IT IS ORDERED as set forth below:

Date: September 16, 2016

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. 16-59055-WLH
	)	
REGINA MURFF,	)	CHAPTER 13
	)	
Debtor.	)	JUDGE WENDY L. HAGENAU
	)	

ORDER DENYING MOTION FOR RULE 60 RELIEF FROM JUDGMENT

The Motion for Rule 60 Relief from Judgment [Docket No. 37] (the "Motion") filed by the Debtor Regina Murff came before the Court for hearing, after notice, on September 14, 2016. Regina Murff appeared *pro se*, Ryan Williams appeared on behalf of the Chapter 13 Trustee, and Daniel Melchi appeared on behalf of Shakerag Homeowners Association, Inc. ("Shakerag"). After considering the arguments of the parties and the record of this case in total, the Motion is hereby DENIED.

The Debtor filed this Chapter 13 bankruptcy case on May 25, 2016. The petition identified only two creditors, Chase Bank and Shakerag, both of whom appear to be related to a single piece of real property. This case is the seventh bankruptcy case filed by the Debtor in the last 10 years and the third bankruptcy case filed within a year. The Debtor received a Chapter 7

discharge in 2014 and therefore is not eligible for a discharge in this case, and was not eligible for a discharge in her prior two cases. 11 U.S.C. § 1328(f). The Debtor did not file a Chapter 13 plan.

On May 28, 2016, the Bankruptcy Court Clerk's Office sent a notice to the Debtor and all creditors containing information regarding the Debtor's bankruptcy filing, various deadlines, and the date of the confirmation hearing, set for August 3, 2016 [Docket No. 6]. This same notice included information that the Debtor's 341 meeting with the Chapter 13 Trustee was scheduled for June 30, 2016. A certificate of service of the notice [Docket No. 8] reflects it was served on the Debtor at 7295 Devon Hall Way, Duluth, Georgia 30097-7101. This address is the same address identified by the Debtor as her address in the petition and also the same address the Debtor announced as her address at the hearing on the Motion. The Debtor did not appear for her scheduled 341 meeting. The Chapter 13 Trustee filed her Objections to Confirmation of Plan and Motion to Dismiss Case [Docket No. 27] on July 11, 2016 and served the objection and motion on the Debtor at the address identified above. On July 26, 2016, Shakerag filed its own Objection to Confirmation of Chapter 13 Plan and Motion to Dismiss Case with Prejudice Pursuant to 11 U.S.C. § 349(a) and 105(a) [Docket No. 32] which was also served on the Debtor at the address identified in the petition.

At the scheduled confirmation hearing on August 3, 2016, the Debtor did not appear. At that time, there was still no Chapter 13 plan filed, the Debtor had made no payments to the Chapter 13 Trustee and had not appeared for her 341 meeting. The Court therefore granted both motions to dismiss and, upon consideration of the case and the arguments of the parties, the Court ordered the dismissal be with a bar to the Debtor refiling a bankruptcy case for 180 days [Docket No. 35].

Ten days later, the Debtor filed her Motion. Her primary contention is that she did not have notice of the hearing. She argues in her pleading that service was insufficient. She also states the Trustee "usually" allows for two 341 meetings before the case is dismissed and that she had only missed one 341 meeting. She argued she had filed everything that was required. Finally, she noted a prior order of this Court confirming no stay was in effect was on appeal. However, none of the forgoing grounds are sufficient for the Court to grant her Motion.

Rule 60(b)

Rule 60(b) as applied to bankruptcy cases in Fed. R. Bankr. P. 9024 provides:

> 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.

"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 & 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)). The Court notes the Debtor filed her Motion within 14 days of entry of the Court's order dismissing the case and therefore she could have pursued a motion for reconsideration under Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59. These sections permit a court to alter or amend a judgment. However, 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 Insurance Company, 224 F.3d 601, 606 (7th Cir. 2000) (cites omitted). The Court will review each of the Debtor's allegations in light of this standard.

Notice/Service

The Court concludes the Debtor was properly and sufficiently served with notice of the hearing. Notice of the confirmation hearing was served on the Debtor by the Bankruptcy Noticing Center on May 28, 2016, and the certificate of service is filed at Docket No. 8. The Court notes the notice of the confirmation hearing was served on the address provided by the Debtor in her petition and confirmed by the Debtor as her address in court. The notice of the confirmation hearing was served on the same address as this Court's order dismissing the case, which the Debtor obviously received. The notice of the confirmation hearing was served on the same address as this Court's order confirming that no stay is in effect [Docket No. 11], which the Debtor received and appealed. The Court does not find credible the Debtor's statement that she did not receive notice.

The Chapter 13 Trustee's objection to confirmation and motion to dismiss and Shakerag's objection to confirmation and motion to dismiss were also both served on the Debtor at the address she provided. In each of the pleadings, the request that the case be dismissed in lieu of confirmation is in the title of the document and in the relief requested.

The service of the notice of confirmation hearing and of the objections to confirmation and motions to dismiss is sufficient under the Bankruptcy Rules. The notice of confirmation hearing was served more than 28 days before the scheduled hearing and therefore complied with Fed. R. Bankr. P. 2002(b). The responses by the Chapter 13 Trustee and Shakerag with objections to confirmation and motions to dismiss were served at least seven days before the scheduled hearing in accordance with Fed. R. Bankr. P. 9006(d). Service of their objections and

motions was in accordance with Fed. R. Bankr. P. 9013 since they served the Debtor at the address provided by the Debtor in the petition. Moreover, service of their motions to dismiss was in accordance with Fed. R. Bankr. P. 1017, 9014 and 7004 because service was on the Debtor at her home address. Although the Debtor argues her due process rights were violated, "due process does not require that notice be given in any particular form. Notice is sufficient for due process purposes if it is 'reasonably calculated, under all the circumstances' to inform the recipient of the nature of the case and the recipient's opportunity to respond." Sanders v. Cohen et al. (In re Sanders), 2016 WL 3961804, at *5 (9th Cir. BAP July 15, 2016). Here, the notice and service complied with all bankruptcy rules and was sufficient and reasonably calculated to inform the Debtor that a confirmation hearing was set for August 3rd, that two parties objected to her confirmation, and that they requested her case be dismissed in lieu of confirming a plan.

Multiple 341 Meetings

In the Debtor's Motion, she states that, "Generally, the Trustee will allow the debtor two opportunities to attend a 341 creditor's meeting. In the event the debtor fails to appear or in the event the meeting cannot be held for whatever reason." (*sic*) The Debtor provides no support for this statement. The Bankruptcy Code does not require that the Trustee provide the Debtor more than one opportunity to appear at the 341 meeting. The Court notes that, not only did the Debtor not attend the 341 meeting, the Debtor had not filed a plan or made any payments to the Trustee. The Debtor did not contact the Trustee to seek a reset of the 341 meeting. The Court notes that in the Debtor's prior case, No. 15-60147, she failed to appear at either scheduled 341 meeting and that in her case number 16-52055, the case was dismissed due to her failure to correct all filing deficiencies including filing the schedules and the plan. As a result, no 341 meeting was held in that case either. The Trustee was not obligated to provide the Debtor with a second opportunity to attend a 341 meeting under these circumstances.

Debtor Did Not File All Required Documents

The Debtor argues in her Motion she "filed everything". However, she neglected to file a very crucial item in a Chapter 13 case: the Chapter 13 plan. The whole purpose of a Chapter 13 case is to have a Chapter 13 plan and make monthly payments, which are then applied to the debts. The Debtor never filed a plan and never made a payment.

Appeal

The Court entered an order on June 6, 2016 confirming that no automatic stay was in effect in this case because it was the Debtor's third filing within a year. The Debtor appealed this order to the District Court. The Court recognizes that "filing of a proper notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the appellate court and divests the trial court of its control over those aspects of the case involved in the appeal." In re Walker, 515 F.3d 1204, 1211 (11th Cir. 2008) (cites omitted). But, under Fed. R. Bankr. P. 8007(e), the bankruptcy court may "suspend or order the continuation of other proceedings in the case; or … issue any other appropriate orders during the pendency of an appeal to protect the rights of all parties in interest." So, while the Court should not consider matters which would interfere with an appeal and the jurisdiction of the appellate court, "the court does have jurisdiction over, and should proceed with other aspects of the case." In re Demarco, 258 B.R. 30, 32 (Bankr. M.D. Fla. 2000). A failure to proceed "would freeze the case at the procedural posture reached when the appeal was filed, and would inure unjustly to the benefit of any party whose interests were furthered by delay." In re Strawberry Square Associates, 152 B.R. 699, 702 (Bankr. E.D.N.Y. 1993). As the First Circuit Bankruptcy Appellate Panel concluded, "The application of a broad rule that a bankruptcy court may not consider any request filed while an appeal is pending has the potential to severely hamper a bankruptcy court's ability to administer its cases in a timely manner." Whispering Pines Estates, Inc. v. Flash Island (In re Whispering Pines Estates, Inc.),

369 B.R. 752, 758 (1st Cir. BAP 2007). See also Ogier v. Daniels (In re Patterson), 2016 WL 4919947 (Bankr. N.D. Ga. Sept. 2, 2016); In re Washington Mutual, Inc., 461 B.R. 200, 219 (Bankr. D. Del. 2011) (other parts of the opinion were subsequently modified). The application of a broad rule is particularly inappropriate in a bankruptcy case "with myriad issues, many totally unrelated and unconnected with the issues involved in any given appeal taken by a litigant in the course of the administration of a case." Demarco, 258 B.R. at 32 (citing In re Urban Development Ltd. Inc., 42 B.R. 741, 744 (Bankr. M.D. Fla. 1984)).

In this case, the only order on appeal is an order confirming no stay was in effect. Whether a stay is or is not in effect has no impact on whether the Debtor can confirm a plan in this bankruptcy case under these facts where the Debtor had not filed a plan nor paid any money to the Trustee nor appeared at her 341 meeting. The appeal of the Court's order confirming no stay is in effect may proceed and is not necessarily mooted by the dismissal of the Debtor's case. To the extent this Court erred in entering the order confirming no stay is in effect, and the Debtor was harmed by that order because creditors took actions against the Debtor in reliance upon the order, the issues remain for the District Court to consider and review. Allowing the appeal of an order confirming no stay is in effect to stay any action in a bankruptcy case which the debtor is otherwise not prosecuting is harmful to the other parties to the case and to the bankruptcy system. Therefore, the fact the Debtor had appealed the Court's prior order on the automatic stay did not eliminate the Court's right to dismiss the Debtor's bankruptcy case on these facts.

Dismissal with Prejudice

Finally, the order dismissing the Debtor's case prohibited the Debtor from refiling a bankruptcy case within 180 days. The order was based on 11 U.S.C. § 109(g)(1) as well as 11 U.S.C. §§ 349(a) and 105(a). At the hearing on the Debtor's Motion, the Court allowed the Debtor to address whether the dismissal should continue to be with prejudice. The Debtor's only

response was that she had insufficient notice of the hearing and that is why she did not appear at the confirmation hearing. She also attempted to place blame on an attorney; however, the case was filed *pro se* and there is no attorney representing the Debtor in this case. The Court continues to find the case was properly dismissed by the Court for the Debtor's willful failure to appear before the Court in proper prosecution of the case because of her failure to file a plan, make any payments to the Trustee, attend the 341 meeting, or appear at the confirmation hearing.

Moreover, additional grounds for dismissal "with prejudice" exist under 11 U.S.C. §§ 349(a) and 105. Section 349(a) provides as follows:

> Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

This section permits the Court "for cause" to dismiss a case with prejudice. "With prejudice" in this context means either barring the discharge of certain debts or limiting the debtor's authority to file a bankruptcy petition for a certain time period or both. "[A] number of cases support the authority of the bankruptcy court to dismiss a debtor's case with prejudice to future filings that extends beyond 180 days, among other remedies." Dietrich v. Knob-Hill Stadium Properties, 2007 WL 579547 (6th Cir. Feb. 15, 2007) (cites omitted). Additionally, Section 105(a) of the Bankruptcy Code provides, "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

Courts have found cause to prohibit future bankruptcy filings by a debtor where the debtor filed or pursued a bankruptcy case in bad faith. In re Leavitt, 171 F.3d 1219 (9th Cir. 1999); In re Tornheim, 239 B.R. 677 (Bankr. E.D. N.Y. 1999). "A lack of good faith exists when a debtor files a petition without intending to perform the statutory obligations required by the Bankruptcy Code or when a debtor's conduct constitutes an abuse of the bankruptcy

process." In re Brown, 319 B.R. 691, 693 (Bankr. M.D. Ala. 2005) (cites omitted). Grounds for relief also exist if the debtor has violated a court order. Dietrich, 2007 WL 579547, at *5. Under any construction, the courts assess the totality of the circumstances in deciding whether cause exists to bar the refiling of a bankruptcy case. Courts consider such factors as whether the debtor misrepresented facts, the debtor's history of filings and dismissals, whether the debtor only intended to defeat outside litigation, and whether the debtor's behavior is egregious. In re Leavitt, 171 F.3d at 1224.

Here, the Debtor has a long history of bankruptcy filings. She is not eligible for a discharge, failed to file a plan, make any payments to the Trustee, attend the 341 meeting or attend the confirmation hearing. This combination of factors supports the Court's dismissal of the case with prejudice. Therefore, no grounds exist to modify the Court's order prohibiting the Debtor from refiling the case within 180 days of its dismissal.

END OF ORDER

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