NOT RECOMMENDED FOR PUBLICATION

No. 20-5355

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 30, 2021
DEBORAH S. HUNT, Clerk

In re: DREXEL ALAN WHITE,

Debtor.

DREXEL ALAN WHITE,

Appellant,

v.

REGIONS BANK, dba Regions Mortgage,

Appellee,

KARA L. WEST, Chapter 13 Trustee,

Interested Party-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

O R D E R

Before: COLE, GRIFFIN, and STRANCH, Circuit Judges.

Drexel Alan White, a Tennessee resident proceeding through counsel, appeals the judgment of the district court affirming an order of the United States Bankruptcy Court for the Eastern District of Tennessee. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

White filed for Chapter 13 bankruptcy in 2012. On January 11, 2013, the bankruptcy court confirmed his Chapter 13 plan, which provided that White's mortgage payments to Regions Bank d/b/a Regions Mortgage ("Regions") would be paid outside the plan. In June 2014, Regions filed a motion for relief from the automatic stay, asserting that White had failed to make his mortgage payments since October 2013. White thereafter requested to modify his Chapter 13 plan so that

both his monthly mortgage payments and a separate arrearage payment of $300 per month would be paid inside the plan. The bankruptcy court approved the change, and, after August 28, 2014, the Trustee paid all monthly mortgage payments owed to Regions; however, the Trustee mistakenly did not make any separate arrearage payments.

On September 14, 2017, the Trustee filed a certificate of final payment and filed her final report on November 2, 2017, not yet realizing her failure to pay the arrearage to Regions. The bankruptcy court entered an order of discharge on November 15, 2017. After that time, White resumed paying his monthly mortgage payments directly to Regions.

In December 2017, once the Trustee realized the error relating to the arrearage payments, she informed White and filed a motion pursuant to Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024 for an agreed order to set aside the certificate of final payment. The motion acknowledged that the certificate of final payment should not have been filed, and the Trustee requested that she be allowed to reopen the case to administer additional assets. In particular, the Trustee notified the bankruptcy court that, although the parties acknowledged that White's debt to Regions was not dischargeable, White wanted the opportunity to "cure th[e] pre-petition arrearage as intended in the confirmed plan." The bankruptcy court granted the motion, ordered that the certificate of final payment was withdrawn, and continued the case under the confirmed plan; it did not expressly vacate the discharge order at that time.

After the order setting aside the Trustee's certificate of final payment was entered, the Trustee resumed monthly mortgage payments in February 2018 while also making payments on the arrearage claim in April 2018. However, White also continued to make direct monthly mortgage payments to Regions from December 2017 to September 2018; those extra payments ultimately totaled $6,274.65.

In March 2019, Regions filed a "Motion For Instructions Regarding Mortgage Overpayments Paid to Regions Mortgage," asking the bankruptcy court for instructions as to whether White's overpayment of $6,274.65 should be paid to the Trustee, refunded to White, or otherwise applied. At a hearing, White argued that Regions should return his direct payments to him, with interest, so that he could then pay the Trustee and pay off the Chapter 13 plan. The

Trustee and Regions argued that the most practical solution would be for the money to be "returned" to the Trustee to distribute pursuant to the plan. Following the hearing, the bankruptcy court ordered that Regions "refund" $6,274.65 to the Trustee, who would then disburse the funds as required pursuant to the terms of White's Chapter 13 plan. The bankruptcy court's order, entered April 18, 2019, also noted that the discharge order of November 15, 2017, had been filed erroneously. The court vacated the prior discharge order without prejudice to granting a discharge upon completion of the Chapter 13 plan.

White filed a notice of appeal on May 1, 2019, but he did not seek a stay pending appeal in the bankruptcy court; thus, the Trustee continued its disbursements. After paying the remainder of the arrearage and ensuring that the mortgage to Regions was current, the Trustee, as per the bankruptcy court's order, remitted the excess funds to White. On September 5, 2019, the Trustee filed a final report, and, on September 9, 2019, the bankruptcy court issued a second order of discharge.

In his initial brief in the district court, White argued that, in its April 18, 2019 order, the bankruptcy court erred by: (1) vacating his discharge more than one year after it was entered, in violation of Federal Rule of Civil Procedure 60(b) and (c)(1), and doing so without prior notice or a hearing on the issue; (2) ordering Regions to remit the $6,274.65 overpayment to the Trustee; and (3) failing to order Regions to remit the overpayment to him with interest. The Trustee filed a motion to intervene and a motion to dismiss the appeal, asserting that White's request to reverse the vacatur of the discharge order was moot because White's Chapter 13 plan was complete and a discharge order had been entered. The Trustee argued that the remaining issue—interest on the overpayment—was a contractual matter between White and Regions, which was an issue of state law unrelated to the underlying bankruptcy case.

Regions filed a responsive brief, taking no position regarding the bankruptcy court's vacatur of White's discharge. Regions did assert that the issue of whether the overpayment was correctly remitted to the Trustee was now moot and that there was no legal basis upon which Regions would owe White interest on payments applied to his mortgage under the terms of his promissory note.

After review, the district court determined that the bankruptcy court did not err by vacating White's discharge in its April 18, 2019 order. The district court explained that even if the vacatur of the discharge was not expressly stated until the April 18, 2019 order, the Trustee's motion for an agreed order, as well as the parties' actions, indicated that the discharge was actually withdrawn as a result of the December 15, 2017 order that withdrew the certificate of final payment and reopened the Chapter 13 plan. Because that action was taken within one year after the November 15, 2017 order discharging White from bankruptcy, it was timely under Rule 60(b). The district court further determined that White had identified no authority that would support a finding that the bankruptcy court's decision to order that Regions remit the overpayment to the Trustee was in error. The district court affirmed the order of the bankruptcy court and denied as moot the Trustee's motions to intervene and to dismiss the appeal.

White now appeals. As he did on appeal to the district court, he asserts that the bankruptcy court erred by vacating the Chapter 13 discharge because it was vacated without notice to him, without a hearing, and absent any procedural precedent. He claims that no motion to vacate the first discharge was ever filed and that neither Rule 60(b) nor Bankruptcy Rule 9024 can justify the vacatur in this case. He argues that the bankruptcy court erred by not refunding the overpayment to him, even if doing so was procedurally correct. Finally, he claims that the second discharge is arguably void and should be vacated. White states that, because the issue of the vacatur of the first discharge already was on appeal at the time, the bankruptcy court was prohibited from issuing the second discharge without permission of the district court.

The Trustee argues that White did not seek a stay pending appeal and that the appeal is moot because the discharge was entered after the notice of appeal was filed. As to the merits, the Trustee argues that vacatur of the first discharge was not an abuse of discretion under Rule 60(b), which allows a court to correct a mistake arising from oversight or omissions, because payments had not been completed when first discharge was entered. The Trustee also argues that the overpayment was properly remitted to her because, under bankruptcy law, if a creditor is overpaid, the funds are to be returned to Trustee, no matter where payments came from. Regions also asserts that the appeal is moot, given the order of discharge by the bankruptcy court after the filing of

White's appeal to the district court. Alternatively, Regions argues that White has not established that the bankruptcy court's decision requires reversal.

We "directly review a bankruptcy court's order when appealed from a district court." *In re Patel*, 565 F.3d 963, 967 (6th Cir. 2009). That is, "[w]e give no deference to the district court's decision." *In re Cook*, 457 F.3d 561, 565 (6th Cir. 2006). We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *Id*.

At the outset, we note that the bankruptcy court's second discharge, entered after White filed his notice of appeal in district court, is not void. "The general rule that a properly filed notice of appeal deprives the trial court of jurisdiction to proceed further except by leave of the appellate court does not apply in bankruptcy proceedings." *In re Wade*, 500 B.R. 896, 905 (W.D. Tenn. 2013) (quoting *Matter of Christian & Porter Aluminum Co*., 584 F.2d 326, 334 (9th Cir. 1978)). "The Trustee in a bankruptcy proceeding is expected and encouraged to proceed with administration of the estate after the entry and during the appeal of an order of adjudication." *Id*. (quoting *Matter of Christian & Porter Aluminum Co.*, 584 F.2d at 334). Accordingly, the bankruptcy court did not err by entering a second order of discharge on September 9, 2019.

Next, we must determine whether we have jurisdiction over this appeal, as the Trustee and Regions both assert that the September 9, 2019, discharge order renders portions of this appeal moot. A bankruptcy court proceeding is not moot even after a discharge order has been entered so long as the "appellate court [can] fashion relief that is both effective and equitable." *Spirtos v. Moreno (In re Spirtos)*, 992 F.2d 1004, 1006 (9th Cir. 1993). In determining whether effective and equitable relief is available, the court considers whether both parties are still before the court and both were aware of the pending appeal, *see id*. at 1007, conditions that are satisfied here. It is true that a reversal of the bankruptcy court's decision regarding its vacatur of White's 2017 discharge order would put White in the same position he is in now—discharged from his Chapter 13 plan. However, the possibility of effective relief still exists, given White's assertion that he suffered other effects of the vacatur, including harm to his credit profile and his job-related security clearances, which could be remedied by an order from this court that the first discharge was erroneously vacated. We will therefore address the merits of White's claims.

White first argues that the bankruptcy court erred by vacating his 2017 discharge without first notifying him of its intent to do so or holding a hearing on the issue. He also claims that the court was without statutory or procedural authority to take such an action. White's arguments lack merit. First, Bankruptcy Rule 9024, which incorporates Rule 60(b), allows a bankruptcy court to vacate its discharge order. *See Disch v. Rasmussen*, 417 F.3d 769, 778-79 (7th Cir. 2005); *Cisneros v. United States (In re Cisneros)*, 994 F.2d 1462, 1466 (9th Cir. 1993). Rule 60(b) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b). This includes vacating a discharge that was entered by mistake. *See Cisneros*, 994 F.2d at 1466 ("The plain language of Rule 60(b) and Bankruptcy Rule 9024 appears to support the court's understanding of its authority [to vacate a discharge]."). Second, although Rule 60(c) requires that motions made under Rule 60(b)(1) must be made within one year, Rule 9024 exempts motions to reopen cases under the Bankruptcy Code from that one-year limitation. *See* Fed. R. Bankr. P. 9024.

The bankruptcy court did not err by vacating White's 2017 discharge. Here, once the Trustee discovered the mistake of failing to pay the mortgage arrearage to Regions, she filed a motion pursuant to Rule 60(b) and Rule 9024 for relief from the certificate of final payment, requesting—as agreed by the parties—that the court reopen the plan so that White could remedy the pre-petition arrearage within the confirmed plan. The bankruptcy court granted the motion, ordered that the certificate of final payment be withdrawn, and continued the case under the confirmed plan. Subsequently, the bankruptcy court ordered that the discharge of November 15, 2017, be vacated "without prejudice to the granting of a discharge upon completion of the [C]hapter 13 plan," reasoning that the discharge had been "filed erroneously." *See In re Bethe*, No. 11-25388-GMH, 2017 WL 3994813, at *3 (Bankr. E.D. Wis. Sept. 8, 2017).

The fact that the mistake was on the part of the Trustee does not change the conclusion that the bankruptcy court's action was not improper. In *In re Midkiff*, 342 F.3d 1194 (10th Cir. 2003), the trustee inadvertently closed the case, and the bankruptcy court entered an order granting the debtors a discharge, prior to the debtors' delivery of their federal tax refund to the trustee, even

though that refund was always intended to fund the plan. *Id.* at 1196-97. When the trustee discovered the error, she requested, and the bankruptcy court granted, vacatur of the discharge order to allow administration of the tax refund. *Id*. at 1197. On appeal, the Tenth Circuit affirmed, concluding that Bankruptcy Rule 9024 permitted such relief. *Id*. at 1203. In another case, although the problems in the case were "attributable to the failure of the Trustee," the Ninth Circuit Court of Appeals determined that that fact was "immaterial." *In re Cisneros*, 994 F.2d at 1467. The appellate court explained that "[t]he order of discharge was entered by the bankruptcy court under a misapprehension as to the facts of the case. Had the court been apprised of the actual facts, it would never have entered the order." *Id.*

The same holds true in this case. Had the bankruptcy court been aware that the Trustee had failed to make the arrearage payments to Regions pursuant to the confirmed Chapter 13 plan prior to the first discharge, it would not have entered the certificate of final payment and the order of discharge. Once the mistake was realized and brought to the court's attention, it was within the bankruptcy court's discretion to withdraw the certificate of final payment and vacate the original discharge order.

Finally, the bankruptcy court did not vacate the discharge without giving White an opportunity to challenge the action. The record reflects that the bankruptcy court proposed vacating the discharge during the hearing on Regions's motion for instructions. Accordingly, White had an opportunity to be heard on the issue at that time and indicated affirmation to the court's decision. Under these circumstances, the bankruptcy court did not err by vacating White's 2017 discharge without prejudice.

Next, White challenges the bankruptcy court's decision to remit the overpayment of his mortgage to Regions. Courts recognize that "[a]ny payment made in accordance with the provisions of a chapter 13 plan is a payment under the plan . . . ." *In re Kessler*, No. 09-60247-RLJ-13, 2015 WL 4726794, at *3 (Bankr. N.D. Tex. June 9, 2015); *see also In re Foster*, 670 F.2d 478, 486 (5th Cir. 1982). If a plan provision addresses the claim, *irrespective of who disburses the payments to the creditor*, those payments are under the plan. *In re Hoyt-Kieckhaben*, 546 B.R. 868, 872 (Bankr. D. Colo. 2016). In addition, unless otherwise provided in the plan or

confirmation order, disbursements under a plan must be made by and through the Chapter 13 Trustee. *See* 11 U.S.C. § 1326(c). "Direct payments are the exception and not the rule—in no small part because they complicate the Trustee's task of verifying and accounting for plan contributions and disbursements—and in each instance require express authorization from the court." *In re Puglia*, No. 04-13438-RS, 2006 WL 849879, at *5 (Bankr. D. Mass. Mar. 28, 2006).

It is undisputed that White made direct payments to Regions after the bankruptcy court reopened the case and ordered that the payments to Regions would continue under the confirmed plan by the Trustee. It is also undisputed that White did not obtain authorization from the bankruptcy court to make those direct payments. As a result, White's direct payments were improperly distributed. Because the trustee has a fiduciary obligation to the estate and to creditors, courts agree that the Bankruptcy Code grants implicit authority to the trustee to recoup improperly distributed funds. "The Chapter 13 trustee's power to recover overpayment is inherent in the overall scheme of a trustee's fiduciary duties as a necessary means to ensure that the trustee's payment system functions smoothly." *Stevens v. Baxter (In re Stevens)*, 187 B.R. 48, 51-52 (Bankr. S.D. Ga. 1995), *aff'd in part and rev'd in part*, *Ford Motor Credit Co. v. Stevens (In re Stevens)*, 130 F.3d 1027 (11th Cir. 1997); *see also Kerney v. Cap. One Fin. Corp. (In re Sims)*, 278 B.R. 457, 476 n.10, 477 (Bankr. E.D. Tenn. 2002). Because courts recognize a trustee's authority to recover overpayments, the bankruptcy court did not err by ordering that the overpayment be returned to the Trustee for proper disbursement.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk