IT IS ORDERED as set forth below:

Date: August 31, 2009

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 05-79056
Mark Edward Manning and Tracie Lynn Manning,	CHAPTER 7
Debtors.	JUDGE MASSEY

AMENDED ORDER DETERMINING PROCEEDS OF
SALE OF PROPERTY ARE PROPERTY OF THE ESTATE

Martha Miller, the Chapter 7 Trustee in this reopened case, moves for an order determining that the surplus proceeds of the sale of the Debtors' residence at a foreclosure sale are property of the estate. The Court construes the motion as requesting an order revoking any technical abandonment of the residence to the extent of surplus proceeds.

During the initial pendency of this case, Washington Mutual Bank, holder of the first priority security deed on the residence, obtained relief from the automatic stay. That order, entered on January 12, 2006, stated in relevant part: "[u]pon completion of any foreclosure sale,

any funds in excess of the payoff due to Movant under its Note and Security Deed shall be paid to the Trustee for the benefit of the Estate." The foreclosure sale occurred on May 2, 2006, three months after the case was closed.

The foreclosure sale brought more than the debt owed to Washington Mutual, but its law firm held the surplus proceeds without informing either Ms. Miller or the record holder of a second security deed, K. Brett Hughes. In 2008, Mr. Hughes learned of the existence of the proceeds and contacted Washington Mutual's counsel, which in turn notified Ms. Miller. She then filed a motion to reopen this case, which the Court granted. Thereafter, the Trustee filed Adversary Proceeding No. 08-6528, naming as Defendants, Mr. Hughes, the Debtors and the Estate of Glyndon C. Pruitt, which contends that Mr. Hughes had assigned the second deed to Mr. Pruitt to secure a debt owed by Mr. Hughes to Mr. Pruitt. In that proceeding, the Trustee seeks to determine the extent of the Defendants' interest in the proceeds.

In the adversary proceeding, Mr. Hughes moved for summary judgment. In an order setting a hearing on the motion, the Court raised the issue whether the proceeds are property of the Debtors' bankruptcy estate. The Trustee then filed a motion in this case seeking an order determining that the proceeds are property of the estate and scheduled a hearing on that motion for July 14 at the same time as the hearing on the summary judgment motion. At the hearing, the Court invited the Defendants to file responses to the Trustee's motion in the main bankruptcy case and gave them a week to do so. None of the Defendants filed a response.

Section 554(c) of the Bankruptcy Code provides: "(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of

this title." 11 U.S.C. § 554(c). Such an abandonment, which occurs automatically upon closing unless the court has ordered otherwise, is sometimes referred to as a "technical abandonment." The order closing the case entered on January 30, 2005 did not "order otherwise."

The Trustee contends that she never intended to abandon surplus proceeds from the sale of Debtors' residence, but she provided no factual support for this position. This position might have been supported by the direction in the order granting stay relief to Washington Mutual Bank that excess sale proceeds be paid to the Trustee but for the following facts. The Trustee had not previously reported in her "no distribution" report that there was nothing in the estate that would generate funds for unsecured creditors. The motion for stay relief made no mention of preserving any interest in the residence as estate property. And the Trustee did not appear at the hearing on Washington Mutual's motion and did not otherwise oppose it.

Therefore, the direction to turn over to the Trustee excess sales proceeds hinged on the sale occurring while the residence was property of the estate. To see that this must be true, imagine that Debtors and Washington Mutual agreed to rework the terms of the loan and that a default and foreclosure occurred in 2012. It cannot be seriously argued that an order lifting the automatic stay in 2006 with respect to property abandoned in 2006 nevertheless preserved an interest in excess proceeds of a sale occurring years later.

The question presented is whether the technical abandonment of the residence is revocable to the extent of the surplus proceeds. In *In re Woods*, 173 F.3d 770 (10th Cir.1999), the court of appeals ruled "that a strict irrevocability rule does not properly account for Fed. R. Bankr P. 9024, which provides that Fed. R. Civ. P. 60 applies, with minor modifications, to all bankruptcy cases." *Id*. at 778 (footnotes omitted). Based on its analysis of the reach of Civil Rule 60(b), the

court of appeals affirmed the rulings of the lower courts that permitted revocation of the technical abandonment of estate property. One other circuit court has concurred with this approach. *LPP Mortg., Ltd. v. Brinley*, 547 F.3d 643 (6th Cir. 2008).

Civil Rule 60(b), made applicable by Bankruptcy Rule 9024 with certain exceptions not relevant here, provides:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative 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.

Only subparagraphs (b)(1) and (b)(6) provide a ground for revoking the abandonment. As the *Woods* court held, Civil Rule 60(b)(1) provides a basis for revocation of a technical abandonment for mistake or excusable neglect. Here, there is a basis for revoking the abandonment under Rule 60(b)(1).

The Debtors listed on Schedule D a second mortgage debt owed to Glyndon C. Pruitt, which they did not dispute. The sum of the debts owed to Washington Mutual and to Mr. Pruitt exceeded the value of the residence according to the Debtors' Schedules. The Debtors did not exempt the residence, which added to the basis for assuming that Mr. Pruitt's second mortgage position eliminated any chance of surplus proceeds from a foreclosure sale. In the adversary proceeding, however, Debtors filed a response to the motion for summary judgment filed by Mr.

Hughes claiming that they never received any funds on the loan purportedly secured by the second mortgage and did not sign the security deed, *Miller v. Hughes, et al.*, A.P. No. 05-79506, Doc. No. 47. They also challenge the validity of the deed. Had the Trustee thought that the second mortgage might not be valid, she would presumably have obtained an order pursuant to section 554(c) making it clear that the estate's claim to the residence to the extent of surplus proceeds was not abandoned.

If the Trustee's conduct is for some reason thought not to be a mistake for purposes of Civil Rule 60(b)(1), the same facts stated above provide a sufficient reason under subparagraph (b)(6) to permit technical revocation of the abandonment. The court of appeals in the *Woods* case pointed out that Rule 60(b) is a "'grand reservoir of equitable power to do justice in a particular case.' *Pierce v. Cook & Co.*, 518 F.2d 720, 722 (10th Cir.1975) (en banc)." *In re Woods*, 173 F.3d at 780. If it turned out that the second security deed is invalid or that it secures no debt and that Debtors have unclean hands in showing the debt to be valid on Schedule D, the technical abandonment, if not revoked, would result in Debtors getting the funds, which would be inequitable under these assumptions. The Court hastens to add that it is not yet in a position to determine whether there is a logical explanation for the inconsistency between the Debtors's Schedule D and their responses to the summary judgment motion in the adversary proceeding.

Further, all of the Defendants have been aware of the efforts of the Trustee to determine the rightful owner of the funds since this case was reopened. Yet, none of them objected to the reopening of the case or the effort of the Trustee to administer the funds. Requiring the Defendants to resolve the issue in state court would be a waste of the efforts made to date, which are considerable. (The Trustee asserts that the Pruitt Estate has thrown in the towel, but there is

nothing of record to support that assertion; there is at least some possibility that the Pruitt Estate is entitled to the surplus proceeds.)

Accordingly, the Trustee's unopposed motion to determine that the surplus proceeds of the sale of the Debtors' residence at a foreclosure sale are property of the estate, which the Court construes as requesting an order revoking any technical abandonment of the residence to the extent of surplus proceeds, is GRANTED. The surplus proceeds are property of the Debtors' bankruptcy estate. The Clerk is directed to serve a copy of this Order on the Trustee, the Debtors and their counsel, the attorney for K. Brett Hughes in the adversary proceeding, and Deanna W. Pruitt, as executor of the Estate of Glydon C. Pruitt, at the address given in her answer in the adversary proceeding.

END OF ORDER