

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
STEPHEN THOMAS WILSON,) CASE NO. 13-33123 HCD
) CHAPTER 11
)
DEBTOR.)

Appearances:

Daniel Freeland, Esq., counsel for creditors David Schenk and Deborah Schenk, 9015 Indianapolis Boulevard, Highland, Indiana 46322;

Rebecca Hoyt Fischer, Esq., counsel for Horizon Bank, N.A., Laderer & Fischer P.C., 401 East Colfax Avenue, Suite 305, South Bend, Indiana 46617;

Michael Bergerson, Esq., counsel for debtor, 601 Franklin Street, Suite 200, Post Office Box K, Michigan City, Indiana 46360; and

Alexander Edgar, Esq., Assistant United States Trustee, One Michiana Square, Fifth Floor, 100 East Wayne Street, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on April 4, 2014.

Before the court is the “Motion to Vacate Court’s Order of March 12, 2014, Denying the Debtor’s Motion to Assume Executory Contract” (“Motion to Vacate”), filed by creditors David Schenk and Deborah Schenk (“creditors”), by counsel. The time for response having passed, the court now denies the Motion.

BACKGROUND

The debtor Stephen Thomas Wilson filed his chapter 13 petition on October 30, 2013, and converted his bankruptcy case to a chapter 11 case on December 19, 2013. On January 24, 2014, the debtor filed a “Motion to Assume Executory Contract” (“Motion to Assume”) pursuant to 11 U.S.C. § 365(a). *See*

R. 58. According to that Motion to Assume, the debtor and David Schenk purchased real estate together in Long Beach, Indiana, and hold the property as tenants in common. He alleged that the fair market value of the property was \$800,000.00, and that, upon approval of the Petition to Sell, he would pay David Schenk \$123,659.50. Horizon Bank, N.A. (“Bank”), which holds a judgment lien on all the debtor’s real estate, including the Long Beach property, filed an Objection to the Motion (“Objection”), claiming that its judgment has priority over the Schenks’ interest in the real estate, and proposing to pay the creditor David Schenk \$123,659.50 at closing upon a sale of the Long Beach real estate. *See* R. 62.

On February 12, 2014, the court set a hearing on the debtor’s Motion to Assume and the Bank’s Objection. *See* R. 58, 62, 67. The hearing date was set for March 11, 2014. The electronic filers to whom the Notice of the hearing was electronically mailed included the attorneys Daniel Freeland, Frederick Carpenter, and Sheila Ramacci, all of whom previously had entered their appearances in this bankruptcy proceeding on behalf of the creditors David and Deborah Schenk.¹

On March 6, 2014, the creditors, by counsel, filed a “Motion to Intervene,” asserting that they are parties in interest concerning the Motion to Assume Executory Contract “by reason of the fact that they are the Non-Debtor party to the contract.”² R. 78, ¶ 4. On March 7, 2014, the court granted the Motion to Intervene. However, at the duly scheduled hearing on the Motion to Assume Executory Contract, conducted on March 11, 2014, neither the creditors nor their counsel appeared. Nor did counsel for the debtor appear. After hearing the positions of the appearing parties – the Bank, represented by Rebecca Hoyt Fischer, Esq., and the United States Trustee, represented by Alexander Edgar, Esq. – the court denied the debtor’s Motion to Assume Executory Contract. *See* R. 83.

¹ Attorneys Freeland, Carpenter, and Ramacci had entered their appearances on behalf of David and Deborah Schenk on November 19, 2013. *See* R. 16, 17, 18.

² The creditors attached to the Motion to Intervene a “Memorandum of Law In Opposition to Horizon Bank’s N.A. Objection to Debtor’s Motion to Assume Executory Contract.” R. 78, Ex. A. The Memorandum presented their argument that “the interests of the Schenks are superior to that of Horizon and thus Horizon’s Objection to the Motion to Assume Executory Contract should be denied.” *Id.* at 6. The court considered this Memorandum when deciding to allow the creditors’ request for intervention.

On March 20, 2014, the creditors filed the motion now before the court, the Motion to Vacate Court's Order of March 12, 2014. R. 88. The creditors asked the court to set aside its Order of March 12, 2014, for two reasons: (1) "the excusable neglect of the Schenks", and (2) "the law favoring the assumption of the contract." *Id.* at 3.

DISCUSSION

Because the creditors' Motion was filed within fourteen (14) days of entry of the court's Order of March 12, 2014, the court construes the Motion to Vacate as a motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, made applicable in bankruptcy cases under Rule 9023 of the Federal Rules of Bankruptcy Procedure.

A Rule 59(e) motion will be successful only where the movant clearly establishes: "(1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment.

Cincinnati Life Ins. Co. v. Beyrer, 722 F.3d 939, 954 (7th Cir. 2013) (quoting *Blue v. Hartford Life & Accident Ins. Co.*, 698 F.3d 587, 598 (7th Cir. 2012)). "[Rule 59(e)] does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the . . . court prior to the judgment." *Bordelon v. Chicago School Reform Bd. of Trs.*, 233 F.3d 524, 529 (7th Cir. 2000). A party cannot "complete presenting his case after the court has ruled against him." *Matter of Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (quoting *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995)). The rule allows a bankruptcy court, in its discretion, to change its judgment if the movant provides proper evidence of the court's need for the amendment. *See In re DeLaughter*, 295 B.R. 317, 319 (Bankr. N.D. Ind. 2003).

The creditors presented two reasons that the court should alter or amend its denial of the debtor's Motion to Assume Executory Contract, but neither fit squarely into the criteria of Rule 59(e). The creditors stated that, "by reason of the excusable neglect of the Schenks and the law favoring the assumption of the

contract the Court as set out herein should set aside its Order of March 12, 2014, and reset this matter for further hearing.” R. 88, ¶ 12. Perhaps the creditors, by suggesting in this cursory fashion that “the law” favors “the assumption of the contract,” intended to argue that the court made a “manifest error of law.” They certainly did not identify or argue in what way the court’s ruling on the debtor’s Motion to Assume Executory Contract was a “manifest error of law,” and the court finds that the creditors, with the burden of proving that the court so erred, did not establish any error of law.

Before the hearing, the court had received from the creditors a “Motion to Intervene” and an attached “Memorandum of Law in Opposition to Horizon Bank’s Objection.” The Memorandum presented arguments based on Indiana law concerning tenancies in common. It argued that the Bank’s judgment lien was subordinate to the “Tenancy in Common Agreement” between the debtor and the creditors. The Motion and attached Memorandum persuaded the court that the creditors had a sufficient stake in the action to be allowed to intervene. The court made no determination, however, concerning the substantive position of the creditors. Indeed, the court noted that the Memorandum’s position was based entirely on Indiana law and never addressed 11 U.S.C. § 365(a), the Bankruptcy Code section on which the Motion to Assume Executory Contract was based and about which the hearing was held. The court also took note of the fact that the debtor’s Motion to Assume stated that it was “made under and pursuant to . . . 11 U.S.C. § 365(a),” R. 58, ¶ 9, but made no argument based upon that provision. The court awaited those arguments at the hearing, but no one appeared to represent the positions of the debtor and the creditors.

In their Motion to Vacate, the creditors argued that they had supported the debtor’s Motion to Assume Executory Contract, but that “the response is not reflected on the Court’s entry.” R. 88, ¶ 10. The court reiterates that it gave the creditors the opportunity to intervene to support the Motion to Assume. They failed to make their arguments in support before the court. The creditors’ “Memorandum of Law in Opposition to Horizon Bank’s N.A. Objection to Debtor’s Motion to Assume Executory Contract,” attached to their Motion to Intervene, gave sufficient justification for the creditors’ standing to intervene. However,

the creditors had to raise their arguments concerning the Motion to Assume at the hearing. It was not the court's job to make the creditors' arguments on their behalf, in their absence, in open court. Neither the creditors nor the debtors appeared at the hearing on the debtor's Motion to Assume Executory Contract.

The court takes notice of the creditors' filing of the identical Memorandum as a separate document on the same day that the hearing was held, March 11, 2014. If the creditors considered that filing their "response" to the Bank, it was belated. The court's Notice of Electronic Filing reflects that the Memorandum was received from Mr. Freeland's office on March 11, 2014, at 1:12 p.m. – more than three hours after the 10:00 a.m. hearing. In any case, its failure to address § 365(a) was a fatal flaw to its argument in this bankruptcy court, compounded by the debtor's failure to support its own Motion under § 365(a) at the hearing.

The court finds that the creditors' Motion to Vacate was not based on newly discovered evidence and did not demonstrate a manifest error in law or fact. The court concludes that the creditors did not identify any reason for reconsidering the court's denial of the Motion to Assume Executory Contract pursuant to Federal Rule of Civil Procedure 59(e) and Federal Rule of Bankruptcy Procedure 9023.

The creditors also based their Motion to Vacate on "excusable neglect." They claimed that their attorney was unaware of the March 11, 2014 hearing. They explained that electronic filing (ECF) notices routinely were received in their counsel's office in a "batch download" the day after they were electronically filed in the bankruptcy court. Perhaps for weather-related conditions, they commented, the batch download concerning this case was inadvertently not printed. *See* R. 88, ¶ 4. They asked the court to find that their absence from the hearing was excusable neglect.³

³ It appears to the court that the attorneys have chosen to receive "daily summary reports" of cases in one electronic notification, which they have designated a "batch download."

Whenever a paper is filed electronically, a "Notice of Electronic Filing" will be transmitted automatically by e-mail to all ECF Users who have appeared in the case or proceeding. Service of this email Notice shall constitute the service or notice of the paper filed.

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“Excusable neglect” is a ground for relief under Rule 60(b)(1), not Rule 59(e). However, “[l]ike relief under Rule 59(e), relief under Rule 60(b) is an extraordinary remedy to be granted only in exceptional cases.” *In re Zoll*, 2012 WL 295168 at *7 (Bankr. N.D. Ill. Feb. 1, 2012) (citing cases). Generally, “inexcusable attorney negligence does not constitute proper grounds for relief” under that rule. *Helm v. Resolution Trust Corp.*, 84 F.3d 874, 878 (7th Cir. 1996). The burden of proving excusable neglect rests on the claimant. Courts consistently hold that errors caused by a law office failure, including inattention or lack of oversight, simply do not justify excusable neglect. *See, e.g., In re Musicland Holding Corp.*, 356 B.R. 603, 608 (Bankr. S.D.N.Y. 2006); *In re Bradley*, 342 B.R. 783, 790 (Bankr. N.D. Ind. 2005). When the error could have been detected by a party’s diligence, it is not found to be excusable neglect. *See Easley v. Kirmsee*, 382 F.3d 693, 698 (7th Cir. 2004) (refusing to excuse counsel’s neglect); *Western Transp. Co. v. E. I. DuPont de Nemours*, 682 F.2d 1233, 1236 (7th Cir. 1982) (“A negligent mistake, that is one evincing a lack of due care, is not a proper ground for relief under Rule 60(b).”).

Litigants whose lawyers fall asleep at critical moments may seek relief from the somnolent agents; inexcusable inattention to the case . . . does not justify putting the adversary to the continued expense and uncertainty of litigation.

Helm, 84 F.3d at 878 (quoting *United States v. Golden Elevator, Inc.*, 27 F.3d 301, 303 (7th Cir. 1994)).

In this case, Mr. Freeland and his two co-counsel who filed an appearance in this case are generally “diligent, conscientious, intelligent, qualified and well-trained.” *Easley*, 382 F.3d at 697. The court considers whether the inadvertent failure to print the court’s ECF daily summaries, received in a “batch download,” was excusable neglect.

The creditors suggested that the weather – perhaps a blizzard day, of which there were many this winter – was a factor in counsel’s nonreceipt of the Notice of hearing. However, the court was open and conducting business on February 12 and 13, 2014, and the electronic Notice went to all electronic filers, including the three attorneys representing the creditors, who could have received the Notice on their

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Sixth Amended Order Authorizing Electronic Case Filing, p.4, ¶ 11.

electronic devices wherever they were located. The Notice also was placed on the docket of this bankruptcy case as notification to all parties and to the public. This court has suspended some filing deadlines when unanticipated events related to the weather have made the clerk's office inaccessible. However, "when the court's ECF system was otherwise up and running and functioning properly," a party's untimely filing caused by their own technical problems did not constitute excusable neglect. *In re Sizemore*, 341 B.R. 658, 660 (Bankr. N.D. Ind. 2006) (citing cases). In this case, the creditors did not suggest any technical difficulty with the receipt of the electronic information. The court's ECF system properly electronically mailed the documents. It is clear that the error occurred in the attorneys' office.

The court particularly noted that, after granting the creditors' Motion to Intervene, filed the week before the hearing on the debtor's Motion to Assume Executory Contract, their nonappearance reflected a lack of diligence not usually seen from this attorney or his co-counsel, all of whom have practiced in this court for years. A review of the record plainly reveals that counsel had a month of opportunities to discover the material not downloaded. The Notice of Hearing was sent on February 12, 2014, a month before the hearing, and attorneys Freeland, Carpenter, and Ramacci each individually received the electronic filing of the Notice. *See* R. 67. The Notice was listed on the docket in Mr. Wilson's case, with a link to the "Motion to Assume Executory Contract." Mr. Freeland, having filed a Motion to Intervene with respect to the Motion to Assume Executory Contract a week before the hearing, described the Schenks' deep interest in intervening as "specifically parties in interest to the contested matter arising from the Motion to Assume the Executory Contract . . . by reason of the fact that they are the Non-Debtor party to the contract." R. 78 ¶ 4. The court, agreeing that they should be heard on the issue, immediately granted their right to intervene. Even if the "batch download" had been overlooked, all the information was available to anyone who consulted the court docket of the case. "It exceeds the bounds of reason to say that a party who takes the unusual step of asking a court to promptly issue a written order may then disclaim all responsibility for taking any action to see if the request has been honored, especially where . . . all [one] had to do was check the online docket." *Kuhn*

v. Sulzer Orthopedics, Inc., 498 F.3d 365, 372 (6th Cir.), *cert. denied*, 552 U.S. 1040 (2007); *see also Wheat v. Rieser*, 452 B.R. 627, 636 (S.D. Ohio 2011) (finding no excusable neglect when counsel “fails to check the online docket”). The court concludes that creditors’ counsel – three seasoned attorneys – and/or their staff failed in their duty of responsibility to their clients.

However, the failure of responsibility extended to the debtor, as well. The hearing held on March 11, 2014, addressed the debtor’s Motion to Assume Executory Contract. Neither the debtor nor his counsel appeared. Neither the debtor nor his counsel filed a motion to alter or amend the court’s ruling or to obtain relief from the judgment pursuant to Federal Bankruptcy Rules 9023 or 9024. It was the debtor’s Motion before the court, and the Bank appeared and was heard. Its clear, reasoned position concerning the debtor’s claimed executory contract led to the court’s determination to deny the debtor’s Motion to Assume.

The court finds that the creditors failed to show any ground for relief on its Motion to Vacate pursuant to Federal Bankruptcy Rule 9023. In light of the court’s denial of the creditors’ Motion to Vacate, the court also denies the creditors’ request for oral argument on their Motion to Vacate Court’s Order.

For the reasons set forth in this Memorandum of Decision, the creditors’ Motion to Vacate Court’s Order of March 12, 2014, Denying the Debtor’s Motion to Assume Executory Contract, is denied.

SO ORDERED.

/s/ HARRY C. DEES, JR.

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