

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In re:	§	
	§	
MATT A. HERSHMAN and	§	Case No. 10-42288
DYAN M. HERSHMAN,	§	(Chapter 13)
	§	
Debtors.	§	

MEMORANDUM OPINION AND ORDERS

This matter is before the Court on a motion by the debtors, Matt and Dyan Hershman, to vacate the order dismissing their chapter 13 case. Janna Countryman, the chapter 13 trustee, opposes the debtors’ motion. For the reasons stated on the record on December 8, 2010, and set forth more fully in this memorandum opinion, the Court concludes that the debtors’ motion should be granted.¹

BACKGROUND

The debtors filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code on July 8, 2010. They simultaneously filed a chapter 7 petition for their security alarm business, SMI, Inc. d/b/a SCOTT Security Concepts (“SMI”). SMI, Matt Hershman and Matt’s brother, Scott Hershman, were defendants in several lawsuits as of the petition date. In addition, Dyan and Matt Hershman were co-debtors on SMI’s business debts.

The debtors filed a chapter 13 plan in which they proposed to make monthly payments to the chapter 13 trustee for 60 months. The debtors planned to use the bulk of these payments to satisfy their debt to the Internal Revenue Service. They estimated that

¹ On December 15, 2010, the Court entered a one-page order granting the debtors’ motion. The Court entered the December 15th order in error, and the chapter 13 trustee immediately requested that the Court vacate it. The Court finds good cause to grant the trustee’s motion, *see* FED. R. CIV. PROC. 59(e), and the following discussion is premised on the vacation of the December 15th order.

their total general unsecured debt was \$242,328.00 and that unsecured creditors would receive a pro rata share of \$2,252.09.

The Court confirmed the debtors' plan on October 8, 2010. The confirmation order provided that the debtors would make monthly payments to the chapter 13 trustee pursuant to the terms of the plan together with any income tax refunds they received during the life of the plan. On November 1, 2010, the chapter 13 trustee received a tax refund pursuant to the debtors' confirmed plan.

On November 8, 2010, the debtors filed a motion to dismiss their chapter 13 case. The debtors did not articulate a reason for dismissal in their motion. They simply invoked their right to dismiss their case under 11 U.S.C. § 1307(b). The Court entered an order granting the debtors' motion and dismissing their case on November 10, 2010.

A dispute then arose between the chapter 13 trustee and the debtors regarding whether the funds held by the trustee should be refunded to the debtors or paid to their creditors. The chapter 13 trustee is holding the total sum of \$7,595.85 paid to her pursuant to the terms of the debtors' confirmed plan. The chapter 13 trustee takes the position that she is required by the terms of the confirmed plan as well as the Bankruptcy Code to distribute the funds to creditors. The debtors contend that the funds should be returned to them since they did not receive a discharge and the Court has dismissed their case.

On November 17, 2010, the debtors filed the instant motion to vacate the dismissal order. The debtors seek to reinstate their case so that they can obtain an order expressly requiring the chapter 13 trustee to distribute the funds she is holding to them. The chapter 13 trustee opposes the debtors' motion. At a hearing on December 1, 2010,

the parties presented their dispute as a conflict between §§ 349(b)(3) and 1326(a)(2) of the Bankruptcy Code. The parties filed briefs in support of their respective positions following the hearing, and the Court orally announced her ruling on December 8, 2010.

DISCUSSION

The debtors filed the motion to vacate the order dismissing their case prior to the deadline under Federal Rule of Civil Procedure 59(e), as adopted and applied to this case by Federal Rule of Bankruptcy Procedure 9023. Although the motion does not contain any citation to Rule 59(e), the Fifth Circuit has instructed courts to construe a motion that seeks reconsideration of an order and is filed within 14 of the order that it challenges as a Rule 59(e) motion – regardless of how the motion is labeled. *See, e.g., Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 668 (5th Cir. 1986) (en banc). Indeed, even motions captioned under Rule 60(b), but filed within 14 days of the underlying judgment or order, are normally deemed Rule 59(e) motions and reviewed under standards of Rule 59(e). *See, e.g., Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 68 (1982) (citing *Woodham v. American Cystoscope Co.*, 335 F.2d 551 (5th Cir. 1964)).

Motions to alter or amend a judgment under Rule 59(e) “serve the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.” *Waltman v. Int’l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (citations omitted). A Rule 59(e) motion should not be granted unless there is: (1) an intervening change in controlling law; (2) new evidence not previously available; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice. *See, e.g., Schiller v. Physicians Res. Group, Inc.*, 342 F.3d 563, 567 (5th Cir. 2003); *Russ v. Int’l Paper Co.*, 943 F.2d 589, 593 (5th Cir. 1991). Here, the debtors do not attempt to present

new evidence or establish an intervening change in the law. Rather, the debtors disagree with the chapter 13 trustee about the legal effect of dismissal on funds paid to the chapter 13 trustee pursuant to a confirmed plan and held by the chapter 13 trustee at the time of dismissal.

The interplay between § 349 (regarding the effect of dismissal) and § 1326 (regarding the disbursement of plan payments) is a matter of first impression for this Court. Section 349 addresses the restoration of a debtor's pre-petition property rights upon dismissal. In particular, § 349(b) provides that, unless the bankruptcy court, for cause, orders otherwise, the dismissal of a case reverts the property of the estate in the entity in which the property was vested at the commencement of the case. *See* 11 U.S.C. § 349(b). The Code defines "property of the estate" to include property which the debtor acquires *after* confirmation of a chapter 13 plan, including "earnings from services performed by the debtor after commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first." 11 U.S.C. § 1306(a)(2). Thus, in this case, the debtors argue that § 349(b) reinstated their interest in the funds the chapter 13 trustee is holding, and the chapter 13 trustee must turn over the funds to them.²

² In a similar case, *Nash v. Kester (In re Nash)*, 765 F.2d 1410 (9th Cir. 1985), the Ninth Circuit held that funds held by a chapter 13 trustee should be paid to the debtors. In *Nash*, as in the present case, the debtors obtained confirmation of a chapter 13 plan. Following confirmation, the chapter 13 trustee received wage deductions from the debtors. The bankruptcy court dismissed the debtors' case at their request and, after dismissal, the chapter 13 trustee distributed the funds he was holding pursuant to the terms of the confirmed plan. The Ninth Circuit held that these disbursements were improper. The Ninth Circuit reasoned that "dismissal effectively vacated the first confirmed plan." *Id.* at 1413 (citing *In re Doyle*, 11 B.R. 110, 110 (Bankr. E.D. Pa. 1981)). The Ninth Circuit invoked § 1307(b), which allows a debtor to dismiss a chapter 13 case, and § 349(b)(3) in support of its decision. The Ninth Circuit, however, did not address the present § 1326(a). The debtors in *Nash* filed for bankruptcy in 1983. Congress enacted the present § 1326(a) as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-315.

The chapter 13 trustee points out that the confirmation order is not among those orders that § 349(b) expressly vacates upon dismissal of a case. *See* 11 U.S.C. § 349(b)(2). The trustee argues that the Code requires her to distribute the funds she is holding pursuant to the debtors' confirmed plan. The trustee relies upon § 1326(a)(2), which provides that a "payment made under [a proposed chapter 13 plan] shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as practicable." 11 U.S.C. § 1326(a)(2).³ Although § 1326(a)(2) does not address the distribution of funds paid to a chapter 13 trustee after a plan is confirmed, *see In re Boggs*, 137 B.R. 408, 410 (Bankr. W.D. Wash. 1992), the bankruptcy court in *In re Parrish*, 275 B.R. 424, 429 (Bankr. D.C. 2002), for example, construed the express language of § 1326(a)(2) as taking precedence over the more general language of § 349(b).⁴ *See also In re Parker*, 400 B.R. 55 (Bankr. E.D. Pa. 2009) (holding that dismissal of case after confirmation did not undermine creditor's right to receive funds paid to chapter 13 trustee prior to confirmation in accordance with the terms of the confirmed plan). *Contra In re Tran*, 309 B.R. 330 (9th Cir. BAP 2004) (requiring the chapter 13 trustee to return undistributed funds to the debtor).

³ Notably, Congress enacted the present § 1326(c) as § 1326(b) in 1978 as part of the Bankruptcy Reform Act. Section 1326(c) designates the trustee as the disbursing agent in default of any other provision providing otherwise – it does not address whether the trustee is required to disburse funds in accordance with the plan after dismissal. *See Nash*, 765 F.2d at 1413 n. 1.

⁴ The *Parrish* court also distinguished the specific provisions of § 1326(a)(2) from the more general language of § 1326(c). *In re Parrish*, 275 B.R. at 428 n. 4.

This Court is persuaded to follow *Parrish* as giving effect to all of the relevant statutory provisions.⁵ A chapter 13 trustee is statutorily obligated to distribute funds paid pursuant to a confirmed plan to creditors. *See* 11 U.S.C. § 1326(c). The confirmation order is not among those that § 349(b) expressly vacates upon dismissal. *See* 11 U.S.C. § 349(b)(2). Moreover, the dismissal of a chapter 13 case does not relieve the chapter 13 trustee of her statutory duty to account for and distribute all monies received in accordance with the debtors' confirmed plan. *See* 11 U.S.C. §§ 704(a)(2), 1302(b)(1), 1326(a)(2). Accordingly, a confirmed plan controls the distribution of any funds paid to the chapter 13 trustee unless the plan is modified or the order confirming the plan is set aside. *See also In re Lampman*, 276 B.R. 182 (Bankr. W.D. Tex. 2002) (allowing the chapter 13 trustee to pay a debtor's attorneys fees after dismissal of the case from funds paid pursuant to a confirmed plan). As the bankruptcy court explained in *Parrish*, "unless dismissal vacates the effectiveness of a confirmed plan . . . , § 1326(a)(2) requires the trustee to disburse those funds in accordance with the confirmed plan" *In re Parrish*, 275 B.R. at 429.

In this case, the debtors voluntarily sought dismissal of their Chapter 13 case pursuant to § 1307(b). It was incumbent upon them to establish cause to alter the effects of dismissal set forth in § 349(b) by seeking revocation of the confirmation order. They

⁵ Other courts have reached the same result as *Parrish* by interpreting §§ 349(b) and 1326(a)(2) in light of the binding effect of the terms of a confirmed plan. *See* 11 U.S.C. § 1327(a). Some courts have held that the *res judicata* effect of an order confirming a chapter 13 plan grants creditors a vested interest in payments made under the plan. *See, e.g., In re Shaffer*, 48 B.R. 952 (Bankr. N.D. Ohio 1985). Alternatively, some courts have held that, upon receipt by the trustee, plan payments are "vested in" creditors holding allowed claims and cannot thereafter be divested. *See, e.g., In re Pegues*, 266 B.R. 328 (Bankr. D. Md. 2001) (finding once chapter 13 debtor makes payment under confirmed plan, he relinquishes all rights to that payment); *In re Hardin*, 200 B.R. 312 (Bankr. E.D. Ky. 1996) (holding that confirmation vests rights in creditors under § 1306 and other "equitable factors"); *In re Galloway*, 134 B.R. 602 (Bankr. W.D. Ky. 1991) (finding that creditor's interest in chapter 13 plan payments vests as payments are made).

failed to do so. However, since this is a matter of first impression, the Court finds that good cause exists to vacate the order dismissing the debtors' case in order to allow them to seek an order that both revokes the confirmed plan and dismisses their case pursuant to § 349(b) of the Bankruptcy Code.

IT IS THEREFORE ORDERED that the motion by the chapter 13 trustee to vacate the Order entered on December 15, 2010 [Dkt. No. 22] is hereby **GRANTED**.

IT IS FURTHER ORDERED that the Order entered on December 15, 2010 [Dkt. No. 21] shall be, and it is hereby, **VACATED**.

IT IS FURTHER ORDERED that the debtors' motion to vacate the order dismissing their case [Dkt. No. 12] shall be, and it is hereby, **GRANTED**.

Signed on 03/08/2011

Brenda T. Rhoades SD
HONORABLE BRENDA T. RHOADES,
CHIEF UNITED STATES BANKRUPTCY JUDGE