

1 WRITTEN DECISION - NOT FOR PUBLICATION

2

3 ENTERED 9/12/2007

4 FILED

5 SEP 14 2007

6 CLERK, U.S. BANKRUPTCY COURT

7 SOUTHERN DISTRICT OF CALIFORNIA

8 BY *[Signature]* DEPUTY

9 UNITED STATES BANKRUPTCY COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re) Case No. 06-03012-H13

12)

13 GLORIA SANCHEZ and) ORDER ON MOTION TO

14 RANDOLPH FRANCIS SANCHEZ,) RECONSIDER

15)

16 Debtors.)

17 Wells Fargo moved for relief from the automatic stay in

18 order to foreclose on debtors' residence. Although it appeared

19 the motion was properly served on both the debtors and their

20 counsel, no opposition was filed. Accordingly, an order was

21 entered granting relief. Debtors' residence was thereafter

22 foreclosed upon by Wells Fargo. Debtors now ask the Court to

23 reconsider and vacate the order granting relief from stay

24 pursuant to Rule 60(b)(6), Fed.R.Civ.P. (made applicable in

25 Bankruptcy proceedings pursuant to Rule 9024, Fed.R.Bankr.P.).

26 Debtors assert that the failure to file any opposition to the

///

1 relief from stay motion was due to the grossly negligent advice
2 of counsel.

3 This Court has subject matter jurisdiction pursuant to 28
4 U.S.C. § 1334 and General Order No. 312-D of the United States
5 District Court for the Southern District of California. This is
6 a core proceeding under 28 U.S.C. § 157(b)(2)(A) & (G).

7 **BACKGROUND**

8 On October 6, 2006 debtors filed a chapter 13 petition. The
9 debtors' schedules included their residence (Property) which they
10 valued at \$500,000.00. The schedules indicated that the Property
11 was subject to a first priority lien in favor of Wells Fargo
12 Bank, N.A.,¹ in the amount of \$297,829.00 and a second lien in
13 the amount of \$34,900.00.

14 For some reason which has not been explained to the Court,
15 three days prior to filing the petition debtors inquired of the
16 office of their counsel, Pedro Bonilla, whether and when they
17 should make their monthly mortgage payment to Wells Fargo.
18 According to debtors, Bonilla's paralegal, Mike Solorio, told
19 them not to make the payment until it was clear that the trustee
20 would not seek to convert the as-of-then unfiled case. Debtors
21 stopped making their monthly payments.

22 On December 13, 2006, the Court confirmed debtors' chapter
23 13 plan. Attorney Bonilla instructed debtors to re-commence
24

25 ¹The claim was scheduled in favor of "Chase Manhattan Mortgage" which, it appears, should
26 have been Chase Home Finance, LLC, as servicing agent for Wells Fargo. For the purposes of this
discussion actions taken on behalf of Wells Fargo are treated as taken by Wells Fargo.

1 their monthly payments, which they did. However, on January 4,
2 2007, Wells Fargo returned the proffered payment. Debtors spoke
3 to paralegal Solorio about the matter, and he told them that he
4 would contact Wells Fargo. He later told debtors to continue to
5 make their payments. It is not clear from the record whether
6 debtors attempted to make another payment.

7 On February 5, 2007, Wells Fargo filed a motion for relief
8 from stay. Debtors inquired of Mr. Bonilla as to how to respond
9 and were apparently told that they had no grounds to defend
10 against the motion because they had not made post-petition
11 mortgage payments. This advice was given notwithstanding the
12 fact that debtors appeared to have substantial equity in the
13 Property. Accordingly, the debtors filed no opposition to the
14 motion and the unopposed motion was granted on March 12, 2007.

15 On April 1, 2007, Wells Fargo acquired the Property at a
16 foreclosure sale.

17 Approximately two months later debtors sought new legal
18 advice from Pacific Law Center, who substituted in on May 31,
19 2007. Debtors sought and obtained a temporary restraining order
20 (TRO) enjoining Wells Fargo from re-selling the Property.
21 However, the TRO was dissolved at the June 21, 2007 hearing on
22 the motion for preliminary injunction.

23 Prior to the hearing on the preliminary injunction, debtors
24 filed this motion to reconsider the order granting relief from
25 stay. Debtors request that the Court vacate the order granting

26 ///

1 relief from stay and allow them to complete payment to Wells
2 Fargo under the terms of their confirmed plan.

3 **DISCUSSION**

4 Debtors seek relief under Rule 60(b) of the Federal Rules of
5 Civil Procedure which provides:

6 On motion and upon such terms as are just,
7 the court may relieve a party or a party's
8 legal representative from a final judgment,
9 order, or proceeding for the following
10 reasons: (1) mistake, inadvertence, surprise,
11 or excusable neglect; (2) newly discovered
12 evidence which by due diligence could not
13 have been discovered in time to move for a
14 new trial under Rule 59(b); (3) fraud
15 (whether heretofore denominated intrinsic or
16 extrinsic), misrepresentation, or other
17 misconduct of an adverse party; (4) the
18 judgment is void; (5) the judgment has been
19 satisfied, released, or discharged, or a
20 prior judgment upon which it is based has
21 been reversed or otherwise vacated, or it is
22 no longer equitable that the judgment should
23 have prospective application; or (6) any
24 other reason justifying relief from the
25 operation of the judgment.

17 Specifically, debtors contend that the bad legal advice they
18 received from former counsel warrants relief under the catch-all
19 subsection (6) - "any other reason justifying relief"

20 Debtors argue that the case at hand is analogous to
21 U. S. v. Alongi, 346 F.Supp.2d 394, 395 (E.D.N.Y. 2004), in
22 which the court granted a motion to set aside a default judgment
23 in a case where movant, on advice of counsel, failed to respond
24 to a complaint. The court began by recognizing that the decision
25 whether to grant a motion to vacate is within the discretion of
26 the court. Id. at 395. The court then explained:

1 In deciding a motion to vacate, a court is
2 guided by three principal factors: "(1)
3 whether the default was willful, (2) whether
4 the defendant demonstrates the existence of a
5 meritorious defense, and (3) whether, and to
6 what extent, vacating the default will cause
7 the nondefaulting party prejudice."

8 Id. (citations omitted).

9 The ruling in Alongi was apparently based on Rule 60(b)(1) -
10 "mistake, inadvertence, surprise, or excusable neglect . . ."
11 In Community Dental Services v. Tani, 282 F.3d 1164 (9th Cir.
12 2002), the court reached a similar conclusion under Rule 60(b)(6)
13 - "any other reason justifying relief from the operation of the
14 judgment." The court stated that a party would be entitled to
15 relief under Rule 60(b)(6) "if he demonstrates 'extraordinary
16 circumstances which prevented or rendered him unable to prosecute
17 [his case].' The party must demonstrate both injury and
18 circumstances beyond his control that prevented him from
19 proceeding with the prosecution or defense of the action in a
20 proper fashion." Id. at 1168 (citations omitted). In Tani
21 defendant Tani's former counsel had failed to serve the answer on
22 plaintiff's counsel while assuring defendant that the case was
23 "proceeding smoothly". The court noted the general rule that a
24 client was ordinarily chargeable with his counsel's negligent
25 acts, but recognized that some courts had relieved clients from
26 the results of their counsel's "gross negligence" or "neglect so
gross that it is inexcusable". Id. The Ninth Circuit adopted
the rule that gross negligence would warrant setting aside a
default under Rule 60(b)(6). Id. At 1169. The court went on to

1 find that the gross negligence standard had been met in that
2 case:

3 Upon review of the record, it is clear that
4 in this case "extraordinary circumstances"
5 justify the granting of relief from the
6 default judgment. Salmonsens virtually
7 abandoned his client by failing to proceed
8 with his client's defense despite court
9 orders to do so. Salmonsens's inexcusable and
10 inexplicable acts commenced with his conduct
11 surrounding the ill-fated answer to CDS's
12 complaint. After failing to sign a
13 stipulation (already signed by CDS) for an
14 extension of time to file an answer,
15 Salmonsens filed an answer two weeks late.
16 However, he then failed to serve a copy of
17 the answer on CDS, despite repeated requests
18 from CDS and a direct order from the district
19 court. In the end, Salmonsens never provided
20 CDS with a copy.

21 Salmonsens abandoned his duties as an
22 attorney and agent in other areas of the pre-
23 trial work as well. The district court noted
24 that Salmonsens failed to contact CDS for
25 preliminary settlement discussions despite
26 being ordered to do so, failed to oppose
CDS's motion to strike the answer, and failed
to attend various hearings. Such failures
and actions cannot be characterized as simple
attorney error or "mere 'neglect.'" Rather,
conduct on the part of a client's alleged
representative that results in the client's
receiving practically no representation at
all clearly constitutes gross negligence, and
vitiating the agency relationship that
underlies our general policy of attributing
to the client the acts of his attorney.

27 Id. At 1170-71 (citations omitted).

28 The Ninth Circuit has very recently reiterated its views on
29 Rule 60(b)(6). In re International Fibercom, Inc., ___ F.3d
30 ___, 2007 DJDAR 14211, No. 05-16358, (filed September 12, 2007),
31 the court wrote:

1 We have stated in the past that Rule
2 60(b)(6) should be "liberally applied,"
3 Hammer, 940 F.2d at 525, "to accomplish
4 justice." [Citations omitted.] At the same
5 time, "[j]udgments are not often set aside
6 under Rule 60(b)(6)." [Citation omitted.]
7 Rather, Rule 60(b)(6) should be "'used
8 sparingly as an equitable remedy to prevent
9 manifest injustice' and 'is to be utilized
10 only where extraordinary circumstances
11 prevented a party from taking timely action
12 to prevent or correct an erroneous
13 judgment.'" [Citations omitted.] Accordingly,
14 a party who moves for such relief "must
15 demonstrate both injury and circumstances
16 beyond his control that prevented him from
17 proceeding with . . . the action in a proper
18 fashion."

19 Wells Fargo relies on Latshaw v. Trainer Wortham & Co.,
20 Inc., 542 F.3d 1097 (9th Cir. 2006). In that case the court held
21 that the district court had not abused its discretion in denying
22 the Rule 60(b) motion, including on Rule 60(b)(6) grounds.
23 Latshaw did not involve a default judgment which, as noted, is
24 not favored by the courts:

25 Our decision in *Tani* was explicitly premised
26 upon the default judgment context of the
27 case. *Id.* at 1169 (concluding that "'where
28 [a] client has demonstrated gross negligence
29 on the part of his counsel, a default
30 judgment against the client may be set aside
31 pursuant to Rule 60(b)(6),'" and, continuing,
32 "'[o]ur holding is consistent with the well-
33 established policy considerations that we
34 have recognized as underlying default
35 judgments and Rule 60(b)'""); see Falk v.
36 Allen, 739 F.2d 461, 463 (9th Cir. 1984)
37 (noting that Rule 60(b), as applied to
38 default judgments, is "remedial in nature and
39 . . . must be liberally applied. [Default
40 judgments are] appropriate only in extreme
41 circumstances; a case should, whenever
42 possible, be decided on the merits."); see
43 also TCI Group Life Insurance Plan v.

1 Knoebber, 244 F.3d 691, 699 (9th Cir. 2001).

2 Id. At 1097.

3 This case is very much on the borderline between a
4 disfavored default ruling as a product of counsel's negligence,
5 and a negligent malpractice case that does not meet the gross
6 negligence standard via extraordinary circumstances. On the one
7 hand, the relief from stay motion was unopposed, and the
8 resulting order was essentially a default order. On the other
9 hand, debtors contacted their counsel about the motion, and were
10 persuaded there was no point in filing an opposition, more like
11 the Latshaw decision.

12 The Court's concern is that Rule 60(b)(6) not be so
13 liberally construed in the effort to afford full process that it
14 swallows Rule 60(b)(1). They are intended to be different
15 standards. Community Dental Services v. Tani, 282 F.3d 1164,
16 1170 fn. 12 (9th Cir. 2002). In the last analysis, the Court
17 finds persuasive the fact that the relief from stay order was a
18 default order, even though the uncontroverted record indicates
19 1) debtors had substantial equity in the property; and 2) they
20 were only a few post-petition payments behind, having filed the
21 petition in October and submitted a payment in December (which
22 was returned by the lender in early January).

23 In analyzing the instant case, the Court looks in part at
24 the factors listed by the Alongi court - 1) was the default
25 willful; 2) is there a potentially meritorious defense; and 3) is
26 there prejudice to the other side. The Alongi court found that

1 the default was not "wilful" because movant had relied on advice
2 of counsel and acted promptly to remedy the situation. Wells
3 Fargo attempts to distinguish the Alongi case on the grounds that
4 the movant in that case "had received improper or no advice from
5 his attorney regarding response to the complaint . . ." and had
6 "sought relief from the default judgment, nine days after it was
7 entered." As to the first ground, the Court finds no real
8 difference. The evidence before the Court is that debtors were
9 counseled not only to cease making their mortgage payments, but
10 also that they had no defense to the motion for relief from stay,
11 notwithstanding the fact that substantial equity in the property
12 appears to have existed.

13 As to the second, debtors did wait three months to file
14 their motion for reconsideration. However, they apparently spent
15 the interim attempting to address the matter through refinance,
16 which the Court finds a reasonable reaction given the advice that
17 they had no defense. After that failed, debtors immediately
18 sought advice from new counsel who acted promptly to have the
19 order set aside. In light of the foregoing, the Court does not
20 find the time difference in the two cases to be significant.
21 Thus, the Court finds that debtors have satisfied the first
22 factor - the failure to reply to the motion for relief from stay
23 was not willful.

24 The Court also finds that debtors have satisfied the second
25 factor - they can proffer a potentially meritorious defense to
26 the motion for relief from stay. The evidence before the Court

1 indicates that Wells Fargo has an equity cushion in excess of
2 \$100,000 or 25% of its claim. Further, debtors' confirmed plan
3 provides for monthly mortgage payments. In In re Avila, 311 B.R.
4 81 (Bankr.N.D.Cal. 2004), the court held that the existence of an
5 equity cushion and a plan which provided for monthly mortgage
6 payments warranted denial of a motion for relief from stay even
7 when there was a default in payment. Id. At 84.

8 Finally, the Court finds that granting the motion will not
9 cause Wells Fargo substantial prejudice, especially when compared
10 to the prejudice debtors will suffer if the Order stands. There
11 is no evidence that Wells Fargo has done anything but foreclosed
12 and taken possession of the Property. Any costs Wells Fargo
13 incurred in the foreclosure process will be added to the amount
14 owed on and secured by the Property. Wells Fargo will be paid
15 the full amount owed pursuant to the terms of the plan and the
16 promissory note.

17 A serious concern of the Court is that attorney Bonilla is
18 not a party to this proceeding, yet grave allegations of gross
19 negligence are involved. The Court notes that debtors did serve
20 their moving papers on his office. Further, Wells Fargo has had
21 the opportunity to attempt to controvert the allegations in
22 debtors' declaration. In ruling on this motion, the Court is
23 taking debtors' uncontroverted allegations on their face and
24 without making any findings or conclusions about the validity of
25 them. Latshaw, 452 F.3d at 1100 n.1.

26 ///

1 In the context of these proceedings, and analyzing the
2 motion under the standards of Rule 60(b)(6), the Court finds that
3 the actions and omissions of debtors' former counsel amounted to
4 gross negligence. Not only did counsel, through his staff,
5 instruct debtors to refrain from making their mortgage payment,
6 thereby causing the default, but then compounded the error by
7 instructing debtors that because of the default debtors had no
8 possible defense to the motion for relief from stay
9 notwithstanding the obvious equity in the Property. The defense
10 of equity cushion should at least have been argued. Had counsel
11 simply erred in its legal judgment regarding debtors' legal
12 duties to continue to make their mortgage payments, or missed a
13 deadline in responding to the motion the Court would likely find
14 simple negligence. However, the acts and omissions of counsel in
15 this case go beyond simple mistakes and amount to gross
16 negligence in allowing a default order to be entered.
17 Accordingly, the Court finds that under the rationale and holding
18 of the Tani case, relief under Rule 60(b)(6) is warranted.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

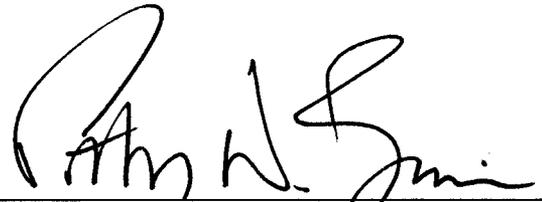
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CONCLUSION

For the reasons set forth above the Court grants Debtors' motion to reconsider and hereby vacates the order granting relief from stay.

IT IS SO ORDERED.

DATED: SEP 14 2007



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court