ORDERED.

Dated: August 07, 2018

Karen S. Jennemann
United States Bankruptcy Judge

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

In re	)	
	)	
CHARLES JAMES MCHALE AND	)	Case No. 6:10-bk-02527-KSJ
SUSAN MCHALE,	)	Chapter 7
	)	
	)	
Debtors.	)	
	)	

ORDER GRANTING MOTION TO AMEND

This case came before the Court without hearing to consider Christiana Trust's Motion to Amend Order Denying Creditor's Motion to Reopen and Compel Surrender of Property.[1] The Court issued an Order Directing Response requiring the Debtor to file a response to the Motion to Amend.[2] Debtor filed a response in opposition.[3] The Court took the matter under advisement. The Motion to Amend is granted to the limited extent discussed below.

The Court held a full day trial on the underlying Motion to Reopen, which sought a court order compelling the surviving Debtor, Mrs. McHale, to drop her defenses to a state court

[1] Doc. No. 82 (the "Motion to Amend"). Christiana Trust is more specifically named Christiana Trust, A Division of Wilmington Savings Fund Society, FSB, as Trustee for Normandy Mortgage Loan Trust, Series 2013-4.
[2] Doc. No. 83.
[3] Doc. No. 85.

foreclosure case.[4] After considering the arguments of counsel, the evidence, and witness testimony, the Court denied the Motion to Reopen.[5] Christiana Trust timely filed the Motion to Amend.[6] Christiana Trust raises three main issues with the Order: (1) the Court made statements of fact not supported by the record and those facts may be improperly used in the state court foreclosure action; (2) the Court made erroneous legal conclusions; and (3) the Court ruled on relief not requested by the parties.[7]

Reconsideration of an order under Rule 59(e) "is an extraordinary remedy to be employed sparingly" due to interests in finality and conservation of judicial resources.[8] "The function of a motion to alter or amend a judgment is not to serve as a vehicle to relitigate old matters or present the case under a new legal theory … [or] to give the moving party another 'bite at the apple' by permitting the arguing of issues and procedures that could and should have been raised prior to judgment."[9] "A trial court's determination as to whether grounds exist for the granting of a Rule 59(e) motion is held to an 'abuse of discretion' standard."[10] Where Courts have granted relief under Rule 59(e), they act to: (1) account for an intervening change in controlling law, (2) consider newly available evidence, or (3) correct clear error or prevent manifest injustice.[11] "Far too often, litigants operate under the assumption … that any adverse ruling confers on them a license to move for reconsideration, and utilize such motion as a platform to relitigate issues that have already been

[4] The trial occurred on November 7, 2017.
[5] Doc. No. 80 (the "Order") was entered on March 9, 2018.
[6] The Motion to Amend was filed on March 23, 2018.
[7] Doc. No. 82.
[8] *Mathis v. United States (In re Mathis)*, 312 B.R. 912, 914 (Bankr. S.D. Fla. 2004) (quoting *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994)) (internal quotation marks omitted). Federal Rule of Civil Procedure 59 is incorporated into the Bankruptcy Code by Federal Rule of Bankruptcy Procedure 9023.
[9] *In re Mathis*, 312 B.R. at 914 (quoting *In re Halko*, 203 B.R. 668, 671-72 (Bankr. N.D. Ill. 1996)) (citations omitted).
[10] *In re Mathis*, 312 B.R. at 914 (citing *Am. Home Assurance Co. v. Glenn Estess & Assocs.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985) ("The decision to alter or amend judgment is committed to the sound discretion of the [trial] judge and will not be overturned on appeal absent an abuse of discretion.")).
[11] *In re Mathis*, 312 B.R. at 914 (citations omitted).

decided or otherwise seek a 'do over.' Such use of Rule 59 is improper. Indeed, a court's order is not intended as a mere first draft, subject to revision at the litigant's whim."[12]

Only one point made by Christiana Trust merits reconsideration. On the first issue, Christiana Trust is correct that the Court "did not intend to rule on the merits of the underlying foreclosure litigation, but rather intended to allow the underlying foreclosure litigation to resume to completion without intervention."[13] If language in the Court's Order was unclear or made any misstatements of the record, reconsideration is appropriate. Christiana Trust points out four contested findings it alleges are not supported by the record and that may be construed as findings critical to the state court foreclosure litigation.[14]

The Court will address each contested finding grouping together the first, second, and fourth contested findings that relate to Mr. McHale's payment default, if any.

- (1) First contested finding: the Court stated "Mr. McHale remained current on his regular monthly loan payments throughout the pendency of the bankruptcy."[15]
- (2) Second contested finding: "There was a never payment default."[16] On page 11, the Court states that: "During the bankruptcy case, Mr. McHale was current on his mortgage payments … No default occurred."[17]
- (3) Fourth contested finding: the Court stated "Mortgage payments only stopped after the bankruptcy case was closed, when Mr. McHale died."[18]

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[12] *Woide v. Fed Nat'l Mortg. Ass'n (In re Woide)*, No. 6:10-BK-22841-KSJ, 2017 WL 549160, at *2 (M.D. Fla. Feb. 9, 2017).
[13] Doc. No. 82, ¶ 5.
[14] *Id.* at ¶ 7.
[15] *Id.* at ¶ 7.
[16] *Id.* at ¶ 7.
[17] Doc. No. 80, p. 11. The Court states later in the Order that if Mr. McHale had signed the reaffirmation agreement, the post-bankruptcy events would have occurred exactly the same way, and Mr. McHale would have "defaulted" on his payments post-bankruptcy. Doc. No. 80, p. 12.
[18] Doc. No. 82, ¶ 7.

In the prior Order, I noted that Mr. McHale made regular monthly mortgage payments. And I concluded he made these regular payments until he could no longer because of his sickness and lost income, when he then *tried* to restructure the loan.[19] Specifically, the Court noted that Mr. McHale was current with his payments when his bankruptcy case was filed on February 19, 2010, and remained current when he received a discharge on July 1, 2010.[20] The Court noted: "Christiana Trust acknowledges the Debtors were current on their mortgage when they filed bankruptcy … and they made all future payments through February 2011."[21] This is uncontroverted. Christiana Trust points out that the record shows the Debtors stopped making payments for a few months post-discharge while the bankruptcy case was still open (the case was closed on September 22, 2011).[22] This is clear in the Court's delivery of the facts. All of these findings are accurate.

Statements made later in the Court's Order merit reconsideration, or more accurately, clarification. The Court stated on pages 8-9 that Mr. McHale was current on his mortgage payments **at all times** during the bankruptcy, kept his payments current post-discharge for many months, modified the mortgage with the lender when his illness advanced, and only stopped making payments when he died.[23] The Court will clarify this statement to state that some payments were missed post-discharge, but before the bankruptcy case was closed on September 22, 2011, and while Mr. McHale was still alive. The case was open during this period to allow the Chapter 7 Trustee to administer and distribute assets to creditors. The automatic stay, however, was lifted as to the subject property upon discharge on July 10, 2010. Therefore, as to the Debtors, the case was effectively "over." But, creditors still had a forum to use if they wanted to enforce any rights

[19] Doc. No. 80, p. 2.
[20] *Id.* at p. 2.
[21] *Id.* at p. 2.
[22] Doc. No. 82, ¶ 8. The Order Approving Trustee's Report of No Distribution and Closing Estate is Doc. No. 18.
[23] Doc. No. 80, pp. 8-9.

while the case was open. Here, mortgage payments were accepted by the lender from the McHales from the state of this bankruptcy case until shortly after Mr. McHale died.

Mr. McHale was current post-discharge for many months. He then entered into a temporary loan modification with the lender. Similarly, on page 14 of the Order, the Court stated that Mr. McHale timely paid his mortgage.[24] Again, mostly, he did timely pay his mortgage until he could no longer, when he then attempted to restructure the loan. The Court's conclusions are not altered in any way by reconsideration of these sentences. The Court again makes no legal determination on whether there was a legal payment default.

The third and last contested finding does not relate to any payment default and states: "The loan was permanently modified."[25] The Court, in fact, stated that "the lender accepted payments made by Mr. McHale and eventually modified the mortgage loan long after the bankruptcy case was closed."[26] On page 14 of the Order, the Court referred to the lender's post-bankruptcy modification of the loan. However, the Court also specifically stated that the "lender refused to issue a permanent loan modification."[27] So, of course the Court did not mean the parties were operating under a permanent loan modification agreement. Payments were made under a temporary loan modification for months.[28] It appears some of the payments under the temporary loan modification were made while the case was still open but after the discharge. To the extent these sentences were misstatements, those misstatements would not alter the Court's conclusions in any way.

[24] *Id.* at p. 14, n. 68.
[25] Doc. No. 82, ¶ 7.
[26] Doc. No. 80, p. 6.
[27] *Id.* at p. 3.
[28] *Id.* at p. 3.

On the second issue, the Court sees no reason to reconsider its analysis of the *Jones v. Citimortgage, Inc.* case.[29] The Court stated that *Jones* "**may**" stand for the proposition that creditors who accept post-bankruptcy payments from debtors who do not sign reaffirmation agreements **may** lose their ability to force compliance with § 521 of the Bankruptcy Code when the debtor later defaults post-bankruptcy.[30] Christiana Trust may disagree with the Court's analysis of the holdings in *Jones*, but that is no reason to reconsider the Court's Order.

On the third issue, Christiana Trust's attorney "erroneously" referenced both Debtors in the original Motion to Reopen.[31] The evidence and testimony focused on Mrs. McHale. Even without the "erroneous" reference to both Debtors in the original Motion to Reopen, it is a logical extension of Christiana Trust's argument that by forcing Mrs. McHale to drop foreclosure defenses based on choices and actions of her late husband, Christiana Trust is asking the Court to compel Mr. McHale to follow through with his choices although he is dead. The Court said so much in its Order. The Court sees no reason to reconsider its Order on this point.

Accordingly, it is

ORDERED that the Motion to Amend (Doc. No. 82) is **GRANTED** to the limited extent needed to clarify that payments were missed post-discharge, but before the bankruptcy case was closed on September 22, 2011. No additional clarification or reconsideration is merited. The Motion to Amend is otherwise denied.

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Attorney, Jonathan Sykes, is directed to serve a copy of this order on parties that do not receive service by CM/ECF and file a proof of service within three days of entry of the order.

[29] 666 Fed. App'x 766 (11th Cir. 2016).
[30] Doc. No. 80, p. 14 (emphasis provided).
[31] Doc. No. 20.