UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MARK C. O'MALLEY	CASE NO. 03-63315
Debtor	Chapter 13

APPEARANCES:

ROSICKI, ROSICKI & ASSOCIATES, P.C.
Attorneys for Citimortgage, Inc.
152 Islip Avenue, Ste. 18
Islip, New York 11751

GETNICK, LIVINGSTON, ATKINSON
GIGLIOTTI & PRIORE, LLP
MARY E. JOHNSON, ESQ.
Of Counsel

LYNN HARPER WILSON, ESQ.
Staff Attorney for Chapter 13 Trustee
250 South Clinton Street, Suite 203
Syracuse, New York 13202

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Presently under consideration by the Court is a motion filed by Mark W. Swimelar, Esq., chapter 13 trustee ("Trustee"), on August 9, 2004, in the case of Mark C. O'Malley ("Debtor"). The Trustee seeks reconsideration of the Court's Memorandum-Decision, Findings of Fact, Conclusions of Law and Order ("Memorandum-Decision"), dated August 5, 2004, pursuant to Rule 60(b)(1) and (6) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), as incorporated in Rule 9024 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.").

The motion was heard at the Court's regular motion term in Binghamton, New York, on August 17, 2004. Following oral argument the Court agreed to take the matter under submission without further memoranda of law.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(B), (G), (K) and (O).

FACTS

The Court in its Memorandum-Decision granted the motion of Citimortgage, Inc. ("CMI") to the extent that it sought relief from the automatic stay pursuant to § 362(d) of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), to proceed in state court to seek to reform its mortgage, dated June 30, 2000. The Court denied CMI's motion without prejudice to the extent that it sought relief from the automatic stay to foreclose on its mortgage and proceed with eviction.

The Debtor, as well as the Trustee, filed opposition to CMI's motion on the basis that CMI did not have a perfected lien on the premises as of the petition date due to an incorrect legal description of the property contained in the mortgage. CMI had commenced an action in state court prepetition seeking to reform the mortgage and to foreclose on the premises. It also had filed a Notice of Pendency or *lis pendens* with the Broome County Clerk's office. The Debtor argued that the *lis pendens* represented a transfer that was avoidable pursuant to Code § 544 and § 547 by virtue of the fact that it had been filed within ninety days of the commencement of the bankruptcy case.

CMI took the position that by seeking reformation of its mortgage it was not asking the

state court to effect a transfer of a security interest in the premises; rather, it was simply asking that the state court determine whether its lien was valid retroactive to June 30, 2000. CMI argued that the filing of the *lis pendens* did not constitute a transfer subject to avoidance.

By letter, dated June 25, 2004, Lynn Harper Wilson, Esq. ("Wilson"), as Staff Attorney for the Trustee, indicated that she would not be submitting a memorandum of law. Her letter stated, "[a]fter further research on the matter, I do not believe I am able to counter the legal arguments set forth in the memorandum of law submitted on behalf of Citimortgage." The Court interpreted Wilson's letter as indicative of the fact that the Trustee was, in effect, withdrawing his opposition to CMI's motion. *See* Memorandum-Decision at 5. The Court then considered whether the Debtor had standing to oppose CMI's motion. The Court concluded that the Debtor lacked standing to oppose the motion on the grounds that CMI's mortgage lien was avoidable. Accordingly, the Court granted CMI's motion to the extent that it sought to proceed in state court to reform its mortgage.

ARGUMENT

The Court had set a deadline for the submission of memoranda of law in connection with CMI's motion for June 30, 2004. According to Wilson, she submitted her letter of June 25, 2004, two days prior to going out of town to attend a conference and prior to receiving the memorandum of law submitted on behalf of the Debtor. *See* Affidavit of Wilson, sworn to August 6, 2004. Wilson contends that it was not her intention to withdraw the Trustee's opposition to CMI's request for relief from the automatic stay. *Id.* According to Wilson, her

letter was intended simply to apprize the Court that she would not be submitting a memorandum of law on behalf of the Trustee and apparently would rely on Debtor's counsel to provide the Court with any applicable law in opposition to CMI's position. Accordingly, the Trustee asks that the Court reconsider its Memorandum-Decision "in the interests of justice" and address the issue of whether the filing of a *lis pendens* is a transfer that can be avoided as a preference pursuant to Code § 547.

DISCUSSION

In his motion, the Trustee asserts that it was not clear that the Court would be addressing the issue of the Debtor's standing when it afforded the parties an opportunity to submit memoranda of law regarding CMI's motion. This argument is belied by the fact that in a footnote in its supplemental memorandum of law, filed on June 24, 2004, CMI does point out that "a Chapter 13 Debtor does not have standing to bring a preference action." Furthermore, even if the parties had not raised the issue of standing, the Court had an obligation to raise the issue *sua sponte*. *See In re ANC Rental Corp.*, 280 B.R. 808, 815 (D. Del. 2002); *see also In re Myers*, 262 B.R. 445, 447 (Bankr. N.D. Ind. 2001) (raising the issue of whether the debtor had standing to challenge the validity of a creditor's mortgage).

Fed.R.Civ.P. 60(b)(6)[1] authorizes the Court, in its discretion, to "relieve a party . . . from

---

[1] The Trustee's motion also makes reference to Fed.R.Civ.P. 60(b)(1). However, at the hearing of the motion on August 17, 2004, the parties focused their arguments on Rule 60(b)(6) and made no suggestion to the Court that it should consider whether to relieve the parties of its Memorandum-Decision based on "mistake, inadvertence, surprise or excusable neglect" on the part of the Trustee.

a final judgment, order or proceeding for . . . (6) any other reason justifying relief from the operation of the judgment." *See Neimaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986). The Court must balance the interests of justice against the need for preserving finality of judgments. *Id.* While Fed.R.Civ.P. 60(b)(6) has been described as a "grand reservoir of equitable power to do justice in a particular case," *Compton v. Alton Steamship Co.*, Inc., 608 F.2d 96, 106 (4th Cir. 1979), nonetheless, such relief is to be granted only if the movant is able to demonstrate "extraordinary circumstances." *LeBlanc v. Cleveland*, 248 F.3d 95, 100 (2d Cir. 2001). As noted by one authority, the controlling factor in determining whether extraordinary circumstances exist is whether the movant "is completely without fault for his or her predicament; that is, the movant was almost unable to have taken any steps that would have resulted in preventing the judgment from which relief is sought." 12 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.48[3][b] (3d ed. 2004).

In this case, Wilson admits that her correspondence was misleading and asks for the Court's reconsideration in an effort to avoid prejudice to the Debtor herein, as well as to Mark E. and Debra J. Perosio, Case No. 03-67641, whose attorney had filed an *amicus* brief.[2] In particular, she asks that the Court address the issue of whether the filing of a *lis pendens* is a transfer that can be avoided as a preference, particularly given the fact that the Court admitted that it had been prepared to rule on the issue until it reached its conclusion that the Debtor had no standing.

The Court must deny the Trustee's motion based on a failure to establish extraordinary

---

[2] As noted in the Court's Memorandum-Decision, the Perosios had commenced an adversary proceeding seeking to avoid a mortgage lien held by NBT Bank N.A. pursuant to Code 544(a)(3) due to "apparent scrivener's errors.".

circumstances that would warrant such relief. By Wilson's own admission, she is not completely without fault for the predicament. Moreover, the Court notes that the Trustee has not commenced an adversary proceeding seeking to avoid the *lis pendens* as a preferential transfer in this case and to address the issue under these circumstances in an effort not to prejudice the Perosios would place the Court in a position of rendering an advisory opinion, which it is without authority to do. *See Matter of FedPak Systems, Inc.*, 80 F.3d 207, 211-12 (7th Cir. 1996) (indicating that "[a] bankruptcy court, like any other federal court, lacks the constitutional power to render advisory opinions or to decide abstract, academic or hypothetical questions").

Based on the foregoing, it is hereby

ORDERED that the Trustee's motion seeking relief from the Court's Memorandum-Decision pursuant to Fed.R.Civ.P. 60(b)(6) is denied.

Dated at Utica, New York

this 2nd day of September 2004

_____

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge