

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
MICHAEL RAY SMITH and)	CASE NO. 06-31671 HCD
JADE MARIE SMITH,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
JACQUELINE SELLS HOMANN, TRUSTEE,)	
PLAINTIFF,)	
vs.)	PROC. NO. 08-3017
)	
MICHAEL RAY SMITH and)	
JADE MARIE SMITH,)	
DEFENDANTS.)	

ORDER

At South Bend, Indiana, on January 9, 2009.

Before the court is the Motion to Reconsider filed by Chapter 7 Trustee Jacqueline Sells Homann. It requests that the court modify its Order of October 3, 2008, so that dismissal of the adversary proceeding is without, rather than with, prejudice. For the reasons that follow, the court denies the Motion.

Background

In its Memorandum of Decision of July 21, 2008, the court denied the Trustee's Motion for Default Judgment on legal grounds. *See* R. 15. When the Clerk's Entry of Default was returned to the court as undelivered and undeliverable mail, the court found that service of process of that document on the defendants had not been completed. The court concluded that, because of the failed service of process, the court had no jurisdiction over the defendants and thus no authority to adjudicate that the defendants were in default. Therefore, the Clerk's Entry of Default was vacated and set aside and the Motion for Default Judgment was denied "without prejudice." *Id.* at 7. The court allowed the Trustee 30 days to present to the court evidence that service of process of the summons and Complaint had been effected upon the defendants. *See id.*

The court actually gave the Trustee more than 70 days to serve the defendants. However, the Trustee did not respond. Consequently, by Order of October 3, 2008, the court dismissed the adversary proceeding with prejudice on the ground that the Trustee had presented no evidence that the defendants were duly served the summons and Complaint and, therefore, that the court had no jurisdiction over the defendants. The adversary case was closed on October 31, 2008.

Without filing a motion to reopen, the Trustee filed a Motion to Reconsider on November 18, 2008. She asserted that the defendants neither complied with the court's orders nor advised it of their change of address, and that she was unable to locate the defendants. She argued that "not allowing the Trustee to proceed with an adversary proceeding to revoke their discharge would allow the debtor to get the benefit of the bankruptcy without having to comply with the rules and obligations set forth in the [B]ankruptcy [C]ode." R. 19 at 1-2. She requested that the court modify its October 3, 2008, Order to a dismissal *without prejudice* of the adversary proceeding. *See id.* at 2.

Discussion

Because the Trustee's Motion to Reconsider was filed more than ten days after entry of the court's Order, the court treats it as a motion for relief from the Order under Rule 60(b) of the Federal Rules of Civil Procedure.¹ *See Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800 (7th Cir. 2000); *Helm v. Resolution Trust Corp.*, 43 F.3d 1163, 1166-67 (7th Cir. 1995). Under that rule, made applicable in bankruptcy cases by Federal Rule of Bankruptcy Procedure 9024, "the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding" for six listed reasons.

The Trustee did not articulate a legal basis for reconsidering the court's Order; she made no reference to Rule 60(b)'s enumerated subsections. She did not claim there was mistake, excusable neglect, newly discovered evidence, or fraud, under Rule 60(b)(1) through (3). Nor did she assert that the judgment was void

¹ The defendant has not claimed that clerical mistakes were made. For that reason, Rule 60(a) is not applicable herein. The defendant's entitlement to relief must be proven under Rule 60(b).

or had been satisfied, pursuant to Rule 60(b)(4) or (5). The court therefore considered whether there was “any other reason justifying relief” under the catchall section, Rule 60(b)(6). See Fed. R. Bankr. P. 9024; Fed. R. Civ. P. 60(b)(6). “To justify relief under subsection (6), a party must show ‘extraordinary circumstances’ suggesting that the party is faultless in the delay.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 393, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993). The burden of showing those extraordinary circumstances is on the party seeking relief from the Order at issue. See *In re Czykoski*, 320 B.R. 385, 389 (Bankr. N.D. Ind. 2005).

The Trustee declined to demonstrate any exceptional circumstances or to justify the requested relief. She did not challenge the court’s determinations that its service of process of the Clerk’s Entry of Default had failed and that the defendants therefore had no notice of the entry of default. She did not seek reinstatement of the Clerk’s Entry of Default. Nor did she claim any error in the court’s reasoning that an entry of default under Rule 55(a) was a prerequisite to a default judgment under Rule 55(b). The court made clear that, when service of process was defective, the court had no jurisdiction over the defendants and no authority to adjudge that they were in default. It noted, as well, that defective service of a complaint may result in dismissal of an adversary proceeding. The Trustee did not dispute any of those clear, bedrock legal principles.

The court notes that it denied the Motion for Default Judgment explicitly *without prejudice* so that the Trustee could serve the defendants. Because the Trustee presented no evidence that the defendants were duly served the summons and Complaint, the court had no jurisdiction over those defendants. Consequently, in its Order of October 3, 2008, the court dismissed the adversary proceeding with prejudice.

The Trustee did not appeal the Order.² In her Motion to Reconsider, she did not address the court’s lack of jurisdiction or the procedural deficiencies that caused the lack of jurisdiction. Nor did she offer any reason for her failure to respond to the court’s ruling of July 21, 2008, or for her delay in filing her motion seeking

² The Trustee’s cursory argument that the defendants did not advise the court of their change of address, stated without legal support for the claim and raised for the first time in the Motion to Reconsider, has been waived. See *Publishers Res., Inc. v. Walker-Davis Publ’ns, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) (stating that motions to reconsider cannot introduce new evidence or tender new legal theories).

