

ORDERED.

Dated: August 13, 2015

  
Cynthia C. Jackson  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
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In re:

PONGHUI CHARTIER,

Chapter 7

Case No.: 6:14-bk-06563-CCJ

Debtor.

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ORDER DENYING CREDITOR DANIELS CROSSING  
HOMEOWNERS ASSOCIATION, INC'S MOTION TO VACATE

This case came before the Court on creditor Daniels Crossing Homeowners Association, Inc.'s Motion to Vacate Order Granting Motion to Strip Lien (Doc. No. 20; the "Motion to Vacate"). By the Motion to Vacate, the secured creditor asks this Court to vacate a lien strip order on the basis of an intervening change in law. For the reasons set forth below, the Motion to Vacate is denied.

The debtor filed this Chapter 7 bankruptcy case on June 4, 2014, and filed a motion to strip the secured creditor's lien on June 26, 2014 (Doc. No. 7; the "Motion to Strip"). The debtor

filed the Motion to Strip with negative notice, and the secured creditor did not file an opposition; as such, the Court granted the Motion to Strip on August 8, 2014.<sup>1</sup> The secured creditor did not file an appeal, and one month later, on September 9, 2014, the Court entered the debtor's discharge.<sup>2</sup>

On June 1, 2015, in *Bank of America, N.A. v. Caulkett*, the Supreme Court ended the Eleventh Circuit's practice of Chapter 7 lien stripping.<sup>3</sup> The Court held that its prior precedent "dictates that a debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under § 506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral".<sup>4</sup>

On the basis of this change in the law, the secured creditor asks this Court to set aside the Order granting the Motion to Strip. The secured creditor does not cite a rule, but because the secured creditor filed the Motion to Vacate more than 14 days after the Order granting the Motion to Strip, the Court evaluates the Motion to Vacate under Federal Rule of Civil Procedure 60(b).<sup>5</sup>

Rule 60(b) relief is inappropriate here. Rule 60(b) provides two avenues for relief on the basis of an intervening change in the law: relief from the order under Rule 60(b)(5) because "applying it prospectively is no longer equitable", and relief under Rule 60(b)(6) "for any reason that justifies relief".

Relief from an order on the basis of Rule 60(b)(5) is appropriate only if the order in question has some prospective effect.<sup>6</sup> This Court understands lien strips to be effective upon

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<sup>1</sup> (Doc. No. 14).

<sup>2</sup> (Doc. No. 16).

<sup>3</sup> 135 S. Ct. 1995, 2001 (2015).

<sup>4</sup> *Id.*

<sup>5</sup> Compare Fed. R. Bankr. P. 9023, with Fed. R. Bankr. P. 9024.

<sup>6</sup> See *Horne v. Flores*, 557 U.S. 433, 447–48 (2009); see also *Griffin v. Sec'y, Fla. Dep't of Corr.*, 787 F.3d 1086, 1089 (11th Cir. 2015).

entry of discharge. Because the Court has already entered a discharge in this case, the lien has already been stripped. The lien strip order, therefore, has no prospective effect, and Rule 60(b)(5) relief is unavailable here.

Rule 60(b)(6) relief is also unavailable. Rule 60(b)(6) relief “is an extraordinary remedy”,<sup>7</sup> and the movant “must persuade the court that the circumstances are sufficiently extraordinary to warrant relief”.<sup>8</sup> This relief is inappropriate when--as here--the movant failed to file a timely appeal.

“A party may not use Rule 60(b)(6) as a substitute for a timely and proper appeal”;<sup>9</sup> “Rule 60(b)(6) does not reward a party that seeks to avoid the consequences of its own free, calculated, deliberate choices”, as when a party chooses not to file an appeal.<sup>10</sup> Moreover, “[a]n unsuccessful litigant may not rely on appeals by others and share in the fruits of victory by way of a Rule 60(b) motion”.<sup>11</sup>

Even if the Court were to overlook the secured creditor’s failure to appeal, relief would be inappropriate because the secured creditor has failed to show “extraordinary circumstances” that would warrant relief. The Eleventh Circuit has held that “something more than a ‘mere’ change in the law is necessary to provide grounds for Rule 60(b)(6) relief”.<sup>12</sup> The movant must show factors *including* a change in the law that amount to “extraordinary circumstances”.<sup>13</sup> The movant here alleges no such circumstances. As such, the change in the law does not justify relief.

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<sup>7</sup> *Ritter v. Smith*, 811 F.2d 1398, 1400 (11th Cir. 1987).

<sup>8</sup> *Booker v. Singletary*, 90 F.3d 440, 443 (11th Cir. 1998) (quoting *Ritter*, 811 F.2d at 1401) (brackets and internal quotation marks omitted).

<sup>9</sup> *Parks v. U.S. Life & Credit Corp.*, 677 F.2d 838, 840 (11th Cir. 1982).

<sup>10</sup> *Aldana v. Del Monte Fresh Produce, N.A.*, 741 F.3d 1349, 1357 (11th Cir. 2014) (internal quotation marks omitted).

<sup>11</sup> *Parks*, 677 F.2d at 840.

<sup>12</sup> *Ritter*, 811 F.2d at 1401.

<sup>13</sup> *Id.*

Because the Order granting the Motion to Strip is not prospective, and because the secured creditor failed to timely appeal or show “extraordinary circumstances”, Rule 60(b) relief is inappropriate.

For the reasons set forth above, it is ORDERED that the Motion to Vacate is denied.

Attorney Charles L. Eldredge, Jr. 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.