

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION**

In re:)	
)	
MARK BRIAN QUINN,)	Case No. 02-30544-JWV
)	
Debtor.)	
)	
CHICAGO TITLE INSURANCE COMPANY,)	
DONALD E. LOVETT, and SANDRA J.)	
LOVETT,)	
)	
Plaintiffs,)	
)	
v.)	Adversary No. 02-3023-JWV
)	
MARK BRIAN QUINN,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

The Court takes up for consideration at this time the Motion (Document # 7) filed by Chicago Title Insurance Company and Donald E. Lovett and Sandra J. Lovett, the Plaintiffs in this Adversary Proceeding (“Plaintiffs”), asking the Court to set aside the Court’s previous Order dismissing the Plaintiffs’ Complaint.¹

The history of this rather abbreviated case can be quickly summarized. Joel B. Laner (“Laner”), the attorney for the Plaintiffs, filed a Complaint objecting to the discharge of Mark Brian Quinn (“Debtor”) pursuant to 11 U.S.C. § 523(a)(2)(A) on August 1, 2002 (Document # 1). A summons and Pretrial Order and Notice of Trial were prepared by the Clerk of the Court and sent to Laner by electronic mail on August 5, 2002, with instructions that Laner serve both documents on the Debtor (Docket Entries 2 and 3). Apparently, Laner mailed a copy of the

¹ The Court has jurisdiction in this matter pursuant to 28 U.S.C. § § 1334 and 157. This Order sets out the Court’s findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, Fed.R.Bankr.P.

Complaint to J. Kevin Checkett, the Debtor's attorney of record, but never served the Debtor or Checkett with the summons and Pretrial Order, because on September 5, 2002, Checkett filed a Motion to Dismiss (Document # 4), alleging that the Plaintiffs had not prosecuted their case. Laner never responded to the Motion to Dismiss, and on October 9, 2002, more than a month after the Motion to Dismiss was filed, the Court entered its Order dismissing the Complaint (Docket Entry # 5).

Then, on January 24, 2003, more than three and one-half months after the Court entered its Order dismissing the Complaint, Laner filed the instant Motion, entitled "Motion of Chicago Title Insurance Company, Donald E. Lovett, and Sandra J. Lovett, to Relieve Them From Final Order." (hereinafter, the "Motion;" Document # 7) The Motion was accompanied by Suggestions in Support (Document # 8) and an Affidavit (Document # 9) executed by Laner. In the Affidavit, Laner stated that he did not receive any of the electronic filings in the case and had no record of ever having received them. He then stated that, "[u]pon awareness of the facts in this case, I have attempted to identify and rectify problems in my law firm's electronic filing system." (Affidavit, ¶ 4)

A Response (Document # 6) was filed by the Debtor's attorney to Laner's Motion on December 12, 2002, approximately six weeks *before* Laner's Motion was filed with the Court. This strange occurrence is explained by the fact that, according to the certificate of service, Laner actually mailed a copy of the Motion to the Debtor's attorney on December 2, 2002, more than *seven weeks before the Motion was filed with the Court*. Laner has offered no explanation for this unusual sequence of events. Perhaps needless to say, the Debtor has objected to the granting of the relief requested by the Plaintiffs.

The Court has considered the matter on the papers filed.

DISCUSSION

According to the Suggestions in Support, the Motion seeking relief from the Order dismissing the Adversary Proceeding was filed pursuant to Rule 9024(b) [sic], Fed.R.Bankr.P., a rule that does not exist. The apparent reference is to Rule 60(b) of the Federal Rules of Civil Procedure, which is incorporated by reference into Bankruptcy Rule 9024. Rule 60(b) provides,

in pertinent part:

(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 or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment....

Rule 60(b), Fed.R.Civ.P.

In his Suggestions, Laner asserts that the Court's Order of Dismissal should be set aside because (1) Laner did not receive notice of any of the proceedings in the case "except for the dismissal of the bankruptcy [sic] proceeding;"² (2) the adversary proceeding was dismissed "in its infancy," having been filed only in August 2002; (3) "no prejudice will result to the debtor from reinstatement of the action" because of the relatively recent initiation of the case; (4) the Plaintiffs have raised serious objections to the Debtor's discharge; (5) courts favor disposition of cases on their merits; and (6) no bad faith or inequitable conduct has occurred. Laner states that the "plaintiffs' omissions to act which occasioned the dismissal resulted from mistake, inadvertence, surprise, or excusable neglect;" however, Laner bases his arguments for relief exclusively on the grounds of "excusable neglect."

The seminal case on "excusable neglect" is *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), in which the Supreme Court addressed the burdens and standards a party must meet when seeking relief on the basis of "excusable neglect." To determine whether certain neglect is excusable, a court should take account "of all the relevant circumstances surrounding the party's omission." *Id.* at 395, 113 S.Ct. at 1498. The factors that should be considered include:

(1) The danger of prejudice to the debtor;

² This statement is interesting in view of the fact that, in his Affidavit and also at another point in the Suggestions, counsel asserts that he did *not* receive notice of the Order of Dismissal.

- (2) The length of the delay and its potential impact on judicial proceedings;
- (3) The reason for the delay, including whether it was within the reasonable control of the movant; and
- (4) Whether the movant acted in good faith.

Id. at 394-95, 113 S.Ct. at 1498. The proper focus, however, is on whether the neglect is excusable. *Id.* at 396-98, 113 S.Ct. at 1499. “[T]he determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Id.* at 395, 113 S.Ct. 1498.

While all of the foregoing factors are to be analyzed by the Court, it is first the movant’s burden to demonstrate that excusable neglect exists. *Hartford Casualty Insurance Co. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 214 B.R. 197, 200 (8th Cir. BAP 1997); *McGraw v. Betz (In re Bell & Beckwith)*, 112 B.R. 879, 880 (Bankr. N.D. Ohio 1990).

This case has been marked throughout by the neglect of the Plaintiffs and their counsel. The Court’s electronic records in this Adversary Proceeding reflect that *all* of the notices, orders, and pleadings entered of record in the case were electronically transmitted to Laner. The records of the Court show that Laner applied for and received on May 22, 2002, a login and password that allowed him to fully participate in this Court’s electronic case filing (ECF) system. In signing the registration form, Laner consented to receiving all notices electronically. The email address on the docket sheet of this case is the same email address that appears on Laner’s application form. Despite being fully qualified to file pleadings electronically, it appears that Laner did not file any documents electronically in this case.

Although Laner filed the Plaintiffs’ Complaint on August 1, 2002, there is nothing in the record to suggest that he ever made any inquiry of the Clerk’s office as to why he had not received the summons and pretrial order and notice of trial that are issued by the Clerk in every adversary proceeding filed in this Court. As reflected on the docket sheet, Laner *never filed any document whatsoever* in this case between August 1, 2002, and January 24, 2003, a period of almost six months. Laner’s neglect in this proceeding is most vividly illustrated by the fact that he did not file the instant Motion to relieve the Plaintiffs of the effect of the Order of Dismissal until approximately *fourteen weeks* after the Order of Dismissal was entered, more than *seven*

weeks after he had mailed a paper copy of the Motion to counsel for the Debtor, and more than *six weeks* after the Debtor's attorney had filed a Response to the Motion.³

In the face of such obvious neglect, Plaintiffs' counsel has totally failed to demonstrate that the neglect was excusable. Counsel offers no explanation for his failure to act in the case, other than to say that he did not receive any notices from the Clerk of the Court. "This imbroglio has arisen because no notice was received by the plaintiffs' counsel," Laner states in his Suggestions. The closest Laner comes to offering any explanation for his neglect is the statement in his Affidavit that, "[u]pon awareness of the facts in this case, I have attempted to identify and rectify problems in my law firm's electronic filing system." Based on this statement, the Court can surmise that Laner must have had some sort of computer system problem in his office, but surmise is all the Court can do. Even assuming, *arguendo*, that such was the case, there is still no explanation as to why Laner did not ever inquire of the Clerk as to the reason he had not received a summons or notice of trial to serve on the Debtor or why he did absolutely nothing in the case for nearly five full months.

"It is well settled that a party has an independent obligation to monitor developments in a case." *United States of America v. Henry Brothers Partnership (In re Henry Brothers Partnership)*, 214 B.R. 192, 196 (8th Cir. BAP 1997). An attorney must monitor the docket "to advise himself when the court enters an order against which he wishes to protest." *Mennen Co. v. Gillette Co.*, 719 F.2d 568, 570 (2nd Cir. 1983). "An attorney has a clear obligation to move his client's case forward while keeping his client informed of the state of the court proceedings." *Bardney v. United States of America*, 959 F.Supp. 515, 523 (N.D. Ill. 1997). "An attorney's negligent mistake, evincing a lack of due care, is not a proper ground for relief under Rule 60(b)." *Rodgers v. Wood*, 910 F.2d 444, 449 (7th Cir. 1990). Laner does not allege that the Clerk of the Court failed to give him notice of the various orders entered, and the Court expressly finds that the Clerk, did, in fact, give Laner electronic notice of all entries on the docket at the

³ Laner's lack of attentiveness to this case stands in stark contrast to the conduct of Debtor's counsel. Even though the instant Motion had not been filed with the Court, counsel for the Debtor filed (electronically) a Response to the Motion within 10 days of receiving a copy of the Motion in the mail.

electronic mail address which Laner had registered with the Court when he obtained his ECF login and password. Even if the Clerk had failed to give Laner notice of any of the docket entries, that would not be sufficient grounds to support a finding of excusable neglect. *Mennen*, 719 F.2d at 570. *See also Delaney v. Alexander (In re Delaney)*, 29 F.3d 516, 518 (9th Cir. 1994).

Turning to the other factors noted by the *Pioneer Investment* Court, the Court finds that the equities weigh in favor of the Debtor in this case. As noted above, one of the factors that should be considered in ruling on the instant Motion is whether granting the relief requested would be prejudicial to the other party – in this case, the Debtor. Plaintiffs’ counsel argues that, because the case has been dismissed “in its infancy,” no prejudice will result to the Debtor by reinstating the Complaint. To the contrary, it would clearly be prejudicial to the Debtor to reinstate the Complaint, for by doing so the Debtor would be exposed to a possible nondischargeable judgment of more than \$36,000, and would be compelled to incur substantial attorneys’ fees in defending against the action even if he is successful in avoiding an adverse judgment. Furthermore, the Debtor would be deprived of the certainty and finality of the discharge in bankruptcy which was entered on October 9, 2002.⁴

Another factor for consideration is the length of the delay and its potential impact on judicial proceedings. As previously noted, Plaintiffs’ counsel did absolutely nothing in the Adversary Proceeding for nearly five months, and then he took action only in response to adverse rulings. Counsel has done nothing affirmatively to move the Adversary Proceeding along. In bankruptcy, where things tend to move much more quickly than in other civil proceedings, a delay of five months can be significant. In this case, reinstating the Plaintiffs’ Complaint would deprive the Debtor of the full discharge that he has been granted and would further delay his opportunity to obtain a “fresh start,” as envisioned by Congress in enacting the Bankruptcy Code. And, while the impact on judicial proceedings would not be great, reinstating the Complaint

⁴ It is worth noting that Laner moved on October 24, 2002, to have the Debtor’s discharge set aside in the main case on grounds that the Plaintiffs had been deprived of an opportunity to present their case to contest the discharge. That motion was denied on November 20, 2002. Once again, we are left to wonder why Laner waited until January 24, 2003 – more than two months – to file the instant Motion in the Adversary Proceeding.

would, quite obviously, require substantial additional judicial resources and time at a time when this Court's docket is full.

The third factor enumerated above for consideration is the reason for the delay, including whether it was within the reasonable control of the movant. In this case, the Court has, quite frankly, been provided with no real reason for counsel's delay in moving this case forward, other than the statement that he did not receive notices from the Clerk. At one point, counsel states that he has attempted to "identify and rectify problems" in his law firm's electronic filing system; at another point, he refers to the problems as "a computer-related miscommunication," whatever that might be. The Court does not know what happened with respect to the attorney's computer system, but the one thing that is crystal clear is that – whatever the problem – it was exclusively within the control of Plaintiffs' counsel to remedy.⁵ It was not the Debtor's fault or the Court's fault that Laner had a computer-related problem in his office, and it would not be within their power to correct any such problem.

The last factor for consideration is whether the movant has acted in good faith. While this Court has no reason to believe that counsel has acted with any malicious intent, counsel's failure to remedy on a timely basis the omissions and failings in this case demonstrates that counsel has acted in less than good faith. *Envisionet Computer Services Inc. v. ECS Funding LLC*, 288 B.R. 163, 166 (D. Me. 2002).

Counsel for the Plaintiffs correctly asserts that courts favor the disposition of matters on the merits, and that the Plaintiffs have raised serious questions about the entitlement of the Debtor to discharge of debts that might be owing to the Plaintiffs. However, counsel's lack of attentiveness to this case runs counter to this argument. If the Plaintiffs and counsel believed in the justice of their cause, why were they not more diligent in pursuing the action? Why was no inquiry made to the Clerk when the summons and notice of trial were not timely received by counsel? Why did it take counsel almost fourteen weeks to file the instant Motion to set aside

⁵ It is curious that Laner has continued to file pleadings in this case in paper form, rather than electronically, as required by this Court's General Order and Rules. Even the instant Motion and other pleadings were filed on January 24, 2003, in paper. This suggests that Laner, inexplicably, still has not rectified the computer problems in his office.

the earlier Order of Dismissal? It is, indeed, regrettable that the Plaintiffs may very well suffer the consequences of the dismissal of their Complaint, but the Courts have long held that clients are to be held accountable for the acts and omissions of their attorneys. *See Link v. Wabash R. Co.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962) (“Petitioner voluntarily chose this attorney as his representative...and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation...”), and *Pioneer Investment*, 507 U.S. at 396-97, 113 S.Ct. at 1499 (“[C]lients must be held accountable for the acts and omissions of their attorneys.”).

In summary, it is the movant’s burden to show that excusable neglect exists. This the Plaintiffs have utterly failed to do. Taking into account all of the circumstances surrounding the failure of counsel for the Plaintiffs to act in this case – as presented to the Court in the instant Motion, the Suggestions in Support, and counsel’s Affidavit – and taking into account all equitable considerations, it is the Court’s firm opinion that the Motion should be denied.

Therefore, it is

ORDERED that the Motion (Document # 7) filed by Chicago Title Insurance Company and Donald E. Lovett and Sandra J. Lovett, asking the Court to set aside the Court’s previous Order dismissing the Plaintiffs’ Complaint, be and is hereby DENIED.

SO ORDERED this 18th day of March, 2003.

/s/ Jerry W. Venters
United States Bankruptcy Judge

A copy of the foregoing mailed electronically or conventionally to:
J. Kevin Checkett
Joel B. Laner