


ORDERED.

Dated: October 30, 2015


Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

DENISE ORLANDO,

Chapter 7
Case No. 6:14-bk-07900-CCJ

Debtor.

_____ /

ORDER DENYING MOTION TO VACATE

This case came before the Court on September 16, 2015, for consideration of the Motion to Vacate the Order Granting Debtor's Verified Motion to Strip Lien and Determine Secured Status of Citibank, Inc. (Doc. No. 33; the "60(b)(4) Motion") filed by Citibank, Inc. ("Creditor"). The Debtor filed a Response to Creditor's Motion to Vacate Order to Strip Lien and Determine Secured Status of Citibank, Inc. (Doc. No. 46; the "Response"). Having considered the pleadings and the record in this case, the Court denies the 60(b)(4) Motion for the reasons set forth below.

Background

The Debtor filed a Voluntary Petition for relief under Chapter 7 of Bankruptcy Code on July 10, 2014. On September 9, 2014, the Debtor filed a Verified Motion to Strip Lien and Determine Secured Status of Citibank¹ (the “Lien Strip Motion”) on negative notice, and served the Lien Strip Motion by US Mail to one of the Creditor’s many known addresses. When no party filed a timely response to the Lien Strip Motion within the thirty-day negative notice period, the Court entered the Order Granting Debtor’s Verified Motion to Strip Lien and Determine Secured Status of Citibank² (the “Lien Strip Order”).

On November 21, 2014, the Creditor filed the 60(b)(4) Motion, seeking to vacate the Lien Strip Order pursuant to Federal Rule of Civil Procedure 60(b)(4) on the grounds that Creditor was not properly noticed under Federal Rule of Bankruptcy Procedure 7004(h). On December 12, 2014, the Clerk’s Office scheduled a preliminary hearing on the 60(b)(4) Motion for January 14, 2015, and the Creditor was directed to prepare, file, and serve the notice of hearing on the 60(b)(4) Motion within three days. The Clerk’s Noticing Instructions warned that failure to comply would result in cancellation of the hearing on the 60(b)(4) Motion. On December 17, 2014, when the Creditor had still not filed a notice of hearing, the Clerk’s Office reminded Creditor to do so. Because the Creditor failed to comply, the Clerk’s Office cancelled the hearing on the 60(b)(4) Motion on December 19, 2014.

The Creditor waited approximately *five months*, until May 13, 2015, to request another hearing date on the 60(b)(4) Motion. On June 29, 2015, the Clerk’s Office scheduled a preliminary hearing on the 60(b)(4) Motion for July 22, 2015. The Clerk’s Office, again, directed the Creditor to prepare, file, and serve a notice of hearing on the 60(b)(4) Motion within three days, and warned that failure to comply would result in cancellation of the hearing. On

¹ Doc. No. 10.

² Doc. No. 22.

July 2, 2015, the Clerk's Office reminded Creditor to file the notice of hearing because it, again, had not complied with the Noticing Instructions. When the Creditor still failed to file the notice of hearing, the Clerk's Office cancelled the hearing on the 60(b)(4) Motion on July 7, 2015.

On July 9, 2015, the Creditor made another request for a hearing on the 60(b)(4) Motion. The Clerk's Office scheduled a preliminary hearing on the 60(b)(4) Motion for September 16, 2015. On this third instance, the Creditor complied with the Clerk's Noticing Instructions and timely filed and served a notice of hearing.

By the 60(b)(4) Motion, the Creditor seeks to vacate the Lien Strip Order pursuant to Federal Rule of Civil Procedure 60(b)(4), arguing that the Creditor was not given proper notice under Federal Rule of Bankruptcy Procedure 7004(h). The Creditor asserts that Rule 7004(h) required the Debtor to serve the Lien Strip Motion by certified mail to an officer of the Creditor. By the Response, the Debtor argues that a motion under Rule 60(b) must be made within a "reasonable time," and that the Creditor did not act within a reasonable amount of time after it continuously failed to serve a notice of hearing on the 60(b)(4) Motion, which was originally scheduled for hearing on January 14, 2015. The Debtor concedes that the Creditor was not properly served in accordance with Rule 7004(h), but contends that, had the hearing occurred on the date it was originally scheduled, the Debtor would not have been prejudiced by vacating the Lien Strip Order, as the law in effect at the time would have permitted the Debtor to refile the Lien Strip Motion.

Discussion

Motions to strip liens require service in accordance with Rule 7004 of the Federal Rules of Bankruptcy Procedure.³ Rule 7004(h) specifically applies to insured depository institutions and provides, in relevant part, that service of process on a federally insured depository institution

³ *In re Braden*, 516 B.R. 672, 675 (Bankr. S.D. Ga. 2014).

“shall be made by certified mail addressed to an officer of the institution....”⁴ Where a debtor fails to serve an insured depository institution in a manner that comports with Rule 7004(h), courts have found that such improper service renders any resulting judgment void for lack of jurisdiction.⁵

Rule 60(b) of the Federal Rules of Civil Procedure lists the grounds for which the court may, on motion and “just terms,” relieve a party from a final judgment or order.⁶ Under Rule 60(b)(4), one such ground exists when a judgment is void.⁷ Pursuant to Rule 60(c), a motion under Rule 60(b) must generally be made “within a reasonable time.”⁸ The Eleventh Circuit, however, is one of several circuits⁹ which has held that the time within which a Rule 60(b)(4) motion may be brought is not constrained by reasonableness.¹⁰ Nevertheless, courts have long noted that there may be “exceptional situations” where a Rule 60(b)(4) motion might be denied for lack of diligence.¹¹

It is undisputed in the present case that the Creditor is an “insured depository institution.” As such, the Creditor is entitled to be served in accordance with the heightened service requirements of Rule 7004(h). Yet, the Debtor neither served the Creditor with the Lien Strip

⁴ Fed. R. Bankr. P. 7004(h).

⁵ See *PNC Mortgage v. Rhiel*, No. 2:10-CV-578, 2011 WL 1043949, at *4 (S.D. Ohio Mar. 18, 2011); see also *In re Miller*, 428 B.R. 791, 794 (Bankr. S.D. Ohio 2010) (order confirming modified Chapter 13 plan was void where the plan provided for strip off institution’s lien, but institution was only served by regular mail and none of the mailings designated any specific department or individual); *In re Sawyer*, 373 B.R. 454 (Bankr. D.S.C. 2007) (order confirming Chapter 13 plan was void where debtor failed to serve institution pursuant to Rule 7004(h), thereby depriving institution of due process).

⁶ Fed. R. Civ. P. 60(b).

⁷ Fed. R. Civ. P. 60(b)(4).

⁸ Fed. R. Civ. P. 60(c).

⁹ See *United States v. One Toshiba Color Television*, 213 F.3d 147, 157 (3d Cir. 2000); *Briley v. Hidalgo*, 981 F.2d 246, 249 (5th Cir.1993); *Precision Etchings & Findings, Inc. v. LGP Gem, Ltd.*, 953 F.2d 21, 23 (1st Cir.1992); *Rodd v. Region Constr. Co.*, 783 F.2d 89, 91 (7th Cir.1986); *Katter v. Arkansas La. Gas Co.*, 765 F.2d 730, 734 (8th Cir.1985); *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir.1985); *Misco Leasing, Inc. v. Vaughn*, 450 F.2d 257, 260 (10th Cir.1971); *Austin v. Smith*, 312 F.2d 337, 343 (D.C. Cir. 1962).

¹⁰ *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1130 (11th Cir. 1994).

¹¹ See *Hertz Corp.*, 16 F.3d at n. 8; *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*, 841 F.2d 646, n. 6 (5th Cir. 1988); *Yanow v. Weyerhaeuser S.S. Co.*, 274 F.2d 274, 284 (9th Cir. 1958); *Delaware Valley Factors, Inc. v. Coma Exp., Inc.*, 530 F. Supp. 180, 184 (E.D. Pa. 1982).

Motion by certified mail, nor addressed the Lien Strip Motion to an officer of the Creditor. Rather, the Debtor served the Lien Strip Motion by US Mail to one of the Creditor's many known addresses. As a result, service of the Lien Strip Motion was insufficient, and the Creditor properly moved to vacate the Lien Strip Order under Rule 60(b)(4).

While the Creditor would not, as the Debtor contends, ordinarily be restricted to filing the 60(b)(4) Motion within a "reasonable time," the Creditor's lack of diligence in noticing the 60(b)(4) Motion constitutes an "exceptional situation" warranting denial. Defective service notwithstanding, at the time the Debtor filed the Lien Strip Motion, she was permitted to do so in accordance with existing Eleventh Circuit precedent.¹² Under *McNeal*, a Chapter 7 debtor could strip off a wholly unsecured, second priority mortgage lien.¹³ The United States Supreme Court took up the issue of lien stripping in Chapter 7 cases in *Bank of Am., N.A. v. Caulkett*,¹⁴ granting the petition for a writ of certiorari from the Eleventh Circuit Court of Appeals on November 17, 2014. Thus, the appeal in *Caulkett* was already underway when the Creditor filed the 60(b)(4) Motion on November 21, 2014.

The Court finds the Creditor's timeline highly suspect with respect to its continuous failure to notice the 60(b)(4) Motion for hearing. Had the Creditor properly noticed the 60(b)(4) Motion for hearing when it was first scheduled for January 14, 2015, the Lien Strip Order could have been vacated, and the Debtor could have refiled and properly served the Lien Strip Motion under *McNeal*. But, by failing to properly notice the hearing on the 60(b)(4) Motion until the third hearing date, which was requested a mere thirty-eight days after the United States Supreme Court delivered its opinion in *Caulkett*¹⁵ prohibiting Chapter 7 debtors from stripping off wholly

¹² See *McNeal v. GMAC Mortg., LLC (In re McNeal)*, 735 F.3d 1263 (11th Cir. 2012) *overruled by In re Waits*, 793 F.3d 1267 (11th Cir. 2015).

¹³ See *id.*

¹⁴ *Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995, 192 L. Ed. 2d 52 (2015).

¹⁵ *Caulkett* was decided on June 1, 2015.

unsecured junior mortgage liens, the Creditor foreclosed the Debtor's opportunity to refile the Lien Strip Motion.

Bankruptcy courts are inherently courts of equity with broad remedial powers.¹⁶ To grant the 60(b)(4) Motion in the wake of the Creditor's seemingly deliberate delay would run afoul of the "just terms" contemplated by Rule 60(b),¹⁷ as well as the overarching equitable principles governing the exercise of bankruptcy jurisdiction.¹⁸ The Court finds that the Creditor's lack of diligence in noticing the 60(b)(4) Motion, and the substantial prejudice that would result to the Debtor if the Lien Strip Order was now vacated, comprise an exceptional situation which requires denial of the 60(b)(4) Motion.

Conclusion

For the reasons set forth above, it is ORDERED that:

1. The 60(b)(4) Motion is denied.
2. The Lien Strip Order remains in effect.

Attorney Maurice Hinton is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.

¹⁶ *Matter of Provincetown-Boston Airline, Inc.*, 67 B.R. 66, 70 (Bankr. M.D. Fla. 1986) (citing *In re Ranch House of Orange-Brevard, Inc.*, 773 F.2d 1166 (11th Cir. 1985)).

¹⁷ See Fed. R. Civ. P. 60(b).

¹⁸ See *Matter of Provincetown-Boston Airline, Inc.*, 67 B.R. at 70.