UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

<table>
<tr><td>In Re:

Evelyn G. Vitanovich,

Debtor,

Adesa - Ohio, Inc.,

Plaintiff,

v.

Evelyn G. Vitanovich,

Defendant.</td><td>)
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Case No. 02-30188
(formerly Eastern Div. Case No. 99-63759)

Adv. Pro No. 02-3011
(formerly Eastern Div. Case No. 00-6012)

Chapter 7

JUDGE MARY ANN WHIPPLE</td></tr>
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MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR RELIEF FROM ORDERS PURSUANT TO RULE 60(b)

This case is before the court after an evidentiary hearing on Defendant and Debtor Evelyn G. Vitanovich's ("Mrs. Vitanovich") Motion To: a) Reopen Case Pursuant To 11 U.S.C. Section 350(b) and Fed. R. Bankr. P. Rule 5010; and b) Motion for Releif [sic] From Orders Pursuant to Fed. R. Civ. P. Rule 60(b) Which is Adopted by Bankruptcy Rule 9024 ("Motion") [Doc. #18]. The Motion was previously granted in part by the court, authorizing reopening of both Mrs. Vitanovich's underlying Chapter 7 case and this adversary proceeding to address the merits of the balance of the Motion. [Doc. #22].

The Motion seeks vacation of a default judgment and related memorandum and order entered against Mrs. Vitanovich on January 3, 2001. The grounds for the default judgment were Mrs. Vitanovich's failures to appear and defend, as well as her failures to comply with court orders requiring the production of documents to Plaintiff ADESA-OHIO, Inc. ("ADESA"). She now argues that these problems resulted from excusable neglect. ADESA opposes the Motion. [Doc. #21]. Based on the authorities and reasons set forth below, the court will not vacate the judgment and order, and the Motion

will be denied.

I. FACTS AND PROCEDURAL BACKGROUND

A. Mrs. Vitanovich's Chapter 7 Case

On November 22, 1999, Mrs. Vitanovich filed[1] her voluntary petition for relief under Chapter 7 of the Bankruptcy Code. [Plf. Hearing Ex. A]. The first page of her petition listed four other names used by the debtor in the capacity of "fdba." These other names used by Mrs. Vitanovich included "fdba East Coast Auto Group." [*Id*.]. The court infers that "fdba" is an acronym for "formerly doing business as."

In her initial Chapter 7 filing, Mrs. Vitanovich sought to discharge $935,791.20 of unsecured debt, and also scheduled $256,000.00 of secured debt. [*Id*.: Summary of Schedules]. Her bankruptcy Schedule F listing her unsecured debts was seventeen pages long. [*Id.:* Schedule F]. On March 27, 2000, Mrs. Vitanovich amended her original Schedule F to add five more creditors and an additional $57,643.21 in unsecured debts. [Case No. 02-30188: Doc. #5].

Many of the creditors listed were identified as being connected with various of the "fdba" names she reported, including East Coast Auto Group. There were also substantial credit card debts and personal loan debts scheduled. Several of her scheduled debts show that she was a co-signer on various loans for certain of the named entities. For example, on page twelve of her Schedule F, Mrs.

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[1] Mrs. Vitanovich commenced her Chapter 7 case in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division, at Youngstown. At her request, the court immediately transferred her case to the Eastern Division at Canton, where it was initially assigned Case. No. 99-63759 and handled by Judge James H. Williams. ADESA likewise commenced this adversary proceeding in Canton, where it was initially assigned Case No. 00-6012 and handled by Judge Williams. After Judge Williams' retirement, on May 5, 2000, the adversary proceeding was assigned to Judge Harold F. White. On December 30, 2000, Judge White's involvement in the adversary proceeding was terminated upon his retirement and the case was assigned to Judge Marilyn Shea-Stonum. Judge William T. Bodoh, of the division's Youngstown location, signed both of the January 3, 2001, entries now in issue. The clerk then closed the adversary proceeding on January 19, 2001, after the appeal period had run. By the time the Motion was filed on January 3, 2002, Judge Russ Kendig had been appointed to Judge William's seat in Canton. Judge Kendig entered an order of recusal that terminated both his involvement and Judge Shea-Stonum's involvement in the adversary proceeding, as he had been the Chapter 7 Trustee in the main case. [Doc. #19]. Thereafter, Chief Judge Bodoh reassigned the main case and this adversary proceeding to the undersigned bankruptcy judge in the Western Division of the Northern District of Ohio, at Toledo, where new case numbers were assigned. [Doc. #20].

Vitanovich schedules a debt to National City Bank for $250,000.00 as a co-signer for a loan. [Plf. Hearing Ex. A: Schedule F]. Another of the debts listed on her Schedule F is a debt to "Adesa Auto Auction" incurred in 1998 for "vehicles (East Coat Auto Group)." [*Id.*]. The court infers, despite the difference in precise names, that this scheduled entity and debt refers to Plaintiff in this adversary proceeding. None of Ms. Vitanovich's scheduled unsecured debts, including the ADESA debt, are checked off on the form or otherwise noted as being contingent, unliquidated or disputed in any fashion.

Mrs. Vitanovich's bankruptcy filing documents were prepared for her by attorney Wylan Witte, who testified at the hearing pursuant to a subpoena issued on behalf of ADESA. Mrs. Vitanovich's son, Michael Vitanovich ("Mr. Vitanovich"), testified that he helped Witte prepare the petition by gathering documents and providing them to Witte.

Mr. Vitanovich had filed his own Chapter 7 bankruptcy case, in which he also scheduled a debt to ADESA. Pursuant to an Agreed Judgment Entry [Plf. Hearing Ex. B], Mr. Vitanovich and ADESA settled the amount of the debt to ADESA at $36,000.00, and further agreed that this amount would be excepted from his discharge. The Agreed Judgment Entry also provided terms for repayment of the debt, including that "Plaintiff agrees that so long as Defendant is current in his obligations under this Agreed Judgment Entry, Plaintiff shall not execute on any judgment obtained by Plaintiff against Evelyn Vitanovich and/or Kathleen Harchick in Summit County Common Pleas Court Case No. CV 98 02 0479 captioned as *ADESA-Ohio, Inc. v. East Coast Auto Group, Inc., et al."* [*Id.*, at ¶6(emphasis original)]. Mr. Vitanovich admitted that his debt to ADESA under the Agreed Judgment Entry has not been paid, in accordance with the agreed terms or otherwise.

It was clear from the testimony at the hearing and the case record that Mrs. Vitanovich willingly deferred to her son in the handling of the adversary proceeding, including as an intermediary with her attorney. She said she only dealt directly with Witte once, and did not know where the information came from to put on her bankruptcy schedules. Witte's testimony corroborates this point, as he does not recall ever actually talking to Mrs. Vitanovich on the telephone. He expressed frustration at being unable to communicate effectively and directly with her due to Mr. Vitanovich's role. But Mrs. Vitanovich did not indicate in any way in her testimony that her son did things he should not have done, or did not do things that he should have done, or that she was under duress or other pressure from him in her conduct. She purported not to know what the adversary proceeding was, whether ADESA was listed as a creditor in her Chapter 7 case, whether she owed ADESA any money, or what the East Coast Auto Group was. Mrs. Vitanovich said she had "heard" of the other entity names listed on her petition,

but that she did not have anything to do with them, including specifically East Coast Auto Group, and that she did not have any business dealings with ADESA. She was not employed at the time of the hearing, and said she never had been. She was aware of the default judgment, but did not know why it was entered and was not aware that she did not turn over any requested documents to ADESA. She did acknowledge paying money that was assessed as sanctions for her noncompliance with discovery orders of the court. In short, Mrs. Vitanovich's testimony at the hearing could be fairly summarized as her not knowing anything.

The court did not find Ms. Vitanovich's testimony as credible, insofar as her completely blanket denials of knowledge about any of the subjects of inquiry. Although Mrs. Vitanovich was very clearly not a sophisticated or educated business woman, she was just as clearly more than the average consumer debtor burdened with credit card debt. Given Mrs. Vitanovich's petition admission that she was a co-signer on a number of substantial business debts, she clearly had experience signing business-oriented documents. There was also no indication at the hearing that she could not read or comprehend the proceedings in which she was involved, or that she did not receive the court orders and notices in issue. And Mrs. Vitanovich admitted that she signed her bankruptcy petition, which was executed under penalties of perjury certifying the truth and correctness of all information provided, seeking a discharge of almost a million dollars of unsecured debt. Indeed she ultimately obtained a discharge, on June 7, 2001, after numerous occasions on which her first meeting of creditors was not held because she, not her attorney, failed to appear. [Case No. 02-30188:Doc. ## 8 and 9, and unnumbered entries dated January 5, 2000, January 19, 2000, February 2, 2000, February 16, 2000, March 1, 2000, March 14, 2000, March 31, 2000, April 12, 2000, April 26, 2000, May 10, 2000, and May 24, 2000, supported by Trustee Kendig's Minutes of Meeting of Creditors].

Mrs. Vitanovich 's bankruptcy filing documents also reveal her significant prior involvement in the legal process as a party to other lawsuits, both as a plaintiff and as a defendant. She appears as a plaintiff in at least two lawsuits, one against an entity called DNH Rental "for contractual amounts due" and an "account receivable" and the other a malpractice action. [Plf. Hearing Ex. A: Statement of Affairs Q. 4a and b, Schedule B, Qs. 15 and 20]. Her secured debts include at least two judgment liens dating to 1996, and National City Bank seized assets from her pre-petition. [Plf. Hearing Ex. A: Schedule D; Statement of Affairs Q.4b]. Her bankruptcy Schedule F and Amended Schedule F also show she has unsecured debts to accountants and at least two other law firms. Although Mr. Vitanovich testified that he listed "everything" on both bankruptcy filings "in case something would come

up," he also testified that Mrs. Vitanovich was "on the incorporation papers" for East Coast Auto Group.

B. ADESA's Adversary Proceeding

On February 10, 2000, ADESA timely filed its complaint in this adversary proceeding. [Doc.#1]. The complaint sought judgment against Mrs. Vitanovich for $41,945.00, plus, interest, attorney fees and a determination that the debt was excepted from Mrs. Vitanovich's bankruptcy discharge under 11 U.S.C. § 523(a)(2) and (6). The complaint alleged various forms of misconduct by Mrs. Vitanovich in connection with the purchase at auction of vehicles by or on behalf of East Coast Auto Group from ADESA, and further that East Coast Auto Group was an alter ego of Mrs. Vitanovich. The general allegations are that checks for the $41,945.00 purchase price of the vehicles were given to ADESA, in consideration for which it permitted the vehicles to be taken from the auction site. Payment on the checks was then stopped, payment for the vehicles never occurred and the automobiles were not returned. Mr. Vitanovich testified at the hearing that he stopped payment on the checks.

On March 27, 2000, Mrs. Vitanovich answered the complaint. [Doc. #3]. She generally denied the allegations, and affirmatively asserted that she had nothing to do with the events and with the entities involved.

On March 30, 2000, Judge Williams held a pretrial conference, at which Witte appeared on behalf of Mrs. Vitanovich. Judge Williams then issued a scheduling order memorializing the pretrial conference, requiring discovery to be quickly completed by May 30, 2000. [Doc.#4]. The scheduling order did not set a trial date or any other case deadlines.

On May 17, 2000, ADESA deposed Mrs. Vitanovich under a notice of deposition, with a request for production of thirteen different categories of documents included in the body of the notice. The notice had been served on Witte on May 8, 2002, which technically did not allow sufficient time for production of the requested documents under Fed. R. Civ. P. 34, applicable in this adversary proceeding through Fed. R. Bankr. P. 7034. *See* Fed. R. Civ. P. 30(5)(notice of deposition to a party deponent may be accompanied by a request for production of documents, to which the procedures of Rule 34 apply, including a thirty day response time). There is no indication in the record that Mrs. Vitanovich ever objected to ADESA's document production requests, on either substantive or procedural grounds. Nor is there anything in the record that shows whether a formal written response to the documents production requests was served, asserting, for example, that there were no such documents as to any given category requested. *See* Fed. R. Civ. P. 34(b).

The record is clear that Mrs. Vitanovich both appeared and produced some documents

at the deposition. [Plf. Hearing Ex. C, at p.2. and May 19, 2000, letter attached as part of exhibit]. Mr. Vitanovich also attended his mother's deposition. [Plf. Hearing Ex. C, at p. 2, ¶1, of May 19, 2000, letter attached as part of exhibit]. No transcript of the deposition or any part of the deposition has been filed or otherwise been provided to the court. But the record is also clear, and the court found, that Mrs. Vitanovich did not produce three categories of the requested documents at the deposition. [*Id.*; Plf. Hearing Ex. E]. Those documents were as follows:

> Copies of all loan documentation executed by her on behalf of and/or involving East Coast Auto Group, Inc. and/or Evelyn Vitanovich since January 1, 1995.
>
> Copies of all pleadings filed for any and all lawsuits involving Ohio Auto Group, Inc. and/or Evelyn Vitanovich since January 1, 1995.
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> Copies of all 1996, 1997, 1998 and 1999 Federal, State of Ohio and local income tax returns filed by or on behalf of Evelyn Vitanovich.

On May 19, 2000, ADESA's lawyer sent Witte a letter following up on the status of the requested documents. [*Id.*]. Production of the documents was requested by May 30, 2000, which was the discovery deadline set by Judge Williams. The documents were not produced.

ADESA then filed on June 27, 2000, its Motion to Compel. [*Id.*]. The court cannot discern from the hearing or case record whether a hearing was held on the Motion to Compel and, if so, who appeared. The Motion to Compel nevertheless resulted in Judge White's entry of an order [Plf. Hearing Ex. D; Doc. #6] on July 5, 2000, granting the Motion to Compel. Judge White ordered Mrs. Vitanovich to comply with ADESA's discovery requests, as set forth in the notice of deposition and in the May 19, 2000, letter to Witte, and further to pay ADESA's costs and legal fees incurred for failing to timely respond to the discovery requests. [*Id.*]. The order also set a further hearing for July 26, 2000, for presentation of evidence on ADESA's request for fees and costs. The clerk served the order on Witte, Trustee Kendig and ADESA's lawyer. [Doc. #6]. Witte testified that, in turn, he generally "continually forwarded [to his client] things on the stuff I was asked to do." Generally, he said he also "tried to get documents [from his client]" through phone calls, faxes and letters. Specifically, he said he followed up on the request for documents and faxed it to Mr. Vitanovich, whereupon he was told he already had the documents. Witte knew that some documents had been "passed on" to ADESA's lawyer and some had not, but he felt there was always a controversy, presumably as between himself and the Vitanoviches, as to what was passed on and what was not. There was, however, no lack of clarity in the court's view as to what was produced and what was not produced to ADESA.

On July 26, 2000, Judge White held the hearing on ADESA's request for attorney's fees. Witte attended that hearing. The hearing resulted in a further Scheduling Order, entered on August 1, 2000. [Plf. Hearing Ex. E; Doc. #7]. The court made a finding in that order that "Defendant's failure to respond to Plaintiff's discovery requests persists." [*Id.*]. Judge White ordered Mrs. Vitanovich to pay ADESA $225.00 in legal fees. Further, Judge White ordered production of the requested documents within ten working days of the date of the order, which would have been by August 15, 2000. And, finally, if the requested discovery was not provided within ten working days, an additional sanction of $100.00 per working day of noncompliance was imposed. [*Id.*]. The court also scheduled in that order a further pre-trial conference, to be held on September 15, 2000. At this point, no trial date had yet been set, necessitating a further pretrial conference. This order was served on Witte and ADESA's lawyer.

Judge White conducted the further pre-trial conference on September 15, 2000. As required by Fed. R. Civ. P. 16(e), applicable to this adversary proceeding by Fed. R. Bankr. P. 7016, Judge White entered a Memorandum Order Following Pretrial Conference. [Plf. Hearing Ex. F; Doc. #8]. For reasons unknown, this memorandum order was not entered until October 27, 2000, when it was served on both Witte and ADESA's lawyer. There is a dispute in the record as to whether Witte appeared at the September 15, 2000, pre-trial conference. The proceeding memo in the record and the memorandum order recite that Witte did not appear. Witte testified, however, that he attended all hearings until November 8, 2000. In this instance, the court defers to the contemporaneous record of the proceeding memo, which states that there was no appearance by debtor's counsel. Also, if Witte had in fact appeared, it seems likely a trial date would have been set at that time, regardless of the status of the persistent discovery problem.

Judge White recited in his memorandum order that, upon his own inquiry, Mrs. Vitanovich had still not fully complied with the discovery order. He found that one of the three categories of documents–the lawsuit pleadings-- had since been produced, but that the other documents had still not been provided to ADESA. Further, ADESA's lawyer reported that the sanctions required by the court's August 1, 2000, order had not been paid. As a result, Judge White ordered Mrs. Vitanovich to personally appear at a further hearing on November 8, 2000, to show cause "why her discharge should not be revoked and why additional monetary sanctions should [sic] be applied for her persistent failure to produce the requested discovery and pay the required sanctions..." [*Id.*]. This order was also served on Witte and ADESA's lawyer on October 27, 2000. Notwithstanding the short time period before the next hearing, it is clear from the events that followed that Witte, Mrs. Vitanovich and Mr. Vitanovich were

aware of the November 8, 2000, hearing date and of the memorandum order.

The next relevant event in the record is Witte's Motion to Withdraw as Counsel for Debtor filed on November 1, 2000. [Plf. Hearing Ex. G; Doc.#9]. As grounds for his requested withdrawal, Witte alleged that Mrs. Vitanovich had failed to rationally communicate with him, using her son for "negotiations, correspondence and decision making;" that she had ignored his advice; that she agreed to settle the case, then refused to sign a settlement entry; and that he was not getting paid where "[m]any hours have been expended." Lastly, he alleged that Mr. Vitanovich had indicated to him by telephone on October 31, 2000, that "he" had obtained new counsel. [*Id.*]. Witte's motion was also set for hearing on November 8, 2000, by a separate Scheduling Order entered on November 2, 2002. [Doc. #11]. In this Scheduling Order, Judge White specified that Mr. Vitanovich was authorized to appear at the November 8, 2000, proceedings for his mother.

Judge White held the further hearing on the order to show cause on November 8, 2000, as scheduled. As memorialized in Judge's White's Memorandum Order entered on November 9, 2000, [Plf. Hearing Ex. H; Doc. #13], Witte and ADESA's lawyer both appeared. Mrs. Vitanovich's personal appearance had been excused by Judge White before the hearing because of her husband's hospitalization. Mr. Vitanovich and Mrs. Vitanovich both testified that the elder Mr. Vitanovich was incapacitated, was tube fed, could not speak and was generally unwell after a stroke he suffered in 1998. Thereafter, she was the primary care giver for him, from well before she commenced her Chapter 7 bankruptcy case. Mr. Vitanovich, who lives in Pittsburgh, testified that he also provided "a little care for dad." Ultimately, the elder Mr. Vitanovich died on January 21, 2001. His last illness and Mrs. Vitanovich's involvement in caring for him form the crux of her claim of excusable neglect in this adversary proceeding.

Mr. Vitanovich did appear by telephone on his mother's behalf at the November 8, 2000, hearing, as permitted by Judge White, along with attorney Craig G. Pelini. The court noted, however, that Pelini's appearance was limited to "assisting the debtor with her absence at the hearing and to assisting the debtor engage successor counsel," with no further appearance by him contemplated or expected. [*Id.*].

The court addressed Witte's motion to withdraw at the November 8, 2000, hearing, and found it well-taken. Judge White entered a separate order permitting Witte's withdrawal from further representation of Mrs. Vitanovich. [Doc. #12]. Judge White then ordered that, should Mrs. Vitanovich desire to engage successor counsel, an appearance was to be entered within ten days from the date of

the Memorandum Order. [Plf. Hearing Ex. H]. Upon the entry of an appearance, the court stated that further hearings on all pending matters would be scheduled. At this point, a trial date still had not been set.

ADESA's lawyer represented at the hearing that $450.00 had been received against the previously ordered monetary sanctions. [Plf. Hearing Ex. H]. It appears that this amount represents the $250.00 in attorney fees, plus two days of the $100.00 per working day sanction required by the court's August 1, 2000, order. [Plf. Hearing Ex. E]. Judge White does not specify in the Memorandum Order [Plf. Hearing Ex. H] the status of the document production at that point. But the second numbered paragraph of its "orders" section explicitly warns Mrs. Vitanovich **"[t]hat should the debtor elect to take no further action, such election could result in the entry of default relief against the debtor."** [*Id.*(Emphasis added)]. The court understands this language to mean that complete production of the requested documents still had not occurred. The court does not understand this warning to refer to the failure to obtain counsel, because individuals are permitted to proceed without counsel should they choose to do so, no matter how ill-advised it might be.[2] Significantly, Judge White also held that "its [the court's] previously entered orders, and any continuing requirements thereunder, remain in full force and effect." [*Id.*].

The language of the Memorandum Order, referring to receipt of "the sum of $450.00 *against* monetary sanctions previously ordered by this Court" also demonstrates that full compliance with the sanctions aspect of the prior order had still had not occurred either. [*Id*.(emphasis added)]. Mrs. Vitanovich acknowledged at the hearing on the Motion that she did pay some money as sanctions, showing her knowledge of the issue and of the imposition of sanctions.

Judge White's law clerk mailed the Memorandum Order on November 9, 2000, to Witte, ADESA's lawyer, Pelini, Mrs. Vitanovich at her home address at 660 Sanderson Drive, Campbell Ohio (where she still lives), and Mr. Vitanovich at the same address. [*Id.*]. The clerk's office mailed the separate order permitting Witte to withdraw on November 13, 2000, to Witte, Mrs. Vitanovich at her home address, Trustee Kendig, ADESA's lawyer and the United States Trustee's office.

The docket shows that there was no entry of appearance by new counsel for Mrs. Vitanovich, by November 19, 2000, or indeed prior to the entry of default judgment against Mrs.

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[2] After there was no entry of an appearance by any lawyer for Mrs. Vitanovich, as will be explained below, Judge White proceeded to set a further scheduling conference for December 15, 2000, to try and move ahead with the case without counsel.

Vitanovich. Seeking to move ahead nevertheless, and still without a trial date , Judge White entered another Scheduling Order on November 30, 2000. [Doc. #14]. The heart of this further Scheduling Order is as follows:

> 1. This matter shall be set for a further telephonic pre-trial conference on **December 15, 2000** at **9:30 a.m.** The Court will initiate the call using the telephone numbers appearing on the attached certificate of service. If the Court has not listed the appropriate number where parties can be reached, parties shall notify the Court of an alternate number where they can be reached; and
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> 2. The Court notes that its previously entered orders, and any continuing requirements thereunder, remain in full force and effect.

[*Id.* (emphasis original)]. The clerk mailed this Scheduling Order on November 30, 2000, to one Donald Little, to ADESA's attorney, to Mrs. Vitanovich at her home address with a phone number of (412)418-5186 specified, and to Mr. Vitanovich at the same address. [*Id.*]. The record does not at this point show Donald Little's role or interest in the adversary proceeding.

On December 15, 2000, Judge White held the scheduled telephone pretrial conference. [Doc.#15]. ADESA's lawyer appeared by telephone. Mrs. Vitanovich did not appear, in person, by telephone or through counsel. [Doc. #15: court Proceeding Memorandum filed December 18, 2000]. Mrs. Vitanovich could not be reached at her home phone number, despite the court's extra efforts to do so both before the hearing and at the scheduled hearing time. Nor did she contact the court to explain or to provide a different phone number. Out of an abundance of caution, the court called Little, an attorney who had been contacted about representing Mrs. Vitanovich. He reported that he had declined the engagement and was not Mrs. Vitanovich's lawyer. It is not known how his name was known to the court in this context and at that time. [*Id.*]. The court's contemporaneous Proceeding Memorandum further noted that the "court ordered [plaintiff] to prepare order & [sic] court to enter its own memorandum order."

Mrs. Vitanovich testified that she could not attend or participate in the December 15, 2000, pretrial scheduling conference because her husband was in the hospital to have feeding tubes changed. Mr. Vitanovich testified that on December 15, 2000, they had put his father in the hospital, and that they could not find a lawyer. No medical records have been supplied, and the duration of his hospitalization is unclear; it is unknown whether he had been continuously hospitalized since November, 2000, or remained hospitalized thereafter until his death approximately one month later, on January 21, 2001.

Mr. Vitanovich testified that he did show up for the last hearing in December, and

remembered that he had participated in a phone call sometime in November. Further, he said that he called 'the bailiff's office" between November 8, 2000, and January 3, 2001, and reported that they still could not find a lawyer. It is not known to whom Mr. Vitanovich was referring, and these telephone calls are not reflected elsewhere in the record. The record also does not otherwise confirm his appearance on December 15, 2000, although it is irrelevant in the court's view whether he did. As to the status of the unproduced documents, Mrs. Vitanovich said she was not aware that she did not turn over requested and required documents. Mr. Vitanovich admitted that he had no knowledge that the requested documents had in fact been delivered to ADESA's lawyer.

C. The Judgment and Memorandum Order in Issue

On January 3, 2001, the two orders in issue were entered by the court. The first entry was titled Memorandum Order Following Pretrial Conference. [Doc. #15]. This memorandum sets forth the background facts supporting the entry of a default judgment against Mrs. Vitanovich. Specifically, the court found that "the debtor, Evelyn Grace Vitanovich, has failed to show sufficient cause why default relief should not be entered against her and in favor of the plaintiff. Accordingly, the Court finds that plaintiff's request for default relief appears appropriate." The memorandum was served on ADESA's lawyer and on Mrs. Vitanovich on January 3, 2001.

The second entry was the court's judgment, specifically titled Judgment Entry. [Doc. #16]. It shows that it was prepared by ADESA's lawyer, and recites four grounds for default. They were (1) the failure to obey the August 1, 2000, order concerning producing documents; (2) the failure to personally appear at September 15, 2000, pre-trial; (3) the failure to obey the October 27, 200 show cause order; and (4) the failure to obtain new counsel by November 18, 2000, and to show cause why her discharge should not be revoked and additional sanctions should not be applied for her "persistent failure to produce the requested discovery." Further, an express finding is made that "Defendant has failed to provide the requested discovery or show cause to explain her failure to provide the requested discovery." Judgment was entered against Mrs. Vitanovich in the amount of $36,000.00, plus interest at the rate of 10% from April 15, 1997, and unspecified court costs. This amount is less than the prayer in the complaint, and is the same as the amount in ADESA's Agreed Entry with Mr. Vitanovich [Plf. Hearing Ex. B]. The judgment amount was specifically determined in the Judgment Entry as "non-dischargeable pursuant to the Bankruptcy Code."

Neither entry specifies the authority for the relief granted. *See United States v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002)(dismissal for lack of cooperation in discovery upheld even though trial court

did not identify procedural rule upon which it was based). Default judgment is, however, expressly authorized as a sanction for discovery noncompliance and noncompliance with pretrial scheduling orders under Fed. R. Civ. P. 16(f) and Fed. R. Civ. P. 37(b)(2)(C), applicable to this adversary proceeding by Fed. R. Bankr. P. 7016 and 7037, respectively.

There is also some inconsistency between the two entries as to the source of the default. The memorandum states that "[b]ased on the matters discussed at the pretrial conference, Mr. Kasle [ADESA's attorney] represented that he would file a motion for default judgement against the debtor" and later that 'the Court finds that plaintiff's request for default relief appears appropriate." [Doc. #15]. The case file shows that there was never a written motion for default judgment filed by ADESA. On the other hand, the Judgment Entry refers to this matter coming "before the Court upon the Court's own motion relative to Evelyn Grace Vitanovich's ("Defendant") failure to..." comply with the various court orders described above. Also, the Judgment Entry cites Mrs. Vitanovich's failure "to personally appear at the September 15, 2000, pre-trial despite due notice of same." This reference appears to constitute a clerical error. Although there was a pre-trial conference held on September 15, 2000, the court cannot find anything in the record that required Mrs. Vitanovich to appear personally before the court on that date. Instead, the finding was probably intended to refer to the December 15, 2000, pre-trial conference, at which Mrs. Vitanovich was ordered to appear personally and did not.

The ten day appeal period of Fed. R. Bankr. P. 8002 passed on January 16, 2001, without an appeal being commenced. *See* Fed. R. Bankr. P. 9006(a)(computation of time: the ten days expired on a weekend and the following Monday was Martin Luther King Day). Exactly one year after their entry, on January 3, 2002, [3] Mrs. Vitanovich filed her Motion seeking relief from the memorandum order and judgment. [Doc. #18].

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[3] Rule 60(b) requires motions to vacate judgements and orders under subsections (1), (2) or (3) thereof to be filed both within one year of the entry of the judgment in issue and within a reasonable time. 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2866, at 389 (2d ed. 1995). Filing within one year, as occurred here, does not automatically make the motion timely as being filed within a reasonable time. Mrs. Vitanovich has not explained why she waited so long after the entries were filed on January 3, 2001, and after the death of her husband shortly thereafter, on January 21, 2001, to seek vacation of the orders. But ADESA has not contested the timeliness of the Motion, so that issue will not be addressed further by the court.

II. LAW AND ANALYSIS

A. The Parties' Arguments

The Motion asks the court to vacate both the judgment and the memorandum order. Mrs. Vitanovich alleges that she was unaware of the December 15, 2000, pretrial conference until after the fact, and that the incapacitating illness of her husband prevented her from either attending herself or timely finding a new lawyer to represent her. [Doc. #18, p.4]. Moreover, she argues that she has a valid defense to ADESA's claims, in that she had nothing to do with either ADESA or East Coast Auto Group, as averred in her answer to ADESA's complaint. Alternatively, Mrs. Vitanovich asks the court to clarify whether her bankruptcy discharge was completely revoked by the entries, as there is some language in the case record indicating that was an additional sanction being considered by Judge White.

ADESA opposes the Motion, arguing that no excusable neglect or extraordinary circumstances have been shown. Further, ADESA argues that it would be prejudiced by relief now because other post-petition creditors of Mrs. Vitanovich have the potential for displacing its position in her property if it loses its judgment lien as a result of vacation, even if later reinstated on the merits.

B. Requirements of Rule 60(b)

Mrs. Vitanovich asserts that she is entitled to relief under Fed. R. Civ. P. 60(b)(1) and (6), applicable to this proceeding through Fed. R. Bankr. P. 9024.[4] In pertinent part, Rule 60(b) provides:

> **(b) Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence, Fraud, Etc**. On motion and upon such terms as are just, the court may relieve a party... from a final judgment, order, or proceeding for the following reasons:(1) mistake, inadvertence, surprise, or excusable neglect;... or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and... not more than one year after the judgment, order, or proceeding was entered or taken.

As the party invoking Rule 60(b), Mrs. Vitanovich must show that her circumstances come within the

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[4] At the opening of the evidentiary hearing, ADESA orally moved for dismissal of the Motion, on the procedural ground that Mrs. Vitanovich had not submitted affidavits or other evidence in support of her Motion. The court took ADESA's oral motion under advisement and now overrules it. The court finds no requirement that a Rule 60(b) movant must make an evidentiary showing along with the motion as a predicate for even having a hearing if deemed appropriate by the court. *Cf.* Fed. R. Civ. P. 56. The Motion clearly stated the particular factual and legal bases for the relief sought, and ADESA was fairly able to respond to the Motion, both in writing and through its presentation at the hearing.

provisions of the rule. *Jinks v. AlliedSignal, Inc.,* 250 F.3d 381, 385 (6th Cir. 2001). The Sixth Circuit has recognized that the word "may" in Rule 60(b) allows a trial court discretion in granting relief from judgments and orders. *McCurry v. Adventist Health System/SunBelt, Inc.*, 298 F.3d 586, 592 (6th Cir. 2002). This discretion is nevertheless circumscribed by "public policy favoring finality of judgments and termination of litigation." *Waifersong, Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992).

The Sixth Circuit held in *Cacevic v. City of Hazel Park*, 226 F.3d 483, 490 (6th Cir. 2000), that a motion under Rule 60(b)(1) is " intended to provide relief to a party in only two instances: (1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge has made a substantive mistake of law of fact in the final judgment or order." Mrs. Vitanovich is arguing only the first circumstance, namely that she made an excusable litigation mistake in not appearing at the scheduling conference on December 15, 2000, because of her husband's illness and her lack of legal representation, which she argues was also justified under the circumstances. She has not argued that the entry of the default judgment was a substantive mistake of law or fact by the court, an argument that would be limited to a motion for relief filed during the applicable appeal period in any event. *United States v. Reyes,* 307 F.3d at 455-56.

The case that the Sixth Circuit has itself described as the "seminal case in this circuit on Rule 60(b) motions to vacate default judgements" is *United Coin Meter Co.. v. Seaboard Coastline R.R.*, 705 F.2d 839 (6th Cir. 1983). *Weiss v. St. Paul Fire and Marine Ins. Co.*, 283 F.3d 790, 794 (6th Cir. 2002). *United Coin Meter* directs a trial court to consider three elements in deciding a motion to set aside a default judgment under Rule 60(b)(1): (1) whether plaintiff will be prejudiced if the judgment is vacated; (2) whether the defendant had a meritorious defense; and (3)whether culpable conduct of the defendant led to the default. *United Coin Meter*, 705 F.2d at 845. Subsequently, as ADESA correctly argues, in *Waifersong* the Sixth Circuit extended its *United Coin Meter* analysis, by making it "clear that a party seeking to vacate a default judgment under Rule 60(b)(1) must demonstrate first and foremost that the default did not result from his culpable conduct." *Weiss*, 283 F.3d at 794; *Waifersong*, 976 F.2d at 292. And more specifically, only if the moving party makes a showing that the default resulted from non-culpable mistake, surprise or excusable neglect may the trial court then proceed to consider the other two *United Coin Meter* factors of prejudice to the opposing party and whether there is a meritorious defense. *Waifersong*, 976 F.2d at 292; *Mfrs. Indus. Relations Ass'n v. East Akron Casting Casting Co*., 58 F.3d 204 (6th Cir. 1995). The three factors do not comprise a balancing test where relief from a default judgment is sought. *Waifersong*, 976 F.2d at 292; *Mfrs. Indus. Relations Ass'n*, 58 F.3d at 209.

The availability of relief under Rule 60(b)(6) is more limited than under Rule 60(b)(1). This subsection of Rule 60(b) applies "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990); *Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001)(quoting *Olle*); *see Jalapeno Prop. Mgmt. LLC v. Dukas*, 265 F.3d 506 (6th Cir. 2001). This point was recently reinforced by the Sixth Circuit in *McCurry*, where the court held that the trial court erred in jumping first to considering and granting relief to plaintiffs under Rule 60(b)(6) before analyzing the propriety of relief under Rule 60(b)(1). *McCurry*, 298 F.3d at 593. Addressing the interplay between Rule 60(b)(1) and Rule 60(b)(6), the Sixth Circuit emphatically held that the two clauses are mutually exclusive:

> "...[w]ith relief available under subsection (b)(6) only in the event that none of the grounds set forth in clauses (b)(1) through (b)(6) are applicable.[citation omitted]. Were it otherwise, our decisions involving the first five clauses of Rule 60(b)-- *FHC Equities*, for example–would lose much of their force, as a party who failed to meet the prerequisites for relief under one of these provisions could simply appeal to the 'catchall' of subsection (b)(6)."

Id., at 596.

C. Analysis of Entitlement to Relief Under Rule 60(b)(1)

The court finds that Mrs. Vitanovich has failed to demonstrate excusable neglect or mistake. Mrs. Vitanovich's argument for relief focuses almost completely on her failure to appear for the December 15, 2000, pretrial conference, in person, by telephone or through counsel. Her argument is somewhat contradictory. On one hand, she argues that she was not aware of the pretrial conference and thought her lawyer was handling the lawsuit. [Doc. #18, ¶10(c)]. On the other hand, she argues that she could not attend because of her husband's illness. [Doc. # 18, ¶10(b)].

The record does not support a non-culpable lack of awareness of the December 15, 2000, pretrial conference. She was clearly aware of the prior November 8, 2000, proceedings. Judge White took extra and unusual steps to accommodate Mrs. Vitanovich's husband's medical emergency by excusing her personal appearance from that hearing. He even allowed her son to appear and speak for her, as well as permitting a limited appearance by attorney Pelini for purposes of that hearing only. Ordinarily, of course, non-attorneys are not permitted to represent others, and attorneys are not permitted to come and go from lawsuits on a selective basis.

Witte's withdrawal was orally authorized by Judge White at that hearing, more than a month before the December 15, 2000, hearing. The oral authorization to withdraw was then memorialized

in two written court orders entered on November 9, 2000. Judge White's November 9, 2000, Memorandum Order, [Plf. Hearing Ex. H; Doc. #13]], made a finding that Witte's withdrawal was well-taken, and then set forth requirements for further action by Mrs. Vitanovich. This order was served directly on Mrs. Vitanovich at her home address, Mr. Vitanovich at the same address and Pelini, who appeared on her behalf at the hearing. The address at which she was served directly with this order was the same address in her petition and the same address to which she testified at the hearing on the Motion as being her home address. A second order, which appears to have been prepared by Witte, expressly authorized his withdrawal from further representation of Mrs. Vitanovich. [Doc. #12]. This order was also served directly on Mrs. Vitanovich at her home address. There is nothing in the record to support any argument that she did not receive either of these orders permitting Witte to withdraw. And both her son, to whom she willingly delegated her responsibilities in connection with both her Chapter 7 case and this adversary proceeding, and Pelini were clearly aware of what occurred during the November 8, 2000, proceedings. So to the extent Mrs. Vitanovich is basing her request for relief on an argument that she did not know that her lawyer had been permitted to withdraw, the court rejects that argument as wholly unsupported by the record. Mr. Vitanovich also testified that a search for a lawyer, ultimately unsuccessful, was undertaken. This undercuts any argument that she was not aware of Witte's withdrawal and thought he was handling all appearances. This is a prong of the overall "I don't know anything" posture that Mrs. Vitanovich adopted at the Motion hearing, and which the court has rejected as lacking credibility.

Likewise, the court does not find support in the record for an argument that Mrs. Vitanovich was not aware, at least in a non-culpable sense, of the fact of the December 15, 2000, pretrial conference. It was set by Judge White's November 30, 2000, Scheduling Order, in which Judge White took pains to permit a telephone appearance by Mrs. Vitanovich, and also to make sure that a good telephone number was available at which she could be reached at the scheduled time wherever she would be. [Doc. #14]. This Scheduling Order was served directly and separately on Mrs. Vitanovich and Mr. Vitanovich at her home address by first class mail on November 30, 2000. There is no basis in the record to support a finding that the Scheduling Order was not received, making any lack of awareness of the conference culpable in nature.

The heart of Mrs. Vitanovich's Motion is that her failure to attend the December 15, 2000, pretrial conference should be excused because of her husband's incapacitating illness. There is no doubt that he was incapacitated, and that the burden of care for him when he was not in the hospital fell upon

Mrs. Vitanovich. There is also no doubt that he died shortly after the court events in issue. That said however, his incapacity and illness predated the commencement of her Chapter 7 case in November, 1999. It was a factor that was present when she decided to seek the substantial relief available under the bankruptcy code, including a discharge of nearly a million dollars in debt and the automatic stay to prevent further creditor asset seizures. The evidence presented at the hearing as to the specific impact of her husband's illness and his hospitalizations on the events in issue was also too vague for the court to find that it was a factor that excused Mrs. Vitanovich from either finding a lawyer or appearing herself at the December 15, 2000, hearing. *See Jinks*, 250 F.3d at 385 (denial of Rule 60(b) motion affirmed where movant was silent on details of witness' illness alleged to justify relief). The hearing did not even require a personal appearance, with Judge White trying to conduct the scheduling conference by telephone wherever Mrs. Vitanovich was present, including the hospital if that was the case.

More importantly, Mrs. Vitanovich's arguments and evidence fail to address the other factors that resulted in the entry of the default judgment as a sanction. Although she focuses on her husband's last illness and her failure to appear at the December 15, 2000, pretrial scheduling conference as the grounds for vacating the judgement, that was not the only basis for the default sanction. The court found on at least two occasions well before November and December, 2000, that Mrs. Vitanovich failed to comply with ADESA's discovery requests, and that her failure was persistent. The lesser sanction of a monetary penalty for noncompliance was imposed, without success. Judge White's later orders emphasized that all prior orders regarding the requirement to produce the requested documents and discovery sanctions remained in effect.

The court found that Mrs. Vitanovich had still not complied with these requirements and orders by December 15, 2000. The documents had still not been completely produced and the monetary sanction was only partially paid. This was seven months after they had been requested and four months after the first court order requiring production. Mrs. Vitanovich's arguments and the evidence at the hearing failed to address how her extended and persistent failures to produce documents and comply with court orders in that regard for production of documents were the product of excusable neglect. During most of that time period, she was represented by counsel and had the willing assistance of her son, to whom she voluntarily delegated her litigation responsibilities. And again, her husband's illness predated all of these events. There is no particularized explanation as to how it prevented her, particularly with Mr. Vitanovich's assistance, from complying with the discovery requests and orders. Her assertion that she was also unaware of these issues and requirements is again unsupported, especially since she

acknowledged paying some money as a sanction. So even if Mrs. Vitanovich's failure to appear at the December 15, 2000, pretrial scheduling conference were found to be the product of her excusable neglect, she has still failed to explain the other, equally serious and significant failures upon which the January 3, 2001, default judgment and memorandum order were based.

The discovery failures alone were sufficient to justify entry of default judgment against Mrs. Vitanovich. In that regard, the facts of this case are similar to the facts of *United States v. Reyes*, 307 F.3d 451 (6th Cir. 2002). The trial court in *Reyes* dismissed a claim as a sanction for failure to cooperate in discovery in a criminal forfeiture action, requiring the forfeiture of real property that claimant Juan Acevedo alleged he owned instead of his son- in-law, who had been convicted of a drug crime. The government requested production of documents from Acevedo, including as in this case tax returns, as well as all documents showing payments on the property and his bank accounts. Again as in this case, some documents were produced and others were not. A formal response to a second request was never made by his lawyer. After government efforts to secure complete responses were unavailing, the trial court dismissed Acevedo's claim to the property in issue as a sanction, much as has occurred in this case.

Shortly after entry of the dismissal, Acevedo moved to vacate the judgment under Fed. R. Civ. P. 60 (b)(1) and (6). His arguments for vacation mirror Mrs. Vitanovich's arguments in this case in many respects. Acevedo argued that he could not produce the documents because he was elderly, did not keep good records, had communication problems with his lawyer because of an inability to speak English and because he was caring on a daily basis for his terminally ill mother in a nursing home.

Examining both the merits of the judgment and the trial court's subsequent denial of relief under Rule 60(b), the Sixth Circuit declined to vacate the trial court's dismissal of Acevedo's claim to the property. Given the factual similarities between Acevedo's situation and Mrs. Vitanovich's situation, the Sixth Circuit's reasoning in *Reyes* is particularly resonant here. The Sixth Circuit rejected all of these proffered reasons as vague and not excusable grounds for noncompliance with the discovery requests and for counsel's inability to properly respond to the discovery requests and related court orders. Mrs. Vitanovich likewise has not made any showing that she did not have the ability to timely comply with the discovery requests and orders, as a result of her husband's illness or other aspects of her personal capabilities and situation. She has had prior experience with commercial documents and litigation. And she chose the timing to proceed with her Chapter 7 case so as to obtain the considerable benefit of the automatic stay against further property seizure and a bankruptcy discharge, even though her husband was

then incapacitated and required her constant attention. She also deferred willingly to her son to assist her, and to the extent he failed to act properly on her behalf, she cannot insulate herself from the consequences by then taking the position that she did not know what was going on. *Cf. United States v. Reyes*, 307 F.3d at 456 (clients are equally accountable for acts and omissions of counsel as their agents).

Under all of these circumstances, the court concludes that Mrs. Vitanovich's inaction in and intentional detachment from this case prior to the default judgment demonstrate a willing disregard for the effects of her conduct on both ADESA and the proceedings, not a mistake or excusable neglect. That makes her conduct culpable under the controlling Sixth Circuit case law, which means she is not entitled to relief on the basis of excusable neglect or mistake. *Thompson v. Am. Home Assur. Co.*, 95 F.3d 429, 433 (6th Cir. 1996); *see Shepard Claims Serv., Inc. v. William Darrah & Assoc.*, 796 F.2d 190, 194 (6th Cir. 1986)(relief from entry of default); *cf. Mfrs. Indus. Relations Ass'n*, 58 F.3d at 207, 208-09 (rejects distinction between "reckless disregard" and "intentional disregard" as "legally non-existent" in context of Rule 60(b)(1)).

Having decided that Mrs. Vitanovich has not demonstrated non-culpable conduct in connection with her failures to act resulting in the January 3, 2001, court orders, *Waifersong* directs that the court need not evaluate the other two *United Coin Meter* factors. The analysis stops there.[5]

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[5] Nevertheless, to the extent it should become relevant, the court does not find that Mrs. Vitanovich presented a potential meritorious defense. The court acknowledges that the standard for what constitutes a showing of a meritorious defense in this context is not high. *Thompson*, 95 F.3d at 434. A presentation or proffer of evidence which, if believed, would permit the fact finder to find for the defendant is sufficient. It must, however, at least raise a serious question regarding the propriety of the default, and be supported by a developed legal and factual basis. *Jones v. Phipps*, 39 F.3d 158, 165 (7th Cir. 1994). And although conclusive proof is not required, a bare allegation is not sufficient; the showing of a potential defense must be more than merely conclusory. Mrs. Vitanovich's proffered defense is that she had nothing to do with East Coast Auto Group, ADESA or the events in issue in the complaint. But her argument and testimony were conclusory at best. *Consol. Masonry & Fireproofing, Inc. v. Wagman Constr. Co.*, 383 F.2d 249, 251-52 (4th Cir. 1967)("The defendant did no more than state that plaintiff breached the contract, a mere conclusion which fell far short of providing the court with a satisfactory explanation fo the merits of the defense."). Her denials of liability as the basis for her defense are especially problematic in light of the unexplained contrary facts displayed by her bankruptcy petition and schedules. *See Jones*, 39 F.3d at 165-66("Having found her explanation for not listing assets unsatisfactory, and to a large extent lacking in factual basis, the district court did not abuse its discretion in concluding Phipps' defense was meritless."). One of the several "fdbas" on the face of her petition

D. Analysis of Entitlement to Relief Under Rule 60(b)(6)

Alternatively, the Motion requests relief under Rule 60(b)(6). [Doc.#18, p.5]. As already explained, Rule 60(b)(6) applies only "in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses" of Rule 60(b). *Blue Diamond Coal Co.,* 249 F.3d at 524 (6th

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was East Coast Auto Group. [Plf. Hearing Ex. A]. ADESA was also scheduled as one of her creditors, but not identified as having a disputed, contingent or unliquidated claim. These statements are at least an evidentiary admission, *Torgenrud v. Benson (In re Wolcott)*, 194 B.R. 477, 483 (Bankr. D. Mont. 1996)(debtor's schedules and statement of affairs are admissible admissions when offered against the debtor), and may rise to the level of binding judicial admissions. *Morgan v. Musgrove (In re Musgrove)*, 187 B.R. 808, 812-13 (Bankr. N.D. Ga. 1995)(failing to qualify schedule description so as to include the term "disputed" constituted a binding judicial admission waiving the right to contest a debt's existence).

But the court also cannot find that ADESA would be prejudiced by vacation of the entries, other than by the delay and expense routinely attendant to vacation of prior judgments. The Sixth Circuit requires a showing of more than mere delay and routine litigation expense to establish prejudice, *United Coin Meter*, 705 F.2d at 845, such as loss of evidence, increased discovery difficulties, or enhanced opportunities for fraud or collusion. *Thompson*, 95 F.3d at 433-34. Those types of problems (beyond those that originally resulted in the default judgment) or other intervening equities have not been shown here. ADESA argues that other intervening creditors may usurp the present priority position of its resulting judgment lien in Mrs. Vitanovich's real property should the entries now be vacated and it ultimately prevail. This argument is speculative and unsupported, as Mrs. Vitanpovich's Schedules A and D [Plf. Hearing Ex. A] show that pre-petition liens on the property already exceed the value of both her 1/2 interest and the other 1/2 interest.

Nevertheless, ADESA was undoubtedly prejudiced by Mrs. Vitanovich's conduct *prior* to entry of judgment in incurring expenses for futile court appearances. There was nothing else it (or the court) could or should have done to try and move the case forward. Nor has there yet been any assurance by Mrs. Vitanovich that the missing discovery would be addressed if the entries were vacated. Rule 60 provides that vacation is proper "upon such terms as are just." This part of the rule permits courts to make vacation conditional, *Hritz v. Woma*, 732 F.2d 1178, 1182 n.3 (3d Cir. 1984), such as upon payment of costs and expenses occasioned by the mistake or neglect that produced the default in the first instance. *Morisse v. Defensive Instruments, Inc*., 55 F.R.D. 433, 435 (E.D. Wis. 1972); *Trueblood v. Grayson Shops of Tenn., Inc.*, 32 F.R.D. 190, 195(E.D. Va. 1963)(imposing taxable costs, plus attorney's fees of $2000.00, as conditions of vacation). Had Mrs. Vitanovich established grounds for relief, this court would nevertheless condition vacation upon, at a minimum, payment of certain of ADESA's attorney's fees beyond the fees already imposed as a sanction, as well as upon production of the documents in issue.

Cir. 2001) (citing *Olle v. Henry & Wright Corp*., 910 F.2d 357, 365 (6th Cir. 1990)). Mrs. Vitanovich's grounds for vacation of the court's January 3, 2001, entries fit squarely within the ambit of Rule 60(b)(1). *McCurry,* 298 F.3d at 595-96. Having already decided that the circumstances Mrs. Vitanovich has advanced do not rise to the level of excusable neglect or mistake, the Sixth Circuit emphatically directs that Rule 60(b)(6) not be treated as a catch-all reservoir for relief otherwise foreclosed under Rule 60(b)(1). In this case as in *McCurry*, "[g]iven the precise fit between the circumstances presented here and those addressed in Rule 60(b)(1), and given our conclusion that subsection (b)(1) affords no basis for relief from the District Court's order of dismissal in this case, it clearly would be inappropriate to invoke subsection (b)(6) to grant relief that is foreclosed under subsection (b)(1)." *Id.* at 596. The court cannot find anything extreme or unusual in this case justifying vacation of the January 3, 2001, entries, with Mrs. Vitanovich having established a pattern of failing to cooperate with ADESA, the Chapter 7 Trustee, her attorney and the orders of the court long before the penultimate events of December 15, 2000.

E. Analysis of Request for Clarification of Order

In the absence of vacation of the January 3, 2001, entries, Mrs. Vitanovich also asks the court to clarify that they did not result in revocation of her Chapter 7 discharge. Having reviewed the default judgment and the memorandum order, as well as the records of both the adversary proceeding and the main case, the court does not find that there is any issue in this regard necessitating explicit amendment of either entry. Judge White did warn in earlier orders that Mrs. Vitanovich faced revocation of her discharge as a potential sanction. That warning was not, however, carried out. The January 3, 2001, default judgement only awards a monetary judgment to ADESA and declares it to be non-dischargeable. There is nothing in the case record showing that it was served on all creditors, nor was there any separate notice of revocation of discharge entered or served. In contrast, notice of her discharge was originally served on all of Mrs. Vitanovich's creditors on June 9, 2000. [Case No. 02-30188: Doc. ## 10 and 11]. Thereafter, no subsequent entries occurred in the main case as to her discharge, showing that the court did not consider the effect of the January 3, 2001, entries in the adversary proceeding to be a revocation of her discharge as opposed to an exception from discharge of one debt.

III. CONCLUSION

For all of the foregoing reasons, Mrs. Vitanovich is not entitled to relief on the merits by either vacation or modification of the January 3, 2001, default judgment entry and memorandum order. An order denying the balance of her Motion in accordance with this opinion will be separately entered by the court.

Dated:

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MARY ANN WHIPPLE
UNITED STATES BANKRUPTCY JUDGE