

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
ABILENE DIVISION

IN RE:	§	
	§	
KENNY JOE BRILEY AND	§	CASE NO. 01-10691-RLJ-13
PATSY DELORIS BRILEY,	§	
	§	
DEBTORS.	§	

**MEMORANDUM OPINION AND ORDER**

First National Bank in Graham (FNB) filed its motion seeking reconsideration of the court's order confirming Kenny Joe Briley's and Patsy Deloris Briley's (Debtors) Chapter 13 plan. The Debtors filed their response opposing reconsideration.

This court has jurisdiction of this matter under 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

**Background**

FNB is a secured creditor, secured by the Debtors' 1997 Dodge Intrepid. The Debtors filed their Chapter 13 case on August 3, 2001. On August 22, 2001, FNB filed an amended proof of claim listing its claim as secured and reflecting a value of \$8,325 for the car. On July 2, 2002, the Debtors filed their final Chapter 13 plan. On the same date, they filed a motion for valuation, seeking to have secured collateral valued at the amounts listed in the plan. The confirmation hearing was set August 8, 2002.

On July 18, 2002, FNB filed its objection to the Debtors' Chapter 13 plan, complaining of FNB's treatment under the plan. Specifically, FNB objected to the plan's valuation of the car at

\$5,500, arguing instead that the car should be valued at \$8,325. FNB also objected to the interest rate to be paid under the plan. The contract between FNB and the Debtors provides for an annual rate of 17.9%. The plan, however, provided for interest at the rate of 12% per annum. The confirmation hearing was held August 8, 2002. FNB failed to attend the hearing. The court therefore overruled FNB's objection in light of FNB's failure to appear and confirmed the Debtor's plan by order entered August 12, 2002.

FNB filed its original motion for reconsideration on August 16, 2002; its amended motion was filed October 8, 2002. FNB seeks reconsideration of the order of confirmation under Bankruptcy Rules 9023 (incorporating Rule 59 FED. R. CIV. P.), 9024 (incorporating Rule 60 FED. R. CIV. P.), and 7055 (incorporating Rule 55 FED. R. CIV. P.). FNB advances two arguments in support of reconsideration. First, FNB contends that its conduct was the result of excusable neglect, and that the court, under Rule 60(b), has discretion to relieve FNB of such excusable neglect. Second, FNB argues that, in light of its written objections to confirmation, the Debtors failed to offer evidence sufficient to support confirmation under section 1325(a) of the Code.

FNB admits that it received timely notice of Debtors' plan and timely notice of the confirmation hearing. FNB explains that its failure to attend the hearing was the result of "oversight and not intent" as counsel for FNB failed to docket the hearing on any one of four of his calendars.

### **Discussion**

FNB seeks a new hearing on confirmation of the Debtors' Chapter 13 plan so that the court may consider the merits of the objections raised by FNB. The original motion for reconsideration was filed August 16, 2002, eight days after the confirmation hearing. FNB did not appear at either the pre-

hearing conference or the confirmation hearing. The court therefore effectively deemed any objections filed by FNB as waived and proceeded to approve confirmation. It is not disputed that FNB's failure to appear was caused by a failure to place the matter on counsel's calendar. This was an oversight by counsel.<sup>1</sup>

The court recognizes that authority exists for the proposition that fraud is the only basis available for revocation of a Chapter 13 confirmation order. *See Branchburg Plaza Assocs. v. Fesq (In re Fesq)*, 153 F.3d 113 (3d Cir. 1998). In *Fesq*, the Third Circuit addressed the "fundamental question of whether a *final* order confirming a debtor's Chapter 13 plan can be vacated without a showing of fraud." *Id.* (emphasis added). The court held that section 1330 of the Code mandates that fraud is indeed the only ground for revocation of a Chapter 13 confirmation order.<sup>2</sup> As a result, the

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<sup>1</sup>To perhaps justify counsel's argument that his "neglect" was "excusable," counsel submits that he "never received any communication from Debtors' attorney concerning confirmation or treatment of [FNB's] claim" and that Debtors failed to file and serve a witness and exhibit list prior to the confirmation hearing. He further states that he never received notice that the case was *not* dismissed on the motion filed by the Chapter 13 Trustee seeking dismissal of the case. FNB failed to appear because of counsel's failure to place the confirmation hearing on his calendar. FNB and its counsel were owed nothing more.

<sup>2</sup>Section 1330(a) provides as follows:

(a) On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

(b) If the court revokes an order of confirmation under subsection (a) of this section, the court shall dispose of the case under section 1307 of this title, unless, within the time fixed by the court, the debtor proposes and the court confirms a modification of the plan under section 1329 of this title.

11 U.S.C. § 1330(a).

The court in *Fesq*, in its analysis, stated that section 1330(a) could mean either: (1) an order of confirmation may be revoked only if it was procured by fraud and only within 180 days after its entry; or (2) the 180 day deadline to request revocation applies only if the stated basis for revocation is fraud in the procurement. *See In re Fesq*, 153 F.3d at 115. The court concluded that the first interpretation was the only logical interpretation. *See id.* at 116-17. First, applying settled law, the court noted that the Supreme Court may not employ its rule-making authority to alter substantive provisions enacted by Congress. *See id.* at 116, *citing* 28 U.S.C. § 2075. If section 1330(a) is properly read to provide that fraud is the only available basis for revocation of an order of confirmation, then Rule 9024 (and Rule 60 FED. R. CIV. P.) cannot provide additional grounds for revocation. *Id.* at 116. Second, section 1330(a) is not permissive, i.e. section

court found that asserted additional grounds for relief from a judgment contained in Rule 60(b) are unavailable.

As stated, the *Fesq* court considered a final order. In the present case, FNB's motion was filed before the confirmation order became final. An order becomes final ten days after entry or, if a motion under Rules 9023 or 9024 is filed within the ten days, as was done here, ten days from the order disposing of such motion. *See* FED. R. BANKR. P. 8001; 8002.

This case does not concern a final order, thus the holding in *Fesq* is not implicated. As the confirmation order was not final at the time FNB's motion for reconsideration was filed, the court may address the grounds raised by Rules 9023 and 9024 to possibly alter, amend, vacate, or relieve the parties from the effect of the order, if sufficient cause is shown. *See In re Cook*, 205 B.R. 617, 621 (Bankr. N.D. Ala. 1996). The court therefore addresses whether sufficient cause exists in the present case so as to justify reconsideration of the confirmation order, and, specifically, considers whether

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1330(a) does not mention fraud merely by way of example or merely to apply the 180 day deadline to instances of fraud. *Id.* at 117-18. Rather, section 1330(a) is exclusive – fraud is the only available basis for vacating a Chapter 13 order of confirmation. *Id.* at 120. Finally, the court noted that the importance of finality to a Chapter 13 confirmation order: “the protection of the finality of Chapter 13 confirmation orders [is] more important than the obligation of the bankruptcy court and the trustee to ensure that a plan complie[s] with the Code.”

Numerous courts have followed the Third Circuit's line of cases in holding that fraud is the only basis for revocation of an order of confirmation. *See, e.g., In the Matter of Pence*, 905 F.2d 1107, 1110 (7th Cir. 1990) (holding that creditor may not collaterally attack matters resolved by a confirmation hearing, and that fraud is the only basis for revocation of a Chapter 13 order of confirmation); *Blackwell v. Little (In re Little)*, 253 B.R. 427, 430 n.6 (B.A.P. 8th Cir. 2000) (recognizing that there is persuasive case authority for the proposition that Rule 60(b) may not be employed to revoke an order of confirmation); *Mason v. Young (In re Young)*, 237 B.R. 791, 802-03 (B.A.P. 10th Cir. 1999) (agreeing with *In re Fesq* that fraud is the only basis for revocation of confirmation, and that the grounds listed in Rule 9024 for relief from judgment do not apply to revocation of order of confirmation); *In re Vencor Inc.*, 284 B.R. 79, 83 (Bankr. D. Del. 2002) (Chapter 11 case); *State of Florida v. Randolph (In re Randolph)*, 273 B.R. 914, 918 (Bankr. M.D. Fla. 2002); *In re Hudson*, 260 B.R. 421, 444 (Bankr. W.D. Mich 2001) (holding that constitutional requirements trump a conflicting statute, thus Rule 9024 may be used to relieve a party from an order of confirmation when notice of the confirmation hearing is constitutionally inadequate); *In re Rickel & Assocs. Inc.*, 260 B.R. 673, 678 (Bankr. S.D.N.Y. 2001) (Chapter 11 case); *Educational Credit Mgmt. Corp. v. York (In re York)*, 250 B.R. 842, 845-46 (Bankr. D. Del. 2000); *United States v. Lee*, 89 B.R. 250, 256 (N.D. Ga. 1987), *aff'd sub nom In re Hochman*, 853 F.2d 1547 (11th Cir. 1988)(per curiam).

FNB's failure to appear was the result of excusable neglect under Rule 60(b)(1). The court is satisfied that the failure to appear was attributable to counsel's oversight and not to a deliberate disregard of the rules and procedures applicable at confirmation. Counsel was candid in explaining his failure to appear. FNB did not default in objecting to the plan, it simply failed to appear at the confirmation hearing. FNB took quick action to address its failure to appear by promptly filing its motion for reconsideration.

Rehearing of confirmation does not greatly prejudice the Debtors as there is no issue of lost evidence, problems with discovery, or unavailability of witnesses. Any prejudice to Debtors caused from delay is not sufficient. The allegations raised by FNB in their objection, if established, certainly have merit. FNB's conduct in failing to appear does not rise to the level of gross carelessness, ignorance of the rules, or ignorance of the law. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 113 S.Ct. 1489 (1993).

Confirming the Debtors' plan without considering FNB's objection was akin to granting a default, which is disfavored by the court. The court certainly prefers resolution on the merits of disputes before the court. This preference was not met by the court's failure to consider FNB's objections at confirmation.

### **Conclusion**

Upon the foregoing, the court grants FNB's motion seeking a rehearing on confirmation of the Debtors' Chapter 13 plan. It is, therefore,

ORDERED that rehearing of the Debtors' Chapter 13 plan is granted; it is further

ORDERED that such rehearing of the Debtors' Chapter 13 plan shall be held on the 5th day of February, 2003, at 11:00 o'clock A.M.

DATED: January 6, 2003.

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ROBERT L. JONES  
UNITED STATES BANKRUPTCY JUDGE

The Clerk shall provide copies to:

Attorney for FNB: John A. Leonard, Russell, Leonard & Key, 900 Eighth St., Suite 320, P.O. Box 8385, Wichita Falls, TX 76301-8385;

Attorney for Debtors: Della J. Durham, Monte J. White & Associates, 402 Cypress, Suite 310, Abilene, TX 79601;  
and

Chapter 13 Trustee: Walter R. O'Cheskey, 2575 S. Loop 289, Suite 103, Lubbock, TX 79423.