

IT IS SO ORDERED.

Dated: August 31, 2012
12:01:33 PM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

AARON I. COLEMAN,

Debtor.

CASE NUMBER 11-41523

* * * * *

AARON I. COLEMAN,

Plaintiff,

ADVERSARY NUMBER 12-4034

v.

GREEN TREE SERVICING, LLC,

Defendant.

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING MOTION OF
GREEN TREE SERVICING LLC FOR RECONSIDERATION OR,
IN THE ALTERNATIVE, FOR RELIEF FROM JUDGMENT OF
THIS COURT'S AUGUST 3, 2012 ORDER

Before the Court is Motion of Green Tree Servicing LLC for

Reconsideration or in the Alternative Relief from Judgment of This Court's August 3, 2012 Order ("Motion for Reconsideration") (Doc. # 20) filed by Defendant Green Tree Servicing LLC ("Green Tree") on August 10, 2012. On August 3, 2012, this Court entered (1) Memorandum Opinion Regarding (i) Motion to Stay Adversary Complaint and Compel Arbitration; and (ii) Motion for Judgment on the Pleadings (Doc. # 16); and (2) Order (i) Granting Motion for Judgment on the Pleadings; and (ii) Granting, in Part, and Denying, in Part, Motion to Stay Adversary Complaint and Compel Arbitration (Doc. # 17) (collectively, "August 3, 2012 Order"). In the Motion for Reconsideration, Green Tree requests the Court, pursuant to Federal Rules of Civil Procedure 59(e) and 60(b), to reconsider and/or vacate the August 3, 2012 Order. Consistent with this Court's Memorandum Regarding Bankruptcy Court Policies and Procedures dated January 31, 2012 ("Procedures Memo"), Debtor/Plaintiff Aaron I. Coleman ("Debtor") did not file a written response to the Motion for Reconsideration.¹ (See Procedures Memo at 4.)

The Court held a hearing on the Motion for Reconsideration on August 30, 2012 ("Hearing"). David J. Demers, Esq. appeared on behalf of Green Tree and Philip D. Zuzolo, Esq. appeared on behalf of the Debtor. Following the presentations of counsel, the Court orally denied the Motion for Reconsideration. The Court hereby

¹The Procedures Memo is available at the Court's website at www.ohnb.uscourts.gov.

enters this Memorandum Opinion and accompanying Order to formalize that ruling.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general orders of reference (General Orders No. 84 and 2012-7) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Bankruptcy Case

By way of background, on May 19, 2011, the Debtor filed (i) chapter 13 petition, denominated Case No. 11-41523 ("Main Case");² and (ii) Chapter 13 Plan (Main Case, Doc. # 2). In the Chapter 13 Plan, the Debtor listed (i) "none" for "Secured Claims - Residence/Real Property"; and (ii) Green Tree under "Secured Claims - Other" in the secured amount of \$40,000.00 with an interest rate of 5.25% and the unsecured amount of \$36,201.77. (Ch. 13 Plan, Arts. 2 E, 2 F.)

On May 24, 2011, Green Tree filed a proof of claim, which was denominated Claim No. 1, as a secured claim in the amount of \$84,447.11 with interest at the rate of 8.75%. Security for the

²All docket references are to this adversary proceeding unless the Main Case is indicated.

claim is listed as "real estate" and "1997 32 x 76 Commodore Ser#: CV31521AB." (Claim No. 1 at 1.)

On July 7, 2011, Green Tree filed Objection to Confirmation (Main Case, Doc. # 14), which objected to confirmation of the Debtor's Chapter 13 Plan for two reasons, as follows: (i) Green Tree objected to the Debtor's attempt to cram down the value of Green Tree's security interest to \$40,000.00 and further objected to the Debtor's valuation of such security interest; and (ii) Green Tree objected to the Debtor's proposed interest rate of 5.25% on the secured portion of Green Tree's claim.

The Court held a hearing on the Objection to Confirmation on September 15, 2011. Counsel for the Debtor appeared at the hearing, but no one appeared on behalf of Green Tree. The issue before the Court was whether Claim No. 1 could be crammed down, as proposed in the Chapter 13 Plan, pursuant to 11 U.S.C. § 1322(b)(2). As a consequence, the Court requested briefs on the issue of whether the Debtor's manufactured home was real or personal property.

Thereafter, on September 22, 2011, the Debtor filed Response to Objection to Confirmation of Plan (Main Case, Doc. # 24), which explained that the manufactured home met the definition of personal property in Ohio Revised Code § 5701.02(B)(2) because (i) it was not affixed to a permanent foundation; and (ii) the certificate of title had not been inactivated by the clerk of courts for the common pleas court that issued it. Under Ohio law, both of these

conditions must be met to transform a manufactured home into realty.

On September 26, 2011, the Court issued Order Overruling Objection of Green Tree Servicing LLC to Confirmation ("Order Overruling Confirmation Objection") (Main Case, Doc. # 25), which overruled both prongs of the Objection to Confirmation. The Court held that (i) section 1322(b)(2) did not prohibit the Debtor from cramming down Green Tree's claim because, although such claim was secured by the Debtor's residence, the residence was comprised of both real property and personal property in the form of the manufactured home; and (ii) the interest rate of 5.25% proposed in the Debtor's Chapter 13 Plan was consistent with *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

The Debtor's Chapter 13 Plan has not yet been confirmed. It was deemed not feasible based upon the claims, as filed. As set forth above, Green Tree has filed a secured claim in the amount of \$84,447.11, but the Plan provides for a secured claim in the amount of \$40,000.00. Thus, a predicate for confirmation of the Debtor's Chapter 13 Plan is resolution of the secured amount of Claim No. 1.

B. Adversary Proceeding

In order to facilitate resolution of the amount of Green Tree's secured claim, on March 14, 2012, the Debtor filed Complaint (To Object to Proof of Claim and to Determine the Extent, Validity, and Priority of Lien Under § 506) ("Complaint") (Doc. # 2). The Complaint contains six counts, as follows: (i) Count One: Fair Debt

Collection Practices Act; (ii) Count Two: Ohio Consumer Sales Practices Act; (iii) Count Three: fraudulent misrepresentation; (iv) Count Four: breach of the covenant of good faith and fair dealing; (v) Count Five: invasion of privacy by intrusion upon seclusion; and (vi) Count Six: validity/priority/extent of liens. The facts set forth in the Complaint all deal with pre-petition conduct.

On March 23, 2012, Green Tree filed Answer of Green Tree Servicing, LLC ("Answer") (Doc. # 8), which contains a First Defense that generally denies or denies for lack of knowledge most of the allegations in paragraphs 1 through 42 of the Complaint. Green Tree fails to address, either specifically or through a general denial, the allegations in paragraphs 43 through 69 of the Complaint (the last paragraph of Count One and the totality of Counts Two through Six). As a result of Green Tree's admission of the allegations in paragraphs 43 through 69, on July 16, 2012, the Debtor filed Motion for Partial Judgment on the Pleadings Under FRCP 12(c) and FRBP 7012 (Doc. # 12) and Memorandum in Support thereof (Doc. # 13) (collectively, "Motion for Judgment on the Pleadings") with respect to Counts Two through Six of the Complaint.

The Answer also contains nine other defenses, as follows: (i) Second Defense: failure to state a claim upon which relief can be granted; (ii) Third Defense: statute of limitations; (iii) Fourth Defense: not a core proceeding and no jurisdiction of

this Court; (iv) Fifth Defense: improper venue; (v) Sixth Defense: res judicata and collateral estoppel; (vi) Seventh Defense: laches; (vii) Eighth Defense: waiver; (viii) Ninth Defense: unclean hands; and (ix) Tenth Defense: complaint is subject to the arbitration provision of the Security Agreement and/or Note.

Apparently in support of the Tenth Defense and in reliance on paragraph 16 of the Manufactured Home Retail Installment Contract and Security Agreement ("Installment Contract"),³ on June 20, 2012, Green Tree filed Motion of Green Tree Servicing LLC to Stay Adversary Complaint and Compel Arbitration ("Motion to Compel Arbitration") (Doc. # 9).⁴ The Motion to Compel Arbitration sought "an Order staying the Adversary Case Complaint ("Complaint") by Plaintiff Aaron Coleman and compelling the Complaint to binding arbitration." (Mot. to Compel Arb. at 1.)

Although Green Tree's Motion to Compel Arbitration sought arbitration of all six counts of the Complaint, Green Tree now appears to concede that its Motion should not have been so broad because the relief sought in Count Six - *i.e.*, bifurcation of and determination of the secured amount of Green Tree's proof of claim - was fully resolved when the Court entered the Order Overruling Confirmation Objection. This belated recognition of the binding nature of the Order Overruling Confirmation Objection is set forth

³The Installment Contract provides for a security interest in "the goods or property being purchased" and "real property located at Ron Lane, Youngstown, OH 44505." (Installment Contract at 1.) The property being purchased is described as "1997 Commodore Brookwood Serial Number CV31521AB 32 x 76." (*Id.* at 2.)

⁴The Installment Contract was attached to the Motion to Compel Arbitration.

in the Motion for Reconsideration. (See Mot. for Recons. at 12 n.1 ("Green Tree believes that issues contained in Count 6 of Plaintiff's Complaint were previously resolved and do [sic] not challenge them herein.").)

Green Tree did not notice the Motion to Compel Arbitration for hearing nor did the Certificate of Service indicate when responses to the Motion were due, as required by Local Bankruptcy Rule ("LBR") 9013-1(a). As a consequence, the Court (i) set July 16, 2012, as the last date to respond to the Motion to Compel Arbitration; and (ii) scheduled a hearing on the Motion for August 2, 2012. (See Doc. # 10.) On July 16, 2012, the Debtor filed Memo in Opposition to Defendant's Motion to Stay Adversary Complaint and Compel Arbitration (Doc. # 14).

Also on July 16, 2012, the Debtor filed the Motion for Judgment on the Pleadings. Green Tree did not respond to the Motion for Judgment on the Pleadings.

On July 31, 2012, counsel for the Debtor filed Motion to Continue August 2, 2012 Hearing (Doc. # 15). The Motion to Compel Arbitration was fully briefed and no party had requested a hearing on the Motion. As a consequence, on July 31, 2012, the Court struck the hearing. The Court then entered the August 3, 2012 Order, which resolved (i) the Motion for Judgment on the Pleadings; and (ii) the Motion to Compel Arbitration. The August 3, 2012 Order is the subject of Green Tree's Motion for Reconsideration.

II. THE AUGUST 3, 2012 ORDER

Prior to issuing the August 3, 2012 Order, the Court reviewed (i) paragraph 16 of the Installment Contract ("Arbitration Clause"); (ii) case law governing application of consensual arbitration; (iii) the pleadings in this adversary proceeding; (iv) the standard for granting judgment on the pleadings; and (v) applicable rules and case law concerning judgment on the pleadings. The Court determined that, by failing to address the allegations in paragraphs 43 through 69 of the Complaint, pursuant to Rule 8(b)(6) of the Federal Rules of Civil Procedure (incorporated into this proceeding by Federal Rule of Bankruptcy Procedure 7008(a)), Green Tree had admitted all of the allegations of those paragraphs. Accordingly, the Debtor had properly filed the Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure (incorporated into this proceeding by Federal Rule of Bankruptcy Procedure 7012(b)). The Court held that, because Green Tree admitted all allegations in Counts Two through Six, the Motion for Judgment on the Pleadings was well taken. As a consequence, the Court granted judgment in favor of the Debtor as to liability on Counts Two through Six.

The Court also found that Green Tree and the Debtor agreed to arbitrate, as set forth in the Arbitration Clause in the Installment Contract. The Court analyzed the scope of the Arbitration Clause and determined that Counts One through Five fell within the scope of the Arbitration Clause, but that Count Six was

outside the Arbitration Clause. Count Six did not involve contract interpretation or an accounting, but rather required (i) determination of the amount and priority of Claim No. 1 in the Debtor's bankruptcy estate; (ii) bifurcation of Claim No. 1 into secured and unsecured portions; and (iii) partial avoidance of Green Tree's lien.

The Court noted that, in Count Six, the Debtor acknowledged that he owed Green Tree \$84,447.11, as set forth in Claim No. 1, but he objected to the total amount being classified as secured. Green Tree previously sought this Court's judgment concerning whether the Debtor could bifurcate Green Tree's claim based on § 1322(b)(2). This Court overruled Green Tree's Objection to Confirmation and held that Green Tree's claim could be bifurcated into secured and unsecured components, as proposed in the Debtor's Chapter 13 Plan. Green Tree did not appeal or ask for reconsideration of the Order Overruling Confirmation Objection. Because Count Six required a determination of Claim No. 1, consistent with this Court's prior Order Overruling Confirmation Objection, the Court found that arbitration of Count Six would conflict with the purposes of the Bankruptcy Code.

Because Green Tree admitted the allegations in paragraphs 43 through 69, there could be no further dispute relating to liability for an arbitrator to resolve. The only open issue concerning Counts Two through Five was the amount of damages to which the Debtor would be entitled. Moreover, based on Green Tree's

admission of paragraph 43, the amount of damages was also the only open issue regarding Count One.

The Court also addressed the second component of the Motion to Compel Arbitration, which was Green Tree's request to stay the pending adversary proceeding. The only question for an arbitrator was the amount of damages relating to Counts One through Five. Despite noting the inefficiency of doing so, the Court stayed the Adversary Proceeding with respect to Counts One through Five.

III. MOTION FOR RECONSIDERATION

At the Hearing on the Motion for Reconsideration, Mr. Demers, on behalf of Green Tree, largely restated the arguments set forth in the Motion. Mr. Zuzolo, on behalf of the Debtor, simply represented to the Court that the Debtor opposes the Motion for Reconsideration.

A. Rule 59(e)

The Motion for Reconsideration is purportedly based on Federal Rules of Civil Procedure 59(e) and 60(b). (See Mot. for Recons. at 5.) Rule 59(e) provides, "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." FED. R. CIV. P. 59(e) (West 2012). Federal Rule of Bankruptcy Procedure 9023 provides, "Except as provided in this rule and Rule 3008, Rule 59 F.R.Civ.P. applies in cases under the Code. A motion for a new trial or to alter or amend a judgment shall be filed, and a court may on its own order a new trial, no later than 14 days after entry of judgment." FED. R. BANKR. P. 9023

(West 2012). Because the Motion for Reconsideration was filed on August 10, 2012, it is timely under Federal Rule of Bankruptcy Procedure 9023.

Citing *Henderson v. Walled Lake Consolidated Schools*, 469 F.3d 479, 496 (6th Cir. 2006), Green Tree argues there are two bases for granting it relief from the August 3, 2012 Order under Rule 59(e) – *i.e.*, “newly discovered evidence” and the “need to prevent manifest injustice.” (Mot. for Recons. at 5.)

First, although acknowledging that it does not constitute “newly discovered evidence,” Green Tree states:

Although not necessarily evidence as it pertains to the facts contained within the allegations of Plaintiff’s Complaint, I am sure the Court was unaware at the time it issued its Order that counsel for the respective parties had agreed to continue the hearing and grant Green Tree, if necessary, additional time within which to respond to Plaintiff’s Motion for Partial Judgment on the Pleadings. It was anticipated that once the Court set a new hearing date on the Motion to Compel Binding Arbitration, and when counsel for the Plaintiff returned from vacation the parties would agree upon a date for Green Tree to respond to Plaintiff’s Motion for Partial Judgment on the Pleadings.

(*Id.* at 6.) Counsel for Green Tree correctly notes that the Court was “unaware” of these matters because they appear nowhere on the case docket, making it impossible for the Court to know about them. The fact that the parties may have privately discussed Green Tree filing a late response to the Motion for Judgment on the Pleadings in no way constitutes any type of “newly discovered evidence.” Indeed, this argument borders on the absurd. As set forth in this Court’s Adversary Case Management Initial Order (“Case Management

Order") (Doc. # 4), Green Tree had fourteen days to respond to the Motion for Judgment on the Pleadings or risk the Court entering an order upon the unopposed Motion.

The Case Management Order provides, "Motion practice is governed by LBR 9013-1 and 9013-2. For all dispositive motions (e.g., summary judgment, Defendant's motion to dismiss, motion for judgment on the pleadings), the opposing party shall file a response within fourteen (14) days after the motion is filed and served." (Case Mgmt. Order at 6 (emphasis added).) LBR 9013-1 provides, "*Effect of No Response*. Failure to file a response on a timely basis may be cause for the Court to grant the motion or application as filed without further notice to the extent such action would not conflict with any Federal Rule of Bankruptcy or Civil Procedure." LBR 9013-1(d) (May 16, 2011).

The Certificate of Service on the Motion for Judgment on the Pleadings states that it was served electronically on Mr. Demers, as counsel for Green Tree, on July 16, 2012. Fourteen days after service of the Motion for Judgment on the Pleadings was July 30, 2012. Counsel for Green Tree never sought or obtained an extension of time in which to respond to the Motion for Judgment on the Pleadings. Without obtaining an extension of time to respond to the Motion for Judgment on the Pleadings, Green Tree's response was due no later than July 30, 2012. The Court did not issue the August 3, 2012 Order until eighteen days after service of the Motion for Judgment on the Pleadings.

In addition to the alleged undisclosed discussions regarding Green Tree taking additional time to respond to the Motion for Judgment on the Pleadings, Mr. Demers states:

After filing an Answer, counsel for the respective parties had numerous conversations regarding the litigation, including submission of a joint proposed Pre-Trial Report. Pursuant to the agreed upon dates, the parties have until December 15, 2012 within which to complete discovery. The parties also informed the Court that they believe the case would be in a posture to proceed to trial in May or June 2013.

(Mot. for Recons. at 3.) Mr. Demers may have had "numerous conversations regarding the litigation" with counsel for the Debtor, but this Court has no way of knowing if that is true. Counsel for Green Tree states, "The parties recently entered into a Pre-Trial report that was filed with the Court on June 19, 2012."

(*Id.* at 9.) Perhaps counsel for Green Tree confused this proceeding with some other litigation, because, to the contrary, no pre-trial report, proposed discovery plan or any other type of filing has been made concerning discovery deadlines or trial readiness in this case.⁵ As a consequence, pursuant to Section 2 of the Case Management Order, the parties were required to complete all discovery no later than 120 days following service of the summons and the Complaint. (See Case Mgmt. Order at 2.) Service of the summons and the Complaint occurred on March 22, 2012 (see Doc. # 6), making the discovery deadline July 20, 2012 – *i.e.*, fourteen days prior to entry of the August 3, 2012 Order. In

⁵At the Hearing, Mr. Demers acknowledged that the pre-trial report had never been filed.

order to agree to a discovery period longer than 120 days, the parties were required to file (i) within 60 days after service of the summons and the Complaint, a discovery plan in substantially the same form as the proposed discovery plan attached to the Case Management Order; or (ii) prior to the close of the discovery period, a motion requesting an extension. (See *id.* at 3.) The parties took no such action.

The Court is informed only through the case docket and hearings before the Court. Likewise, the Court speaks only through its orders. Thus, Green Tree's assertion that there was an "agreement" between counsel that Green Tree would take additional time to respond to the Motion for Judgment on the Pleadings is wholly immaterial because (i) no such agreement appears on the case docket; and (ii) the Court never granted Green Tree an extension of time. As Green Tree acknowledges, this alleged agreement is not newly discovered evidence. (See Mot. for Recons. at 6.) Any discussion concerning an agreement to extend Green Tree's time to respond to a motion does not and cannot constitute the kind of "newly discovered evidence" referenced in and required by Rule 59(e) or *Henderson v. Walled Lake Consolidated Schools*.

Green Tree's second argument is that reconsideration is necessary in order to prevent a manifest injustice. As Green Tree concedes, however, because Green Tree failed to respond to paragraphs 43 through 69 of the Complaint, "[T]he Court was left with no alternative but to grant Plaintiff's Motion for Partial

Judgment on the Pleadings and only submit the issue of damages to arbitration on Counts Two - Five.” (*Id.* at 6 (emphasis added).)

Although not a model of clarity, the manifest injustice alleged by Green Tree appears to concern only Count One of the Complaint. Green Tree states that because it denied the allegations in paragraphs 41 and 42 of the Complaint, Count One should have been referred to arbitration for a determination of liability, as well as damages. The Court disagrees that the August 3, 2012 Order needs to be vacated to prevent a manifest injustice, finding no injustice in referring Count One to arbitration on the issue of damages only. In the August 3, 2012 Order, the Court recognized that Count One presented a conundrum because Green Tree’s responses and lack of response to the three paragraphs in this Count were inconsistent.

Count One presents somewhat of a puzzle, because Green Tree admitted paragraph 43, which states that the Debtor was harmed by Green Tree’s violations of the FDCPA and is entitled to statutory damages, actual damages and attorneys’ fees and costs pursuant to 15 U.S.C. § 1692k(a). However, Green Tree denies the allegations in paragraphs 41 and 42 of the Complaint. Since Green Tree has admitted that the Debtor is entitled to the damages set forth in paragraph 43, the Court will also compel arbitration on only damages in Count One.

(August 3, 2012 Order at 22 (emphasis added).) Green Tree requests the Court to “correct” the August 3, 2012 Order “to be consistent with the Plaintiff’s Motion and the Court’s Memorandum.” (Mot. for Recons. at 7.) The Court finds no inconsistency between its Memorandum Opinion and the August 3, 2012 Order. As set forth above, Green Tree admitted that the Debtor is entitled to the kinds

of damages specified in paragraph 43. Because Green Tree admitted that the Debtor is entitled to damages, the arbitrator is limited to determining the amount of such damages, but cannot make a determination regarding liability.

For the reasons set forth above, the Court finds that Green Tree has failed to set forth newly discovered evidence or establish manifest injustice. Accordingly, there is no basis for this Court to grant relief from the August 3, 2012 Order pursuant to Federal Rule of Civil Procedure 59(e).

B. Rule 60(b)

Rule 60(b) (incorporated into this proceeding by Federal Rule of Bankruptcy Procedure 9024) provides the grounds for relief from a final judgment, as follows:

(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.

FED. R. CIV. P. 60(b) (West 2012). The only ground in Rule 60(b) that Green Tree argues is "mistake, inadvertence, surprise, or excusable neglect."

The Motion for Reconsideration, as augmented by Mr. Demers's oral argument, demonstrates that Green Tree was neglectful or negligent, but does not provide any basis to find that such neglect was excusable. The standard for finding excusable neglect is set forth in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), where the Supreme Court held:

At the same time, reading Rule 9006(b)(1) inflexibly to exclude every instance of an inadvertent or negligent omission would ignore the most natural meaning of the word "neglect" and would be at odds with the accepted meaning of that word in analogous contexts.

This leaves, of course, the Rule's requirement that the party's neglect of the bar date be "excusable." . . . With regard to determining whether a party's neglect of a deadline is excusable, we are in substantial agreement with the factors identified by the Court of Appeals. Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 394-95 (n.12-14 omitted) (citation omitted) (emphasis added).

Applying the *Pioneer* test to the facts before this Court, the Court finds that the weight of these factors favors denial of the

Motion for Reconsideration. The only factor in Green Tree's favor is the lack of any apparent bad faith on the part of Green Tree.⁶ The other factors, however, weigh against Green Tree.

Green Tree contends that there would be minimal prejudice to the Debtor if the Court vacates the August 3, 2012 Order because:

The parties recently entered into a Pre-Trial report that was filed with the Court on June 19, 2012. Pursuant to the Pre-Trial Report, the parties have until December 15, 2012 within which to complete discovery. Furthermore, expert disclosure is not required until early 2013 with a proposed trial date of May or June 2013.

(Mot. for Recons. at 9.) As set forth above, the Pre-Trial Report to which Mr. Demers refers is a figment of his imagination. It simply does not exist on the docket.⁷ Consistent with the Case Management Order, the discovery period in this adversary proceeding concluded four days after the filing of the Motion for Judgment on the Pleadings. Thus, the Debtor would be greatly prejudiced if Green Tree is allowed to amend its Answer at this late date. Despite acknowledging in a footnote that it does not challenge the August 3, 2012 Order on the "issues contained in Count 6" (*id.* at 12 n.1), Green Tree's proposed amended answer ("Proposed Amended Answer"), which is attached to the Motion for Reconsideration, denies the allegations in Count Six of the Complaint. As a consequence, this Court finds that vacating the August 3, 2012

⁶The Court notes that, although Mr. Demers does not appear to have acted in bad faith in filing the Answer, he puts the blame for the allegedly mistaken Answer on a paralegal in his office.

⁷Furthermore, because confirmation of the Debtor's Chapter 13 Plan hinges upon resolution of Claim No. 1, which is the subject of Count Six, the Court would have been loath to permit this adversary proceeding to languish for more than a year even if the parties had proposed such a long discovery period.

Order and putting the issue of damages with respect to Count One and all issues in Counts Two through Six in dispute would prejudice the Debtor because (i) the Proposed Amended Answer would follow the conclusion of discovery in this case; and (ii) confirmation of the Plan would be unduly delayed by allowing Green Tree to dispute Count Six. During such delay none of the Debtor's creditors would receive any distribution on their claims.

Green Tree next argues that the length of the delay and its impact on this proceeding are minimal because the parties "have four months to complete discovery and do not anticipate a trial date until the Spring of 2013." (*Id.*) As stated above, despite Green Tree's argument to the contrary, the discovery period ended more than five weeks ago on July 20, 2012. The Debtor filed the Complaint on March 13, 2012, and Green Tree filed its Answer on March 23, 2012. To date, Green Tree has never moved for leave to file the Proposed Amended Answer although such request is buried deep in the Motion for Reconsideration. (*See id.* at 5, 7.) The Motion for Reconsideration (which includes the Proposed Amended Answer) was filed (i) more than sixteen weeks after Green Tree filed its Answer; and (ii) 25 days after the Debtor filed the Motion for Judgment on the Pleadings. Despite Green Tree's characterization to the contrary, this time period is a lengthy and unwarranted delay. Accordingly, the Court finds that granting Green Tree relief from the August 3, 2012 Order would (i) have a significant negative impact on the Debtor; and (ii) cause

substantial delay in resolution of this Adversary Proceeding and confirmation of the Debtor's Chapter 13 Plan.

The last *Pioneer* factor concerns "the reason for the delay, including whether it was within the reasonable control of the movant." *Pioneer*, 507 U.S. at 395. The reason for the delay was entirely within the control of Green Tree – *i.e.*, the "mistake" was simply that counsel for Green Tree did not check to see that the correct version of the Answer was properly uploaded. Although Green Tree insists that a different and more complete answer had been prepared prior to when it filed the Answer, it makes no sense to this Court that Green Tree's "draft" Answer would be simultaneously so complete and yet so deficient. As noted in the August 3, 2012 Order, the Answer on its face looks complete. The response to paragraph 42 does not appear at the end of a page. The Second Defense begins with numbered paragraph 43 and follows immediately after the response to paragraph 42 – without any indication that there is missing information or more material to be inserted. (See Ans. at 6.) To the extent the paralegal may have made a mistake in uploading the Answer, counsel for Green Tree is responsible for permitting such mistake to occur.

Green Tree also states, "Up to the time that Green Tree received Plaintiff's Motion [for Judgment on the Pleadings], Green Tree was unaware that the Answer it had filed did not contain responses to paragraphs 43-69 of Plaintiff's Complaint." (Mot. for Recons. at 3.) Taking this statement at face value – *i.e.*, that

counsel for Green Tree never read or checked the pleading he filed – Green Tree offers no reason why it did not immediately seek leave of the Court to file the Proposed Amended Answer. At the Hearing, Mr. Demers stated that he was waiting to discover why the wrong answer had been filed before he corrected the alleged mistake. However, the most natural reaction upon learning of such mistake would seem to have been for counsel to file both a response to the Motion for Judgment on the Pleadings and a motion for leave to file an amended answer *instanter*. Instead, Green Tree took no action whatsoever until it filed the Motion for Reconsideration. Green Tree offers no reason why it did nothing – for 25 days – to correct or amend the alleged “mistaken” Answer after Green Tree became aware, through the Motion for Judgment on the Pleadings, that paragraphs 43 through 69 had been admitted.

Green Tree posits:

[B]ecause Plaintiff’s motion was a dispositive motion, and leave of court to file the Motion had not been granted pursuant to the Court’s Adversary Case Management Initial Order, Green Tree believed that the matter would not be ripe for decision until Plaintiff was granted leave of Court. It was Green Tree’s belief that Once [sic] leave of Court was granted, Plaintiff’s Motion would be set for hearing.

(*Id.* at 4.) Unfortunately, counsel for Green Tree should have read the Case Management Order more carefully instead of relying on unsubstantiated “beliefs.” In the Case Management Order, only motions for summary judgment require prior leave of the Court.

(See Case Mgmt. Order at 5 (“A motion for summary judgment may be filed only if the movant first obtains leave of the Court.”).) A

motion for leave to move for summary judgment requires a joint stipulation of facts demonstrating that there are no facts in dispute. (See *id.*) Other dispositive motions, which are determined as a matter of law, do not require prior leave of the Court.

In the present circumstances, the Motion for Judgment on the Pleadings did not require leave of the Court because it was based on the pleadings, as filed; therefore, no stipulation of facts would be required. Notwithstanding Green Tree's stated belief, there is no requirement in the Case Management Order for a party to obtain prior leave of the Court to file a motion for judgment on the pleadings. Furthermore, the Court's usual practice is to rule on dispositive motions based on the papers, without a hearing. Therefore, Green Tree had no reason to believe that the Motion for Judgment on the Pleadings (i) required prior leave of the Court; or (ii) would be set for hearing.

Moreover, Green Tree asserts, "Green Tree believed that the hearing on the Motion to Compel and Plaintiff's Motion for Judgment on the Pleadings was going to be reset and Green Tree had additional time within which to respond to Plaintiff's Motion." (Mot. for Recons. at 10.) Green Tree's stated belief, however, is not supported by the record. First, the hearing scheduled by the Court was only on the Motion to Compel Arbitration. At the time the hearing was set, the Motion for Judgment on the Pleadings had not been filed. No hearing was ever noticed for the Motion for

Judgment on the Pleadings. As set forth above, it was in error for Green Tree to assume that a hearing would be set on the Motion for Judgment on the Pleadings since the Court generally decides dispositive motions based on the papers, without a hearing. Even if the Court had continued the hearing on the Motion to Compel Arbitration, the Court would have entered an order granting the Motion for Judgment on the Pleadings. As Green Tree itself acknowledges, the Court had "no alternative but to grant Plaintiff's Motion for Partial Judgment on the Pleadings." (*Id.* at 6.)

For the reasons set forth above, the Court finds that Green Tree has failed to establish "excusable neglect." Accordingly, there is no basis for this Court to set aside the August 3, 2012 Order pursuant to Federal Rule of Civil Procedure 60(b).

IV. CONCLUSION

Counsel for Green Tree states that the "wrong" Answer was mistakenly uploaded by a paralegal in his office. He acknowledges that he was unaware that the Answer, as filed, failed to respond to paragraphs 43 through 69 of the Complaint until the Debtor filed the Motion for Judgment on the Pleadings. Counsel for Green Tree was clearly negligent (i) in not checking to see that the appropriate Answer had been uploaded – especially when more than one version of the Answer allegedly existed; (ii) in not reading the Answer before it was filed; (iii) by failing to file a motion for leave to file an amended answer once the deficiency was brought

to his attention; (iv) by failing to respond to the Motion for Judgment on the Pleadings; and (v) in believing that he was not required to seek and obtain an extension of time to respond to the Motion, if such an extension was desired. Despite the catalog of negligent actions, none of these failures constitutes "excusable neglect"; they are merely ordinary neglect. These incidents of negligence were wholly within Green Tree's control. Green Tree's lack of diligence in failing to move for leave to amend the Answer and/or respond to the Motion for Judgment on the Pleadings has caused and will cause delay, which is prejudicial to the Debtor.

Green Tree cannot rely on "newly discovered evidence" as the basis for vacating the August 3, 2012 Order because Green Tree has pointed to no such evidence. To the extent Green Tree believes this Court's August 3, 2012 Order is inconsistent regarding Count One, this Court disagrees.

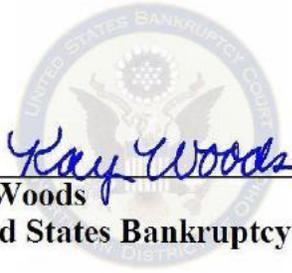
As a consequence, Green Tree has failed to present any reason to vacate the August 3, 2012 Order or to "reconsider" the substance of such Order. The equities do not support vacating the August 3, 2012 Order. Accordingly, the Court will deny the Motion for Reconsideration.

An appropriate order will follow.

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IT IS SO ORDERED.

Dated: August 31, 2012
12:01:33 PM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

AARON I. COLEMAN,

Debtor.

CASE NUMBER 11-41523

* * * * *

AARON I. COLEMAN,

Plaintiff,

ADVERSARY NUMBER 12-4034

v.

GREEN TREE SERVICING, LLC,

Defendant.

HONORABLE KAY WOODS

ORDER DENYING MOTION OF
GREEN TREE SERVICING LLC FOR RECONSIDERATION OR,
IN THE ALTERNATIVE, FOR RELIEF FROM JUDGMENT OF
THIS COURT'S AUGUST 3, 2012 ORDER

Before the Court is Motion of Green Tree Servicing LLC for

Reconsideration or in the Alternative Relief from Judgment of This Court's August 3, 2012 Order ("Motion for Reconsideration") (Doc. # 20) filed by Defendant Green Tree Servicing LLC ("Green Tree") on August 10, 2012. On August 3, 2012, this Court entered (1) Memorandum Opinion Regarding (i) Motion to Stay Adversary Complaint and Compel Arbitration; and (ii) Motion for Judgment on the Pleadings (Doc. # 16); and (2) Order (i) Granting Motion for Judgment on the Pleadings; and (ii) Granting, in Part, and Denying, in Part, Motion to Stay Adversary Complaint and Compel Arbitration (Doc. # 17) (collectively, "August 3, 2012 Order"). In the Motion for Reconsideration, Green Tree requests the Court, pursuant to Federal Rules of Civil Procedure 59(e) and 60(b), to reconsider and/or vacate the August 3, 2012 Order.

The Court held a hearing on the Motion for Reconsideration on August 30, 2012. David J. Demers, Esq. appeared on behalf of Green Tree and Philip D. Zuzolo, Esq. appeared on behalf of the Debtor.

For the reasons set forth in this Court's Memorandum Opinion Regarding Motion of Green Tree Servicing LLC for Reconsideration or, in the Alternative, for Relief from Judgment of This Court's August 3, 2012 Order entered on this date, the Court hereby:

1. Finds that Green Tree has failed to set forth "newly discovered evidence";
2. Finds that Green Tree has failed to establish "manifest injustice";
3. Finds that Green Tree has provided no basis for this

Court to grant relief from the August 3, 2012 Order pursuant to Federal Rule of Civil Procedure 59(e);

4. Finds that Green Tree has failed to establish "excusable neglect";
5. Finds that Green Tree has provided no basis for this Court to set aside the August 3, 2012 Order pursuant to Federal Rule of Civil Procedure 60(b); and
6. Denies the Motion for Reconsideration.

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