service*," what the motion actually faults the Debtor for is only providing "insufficient information and inadequate notice" – a due process argument. *See* Doc. 30 at 3. Much more has been held to not preserve a personal jurisdiction argument. For example, in *Hayhurst*, the Ninth Circuit held that a *pro se* motion to set aside a default judgment that flatly stated the defendant "had not been properly served" did not raise personal jurisdiction because personal jurisdiction itself was not mentioned. *Hayhurst*, 227 F.3d at 1107. Likewise in *Swaim*, the Seventh Circuit held that a Federal Rule 60(b) motion that raised "ineffective and 'confused' service of process," *Swaim*, 73 F.3d at 716 did not raise personal jurisdiction because it did not mention it, *id*. at 717-18.

[2] *See* Doc. 30 at 3 ("At the very least, Debtor should be required to attempt any 'strip down' of Secured Creditor's lien through adversary proceeding practice. A Complaint stating the name of the Secured Creditor . . . should be filed with the Court in order to alert creditors of the proposed disposition of the unsecured portion of the lien."). For this proposition, U.S. Bank cited *In re Ruehle*, 307 B.R. 28 (B.A.P. 6th Cir. 2004), a case that held due process required an adversary proceeding and notice thereof in a student loan discharge. That somewhat more defensible proposition, however, was rejected by *Espinosa*, which explicitly overruled the Sixth Circuit's affirmance of *Ruehle*. *See Espinosa*, 559 U.S. at 268 n.6 (citing *In re Ruehle*, 412 F.3d 679 (6th Cir. 2005) as among the circuit cases abrogated by the Court's ruling).

Further, while there is no binding authority in the Sixth Circuit that an initial Federal Rule 60(b) motion that fails to raise personal jurisdiction waives it, this Court agrees with the circuits that have so held. First, a Federal Rule 60(b) motion that does not raise personal jurisdiction implicitly concedes that the court has jurisdiction over the party making the motion, just as an answer or motion to dismiss that does not raise personal jurisdiction concedes it. Second, by not raising personal jurisdiction, it "caus[es] the court to go to some effort that would be wasted if personal jurisdiction is later found lacking," *Gerber*, 649 F.3d at 519, thereby wasting judicial resources and causing detrimental delay. *See Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 734 (7th Cir. 1991) (holding that postjudgment personal jurisdiction defenses should be raised in a timely fashion "to eliminate harmful delay and waste of judicial resources"). U.S. Bank did not raise personal jurisdiction in its Federal Rule 60(b) Motion; thus it has waived any claim that the Court did not have personal jurisdiction over U.S. Bank to value its collateral in the plan.

Moreover, in filing its motion for stay relief before it filed its Federal Rule 60(b) motion, U.S. Bank waived Federal Rule 60(b)(4) claims premised on a lack of personal jurisdiction by its participation in the case. The stay relief motion "indisputably gave [the Debtor] a reasonable expectation" that U.S. Bank would litigate this matter "on the merits." *King v. Taylor*, 694 F.3d 650, 660 (6th Cir. 2012) (internal quotation marks omitted) (citation omitted). The motion also caused this Court "to go to some effort that would be wasted if personal jurisdiction [were] later found lacking." *Gerber*, 649 F.3d at 519. This Court both reviewed the stay relief motion and Debtor's objection to the motion, and held a hearing on the stay motion before any claim of defect in personal jurisdiction was raised. *See* Doc. 37.

B. Due Process

U.S. Bank's further attempts to set aside the Confirmation Order as void on due process grounds are foreclosed by *Espinosa*. U.S. Bank argues that the Debtor's notice of his valuation motion was both "quantitatively" and "qualitatively" defective, i.e. that the notice was both improperly served and insufficiently clear. The Court first takes up U.S. Bank's "quantitative" argument.

1. Due Process – Service of Notice.

What due process requires in the way of service is simply stated. Due process requires either a means of service "reasonably calculated to reach the intended recipient when sent," *Jones v. Flowers*, 547 U.S. 220, 226 (2006), *or* actual notice. *See Espinosa*, 559 U.S. at 272 (holding that "actual notice . . . more than satisfies . . . due process rights" because "due process does not require actual notice") (internal quotation marks omitted) (citation omitted). Accordingly, service of process rules do not control whether service satisfies due process; service that does not comply with a service of process rule will satisfy due process if actual notice is attained. *Id*.

U.S. Bank does not deny that it received actual notice of the plan. It argues nevertheless that the means of service – regular mail – did not satisfy due process, and that certified mail to an officer of the bank was required to meet the constitutional standard. *Espinosa*, however, rejected an identical argument. There, a student lender argued that though it received actual notice of a plan, due process required a summons and complaint under Bankruptcy Rule 7004 because the plan purported to discharge the debtor's student debt. The Court described the right to a summons and complaint as "a right granted by a procedural rule," and held that the creditor's due process rights were "more than satisfied" by actual notice. *Espinosa*, 559 U.S. at 272. The same result applies here.

U.S. Bank attempts to distinguish *Espinosa*, arguing that under certain circumstances due process will require more than actual notice, and that *Espinosa* only applies to creditors who "sleep on their rights." It cites a New Jersey district court case, *Jacobo v. BAC Home Loans Servicing, LP*, 477 B.R. 533 (D.N.J. 2012), as authority for these propositions. *Jacobo*, however, did not hold that actual notice can fail to satisfy due process; it held that the creditor in that case did not have actual notice, because notice was only received by employees incompetent to "attend[ ] to" the notice. *Id*. at 541. U.S. Bank has not argued that it lacked actual notice.

Second, *Jacobo* did not hold that the amount of delay makes a difference, and *Espinosa* did not turn on the length of delay present in that case. Although noting the "stark contrast" between the delay in *Espinosa* and the punctuality of the creditor's motion in the case before it, *id*. at 540, the *Jacobo* court based its holding entirely on its finding that the creditor in that case did not really have actual notice. Likewise, the length of time the creditor in *Espinosa* slept on its rights had nothing to do with the Court's holding in *Espinosa*; the Court simply held that the creditor's due process rights were more than satisfied by the actual notice it received. Nor could the Court have relied on how long the creditor slept on its rights; there is no time limit on bringing Federal Rule 60(b)(4) motions.

2. Due Process – Substance of Notice

Finally, U.S. Bank argues that the plan's lack of clarity deprived the bank of due process. As to the contents of notice, "due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Espinosa*, 559 U.S. at 272 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)) (internal quotation marks omitted). In other words, due process requires "clear notice." *In re Shook*, 278 B.R. 815, 825 (B.A.P. 9th

Cir. 2002). In the plan context, a sufficient notice "is one that contains all the material substantive and procedural information necessary to apprise a creditor of the debtor's proposed treatment of the creditor's claim." *In re McLemore*, 426 B.R. 728, 735-36 (Bankr. S.D. Ohio 2010).

U.S. Bank argues that the plan's language regarding the § 506 motion was too unclear to put it on notice that its claim's value would be decided at confirmation. The relevant provisions of the plan read as follows:

> NOTICE TO CREDITORS: This Plan may modify your rights. If you oppose any provision of the plan you must file an objection with the Bankruptcy Court by the deadline fixed by the Court. If you do not file a timely objection, you will have accepted the terms of the Plan, and the plan can be confirmed and the motions granted without further notice or hearing.
> . . .
> 2. Secured Claims Valued Under § 506. The Debtor moves the Court to value collateral as follows according to 11 U.S.C. § 506(a). Each of the following secured claims, if allowed, shall be paid through the plan in equal monthly payments set forth below, until the secured value or the amount of the claim, whichever is less, has been paid in full. Any remaining portion of the allowed claim shall be treated as a general unsecured claim. Any claim with a secured value of $0 shall be treated as a general unsecured claim.

[Doc. 2 at 1.] The Court finds that this language is abundantly clear. It explains that creditors must file an objection if they oppose any provision of the plan, that they will be deemed to accept its terms if they do not object, and that the Court may grant any motion contained in the plan without further notice or hearing if creditors do not object. U.S. Bank complains that the provision that motions "can be" granted is ambiguous and failed to put it on notice that its claim would be "conclusively" valued by Debtor's motion, *see* Doc. 46 at 17. The Court disagrees. Obviously, the final arbiter of the approved plan provisions and motions is the Court, whether or not an objection is interposed.

After explaining that creditors must object if they oppose the plan and that motions therein can be granted without further hearing if creditors did not object, the plan moved to value

U.S. Bank's claim under § 506(a). Nothing could be plainer. Moreover, the Court notes that the Debtor was required to and did use this District's form chapter 13 plan. The language which U.S. Bank complains is unclear has been in this District's form plan since 2005. Longstanding practice and form plan language has been held to put sophisticated creditors on notice that their collateral can be valued through a plan. *See In re Bennett*, 466 B.R. 422, 437 (Bankr. S.D. Ohio 2012). In sum, the plan language was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [motion] and afford them an opportunity to present their objections." *Espinosa*, 559 U.S. at 272. It therefore satisfied due process.

II. Bankruptcy Rule 9024 – Federal Rule 60(b)(3)

Finally, U.S. Bank moves to set aside the Confirmation Order under Federal Rule 60(b)(3) for fraud, misrepresentation, or misconduct. U.S. Bank argues that it has a lien on Debtor's mobile home, and that Debtor, in spite of that lien, fraudulently valued U.S. Bank's secured claim in the plan at the value of only the real estate. This argument fails because, taking U.S. Bank's allegations as true, U.S. Bank knew of and had an opportunity to object to Debtor's alleged fraud at the time of confirmation.

Bankruptcy Rule 9024 incorporates Federal Rule 60 in bankruptcy, subject to the time limitations on requests to revoke orders confirming plans imposed by §§ 1144, 1230, and 1330. Federal Rule 60(b)(3) allows courts to grant relief from judgment on account of "fraud . . . misrepresentation, or misconduct." Section 1330, the applicable section in this proceeding, provides that a party in interest may move to revoke an order of confirmation in 180 days if it was procured by fraud. 11 U.S.C. § 1330. However, "[w]here a creditor knows of a basis for challenging confirmation and fails to object, the creditor cannot be permitted to use that basis to claim fraud under [S]ection 1330 after confirmation." *In re Kouterick*, 161 B.R. 755, 760 (Bankr.

D.N.J. 1993). *See also In re Valenti*, 310 B.R. 138, 150 (B.A.P. 9th Cir. 2004); *U.S. v. Alfano*, 34 F. Supp.2d 827, 843 (E.D.N.Y. 1999).

U.S. Bank argues that the Debtor obtained the Confirmation Order by fraud: specifically, by falsely representing to the Court that U.S. Bank did not have a lien on his mobile home. Even if such representation was made, was false and constituted fraud, U.S. Bank had notice of Debtor's proposed valuation and failed to object before confirmation. Therefore, U.S. Bank's motion to set aside the Confirmation Order under Federal Rule 60(b)(3) is without merit.

III. Conclusion

The foregoing constitutes the Court's findings of fact and conclusions of law. The Confirmation Order was not granted in an absence of due process and U.S. Bank waived any claim regarding a lack of personal jurisdiction. U.S. Bank may not move to set aside the Confirmation Order for fraud when it knew of its basis to object before confirmation.

IT IS HEREBY ORDERED that: (1) U.S. Bank's Motion to set aside the Confirmation Order [Doc. 30] is DENIED; (2) U.S. Bank's Motion for Order Terminating Stay [Doc. 19] is DENIED, and Debtor's Objection to Claim [Doc. 21] is GRANTED.

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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:
Tracey N. Wise
Bankruptcy Judge
Dated: Tuesday, July 23, 2013
(tnw)
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