

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

IN RE

**Wayne Mullins and
Mary Ann Mullins,**

Case No. 01-11124

Debtors.

Chapter 13

**MEMORANDUM OPINION AND ORDER RE
MOTION TO SET ASIDE DISCHARGE ISSUED UNDER CHAPTER 7**

The Court conducted a hearing on the debtor's "Motion to Set Aside Discharge Issued Under Chapter 7" on August 22, 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 & CONCLUSIONS OF LAW

The debtors, Wayne and Mary Ann Mullins, filed a Chapter 7 petition on March 13, 2001. The Debtors were granted a Chapter 7 discharge as to all debts, with the exception of two debts owed to Federated Department Stores and American Express, on June 26, 2001. Approximately ten months later, the Debtors filed a motion to convert their case to chapter 13. Said motion was granted on April 12, 2002. The Debtors then filed a motion to set aside their chapter 7 discharge on July 29, 2002. In arguing the motion before the Court, the debtors asserted that they would now like to fund a chapter 13 plan rather than discharge any debts in chapter 7.

Pursuant to 28 U.S.C. § 158 and FED. R. BANKR. P. 8002, a party has ten days after the date of entry of an order to appeal. 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. 9024.¹ 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). Rule 60(b) attempts to balance the interest in stability of judgments (i.e., the policy of res judicata) with the interest in seeing that judgments not become instruments of oppression and fraud. In the Sixth Circuit, courts must apply Rule 60(b) "equitably and liberally . . . to achieve substantial justice." *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 844-45 (6th Cir. 1983). A decision to grant or deny a Rule 60(b) motion is within the discretion of the trial court. *See, for example, In re Roxford Foods, Inc.*, 12 F.3d 875 (9th Cir. 1993). A motion made pursuant to Rule 60(b)(1), (2), or (3) must be made not more than one year after the judgment was entered. A motion made pursuant to Rule 60(b)(4), (5), or (6) must be made within a "reasonable time." FED. R. CIV. P. 60(b).

¹Debtors may move to set aside their discharge under Fed. R. Bankr. P. 9024. *In re Mosby*, 244 B.R. 79, 90 (Bankr. E.D. Va. 2000).

In the case of *In re Mosby*, 244 B.R. 79 (Bankr. E.D. Va. 2000), the court was faced with a fact situation exactly like the one in the case at bar. In *Mosby*, debtors who had initially filed under chapter 7, received a chapter 7 discharge, and then converted their cases to chapter 13 had moved the court to revoke their chapter 7 discharges. As grounds for revoking the discharges, the debtors argued that they would rather proceed under chapter 13. The *Mosby* court denied the debtors' motions and, in so doing, stated:

It would be difficult to find that the debtors in either of the two cases presently before the court have made a compelling case for relief under Rule 9024. No evidence has been offered that the discharges in either case were entered as a result of inadvertence, mistake, surprise, or excusable neglect, either on the part of the court or on the part of the debtors. Rather, all that has happened is that the debtors have changed their minds and belatedly decided that they would be better off under chapter 13 than chapter 7. . . Courts are not mere rubber stamps and ought not to decree relief that is not required simply because it makes the litigants feel better.

Id. at 90- 91. The *Mosby* court further recognized that

"[t]he debtor . . . must be diligent in examining the available legal options prior to discharge . . .As a matter of basic public policy, discharge orders must not be set aside merely because of ignorance of the law or carelessness of the parties in having failed to timely effect a choice of remedy."

Id. at 90 (citing *In re Leiter*, 109 B.R. 922, 925 (Bankr.N.D.Ind.1990).

In the case at bar, the debtors waited thirteen months after receiving their chapter 7 discharge to file their motion to set that discharge aside. As grounds for this motion, they argued that they would now like to fund a chapter 13 plan rather than discharging their debts in chapter 7. Relying on the holding and reasoning of the *Mosby* court, this Court finds that the Mullins' delay in filing their motion as well as their argument for setting aside the discharge fail to satisfy the requirements of Rule 60(b). The Mullins did not offer any evidence of a mistake, newly

discovered evidence or fraud. In fact, the debtors failed to allege that any type of circumstance, be it minute or catastrophic, financial or otherwise, had changed since they originally filed for chapter 7 relief in 2001. The fact that they would now rather operate under chapter 13, after having two debts declared non-dischargeable while in chapter 7, falls far short of the exceptional circumstances required by Rule 60(b).

II. ORDER

It is therefore **ORDERED** that the Debtor's "Motion to Set Aside Discharge Issued Under Chapter 7" is **DENIED**.

It is so ordered.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: August 28, 2002

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