THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THIS OPINION IS NOT INTENDED FOR PUBLICATION

IN RE	)	CASE NO. 00-50816
	)	
NORMAN DRONGOWSKI,	)	CHAPTER 13
	)	
DEBTOR.	)	JUDGE MARILYN SHEA-STONUM
	)	
	)	**ORDER GRANTING MOTION FOR**
	)	**RELIEF FROM ORDER**
	)	**STIPULATING TREATMENT OF**
	)	**CLAIM AND CONFIRMATION OF**
	)	**CHAPTER 13 PLAN**

This matter came before the Court on Fifth Third Bank's ("Fifth Third") Opposition to Treatment of Claims and Request for Hearing, filed August 25, 2000. The matter was set for hearing on October 5, 2000. David J. Pasz, counsel for Fifth Third, appeared for the hearing with a representative of Fifth Third. However, Roger Stearns, the debtor's attorney, did not appear and the hearing was adjourned to November 9, 2000. On November 9, 2000, Pasz appeared but the debtor's attorney again was not present. The Court at that time indicated that Fifth Third's objection to the treatment of its secured claim in the debtor's chapter 13 case should be framed in terms of a Fed. R. Civ. P. 60(b) motion for relief from judgment. The Court ordered that the issue be briefed and the briefing submitted to the Court no later than December 1, 2000, and set a hearing on the matter for December 14, 2000. Fifth Third filed its Motion For Relief From Order Stipulating Treatment of Claim and Confirmation of Chapter 13 Plan (the "Motion"), on December 1, 2000, amending its previously filed opposition to treatment of claim and requesting relief from the August 19, 2000, Order of the Court stipulating the treatment of Fifth Third's claim as partially unsecured.

Pasz appeared at the December 14, 2000, hearing but the debtor's attorney, for a third time, did not appear. Neither the chapter 13 standing Trustee, Jerome Holub, nor

the debtor's attorney, on behalf of the debtor, filed a response to Fifth Third's Motion.[1] In its Motion Fifth Third states that it should be relieved from the Order of the Court, dated August 19, 2000, stipulating the treatment of Fifth Third's claim, and relieved from the Order of the Court confirming the debtor's chapter 13 plan pursuant to the provisions of Rule 60(b). Fifth Third states that it should be listed as fully secured in its claims with no unsecured portion.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(A) and (L) over which this Court has jurisdiction pursuant to 28 U.S.C. 1334(b).

I. BACKGROUND

The uncontested facts, as set forth in Fifth Third's Motion, are as follows;

On March 13, 2000, the debtor, Norman Drongowski, filed his chapter 13 petition through his attorney Roger Stearns. On May 19, 2000, Pasz filed a notice of appearance on behalf of Fifth Third and requested service be made to him. Shortly thereafter, a copy of the proposed chapter 13 plan was forwarded to Pasz by Fifth Third for Pasz' review. Motion, Exhibit B. Upon review, Pasz determined that the proposed plan was in error as there was no unsecured portion of Fifth Third's claim and that in fact the value of the collateral securing the loans exceeded the amount loaned to Drongowski.

On May 25, 2000, Pasz contacted Stearns to alert him to the error. Stearns

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1. Although there was no certificate of Service attached to the Motion, Pasz' office faxed to the Court the cover letter sent to Holub and Stearns on December 1, 2000, indicating that the Motion was enclosed. It appears that service was perfected.

requested a letter explaining the error and showing the value of the collateral securing the loans. On the same day Pasz requested and received from Fifth Third a memorandum dated January 27, 2000, and entitled "Collateral Analysis," which he immediately faxed to Stearns. Motion, Exhibit C. The Collateral Analysis showed debt totaling $257,294.59 and collateral value of approximately $262,000. *Id.* The collateral consisted of three 1997 Mack Dump trucks and a second mortgage on the borrower's residence, all secured by a "blanket UCC lien, liens on Motor Vehicle Titles and an Open End (2nd) mortgage on Borrower's residence for $77,500," *id.*, the valuation of which rendered Fifth Third fully secured.

On May 31, 2000, Pasz sent another letter to Stearns to discuss Fifth Third's claim and to follow up on the May 25, 2000, telephone conversation. He stated in the letter "[a]s I know that there is a confirmation hearing scheduled for June 8 at 1:30 P.M., I would appreciate it if you could revise the Ch. 13 Plan and fax it to my office prior to this date. So long as we have the Plan amended as set forth herein, we will have no objection to the confirmation of the Plan." Motion, Exhibit D. On June 4, 2000, Pasz faxed a memo to Stearns asking whether Stearns was going to make the changes in the plan as they had discussed or whether it would be necessary for Fifth Third to file an objection. Motion, Exhibit E. In the Motion, Pasz alleges that Stearns indicated that Fifth Third's proposed changes were appropriate, informed Pasz that the hearing had been re-scheduled for June 29, 2000, and stated that he would make the proposed changes before the confirmation hearing.

On June 6, 2000, Fifth Third filed its proof of claim indicating that the total indebtedness of Drongowski amounted to $257,294.59 and that the debt was secured by collateral valued at $262,000. Motion, Exhibit A. The proof of claim was served on the

trustee and on the debtor's attorney. No objection to the proof of claim was filed by the trustee or the debtor's attorney and no hearing was requested to determine the value of the collateral.

On June 16, 2000, Pasz again contacted Stearns to say that he would be filing an objection to the plan unless an agreement could be reached based on Fifth Third's documentation of its claim. Motion, Exhibit F. Stearns, in response, indicated that he would prepare an amended plan and that it would not be necessary to file an objection. On June 28, 2000, Pasz was again assured that the plan would be revised in accordance with the agreement of counsel and sent a follow-up letter to that effect to Stearns, with a copy to the Trustee. Motion, Exhibit G. The confirmation hearing was held on June 29, 2000, and the plan was confirmed by this Court on July 3, 2000. None of the changes that were agreed to by counsel were made in the plan.

On August 17, 2000, the Trustee filed his Motion Stipulating Treatment of the Fifth Third Claim. Docket # 69. In his Motion the Trustee indicated that a proof of claim had been filed by Fifth Third, stated that the total amount of Fifth Third's loan was secured, but stated that the claim would be treated as $150,000 secured and $107,294.59 unsecured. *Id.*

The Court entered an order stating, *inter alia*, "the above claims are to be paid as stipulated unless a party in interest files a request for hearing within 20 days of this order." *Id.* On August 25, 2000, Fifth Third filed its opposition to the treatment of the claim and requested a hearing. Docket # 77. Hearings were set and held as stated *supra* with the Court requesting the briefing be re-framed as a Fed. R. Civ. P. 60(b) motion.

In its Motion Fifth Third asserts that it is entitled to relief under Rule 60(b)(1), (3), (4) and (6).

II. DISCUSSION AND ANALYSIS

Fed. R. Bankr. P. 9024 makes Fed. R. Civ. P. 60 applicable in bankruptcy cases, with certain exceptions not applicable in this case. Fed. R. Civ. P. 60 states, in pertinent part:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . ; (3) fraud . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; . . . or; (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.[2] . . ..

It is "well settled that the granting of a motion to set aside a judgment under Rule 60(b)(1) is a matter addressed to the sound discretion of the trial court." *Miller v. Owsianowski, et al. (In re Salem Mortgage Co.)*, 791 F.2d 456, 458 (6th Cir. 1986). The burden is upon the movant to bring itself within the provisions of Rule 60(b). *Smith v. Kincaid*, 249 F.2d 243, 244 (6th Cir. 1957).

A. RULE 60(b)(1)

To obtain relief under Rule 60(b)(1), "the movant must demonstrate the following: (1) The existence of mistake, inadvertence, surprise or excusable neglect [, and] (2) That he has a meritorious defense." *Marshall v. Monroe & Sons, Inc.*, 615 F.2d 1156, 1160 (6th Cir. 1980). Errors occurring as a result of excusable neglect may be set aside, especially if under the circumstances it would be equitable to do so. *Whitaker v. Assoc.*

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2. There is no issue in this case that the Motion was not timely filed.

Credit Servs., 946 F.2d 1222, 1224 (6th Cir. 1991), *see also* 11 Wright & Miller, Federal Practice and Procedure § 2858 (1973).

Fifth Third states that not filing an objection to the debtor's proposed chapter 13 plan constitutes excusable neglect because its attorney, Pasz, justifiably relied on the assurances of the debtor's attorney that the plan would be amended to reflect that Fifth Third's claim against the debtor was fully secured and would be so treated. Fifth Third also states that its actions were taken in an attempt to avoid the expense of filing an objection necessitating a hearing, when Fifth Third reasonably believed an agreement had been reached with the debtor's attorney.

In *Pioneer Investment Servs. Co. v. Brunswick Assoc. Ltd Partnership*, 507 U.S. 380, 395 (1992), a Chapter 11 bankruptcy case involving late filing of a proof of claim and an appeal from the Sixth Circuit, the Supreme Court held that "excusable neglect," at least for purrposes of Rule 60(b), is "understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 394. The Court also stated that the definition of "neglect" encompasses omissions caused by carelessness. *Id.* at 388. The *Pioneer* Court also considered what the criteria for finding the neglect "excusable" should be and concluded that the determination was an equitable one, taking into account all relevant circumstances. "These include . . . the danger of prejudice to the debtor, the length of delay and its potential impact on judicial proceedings, the reason for the delay, and whether the movant acted in good faith." *Id.*

The *Salem Mortgage* Court stated that the movant's "Rule 60(b) Motion must be equitably and liberally applied to achieve substantial justice. Doubt should be resolved in favor of a judicial decision of the merits of a case, and a technical error or a slight mistake by plaintiff's attorney should not deprive plaintiff of an opportunity to present the true

merits of his claims." 791 F.2d at 459-460, *citing Blois v. Friday*, 612 F.2d 938, 940 (5th Cir. 1980). The Court went on to state that the "countervailing factors are the defendants' and society's interests in the finality of judgments and the avoidance of prejudice." *Id.* at 460, *citing Roberts v. Rehoboth Pharmacy, Inc.*, 574 F.2d 846, 847-48 (5th Cir. 1977). The *Salem Mortgage* Court also stated that the movant "should not be punished for his attorney's mistake absent a clear record of delay, willful contempt or contumacious conduct." *Id.*, *citing Hassenflu v. Pyke*, 491 F.2d 1094, 1095 (5th Cir. 1974).

Fifth Third admits that it did not file an objection to the proposed chapter 13 plan in this case, but states that the reason for the omission was its reasonable belief that an agreement had been struck with the debtor's attorney to amend the plan to show that Fifth Third was fully secured. There has been no response filed stating that Fifth Third's belief was unreasonable or that the facts as it relates them are in dispute. However, even if Fifth Third's omission were found to constitute neglect or carelessness, it would be considered "excusable neglect" under the above stated criteria. There has been no allegation that there would be prejudice to the debtor if the Motion were granted, and no showing that Fifth Third acted other than in good faith. Moreover, there is no evidence that Pasz delayed in his attempts to have Fifth Third's claims treated as completely secured, and no showing of "willful contempt" or "contumacious conduct." Pasz made numerous attempts to have Stearns amend the plan to reflect Fifth Third's claim as fully secured, and received assurances that the plan would be so amended. Stearns has not responded to this Court that any of the representations of fact made in the Motion are, in fact, not true or did not occur. The Court finds that Fifth Third has satisfied the elements necessary to find "excusable neglect" as set forth by Supreme Court and Sixth Circuit precedents.

The second prong of Rule 60(b)(1) is that the movant have a meritorious defense.

In determining whether a movant has a meritorious defense, likelihood of success is not the measure. *United Coin Meter Co., Inc. v. Seaboard Coastline Railroad*, 705 F.2d 839, 845 (6th Cir.1983). Rather "if any defense relied upon states a good defense at law, then a meritorious defense has been advanced." *Id.*

There is no question that Fifth Third has presented documentation of its claim and the valuation of the collateral securing its loans to the debtor. These documents were requested by Stearns, sent to him and their accuracy and/or validity has not been disputed at any time. In addition, the Trustee received a copy of Pasz' letter to Stearns, dated June 28, 2000, and should have been aware that Fifth Third was attempting to have the proposed plan amended and that Pasz had been in contact with Stearns to accomplish the amendment. Further, Fifth Third timely filed its proof of claim, to which no party objected. Fifth Third also attached to its Motion the affidavit of Angie Kazi, an assistant Vice President of Lending, through which she stated that true and correct copies of the notes, security agreements and truck titles were attached to the proof of claim and that the amount of indebtedness owed by the debtor to Fifth Third was thus fully secured. Motion, Exhibit H. Fifth Third has presented a "meritorious defense." The requirements of Rule 60(b)(1) are therefore met.

A. RULE 60(b)(3)

Under Rule 60(b)(3) the movant must demonstrate that it is entitled to relief due to the "fraud . . ., misrepresentation, or other misconduct of an adverse part." Fed. R. Civ. P. 60(b)(3). Fifth Third asserts that it is entitled to relief under 60(b)(3) because Stearns misrepresented to it that the plan would be changed to reflect the secured claims of the bank. This Court agrees. Stearns does not dispute that he affirmatively stated to Pasz

that the plan would be changed. Such an affirmative misstatement rises to the level of misrepresentation required by the Sixth Circuit under *Platsis v. E.F. Hutton & Co., Inc.*, 946 F.2d 38, 41-42 (6th Cir. 1991)(misrepresentation requires a representation which "is false in fact").

The burden of proof in a 60(b)(3) context is on the party filing the motion because the rule could upset the finality of judgments too easily otherwise. *See V.T.A., Inc. v. Airco., Inc.*, 597 F.2d 220, 226 (10th Cir. 1979)(Rule 60(b) must be interpreted so as not to disturb the "delicate balance between finality of judgment and justice that Rule 60(b) seeks to maintain."), *cited in Jordan v. Paccar, Inc.*, 1996 WL 528950, at *7 (6th Cir.(Ohio) Sept. 17, 1996), unpublished opinion. However, "the fairness and integrity of the [legal] process is of greater concern" than "the important consideration of the finality of judgments." *Schultz v. Butcher*, 24 F.3d 626, 630-31 (4th Cir. 1994). Since Stearns has not responded to notices of the hearings or to the Motion and has not presented any information to the contrary, there can be no dispute concerning the facts and no showing that the burden of proof has not been met.

On the facts as stated, it is clear that the debtor's attorney, Roger Stearns, misrepresented to Fifth Third that he would amend the plan to address Fifth Third's secured claims and that the bank relied on those misrepresentations. The communications between Fifth Third and Stearns show a pattern of attempts to have the changes made. If Fifth Third had thought that Stearns disagreed with its position, it was prepared to file an objection at any time and so informed Stearns. Stearns represented that he agreed with Fifth Third's amendments to the plan and convinced Pasz that they would be made. Based on the representations of Stearns, Fifth Third did not file an objection to the confirmation of the plan. In addition, after confirmation of the plan, Stearns did not appear at any of

the scheduled hearings and did not respond to Fifth Third's Motion. This Court has heard nothing from Stearns in regard to this matter since August 25, 2000, when Fifth Third filed its objection to the treatment of its claims and requested a hearing.[3] Fifth Third meets the requirements of Rule 60(b)(3) as well as (b)(1).

III. CONCLUSION

For the foregoing reasons, the Court finds as follows:

1. Fifth Third Bank's Motion For Relief From Order Stipulating Treatment Of Claim And Confirmation Of Chapter 13 Plan is GRANTED;

2. Within 20 days of the signing of this Order, attorney Roger Stearns shall file papers with this Court to show cause why he, personally, should not be held responsible for Fifth Third's attorney's fees accrued with respect to this motion;

3. Within 20 days of the signing of this Order, Fifth Third may file a detailed accounting of its attorney's fees regarding this matter; and that,

4. In the alternative, Stearns and Fifth Third may submit a proposed, agreed order resolving this matter within 20 days of the signing of this Order.

IT IS SO ORDERED

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MARILYN SHEA-STONUM
United States Bankruptcy Judge

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2. Because the court finds that the elements of Rule 60(b)(1) and (b)(3) are met, the Court need not address the other sections of Rule 60(b) on which Fifth Third relies for relief.

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DATED: 1/31/01