

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 intervening 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 July 14, 2014.

Before the court is the Motion to Reconsider filed by David Schenk and Deborah Schenk, intervening creditors of the chapter 11 debtor Stephen Thomas Wilson. A hearing on the Motion was held on June 26, 2014, and the matter was taken under advisement.

The relevant underlying facts herein are uncontested.<sup>1</sup> On March 11, 2014, the court held a duly scheduled hearing on the debtor's Motion to Assume Executory Contract and Horizon Bank's Objection to the Motion. *See* R. 58, 62, 67. Present at the hearing were the Assistant United States Trustee and counsel for Horizon Bank. There was no appearance by the debtor, the intervening creditors, or their attorneys. The court, having considered the relevant written documents and having heard the arguments of the attorneys

---

<sup>1</sup> The factual background is presented in broader detail in the court's Memorandum of Decision of April 4, 2014. *See* R. 101.

in attendance, rendered its decision from the bench in open court. It denied the debtor's Motion to Assume Executory Contract. *See* R. 83, Order of March 12, 2014.

On March 20, 2014, the intervening creditors filed a Motion to Vacate that Order. *See* R. 88. On April 4, 2014, in a Memorandum of Decision, the court fully considered the Motion as a Rule 59(e) motion to alter or amend the judgment and, for the reasons set forth therein, denied the intervening creditors' Motion to Vacate Court's Order of March 12, 2014. *See* R. 101.

On May 22, 2014, the intervening creditors filed the "Motion to Reconsider Court's Order of April 4, 2014" which is now before the court. The Motion was supported by a brief and affidavit. *See* R. 109, 110, 111. On June 26, 2014, the court held an oral argument on the matter. All parties appeared at that hearing.

The intervening creditors' position was that the court held a misconception concerning the events leading to their failure to appear at the March 11, 2014 hearing. They urged the court to excuse their counsel's staff's mishandling of the court's daily electronic notifications that had arrived on February 12, 2014. Counsel explained that, because of extreme weather conditions on February 12, his office personnel either were absent from or late to the office. For that reason, he stated, "apparently the February 12, 2014 ECF sheet ["Notice of Hearing"] was not printed and distributed." R. 111, ¶ 14. The attorney informed the court that procedural changes had been made in his office and insisted that his unawareness of the hearing on March 11, 2014, was "excusable neglect."

At the hearing, counsel for the debtor also informed the court that he, as well, did not have the hearing date in his calendar because the weather was so bad. Counsel for Horizon Bank stated that her client had no objection to the court's consideration of the merits of the executory contract issue before it. The United States Trustee's Office informed the court that it would take no position. The court then took the matter under advisement.

## DISCUSSION

The court construes the creditors' Motion to Reconsider to be a request for relief from judgment or order under Rule 60(b) of the Federal Rules of Civil Procedure, made applicable in bankruptcy cases by Rule 9024 of the Federal Rules of Bankruptcy Procedure. Under that rule, a court has discretion to "relieve a party or its legal representative from a final judgment, order, or proceeding" for any of six listed reasons. The first ground listed is "mistake, inadvertence, surprise, or excusable neglect," and the intervening creditors relied on "excusable neglect." *See* Fed. R. Civ. P. 60(b)(1). "Relief under Rule 60(b) is an extraordinary remedy granted only in exceptional circumstances." *Nelson v. Napolitano*, 657 F.3d 586, 590 (7th Cir. 2011); *see also Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir. 2006). The burden of showing those extraordinary circumstances is on the moving party. *See In re Dorff*, 480 B.R. 919, 922 (Bankr. E.D. Wis. 2012). The Seventh Circuit recently described a movant's burden of proof when invoking "excusable neglect" in *In re Canopy Financial, Inc.*, 708 F.3d 934, 936 (7th Cir. 2013), and a court's proper approach in evaluating "excusable neglect" in *Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, 646 F.3d 401 (7th Cir. 2011):

*Pioneer* describes "excusable neglect" as an "equitable" standard, one that requires the court to take "account of all relevant circumstances surrounding the party's omission . . . includ[ing] . . . 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 404-05 (quoting *Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993)).

In the Motion now before the court, the intervening creditors reiterated the arguments presented in their Motion to Vacate Order of March 12, 2014, which the court denied in its Memorandum of Decision of April 4, 2014. They asserted no legal or factual errors in the court's Memorandum of Decision which they wish the court to reconsider. Instead, they contended that the court misconceived the underlying circumstances. The court, in an abundance of caution, allowed the parties to argue the Motion in open court.

The intervening creditors' claim of "excusable neglect" was based on the clerical error of counsel's staff due to extreme weather conditions. Certainly when unanticipated events such as hazardous weather cause the courthouse to close and court hearings to become inaccessible, a party's appearance at a hearing may be excused and filing deadlines may be suspended. *See In re Sizemore*, 341 B.R. 658, 660 (Bankr. N.D. Ind. 2006). However, in this case, counsel did not miss a hearing on February 12, 2014; rather, his staff failed to print out the Notice at his office. The court (which was open and accessible) sent out the Notice of the hearing on February 12, 2014. The electronic Notice was filed at 9:55 a.m. that day and was served on all electronic filers who had entered appearances in the bankruptcy proceeding, including three attorneys in the firm of counsel for the intervening creditors. Counsel confirmed that his law firm received the Notice. Even if no one traveled to the law firm to receive the Notice on February 12, someone surely got to the office within a few days of that date, and the Notice of hearing would have been waiting in the "Email inbox" of the three attorneys and/or the law firm.

Moreover, the Notice, Document No. 67 on the public docket in the case, could have been read at any time after its entry by any interested party, including a party allowed to intervene on the Motion to Assume Executory Contract – a Motion that had been duly scheduled for a hearing on March 11, 2014. *See Pace v. AIG*, 2010 WL 4530357 at (N.D. Ill. Nov. 1, 2010) (noting that "attorneys have a responsibility to check the docket in their cases").

The court finds it has no misconception concerning the reasons for counsel's failure to be present at the March 11, 2014 hearing. His nonattendance cannot be attributed to the extreme weather conditions of February 12, 2014, or to any other circumstances outside the attorney's reasonable control. Counsel admitted that his law firm received the electronic Notice; he therefore had actual notice of the hearing. *See, e.g., Ruby Tuesday, Inc. v. Thomas*, 37 Fed. Appx. 821, 825 (7th Cir. 2002) (concluding that "notice" issue raised in Rule 60(b)(1) motion was frivolous). Counsel also admitted that his firm adopted new internal office procedures as a result of this event. *See In re Philbert*, 340 B.R. 886, 890-91 (Bankr. N.D. Ind. 2006)

(noting counsel's responsibility to monitor cases, to establish procedures to ensure the court's notices and orders are brought to their attention). The court determines that the weather and other circumstances described by counsel (such as the fact that no other attorney made reference to the March 11 hearing at the 341 meeting of creditors) fail to establish excusable neglect. *See, e.g., U.S. v. Placido-Santos*, 2008 WL 153536 at \*1 (E.D. Wis. Jan. 14, 2008) (finding that, "with electronic filing, inclement weather generally should not prevent compliance with the Rules"); *O'Malley v. Town of Egremont*, 453 F. Supp.2d 240, 247 (D. Mass 2006) (finding that clerk's office itself must be physically closed due to weather to be deemed inaccessible); *In re New River Dry Dock, Inc.*, 2013 WL 4014786 (Bankr. S.D. Fla. Aug. 5, 2013) (finding that attorney's failure to attend because receptionist did not print Notice of Hearing was not excusable neglect). It concludes that the intervening creditors' request for reconsideration failed in its burden of proving excusable neglect. *See In re Canopy Fin'l, Inc.*, 708 F.3d at 937 (hypothesizing that a misrouting of documents in party's mailroom, despite party's use of ordinary care, might establish excusable neglect, but finding that party failed in burden of proving excusable neglect).

Nevertheless, the court also took into account the other *Pioneer* factors in its equitable review. It found first that the good faith of the intervening creditors and their counsel was not challenged. It also determined that their conduct in failing to appear was neither willful nor contumacious. In addition, there was no prejudice to the debtor. Indeed, without even arguing on his own behalf, the debtor's Motion to Assume Executory Contract might be revived.

Yet it is clear that the delay caused by counsel's failure to appear at the hearing was indeed due to factors within his reasonable control. In this regard, however, the court finds that the series of mistakes "represent the kind of understandable and regrettable human error that often befalls mortals." *In re Hall*, 259 B.R. 680, 682 (Bankr. N.D. Ind. 2001). In *Hall*, debtor's counsel, after failing to timely file a notice of appeal, made a showing of excusable neglect. The court found that the reason for his failure to file, a miscommunication between counsel's different offices, was sufficient for excusable neglect under

Bankruptcy Rule 8002(c). This court agrees that “such clerical or law office problems do not rank high on the list of forgivable errors, *Pioneer*, 507 U.S. at 398, 113 S. Ct. at 1499, yet, neither are they beyond its pale.” *Id.*, 259 B.R. at 682.

The factors perhaps most influencing the court on this issue, however, were the lack of opposition to the intervening creditors’ Motion to Reconsider and the Bank’s suggestion of its consent to the court’s hearing the executory contract issue on its merits.<sup>2</sup> Although a reconsideration of the court’s denial of the debtor’s Motion to Assume Executory Contract will, by resuscitating the issue of executory contract, have an impact on future judicial proceedings, the Bank acquiesced in that reconsideration. The Bank, whose successfully argued objection was sustained at the March 11, 2014 hearing, is the only party being prejudiced by the court’s reconsideration of its Memorandum of Decision of April 4, 2014. The Bank’s decision not to oppose the intervening creditors’ Motion to Reconsider and further to agree to reconsideration of the issue of executory contract in light of the creditors’ intervention, has tipped the balance in the court’s decision toward granting the Motion to Reconsider.

Therefore, after weighing the *Pioneer* factors and all the relevant circumstances in this case, the court concludes that principles of equity weigh in favor of granting relief under Rule 60(b)(1) in this matter. Consequently, the Motion to Reconsider Court’s Order of April 4, 2014, filed by the intervening creditors David Schenk and Deborah Schenk, is granted. The court will re-set the debtor’s Motion to Assume Executory Contract and Horizon Bank’s Objection to the Motion by separate order.

SO ORDERED.

HARRY C. DEES, JR.  
Harry C. Dees, Jr., Judge  
United States Bankruptcy Court

---

<sup>2</sup> In the court’s view, two of the substantive issues in this discussion concerning the assumption of an executory contract are the validity of any executory contract between the debtor and the intervening creditors and the priority of any liens held by the intervening creditors and secured creditor Horizon Bank.