IT IS ORDERED as set forth below:

Date: May 22, 2014

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
	:	
Wilhelmenia McFashion,	:	**13-74255-MGD**
	:	
Debtor.	:	CHAPTER 13
	:	

SUPPLEMENTAL ORDER OF DISMISSAL AND ORDER DENYING MOTION TO RECONSIDER APRIL 9, 2014 DISMISSAL ORDER

A continued Chapter 13 confirmation hearing was held on April 9, 2014 in the above-styled case. Charles Taylor represented Wilhelmenia McFashion ("Debtor"). Mark Walker appeared for mortgage creditor Blackburne & Brown Mortgage Fund I ("Blackburne & Brown") in opposition to confirmation, and K. Edward Safir was present for the Chapter 13 Trustee, Mary Ida Townson.

The confirmation hearing was originally scheduled in this case for January 10, 2014. Debtor filed this case *pro se* and sought an extension of time to file her statement of financial affairs,

schedules, and plan, in addition to other required documents. To accommodate Debtor's deadline extension, the Chapter 13 Trustee rescheduled the confirmation hearing to February 12, 2014. A hearing on Blackburne & Brown's request for relief from the automatic stay was held on January 10, 2014.

Debtor does not dispute that she is indebted to Blackburne & Brown on two notes secured by deeds to secure debt in the approximate amounts of $237,000.00 and $43,000.00. Debtor also does not dispute that these notes fully matured prepetition on August 1, 2013. The property at issue is used by Debtor to operate a licensed child daycare center, Eagle Rock Christian Academy. Debtor is the owner of Eagle Rock Christian Academy and is self-employed. According to Debtor's schedules, Debtor's only source of income is from the operation of Eagle Rock Christian Academy.

At the January 10, 2014 hearing on Blackburne & Black's motion for relief from stay, Debtor had obtained counsel, Mr. Taylor, and was trying to propose a plan that would adequately treat Blackburne & Brown's matured mortgage claims in full through the plan. Since the notes matured prepetition and this property is not Debtor's residence, modification of Blackburne & Black's secured claims are restricted by section 1322(d). 11 U.S.C. §§ 1322(b)(2); 1322(d); *see In re Pierrotti*, 645 F.3d 277, 280 (5th Cir. 2011); *JPMorgan Chase Bank, N.A. v. Galaske*, 476 B.R. 405, 410 (D. Vt. 2012). The Court granted Blackburne & Black limited relief by modifying the automatic stay to allow for a foreclosure sale to be advertised. Additionally, Blackburne & Black was permitted to negotiate funds on hand paid by the Debtor while preserving all their legal theories and rights as a form of adequate protection. Based upon Debtor's arguments that she had an expanded business plan to increase revenue to pay the full mortgage claims, the remaining relief sought by Blackburne & Black was continued to a later hearing to coincide with confirmation.

The same day as the relief from stay hearing, Debtor filed a Second Amended Plan which treats Blackburne & Blacks' claims in full during the plan. The proposed plan provides a monthly payment of $5,900 beginning on April 2014. Prior to April, the plan payments were $1,900.

On February 26, 2014, Debtor's confirmation hearing and the continued hearing on Blackburne & Black's relief from stay motion was held.[1] The Chapter 13 Trustee and Blackburne & Black objected to confirmation. The Court heard testimony by Debtor regarding her proposal to pay the entire debt owing to Blackburne & Black over the life of the plan – proposed as a 60 month applicable commitment period. Debtor testified that she planned to supplement her current daycare business with 24-hour overnight childcare services to meet the $5,900 monthly plan payment, and this expanded service would require an additional license and approval from a state governance agency. Debtor testified as to her discussions with current clients, projected demand, and the facility improvements required for the 24-hour license. There was uncertainty as to the licensing process and timeline, and Debtor expressed concern about committing funds to improve a facility she potentially could lose. For example, Debtor had been aware of a flooring deficiency for over 6 months prior to the date of the February 26, 2014 hearing yet had taken no action. There was also uncertainty as to the increased expenses required to operate the facility for 24-hours.

Debtor testified that she had no formal commitments or enrollment contracts for the 24-hour services given the uncertainty regarding the facility. Debtor testified that a professional had volunteered her services to market Eagle Rock Christian Academy's 24-hour service offering with Division of Family and Children Services. The current enrollment for Eagle Rock Christian

[1] Both matters noticed for February 12, 2014 were rescheduled to February 26, 2014 due to Court closures on February 12, 2014 as a result of severe weather.

Academy was 10-20 enrollees. Debtor projected that she would have 40-60 enrollees based upon these marketing efforts. Debtor estimated that she could have Eagle Rock Christian Academy operating with 24-hour services within two weeks from the February 26, 2014 hearing date. Debtor was not able to provide a specific number of enrolled children needed to make the proposed $5,900 plan payments, but it would take more than 28 enrolled children.

After hearing Debtor's testimony and the parties' arguments, the Court ruled that Debtor was unable to prove section 1325(a)(6)'s confirmation requirement – that Debtor could make the plan payments as proposed under the plan, yet based upon Debtor's offer of adequate protection and the potential for increased income, confirmation was continued to April 9, 2014 to allow Debtor to secure the license and demonstrate her ability to perform under the higher $5,900 monthly plan payments. The Court granted Blackburne & Black further relief to cry the scheduled March 4, 2014 foreclosure sale but without the authority to file the Deed Under Power of Sale. Again, the remaining relief requested by Blackburne & Black was continued to a April 9, 2014 hearing to coincide with confirmation.

On April 7, 2014, Debtor filed a request, *pro se*, to continue the April 7, 2014 hearing for a period of 30 days to retain new counsel.[2] Debtor stated she filed a complaint with the State Bar of Georgia regarding Mr. Taylor.

Debtor, Mr. Taylor, Mr. Walker, and Mr. Safir appeared at the April 9, 2014 hearing. Since the Court had not authorized the withdrawal of Mr. Taylor, he remained Debtor's counsel. B.L.R.

[2] Under Bankruptcy Local Rule 9010-4(b), "[a] party represented by an attorney may not appear or act in the party's own behalf in the case or proceeding or take any step therein unless the party has first given notice to the attorney of record and to the opposing party that the party intends to act pro se."

9010-5, N.D. Ga.[3]

The Court again heard Debtor's testimony to evaluate whether Debtor could prove that she had the ability to make the plan payments as proposed by the plan and as required by § 1325(a)(6). At the hearing, Debtor had failed to make the April 2014 plan payment of $5,900 as proposed under the Second Amended Plan and Eagle Rock Christian Academy had not been licensed or approved for 24-hour care, although further facility improvements had been made.

Whether a debtor's plan is feasible is a factual question. *E.g., In re Todd*, 181 B.R. 997, 1004 (Bankr. N.D. Ala. 1995). Section 1325(a)(6) of the Bankruptcy Code provides that ". . . the court shall confirm a plan if — . . . the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). To satisfy feasibility, a debtor's plan must have a reasonable likelihood of success, "i.e., that it is likely that the debtor will have the necessary resources to make all payments as directed by the plan." *In re Harris*, 497 B.R. 652, 666 (Bankr. D. Mass. 2013). The debtor carries the burden of satisfying the feasibility requirement and the other section 1325 requirements. *Id.*

After hearing Debtor's testimony and arguments from the parties, the Court ruled that Debtor failed to satisfy the requirements of confirmation under section 1325(a), finding that Debtor had not proved she had the ability to make the plan payments as proposed. Debtor's testimony did not reveal that Debtor could generate a sufficient income stream through the operation of Eagle Rock Christian Academy to make and maintain the $5,900 plan payments at the present time. Debtor did not have

[3] "(a) Withdrawal Policy. An attorney who has appeared in a case or adversary proceeding, other than for the limited purpose of receiving notices, must obtain permission from the Bankruptcy Court to withdraw as counsel, unless substitute counsel has made an appearance for that party." B.L.R. 9010-5(a), N.D. Ga

any enrollment contracts and had no further meetings scheduled with the licensing agency for approval of the 24-hour facility to support her statements that she believed she could make the $5,900 monthly payment going forward.

Further, Debtor testified that the necessary facility improvements impeded her ability to make the $5,900 monthly plan payment. Debtor testified there were further facility improvements necessary to meet the standards required for the 24-hour service beyond what she had previously testified. Debtor testified that she needed an additional 5 weeks to 2 months to generate sufficient income to make the proposed plan payments of $5,900. The credibility of this statement, however, was weighed against Debtor's inability to make the lower plan payments in the prior case, the current enrollment at Eagle Creek Christian Academy, the cost of the remaining facility improvements or repairs, and the uncertainty of future enrollment for daycare and overnight services. Debtor also testified that she had not made the property insurance premium payment but she could reinstate the policy with payment.

Despite Debtor's good intentions, the evidence regarding her current income and projected income was insufficient to carry her burden of proof that she was able to make the proposed $5,900 plan payments at the present time or over the life of the proposed plan. The speculative nature of the expanded services of Eagle Creek Christian Academy and Debtor's past performance also supported the denial of confirmation. By failing to satisfy the requirements under § 1325(a), Debtor's case was dismissed. A standard form order was entered dismissing the case. This Order supplements the form dismissal order.

Debtor subsequently filed a motion to reconsider the dismissal order on April 15, 2014 under Federal Rule of Civil Procedure 60(b)(6) (made applicable to this proceeding by Federal Rule of

Bankruptcy Procedure 9024). On April 23, 2014, Debtor filed a notice of appeal. Typically, when a notice of appeal is filed taking an appeal from the bankruptcy court to the district court or the bankruptcy appellate panel, jurisdiction is divested from the bankruptcy court. *Walden v. Walker (In re Walker)*, 515 F.3d 1211, 1215 (11th Cir. 2008). The result, however, is different when a motion is made under Rule 9024, because Rule 8002(b) provides that any "notice of appeal filed after entry of the judgment, order or decree but before disposition of the motion is ineffective to take an appeal from such judgment, order or decree . . . ." FED. R. BANKR. P. 8001(b)(4). In such a case, like this case, this Court retains jurisdiction. *In re Adelphia Comm's Corp*., 54 C.B.C.2d 789, 327 B.R. 175, 178 (Bankr. S.D.N.Y. 2005), *aff'd on other grounds*, 337 B.R. 475 (S.D.N.Y. 2006). Accordingly, this Order will also resolve Debtor's Motion to Reconsider.[4]

For the reasons set forth below, Debtor's *pro se* Motion to Reconsider is **denied.** Debtor seeks relief from the April 9, 2014 dismissal order under a theory of fraud.[5] "One who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence." *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978). In short, Debtor's motion does not allege any fraud or misconduct by the Trustee or Blackburne & Black or any other opposing party. Additionally, there is no basis to give Debtor relief from the dismissal order under Rule 9024.

In paragraph 2 of Debtor's motion she states that the Court misunderstood the facts as

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[4] A motion under Rule 9024 has the effect of tolling the running of the 14-day appeal period of Rule 8002(a), pursuant to Rule 8002(b).

[5] Fraud is listed as a ground under Rule 60(b)(3) but Debtor's motion lists Rule 60(b)(6) as the basis for her motion to reconsider. Rule 60(b)(6)'s reason for relief from judgment is for "any other reasons that justifies relief." The Court has given consideration to each basis.

presented because she was not represented by counsel. It is inaccurate to state that Debtor was not represented by counsel. Mr. Taylor appeared on Debtor's behalf at each hearing and solicited her direct testimony on two separate occasions. Debtor's own testimony served as the evidence for the Court's ruling that she was unable to satisfy the feasibility confirmation requirement under § 1325(a)(6). The factual record includes Debtor's failure to make the first $5,900 plan payment as provided by the plan and that Debtor's failure to make such payment was because she was incurring expenses to improve the facility to make it compliant with the licensing requirements and because the current revenue did not generate sufficient funds to allow Debtor to make the $5,900 monthly plan payment. Debtor's Motion doesn't refer to any factual error relied upon by the Court.

Debtor also alleges in paragraph 2 that the dismissal order should be set aside because her attorney failed to object to the motion for relief from stay and failed to convert Debtor's case to a Chapter 7 case. Debtor is correct that there was no written response to Blackburne & Black's relief from stay motion by Debtor's counsel in the above-styled case, yet none is required. B.L.R. 9014-2, N.D. Ga. Again, Mr. Taylor appeared at the hearing and opposed the relief from stay motion. Mr. Taylor also appeared at the hearings and argued for additional time to allow Debtor to try to confirm a Chapter 13 plan that treated the fully matured notes through the plan. Further, any conversion to a Chapter 7 case would not advantage Debtor in retaining the property given that there is no equity according to Debtor's own schedules. Most importantly, Debtor's arguments regarding her representation are not relevant to this Motion.

Paragraphs 3, 5 & 6 of Debtor's Motion to Reconsider raise facts regarding Debtor's prior Chapter 13 case that has been closed and for which Mr. Taylor did not serve as her attorney according to the case docket. Again, Debtor seeks reconsideration or relief from judgment, in part,

on the basis that she was not represented by counsel or that she was ineffectively represented by counsel. These arguments are not relevant to the dismissal order in the above-styled case from which Debtor seeks relief. Further, any remedy available to Debtor regarding her representation is not properly disposed of in this Motion.

Paragraph 4 seeks relief from the dismissal order on the basis that the Court's decision to hold the April 9, 2014 confirmation hearing violated Debtor's Fifth and Sixth Amendment rights. The Fifth Amendment to the Constitution provides for the due process of law and presumably Debtor's arguments involve procedural due process in the context of her request for a continuance. The Supreme Court has repeatedly stated that in order to satisfy due process, notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections." *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). First, Debtor's presence at the April 9, 2014 hearing is evidence of adequate notice, as is participation in the proceeding. Second, Debtor asserts that delaying the hearing would not have prejudiced the Court. However, the relevant inquiry for the Court is whether a further delay would prejudice the parties. Here, there was significant prejudice to Blackburne & Black because it held fully matured notes upon which Debtor was not making payments and from which it was limitedly stayed from exercising its state law rights and remedies against Debtor according to the terms in the notes and attendant deeds to secure debt that were executed and agreed to by Debtor. The Court recognized the prejudice to Blackburne & Black in rescheduling confirmation earlier in the case and provided in the Order that no further reset would be available without the consent of all the parties. (Docket No. 30). Debtor's Sixth Amendment arguments are not relevant because Sixth Amendment protections are limited to

criminal proceedings. *See generally Rothgery v. Gillespie County*, 554 U.S. 191, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008).

In paragraph 7, Debtor asserts that she was unaware her property had been foreclosed upon and that she "was not behind." At the February 26, 2014 hearing, the Court gave Blackburne & Black relief from stay to cry the foreclosure sale but no relief was given to record the deed under power. Debtor was present at the hearing where the Court made this order ruling and was served with the written Order at her address of record. (Docket No. 41). Debtor's statements contesting that she was making timely payments under the plan were contradicted at the April 9, 2014 hearing by the Chapter13 Trustee and by Debtor's own statements under oath.

Lastly, in paragraph 8 of Debtor's Motion, Debtor raises the issue of having two open bankruptcy cases in November of 2013. Again, any claim that pertains to Debtor's representation in this or a prior case is not relevant to Debtor's request for reconsideration of the dismissal order.

Debtor's motion provides no basis to give her relief from the dismissal order under Rule 9024 or otherwise. Debtor was given great latitude by previously continued hearing by the parties and by the Court. Debtor's inability to perform under the higher plan payment of $5,900 under the proposed plan for the month of April 2014, in addition to Debtor's testimony that revealed the ability to comply with the proposed plan is highly speculative at best, led to a factual determination that Debtor failed to meet the feasibility requirement of section 1325(a)(6). Although *pro se* litigants are not excused from the strictures of the rules of procedure or of substantive law, *e.g.*, *In re Adeleke*, 2012 WL 2953195 (Bankr. S.D. Fla. July 19, 2012), and Debtor continues to be represented by counsel in this proceeding, in its discretion, the Court gave broad review to Debtor's *pro se* Motion and there is no basis to reconsider or give Debtor relief from judgment. Accordingly, it is

ORDERED that Debtor's motion to reconsider the dismissal order is **DENIED.**

The Clerk shall serve a copy of this Order upon Debtor, counsel for the Debtor, counsel for Blackburne & Black, the Chapter 13 Trustee, and all creditors.

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