

Dated: April 11, 2024
The following is ORDERED:



Denise E. Barnett
UNITED STATES BANKRUPTCY JUDGE

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

In re:
KIM JONES,
Debtor.

Case No. 23-24343
Chapter 13

**ORDER GRANTING, IN PART, EXPEDITED
MOTION TO RECONSIDER, VACATE, OR MODIFY
ORDER GRANTING *IN REM* RELIEF FROM THE
AUTOMATIC STAY AND THE CO-DEBTOR STAY**

This case came before the Court on April 2, 2024, at 1:00 p.m., on Kim Jones' ("Ms. Jones" or "Debtor's") *Expedited Motion to Reconsider, Vacate or Order Granting In Rem Relief from the Automatic Stay and Relief from the Co-Debtor Stay* ("Motion to Reconsider"). (ECF No. 52).¹ Both counsel for Debtor and The Bank of New York Mellon f/k/a The Bank of New York, successor to JPMorgan Chase Bank, as trustee, for the holders of the Bear Stearns Asset Backed Securities Trust 2004-SD3, Asset-Backed Certificates, Series 2004-SD3 ("Creditor") made arguments on their respective positions regarding the motion. Upon review of the record,

¹ The Court has separately entered an *Order Granting Debtor's Expedited Motion to Reinstate the Chapter 13 case*.

filed documents, and consideration of the arguments from the parties, the Court grants, in part, the Motion to Reconsider for the reasons outlined below.

FACTUAL AND PROCEDURAL BACKGROUND

Before her present case, Ms. Jones filed for bankruptcy thirteen (13) times since 2001. On September 1, 2023, Ms. Jones filed a Chapter 13 petition.² At the time of filing, and until most recently, Ms. Jones was *pro se*.

On November 29, 2023, Creditor filed a motion for relief from the automatic stay and the co-debtor stay,³ and the motion was scheduled to be heard on December 12, 2023. The hearing on the motion was rescheduled first for January 9, 2024, and then January 23, 2024.⁴ At the January 23, 2024 hearing, the Court learned from the Creditor that Ms. Jones is significantly behind on her mortgage payments and made no payments in years. The Chapter 13 trustee further informed the Court that Ms. Jones made no Chapter 13 plan payments. The Court advised Ms. Jones to hire counsel and “clean up” her case, or it will be dismissed. The matters were then continued to February 6, 2024, to allow Ms. Jones to retain the services of an attorney to get her Chapter 13 case back on track.

On January 29, 2024, Ms. Jones (acting *pro se*) filed a Motion to Reset,⁵ in which she requested to reset the matters scheduled for a hearing on February 6, 2024. In the Motion to Reset, Ms. Jones explained the reasons for the continuance request, that she intended to hire

² ECF No. 1.

³ ECF No. 29.

⁴ The other matters before the Court on January 23, 2024 were *Trustee’s Motion to Dismiss- Failure to Provide a Confirmable Plan, Objection to Confirmation- Select Portfolio Servicing, Inc., Trustee’s Objection to Confirmation of Plan, and Confirmation Hearing*.

⁵ ECF No. 37.

counsel, and that she will be seeking financial assistance from her parents. On February 5, 2024, the Court entered an order granting the motion to reset hearing.⁶

At the continued hearing on March 5, 2024, neither Ms. Jones nor her newly hired counsel appeared. The Creditor was present, and the Court heard Creditor's argument on motion for relief from the automatic stay and co-debtor stay. The Chapter 13 trustee stated Ms. Jones paid \$9,600 toward her Chapter 13 plan payments.⁷ Because neither Ms. Jones nor her counsel were present, the Court granted the Chapter 13 trustee's Motion to Dismiss for Failure to Provide a Confirmable Plan and Creditor's Motion for In Rem Relief from Stay and Co-Debtor Stay.⁸

On March 7, 2024, counsel for Ms. Jones filed an Expedited Motion to Reinstate the Case.⁹ In the motion, counsel confirmed that Ms. Jones hired him prior to the March 5th hearing and provided counsel with all necessary documents to amend her Chapter 13 plan. Counsel admits that he was out of town, did not review the documents, did not amend the plan, and failed to appear at the hearing on March 5th.

On March 18, 2024, counsel for Ms. Jones filed an Expedited Motion to Reconsider, Vacate, or Modify Order that granted Creditor In Rem Relief from the Automatic Stay and Relief from the Co-Debtor Stay.¹⁰ Additionally, on the same date, Ms. Jones (through counsel) also filed an Amended Chapter 13 Plan and Amended Schedules I and J.¹¹

⁶ ECF No. 38.

⁷ Hearing on Mar. 5, 2024, at 10:41 a.m.

⁸ ECF No. 26 and 29.

⁹ ECF No. 43.

¹⁰ ECF No. 52.

¹¹ ECF Nos. 50 and 53.

On March 19, 2024, the Court heard Ms. Jones' motion to reinstate the case.¹² Both Ms. Jones and her attorney were present. At the hearing, the Court learned Ms. Jones retained counsel a week before the hearing on March 5th, and counsel did not put the hearing date in his calendar. Realizing counsel for Ms. Jones filed a motion to reconsider the order granting relief from stay, the Court continued the motion to reinstate so both matters could be heard on April 2, 2024, at 1:00 p.m., and allow parties to present evidence regarding reinstating the Chapter 13 case and reconsidering the stay relief order.

On April 2, 2024, the Court conducted an evidentiary hearing on the motion to reinstate the Chapter 13 case and Motion to Reconsider. Ms. Jones and her son testified. Creditor did not present any evidence and did not cross-examine the witnesses. The Chapter 13 trustee updated the Court regarding the Chapter 13 plan payments and other aspects to the Chapter 13 case.

From the testimonial evidence presented, the Court finds that Ms. Jones is a sales representative, and just obtained an additional job where she will design and sell apparel.¹³ Ms. Jones works about forty hours each week and sometimes works overtime.¹⁴ Ms. Jones' "take-home pay" ranges from \$1,900 to \$2,300 every two weeks, depending on the number of overtime hours each pay period.¹⁵

Ms. Jones filed this case (and prior Chapter 13 cases) to avoid the foreclosure of her home. She explained that she lived at the house since 2004, when it was purchased with her

¹² The day before the hearing on March 19th, Debtor filed an Expedited Motion to Reconsider. This matter was set to be heard on Apr. 2, 2024, at 1:00 p.m.

¹³ Hearing on Apr. 2, 2024, at 2:00 p.m. Debtor further testified that she makes about \$7,000 when she goes to conferences.

¹⁴ *Id.* at 2:02 p.m.

¹⁵ *Id.*

estranged husband.¹⁶ For sentimental reasons, Ms. Jones wants to save this home from foreclosure—it was the first home she purchased, where she raised her two sons, and this home placed her family in a better situation than they were in at the time.¹⁷ Currently, Ms. Jones lives in the home with one of her two sons.¹⁸ Although the mortgage Note is executed solely in the name of Ms. Jones’ estranged spouse, both Ms. Jones and her estranged spouse are on the Deed of Trust. Ms. Jones explained that her estranged spouse no longer resides in the home, but since the purchase of the home, he took on the sole responsibility of make the mortgage payments.¹⁹ For some time, Ms. Jones travelled between Memphis, Tennessee, and Florida, where she was the primary care giver of her sister who was battling cancer. Ms. Jones’ sister recently passed away, and so Ms. Jones is now living in the home at issue in this case. Ms. Jones discovered that the mortgage payments were not being made about ten years ago when she was traveling between Tennessee and Florida,²⁰ and began providing her estranged husband with funds for the mortgage payments.²¹ Ms. Jones stated that she had no knowledge of whether her estranged husband used the funds she provided to him towards the mortgage payments. Ms. Jones explained that she filed her prior bankruptcy cases to avoid foreclosure, and those cases were dismissed because she was a *pro se* debtor who did not understand how proceed through Chapter 13.²²

¹⁶ *Id.* at 1:50 p.m.

¹⁷ *Id.* at 2:06 p.m.

¹⁸ *Id.*

¹⁹ *Id.* a 1:53 p.m.

²⁰ *Id.* at 1:57 p.m.

²¹ *Id.*

²² *Id.* at 1:58 p.m.

Ms. Jones (through counsel and her testimony) explained that she has now hired counsel and will have the resources to succeed in this Chapter 13 plan case. Ms. Jones anticipates receiving funds from family (her sons and parents) that total \$6,000 a month.²³ With Ms. Jones' income and the family contributions, Ms. Jones anticipates that she will be able to keep up with her Chapter 13 plan payments.²⁴ The Chapter 13 plan payments will be substantial to cover the significant arrearage and ongoing mortgage payments.²⁵

Creditor contends that the Chapter 13 plan is not feasible due to the very large mortgage arrearage.²⁶ Though the Creditor acknowledges the efforts Ms. Jones recently made in the case with the substantial \$9,600 payment towards her Chapter 13 plan, the Creditor is concerned that the reliance on family contributions over a 60-month period is not sustainable.²⁷ Creditor requests that if the Court is inclined to grant Ms. Jones' motions to reinstate the Chapter 13 case and vacate the stay relief order, the Court should include "strict compliance" language in the relief granted.²⁸

²³ *Id.* at 2:03 p.m.

²⁴ *Id.* at 2:04 p.m.

²⁵ *Id.* at 2:08 p.m.

²⁶ *Id.* at 1:48 p.m. Creditor's proof of claim (Claim 5-1) states a payment has not been made since August 2005, but Debtor cannot confirm that is correct.

²⁷ *Id.* at 1:47 p.m.

²⁸ *Id.* at 1:49 p.m.

DISCUSSION

Rule 60(b) governs relief from a judgment or order.²⁹ Rule 60(b)(6) acts as the catch-all provision for situations that do not meet the requirements under Rule 60(b)(1) through (5).³⁰ Under Rule 60(b)(6), the Court is allowed to consider extraordinary circumstances based on the facts presented.³¹ The Court believes that Rule 60(b)(6) is applicable and appropriate for the facts and circumstances of this case.³²

²⁹ Bankruptcy Rule 60: (b) on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistake, inadvertence, surprise, or excusable neglect;
- (2) Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) Fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) The judgment is void;
- (5) The judgement has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) Any other reason that justifies relief.

³⁰ *Id.* at *6.

³¹ *In re Timmons*, 479 B.R. 597, 604 (Bankr. N.D. Ala. 2012) (explaining factors the court considered when determining whether to vacate the order granting relief under Rule 60(b)(6)).

³² Rule 60 does not define “mistake” and “excusable neglect” under Rule 60(b)(1), but case law suggests the court focuses on mistakes and neglect in the conduct of litigation. *In re Curare Laboratory, LLC*, No. 22-8023, 2023 WL 4044473, at *5 (Bankr. App. 6th Cir. June 16, 2023) (explaining “mistake” and “excusable neglect” under Bankruptcy Rule 60(b)). The bankruptcy court in *In re Player* denied the Debtor’s request to reinstate the case, which included a request to vacate the order granting relief from the automatic stay. *In re Player*, No. 15-30759, 2015 WL 5885348, at *1 (Bankr. N.D. Ohio Oct. 7, 2015) (denying debtor’s motion to vacate an order granting relief from stay). The bankruptcy court granted relief from the automatic stay because the debtor did not oppose the motion for relief. Subsequently, the creditor foreclosed on the debtor’s home. The debtor then sought to reinstate the case under Rule 60(b)(1) because of Debtor’s attorney “mistake” in not filing a response to the motion for relief from stay. The bankruptcy court found that failing to respond to a motion does not amount to “mistake” or “excusable neglect” in litigation strategies to be considered under Rule 60(b)(1), and denied debtor’s motion to reinstate the case, which in turn denied debtor’s request of vacating the order granting relief from the automatic stay.

In this case, Ms. Jones is seeking to vacate the order granting relief from the automatic stay. Debtor’s counsel explained that he and his client’s failure to attend the hearing on March 5, 2024, resulted from miscommunications between him and Ms. Jones. Counsel did not clearly indicate whether he was proceeding under Rule 60(b)(1), but to the extent Rule 60(b)(1) was implicated, the Court does not find any support for proceeding under Rule 60(b)(1). Ms. Jones’ attorney’s failure to appear at the hearing on the motion to relief is not “mistake” or “excusable neglect.”

In *In re Timmons*, the debtor filed two previous cases before the present case to stop the creditor from foreclosing on his home.³³ In the debtor's present case, the bankruptcy court granted the debtor's motion to reimpose the automatic stay, but with strict compliance as to the creditor with a secured interest on the home.³⁴ The order granting the motion to reimpose the stay stated that if the debtor failed to make a payment, and does not cure within fifteen (15) days, the creditor is granted relief from stay "without further notice or order of this court."³⁵ Subsequently, the debtor failed to make monthly mortgage payments and did not cure the default, and a foreclosure sale was initiated again.³⁶ The debtor filed two motions: (1) Motion for Temporary Restraining Order to Prohibit Sale of Property and (2) Motion for Expedited Hearing on Debtor's Motion for Temporary Restraining Order to Prohibit Sale of Property.³⁷ In reviewing these matters, the bankruptcy court relied on Rule 60(b)(6) and the *Teer v. Cygnet Finance Alabama, Inc.* decision to determine if relief should be allowed.³⁸ The bankruptcy court found the debtor's situations changed and certain circumstances should be considered.³⁹ It considered factors such as the debtor's oldest child going to college with a job and full

³³ *Timmons*, 479 B.R. at 599 (Debtor filed for bankruptcy to prevent his home from being foreclosed. In all 3 cases, the debtor failed to make monthly mortgage payments and the creditor initiated a foreclosure but stopped the process because the debtor filed for bankruptcy.).

³⁴ *Id.* at 601.

³⁵ *Id.*

³⁶ *Id.* Because the debtor did not comply with the court's order, the creditor was ultimately granted relief from the automatic stay.

³⁷ *Id.* at 599.

³⁸ *Id.* at 602-09 (citing and relying on *Teer v. Cygnet Finance Alabama, Inc.*, (*In re Teer*), Memorandum Opinion and Order, entered May 15, 1998, Case No. 97-07835, Adv. No. 98-00157, where the court granted a motion requesting relief from an order that lifted the automatic stay because the debtor demonstrated "extraordinary circumstances.").

³⁹ 479 B.R. at 609.

scholarship, which require less expenses from the debtor.⁴⁰ The debtor's business was positioned to expand, which will increase the debtor's income.⁴¹ The debtor's circumstances changed since relief was granted, and the bankruptcy court found the debtor should be relieved from the order granting relief from the automatic stay.⁴²

Here, under Rule 60(b)(6), Ms. Jones' circumstances supports the granting of her motion to reconsider the order granting relief from the stay. Through her and her son's testimony, Ms. Jones has shown she will likely be able to make Chapter 13 plan payments. Although the monthly Chapter 13 plan payments will be exceptionally high, Ms. Jones contends that she has consistent income from her primary job, and will have additional income from new part-time employment, as well as the financial contributions from her family (sons and parents). Ms. Jones made a payment of \$9,600 towards her Chapter 13 plan payments. This is a demonstration of good faith. Ms. Jones has retained the services of a bankruptcy attorney, and she indicates that she will comply with the requirements of Chapter 13. Based on her payment of \$9,600 to the Chapter 13 trustee, testimony, and commitment to timely make her Chapter 13 plan payments, the Court finds that there are sufficient reasons that justify granting Ms. Jones' motion to vacate the order granting relief from stay and co-debtor stay and reinstating the case. The Court also finds and concludes that Creditor's request for "strict compliance" language is appropriate in this case.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 609.

CONCLUSION AND ORDER

For the reasons stated above, the Court finds and concludes that the Debtor has demonstrated a sufficient basis for relief under Rule 60(b)(6) and her motion to reconsider, vacate or modify order in granted, in part. Accordingly, it is **ORDERED**:

1. Ms. Jones' Motion to Reconsider, Vacate or Modify Order Granting In Rem Relief From the Automatic Stay Relief From the Co-Debtor Stay regarding properly located 8381 Forest Mist Drive, Memphis, TN 38125 is GRANTED, IN PART.

2. The *Order Granting In Rem Relief From The Automatic Stay And Relief From The Co-Debtor Stay* (ECF No. 48) is VACATED.

3. Ms. Jones shall file an Amended Chapter 13 Plan no later than twenty-one (21) days from entry of this order addressing the concerns of the Chapter 13 trustee and providing for treatment of Proof of Claim 5 filed by The Bank of New York Mellon f/k/a The Bank of New York, successor to JPMorgan Chase Bank, as trustee, for the holders of the Bear Stearns Asset Backed Securities Trust 2004-SD3, Asset-Backed Certificates, Series 2004-SD3.

4. Creditor is entitled to adequate protection (pre-confirmation) payments in an amount to be determined in consultation with the Chapter 13 trustee and Ms. Jones' counsel.

5. Creditor is entitled to immediate in rem stay relief (or reinstating the vacated order) if Ms. Jones fails to remain current with Chapter 13 plan payments upon the Creditor's filing of a verified notice of default.

6. If this case is dismissed because of Ms. Jones' failure to make her Chapter 13 plan payments or otherwise comply with the provisions of Chapter 13, the case will be dismissed with prejudice, barring Ms. Jones from filing another bankruptcy case for a period of two (2) years after entry of the order dismissing this case.

7. Any party filing a motion to dismiss this case is directed to make sure the motion to dismiss is set for hearing at 10:00 a.m.

Cc: Debtor
Debtor's Attorney
Creditor
Creditor's Attorney
Chapter 13 Trustee
All creditors on matrix