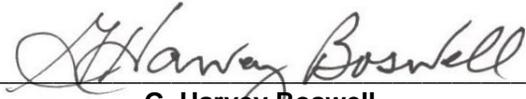




Dated: November 04, 2004
The following is SO ORDERED.


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re:

JAMES TERRY SEALE,

Case No. 04-11419

Debtor.

Chapter 13

**MEMORANDUM OPINION AND ORDER RE (1) DEBTOR'S MOTION TO
MODIFY ORDER RESOLVING OBJECTION TO CONFIRMATION AND
(2) CATERPILLAR FINANCIAL SERVICES CORPORATION'S OBJECTION
TO MOTION TO MODIFY ORDER RESOLVING OBJECTION TO CONFIRMATION**

The Court conducted a hearing on the debtor's motion to modify and Caterpillar's objection thereto on September 16, 2004. FED. R. BANKR. P. 9014. Resolution of these matters is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

At issue in this case is an agreed order entered into by the Debtor and Caterpillar Financial Services Corporation, ("Caterpillar") on July 6, 2004. Prior to filing for bankruptcy relief, the debtor entered into two leases with Caterpillar for D5C track-type tractors. The first lease was executed on August 9, 2000, and the second was executed on July 18, 2001. The debtor defaulted on both leases in

the summer of 2002. On October 28, 2002, the debtor filed a chapter 13 petition, case no. 02-14978. That case was dismissed prior to confirmation on December 30, 2002, for failure to commence making payments to the Trustee. The debtor filed a chapter 11 petition on January 8, 2003, case no. 03-10113. That case was dismissed on March 11, 2004, based on the debtor's failure to file delinquent federal tax returns. The debtor filed the instant case on March 31, 2004.

Based on the default status of the leases, Caterpillar filed a motion to lift the automatic stay and an objection to confirmation of the debtor's plan on May 24, 2004. On July 6, 2004,¹ the debtor and Caterpillar entered into agreed orders resolving both the motion and the objection. Pursuant to the terms of those orders,² the debtor agreed to do several things. First, the debtor agreed to amend his chapter 13 plan to reflect that Caterpillar has two secured claims: (1) claim one in the amount of \$76,689.56 to be paid at the rate of 6% per annum in sixty monthly payments of \$1,483.00; and (2) claim two in the amount of \$46,345.46 to be paid at the rate of 6% per annum in forty-eight monthly installments of \$1,088.00. Secondly, the debtor agreed to tender sufficient funds to the Chapter 13 Trustee by the "cutoff" date each month to enable the Trustee to make a monthly disbursement on each of Caterpillar's secured claims. If Caterpillar failed to receive a disbursement on its secured claim in any month, the debtor agreed to remit enough money by the "cutoff" date for the next month to enable the Trustee to make a double disbursement to Caterpillar in that month. Lastly, and most importantly for the matter before the Court, the debtor agreed to either have his plan confirmed in time for the Trustee to make a disbursement to Caterpillar in July 2004 or in time for the Trustee to make a double disbursement to Caterpillar in August 2004. The agreed order further stated that if the plan was not confirmed in time for Caterpillar to receive two disbursements on each of its claims by August 2004, the automatic stay would be terminated as to the leased equipment and the proceeds thereof. Paragraph 6 of the order stated that "this shall be the Debtor's 'last opportunity' to retain" the leased equipment.

At the time the agreed orders were entered into, there was an objection to confirmation by First South Bank and a motion to lift the automatic stay by First Bank pending. First South Bank's objection

¹Although both orders were signed on the same day, only the agreed order resolving Caterpillar's motion to terminate the automatic stay was entered on July 6, 2004. The agreed order resolving Caterpillar's objection to confirmation was not entered until August 11, 2004, due to a clerical error on the part of the Clerk's office.

²The agreed order resolving Caterpillar's objection to confirmation states that "Debtor and Caterpillar have agreed to the resolution of Caterpillar's Objection [to confirmation] subject to the entry of, and according to the same terms and conditions as, the Agreed Order [resolving Caterpillar's Motion to Terminate the Automatic Stay, or in the alternative, for Adequate Protection.]" As a result, the terms referred to in this memorandum opinion and order actually appear in the "Agreed Order Resolving Caterpillar's Motion to Terminate the Automatic Stay."

was filed on May 28, 2004, and was resolved by a consent order on September 22, 2004. First Bank's motion to lift was filed on May 17, 2004, and was granted on September 22, 2004.

According to the Chapter 13 Trustee's records, the debtor has remitted \$12,959.00 in plan payments since the case was filed; however, the debtor did not make a plan payment in June or July. This failure prompted the Trustee to file a motion to dismiss for failure to pay on July 28, 2004. In an effort to resolve the Trustee's motion, the debtor submitted \$5000.00 on August 31, 2004. The Trustee's motion was conditionally denied on September 16, 2004, based on the debtor making all future plan payments timely and in the correct amount. The case is currently in arrears in the amount of \$306.00.

The debtor's case has been set for confirmation several times; however, there have been various matters which have prevented confirmation, including objections to confirmation and motions to lift the stay. The Chapter 13 Trustee filed a second motion to dismiss on September 2, 2004, for failure to cooperate. According to the Trustee, the Chapter 13 Trustee's office routinely sends business papers to self-employed debtors in order to ascertain whether or not the debtor should be a business. Although the debtor testified at the hearing in this matter that he has completed the papers and returned them to the Trustee's office, the Chapter 13 Trustee stated that his office had not received the papers as of the time of the hearing.

Because the case has yet to be confirmed, Caterpillar has not received any payments. As a result, Caterpillar issued a notice of default to the debtor. The debtor filed a motion to "Modify the Agreed Order Resolving Caterpillar's Objection to Confirmation" on August 26, 2004. The debtor's motion states that he wants to modify the order so that he can make the monthly payments directly to Caterpillar, rather than submitting the money under the plan; however, at the hearing on the motion, the debtor's attorney stated that the debtor wants the Court to allow the Chapter 13 Trustee to disburse enough money to Caterpillar so that they are current pursuant to the terms of the agreed order. The debtor did not file a motion to modify the "Agreed Order Resolving Caterpillar's Motion to Terminate the Automatic Stay, or in the Alternative, for Adequate Protection." Caterpillar filed an objection to the debtor's motion to "Modify the Agreed Order Resolving Caterpillar's Objection to Confirmation" on August 30, 2004.

II. Conclusions of Law

In this case, the debtor is asking the Court to allow him to modify the agreed order resolving the objection to confirmation so that the trustee can disburse payments despite the fact that the plan has not been confirmed. In essence, he is asking the Court to set aside the agreed order. As this Court has previously held in two other cases, 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). 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).

Although subsections (1) through (5) list specific grounds for obtaining relief from a final order, subsection (6) serves as a catch-all provision. In addressing what type of case is proper for Rule 60(b)(6) relief, the United States Supreme Court has held that only those situations involving “extraordinary circumstances” will be granted such relief. *Ackermann v. U.S.*, 304 U.S. 193, 199 (1950). The Sixth Circuit has been strict in applying this “extraordinary circumstances” test to Rule 60(b)(6) motions:

We have held that Rule 60(b)(6) should apply “only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule. . . . Courts, however, must apply subsection (b)(6) only “as a means to achieve substantial justice when ‘something more’ than one of the grounds contained in Rule 60(b)’s first five clauses is present.”

Olley v. Henry & Wright Corp., 910 F.2d 357, 365 (6th Cir. 1990) (citations omitted); *See also, Mallory v. Eyrich*, 922 F.2d 1273, 1280 (6th Cir. 1991); *Hopper v. Euclid Manor Nursing Home, Inc.* 867 F.2d 291, 294 (6th Cir. 1989); *Pierce v. United Mine Workers*, 770 F.2d 449, 451 (6th Cir. 1981), cert. denied, 474 U.S. 1104, 106 S.Ct. 890, 88 L.Ed. 925 (1986). These cases are unanimous in holding that something above and beyond those situations enumerated in Rule 60(b) must exist before a party may be successful in having their judgment set aside under the catch-all provision of subsection (b)(6). *Fuller v. Quire*, 916 F.2d 358 (6th Cir. 1990); *Hopper*, 867 F.2d at 294; *Critical Care Support Servs. v. United States (In re Critical Care Support Servs.)*, 236 B.R. 137 (E.D.N.Y. 1999) (“ . . . Rule 60(b)(6) may only be invoked when the asserted grounds for relief are ‘not premised on one of the grounds for relief

enumerated in clauses (b)(1) through (b)(5).” quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)).

The debtor in this case has not alleged any of the grounds under Rule 60(b) as justification for his proposed modification. He has simply stated that he wants the Court to authorize the Trustee to disburse money so that Caterpillar can be paid. What the debtor seems to be forgetting, however, is that there is another crucial part to the agreed order. Pursuant to the terms of the orders resolving Caterpillar’s objection to confirmation and motion for relief from the stay, the debtor was required to have his plan confirmed by June or July. The debtor did not make any argument that this was an inconsequential or trivial requirement. Presumably, Caterpillar lobbied for this inclusion so that they could have some assurance of receiving monthly payments. The Court wholeheartedly understands this desire considering the fact that the debtor has been using Caterpillar’s collateral for over two years without making payments.

At the time of entering into the agreed orders with Caterpillar, First South Bank’s objection to confirmation was pending as was First Bank’s motion to lift the automatic stay. The debtor was aware of these filings and yet he agreed to the provision about having the plan confirmed by June or July. Surely the debtor must have thought he could resolve the other matters in time to clear the path for confirmation. The debtor entered into the agreed order on June 6, 2004. He knew he had a relatively small window of time within which to get his case on track. The debtor simply failed to do this.

The debtor made a deliberate decision in this case to enter into the agreed order with Caterpillar in order to resolve its objection to confirmation. As the Third Circuit has recognized, when parties have chosen to submit to a consent decree instead of seeking a more favorable judgment upon litigation, “their burden under Rule 60(b) is perhaps even more formidable than had they litigated and lost.” *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114, 1119-20 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1026, 100 S.Ct. 689, 62 L.Ed.2d 660 (1980). Based upon the debtor’s failure to demonstrate that any of Rule 60(b)’s grounds apply to the instant case, the Court has no choice but to deny the debtor’s motion.

Even if the Court were to allow the debtor to set aside the agreed order on Caterpillar’s objection to confirmation, the consequences of failing to make the payments and have the plan confirmed would still exist. The debtor did not move to modify or set aside the agreed order resolving Caterpillar’s motion to lift. So, the stay would still be lifted and the “last opportunity” clause would go into effect under that order.

In Caterpillar’s objection to the debtor’s motion to modify, the attorney for Caterpillar alleged that the debtor should be held liable for all attorney’s fees and expenses incurred by Caterpillar in connection with the motion to modify. The Court is abstaining from deciding this issue until such time

as Caterpillar's attorney files a formal fee application. Such application shall include an itemized statement of the attorney's time and expenses as well as a legal argument setting forth the authority for payment of these fees. The Court will set the application and any objection thereto for a hearing.

III. ORDER

It is therefore **ORDERED** that the Debtor's Motion to Modify Order Resolving Objection to Confirmation is **DENIED**.

It is **FURTHER ORDERED** that Caterpillar Financial Services Corporation's Objection to the Debtor's motion is **SUSTAINED**.

Service List

debtor

Timothy Latimer, debtor's attorney

Harris Quinn, Attorney for Caterpillar Financial Services Corporation

Tim Ivy, Chapter 13 Trustee