


ORDERED.

Dated: November 09, 2016



Karen S. Jennemann
United States Bankruptcy Judge

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

In re)	
)	
MARK ANDREW MACQUARRIE,)	Case No. 6:14-bk-13112-KSJ
)	Chapter 7
Debtor.)	
)	

ORDER GRANTING HSBC BANK’S MOTION TO VACATE

HSBC Bank¹ asks this Court to vacate its Order Granting Motion to Avoid Judicial Lien² under Rule 60 of the Federal Rules of Civil Procedure.³ Debtor argues HSBC Bank waited too long to seek reconsideration under Rule 60 and that certain provisions of Rule 60 do not apply. The Court will grant HSBC Bank’s Motion and vacate its Order Granting Motion to Avoid Judicial Lien.

In 2013, prior to filing this bankruptcy case, HSBC Bank started foreclosure proceedings against the Debtor’s home in the Florida State Courts.⁴ The State Court entered a final judgment of foreclosure on September 2, 2014.⁵ Debtor then filed his Chapter 13 bankruptcy petition⁶ and his

¹ The movant’s full name is HSBC Bank USA, National Association, as Trustee for GSMPS Mortgage Loan Trust 2005-RP1 currently serviced by JPMorgan Chase Bank, N.A. but the Court will refer to the movant as “HSBC Bank.”

² Doc. No. 29.

³ Rule 60 is incorporated by reference into Federal Rule of Bankruptcy Procedure 9024.

⁴ Case No. 2013-CA-005680-O, Circuit Court in and for Orange County, Florida. The Court will refer to the foreclosure proceedings as the “Foreclosure Case.”

⁵ Doc. No. 31, Exh. A.

⁶ Doc. No. 1, filed December 1, 2014.

first Motion to Avoid Judicial Lien of HSBC Bank.⁷ Shortly thereafter, the Court abated the Motion to Avoid Judicial Lien⁸ and dismissed the Debtor's case for failure to file information.⁹ The same day the case was dismissed, the Debtor filed certain requested information and a *second* Motion to Avoid Judicial Lien of HSBC Bank by negative notice.¹⁰ Because the case was dismissed when these documents were filed, the Debtor needed to reopen or reinstate his case. Several months went by before the Debtor moved to reopen his case and voluntarily convert to Chapter 7.¹¹ The Court reinstated the Debtor's case and converted it to Chapter 7.¹²

The Court then erroneously entered an Order that granted the second Motion to Avoid Judicial Lien.¹³ Importantly, the second Motion to Avoid Judicial Lien *was not served* on HSBC Bank and was filed when the case already was dismissed. HSBC Bank may have received via mail the *Order Granting the Motion to Avoid Judicial Lien*.¹⁴ Debtor then received his Chapter 7 discharge, and the case was closed.¹⁵

HSBC Bank then sought to reopen the case¹⁶ and filed a Motion to Vacate the Order Granting Motion to Avoid Judicial Lien ("Motion to Vacate").¹⁷ HSBC Bank credibly argued that it did not know its lien was avoided until the Debtor brought the Order to a hearing in the Foreclosure Case. The Court granted the Motion to Reopen, finding cause to consider this issue, but gave the parties more time to prepare for the hearing on the Motion to Vacate. The Court heard oral argument on the Motion to Vacate on August 15, 2016, and took the matter under advisement.

⁷ Doc. No. 13, filed December 19, 2014.

⁸ Doc. No. 14, entered December 29, 2014.

⁹ Doc. No. 15, entered on December 30, 2014.

¹⁰ Doc. Nos. 16 and 17, filed on December 30, 2014.

¹¹ Doc. Nos. 21 and 22, filed on March 3, 2015.

¹² Doc. Nos. 24 and 25, entered on March 4, 2015.

¹³ Doc. No. 29, entered on March 9, 2015.

¹⁴ Doc. No. 30, filed March 12, 2015. Notice was sent to HSBC Bank at 1800 Tysons Blvd, McLean, VA, 22102-4257.

¹⁵ Doc. Nos. 33 and 35, entered on June 15, 2015, and January 11, 2016 respectively.

¹⁶ Doc. No. 37, filed on July 1, 2016.

¹⁷ Doc. No. 38, filed on July 1, 2016.

There is no question that the Order Granting Motion to Avoid Judicial Lien was entered in error. When a case is dismissed, all pending motions are denied. This means the first Motion to Avoid Judicial Lien was denied when the dismissal order was entered. The *second* Motion to Avoid Judicial Lien was filed *after* the case was dismissed.¹⁸ The Court does not act on any motion filed after a case is dismissed. The Court simply goofed in entering the Order.

HSBC Bank's arguments focus on Federal Rule of Civil Procedure 60(b) that provides grounds for relief from a final judgment, order, or proceeding.¹⁹ Motions requesting relief under Rule 60(b)(1)-(3) should be filed no more than one year after entry of the order in question.²⁰ Motions requesting relief under Rule 60(b)(4)-(6) must be made only within a "reasonable time."²¹ Here, the Court finds HSBC Bank's Motion was filed within a reasonable time under Rule 60(b)(6).

Rule 60(b)(6) provides that a court may grant a party relief from an order for any other reason that justifies the relief sought. This is commonly referred to as the "catchall provision."²² "Rule 60(b)(6) motions must demonstrate 'that the circumstances are sufficiently extraordinary to warrant relief. Even then, whether to grant the requested relief is ... a matter for [the Court's] sound discretion.'"²³ Relief under Rule 60(b)(6) is appropriate for the following reasons: the Court improperly entered an order on a Motion that was filed in a dismissed case; the Motion was never served on HSBC Bank; and the Order Granting the Motion was improperly served on HSBC Bank by first class mail.²⁴ These circumstances are sufficiently extraordinary to warrant relief and the Court will do so at its own sound discretion. The Court simply will not punish HSBC Bank for an error of its own systems when HSBC Bank was not given notice of the Motion to Avoid Judicial

¹⁸ The dismissal order was docketed at 2:24 p.m. on December 30, 2014. The second Motion to Avoid Judicial Lien was filed at 5:56 p.m. on December 30, 2014.

¹⁹ Fed. R. Civ. P. 60(b).

²⁰ Fed. R. Civ. P. 60(c)(1).

²¹ Fed. R. Civ. P. 60(c)(1).

²² *Sec. & Exch. Comm'n v. N. Am. Clearing, Inc.*, No. 15-12919, 2016 WL 3742786, at *1 (11th Cir. July 13, 2016) (unpublished decision).

²³ *Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006).

²⁴ However, the Motion itself was *required* to be served on HSBC Bank under Bankruptcy Rules of Procedure 9013, 9014, and 7004.

Lien and had no opportunity to timely respond. Failure to correct the Court's error would only result in an unjustified windfall to the Debtor allowing him to injudiciously avoid a mortgage he legally is required to pay if he wishes to retain the mortgaged real property.²⁵

Alternatively, this Court finds that it has the authority under Section 105(a) of the Bankruptcy Code to vacate its own orders. Bankruptcy courts are courts of equity and may enter any appropriate order that would prevent an abuse of process. The Court finds that allowing the Debtor to avoid this lien in this manner would be an abuse of process.

Accordingly, it is

ORDERED:

1. The Motion to Vacate (Doc. No. 38) is **GRANTED**.
2. The Order Granting the Motion to Avoid Judicial Lien (Doc. No. 29) is **VACATED**.
3. The Motion to Avoid Judicial Lien (Doc. No. 17) is **DENIED**.
4. The Clerk is directed to reclose this case.

###

Attorney, Steven Powrozek, is directed to serve a copy of this order on all interested parties and file a proof of service within three days of entry of the order.

²⁵ The Debtor, of course, is discharged from any *in personam* liability under his discharge. Doc. No. 33.