UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 95-11444
	)	
LINDA JONES-WILLIAMS,	)	Chapter 13
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**
	)	**AND ORDER GRANTING**
	)	**HERITAGE'S MOTION TO**
	)	**RECONSIDER AND DENYING**
	)	**DEBTOR'S MOTION TO STRIKE**

This case is before the Court on the (1) Motion of Heritage Acceptance Corporation ("Heritage") for reconsideration of an Order Sustaining Debtor's Objection to Heritage's claim; and (2) Debtor's Motion to Strike the Motion for Reconsideration. Heritage's Motion initially came on for hearing on January 23, 1996, at which time Debtor's counsel requested an adjournment to permit filing a response. Debtor did not file a brief in opposition to the motion, but instead filed the Motion to Strike. At the adjourned hearing on February 27, 1996, the Motion for Reconsideration and the Motion to Strike were submitted to the Court on the pleadings. For the reasons stated below, the Motion for Reconsideration is granted and the Motion to Strike is denied.

JURISDICTION

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

FACTS

The relevant facts are essentially undisputed and are set forth in the pleadings, the Affidavit of Russell W. Harris submitted in support of Heritage's Motion ("Aff.") (Docket 29), and the file, as follows:

1. Debtor filed a Chapter 13 case on April 3, 1995. Debtor's initial plan treated Heritage as an unsecured creditor.

2. Heritage filed an Objection to confirmation of the plan on May 5, 1995 based on the failure to designate it as a secured creditor. This Objection was served on Debtor's counsel and the Chapter 13 Trustee, as evidenced by the certificate of service attached to the Objection. (Docket 8). The statement of Debtor's counsel to the contrary is not supported by evidence.

3. Heritage filed a proof of claim on May 8, 1995 in which it asserted a secured claim in the amount of $10,824.16. (Proof of Claim Docket 1).

4. Heritage's counsel did not file a notice of appearance and did not appear at the First Meeting of Creditors and Confirmation hearing held on May 12, 1995.

5. The hearing on confirmation and pending objections was adjourned to June 20, 1995. This adjournment was appropriately done without further notice to Heritage based on a notice sent in Chapter 13 cases to all scheduled creditors which provides that "the confirmation hearing may be adjourned by the trustee to a date and time announced at the meeting of creditors without further notice."

6. Debtor filed a Motion to Modify the plan on June 9, 1995 which valued Heritage's claim at $2,000 (secured) and provided 10% interest. Debtor did not serve this Motion on Heritage. (Docket 14).

7. Debtor filed a Second Motion to Modify the plan on August 11, 1995. Once again, this Motion was not served on Heritage. (Docket 18).

8. On August 29, 1995, the Court overruled Heritage's objection and confirmed Debtor's second modified plan (the "Plan"). The Order confirming that modified Plan was entered on September 11, 1995. Heritage was not served with the confirmation Order. (Docket 23).

9. Debtor filed an Objection to Heritage's claim on November 6, 1995 and served the objection on November 3, 1995. The Objection included a clause requiring that a response be filed no later than seven days before the December 5, 1995 hearing and indicating that "if no request for hearing with respect to this objection is filed and served within said 7 calendar days prior to the date of hearing the objection may be granted without hearing." (Docket 25).

10. Heritage received the Objection to its claim and did not file a response. Russell W. Harris, former counsel for Heritage, appeared in court on the hearing date at which time the Court apparently sustained the Objection without hearing based on the absence of a filed response. (This case was at the time before a different Bankruptcy Judge). The December 11, 1995 Order sustaining the Objection provided for allowance of a secured claim in the amount of $2,000 with interest at 10% per annum and monthly payments of $42.50 per month. (Docket 27).

11. Former counsel for Heritage was unfamiliar with bankruptcy procedure. He believed the December 5, 1995 hearing was for the purpose of hearing his previously-filed Objection to confirmation in addition to Debtor's Objection to claim. (Aff. ¶ 7). He did not know that the Plan

had already been confirmed because Debtor did not serve him with the motions to modify or with the confirmation Order.

12. Heritage filed its Motion for Reconsideration on December 20, 1995. (Docket 28). The Motion included a notice setting the Motion for hearing on January 23, 1996 and required the filing of an objection and a request for hearing within 10 days in accordance with the applicable local rules. Debtor did not file a timely response or request for hearing.

13. New counsel for Heritage and Debtor's counsel appeared at the January 23, 1996 hearing on Heritage's Motion for Reconsideration. After listening to the preliminary arguments of the parties, the Court adjourned the matter to February 13, 1996 with Debtor given leave until February 1st to file a brief in opposition to the Motion. Debtor did not file a response to the Motion to Reconsider; instead, Debtor filed her Motion to Strike on February 12, 1996. Heritage filed a Brief in Opposition to the Motion to Strike on February 20, 1996.

DISCUSSION

Heritage requests reconsideration of the Order sustaining Debtor's Objection to its claim based on former counsel's unfamiliarity with bankruptcy procedure and Debtor's failure to give appropriate notice to Heritage. If reconsideration is granted, Heritage argues the decision sustaining the Objection to its claim should be reversed because it is improperly based on a finding that the Plan's valuation of Heritage's claim is binding in the claims proceeding.

Debtor contends the Motion for reconsideration should be stricken as an improper attempt to revoke the order confirming Debtor's plan. Moreover, Debtor claims that the value of Heritage's collateral was conclusively determined on the confirmation of Debtor's Plan.

I. MOTION TO STRIKE

Debtor claims the Plan valuation of Heritage's claim is binding and the Motion for Reconsideration should be stricken because it is an improper attempt to revoke the Order of confirmation. She argues further that a revocation of confirmation can only be commenced by an adversary proceeding rather than by motion. This argument is circular and without merit. The purpose of Heritage's Motion is to have the Court reconsider the ruling on the claim Objection; that ruling gave binding effect to the valuation set forth in the Plan. A determination regarding the binding effect of an order of confirmation vis-a-vis one creditor is not a revocation of confirmation. While such a determination involves interpretation of the confirmation proceedings and the effect of the order of confirmation, it does not constitute a revocation of the order, but rather an analysis as to its binding effect with regard to Heritage's claim.

Case law cited by Debtor on its motion does not contradict this conclusion. In *In re Woods*, 130 B.R. 204 (D.C. W.D. Va. 1990), a creditor with notice failed to appear at the § 341 meeting or to object to the plan or to appeal from the confirmation order. Later, the creditor moved to lift the automatic stay on the ground that the plan improperly treated its claim. The case did not involve an objection to a claim or a motion to reconsider a ruling on an objection to claim. Under those facts, the Court held that the binding effect of a confirmed plan could only be avoided by revocation of the order of confirmation. The remaining cases cited by Debtor discuss the preclusive effect of various types of judgments and are inapposite.

While it is clear that revocation of an order confirming Debtor's plan would be governed by § 1330 of the Bankruptcy Code and that Bankruptcy Rule 7001(5) defines such proceeding as an adversary proceeding, those provisions do not apply to this request to reconsider the order sustaining

objection to Heritage's claim. 11 U.S.C. § 1330. Requests for reconsideration are properly brought before the court by motion pursuant to Bankruptcy Rule 3008 which provides that "a party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate." Debtor's Motion to Strike is, therefore, without merit and is denied.

II. MOTION FOR RECONSIDERATION

Heritage requests relief from the Order of December 11, 1995 sustaining Debtor's objection to its claim. Section 502(j) of the Bankruptcy Code provides, in pertinent part, that:

> (j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case . . . .

11 U.S.C. §502(j). Decisions to reconsider are committed to the sound discretion of the trial court. *In re Mathiason*, 16 F.3d 234 (8th Cir. 1994).

"Cause" for reconsideration is not defined by the Bankruptcy Code, but has been defined by courts in the context of relief from judgments available under other related rules, including Bankruptcy Rule 7055 (default judgments), Bankruptcy Rule 9023 (amendment of judgments), and Bankruptcy Rule 9024 (relief from judgment). *In re Mathiason, above*; *In re Aguilar*, 861 F.2d 873 (5th Cir. 1988); *In re Motor Freight Express*, 91 B.R. 705 (Bankr. E.D. Pa. 1988); *In re Miles*, 39 B.R. 494 (Bankr. W.D. N.Y. 1984). There is no indication that the Court in the present case took evidence or otherwise addressed the substance of the dispute. Instead, the Order at issue is essentially a default judgment granted by the Court in the absence of a timely response by Heritage. Under these circumstances, the Motion for Reconsideration is akin to a Motion to set aside a default judgment.

Three factors are relevant to a decision to set aside a default judgment and, therefore, are relevant to this Motion: (1) whether Heritage has a meritorious defense, (2) whether culpable conduct by Heritage led to the default, and (3) whether Debtor will be prejudiced. *Waifersong, Ltd. Inc. v. Classic Music Vending*, 976 F.2d 290 (6th Cir. 1992); *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 398 (6th Cir. 1987). A meritorious defense is one good at law without reference to the likelihood of success. *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839 (6th Cir. 1983). The culpability factor is framed in terms of mistake, inadvertence, or excusable neglect by reference to Rule 60 of the Federal Rules of Civil Procedure. *Waifersong, Ltd., Inc., above*. See Bankruptcy Rule 9024 (Federal Rule of Civil Procedure 60 is applicable to bankruptcy proceedings with certain modifications not relevant to this case).

Meritorious Defense: Heritage presented a meritorious defense to Debtor's Objection to Heritage's claim; that is, Debtor's failure to serve it with the plan modifications. Bankruptcy Rule 2002 (a)(6) requires not less than 20 days notice to all creditors of the time fixed to accept or reject a proposed plan modification. Debtor's own certificates of service prove that she failed to give Heritage appropriate notice of the proposed modifications in violation of this rule. With notice, Heritage would have had an opportunity to accept or reject the modified plans which included the unfavorable treatment of Heritage's debt.

Debtor cites Bankruptcy Rule 9007 in support of the notion that she did not have to comply with Rule 2002(a)(6). Rule 9007 gives the court general authority to regulate notices when the rules do not otherwise specify "the time within which, the entities to whom, and the form and manner in which the notice shall be given." That rule is inapplicable to these facts because there is a specific rule setting forth appropriate notice when debtor proposes to modify a plan.

In essence, Debtor argues alternatively in her Motion to Strike that Heritage has not presented a valid defense because the confirmed Plan has a res judicata effect with respect to all issues that were or could have been raised in the confirmation proceedings. 11 U.S.C. § 1327(a). Case law recognizes that the doctrine of res judicata does apply to confirmation orders. *In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458 (6th Cir. 1991). While the concept serves an important function by bringing finality to the confirmation process, the need for finality does not mean that a confirmation order is set in stone for all time. Instead, in a Chapter 13 proceeding, a confirmed plan bars relitigation regarding the value of a secured claim *only if* due process was provided to the secured creditor. Due process in this context requires, at a minimum, notice of the confirmation hearing and notice that the court will consider valuation issues at that time. *In re Linkous*, 990 F.2d 160 (4th Cir. 1993); *see, Chattanooga Wholesale Antiques, Inc., above*, 930 F.2d at 463 (confirmed plan was res judicata where trustee did not contend that notice was deficient or that the proceedings were otherwise flawed). If Debtor had moved forward to confirm the original plan, Debtor would not have had to give Heritage notice of the adjourned confirmation hearing and the plan confirmation would have been res judicata on the valuation issue. Debtor did not , however, confirm the original plan but instead sought to confirm a first and then a second modified plan. The bankruptcy rules give Heritage the right to notice of each of those proposed modifications. Since Debtor did not notify Heritage regarding the hearings on the modified plans, Heritage cannot be bound by the valuation of its claim in the confirmed Plan. Heritage has, therefore, established a meritorious defense.

Culpability: Heritage relies on former counsel's unfamiliarity with bankruptcy procedure and a claimed lack of sufficient notice on the November 6, 1995 Objection to claim to show that the

default was not caused by its own culpable conduct. Counsel's failure to file a timely response to the Objection to claim, which failure resulted in an adverse judgment, does not appear to be culpable under the circumstances. Counsel did appear at the scheduled hearing, even though he failed to file a response due to lack of familiarity with bankruptcy procedures. While the Court does not intend to condone or encourage a failure to follow appropriate procedures, leniency in this regard is appropriate given counsel's appearance on the hearing date.

Leniency is also called for in view of Debtor's own behavior. First, Debtor herself did not file a timely response to Heritage's Motion for Reconsideration; without leave of Court to respond, Heritage's Motion could have been granted by default. Second, although the Court gave Debtor leave to file a brief by February 1, 1996, Debtor did not file anything in response until February 12, 1996. These facts tip the scale in favor of Heritage.

Finally, although Heritage also asserts by way of excuse that it received insufficient notice of the hearing on the Objection to its claim, that position is unfounded. The record indicates Debtor sent notice on November 3 regarding the December 5 hearing, thus meeting the 30-day notice requirement of Bankruptcy Rule 3007.

Prejudice: Heritage filed its Motion for Reconsideration promptly within the applicable appeal period and Debtor has not identified any prejudice to her if the Objection to claim is determined on the merits.

Based on the discussion above, under the relevant considerations and equities, cause exists to reconsider the Order sustaining Debtor's Objection to Heritage's claim.

CONCLUSION

Debtor's Motion to Strike Heritage's Motion for Reconsideration is denied. Heritage's Motion for Reconsideration of the Order sustaining objection to its claim is granted. On reconsideration, Heritage is entitled to a hearing on the value of its secured claim. That evidentiary hearing will be held on **April 30, 1996 at 9:00 a.m.**

IT IS SO ORDERED.

April 10, 1996

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served on: Alexander Jurczenko (by mail)
Stephen Hobt (by mail)
Myron Wasserman (by mail)

By: Joyce L Gordon, Secretary

Date: 4/10/96