

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
\*  
HENRY A. GARONO, \*  
\* CASE NUMBER 04-46114  
Debtor. \*  
\*  
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\*  
FIRST NATIONAL BANK OF OMAHA, \*  
\* ADVERSARY NUMBER 05-4073  
Plaintiff, \*  
\*  
vs. \*  
\*  
HENRY A. GARONO, \*  
\* THE HONORABLE KAY WOODS  
Defendant. \*  
\*

\*\*\*\*\*  
ORDER DENYING PLAINTIFF'S MOTION TO VACATE  
ORDER DISMISSING ADVERSARY PROCEEDING  
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The matter before the Court is Plaintiff's Motion to Vacate Order Dismissing Adversary Proceeding ("Motion to Vacate"). The Order in question was entered by the Court on March 23, 2006 ("Order of Dismissal"), which dismissed the instant adversary proceeding for lack of prosecution.

The procedural history of this case is as follows: Plaintiff First National Bank of Omaha ("Plaintiff") commenced this case by filing a Complaint on April 4, 2005 against Debtor/Defendant Henry A. Garono ("Debtor"). The Complaint alleges that certain charges Debtor made on a credit account issued by Plaintiff to Debtor should be determined to be non-dischargeable pursuant

to 11 U.S.C. § 523(a)(2)(A) and (C). After Debtor answered the Complaint, there was no activity in the case for more than six (6) months. As a consequence, this Court issued an Order dated November 17, 2005 (the "15 Day Order"), requiring the parties to file an appropriate pleading within fifteen (15) days or the adversary proceeding would be dismissed for failure to prosecute. In response to the 15 Day Order, on December 2, 2005, Plaintiff filed Response to Court's Order Dated November 17, 2005 ("Response"), in which Plaintiff requested that the Court set the matter for a telephonic pretrial conference.

In the Response, Plaintiff stated that the parties had engaged in settlement discussions, but had not yet reached a settlement. In addition, Plaintiff stated that Debtor had responded to Plaintiff's written discovery and that Plaintiff had taken the "initial deposition" of Debtor. Plaintiff asserted that the deposition had not been concluded because Debtor had not retained all of his financial records, which would be subpoenaed by Plaintiff. (Response, ¶ 3.)

The Court scheduled a telephonic status conference for December 16, 2005. At that time, the parties requested (i) additional time for discovery, and (ii) a deadline by which to file dispositive motions. The Court set February 13, 2006 as the date for filing dispositive motions. Neither party filed a dispositive motion. As a consequence, the Court scheduled a Final Pre-trial on the record for March 21, 2006 at 9:30 a.m. The Notice of the Final Pre-trial (Docs. 13 and 14) was sent by first class mail to

Plaintiff First National Bank of Omaha, 1620 Dodge St., Stop 3105, Omaha, NE 68197-0002, and electronically to counsel for Plaintiff at [RCOOPERESQ@aol.com](mailto:RCOOPERESQ@aol.com). This Notice states:

Notice is hereby given that a hearing in the above case will be held at the U.S. Bankruptcy court on: Tuesday, March 21, 2006 at 9:30 a.m., U.S. Bankruptcy Court, Third Floor, 10 E. Commerce St., Youngstown, OH 44503. To consider and act upon the following matters: FINAL PRE-TRIAL ON THE RECORD, ALL PARTIES REQUIRED TO BE PRESENT.

Notice of Hearing dated February 21, 2006 (Doc. 13). Debtor and his legal counsel attended the March 21, 2006 Final Pre-trial. Despite the requirement that all parties be present for the Final Pre-trial on the record, neither Plaintiff nor Plaintiff's counsel were present. As a consequence, this Court dismissed this adversary proceeding for failure to prosecute.

In the Motion to Vacate, Plaintiff urges this Court to vacate the Order of Dismissal for the reason that Plaintiff's counsel "mistakenly thought the pretrial would be conducted by telephone as was the prior pretrial conference." (Motion to Vacate, ¶ 3.) The Notice dated December 8, 2005 for the December 16, 2005 telephonic status conference was on the same "Notice of Hearing" form as was the Notice dated February 21, 2006 for the March 21 Final Pre-trial, but the information in the Notices differed dramatically. The Notice of Hearing dated December 8, 2005 (Doc. 12) states that the matter to be considered and acted upon is: "TELEPHONIC STATUS CONFERENCE" whereas the Notice dated February 21, 2006 (Doc. 13) states that the matter to be considered and acted

upon is: "FINAL PRE-TRIAL ON THE RECORD, ALL PARTIES REQUIRED TO BE PRESENT."

The Response also alleges that it is "hypocritical" for Debtor to "show up for a pretrial conference and seek to proceed to trial" when Plaintiff alleges that Debtor has previously failed to cooperate in completing discovery. (Motion to Vacate, ¶ 6.) This Court is dismayed that Plaintiff considers the conduct of Debtor and his counsel in complying with the Court's order to appear in person at a final pre-trial on the record to be "hypocritical." The failure of Plaintiff and Plaintiff's counsel to attend the final pre-trial was in contravention of the Court's Notice requiring them to be present. The Court will not countenance Plaintiff's attempt to excuse its own failure by being critical of the Debtor and his counsel for adhering to the terms of this Notice. In addition, the description of Debtor's conduct regarding discovery in the Motion to Vacate at paragraph 6 contradicts the Plaintiff's description of Debtor's response to discovery in the Response at paragraph 3.

Plaintiff's Motion to Vacate does not include any statutory basis for the relief it seeks. This Court assumes that the Motion to Vacate is based on FED. R. CIV. P. 60, incorporated by FED. R. BANKR. P. 9024. The Court may relieve a party from a final judgment if the party establishes one of the bases for such relief in Rule 60(b). Although not expressly stated, this Court assumes that Plaintiff is relying on subsection (1) "mistake, inadvertence, surprise, or excusable neglect."

Although Plaintiff's counsel alleges that he made a mistake in thinking that the final pre-trial on March 21 was to be conducted by telephone, he suggests no reason to conclude that (i) he had a reasonable basis for believing he did not have to attend the pre-trial in person or (ii) such mistake constitutes excusable neglect. The Notice dated February 21, 2006 expressly stated that the Final Pre-trial would be on the Record and required all parties to be present. This Notice is in stark contrast to the prior notice that referenced a Telephonic Status Conference. During the telephonic status conference in December, this Court, at the request of the parties, extended the period for discovery and set a new dispositive motion date. Despite the extension of time for discovery, neither party filed a dispositive motion. The parties also did not conclude settlement discussions during this period of time. Although Plaintiff now suggests that Debtor has not cooperated in discovery, this contradicts Plaintiff's representations to the Court in the Response. In addition, Plaintiff never filed a motion to compel Debtor to respond to discovery nor did Plaintiff indicate that discovery was not complete or that additional time (subsequent to the dispositive motion date) was necessary to complete discovery.

Plaintiff's counsel alleges that he made a "mistake" in thinking the final pre-trial was to be conducted by telephone. Based upon the record as a whole, this Court does not find the mistaken belief of Plaintiff's counsel to require vacatur of the Order of Dismissal. The Notice of the March 21, 2006 Final

Pre-trial was clear and unambiguous. The failure of Plaintiff and Plaintiff's counsel to attend the Final Pre-trial should not and will not be excused. For the forgoing reasons, this Court denies the Motion to Vacate.

**IT IS SO ORDERED.**

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**HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE**