

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
MICHAEL ROBERT KLARKE,) CASE NO. 04-36627 HCD
) CHAPTER 7
)
DEBTOR.)

Appearances:

Doug Allen Bernacchi, Esq., attorney for debtor, 450 St. John Road, Suite 109, Michigan City, Indiana 46360;

Lyn Leone, Esq., co-counsel for debtor, Post Office Box 1028, Notre Dame, Indiana 46556; and

R. William Jonas, Jr., Esq., attorney for plaintiffs, Hammerschmidt, Amaral & Jonas, 137 North Michigan Street, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on June 16, 2005.

The debtor Michael Robert Klarke (“debtor”) has filed two motions, “Motion to Correct Errors and to Reinstate Hearing on Plaintiffs/Creditors’ Motion to Lift Stay on State Court Review on [*sic*] Motion to Correct Errors Before the State Court” and “Motion to Reinstate Stay on State Court Review of Motion to Correct Errors Before the State Court.” The motions were filed on May 23, 2005, by Lyn Leone, Esq., local co-counsel for the debtor. James and Catherine Busse (“creditors”), by their counsel, R. William Jonas, Esq., filed a “Response to Motion to Correct Errors” on the same date. For the reasons that follow, the court denies the two motions filed by the debtor.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(G) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1)

and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

Michael Robert Klarke filed a voluntary chapter 7 petition on December 30, 2004. On March 22, 2005, James and Catherine Busse, creditors of the debtor, by their attorney R. William Jonas, Jr., Esq., filed a “Motion for Relief from Stay to Permit Completion of Consideration of Creditor’s Motion to Correct Errors in State Court Action and to Permit Creditor to Pursue Insurance Proceeds in Satisfaction of Claim.” R. 11. In the motion, the creditors stated that they had obtained a judgment on November 22, 2004, in the Lake Superior Court. They filed a motion to correct errors in that court, asking the court to clarify the judgment “to expressly include the individual debtor and M & D Properties in the judgment so the written judgment is in accord with the oral findings expressed by the Court at the conclusion of the trial.” *Id.* at 1. Because the court hearing on that motion was stayed by the debtor’s bankruptcy, the creditors asked that the stay be lifted so that they could complete their state court case. Their motion stated: “Debtor has acknowledged his individual responsibility for the judgment obligation in Schedule F of his bankruptcy papers; there is no suggestion that the Debtor’s individual responsibility for the claim is disputed.” *Id.* at 2, ¶ 5. The creditors sought to collect available bond or insurance proceeds to satisfy the judgment, as well.

On April 12, 2005, the debtor, through his attorney Doug Allen Bernacchi, Esq., objected to the motion. The court held a trial on the motion and objection on May 6, 2005. At the trial, the debtor was represented by Lyn Leone, Esq., co-counsel for the debtor. The parties submitted an “Agreed Order for Relief from Automatic Stay,” stating that they had agreed that the automatic stay should be modified so that the creditors could proceed with the hearing in state court and could collect any insurance proceeds available to satisfy the

judgment. *See* R. 20. Ms. Leone and Mr. Jonas had approved the form and content of the Agreed Order and had signed it on behalf of their clients.

On May 23, 2005, Ms. Leone filed an appearance in the case and filed the two motions that presently are pending before the court. In the first one, the “Motion to Correct Errors and to Reinstate Hearing,” the debtor asked the court to correct the error committed at the hearing. *See* R. 22. The debtor explained that Ms. Leone had attended the hearing on behalf of Mr. Bernacchi, who had given her specific instructions in this case: “ok to stipulate to release of insurance proceeds but to argue the objection.” *Id.* at 2. According to the motion, neither Ms. Leone nor Mr. Bernacchi was able to contact the creditors’ lawyer, Mr. Jonas, the day before the hearing. However, Ms. Leone discussed the case with Mr. Jonas on the morning of the hearing. The motion stated the circumstances that created the error the debtor sought to correct:

8. Attorney Jonas did call the morning of May 6, 2005 for a quick pre-hearing discussion. Attorney Leone was adamantly clear that she had instructions that would allow for stipulation regarding the insurance proceeds but was planning to argue against the Plaintiffs/creditors’ Motion to Lift State Court stay.

9. Attorney Jonas indicated he was willing to stipulate to a continue [*sic*] of the ruling in the Federal Court on the issue of the Stay and would write up the Stipulation papers.

10. As a result of delay caused by such last minute consultations, Attorney Leone needed to rush to get to Court on time.

11. Upon Attorney Leone’s arrival at Court, Attorney Jonas rushed the stipulation paperwork before her for her signature.

12. To this date, Attorney Leone has not received a copy of the signed stipulation but believed in good faith that what she signed was consistent with the intent of the attorneys.

13. Attorney Leone now has reason to believe that the signed Stipulation is a misrepresentation of the mutual intent regarding only the issue of State Court review on the Motion to Correct Errors before the State Court.

Id. at 2-3. The debtor also filed a “Motion to Reinstate Stay on State Court Review of Motion to Correct Errors Before the State Court.” R. 25. In it, the debtor, by counsel Ms. Leone, asked the court to impose a stay once again on the state court proceedings until the court rules on the debtor’s Motion to Correct Errors.

A few hours later on May 23, 2005, the creditors filed a “Response to Motion to Correct Errors.”

Creditors’ counsel asserted that the debtor’s motion was untimely and that there was no misrepresentation:

Counsel for Busses did not ‘misrepresent’ the agreement among counsel. In fact, Busses’ counsel clearly stated before the court that the effect of the stipulation was to allow the state court to decide the ‘fraud question’ presented by the state court motion to correct errors. Counsel for Busses further stated that the result of the state court hearing would control the outcome of the adversary proceeding by providing the prevailing party with a basis for summary judgment. In no way whatsoever can counsel for the debtor argue that the stipulation misrepresented the agreement of counsel.

R. 24 at 1. On May 27, 2005, the debtor filed a “Reply to Response to Motion to Correct Errors.” In it, Ms. Leone stated that she first became aware on May 20, 2005, “that the Court’s Order apparently reflects an alleged agreement that is diametrically opposite [*sic*] the intent and directives pursued by Attorney Leone on the matter.”

R. 26 at 1. On that day, she said, she filed two motions; however, she filed them in the wrong case. She then entered her appearance and filed the motions in the proper case on May 23, 2005. She argued that, if the motions are untimely, “the totality of the circumstances clearly demonstrate the existence of excusable neglect set in motion from the inception of the alleged ‘stipulation.’” *Id.* at 2.

Discussion

The court treats the debtor’s “Motion to Correct Errors and To Reinstate Hearing” as a Motion to Alter or Amend a Judgment pursuant to Federal Rule of Civil Procedure 59(e), made applicable in bankruptcy cases under Federal Rule of Bankruptcy Procedure 9023. Rule 59(e) provides that a party has ten days from the entry of a court’s order in which to file his motion asking for an alteration or amendment of the court’s ruling. Because the debtor’s motion was filed 17 days after the parties’ “Agreed Order” was approved by the court and entered on the docket, the court finds the motion to be untimely. A Rule 59(e) motion also “requires that the moving party clearly establish a manifest error of law or an intervening change in the controlling law or present newly discovered evidence.” *Romo v. Gulf Stream Coach, Inc.*, 250 F.3d 1119, 1121 n.3 (7th Cir. 2001). The

debtor did not suggest a manifest error of law or an intervening change in the controlling law; nor did he present newly discovered evidence. The court thus finds that the motion cannot be granted under Rule 59(e).

Because the debtor's motion was filed more than ten days after the entry of the court's order, the court, in its discretion, treats it as a motion for relief from the order under Federal Rule of Civil Procedure 60(b), which is made applicable in bankruptcy under Federal Rule of Bankruptcy Procedure 9024. See *Easley v. Kirmsee*, 382 F.3d 693, 696 (7th Cir. 2004); *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800 (7th Cir. 2000). Under that rule, "the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding" for such reasons as "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). However, relief under Rule 60(b) is an extraordinary remedy. See *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628 (7th Cir.1997); *In re Czykoski*, 320 B.R. 385, 388-89 (Bankr. N.D. Ind. 2005) (citing cases). The movant, in this case the debtor, has the burden of proving that there are exceptional circumstances and sufficient grounds to warrant vacating the court's order by showing a reason or good cause for the mistake and the existence of a meritorious defense. See *Jones v. Phipps*, 39 F.3d 158, 162 (7th Cir. 1994); *In re Hall*, 259 B.R. 680, 682 (Bankr. N.D. Ind. 2001). 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. (In re Robb)*, 122 F.3d 354, 359 (7th Cir. 1997) (analyzing the broader meaning of excusable neglect after *Pioneer*).

Ms. Leone has alleged that the totality of the circumstances clearly demonstrates excusable neglect. She argued that, after quick last-minute consultations, a rush to the courthouse, and a rush to sign the stipulation before the hearing, the signed document was not consistent with what she believed was the mutual intent of counsel and the parties. Indeed, she stated that the "signed Stipulation is a misrepresentation of the mutual intent regarding only the issue of State Court review on the Motion to Correct Errors." R. 22 at 3. However, she only "became aware" that the agreement was "diametrically opposite" from her understanding of it 14 days after the hearing. R. 26 at 1. The creditors deny that there was any misrepresentation.

The court first finds that the attorney's delay in discovering the "misrepresentation" was entirely within the reasonable control of the debtor and his counsel. *See Pioneer*, 507 U.S. at 395, 113 S. Ct. at 1498. An attorney has a duty to be diligent about the status of his or her cases and, if necessary, to seek clarification from the court. *See Easley*, 382 F.3d at 698 (concluding that the attorney's inattentiveness to litigation was inexcusable neglect, not excusable carelessness). In this case, it was the attorney's responsibility to read the document before signing it; to listen to the creditor's attorney's summation of the stipulation before agreeing to it verbally in open court; and to check the docket to verify that the intended agreement had been approved by the court. In the view of the court, counsel's failure to read and verify the one-page agreement on behalf of her client reflected a lack of attention, a lack of care, and a level of negligence that constitutes neglect as it was defined in *Pioneer*.¹ *Cf. Republic Credit Corp. I v. Rance*, 172 F. Supp. 2d 1178, 1183 (S.D. Iowa 2001) (commenting that a lawyer in practice for 17 years "should be expected to read a one page contract"); *Medical Components, Inc. v. Classic Medical, Inc.*, 210 F.R.D. 175, 178 n.4 (M.D.N.C. 2002) (stating that local counsel, who had failed to read the pleadings before signing them, would be responsible with their contents; adding that "the Court is disappointed and would not expect such conduct to occur again").

Once neglect has been established, the court must determine whether it qualifies for relief as "excusable neglect." The United States Supreme Court, in *Pioneer*, made it clear that "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer*, 507 U.S. at 396, 113 S.Ct. at 1499 (stating that "the proper focus is upon whether the neglect of [the debtors] and their counsel was excusable"); *see also*

¹ In *Pioneer*, the Supreme Court directed courts to use the ordinary dictionary definition of "neglect." It found that the term "encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness." *Id.* at 388, 113 S. Ct. at 1494-95. It held that the determination of "excusable neglect" is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395, 113 S. Ct. at 1498.

Hough v. Local 134, I.B.E.W., 867 F.2d 1018, 1022 (7th Cir. 1989) (stating that an attorney’s carelessness or ignorance will not provide sufficient grounds for relief under Rule 60(b)). The court has taken account of all the relevant facts and circumstances surrounding the conduct of the debtor’s attorneys – from Mr. Bernacchi’s last-minute enlistment of Ms. Leone to appear at the hearing on behalf of the debtor to Ms. Leone’s failures concerning the written stipulation – in light of the standards expected of all attorneys, the factors presented in *Pioneer*, and the recent analysis of those factors by the Seventh Circuit Court of Appeals in *In re Kmart Corp.*, 381 F.3d 709 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 933 (2005), and *Easley*, 382 F.3d at 697-99. It now finds that the conduct of each of the debtor’s attorneys demonstrated a lack of diligence and attentiveness that falls outside the parameters of “excusable neglect” under Rule 60(b)(1). It further finds that the debtor must be held accountable for the conduct of the attorneys he chose to represent him. *See Pioneer*, 507 U.S. at 397, 113 S. Ct at 1499; *see also Easley*, 382 F.3d at 698-99 (refusing to excuse plaintiff’s counsel’s inattentiveness and inexcusable neglect of the case but expressing regret about the consequences).

The court finds next that the record in this case reflects no misrepresentation. At the May 6, 2005 hearing, Mr. Jonas stated that the parties were filing an agreed order resolving the stay motion. At the court’s request, he summarized the agreement reached between the debtor and creditors. He said that they had agreed that the motion would be granted to allow the state court to consider the motion to correct errors and to allow the claimants to pursue the collection of any future insurance proceeds that might be available to satisfy the judgment in the state court action. The court asked Ms. Leone if that was her understanding of the agreement, and she replied, “Yes, your honor, that’s right.” When the court inquired about the status of the adversary proceeding pending in the case, Mr. Jonas replied that the state court’s response to the motion to correct errors would have an impact on the adversary proceeding. Based on the stated and written agreement between the parties to allow the state court proceeding to continue, the bankruptcy court asked whether it should delay setting a hearing date in the adversary. The parties agreed to the delay, and the hearing was adjourned. The Agreed Order for Relief

From Automatic Stay, which had been “approved as to form and content” and signed by Ms. Leone and Mr. Jonas, was signed by the bankruptcy judge and entered on the docket that same day, May 6, 2005.

The stipulated agreement is titled “Agreed Order for Relief from Automatic Stay.” The document itself is a clear and unambiguous statement. Mr. Jonas’s explanation of the agreement in open court was equally straightforward. Ms. Leone signed the document before the hearing, heard Mr. Jonas’s summary in court, and verified to the court that creditors’ counsel’s representation of their agreement was correct. The court finds, therefore, that there is no evidence in the record of a misrepresentation of the agreement between the parties.

The court was presented with an agreed-upon settlement of a dispute. Consensual resolutions are favored in bankruptcy and indeed in federal law generally. For that reason, stipulated agreements are construed liberally “and a stricter standard is applied to a Rule 60(b) motion in this context.” *In re AMC Realty Corp.*, 270 B.R. 132, 145-46 (Bankr. S.D.N.Y. 2001).

Thus, a party attacking a settlement agreement bears the burden of proving its invalidity and unenforceability, “either by fraud practiced upon him or by a mutual mistake under which both parties acted.”

Id. at 146 (citations omitted); *see also Weaver v. Burger King Corp. (In re Weaver)*, 219 B.R. 890, 899-900 (Bankr. D Mont. 1998). The debtor’s attorney has presented neither an affidavit nor a scintilla of evidence of a fraud perpetrated upon her or upon the debtor. Nor has she pointed to a mutual mistake by the parties in reaching the agreement. *See Weaver*, 219 B.R. at 899. This court is loath to allow a party to cancel a stipulated agreement because of a self-serving, after-the-fact, unsubstantiated allegation of misrepresentation.

In conclusion, the court finds that the conduct of debtor’s counsel does not qualify as excusable neglect. It has determined that the attorney for the debtor has presented no evidence of misrepresentation or of the invalidity or unenforceability of the agreement between the parties that was submitted to the court by counsel at the hearing of May 6, 2005. Accordingly, the court determines that debtor’s motion to alter or amend the Agreed Order for Relief from Automatic Stay, entered on the court’s docket on May 6, 2005, is denied under Rule 59(e) and Rule 60(b). The debtor’s Motion to Reinstate Stay is denied as moot.

Conclusion

Having considered all the relevant facts and circumstances surrounding the conduct of counsel for the debtor Michael Robert Klarke and having found no excusable neglect, the court denies the debtor's "Motion to Correct Errors and to Reinstate Hearing on Plaintiffs/Creditors' Motion to Lift Stay" and the "Motion to Reinstate Stay on State Court Review of Motion to Correct Errors."

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT