

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
PILGRIM INTERNATIONAL, INC.,)	CASE NO. 08-33256 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
J. RICHARD RANSEL,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 10-3090
)	
ZERTECK, INC.,)	
)	
DEFENDANT.)	

Appearances:

J. Richard Ransel, Esq., and Lisa Gilkey Schoetzow, Esq., counsel for plaintiff, Thorne, Grodnik LLP, 228 West High Street, Elkhart, Indiana 46516; and

Joshua R. Payton, Esq., counsel for defendant, 202 South Michigan Street, Suite 600, Post Office Box 4577, South Bend, Indiana 46634-4577.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 20, 2011.

Before the court is the Defendant’s Motion to Vacate Default Judgment, filed by Zerteck, Inc. (“defendant” or “Zerteck”) pursuant to Federal Rules of Civil Procedure 55(c) and 60(b). The plaintiff, J. Richard Ransel (“plaintiff” or “Trustee”), Trustee of the chapter 7 debtor Pilgrim International, Inc., filed a Response to the Motion. For the reasons that follow, the court denies the defendant’s Motion.¹

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E).

BACKGROUND

In this adversary proceeding, the Court granted the plaintiff's Motion for Default Judgment and entered a judgment by default in the sum of \$14,951.46 against the defendant. The next day, the adversary case was closed. Four days later, the defendant filed its Motion to Vacate Default Judgment and the attached Affidavit of its President, Don Littlefield. The plaintiff responded to the Motion. The court reopened the adversary *sua sponte* and considered their arguments.²

DISCUSSION

The defendant sought to vacate the default judgment pursuant to Federal Rule of Civil Procedure 55(c), which permits a court to set aside a default judgment under Rule 60(b). Rule 60(b), in turn, is made applicable to bankruptcy cases by Bankruptcy Rule 9024, and it provides six grounds for relief from a final judgment. Zerteck claimed that it should be relieved from the default judgment under Rule 60(b)(1), because of "mistake, inadvertence, surprise, or excusable neglect." It stated that its "prior in-house counsel apparently failed to address the Plaintiff's Summons, Complaint, and Motions." R. 11 at 2. It said it was unaware of "prior counsel's oversight" until it sorted through that attorney's office. *Id.* It insisted, therefore, that it "did not have actual knowledge of the pending action against it due to the failings of one individual." *Id.* at 3. Zerteck claimed that no prejudice would result to the plaintiff and urged the court to consider the issue on its merits. The plaintiff responded that the defendant was served the summons and Complaint by both certified and regular mail, and also that the defendant was sent demand letters before the Complaint was filed. R. 13 at 2. Even if the defendant's former counsel failed to respond diligently to the summons and Complaint, he argued, the defendant gave no compelling reason that such neglect was excusable. *Id.*

² The defendant never sought to reopen the adversary proceeding. Nevertheless, the court in its discretion *sua sponte* reopened the case pursuant to 11 U.S.C. § 350(b), to afford relief to the debtor and for good cause. *See In re Castillo*, 297 F.3d 940, 945 (9th Cir. 2002) (recognizing bankruptcy court's discretion to reopen *sua sponte*); *In re Johnson*, 148 B.R. 532, 537 (Bankr. N.D. Ill. 1992) (reopening *sua sponte*).

Zerteck recognized that the “excusable neglect” standard analyzed in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993) is applicable in these circumstances. It relied on the Supreme Court’s statement that “Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake or carelessness, as well as by intervening circumstances beyond the party’s control.” *Id.* at 388, 113 S. Ct. at 1495. However, the defendant did not address the Supreme Court’s clear position in *Pioneer* that “clients must be held accountable for the acts and omissions of their attorneys.” *Id.* at 396, 113 S. Ct. at 1499. The Court held that “the proper focus is upon whether the neglect of the respondents *and their counsel* was excusable.” *Id.* at 397, 113 S. Ct. at 1499. In *Pioneer*, the attorney had filed proofs of claim 20 days past the bar date. Assessing his culpability, the Court gave “little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date.” *Id.* at 398, 113 S. Ct. at 1499. The post-*Pioneer* case law consistently refuses to excuse the mistakes or negligence of attorneys who fail to conduct their clients’ business properly. *See, e.g., In re KMart Corp.*, 381 F.3d 709, 717 (7th Cir. 2004), *cert. denied*, 543 U.S. 1056 (2005) (affirming bankruptcy court’s finding that the one-day-late filing of a proof of claim was not excusable neglect); *Lobrow v. Village of Port Barrington, Ill.*, 406 Fed. Appx. 60 at **1 (7th Cir. Dec. 23, 2010) (holding that “a lawyer’s inattentiveness to litigation is generally not excusable – and thus not a basis for relief under Rule 60(b) – no matter the consequences to the litigant or the attorney’s degree of culpability”); *Sass v. Trustmark Ins. Co.*, 10 Fed. Appx. 371 at **3 (7th Cir. 2001) (affirming that counsel’s failure to respond to motion because his law firm dissolved was not excusable, noting that he failed to ask for an extension of time to respond).

The test for determining excusable neglect is “at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Pioneer*, 507 U.S. at 395, 113 S. Ct. at 1498. In this case, Don Littlefield, President of Zerteck, described in his Affidavit the circumstances at issue. He stated that, on November 22, 2010, he fired Zerteck’s in-house counsel “for his lack of attention and

mishandling of several matters for the Defendant.” R. 11, Ex. A, at 2. He said they were sorting through the papers in that counsel’s office and became aware of the filings against Zerteck during the week of December 13-17, 2010. He reported that the company’s outside counsel contacted the Trustee as soon as he learned of the adversary proceeding. The new outside counsel notified the Trustee of Zerteck’s intention to respond to the Complaint and the Request for Default Judgment. However, Mr. Littlefield declared, the Trustee would not consent to a brief adjournment of the Motion. Zerteck’s President hired local counsel on December 16, 2010, and that attorney filed this Motion to Vacate Default Judgment.

The court finds that counsel for the plaintiff sent the defendant two demand letters, notifying it of the debt due to the debtor Pilgrim International, in the months before the Trustee filed the Complaint. The Complaint was filed on September 16, 2010, and was served (along with the summons) by both certified mail and regular mail to the attention of the “highest ranking officer,” in compliance with Bankruptcy Rule 7004(b)(3). The certified mail return receipt demonstrated that the defendant received the summons and Complaint on September 20, 2010. *See* R. 4, Affidavit of No Answer. Thereafter, these documents were served on Zerteck: the plaintiff’s Affidavit of No Answer, Defense or Response, on November 5, 2010; the Clerk of Court’s Entry of Default, on November 10, 2010; the plaintiff’s Motion for Default Judgment, on November 12, 2010; and the court’s Order Granting the Motion, on December 15, 2010.

The court’s review of the record makes clear that the defendant has not asked that his in-house counsel be excused from a mere filing mistake or a single missed deadline. There is a failure by the defendant to respond to many documents. Over a period of ten months, the defendant received letters, pleadings, and motions addressed to Zerteck’s “highest ranking officer” and notifying Zerteck of a lawsuit filed against it. Even with the service of a default judgment, Zerteck’s counsel neither responded to that motion nor, apparently, warned Zerteck, when he was fired, of the severe consequences of a default.

The court also finds that the neglect and lack of attentiveness in this case was not limited to the defendant’s in-house counsel. *Cf. Adams v. Trustees of New Jersey Brewery Employees’ Pension Trust*, 29

F.3d 863, 872 (3d Cir. 1994) (“[A] party with in-house counsel . . . is deemed to be aware of how its case is proceeding . . .”). Zerteck was clearly aware of its counsel’s transgressions before November 22, 2010, when he was fired, but did not act quickly and diligently to determine the problems and to request from the court, rather than from the opposing party, that an extension of time be allowed for response. *See, e.g., In re Slm Trans, Inc.*, 2010 WL 2739996 at *5 (S.D. Ill. July 12, 2010) (finding no good cause for failing to timely oppose motion for default judgment, finding defendant had time and ability to retain new counsel or to file request for extension of time). The defendant’s delay in reviewing its attorney’s papers and in taking three weeks to discover this lawsuit cannot constitute excusable neglect on the part of the defendant, and the many oversights of its in-house counsel before he was fired were clearly inexcusable. *See In re C. Lynch Builders, Inc.*, 2007 WL 2363029 at *6 (Bankr. W.D. Tex. 2007) (finding that the defendant’s excuse, “that its in-house counsel dropped the ball,” was “insufficient to support a finding of excusable neglect”).

The defendant asserts that no prejudice would result to the plaintiff because the time lapse beyond the original deadline was brief.³ The court, having found that the defendant failed to file responses to each and every document filed by the plaintiff, considers the ten-month time lapse far from brief. It concludes that prejudice surely would result to the plaintiff Trustee if this adversary proceeding were reopened for a determination on the merits. He pursued this debt owed by the defendant for unpaid invoices in good faith and with complete propriety, fulfilling the service of process requirements and the default requirements of Rule 55(a) and (b). This court generally prefers a trial on the merits, and it demands strict compliance with the procedures set forth in Rule 55 to achieve a judgment based on the default of a defendant. The Trustee succeeded in obtaining that default judgment. He will not be required to litigate the Complaint that went unanswered because of the inattentiveness or negligence of the defendant and its counsel.

³ The defendant argued that it had good cause to set aside the entry of default as well as justification to set aside the default judgment under Rule 60(b)(1). *See Sun v. Board of Trustees of Univ. of IL*, 473 799, 810 (7th Cir. 2007) (setting forth “good cause” test for relief from the earlier entry of default, based on the defendant’s good cause to set aside the default, quick action to correct it, and the existence of a meritorious defense to the complaint).

Finally, the defendant tells the court that it has a meritorious defense. In his Affidavit, Zerteck's President stated that "[t]his meritorious defense and the records evidencing that the payments received were not preference payments will be submitted within seven (7) days of this opposition." R. 11, Ex. A, ¶ 13. The court finds, however, that the defendant has not submitted any records to this court to prove its defense. Nevertheless, even a presentation of a meritorious defense would not, on its own, cause the court to set aside a default judgment. *See id.* at *7. The court determines that the delay caused by the defendant's lack of response to any communication, pleading, or motion served by the plaintiff over ten months was dilatory and that the prejudice to the plaintiff, if he were forced to pursue this litigation, would be great. "The equities in this case do not favor the defendant." *Id.* at *6. Exercising its discretion, the court concludes, therefore, that there is neither good cause for relief from the default nor excusable neglect proven by the defendant to set aside the default judgment entered in this adversary proceeding.

CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court has reopened the adversary proceeding *sua sponte* pursuant to 11 U.S.C. § 350(b). The court now denies the Motion to Vacate the Default Judgment filed by the defendant Zerteck, Inc., and again closes this adversary proceeding pursuant to § 350(a).

SO ORDERED.

/s/ HARRY C. DEES, JR.

HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT