

**Not Intended for Publication or Citation**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN THE MATTER OF: )  
 )  
LORNA GAIL WINSTON ) CASE NO. 09-11310  
 )  
 )  
Debtor )

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

At Fort Wayne, Indiana, on July 25, 2011

This chapter 13 case was dismissed on the debtor’s motion on June 15, 2011. Over one month later, on July 19, 2011, the debtor filed a motion asking the court to vacate that order and to reinstate the case. It is that motion which is presently before the court.

The debtor’s motion is based upon Rule 60(b)(1) of the Federal Rules of Civil Procedure. She argues that the order dismissing the case should be vacated and the case should be reinstated because the debtor mistakenly filed a motion to dismiss when she meant to file a motion to convert the case from chapter 13 to chapter 7.

Rule 60(b)(1) of the Federal Rules of Civil Procedure authorizes relief from a judgment due to a mistake, inadvertence, surprise or excusable neglect and the court has wide discretion in deciding such a motion. Zuelzke Tool & Engineering Co. v. Anderson Die Castings, Inc., 925 F.2d 226, 228-29 (7th Cir. 1991). The motion must be filed within a reasonable time. See e.g., Kagan v. Caterpillar Tractor Co., 795 F.2d 601, 610 (7th Cir. 1986). It may be considered without a hearing or 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).

Debtor’s motion to dismiss was filed the day before a hearing on a motion to dismiss that had

been filed by the Chapter 13 trustee. Debtor's counsel appeared for that hearing and, when the case was called, advised the court that the trustee's motion was moot because the debtor had voluntarily dismissed the case the day before. The docket entry from the hearing (which was electronically served upon debtor's counsel) memorialized that by stating: "The motion to dismiss is MOOT due to Debtor's voluntary dismissal." Docket Entry dated June 10, 2011. The order of dismissal was eventually entered on June 15.

Debtor's counsel had at least three opportunities to make their true intentions known: at the hearing on the trustee's motion, after being served with the docket entry from that hearing, and upon being served with the court's order. At each of these events the recitation was that the debtor had filed a motion to dismiss. Nonetheless, the present motion was not filed until over one month after the order of dismissal. If the debtor truly intended to file a motion to convert the case, rather than dismiss it, why did these events, especially the order of dismissal, not prompt the debtor into action sooner? There is quite a difference between conversion and dismissal and the difference should have been noticed much sooner. Under these circumstances, the motion is untimely.

Even if the motion was timely, the court would not grant it. The court did precisely what the debtor asked it to do when it dismissed this case and it sees no reason why it should vacate that order simply because counsel claims it was not paying attention to what it filed. This is especially so since counsel's position at the hearing on the trustee's motion was in complete harmony with the supposedly erroneous filing – they both reflected the debtor's desire for dismissal. See, Helm v. Resolution Trust Corp., 84 F.3d 874, 878 (7th Cir. 1996).

Furthermore, the dismissal was without prejudice. See, 11 U.S.C. § 349(a). See also, 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 debtor of the opportunity to discharge her debts in a future case or restricted her eligibility for further bankruptcy relief. She is free to file a second case.

Debtor's motion for relief from judgment is DENIED.

SO ORDERED.

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