UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

In the Matter of:	:	Chapter 13
CAROLYN LEE PEARSON,	:	
Debtor	:	Case No. 95-30158 RFH
CAROLYN LEE PEARSON,	:	
Plaintiff	:	
vs.	:	
U.S. DEPARTMENT OF EDUCATION and EDUCATIONAL CREDIT MANAGEMENT CORP.,	:	
Defendants	:	Adversary Proceeding No. 99-3051

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

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For Educational Credit Management Corp.:	LUKE A. KILL 2800 Marquis One Tower 245 Peachtree Center Ave., N.E. Atlanta, Georgia 30303-1227
The Chapter 13 Trustee:	CAMILLE HOPE Chapter 13 Trustee Post Office Box 954 Macon, Georgia 31202

MEMORANDUM OPINION

Carolyn Lee Pearson, Plaintiff, filed on October 21, 1999, a Complaint to Determine Dischargeability of Debt and for Damages for Contemptuous Violation of Discharge Order. Educational Credit Management Corp., Defendant, filed its response on November 18, 1999. The United States Department of Education, Defendant, filed its response on November 24, 1999. The Court is persuaded that Educational Credit Management Corp. is the real defendant in this adversary proceeding and will refer to that entity as "Defendant." The United States Department of Education will be referred to as "Department of Education."

Defendant filed on May 15, 2000, its Motion for Relief from Discharge Order. Plaintiff's complaint and Defendant's motion came on for a hearing on June 20, 2000. The Court, having considered the stipulation of facts and the arguments of counsel, now publishes this memorandum opinion.

The material facts are not in dispute. Plaintiff obtained a student loan from the Department of Education. In November of 1994 the Department of Education assigned Plaintiff's loan to Defendant.[1] Plaintiff filed a petition under Chapter 13 of the Bankruptcy Code on February 23, 1995.

[1] Defendant was formerly known as the Transitional Guaranty Agency.

The Court entered an order on June 6, 1995, confirming Plaintiff's Chapter 13 plan.

Defendant filed a proof of claim in Plaintiff's Chapter 13 case. Plaintiff filed an objection to Defendant's claim. Defendant did not file a response. The Court entered an order on June 7, 1996, disallowing Defendant's claim.

Plaintiff completed her Chapter 13 plan payments. The Court entered an order on January 15, 1997, discharging Plaintiff from all dischargeable obligations. Defendant was served with the discharge order.[2] The Court entered a Final Decree on January 15, 1997, and Plaintiff's Chapter 13 case was closed.

Sometime during 1999, Defendant attempted to collect the student loan obligation. Plaintiff filed on July 20, 1999, a motion to reopen her Chapter 13 case to stop Defendant's collection actions. The Court entered an order on August 23, 1999, reopening Plaintiff's Chapter 13 case.

Plaintiff first contends that the Court's order disallowing Defendant's claim prevents Defendant from collecting the student loan obligation. The Court considered and rejected this argument in Mathis v. Nebraska Student Loan Program, Inc. (In re Mathis), Ch. 13 Case No. 95-41678, Adv.

[2] Defendant received the discharge order on January 21, 1997. See Defendant ECMC's Brief in Support of Motion for Relief from Discharge, Ex. A (filed May 15, 2000).

No. 97-4003 (Bankr. M.D. Ga. Nov. 20, 1997) (Laney, J.) (order disallowing claim for student loan obligation did not prevent postdischarge collection by creditor that did not respond to objection to claim; order that merely disallowed claim did not determine that the obligation was dischargeable in bankruptcy).

Plaintiff next contends that the Court's discharge order discharged her student loan obligation. The discharge order provides, in part, as follows:

> ORDER DISCHARGING DEBTOR AFTER COMPLETION OF CHAPTER 13 PLAN
>
> The court finds that the debtor filed a petition under title 11, United States Code, on February 23, 1995, that the debtor's plan has been confirmed, and that the debtor has fulfilled all requirements under the plan.
>
> IT IS ORDERED THAT:
>
> 1. Pursuant to 11 U.S.C. sec. 1328(c), the debtor is discharged from all debts provided for by the plan or disallowed under 11 U.S.C. sec. 502, except any debt:
>
> . . . .
>
> c. for a student loan or educational benefit overpayment as specified in 11 U.S.C. sec. 523(a)(8) in any case in which discharge is granted prior to October 1, 1996;

The Court entered Plaintiff's discharge order on January 15, 1997. Under the terms of the discharge order, Plaintiff's student loan obligation was discharged. Defendant did not file a notice of appeal to the discharge order. Fed.

R. Bankr. P. 8002(a) (notice of appeal shall be filed within 10 days of entry of the order).

Defendant contends that the Court's discharge order did not reflect a change in the Bankruptcy Code that was applicable to Plaintiff's Chapter 13 case. Prior to 1990, student loan obligations were dischargeable in Chapter 13 cases. Congress amended section 1328(a)(2) of the Bankruptcy Code, effective November 5, 1990, to provide that most student loans would be nondischargeable in Chapter 13 cases in which the discharges were granted prior to October 1, 1996. Under the "sunset" provision of the amendment, student loans would be dischargeable in Chapter 13 cases in which the discharge order was entered on or after October 1, 1996.[3] Congress repealed the "sunset" provision on July 23, 1992.[4] Simply stated, since November of 1990,[5] most student loans have been nondischargeable in Chapter 13 cases.[6]

The Court used a "form discharge order" to grant Plaintiff's discharge on January 15, 1997. The discharge

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[3] Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3007-08, 104 Stat. 1388-28, -29.

[4] Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 102-325, § 1558, 106 Stat. 841.

[5] See 8 Collier on Bankruptcy, § 1328.02[3][d] (15th ed. rev. 2000).

[6] Certain student loans are dischargeable in Chapter 13 cases. These exceptions do not apply in this case.

order was provided to the Court by the Administrative Office of the United States Courts. The Administrative Office did not timely change the discharge order to reflect the repeal of the sunset provision. Thus, the discharge order provided that Plaintiff's student loan obligation was discharged.

Defendant contends that Federal Rules of Civil Procedure 60(a), (b)(4), and (b)(6)[7] allows the Court to correct the discharge order to reflect the repeal of the sunset provision. Rule 60 provides, in part, as follows:

> **Rule 60. Relief From Judgment or Order**
>
> **(a) Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. . . .
>
> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (4) the judgment is void; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

[7] Fed. R. Civ. P. 60(a), (b)(4), (b)(6). This rule is applicable to Chapter 13 cases. See Fed. R. Bankr. P. 9024.

Fed. R. Civ. P. 60(a), (b)(1), (b)(4), (b)(6).

Defendant first contends that the discharge order was a clerical mistake that may be corrected at any time. See Rule 60(a). "Under rule 60(a) the court may correct clerical mistakes or oversights that cause the judgment to fail to reflect what was intended at time of trial. Errors that affect substantial rights of the parties, however, are beyond the scope of rule 60(a)." Mullins v. Nickel Plate Mining Co., 691 F.2d 971, 973 (11th Cir. 1982).

In Weeks v. Jones,[8] the Eleventh Circuit Court of Appeals stated:

> While the district court may correct clerical errors to reflect what was intended at the time of ruling, "[e]rrors that affect substantial rights of the parties . . . are beyond the scope of rule 60(a)." Mullins v. Nickel Plate Mining Co., 691 F.2d 971, 973 (11th Cir. 1982) (citing Warner v. City of Bay St. Louis, 526 F.2d 1211, 1212 (5th Cir. 1976)); see United States v. Whittington, 918 F.2d 149, 150 n.1 (11th Cir. 1990) (noting that "for Rule 60(a) purposes, a mistake of law is not a 'clerical mistake,' 'oversight,' or 'omission'" (quoting Warner, 526 F.2d at 1212)); see also Truskoski v. ESPN, Inc., 60 F.3d 74, 77 (2d Cir. 1995) (per curiam) ("That provision, which states in pertinent part that '[c]lerical mistakes in judgments . . . may be corrected by the court at any time,' permits only a correction for the purpose of reflecting accurately a decision that the court actually made." (quoting Fed. R. Civ. P. 60(a)). "Although Rule 60(a) clerical mistakes need not be made by the clerk, they must be in the nature of recitation of amanuensis mistakes that a clerk might make.

[8] 100 F.3d 124 (11th Cir. 1996).

> They are not errors of substantive judgment." Jones v. Anderson-Tully Co., 722 F.2d 211, 212 (5th Cir. 1984) (per curiam) (emphasis added); see Paddington Partners v. Bouchard, 34 F.3d 1132, 1140 (2d Cir. 1994) ("An error in a judgment that accurately reflects the decision of the court or jury as rendered is not "clerical" within the terms of Rule 60(a)." (quoting Fed. R. Civ. P. 60(a)). "A district court is not permitted, however, to clarify a judgment pursuant to Rule 60(a) to reflect a new and subsequent intent because it perceives its original judgment to be incorrect." Burton v. Johnson, 975 F.2d 690, 694 (10th Cir. 1992), cert. denied, 507 U.S. 1043, 113 S. Ct. 1879, 123 L. Ed. 2d 497 (1993). . . .

100 F.3d at 128-29.

In United States v. Kellogg (In re West Texas Marketing Corp.,[9] the Fifth Circuit Court of Appeals stated:

> In sum, the relevant test for the applicability of Rule 60(a) is whether the change affects substantive rights of the parties and is therefore beyond the scope of Rule 60(a) or is instead a clerical error, a copying or computational mistake, which is correctable under the Rule. As long as the intentions of the parties are clearly defined and all the court need do is employ the judicial eraser to obliterate a mechanical or mathematical mistake, the modification will be allowed. If, on the other hand, cerebration or research into the law or planetary excursions into facts is required, Rule 60(a) will not be available to salvage the government's blunders. Let it be clearly understood that Rule 60(a) is not a perpetual right to apply different legal rules or different factual analyses to a case. It is only mindless and mechanistic mistakes, minor shifting of facts, and no new additional legal perambulations which are reachable through Rule 60(a).

[9] 12 F.3d 497 (5th Cir. 1994).

12 F.3d at 504-05.

In Warner v. City of Bay St. Louis,[10] the district court, in a diversity action, entered a judgment with interest to run at six percent. The state legislature, however, had increased the applicable interest rate to eight percent. The Fifth Circuit Court of Appeals held that the district court had made an error of law, rather than a typographical error, which was not correctable under Rule 60(a). The Fifth Circuit stated:

> Appellee contends here that the failure to enter 8% interest instead of 6% was a mere oversight by the district court. Yet, the appellee does not contend that the district court intended that its judgment read 8%. There is no allegation that this error is a typographical or transcribing mistake, or the mistake was an inadvertent one. Nor is this a case where the court sought to make more specific its order allowing interest. Instead, it appears that the district court was unaware of the recent change in Mississippi law.
>
> We believe that where the judgment states the amount of interest intended by the district court, relief is not available under Rule 60(a). . . . The district court allegedly made an error of law, but the judgment did state what was intended. To allow a party to correct alleged errors of law at any time by the mechanism of Rule 60(a) would significantly weaken the policy of finality as embodied in the Federal Rules. In short, if any error was committed by the district court, such mistake is not within the limited type of error

[10] 526 F.2d 1211 (5th Cir. 1976). Decisions of the former Fifth Circuit handed down prior to October 1, 1981, are binding precedent on this Court. Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1209 (11th Cir. 1981).

encompassed by Rule 60(a).

526 F.2d at 1212-13.

The Court is not persuaded that the Court's discharge order was a clerical mistake as that term is used in Rule 60(a). The discharge order did not contain a typographical, transcribing, or inadvertent mistake. The Court is persuaded that the discharge order cannot be corrected under Rule 60(a).

Defendant next contends that the Court's discharge order is void and that relief may be granted at any time under Rule 60(b)(4). "A judgment is not void merely because it is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter, or the parties, or if it acted in a manner inconsistent with due process of law." 11 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane Federal Practice and Procedure Civ. 2d § 2862 at 326-29 (1995); see Chambers v. Armontrout, 16 F.3d 257, 260 (8th Cir. 1994); Marshall v. Board of Education, Bergenfield, New Jersey, 575 F.2d 417, 422 (3rd Cir. 1978).

Defendant, by filing a proof of claim against Plaintiff's bankruptcy estate, consented to the Court's exercise of personal jurisdiction. Tucker Plastics, Inc. v. Pay 'N Pak Stores, Inc. (In re PNP Holdings Corp.), 99 F.3d 910, 911 (9th Cir. 1996); In re Bailey & Assoc., 224 B.R. 734, 738 (Bankr. E.D. Mo. 1998); Lykes Bros. Steamship Co. v.

Hanseatic Marine Service (In re Lykes Bros. Steamship Co.), 207 B.R. 282, 285-86 (Bankr. M.D. Fla. 1997). The issue of a debtor's discharge in bankruptcy is a proper subject matter of this Court. See 28 U.S.C.A. § 157 (West 1993). Defendant was served with the discharge order. Defendant had the opportunity to, but did not, file a notice of appeal. The Court is persuaded that the discharge order is not void as that term is used in Rule 60(b)(4).

Finally, Defendant contends that relief should be granted under Rule 60(b)(6) ("any other reason justifying relief"). "A claim of strictly legal error falls in the category of 'mistake' under Rule 60(b)(1) and thus is not cognizable under 60(b)(6) absent exceptional circumstances. The parties may not use a Rule 60(b) motion as a substitute for an appeal . . . ." Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989). "The fact that the judgment was erroneous does not constitute 'any other reason justifying relief.' The remedy was by appeal." Annat v. Beard, 277 F.2d 554, 559 (5th Cir.), cert. denied, 364 U.S. 908, 81 S. Ct. 270, 5 L. Ed 2d 223 (1960).

Rule 60(b)(1), rather than Rule 60(b)(6), applies to obvious mistakes or errors of law. See Fackelman v. Bell, 564 F.2d 734, 736 (5th Cir. 1997). A motion for relief under Rule 60(b)(1) must be made within one year after the order was entered. Defendant's motion was not made within one year of

the discharge order. The Court is not persuaded that Defendant is entitled to relief under Rule 60(b)(1) or (6).[11]

The Court is not persuaded that Defendant is entitled to relief from the Court's discharge order which was entered on January 15, 1997. The Court is persuaded that the obligation of Plaintiff to Defendant was discharged by the discharge order.

Plaintiff contends that Defendant's collection actions violated the discharge injunction of section 524 of the Bankruptcy Code.[12]

In Hardy v. United States (In re Hardy),[13] the Eleventh Circuit Court of Appeals stated:

> In Jove, this court adopted a two-pronged test to determine willfulness in violating the automatic stay provision of § 362. Under this test the court will find the defendant in contempt if it: "(1) knew that the automatic stay was invoked and (2) intended the actions which violated the stay." Jove, 92 F.3d at 1555. This test is likewise applicable to determining willfulness for violations of the discharge injunction of § 524.
>
> If the court on remand finds, as the plaintiff claims, that IRS received notice of Mr. Hardy's discharge in bankruptcy, and was thus aware of the discharge injunction,

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[11] Compare In re McClain, Ch. 13 Case No. G95-21383-REB (Bankr. N.D. Ga. Aug. 17, 2000) (creditor granted relief from erroneous discharge order dated March 13, 2000; creditor moved for relief within a few months of entry of discharge order).

[12] 11 U.S.C.A. § 524 (West 1993 & Supp. 2000).

[13] 97 F.3d 1384 (11th Cir. 1996).

> Mr. Hardy will then have to prove only that IRS intended the actions which violated the stay. We remand to the district court for factual determinations and for determination of IRS's liability for willful violations of § 524 in accordance with the guidelines set forth in Jove.

97 F.3d at 1390.

The Court is persuaded that Defendant willfully violated the discharge injunction. Defendant attempted to collect Respondent's student loan obligation after Plaintiff received her discharge in bankruptcy. Defendant was served with the discharge order. Defendant sent collection letters to Plaintiff and requested that the Department of the Treasury offset Plaintiff's 1998 tax refund against her student loan obligation.

Plaintiff and Defendant stipulate that Plaintiff suffered certain damages as a result of Defendant's collection action.[14] The stipulated damages are as follows:

1998 federal tax refund offset	$2,317.00
Interest on tax refund at 12%	278.04
Attorney's fees[15]	1,500.00

[14] Defendant does not concede that Plaintiff is entitled to recover these damages, only that Plaintiff suffered these damages.

[15] Defendant concedes that the attorney's fees are reasonable.

Court costs	130.00
Plaintiff's missed time from work	32.00
Total	$4,257.04

The Court is persuaded that Plaintiff is entitled to recover $4,257.04 from Defendant for its willful violation of the discharge injunction. The Court is not persuaded that the Department of Education violated the discharge injunction.

An order in accordance with this memorandum opinion will be entered this date.

DATED the 1st day of September, 2000.

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ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court