

ORDERED.



Dated: December 21, 2010

*Eileen W. Hollowell*

EILEEN W. HOLLOWELL  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re

Chapter 13

PETER TESCIONE, JR.,

Case No. 4:09-bk-05569-EWH

Debtor.

**MEMORANDUM DENYING DEBTOR'S  
MOTION FOR RECONSIDERATION**

**I. INTRODUCTION**

Peter Tescione (the "Debtor") seeks to have the court reverse an order granting relief from stay on his residence. However, the Debtor has provided no newly discovered evidence or any other reason that would warrant setting aside the court's order.

**II. FACTUAL AND PROCEDURAL HISTORY**

Debtor, represented by counsel, filed a Chapter 13 petition on March 25, 2009. Debtor's sole real property asset is his residence ("Residence"). Prior to the filing of his petition, there had been ongoing litigation in state court between the Debtor and his homeowner's association. That litigation resulted in a judgment awarding attorneys' fees ("Judgment #1") against the Debtor. One day before Judgment #1

1 was recorded by the creditor ("Creditor"),<sup>1</sup> the Debtor conveyed the Residence to a  
2 third party. Further litigation regarding that transfer followed, resulting in a fraudulent  
3 transfer judgment ("Judgment #2") being entered to enjoin the third party from  
4 conveying the Residence to any other person until both Judgment #1 and Judgment  
5 #2 were satisfied in full. Judgment #2 incorporated Judgment #1 (collectively, the  
6 "Judgment"). The Judgment was recorded on October 31, 2007. Notwithstanding the  
7 bar against conveyance, the third party reconveyed the Residence to the Debtor on  
8 November 19, 2007.  
9

10 The Debtor listed the Residence on his schedules and claimed it as exempt.  
11 He listed the Creditor as a general unsecured creditor. Debtor's Schedule I listed his  
12 regular monthly income as zero. The Debtor's Chapter 13 plan provided for monthly  
13 payments of \$118.00 for 58 months with a total return to unsecured creditors of less  
14 than \$2,000.  
15

16 Litigation with the Creditor in this court commenced shortly after the Chapter 13  
17 case was filed. The Creditor objected to Debtor's exemption claim on May 12, 2009,  
18 objected to plan confirmation on May 15, 2010, and filed a motion for relief from stay  
19 on May 22, 2010. In response, Debtor's counsel filed an opposition to the motion for  
20 relief from stay and filed a motion to avoid Creditor's judgment lien under 11 U.S.C.  
21 § 522(f). Resolution of the Creditor's stay relief motion was deferred until the Debtor's  
22 § 522(f) litigation was completed. On November 16, 2010, the court issued a  
23 memorandum decision and order finding that the Debtor could not avoid Creditor's  
24 judgment lien because he did not hold title to the Residence when the Judgment was  
25 recorded.  
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27 <sup>1</sup> There are two creditors, Auto Owners Insurance Co. and Owners Insurance Co, who are both  
28 represented by the same counsel and have been acting in unison throughout these proceedings. For  
simplicity, this memorandum refers to them simply as Creditor.

1 After entry of that order, Debtor’s counsel filed an amended Chapter 13 plan  
2 which provided for varying monthly payments over a sixty month term with a balloon  
3 payment to the Creditor in the final month of the plan. Creditor responded by filing a  
4 renewed motion for relief from stay and an objection to the amended plan. The  
5 renewed motion for relief from stay “rode” the calendar with the contested Chapter 13  
6 evidentiary confirmation hearing. That hearing was held on May 26, 2010. On  
7 June 4, 2010, an order was entered denying confirmation of the amended plan.  
8

9 On July 9, 2010, Debtor’s counsel filed an objection to Creditor’s claim as  
10 “excessive and unnecessary” (the “Claim Objection”). On July 27, 2010, Creditor filed  
11 an “Amended/Renewed Motion for Relief from Stay” (“Lift Stay Motion #2”). The court  
12 held a combined evidentiary hearing on the Claim Objection and Lift Stay Motion #2  
13 on October 22, 2010 (the “Evidentiary Hearing”) and announced its ruling from the  
14 bench. The court overruled the Claim Objection and granted Creditor stay relief  
15 effective November 22, 2010. However, an order lifting the stay (the “Lift Stay Order”)  
16 was not entered until November 18, 2010.  
17

18 Sometime after the Evidentiary Hearing, there was a breakdown in the  
19 attorney-client relationship between Debtor and his counsel (“Counsel”). On  
20 November 3, 2010, the Debtor filed a pro se motion to extend the time to appeal the  
21 Lift Stay Order (“Motion to Extend”). On November 8, 2010, Counsel moved to  
22 withdraw.  
23

24 The court set a hearing on both motions for November 12, 2010. At that  
25 hearing, the court granted Counsel’s motion to withdraw. The court also ruled that the  
26 Motion to Extend was not timely filed under Rule 8002(c)(2).<sup>2</sup> The court erroneously  
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28 <sup>2</sup> Unless otherwise indicated, all citations to the Rules refer to the Federal Rules of Bankruptcy Procedure.

1 calculated the time period based on the date of its oral ruling at the Evidentiary  
2 Hearing. In fact, the Lift Stay Order had not yet been submitted by the Creditor at the  
3 time of the November 12 hearing. The court also ruled that even if the Motion to  
4 Extend was timely, there was no cause to grant an extension because the Debtor did  
5 not demonstrate that he had anything more than a “hope” that he could confirm a  
6 Chapter 13 plan.

7  
8 On November 18, 2010, the Debtor filed a “Motion for Reconsideration re:  
9 Lifting the Stay” (the “Reconsideration Motion”). The court will treat the  
10 Reconsideration Motion as a Rule 9023 motion to alter or amend a judgment.

### 11 **III. ISSUES**

- 12 (1) Did the filing of the Reconsideration Motion toll the time to file an appeal?  
13 (2) Should Debtor’s Reconsideration Motion be granted?

### 14 **IV. JURISDICTIONAL STATEMENT**

15 Jurisdiction is proper under §§ 28 U.S.C. 1334 and 157(b)(1)(G).

### 16 **V. DISCUSSION**

#### 17 **A. Time to appeal**

18  
19 A party seeking to appeal a bankruptcy court’s judgment, order, or decree must  
20 file a notice of appeal within fourteen days of entry of the judgment. Rule 8002(a). An  
21 extension of time to file the notice of appeal is not available if the order being  
22 appealed from is an order lifting the automatic stay. Rule 8002(c)(1)(A). When a  
23 notice of appeal is filed “after the announcement of a decision or order but before  
24 entry of the judgment, order, or decree,” a court shall treat the notice as having been  
25 filed on the same day as the entry of the judgment. Rule 8002(a).  
26  
27  
28

1 If a party files a timely “tolling motion,” then the time for appeal does not start to  
2 run until after the court disposes of the last tolling motion. Rule 8002(b). See also Nat’l  
3 Loan Investors, L.P. v. Brewster (In re Brewster), 243 B.R. 51, 55 (B.A.P. 9th Cir.  
4 1999). Rule 8002(b)(2) provides that a tolling motion includes any motion to alter or  
5 amend a judgment under Rule 9023, which incorporates Fed. R. Civ. P. 59 by  
6 reference. Moreover, if a notice of appeal had been filed before disposition of a tolling  
7 motion, then the notice of appeal is deemed ineffective until the court disposes of the  
8 tolling motion. Rule 8002(b).  
9

10 The Debtor in this case has not yet filed a notice of appeal, but did file the  
11 Motion to Extend which the court erroneously treated as late filed. In fact, the Motion  
12 to Extend was filed prematurely because the order granting the Lift Stay Motion was  
13 not signed and docketed until November 18, 2010. Brown v. Wilshire Credit Corp. (In  
14 re Brown), 484 F.3d 1116, 1121 n.3 (9th Cir. 2007) (court’s minute entry is not final  
15 judgment).  
16

17 The Reconsideration Motion, which is a tolling motion, was timely filed because  
18 it was filed within twenty eight days of the entry of the Lift Stay Order. Fed. R. Civ. P.  
19 59(b). Therefore, the fourteen day deadline to file a notice of appeal does not begin  
20 to run until the court disposes of the Reconsideration Motion. Rule 8002(b). It does  
21 so now.  
22

### 23 B. The Debtor’s Reconsideration Motion

24 Motions for reconsideration are routinely treated as motions to alter or amend a  
25 judgment under Fed. R. Civ. P. 59. In re Thomason, 2008 WL 2755654, at \*2 (Bankr.  
26 D. Idaho 2008) citing United States v. Comprehensive Drug Testing, Inc., 513 F.3d  
27 1085, 1098 (9th Cir. 2008). In order to prevail under Fed. R. Civ. P. 59 the movant  
28

1 must demonstrate that: (1) there is newly discovered evidence which was not  
2 available at the time of trial, (2) the court committed clear error or that its decision was  
3 manifestly unjust, or (3) there has been an intervening change in controlling law.  
4 Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001).

5 The Debtor's argument that the failure of his attorney to present certain  
6 possible scenarios for the Debtor to make plan payments does not satisfy the first  
7 prong of the test because those possibilities were known at the time of the Evidentiary  
8 Hearing. It is not newly discovered evidence. It is evidence Debtor's disagreement  
9 with former counsel, but that does not make the evidence "new."<sup>3</sup>

11 The Debtor also insists that the court's ruling was erroneous because he was  
12 making plan payments to the Chapter 13 trustee and adequate protection payments  
13 to the Creditor when the ruling was issued. But that evidence is insufficient to  
14 demonstrate that the Debtor would be able to make payments for a plan term of sixty  
15 months and in amounts sufficient to make the plan confirmable.

17 At the time Debtor filed his case, and for more than the eighteen months the  
18 case has been pending, the Debtor has not had a regular source of income. At the  
19 Evidentiary Hearing and in the Reconsideration Motion, Debtor argues that he will  
20 receive SSI. However, the possibility that there may be a regular source of income at  
21 some future time is not enough to demonstrate that the Debtor could confirm a  
22 Chapter 13 plan. Inability to confirm a plan is, by itself, grounds to lift the stay under  
23 11 U.S.C. § 362(d)(2). See In re Moorpark Adventure, 161 B.R. 254 (Bankr. C.D. Cal.  
24 1993).

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27  
28 <sup>3</sup> Even if that evidence had been presented, the scenarios set forth in the Reconsideration Motion are so speculative that it is unlikely that the court would have given them any weight.

1 Finally, the Debtor argues that lifting the stay is unjust because the amount of  
2 the Creditor's claim remains in dispute. It isn't. At the Evidentiary Hearing, the  
3 Debtor's Claim Objection was overruled. The Creditor's claim, including the attorney's  
4 fees (as calculated in Exhibit 17), was allowed.

5 **VI. CONCLUSION**

6 The Debtor has failed to demonstrate that he has entitled to relief under  
7 Rule 9023. Accordingly his motion will be DENIED.

8 Dated and signed above.  
9

10  
11 Notice to be sent through the  
12 Bankruptcy Noticing Center "BNC"  
to the following

13 Peter Tescione, Jr.  
14 4471 West Meggan Place  
Tucson, AZ 85741

15 Margaret McCracken  
16 926 North 34th Street  
Milwaukee, WI 53208

17 Thomas A. Denker, Esq.  
18 Munger Chadwick, P.L.C.  
333 North Wilmot Rd., Suite 300  
Tucson, AZ 85711

19 Dianne C. Kerns  
20 7320 North La Cholla, #154 PMB 413  
Tucson, AZ 85741-2305

21 Office of the U.S. Trustee  
22 230 North First Ave., Suite 204  
Phoenix, AZ 85003  
23  
24  
25  
26  
27  
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