Dated: June 23, 2004
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
CHARLES RICHARD COCKRELL, Case No. 97-38373-L
Debtor. Chapter 13

Charles Richard Cockrell,
Plaintiff,

v. Adv. Proc. No. 03-00939

Southern Financial, Inc.,
Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DISMISSING ADVERSARY PROCEEDING

BEFORE THE COURT is the motion for summary judgment filed March 26, 2004, by Defendant Southern Financial, Inc. ("Southern Financial"). Neither the motion nor the response filed by Plaintiff Charles Richard Cockrell ("Debtor") was accompanied by an affidavit, but the Court has determined from a review of the pleadings that there is no material factual dispute.

The heart of the complaint is the allegation that Southern Financial "was erroneously put in [Debtor's Chapter 13 plan] as the plaintiff's current mortgage company" and was paid a total of $7,420.71 before the error was discovered. The complaint admits that Debtor was a co-maker with his mother on a debt owed to Southern Financial secured by real property, and admits that when the bankruptcy petition was filed, Southern Financial was listed as an unsecured creditor for a mortgage foreclosure. The complaint offers no legal theory that would entitle the Debtor to recover the funds paid to Southern Financial allegedly in error. In essence, the Debtor seeks relief from the order of confirmation on the basis of mistake. Because the Debtor's complaint for relief was not timely filed, the motion of Southern Financial will be granted. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A), (B), (L) and (O).

FACTS

The following facts appear from the pleadings and other papers filed in the Debtor's bankruptcy case. The plan proposed by the Debtor listed Southern Financial as a secured creditor, but not as the holder of the Debtor's home mortgage. Because the Debtor's attorney believed that Southern Financial had acquired the debt secured by the Debtor's residence, at the first meeting of creditors Southern Financial was substituted for The Money Store in the Debtor's plan as the holder of the home mortgage. The plan as modified was confirmed on February 27, 1998. Southern Financial filed a proof of claim for a mortgage arrearage in the amount of $3,124.67. The Money Store also filed a proof of claim for mortgage arrearage in the amount of $2,451.20, but an administrative order was entered disallowing the claim based upon its being a duplicate of the Southern Financial claim. A copy of the administrative order is shown to have been served upon the Debtor's attorney and The Money Store, but not upon the Debtor. Neither the Debtor nor The Money Store timely sought judicial review of this order. On December 3, 1998, an order was

entered setting the percentage to be paid to unsecured creditors at 100%.

On January 8, 1999, The Money Store filed a motion for relief from the automatic stay based upon its failure to receive regular monthly installment payments. In response, on March 2, 1999, the Debtor filed a motion seeking to (1) surrender the property encumbered by the lien held by Southern Financial; (2) add the post-petition arrearage owed to The Money Store to the plan; and (3) reduce the percentage to be paid to unsecured creditors through the plan. The motion recites, "in support of said motion, the Debtor would show unto the Court that at the 341 meeting the property to be surrendered was mistakenly substituted for the Debtor's home at 1431 Flamingo resulting in creditor, The Money Store, not receiving ongoing or mortgage arrearage payments." In response to this motion, Southern Financial filed a motion for relief from the co-debtor stay of 11 U.S.C. § 1301. On March 29, 1999, a consent order was entered between the Debtor and The Money Store which modified the Debtor's plan to provide for an ongoing mortgage payment to be made to The Money Store in the amount of $511.68; established a mortgage arrearage in the amount of $10,182.23 to be repaid at $225.00 per month; and provided that any excess proceeds from the sale of the property securing the obligation to Southern Financial would be applied to the arrearage owed to The Money Store. On April 29, 1999, an order was entered terminating the co-debtor stay and reclassifying the balance of the Southern Financial claim as unsecured. By separate order, the percentage to be paid to unsecured creditors and the amount of the bi-weekly plan payment were reduced.

On June 18, 2003, the Chapter 13 trustee filed a motion to dismiss the Debtor's Chapter 13 case because the case had exceeded five years in length. *See* 11 U.S.C. § 1329(c). The hearing on the motion to dismiss was continued a number of times. On September 23, 2003, the Debtor filed his complaint commencing this adversary proceeding. In his complaint, the Debtor alleges that

$7,420.71 was paid to Southern Financial in error pursuant to the confirmed plan. The Debtor seeks to recover these funds for application to the outstanding balance owed in the plan. Southern Financial filed its answer on October 1, 2003, averring that any mistake that resulted in payments being made to Southern Financial was the Debtor's and that the Debtor should be barred by the equitable doctrine of laches from seeking to recover plan payments made four years prior to the filing of the request. On June 3, 2004, the bankruptcy case was dismissed pursuant to the trustee's motion.

Southern Financial filed its motion for summary judgment on March 6, 2004. The response filed by the Debtor explains that, "The debtor's attorney believed that Southern Financial had acquired the mortgage on the debtor's residence from The Money Store." It also suggests that the Debtor believed that the mortgage on the property securing the obligation to Southern Financial had been foreclosed prior to the filing of the bankruptcy case. The Debtor asserts that reconsideration of the claim of Southern Financial is appropriate pursuant to 11 U.S.C. § 502(j) and FED. R. BANKR. P. 3008.

ANALYSIS

Federal Rule of Bankruptcy Procedure 7056 incorporates Federal Rule of Civil Procedure 56, which provides in pertinent part:

> **(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> **(c) Motion and Proceedings Thereon.** . . . The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(b) and (c). Southern Financial, as the moving party, bears the burden of showing that no genuine issue of material fact remains in dispute. *Gregg v. Allen-Bradley Co.,* 801 F.2d 859, 861 (6th Cir. 1981). The facts, as well as any inferences that can be drawn from them, must be viewed in the light most favorable to the Debtor as nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348 (1986).

For purposes of deciding this motion, the Court will assume that the Debtor's statements concerning his belief about the foreclosure on his mother's property and his attorney's belief about the acquisition of the mortgage on the Debtor's residence are true. Southern Financial does not dispute the Debtor's statements about his mistakes. Southern Financial will be entitled to summary judgment, however, only if it is entitled to judgment as a matter of law. The motion raises two legal issues. First, may a Chapter 13 debtor recover payments made to a creditor pursuant to a confirmed plan based upon the debtor's unilateral mistake? Second, if so, may the debtor's right to recover such payments be barred after the passage of time under the equitable doctrine of laches?

The provisions of a confirmed Chapter 13 plan bind both the debtor and each creditor. 11 U.S.C. § 1327. The order confirming a Chapter 13 plan has the effect of a judgment and is a final appealable order. *See In re Sanders*, 243 B.R. 326, 331 (Bankr. N.D. Ohio 2000). The Debtor did not appeal the confirmation order. An order of confirmation may be revoked, but only when the request for revocation is made within 180 days after the date of entry of the order of confirmation, and then, only for fraud. *See* 11 U.S.C. § 1330(a). The Debtor did not seek revocation of the confirmation order. Relief from a judgment or order may be obtained under Rule 60(b) of the Federal Rules of Civil Procedure (incorporated at Rule 9024 of the Federal Rules of Bankruptcy Procedure) for mistake, inadvertence, excusable neglect, newly discovered evidence, fraud and the like, but if the ground of the motion is mistake, inadvertence or excusable neglect, the motion must

be made within one year after the order or judgment was taken. FED. R. CIV. P. 60(b). Even if the Debtor's complaint is construed to include a motion pursuant to Rule 60(b), if was not filed timely. The Debtor and the Debtor's attorney were made aware of their mistake on or about January 9, 1999, when The Money Store filed its motion for relief from the automatic stay. The plan was confirmed February 27, 1998. The Debtor had adequate time to file a motion seeking relief from the order of confirmation based on his mistake. The Debtor did not file a motion for relief from the order of confirmation, but did file a motion to modify the plan on March 2, 1999. This motion did not seek relief from the order of confirmation, and would not have been timely filed if it had.

As the result of the Debtor's motion to modify and some negotiations among the parties, the plan was modified on March 29, 1999, to provide for the claim of The Money Store, and on April 29, 1999, to reclassify the balance of the Southern Financial claim as unsecured. The plan was also modified to reduce the percentage to be paid to unsecured creditors. These modifications were effective as of the date of entry of the order permitting them. None of them can be said to retroactively modify the confirmed plan. Payments made to Southern Financial pursuant to the confirmed plan were properly made up to the date of modification. There is no indication that Southern Financial continued to receive payments after relief from the co-debtor stay was granted to permit it to foreclose its deed of trust, and the plan was modified to treat any remaining balance owed to Southern Financial as an unsecured claim.[1]

Finally, the Debtor's reliance upon 11 U.S.C. § 502(j) and FED. R. BANKR. P. 3008 indicate that he believes that the issue before the Court is one of reconsideration of a claim. The Debtor is mistaken. The Debtor does not assert that the proof of claim filed by Southern Financial was

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[1] The Court is aware that in the Sixth Circuit, a debtor may not modify his plan to surrender collateral and treat any deficiency balance after the liquidation of the collateral as an unsecured claim. *See Chrysler Fin. Corp. v. Nolan (In re Nolan),* 232 F.3d 528 (6th Cir. 2000). The modification made to the Debtor's plan in this case resulted from the consent of Southern Financial.

incorrect as to amount or classification. The claim was properly presented as one for arrearage on a secured obligation. The Debtor concedes that he was obligated with his mother on the note to Southern Financial. The Debtor's difficulties stem from the substitution in his Chapter 13 plan of Southern Financial for The Money Store as the creditor holding his home mortgage, not from the allowance of the claim of Southern Financial.

CONCLUSION

Because the Court has determined that the Debtor's complaint for relief from the order of confirmation was not timely filed pursuant to law, it need not consider Southern Financial's additional argument for the application of the equitable doctrine of laches. For the forgoing reasons, the motion of Southern Financial for summary judgement is **GRANTED** and this adversary proceeding is **DISMISSED**.

cc: Debtor/Plaintiff
Attorney for Debtor/Plaintiff
Defendant
Attorney for Defendant
Chapter 13 Trustee