UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE	
NICKEY EVANS AND CARRIE EVANS,	**Case No. 03-10936**
Debtors.	**Chapter 11**
NICKEY EVANS AND CARRIE EVANS,	
Plaintiffs,	
vs.	**Adv. Pro. No. 03-5057**
COMMERCIAL BANK AND TRUST CO.,	
Defendants.	

MEMORANDUM OPINION AND ORDER
RE DEFENDANT'S MOTION TO SET ASIDE ORDER GRANTING TURNOVER OF VEHICLES, TO REFER MATTER TO U.S. ATTORNEY FOR PERJURY INVESTIGATION, AND REQUEST FOR EXPEDITED HEARING

The Court conducted a hearing on the Defendant's Motion to Stay Order Granting Turnover on April 3, 2003. FED. R. BANKR. P. 9014 Resolution of this 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

The debtors in this matter, Nickey and Carrie Evans, (hereinafter, Nickey Evans will be referred to as "debtor"), filed the instant adversary proceeding against the defendant, Commercial Bank and Trust, ("Bank"), on February 24, 2003. In so doing, the debtors sought turnover of a 1987 GMC van, a 1998 Dodge van, and a 1998 Ford Mustang which had been repossessed by the defendant on or around February 19, 2003. The Court conducted a hearing in the matter on March 13, 2003. At this hearing, the debtor testified that his wife was expecting a baby and that the only vehicle they owned which would be suitable for use as a family vehicle was the 1998 Ford Mustang. The debtor further testified that he uses both the 1987 GMC van and the 1998 Dodge van to haul chemicals he uses as a mobile car painter for dealerships.

Under cross examination by the Bank's attorney, the debtor admitted that he had purchased a 1997 Mercury Mountaineer in the fall of 2002; however, when questioned about the condition of the Mountaineer, the debtor stated that he purchased the vehicle in a wrecked condition with the intention of repairing it or using it for salvage parts. When asked by the Bank's attorney if he could fix it up and use

it as a family vehicle, the debtor stated "[n]ot anytime soon with the damage that is done to it" and that the Mountaineer "is not driveable." The debtor further stated that the vehicle needed approximately $3,000.00 worth of work before it would be suitable for use as a family vehicle. Based on the debtor's testimony about the Mountaineer's condition and his need for a family vehicle, the Court granted the debtor's complaint for turnover of all three vehicles on March 13, 2003.

One day after the turnover order was entered, the Bank filed a motion to set the order aside. The Bank alleged that the debtor had offered perjured testimony at the turnover hearing about the condition of the Mountaineer. Specifically, the Bank alleged that bank representatives had witnessed the vehicle in a fully operational condition on March 14, 2003, in Paris, Tennessee. The Bank asked the Court to set aside the turnover order and refer the matter to the U.S. Attorney for a perjury investigation.

On March 19, 2003, the Bank filed "Motion to Stay Order Granting Turnover." The Court granted the motion and stayed the turnover of the 1998 Mustang until such time as the Bank's motion to set aside could be heard.

The Court conducted a hearing on the Bank's motion to set aside on April 3, 2003. The first witness called by the Bank to testify was Holly Popovitch, a loan officer at the Bank. According to Popovitch's testimony, the Bank's attorney called her on March 13, 2003, to inform her of the turnover order. Upon being so informed, Popovitch went to the storage facility at which the vehicles to be turned over were located to take pictures for her files. On her way to the storage facility, Popovitch passed the debtor's house. Popovitch saw the Mountaineer in front of the house and noted that it was not in a "wrecked" condition. When she arrived back at the Bank, Popovitch called the Bank's attorney to tell him she had seen the Mountaineer at the debtor's home and that it did not appear to be wrecked. Popovitch then began to actively look for the Mountaineer around town to see if the debtors were in fact using it as transportation.

On the morning of March 14, 2003, Popovitch saw a black Mercury Mountaineer at the OB/GYN clinic at the Paris hospital. She drove up to the vehicle to see if it was the debtor's. After checking the vin numbers at the county courthouse, Popovitch discovered it was indeed the Mountaineer about which the debtor had testified on March 13, 2003. Popovitch also ran a check on the dealer tag number and discovered that it was registered to "Evans Auto Brokerage." Popovitch testified that the vehicle's body was in good condition. She took pictures of the vehicle to record the condition and emailed those pictures to the Bank's attorney. TRIAL EXHIBITS 3 and 9.

Upon receiving the pictures, the Bank's attorney called the debtor's attorney's office to inform them that the debtor had apparently lied about the condition of the Mountaineer on March 13, 2003. The

debtor's attorney contacted the debtor to question him about Popovitch's observations. The debtor reiterated to his attorney that the mountaineer was in an "inoperable state."

On Monday or Tuesday of the next week, Popovitch went to the debtor's collision repair shop to take more pictures of the Mountaineer. TRIAL EXHIBIT 4. Before taking pictures, Popovitch looked at the vin number to verify it was the same vehicle she had seen at the hospital on Friday, March 14, 2003. The vin number was the same; however, the condition of the vehicle was dramatically different. The front grill, the front quarter panel, and the right tire were all off the vehicle. There was a quarter panel beside the vehicle which was dented and bent up. All three of the missing items had been intact and in good condition when Popovitch saw the vehicle at the hospital on March 14. . Popovitch further testified that the debtor was not on the premises when they came to take these pictures.

The next witness called by the Bank was the debtor, Nickey Evans. Before the debtor was questioned by the Bank's attorney, the Court informed him of his 5th Amendment right not to testify against himself and informed him of the penalty for committing perjury in a federal court. The debtor indicated he understood this information and waived his 5th Amendment right.

When asked to explain the discrepancies between his March 13, 2003, testimony and Popovitch's observations of the vehicle on March 14, 2003, the debtor stated that perhaps he should have explained himself better at the prior hearing. The debtor went on to state that the Mountaineer had mechanical problems as well as cosmetic ones and could not be driven for a lengthy amount of time. The debtor admitted that both he and his wife had driven the vehicle on a few occasions, even acknowledging that he had received a speeding ticket while driving the Mountaineer in Henry County on March 7, 2003. The debtor was keen to point out, however, that the only reason he or his wife drove the Mountaineer was because they had nothing else to drive. According to the debtor's testimony, the Mountaineer had not been driven more than a total of 25 or 30 miles. The debtor stood by his earlier testimony that the Mountaineer was "undriveable" and admitted that he had told his attorney's office on March 14, 2003, that the Mountaineer was inoperable. The debtor further testified that he has purchased some parts for the vehicle, but that he does not have the money to finish repairing it at this time.

When questioned about Popovitch's observation of the Mountaineer at the hospital on March 14, 2003, the debtor admitted that his wife had driven the vehicle, without his permission, to her OB/GYN appointment on that day. Despite being shown the pictures Popovitch had taken of the Mountaineer at the hospital, the debtor alleged that Popovitch was lying about the condition of the vehicle and about the grill being on the vehicle at that time. The debtor insisted that the grill was not on the vehicle on March 14, 2003.

The third witness called by the Bank's attorney was Miranda Lewis, a customer service representative for Money Tree Loan Company in Paris, Tennessee. Money Tree holds the lien on the Mercury Mountaineer. Money Tree's lien is noted on the Mountaineer's Certificate of Title which was issued on December 13, 2002. The "Actual Mileage" listed on the title is 89,000. TRIAL EXHIBIT 6. According to Money Tree's file, the debtors made a payment on the loan on January 13, 2003, and February 19, 2003. Lewis testified that she witnessed Carrie Evans drive up to the Money Tree office in a black Mercury Mountaineer to make either the January or February loan payment. Lewis further testified that when she saw the vehicle, it was "pretty" and in good condition.

The first witness called by the debtor's attorney was Brian Atkins of B & L Automotive in Paris, Tennessee. The debtor asked Atkins to examine the Mountaineer and give an estimate of what it would cost to repair the mechanical problems. Atkins looked at the Mountaineer on March 10, 2003, at which time he prepared a written "Auto Repair Estimate." TRIAL EXHIBIT 8. Atkins informed the debtor that the vehicle had serious engine problems gave him an estimate of $2,251.67 for parts and labor. When asked by the debtor's attorney for his opinion about the "driveability" of the Mountaineer, Atkins replied "the more it was used, the more damage would be done to the engine." Interestingly, the mileage on the "Auto Repair Estimate" is listed as 108, 102.

II. CONCLUSIONS OF LAW

FED. R. BANKR. P. 9024 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).

In the case at bar, the defendant has alleged that the debtor's March 13, 2003, testimony about the condition of the Mountaineer amounts to fraud under Rule 60(b)(3). Such an allegation requires proof by clear and convincing evidence. *Simons v. Gorsuch,* 715 F.2d 1248, 1253 (7th Cir. 1983). In the case of *Abrahamsen v. Trans-State Express, Inc.,* 92 F.3d 425 (6th Cir. 1996), the Sixth Circuit discussed the various behaviors included within Rule 60(b)(3)'s parameters:

> Failure to disclose or produce material requested in discovery can constitute "misconduct" within the purview of 60(b)(3). *Anderson v. Cryovac, Inc.,* 862 F.2d 910, 923 (1st Cir. 1988). Similarly, a 60(b)(3) motion may be granted where the court is "reasonably well satisfied that the testimony given by a material witness is false; that, without it, a jury might have reached a different conclusion; that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after trial." *Davis v. Jellico Community Hosp., Inc.,* 912 F.2d 129, 134 (6th Cir. 1990) (quoting *Gordon v. United States,* 178 F.2d 896, 900 (6th Cir. 1949), *cert. denied,* 339 U.S. 935, 70 S.Ct. 664, 94 L.Ed. 1353 (1950).

Id. at 428. In an unpublished decision from the same year, the Sixth Circuit further defined Rule 60(b)(3)'s terms as follows:

> "Misrepresentation" can be interpreted as an affirmative misstatement. *See Platsis v. E.F. Hutton & Co.*. 946 F.2d 38, 41-42 (6th Cir. 1991) (even an innocent misrepresentation claim must be based on an affirmative misstatement), *cert. denied,* 503 U.S. 984 (1992). "Fraud" can be interpreted as reaching deliberate omissions when a response is required by law or when the non-moving party has volunteered information that would be misleading without the omitted material. *See O'Neal v. Burger Chef Sys., Inc.,* 860 F.2d 1341, 1347 (6th Cir. 1988) (common law defines fraud to include certain omissions, "i.e., failure to disclose material facts when under a duty to do so"). And "other misconduct" can be interpreted to reach questionable behavior affecting the fairness of litigation other than statements or the failure to make statements.

Jordan v. Paccar, Inc., 97 F.3d 1452, *6 (6th Cir. 1996).

At the March 13, 2003, turnover hearing in this case, the debtor testified that his wife was pregnant and that the only vehicle they owned which could serve as a family vehicle was the Cobra Mustang. When asked by the Bank's attorney whether or not he could repair the Mercury Mountaineer and drive it as a family vehicle, the debtor responded "[n]ot anytime soon with the damage that is done to it" and that the Mountaineer "is not driveable." Based on this testimony, the Court granted the debtor's complaint for turnover and ordered the Bank to turn the Mustang over to the debtors.

After reviewing the testimony and evidence presented at the April 3, 2003, hearing, it is now apparent that the debtor's statements on March 13, 2003, misrepresented the condition of the Mountaineer. Six days prior to testifying that the Mountaineer was not "driveable," the Mountaineer was "driveable" enough for the debtor to get a speeding ticket. The Mountaineer also was "driveable"

enough on March 14, 2003, for Carrie Evans to take it to the doctor's office. The pictures taken by Popovitch on that day show a vehicle in almost pristine condition. What is most lethal to the debtor's claim of "undriveability," however, is the mileage discrepancy between the December 2002 certificate of title and the March 2003 "Auto Repair Estimate." In December 2002, the "undriveable" vehicle had 89,000 miles on it. By the time Brian Atkins got around to looking at the engine damage in March 2003, the mileage had skyrocketed to 108,102. That is a difference of 19,102 miles in a matter of three months. If the Mountaineer was truly "undriveable" during this time, then every man, woman and child in the nation should go out and purchase a Mercury Mountaineer immediately. If an undriveable Mountaineer can go 19,000 in three months, think what a driveable one could do.

All of this evidence, when taken as a whole, leads the Court to conclude that the March 13, 2003, turnover order should be set aside as to the 1998 Ford Mustang Cobra under FED. R. CIV. P. 60(b)(3). The Court also finds that this matter is an appropriate one to refer to the United States Attorney's Office for a perjury investigation. As a result, the Court will issue an order setting aside the March 13, 2003, turnover order as it relates to the 1998 Mustang and will refer this matter to the United States Attorney.

ORDER

It is therefore **ORDERED** that the turnover order entered on March 13, 2003, is hereby **SET ASIDE** as to the 1998 Ford Mustang.

IT IS SO ORDERED,

BY THE COURT,

G. HARVEY BOSWELL
United States Bankruptcy Judge

Date: June 10, 2003