

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
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ROBERTSON NDEGWA, ) CASE NO. BK95-81525  
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DEBTOR ) CH. 13

MEMORANDUM

Hearing was held on March 8, 1996, on Motion to Set Aside Relief from Stay, to Reinstate Automatic Stay and Request for Expedited Hearing filed by the Debtor. Appearances: Julie Frank, Attorney for debtors; Donald Swanson, Attorney for Security National Bank. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(G).

**Background**

The debtor filed a Chapter 13 petition on September 22, 1995. For the past year, the debtor has been living outside of the United States, but has retained a personal residence in Omaha. On December 18, 1995, the court granted relief from the automatic stay to Security National Bank (the Bank), a junior lienholder in the debtor's personal residence. The Bank alleged in its original Motion for Relief that the debtor failed to provide insurance against general damage loss, failed to winterize the home before leaving the country, and failed to pay post-petition interest and taxes on prior liens.

The debtor has moved this court to set aside the prior order granting relief from the automatic stay and to reinstate the automatic stay. The debtor has since obtained homeowners insurance on the home. A foreclosure sale is scheduled for Monday, March 11, 1996 at 9:00 a.m.

**Discussion and Decision**

The debtor is requesting that the bankruptcy court set aside relief from the automatic stay and reinstate the automatic stay

pursuant to its authority under Section 105(a), which provides in relevant part:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

11 U.S.C. § 105(a).

The Eighth Circuit has already ruled that a bankruptcy court's powers under Section 105(a) are limited:

Generally, the bankruptcy court possesses only the jurisdiction and powers conferred upon it by Congress, and its broad equitable powers may only be used to further the policies and provisions of the Code.

Bird v. Carl's Grocery Co., Inc. (In re NWFx, Inc.), 864 F.2d 595, 595 (8th Cir. 1989) (citing Johnson v. First Nat'l Bank, 719 F.2d 270, 272 (8th Cir. 1983)). Therefore, Section 105(a) equitable powers may be used to enforce provisions of the Bankruptcy Code, but may not be used to create "new substantive rights" inconsistent with the provisions of the Bankruptcy Code. NWFx, 864 F.2d at 595 (citations omitted). Section 105(a) is procedural instrument, and standing alone, it gives no authority for this court to grant the relief requested by the debtor to set aside the court's prior order granting relief from the automatic stay. See Id.

The Bankruptcy Rules, however, are not silent as to the right of a party to have a judgment amended or to be granted relief from an order of the court. Bankruptcy Rule 9023 applies Federal Rule of Civil Procedure 59(e) to bankruptcy cases and provides that a motion to alter or amend a judgment may be brought within ten days of the original judgment. See FED. R. BANKR. P. 9023; FED. R. CIV. P. 59(e). This rule does not apply in this case because this court may not expand the time period beyond the ten days. See FED. R. BANKR. P. 9006(2) (prohibiting bankruptcy courts from enlarging the time period under Rule 9023).

Another Bankruptcy Rule extending the right of a party to enlarge a time period is Rule 9024, which applies Federal Rule of Civil Procedure 60(b) to bankruptcy cases and which provides a one year statute of limitations for seeking relief from an order. It provides in part:

(b) 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: (1) mistake, inadvertence, surprise, or excusable neglect.... The motion shall be made within a reasonable time, and for reasons (1), ... not more than one year after the judgment, order, or proceeding was entered or taken.

FED. R. BANKR. P. 9024; FED. R. CIV. P. 60(b).

The Eighth Circuit recently interpreted Federal Rule 60(b) in a bankruptcy case in Ellis v. Ellis (In re Ellis), 72 F.3d 628 (8th Cir. 1995). In Ellis, a bankruptcy court ruled that an award pursuant to a divorce decree granted to a former spouse was a dischargeable property settlement, instead of alimony. Id. at 630. Almost one month later, the former spouse filed an untimely motion to alter or amend a judgment under Federal Rule 59(e) through the authority of Federal Rule 60(b) and the excusable neglect standard. Id. The Eighth Circuit first noted that because Federal Rule 59(e) could not be enlarged beyond 10 days under Bankruptcy Rule 9006(b)(2), the bankruptcy court was without jurisdiction to consider the former spouse's Federal Rule 59(e) motion. Id. at 631.

The Eight Circuit next noted:

Rule 60(b) is appropriately invoked to offer excuses for neglect leading up to the judgment in the first place, not excuses for neglect for failure to file post-judgment motions to alter or amend. A Rule 60(b) motion alleging excusable neglect is appropriately used when seeking relief from judgment for excusable neglect, not when seeking relief from the deadlines set by the rules for post-judgment motions, even if those deadlines are not met because of excusable neglect.

Ellis, 72 F.3d at 631 (citations omitted).

The Supreme Court defined the term "excusable neglect" in Pioneer Inv. Servs. v. Brunswick Assoc. Ltd. Partnership, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). The Court determined that the following non-exhaustive list of factors

should be evaluated in each case to determine whether the neglect is "excusable":

1. The danger of prejudice to the debtor;
2. The length of the delay and its potential impact on judicial proceedings;
3. The reason for the delay, including whether it was within the reasonable control of the movant; and
4. Whether the movant acted in good faith.

Pioneer, 113 S. Ct. at 1498.

In this case, it does not appear that either the debtor or counsel for the debtor is guilty of excusable neglect. At the time the order lifting the automatic stay was entered, there was no insurance on the house and the creditor had a right to relief from the stay. Debtor had no legitimate grounds for appeal or reconsideration. Now there is insurance, but that fact is not relevant to the Rule 60(b) analysis.

The debtor's motion to set aside the order lifting the automatic stay and to reinstate the automatic stay is denied in this case. While Rule 60(b) through Bankruptcy Rule 9024 may be invoked under certain circumstance to grant relief from a prior order of the bankruptcy court, the facts in this case do not justify such relief.

There is no evidence on the record to support a finding that the debtor failed to pay his insurance before the December 18, 1995 hearing as a result of excusable neglect. Nor is there evidence that the lack of appeal from the entry of the order lifting the stay was a result of excusable neglect. The debtor lost because he did not take care of business.

The delay in this case is within the reasonable control of the debtor. The relief was granted because the debtor did not provide insurance or protection from damage for his residence to his secured creditors. While the court is sympathetic to the fact that the debtor is being delayed because he is not currently in the United States, the court does not believe that a debtor can file a bankruptcy case and get the protection of the automatic stay, specifically protection from a foreclosure sale, then avoid the burdens of the Bankruptcy Code. One of the allegations of the original motion was that the debtor failed to winterize the home, the Bank had to scramble to get authorization

to enter the house and winterize it because of its concern about damage from persistent sub-zero temperatures. The debtor's home was at serious risk of being seriously damaged, which would have been the fault of the debtor, had the Bank not acted to protect its collateral.

There is no evidence that the debtor has intentionally acted in bad faith, but the circumstances of this case do raise the possibility. The insurance obtained by the debtor appears to be at the direction of the senior lienholder in this case, not the debtor. The debtor is acting on the eve of a foreclosure action. The debtor subjected the property to the threat of damage. The bankruptcy file shows that a Motion to Dismiss is pending because the debtor did not appear for a Section 341 hearing or make his initial plan payments. While a Chapter 13 plan has been filed, the debtor conceded at the hearing that it must be amended. These factors show that the debtor is not seriously addressing the obligations of Chapter 13 or perhaps, the debtor is not able to handle those obligations.

The debtor is not entitled to relief from the court's prior order of December 18, 1995 which granted relief from the automatic stay to the Bank.

Separate journal entry previously filed.

DATED: March 8, 1996

BY THE COURT:

Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

SWANSON, DONALD	390-9005
*FRANK, JULIE	346-5920

Copies mailed by the Court to:

Kathleen Laughlin, Trustee  
United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
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ROBERTSON NDEGWA, )  
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DEBTOR(S) )  
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Plaintiff(s) )  
vs. )  
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Defendant(s) )

CASE NO. BK95-81525  
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CH. 13  
Filing No. 50

JOURNAL ENTRY

HEARING DATE: March 8,  
1996

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Set Aside Relief from Stay, to Reinstate Automatic Stay, and Request for Expedited Hearing filed by the Debtor.

APPEARANCES

Julie Frank, Attorney for debtor  
Don Swanson, Attorney for Bank

( ) Copy to Law Clerk (X) Exhibits received

IT IS ORDERED:

Motion to set aside order granting relief from automatic stay is denied. Memorandum shall be filed later.

BY THE COURT:

Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

\*FRANK, JULIE 346-5920  
SWANSON, DONALD 390-9005

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