

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
ROBERT CERVANTES,) CASE NO. 04-62780 JPK
) Chapter 13
Debtor.)

ORDER REGARDING MOTION TO SET ASIDE DISMISSAL
ORDER ["MOTION"]

The debtor, by counsel, filed the above-designated Motion on July 21, 2006, seeking to set aside an order of dismissal of the debtor's case entered on June 15, 2006. The legal authority upon which the Motion is premised is not stated in the Motion. Presumably, the Motion was filed pursuant to Fed.R.Bankr.P. 9024, but that is the Court's assumption because that would be the proper procedural vehicle by which the relief requested by the Motion would be brought before the Court. However, it is not the Court's function to guess at the legal basis for a motion which seeks relief from a final order. Additionally, the Motion is not accompanied by a separate supporting brief, in contravention of N.D.Ind.L.B.R. B-9023-1. Finally, there is no authorization in the rules of the United States Bankruptcy Court for the Northern District of Indiana for the utilization of a "drop dead" procedure with respect to motions of this nature.

The Court is aware that it has not previously diligently enforced the provisions of N.D.Ind.L.B.R. B-9023-1(a) with respect to motions of this nature, and that it has not specifically enforced what should be a sound litigation practice of designating in a motion of this nature the statute and/or rule upon which the requested relief is premised. That lack of enforcement by the Court has led to incredibly sloppy practice in relation to motions of this nature presented to the Court. The problems associated with this practice are several. First, some motions of this nature are filed within the 10-day period immediately following the entry of an order of dismissal. Without designation of the basis for the requested relief, a document so filed might be construed to be a motion under Fed.R.Bankr.P. 9023, under Fed.R.Bankr.P. 9024, or

perhaps even a notice of appeal under Fed.R.Bankr.P. 8001(a). Different procedures and legal principles apply to each one of those totally separate procedural devices.

Secondly, most of the motions of the nature of that before the Court now do not focus on the provisions of Fed.R.Civ.P. 60(b)(1). Rather, most of these motions are based essentially upon an assertion that "I didn't do it in time, but after the order of dismissal was entered, I was able to do it, and I shouldn't be punished for being late". That assertion does not provide a legal basis for relief under Fed.R.Civ.P. 60(b)(1). The function of the brief required by N.D.Ind.L.B.R. B-9023-1(a) is to provide the Court with the movant's legal authorities in relation to the requested relief, **and to address the factual circumstances of failure to perform as required under the legal parameters of Rule 60(b)(1)**, and to require the movant to provide the Court with the legal and factual basis for determining the motion in advance of the Court's conducting of a hearing on the motion. In a related context, because the brief is filed of record in the case, any creditor or party-in-interest may view the contentions of the movant in advance of the hearing, and thus make an intelligent decision as to whether or not the reviewing creditor or party-in-interest should appear at the hearing in opposition to the motion.

Finally, litigants who have appeared before the author of this order have surely noted that a hearing is always set on motions of this nature; that the hearing is noticed to all creditors and parties-in-interest; and that the Court deems the "drop dead" procedure sometimes employed with respect to motions of this nature to be entirely superfluous. In the context of Fed.R.Bankr.P. 9023-1(c), this Court exercises its discretion under Fed.R.Bankr.P. 7007-2(c) to always schedule a motion of this nature for hearing.

Based upon the foregoing, the Court finds that the above-designated Motion should be denied, without prejudice.

IT IS ORDERED that the Motion is denied, without prejudice to the filing of a subsequent motion seeking the same or similar relief in accordance with applicable law and

rules.

Dated at Hammond, Indiana on August 31, 2006.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor
Trustee, US Trustee