

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

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**IN RE**

**Mary Waddell,  
  
Debtor.**

**Case No. 00-14830  
  
Chapter 13**

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**MEMORANDUM OPINION AND ORDER RE  
MOTION TO SET ASIDE DEFAULT BY MCKENZIE BANKING COMPANY**

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The Court conducted a hearing on Motion to Set Aside Default by McKenzie Banking Company on August 1, 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**

At issue in the case at bar is a Notice of Default filed by McKenzie Banking Company, ("McKenzie" or "Bank"), on July 1, 2002. McKenzie holds the mortgage on the debtor's residence. In the fall of 2001, the debtor, Mary Waddell, and her husband, Joseph Waddell, defaulted on their mortgage. On October 31, 2001, they entered into an agreed order with McKenzie providing for the cure of default. The October 31<sup>st</sup> order further contained a final opportunity clause which stated that if the Waddells missed a payment in the future, the Bank would file a notice of default. The Waddells would then have fifteen days to cure the default or the automatic stay would be lifted.

The Waddells separated and filed for divorce in May 2002. Joseph Waddell was dismissed from this case and filed case number 02-13328 on July 29, 2002.

McKenzie filed a Notice of Default in Mary Waddell's case on July 1, 2002, alleging that neither the June nor July mortgage payment had been made. Mary Waddell filed a motion to set aside the notice of default on July 19, 2002. At the hearing on this motion, the debtor alleged that she was unable to make the payments because of her separation from Joseph Waddell. The Chapter 13 Trustee reported to the Court that there is enough money on hand to make the June and July disbursement to McKenzie and that, if Mary Waddell remitted \$165.00 to the trustee's office, there would be enough money on hand to make the August disbursement to McKenzie as well.

Joseph Waddell is supposed to begin making the monthly mortgage payment to McKenzie in September 2002. Mary Waddell stated that if he fails to do so, she will remit the payment directly to McKenzie herself.

## **II. CONCLUSIONS OF LAW**

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). 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 (6<sup>th</sup> 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 (9<sup>th</sup> Cir. 1993).

Because none of the grounds in the first five subsections of Rule 60(b) has been alleged by the debtor nor proven at the hearing, the only subsection under which Waddell may succeed in having the agreed order set aside is subsection (b)(6). 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 (6<sup>th</sup> Cir. 1990) (citations omitted); *See also Mallory v. Eyrich*, 922 F.2d 1273, 1280 (6<sup>th</sup> Cir. 1991); *Hopper v. Euclid Manor Nursing Home, Inc.* 867 F.2d 291, 294 (6<sup>th</sup> Cir. 1989); *Pierce v. United Mine Workers*, 770 F.2d 449, 451 (6<sup>th</sup>

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).

In the case at bar, the debtor and her husband entered into an agreed order with McKenzie in October 2001. Payments were being made pursuant to the terms of that order until the parties separated in May 2002. At that time, Mr. Waddell was dismissed from this case and filed an individual case, in which he is supposed to take over the responsibility for making payments on McKenzie's collateral.

The Court finds that the parties separation in May 2002 qualifies for relief under Rule 60(b)(6). When the Waddells entered into the agreed order with McKenzie they were married. The Waddells made payments to McKenzie up until they separated. The Court finds that the Waddell's separation and the problems that flowed from it are exceptional circumstances that were not foreseeable in October 2001. The notice of default will be set aside and the debtor will be given ten days to submit \$165.00 to the Chapter 13 Trustee's office so that the Chapter 13 Trustee may disburse the June, July and August payments to McKenzie Banking. Should Mr. Waddell not make the house payment in September 2002, Mary Waddell may submit the payment to McKenzie Banking directly. Should (1) Mary Waddell fail to remit the \$165 to the Chapter 13 Trustee's office within ten days or (2) either party fails to make the September 2002 payment or a payment in any of the months thereafter, McKenzie Banking will be authorized to file a notice of default which will not, under any circumstances, be set aside.

As victorious as this finding might seem for debtors in this district, the Court wants to make clear that the fact that the Chapter 13 Trustee has enough money on hand to disburse the June and July payments weighs heavily in the debtor's favor. If the situation were different and McKenzie Banking was not going to get the full amount of these payments now, the Court would rule differently.

### **III. ORDER**

It is therefore **ORDERED** that the Debtor's "Motion to Set Aside Default by McKenzie Banking Company" is **CONDITIONALLY GRANTED**. The Debtor is **HEREBY ORDERED** to remit \$165.00 to the Chapter 13 Trustee within ten days after entry of this order. Provided that the debtor makes this payment, the notice of default filed by McKenzie Banking on July 1, 2002, will be set aside without further action by this Court. After the debtor remits the \$165.00 to the Chapter 13 Trustee, the Trustee is **HEREBY AUTHORIZED** to disburse the June, July and August 2002 payments to McKenzie Banking.

**It is so ordered.**

**By the Court,**

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

**Date: August 27, 2002**

cc:

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"Memorandum Opinion and Order re Motion to Set Aside Default by McKenzie Banking Company"

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