IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	:	
GRANT L. & SHIRLEY M. BOWEN.	:	Bankruptcy Case Number 98-28722
Debtors.	:	Chapter 7

MEMORANDUM DECISION AND ORDER

Terry L. Hutchinson of Terry L. Hutchinson, P.C., St. George, Utah, for Grant L. & Shirley M. Bowen, Debtors.

Jeffrey Weston Shields of Jones, Waldo, Holbrook & McDonough, Salt Lake City, Utah, for American General Finance, Movant.

This is a contested matter arising from the Motion of American General Finance (AGF): "1). For Relief From Order Dated April 13, 2001, Imposing Sanctions upon American General Finance, Inc. Pursuant To Bankruptcy Rule 9024 And F. R. Civ. P. 60(b); And Alternatively 2). To Alter Or Amend April 13, 2001, Order Or Grant New Hearing Pursuant To Bankruptcy Rule 9023 [sic] And F. R. Civ. P. 59." Upon careful consideration of the evidence, the pleadings and arguments, and upon an independent analysis of applicable law, the Court concludes that AGF's motion under Rule 60(b) and alternatively under Rule 59 is granted.

FACTS[1]

On August 17, 1998, Debtors, Grant L. Bowen and Shirley M. Bowen (Debtors), filed a voluntary Chapter 7 petition under Title 11 of the United States Bankruptcy Code. Following an order of discharge, a final decree was entered and the case closed on January 6, 1999. On February 19, 2000, Debtors filed a motion to reopen the case for the purpose of seeking sanctions against creditor ContiMortgage for alleged violations of the automatic stay under 11 U.S.C. §§ 362(a)(4) and (5).[2] Debtors' case was reopened and a hearing held on their Motion For Sanctions, at which Debtors made the only appearance. The Court ordered ContiMortgage to pay Debtors actual damages of $9,000, attorneys fees of $10,000, and punitive damages of $80,000. A final decree was entered and the Debtors' case was closed on July 7, 2000.

On September 7, 2000, ContiMortgage filed its Motion To Reopen Case To Consider Motion To Vacate Court's Order Dated June 27, 2000, Imposing Sanctions Upon ContiMortgage Corporation. The gravamen of the motion was that the sanctions order was entered subsequent to ContiMortgage filing for Chapter 11 bankruptcy protection in the Southern District of New York. A hearing was held thereon and the Court reopened the case and vacated its June 27, 2000, sanctions order. Again, a final decree was entered and Debtors' case was closed on December 28, 2000.

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[1] For the purpose of this Memorandum Decision and Order, the facts shall be limited to those necessary for a determination under F. R. Bankr. P. 60(b) and 59, and do not represent those facts necessary for a determination on the merits of the underlying sanctions sought by Debtors.

[2] All future references are to Title 11 of the United States Bankruptcy Code unless otherwise noted.

On February 23, 2001, Debtors again filed a motion to reopen their bankruptcy case, this time for the purpose of imposing sanctions against creditor "American General Finance of Utah, Inc. and/or American General Finance, Inc. and/or First Finance and/or Morequity Inc. and/or Fairbanks Capital Corp.[(Creditors)], because of the actions of their agent, ContiMortgage . . . for the violation of the Automatic Stay Rule 11 USC § 362(a)(4) and (5). . . ." Debtors alleged that Creditors were in violation of the automatic stay because ContiMortgage's alleged postpetition contacts were within its capacity as agent of Creditors. A hearing was held on April 3, 2001, with only the Debtors making an appearance. The case was reopened and the Court awarded sanctions against Creditors in amounts identical to those awarded against ContiMortgage on June 21, 2000. In addition, the liens of Creditors were deemed void and attorneys fees of $20,000 were awarded. The Order For Sanctions And Judgment was entered on April 13, 2001.[3]

On April 23, 2001, AGF filed its motion "1). For Relief From Order Dated April 13, 2001, Imposing Sanctions upon American General Finance, Inc. Pursuant To Bankruptcy Rule 9024 And F. R. Civ. P. 60(b); And Alternatively 2). To Alter Or Amend April 13, 2001, Order Or Grant New Hearing Pursuant To Bankruptcy Rule 9023 [sic] And F. R. Civ. P. 59." A hearing was held thereon on September 17, 2001, before the Hon. William T. Thurman, and the matter was taken under advisement.[4]

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[3] Upon the motion of AGF, the Court entered an Order on June 22, 2001, staying the effect of the April 13, 2001, sanctions order pending disposition of AGF's motion to vacate or alter or amend the judgment. The Order was retroactively effective to May 29, 2001, and remains in effect pending a determination on the merits of AGF's defenses.

[4] Prior to the April 17, 2001, hearing, the Hon. John H. Allen presided over this (continued...)

DISCUSSION

1. Jurisdiction

This Court has jurisdiction over the parties and subject matter of this contested matter under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(A) and (O), and the Court has authority to enter a final order. Venue is proper in the Central Division of the District of Utah under 28 U.S.C. § 1409.

2. Analysis of AGF's Motion Pursuant to Rules 60(b) and 59.

The matter is properly before this Court as a motion seeking relief from the sanctions order pursuant to Fed. R. Civ. P. 60(b), and alternatively, as a motion to alter or amend the sanctions order pursuant to Fed. R. Civ. P. 59.[5] *Lopez v. Long (In re Long)*, 255 B.R. 241, 244 (10th Cir. BAP 2000). The decision about which rule to apply generally depends on the time the motion is served; *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1992), the petitioner's characterization of the motion is not controlling. *Skagerberg v. Oklahoma*, 797 F.2d 881, 882 (10th Cir. 1986)("[R]egardless of how it is characterized, a post-judgment motion made within ten days of the entry of judgment that questions the correctness of a judgment is properly construed as a motion to alter or amend judgment under Fed. R. Civ. P. 59(e)."). Consequently, although AGF prays for relief in the alternative; seeking first to vacate the sanctions order under Rule 60(b), or second, to alter or amend the judgment under Rule 59, this Court is not precluded

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[4](...continued)
contested matter.

[5] It is undisputed that AGF timely filed both its Rule 60(b) and 59(e) motions.

from its responsibility to review the motion under Rule 59. However, based on the facts germane to AGF's motion, the arguments of counsel, and the testimony at the September 17, 2001, hearing, this Court finds it most appropriate to begin with an application of Rule 60(b).[6]

a. Rule 60(b) Analysis

Rule 60(b) applies to this case pursuant to Fed. R. Bankr. P. 9024 and provides in pertinent part: "On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . . The motion shall be made within a reasonable time. . . ." Fed. R. Civ. P. 60(b)(1) - (6). Relief under Rule 60(b) is extraordinary and may only be granted upon a showing of exceptional circumstances. *Stubblefield v. Windsor Capital Group*, 74 F.3d 990, 994 (10th Cir. 1996). "The movant must plead and prove the mistake or excusable neglect. On the other hand, a Rule 60(b) motion should be liberally construed and every effort should be made to try cases on their merits." *Greenwood Explorations, Ltd. v. Merit Gas And Oil Corporation, Inc.*, 837 F.2d 423, 426 (10th Cir. 1988).

Here, the record reflects that Debtors' Motion To Reopen Case And Motion For Sanctions was properly served on CT Group, AGF's registered agent in Utah. The motion papers were then forwarded to AGF's legal department at its headquarters in Evansville, Indiana, where an AGF paralegal (paralegal) was charged with determining whether the papers involve

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[6] This Court is aware of the significant distinction between a motion seeking relief from the judgment under Rule 60(b) and one seeking to alter or amend the judgment under Rule 59(e), as set forth in *Hawkins v. Evans*, 64 F.3d 543, 546 (10th Cir. 1995). However, the conclusions set forth herein obviate that distinction.

litigation against AGF, a foreclosure, or a bankruptcy matter. In this instance, the paralegal construed the motion as involving general bankruptcy matters rather than litigation. Based on that determination, the paralegal forwarded the papers to the Director of Operations, whereupon no further action was taken. As a result, AGF was not alerted that it should respond to Debtors' motion. Based on these representations by AGF and the testimony of the paralegal, AGF maintains that the neglect of its employee should be considered "excusable" for the purposes of Rule 60(b).

As set forth in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993),[7] to determine the types of neglect considered excusable, the Court must take an equitable approach, evaluating all relevant circumstances surrounding the party's omission. "These include . . . the danger of 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." *Id*. Weighing each of these criteria in light of the facts at hand, this Court concludes that AGF has shown excusable neglect.

First, any prejudice to the Debtors has since subsided. The real property at issue was successfully surrendered, as Debtors declared in their Statement of Intent, and Debtors have not alleged that there are now any ongoing postpetition contacts. Moreover, Debtors make no representation that they have detrimentally relied on the award of April 13, 2001. Second,

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[7] Cited in *U.S. v. Cruz-Mendez*, 201 F.3d 449, 1999 WL 1015549 (10th Cir. 1999)("FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, or collateral estoppel.").

AGF's Rules 60(b) and 59 motion was filed just ten days after entry of the Order For Sanctions And Judgment, thus, minimizing any delay. Furthermore, no other ongoing contested or adversarial matters exist in the bankruptcy case. Third, Debtors conceded during oral argument that AGF's alleged neglect was in good faith.

Finally, and of some concern to this Court, is its consideration of the reason for AGF's delay in responding to Debtors' Motion To Reopen Case And Motion For Sanctions. Specifically, the Court is concerned over the reason for this neglect, whether it be insufficient training or the absence of supervision. *See Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990). However, there is no evidence, and the parties do not dispute, that the paralegal did nothing more than misinterpret as innocuous, a pleading which should have been brought to the attention of an attorney. Instructive on this element of excusable neglect is *Poncebank v. Memorial Products Co., Inc. (In re Memorial Products Co., Inc.)*, 212 B.R. 178, 179-81 (1st Cir. BAP 1997). The argument of the movant as set forth in *In re Memorial Products Co., Inc.*, was that counsel's secretary inadvertently misfiled the motion without having brought it to counsel's attention. *Id*. at 179. Counsel did not respond to the motion because he did not become aware of it until after he received the order dismissing the case, an explanation attested to by counsel's secretary in a supporting affidavit attached to the motion. *Id*. at 179-180. Citing *Pioneer Investment Services Co.*, the court in that case was persuaded, as is this Court, that Congress contemplated that courts would accept pleadings caused to be filed late by inadvertence, mistake, or carelessness. *Id*. at 181. The court went on to find that although the secretary acted negligently, such actions were not in bad faith, and the movant sought to vacate the order at issue

without undue delay. *Id*. *Cf*. *Sibson v. Midland Mortgage Co., (In re Sibson*), 235 B.R. 672, 676 (Bankr. M.D. Fla. 1999)(declining to recognize excusable neglect for an improperly filed pleading when the order directing counsel to file the amended pleading within in a specified time was drafted by that same counsel, and rejecting counsel's argument that he thought errors were corrected in accordance with instructions he made to his secretary).

Although a paralegal may be charged with a greater recognition of legal documents than would a secretary, the facts at hand lead to the same conclusion. The AGF paralegal mistakenly misdirected Debtors' motion and counsel for AGF did not respond until after receiving the order awarding sanctions. As in *Memorial Products*, the paralegal in this case verified this explanation through the testimony presented at the hearing and this Court finds that testimony credible. Therefore, balancing the equities as required by *Pioneer Investment Services Co.*, AGF has met its burden of showing excusable neglect.

Nevertheless, this Court's inquiry is not concluded. When, as here, the order and judgment were issued by default, the party requesting Rule 60(b) relief is faced with an additional burden. As set forth in *United States v. Timbers Preserve*, 999 F.2d 452, 454 (10th Cir. 1993), courts have developed three requirements in addition to those set forth in Rule 60(b) that must be met when setting aside a default judgment: (1) the moving party's culpable conduct did not cause the default; (2) the moving party has a meritorious defense; and (3) the non-moving party will not be prejudiced by setting aside the judgment. A party's conduct will be considered culpable only if the party defaulted willfully or has no excuse for the default. *Id*. *citing* 6 *Moore's Federal Practice* ¶ 55.10[1] (2d. ed. 1992).

By admission of the parties, the entry of the judgment by default was the result of the paralegal's neglect in handling the Debtors' pleading. Although service upon AGF is undisputed, Debtors do not allege, and the evidence does not suggest, that the paralegal's actions were willful. *See Wagstaff-El v. Carlton Press Co.*, 913 F.2d 56, 57 (2d. Cir. 1990)(considering culpability in terms of whether the default was willful), *cert. denied*, 499 U.S. 929 (1991). Therefore, AGF's conduct cannot be considered culpable.

Next, AGF must demonstrate the existence of a meritorious defense. *Greenwood Explorations, Ltd.*, 837 F.2d at 427 (citing *Cessna Fin. Corp. v. Bielenberg Masonry Contracting, Inc.*, 715 F.2d 1442, 1445 (10th Cir. 1983). The defendant must state a 'defense good at law' which is sufficient if it contains 'even a hint of a suggestion which, proven at trial, would constitute a complete defense.'" *Thompson v. American Home Assurance Co.*, 95 F.3d 429, 433 (6th Cir. 1992), *quoting INVST Fin. Group, Inc. v. Chem Nuclear Sys., Inc.*, 815 F.2d 391, 398 (6th Cir. 1987). A court is limited to ascertaining not the truth of the movant's factual allegations, but assuming them to be true, simply whether they state a valid claim or defense. *In re Stone*, 588 F.2d 1316, 1319 (10th Cir. 1978).

In support of its 60(b) motion, AGF raises the following defenses: (1) that the order is void as imposing liability via state agency or vicarious liability concepts;[8] (2) that the order is

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[8] There is substantial dispute between the parties on the issue of whether the order is void in light of *Atlas Mach. & Iron Works, Inc. v. Bethlehem Steel Corp. (In re Atlas Mach. & Iron Works, Inc.)*, 239 B.R. 322 (Bankr. E.D. Va. 1998) and (by virtue of Debtors' pleading), *Atlas Mach. & Iron Works, Inc. v. Bethlehem Steel Corp.*, 986 F.2d 709 (4th Cir. 1993). Inasmuch as AGF need only show that a valid defense exists, the Court at this time determines only that AGF has met its burden.

void by the "law of the case" with respect to ContiMortgage's Chapter 11 bankruptcy filing in New York; (3) that the order is void because the property was foreclosed and sold prior to its entry; and (4) that the order is void because Debtors made an election of remedy by filing a proof of claim in the ContiMortgage bankruptcy. Absent a determination on the merits of these defenses, this Court must conclude that AGF raises defenses that could constitute at least one complete defense at trial.

The final requirement that AGF must satisfy is that the non-moving party will not be prejudiced by the setting aside of the judgment. The fact that a default sanction order is set aside is not the kind of prejudice suggested by the caselaw. "For the setting aside of a default judgment to be considered prejudicial, it must result in more than delay. Rather, 'the delay must result in tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion.'" *BN1 Telecomm., Inc.*, 236 B.R. 238, 241 (Bankr. N.D. Ohio 1999) *quoting Thompson v. American Home Assurance Co.*, 95 F.3d at 433-34.

Applying the preceding test, this Court cannot say that setting aside the judgment is prejudicial. There is no evidence that a delay caused by vacating the judgment and addressing the sanctions motion on its merits will result in tangible harm to the Debtors. The factual backdrop of the underlying matter is nearly undisputed, and in the absence of such dispute, this Court cannot see how any delay will negatively affect the Debtors' rights, e.g. in the production of evidence, procurement of discovery materials, or the fostering of fraud or collusion. Furthermore, Debtors provide no more argument on this issue other than to state: "The prejudice to the nonmoving party of AGF's being allowed to set aside the judgment is clear on its face."

Therefore, to the extent AGF maintains that it is entitled to relief pursuant to Rule 60(b), the motion is granted.[9]

b. Rule 59 Analysis

Although satisfying the substantive requirements for relief under Rule 60(b), this Court must construe AGF's motion as a timely filed prayer for relief under Rule 59. *See Skagerberg*, 797 F.2d at 882-83. Subsection (a) of Rule 59, incorporated in bankruptcy proceedings under Fed. R. Bankr. P. 9023, provides in part that a new trial may be granted to all or any of the parties and on all or part of the issues: "(2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity of the courts of the United States." Fed. R. Civ. P. 59(b).

Cloaked with this broad equitable power, AGF asserts that this Court can grant a new hearing or, alter or amend the judgment to comport with the fundamentals of due process and fair play. In support of a new hearing, AGF contends that vicarious or principal/agent liability for § 362(h) or § 524 claims is barred as a matter of law. Alternatively, AGF seeks to have the judgment altered or amended to correct manifest errors of law and fact in the April 13, 2001, ruling. Specifically, AGF argues that the judgment cannot stand wherein AGF is held liable under agency theory for actions of which it was not aware.

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[9] If appropriate, this Court would be inclined to grant relief under the purview of 60(b)(6), that "grand reservoir of equitable power to do justice in a particular case." *Woods v. Kenan (In re Woods)*, 173 F.3d 770, 780 (10th Cir. 1999) *citing Pierce v. Cook & Co.*, 518 F.2d 720, 722 (10th Cir. 1975)(*en banc*). However, Rule 60(b)(6) relief is only available provided that the motion is not, as is the case here, premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5). *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 (1988).

As previously stated, this Court makes no determination on the merits of the defenses raised. Nevertheless, reviewing the defenses on their face and in light of the arguments and evidence presented, this Court is compelled to afford the relief requested under Rule 59.

CONCLUSION

For the foregoing reasons, the Court finds that AGF has shown that it is entitled to relief from the April 13, 2001, Order For Sanctions And Judgment under Rule 60(b) and Rule 59, and a new hearing shall be held on Debtors' Motion For Sanction filed February 23, 2001. Therefore, it is hereby

ORDERED, that AGF's Motion 1). For Relief From Order Dated April 13, 2001, Imposing Sanctions upon American General Finance, Inc. Pursuant To Bankruptcy Rule 9024 And F. R. Civ. P. 60(b); And Alternatively 2). To Alter Or Amend April 13, 2001, Order Or Grant New Hearing Pursuant To Bankruptcy Rule 9023 [sic] And F. R. Civ. P. 59, is granted.

DATED this _____ day of October, 2001.

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WILLIAM T. THURMAN
United States Bankruptcy Judge

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I certify that I mailed a true and correct copy of the foregoing **Memorandum Decision and Order** to the following, postage prepaid, by United States mail on the ____ day of October, 2001.

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