

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
* CASE NUMBER 03-45326
ROGER L. ZAKEN, *
* CHAPTER 13
*
Debtor. * HONORABLE KAY WOODS
*

ORDER DENYING MOTION TO VACATE PRIOR ORDER OF THE COURT

Debtor Roger L. Zaken ("Debtor") filed a voluntary Chapter 13 petition on October 16, 2003. At that time Debtor was represented by counsel, Robert J. Buckley. On December 16, 2003, BA Mortgage, LLC (a wholly owned subsidiary of Bank of America, N.A.) ("BA Mortgage") filed a motion for relief from stay with respect to property located at 8421 Center Road, Saybrook, Ohio 44004. Debtor filed a response to the motion for relief from stay on December 19, 2003. A hearing was scheduled for January 22, 2004 on the motion for relief from stay, which hearing was not held because an agreed order was to be submitted. On February 5, 2004, this Court signed an agreed order for relief from stay, which provided that Debtor would maintain regular monthly post-petition payments to BA Mortgage outside the Chapter 13 plan beginning with the payment due February 2004. Failure by Debtor to make any such payment within 30 days of the date due would constitute a default. Upon the existence of a default, counsel for BA Mortgage could

send Debtor and counsel for Debtor a 10-day notice of BA Mortgage's intent to file an affidavit and proposed order granting relief from stay. If the default was not cured within that 10-day period, then upon the filing of an affidavit by BA Mortgage attesting to the default by Debtor, an order would be entered without further hearing, terminating the stay imposed by § 362 of the Bankruptcy Code with respect to BA Mortgage.

On February 26, 2004, Robert J. Buckley filed a notice of withdrawal of representation of Debtor. An order authorizing Robert J. Buckley to withdraw as Debtor's counsel was signed by the Court on March 8, 2004. On April 29 2004, the Court entered an amended agreed order granting relief from stay, which was signed by BA Mortgage and Debtor. The pertinent terms of that order stated that Debtor shall maintain regular monthly post-petition payments to BA Mortgage outside the Chapter 13 plan beginning with the payment due April 2004 in the form of certified funds. Failure by Debtor to make any payment within 30 days of the date due would constitute a default. The other pertinent terms with respect to providing notice of default and obtaining an order terminating the stay imposed by § 362 of the Bankruptcy Code were the same as in the prior agreed order.

On November 11, 2004, BA Mortgage filed an affidavit setting forth the default of Debtor under the prior order of

the Court, alleging that Debtor was in default for a total post-petition arrearage of Five Hundred Eighty-Five and 93/100 Dollars (\$585.93) for the month of October 2004 and that Debtor had failed to comply with the amended agreed order on the motion for relief from stay entered on April 29, 2004. On December 1, 2004, this Court entered an order granting a final modification of the auto-matic stay, based upon the affidavit of default by BA Mortgage. On December 15, 2004, Debtor, *pro se*, filed a motion to vacate re: order granting final modification of automatic stay - 8421 Center Road, Austinburg, Ohio 44010. The gist of Debtor's motion is that the prior order of the Court should be vacated because he had not been able to properly defend his Chapter 13 case because the lawyers for Bank of America refused to return his calls.

BA Mortgage filed a response to the motion to vacate stating that the subject mortgage loan account had post-petition arrearages for the months of October 2004 through January 2005 in the amount of Five Hundred Sixty-Four and 35/100 Dollars (\$564.35) per month plus four late charges at Twenty-One and 58/100 Dollars (\$21.58) each, plus Two Hundred Seventy-Five Dollars (\$275.00) for attorney fees and costs, for a total post-petition arrearage of Two Thousand Six Hundred Eighteen and 72/100 Dollars (\$2,618.72). BA Mortgage's response argues that Debtor has not met the procedural basis

for vacation of a prior order, as set forth in FED. R. CIV. P. 60(b)(6), made applicable to this case by FED. R. BANKR. P. 9024. BA Mortgage alleges that, because Debtor has not set forth any "exceptional circumstances," the motion to vacate the prior order should be overruled.

A hearing on the motion to vacate was held on January 12, 2005. The Court found that Debtor had not set forth circumstances that would justify vacating the prior order of the Court and denied Debtor's motion to vacate. Accordingly, Debtor's motion to vacate the order of this Court entered December 1, 2004 is hereby denied.

IT IS SO ORDERED.

JUDGE

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was placed in the United States Mail this _____ day of January, 2005, addressed to:

ROGER LEE ZAKEN, 8421 Center Road,
Austinburg, OH 44010.

EDWARD J. BOLL, III, ESQ., P. O. Box 5480,
Cincinnati, OH 45201.

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JOANNA M. ARMSTRONG