UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 02-01266-W
Kisha M. Crawford,	**JUDGMENT**
Debtor.	Chapter 13

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Kisha M. Crawford's ("Debtor") Motion to Vacate the March 14, 2002 Order that granted Blanton Supplies, Inc. ("Blanton") relief from the automatic stay is granted. Debtor must immediately pay Blanton the attorneys' fees Blanton incurred in exacting the default judgment and defending the Motion to Vacate in the amount of $1,500.00. The Court may set a hearing to address Blanton's §362 motion upon further consultation with the parties.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
May 22, 2002.

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:

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DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KAREN R. WEATHERS

Deputy Clerk

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 02-01266-W
Kisha M. Crawford,	**ORDER**
Debtor.	Chapter 13

THIS MATTER comes before the Court upon Kisha M. Crawford's ("Debtor") Motion for Relief from Default Judgment (the "Motion to Vacate"). Debtor seeks to vacate a judgment this Court entered on March 14, 2002 that granted Blanton Supplies, Inc. ("Blanton") relief from the automatic stay against Debtor. As its basis for vacating the March 14, 2002 Order, Debtor argues the default judgment was entered because of excusable neglect by her counsel in failing to respond to Blanton's motion timely. Blanton objects to the Motion to Vacate, arguing (1) it properly received relief from the automatic stay, (2) Debtor has not shown a meritorious defense as required by Federal Rule of Civil Procedure 60(b), and (3) the setting aside of the Order would unfairly prejudice Blanton.[1] In addition, Blanton asserts that it should be reimbursed for fees and costs it incurred in defending the Motion to Vacate. After considering the pleadings and counsel's arguments, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52, applicable in bankruptcy proceedings by Bankruptcy Rule 7052.[2]

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[1] 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 the Bankruptcy Rule number only.

[2] The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any of Conclusions of Law of constitute Findings of Fact, they are so adopted.

FINDINGS OF FACT

1. On May 1, 2000, Blanton received an Order of Sale directing a foreclosure of Debtor's property upon which Blanton holds a mortgage. A sale date was set for June 5, 2000; however, on that date, Debtor filed her first bankruptcy case, C/A No. 00-04885-D. The scheduled sale did not occur.

2. On December 7, 2001, the first case was dismissed.

3. After the dismissal of the first case, the foreclosure sale was rescheduled for February 4, 2002.

4. Debtor filed her second and current Chapter 13 bankruptcy case on February 1, 2002.

5. On February 4, 2002, the foreclosure sale was held without notice of Debtor's second bankruptcy case. At the sale, Blanton purchased the mortgaged property; however, because of Debtor's bankruptcy, title has not been transferred to Blanton.

6. Blanton filed a Motion for Relief from Stay (the "Motion for Relief") on February 27, 2002. In its Motion for Relief, Blanton alleges that, pursuant to 11 U.S.C. §362(d)(1), Debtor cannot provide Blanton with adequate protection because Debtor lacks equity in the subject property and because Debtor has not made any postpetition adequate protection payments to Blanton.[3] In addition, Blanton argues that, pursuant to §362(d)(2), Debtor lacks equity in the property and that the subject property is not necessary for an effective reorganization.

7. As set forth in the Certificate of Service filed with the Court on February 27, 2002, Blanton served the Motion for Relief on Debtor, Debtor's counsel, and the Chapter 13 Trustee.

8. The deadline for filing objections to the Motion for Relief was March 12, 2002.

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[3] Further references to the Bankruptcy Code shall be by section number only.

9. On March 13, 2002, Blanton filed a Certification of No Objection with the Court as well as a proposed order granting it relief from the stay.

10. Also on March 13, 2002, Debtor filed her Response to Motion for Relief from Automatic Stay.

11. On March 14, 2002, the Court entered an Order granting Blanton relief from the automatic stay.

12. On April 15, 2002, Debtor filed the Motion to Vacate the March 14, 2002 Order.

CONCLUSIONS OF LAW

To set aside a judgment, a party must rely on Rule 60(b), applicable in bankruptcy proceedings by Bankruptcy Rule 9024, and its two-step process. See Hovis v. Grant / Jacoby, Inc. (In re Air South Airlines, Inc.), 249 B.R. 112, 115 (Bankr. D. S.C. 2000). First, the Rule 60(b) movant has the burden of proving the following: (1) it timely filed the Rule 60(b) motion; (2) the non-moving party will not be unfairly prejudiced by the setting aside of the judgment; and (3) it has a meritorious defense to the action. See Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 811 (4th Cir. 1988); Air South, 249 B.R. at 116; In re Dorsett, 1999 WL 33486072 at *2 (Bankr. D. S.C.). Once the requirements of the first prong have been met, the moving party must then satisfy one of the six grounds for relief as set forth in Rule 60(b). See Air South, 249 B.R. at 116.

In this case, Debtor filed her Motion to Vacate thirty-two days after the Court entered the March 14, 2002 Order, and the Court believes this filing was timely under these circumstances and satisfies Rule 60(b), which requires a movant to file its motion no more than one year after the judgment was entered when the movant relies upon mistake, inadvertence, surprise, or

excusable neglect as its ground for relief from judgment. See id. at 116 (finding a motion to reconsider was timely filed when it was filed thirty-seven days after the entry of default).

Next, Debtor must prove that Blanton will not be unfairly prejudiced if the judgment were set aside. Blanton argues that, if relief were granted to the Debtor, Blanton will suffer prejudice as Debtor's multiple bankruptcy filings have delayed Blanton from pursuing its remedy to foreclose against the subject property. In addition to delay, Blanton also cites the attorneys' fees it has incurred in pursuing these foreclosure actions as prejudice it would endure if the March 14, 2002 Order were vacated. The Court agrees that Blanton has suffered prejudice to the extent that it has incurred attorneys' fees in exacting the default judgment and responding to Debtor's Motion to Vacate, and, if the Order were vacated, the Court would condition the vacation upon Debtor paying Blanton's attorneys' fees. Aside from these costs, however, the Court does not believe that Blanton will be unfairly prejudiced if the judgment were set aside and Blanton had to prosecute its §362 motion. Previously, this Court has ruled that a creditor who obtained relief from the automatic stay by a default judgment would not suffer prejudice if it had to prosecute its motion. See Dorsett, at *2. Specifically, in Dorsett, the Court noted that one factor leading to its conclusion that no prejudice would be suffered was because the non-moving party was both a mortgage holder and the highest bidder at a foreclosure sale that was held without notice of the debtor's bankruptcy case. Because, in part, no third parties were impacted by relieving the default judgment, the Court granted relief from the judgment. The Court believes the facts of the case at bar are similar as Blanton is a mortgage holder who was the highest bidder on the property at the foreclosure sale. Accordingly, the Court concludes that Debtor satisfies this element and that Blanton will not suffer prejudice if the Order were vacated. See also In re

Fuller, 111 B.R. 660, 662 (Bankr. S.D. Ohio 1989) (noting that mere delay in satisfying a plaintiff's claim is not sufficient prejudice to require a denial of a motion to set aside a default judgment).

In addition, Debtor must have a meritorious defense to the action, and, to satisfy this element, the movant must "make a proffer of evidence which would permit a finding in his or her favor. (citation omitted) A proffer of evidence requires more than a mere claim of a defense; rather, it involves the assertion of facts or law by testimony or affidavit, on which the defense is based." Air South, 249 B.R. at 116 (citing In re Baskett, 219 B.R. 754, 760-61 (6th Cir. BAP 1998; Holland v. Virginia Lee Co., Inc., 188 F.R.D. 241, 249 (W.D. Va. 1999)). Although the movant must assert a meritorious defense, the Court does not consider or weigh the likelihood of the proffered defense's success on the merits; rather, the Court focuses solely on whether the movant proffers a defense that is good at law. See Fuller, 111 B.R. at 662 (Bankr. S.D. Ohio 1989) (citing United Coin Meter Co. v. Seaboard Coastline Railroad, 705 F.2d 839, 845 (6th Cir. 1983). At the hearing, Debtor proffered defenses to the underlying §362 motion, claiming she would provide adequate protection to Blanton by making a stream of payments under her reorganization plan and that the property was necessary for her reorganization because the subject property is land contiguous to her residence.[4] Based on this proffer, the Court believes Debtor has met her burden.[5]

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[4] The Court believes that relief from stay under §362(d)(2) may turn on the issue of whether the property is necessary for an effective reorganization but notes that the parties did not provide sufficient information at the Rule 60(b) hearing for the Court to conclude that issue.

[5] The Court notes that, although Debtor's defenses satisfy the requirements under Rule 60(b), this fact does not necessarily mean that she will prevail on the merits.

Having met the requirements of the first prong, Debtor must next establish one of the grounds for relief under Rule 60(b). Debtor argues that she is entitled to relief pursuant to Rule 60(b)(1) because the failure to respond timely to the Motion for Relief stems from mistake, inadvertence, surprise, or excusable neglect. Both parties stipulate that the Motion to Vacate is based upon Debtor's counsel's mistake or neglect; consequently, at the hearing, no evidence was presented to prove Debtor's counsel's mistake or neglect. In this Circuit, sufficient cause exists to set aside a judgment under Rule 60(b)(1) (provided the three elements of the first prong have been proven) when the movant is blameless and the attorney is at fault in causing the default judgment. See Augusta Fiberglass, 843 F.2d at 811 (setting aside a default judgment where the movant's attorney handled an amended complaint carelessly and did not file an answer); Dorsett, at *2 (granting the motion to reconsider a default judgment where the attorney's staff mistakenly docketed the deadline for objection and counsel did not timely respond to the creditor's motion for relief from the stay).[6]

As the prongs of the two-part test are met, the Court, therefore

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[6] The Court also considered a recent case that dealt with debtor seeking relief pursuant to Rule 60(b)(1) from a default judgment that granted her creditor relief from the automatic stay. See In re Kirkendall, 2000 WL 33712221 (Bankr. D. Idaho). In Kirkendall, the court denied the debtor's motion to set aside the order, and this Court believes distinguishing facts explain why the Idaho Bankruptcy Court reached a different result than issued here. In Kirkendall, the debtor filed no response to the motion for relief from the stay in a four month period. See id. at *3. In contrast, Debtor filed her response one day late in the case before this Court. Also, the Kirkendall debtor offered no explanation or reason for not responding to the motion and filed her motion to set aside the order on the eve of foreclosure. See id. As noted previously, Debtor timely filed her Motion to Vacate in this case and explained that it was solely her attorney's neglect or mistake that caused the delay in responding. Further, in Kirkendall, the encumbered property was sold at a foreclosure sale to a third party; in contrast, in the case before this Court, no third party purchased the subject property at the foreclosure sale. See id. Finally, in the case before the Court, Debtor's Plan has been confirmed, and, under the Plan, Blanton's interests could be considered to be adequately protected by the plan payments it receives.

ORDERS that the March 14, 2002 Order, which granted Blanton relief from the automatic stay, is vacated.

IT IS FURTHER ORDERED that Debtor shall immediately pay Blanton the attorneys' fees it incurred in exacting the default judgment and in defending the Motion to Vacate in the amount of $1,500.00.

IT IS FURTHER ORDERED that a hearing may be set to address Blanton's §362 motion upon further consultation with the parties.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
May 22, 2002.

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:

mailed

MAY 24 2002

Pennington

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KAREN R. WEATHERS
Deputy Clerk