UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

Case No. HM 04-90205

STEVEN MILLER and
MICHELLE MILLER,

Debtors.
_____/

NOT FOR PUBLICATION

MEMORANDUM OPINION AND ORDER RE:
DEBTORS' MAY 2, 2005 MOTION TO RECONSIDER

On May 2, 2005, Debtors filed a motion entitled "Debtors' Motion for Reconsideration and to Set Aside Order Lifting the Stay as to Deutsche Bank National Trust Company f/k/a Bankers Trust." The motion is brought pursuant to Fed.R.Bankr.P. 9023 and 9024[1]. For the reasons stated herein, the motion is denied.

BACKGROUND

Debtors filed a petition for relief under Chapter 13 on March 10, 2004. Their Chapter 13 plan was confirmed on June 9, 2004.

Deutsche Bank National Trust Company ("Deutsche Bank") is a creditor of the Debtors. Debtors' indicated in their plan that they owed Deutsche Bank $78,235.00 and that the indebtedness

[1]The Federal Rules of Bankruptcy Procedure are set forth in Fed.R.Bankr.P. 1001-9036. Unless otherwise noted, all further references to a rule are to the Federal Rules of Bankruptcy Procedure.

was secured by a first mortgage in their home. Debtors also disclosed that there was a pre-petition arrearage on their payments to Deutsche Bank of approximately $19,000.00.

Debtors' plan provided that they would continue to honor the terms of their obligation to Deutsche Bank as originally agreed.[2] Debtors in fact had no choice but to treat Deutsche Bank in this fashion because Deutsche Bank's indebtedness was secured only by Debtors' residence and, therefore, was generally exempt from modification. 11 U.S.C. § 1322(b)(2).[3] However, Debtors' plan did take advantage of Section 1322(b)(5) by providing that the $19,000.00 pre-petition arrearage would be cured through additional monthly payments of $317.00 each.[4]

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[2]Specifically, Debtors' confirmed plan provided that:

> Creditor, Deutsche Bank, shall retain its mortgage lien. Debtors assume the contract. The creditor shall be paid its regular monthly payment estimated to be $681. . . .

March 10, 2004 Plan, Section II.B.1.a.

[3]The Bankruptcy Code is set forth in 11 U.S.C. §§ 101-1330. Unless otherwise noted, all further statutory references are to the Bankruptcy Code.

[4]Specifically, Debtors' confirmed plan provided that:

> Creditor, Deutsche Bank, is owed an arrearage on its mortgage estimated to be $19,000. The Trustee shall pay $317 per month, at zero percent (0%) interest on the mortgage arrearages. Any claims allowed for an arrearage shall be paid over a reasonable period of time through pro-rata distributions with the other secured claims.

March 10, 2004 Plan, Section II.B.1.b.

Debtors' plan was confirmed without objection by Deutsche Bank. A consequence of the plan's confirmation was that both Deutsche Bank and Debtors became bound by its terms. 11 U.S.C. § 1327(a).

Debtors' plan provided that the Chapter 13 trustee was to make both the regular $681.00 payment and the $317.00 arrearage payment to Deutsche Bank. Debtors initially contributed sufficient funds to the Chapter 13 trustee to make these monthly payments. However, Debtors admit that beginning in late 2004 or early 2005 they defaulted on their required contributions to the Chapter 13 trustee. Consequently, the Chapter 13 trustee fell behind in making the corresponding monthly payments to Deutsche Bank.

On March 17, 2005, Deutsche Bank filed a motion for relief from stay because of Debtors' failure to keep current on their plan contributions to the Chapter 13 trustee. Deutsche Bank served the motion and proposed order pursuant to LBR 9013 and Debtors filed a timely objection to the motion. Debtors conceded in their objection that they were $3,163.34 in arrears to the Chapter 13 trustee on their plan contributions as of March 31, 2005. However, Debtors also stated in their objection that they intended to cure the arrearage by forwarding to the Chapter 13 trustee their expected 2004 tax refund by no later than April 5, 2005.

Debtors' timely objection precipitated the scheduling of a hearing on Deutsche Bank's motion. That hearing was held on April 26, 2005. Both Deutsche Bank and Debtors appeared at the hearing. The Chapter 13 trustee also appeared, albeit by a video conference connection.[5] Debtors

[5]This case is assigned to the Marquette, Michigan docket. Marquette is a seven hour drive from Grand Rapids, Michigan. The court permits parties who wish to attend a hearing being held in Marquette the option of appearing by a video feed over the internet from the Grand Rapids courtroom.

represented at the hearing that they had in fact cured the payment arrearages due the Chapter 13 trustee and that the Chapter 13 trustee consequently was able to pay the past due installments owing to Deutsche Bank under the plan. However, Deutsche Bank indicated that it was unwilling to waive the post-confirmation default in payments on account of its home mortgage loan. Deutsche Bank preferred instead to proceed with its motion for relief from the automatic stay.

I granted Deutsche Bank's motion after hearing argument from both parties. I further directed Deutsche Bank to submit a proposed order for execution and entry. However, Debtors filed their Rule 9023 motion before I had the opportunity to sign that order.

DISCUSSION

Rule 9023 parallels Fed.R.Civ.P. 59. Courts should not grant motions brought pursuant to either rule as a matter of course.

> Motions for new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence. *Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656 (N.D. Ill. 1982), *aff'd*, 736 F.2d 388 (7th Cir. 1984).
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> These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued. *Evans, Inc v. Tiffany & Co.*, 416 F.Supp. 224, 244 (N.D. Ill. 1976). Moreover, they cannot be used to argue a case under a new legal theory. *Keene,* 561 F.Supp. at 666; *Evans*, 416 F.Supp. at 244.

Fed. Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986).

I am dubious as to whether the automatic stay was even in effect at the time Deutsche Bank filed its motion. Section 362(c)(1) provides that the automatic stay imposed by Section 362(a) is terminated with respect to acts against property of the estate "when such property is no longer property of the estate." Debtors' confirmed plan in turn states that:

> Upon confirmation of the Plan all property of the estate shall vest in the Debtor, except for the future earnings of the Debtor and other property specifically devoted to the Plan.

March 10, 2004 Plan, Section I.E.

This provision is consistent with the Bankruptcy Code.

> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

11 U.S.C. § 1327(b).

Therefore, it is reasonable to conclude from Debtors' confirmed plan and Section 362(c)(1) that Deutsche Bank's right to foreclose on its lien against Debtors' home was no longer impeded by the automatic stay once Debtors' plan was confirmed.

I recognize that the district court for this district has held that the post-confirmation bankruptcy estate in a Chapter 13 proceeding retains a property interest protected by the automatic stay notwithstanding the fact that the property "re-vested" with the debtor upon plan confirmation. *Annese v. Kolenda (In re Kolenda)*, 212 B.R. 851 (Bankr. W.D. Mich. 1997). The district court reconciled Section 1327(b) by determining that the term "vests" as used in that section means something less than a complete transfer of ownership of bankruptcy estate property back to the debtor.

> I am not persuaded by this reading of the statute. "Vesting" may mean more than mere possession without meaning ownership. The term "vesting" is not necessarily synonymous with a transformation of the estate property into property of the debtor. *See Security Bank*, 1 F.3d at 691. Vesting instead has the ordinary meaning of conveying some immediate right in property. *See Fisher I*, 198 B.R. at 724 & n. 4; Black's Law Dictionary 1401 (5th ed. 1979) ("vest" is defined as "to give an immediate fixed right of present or future enjoyment. . . .

> To clothe with possession."). One could understand the term to return to the debtor something more than possession- - i.e., full ownership rights in the property except vis-a-vis the interest of the estate in fulfilling the plan. *See Fisher I*, 198 B.R. at 733. *See also Aneiro*, 72 B.R. at 429-30 ("The ownership rights of the debtor in the property of the estate are limited at least to the extent that the property is committed to successful performance under the plan."). Alternatively, "[s]ince "vesting" may mean a fixing of rights, as well as a transfer, Section 1327(b) should be read, consistent with the rest of Chapter 13, as fixing the debtor's right to possess and deal with estate property after confirmation. . . . The estate, however, remains intact after confirmation." *Fisher I*, 198 B.R. at 733.

Id. at 854.

However, in making this determination, the district court did not consider Section 349(b).

> (b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—
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> * * *
>
> (3) **revests** the property of the estate in the entity in which such property was **vested** immediately before the commencement of the case under this title.

(Emphasis added).

Section 349(b) strongly suggests that Congress did in fact intend "vest" to mean the transfer of the bankruptcy estate's entire interest in property as opposed to the transfer of some rights but with the reservation of other rights. I doubt that anyone would argue that the "re-vesting" of property of the estate to the debtor under Section 349(b) upon dismissal of a bankruptcy proceeding would involve anything less than the reconveyance of the bankruptcy estate's entire interest in that property. Consequently, it is fair to conclude that Congress intended the term "vest" to have the same effect when Congress used that unique word again in Section 1327(b) to address the post-confirmation

return to debtor of property that had become property of the estate at the commencement of his bankruptcy proceeding.

However, it is immaterial whether the automatic stay was terminated or not in this instance. Cause nonetheless existed under Section 362(d)(1) to modify the automatic stay. Specifically, Debtors were, as Debtors themselves agreed at the hearing, in material default under the terms of their confirmed plan and, therefore, the Chapter 13 trustee was in material default with respect to the monthly payments to Deutsche Bank required by that plan.

Debtors' argue that I erred in determining that cause existed because I did not take into consideration that Debtors had caught up on their plan contributions such that the Chapter 13 trustee was able to cure the missed payments to Deutsche Bank at the time of the hearing. However, I did take this argument into consideration.[6] What I did not do was give it any weight in making my decision.

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[6]Debtors argue that the information concerning the Chapter 13 trustee's ability to cure the Deutsche Bank default did not come to light because I did not give the Chapter 13 trustee the opportunity to speak. It is true that the Chapter 13 trustee did not speak until after my decision. However, the Chapter 13 trustee's failure to interject his comments at a prior point was inadvertent. The Chapter 13 trustee appeared at the April 26, 2005 hearing through the video conference feed from Grand Rapids. Therefore, his visual presence was limited to his image on a television screen and his ability to communicate was limited by both a delay and an audio override. As the Chapter 13 trustee put it "I have been hanging out here in the boondocks trying to get everybody's attention, ..." 4/26/05 Hearing Transcript, p. 10.

Moreover, what the Chapter 13 trustee offered when he had gained my attention had nothing to do with what monies he had on hand to cure the post-confirmation default with Deutsche Bank. Finally, Debtors themselves had already represented prior to my ruling that they had made sufficient plan contributions to allow the Chapter 13 trustee to cure the payment defaults to Deutsche Bank. Therefore, the Chapter 13 trustee would have only corroborated what Debtors had already said and what I had accepted as true even if the Chapter 13 trustee had addressed this issue.

Debtors assume that Deutsche Bank is under some obligation to accept the Chapter 13 trustee's cure of the post-confirmation default of Deutsche Bank's rights to payment under that plan. However, Debtors admitted that there was nothing within the four corners of their agreement with Deutsche Bank that required it to accept such a cure. Moreover, Debtors have not cited any Bankruptcy Code provision or case law which imposes such an obligation upon Deutsche Bank. At best, Debtors rely upon vague notions of equity and judicial discretion as authority for challenging my decision to grant Deutsche Bank the relief it requested.

I agree that I am permitted some discretion to consider facts beyond the terms of the confirmed plan in determining whether cause exists or not to grant a movant relief from the automatic stay. However, that discretion is not unlimited. Congress' mandate in Section 362(d)(1) is quite clear. The court "shall grant relief from the stay . . . for cause. . . ." The implication is that the court must grant the motion so long as the movant has offered a sufficient basis to justify the relief. Debtors did not argue that the Chapter 13 trustee's failure to make payments to Deutsche Bank, which they themselves had induced, did not constitute a material default. Rather, they argued that their material default should have been ignored because of their subsequent effort to cure that default. Unfortunately, Deutsche Bank chose not to accept the cure and, therefore, Debtors remained in material default under the terms of their plan.[7] Consequently, cause continued to exist under Section 362(d)(1) to grant the relief mandated by that section.

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[7]Debtors did represent at the hearing that the Chapter 13 trustee had tendered $1,500.00 to Deutsche Bank on April 1. However, Debtors did not make the further representation that Deutsche Bank had accepted that payment. More important, Debtors did not assert then nor do they assert now that Deutsche Bank's alleged acceptance of the tendered payment constituted a waiver of the default or that the alleged acceptance otherwise estopped Deutsche Bank from proceeding with its motion.

The limitation on my discretion to ignore what is otherwise clear cause to grant the requested relief is especially apparent in the instant case. As already discussed, Debtors' own ability to address Deutsche Bank's indebtedness in their Chapter 13 proceeding was limited from the outset. Debtors could not modify Deutsche Bank's rights under their pre-petition lending agreement with Deutsche Bank other than to cure a then existing default under that agreement. *In re Stiller*, 323 B.R. 199, 205-11 (Bankr. W.D. Mich. 2005). In reality, Debtors' request to give effect to their proffered cure is nothing more than an attempt to invoke for a second time the plan relief permitted by Section 1322(b)(5). However, curing post-confirmation arrearages over the home mortgagee's objection is not included among the post-confirmation amendments permitted by Section 1329(a). Consequently, it follows that Debtors cannot rely upon equity or the court's discretion to procure relief which is clearly not afforded them by the Bankruptcy Code itself.[8]

The same reasoning applies to Debtors' argument that I should not have terminated the stay altogether when I granted Deutsche Bank's motion. Their argument is based upon the following language in Section 362(d):

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, **such as by terminating, annulling, modifying, or conditioning such stay**—
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> * * *

(Emphasis added).

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[8]A debtor's inability to compel a home mortgagee to accept a cure for a post-confirmation default of the plan's treatment of that home mortgagee does not mean that the home mortgagee cannot agree to accept a cure. Indeed, it is often in a home mortgagee's interest to forego foreclosure and elect instead to continue receiving payments under revised terms. If an agreement can be reached, then it is appropriate to adjust the plan to reflect whatever change in payment is required to effectuate that arrangement. 11 U.S.C. §§ 1329(a)(1) and (2).

Although not articulated, Debtors seem to assert that I was not required to modify the automatic stay with respect to Deutsche Bank as I did but that I could have instead "conditioned" its request on, for example, Debtors' cure of the default and their promise not to do it again. Debtors have not cited any authority for this interpretation of Section 362(d). However, even if I were to accept Debtors' proposition that I do have some discretion under Section 362(d) to award relief other then that requested by the movant, exercising such discretion in this circumstance was clearly not appropriate given Debtors' very limited ability to modify a home mortgage lender's rights in a Chapter 13 proceeding.

CONCLUSION

Therefore, for the reasons stated in this memorandum, Debtors' motion is DENIED. This memorandum serves as the court's order with respect to the motion.

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Honorable Jeffrey R. Hughes
United States Bankruptcy Judge

Signed this _____ day of May, 2005,
at Grand Rapids, Michigan.

Served pursuant to this Court's CM/ECF electronic notification process or by first-class U.S. mail upon:

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