

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN**

In re:

Case No. HM 05-90715

MICHAEL R. BLOXSOM and
CYNTHIA A. BLOXSOM,

Debtors.

NOT FOR PUBLICATION

**OPINION RE: AEGIS MORTGAGE COMPANY'S
JUNE 1, 2007 MOTION**

Appearances:

Edith A. Landman, Esq., Grand Rapids, Michigan, attorney for Aegis Mortgage Company
Daniel M. Morley, Esq., Traverse City, Michigan, attorney for Colleen Olson, Chapter 7 Trustee

On June 1, 2007, Aegis Mortgage Company (“Aegis”) filed a motion entitled “Motion to Vacate Order Reopening Case and to Reclose Case.” The motion is brought pursuant to FED.R.BANKR.P. 9024,¹ which incorporates for the most part FED.R.CIV.P. 60. For the reasons stated in this opinion, the motion is denied.

¹Unless otherwise indicated, all further citations in this opinion to “Rule _____” will be to the Federal Rules of Bankruptcy Procedure.

BACKGROUND

Michael and Cynthia Bloxsom (“Debtors”) filed for relief under Chapter 7 of the Bankruptcy Code² on August 16, 2005. Debtors’ scheduled their Marley Street residence as an asset of the estate with no equity. They elected not to claim it as exempt. Rather, Debtors indicated that they intended to surrender it to their mortgagee.

As for the Chapter 7 trustee, Colleen Olson, she quickly determined that further administration of the case was unnecessary. Consequently, she filed a “no asset” report with the court less than two months after the case was commenced. That report prompted the court in turn to close the bankruptcy case under Section 350(a). The order closing the case was entered on January 25, 2006.

Nearly fourteen months passed before Ms. Olson filed a motion to reopen the case. The March 20, 2007 motion stated that “[t]he Trustee has recently discovered that the estate possesses an unencumbered asset, being the debtors’ real property located at 108 S. Marley Street, St. Ignace, Michigan, which the parties had previously believed to be subject to a mortgage and without equity.” Ms. Olson served the March 20, 2007 motion and a proposed order pursuant to this court’s “notice and opportunity” procedure³ upon the United States Trustee’s office and Debtors’ attorney but not upon Aegis. An order was then entered on April 13, 2007 reopening the case.

²11 U.S.C. §§ 101, *et seq.* Debtor’s petition pre-dates the October 17, 2005 effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub. L. No. 109-8, § 1501(b)(1), 119 Stat. 23. Unless otherwise indicated, all citations in this opinion to the Bankruptcy Code will be to the Bankruptcy Code as written prior to the BAPCPA amendments. The citation will be simply “Section _____” if the amendments have not changed the enumeration. However, if the enumeration has been changed, then the citation will be “Section _____ (pre-BAPCPA).”

³LBR 9013.

Aegis filed its Rule 9024 motion on June 1, 2007.⁴ That motion requests the court to set aside its April 12, 2007 order reopening the case because, among other things, Aegis had not been given the opportunity to object prior to its entry. I heard that motion first on July 2, 2007 and again on July 24, 2007. I then took the matter under advisement.

DISCUSSION

I recently issued my opinion in *Moyer v. ABNAMRO Mortgage Group, Inc. (In re Feringa)*, _____ B.R. _____ (Bankr. W.D. Mich. 2007) (Adv. Pro No. 07-80156). The Chapter 7 trustee there had closed the case without pursuing an avoidance action and the recipient of the alleged transfer had opposed the case being reinstated for many of the same reasons that Aegis has articulated in this instance. Therefore, I am simply adopting much of the reasoning I set forth in *Feringa* for purposes of this decision. Suffice it to say that I reject Aegis's contention that Ms. Olson, as the former trustee in this case, lacked standing to request the reopening of the case under Section 350(b) and Rule 5010. If nothing else, Ms. Olson has a keen interest in having the case reinstated and the Marley Street property sold for the benefit of the bankruptcy estate given that she is at risk personally because of her decision to close the case in the first place.⁵

As for Aegis, it correctly points out that it was not served with Ms. Olson's Section 350(b) motion and, as such, it never had the opportunity to be heard. However, Aegis' complaint does beg

⁴Aegis also objected on that same day to a prior motion filed by Ms. Olson to sell the Marley Street property pursuant to Section 363(b). However, Ms. Olson ultimately withdrew that motion because she had yet to avoid Aegis's claimed lien in that property.

⁵In making this observation, I do not mean to suggest that Ms. Olson did in fact err in closing the case when she did. She undoubtedly has a number of reasons why she elected to close the estate at that time. However, such explanations become unnecessary if the harm itself can be remedied simply by reinstating the case.

the question as to whether its objection, even if heard, would have been successful. Aegis' opposition, after all, is self-interested. Obviously, Aegis's defense of the adversary proceeding Ms. Olson has now commenced against it⁶ will be unnecessary if Aegis can succeed in its effort to have the April 12, 2007 order vacated and the case closed once again.

This is not to say that Aegis's self-interest would have precluded it from voicing its objection to Ms. Olson's March 20, 2007 request to reopen the case. After all, as Aegis admits, it is ostensibly an unsecured creditor with respect to a substantial amount of the indebtedness owed to it by Debtors unless and until it is able to convince some court to reform the mortgage to include the Marley residence. However, as an unsecured creditor, one would expect Aegis to support, rather than oppose, the reopening of the case since Ms. Olson's success in pursuing the adversary proceeding would presumably lead to a greater Section 726 distribution to Aegis and the unsecured creditors. Consequently, it is fair to infer that Aegis' motivation for opposing reopening of the case is largely, if not altogether, selfish and, as such, would have been given little weight had Aegis originally appeared to oppose reopening the case.

⁶The court's records indicate that Ms. Olson filed a complaint against Aegis and other co-defendants on August 8, 2007. The complaint describes Aegis as having no lien at all in the Marley Street residence. Specifically, the complaint alleges that Debtors owned a vacant lot that was adjacent to their Marley Street residence, that Debtors granted to Aegis a mortgage in that lot, and that Aegis then recorded that mortgage. However, the complaint further alleges that Debtors never granted to Aegis a mortgage in the adjacent Marley Street residence. Indeed, the complaint references a state court action that Aegis and Mortgage Electronic Registration Systems, Inc. had commenced in March 2007 in Mackinac County, Michigan against Debtors. Aegis admitted in the Mackinac County complaint that the mortgage that Debtors had executed in its favor did not include the Marley Street residence in the property description. However, Aegis contends that the omission of the Marley Street residence from that description was by mutual mistake. Consequently, Aegis had sought through the state court litigation to reform the vacant lot mortgage that Debtors had actually granted to Aegis to include the Marley Street residence as well.

Aegis also argues that a motion to reopen a case under Section 350(b) can be likened to a Rule 9024 motion to set aside an order and that, therefore, motions to reopen under Section 350(b), at least to the extent they are based upon mistake, inadvertence, surprise or excusably neglect, must be brought within a year of the closure order. FED.R.BANKR.P. 9024 (incorporating by reference FED.R.CIV.P. 60(b)). Consequently, Aegis contends that Ms. Olson's motion to reopen the case, which was brought almost fourteen months after the January 25, 2006 closure, is untimely. However, Aegis offers no authority for its contention. Moreover, Rule 9024 itself states that while FED.R.CIV.P. 60 is to apply generally in cases under the Bankruptcy Code, it does not apply with respect to "a motion to reopen a case under the [Bankruptcy] Code. *Id.*

Aegis has cited a number of cases in its two briefs in which the court has permitted targeted parties like Aegis to use the Section 350(b) process to preempt an anticipated action against it. However, "[t]here is a time for everything,"⁷ and, in this instance, now is not the time for Aegis to raise its defenses. I agree with those courts that view closing and reopening a bankruptcy case as largely ministerial acts.

A motion to reopen is simply a mechanical device which can be brought ex parte and without notice. *In re Daniels*, 34 B.R. 782, 784 (9th Cir. BAP 1983). It has no independent legal significance and determines nothing with respect to the merits of the case. *In re Germaine*, 152 B.R. 619, 624 (9th Cir. BAP 1993).

Abbott v. Daff (In re Abbott), 183 B.R. 198, 200 (9th Cir. BAP 1995).

I do not see within the four corners of Section 350(b) any opportunity for a potential defendant like Aegis to use this administrative process as a tactical device to preempt the commencement of an adversary proceeding against it. In fairness to Aegis, it filed its Rule 9024 motion before Ms. Olson

⁷Ecclesiastes 3:1

had actually commenced her adversary proceeding and, therefore, Aegis at least had the argument that filing its motion was the only mechanism through which it could at that time voice its position. However, Aegis does not explain why it could not have waited until it had been joined as a defendant in an adversary proceeding or otherwise engaged in a contested matter in which its purported interest was at issue.

Moreover, Ms. Olson has now commenced an adversary proceeding in which Aegis may raise its defenses, including those already raised by Aegis in conjunction with this motion. For example, Aegis preserves its argument that the adversary proceeding is barred by Section 546(a)(2) or the doctrine of laches because of the case's closure in January of 2006. Likewise, Aegis preserves its argument that Ms. Olson, on behalf of the estate, is not entitled to the declaration she is seeking vis-a-vis Aegis because the Marley Street residence was deemed abandoned by operation of Section 554(a) when the case was previously closed.

CONCLUSION

For the reasons stated, Aegis' motion is denied. The court will issue a separate order consistent with this opinion.

/s/ _____
Hon. Jeffrey R. Hughes
United States Bankruptcy Judge

Signed this 3rd day of October, 2007
at Grand Rapids, Michigan.