

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: December 14 2005

Mary Ann Whipple  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re:	)	Case No. 05-76755
	)	
John Kurt Zimmerman and	)	Chapter 7
Nancy A. Zimmerman,	)	
	)	
Debtors.	)	JUDGE MARY ANN WHIPPLE

**ORDER GRANTING MOTION TO ALTER OR AMEND**

This case is before the court on Debtors’ Motion to Alter or Amend Judgment or Grant Relief from Judgment and to Reinstate Case (“Motion”) [Doc. # 72] after being transferred to the undersigned judge. Debtors seek an order vacating an order dismissing their Chapter 7 case. Having considered the Motion, and for the reasons that follow, Debtors’ Motion will be granted.

**BACKGROUND**

Debtors filed a “bare-bones” Chapter 7 petition on October 16, 2005. Their Bankruptcy Schedules, Statement of Financial Affairs and Attorney Fee Disclosure Statement were due on October 31, 2005, and their first meeting of creditors was scheduled to take place on December 28, 2005. On October 31, 2005, Debtors filed their first Motion for Extension of Time until November 15, 2005, to file the required documents, stating that the reason for such request was that Debtors’ case was filed in the rush before the

effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”). [Doc. # 11]. The court granted the motion. The court’s order further provided that upon Debtors failure to file the documents on or before the date ordered, “the case shall be **DISMISSED WITHOUT FURTHER NOTICE OR HEARING.**” [Doc. # 15]. On November 15, 2005, Debtors filed their Motion for Additional Extension of Time until November 29, 2005, to file the necessary documents. [Doc. # 28]. The court granted the second motion, emphasizing that upon Debtor’s failure to file the documents by the date ordered, “the case shall be **DISMISSED WITHOUT FURTHER NOTICE OR HEARING.**” [Doc. # 36] (emphasis in original). On November 29, 2005, Debtors filed a Motion for Final Extension of Time until December 5, 2005, stating that the reasons for the further request were that Debtors’ case is complex due to numerous rental properties and pending foreclosures and, although their Schedules were on that date ready for review by Debtors, Mr. Zimmerman was working out of town during that week and would not be available to review and sign the documents until that weekend . [Doc. # 49]. On December 1, 2005, the court denied Debtors’ third motion and entered an Order of Dismissal.

On December 9, 2005, Debtors filed the instant Motion pursuant to Federal Rules of Civil Procedure 59 and 60(b)(1). Debtors argue that they were not put on notice that no further extensions of time would be granted. In addition to the facts set forth in the motions for extension of time, Debtors’ counsel further indicates in the Motion that he underwent reconstructive knee surgery on September 28, 2005 and was physically unable to meet with his clients to complete all schedules before October 17, 2005, the effective date of BAPCPA, and was physically unable to complete all of the documents required for his clients without requesting additional extensions of time.

### **LAW AND ANALYSIS**

Motions to alter or amend judgment brought pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 9023, may be granted if there is clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. *Gencorp, Inc. v. American Int’l Underwriters*, 178 F.3d 804, 834 (6<sup>th</sup> Cir. 1999). Debtors set forth no facts or argument suggesting the existence of newly discovered evidence or any error or change in the law. And the court rejects any suggestion that it was a “manifest injustice” that Debtors were not notified that no further extensions of time would be granted. The court emphasized clearly in its order granting the second extension of time that “the case shall be **DISMISSED WITHOUT FURTHER NOTICE OR HEARING**” if the required documents were not filed by the date ordered. Debtors’ suggestion would render those words meaningless. Although similar language was used in the

court's order granting Debtors' first motion to extend time and the court permitted one further extension, it was unreasonable for Debtors to simply assume that a third extension would be granted, especially in light of the court's clear and plain emphasis that the case "shall be" dismissed.

Nevertheless, the court finds that relief from the Order of Dismissal is appropriate under Rule 60(b)(1) of the Federal Rules of Civil Procedure, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 9024. Under Rule 60(b), the court may relieve a party from a final judgment or order for any one of several reasons, including "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). "Excusable neglect" encompasses the neglect of either the Debtors or their counsel and includes both "simple, faultless omissions to act" as well as "omissions caused by carelessness." *Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388, 397 (1993)(construing excusable neglect under Fed. R. Bankr. P. 9006(b)(1)). In determining whether such neglect is "excusable," the court considers whether there is danger of prejudice to creditors, the length of the delay in filing the required documents, the reason for the delay, including whether it was within the reasonable control of Debtors and whether Debtors acted in good faith. *See id.* at 395.

The court recognizes that an extraordinary number of bankruptcy cases were filed in this court and others in the days before the effective date of BAPCPA. Unfortunately, Debtors' counsel also underwent surgery approximately two weeks before the effective date, which resulted in him being physically unable to complete all schedules and other required documents without requesting the first and second extension of time. This fact, although set forth in Debtors' Rule 60(b) motion, was not apparent in their motions for extension of time. Although counsel was able to complete the required documents by November 29, 2005, the final date for them to be filed as ordered by the court, Mr. Zimmerman was then working out of town and could not review and sign the documents. However, he was able to do so within days thereafter. As the first meeting of creditors is not scheduled to take place until December 28, 2005, the court finds that Debtors' delay will cause no undue prejudice to the Chapter 7 Trustee, to the Office of the United States Trustee or to creditors in this case. And there is no indication that Debtors have not acted in good faith. On these facts, the court finds that Debtors' failure to file the required documents by November 29, 2005, was the result of excusable neglect. As such, Debtors are entitled to relief from the Order of Dismissal under Rule 60(b).

**THEREFORE**, for the foregoing reasons, good cause appearing,

**IT IS ORDERED** that Debtors' Motion [Doc. # 72] be, and hereby is, **GRANTED**; and

**IT IS FURTHER ORDERED** that the court's Order Denying Motion to Extend [Doc. #56] and

Order of Dismissal [Doc. # 57] be, and hereby are, **VACATED** and that this case be reinstated; and

**IT IS FURTHER ORDERED** that Debtor's third Motion for Extension of Time [Doc. #49] is hereby **GRANTED**; and

**IT IS FURTHER ORDERED** that Debtors are granted until **December 19, 2005, at 4:00 o' clock p.m.** to file the required documents. **NO FURTHER EXTENSIONS OF TIME SHALL BE GRANTED**; and

**IT IS FURTHER ORDERED** that upon failure by Debtors to file the required documents by the required date, this case shall be **DISMISSED WITHOUT FURTHER NOTICE OR OPPORTUNITY FOR HEARING**.