IT IS ORDERED as set forth below:

Date: October 15, 2015

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. 15-64253-WLH
	)	
HAROLD A. SHAW,	)	CHAPTER 13
	)	
Debtor.	)	JUDGE WENDY L. HAGENAU
	)	

ORDER ON DEBTOR'S MOTIONS TO RECONSIDER AND RECUSE

This Court entered an order on September 9, 2015 granting relief from the stay to Branch Banking & Trust Company. The Debtor has filed a "Response and Appeal to Order Dated September 8, 2015" [Docket No. 26] and "Motion for Judicial Review and Disqualification for Lack of Due Process, Bias and Prejudice, and a Reversal of Relief from Stay [Docket No. 29], both of which are before the Court for review. For the reasons discussed below, both motions are DENIED.

BACKGROUND

This Chapter 13 case is the Debtor's ninth bankruptcy case since 2002, and the Debtor's fifth bankruptcy case since 2012. This case is the fourth one assigned to this judge. The Debtor's current predicament began in 2012 when he filed Case No. 12-58761 under Chapter 7

of the Bankruptcy Code. He received a discharge on January 16, 2013. In that Chapter 7 case, the Debtor filed an adversary proceeding against the Georgia Department of Revenue and Department of Labor for a variety of claims related to his allegation that his wages and bank accounts had been improperly garnished. After receiving his discharge, the Debtor then filed a case under Chapter 13 in Case No. 13-60232 on May 7, 2013. This case was dismissed on May 22, 2013 for the failure of the Debtor to pay filing fees, and the Debtor's motion to re-open the case was denied. The Debtor never filed a plan or made any plan payments in that case.

Debtor next filed a Chapter 11 petition on August 6, 2013 in Case No. 13-67264. This case was converted to one under Chapter 13 on October 22, 2013. The case was dismissed on December 20, 2013 because the Debtor had not obtained pre-petition credit counseling as required by 11 U.S.C. § 109(h). Again, no plan was filed and no payments were made.

Next, the Debtor filed Case No. 14-53671 on February 25, 2014 under Chapter 13 of the Bankruptcy Code. In that case, Branch Banking & Trust ("BB&T") filed a motion for entry of an order confirming that no stay was in effect under 11 U.S.C. § 362(c)(4) because this was the Debtor's third bankruptcy case pending within a year. BB&T represented to the Court it had a foreclosure scheduled for March 4, 2014. The Debtor also filed a motion to impose the stay. The Court held a hearing on both the Debtor's motion to impose the stay and BB&T's motion for entry of an order confirming no stay was in effect. The Court entered an order on March 4, 2014 denying the Debtor's motion to impose the stay [Docket No. 23], providing in part, "The Debtor has not shown any change in his financial or personal affairs since the dismissal of the prior case nor any other reason that this case will conclude with a confirmed plan that will be fully performed. The Court notes the Debtor is not eligible for a discharge in this case due to a prior Chapter 7 discharge, the Debtor is not personally liable to BB&T on the debt in question due to his prior discharge, the Debtor has not filed a Chapter 13 plan nor made any Chapter 13 plan

payments, and the Debtor's credit counseling certificate is outdated. The Debtor is unemployed and agrees that some amount is past due to BB&T." On the same date, the Court entered an order granting BB&T's motion to confirm that no stay was in effect [Docket No. 22]. The Debtor's bankruptcy case was ultimately dismissed on March 24, 2014 due to the Debtor's failure to comply with 11 U.S.C. § 109(h).

No bankruptcy cases were filed by the Debtor until this case was filed on July 30, 2015. BB&T filed a motion for relief from the stay on August 7, 2015, alleging that it owned the property through foreclosure and had obtained a writ of possession from the Gwinnett County Magistrate Court dated July 22, 2015. The Debtor opposed BB&T's motion for relief from stay. In his written response [Docket No. 22], the Debtor asked the Court to set aside the judgment for writ of possession entered by the Gwinnett County Magistrate Court. The Debtor also disclosed that he had appealed the writ of possession and he asked the Court to maintain the automatic stay in place until the appeal was decided. The Debtor contended the foreclosure was improper and as such he still owned the property at issue. The Court held a hearing on the motion for relief from stay and the Debtor's response on August 26, 2015, at which Mr. Shaw appeared *pro se* and Douglas Ford appeared on behalf of BB&T. After hearing the arguments of the parties, the Court entered an order granting relief from the stay of which the Debtor now complains.

Both of the Debtor's motions ask the Court to reconsider its order granting relief from the stay and further request that this judge be removed from the case, including from hearing any appeal of the matter.

MOTION TO RECONSIDER

In both motions, the Debtor asks the Court to revisit or reconsider its order granting relief from the stay.

A motion to reconsider is filed under Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59. This rule permits a court to alter or amend a judgment but "it 'may not be used to relitigate 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 (2008) (cites omitted). Other courts have held that, to prevail on a motion for reconsideration under Rule 59, the movant must either present "newly-discovered evidence or [establish] manifest errors of law or fact." In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999). "Bankruptcy Rule 9023 motions for new trial or to alter or amend an order should not be used to relitigate issues already decided, to pad the record for an appeal or to substitute for an appeal. Such a motion is frivolous if it raises no manifest errors of law or misapprehensions of fact to explain why the court should change the original order." In re Miles, 453 B.R. 449, 450-51 (Bankr. N.D. Ga. 2011). "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).

Another ground for setting aside an order of this Court exists under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60. The rule 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.

However, Rule 60(b) is "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) (cites omitted).

Relief from the stay is appropriate under 11 U.S.C. § 362 for cause including a lack of adequate protection of the creditor's interest and also if the Debtor has no equity in the property and it is not necessary for an effective reorganization. A "hearing on a motion for relief from stay is meant to be a summary proceeding, and the validity or merit of claims and defenses are not litigated during the hearing." In re Fontaine, 2011 WL 1930620 at *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. 2011); Fontaine, 2011 WL 1930620. 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.

The Debtor argues that the Court should not have lifted the stay because the Debtor wants to litigate in bankruptcy court the propriety of the default judgment entered by the Gwinnett Magistrate Court. As the Court explained to Mr. Shaw at the hearing, the bankruptcy court simply has no authority to reverse the judgment of a state court. Federal district courts have only original jurisdiction and are therefore precluded from acting as appellate courts over state court actions. See Exxon Mobile Corp. v. Saudi Basic Indus. Corp., 544 U.S. 284, 293 (2005). In matters over which the state and federal courts have concurrent jurisdiction, the Full Faith and Credit Act requires federal courts to give preclusive effect to state court judgments. Id. at 292-93 (citing 28 U.S.C. § 1738). In a series of Supreme Court decisions known as the "Rooker-

Feldman"[1] decisions, the Supreme Court explained that "federal district courts do not have jurisdiction to act as appellate courts and [they are precluded] … from reviewing final state court decisions". Green v. Jefferson Cnty. Comm'n, 563 F.3d 1243, 1249 (11th Cir. 2009).

Moreover, the creditor has a colorable claim to the property. The record includes the writ of possession issued by the Magistrate Court of Gwinnett County delivering possession of the property to BB&T. Mr. Shaw disagrees with the outcome but acknowledges the order was entered. Based on this order, it would appear the Debtor has no interest in the property to be protected in the bankruptcy case. However, as the Court explained to Mr. Shaw, a decision granting relief from the stay does not indicate that this Court has in any way ruled on Mr. Shaw's defenses to the writ of possession or any claims he may have against BB&T. Rather, the order lifting the stay recognizes that BB&T has a colorable claim to the property, that a state court has already ruled it is entitled to the property, and that Mr. Shaw has appealed the judgment to the Superior Court of Gwinnett County. The appropriate place for resolution of the issues regarding the property is the state court. As explained to Mr. Shaw in the hearing, if he is successful in state court such that he obtains title to the property, then, bankruptcy court may provide an avenue for him to propose repayments on debts in order to save that property.

The Debtor has not presented any new evidence or demonstrated the Court made a manifest error of law or fact. The Debtor has not established any of the grounds for setting aside an order under Rule 60. The Debtor disagrees with this Court's order, and may appeal it. Because the Debtor has not shown any grounds for setting aside the prior order of the Court under Fed. R. Bankr. P. 9023 or 9024, the Court DENIES the Motion for Reconsideration.

[1] Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

RECUSAL

Next, the Debtor asks that this judge not sit in hearing an appeal and disqualify herself under 28 U.S.C. § 455(a). First, any appeal by the Debtor will be heard by the District Court and not by the bankruptcy court. This judge will, therefore, not under any circumstances hear any appeal the Debtor may make of this decision.

Recusal of this judge from hearing any further matter in this case is governed by 28 U.S.C. § 455(a), which provides, "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The appropriate test under Eleventh Circuit law is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988). Section 455 "does not invite recusal whenever it is requested by a party." Guthrie v. Wells Fargo Home Mortgage, N.A., 2015 WL 1401660 at *3 (N.D. Ga. March 26, 2015). In fact, "there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." Id. (cites omitted). Importantly, "it is the facts, not the movant's allegations, that control the propriety of recusal." Id. "Recusal cannot be based on 'unsupported, irrational or highly tenuous speculation.'" United States v. Cerceda, 188 F.3d 1291, 1293 (11th Cir. 1999) (cites omitted). Furthermore, allegations made under 28 U.S.C. § 455 need not be taken as true. Weatherhead v. Globe International, Inc., 832 F.2d 1226, 1227 (10th Cir. 1987). Finally, motions to recuse under Section 455 "are typically decided by the presiding judge." Guthrie at *3. This Court will therefore undertake to review Mr. Shaw's motion to disqualify this judge under 28 U.S.C. § 455.

Mr. Shaw alleges this Court has a bias for the creditor. Mr. Shaw complains that the judge made remarks with regard to the number of bankruptcy filings made by the Debtor and that he viewed such comments as disrespectful. Mr. Shaw also believed the judge was biased toward the creditor because, in his view, she did not obtain sufficient information to grant relief from the stay to the creditor. All of the complaints which Mr. Shaw makes about this judge arise from the hearings held in this matter. There are no allegations, and there can be none, that the Court has any relationship with the attorney for BB&T or with BB&T itself. A judge is not '"recusable for bias or prejudice [when] his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings.'" Tucker v. Mukamal, 2015 WL 5166276 at *2 (11th Cir. Sept. 4, 2015) (citing Liteky v. United States, 510 U.S. 540, 551 (1994)). All of the information which this Court has received regarding this matter and Mr. Shaw and all of the Court's opinions regarding how best to rule on the matters brought before the Court were obtained only through the bankruptcy court proceedings presented to the Court. The Court is entitled to base its decision and opinion on the matters brought before it.

Moreover, a review of the transcript of the hearing held on August 26 (not September 8), 2015 shows that the Court heard Mr. Shaw's arguments. Mr. Shaw did not want the automatic stay lifted because he believed the Gwinnett Superior Court would continue hearing his appeal as to the rightful owner and possessor of the real property at issue. What Mr. Shaw did not understand was that lifting the stay was proper to allow the state court to make the decision which Mr. Shaw wanted the state court to make. As explained above, lifting the stay is not a ruling by this Court on any of the substantive issues raised by Mr. Shaw but is instead in recognition of the fact that the state court had already made the decision and Mr. Shaw was properly pursuing his avenues of appeal. Mr. Shaw complained that the state court was biased against him and that he never had an opportunity to be heard in the state court or in the

bankruptcy court. The Court pointed out that Mr. Shaw had nine previous bankruptcy filings dating back to 2002 and at least three prior bankruptcy filings which this particular Court had heard. The statement was made in an effort to demonstrate to Mr. Shaw that he had numerous attempts to be heard in the bankruptcy court.

Mr. Shaw has presented no facts which support this Court's recusal. Mr. Shaw's "factual" allegation is that this Court has ruled against him on several occasions. That fact does not demonstrate bias in favor of BB&T or against the Debtor, but rather this Court's view of the application of the law to the facts presented to it. This Court therefore DENIES Mr. Shaw's request for recusal.

END OF ORDER

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