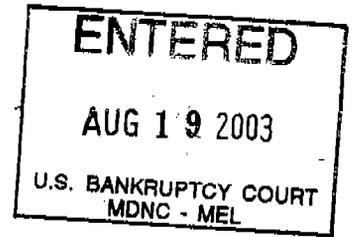


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION



IN RE:)
)
Haywood M. Clayton,) Case No. 02-82063C-13D
)
Debtor.)
)

ORDER

This case came before the court on July 29, 2003, for hearing upon a motion filed by the Debtor entitled "Motion to Vacate Order of Dismissal and to Amend Orders of Court Obtained Under Color of Law and Fraudulent Misrepresentation by Creditor, Ameriquest Mortgage Company" ("the Motion to Vacate"). The Debtor appeared pro se and Benjamin A. Kahn appeared on behalf of Ameriquest Mortgage Company ("Ameriquest").

MATTER BEFORE THE COURT

The Motion to Vacate prays that the court vacate an order entered in this case on August 6, 2002, dismissing this case so that appropriate amendments to entered orders may be made. Although not entirely clear from the Motion to Vacate and supporting memorandum, it appears that the orders which the Debtor seeks to amend are orders which this court entered with reference to a proof of claim that was filed by Ameriquest. The Debtor apparently seeks relief regarding such orders out of concern by Debtor that such orders could have preclusive effect in future litigation with Ameriquest which the Debtor apparently anticipates.

PROCEDURAL BACKGROUND

Prior to the filing of this Chapter 13 case, the Debtor had been the Debtor in Case No. B-01-83187, another Chapter 13 case filed by the Debtor. On March 28, 2002, the Debtor requested and obtained a voluntary dismissal of Case No. B-01-83187. At the time that the Debtor requested the voluntary dismissal of Case No. B-01-83187, a motion for relief from the automatic stay filed by Ameriquest was pending in that case. As a result, the Debtor became subject to the provisions of § 109(g) of the Bankruptcy Code. Under this provision, "no individual . . . may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if . . . the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title." Pursuant to § 109(g), the Debtor was not eligible to file a Chapter 13 case for a period of 180 days from March 28, 2002. Despite not being eligible to file a Chapter 13 case, the Debtor filed this case on July 11, 2002.

As reflected in the Debtor's Motion to Vacate and supporting memorandum, Debtor filed this case in order to halt, by means of the automatic stay, a foreclosure proceeding being pursued by Ameriquest against the Debtor and his spouse in state court. Prior to filing this case on July 11, 2002, the Debtor had instituted a

suit in the United States District Court for the Middle District of North Carolina ("the District Court") in order to obtain an injunction against a foreclosure by Ameriquest in the state court proceeding. On July 10, 2002, one day before the filing of this case, Judge Beaty issued a temporary restraining order in that suit which, upon the Debtor posting a \$5,000.00 bond, would have stayed the state court foreclosure proceeding. Rather than posting the \$5,000.00 bond, the Debtor elected to file this Chapter 13 case despite not being eligible to do so.

On July 18, 2002, the Chapter 13 Trustee filed a motion to dismiss this case based upon Debtor's lack of eligibility to be a Chapter 13 debtor under the provisions of § 109(g). On July 30, 2002, a hearing was held on the Trustee's motion to dismiss and the motion was granted. The order granting the motion to dismiss was entered on August 6, 2002. On August 16, 2002, the Debtor filed a motion for reconsideration of the August 6 dismissal order, which is the same order that the Debtor now seeks to vacate. On September 17, 2002, a hearing was held on the Debtor's motion for reconsideration of the dismissal order and the motion was denied. The order denying the motion for reconsideration was entered on September 18, 2002.

Following the denial of the motion for reconsideration, the Debtor appealed the dismissal order, the order denying the motion for reconsideration and an order imposing Rule 9011 sanctions

against the Debtor to the District Court. On June 11, 2003, an order was entered in the District Court affirming all of the orders which the Debtor appealed to the District Court, including the order dismissing this case and the order denying reconsideration of the dismissal order, and remanding this case to the bankruptcy court. The Motion now before the court was filed on June 9, 2003, two days before the entry of the District Court order and seeks to vacate the dismissal order which was affirmed by the District Court in the June 11, 2003 order.

ANALYSIS

Debtor's motion apparently was filed pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure which incorporates Rule 60 of the Federal Rules of Civil Procedure. Specifically, it appears that Debtor relies upon either Rule 60(b)(2) or 60(b)(6), or perhaps both provisions. For the reasons that follow the court has concluded that the Debtor is not entitled to relief under either of these provisions.

Under Rule 60(b)(2), the court may relieve a party from a final judgment based upon newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial. Under Rule 60(b)(6), the court may relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment." The grounds relied upon by the Debtor in seeking relief under these provisions consist of alleged

misconduct by Ameriquest during the course of the foreclosure proceeding which is described in Debtor's motion and supporting memorandum. While the court certainly does not condone behavior of the type alleged in the motion, it does not follow that the Debtor is entitled to have the dismissal order vacated.

In order to obtain relief under Rule 60(b)(2), the newly discovered evidence must be material to the issues that were tried and must be such that it likely would change the outcome of the earlier order or judgment. See Harris v. Owens-Corning Fiberglas Corp., 102 F.3d 1429, 1434 (7th Cir. 1996); British Caledonia Airways v. First State Bank, 819 F.2d 593, 601-02 (5th Cir. 1987). The operative facts underlying the dismissal order in this case are simple, undisputed and involve Debtor's conduct and not that of Ameriquest. The operative facts are that, while a motion for relief from the automatic stay was pending in the Chapter 13 case that preceded this case, the Debtor sought and obtained the dismissal of that case. This action by Debtor brought into play § 109(g) which operated to make the Debtor ineligible to file a Chapter 13 case for a period of 180 days. When this case was filed within 180 days, this case therefore was subject to dismissal pursuant to § 109(g). Even if the alleged evidence of misconduct on the part Ameriquest could be regarded as newly discovered, it does not satisfy the requirements of Rule 60(b)(2) because it would not alter the outcome of the motion to dismiss. This is true

because such evidence has no bearing upon and does not alter the fact that the Debtor was not eligible to be in Chapter 13 because of the previous dismissal by Debtor and that dismissal of this case was appropriate under § 109(g).

The evidence of alleged improper conduct in the foreclosure proceeding likewise would not change the provisions in the dismissal order finding that the Debtor has abused the bankruptcy process and imposing limitations upon his filing for relief under Chapter 13 for a period of two years. Those provisions were not solely the result of Debtor filing this case or even the case filed immediately before the filing of this case. Debtor has a long history of Chapter 13 filings which includes nine Chapter 13 cases, including the present case. All of the Debtor's Chapter 13 cases were dismissed without the Debtor successfully completing a Chapter 13 plan. Debtor's attempt to excuse this extensive history of filings by alleged misconduct on the part of Ameriquest in a state court foreclosure proceeding is contrary to the record, which reflects that Ameriquest and its foreclosure proceeding have been involved in only three of the nine cases that have been filed by the Debtor. As to the filings that have occurred during Debtor's ongoing dispute with Ameriquest, such filings have not been legitimized by Debtor's proclaimed success in the state court proceedings involving a dismissal of the original proceeding without prejudice. The fact remains that this case was filed for

an improper purpose, namely, for the sole purpose of invoking the stay against a foreclosure proceeding that already was being contested in state court and the District Court. Chapter 13 was not intended to provide an additional forum for the continuation of the litigation of a two-party dispute by a party with no intention of reorganizing his affairs and who seeks only an additional forum to contest issues already extant in state court proceedings. Absent some legitimate reorganization objective achievable under the reorganization provisions of the Bankruptcy Code, a bankruptcy filing may not be used merely to provide a federal forum for a lawsuit. Where a debtor's filing essentially consists of a two-party dispute involving state law issues that can be resolved in state court, and the Chapter 13 filing is intended to delay or frustrate ongoing state court proceedings rather than involving a genuine effort to use the statutory process of Chapter 13 to effect a plan of reorganization, the filing is abusive. That is precisely the situation that exists in the present case, and the fact that the Debtor may have won a battle in state court in his war with Ameriquest over whether he will have to repay the \$267,000.00 he borrowed from Ameriquest or face foreclosure does not alter the fact that the filing of this case was the latest in a series of abusive filings by the Debtor. The provisions in the dismissal order imposing limitations on further filings by the Debtor are fully supported by the record and Debtor has offered no grounds for

such provisions to be altered in any respect.

The allegations of misconduct on the part of Ameriquest also do not constitute a reason for granting relief pursuant to Rule 60(b)(6). In order to obtain relief under Rule 60(b)(6) there must be a showing of extraordinary circumstances justifying relief and the movant must not have contributed to the situation from which relief is sought. See Dawson v. Compagnie des Bauxites de Guinee, 112 F.R.D. 82, 85-86 (1986). Moreover, a failure to appreciate the legal significance of actions or court orders does not constitute an extraordinary circumstance for purposes of Rule 60(b)(6). See PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 897-898 (2d Cir. 1983). Nothing that Debtor alleges in his motion constitutes extraordinary circumstances that alter the fact that he did not have standing to file this case as a result of his prior dismissal. Rather than seek injunctive relief in the state court where the foreclosure proceeding was pending, the Debtor elected to file a suit in District Court. Then, rather than post a \$5,000.00 bond and receive the restraining order that was issued in that case, the Debtor elected to file this case. Without regard to whether impropriety on the part of Ameriquest occurred in the state court proceedings, there is no basis for the court to grant relief under Rule 60(b)(6) from a dismissal order that resulted from the Debtor having adopted litigation strategy to deal with such alleged impropriety that was not available under § 109(g) of the Bankruptcy

Code.

An additional reason why the dismissal order should not be vacated is Debtor's apparent confusion and mistaken belief that he would be in a position to obtain relief from other orders that have been entered by the court upon the dismissal order being vacated. According to Debtor's motion and supporting memorandum, the orders which the Debtor wishes to amend are orders that have been entered regarding a proof of claim filed by Ameriquest. However, the record reflects that no proof of claim was filed by Ameriquest in this case and that no orders have been entered in this case regarding an Ameriquest proof of claim. As to the orders that have been entered in this case, there has been no showing by Debtor that such orders were the result of fraudulent misrepresentations or other misconduct on the part of Ameriquest.

It is, therefore, ORDERED, ADJUDGED AND DECREED that Debtor's "Motion to Vacate Order of Dismissal and To Amend Orders of Court Obtained under Color of Law and Fraudulent Misrepresentation By Creditor, Ameriquest Mortgage Company" is hereby overruled and denied.

This 14th day of August, 2003.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge