THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



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| In re: | ) | Case No. 03-14613 |
| | ) | |
| ANDREA WASHINGTON, | ) | Chapter 7 |
| | ) | |
| Debtor. | ) | Judge Pat E. Morgenstern-Clarren |
| | ) | |
| | ) | **MEMORANDUM OF OPINION** |

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| In re: | ) | Case No. 03-14324 |
| | ) | |
| RHONDA RUFF-QUEEN, | ) | Chapter 7 |
| | ) | |
| Debtor. | ) | Judge Pat E. Morgenstern-Clarren |
| | ) | |
| | ) | **MEMORANDUM OF OPINION** |

Petition preparer Ronald Smedley moves for relief from judgments entered in the cases of Andrea Washington and Rhonda Ruff-Queen. He relies on Federal Rule of Civil Procedure 60(b)(1), (3), and (6). *See* FED. R. BANKR. P. 9024 (incorporating FED. R. CIV. P. 60). The United States trustee (UST) opposes the motions.[1]

## JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. These are core proceedings under 28 U.S.C. § 157(b)(2).

[1] *See In re Andrea Washington*, Case No. 03-14613 (Docket 19, 20); *In re Rhonda Ruff-Queen*, Case No. 03-14324 (Docket 32, 35). Mr. Smedley also requested relief from judgment in *In re Vermail Crowell*, Case No. 03-13821. That request was denied by separate order. (Docket 16, 18).

## FACTS AND DISCUSSION

### I. The Orders

#### In re Andrea Washington

The UST filed a motion to disgorge fees and impose fines upon Mr. Smedley. Mr. Smedley was served with the motion and a notice setting a hearing for June 19, 2003. The motion stated that any objection must be filed within ten days of service and that in the absence of an objection the Court could grant the requested relief. Mr. Smedley did not file an objection or appear at the hearing.

The UST presented his case at the hearing through the debtor's testimony and exhibits. After taking the matter under submission, the Court entered an order granting the motion and requiring Mr. Smedley to: (1) pay $1,500.00 as a fine under 11 U.S.C. § 110; (2) turn over $199.00 in fees to the chapter 7 trustee; and (3) pay the remaining $100.00 case filing fee. (Docket 15, 16).

#### In re Rhonda Ruff-Queen

The UST filed a motion to require Mr. Smedley to disgorge fees based on having engaged in the unauthorized practice of law. Mr. Smedley was served with the motion and a notice setting a hearing for June 19, 2003. The motion stated that an objection must be filed within ten days of service and that in the absence of an objection the Court could grant the requested relief. Mr. Smedley did not file an objection or appear at the hearing.

The UST presented his case through the debtor's testimony and exhibits. After taking the matter under submission, the Court entered an order granting the motion and requiring Mr. Smedley to turn over $249.00 in fees to the chapter 7 trustee. (Docket 25, 26).

## II. Relief from Judgment

Mr. Smedley requests relief from the two orders under Federal Rule of Civil Procedure 60(b), citing excusable neglect and other grounds. *See* FED. R. BANKR. P. 9024 (incorporating FED. R. CIV. P. 60(b)). As the party seeking relief, Mr. Smedley has the burden of proving his Rule 60 case. *See Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001).

### Rule 60(b)(1)

Mr. Smedley contends that the judgments should be set aside because he was denied an opportunity to present his side of the story. Specifically, he states that the Court and the UST "knew full well in advance of [the] hearing that [he] would not be available for appearance at such a proceeding." He cites "excusable neglect" as a basis for relief from the orders. *See* FED. R. CIV. P. 60(b)(1). The two orders are essentially default judgments because Mr. Smedley did not defend himself either through an objection or an appearance at the hearings. The issue is whether Mr. Smedley has established that this neglect was excusable.

A party seeking to vacate a default judgment under Rule 60(b)(1) must demonstrate that "the default did not result from his culpable conduct." *Weiss v. St. Paul Fire and Marine Ins. Co.*, 283 F.3d 790, 794 (6th Cir. 2002). That determination is guided by the Supreme Court's analysis of the term "excusable neglect" in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993). *See Jinks*, 250 F.3d at 386. The determination as to what "sorts of neglect will be considered 'excusable'. . . is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs.*, 507 U.S. at 395. Factors to consider include "(1) the danger of prejudice to the other party, (2) the length of delay, (3) its potential impact on judicial proceedings, (4) the reason for the delay, and (5) whether the

movant acted in good faith." *Jinks*, 250 F.3d at 386 (citing *Pioneer Inv. Servs.*, 507 U.S. at 395). It is appropriate to consider these factors "in cases where procedural default has prevented the court from considering the true merits of a party's claim." *Id.*

If the court finds that the default was not the result of a party's culpable conduct, the court must inquire further into other relevant factors. *See Weiss*, 283 F.3d at 794 (citing *Waifersong, Ltd., Inc. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992) and stating the relevant considerations for relief from a default judgment to be: "(1) whether the opposing party would be prejudiced; (2) whether the proponent had a meritorious claim or defense; and (3) whether the proponent's culpable conduct led to the default.").

Mr. Smedley's primary default in this matter was his failure to file objections to the UST's motions. The procedure used by the UST in setting the motions for hearing complied with the local rules and required Mr. Smedley to file objections to the motions if he opposed the relief sought. LBR 9013-1(a). The rules also provide that "the Court is authorized to grant the relief requested without further notice" in the absence of a timely objection. *Id.* Mr. Smedley failed to object to the motions.[2] It was incumbent on Mr. Smedley to explain why he did not file objections; he did not do so. Instead, he has attempted to explain his failure to attend the hearings. He argues that the Court and counsel for the UST knew he would not be available on that date.

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[2] The Court could have granted the motions based on that failure alone; however, the Court held the hearings and required the UST to present his evidence. The Court then entered its orders based on the credible, uncontroverted evidence.

For Mr. Smedley's sole support, he relies on events which took place during a hearing in another case:[3] *Brian and Tyree Ware* (Case No. 03-12593). Mr. Smedley contends that he "stated . . . on the record that . . . [he] would be out of town until after the Fourth of July, 2003[.]" This statement is factually inaccurate, as this Court previously noted in ruling on Mr. Smedley's motion for recusal in the *Ware* case:

> The Court first proposed holding the evidentiary hearing [in the *Ware* case] on June 27. Mr. Smedley agreed to that date, but Mr. Ware was not available. The Court then suggested July 7th. Mr. Smedley responded that was not a good date because he would be out of town over the July 4th holiday and requested something closer to the middle of July . . . There was no discussion in that hearing about any case other than the *Ware* case or about setting or rescheduling any hearing in any other case. No other case involving Mr. Smedley was heard at that time . . . The Court concludes based on the record that Mr. Smedley's statement that this judge held the *Washington* [and] *Ruff* . . . hearings without giving him notice and at a time when the Court knew he would not be able to attend is not factually accurate[.]

*In re Ware*, Case No. 03-12593, Memorandum of Opinion Re Motion To Recuse (Docket 31) (referencing hearing transcript of May 15, 2003). Mr. Smedley's belief that he informed the Court he was not available for a hearing in these two cases until after July 4, 2003 is mistaken. Additionally, he has not supported his claim that the UST was so informed. Moreover, Mr. Smedley did not substantiate that he was, in fact, out of town on June 19th and did not explain what prevented him from returning to attend the hearings.

Mr. Smedley has not provided any reason for his delay in these matters and, in failing to do so, he has not shown that he acted in good faith. While the length of his delay is not

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[3] Mr. Smedley's motion refers to an April 19, 2003 hearing; the hearing actually took place on May 15, 2003. *See In re Brian and Tyree Ware*, Case No. 03-12593 (Docket entry for 5/15/03 and Docket 15).

substantial, the UST has already presented his evidence and would be prejudiced if the orders were to be set aside. The debtors in these two cases were required to appear and testify at the hearings (taking time away from their jobs) and the judicial proceedings would no doubt be adversely impacted if they were required to appear on these matters yet again. Under these circumstances, Mr. Smedley has failed to demonstrate that he is not culpable for his failure to respond to the motions and to attend the hearings. He has also not demonstrated that he has a meritorious defense to the motions. Mr. Smedley's request for relief from the orders based on excusable neglect is, therefore, denied.

**Rule 60(b)(3)**

Mr. Smedley's motions also cite Rule 60(b)(3) which provides for relief from a final judgment for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]" FED. R. CIV. P. 60(b)(3). "The purpose of [this] rule is to afford parties relief from judgments which are unfairly obtained[.]" *Diaz v. Methodist Hosp.*, 46 F.3d 492, 496 (5th Cir. 1995). Mr. Smedley has the burden of proving fraud by clear and convincing evidence. *See Simons v. Gorsuch*, 715 F.2d 1248, 1253 (7th Cir. 1983). *See also Abrahamsen v. Trans-State Express, Inc.*, 92 F.3d 425, 429 (6th Cir. 1996).

Mr. Smedley's argument on this point is that the UST deliberately scheduled the hearings for June 19th knowing that Mr. Smedley would be out of town on that date. Mr. Smedley has not proven (1) that counsel for the UST knew he was not available on June 19th or (2) any misconduct by the UST. The fault in these matters was Mr. Smedley's neglect rather than misconduct on the part of the UST. Relief from the orders under Rule 60(b)(3) is not, therefore, warranted.

**Rule 60(b)(6)**

Finally, Mr. Smedley requests relief under Rule 60(b)(6) for "any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b)(6). Rule 60(b)(6) "applies 'only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule.'" *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990). "This is because 'almost every conceivable ground for relief is covered' under the other subsections of Rule 60(b)." *Id.*

The grounds identified by Mr. Smedley fit squarely within the circumstances addressed by Rule 60(b)(1) and (3). Mr. Smedley did not prove his claims under those subsections. A party's failure to meet the prerequisites for relief under (b)(1) and (3) does not provide a basis to "appeal to the 'catchall' of subsection (b)(6)." *McCurry v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586, 596 (6th Cir. 2002). Consequently, Rule 60(b)(6) relief is not available here.

**CONCLUSION**

Mr. Smedley's motions for relief from judgment are denied for the reasons stated.

Separate orders reflecting this decision will be entered in each case.

Date: 1 Aug 2003

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Dean Wyman, Esq.
Mr. Ronald Smedley
Mary Ann Rabin, Esq.
Ms. Andrea Washington

By: Joyce L. Gordon, Secretary
Date: 8/1/03

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| In re: | ) | Case No. 03-14324 |
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| RHONDA RUFF-QUEEN, | ) | Chapter 7 |
| | ) | |
| Debtor. | ) | Judge Pat E. Morgenstern-Clarren |
| | ) | |
| | ) | **ORDER** |

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that Ronald Smedley's motion for relief from judgment is denied. (Docket 32).

Date: 1 August 03

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Dean Wyman, Esq.
Mr. Ronald Smedley
Mary Ann Rabin, Esq.

By: Joyce L. Gordon, Secretary

Date: 8/1/03

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| Debtor. | ) | Judge Pat E. Morgenstern-Clarren |
| | ) | |
| | ) | **ORDER** |

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that Ronald Smedley's motion for relief from judgment is denied. (Docket 19).

Date: 1 August 2003

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Dean Wyman, Esq.
Mr. Ronald Smedley
Ms. Andrea Washington

By: Joyce L. Gordon, Secretary

Date: 8/1/03