Not intended for publication

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

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**IN RE**

**Thomas Dale Hollingsworth**, **Case No. 01-12576**

**Debtor.** **Chapter 11**

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**MEMORANDUM OPINION AND ORDER RE**
**MOTION TO REINSTATE AUTOMATIC STAY**

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The Court conducted a hearing on the Debtor's Motion to Reinstate the Automatic Stay as it relates to Commercial Bank on November 21, 2001. 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

At issue in this case is whether or not the automatic stay should be reinstated as to Commercial Bank. On July 26, 2001, Commercial Bank filed a "Motion to Dismiss Case or Alternatively for Adequate Protection." The debts and obligations owed by the debtor to Commercial Bank were listed in the motion as follows:

| Note # | Balance | Collateral |
|---|---|---|
| 21290 | $20,455.78 | Deed of Trust on a piece of bare land in Benton County, Tennessee |
| 34569 | $59,388.79 | Logging Equipment |

The Court signed and entered a consent order on September 13, 2001, which stipulated that the

debtor was to begin making monthly adequate protection payments of $700 to Commercial Bank. These payments were to begin on October 1, 2001. The order further stipulated that "[i]f the Debtor fails to pay said adequate protection payments, the automatic stay will be lifted upon 15 days notice filed with the Debtor's attorney." Both the debtor's attorney and Commercial Bank's attorney signed off on this motion.

On October 4, 2001, Commercial Bank filed a "Notice of Default" with the Court. In accordance with the Court's September 13th order, the notice provided that "[i]f the payments are not brought current within fifteen days from the filing of this notice, the stay will be lifted without further notice or hearing. . .." The debtor filed a response in opposition to the notice on October 16, 2001. Pursuant to the Court's September 13th order, the automatic stay was lifted as to Commercial Bank on October 19, 2001.

The Debtor filed a "Motion to Reinstate the Automatic Stay" as to Commercial Bank on November 13, 2001. As grounds for this relief, the Debtor alleged that he had "instructed" his wife to make the payments to the bank and that she told him the payments had in fact been made. The motion further stated that "[t]he truth of the matter is that Debtor's-In-Possession wife presented two (2) payments in the amount of $700.00 each to Commercial Bank on November 7, 2001. She purported to apply these to the October and November adequate protection payments." At the hearing on the motion, the Debtor's wife testified that she took a payment in the amount of $700.00 to Commercial Bank on October 1, 2001, but that the tellers were unable to accept it because they did not know how to post such a payment. As a result, the Debtor's wife purportedly left the check in an envelope for Janet Allen, the loan document specialist with

whom the Debtor and his wife were acquainted. When questioned about this check at the hearing, Janet Allen testified that she never received an envelope with a check in it from the Hollingsworths between October 1, 2001, and November 7, 2001. Janet Allen also testified that when Commercial Bank came to repossess the debtor's equipment, Mrs. Hollingsworth called her at home and asked her to say she had received the check. Janet Allen refused to do so.

According to Trial Exhibits 1 and 2, two payments of $700 were made to Commercial Bank on November 7, 2001. Although no evidence or testimony was presented as to who posted these payments, the initials on the bank receipts were listed as "SS." On Trial Exhibit 1, the date that was printed at the bottom of the receipt by the computer is "110701." The teller had handwritten the date on a line at the top of the receipt as "11-7-01;" however, someone had gone back over that date and written "OCT" over "11." Someone had also written "Oct. 07, 2001" at the bottom of the receipt. At the hearing on the debtor's motion, the debtor's wife testified that she had written "OCT" and "Oct. 07, 2001" on the receipt, but that she had not done this in order to try and make it look like she had made the payment in October.

## II. CONCLUSIONS OF LAW

The Debtor in this case has filed a "Motion to Reinstate the Automatic Stay," in essence asking the Court to set aside the lifting of the stay which occurred on October 19, 2001. 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. 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). In the case at bar, the Debtor did not allege any of these grounds specifically; however, because the Debtor has alleged that he believed the payments had been made by his wife, the Court finds that the only possible subsection under which the Debtor could proceed would be (b)(1).

Although the debtor's wife testified that she had attempted to make the October 1st payment to Commercial Bank, but was unable to do so, the Court finds that there was not credible or sufficient evidence to back up this claim. Being in the business of loaning money, the Court does not believe Mrs. Hollingsworth's testimony that no one at the bank knew how to accept and post her check on the 1st of October. The Court also finds that, in light of the other evidence and testimony, Janet Allen proved to be a more credible witness than Mrs. Hollingsworth. The Court believes that Mrs. Hollingsworth asked Janet Allen to falsely say she had lost the check. The Court finds that Mrs. Hollingsworth did not attempt to make a payment to Commercial Bank on October 1, 2001. As a result, the Court holds that no mistake was made.

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.

As a result of these findings, the Court hereby finds that the debtor is not entitled to have the automatic stay reinstated as to Commercial Bank. The lifting of the stay remains in effect and the debtor's motion will be DENIED.

## III. ORDER

It is therefore **ORDERED** that the Debtor's Motion to Reinstate the Automatic Stay as it relates to Commercial Bank is **DENIED.**

**It is so ordered.**

**By the Court,**

**G. Harvey Boswell**
**United States Bankruptcy Judge**

**Date: November 30, 2001**