

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

Thomas Dale Hollingsworth,

Case No. 01-12576

Debtor.

Chapter 11

**MEMORANDUM OPINION AND ORDER RE
DEBTOR'S MOTION TO AMEND JUDGMENT OR FOR A NEW TRIAL**

The Court conducted a hearing on the Debtor's Motion to Amend Judgment or for a New Trial on January 9, 2002. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

On November 30, 2001, this Court issued a Memorandum Opinion and Order denying the Debtor's Motion to Reinstate the Automatic Stay as to Commercial Bank. The relevant facts behind that motion are as follows. Prior to filing for bankruptcy relief, the debtor was indebted to Commercial Bank on two notes. One was secured by a deed of trust; the other was secured by logging equipment. The Court signed and entered a consent order on September 13, 2001, that required the debtor to make monthly adequate protection payments of \$700.00 to Commercial Bank beginning on October 1, 2001. Pursuant to the terms of the consent order, Commercial Bank filed a notice of default with the Court when the debtor failed to make the first payment and the automatic stay was lifted on October 19, 2001. The Debtor subsequently filed a motion

to reinstate the automatic stay. As grounds for this motion, the Debtor alleged that he had instructed his wife to make the payments, but she had failed to do so. At the hearing on the Debtor's motion, the Debtor's wife testified that she tried to make the first adequate protection payment of \$700 on October 1, 2001, but the tellers were unable to accept it because they did not know how to post such a payment. Two payments of \$700 were eventually made to Commercial Bank on November 7, 2001.

After reviewing the evidence from the hearing, the Court concluded that there were no grounds on which to grant the Debtor's motion to reinstate the automatic stay:

Even if the Court were to conclude that there had been a mix up with the payment on the part of the bank, the Court is not so certain that this would rise to the level of "mistake, inadvertence or excusable neglect" required by FED. R. CIV. P. 60(b). It is and was the debtor's responsibility, and not his wife's, to see that the adequate protection payments were made to Commercial Bank by October 1, 2001. Merely alleging that he had passed this responsibility off to his wife, who is not a debtor in this case, does not relieve the debtor from this obligation.

The Debtor's motion to reinstate the automatic stay was denied.

On December 11, 2001, the Debtor filed the instant Motion to Amend Judgment or for a New Trial. As grounds for this motion, the Debtor alleged the following:

Subsequent to the Court's entry of the above-referenced Memorandum Opinion and Order, the Debtor and the Debtor's wife, Tammy Hollingsworth, informed counsel for the Debtor that Mrs. Hollingsworth suffers from a mental disorder for which she seeks medical treatment. Said mental disorder adversely affects her ability to have memory recall. Specially, [sic] the disorder causes Mrs. Hollingsworth to believe that she has performed tasks and duties when in fact she has not.

Because of said mental disorder, Mrs. Hollingsworth firmly believed that the October 2001 adequate protection payment to Commercial Bank had in fact been delivered to Commercial Bank, and so informed her husband repeatedly that said payment had been made.

Neither Mrs. Hollingsworth nor her physician were present at the January 9, 2002, hearing to testify about her mental disorder. The Debtor did not present any medical records evidencing his wife's disorder.

II. CONCLUSIONS OF LAW

As pointed out in the November 30, 2001, Memorandum Opinion and Order, a party has ten days after the date of entry of an order to appeal. 28 U.S.C. § 158 and FED. R. BANKR. P. 8002. If a party fails to appeal an order within this ten day period, the order becomes final and the party must file a "Motion to Set Aside" pursuant to FED. R. BANKR. P. 9024. This rule incorporates Fed. R. Civ. P. 60 and provides that a party may receive relief from a "final judgment, order or proceeding" for several reasons, including:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or,
- (6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b)(1)-(6). The Court finds that the Debtor's allegations of his wife's mental disorder do not fit within Rule 60's parameters. The Debtor did not present any evidence to the Court of his wife's mental disorder. His wife was not present to testify about her condition, nor was her physician, from whom she allegedly receives treatment, present to back up the Debtor's allegations. No medical records were introduced at the hearing which might have proven the

Debtor's claims, nor were any receipts for medical visits introduced. The Debtor's testimony that his wife suffers from a disorder without any supporting evidence does not satisfy the evidentiary requirements of the law.

III. ORDER

It is therefore **ORDERED**:

(1) that the Debtor's Motion to Amend Judgment or For a New Trial as it relates to Note 34569 secured by logging equipment is **DENIED**;

(2) that the Debtor's Motion to Amend Judgment or For a New Trial as it relates to Note 21290 secured by a deed of trust on land in Benton County, Tennessee, is **GRANTED**. The Automatic Stay is reinstated as to the land. As adequate protection, the Debtor shall be required to keep the real estate taxes current.

It is so ordered.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: January 25, 2002