

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

IN RE:)
GEORGE JERRY CHILDRESS)
) BANKRUPTCY NO. 09-21610
)
Debtor)

MEMORANDUM OPINION
AND
ORDER

George Jerry Childress, a Pro Se Debtor (“Debtor”), on September 1, 2009, filed a “Motion to Stay” and a “Motion to Reconsider” the Memorandum Opinion and Order of this Court dated August 21, 2009, set out upon a separate document pursuant to Fed. R. Bk. P. 9021, and entered of record by the Clerk on the Docket on August 21, 2009 pursuant to Fed. R. Bk. P. 5003 (“Order”).

That Order denied the Debtor’s Motion to Stay filed by the Debtor Pro Se on August 17, 2009, which the Court construed as a Motion for the Continuance of the Stay pursuant to 11 U.S.C. §362(c)(3)(B), as being untimely in that the Debtor filed his Chapter 13 Petition on April 28, 2009, and §362(c)(3)(B) expressly requires that the hearing on any such motion must be filed and completed within thirty days of the Petition date. (“Order”). A Response to said Motion was filed by U. S. Bank, N.A. asserting that the Motion of the Debtor is without merit.

The Debtor did not file a separate request for oral argument as required by N. D. Ind. L.B.R. B-9023-1(C) and N.D. Ind. L.B.R. B-7007-2(b). Accordingly, the Debtor has waived any request for hearing and oral argument as to the Motion.¹

¹
N.D. Ind. L.B.R. B-9023-1 provides as follows:

Post Judgment Motions

(a) Any motion filed after the entry of a final judgment or order, whether filed pursuant to Fed. R. Bankr.

The Court would first note that the Federal Rules do not contemplate Motions for Reconsideration. In re Curry and Sorenson, Inc., 57 B.R. 824, 827 (9th Cir. BAP 1990). Motions for Reconsideration have traditionally been treated as Motions to Alter or Amend under Fed. R. Civ. P. 59 (e) if the Motion draws into question the correctness of the Trial Court's decision. Id. The Bankruptcy Court's power to reconsider prior Orders is controlled by Fed. R. Civ. P. 59, as made applicable by Fed. R. Bk. P. 9023, or Fed. R. Civ. P. 60, as made applicable by Fed. R. Bk. P. 9024. In re Leiter, 109 B.R. 922-924-25 (Bankr. N. D. Ind. 1990). (Citing Matter of Met-L-Wood Corp., 861 F2d 1012, 1018 (7th Cir. 1998)).

P. 9023 or Fed. R. Bankr. P. 9024, shall be accompanied by a separate supporting brief and any appropriate affidavits or other materials in support thereof. The failure to submit a supporting brief will be deemed a waiver of the opportunity to do so.

(b) Unless otherwise ordered by the court, no response to the motion is required.

(c) The provisions of N.D. Ind. L.B.R. B-7007-2 (oral argument on motions) apply to post judgment motions.

N.D. Ind. L.B.R. 7007-2 states as follows:

(a) Any motion filed within an adversary proceeding or a contested matter may be determined by the court without argument or hearing, following the expiration of the time for any response or reply provided for by these rules.

(b) A request for oral argument shall be filed separately and served along with any brief, response, or reply. The request shall specifically identify the purpose of the request and estimate the time reasonably required for any argument. The granting of any request for oral argument shall be discretionary with the court.

(c) The court may, on its own initiative, schedule any motion for oral argument or a hearing.

In addition, Fed. R. Bk. P. 9006(d) provides in part as follows:

When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 9023, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

Fed. R. Civ. P. 59(c), as made applicable by Fed. R. Bk. P. 9023 states as follows:

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by parties' written stipulation. The court may permit reply affidavits.

The Court must first characterize the Motion to Reconsider by the Debtor, as does not state if it is filed pursuant to Fed. R. Civ. P. 59 or Fed. R. Civ. P. 60. The Motion was filed on September 1, 2009. The Order was entered on August 21, 2009. Thus, the Motion was filed eleven days of the entry of the Order. The court in Mares v Busby, 34 F.3d 533, 535 (7th Cir. 1994), held that under which Rule the Motion falls turns on the time at which the Motion is served (now filed). If the Motion is filed within ten days of entry of the Order the Motion falls under Rule 59. If the Motion is filed over ten days it falls under Rule 60. (Citing, United States v. Deutsch, 981 F.2d 299, 300 (7th Cir. 1993)). Accordingly, the Court shall treat the Debtor's Motion to Reconsider as falling under Rule 60, as the Motion of the Debtor was filed on the eleventh day after the entry of the Order.²

The Motion by the Debtor alleges that the Court erred in denying his Motion to Continue the Stay, in that although there is nothing to indicate in the record of the Court that his Motion to Continue the Stay was physically received by, and filed with the Clerk of the Court, he asserts he did provide materials showing that the Motion was properly place in the U S. Mail addressed to the Court on May 21, 2009. The Debtor thus asserts that pursuant to the "Mailbox Rule", it is presumed that said Motion was timely filed with the Court, when properly place in the U. S. Mail. The Debtor cited the following case in support of his Motion: United States v. Ekong, 518 F3d 285 (5th Cir. 2007; Mulder v. Commissioners of Internal Service, 844 F.2d 208 (5th Cir. 1988); Lyle Cushion Co. v. McKendrick, 204 F.2d 609 (5th Cir. 1953); Custer v. Murphy Oil USA, Inc., 503 F.3d 415 (5th Cir 2007); and, Greyhound Lines, Inc., v. Rogers, 62 F.3d 730 (5th Cir. 1995). However, as stated by the Court in In

² The time to file a Motion pursuant to Fed. R. Civ. P. 59 does not begin to run until the Judgment or Order has been both set out on a Separate Document pursuant to Fed. R. Bk. P. 9021, and the Judgment or Order is entered on the Docket Sheet by the Clerk pursuant to Fed. R. Bk. P. 5003(a). Only at that point is the Order a final appealable order. Fed. R. Bk. P. 9021 is an adaption of Fed. R. Civ. P. 58. Fed. R. Civ. 5003(a) is an adaption of Fed. R. Civ. P. 79. It should be noted that Fed. R. Bk. P. 9021 states that the reference to Fed. R. Civ. P. 79 (a) should be read as a reference to Fed. R. Bk. P. 5003. Pursuant to Fed. R. Bk. P. 9021(a) a Judgment or Order is effective when entered pursuant to Fed. Bk. P. 5003(a). See Matter of Kilgus, 811 F.2d 1112, 1117 (7th Cir. 1987; Rosser v. Chrysler Corp., 864 F.2d 1299, 1305 (7th Cir. 1988).

re Henry Brothers Partnership, 214 B.R. 192 (8th Cir. BAP 1997):

A document is filed when it is delivered into the actual custody of the proper officer, a clerk, authorized deputy, or a judge. Unites States v Lombardo, 241 U.S. 73 36 S. Ct. 508, 60 L.Ed. 897 (1916); McIntosh v. Antonino, 71 F.3d 29 (1st Cir. 1955). To be filed, the document must be delivered and received, not merely sent thorough the United States mail. Chrysler Motors Corp. v. Schneiderman, 940 F.2d 911, 914 (3rd Cir. 1991); see generally 10 King, Collier on Bankruptcy, ¶¶5001.01, 5005.05 (15th Rev. Ed. Supp. 1997).

Id. 214 B.R. at 195. See also, Gilardi v. Schroeder, 833 F.2d 1226, 1233 (7th Cir. 1987) (a complaint is filed when it reaches the custody of the Clerk, even if it fails to conform with the formal requirements of local rules).

Federal Rule of Bankruptcy Procedure 9006 (e), TIME OF SERVICE, provides that service of process and service of any paper other than process or of notice by mail is complete on mailing. Federal Rule of Bankruptcy Procedure 5005(a)(1), FILING, provides that any paper required to be filed by the Bankruptcy Rules shall be filed with the clerk in the district where the case under the Code is pending. The Court in Chrysler Motor Corp. v. Schneiderman, 940 F2d 911 (3rd Cir. 1991), affirmed the decision of the District Court which held that there is no rebuttable presumption that a claim was received and filed when it has been timely and accurately mailed. The Court stated as follows:

On this appeal Chrysler points out that the Supreme Court held in Hagner v. United States, 285 U.S. 427, 430, 52 S. Ct. 417, 419, 76 L. Ed. 861 (1932), “that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed: and it urges that we apply that presumption here. Chrysler further contends it had no obligation physically to place the proof of claim in the appropriate file in the clerk’s office. Accordingly, inasmuch as the rebuttable presumption that the claim was received was not rebutted, the proof of claim, even if mislaid by the bankruptcy court, must be regarded as properly filed and we should accordingly reverse the district court.

* * * *

We are in full accord with the district court in its rejection of Chrysler’s rebuttable presumption contention for the reasons the court set fourth which we described above. We also point out that while Bankr. R. 5005(a) states that proofs of claims “shall be filed with the clerk,” Bank. R. 9006(e) provides that service of certain papers by mail

is deemed complete on mailing. See, In re Allegheny Int'l. Inc., 93 B.R. 910, 912 (Bankr. W.D. Pa. 1988). The reference to the use of the mails for service demonstrates that the framers of the rules knew how to provide for such use to complete a delivery and thus gives rise to an inference that filing within Bankr. R. 5005(a) means actual filing. Clearly, there is a sharp distinction between service of papers among parties, and the filing of papers with the court.

* * * *

We adhere to the Taylor [Taylor v. Freeland & Kronz, 938 F.2d 420 (3rd Cir. 1991)] approach. A mailing in itself is not a filing. If we adopted the rebuttable presumption rule we would greatly complicate bankruptcy administration, as it would be uncertain in many cases whether a scheduled creditor failed to file a proof of claim because of an oversight or because it was abandoning its claim. We also point out that a creditor can protect itself with minimal expense through the use of certified mail with a return receipt requested when filing a proof of claim or, if convenient, can provide for manual filing across the counter in the clerk's office. Furthermore, a rebuttable presumption rule would easily permit a creditor which failed to file a proof of claim to fabricate evidence, not easily disprovable, that it had been properly mailed.

Hagner v. United States, 285 U. S. 427, 52 S. Ct. 417, on which Chrysler relies, certainly does not compel a contrary result.

* * * *

[t]he statement by the Supreme Court that there is a presumption that a properly directed letter placed in a post office reached its destination in usual time and was actually received by the addressee, was made in a completely different context than that in this case. the Court was not concerned with a situation in which a proper mailing was the predicate for a claim that a document was filed as required by a rule of court.

Id. 940 F.2d at 913, 914-15 (footnotes omitted). See also In re Allegheny Int'l. Inc., 93 B.R. 910, 911-12 (Bankr. W. D. Pa. 1988) (Rejecting the "Mailbox Rule" as to the filing of proof of claims.)

The Court agrees with the conclusion reached by the Court in Schneideaman. There is a significant difference between when a paper is served on a party pursuant to Fed. R. Bk. P. 9006(e), and when a paper is filed with the Court pursuant to Fed. R. Bk. P. 5005(a). The "mailbox Rule" is not applicable when the paper is to be filed with the Court. The paper must be delivered to and be in the actual custody and possession of the Clerk to be filed.

The cases cited by the Debtor all support the "Mailbox Rule" and the Seventh Circuit has

expressly adopted that rule. See in re Longardner & Associates, Inc., 855 F.2d 455, 459-60 (7th Cir. 1988). However, all of the cases cited by the Debtor, as well as Longardner, are factually distinguishable from the facts in this case, and in Chrysler v. Schneiderman, Supra. They do not support his assertions that it is presumed that his Motion was filed with the Court when placed in the U.S. Mail. All of those cases, with the exception of Greyhound Lines, Inc. v. Rogers, 62 F.3d 730, involved an issue of whether a paper had been mailed by a party or another party when properly placed in the U. S. Mail—not whether a paper that had been properly mailed had been filed with a Court. In Greyhound, a case under Chapter 11, the issue was whether certain creditors received notice of claims bar date by U.S. Mail.

Rule 60(b) is not intended to correct errors of law made by the Court in the underlying decision which resulted in the final judgment. McKnight v. United States Steel Corp., 726 F.2d 333, 338 (7th Cir. 1985). A party “cannot avoid the time limits on filing an appeal by filing a rule 60(b)(1) motion challenging the district court’s legal rulings and then appealing from a denial of that motion.” Id. (quoting, Bank of California, N.A. v. Arthur Anderson & Co., 709 F.2d 1174, 1178 (7th Cir. 1983)). The appropriate way to seek review of alleged legal errors is by timely appeal; a 60(b) motion is not a substitute for an appeal or a means to enlarge indirectly the time for appeal; Id., Kagan v. Caterpillar Tractor, 795 F.2d 601, 606 (7th Cir. 1986). Therefore, Rule 60(b) cannot be invoked by the Debtor to attack any alleged error of law in the Order.

The next query is this, whether any relief from said Order is available to the Debtor under Rule 60(b). The Seventh Circuit has held that “[r]elief from a judgment under Rule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances.” United States v. One 1979 Rolls-Royce Comiche Convertible, 770 F.2d 713, 716 (7th Cir. 1985); C.K.S. Engineers, Inc., v. White Mountain Gypsum Company, 726 F.2d 1202, 1204 (7th Cir. 1983); Ben Sager Chemical International v. Targosz

& Co., 560 F.2d 805, 809 (7th Cir. 1977).

The Supreme Court's "excusable neglect" definition in Pioneer Investment Services Co., v. Brunswick Associates Limited Partnership, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993) is used in Rule 60(b) determinations. See Robb v. Norfolk & Western R. Co., 122 F.3d 354, 358-363 (7th Cir. 1997) (analyzing the broader meaning of excusable neglect after Pioneer). The Supreme Court in Pioneer held that inadvertence, ignorance of the Rules of Civil Procedure or mistake in construing those Rules do not usually constitute "excusable neglect". Pioneer, 113 S. Ct. at 1496. See also In re Food Barn Stores, Inc., 214 B.R. 197, 200-201 (8th Cir. BAP 1997) (collecting cases).

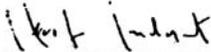
The Court having examined said Motion, its Order, and the Record, and being duly advised in the premises, finds that the facts as alleged by the Debtor in his Motion, even accepted as true, do not constitute mistake, inadvertence, surprise, or excusable neglect as required by Fed. R. Civ. P. 60(b). Because the Debtor is Pro se, the Court will liberally treat and construe any papers actually filed by him with the Clerk. However, the mistaken and erroneous assumption by the Debtor that a Motion is deemed filed with the Court when placed in the Mail, and the complete failure to actually file his Motion to Continue the Stay with the Clerk within the thirty day time limit, as expressly required by §362(c)(3)(B), which requires that a hearing on a Motion for Continuance of the Stay be held and completed within the thirty days of the Petition date, does not constitute excusable mistake or neglect pursuant to Rule 60(b).

The Court also takes judicial notice that the Debtor filed his Chapter 13 Petition on April 28, 2009. Even assuming arguendo that the Debtor's Motion was filed on May 21, 2009 when placed in the U.S. Mail, as asserted by him, the fact remains that the Motion was never physically received by the Clerk and thus could never be brought to the Court's attention in a timely manner. Section 362(c)(3)(B) expressly provides that the hearing on a Motion to continue the Stay, must be completed before the

expiration of the 30 day period, i.e. 30 days after the Chapter 13 Petition is filed. In this case, the 30th day was May 28, 2009. In that the Court was not made aware of the purported Motion the Debtor asserts was placed in the U. S. Mail on May 21, 2009 because it was never filed with the Clerk, it was not possible for the Court to conduct the required hearing within the 30 day period after proper Notice to the Trustee and all Creditors. It was the obligation of the Debtor to bring to the Court's attention that the hearing on his Motion had to be held within 30 days of the Petition date. The Debtor failed to so advise the Court. It is therefore,

ORDERED, that the Motion filed on September 1, 2009 by the Debtor to Reconsider the Court's Order dated August 21, 2009 should be and is hereby **DENIED**.

Dated: October 22, 2009



JUDGE, U. S. BANKRUPTCY COURT

Distribution
Debtor
Trustee
U. S. Trustee