

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN RE: CASE NO. 05-14396 )  
 )  
PAUL RICHARD BIRCHMAN II )  
 )  
Debtor )  
 )  
 )  
YVETTE GAFF KLEVEN )  
 )  
Plaintiff )  
 )  
vs. ) PROC. NO. 06-1413  
 )  
PAUL RICHARD BIRCHMAN II )  
 )  
Defendant )

**DECISION AND ORDER**  
**DENYING RELIEF FROM JUDGMENT**

At Fort Wayne, Indiana, on May 21, 2007.

The debtor's discharge was revoked by a default judgment entered on December 15, 2006. Now, five months later, the debtor has asked the court for relief from that judgment. This request, which the court is construing as a motion filed pursuant to Rule 60(b), Fed. R. Bankr. P. Rule 9024, offers a variety of explanations for why the debtor did not respond to the Trustee's complaint and why the judgment against him should be vacated, including: the failure of the attorney who represented him in the underlying bankruptcy to communicate with the debtor or respond to his inquiries, the destruction of the mailbox the debtor used, with the result that the postal service held the mail rather than delivering it, medical problems suffered by both the debtor and members of his family, and the debtor's failure to understand why what he has done should result in the loss of his discharge. The remainder of the submission complains about the consequences of the discharge

revocation which, not surprisingly, involve creditors taking steps to collect the amounts due them.

The motion is premised upon Rule 60(b) of the Federal Rules of Civil Procedure and apparently Rule 60(b)(1) which authorizes relief from a judgement due to a mistake, inadvertence, surprise or excusable neglect. The court has wide discretion in deciding motions under Rule 60(b)(1). Zuelzke Tool & Engineering Co. v. Anderson Die Castings, Inc., 925 F.2d 226, 228-29 (7th Cir. 1991). To begin with, the motion must be filed within a reasonable time. Then, where the judgment has been entered by default, the moving party has the burden of showing:

- 1) good cause for the default;
- 2) quick action to correct the default, and;
- 3) a meritorious defense. Zuelzke, 925 F.2d at 229. See also, Nelson v. City Colleges of Chicago, 962 F.2d 754, 755-56 (7th Cir. 1992).

All of these requirements must be met or the motion may be denied. Pretzel & Stouffer v. Imperial Adjusters, Inc., 28 F.3d 42, 46-47 (7th Cir. 1994). The debtor fails to satisfy any of them.

The motion was not filed within a reasonable time. Debtor's discharge was denied on December 15, 2006 and the underlying bankruptcy case was closed on January 23, 2007. The debtor was served with both a copy of the judgment and a separate notice of its entry by first class mail. Furthermore, both he and the attorney who represented him in the underlying bankruptcy case were served with a copy of the altogether separate notice that was served upon all debtor's creditors advising them that the discharge had been revoked: the debtor was served by first class mail and his counsel was served electronically through the court's ECF system. Given the importance of the discharge to a bankruptcy debtor one would expect that its loss would be addressed very promptly. Yet, the debtor waited five months before doing so and has apparently only done so now because creditors have begun to enforce the rights they possess as a consequence of the judgment. The only

explanation for the delay consists of various health problems that began in late December and then the troubles with the mailbox. While the court can appreciate that the health problems in the debtor's family were distracting, they do not justify five months of complete inactivity. As for the problems with the mailbox, why the debtor could not and did not collect his mail at the post office are questions left unanswered.

The request does not demonstrate good cause for the default. To do so, the debtor "must show a good faith reason for failing to appear, 'meaning that we will grant relief only where the actions leading to the default were not willful, careless, or negligent.'" Swaim v. Moltan Co., 73 F.3d 711, 721 (7th Cir.1996) (quoting Johnson v. Gudmundsson, 35 F.3d 1104, 1117 (7th Cir. 1994)). Inattentiveness to litigation is not excusable and missing a deadline because of slumber can be fatal, Matter of Plunkett, 82 F.3d 738, 742 (7th Cir. 1996); yet, that is all the debtor appears to offer here. Both he and the attorney who represented him in the underlying bankruptcy case were properly served with the summons and complaint, but nothing was done to respond to it. The only explanations the debtor offers for this lack of action are vague complaints about his health and to criticize his attorney's failure to communicate with him. Neither explanation is sufficient. Nothing has been said about the debtor's various medical problems that would suggest why he could not or did not take the relatively simple step of trying to answer the trustee's relatively simple complaint. As for debtor's complaints about his attorney failing to communicate with or respond to him, that does not matter. If the actions of debtor's counsel are the true cause for the loss of the debtor's discharge, that "may be a good reason to recover from the lawyer but [it] does not justify prolonging litigation against the original adversary." U.S. v West Grand Avenue, 15 F.3d 632, 633 (7th Cir. 1994). See also, In re Saylor, 339 B.R. 190, 193 (Bankr. N.D. Ind. 2006).

The debtor has not demonstrated a meritorious defense to the trustee's claim. The action was based upon the debtor's failure to comply with the court's order directing the debtor to turnover to the trustee copies of his 2004 state and federal tax returns, tax refunds and information concerning accounts receivable, invoices and contracts. That order was entered on July 31, 2006, after both the debtor and his attorney had been given notice of the trustee's motion and at least twenty days to file any objections to it, and no objections were ever filed. As best the court can tell, the debtor does not deny failing to comply with the court's order but tries to justify that non-compliance by contending he did not file and was not required to file tax returns for 2004. Yet, if true, that should have prompted the debtor to object to the trustee's original motion. If there is a reason – any reason – a debtor should not deliver property or financial records to the trustee, see, 11 U.S.C. §§ 521(a)(4), 541(a), the debtor must file an objection to a motion for turnover. A debtor cannot ignore such a motion, allow it to be granted, and then, when called to task for failing to comply with the court's order, advance an argument that could have been raised in opposition to the original request. United States v. Rylander, 460 U.S. 752, 756-57, 103 S.Ct. 1548, 1552 (1983); Maggio v. Zeitz, 333 U.S. 56, 69, 68 S.Ct. 401, 408 (1948). Once the court's order "has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place." Maggio, 33 U.S. at 69, 68 S.Ct. at 1552. That is precisely what the debtor has attempted to do by arguing that he never filed a 2004 tax return and therefore cannot produce one. Even if this argument could be successful, it is incomplete. The 2004 tax return was only one of several things the debtor was required to deliver to the trustee, and the debtor has not come forward with any explanation for why he has failed to deliver the information concerning accounts receivable, invoices and contracts.

As for the final requirement, the court need only note that the debtor has not yet tendered an

answer to the trustee's complaint and, therefore, is still in default. See, Tolliver v. Northrop Corp., 786 F.2d 316, 319 (7th Cir. 1986).

The debtor/defendant's motion for relief from judgment is DENIED.

SO ORDERED.

/s/ Robert E. Grant  
Judge, United States Bankruptcy Court