IT IS ORDERED as set forth below:

Date: June 7, 2012

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CASE NO. 09-69716-WLH
	)	
SAMMY L. RICHARDS,	)	CHAPTER 13
	)	
Debtor.	)	JUDGE WENDY L. HAGENAU
	)	
	)	
SAMMY L. RICHARDS,	)	
	)	
Movant,	)	
	)	
v.	)	CONTESTED MATTER
	)	
WELLS FARGO BANK,	)	
	)	
Respondent.	)	
	)	

ORDER ON DEBTOR'S AMENDED MOTION FOR RECONSIDERATION AND FOR A FINDING OF FACT AND CONCLUSION OF LAW *(sic)*

The Debtor filed a "Motion for Reconsideration and for a Finding of Fact and Conclusion of Law" [Docket No. 107], which was amended on May 4, 2012 [Docket No. 108] ("Motion for Reconsideration") and which is now before the Court. In it, the Debtor asks the Court to enter a Finding of Fact and Conclusion of Law on his "Motion to Set Aside a Order Due to 'Unclean

Hands' and Fraud and Motion for Sanctions Pursuant to Rule 11(b) and Damages" [Docket No. 93] ("Set Aside Motion") and to reconsider its denial of the Set Aside Motion. The following constitutes the Court's Findings of Fact and Conclusions of Law under Fed. R. Bankr. P. 7052 on the Set Aside Motion and the Motion for Reconsideration. For the reasons stated below, the Debtor's Motion for Reconsideration and Set Aside Motion are DENIED.

FACTS

The Debtor filed a chapter 13 petition in this Court on April 14, 2009. His schedules listed Wells Fargo as a secured creditor, being owed $113,212.00. On July 30, 2009, the Debtor's plan was confirmed. The plan proposed payments over a 36-month applicable commitment period. The plan provided for payment of $1,939.00 in pre-petition arrearage owed to Wells Fargo on its first mortgage. Wells Fargo filed a proof of claim [Claim No. 4] on July 31, 2009. Attached to the proof of claim are the original note signed by the Debtor in 2003 and made payable to Wells Fargo, a security deed with Wells Fargo as the grantee, also dated 2003, a loan modification between Mr. Richards and Wells Fargo dated 2007, and an itemization of Wells Fargo's arrearage claim. On September 28, 2010 (over a year later), Wells Fargo filed a Motion for Relief from Stay, alleging the Debtor had not made the post-petition mortgage payments for August and September 2010 as required by the plan. [Docket No. 58]. According to the certificate of service, this motion for relief from stay was served by Wells Fargo directly on the Debtor as well as on the Debtor's counsel. The matter was called for hearing on October 20, 2010. Neither the Debtor nor the Debtor's counsel appeared at the hearing or filed opposition to the motion for relief from stay. Consequently, on October 26, 2010, the Court entered an order [Docket No. 60] lifting the automatic stay ("Order on Relief from Stay"), which also directed the Chapter 13 Trustee to cease distributions on Wells Fargo's claim. This Order on Relief from Stay was served on the Debtor individually and also on the Debtor's counsel.

As a result of an unrelated litigation settlement, the Debtor was able to complete the payment of his obligations under the plan several months sooner than anticipated. On December 21, 2011, the Chapter 13 Trustee filed a Notice of Plan Completion [Docket No. 87], reflecting that all payments had been made under the plan. Subsequently, on February 1, 2012, the Debtor filed the Set Aside Motion.

In the Set Aside Motion, the Debtor alleges the following facts which are assumed by the Court to be true for purposes of its ruling. The Debtor states he was aware of the filing of the Motion for Relief from Stay and the scheduled hearing. (P. 3-4, ¶ 5-6). The Debtor delivered to his counsel proof of having paid the August 2010 payment on August 19, 2010 and having paid the September 2010 mortgage payment on September 27, 2010. (Ex. D to Set Aside Motion). He did not request that his attorney oppose the Motion for Relief from Stay. Rather, the Debtor pursued a loan modification with Wells Fargo. (P. 3-4, ¶ 6-7). He then began working with Americas First to submit a loan modification package. In December 2010, the Debtor received from Wells Fargo the proposed terms of a loan modification. (P. 5). The Debtor found the terms unsatisfactory and argues in the Set Aside Motion the proposed modification is an event of fraud. (P. 5). The Debtor then retained counsel to investigate various allegations against Wells Fargo. Counsel for the Debtor submitted a Qualified Written Request under RESPA and TILA to Wells Fargo on January 13, 2011. (Ex. E). Additional communications in February and March 2011 occurred between the Debtor's counsel and Wells Fargo regarding additional documents needed. (Exs. E, H). Nevertheless, on or about April 5, 2011, Wells Fargo purportedly foreclosed on the Debtor's property. It appears, however, Wells Fargo did not record a deed under power after the completion of the sale. (Set Aside Motion, P.7, ¶ 9; July 2011 letter, Ex. H). The Debtor's counsel then began challenging the foreclosure as inappropriate. On June 25, 2011, the Debtor executed an Affidavit of Forgery, alleging Wells Fargo's security deed was altered after Mr.

Richards' signature, which affidavit was filed in Clayton Superior Court on June 27, 2011. (Ex. H).

A hearing was set on the Set Aside Motion and then rescheduled at the request of counsel for the Debtor. The hearing was held on April 18, 2012, at which the Debtor personally appeared, along with his counsel, Satyam Mehta, and Ashley Thompson, counsel for Wells Fargo. The Debtor argued the Order on Relief from Stay should be set aside because of fraud and other acts of Wells Fargo discussed more fully below. At the conclusion of the hearing, the Court ruled from the bench that the Debtor's Set Aside Motion would be denied because the pre-requisites under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b) had not been satisfied and further that the Debtor's plan could not be modified to address any debt of Wells Fargo since all plan payments had been made. An order denying the Set Aside Motion was entered on April 19, 2012 [Docket No. 105]. The Debtor then filed his Motion for Reconsideration.[1]

Before reaching the merits of the Debtor's Motion for Reconsideration, the Court will review the Order on Relief from Stay and the Order Denying the Set Aside Motion, which the Debtor challenges in his Motion for Reconsideration.

Motion and Order on Relief from Stay

Wells Fargo filed a Motion for Relief from Stay on September 28, 2010 and alleged the Debtor had not made two post-petition payments as required by the plan. At the time the Motion for Relief from Stay was filed, Wells Fargo had already filed its proof of claim [Claim No. 4] that included copies of the note, security deed and prior loan modification with the Debtor, all of which identified Wells Fargo as the secured lender. The Debtor had also identified Wells Fargo as a secured lender in his petition, schedules and in his plan. Moreover, the Court notes the

[1] Any other facts discussed below are included in the Findings of Fact.

Motion for Relief from Stay was unopposed. The Debtor's Set Aside Motion states he did not instruct counsel to appear at the hearing on the Motion for Relief from Stay or to oppose it, all of which is very common in the context of a Chapter 13 case. Thus, the Order on Relief from Stay was entered on October 26, 2010. Moreover, it is undisputed that the Debtor received a copy of the Motion for Relief from Stay and the Order on Relief from Stay, yet took no action in the Court to address the situation until the Set Aside Motion was filed over 15 months later. The Debtor believes the Order on Relief from Stay is the root of his problems, but the Debtor's belief is incorrect.

A "hearing on a motion for relief from stay is meant to be a summary proceeding, and the validity or merits of claims and defenses are not litigated during the hearing." In re Fontaine, 2011 WL 1930620, *1 (Bankr. N.D. Ga. April 12, 2011). Rather, the purpose of the hearing is simply to determine "whether a creditor has a colorable claim to property of the estate". Grella v. Salem Five Cent Bank, 42 F.3d 26, 32 (1st Cir. 1994); In re Lebbos, 455 B.R. 607, 615 (Bankr. E.D. Mich. Aug. 23, 2011); In re Fontaine, 2011 WL 1930620 (Bankr. N.D. Ga. April 12, 2011). As the court in Grella said, "As a matter of law, the only issue properly and necessarily before a bankruptcy court during relief from stay proceedings is whether the movant creditor has a colorable claim; thus the decision to lift the stay is not an adjudication of the validity or avoidability of the claim, but only a determination that the creditor's claim is sufficiently plausible to allow its prosecution elsewhere." 42 F.3d at 32. An order granting relief from stay, therefore, only finds that the creditor has a colorable claim and that its interest is not adequately protected by the debtor at the time the order is issued. See also In re Evans, 786 F.Supp. 2d 347, 355 (D. D.C. 2011).

The Order on Relief from Stay in this case is no different. The Order does not make any findings regarding the validity of Wells Fargo's claims or the security deed. The Order does not

purport to adjudicate any defenses Mr. Richards may have to the foreclosure. Therefore, the Motion for Relief from Stay and the Order granting it did not address or adjudicate in any way the issues the Debtor seeks to raise now regarding the validity of the security deed and the validity of the foreclosure sale. Similarly, the Order on Relief from Stay is not *res judicata* as to any of those issues. There was no issue raised nor did the Debtor have an obligation to raise at the time of the hearing on the Motion for Relief from the Stay any defenses he had to Wells Fargo's claim or proposed foreclosure. Creatore v. Girton, Oakes & Burger, Inc., 2010 WL 3672229 (N.D. Ohio, Sept. 10, 2010); Evans v. First Mount Vernon, ILA, 786 F.Supp. 2d 347, 355 (D. D.C. 2011); In re Lebbos, 422 B.R. 235 (E.D. Cal. 2009). Nothing about the entry of the Order on Relief from Stay in any way impaired, or impairs presently, the Debtor's right to raise all of the issues and defenses he has against Wells Fargo in state court. As the court in Creatore stated: "The effect of the bankruptcy court's order for relief from stay does not equate to a final decision on the merits of a discrete issue, but merely grants the right to assert a claim in another court." 2010 WL 3672229 at *4.

Motion to Set Aside

The Debtor argued in the Set Aside Motion and at the hearing on April 18, 2012 that the Order on Relief from Stay should be set aside under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b). Under Rule 60(b),

> 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.

However, a motion under Rule 60(b)(1), (2) or (3) must be made no more than one year after entry of the judgment or order. A motion under Rule 60(b)(4), (5) or (6) must be made within a "reasonable time".

The Debtor's counsel acknowledged the Set Aside Motion was brought outside the one-year limitation to challenge the Order on Relief from Stay under Rule 60(b)(1), (2) or (3), which includes fraud. Moreover, the record reflects that, within the one-year period, the Debtor was clearly aware of the arguments he now makes. The security deed the Debtor now claims is forged is the same security deed attached to Wells Fargo's proof of claim in July 2009. The Debtor knew of the entry of the Order on Relief From Stay, but chose instead to work on a loan modification with the lender. The Debtor knew of the lender's proposed modification in December 2010; knew of the foreclosure in April 2011; and signed an affidavit of forgery with respect to the Wells Fargo security deed in June 2011. The Order on Relief from Stay was not entered until October 26, 2010, so the Debtor had until October 2011 to challenge the Order on Relief from Stay on the basis of fraud or newly discovered evidence under Rule 60(b). He did not do so and now may not do so.

Instead, the Debtor's counsel argued the Order on Relief from Stay should be set aside as void because it was obtained by fraud. "A judgment is not void … simply because it is or may have been erroneous. … Instead, Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or 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, 130 S.Ct. 1367, 1377 (2010) (cites omitted). Here, the order granting relief from stay was not void. The bankruptcy court is authorized to hear and determine all core proceedings arising under Title 11. Motions to modify the automatic stay are specifically enumerated in 28 U.S.C. § 157(b)(2)(G) as core matters. Moreover, the Debtor, by voluntarily

filing a bankruptcy petition, subjected himself and his property to the jurisdiction of the bankruptcy court. Therefore, the Court had the jurisdiction and authority to enter the Order on Relief from Stay.

Furthermore, the Debtor was provided due process before the entry of the Order on Relief from Stay. Due process requires the party be given notice and a meaningful opportunity to be heard. Lachance v. Erickson, 522 U.S. 262, 266 (1998). The Motion for Relief from Stay and notice of hearing were served on the Debtor individually and on the Debtor's counsel. The Debtor acknowledges in the Set Aside Motion he was aware Wells Fargo filed the Motion for Relief from Stay and communicated with his counsel about it. The Court, having provided the Debtor with notice and an opportunity to be heard with respect to the Motion for Relief from Stay, and the Debtor having chosen not to avail himself of that right, afforded the Debtor due process. Therefore, the Order on Relief from Stay is not void and may not be set aside under Rule 60(b)(4).

Next, the Debtor and his counsel argued the Order on Relief from Stay should be set aside under Rule 60(b)(5) because applying the order prospectively is no longer equitable. The Debtor and his counsel argued that, because of the alleged fraud of Wells Fargo in obtaining the Order on Relief from Stay and the alleged invalidity of the security deed, it was no longer equitable for Wells Fargo to have stay relief and be allowed to foreclose. However, "Rule 60(b) was not intended to provide relief for error on the part of the court or to afford a substitute for appeal". Matter of E.C. Bishop and Son, Inc., 32 B.R. 534, 536 (Bankr. W.D. Mo. 1983) (quoting Title v. U.S., 263 F.2d 28, 31 (9th Cir. 1959)). Most often, this section arises in the context of "institutional reform litigation" or prospective injunctions where the prospective actions are "reviewed for inequitable application because of changed circumstances". Lee v. Marvel Enterprises, Inc., 765 F.Supp. 2d 440, 451 (S.D. N.Y. 2011). While Rule 60(b)(5) is

sometimes used to re-impose the automatic stay, such re-imposition here is not appropriate. First, the Debtor made no effort to challenge the Order on Relief from Stay for over 15 months, despite being fully aware of its existence and the repercussions of its entry. Most importantly, however, setting aside the Order on Relief from Stay, thereby imposing a stay on Wells Fargo does not reverse the actions taken by Wells Fargo in the interim or provide the Debtor with the relief he wants. First, reimposing the stay does not void the actions Wells Fargo took in the interim. If Wells Fargo foreclosed on the Debtor's property, that foreclosure remains in place. To the extent Wells Fargo has not yet foreclosed on the Debtor's property, or the foreclosure can be set aside for state law reasons, the bankruptcy court cannot provide the Debtor the relief he seeks.

The Debtor's Chapter 13 plan has been fully performed and was fully performed before the Debtor filed the Set Aside Motion. The Trustee filed the Notice of Completion of Plan in December 2011. Thus, under 11 U.S.C. § 1329, the plan can no longer be modified. The purpose of a Chapter 13 bankruptcy case, and the purpose of the imposition of the automatic stay, is to give the debtor a breathing period within which to reorganize its debts. Here, re-imposition of the automatic stay would not achieve that goal, since the Debtor can no longer propose a plan to address the Wells Fargo debt. Furthermore, the issues raised by the Debtor are presently being litigated by the parties in the Clayton Superior Court, so the Debtor is not without a remedy to address the issues he raises as to the validity of the security deed or any fraud allegedly occurring in connection with the loan modification process. Therefore, the Court denied the request to set aside the Order on Relief from Stay under Rule 60(b)(5).

Finally, the Debtor argued the Order on Relief from Stay should be set aside under Rule 60(b)(6), which is for "any other reason that justifies relief." The Debtor argued the injustice resulting from the entry of the Order on Relief from Stay is "extraordinary, … substantial and

represents irreparable injury to the Debtor". Rule 60(b)(6) affords the Court some discretion to address issues raised by the parties that necessitate the setting aside of a prior order or judgment. However, it is not meant to supersede the requirements of Rule 60(b)(1) through (5). In other words, it is not meant to avoid the one-year limitation on a challenge under Rule 60(b)(1) through (3), or to change the standards for what constitutes a void judgment under Rule 60(b)(4) or relief from a prospective judgment under Rule 60(b)(5). Gulf Coast Bldg. & Supply Co. v. Int'l Bhd. of Elec. Workers, Local No. 480, AFL-CIO, 460 F.2d 105, 108 (5th Cir. 1972). See also Sneed v. Pan American Hosp., 435 Fed. Appx. 839, 841 (11th Cir. 2011). Moreover, relief under Rule 60(b)(6) "is extraordinary and may only be granted in exceptional circumstances." Davis v. Kan. Dept. of Corr., 507 F.3d 1246, 1248 (10th Cir. 2007).

As the Court stated at the hearing, setting aside the Order on Relief from Stay accomplishes nothing for the Debtor because the Debtor's bankruptcy plan has been completed. As explained to the Debtor at the hearing, if the stay were re-imposed, but Wells Fargo sought relief from the stay again, the Court would be forced to grant such relief because the Debtor will be unable to provide any repayment or treatment of the claim in the bankruptcy case. The Debtor will not be able to make payments or propose a plan to Wells Fargo in the bankruptcy case. Moreover, the issues raised by the Debtor are being litigated adequately in Clayton Superior Court, and there is no reason to re-impose the automatic stay.

The Court denied the Set Aside Motion by order dated April 19, 2012. The Court noted the Debtor had also requested sanctions under Fed. R. Bankr. P. 9011 against Wells Fargo and its counsel. The Debtor had not followed the procedures set out in Rule 9011 for assertion of a sanctions claim, including advance notice to the respondents. The Court therefore instructed the Clerk's office not to close the case for a period of 60 days to give the Debtor an opportunity to file an adversary proceeding in the bankruptcy case to pursue his allegations that Wells Fargo

violated Fed. R. Bankr. P. 9011 in connection with the Motion for Relief from Stay and his claim for sanctions against Wells Fargo and its counsel. To date, the Debtor has not filed such an adversary proceeding. Rather, the Debtor has now filed a Motion for Reconsideration of the Court's Order dated April 19, 2012.

Motion for Reconsideration

The Debtor's Motion for Reconsideration is filed under Fed. R. Bankr. P. 9023, which incorporates Fed. R. Civ. P. 59. "Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to re-litigate old matters or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" Exxon Shipping Co. v. Baker, 554 U.S. 471, 486, n.5 (2008) (citing 11 C. Wright & A. Miller, Fed. Prac. & Proc. § 2810.1, pp. 127-128 (2nd ed. 1995)). Other courts have held that, to prevail on a motion for reconsideration under Rule 59, "the movant must present either newly discovered evidence or establish a manifest error of law or fact. A 'manifest error' is not demonstrated by the disappointment of the losing party. It is the 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" Oto v. Metro Life Ins. Co., 224 F.3d 601, 606 (7th Cir. 2000).

As the Court reviewed above, the Debtor has not presented any new arguments that suggest to the Court its original decision on the Set Aside Motion was in error. In the Amended Motion for Reconsideration, the Debtor makes several arguments: the Order on Relief from Stay was void due to fraud and a lack of due process; he has discovered new evidence; and there has been a change in the law. First, he argues that a court has no discretion to refuse to vacate a void judgment. While that statement is true, as the Court explained above, the Order on Relief from Stay is not void because the Court had both subject matter jurisdiction and personal jurisdiction to enter the Order on Relief from Stay and the Debtor was provided due process. Secondly, the Debtor argues the Court's order denying the Debtor's Set Aside Motion was issued without due

process and therefore void. The Court, however, finds the Debtor was afforded due process in connection with the April 18, 2012 order. The Set Aside Motion was set for hearing and re-scheduled at the request of the Debtor's counsel. The Debtor appeared personally at the hearing on the Set Aside Motion, as did his counsel. Counsel made arguments to the Court regarding the Set Aside Motion. As discussed above, due process requires the parties be afforded notice and an opportunity to be heard. Since the Debtor received both, he received due process before the Court denied the Debtor's Set Aside Motion.

The Debtor argues in his Amended Motion for Reconsideration the Court's order denying the Set Aside Motion should be reconsidered because he has discovered new evidence. "Newly discovered evidence refers to evidence that: 1) is material and not merely cumulative; 2) was not discoverable before trial through the exercise of reasonable diligence; and 3) would probably have changed the outcome of the trial." In re Reading Broad., Inc., 386 B.R. 562, 567 (Bankr. E.D. Pa. 2008). The new evidence allegedly discovered is Wells Fargo's counsel's statement made after the hearing on the Set Aside Motion regarding application of payments.

While the Debtor may not have previously heard a Wells Fargo attorney make such statements, the issue regarding application of payments is not a new one. In fact, the Debtor's Set Aside Motion is based on his argument that he had made the payments to Wells Fargo and the foreclosure was therefore wrongful. Further, routine discovery requests for a payment history would have disclosed Wells Fargo's application of funds. The Debtor also stated in his Set Aside Motion that he chose not to oppose the Motion for Relief from Stay; rather, he chose to proceed with a loan modification. Thus, while the alleged admission by the Wells Fargo attorney may be new, the Debtor was well aware of the issue and the facts were readily discoverable. Moreover, knowing this information would not have changed the Court's ruling on the Set Aside Motion. As explained to the debtor in court, his plan cannot be modified, so the

Court would not reimpose a stay in this completed case. Finally, the Court made no finding in the Order on Relief from Stay regarding amounts due to Wells Fargo or the application of payments made by the Debtor to Wells Fargo. Thus, the Debtor's arguments remain available to him to litigate in his Clayton Superior Court case.[2]

The Debtor also argues he has just discovered the new evidence that Wells Fargo was sanctioned $3.1 million in a case pending in the Fifth Circuit. The Debtor argues the evidence in that case and the holdings in that case would establish a pattern of willful behavior supporting his allegations of fraud against Wells Fargo. This argument also fails. The Court's denial of the Set Aside Motion was not based on the failure of the Debtor to prove fraud by Wells Fargo. Rather, the denial of the Set Aside Motion was based on the fact that various deadlines for setting aside the Order on Relief from Stay under Rule 60(b) had expired, and secondly, that reimposing the automatic stay in a case that has been completed, like Mr. Richards' case, is not proper. Further, the Wells Fargo litigation of which Mr. Richards now claims to be aware has been pending for a number of years and was certainly discoverable at the time of the hearing on the Set Aside Motion. Thus, the "newly discovered evidence" was discoverable before trial through the exercise of reasonable diligence and would not have changed the Court's ruling on the Set Aside Motion.

The real argument the Debtor seems to make in the Motion for Reconsideration is that, if the Order on Relief from Stay is not set aside, the Debtor will be precluded from arguing that it was obtained by fraud. The Court does not believe that to be the case. The Court's decision to leave in place the Order on Relief from Stay was not based on any finding as to the merits of the Debtor's claim of fraud. Rather, it is based on the passage of the one-year period within which a

[2] Once this case is closed, the Debtor, of course, may choose to file a subsequent Chapter 13 case which would have the effect of imposing an automatic stay. The Debtor could challenge any claims which Wells Fargo may have in that bankruptcy case and propose a plan to pay the claim as determined.

judgment or order can be challenged on the basis of fraud. Moreover, as the Court explained at the beginning of this Order, the Order on Relief from Stay has no *res judicata* effect as to any of the Debtor's claims or defenses against Wells Fargo. It simply is *res judicata* to the finding that Wells Fargo has a colorable claim in and to the property and that such interest was not adequately protected, and therefore it could pursue state law remedies. Nothing about the Order on Relief from Stay in any way deprives the Debtor of his right to raise defenses to any claims made by Wells Fargo or to sue Wells Fargo on any claims the Debtor believes he has.[3]

Request for Evidentiary Hearing

In the Debtor's Amended Motion for Reconsideration, he requests the Court to hold an evidentiary hearing to determine whether fraud has occurred. The Court denies the Debtor's request. The one-year period for granting relief from a judgment or order on the basis of fraud has expired and the Order on Relief from Stay makes no finding which needs to be set aside for the Debtor to proceed with any fraud claims against Wells Fargo. The Court has, however, provided a mechanism for the Debtor to have an evidentiary hearing by allowing the Debtor additional time within which to file an adversary proceeding or appropriate motion to sanction Wells Fargo and/or their attorneys under Rule 9011. Should the Debtor choose to do so, there will be an evidentiary hearing after appropriate discovery. Such a procedure is within the

[3] Although the Debtor did not raise Rule 60(d) as a basis for setting aside the Order on Relief from Stay, in the interest of fairness, the Court will address it. "Fraud upon the court requires that there was a material subversion of the legal process such as could not have been exposed within the one-year window…" Apotex Corp. v. Merck & Co., Inc., 507 F.3d 1357, 1360 (Fed. Cir. 2007). "Where complainant's own negligence or oversight, however innocent, contributed to the original judgment, an independent action for relief is not proper." In re APEX Intern. Mgmt. Services, Inc., 215 B.R. 245, 249 (Bankr. M.D. Fla. 1997). Here, all of the facts that were allegedly falsely presented in Wells Fargo's Motion for Relief from Stay were known to the Debtor at the time of the Motion for Relief from Stay or most certainly within one year after the entry of the Order on Relief from Stay. Further, "[t]o prove fraud on the court, the movant must establish that the officer of the court's misrepresentation or non-disclosure was material to the court's judgment." In re NWFX, Inc., 384 B.R. 214, 220 (Bankr. W.D. Ark. 2008). Here, it was the Debtor's lack of opposition to the Motion for Relief from Stay which caused it to be granted, not any finding by the Court as to a delinquency by the Debtor on the mortgage. Finally, even if the Court determines a fraud was perpetrated, it is within its discretionary power to tailor an appropriate remedy. Here, the Court has set up a mechanism which will allow it to address any fraudulent representations made to the Court through the Debtor's filing of an adversary proceeding or appropriate motion for sanctions under Rule 9011.

Court's discretion to tailor an appropriate remedy to alleged fraud. See Pearson v. First N. H. Mortg. Corp., 200 F.3d 30, 42 fn 7 (1st Cir. 1999).

SUMMARY

In summary, the Debtor seems to believe the Order on Relief from Stay is the root of his problems and, if the stay is imposed, the status quo as of October 2010 is returned. Neither is true. The Order on Relief from Stay simply allowed the parties to proceed under state law to enforce their rights and claims. The Debtor does not need the Order on Relief from Stay vacated in order to assert his rights against Wells Fargo in state court. Moreover, the Debtor knew of the Motion for Relief from Stay and knew of the entry of the Order on Relief from Stay, yet took no action with respect thereto until February 2012. The Debtor argues Wells Fargo has committed fraud by alleging he was behind in payments, by refusing to modify his loan as he requested, and by altering the security deed after it had been executed by the Debtor. The Debtor, however, knew of all of those arguments well within the one-year period to have brought a motion to set aside the Order on Relief from Stay on the basis of fraud. Had he done so, his plan was still in place and could have been modified to address the result of those allegations. The Court finds further the Order on Relief from Stay was not void and there is no basis for setting it aside under Rule 60, particularly given that Debtor's plan has been completed and cannot now be modified. Reimposing the stay provides no relief for the Debtor in this completed bankruptcy case. Therefore, the Court **DENIES** the Debtor's Set Aside Motion and Motion for Reconsideration.

IT IS ORDERED FURTHER that the Debtor shall have until **July 2, 2012** to file any adversary proceeding or motion for sanctions under Fed. R. Bankr. P. 9011.

END OF ORDER

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