IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

DALE C. FAIR,

Debtor.

Case No. 05-11340-M
(Chapter 7)

ORDER DENYING DEBTOR'S MOTION TO VACATE JUDGMENT

THIS MATTER comes before the Court pursuant to the Motion to Vacate Judgment and Brief in Support (the "Motion to Vacate") filed by Dale C. Fair, Debtor herein ("Debtor"). In the Motion, Debtor asks the Court to vacate the order entered dismissing this Chapter 7 case. Upon review, the Court finds the position taken by the Debtor to be devoid of merit and denies the Motion to Vacate. The following findings of fact and conclusions of law are made pursuant to Federal Rule of Civil Procedure 52 and Federal Rule of Bankruptcy Procedure 7052, made applicable to this contested matter by Federal Rule of Bankruptcy Procedure 9014.

Jurisdiction

The Court has jurisdiction over this bankruptcy case pursuant to 28 U.S.C.A. § 1334(b).[1] Reference to the Court of this contested matter is proper pursuant to 28 U.S.C.A. § 157(a). Issues relating to the dismissal of bankruptcy cases are core proceedings as contemplated by 28 U.S.C.A. § 157(b)(2)(A).

Findings of Fact

The following facts are not in dispute and may be gleaned from the record. Debtor filed a

[1] Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq*. (West 2005). All other references to federal statutes and rules are also to West 2005 publications.

petition for relief under Chapter 7 of the Bankruptcy Code on March 11, 2005.[2] At all times relevant hereto, Debtor has been represented by Joel A. LaCourse ("Mr. LaCourse"), an attorney with an office in Tulsa, Oklahoma. On June 14, 2005, the United States Trustee ("UST") filed a motion to dismiss (the "Motion to Dismiss") this bankruptcy case under § 707(b).[3] The UST utilized the "notice of opportunity for hearing" procedure outlined in the local rules of this Court.[4] On that same date, notice of the Motion to Dismiss was served upon the Debtor by first class United States mail, postage prepaid, and upon Mr. LaCourse pursuant to the Court's Case Management/Electronic Case Filing system. Mr. LaCourse acknowledges receipt of the Motion to Dismiss, and does not allege that the UST failed to serve a copy of said motion upon the Debtor.

The deadline to object to the Motion to Dismiss fell on July 5, 2005. Neither Debtor nor Mr. LaCourse filed any manner of response to the Motion to Dismiss, nor did they seek an extension of time in which to respond to the Motion to Dismiss. On August 16, 2005, the UST filed its request for the entry of an order granting the Motion to Dismiss.[5] The order granting the Motion to Dismiss

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[2] *Docket No. 1.*

[3] *See Docket No. 20.* Section 707(b) provides that

> After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of a party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

§ 707(b).

[4] *See* Bankr. N.D. Okla. LR 9013.

[5] *See Docket No. 24.*

(the "Dismissal Order") was entered on August 19, 2005.[6]

On August 29, 2005, Debtor filed the Motion to Vacate. In the Motion, Mr. LaCourse alleges that he received a copy of the Motion to Dismiss and forwarded the same to his client. Mr. LaCourse also alleges that at all times from and after June 14, 2005, "Debtor was out of state and only returned [to Oklahoma] in late August."[7] As a result of Debtor's absence, Mr. LaCourse contends that he was unable to formulate a response to the Motion to Dismiss. Mr. LaCourse also alleges that the Debtor, due to his absence from the state, lacked actual notice of the Motion to Dismiss and that the lack of actual notice constitutes grounds for the Court to vacate the Dismissal Order.

To the extent the "Conclusions of Law" contain any items which should more appropriately be considered "Findings of Fact," they are incorporated herein by this reference.

Conclusions of Law

Debtor has premised the Motion to Vacate upon Federal Rule of Civil Procedure 60(b). Federal Rule of Civil Procedure 60(b) is not applicable to the Dismissal Order. Said rule applies only to a "final judgment, order, or proceeding."[8] The Dismissal Order was entered on August 19, 2005. The Motion to Vacate was filed on August 29, 2005, within the time frame for an appeal of the Dismissal Order.[9] Accordingly, at the time the Motion was filed, the Dismissal Order did not constitute a final order of this Court.

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[6] *See Docket No. 25.*

[7] *Motion to Vacate* at 1.

[8] Fed. R. Civ. P. 60(b) (emphasis added).

[9] An appeal of a decision of a bankruptcy court must be taken "within 10 days of the date of the entry of the judgment, order, or decree appealed from." Fed. R. Bankr. P. 8002(a).

The Court will treat the Motion to Vacate as a motion to alter or amend a judgment. Such motions are governed by Federal Rule of Civil Procedure 59, made applicable in bankruptcy cases by Bankruptcy Rule 9023. That section allows for the granting of a new trial or the amendment of a judgment "for any of the reasons for which rehearings have heretofore been granted in suits in equity in courts of the United States."[10] The granting of a motion to alter or amend a judgment is an extraordinary remedy. There are only limited grounds that allow for alteration or amendment of a judgment. There are three principal grounds which justify granting a Rule 59 motion: (1) an intervening change in the controlling law, (2) availability of new or previously undiscoverable evidence, or (3) clear error of law or fact to prevent manifest injustice.[11] Debtor relies upon none of these grounds; instead, he argues that his failure to respond to the Motion to Dismiss is a form of "excusable neglect," as that term is found in Bankruptcy Rule 9006(b)(1).[12] Debtor is effectively

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[10] Fed. R. Civ. Proc. 59(a).

[11] *See Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 944 (10th Cir. 1995)*; see also O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 223*, 963 F.Supp. 1000, 1015 (D. Kan. 1997) (citing *United States v. One Parcel Property*, No. 91-2398-GTV, 1993 WL 289198, at *1 (D. Kan. July 27, 1993)).

[12] Said rule provides that

> Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. P. 9006(b)(1).

asking for a two month extension of time to respond to the Motion to Dismiss due to his failure to keep himself informed as to the status of his bankruptcy case.

The seminal case on the concept of "excusable neglect" is *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*.[13] In *Pioneer*, the Supreme Court stated that excusable neglect is "a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant."[14] The Supreme Court concluded "that the determination is … an equitable one, taking account of all relevant circumstances."[15] Factors specifically enumerated include: (1) the danger of prejudice to opposing parties; (2) length of delay in judicial proceedings and its impact; (3) the reason for the delay, including whether it was in the control of the late-filer; and (4) whether the late-filer acted in good faith.[16] That being said, the Court is aware of no decisions which have held that a debtor's failure to keep himself apprised of developments in his bankruptcy case constitutes excusable neglect. At least one decision has reached the opposite conclusion.[17] Creditors who have made such an argument have been routinely rebuffed by the courts.[18] Attorneys who have argued that the press of other business constitutes

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[13] 507 U.S. 380 (1993) (hereafter "*Pioneer*").

[14] *Id.*, at 392 (footnote omitted).

[15] *Id.* at 395 (footnote omitted).

[16] *Id.* (citing *In re Pioneer Inv. Servs. Co.*, 943 F.2d 673, 677(6th Cir. 1991)).

[17] *See In re Neill*, 158 B.R. 93, 96-97 (Bankr. N.D. Ohio 1993) ("[T]he delay was within the Debtor's reasonable control. Debtor knew that he had a bankruptcy case pending in this Court and could have communicated with his attorney periodically to determine the status of the case.").

[18] *See, e.g., In re Nutri*Bevco, Inc.*, 117 B.R. 771, 786 (Bankr. S.D.N.Y. 1990) (creditor failed to file claim due to absence from jurisdiction during three month vacation); *In re*

excusable neglect have routinely gone down to defeat.[19]

Debtor argues that his failure to become aware of the Motion to Dismiss constitutes excusable neglect, and is cause to vacate the Dismissal Order. The Court disagrees. It is incumbent upon the Debtor to keep abreast of the events taking place in his bankruptcy case. The fact that he chose not to do so does not constitute excusable neglect. If it did, all any debtor would have to do in order to obtain a second bite at the apple would be to refuse to open his mail or communicate with counsel and then contend, "I didn't know what was going on." Such a rule would invite abuse. If Debtor chooses to not check his mail or communicate with counsel, he does so at his peril.

There is no argument that the UST failed to properly serve Debtor or Mr. LaCourse with the Motion to Dismiss. There is no contention that the local rules of this Court were not followed. The Court finds that the Debtor's failure to keep himself apprised of developments in his bankruptcy case does not constitute excusable neglect.

For the reasons set forth above,

Franklina, 29 B.R. 983, 986 (Bankr. E.D. Mich. 1983) (creditor's absence from jurisdiction did not constitute "excusable neglect" for purposes of late filing of dischargeability complaint).

[19] *See, e.g., Schmidt v. Boggs (In re Boggs)*, 246 B.R. 265, 268 (6th Cir. BAP 2000) ("Where counsel have attempted to convince courts that deadlines missed through mistakes made by office staff or by other pressures associated with the operation of a legal practice were the result of excusable neglect, they have been soundly rebuffed."); *In re Mizisin*, 165 B.R. 834, 835 (Bankr. N.D. Ohio 1994) ("Misunderstanding of the Bankruptcy Code and Rules and heavy workload of counsel do not constitute excusable neglect.") (citations omitted); *Wittman v. Toll (In re Cordry),* 149 B.R. 970, 977 (D. Kan. 1993) (and cases cited therein) ("Consistently, courts have held that an attorney's preoccupation or involvement in other cases or litigation does not constitute excusable neglect."); *In re GF Corp.*, 127 B.R. 382, 383 (Bankr. N.D. Ohio 1991) ("[C]ourts have specifically held that an attorney's preoccupation with other litigation cannot constitute excusable neglect.") (citations omitted); *In re Snow*, 23 B.R. 655, 657 (Bankr. E.D. Cal. 1982) ("The mere difficulty with office help, inadvertence, and the press of other matters are insufficient to constitute excusable neglect.") (citation omitted).

IT IS HEREBY ORDERED that Motion to Vacate Judgment and Brief in Support filed by Dale C. Fair, Debtor herein, be, and the same hereby is, denied.

Dated this 2nd day of September, 2005.

BY THE COURT:

TERRENCE L. MICHAEL, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

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