

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 07-11655
)
LEFTERIOS KONSTANTINOS and) Chapter 13
MARCIE M. KONSTANTINOS,)
) Judge Pat E. Morgenstern-Clarren
Debtors.)
) **MEMORANDUM OF OPINION**

GMAC moves to vacate the order confirming the debtors' modified chapter 13 plan and the debtors object to that request.¹ For the reasons stated below, GMAC's motion is denied.²

JURISDICTION

Jurisdiction exists under 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 under 28 U.S.C. § 157(b)(2)(L).

FACTS³

The debtors filed their chapter 13 case on March 15, 2007. In schedule G, they listed an executory lease with GMAC for a 2005 GMC Envoy (the vehicle). On March 26, 2007, GMAC filed a proof of claim based on the lease which stated that notices should be sent to GMAC at

¹ Docket 77, 79, 80, 81.

² In the court's view, the value of this opinion is to decide the dispute between the parties and not as an addition to the general jurisprudence. For that reason, the opinion is not intended for commercial publication.

³ Neither party requested an evidentiary hearing. These undisputed facts are drawn from the parties' briefs, the case file, and the docket.

P.O. Box 130424, Roseville, MN 55113. On May 10, 2007, GMAC through attorney Lindsey Hall of the firm Javitch, Block & Rathbone, filed a motion for relief from stay to allow GMAC to pursue its rights under the lease. The debtor objected and the matter was resolved by an agreed order entered on June 12, 2007.

The debtors filed their initial chapter 13 plan on April 16, 2007. Under this version of the plan, the debtors would assume the GMAC lease, make their postpetition payments outside the plan, and pay the prepetition arrearage inside the plan. The debtors filed amended plans accompanied by motions to modify on May 30, 2007 (the first amended plan), September 11, 2007 (the second amended plan), and September 12, 2007 (the third amended plan). The first and second amended plans did not propose a change in GMAC's plan treatment. The third amended plan, however, provided that the debtors elected to assume the GMAC lease purchase option and would pay the purchase price inside the plan as a secured claim.

Debtors' counsel sent appropriate notices regarding the first and second amended plans to GMAC. Counsel used a different procedure with the third modified plan. Instead of providing notice to GMAC directly, debtors' counsel sent the third motion to modify and notice of the hearing and objection deadline to attorney Hall, with a notation that she was counsel for GMAC.⁴ GMAC did not object to the third amended plan. The confirmation hearing was held on October 9, 2007 and adjourned to October 23, 2007, at which time the third amended plan was confirmed. The court entered the confirmation order on November 5, 2007.

On December 31, 2007, GMAC moved to vacate that confirmation order.

⁴ GMAC's counsel acknowledges that she was served with the third motion to modify and the hearing notice. *See* Movant's memorandum in support at 4, docket 80. As an ECF user, counsel was notified electronically. *See* docket 65, 66.

DISCUSSION

The Positions of the Parties

GMAC moves for relief from the confirmation order under three subsections of federal rule of civil procedure 60(b). First, it argues that it was not afforded due process before the order was entered and that relief is appropriate under rule 60 (b)(4) and (b)(6). Alternatively, GMAC argues that its failure to oppose the debtors' third amended plan was excusable neglect and that relief is appropriate under rule 60(b)(1).⁵

The debtors argue that the confirmation order is a final order that should stand because GMAC was properly served with the third amended plan through its attorney, thus according GMAC due process before the confirmation order was entered.

Relief from Judgment

Generally, a confirmed plan is a final order that is binding on the debtor and each creditor. *See* 11 U.S.C. § 1327(a). Federal rule 60(b) provides that a court may relieve a party from a final order for a number of reasons. FED. R. CIV. P. 60(b). Rule 60(b) applies in bankruptcy with certain exceptions, one of which is relevant to this case. FED. R. BANKR. P. 9024. That exception provides that “a complaint to revoke an order confirming a plan may be filed only within the time allowed by . . . § 1330.” *Id.* Section 1330 states that an order confirming a chapter 13 plan that was procured by fraud may be revoked and that the revocation must be requested within 180 days after the confirmation order is entered. 11 U.S.C. § 1330(a).

⁵ GMAC's brief also requested relief under rule 60(b)(3) based on fraud, but did not provide any argument or legal support on that issue. As a result, that argument is deemed to have been waived.

A number of courts interpreting § 1330 and rule 9024 together have determined that § 1330 provides the only basis for obtaining relief from a chapter 13 confirmation order, and that a court may not grant relief from a confirmation order under rule 9024 that is not available under § 1330. *See Branchburg Plaza Assocs. v. Fesq (In re Fesq)*, 153 F.3d 113, 120 (3d Cir. 1998); *Mason v. Young (In re Young)*, 237 B.R. 791, 802 (B.A.P. 10th Cir. 1999), *aff'd on other grounds*, 237 F.3d 1168 (10th Cir. 2001). Under these cases, a confirmation order may be vacated only for fraud and only if the motion is made within 180 days.

Accepting that interpretation of the two provisions, other courts have noted that the constitutional requirements of due process “trump” the limitations of § 1330, which means that rule 9024 may be used “to set aside or relieve a party from the effect of a chapter 13 confirmation order when notice is constitutionally inadequate.” *In re Hudson*, 260 B.R. 421, 444 (Bankr. W.D. Mich. 2001). *See also Ruehle v. Educ. Credit Mgmt. Corp. (In re Ruehle)*, 412 F.3d 679, 683 (6th Cir. 2005) (holding that a “challenge to the validity of [a chapter 13] confirmation order was properly brought under Rule 60(b)(4)” to address due process concerns); *Duplessis v. Valenti (In re Valenti)*, 310 B.R. 138, 147 (B.A.P. 9th Cir. 2004) (recognizing that rule 60(b) might be applicable to address a chapter 13 confirmation order based on due process considerations); *In re Swanson*, 312 B.R. 153, 158 (Bankr. N.D. Ill. 2004) (agreeing with *Hudson* that relief under rule 60 may be granted with respect to a confirmation order “only when a party has been deprived of a constitutional right”).

This court adopts the line of reasoning set forth above and concludes that relief from the order confirming the debtors’ third modified plan is only available under rule 60(b) based on due process concerns. An order that is entered without due process is void; an attack on this ground

is, therefore, governed by rule 60(b)(4). *See Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995) (stating that a judgment is void under rule 60(b)(4) if it was rendered in a manner that is inconsistent with due process of law). The court will, therefore, consider GMAC's motion under that provision, only. GMAC's request for relief on other grounds is denied.

Due Process

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The bankruptcy notice requirements are designed to satisfy the due process requirement of adequate notice to parties whose interests are to be affected in bankruptcy proceedings. *Boykin v. Marriott Int'l Inc. (In re Boykin)*, 246 B.R. 825, 828-29 (Bankr. E.D. Va. 2000); *see also* 11 U.S.C. § 102(1) (providing that “after notice and a hearing” means after such notice and opportunity for hearing as is appropriate under the circumstances). “Non-compliance with the Bankruptcy Rules does not, however, necessarily mean that constitutional standards for due process have been left unsatisfied.” *In re Arch Wireless*, 332 B.R. 241, 252 (Bankr. D. Mass. 2005).

In a bankruptcy proceeding, notice given to a creditor's counsel can satisfy a requirement that notice be given to a creditor. *See Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 457 (6th Cir. 1982) (noting that notice provided to a creditor's attorney may be imputed to the creditor where the attorney has been authorized to represent the creditor in the bankruptcy proceedings); *Vicenty v. San Miguel Sandoval (In re San Miguel Sandoval)*, 327 B.R. 493, 508 (B.A.P. 1st Cir. 2005) (stating that “notice to the creditor's attorney is sufficient notice to the creditor where that

attorney participates in the bankruptcy case”); *In re GST Telecom, Inc.*, No. 00-1082, 2002 WL 1737445, at *7 (D. Del. July 29, 2002) (noting that actual notice to a creditor through counsel may serve as effective notice under rule 2002); *Linder v. Trump’s Castle Assocs.*, 155 B.R. 102, 104-105 (D. N.J. 1993) (stating that “[t]he general rule in bankruptcy cases . . . is that notice served upon counsel satisfies any requirement to give notice to the party”); *Curtis v. LaSalle Nat’l Bank (In re Curtis)*, 322 B.R. 470, 482-83 (Bankr. D. Mass. 2005) (finding that a creditor’s due process rights with respect to chapter 13 plan confirmation were satisfied by notice upon its attorney, and that the creditor was bound by the confirmation order); *In re Griggs*, 306 B.R. 660, 665 (Bankr. W.D. Mo. 2004) (imputing to a creditor notice regarding the claims bar date provided to the creditor’s attorney).

To determine whether notice to a creditor’s counsel satisfies due process concerns, courts generally consider whether there is a sufficient nexus between the creditor’s retention of the attorney and the creditor’s claim against the debtor. *See In re San Miguel Sandoval*, 327 BR. at 510 (deeming notice to creditor’s counsel who had appeared in the case satisfied creditor’s right to due process with respect to claims bar date and chapter 13 plan confirmation); *In re Griggs*, 306 B.R. at 665 (finding that counsel had appeared at the § 341 meeting and that notice to counsel regarding the case filing and claims bar date satisfied due process regarding the claims bar date); *In re GST Telecom, Inc.*, 2002 WL 1737445 at *7 (noting that notice to counsel regarding the claims bar date may substitute for proper notice, but concluding that there were insufficient facts regarding the attorney’s position to make that determination on summary judgment). Notice to counsel has been found to satisfy a creditor’s right to due process and to serve as a satisfactory substitute to rule 2002 notice regarding chapter 13 plan confirmation. *See*

In re Curtis, 322 B.R. at 482-83 (determining that a creditor's due process rights with respect to confirmation of the debtor's chapter 13 plan were satisfied by notice given to its attorney).

Is Relief Appropriate under the Circumstances?

The debtors modified their chapter 13 plan multiple times before it was confirmed. Although the bankruptcy rules do not require that preconfirmation plan modification be requested by motion, debtors in this district generally file such motions, and debtors' counsel used that procedure in this case. The motion to modify was governed by bankruptcy rule 9013. FED. R. BANKR.P. 9013; *see also* LOCAL BANKR. R. 9013-1, 9013-2, and 9013-3.

Bankruptcy rule 2002 establishes the notice requirements for preconfirmation motions to modify. Rule 2002 (a)(5) requires that creditors be given at least 20 days notice of the time to accept or reject a proposed plan modification, *see* FED. R. BANKR. P. 2002(a)(5), and rule 2002(b) requires that creditors be provided not less than 25 days notice of the objection deadline and confirmation hearing, *see* FED. R. BANKR. P. 2002(b). The plan or a plan summary must be provided with the notice of hearing. *See* FED. R. BANKR. P. 3015(d). A debtor's counsel is responsible for providing notice. *See* LOCAL BANKR. R. 2002-1(b).

Rule 2002(g) governs the manner in which notice is to be given. FED. R. BANKR. P. 2002(g). Under that rule, a creditor or its agent may direct where notices are to be sent. FED. R. BANKR. P. 2002(g)(1). The creditor may make that designation in its proof of claim. FED. R. BANKR. P. 2002(g)(1)(A). If a creditor does not designate a mailing address, notices are to be mailed to the address shown on the debtor's list of creditors or schedule of liabilities. FED. R.

BANKR. P. 2002(g)(2).⁶

The debtors argue that serving GMAC's counsel complied with the bankruptcy rule's service requirements. This is inaccurate. Under the rules, GMAC was entitled to receive a copy of the third modified plan, together with notice of the hearing and the time to accept or reject the plan, at the address designated in its proof of claim. Based on the undisputed facts, the debtors did not follow the bankruptcy rules for service.

The debtors also contend that bankruptcy rule 9014 governed their motion to modify. This is both incorrect and irrelevant. The confirmation process does not become a contested matter until the point at which a creditor files an objection. *See* FED. R. BANKR. P. 3015(f) (providing that an objection to confirmation is governed by rule 9014); *see also In re Jackson-Bostic*, No. 02-52127, 2006 WL 4457347, at *5 (Bankr. D. N.J. June 14, 2006) (rejecting the argument that the rule 9014 service requirement applies to chapter 13 plan confirmation). As GMAC did not file an objection, rule 9014 did not apply. Moreover, even if the debtors' motion had been governed by rule 9014, the debtors would have been required to serve the motion in the same manner as a summons and complaint, which they did not do. *See* FED. R. BANKR. P. 9014(b) ("The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004.").

Although debtors' counsel did not serve the plan, the hearing notice, and the deadline information in accordance with the rules, counsel did timely serve all of this on GMAC's

⁶ Bankruptcy code § 342 also contains notice provisions, but neither party has argued that they apply here. *See* 11 U.S.C. § 342.

counsel. The question is whether that service is sufficient to satisfy constitutional due process concerns.

GMAC was entitled to notice and an opportunity to be heard regarding the terms of the debtors' third modified plan. As discussed above, notice to counsel may be sufficient to satisfy the constitutional mandate. Here, Ms. Hall represented GMAC in the chapter 13 case based on her filing and prosecution of the motion seeking relief from stay. If there were any limitations on that representation, there is nothing in the record to show it.⁷ Serving GMAC's counsel under these circumstances gave GMAC adequate notice and an opportunity to be heard on plan confirmation. Consequently, GMAC's motion for relief under rule 60(b)(4) based on a denial of due process is denied.

CONCLUSION

For the reasons stated, GMAC's motion to vacate the order confirming the debtors' modified chapter 13 plan is denied. A separate order will be entered in accordance with this decision.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

⁷ GMAC attached to its memorandum a Bankruptcy Litigation Referral Worksheet. That is, however, irrelevant because it is a private document sent by GMAC to its counsel, not a limited appearance of counsel in the bankruptcy case.

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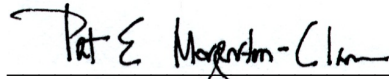
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MARCIE M. KONSTANTINOS,)
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Debtors.)
) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the motion of GMAC to vacate the order confirming the debtors' modified chapter 13 plan is denied. (Docket 77).

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge