UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN

In re:

RUSSELL L. KIPLINGER, JR. and TONDA JEAN KIPLINGER, fka TONDA JEAN HAKEOS, fka TONDA JEAN WORDEN,

Debtors.

Case No. DL 18-00752
Chapter 7
Hon. Scott W. Dales

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MEMORANDUM OF DECISION AND ORDER

PRESENT: HONORABLE SCOTT W. DALES
Chief United States Bankruptcy Judge

I. INTRODUCTION

The entry of a final decree in a bankruptcy case marks a sea change affecting numerous relationships and rights of the parties. The final decree ends a trustee's service, terminates the automatic stay, effects abandonment and re-vesting of most estate property, cuts off certain fees in a chapter 11 case, triggers several limitation periods, and generally brings the court's role to an end. Numerous provisions within the Bankruptcy Code and rules refer to the "closing" of a case and the effects of that important event. Courts and commentators frequently identify the discharge as signaling bankruptcy's fresh start, but the final decree is probably the better harbinger.

In the present dispute, chapter 7 trustee John A. Porter (the "Trustee") seeks relief from the final decree under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b),[1] essentially to secure the benefit of asserting his strong-arm powers in a soon-to-be filed adversary proceeding against U.S.

[1] The court will refer to any Federal Rule of Bankruptcy Procedure or Federal Rule of Civil Procedure simply as "Rule ___," relying on the numbering convention for each set of rules to identify the intended reference.

Bank National Association ("U.S. Bank"). *See* Motion to Vacate Order Closing Case (ECF No. 44, the "Rule 60 Motion"). He hopes to secure for creditors the value of the Debtors' interest in the residential real estate commonly known as 120 E. Third Street, Charlotte, Michigan (the "Residence").

For the following reasons, the court will deny the Rule 60 Motion, leaving the final decree intact.

II. BACKGROUND

On August 6, 2018, the court entered a final decree (ECF No. 19, the "Final Decree"), closing the chapter 7 case of Russell and Tonda Kiplinger (the "Debtors") under 11 U.S.C. § 350.[2] On December 11, 2018, the United States Trustee ("UST") filed a motion to reopen the case to administer an unspecified cause of action, as it turns out, the Trustee's lien avoidance action under § 544 on the grounds that U.S. Bank's "metes and bounds" legal description within a mortgage on the Debtors' Residence did not close.

After notice and a hearing, principally to address the Debtors' concerns associated with reopening their case, the court granted the UST's motion, reopened the case, and authorized the appointment of a trustee. *See* Order Reopening Case and Authorizing Appointment of Chapter 7 Trustee (ECF No. 32). The UST reappointed the Trustee at that time (on March 29, 2019), and eight months later, on November 27, 2019, the Trustee filed the Rule 60 Motion. U.S. Bank objected, and the court set the matter for hearing which took place on January 22, 2020 in Lansing, Michigan. The Trustee and U.S. Bank each appeared through counsel, offering arguments for and against vacating the Final Decree. At the conclusion of the hearing, the court took the matter under advisement.

[2] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

The gist of the Trustee's argument is that initially (and reasonably) he concluded that he had no quarrel with U.S. Bank regarding its mortgage lien encumbering the Debtors' Residence, after comparing the legal descriptions in two quit claim deeds and the related mortgage documents the Debtors provided to him in the course of performing his duties under § 704(a)(4). *See* Declaration of John A. Porter (ECF No. 44-3, ¶ 5, hereinafter "Porter Decl."). The Trustee further concluded that there were no assets to administer and electronically filed his Chapter 7 Trustee's Report No Distribution (ECF No. 9, the "No Asset Report"). A month and a half later, U.S. Bank filed a motion for relief from the automatic stay to pursue its rights under the mortgage. The court granted that motion without contest, and shortly thereafter entered the Final Decree.

U.S. Bank, in its response, states that it obtained a "foreclosure commitment" from a title company before initiating foreclosure and learned that its metes and bounds legal description did not close. It also learned about a potential cloud on title relating to the claim of a former spouse, Tony Worden, under a judgment of divorce and related subordination agreement. To address these concerns, the lender commenced a quiet title and mortgage reformation action in Eaton County Circuit Court (the "State Court"), naming only the Debtors and Mr. Worden as defendants. U.S. Bank and the parties to the quiet title action quickly settled by entering a consent judgment quieting title and reforming the mortgage to U.S. Bank's satisfaction.

Meanwhile, according to the Trustee, he learned about the quiet title action from Debtors' counsel and, believing he might have a right to challenge U.S. Bank's lien and bring some equity into the bankruptcy estate, contacted the UST about reopening the case. As noted above, the court granted the UST's motion to reopen.

III. DISCUSSION

As the Trustee acknowledges by bringing the Motion, the cases distinguish between an order reopening a case under Rule 5010 and § 350(b) on the one hand and vacating or setting aside a final decree under Rule 9024, on the other. An order setting aside final decree has substantive effects, while an order reopening a case is generally regarded as "a ministerial act that involves nothing more than some showing of cause." *Olson v. Aegis Mortgage Corporation (In re Bloxsom),* 389 B.R. 52, 60-62 (Bankr. W.D. Mich. 2008) (dismissing adversary proceeding because reopening order under § 350(b) did not vacate final decree or undo effect of abandonment under § 554(c)). The Trustee is not seeking to reopen the case -- the court reopened it last Spring. Instead, he is seeking to modify substantive rights by vacating the Final Decree. More specifically, the Trustee's Motion seeks to undo some, though perhaps not all,[3] of the consequences of the Final Decree, freeing himself from the aspects of the Final Order that may impede his successful prosecution of the strong-arm case against U.S. Bank. A case not yet filed.

The two main concerns expressed in the Rule 60 Motion and during oral argument are (i) the statutes of limitation; and (ii) the abandonment of the Residence to the Debtors.[4] In a nutshell, the Trustee believes that when he sues U.S. Bank under § 544 (and perhaps §§ 550[5] and 551), U.S.

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[3] Vacating a final decree could raise a number of thorny statutory and practical problems because many important rights and remedies are affected by closing a case. In addition, third parties may have engaged in transactions with a debtor in reliance on the closing of the case. For example, would an order under Rule 60(b) reinstate the automatic stay, re-vest abandoned property in the estate, undermine post-closing transfers, render a discharge revocable? *See, e.g.,* 11 U.S.C. § 362(c)(1) and (2)(A) (termination of automatic stay); 554(c) (automatic abandonment); 727(e)(2)(B) (revocation of discharge). What effect would it have in this case on the State Court's consent judgment and the Full Faith and Credit statute? *See* 28 U.S.C. § 1738. Thankfully, the court does not have to grapple with unwinding a transfer to a third-party purchaser at a foreclosure sale because, as counsel stated on the record, U.S. Bank has not yet foreclosed, and title remains in the Debtors for now.

[4] *See, e.g.,* 11 § 546(a)(1)(B)(2), 550(f)(2), and 554(c).

[5] Because the Trustee may ultimately take aim at U.S. Bank's mortgage -- a nonpossessory interest -- there may be no point in seeking relief under § 550, assuming the Residence is re-vested in the bankruptcy estate. *In re Mickens*, 575 B.R. 797, 806 (Bankr. W.D. Mich. 2017) (trustee will generally not have to seek recovery of avoided nonpossessory

Bank may argue that the relief is time-barred because the suit will have been commenced after the court closed the Debtors' bankruptcy case. *See* 11 U.S.C. §§ § 546(a)(1)(B)(2) (limitation period). Similarly, even if avoidance is timely, U.S. Bank may argue that relief is barred under § 550 or § 551 because the Residence re-vested in the Debtors under § 554(c) when the court closed the case, so avoidance would inure to the benefit of the Debtors, not the estate. 11 U.S.C. § 550(a) (authorizing recovery "for the benefit of the estate" after avoidance of a transfer); *id.*, § 551 (preserving avoided transfers "for the benefit of the estate"); *id.* § 554(c) (abandonment of scheduled property).

Courts, including this one, have addressed similar concerns resulting from the entry of a final decree that a trustee later comes to regret, and the consensus is that relief may be granted under the provisions of Rule 60(b), which balances the need for finality of court orders against the justice or equities of a case. *See LPP Mortgage, Ltd. v. Brinley (In re Brinley),* 547 F.3d 643, 649 (6th Cir. 2008) ("The application of Fed. R. Civ. P. 60(b) strikes the appropriate balance between promoting finality and allowing courts to grant relief in limited circumstances."); *Moyer v. ABN Amro Mortgage Group, Inc. (In re Feringa),* 376 B.R. 614 (Bankr. W.D. Mich. 2007) (considering related concerns); *see also Osberg v. Bartels (In re Bartels),* 449 B.R. 355 (Bankr. W.D. Wisc. 2011) (Rule 60(b) supports vacating order effecting abandonment).

The Trustee does not specify which part of Rule 60 he relies on, referring only generally to the rule. Although the tenor of his argument suggests reliance on "excusable neglect" under

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interest because avoidance and preservation under § 551 will likely be sufficient), *aff'd* 589 B.R. 594 (W.D. Mich. 2018).

Rule 60(b)(1),[6] or newly discovered evidence under Rule 60(b)(2),[7] his citation to the *Bartels* case may also imply reliance on Rule 60(b)(5).

The Sixth Circuit's observation that Rule 60(b) "strikes the appropriate balance between promoting finality and allowing courts to grant relief in limited circumstances"[8] necessarily implicates the time limitations prescribed in Rule 60(c):

> A motion under Rule 60(b) must be made within a reasonable time -- and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

Fed. R. Civ. P. 60(c) (applicable pursuant to Fed. R. Bankr. P. 9024). Here, the Trustee filed the Rule 60(b) Motion more than one year after the Final Decree, so he cannot rely on the rule's first three subsections. The suggestion of Trustee's counsel during the hearing that the one year period of Rule 60(c) should run from the reopening of the case has no basis in the text of that rule, which generally measures timeliness from the entry of the order to be vacated or modified -- here the Final Decree dated August 6, 2018 -- not the order reopening the case.

Because the Trustee is not seeking to reopen the case but rather to vacate the Final Decree, the provision in Rule 9024 excepting motions to reopen from the time limit of Rule 60(c) does not help him here. The drafters of Rule 9024 excepted motions to reopen under Rule 5010 from the time limits expressed in Rule 60(c) because they understood that "all orders of the bankruptcy court are subject to Rule 60 F.R.Civ.P.," even motions to reopen which, naturally, provide relief, albeit ministerial relief, from an order closing the case. *See* Fed. R. Bankr. P. 9024, 1983 Advisory

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[6] *See* Porter Decl. at ¶ 10 ("It is not practical for me to conduct "title searches" in all my cases to verify that such information does, in fact, truly represent the state of the title. It is my understanding that this is the position of all the Chapter 7 trustees in this district.").

[7] *See* Porter Decl. at ¶ 9 ("Upon being advised of the state court lawsuit, I reviewed the complaint's allegations and the register of deeds records and discovered that I had never been provided the instrument upon which debtors' title was based, namely, a warranty deed.").

[8] *In re Brinley*, 547 F.3d at 649.

Committee; *Bloxsom*, 389 B.R. at 60 (reopening a case is a ministerial act). They intended to avoid arguments about the timeliness of a Rule 5010 motion given the vast array of circumstances that might justify reopening a case long after closing it; they did not intend to relax the deadlines for motions that seek substantive modification of an earlier order, in contrast to ministerial relief. *Id.*

For different but equally compelling reasons, Rule 60(b)(5) does not justify relief in this case, either. First, as the Sixth Circuit makes clear:

> We also must heed the requirement that parties cannot disguise Rule 60(b)(1)-(3) motions as 60(b)(4)-(6) motions. What in reality is a 60(b)(2) motion cannot be labeled as a 60(b)(5) motion to gain the benefits of a more generous limitations period. *McDowell v. Dynamics Corp. of Am.,* 931 F.2d 380, 383–84 (6th Cir.1991).

Kalamazoo River Study Grp. v. Rockwell Int'l Corp., 355 F.3d 574, 588 (6th Cir. 2004). As noted above, *supra* at nn. 6 and 7 the gravamen of the Rule 60(b) Motion is "excusable neglect" or newly discovered evidence (the warranty deed predating the two quit claim deeds that the Trustee compared to the mortgage before he filed the No Asset Report) under Rule 60(b)(1) and (b)(2), respectively. "The one-year limitation period for Rule 60(b)(1) and [2] motions would mean little if advocates could sidestep it whenever they wished by attaching a Rule 60(b)(5) or (6) label to the motion." *Cummings v. Greater Cleveland Reg'l Transit Auth.*, 865 F.3d 844, 847 (6th Cir. 2017).

Second, the Sixth Circuit has construed Rule 60(b)(5) as applying when there is a change in the law upon which the judgment at issue is premised, as in *Brinley*,[9] or more generally to

[9] The Trustee did not cite *Brinley* (which found no abuse of discretion in a bankruptcy court's revocation of a technical abandonment for equitable reasons under Rule 60(b)(5)) perhaps because the decision is distinguishable. *Brinley* clearly involved a situation in which seemingly settled law on which the trial court relied (involving application of § 522(f)) had been overruled by the Sixth Circuit, thus bringing the dispute within the spirit of Rule 60(b)(5). *In re McKenzie*, No. 08-16378, 2010 WL 3386012, at *9 (Bankr. E.D. Tenn. Aug. 25, 2010) ("In *LPP Mortgage*, the trustee "mistakenly" relied on case law that was later overruled."). As Judge Shefferly observed, a "careful reading of *Brinley* shows that it involved an atypical, extraordinary set of circumstances." *In re Reiman*, 431 B.R. 901, 911 (Bankr. E.D. Mich. 2010).

consent decrees and injunctions -- orders with clearly prospective or executory effect involving the "supervision of changing conduct or conditions." *Kalamazoo River Study Grp.*, 355 F.3d at 587 (citation omitted). The Court of Appeals identified "injunctions (permanent or temporary), some declaratory judgments, and particularly consent decrees" as "prospective judgments susceptible to a Rule 60(b)(5) challenge." *Id.* The court does not regard the Final Decree as falling within this category.

Rule 60(b)(6), to the extent implicated, is a "catchall provision that provides for relief from a final judgment for any reason justifying relief not captured in the other provisions of Rule 60(b)." *West v. Carpenter*, 790 F.3d 693, 696 (6th Cir. 2015). For the reasons just given, the motives that prompted the Trustee to seek relief from the Final Decree are "captured" in Rule 60(b)(1) and (b)(2), although they are time-barred as explained above.

IV. CONCLUSION AND ORDER

Assuming, for the sake of argument, that the foregoing interpretations of Rule 60(b) and the Rule 60(b) Motion are mistaken, the court, in its discretion, does not find in the Trustee's papers or argument equitable reasons sufficient to vacate the Final Decree, given the central role that case closing plays in bringing the court's role in the lives of debtors and creditors to an end:

> Debtors file Chapter 7 cases to get their discharge and move on with their lives. Congress has created a body of law that reflects its intent that debtors and creditors be subject to the jurisdiction of the bankruptcy court for a limited period of time. A petition for relief does not start a never-ending process in the bankruptcy court.

In re Reiman, 431 B.R. at 913. The argument that the Trustee failed to detect the supposed defect in U.S. Bank's metes and bounds description despite the reportedly usual and common practice of relying on documents provided by the debtor is not especially compelling, even less so considering U.S. Bank's unchallenged assertion that Eaton County provides free electronic access to real estate

title information. The court does not fault the Trustee for following the process that, according to his Declaration, other trustees in our District follow, but he must live with the risks of that decision given the strong federal policy of finality, as Judge Shefferly articulated so well in *Reiman*.

The court is mindful, too, that the State Court entered its order quieting title as described above, likely in reliance on the court's orders lifting the automatic stay and closing the case. The court is obliged to give that order full faith and credit, 28 U.S.C. § 1738, and is not persuaded that vacating the Final Decree to permit the Trustee to challenge the mortgage that the State Court recently reformed comports with the letter or spirit of that statute.

Moreover, the Trustee's statement that U.S. Bank "did not disclose this error in its mortgage and implicitly represented that its mortgage was properly perfected," Porter Decl. at ¶ 8, is equally consistent with U.S. Bank's counsel's statement that his client, an assignee of the mortgage, learned of the unclosed metes and bounds description *after* obtaining relief from the automatic stay, from a title search equally available to the Trustee. Even if the Trustee's tepid statement about the lenders' "implicitly" representing perfection rises to the level of "fraud" within the meaning of Rule 60(b)(3), the argument, like the others, succumbs to the time bar in Rule 60(c). At the very least, the court would require a much stronger statement before pulling the levers of equity.

Finally, the court's interpretation of Rule 60(b) and the Rule 60(b) Motion make it unnecessary to decide whether, as a prudential matter, the motion is ripe before the Trustee actually files suit against U.S. Bank. Today's ruling makes it unnecessary to give the advisory opinion regarding U.S. Bank's unmade defenses that, to some extent, the Trustee sought to elicit by filing the motion. In short, concerns about prudential limitations on the exercise of the court's authority also factor into today's decision.

For the foregoing reasons, the court will deny the Rule 60(b) Motion.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Rule 60(b) Motion is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum of Decision and Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon the Debtors, Scott Marshall Neuman, Esq., Andrew J. Gerdes, Esq., Rodney M. Glusac, Esq., and the United States Trustee.

END OF ORDER

IT IS SO ORDERED.

Dated January 30, 2020

Scott W. Dales
United States Bankruptcy Judge