

IT IS SO ORDERED.

Dated: July 31, 2013
10:12:03 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

WILLIAM SCOTT MERLINO and
JENNIFER L. MERLINO,

Debtors.

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CASE NUMBER 13-40572
CHAPTER 13
HONORABLE KAY WOODS

ORDER DENYING MOTION FOR RECONSIDERATION

Before the Court is Motion for Reconsideration (Doc. # 33) filed by Debtors William Scott Merlino and Jennifer L. Merlino on July 23, 2013. The Debtors request the Court to reconsider - *i.e.*, vacate - the Order of Dismissal (Doc. # 31) entered by the Court on July 11, 2013. For the reasons set forth herein, the Court will deny the Motion for Reconsideration.

I. PROCEDURAL HISTORY

The Debtors filed a voluntary petition pursuant to chapter 13 of Title 11 on March 21, 2013 ("Petition Date").

Because the petition was an incomplete filing, on March 22, 2013, the Clerk's office issued Notice of Documents to be Filed (Doc. # 3), which stated that the following documents "must be filed within 14 days of filing the petition": Summary of Schedules, Statement of Financial Affairs, Schedules A-J, Means Test, Chapter 13 Plan, Declaration Concerning Debtor's Schedules and Employee Income Records (collectively, "Missing Documents"). On April 4, 2013 - the fourteenth day following the Petition Date - the Debtors filed Amended Motion for Leave to File Balance of Documents (Doc. # 12), which requested until April 20, 2013, to file "STATEMENT OF CURRENT MONTHLY INCOME (FORM 22C), PAYMENT ADVICES RECEIVED 60 DAYS BEFORE DATE OF FILING OF PETITION, SCHEDULES A-J, SUMMARY OF SCHEDULES, STATEMENT OF FINANCIAL AFFAIRS, ATTORNEY DISCLOSURE STATEMENT, CHAPTER 13 PLAN and all other balance of documents." On April 5, 2013, the Court issued Order for Leave to File Balance of Documents ("Order Extending Time") (Doc # 13).

Despite requesting and being granted an extension of time, the Debtors failed to timely file the Missing Documents. As a consequence, on April 23, 2013, the Court issued Order to Appear and Show Cause ("Show Cause Order") (Doc. # 15), which required the Debtors and counsel to appear and show cause why this bankruptcy case should not be dismissed based on the Debtors'

failure to timely file the Missing Documents. On May 6, 2013, the Debtors filed the Missing Documents (Docs. ## 18 - 20).

The Court held a hearing on the Show Cause Order on July 11, 2013,¹ at which appeared William Kissinger, Esq. on behalf of the Debtors. At the hearing, Mr. Kissinger stated that although he had requested and obtained an extension of time until April 20, 2013, he had marked on his calendar that the extension was through April 30, 2013. Mr. Kissinger had no explanation for why he failed to file the Missing Documents until May 6, 2013, when he thought the extension of time concluded on April 30, 2013, except to say that it was his error.

Because the Debtors filed their bankruptcy petition on March 21, 2013, the 46th day after the Petition Date was May 6, 2013. At the hearing, the Court explained the dilemma created by 11 U.S.C. § 521(i)(1), which provides that a chapter 13 case shall be automatically dismissed if a debtor fails to file all of the information required under § 521(a)(1) within 45 days after the date of the filing the petition. The Missing Documents constitute information required under § 521(a)(1). Because the Debtors failed to file the Missing Documents within 45 days after the Petition Date, § 521(i)(1) provided for the automatic dismissal of their bankruptcy case. Because the

¹The hearing on the Show Cause Order was originally scheduled for May 9, 2013, but was continued until July 11, 2013, at the request of the Debtors.

Debtors failed to (i) comply with § 521(i)(1); and (ii) show cause why their case should not be dismissed based on their failure to file the Missing Documents by April 20, 2013, the Court dismissed the Debtors' bankruptcy case.

II. REQUEST FOR RECONSIDERATION

Mr. Kissinger urges this Court to vacate the Order of Dismissal because he "mistakenly counted and filed the balance of schedules one day later than permitted thereby resulting in an automatic dismissal." (Mot. for Recons. at 1.) Mr. Kissinger argues that this case presents a question of law "whether the Court has authority [sic] reinstate a case that is automatically dismissed when balance of schedules is filed one day beyond the 45 day limit." (*Id.* at 1-2.) He then contends that his counting mistake falls within the rubric of Federal Rule of Civil Procedure 60(b)(1) and constitutes mistake, inadvertence, surprise or excusable neglect.² The arguments of Mr. Kissinger, as counsel for the Debtors, are without merit.

III. LEGAL ANALYSIS

The Debtors ostensibly rely on *Pioneer Inv. Servs. Co. v. Brunswick Assocs., Ltd. P'ship*, 507 U.S. 380 (1993), but they fail to articulate how filing the Missing Documents after expiration of (i) the 45-day period following the Petition Date; and (ii) the extended time granted by the Court - *i.e.*,

²Civil Rule 60 applies in bankruptcy cases pursuant to Federal Rule of Bankruptcy Procedure 9024.

April 20, 2013, meets the equitable test set forth in the *Pioneer* case. In *Pioneer*, the Supreme Court articulated an equitable test to determine the "excusable neglect" standard in Federal Rule of Bankruptcy Procedure 9006(b)(1). The Supreme Court found "excusable neglect" when a chapter 11 creditor missed the bar date in filing a proof of claim because notice of the bar date was "inconspicuous," "peculiar" and "left a 'dramatic ambiguity' in the notification." *Id.* at 398 (citation omitted).

The present circumstances are distinguishable from the *Pioneer* case, which considered whether conduct constituted excusable neglect under Bankruptcy Rule 9006(b)(1) – a Rule that specifically provides for the enlargement of time when the failure to act is the result of excusable neglect. Unlike the inconspicuous bar date notice in *Pioneer*, the Debtors were on notice when the Missing Documents had to be filed. First, the Court's Order Extending Time granted the Debtors' request and extended their time to file the Missing Documents until the firm and unambiguous date of April 20, 2013. Next, the Debtors were on notice by the Bankruptcy Code that they had to file the Missing Documents "within 45 days after the date of the filing of the petition." 11 U.S.C. § 521(i)(1) (West 2013). The Court's discretion to enlarge the 45-day period to file the Missing Documents is governed by § 521(i)(3), rather than the

excusable neglect standard in Bankruptcy Rule 9006(b)(1). The Court may allow a debtor "an additional period of not to exceed 45 days" "upon request of the debtor made within 45 days after the date of the filing of the petition[.]" 11 U.S.C. § 521(i)(3).

The Debtors made only one request to extend their time to file the Missing Documents, which the Court granted in the Order Extending Time. After missing the April 20, 2013 extended deadline for filing the Missing Documents, the Debtors made no further request for additional time to file the Missing Documents. Indeed, the Debtors never requested this Court to extend their time beyond the 45-day period mandated in § 522(i)(1). Unlike Bankruptcy Rule 9006(b)(1), there is no discretion under § 521(i)(1) or (i)(3) to enlarge the time for filing the Missing Documents based on excusable neglect. Once the Debtors failed to file the Missing Documents within 45 days after the Petition Date, their bankruptcy case was "automatically dismissed effective on the 46th day after the date of the filing of the petition." 11 U.S.C. § 521(i)(1).

As a consequence, the Court answers the question raised by the Debtors in the negative. The Court does not have the discretion to reinstate a case once it has been automatically dismissed by operation of § 521(i)(1).

Even if the Court were to consider the Debtors' conduct under the excusable neglect standard, the Court finds that Mr. Kissinger's failure to file the Missing Documents within the time period he requested and his "miscounting" of the 45-day period constitute garden variety neglect, but not excusable neglect. The Court finds Mr. Kissinger's argument that he miscounted the 45-day period to be disingenuous. At the hearing, Mr. Kissinger appeared to be totally unaware that the Missing Documents were required to be filed within 45 days after the Petition Date (unless the Court, for cause and upon a motion filed within that 45-day period, further extended the time). Mr. Kissinger's explanation at the hearing was that he put the wrong date on his calendar, thinking he had until April 30, 2013, to file the Missing Documents instead of April 20, 2013. Mr. Kissinger offered no explanation for why he missed his self-imposed deadline of April 30, 2013, by six days.

Having fully considered the Debtors' Motion for Reconsideration, the Court finds it to be meritless and hereby denies the Motion for Reconsideration. The Order of Dismissal (Doc. # 31) remains in full force and effect.

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