**IN THE UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF OHIO**
**Eastern Division**

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| **In Re:** | **In Proceedings Under Chapter 7** |
| **ELNORA GASTON,** | **Case No.: 07-15215** |
| **Debtor.** | |

## MEMORANDUM OF OPINION AND ORDER

In this "Motion for Relief From Judgment on the Order Granting Motion for Relief From Stay" (the Motion), Elnora Gaston (Debtor) seeks relief from the judgment entered by the Court to the extent that it granted John Lewis (Landlord) relief to pursue a money judgment against her for back rents. This is a core proceeding pursuant to 28 U.S.C. § 157(b) (2), with jurisdiction conferred under 28 U.S.C. §§ 157 and 1334 and General Order No. 84 of this District. After the conclusion of a duly noticed hearing, an examination of the evidence admitted, and a review of the record generally, the following factual findings and conclusions of law are hereby rendered:

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The Debtor filed her voluntary petition for relief under Chapter 7 of the Bankruptcy Code [11 U.S.C. § 101, etc.] on July 12, 2007. On August 14, 2007, the Landlord filed a motion requesting an order dissolving the automatic stay imposed by § 362 of the Bankruptcy Code. The matter was heard by this Court on September 11, 2007.

The Landlord's prayer for relief stated the following:

> "Wherefore Movant prays for an Order from the court granting Movant to proceed with the eviction and permit him to proceed with other claims and other equitable relief and such other and further relief to which the Movant may be entitled."

During the hearing, counsel for the Landlord asserted that the Debtor owed rents to the Landlord for July and August, 2007 and that the lease expired post-petition on August 31, 2007. The Court granted the Landlord's Motion for Relief from Stay but gave the Debtor two (2) weeks from the entry of the Order to fully cure the rental delinquency.

Subsequently, the Landlord submitted an Order to the Court, entered on September 14, 2007, that granted the Motion for Relief from Stay and contained the following language:

> "It is Therefore Ordered, Adjudged and Decreed that the (sic) John Lewis's Motion for Relief of Stay is granted. Movant is permitted to proceed with an eviction against the Debtor, Elnora Gaston and is permitted to pursue with among other claims his claim to receive rental income for July, August and September 2007."

On September 19, 2007, the Debtor filed the instant motion. The Debtor's Motion requested relief from the judgment to the extent it grants Landlord John Lewis relief to pursue a money judgment. The Debtor's motion stated that the Landlord neither requested nor was granted relief to pursue post-petition rent as was inserted into the order submitted by the movant and entered by the Court.

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The dispositive issue for the Court's determination is whether it was proper for the Landlord to include language in the post hearing order that permitted the collection of post-petition rents when that specific issue was not before the Court during the hearing.

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The Debtor contends that the Order for Stay Relief submitted by the Landlord and entered by the Court included language regarding the collection of post-petition rents that was beyond the scope of the hearing on Landlord's Motion for Stay Relief. Therefore, the entrance of the Order was as a result of mistake or inadvertence on matters that were not granted at the Hearing and, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the Order should be vacated. Debtor also contends that the Landlord is prohibited from pursuing post-petition rents from Debtor as a matter of law.

The Landlord contends that the Motion for Stay Relief that was granted by the Court included language allowing him to "proceed with other claims and other equitable relief and such other and further relief to which the Movant may be entitled". He therefore asserts that the language inserted into the order submitted to the Court by the Landlord was within the scope of the Court's ruling.

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**Rule 60(b) Federal Rules of Civil Procedure**

**Relief from a Judgment or Order**

**(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** 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 judgment 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.

**11 U.S.C. 362 (a) (6)**

**a)** Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

> **(6)** any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

**11 U.S.C. § 365 (d) (1)**

**d)(1)** In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

**11 U.S.C. § 502(g).**

**Allowance of claims or interests**

**(g)(1)** A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

**(2)** A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

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The party requesting Rule 60 (b) relief bears the burden of establishing that its prerequisites are satisfied and establishing all prerequisites associated therewith. See Jinks v. AlliedSignal, Inc., 250 F.3d 381, 385 (6th Cir.2001); McMurry v. Adventist Health Sys./Sunbealt, Inc. 298 F. 3d 586, 592 (6th Cir. 2002). Rule 60 (b) should be applied "equitably and liberally ... to achieve substantial justice." Williams v. Myer, 346 F. 3d 607, 612-13 (6th cir. 1983). When making a determination whether relief under Rule 60(b)(1) is warranted, the court should look to the following three factors: "(1) whether the party seeking relief is culpable; (2) whether the party opposing relief will be prejudiced; and (3) whether the party seeking relief has a meritorious claim or defense." Id. at 613.

The Landlord submitted a proposed Order after the September 11, 2007 hearing that stated "Movant is permitted to proceed with an eviction against the Debtor, Elnora Gaston and is permitted to pursue with among other claims his claim to receive rental income for July, August and September 2007."(emphasis added). The insertion of the language concerning the collection of rental income was an impermissible attempt by the Landlord to collect rents that were due before the filing of the bankruptcy and for those due during the pendency of the bankruptcy.

A lease of residential property is automatically rejected from a debtor's bankruptcy estate unless it has been assumed by the Chapter 7 trustee within sixty (60) days of the filing of the case. 11 U.S.C. § 365 (d) (1). Importantly, the "unexpired lease of the debtor that has not been assumed shall be determined..., the same as if such claim had arisen before the date of the filing of the petition." 11 U.S.C. 502 (g). In other

words, once the lease is rejected by the Chapter 7 trustee, the lessor becomes an unsecured creditor with a prepetition claim for damages which is subject to discharge. See *In re Miller*, 282 F. 3d 874, 876 (6th Cir. 2002).

The Debtor filed her Chapter 7 Bankruptcy petition on July 12, 2007, and scheduled her residential lease with the Landlord on Schedule G. The record does not show that the lease was assumed by the Chapter 7 trustee within the time period allowed under § 365 (d) (1). Therefore the lease was deemed rejected. Read in *pari materia*, § 365 (d) (1) and § 502 (g) supports a finding that the Landlord's claim for rents for July, August and September, 2007, would be considered pre-petition debt because the lease was deemed rejected. Accordingly, the insertion of language into the Order submitted to the Court by the Landlord allowing him to pursue rent from the Debtor for July, August and September 2007, was beyond the scope of the original Motion for Stay Relief and the Court's ruling.

The Landlord had the right to submit his claim for damages against the Debtor's estate in line with his position as an unsecured creditor. However, the language inserted into the Court's order would have given him priority over the other creditors and, as such, was not permissible under the Bankruptcy Code.

A review of the facts of the present case under the three factors listed in the Williams case in how to make a determination whether relief under Rule 60(b)(1) is warranted, clearly reveals that that the relief from judgment sought by the Debtor should be granted. Under the Williams' factors the Court should first consider "whether the party seeking relief is culpable". Since the Landlord submitted the order, there is no culpability on the part of the Debtor in the submission of the erroneous order for the

Court's consideration. The second inquiry is whether the party opposing relief will be prejudiced. In this case there is no prejudice to the Landlord because he was not entitled to the rents for July, August and September in the form he was seeking as an unsecured creditor pursuant to § 365 (d) (1) and § 502 (g). Finally, Debtor, the party seeking relief, has a "meritorious claim or defense" in that the Landlord is seeking to use the Bankruptcy Court to enforce the collection of rents that would have enhanced his claim over other creditors and in derogation of the Bankruptcy Code.

Therefore, the Debtor has met her burden in proving that the Order entered by the Court on September 14, 2007, was the result of mistake, or inadvertence pursuant to Rule 60(b) and should therefore be vacated in part. Specifically, the portion of the ruling for the Motion for Relief from Stay that included language allowing for the collection of rents for July, August and September 2007 is hereby vacated.

The ability to submit proposed orders is a trust granted to attorneys as officers of the Court that must be carefully safeguarded. The information on the proposed order must always be consistent with the ruling of the Court and should never be used as an attempt to gain advantage. Anything less is a potential fraud on the Court. Elements of fraud on the Court are: (1) conduct on part of officer of court; (2) that is directed at judicial machinery itself; (3) that is intentionally false, willfully blind to truth, or is in reckless disregard for truth; (4) that is positive averment or concealment when one is under duty to disclose; and (5) that deceives court. *Workman v. Bell* 484 F.3d 837, 840 (6th Cir. 2007); *Demjanjuk v. Petrovsky,* 10 F.3d 338, 348 (6th Cir.1993).

In the instant case, the submission of the language in the order regarding the collection of rents submitted by Landlord's counsel is disturbingly consistent with

perpetrating a fraud on the Court. An assessment of Counsel's insertion of the language allowing for the impermissible collection of rents under the aforesaid factors reveals a violation of at least four (4) of the factors. This is; (1) conduct on part of an officer of court; (2) that is directed at the judicial machinery itself; (3) that is intentionally false, willfully blind to truth, or is in reckless disregard for truth and, in effect (5) deceives the Court.

It is questionable whether the insertion of the language could be considered a positive averment or concealment when one is under a duty to disclose pursuant to factor No. 4. Nevertheless, the insertion of the language allowing for the collection of rents was a misuse of the privilege of submitting proposed orders.

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Accordingly, Debtor's Motion for Relief From Judgment on the Order Granting Motion for Relief From Stay, is well premised and is hereby granted in part, and is overruled, in part. The portion of the ruling granting the Landlord's Motion for Relief from Stay that included language allowing for the collection of rents for July, August and September 2007 is hereby vacated. The Landlord's opposition thereto is hereby overruled. An appropriate Show Cause Order will issue forthwith upon the Landlord's Counsel.

**IT IS SO ORDERED.**

**Dated this 25th day of March 2008**

**Judge Randolph Baxter**
**United States Bankruptcy Court**
**Northern District of Ohio**