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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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U.S. BANKRUPTCY COURT
DIST OF SOUTH CAROLINA

IN RE:

Thomas Dorsett and Opal Dorsett,

Debtors.

C/A No. 99-04798/D

JUDGMENT

Chapter 13

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Debtors' Motion for Relief from Judgment or Order is granted; the Motion to Annul the Automatic Stay and Debtors' Return to said motion are reset for hearing on September 21, 1999, at 9:30 a.m.; and within ten (10) days of the issuance of a supplemental order Debtors shall pay Creditors' fees and costs incurred due to the prosecution of the default and in the defense of the Motion to Reconsider as set in that order. Within the next five (5) days, Creditors' counsel shall submit to the Court an itemized statement specifying the attorney's fees and costs incurred by Creditors in the prosecution of the default and in the defense of the Motion to Reconsider.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 8, 1999.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

SEP 8 1999

Walker *WKS*
DEBTOR, DEBTOR'S ATTORNEY TRUSTEE

LISA BAUGHMAN
Deputy Clerk

H to chambers

ENTERED

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IN RE:

C/A No. 99-04798/D

Thomas Dorsett and Opal Dorsett,

ORDER

Debtors.

Chapter 13

THIS MATTER comes before the Court upon a motion to reconsider, alter or amend, or alternatively for relief from judgment or order ("Motion to Reconsider")¹ filed by Thomas Dorsett and Opal Dorsett ("Debtors"). Based upon the evidence presented and the presentation of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Debtors filed for relief under Chapter 13 of the United States Bankruptcy Code on June 4, 1999.
2. On May 12, 1999, Peoples Federal Savings & Loan Association ("Peoples Federal") and Federal National Mortgage Association ("Federal National") (collectively "Creditors"), holders of claims secured by mortgages on real property located in Horry County, South Carolina, obtained a Default Order for Judgment, Foreclosure and Sale against the property.
3. Pursuant to said Order, the encumbered property was to be sold at public auction on June 7, 1999. Creditors assert that they were without notice of the Debtors' bankruptcy filing; therefore, the property was sold on June 7, 1999 with Peoples Federal bidding in the property.

¹ While Debtors base their Motion to Reconsider on both Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, the Court bases its conclusions of law on Rule 60(b).

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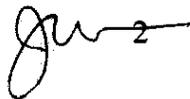
4. On June 23, 1999, Creditors filed a Motion to Annul the Automatic Stay (“Motion to Annul”).
5. As set forth in the Certificate of Service filed with the Court on June 23, 1999; Creditors served the Motion to Annul on the Debtors, counsel for the Debtors, and the Chapter 13 Trustee.
6. The deadline for filing objections to the Motion to Annul was July 6, 1999.
7. On July 8, 1999, Creditors filed an Affidavit of No Objection or Reply and a Proposed Order Annulling the Automatic Stay.
8. On July 9, 1999, the Debtors, through counsel, filed a Return to Motion for Relief from Automatic Stay.
9. This Court entered an Order Annulling the Automatic Stay on July 15, 1999.
10. On July 26, 1999, the Debtors, through counsel, filed the Motion to Reconsider.

CONCLUSIONS OF LAW

Rule 60(b) of the Federal Rules of Civil Procedure,² made applicable to cases under the Bankruptcy Code by Bankruptcy Rule 9024, provides in pertinent part: “On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . (1) mistake, inadvertence, surprise, or excusable neglect.” Whether to grant or deny a motion of relief from judgment under Rule 60(b) is within the sound discretion of the Court. See Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 810 (4th Cir. 1988).

The Order Annulling the Automatic Stay was entered by the Court as a result of the

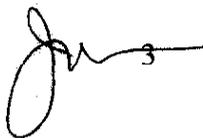
² Further references to the Federal Rules of Civil Procedure shall be by rule number only. Further references to the Federal Rules of Bankruptcy Procedure shall be by reference to bankruptcy rule number.



attorney's failure to timely file an objection to the Motion to Annul. The Motion to Annul was served on the Debtors' attorney on June 23, 1999 and was received on June 28, 1999. According to statements presented at the hearing on the Motion to Reconsider, the deadline for the objection was docketed incorrectly due to the inadvertence of the attorney's staff. The general rule is that "[w]hen the party is blameless and the attorney is at fault, the former interests control and a default judgment should ordinarily be set aside." *Id.* at 811; see also Heyman v. M.L. Marketing Co., 116 F.3d 91, 94 (4th Cir. 1997); Lolatchy v. Arthur Murray, Inc., 816 F.2d 951, 953 (4th Cir. 1986); United States v. Moradi, 673 F.2d 725, 728 (4th Cir. 1982).

In order to obtain relief from judgment under Rule 60(b), the Movant bears the burden to prove the following: (1) that the Rule 60(b) motion was made timely; (2) that the non-moving party will not be unfairly prejudiced by the setting aside of the judgment; and (3) that the movant has a meritorious defense. See Park Corp. v. Lexington Ins. Co., 812 F.2d 894, 896 (4th Cir. 1987).

The Court finds that the Debtors have made a sufficient showing of excusable neglect to set aside the order in accordance with Rule 60(b)(1). The Motion to Reconsider was made within ten (10) days of the entry of judgment. As to prejudice, the Court does not perceive a disadvantage to Creditors beyond the amount of attorneys fees incurred in the prosecution of the default and defense of the Motion to Reconsider. While setting aside the Order Annuling the Automatic Stay will, at least temporarily, render the foreclosure sale on the property void; apparently Peoples Federal was the highest bidder at the foreclosure, thus no third party will be affected by this Order. Furthermore, the Movant also met the burden of showing a meritorious defense. "A meritorious defense requires a proffer of evidence which would permit a finding for

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the defaulting party or which would establish a valid counterclaim.” Augusta Fiberglass, 843 F.2d at 812. In the context of a § 362 motion in a Chapter 13 case, this Court considers whether the secured creditor(s) can be adequately protected by payments under a reorganization plan and whether there is equity above the liens on the property. In this case, it appears that Debtors are current on all their payments under the plan, and that they have deposited a sufficient amount of money in their counsel’s trust account for post-petition payments as well as attorneys fees and costs incurred by the Creditors due to the default.

The Court also finds that any prejudice to Creditors can be mitigated by an award of the non-movant’s costs and legal fees incurred in connection with the default and the Rule 60(b) motion. The Court concludes that the appropriate sanction in this case is for Debtors to pay the fees and costs incurred by Creditors in the prosecution of the default and in the defense of the Motion to Reconsider.³

CONCLUSION

For the reasons stated within, it is therefore,

ORDERED that Debtors be granted relief from the Order Annulling the Automatic Stay entered on July 15, 1999; and that the Motion to Annul, filed June 23, 1999 and the Debtors’ Return to that Motion, filed July 9, 1999, is reset for hearing at 9:30 a.m. on September 21, 1999, at 1100 Laurel Street, Columbia 29201. It is further

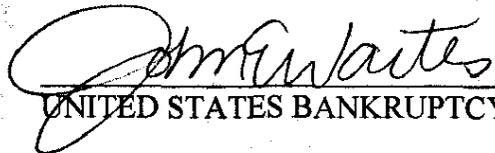
ORDERED that within ten (10) days of the issuance of a supplemental order, Debtors

³ The specific amount of the monetary award is to be determined by the Court upon submission of an itemized statement by Creditors’ counsel within the next five (5) days. On August 26, 1999, Creditors’ counsel submitted a statement reflecting the fees and costs incurred, but the figure specified by counsel apparently also included fees and costs related to the preparation and filing of the Motion to Annul.



pay Creditors' fees and costs incurred due to the prosecution of the default and in the defense of the Motion to Reconsider as set in that order. Within the next five (5) days, Creditors' counsel shall submit to the Court an itemized statement specifying the attorney's fees and costs incurred by Creditors in the prosecution of the default and in the defense of the Motion to Reconsider.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 8, 1999.



CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below:

SEP 9

Walker *WKS*
DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

LISA BAUGHMAN

Deputy Clerk

H to chambers