UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

	)	CHAPTER 11
	)	
IN RE:	)	CASE NO. 96-63092
	)	
DENNIS E. OSTROWSKI and GAIL A. OSTROWSKI,	)	JUDGE RUSS KENDIG
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Debtors.	)	**MEMORANDUM OPINION**
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This matter was heard October 7, 2002 on the motion to vacate order of dismissal and reinstate Chapter 11 proceeding filed by Dennis E. and Gail A. Ostrowski (hereafter "Debtors"). Michael J. Moran, replacement counsel for Debtors, argued on their behalf. Debtor Dennis E. Ostrowski appeared. Debtor Gail A. Ostrowski was unable to appear. Andy Vara, counsel for the United States Trustee (hereafter "UST"), argued on behalf of UST. Dan McGown, Debtors' former counsel (hereafter "Counsel"), testified. The court took the matter under advisement and allowed Debtors until October 21, 2002 to file a supplemental memorandum in support. Debtors filed their supplemental memorandum in support on October 11, 2002. UST did not file a response.

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(a) and the general order of reference entered in this district on July 16, 1984. The following constitute the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

Facts

Debtors commenced their Chapter 11 bankruptcy proceeding in 1996. Their plan, confirmed October 26, 1998, called for annual payments to creditors of $8,000.00 for five years. Debtors made these payments from 1998 to 2000. However, Debtors did not pay their quarterly fees to UST nor file their financial reports for the fourth quarter of 1998 through the second quarter of 2001. Upon noticing these deficiencies, UST filed a motion to convert or dismiss.

The motion to convert or dismiss was set for hearing on September 17, 2001. The hearing did not go forward. Instead, an agreed order was entered settling the motion to dismiss. The order obligated Debtors to pay UST the quarterly fees owed, to file the financial reports not filed, and to file a motion to close the case by November 20, 2001 or else their case would be converted without further hearing. The agreed order was entered September 17, 2001 and signed by Counsel. Debtors did not sign the order. The certificate of service indicates Counsel received a copy of the order but Debtors did not. The hearing was adjourned to November 26, 2001.

Debtors failed to comply with the order of September 17, 2001. In lieu of holding a hearing on November 26, 2001,[1] an order dismissing Debtors' case was entered on November 27, 2001. The certificate of service indicates that the order was served on Counsel but not Debtors. Federal Rule of Bankruptcy Procedure 2002 mandates that the clerk provide notice of the dismissal to the debtors and other interested parties. This was not done for well over three months. The notice was sent March 10, 2002. In the meantime, Debtors made a payment to their creditors in 2001.

Debtors maintain they were unaware of the terms of the stipulated order of September 17, 2001, as well as the order of November 27, 2001 dismissing their case, until after March 10, 2002. At the hearing on the motion to vacate, Counsel testified that he had sent a letter to Debtors advising them of the settlement terms proposed for the September 17, 2001 order and advising them to contact him if they did not accept the terms. Upon receiving no response nor a return of the sent mail, Counsel testified that he executed the stipulated order. Counsel testified that his office is on a rural mail route and that his mail has been tampered with before. He stated that after he learned of Debtors' failure to receive the letter, he postulated that the Debtors' letter could have suffered the same fate. He testified that he did not send Debtors a copy of the November 27, 2001 order dismissing the case.

After learning of the dismissal of their case, Debtors contacted Counsel to assist them in vacating the order. Counsel verified this contact during his testimony. After several months passed during which Counsel failed to act to their satisfaction, Debtors hired their current counsel to file a motion to vacate. They filed a motion to reopen their bankruptcy case on August 12, 2002 and a motion to vacate the dismissal entry on September 4, 2002, less than one year after the dismissal order was entered.

UST stated that it did not oppose Debtors' motion to vacate. UST just requested that quarterly fees owed be paid and financial reports due be filed and that the case be closed expeditiously. UST stated that Debtors' counsel and UST had come to an agreement as to the amount of fees owed and the number of reports due if the dismissal was vacated and the case reinstated.

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[1]Counsel previously informed court staff that he would be out of the country.

Law and Analysis

Debtors move to vacate the dismissal order arguing that it was excusable neglect to fail to comply with the September 17, 2001 order as they did not have notice of the order's provisions. Motions to vacate are analyzed pursuant to Federal Rule of Civil Procedure 60 applicable to bankruptcy cases through Federal Rule of Bankruptcy Procedure 9024. Rule 60(b) reads in pertinent part:

> 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. . . . The motion shall be made within a reasonable time, and for reason[] (1) . . . not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b). The moving party has the burden of proof. Manufacturers' Industrial Relations Assoc. v. East Akron Casting Co., 58 F.3d 204, 207 (6th Cir. 1995).

The United States Supreme Court has had occasion to analyze the term "excusable neglect." *See* Pioneer Inv. Servs. Co. v. Brunswick Assoc. Lmtd. Part., 507 U.S. 380 (1993) (analyzing "excusable neglect" in the context of another bankruptcy rule, but nonetheless finding the analysis applicable to cases under Federal Rule of Civil Procedure 60(b)); *accord* In re O'Brien Environmental Energy, Inc., 188 F.3d 116, 126, f.n. 7 (3rd Cir. 1999) ("The phrase 'excusable neglect' appears not only in Rule 9006(b) but in [other rules]. The Supreme Court referred to each of these rules in construing the 'excusable neglect' analysis in *Pioneer*. *Pioneer*, therefore, is commonly understood to provide guidance . . . in other bankruptcy . . . contexts discussing the issue of excusable neglect."). The Court defined "excusable neglect" as encompassing those acts of neglect within a party's control. Pioneer Inv. Servs. Co., 507 U.S. at 392. "Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' . . . is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." Id. (footnotes omitted).

First, a court must determine whether a party's failure to act was because of "neglect." Id. at 388-93. The Court looked to the ordinary meaning of the term, relying upon the dictionary definition of "to leave undone or unattended to *esp[ecially] through carelessness*" to define "neglect." Id. at 388 (quoting Webster's Ninth New Collegiate Dictionary 791 (1983)) (alteration in original). The Court found this definition encompassed those situations in which the neglect arose from "faultless omissions to act" as well as "omissions caused by carelessness."

Id.

In the present case, Debtors failed to comply with the September 17, 2001 order because they did not receive a copy of the letter from Counsel advising them of the settlement offer, which lead to the dismissal of their case. Their failure to act stems from Counsel's failure to follow up with Debtors and his failure to send them a copy of the September 17, 2001 order and the November 27, 2001 order dismissing their case. These acts are within the realm of "neglect" as defined by the Supreme Court.

The next inquiry is whether Debtors' neglect was "excusable." Pioneer Inv. Servs. Co., 507 U.S. at 395. What constitutes "excusable" neglect is an equitable consideration. Id. One must take into account the circumstances surrounding the party's failure to act. Id. In doing so, the Court adopted a four-part test developed by the lower court, the Sixth Circuit Court of Appeals. A court must examine the danger of prejudice to the responding party, the length of delay and its potential impact on the judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the movant acted in good faith. Id. (citing Brunswick Assocs. Lmtd. v. Pioneer Inv. Servs. Co. (In re Pioneer Inv. Servs. Co.), 943 F.2d 673, 677 (6th Cir. 1991)). The Court found that this test applies equally to a party's or his attorney's conduct. Id. at 396. In making this leap, the Court cited its previous decision in Link v. Wabash R. Co., 370 U.S. 626 (1962). In Link, a party's lawsuit was dismissed because his attorney failed to attend a pretrial hearing, and the Court found "no merit to the contention that dismissal of petitioner's claim because of his counsel's *unexcused* conduct imposes an unjust penalty on the client." Pioneer Inv. Servs. Co., 507 U.S. at 396 (quoting Link, 370 U.S. at 633) (emphasis added). Therefore, the Pioneer Court determined that in order to determine whether a party's actions are excusable, the focus has to be on whether or not the neglect of the party *and its counsel* is excusable. Id. at 397.

To determine whether Debtors' and Counsel's combined actions constitute excusable neglect, the court will apply Pioneer's four-part test. First, the question is whether prejudice will result to UST if the dismissal entry is vacated. In the present case, UST is unopposed to the court's vacation of the dismissal entry as long as Debtors are obligated to pay the quarterly fees and file the financial reports that they failed to do so originally. Given UST's lack of objection, the court cannot find that vacating the dismissal entry would result in prejudice to UST.

Second, the court must examine Debtors' delay in filing the motion to vacate and its impact on the judicial proceedings. In the present case, the dismissal order was entered on November 27, 2001. The certificate of service indicates that Counsel received a copy at that time but that Debtors did not. Counsel explained his failure to forward a copy to Debtors by testifying that he assumed the clerk's office would send a copy of the dismissal order to Debtors. Unfortunately, this was not promptly done. Over three months elapsed between the entry of the November 27, 2001 dismissal order and the sending of the notice generated by the clerk's office. After learning of the dismissal, Debtors contacted Counsel to prepare a motion to vacate. When

Counsel did not act to Debtors' satisfaction, they hired new counsel who filed a motion to reopen the case on August 12, 2002 and a motion to vacate on September 4, 2002. Given the mysterious and unexplained lapse of time between the entry of dismissal by the court and the sending of the notice by the clerk's office, coupled with Debtors' interaction with Counsel, the court is satisfied that the delay in filing the motion to vacate was justifiable and its impact on the proceedings minimal, especially given Debtors' tendering of the 2001 payment under their reorganization plan.

Third, the court must determine the reason for the delay and whether it was within the control of Debtors. As previously discussed, the delay in Debtors' failure to act stems from Counsel's failure to follow through with his communications to them and the delay by the clerk's office in generating the dismissal notice. Parties may not be relieved from the consequences of deliberate decisions made by their counsel although the decisions may later be found to have been made unwisely or in error. Steinhoff v. Harris, 698 F.2d 270, 275 (6th Cir. 1983). However, this assumes a deliberate action on the part of counsel. In the case at bar, Counsel testified he was unaware Debtors did not receive his letter and therefore was unaware that Debtors were not on notice of the negotiated terms of the September 17, 2001 order. In hindsight, Counsel's errors were not the result of his deliberate inaction but the result of a failure, albeit negligent, to make sure his clients were fully informed. Given Counsel's actions, Debtors' delay was justified and not reasonably within their control.

Finally, the court must determine whether Debtors have acted in good faith. There is insufficient evidence to establish that Debtors were aware of the terms of the September 17, 2001 order or of the dismissal of their case. Debtors' payment of their 2001 installment under the reorganization plan lends support to their position. The court finds Debtors acted in good faith in making that payment and in pursuing a motion to vacate the dismissal entry within less than a year after it was entered.

Conclusion

Debtors filed a motion to vacate the dismissal entry of November 27, 2001 on the ground of excusable neglect within less than a year after the order was entered. Debtors have met their burden of proof in demonstrating the excusable neglect necessary under Federal Rule of Civil Procredure 60(b), applicable through Federal Rule of Bankruptcy Procedure 9024, to vacate the order of dismissal.

An appropriate order shall enter forthwith.

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RUSS KENDIG
U.S. BANKRUPTCY JUDGE

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	)	JUDGE RUSS KENDIG
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DENNIS E. OSTROWSKI and	)	
GAIL A. OSTROWSKI,	)	**ORDER**
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Debtors.	)	
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Debtors filed a motion to vacate an order of dismissal entered on November 27, 2001 dismissing their Chapter 11 case and its plan of reorganization.

The court, having found Debtors have met their burden of proof under Federal Rule of Civil Procedure 60(b), applicable through Federal Rule of Bankruptcy Procedure 9024, hereby **VACATES** the order of dismissal entered November 27, 2001 and hereby **REINSTATES** Debtors' Chapter 11 proceeding.

Debtors are hereby **ORDERED** to pay the quarterly fees owed to UST and file the financial reports due to UST for the time periods that the parties agree are deficient within **30 days** of the entry of this order. Debtors are also **ORDERED** to complete their plan of reorganization by paying any installments due under the plan within **30 days** of the entry of this order. Debtors are also **ORDERED** to file a motion to close their case and file a final report within **60 days** of the entry of this order.

It is so ordered.

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RUSS KENDIG
U.S. BANKRUPTCY JUDGE