UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: BRENDA PRICE, a/k/a Bren Price, a/k/a Brenda Price; d/b/a Touchstone Residential Gallery, Touchstone Inn, Spa & Gallery; Bren Price Studio, and Bren Price Enterprises,

No. 11-05-10321 JA

Debtor.

ORDER DENYING MOTION TO RECONSIDER

THIS MATTER is before the Court on the Motion to Reconsider, filed by the Debtor, *pro se*,[1] on December 14, 2009. *See* Docket No. 369. On December 17, 2009, the Debtor filed additional exhibits to the Motion to Reconsider. *See* Docket No. 372. The Motion to Reconsider asserts that the Court has the authority to reimpose the automatic stay, and requests the Court to allow her additional time within which to sell certain real property, asserting, among other things, that the real property issue has value in excess of two times the amount owed against it, including arrears. After consideration of the Motion to Reconsider and the record in this proceeding, the Court finds that the Motion to Reconsider must be denied.

FACTS

A. The Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code on January 19, 2005, prior to the effective date of the Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA").

B. Debtor's principal assets consisted of the Touchstone and Destination Spa in Taos, New Mexico located at 110A and 110B Mabel Dodge Lane. A detached guesthouse is located at 110B Mabel Dodge Lane. Debtor's principal debt consisted of claims secured by liens against all or part of the property located at 110A and/or 110B Mabel Dodge Lane.

C. On January 23, 2006 the Debtor filed Debtor's Disclosure Statement and Chapter 11 Plan Dated January 22, 2006 (the "Plan"). *See* Docket No. 99.

D. The Plan provided that the property located at 110A and/or 110B Mabel Dodge Lane was encumbered by four liens in favor of Americas Wholesale Lender, Countrywide Home Loans, JP Morgan Chase-Lien, and Chase Home Finance LLC. *See* Plan, Article III, Class I, Class II, Class III, and Class IV.

[1] The Debtor was represented by Thomas Lea Dunigan. On December 16, 2009, the Debtor filed a copy of a letter of termination that the Debtor sent to her attorney of record, Thomas Dunigan, dated November 25, 2009. *See* Docket No. 371.

E. On May 19, 2006, the Court entered an Order Confirming Debtor's Disclosure Statement and Chapter 11 Plan Dated January 22, 2006 (the "Confirmation Order"). *See* Docket No. 178.

F. The Plan provides with respect to the Class II claim of Countrywide Home Loans that "[o]n or before January 1, 2009, the Debtor shall [pay] in full all pre-petition arrears due to Countrywide Home Loans or the automatic stay shall be lifted and the respective lender may proceed with foreclosure." *See* Plan, p. 21.

G. The Plan provides with respect to the Class III claim of JP Morgan Chase, that "[o]n or before January 1, 2009, the Debtor shall [pay] in full all pre-petition arrears due to JP Morgan Chase or the property shall be surrendered to JP Morgan Chase to allow foreclosure to proceed." *See* Plan, p. 23.

H. The Confirmation Order required the Debtor to make adequate protection payments in the form of monthly mortgage payments to JP Morgan Chase, Chase Home Finance LLC and America's Wholesale Lender beginning April 1, 2007, and provided further that "[i]f all pre-petition and post-petition arrears are not paid by December 31, 2008, the automatic stay will be lifted on the subject property to allow the above-mentioned creditors to proceed with foreclosure." *See* Confirmation Order, p. 4.

I. The Confirmation Order included a finding that "Pursuant to 1129 (a)(11) if confirmed, Debtor's plan should then not be followed with liquidation. Debtor proposed to receive a bridge loan to provide a cushion. That loan was disclosed in the Plan and at the hearing. Again, the reorganization and liquidation Debtor proposes are in the Plan." *See* Confirmation Order, ¶ j.

J. There is no provision in the Plan or Confirmation Order that specifically addresses vesting of estate assets in the Debtor, discharge of debts, or the discharge injunction.

K. The Debtor has not alleged that she has made all the payments as required under her confirmed plan.

L. On June 9, 2008, JP Morgan Chase (Bank of America, NA, Servicer) filed a Motion for Relief From Stay, alleging as grounds that Debtor failed to make payments to the creditor as required by the Plan (the "Stay Motion). *See* Docket No. 276.

M. On September 18, 2008, the Court entered a Stipulated Order on Creditor's Motion for Relief from Stay ("Stipulated Order"). *See* Docket No. 308. The Debtor approved the Stipulated Order by counsel. The Stipulated Order provided that the automatic stay terminated as to creditor JP Morgan Chase upon confirmation of the Debtor's plan on May 19, 2006, and was replaced with an injunction as set forth in the Plan, the Order confirming the Plan and applicable law. *See* Docket No. 308. The Stipulated Order further provided that the Debtor did not waive any rights that may be available to her under the injunction created upon confirmation of her Chapter 11 plan, and that any attempted foreclosure by JP Morgan Chase concerning secured claims treated in the Debtor's plan "may be subject to whatever rights, defenses, and claims are

available to Debtor based on the plan injunction or any applicable state or federal law." *See* Stipulated Order, p.2.

N. On October 20, 2008, the Debtor filed a motion seeking to set aside the Stipulated Order, asserting that her former counsel lacked authority to enter into the Stipulated Order. *See* Docket No. 313.

O. The Court denied the Debtor's request to set aside the Stipulated Order on May 13, 2009. *See* Docket No. 316 (Order Denying Motion to Reconsider Stipulated Order Granting Relief from Automatic Stay (JPMorgan Chase) and Docket No. 315 (Order Denying Motion to Reconsider).

P. The United States Trustee filed a Motion to Dismiss or Convert Case to a Chapter 7 Proceeding or in the Alternative to Close Case with a Final Decree ("Motion for Entry of Final Decree") on October 27, 2009. *See* Docket No. 352. Several parties filed objections to the Motion for Entry of Final Decree, without specifying any grounds for the objections. *See* Docket Nos. 354, 355, and 356. The Debtor did not file an objection to the Motion for Entry of Final Decree, and a final hearing on the Motion for Entry of Final Decree was set for December 14, 2009. *See* Docket No. 358. The Debtor appeared at the final hearing and opposed entry of a final decree.

Q. The Debtor filed the Motion to Reconsider on December 14, 2009. *See* Docket 369.

DISCUSSION

The Debtor's Motion to Reconsider, which the Court will treat as a motion to alter or amend an order or judgment and as a motion for relief from an order or judgment,[2] is untimely. Motions seeking to alter or amend an order are governed by Fed.R.Civ.P. 59(e), made applicable to bankruptcy cases by Fed.R.Bankr.P. 9023, and must be filed "no later than 10 days after entry of the judgment." Fed.R.Civ.P. 59(e).[3] Motions for relief from a judgment or order are governed by Fed.R.Civ.P. 60, made applicable to bankruptcy cases by Fed.R.Bankr.P. 9024. Motions for relief from a judgment or order filed pursuant to Fed.R.Civ.P. 60 must be made "within a reasonable time" but if the reasons asserted are based on mistake, newly discovered evidence, or fraud, the motion must be made "not more than one year" after the entry of the order. *See* Fed.R.Civ.P. 60(c)(1).

The Motion to Reconsider does not specifically identify which order of the Court the Debtor seeks to reconsider, but asserts, in part, that the Debtor's prior counsel had no specific authority to enter into the Stipulated Order, and that the Court's ruling that her prior counsel had specific authority is "void, unenforceable, and an abuse of discretion." The Motion to

[2] The rules do not recognize motions for "reconsideration." *In re Meyer*, 357 B.R. 635, 636 (Bankr.D.N.M. 2006)(citing *Dimeff v. Good (In re Good)*, 281 B.R. 689, 699 (10th Cir. BAP 2002)(acknowledging that "[n]either the Federal Rules of Civil Procedure nor the Bankruptcy Rules recognize a motion for reconsideration.")(citation omitted).

[3] Federal Rule of Bankruptcy Procedure was amended, effective December 1, 2009, to specify a 28-day period instead of a 10-day period. Whichever period is applied, Debtor's motion to reconsider is untimely.

Reconsider also requests additional time to allow the Debtor to sell her property rather than to permit Bank of America or JP Morgan Chase to foreclose.

The Motion to Reconsider appears directed to the Confirmation Order, which confirmed a plan giving the Debtor a period of time to pay creditors, and to the Stipulated Order. The Motion to Reconsider was not filed within one year of the date of entry of the Confirmation Order or Stipulated Order, nor within one year of the date the Court's orders denying her prior requests for reconsideration were entered. Instead, the Debtor waited until the date of the final hearing on the United States Trustee's Motion for Final Decree before filing her Motion to Reconsider.

To the extent the Motion to Reconsider seeks to set aside the Confirmation Order, Stipulated Order, or the Court's prior orders denying her previous requests for reconsideration, the Motion to Reconsider was not filed within the period provided by Fed.R.Civ.P. 59(e) or within either the 1-year period or a reasonable time limitation provided by Fed.R.Civ.P. 60(c)(1), and therefore, is not timely.

In addition, the Motion to Reconsider is not meritorious. To the extent the Debtor seeks more time to pay creditors than is provided for in the Plan and Confirmation Order, the Debtor is seeking to modify the Plan. Under 11 U.S.C. §1127(b), the Debtor is not permitted to modify the Plan after the Plan has been substantially consummated. The Court has previously determined that the Debtor's plan was substantially consummated. *See* Order Denying Debtor's Motion for Post-Confirmation Modification of Chapter 11 Plan, ¶ 24 (Docket No. 273). Therefore, because the Debtor could not modify her plan to extend the due date for Plan payments through a motion to modify, she likewise cannot modify the due dates for payment under the Plan by filing a motion under Fed.R.Civ.P. 59(e) or Fed.R.Civ.P. 60(b).

To the extent the Debtor seeks reconsideration of the Stipulated Order, her request similarly lacks merit. Even if the Stipulated Order were vacated it would be of no benefit to the Debtor. The Stipulated Order relates to the claim of JP Morgan Chase, and provided that the automatic stay terminated upon confirmation of the Debtor's Plan on May 19, 2006. But the Confirmation Order provided that the automatic stay as it related to any property pledged to JP Morgan Chase would have terminated no later than December 31, 2008. Thus even if the stay were extended beyond the confirmation date through December 31, 2008, that date has long passed, and setting aside the Stipulated Order affords the Debtor no relief.

In individual chapter 11 cases filed prior to the effective date of the BAPCPA, unless the plan provided otherwise, confirmation of a Chapter 11 plan "vests all of the property of the estate in the debtor." 11 U.S.C. § 1141(b). The Debtor's Plan did not address the vesting of estate assets. Therefore, under 11 U.S.C. § 1141(b) on confirmation the assets of the estate vested in the Debtor.

Property vested in the debtor no longer constitutes property of the estate. 11 U.S.C. § 1141(b). *See also, Skies Unlimited, Inc. of Colorado v. King*, 72 B.R. 536, 539 (Bankr.D.Colo. 1987)(noting that the effect of vesting all property of the estate in the debtor upon confirmation is that "the 'estate' no longer existed"); *Carter v. Peoples Bank and Trust Co. (In re BNW, Inc.),*

201 B.R. 838, 849 (Bankr.S.D.Ala. 1996)(stating that the vesting of property of the estate in the debtor upon confirmation "means the property no longer 'property of the estate' which is subject to bankruptcy jurisdiction.")(citations omitted). Debtor's real property located at property located at 110A and 110B Mabel Dodge Lane thus vested in the Debtor upon confirmation and no longer constitutes property of the estate.

Generally, the automatic stay is inapplicable to property that vested in the Debtor upon confirmation of her Chapter 11 plan. *Paradise Valley Country Club v. Sun Valley Development Co. (In re Paradise Valley Country Club)*, 26 B.R. 990, 992 (Bankr.Colo. 1983), *aff'd* 31 B.R. 613 (D.Colo. 1983)(concluding that "[s]ince confirmation of a Chapter 11 plan has the dual effect of revesting the debtor with title to its property and discharging the debtor from all dischargeable pre-petition debts, there can be no further application of the automatic stay subsequent to confirmation."); *Johnston v. Commodity Credit Corp. (In re Johnston)*, 151 B.R. 367, 370 (Bankr.N.D.Miss. 1992)(acknowledging that the occurrence of 1141(b), which vests all property of the estate in the debtor, and 1141(d), which discharges the debtor, "effectively eliminates the automatic stay"). In this case, however, the Confirmation Order provided that with respect to any collateral pledged to JP Morgan Chase that "[i]f all pre-petition and post-petition arrears are not paid by December 31, 2008, the automatic stay will be lifted on the subject property to allow the above-mentioned creditors to proceed with foreclosure." Even if this provision had the effect of imposing a stay until December 31, 2008, that stay has lapsed.[4]

Finally, the Motion to Reconsider complains that Bank of America concealed itself as JP Morgan Chase, and requests the Court to sanction Bank of America for harassment in violation of the Bankruptcy Code.[5] The Debtor does not identify which sections of the Bankruptcy Code she alleges Bank of America violated. The Court "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005)(citation omitted). Nor is it the Court's proper function to "assume the role of advocate for the pro se litigant." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

WHEREFORE, IT IS HEREBY ORDERED that the Motion to Reconsider is DENIED.

ROBERT H. JACOBVITZ
United States Bankruptcy Judge

[4] Although the Motion to Reconsider asserts that under the confirmed plan stated the Debtor had five years after confirmation to complete the plan, the Confirmation Order expressly granted relief from the automatic stay to JP Morgan Chase and other creditors on December 31, 2008 if the Debtor failed to pay all pre- and post-petition payments. If and to the extent that provision in the Confirmation Order differs from the Plan, it modifies and supersedes the Plan. *See In re Reisher*, 149 B.R. 372, 374 Bankr.M.D.Pa. 1992)(stating that "the language of the [confirmation order] must prevail over the language of the plan."). *Cf. In re Diviney*, 225 B.R. 762. 771 (10th Cir. BAP 1998)(finding in connection with a Chapter 13 case that "unless expressly preserved in the plan or the order confirming the plan, all pre-confirmation agreements and orders concerning the treatment of a claim are superseded by the terms and provisions of the confirmed plan")(citation omitted). The Debtor has not alleged that she has made all the required payments by December 31, 2008.

[5] The Stay Motion refers to Bank of America NA as Servicer for JP Morgan.

Date entered on docket: January 7, 2010

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