

ORDERED.

Dated: June 02, 2022



Grace E. Robson
United States Bankruptcy Judge

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

In re)	
)	
Leroy Sylvester Carr,)	Case No. 6:20-bk-06547-GER
)	Chapter 13
Debtor.)	
_____)	

**ORDER GRANTING MOTION TO
VACATE ORDER DISMISSING CHAPTER 13 CASE**

This case came on for hearing on May 9, 2022 at 2:00 p.m., upon the *Motion to Vacate Order Dismissing Chapter 13 Case* (the “Motion to Vacate”) (Doc. No. 106) filed by Leroy Sylvester Carr (the “Debtor”), and the *Objection to the Motion to Vacate Order Dismissing Chapter 13 Case* (the “Objection”) (Doc. No. 109) filed by Citibank, N.A. (“Citibank”).¹ The Court, having reviewed the Motion to Vacate and the Objection, **FINDS, ORDERS, AND ADJUDGES as follows:**

Background

A. The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code² on November 25, 2020 (Doc. No. 1) (the “Petition Date”). The Debtor included in his schedules (Doc.

¹ Citibank also filed a *Notice of Supplemental Authority* (Doc. No. 121) on May 18, 2022.

² Unless otherwise stated, all references to the Bankruptcy Code refer to Title 11 of the United States Code.

No. 16) real property located at 3615 Kingswood Ct., Clermont, Florida 34711, which is legally described as:

LOT 3, DEVONSHIRE AT KINGS RIDGE, CLERMONT, FLORIDA, ACCORDING TO THE PLAT THEREOF AS DESCRIBED IN PB 46, PGS 39-40, OF THE PUBLIC RECORDS OF LAKE COUNTY, FLORIDA.

(the “Property”).

B. The Debtor valued the Property at \$150,754.00 and claimed the Property exempt as homestead.³

C. As of the Petition Date, Citibank held a Judgment Lien on the Property for \$149,812.12 (Proof of Claim No. 22-1).

D. During the case, the Debtor filed a *Motion to Avoid Lien of Citibank, N.A.* (the “Motion to Avoid Lien”) (Doc. No. 29) on March 3, 2021. The Order Granting Motion to Avoid Lien⁴ was entered on August 10, 2021, and provides:

Unless the Debtor’s bankruptcy case is dismissed, the Lien is hereby extinguished and shall not survive the bankruptcy nor affix to or remain enforceable against the Debtor’s property described above.

E. The Trustee filed the *Motion to Dismiss for Failure to Maintain Timely Plan Payments* (the “Motion to Dismiss”) (Doc. No. 96) on December 29, 2021.

F. The *Order Dismissing Chapter 13 Case* (the “Order Dismissing Case”) (Doc. No. 101) was entered on March 3, 2022.

G. One day prior to the entry of the Order Dismissing Case, the Debtor filed a *Motion to Sell Real Property Free and Clear of Liens* (the “Motion to Sell”) (Doc. No. 100).

H. The Debtor filed his first *Motion to Vacate Order Dismissing Chapter 13 Case* (Doc. No. 104) on March 16, 2022, which was denied because the Debtor had not yet listed the

³ Doc. No. 16.

⁴ *Order Granting Motion to Avoid Lien of Citibank, N.A.* (the “Order Granting Motion to Avoid Lien”) (Doc. No. 88).

Property for sale, no offers had been made on the Property, and the motion did not reflect how the proceeds from the sale would be used to bring the Debtor current.⁵

I. Thereafter, the Debtor filed the Motion to Vacate, seeking to vacate the order dismissing the case because the Debtor received a written offer to purchase the Property and he intended to use the sale proceeds to pay creditors. However, at the hearing, the Debtor indicated that the proposed buyer canceled the purchase contract.

J. Citibank opposes the relief arguing that its lien was reinstated upon dismissal of the case and the Debtor failed to address how Citibank's lien would be satisfied. In addition, Citibank argues that the Debtor has not demonstrated good faith and the case should remain dismissed. In the alternative, Citibank argues that if the case is reinstated, its lien should not be avoided until the Debtor has completed making his plan payments.

Discussion

“[A]lthough reinstatement of chapter 13 cases is a common practice, there is no provision in the Bankruptcy Code or Rules for reinstatement of a dismissed case.”⁶ As such, motions to vacate an order dismissing case are governed by Federal Rules of Bankruptcy Procedure 9023 and 9024, as made applicable by Federal Rules of Civil Procedure 59(e) and 60, respectively. Relief under Rule 59(e) is appropriate when within fourteen days a debtor has presented “newly discovered evidence or manifest errors of law or fact.”⁷ “Rule 60 provides for relief from a judgment for the reasons of, inter alia, mistake, inadvertence, surprise, or excusable neglect, or any other reason justifying relief from the operation of the judgment.”⁸ Rule 60(b)(6) is referred

⁵ *Order Denying Motion to Vacate Order Dismissing Chapter 13 Case* (Doc. No. 105).

⁶ *In re Murphy*, 493 B.R. 576, 579 (Bankr. D. Colo. 2013) (quotation marks omitted).

⁷ *In re Yormak*, No. 2:15-BK-04241-FMD, 2021 WL 3630202, at *1 (Bankr. M.D. Fla. Aug. 13, 2021) (citing *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)); Fed. R. Bankr. P. 9023.

⁸ *In re Wathen*, No. 12-35920-H3-13, 2013 WL 1966123, at *2 (Bankr. S.D. Tex. May 10, 2013) (citing Fed. R. Civ. P. 60(b)(1), (6)).

by bankruptcy courts as a “catch-all” provision, often employed to reinstate chapter 13 cases as “whether to grant relief [under this provision] is a matter for the . . . court’s sound discretion.”⁹

**Reinstating the Case is in
the Best Interests of All Parties**

“‘Reinstatement’ is a judicially created fiction, designed to spare debtors the burden of filing a new case.”¹⁰ It is a common practice amongst bankruptcy courts, including courts in this Circuit, to favor reinstatement of chapter 13 cases where a debtor’s case is dismissed due to a small number of missed plan payments and “it is usually in the best interest of all parties for the case to continue.”¹¹

Citibank opposes the Motion to Vacate, arguing that the Debtor has not acted in good faith in seeking to reinstate his case. At the hearing, Citibank referenced the Debtor’s prior chapter 13 bankruptcy case, where the Debtor claimed a different property as homestead.¹² Citibank also pointed out that in the prior case, the trustee filed a motion to dismiss the case because of the Debtor’s failure to make timely plan payments.¹³ While the Debtor claimed a different property as homestead in his prior bankruptcy case, there is no dispute that the Property is the Debtor’s homestead in this case.¹⁴ “It is ‘settled law’ . . . that a debtor’s claim of exemptions is determined

⁹ *In re Miller*, No. 13-76000-MHM, 2015 WL 1743277, at *2 (Bankr. N.D. Ga. Apr. 13, 2015) (second alteration in original) (quoting *Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006)); *see also In re Kwiatkowski*, No. 01-10070DWS, 2005 WL 2860329, at *3 (Bankr. E.D. Pa. Oct. 27, 2005) (holding a “rigid application” of Rule 60(b) “may work an injustice where there are exceptional circumstances that warrant relief,” and finding that relief under Rule 60(b)(6) “provides the flexibility to consider reinstatement of a case where it is in the best interests of the debtor and her creditors to resume a case rather than to start all over”).

¹⁰ *In re Murphy*, 493 B.R. at 579.

¹¹ *In re Miller*, 2015 WL 1743277, at *2.

¹² *See Voluntary Petition, In re Carr*, No. 8:13-bk-11921-CPM (Bankr. M.D. Fla. Sept. 6, 2013) (Doc. No. 1).

¹³ *See Trustee’s Motion to Dismiss for Failure to Make Payments to Trustee, In re Carr*, No. 8:13-bk-11921-CPM (Bankr. M.D. Fla. July 14, 2015) (Doc. No. 68).

¹⁴ Citibank previously objected to the Debtor’s claim of homestead as to the Property. *See Objection to Motion to Avoid Lien of Citibank, N.A. and Objection to Claim of Homestead Exemption* (Doc. No. 47). However, Citibank withdrew its objection in open court. (Doc. No. 87).

as of [the] bankruptcy petition date.”¹⁵ Therefore, the claim of homestead is not a basis to deny reinstatement of this case.

Second, while it is accurate that a motion to dismiss for failure to make timely payments was filed in the prior bankruptcy case, what was omitted from Citibank’s presentation was that the Debtor completed all payments under that chapter 13 plan and received a discharge in the prior case.¹⁶ In addition, the Debtor did not file this bankruptcy case until nearly two years after the entry of the discharge order in the prior case. While the Debtor did fall into arrears on his plan payments resulting in dismissal of this case,¹⁷ the Debtor filed a motion to vacate order dismissing case shortly after the Order Dismissing Case was entered and subsequently has made a good-faith effort to proceed with this case by moving to sell the Property and filing a motion to modify his plan to remove any payments related to the Property.

Reinstatement is favored where a debtor will be voluntarily making payments to creditors on a pro rata basis over an extended period of time, as opposed to dismissal where a race to the debtor’s assets in state court will ensue. Here, the sale or abandonment of the Property and plan modification make it more likely that creditors would be paid because the Debtor will no longer be required to make payments related to the Property. On the other hand, dismissal of the case would result in a race to the Debtor’s assets where only those creditors that make collection efforts against the Debtor might receive recovery.

The Court concludes that reinstatement of the Debtor’s bankruptcy case is in the best interest of the Debtor and all creditors under the facts and circumstances of this case. As the

¹⁵ *In re Hampton*, 616 B.R. 917, 921 (Bankr. S.D. Fla. 2020) (citing *Yerian v. Webber (In re Yerian)*, 927 F.3d 1223, 1229 (11th Cir. 2019)).

¹⁶ *See Order of Discharge, In re Carr*, No. 8:13-bk-11921-CPM (Bankr. M.D. Fla. Nov. 30, 2018) (Doc. No. 151).

¹⁷ The Debtor was in arrears for three payments before the Trustee sought dismissal – not seven payments as Citibank asserted in the Objection. *See* the Motion to Dismiss (Doc. No. 96).

Property is the Debtor's homestead, reinstatement of the case would not prejudice Citibank as it would not be able to foreclose the judgment lien outside of bankruptcy.¹⁸

**Reinstating the Case Reinstates
the Order Avoiding Citibank's Lien**

The effect of a dismissal is to “undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case.”¹⁹ Section 349(b) of the Bankruptcy Code provides that a dismissal reinstates “any transfer avoided under section 522.”²⁰ As such, Citibank is correct that the Order Granting Motion to Avoid Lien was vacated upon the dismissal of the case. However, most courts have treated reinstatement of chapter 13 cases to resume the case as it was prior to dismissal.²¹ Therefore, upon reinstatement, the Debtor's chapter 13 case resumes as it was prior to dismissal and all orders are likewise reinstated, including the Order Granting Motion to Avoid Lien.

**Avoidance of Lien Under Section 522(f)
Is Not Contingent on Completion of Plan**

Citibank requests that if the case is reinstated, avoidance of its lien be conditioned on the Debtor completing his plan payments, arguing that Section 349(b)'s provisions would otherwise be frustrated. However, Section 522(f) is clear and does not impose completion of a plan or entry of a discharge as a condition to avoidance of a lien.²² While the potential for abuse is a valid

¹⁸ Fla. Const. art. X, § 4(a)(1); *see also* Fla. Stat. § 222.10 (2022).

¹⁹ *In re Petersen*, 561 B.R. 788, 792 (Bankr. D. Utah 2016) (quoting H.R. Rep No. 595, 95th Cong., 1st Sess. 338 (1977); S. Rep No. 989, 95th Cong., 2d Sess. 48-49 (1978)); *see also* 11 U.S.C. § 349(b); *In re Murphy*, 493 B.R. at 581 (“Rather than restoring the parties to their respective positions held on the date of the petition, it would perhaps be more accurate to state that the intent behind § 349(b) is to undo the actions of the bankruptcy court to the extent possible.”).

²⁰ 11 U.S.C. § 349(b)(1)(B).

²¹ *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, No. 02-10605, 2013 WL 1748800, at *6 (Bankr. S.D. Tex. Apr. 23, 2013) (citing *Murrell v. Vega (In re Vega)*, No. 98-56569, 2000 WL 425012, at *2 (9th Cir. Apr. 19, 2000)) (“When courts vacate an order, it restores the parties to the position they were in prior to the issuance of the vacated order—it is as if the order had never been issued.”).

²² *In re Ferrante*, No. 09-13098/JHW, 2009 WL 2971306, at *4 (Bankr. D.N.J. Sept. 10, 2009) (first citing *Gamble v. Brown (In re Gamble)*, 168 F.3d 442, 444 (11th Cir. 1999); and then citing *Rodriguez v. First Am. Bank, S.S.B. (In re Rodriguez)*, 278 B.R. 749, 757 (Bankr. N.D. Tex. 2002)) (“The necessary conclusion drawn from this statutory framework is that an order for § 522(f) lien avoidance may be effected immediately, and may not be conditioned upon

concern, the statutory framework allows for the Debtor's immediate use of an exempt asset because property that is exempt is not liable during or after the case for any debt that arose prior to the commencement of the case.²³ Therefore, unless and until the case is dismissed, the exemption and lien avoidance are effective during the pendency of this case.

Accordingly, it is **ORDERED**:

1. The Motion to Vacate (Doc. No. 106) is **GRANTED**.
2. This case is reinstated.
3. The Order Granting Motion to Avoid Lien (Doc. No. 88) is reinstated as of the entry of this Order.
4. The relief in this Order is granted **WITHOUT PREJUDICE** to Citibank's *Objection to Motion to Modify Confirmed Plan* (Doc. No. 120).
5. Citibank's request to condition the effectiveness of the avoidance of its lien on the Debtor's completion of the payments required under the plan is **DENIED**.

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Attorney Jeffrey S. Badgley is directed to serve a copy of this Order on interested parties who do not receive service by CM/ECF and file a proof of service within three days of entry of this order.

the debtor's successful achievement of a discharge."); *see also In re Mulder*, No. 810-74217-reg., 2010 WL 4286174, at *4 (Bankr. E.D.N.Y. Oct. 26, 2010).

²³ 11 U.S.C. § 522(c); *In re Gamble*, 168 F.3d at 444 (citing *Hall v. Fin. One of Ga. Inc. (In re Hall)*, 752 F.2d 582, 584 (11th Cir. 1985)) ("The plain language of the bankruptcy code and precedent from this court are clear that exempt property is no longer part of the bankruptcy estate, and is available for the debtor's use.").