



**IT IS ORDERED as set forth below:**

**Date: June 24, 2013**

*Mary Grace Diehl*

**Mary Grace Diehl  
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

In re:	:	CASE NUMBER
	:	
<b>KERRY JUAN HAYDEN,</b>	:	<b>13-57281-MGD</b>
	:	
Debtor.	:	CHAPTER 7
-----	:	
	:	
<b>EVERBANK, SERVICER FOR BANK</b>	:	
<b>OF NEW YORK MELLON F/K/A THE</b>	:	
<b>BANK OF NEW YORK, AS</b>	:	
<b>SUCCESSOR IN INTEREST TO JP</b>	:	
<b>MORGAN CHASE BANK, N.A.,</b>	:	
<b>FORMERLY JP MORGAN CHASE</b>	:	
<b>BANK AS TRUSTEE FOR THE</b>	:	
<b>STRUCTURED ASSET MORTGAGE</b>	:	
<b>INVESTMENTS, INC. MORTGAGE</b>	:	
<b>PASS-THROUGH CERTIFICATES,</b>	:	
<b>SERIES 2002-AR2, ITS SUCCESSORS</b>	:	
<b>OR ASSIGNS,</b>	:	<b>CONTESTED MATTER</b>
	:	
Movant,	:	
v.	:	

**KERRY JUAN HAYDEN and JASON  
L. PETTIE, Chapter 7 Trustee for the  
Estate of Kerry Juan Hayden,**

Respondents.

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**ORDER DENYING DEBTOR'S MOTION FOR RECONSIDERATION OF ORDER  
LIFTING AUTOMATIC STAY**

Kerry Juan Hayden, *pro se* Debtor, filed a motion for reconsideration of the order granting Movant ("EverBank") relief from the automatic stay with respect to Debtor's property (Docket Nos. 16 & 20). Everbank's motion for relief from stay came on for hearing on May 23, 2013. Mr. Hayden filed a response (Docket No. 18) and appeared at the hearing in opposition. The basis for Mr. Hayden's opposition was that Everbank lacked standing to bring the motion for relief. Mr. Hayden asserts that there is a chain of title defect and that Everbank is not the proper holder or owner of the security deed relating to the property. At the hearing, the Court made an oral ruling that granted the motion based on Everbank's assertion of a colorable claim as to its interest in the property.<sup>1</sup> The Court also based its ruling on the lack of the chapter 7 Trustee's opposition to the motion. The chapter 7 Trustee has since filed a no asset report.

Federal Rule of Bankruptcy Procedure 9024 makes Rule 60(b)(1) of the Federal Rules of Civil Procedure applicable to this matter. FED. R. BANKR. P. 9024. "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: mistake, inadvertence, surprise, or excusable neglect." FED. R. CIV. P. 60(b)(1). Motions for reconsideration cannot be used to relitigate issues previously decided. *In re*

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<sup>1</sup> Counsel for Movant was responsible for presenting a proposed order to the Court. The Order was presented and entered after Debtor's motion for reconsideration was filed. (Docket No. 21).

*Hollowell*, 242 B.R. 541, 542-43 (Bankr. N.D. Ga. 1999). A motion for reconsideration serves the limited function of correcting manifest errors of law or fact, *In re Ionosphere Clubs, Inc.*, 103 B.R. 501, 503 (Bankr. S.D.N.Y. 1989), and should not be used to raise arguments which could have been raised before the subject judgment was issued, *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992). "Reconsideration is only absolutely necessary where there is: (1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact." *Bryan v. Murphy*, 246 F.Supp 1256, 1258-59 (N.D. Ga. 2003) (internal quotations omitted) (citing *Jersawitz v. People TV*, 71 F.Supp.2d 1330 (N.D. Ga.1999); *Paper Recycling, Inc. v. Amoco Oil Co.*, 856 F. Supp. 671, 678 (N.D. Ga. 1993)).

Debtor does not present any mistake or change of law or fact in his motion to reconsider. Debtor's arguments were all raised and addressed at the hearing. Debtor's motion indicates that he misunderstood the Court's explanation of its role in a relief from stay motion in a chapter 7 case. Debtor asserts that the Court ruled, by implication, that Everbank was the proper party to foreclose on Debtor's property. The Court's ruling did not make any such determination. No determination is necessary in a relief from stay motion in a Chapter 7 case where the estate has no interest in the property.

There are several reasons why the bankruptcy court need not make a determination as to the rightful holder or proper party to foreclose on real property held by the chapter 7 estate in which the Trustee has no interest. First, this Court is not concerned with Mr. Hayden's individual rights as to the property because the property, for purposes of the bankruptcy proceeding, belongs to the chapter 7 estate. 11 U.S.C. § 541. Secondly, the relief granted to Everbank is limited to proceeding with its available state law rights. The order does not make any determination as to whether Everbank is a proper party to initiate foreclosure proceedings. That determination is for a different court. Any

argument Debtor wishes to prosecute in a future foreclosure proceeding remains available to him in that state court proceeding. Lastly, the Bankruptcy Code provides for a compressed hearing schedule with respect to relief from stay motions. 11 U.S.C. § 362(e).<sup>2</sup> Section 362(e)(2) of the Bankruptcy Code provides that the automatic stay terminates after 60 days from the request from relief, which in this case was made on April 19, 2013. At this date, more than 60 days have passed since Everbank filed its motion for relief, and by operation of the statute, the automatic stay has terminated with respect to this property.<sup>3</sup> Therefore, given the limited nature of the relief obtained through a motion for relief from the stay, the expedited hearing schedule § 362(e) provides, and because final adjudication of the parties' rights and liabilities is yet to occur, a party seeking stay relief need only establish that it has a colorable claim to enforce a right against property of the estate. *E.g., In re Veal*, 450 B.R. 897, 914-15 (B.A.P. 9th Cir. 2011).

Everbank has satisfied this burden. Everbank presented sufficient facts, including copies of the security deed and subsequent assignments, to meet its burden of proof that it is a party-in-interest to this property and is entitled to relief from the automatic stay. (Docket No. 16).

Debtor also raises questions regarding a servicer's right to move for relief from stay.

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<sup>2</sup> Everbank's notice of hearing accompanying its motion for relief includes a waiver of the § 362(e) hearing date and final determination timelines. Without determining whether a party can waive a statute, the Court's ruling on Debtor's motion does not solely rely on operation of this statute.

<sup>3</sup> Section 362(e)(2) provides: Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—  
(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or  
(B) such 60-day period is extended—  
(i) by agreement of all parties in interest; or  
(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

Everbank presents itself as the servicer to the most recent transferee, The Bank of New York Mellon. It is recognized that a servicer of a mortgage is clearly a creditor and has standing to file a proof of claim or assert a claim against a debtor pursuant to its duties as a servicer. *E.g., In re Minbatiwalla*, 424 B.R. 104, 109 (Bankr. S.D.N.Y. 2010).

Debtor also asserts that Everbank should not have been granted relief because no proof of claim was filed. Because Debtor's schedules revealed that this was likely a no asset case, the Clerk's office issued a notice that it was unnecessary to file proof of claims pursuant to Rule 2002(e) of the Federal Rules of Bankruptcy Procedure. A notice was sent to all creditors and parties in interest in this case, which explicitly instructed: "Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So." The chapter 7 Trustee has since filed a no asset report with the Court.

Debtor's motion to reconsider does not raise new law or facts. Debtor's arguments regarding the propriety of Everbank's ability to foreclose on the property remain irrelevant to this Court's jurisdiction and administration of Debtor's estate. For these reasons, it is

**ORDERED** that Debtor's motion for reconsideration is hereby **DENIED**.

The Clerk shall serve a copy of this Order upon the parties listed below.

#### **END OF DOCUMENT**

#### **Distribution List**

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