SO ORDERED.

SIGNED this 30th day of November, 2016.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	)	
	)	
Yvonne Caldwell Covington,	)	Case No. 14-80290
	)	Chapter 13
Debtor.	)	
	)	

ORDER DENYING MOTION TO SET ASIDE DISMISSAL ORDER

This matter came before the court for hearing on November 16, 2016 upon the Motion of Yvonne Caldwell Covington (the "Debtor") to set aside an order entered on October 13, 2016 dismissing the Debtor's Chapter 13 case with prejudice (the "Motion"). Appearing at the hearing were Richard M. Hutson, II, Chapter 13 Trustee, and Donald L. Coomes on behalf of the Debtor. The Debtor was present, but did not give testimony. Having considered the Motion, the court finds and concludes as follows:

The Debtor filed three Chapter 13 petitions between December of 2010 and March of 2014. On December 2, 2010 the Debtor filed a Chapter 13 petition (the "First Case") (Case No. 10-82198). On November 13, 2012 the Trustee filed a motion to dismiss Debtor's First Case for failure to make plan payments, and a hearing was scheduled for January 10, 2013. According to the motion, the Trustee's office contacted the Debtor regarding delinquent payments and the Debtor did not respond. After notice and hearing on the Trustee's motion, on January 11, 2013

the court entered an order dismissing the Debtor's First Case for failure of the Debtor to comply with the requirements of the Plan.

On January 15, 2013, the Debtor filed another Chapter 13 petition (the "Second Case") (Case No. 13-80049). On March 6, 2013, the court dismissed the Debtor's Second Case pursuant to §521(i) for failure to provide all required information under §521(a)(1) within 45 days after filing the petition.

On March 18, 2014, Debtor filed a third Chapter 13 petition (the "Present Case") (Case No. 14-80290). The court entered an order confirming the Debtor's Plan (the "Plan") in the Present Case on August 27, 2014 (Docket No. 43), providing for ongoing mortgage payments to Assets Recovery 24, LLC ("Assets Recovery"), as well as payments to cure the mortgage arrearage, to be paid inside the Plan by the Trustee. The Plan also includes a special provision that if the Debtor defaults on any payment for 30 days or more the case will be automatically dismissed with prejudice, so as to bar the Debtor from filing a petition for relief under Chapter 13 of the Bankruptcy Code for 180 days from dismissal.

On November 11, 2014 the Debtor filed an objection to Assets Recovery's claim in the amount of $127,987.12, requesting that the claim be disallowed due to a lack of supporting documentation demonstrating that Assets Recovery had the proper standing to file the claim (Docket No. 50). ClearSpring Loan Servicing, Inc. *fka* Acqura Loan Services ("ClearSpring") filed a response as the servicer for Assets Recovery on December 22, 2014. A hearing on the objection to claim was first scheduled on December 23, 2014, but was then continued four times before the objection was ultimately withdrawn by the Debtor on April 15, 2015.

On March 9, 2016, the Trustee filed a motion to dismiss the Present Case with prejudice for failure to make plan payments (Docket No. 81). An order granting the Trustee's motion

under 11 U.S.C. § 109(g), was entered the same day, with a 180-day bar from refiling a Chapter 13 petition (Docket No. 82). Subsequently on March 9, 2016, the Trustee filed a motion to vacate the dismissal order (Docket No. 84). According to the Trustee's motion, the Debtor's attorney had contacted the Trustee office and reported that he had received sufficient funds from the Debtor to bring the Plan current.

The court granted the Chapter 13 Trustee's motion to vacate the dismissal order on March 10, 2016 (Docket No. 85), and the Debtor was reinstated back into her Chapter 13 case. The following month, the Trustee filed a motion to modify the Plan, requesting an increase in payments from $1,782.00 to $1,962.00 per month in order to complete the Plan in 60 months. (Docket No. 91). The Debtor objected to the motion, asserting that Assets Recovery's arrearage claim might be overstated.

On May 4, 2016 the Debtor filed a second objection to Assets Recovery's claim in the amount of $127,987.12 requesting a determination of the correct amount that the Debtor owed on the mortgage debt arrearage (Docket No. 93). This objection to claim was set for hearing on June 16, 2016, but then continued twice before being withdrawn on August 8, 2016 after Assets Recovery agreed to file an amended claim. During this time period, the Trustee agreed to numerous continuances of his motion to modify the Plan to afford the Debtor with time to resolve any issues related to the mortgage claim.

Finally, at the August 11, 2016 hearing on the Trustee's motion to modify Plan, Mr. Coomes appeared and indicated that since an amended mortgage claim had been filed, the Debtor had no issues with the mortgage claim at that time. However, the Debtor was not present at that hearing, and Mr. Coomes was not prepared to respond to the Trustee's motion. As a courtesy, the court allowed yet one more continuance of the motion to modify the Plan to August

25, 2016 to allow Mr. Coomes the opportunity to confer with his client regarding the modified plan payment. Mr. Coomes did not appear at the continued hearing date and the court entered an order granting the Trustee's motion to modify, increasing the plan payments to $1,810.00 per month beginning in September 2016. The certificate of service reflects that a copy of this order dated September 7, 2016 was sent to both the Debtor and Mr. Coomes (Docket No. 106).

The Debtor did not make her September 2016 plan payment. On October 13, 2016, the Chapter 13 Trustee filed another motion to dismiss the Present Case with prejudice, for failure to make plan payments (Docket No. 108). The court granted the Trustee's motion, entering an order dated October 13, 2016 (the "Dismissal Order") dismissing the Present Case with a 180-day bar from refiling a petition for relief under Chapter 13 of the Bankruptcy Code as provided by the terms of the confirmed Plan (Docket No. 109).

In the Motion presently before the court, the Debtor seeks reconsideration of the Dismissal Order under Federal Rule of Civil Procedure 60(b), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 9024, and requests that the court either completely set aside the Dismissal Order or, in the alternative, amend the order to remove the 180-day bar from refiling. In support of the Motion, the Debtor asserts the broadly recognized premise that the bankruptcy court as a court of equity has the power to vacate an order pursuant to Rule 60(b). The Debtor specifically moves under Rule 60(b)(6), relying on *Pennsylvania St. Emp.s' Pension Fund v. Durkalec (In re Durkalec)*, 21 B.R. 618, 620 (Bankr. E.D. Pa. 1982) (quoting *Williams v. Cal Indus., Int'l (In re Ireco Indus., Inc.)*, 2 B.R. 76, 84 (Bankr. D. Or. 1979) ("Rule 60(b)(6) should be liberally applied to accomplish justice and when a cause is properly within clause (6), the Court has broad legal discretion to grant or deny relief in light of the relevant circumstances....")).

Federal Rule of Civil Procedure 60(b) provides that the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

> **(1)** mistake, inadvertence, surprise, or excusable neglect;
> **(2)** newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> **(3)** fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> **(4)** the judgment is void;
> **(5)** the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> **(6)** any other reason that justifies relief.

It is well established that whether an order should be set aside pursuant to Rule 60(b) is in the court's discretion. *Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011). Though the language of subsection (b)(6) is broad, "its context requires that it may be invoked in only 'extraordinary circumstances' when the reason for relief from judgment does not fall within the list of enumerated reasons given in Rule 60(b)(1)-(5)." *Id*. at 500 (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988)).[1]

In the Motion, the Debtor's asserted reasons for her requested relief center on the continued problems with the mortgage servicer, including ClearSpring's lack of responsiveness to requests for information related to the escrow account and a possible mortgage modification. The Motion also describes that the Debtor's need to obtain an estimate for roof repairs caused her to hold off on making her September payment, and that the Debtor's attorney did not fully realize how late the payment was until he received electronic notice of the order dismissing the Debtor's Chapter 13 case.

At the November 16, 2016 hearing on the Motion, the Trustee represented that when he filed the first motion to dismiss with prejudice on March 9, 2016, the Debtor had not made a plan

[1] Where a default judgment is at issue, the Fourth Circuit takes a more liberal view of Rule 60(b). *Augusta Fiberglass Coatings, Inc., v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir.1988).

payment since November of 2015. The Trustee further asserted that he granted some leniency to the Debtor before filing that motion to dismiss, and that he filed a motion to vacate the dismissal order as soon as the Trustee's office received a message that funds were available in Mr. Coomes' trust account to bring the Plan current. The Trustee added that the Debtor made a few plan payments after the Present Case was reinstated, but then failed to make the September 2016 payment. Given the Debtor's payment history, the Trustee opposes the Debtor's Motion.

The Debtor declined to present any evidence at the hearing, but reiterated that she had questions about the amount of her escrow payment. Counsel also suggested that there may have been a miscommunication between himself and the Debtor regarding the necessity of timely paying the September plan payment due to problems with her roof and procuring repair estimates.

Having considered the record in this case, the Debtor's history of repeat filings, and the arguments of counsel, the court cannot find that the Debtor has demonstrated circumstances sufficient to satisfy the requirements of Rule 60(b)(6). The Debtor's concerns regarding the mortgage claim or the amount of her monthly escrow payment do not excuse her failure to timely remit payments to the Trustee. These concerns should have been addressed by filing an objection to the claim, not by the Debtor's unilateral decision to cease plan payments. Further, why the Debtor's need to obtain an estimate for roof repairs would excuse her from making her September plan payment is difficult to comprehend. This case had been on for hearing before the court twice in the previous month, with the Trustee's motion continued to the next hearing date for the very purpose of giving counsel ample opportunity to confer with the Debtor regarding the amount necessary for the September plan payment. Given the precarious status of this case as set forth above, along with the automatic dismissal with prejudice provision in the

Plan, the Debtor's alleged belief that a September plan payment was unnecessary strains the imagination.

Lastly, as to the Debtor's requested alternative relief to amend the Dismissal Order, having considered the record as set forth above, the court finds that the Debtor has not established grounds for the court to modify the terms of the confirmed Plan, which provides for dismissal in the event of default to be with prejudice, so as to bar the Debtor from filing a petition for relief under Chapter 13 of the Bankruptcy Code for 180 days from dismissal of the Present Case.

Based upon the foregoing, it is therefore **ORDERED** that the Debtor's Motion to set aside or amend the Dismissal Order is denied.

END OF DOCUMENT

PARTIES TO BE SERVED

Yvonne Caldwell Covington
14-80290 C-13

All Creditors and Interested Parties in the Case