



Dated: June 13, 2024
The following is ORDERED:

Denise E. Barnett
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
Frederick James Elam,
Debtor.

Case No. 23-25274
Chapter 13

ORDER DENYING MOTION TO REINSTATE CASE

This case came before the Court on Frederick James Elam's ("Debtor's") *Motion to Reinstate Case* and HSBC Bank U.S.A., N.A.'s ("Creditor's") *Response to Motion to Reinstate*. (ECF Nos. 36 and 39). Debtor is not represented by counsel. Debtor's daughter spoke on his behalf when Debtor appeared before the Court (because of Debtor's stated hearing impairment). On March 26, 2024, the Court conducted the initial hearing on Debtor's motion to reinstate the case, but the hearing was continued to April 23, 2024, to allow Debtor to obtain bankruptcy counsel and file a confirmable chapter 13 plan. On April 23, 2024, Debtor did not appear at the hearing, and the Court continued the matter again for a special setting requiring Debtor to appear in person and explain to the Court why his case should be reinstated. On May 14, 2024, the

Court conducted the rescheduled hearing, and Debtor, Debtor's daughter, and Creditor's counsel were in attendance. Upon review of the record, filed documents, and consideration of the arguments from the parties, the Court denies the *Motion to Reinstate Case* for the reasons outlined below.

FACTUAL AND PROCEDURAL BACKGROUND

The primary debt in Debtor's chapter 13 case is the mortgage on Debtor's home located in Collierville, Tennessee. Including the present chapter 13 case, Debtor and his spouse have filed five bankruptcy cases since 2009.¹ On November 12, 2009, Debtor, acting *pro se*, filed a chapter 7 petition, and received a discharge on March 23, 2010. On February 16, 2011, Debtor's spouse, who had bankruptcy counsel, filed a chapter 7 petition, and received a discharge on February 13, 2012.² In all prior cases, Debtor and his spouse listed their mortgage on Schedule D, stating the mortgagee held a secured claim.³

On October 24, 2023, Debtor filed a chapter 13 petition, commencing the present case.⁴ Throughout this case, Debtor remained *pro se*.

¹ *In re Elam*, Case No. 09-27591 (case was dismissed "for other reasons"); *In re Elam*, Case No. 09-32723 (Debtor received standard discharge); *In re Elam*, Case No. 10-26015 (case was dismissed "for other reasons"); and *In re Elam*, Case No. 10-32144 (case was dismissed for failure to make plan payments).

² *In re Elam*, Case No. 11-21571.

³ In Debtor's first and second bankruptcy case (Case No. 09-27591 and Case No. 09-32723), Schedule D states two creditors held secured claims on the home: Aurora Loan Services, LLC and First Bank. In Debtor's third case (Case No. 10-26015), Debtor listed Aurora and Merchant and Farmers as secured creditors on the home. Finally, in Debtor's fourth case, (Case No. 10-32144), Schedule D lists three creditors who held secured claims on the Debtor's home: Aurora Loan, First Bank, and Bank of America. After Debtor's four cases, his spouse filed for bankruptcy. When she filed, Schedule D lists two creditors who held secured claims on the home: Aurora Loan and First Bank.

⁴ ECF No. 1.

On December 4, 2023, Debtor filed a chapter 13 plan, listing no proposed payments to the Chapter 13 Trustee.⁵ On this same day, Debtor also filed his schedules.⁶

On December 22, 2023, Creditor filed proof of claim number 5-1 in the amount of \$1,235,105.44. The proof of claim was filed with various supporting documents, including mortgage proof of claim attachment, adjustable-rate note, loan modification agreement, and a deed of trust. On this same day, Creditor filed an *Objection to Confirmation of Plan*,⁷ in which Creditor stated that Debtor's filed chapter 13 plan does not appear to be a confirmable chapter 13 plan.

On January 3, 2024, the Chapter 13 Trustee ("Trustee") filed a *Motion to Dismiss Due to Failure to Provide Required Documents*, in which the Chapter 13 Trustee explained that certain essential documents were missing from Debtor's case.⁸

On January 30, 2024, the Court conducted a hearing on Creditor's objection the confirmation. At the hearing, the Court sustained, in part, Creditor's objection to confirmation. The Court also instructed Debtor to file an amended chapter 13 plan and hire a bankruptcy attorney to assist in his chapter 13 case. On February 6, 2024, an *Order Sustaining, In Part, HSBC Bank, USA's Objection to Confirmation* was entered directing Debtor to file an amended chapter 13 plan before February 28, 2024, and strongly encouraging Debtor to hire bankruptcy counsel for his case.⁹

⁵ ECF No. 13. In paragraph 10 of the otherwise blank chapter 13 plan, Debtor listed creditor Advance Financial with a proposed payment of \$100 a month.

⁶ ECF No. 16.

⁷ ECF No. 20.

⁸ ECF No. 23. The Trustee withdrew their motion to dismiss because all the required documents were filed.

⁹ ECF No. 28

On February 5, 2024, the Chapter 13 Trustee filed a *Motion to Dismiss Case Due to Failure to Pay*.¹⁰ On February 27, 2024, Debtor's case was dismissed because no payments were made in the chapter 13 case. On February 29, 2024, the *Standing Chapter 13 Trustee's Report and Recommendation Combined with Order Dismissing Case and Notice of the Entry Thereof* was entered.¹¹

On March 12, 2024, Debtor filed a *Motion to Reinstate Case*.¹² In his motion, Debtor argued he had technical issues in attending the virtual Meeting of Creditors. Debtor contends that he was unable to "set up a payment schedule" to commence his chapter 13 plan payments to the Chapter 13 Trustee because he could not attend the creditors' meeting. On March 25, 2024, Creditor filed a *Response to Motion to Reinstate Case*.¹³ Creditor asserted that Debtor's case should not be reinstated because Debtor failed to comply with the Court's order sustaining, in part, Creditor's objection to confirmation. Specifically, Debtor failed to (1) file an amended chapter 13 plan, and (2) obtain bankruptcy counsel. Creditor also argued that Debtor did not pay the chapter 13 filing fee, make any payments to the Trustee, and did not attend the Meeting of Creditors.

On March 26, 2024, the Court conducted an initial hearing on Debtor's motion to reinstate the case and Creditor's response. At the hearing, the Court learned Debtor did not make any payments in his prior case (Case No. 23-25274) and did not file an amended chapter 13 plan in this case, as instructed in the order on Creditor's objection to confirmation. The Court, again,

¹⁰ ECF No. 27.

¹¹ ECF No. 33

¹² ECF No. 36.

¹³ ECF No. 39.

encouraged Debtor to hire bankruptcy counsel. The Court continued the hearing to allow Debtor to file an amended plan and hire counsel.

On April 22, 2024, Debtor filed an Amended Chapter 13 Plan and an Amended/Corrected Chapter 13 Petition and Schedules.¹⁴ Debtor's Chapter 13 plan proposed to pay \$50 a month for 60 months. Debtor listed no payments to creditors in the Amended Chapter 13 plan. On Debtor's Amended Schedules, Schedule A/B failed to list any real property and listed a few personal property items, such as a washing machine, kitchenware, furniture, TVs, computers, clothing, and a checking account with Regions Bank (with a petition date balance of \$500). Debtor did not claim any exemptions on Schedule C, and listed no creditors holding secured claims on Schedule D. On Schedule E/F, Debtor listed no creditors holding priority unsecured claims, but listed Creditor holding a nonpriority unsecured claim in the amount of \$514,000, with the debt incurred on March 2, 2004. Debtor also listed two other creditors as holding nonpriority unsecured creditors that total \$150,000. Schedule H listed no co-debtors. Schedule I states Debtor is unemployed and receives social security income of \$1,600 per month. No income information was disclosed for the non-filing spouse. Schedule J listed Debtor's expenses in the amount of \$1,350, leaving a monthly net income of \$250.

On April 23, 2024, at the continued hearing on the Debtor's motion and Creditor's response, Debtor did not appear, and the Court continued the hearing for a date that would afford Debtor sufficient hearing time. On April 30, 2024, the Court entered an *Order and Notice of Rescheduled Hearing on Debtor's Motion to Reinstate Chapter 13 Bankruptcy Case* and

¹⁴ ECF Nos. 42 and 43.

*Creditor's Response to Debtor's Motion to Reinstate.*¹⁵ The order specifically required Debtor to appear in person.

On May 6, 2024, the Debtor paid the total filing fee in the amount of \$313.

On May 14, 2024, the Court conducted a hearing on the motion and response. At the hearing, Debtor was present, along with his daughter, Debtor's wife (in courtroom), and counsel for Creditor. Debtor did not retain counsel. Debtor's daughter first explained to the Court Debtor's hearing problems, and the Court allowed Debtor's daughter to speak on his behalf.

The Trustee reported to the Court that Debtor made no payments in the case.¹⁶ Trustee reviewed the post-dismissal documents that were filed, Amended Chapter 13 Plan and Amended Petition and Schedules, and stated the Amended Chapter 13 Plan did not provide for Creditor's proof of claim.¹⁷ Trustee also reviewed Creditor's proof of claim whose arrearage is \$827,009.26.¹⁸ Trustee further stated that a 60-month chapter 13 plan would require monthly payments of \$13,783.49 to cure the arrearage and make the an ongoing mortgage payments of \$4,818 a month.¹⁹ Based on Creditor's filed proof of claim, Trustee calculates that the estimated proposed chapter 13 plan payment would need to be \$20,471.63 per month for a 60-month plan (which includes only mortgage payments).²⁰ Trustee also acknowledged the house is not listed

¹⁵ ECF No. 44.

¹⁶ Hearing on *Motion to Reinstate Case*, May 14, 2024, at 1:58 p.m.

¹⁷ *Id.*

¹⁸ *Id.* at 1:59 p.m.

¹⁹ *Id.*

²⁰ *Id.* at 2:00 p.m.

on Schedule A as an asset.²¹ Trustee did not believe Debtor will be able to propose a confirmable plan, unless Debtor surrendered his interest in the house.²²

On behalf of Debtor, Debtor's daughter explained that Debtor and his wife are on fixed income and cannot afford an attorney nor the proposed plan payment Trustee suggested.²³ Debtor explained that he and his wife have lived in the house since 2004.²⁴ Debtor argued that "there is no lien on the house" and the debt owed to Creditor is an unsecured claim. Debtor contends that the debt owed to Creditor was discharged in his 2009 chapter 7 bankruptcy case.²⁵ Debtor stated that, over the past 15 years, he disputed whether the mortgagee had a valid security interest on the property because the company did not produce a deed of trust.²⁶ Finally, Debtor's daughter assured the Court that she will assist her father, Debtor, in retaining a bankruptcy attorney to assist in the case.²⁷

Creditor explained that the issue of the mortgagee's security interest and the deed of trust was litigated for years.²⁸ Creditor further clarified that all the documents Debtor claims are

²¹ *Id.*

²² *Id.* at 2:32 p.m.

²³ *Id.* at 2:02 p.m.

²⁴ *Id.* at 2:04 p.m.

²⁵ *Id.*

²⁶ *Id.* at 2:06 p.m. Debtor's daughter spent a considerable amount of time discussing the issue with the security interest and deed of trust regarding the home. Debtor presented no evidence.

²⁷ *Id.* at 2:42 p.m.

²⁸ *Id.* at 2:14 p.m. The Sixth Circuit entered a final order in August of 2019, saying this issue is res judicata.

missing are attached to the proof of claim and that the loan was modified.²⁹ Creditor does not believe Debtor will be successful going forward in this Chapter 13 case.³⁰

Debtor failed to present evidence that supports vacating the dismissal order and reinstating the bankruptcy case. Debtor's primary argument for reinstating the chapter 13 case is to mount a challenge to the validity of Creditor's claim. Creditor timely filed a proof of claim, which was not challenged in any form and not provided for in Debtor's late filed proposed amended chapter 13 plan, although the case was pending since October 24, 2023. In his amended chapter 13 plan, Debtor proposed to pay \$50 a month to his creditors (with no creditors listed in the plan). Debtor's amended schedules contained errors. Most notably, the real property at issue is not listed on Schedule A/B as an asset. The chapter 13 filing fee was paid after the case was dismissed. Debtor took some action in his case after the case was dismissed. Debtor's contentions regarding the validity of Creditor's secured claim are not before this Court. Debtor's contentions regarding the validity of the Creditor secured claim or security interest in his home do not support vacating the dismissal order and reinstating Debtor's chapter 13 case. Nothing in the record supports extraordinary or exceptional circumstances that justify relief from the order dismissing the case.

DISCUSSION

The Court finds and concludes that Debtor's motion to reinstate the case should be denied because the requirements of Rule 60(b) are not satisfied. Rule 60(b) governs relief from a

²⁹ *Id.* at 2:16 p.m. The Court provided Debtor with the proof of claim filed by Creditor, which included the documents that Debtor's daughter argued were not produced.

³⁰ *Id.* at 2:38 p.m.

judgment or order.³¹ Subparagraphs 1, 2, and 4 of Rule 60(b) are inapplicable because there is no evidence for the Court to apply to these subparagraphs. The Court cannot rely on subparagraph 3 of Rule 60(b) to vacate the dismissal order because Debtor failed to present any evidence showing fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct. Subparagraph 5 of Rule 60(b) also provides no support for vacating the order dismissing this chapter 13 case. Finally, 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). Under Rule 60(b)(6), the Court is allowed to consider extraordinary circumstances based on the facts presented.³² Relief under 60(b)(6) must be established by clear and convincing evidence.³³ The Sixth Circuit defines “extraordinary or exceptional” circumstances as “unusual and extreme situations where principles of equity mandate relief coupled with a showing that absent relief, extreme and undue hardship will result.”³⁴ Rule 60(b)(6) is relevant but inapplicable for the facts and circumstances of this case.

³¹ Rule 60(b), Fed. R. Civ. P. reads on motion and just term that 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.

³² *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)).

³³ *Info-Hold, Inc. v. Sound Merch, Inc.*, 538 F.3d 448, 454 (6th Cir. 2008) (explaining the standard for relief under Rule 60(b)).

³⁴ *Valvoline Instant Oil Change Franchising, Inc. v. Autocare Assoc. Inc.*, No. 98-5041, 1999 WL 98590, at *3 (6th Cir. 1999) (defining “extraordinary and exceptional circumstances”).

In *In re Wassah*, which is factually analogous to this present case, the Court reviewed two motions to vacate the order dismissing case filed by two debtors pursuant to Rule 60(b) and section 350(b) of the Bankruptcy Code.³⁵ Debtors, Wassah and Matthews, filed motions vacating orders dismissing their respective cases. Both cases were dismissed pursuant to Trustee's motion to dismiss the case for failure to file required documents.³⁶ In their respective cases, the debtors did not file chapter 13 plans, attend the meeting of creditors, or file schedules.³⁷ Under Rule 60(b)(6), neither debtor provided sufficient evidence of extraordinary or exceptional circumstances to warrant relief from the order dismissing their cases.³⁸ The Court denied both debtors' motions to vacate the dismissal order.³⁹

Similarly, in *In re King*, debtor sought to vacate order dismissing and order granting relief from the automatic stay.⁴⁰ Debtor voluntarily dismissed case after relief from the automatic stay was granted as to the mortgagee.⁴¹ Debtor filed subsequent chapter 13 case, which was later dismissed because the bankruptcy court concluded that the filing of the subsequent case was filed in violation of 11 U.S.C. § 109(g).⁴² Debtor filed a motion to reopen the bankruptcy case under

³⁵ *In re Wassah*, 417 B.R. 175, 177 (Bankr. E.D.N.Y. 2009) (explaining why the Court denied debtors' motion to vacate order dismissing case under Rule 60(b)).

³⁶ *Id.* at 183-84 & 186.

³⁷ *Id.*

³⁸ *Id.* at 185-86.

³⁹ *Id.* at 186.

⁴⁰ *In re King*, 214 B.R. 334, 335 (Bankr. W.D. Tenn. 1997) (Boswell, J) (explaining why Rule 60(b)(6) was not met in determining whether relief from the order dismissing the case and the lifting the stay was warranted).

⁴¹ *Id.*

⁴² *Id.* The mortgagee filed a motion dismissing the second case, and the Court granted its motion. *Id.* at 336.

Rule 60(b)(6) because subparagraphs 1 through 5 were inapplicable.⁴³ The Court denied the debtor's motion to reopen the case because the debtor did not present evidence to satisfy Rule 60(b)(6).⁴⁴

Here, as in *Wassah* and *King*, under Rule 60(b)(6), Debtor did not provide sufficient evidence to the Court to vacate the dismissal order and reinstate the chapter 13 case. Debtor's case was dismissed because he did not make any payments and other reasons. As in *Wassah*, Debtor did not attend the meeting of creditors, filed a blank chapter 13 plan, and filed incomplete schedules. The chapter 13 filing fee was never paid until eight days before the continued hearing on the motion to reinstate the case. Only after the case was dismissed did Debtor file amended schedules and an amended chapter 13 plan, which were incomplete and contained errors.⁴⁵ Debtor made no payments to the Chapter 13 Trustee. Debtor contends the debt is not owed to Creditor because it was discharged, and Creditor does not hold a valid security interest. Debtor's contention that Creditor's mortgage debt is not a valid security interest was not factually or legally supported. Debtor failed to retain the services of a bankruptcy counsel who could have possibly assisted him to making any available factual and/or legal challenges to Creditor's secured claim or security interest in Debtor's real property. Debtor made no movement towards retaining counsel to evaluate his concerns and move forward with confirmation of a chapter 13 plan. Debtor failed to present evidence of extraordinary or exceptional circumstances to support relief from the dismissal order. Accordingly, the Court concludes that Debtor did not demonstrate

⁴³ *Id.*

⁴⁴ *Id.* at 337.

⁴⁵ Significant errors remain in the Debtor's schedules and in the proposed chapter 13 plan.

any circumstances (extraordinary or otherwise) that would support vacating the dismissal order and reinstating the Chapter 13 case.

CONCLUSION AND ORDER

For the reasons stated above, the Court finds and concludes that the Debtor did not demonstrate a sufficient basis for relief under any of the subparagraphs of Rule 60(b) and his motion to reinstate the case should be denied. Accordingly, it is **ORDERED**:

1. The *Motion to Reinstate Case* is DENIED.
2. The Chapter 13 case remains dismissed.