The relief described hereinbelow is SO ORDERED.

SIGNED this 15th day of March, 2012.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

JERRY GUY OWEN and
REBECCA DIANE OWEN,
Debtors.

Case No. 11-20141
Chapter 13

JERRY GUY OWEN and
REBECCA DIANE OWEN,
Plaintiffs,

v.

Adv. No. 11-6139

U.S. BANK,
Defendant.

ORDER DENYING PLAINTIFFS' SUMMARY JUDGMENT MOTION

Both parties made representations to the Court concerning Defendant U.S. Bank's mortgage lien position against Debtors' homestead. The representations, which indicated U.S. Bank held a junior lien position, are now alleged to be incorrect. An agreed order was entered based on the parties' misinformation. U.S. Bank now seeks to vacate the agreed order while Debtors seek to invalidate U.S. Bank's mortgage as being a wholly unsecured second mortgage

lien against their homestead. Plaintiffs' motion for summary judgment is denied because they have not sustained their burden to show there is no genuine issue of material fact.

Background

Debtors filed a voluntary Chapter 13 petition and plan on January 21, 2011. Debtors scheduled an exempt homestead with a value of $176,000. Debtors scheduled a "First Mortgage" incurred "11/2003" in the amount of $212,000 in favor of Wells Fargo Financial. Debtors also scheduled a "Second Mortgage" incurred "11/2003" in the amount of $29,000 in favor of U.S. Bank.[1] Debtors' plan proposed to avoid U.S. Bank's lien and to pay Wells Fargo directly on its secured lien.[2] On March 17, 2011, U.S. Bank objected to Debtors' plan, alleging it violated §1325(a)(5)(B)(i) and (ii) and §1322(b)(2).[3] On April 19, Debtors filed an adversary proceeding to avoid U.S. Bank's lien. The complaint is based on Debtors' allegation "US Bank's Deed of Trust [sic] is junior to a Deed of Trust [sic] on the same real estate held by Wells Fargo Financial."[4] On April 26, Debtors and U.S. Bank submitted an Agreed Order Resolving Secured Creditor's Objection to Confirmation of Chapter 13 Plan and Adversary Complaint. The Agreed Order provides U.S. Bank's "second mortgage" will become void upon Debtors' successful completion of their plan and entry of a discharge order.[5] On May 4, Debtors' plan was confirmed by separate order.

On June 1, U.S. Bank moved to vacate the Agreed Order because it had evidence its lien was prior in time to Wells Fargo's lien. At the time of the Agreed Order, the parties believed

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[1] Main case, Doc. No. 1, Schedules A and D.
[2] Main case, Doc. No. 4.
[3] Main case, Doc. No. 19.
[4] Adversary case, Doc. No. 1.
[5] Main case, Doc. No. 34.

U.S. Bank's lien was junior to Wells Fargo's lien. U.S. Bank alleges "The exact facts of the reduction of US Bank Line of Credit with the proceeds of the Wells Fargo loan were unavailable at the time of the Order, and have only recently come to light."[6]

Findings of Fact

The parties submitted stipulated facts. On November 24, 2003, Debtors executed a promissory note for $29,000.00 in favor of U.S. Bank. U.S. Bank's note is a home equity line of credit with a 15-year draw period. With the note, Debtors also executed a home mortgage. The mortgage was filed with the records and tax administration on March 16, 2004. On September 18, 2007, Debtors executed a promissory note and mortgage for $213,513.83 in favor of Wells Fargo. The mortgage was filed with the records and tax administration on September 28, 2007, three and a half years after U.S. Bank's lien was recorded. U.S. Bank received $27,818.00 from Wells Fargo on September 22, 2007, reducing the balance remaining on U.S. Bank's note to zero and leaving a surplus of $500.00 which was refunded to Debtors. Debtors did not request U.S. Bank close the home equity line of credit, and Debtors continued to draw on the line. U.S. Bank did not release its lien. On the petition date, Debtors owed U.S. Bank $29,417.00.

The parties stipulate they both believed U.S. Bank's lien was junior to Wells Fargo's at the time they entered the Agreed Order. The parties' stipulation then states, "The exact facts available to US Bank of the reduction of US Bank's line of credit with the proceeds of the Wells Fargo Note and the subsequent withdrawals on the line of credit by Debtors were not provided

[6] Main case, Doc. No. 38.

by US Bank until after the Agreed Order was entered." Debtors moved for summary judgment based on the foregoing uncontroverted facts.

Conclusions of Law

A. Summary Judgment Standard.

Summary judgment is appropriate if the moving party demonstrates there is no genuine issue as to any material fact, and he is entitled to judgment as a matter of law.[7] The movant bears the initial burden of proving the absence of controverted facts.[8] All inferences are to be construed in favor of the non-moving party.[9] Only when reasonable minds could not differ as to the import of the proffered evidence is summary judgment proper.[10]

If the evidence submitted by a party who would not have borne the burden of persuasion at trial establishes the claimant lacks evidence supporting an essential element of the claim, the non-moving party may show he is entitled to judgment.[11] If the non-moving party carries his initial burden, the plaintiff must come forward with specific facts showing a genuine issue for trial.[12]

B. Rule 9024 Applies, Not §1330.

Courts disagree on whether a confirmation order may be challenged under a Rule 9024 motion or whether the challenge must be brought as an adversary under § 1330.[13] In this case,

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[7] FED. R. BANKR. P. 7056.

[8] *Whitesel v. Sengenberger*, 222 F.3d 861, 867 (10th Cir. 2000); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

[9] *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000).

[10] *Anderson*, 477 U.S. at 250-51.

[11] *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1125 (10th Cir. 2000).

[12] *Spaulding v. United Transp. Union*, 279 F.3d 901, 904 (10th Cir. 2002) (citing *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

[13] *Compare Branchburg Plaza Assoc., L.P., v. Fesq (In re Fesq),* 153 F.3d 113 (3d Cir. 1998) (fraud is the only grounds upon which the confirmation order can be revoked; Rule 9024 is not available to vacate a confirmation order), *with In re Carr*, 318 B.R. 517, (Bankr. W.D. Wis. 2004) (Rule 9024 can be used to set aside a confirmation order); *see also In re Midkiff*, 342 F.3d 1194, 1199 (10th Cir. 2003) (noting the difference between revoking a

U.S. Bank seeks to vacate the Agreed Order [Doc. No. 34] which set its lien priority as in second position. U.S. Bank does not request the confirmation order [Doc. No. 36] be vacated.

U.S. Bank does not need to vacate the confirmation order to proceed in the adversary proceeding, but U.S. Bank does need relief from the Agreed Order to have its claims decided on the merits. The confirmed plan does not avoid U.S. Bank's lien but states the Debtors shall avoid the lien under the applicable Code section. The adversary proceeding is the required procedure to avoid a lien under §§ 506 and 1322.[14] If U.S. Bank is ultimately granted relief from the Agreed Order, the adversary will be decided on its merits. Plan confirmation need not be revoked. Thus, §1330 and *United Student Aid Funds, Inc., v. Espinosa* are not implicated by U.S. Bank's Rule 9024 motion seeking relief from the Agreed Order.[15]

C. Rule 9024 Standard.

To obtain Rule 9024 relief, the movant must plead and prove: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud ..., misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other

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discharge order and providing a party limited relief from an order under Rule 9024).

[14] FED. R. BANKR. P. 7001(2) ("[A] proceeding to determine the validity, priority, or extent of a lien or other interest in property" is an adversary proceeding). *See, e.g., Cen-Pen Corp. v. Hanson*, 58 F.3d 89 (4th Cir. 1995); *Sun Finance Co., Inc., v. Howard (In re Howard)*, 972 F.2d 639 (5th Cir. 1992); *Foremost Fin. Servs. Corp. v. White (In re White)*, 908 F.2d 691 (11th Cir. 1990); *Simmons v. Savell (In re Simmons)*, 765 F.2d 547 (5th Cir. 1985); *but see Centex Home Equity Co., LLC, v. Woodling (In re Woodling)*, 2004 Bankr. LEXIS 1751 (Bankr. D. Kan. 2004) (allowing a motion to strip a lien outside of the adversary proceeding process where the lien to be stripped is alleged to have no value).

[15] *See United Student Aid Funds, Inc., v. Espinosa*, 130 S. Ct. 1367, 1376 (2010) (finding Rule 60(b) applies to Chapter 13 confirmation orders because, under Bankruptcy Rule 9024, Rule 60(b) is applicable in Chapter 13 cases). *See also Matter of Transtexas Gas Corp.*, 303 F.3d 571, 581 n.3 (5th Cir. 2002) (noting "[A] postjudgment motion calling into question the form of a judgment rather than its substantive correctness ... is more properly considered as a Rule 60(a) motion.").

reason that justifies relief.[16] Rule 9024 does not excuse litigant's or counsel's carelessness.[17] On the other hand, Rule 9024 should be construed liberally in favor of trying the case on its merits.[18] Rule 60(b) balances the finality of judgments with the interest of equity. To achieve this balance, courts may vacate an order or judgment or provide relief from and alter or amend parts of orders or judgments.[19] A Rule 9024 motion is left to the court's discretion.[20] The movant carries the burden to prove he is entitled to relief .[21]

Rule 60(b)(1) provides for relief from a judgment or order caused by mistake, inadvertence, surprise or excusable neglect. A Rule 9024 motion is the proper procedure to correct injustice caused by an order entered based upon mistaken facts.[22] Furthermore, an agreed order is in the nature of a settlement agreement, and generally a settlement agreement may be rescinded where it is tainted by mutual mistake.[23] As such, a mutual mistake may justify relief under Rule 60(b)(1). However, one party's mistake as to the facts does not justify relief. "Generally speaking, a party who takes deliberate action with negative consequences ... will not be relieved of the consequences [by Rule 60(b)(1)] when it subsequently develops that the

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[16] FED. R. CIV. P. 60(b)(1) made applicable in bankruptcy proceedings by FED. R. BANKR. P. 9024; *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990).

[17] *Id.*

[18] *Greenwood Explorations, Ltd., v. Merit Gas and Oil Corp., Inc.*, 837 F.2d 423, 426 (10th Cir. 1988).

[19] *See In re UAL Corp.*, 299 B.R. 509 (Bankr. N.D. Ill. 2003); *see also In re Lintz West Side Lumber, Inc.*, 655 F.2d 786 (7th Cir. 1981).

[20] *Greenwood Explorations*, 837 F.2d at 426.

[21] *Olson v. Stone (In re Stone)*, 588 F.2d 1316, 1319 (10th Cir. 1978).

[22] *In re Caldwell/VSR, Inc.*, 353 B.R. 130, 136 (Bankr. E.D. Va. 2005); *See also In re Harbor Fin. Group, Inc.*, 303 B.R. 124, 133-134 (Bankr. N.D. Tex. 2003) (citing 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2858 (2d ed. 1995) ("Under Rule 60(b), 'consent judgments have been reopened when they were agreed to because of erroneous factual representations.' ")).

[23] *Matter of Estates of Thompson*, 226 Kan. 437, 440 (1979); *Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, 630 (1948) (a settlement may be attacked upon showing the contract is tainted with invalidity, either by fraud or by a mutual mistake); *see also United States v. Golden*, 34 F.2d 367, 374 (10th Cir. 1929) (acknowledging "that contracts may be rescinded or reformed by reason of a mutual mistake as to a material fact." Citations omitted.).

choice was unfortunate."[24]

Rule 60(b)(3) provides for relief from a judgment or order where there is evidence of fraud, misconduct, misrepresentation, or misconduct by an opposing party. In order to obtain relief under Rule 60(b)(3), the movant must show: (1) the party maintained a meritorious claim at trial; and (2) because of the fraud, misrepresentation or misconduct of the adverse party; (3) the party was prevented from fully and fairly presenting its case at trial.[25]

D. Mistake, Misconduct, Neither, or Both.

In contract law, a mistake is a belief which is not in accord with the facts.[26] A contract is voidable by the adversely affected party where a mutual mistake as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances.[27] An exception is made if the complaining party bore the risk of mistake. A party bears the risk of mistake when the agreement allocates the risk to him; or he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient; or the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.[28] A mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation, unless his fault amounts to a failure to act in good faith and in accordance with

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[24] *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir.1996) (quoting 7 MOORE, FEDERAL PRACTICE ¶ 60–22[2] at 60-182).

[25] *Wilkin v. Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972); *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995) (citing *Green v. Foley*, 856 F.2d 660, 665 (4th Cir. 1988)).

[26] RESTATEMENT (SECOND) OF CONTRACTS § 151 (1981).

[27] *Id.*

[28] *Id.* at §154.

reasonable standards of fair dealing.[29]

Misconduct takes many forms and includes false testimony and withholding information. Misconduct does not demand proof of nefarious intent or purpose.[30] The term can cover accidental omissions. Judgments obtained unfairly because of an opposing party's misinformation may be corrected, regardless intent.[31] The party best situated to provide relevant information usually bears the burden of doing so.[32]

E. Analysis.

U.S. Bank may be entitled to relief if it can prove the Agreed Order is either factually incorrect under Rule 60(b)(1) or unfairly obtained under Rule 60(b)(3). Debtors have failed to meet their burden to show U.S. Bank lacks evidence supporting an essential element of either claim. Debtors seek summary judgment while ignoring their own errors in the record. In their schedules, Debtors incorrectly state the Wells Fargo note originated in November 2003. Now, Debtors stipulate the note originated on September 18, 2007. Debtors' complaint alleges U.S. Bank held a second mortgage. Now, the parties stipulate to a mutual mistaken belief regarding U.S. Bank's lien priority. On the one side, U.S. Bank has its loan documents, a payment history, and the public records. On the other side, Debtors have all their loan documents and personal knowledge of their own debts. Even so, both parties either gave or relied on flawed information. Creditors are responsible for protecting their claims and are required to perform due diligence

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[29] *Id.* at §157.

[30] *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988).

[31] *Id.*, quoting *Bros Inc. v. W.E. Grace Mfg. Co.*, 351 F.2d 208, 211 (5th Cir. 1965).

[32] *In re Midkiff*, 342 F.3d at 1200 (the debtor who voluntarily submits to bankruptcy to obtain the benefit of a discharge of debts must fulfill certain duties to insure the estate is administered in accordance with applicable law).

before entering agreements which modify their rights. Similarly, the Bankruptcy Code is for the honest but unfortunate debtor. Bankruptcy is to protect the debtor, not reward him for his own mischaracterizations of a creditor's claim. The parties' fact stipulations are insufficient. Accordingly, summary judgment is not appropriate.

F. Conclusion

For the foregoing reasons, Debtors' Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS