

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
KEVIN MISCH TRUCKING &) CASE NO. 09-20794 jpk
EXCAVATING, INC.,) Chapter 11
)
Debtor.)

ORDER ON MOTION TO RECONSIDER ORDER
GRANTING RELIEF FROM THE AUTOMATIC
STAY ON AFFIDAVIT OF DEFAULT ("MOTION")

The Motion, filed by the debtor, by counsel, on November 16, 2009, essentially requests relief from a final order entered on November 6, 2009. Most generously construed, the Motion seeks relief pursuant to Fed.R.Bankr.P. 9023/Fed.R.Civ.P. 59, in that it was filed within ten days of the date of entry of the final order on November 6, 2009. It is possible that the Motion seeks relief pursuant to Fed.R.Bankr.P. 9024/Fed.R.Civ.P. 60. That is one part of the problem occasioned by the Motion: it states no basis for the relief which it requests, and it does not cite any rule or statute as the premise for that relief. Additionally, pursuant to N.D.Ind.L.B.R. B-9023-1(a), whether filed pursuant to Fed.R.Bankr.P. 9023 or Fed.R.Bankr.P. 9024, the Motion was required to be accompanied by a supporting brief: it was not.

Pursuant to the terms of the Agreed Order on Motion for Adequate Protection entered into between the debtor and John Deere Construction & Forestry Company, as approved by the court on July 31, 2009, the Affidavit of Default filed by the creditor on October 28, 2009 stated grounds for default. Moreover, pursuant to the terms of the July 31, 2009 Agreed Order, no further order of the court was required to free the creditor from the automatic stay. In a sense, the order entered by the court on November 4, 2009 was declaratory of the relief granted in the event of default, and it was not actually necessary to grant that relief by entry of the order. The court acknowledges that the debtor filed an Objection to Affidavit of Default on October 30, 2009. However, the statement – which essentially asserts that the debtor advised his counsel

that a payment had been sent to the creditor – is not sufficient to overcome the force of the Affidavit of Default filed by the creditor.

If the debtor wishes to challenge the default established by the creditor and/or the order entered on November 6, 2009 confirming that default, it is incumbent upon the debtor to file a motion in accordance with the requirements of Fed.R.Bankr.P. 9013, including a delineation of the specific rule or statute upon which the debtor relies for relief, and a memorandum of law in conformity with N.D.Ind.L.B.R. B-9023-1(a).

For the foregoing reasons, the court finds that the Motion should be denied, without prejudice.

IT IS ORDERED that the Motion is denied, without prejudice.

Dated at Hammond, Indiana on November 25, 2009.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor
US Trustee
Attorney for Creditor