DOCKET NUMBER: 95-11773
ADV. NUMBER: None
JUDGE: M. A. Mahoney
PARTIES: Sallie Moton
CHAPTER: 13
ATTORNEYS:
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KEY WORDS:
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

SALLIE G. MOTON, Case No. 95-11773-MAM-13

Debtor.

ORDER

This matter is before the Court on the Motion of the Debtor for Relief from Judgment dated January 18, 1996 and filed on January 22, 1996. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding under 28 U.S.C. § 157(b)(2) or the Court has no jurisdiction at all because the order of December 19, 1995 is a final, nonappealable order. For the reasons indicated below, the Motion is denied.

FACTS

On September 22, 1995, the Court entered an order denying relief from the automatic stay to the Department of Agriculture, Rural Housing and Community Development Service (RHCDS). RHCDS filed a timely Motion to Alter or Amend the Order under Fed. R. Bankr. P. 9023, and the Court did amend its order by order of December 19, 1995. On January 18, 1996, Debtor filed its Motion for Relief.

The Debtor alleges that Debtor's counsel did not receive a copy of the order until January 11, 1996. Debtor asks the Court to reconsider the relief granted in the December 19, 1995 order or at least to deny Debtor's request and thereby give Debtor a right to appeal the denial of this Motion and the December 19, 1995 order.

At the hearing, the Court elicited testimony from Ms. Moton. She has not made any payments on her Chapter 13 plan since October 3, 1995. She has not been segregating or holding the funds necessary to make the payments either. She has spent at least some of that money on other expenses.

LAW

It is unclear from the Motion whether it is a motion brought under Fed. R. Bankr. P. 9023 or 9024, or is a motion for extension of time to appeal. Rule 9023 parallels Fed. R. Civ. P. 59. Any motion brought under it to alter or amend a judgment must be made within 10 days of entry of the order. Fed. R. Bankr. P. 9023(b). Fed. R. Bankr. P. 9024 parallels Fed. R. Civ. P. 60. Grounds for a motion brought pursuant to this rule would be "mistake, inadvertence, surprise, or excusable neglect" or "any other reason justifying relief from the operation of the judgment." Fed. R. Bankr. P. 9024 (b)(1) and (6). A motion for extension of time to appeal is governed by Fed. R. Bankr. P. 8002(c). The Court will discuss each possibility below.

A recent Eighth Circuit Court of Appeals case is directly on point as to the Rule 9023 and 9024 issues. *Ellis v. Ellis (In re Ellis)*, 72 F.3d 628 (8th Cir. 1995) held that once the 10-day period for filing of Rule 59 motions expired, no enlargement of the time was possible. This is the case here as well. The Debtor's Motion was filed nearly one month after the order was entered. In the *Ellis* case, the debtor had alleged that she had not received notice of the entry of the order, just as in this case. That fact did not change the result as to denial of the Rule 59 motion. It is clear to the court that the portion of Ms. Moton's motion which seeks to alter or amend the order of December 19, 1995 based on allegations that the Court erred in its legal analysis can only be a Rule 59 motion. Therefore, as previously stated, since it is an untimely Rule 59 motion, it must be denied without even considering the merits of the claim. The legal

error portion does not raise any of the grounds under Rule 60(b). Even if Ms. Moton's request were a timely Rule 59 motion, the Court would deny it. The Court very carefully considered the facts and the law at the time of the prior reconsideration.

The Rule 9024 or Rule 60(b) Motion, if that is what Debtor's Motion is, fails as well. As the Court in the *Ellis* case pointed out, "Rule 60(b) is appropriately invoked to offer excuses for neglect leading up to the judgment in the first place, not excuses for neglect for failure to file post-judgment motions to alter or amend." *Ellis* at 72 F.3d 630. The Motion of Ms. Moton does not go to prejudgment mistakes in its request to grant relief due to failure to receive notice.

If Ms. Moton's request is that the order should be overturned due to the failure of Debtor to receive notice, the motion fails. The burden of proof as to lack of notice is on the Movant. Fed. R. Bankr. P. 9006(e) states, "service . . . of notice by mail is complete on mailing." *CUNA Mutual Insurance Group v. Williams (In re Williams)*, 185 B.R. 598, 600 (Bankr. 9th Cir. 1995) ("The law in this circuit is that denial of receipt does not rebut the presumption"); *In re Morelock*, 151 B.R. 121 (Bankr. N.D. Ohio 1992). The Movant's own Motion states that notices and copies of the December 19, 1995 order were mailed to the parties. The Court file contains a certificate of mailing of the order. Movant, without offering any evidence of the fact at the hearing, alleged in her motion that the order was not received. Therefore, the presumption of receipt has not been overcome. The evidence is at best in equipoise. There was not a preponderance of evidence of failure to receive the order.

If Ms. Moton's request for relief under Rule 60(b) is on the basis of equitable considerations under Rule 60(b)(6), it also fails. The Debtor has made no payments toward fulfillment of her Chapter 13 plan obligations since October 3, 1995, and has not retained the funds to make those payments now if the Court were to rule in her favor. This evidence does not

favor an equitable ruling in her favor when a third party has already purchased the property from RHCDS. "To justify relief under subsection (6), a party must show 'extraordinary circumstances' showing that the party is faultless in the delay." *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 1497, 123 L. Ed. 2d 74 (1993).

Finally, the Motion cannot be termed a motion for extension of time to appeal. Under Fed. R. Bankr. P. 8002(c), a bankruptcy judge can only grant to motion to extend the time to appeal if brought within the 10-day period for appeal unless a party shows excusable neglect. Under *Pioneer Investments*, *supra*, neglect is excusable if proof is offered of, for instance, "prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer* at 113 S. Ct. 1498. As discussed above, the Debtor did not offer proof of any excusable neglect. Debtor offered no proof at all.

THEREFORE, IT IS ORDERED that the Motion for Relief from Judgment is DENIED.

Dated: February 5, 1996

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MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE