UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 13
	:	
LEANNA KWIATKOWSKI,	:	Bankruptcy No. 01-10070DWS
	:	
Debtor.	:	

MEMORANDUM OPINION

BY: DIANE WEISS SIGMUND, Chief Bankruptcy Judge

Before the Court is the Debtor's Motion to Reopen Chapter 13 Case (the "Motion"). The Chapter 13 trustee (the "Trustee") objects to the Motion, correctly observing that it is improperly framed as a motion to reopen. The Debtor's Chapter 13 case was dismissed on April 7, 2005. The Debtor now seeks reinstatement of the case to complete the Chapter 13 plan and receive a discharge. As the Debtor did not appear for the hearing on the Motion and her counsel did not make an evidentiary record, I offered him the opportunity to submit a stipulation of facts which he prepared with the Trustee (the "Stipulation").[1] It has been filed along with post-hearing briefs that explicate the parties' respective positions. For the reasons that follow, the Motion will be granted with specific conditions as outlined below.

[1] Both the Debtor's counsel and the Trustee were reciting facts to me. The stories were as noted below, different as to what was required to complete this case. I refused to entertain these attorney proffers and directed that a stipulated record be prepared and submitted if possible.

BACKGROUND

Debtor's Chapter 13 case was filed on January 3, 2001. Stipulation ¶ 1. Her Chapter 13 plan was confirmed on August 16, 2001. Id. ¶ 2. During the first two years of the case the Trustee filed three motions to dismiss for, inter alia, failure to make plan payments.[2] Her case was dismissed for the first time on January 30, 2003. Doc. No. 55. A motion to reinstate was granted on March 20, 2003. There were further Trustee motions to dismiss filed on September 18, 2003 and January 9, 2004, the latter of which was resolved by an abatement of five months of missed payments which increased the monthly payment to the Trustee effective April 2004. The next Trustee's motion to dismiss was filed on February 7, 2005. Debtor responded with a further modification motion because she discovered that the mortgage company had paid off the remaining real estate taxes, thereby reducing the plan requirement for that creditor. Stipulation ¶ 9-11. Before the modification motion could be heard, the Trustee's dismissal motion was scheduled. On April 7, 2005 the case was dismissed for failure to make plan payments, mooting the modification motion. Id. ¶ 12-13. Debtor did not contest the dismissal motion.

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[2] I shall take judicial notice of the docket entries in this case. Fed.R.Evid. 201, incorporated in these proceedings by Fed.R.Bankr.P. 9017. See Maritime Elec. Co., Inc. v. United Jersey Bank, 959 F.2d 1194, 1200 n.3 (3d Cir. 1991); Levine v. Egidi, 1993 WL 69146, at *2 (N.D. Ill. 1993); In re Paolino, 1991 WL 284107, at *12 n. 19 (Bankr. E.D. Pa. 1991); see generally In re Indian Palms Associates, Ltd., 61 F.3d 197 (3d Cir. 1995). While a court may not take judicial notice *sua sponte* of facts contained in the debtor's file that are disputed, In re Augenbaugh, 125 F.2d 887 (3d Cir. 1942), it may take judicial notice of adjudicative facts "not subject to reasonable dispute ... [and] so long as it is not unfair to a party to do so and does not undermine the trial court's factfinding authority." In re Indian Palms Assoc., 61 F.3d 197, 205 (3d Cir. 1995) (citing Fed.R.Evid. 201(f) advisory committee note (1972 proposed rules).

On July 1, 2005 this Motion was filed. At the initial hearing the Debtor appeared and indicated that the untimely request for further bankruptcy relief was occasioned by her interim efforts to refinance her home out of bankruptcy. As she was unsuccessful, she then returned to the court to complete her plan. While the Trustee objects to this request as untimely, I indicated I would be prepared to consider a reinstatement since Debtor is so close to completion of her plan on the condition that she prove that she could accomplish her goal at this juncture. To that end she filed a proposed plan and amended schedules I and J. The proposed 59 month plan continues existing payments of $699 per month.

Debtor's counsel argues that the reduction of the tax claim enables her to amend her plan to pay the balance of the secured and priority creditors in full. While the plan provides for the pro rata payment of unsecured creditors, the plan was not funded to actually pay any unsecured claims. Stipulation ¶ 8. The Trustee disagreed with the Debtor's analysis contending that the Debtor had missed payments in an amount greater than the savings from the reduced claim. It was at this point that I insisted that the parties review the Trustee's payment and claim records and attempt to agree on the amount of funds necessary to complete the plan. The resulting Stipulation sets that number at $5,736.18. Stipulation ¶ 15.[3] The last payment under the plan if the case is reinstated must be made by January 2006.[4] 11 U.S.C. § 1322(d). I advised Debtor's counsel to ensure that Debtor

[3] Notwithstanding the Stipulation, the Trustee in his brief states that $6,214.69 is needed to pay the remaining balances to all secured and priority claimants. Given the Stipulation, I will find that the required payoff of the Plan is $5,736.18.

[4] For reasons that I do not understand, Debtor's amended plan is for 59 months which would require that the last payment be made in December 2005. As she could remain in bankruptcy for (continued...)

escrowed the plan payments during the pendency of this contested matter. She had done so for August and September but apparently had not reserved the funds due for April through July.

DISCUSSION

The Debtor argues that I should reopen the case to accord relief to the Debtor because she is not guilty of fraud and no prejudice will be suffered by a creditor. She states that no cause need be demonstrated to obtain this relief. As support for these contentions she relies on 11 U.S.C. § 350 and decisions relating to fully administered Chapter 7 cases reopened to deal with claim issues. However, Debtor's case was not fully administered; it was dismissed for cause. The legal standard she posits which pertains to reopening a case is simply incorrect as the Trustee has pointed out.[5]

The Debtor's motion is a request to reinstate the case, and it will be treated as such. While such motions are commonplace in bankruptcy jurisprudence, the legal authority for granting this relief is not apparent.[6] Reinstatement is not based on any Code granted right.

(...continued)
another month, I will assume a 60 month plan for the purpose of determining whether the case can feasibly be completed.

[5] Additionally, reopening a case and reinstating a case have different consequences. The former does not reinstate the automatic stay whereas the latter will. Diviny v. Nationsbank of Texas, N.A. (In re Diviny), 225 B.R. 762, 770 (10th Cir. BAP). Clearly Debtor seeks the protection of reinstatement.

[6] The Trustee states in one sentence that the Motion is untimely and cites Rule 8002 dealing with the time to appeal. While this suggests that he believes the Debtor's sole option was to file
(continued...)

The order of dismissal is a judgment. Relief from a judgment is potentially available under Federal Rule of Procedure Rule 59 or 60 incorporated in bankruptcy cases by Federal Rule of Bankruptcy Procedure 9023 and 9024, respectively. In re Noble, 2002 WL 31778056 (Bankr. S.D. Tex. Sept. 26, 2002).

Some debtors seek relief from a dismissal order by filing a motion to reconsider under Rule 59(e). Such a motion must be filed within ten days of the order for which reconsideration is sought. Federal Rule of Civil Procedure 59(e).[7] Moreover the purpose of a motion for reconsideration is "to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 908 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986). The Motion cannot be granted under Rule 59(e) as it is untimely and there is no error of fact or law alleged nor newly discovered evidence presented. Rather the Motion is based on facts that occurred after the judgment was entered. As I have made clear in prior rulings, I will not grant a motion to reconsider based on subsequent circumstances such as the ability to now cure a default.

(...continued)
an appeal of the dismissal order, absent an exposition of his position I cannot entertain it further. This is not an appeal and while the Debtor has not found the proper standard for the relief she seeks, neither has the Trustee. If the Trustee believes that reinstatement motions are improper, he should provide some authority as well as an explanation as to why he supports that relief in many cases.

[7] Fed.R.Civ.P. 59(e) provides as follows:

> "(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment."

Rule 60 also provides for relief from a judgment and has a longer period for filing such motion. A Rule 60 motion would be timely if filed within a reasonable time.[8] I have already concluded that Debtor's belief that she had arranged a refinance of her mortgage so as not to require further bankruptcy relief supported, albeit barely, her inaction in seeking relief for three months until the mortgage application was rejected. However, Debtor has not indicated which of the Rule 60 grounds are implicated by the facts here. The order of dismissal was properly entered as the Debtor had not made post-petitions payments to the Trustee. There is no dispute on that point. Thus, I find no grounds under Rule 60(b)(1), (2), (3), (4) or (5). Indeed at least one court has opined that Rule 60 is not a vehicle to allow the post-deadline curing of defaults. It reasoned that:

> the Court does not see the chapter 13 bankruptcy process as one in which a debtor initially restructures his debt only periodically to default and then to cure defaults when threatened by dismissal of the case. If the Debtor cannot consummate the restructure that he himself or she herself proposed, the Court does not understand the bankruptcy process to provide five years of continuing supervision of attempts to cure defaults. Therefore, on its face the Court does not see the post-deadline curing of defaults (whether the deadline is a hearing date or monthly plan payments to the Chapter 13 Trustee) as grounds for relief under Rule 60.

Id. at 2002 WL 31778056, at *1. I generally agree with this view. However, its rigid application may work an injustice where there are exceptional circumstances that warrant relief. Authority to grant relief under Rule 60(b)(6) ("any other reason justifying relief from the operation of the judgment") provides the flexibility to consider reinstatement of a case

[8] This time is limited to one year with respect to Rule 60(b)(1), (2) and (3).

where it is in the best interests of the debtor and her creditors to resume a case rather than to start all over.

Absent a history of bankruptcy abuse, a debtor is not generally precluded from filing a new Chapter 13 case. Reinstatement is a pragmatic response to a dismissal that occurs late in the bankruptcy case when it often makes more sense to effect a cure of the arrears in the present case than pay them over another five years. Accordingly, the Trustee often supports reinstatement and indeed did at least once before in this case. The unwillingness to do so now appears to stem from the prior defaults under the plan which necessitated multiple motions to dismiss. The Trustee appears to be stating that "enough is enough." While I am sympathetic to the Trustee's position, I also am mindful that the Debtor allowed her case to be dismissed because she believed she could refinance her mortgage. While that may have been an unwise strategy, refusal to consider reinstatement when the plan is months from completion strikes me as harsh in this instance. However, the premise of any reinstatement must be cure of all arrears and assurance that the plan can be completed.

Debtor's plan funding has decreased by $3,460.87 as a result of the payment by her mortgage company of the real estate taxes provided for in the plan. Taking that fact into account, she has a remaining obligation of $5,736.18 according to the Stipulation. Debtor's counsel stated that he is holding the August and September plan payments in escrow. While he did not state the amount he is holding, the payments are $699.00 per month so I will assume he has $1,398 in escrow. Subtracting that sum from $5,736.18 leaves a plan balance of $4,338.18 to be paid over four months (assuming a 60 month plan). Trustee payments would have to increase to $1,100 per month versus the $699 contemplated

by the amended plan. The Debtor's amended schedules I and J indicate disposable income of $1,200. As the Debtor did not testify, the credibility of those documents was not tested. They appear to fly in the face of Debtor's historic difficulty in making payments of $699, a little more than half the required new payment. However, if the risk of non-payment can be minimized, I am prepared to allow her to reinstate her case.

In recognition of Debtor's payment history, reinstatement will be allowed but only on the following stringent conditions. Debtor's counsel will turn over to the Trustee $1,398 representing the August and September payments. Debtor shall make a payment of $1,100 for October. As she was directed to escrow October's payment and knew that her remaining obligation was $5,736.18, she should be prepared to pay this sum forthwith. A wage order will be entered to ensure payment of the remaining three months. As the proposed Second Amended Plan is patently underfunded, a Third Amended Plan shall be filed consistent with the foregoing Memorandum Opinion. When these conditions are met and certified by the Debtor, the case will be reinstated provided there is no objection thereto by the Trustee. If there is no certification of compliance within ten (10) days or the certificate does not establish that all conditions have been met, the Motion will be denied.

An Order shall be entered so providing.

Diane W. Sigmund

DIANE WEISS SIGMUND
Chief U.S. Bankruptcy Judge

Dated: October 24, 2005

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 13
	:	
LEANNA KWIATKOWSKI,	:	Bankruptcy No. 01-10070DWS
	:	
Debtor.	:	

ORDER

AND NOW, this 24th day of October 2005, upon consideration of the Debtor's Motion to Reopen Chapter 13 Case (the "Motion") and the Chapter 13 trustee objection thereto, and after notice and hearing and for the reasons set forth in the accompanying Memorandum Opinion;

It is hereby **ORDERED** that the Motion is **GRANTED** under the following conditions:

1. Debtor's counsel will turn over to the Trustee $1,398 representing the August and September plan payments.

2. Debtor shall make a payment to the Trustee of $1,100 for October.

3. Debtor shall seek a wage order to ensure payment of the remaining three months of plan payments to the Trustee.

4. A Third Amended Plan shall be filed consistent with the foregoing Memorandum Opinion.

5. On or before **November 3, 2005**, Debtor's counsel will file a certification that these conditions have been met and serve a copy on the Trustee. If the Trustee does not object to the certification within five (5) days, this case shall be

reinstated without further order. If there is no timely certification of compliance or the Trustee files an objection indicating that the conditions have not been met, the Motion will be denied. The Trustee shall submit a proposed order with his objection so stating so that the record is clear.

Diane W. Sigmund

DIANE WEISS SIGMUND
Chief U.S. Bankruptcy Judge

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