SO ORDERED.
SIGNED this 27th day of August, 2018

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

ALBERT OKOREEH BAAH

Debtor

Case No. 3-bk-18-30345-SHB
Chapter 13

MEMORANDUM AND ORDER ON EDUCATIONAL CREDIT MANAGEMENT CORPORATION'S MOTION TO RECONSIDER DISALLOWANCE OF CLAIM

This contested matter is before the Court on Educational Credit Management Corporation's Motion to Reconsider Disallowance of Claim ("Motion to Reconsider") filed on June 12, 2018 [Doc. 55], asking the Court to reconsider the Order entered on May 29, 2018 ("May 29 Order") [Doc. 49], which sustained Debtor's objection to the proof of claim[1] filed by Educational Credit Management Corporation ("ECMC") [Doc. 38]. The May 29 Order was entered by default after ECMC did not respond to the objection within thirty days as required by E.D. Tenn. LBR 9013-1(h). ECMC acknowledges that it failed to respond timely under the Court's Local Rules and

[1] ECMC timely filed proof of claim [15-1] in the amount of $25,261.17 on March 29, 2018, for unpaid student loans incurred by Debtor in June and November 1992.

relies on Rule 60(b)(1) and (3) of the Federal Rules of Civil Procedure, arguing that the May 29 Order was entered as a result of excusable neglect and/or was based on fraud or misrepresentation. Debtor filed his response in opposition to the Motion to Reconsider on June 14, 2018 [Doc. 60], arguing that ECMC cannot show that its failure to respond to the claim objection was due to fraud, misrepresentation, or misconduct by Debtor and that ECMC did not plead mistake, inadvertence, or excusable neglect in the Motion to Reconsider.[2]

Because ECMC failed to respond timely to the underlying objection to claim as required by E.D. Tenn. LBR 9013-1(h), the May 29 Order is essentially a default judgment. Nonetheless, a disallowed claim "may be reconsidered for cause [and the] reconsidered claim may be allowed or disallowed according to the equities of the case." 11 U.S.C. § 502(j); *see also* Fed. R. Bankr. P. 3008. "Thus, '[r]econsideration under 502(j) is a two-step process. First, a court must decide whether there is "cause" for reconsideration. Then, the court must decide whether the "equities of the case" dictate allowance or disallowance.'" *In re Meggitt*, Case No. 17-30029, 2018 WL 401224, at *2 (Bankr. N.D. Ohio Jan. 12, 2018) (quoting *Dorula v. Flanders* (*In re Starlight Group, LLC*), 515 B.R. 290, 293 (Bankr. E.D. Va. 2014)). Although ECMC must adequately demonstrate that cause to reconsider exists, the Court possesses broad discretion to reconsider the claim. *Id*.

I. Cause for Reconsideration

The Bankruptcy Code does not define what constitutes "cause" for reconsideration; however, courts facing this issue uniformly agree that the requirements for relief under Rule 60(b)

[2] The Court does not understand Debtor's argument that ECMC did not plead excusable neglect when the motion very clearly references "excusable neglect" and, indeed, the entirety of subsection B (pages six through nine) in its brief focuses on excusable neglect. [*See* Docs. 55, 56 at p. 6-9.]

of the Federal Rules of Civil Procedure provide the proper measure. In this case, Rule 60(b)[3] authorizes the Court to set aside the May 29 Order if the Court determines that ECMC's failure to oppose the underlying objection to claim was the result of "(1) mistake, inadvertence, surprise, or excusable neglect," or if the underlying objection to claim was based on "(3) fraud . . . , misrepresentation, or misconduct" by Debtor. As the party seeking relief from the May 29 Order, ECMC bears the burden of establishing by clear and convincing evidence that all requirements under Rule 60(b) have been satisfied. *See In re Gibson & Epps, LLC*, 468 B.R. 279, 289 (Bankr. E.D. Tenn. 2012). As with Rule 3008, the Court enjoys broad discretion to grant relief under Rule 60(b). *See Municipality of Carolina v. Gonzales (In re Gonzalez)*, 490 B.R. 642, 652 (B.A.P. 1st Cir. 2013).

A. Rule 60(b)(3)

ECMC first argues that it should be relieved from the May 29 Order pursuant to Rule 60(b)(3) because the order was entered as a result of Debtor's fraud, misrepresentation, or conduct. To prevail under Rule 60(b)(3), ECMC is required to show that Debtor "engaged in fraud or other misconduct . . . [that] prevented [ECMC] from fully and fairly litigating [its] case." *RDI of Mich., LLC v. Mich. Coin-Op Vending, Inc.*, No. 08-11177, 2011 WL 3862347, at *6 (E.D. Mich. Sept. 1, 2011). Additionally, "to establish grounds for relief under Rule 60(b)(3), the moving party need not demonstrate that the adverse party has committed all the elements of fraud specified in the law of the state where the federal court is sitting, but rather must simply show that the adverse party's conduct was fraudulent under this general common law understanding." *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 456 (6th Cir. 2008).

[3] Rule 60(b) is applicable in cases under the Bankruptcy Code through Rule 9024 of the Federal Rules of Bankruptcy Procedure.

ECMC argues that Debtor's averments in support of the objection that he previously repaid the student loans in 1991 and 1992 are directly contradicted by Debtor's Schedule F filed in his prior case (#3:13-bk-33937-SHB) on November 1, 2013, on which he listed an undisputed student loan obligation. ECMC also argues that Debtor's assertions that he was not contacted by First Tennessee, First American National Bank, or the Department of Education concerning default of his student loans are false. To support its arguments (and to establish that it has a meritorious defense), ECMC filed the sworn Declaration of Kerry Klisch [Doc. 66], attaching as exhibits the account history archive for Debtor's student loan accounts reflecting communications with Debtor, including notifications of default, and Debtor's payment history reflecting that the loans were not paid off in 1991 and 1992. ECMC also attached page 27 of 41 for docket entry 1 in case number 3:13-bk-33937-SHB, which, in fact, reflects an undisputed, unsecured, nonpriority debt to the Department of Education for student loans in the amount of $9,000.00.

ECMC is incorrect, however, in its arguments that "the Order disallowing ECMC's claim was entered based on the Debtor's affidavit[.]" [Doc. 55 at p. 5.] The May 29 Order was not entered on the merits of Debtor's objection; it was entered by default solely on ECMC's failure to respond under E.D. Tenn. LBR 9013-1(h). Nothing done by Debtor through the objection or his affidavit attached thereto hindered ECMC's ability to fully litigate its claim, and ECMC has not satisfied the requirements necessary for relief under Rule 60(b)(3).

B. Rule 60(b)(1)

ECMC also argues that the May 29 Order should be set aside under Rule 60(b)(1) because of ECMC's excusable neglect in missing the deadline to respond to the underlying objection to claim. "[F]or purposes of Rule 60(b), 'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Pioneer Inv.*

Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 394 (1993); *see also Slobodian v. Capital for Merchants, LLC (In re ABS Ventures, Inc.)*, 523 B.R. 443, 449 (Bankr. M.D. Pa. 2014) ("The use of the term 'neglect' implies that acts of carelessness may be forgiven, but the qualification imposed by the adjective 'excusable' suggests that some careless acts cannot be overlooked."). Determining whether the failure to meet a deadline is "excusable" is "an equitable one, taking account of all relevant circumstances surrounding the party's omission . . . , includ[ing] . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Inv. Servs.*, 507 U.S. at 395. "Courts apply Rule 60(b)(1) 'equitably and liberally . . . to achieve substantial justice[,]' [and i]n cases that have not been heard on the merits, the determination of whether neglect is excusable takes into account the length and reasons for the delay, the impact on the case and judicial proceedings, and whether the movant requesting relief has acted in good faith." *Burrell v. Henderson*, 434 F.3d 826, 832 (6th Cir. 2006) (citations omitted). The Sixth Circuit has held that "*Pioneer* stands for the proposition that a district court should consider the five factors enumerated above in cases where procedural default has prevented the court from considering the true merits of a party's claim." *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 386 (6th Cir. 2001).

ECMC argues that its failure to respond timely to the objection to claim was due to an in-house error in transferring the objection from its records department to its legal department in time for the response to be filed. When it discovered the May 29 Order, ECMC notes that it took steps to seek timely reconsideration by filing the Motion to Reconsider on June 12, 2018. *See* Klisch Aff. at ¶¶ 11-14. Because the Motion to Reconsider was filed two weeks after entry of the Order, no significant delay occurred between discovery of the clerical error and ECMC's attempt to

remedy the error through the Motion. Such action demonstrates "a good faith attempt to correct [its] error in failing to respond to Debtor's objection." *In re Meggitt*, No. 17-30029, 2018 WL 401224, at *4.

Notwithstanding Debtor's argument to the contrary, the Court also finds that reconsidering ECMC's claim and granting the Motion to Reconsider will not substantially impact this bankruptcy case or prejudice Debtor. In his brief in opposition to the Motion to Reconsider, Debtor states that he has proposed to pay a 100% dividend to unsecured creditors in order to resolve pending objections to confirmation and that those negotiations have been delayed due to the filing of the Motion to Reconsider. Nevertheless, neither delay nor increased litigation cost constitute the type of prejudice required. Instead, "the relevant inquiry concerns the future prejudice that will result from [reconsidering the claim], not prejudice that has already resulted[.]" *Dassault Systemes, SA v. Childress*, 663 F.3d 832, 842 (6th Cir. 2011). The Court has not yet confirmed Debtor's proposed amended plan, and a hearing on two objections to confirmation is scheduled for October 17, 2018. For these reasons, the Court finds that ECMC has sufficiently shown "excusable neglect."

II. Equities of the Case

The Court also finds, under Rule 3008, that the equities of the case weigh in favor of reconsideration. Based on the arguments presented, the Court finds that ECMC has pled a meritorious defense and that Debtor will not be prejudiced if the Court reconsiders ECMC's claim. "In determining whether a defense is meritorious, the test is not 'likelihood of success.' Rather, a defense is meritorious, 'if the defense relied upon states a defense good at law.'" *In re Meggitt*, No. 17-30029, 2018 WL 401224, at *4 (quoting *Williams v. Meyer*, 346 F.3d 607, 614 (6th Cir. 2003); *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983)). If

the averments in Kerry Klisch's Affidavit are correct, ECMC would have a basis to challenge Debtor's objection to its claim in an evidentiary hearing. Thus, the defense is meritorious, and the Court finds that it is more equitable to resolve the objection to ECMC's claim on the merits.

The Court, accordingly, directs the following:

1. The Motion to Reconsider is GRANTED.

2. The Order disallowing ECMC's proof of claim entered by the Court on May 29, 2018 [Doc. 49] is VACATED.

3. A hearing on the Objection to Claim of Educational Credit Management Corporation filed by Debtor on April 25, 2018 [Doc. 38], will be held on September 19, 2018, at 9:00 a.m., in Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee.

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