U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 05-14839

JUDGMENT

The relief set forth on the following pages, for a total of 2 pages including this page, is hereby ORDERED.

FILED BY THE COURT
06/18/2007

US Bankruptcy Court Judge
District of South Carolina

Entered: 06/18/2007

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Sarah A. Poole and Christopher B. Poole, Debtors.	C/A No. 05-14839-HB Chapter 13 **JUDGMENT**

Based upon the findings of fact and conclusions of law made in the attached Order, it is hereby ordered:

1. That the debtors' Motion to Reconsider Order Granting Motion for Relief from Stay is GRANTED.
2. That the Order Granting Relief to Irwin Mortgage Corp., and/or its successors and assigns, including but not limited to Midland Mortgage Corp., entered May 1, 2007, is hereby VACATED.
3. That the rights and responsibilities under the Settlement Order entered in this matter on August 1, 2006, including the anticipated default provisions, are hereby restored, with the following changes and additions: debtors shall make and Creditor shall accept the regularly scheduled mortgage payments for the months of June and July, 2007. Creditor shall provide debtors with the total amount of their delinquency within ten (10) days of the entry of the Order in this case and shall advise debtors of the monthly payment necessary, in addition to their regular mortgage payment, to cure that delinquency in six equal or near equal payments. The first payment shall be due August 1, 2007, and shall continue for five additional months thereafter.

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 05-14839

ORDER

The relief set forth on the following pages, for a total of 8 pages including this page, is hereby ORDERED.

FILED BY THE COURT
06/18/2007

US Bankruptcy Court Judge
District of South Carolina

Entered: 06/18/2007

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Sarah A. Poole and Christopher B. Poole, Debtors.	C/A No. 05-14839-HB Chapter 13 **ORDER GRANTING MOTION TO RECONSIDER AND VACATING ORDER GRANTING RELIEF FROM STAY**

This matter came before the Court for hearing on June 7, 2007, pursuant to the debtors' Motion to Reconsider Order Granting Motion for Relief From Stay, and the response thereto filed by Irwin Mortgage Corp., its successors and assigns, including but not limited to Midland Mortgage Corp. ("Creditor"). After careful consideration of the record and testimony, the Court enters the following Order:

FINDINGS OF FACT

1. On August 1, 2006, the Court entered a Settlement Order settling the motion of Creditor for relief from the automatic stay of 11 U.S.C. § 362(a). The Settlement Order provided that relief from the stay was denied on the condition that the debtors adhere to a payment schedule of $423.96 per month to be paid in addition to their regular mortgage payment, in order to cure their mortgage arrearage and pay reasonable attorney fees. It further provided that should the debtors fail to abide by the terms of the Order or should they default in any future monthly mortgage payment for more than 25 days, Creditor could seek *ex parte* relief from the automatic stay by the filing of an affidavit of noncompliance and a proposed order.

2. On April 30, 2007, Creditor filed an Affidavit of Default and proposed order indicating that the debtors were in default under the Settlement Order and requesting relief from the automatic stay. As a result the Court entered an Order granting relief from the automatic stay ("Order Granting Relief") on May 1, 2007.

3. On May 11, 2007, debtors filed a Motion to Reconsider. The debtors' Motion alleges that the Order Granting Relief should not have been entered as the debtors had spoken with a representative of Creditor and had been verbally given an alternative payment schedule for curing the arrearage, instead of making the payments as set forth in the Settlement Order. The Motion alleges that the debtors relied on this verbal agreement to their detriment and that Creditor should be equitably estopped from receiving the requested relief. The Motion therefore asks that the Order Granting Relief be reconsidered and vacated as improper and the stay reinstated.

4. Debtor Sarah A. Poole offered the only testimony. She testified that she was aware of the Settlement Order and made the first payment in August 2006 of $423.96 to the Creditor in addition to the regular mortgage payment. Thereafter, she realized she could not continue to make this payment and called Irwin Mortgage in September and spoke to "Jack," advising him that she and her husband were having difficulty with the cure payment. She asked him if they could pay less, and she testified that Jack said that they could in fact pay less and he provided a new cure payment amount and term. She testified that she asked him for reassurance that she would not lose her house if she complied with this new cure plan. She testified that Jack promised that she would not lose her house so long as she paid the stated amount in a timely fashion. She testified that Jack made statements indicating that he knew about the $423.96 cure payment and was

modifying it. She further testified that she relied on Jack's promise on behalf of Creditor, made the payment he told her to make and believed according to his representations that if she did as she was told, she would not lose her house. The debtor testified that at the time she was making these payments, she thought that Jack was the head of the Creditor's bankruptcy department, but now understands that he was not.

5. The debtors thereafter made a payment of $177. The debtor testified that this was not the amount Jack quoted to her of $123.88. She testified that she initially got the amount wrong, but called him in November when she was having further difficulty and he advised her of the correct amount and gave her an extension of time on the November payment. Thereafter, she consistently paid the sum of $123.88 for five (5) months allegedly according to his instructions. The debtor presented into evidence copies of her checks to document this testimony. She testified that she understood that the new payment schedule was a 12-month long arrangement.

6. Creditor argued that due to the total arrearage and fees, the payment of $123.88 would not pay the amount due within a 12-month period and, therefore, the agreement did not make mathematical sense and was therefore unlikely.

7. Despite the fact that the debtors were not paying the extra sum of $423.96 per month along with their mortgage payment, Creditor accepted the regular payment plus the reduced cure payment for five (5) months and did not return the funds nor declare the debtors in default.

8. Initially, Irwin Mortgage was the payee of debtors' mortgage. Sometime before February 2007, Midlands Mortgage became the payee of the mortgage payment and cure payment. The debtor testified that she initially made the payments to Irwin, but

began making the payments to Midlands as instructed. She also testified that she spoke to someone at Irwin who advised her that Jack was no longer with the company. That person also confirmed that there were notes in Irwin's computer system evidencing conversations between the debtor and Irwin regarding the cure provision and her account. Creditor's attorney did not present any evidence to the Court to contradict debtor's testimony, and her testimony was sufficiently credible.

9. The debtor testified that she was educated through high school, had no knowledge of bankruptcy law prior to the filing of this case, and that this is the first mortgage she has ever had. She testified that she sees the mortgage company as an authority and therefore paid what Creditor's representative told her to pay.

DISCUSSION AND CONCLUSIONS OF LAW

The debtors argue that that they relied on the monthly cure payment quoted by Jack and his instructions to their detriment and as a result the Order Granting Relief was entered. That Order was entered *ex parte* upon the Affidavit of counsel for Creditor upon the instructions of Creditor. The debtors assert that Creditor should be equitably estopped from attempting to hold debtors in default in this matter, and that as a result the request for *ex parte* relief was not warranted and that the Order Granting Relief should be reconsidered and vacated.

This Court previously dealt with facts somewhat similar to this case and discussed the doctrine of equitable estoppel:

> Generally, when a party represents an existing fact to another party who reasonably relies on the representation, the representing party cannot later deny the representation if permitting the denial would result in injury or damage to the relying party. See 4 Samuel Williston & Richard A. Lord, Williston on Contracts § 8:3 (4th ed. 1992). Stated differently, equitable estoppel inhibits a party from asserting a right because of "mischief" caused by that party's own fault, and the

> doctrine may arise even though the estopped party did not intend to relinquish or change any existing right. See Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 415 S.E.2d 384, 387 (S.C. 1992). Equitable estoppel has been used in instances where representations have been by words, conduct, or silence, and its use is designed to work as a protection or shield, not to bring a positive gain to a party. See Faulkner v. Millar, 460 S.E.2d 378, 381 (S.C. 1995); Hubbard v. Beverly, 15 S.E.2d 740, 741 (S.C. 1941); 4 Williston & Lord supra, at § 8:3. In South Carolina, the elements of estoppel as related to the estopped party are (1) conduct that amounts to a false representation or concealment of material facts, or, at least, conduct calculated to convey the impression that the facts are otherwise than and inconsistent with those that the party subsequently attempts to assert, (2) the intent or expectation that its representation will be acted upon by the other party, and (3) knowledge, actual or constructive, of the real facts. See Southern Dev. Land & Golf Co., Ltd. v. South Carolina Pub. Serv. Auth., 426 S.E.2d 748, 750 (S.C. 1993).

In re Burris, No. 01-00776-W, 2001 WL 1806982, at *2 (Bankr. D.S.C. Aug. 31, 2001).

In this case the conduct of Creditor, by and through its employee via telephone, was at least conduct calculated to convey the impression that the facts are inconsistent with those that the Creditor subsequently asserted. That is, the debtors received one set of facts on the phone, yet another set of facts were asserted in the Affidavit of Default. Secondly, the Court can clearly find an intent or expectation that the debtors would act as a result of the conversations, and finally, Creditor was clearly in a position to have knowledge of the real facts.

Additionally, to invoke estoppel, "[t]he party seeking estoppel must (1) lack knowledge and the means to obtain knowledge of the truth as to the facts in question, (2) rely upon the conduct of the party to be estopped, and (3) change his or her position prejudicially." Id. In this case the Court can clearly find (2) and (3) above. Regarding (1), the debtors certainly had knowledge of a written court order requiring them to adhere to a different cure plan. However, the debtors took the reasonable action of contacting the creditor by phone ─ the only feasible way to contact mortgage holders in most instances

— and received different information repeatedly with no reason to question its accuracy. Further, each time the debtors made a payment, it was evidently accepted. This fact would further place them in a position where they had no reason to question the information given by Creditor's representative.

Therefore, it appears that these debtors have met their burden of proving the elements of equitable estoppel regarding the verbal cure arrangement. Creditor did not present any evidence to contradict the debtor's testimony, other than a question regarding the feasibility of the cure plan. However, as the testifying debtor indicated, she lacks sophistication in finances and was predisposed to listen to what the Creditor's representative said without question, recognizing him as an authority. Her subsequent actions in compliance with Jack's instructions further support this testimony.

Since the Affidavit of Default resulting in the requested relief sets forth different facts than those relied upon by the debtors, the Order Granting Relief entered as a result cannot stand. That Order therefore should be vacated pursuant to Fed. R. Civ. P. 60(b)(1) & (6) due to both mistake and "any other reason justifying relief from the operation of the judgment," here, the application of the doctrine of equitable estoppel.[1] Further, as the debtors remain in arrears and many terms of the Settlement Order are now obsolete, the Court will allow the debtors to cure, over a six-month period, any remaining deficiency plus any additional deficiency that may have been caused by the Order Granting Relief.

It is therefore, ORDERED:

1. That the debtors' Motion to Reconsider Order Granting Motion for Relief from Stay is GRANTED.

[1] Fed. R. Civ. P. 60, entitled "Relief from Judgment or Order," is made applicable (with some exceptions which do not apply here) to cases under the Bankruptcy Code pursuant to Fed. R. Bankr. P. 9024.

2. That the Order Granting Relief to Irwin Mortgage and/or its successors and assigns, to include but not limited to Midland Mortgage Corp., entered May 1, 2007, is hereby VACATED.
3. That the rights and responsibilities under the Settlement Order entered in this matter on August 1, 2006, including the anticipated default provisions, are hereby restored, with the following changes and additions: debtors shall make and Creditor shall accept the regularly scheduled mortgage payments for the months of June and July, 2007. Creditor shall provide debtors with the total amount of their delinquency within ten (10) days of the entry of this Order and shall advise debtors of the monthly payment necessary, in addition to their regular mortgage payment, to cure that delinquency in six equal or near equal payments. The first payment shall be due August 1, 2007, and shall continue for five additional months thereafter.