

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN THE MATTER OF: )  
 )  
ROBERT L. THIBOS ) CASE NO. 08-10128  
LORRAINE I. THIBOS )  
 )  
Debtors )

**DECISION AND ORDER**  
**DENYING DEBTORS' MOTION TO RECONSIDER**

At Fort Wayne, Indiana, on May 30, 2008.

This chapter 13 case was dismissed on April 16, 2008, following a hearing held on confirmation of the debtors' proposed plan and the trustee's objections thereto. On April 17, 2008, the debtors filed a motion to reconsider the order of dismissal. It is that motion which is presently before the court. The motion is addressed to the court's discretion, In re Prince, 85 F.3d 314, 324 (7th Cir.1996), and may be considered without a hearing and without requiring a response. See, Dunn v. Truck World, Inc., 929 F.2d 311, 313 (7th Cir. 1991). See also, N.D. Ind. L.B.R. B-9023-1(b).

This case was dismissed because by the time the confirmation hearing was held – April 15, 2008 – the debtors had failed to provide the trustee with copies of bank statements and evidence that they had filed their 2003 federal income tax returns. Debtors are required to provide trustees with this type of information prior to the 341 meeting, by both the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. See e.g., 11 U.S.C. §§ 521(e)(2), 1308, Fed. R. Bankr. P. Interim Rule 4002(b). In this instance, that meant they were supposed to have done so a week before March 13, 2008. The court's notice of the 341 meeting, which was issued on January 22, 2008, reminded the debtors of their duty in this regard. Furthermore, compliance is of sufficient importance to

evaluating the confirmability of a proposed plan and to the proper progress of the case that the notice of the confirmation hearing specifically advised all concerned – including the debtors and their counsel – that:

If confirmation is denied because of the debtor(s)' failure to fulfill duties imposed by the Bankruptcy Code and rules of procedure, such as the duty to provide the trustee with required information or documentation or to commence making the required plan payments, the court may dismiss the case without further notice or hearing. Order Fixing Time to Object to Confirmation of Chapter 13 Plan and Notice of Hearing, ¶ 4, dated Jan. 23, 2008.<sup>1</sup>

Two weeks prior to the scheduled confirmation hearing,<sup>2</sup> the Chapter 13 trustee filed an objection to confirmation, based, in part, upon the fact that the debtors had failed to provide him with the required bank statements and evidence of filing tax returns. See, Trustee's Objection to Confirmation, ¶ 13, filed Apr. 1, 2008. By the time of the confirmation hearing the debtors still had not provided the trustee with the required information. Accordingly, the court did what it said it would: it denied confirmation and dismissed the case.

The debtors' motion is based upon Rule 60(b)(1) of the Federal Rules of Civil Procedure. They argue that the order dismissing the case should be vacated and the case should be reinstated because their failure to provide the trustee with the required information was the product of excusable neglect. This is so, they contend, because, although the trustee reminded the debtors at the 341 meeting that they had not yet provided the required information, the local attorney debtor's counsel arranged to appear at that meeting advised the debtors that the documentation would be

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<sup>1</sup>This paragraph has been included in all of the orders scheduling the initial confirmation hearing issued in this division since mid-August, 2007.

<sup>2</sup>In this division, objections to confirmation are due two weeks prior to the confirmation hearing in order to give debtors and objectors a better opportunity to discuss any objections and, if possible, resolve them prior to the hearing.

provided by their attorney, and somehow this message was never relayed to debtor's counsel. Contrary to the advice given by local counsel, where required information has not been delivered to the trustee prior to the 341 meeting, it is counsel's standard practice to tell his clients that it is their responsibility to provide it to the trustee, as counsel may not have the required documents. It was this miscommunication between the debtors, their attorney, and local counsel that resulted in the trustee not receiving the information in question. See, Motion to Reconsider, filed April 17, 2008, ¶¶ 2-5, 8. Since the information has now been provided – it is attached as an exhibit to the motion – the debtors argue that, although the dismissal was without prejudice, the burdens imposed upon them by requiring them to file a second case, and the additional resources the court, the trustee, and creditors would need to devote to such a filing, outweigh whatever burdens might come from their failure to provide the required information and the resulting delay in considering confirmation of their proposed plan.

Determinations of excusable neglect are, at their core, equitable ones, taking into account all the relevant circumstances surrounding a party's omission including, among other things, the length of the delay and the reasons for it, whether that delay was within the reasonable control of the movant and its impact upon the proceedings. Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 395, 113 S.Ct. 1489, 1498 (1993). As such, it is an issue addressed to the court's discretion. Lee v. Village of River Forest, 936 F.2d 976, 979 (7th Cir. 1991); Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat, 902 F.2d 1275, 1277 (7th Cir. 1990).

We should begin by recognizing that the need to provide the information in question is not unique to this particular case. It is not a peculiarity of the case trustee, the court in the Fort Wayne,

or of the Northern District of Indiana. It is a duty imposed upon debtors by the Bankruptcy Code and the applicable rules of procedure. See e.g., 11 U.S.C. §§ 521(e)(2), 1308, Fed. R. Bankr. P. Interim Rule 4002(b). Consequently, before they ever file their petitions, all debtors know – and to the extent they do not they certainly should know – what they are supposed to do and when they are supposed to do it. Furthermore, fulfilling this duty should not be particularly onerous, especially given the advance notice contained in the statute and the rules. Even when we recognize that bankruptcy debtors may not be known for their record keeping prowess, they will need to do little more than keep the first bank statements they receive after filing the petition and they can obtain copies of any required tax returns they may not have kept, or transcripts of those returns, from the IRS. To the extent the trustee is simply looking for evidence that certain tax returns have been filed, see, 11 U.S.C. §1308, if the debtors do not have copies of those returns or tax transcripts, an affidavit that the returns have been filed will often satisfy the trustee. Thus, fulfilling these obligations simply takes a little forethought, a little planning and a little attention to detail.

The argument that the debtors' failure to provide the trustee with the required information constitutes excusable neglect is unavailing. It is largely based upon miscommunication between the debtors, their bankruptcy counsel and the local attorney debtors' counsel sent to the 341 meeting in his stead. Assuming that such miscommunication could qualify as excusable neglect,<sup>3</sup> it only explains why the debtors did not deliver that information to the trustee in the days following the 341

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<sup>3</sup>In many respects, any confusion that occurred because of the indirect and incomplete, three-way communication between the debtors and the two attorneys resembles internal office problems which do not constitute excusable neglect. Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 398, 113 S.Ct. 1489, 1499-1500 (1993). See also, Connecticut Nat. Mortg. Co. v. Brandstatter, 897 F.2d 883, 884-85 (7th Cir. 1990); United States v. Fraya, S.E., 170 F.R.D. 346, 349 (D. Puerto Rico 1997).

meeting. It does not explain why that information was not provided prior to the 341 meeting, as required by the Bankruptcy Code and rules of procedure. Neither does it explain why, when the trustee objected to confirmation two weeks later – thereby alerting both the debtors and their counsel that the required information still had not been produced – they apparently did nothing to correct the problem during the time leading up to the confirmation hearing.<sup>4</sup> Yet, despite this lack of activity, once the debtors realized the court was serious about the need to produce the information in question, they were readily able to provide it. It is unfortunate that the very clear requirements of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, the reminder contained in the notice of the meeting of creditors, and the warning in the court’s notice of the confirmation hearing did not lead them to that conclusion sooner, and that it took the dismissal of this case to persuade the debtors that the court was serious.

Ultimately, the debtors’ motion is really a plea for greater leniency in the enforcement of the obligations imposed by § 521(e)(2), § 1308, and Rule 4002(b), and the court will acknowledge that it would actually prefer such an approach. Unfortunately, it has already tried that approach and found it sorely lacking.

For almost two years following BAPCPA, the court took a forgiving attitude toward the failure to produce required information and documentation. When the trustee objected to confirmation because such information had not been forthcoming, if the problem had not been corrected by the time of the initial confirmation hearing, the court would continue the hearing for two to four weeks in order to give the debtor another opportunity to comply. As often as not, if the information was provided prior to the continued hearing, it was not delivered sufficiently before that

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<sup>4</sup>See footnote 2.

hearing to give the trustee a reasonable opportunity to review it – it was not unusual for it to be delivered in open court, after the case was called. This would necessitate yet another continuance so that the trustee could review information that was supposed to have been provided a week before the 341 meeting and substantially delayed consideration of confirmation. While this might have been a tolerable situation if it had affected only a small number of cases, that was not so. The court's lenient approach to the issue apparently taught debtors and their counsel that compliance was not a priority, and that the duty to provide information could be ignored without any meaningful consequence. As a result, the problem became increasingly common. The court was confronted with an unacceptable and growing number of cases that required two and three confirmation hearings just to reach the point each of them should have occupied at the very first hearing. Faced with the reality that its leniency had created more problems than it solved, this experience persuaded the court that if was going to have any hope of effectively managing its Chapter 13 docket a different approach was called for. That approach began months ago and is what led to the dismissal of the case.

The dismissal of this case was without prejudice. See, Rodriguez v. Washington, 1995 WL 593081 (N.D. Ill. 1995)(dismissal without prejudice gives no just cause to complain). The court has not deprived the debtors of the opportunity to discharge their debts in a future case or restricted their eligibility for further bankruptcy relief. They are free to file a second case at any time. While doing so may impose additional burdens upon them, their creditors and the court, the court is satisfied that those burdens – whether they be the need to file a motion to extend an otherwise temporary automatic stay, the preparation and filing of additional bankruptcy documents, paying a filing fee, or the scheduling, notices, and various proceedings necessarily associated with any bankruptcy case – do not outweigh the much greater burden placed upon the entire bankruptcy process by debtors

who do not take their responsibilities seriously enough and by the problems and delays that come from not meaningfully enforcing the debtor's duties. They are also burdens the debtors could have completely avoided if they had simply paid attention to the court's reminders and warnings.

The debtors' motion to reconsider the court's order of dismissal is DENIED.

SO ORDERED.

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