

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)	
)	
SHANE A. BARTH)	CASE NO. 09-13583
SHEILA RENEE BARTH)	
)	
Debtors)	

DECISION AND ORDER DENYING MOTION TO ALTER OR AMEND

At Fort Wayne, Indiana, on October 10, 2014.

This chapter 13 case was dismissed on June 12, 2014, following a hearing on the trustee’s motion to dismiss. The debtors did not respond to that motion or attend the scheduled hearing; so it should have come as no surprise that the motion was granted. Nearly three months later, on September 8, 2014, they filed a motion to alter or amend that order and reinstate their case. The motion is based on Rule 60(b)(1) of the Federal Rules of Civil Procedure. Debtors argue that the dismissal of the case was the product of excusable neglect.

Determinations of excusable neglect are, at their core, equitable ones, taking into account all the relevant circumstances surrounding a party’s omission including, among other things, the length of the delay and the reasons for it, whether that delay was within the reasonable control of the movant and its impact upon the proceedings. Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 395, 113 S.Ct. 1489, 1498 (1993). As such, it is an issue addressed to the court’s discretion. Lee v. Village of River Forest, 936 F.2d 976, 979 (7th Cir. 1991); Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat, 902 F.2d 1275, 1277 (7th Cir. 1990). “Rule 60(b) relief is an extraordinary remedy and is granted only in exceptional circumstances.” C.K.S. Engineers v. White Mountain Gypsum Co., 726 F.2d 1202, 1205 (7th Cir.

1984). To succeed, “the moving party must demonstrate that the exceptional circumstances create a substantial danger that the underlying judgment or order is unjust.” Allen v. Shalala, 835 F.Supp. 462, 464 (N.D. Ill. 1993) (citing Lee, 936 F.2d at 978). See also In re Betts, 157 B.R. 631, 634 (Bankr. N.D. Ill. 1993) aff’d, 1994 W.L. 24318 (D. N.D. Ill. Jan. 26, 1994).

The debtors’ explanation for their failure to respond to the motion or to attend the scheduled hearing is that they had provided their former attorney with the missing information that had prompted the trustee to seek dismissal, and they assumed he would handle the matter without the need for them to do anything further. Appealing as it might facially seem, that explanation and that assumption are neither reasonable nor excusable.

Debtors’ former attorney was suspended from practice by the district court on April 10, 2014, and, on April 15, 2104, this court advised the debtors of that fact. See, Order Concerning Disciplinary Action, dated April 15, 2014. That was a month before the trustee filed her motion to dismiss. That motion was served upon the debtors and it should have alerted them to the fact that, as of mid-May, the trustee believed the debtors had failed to fulfill significant obligations. The court then served the debtors with a notice that it would hold a hearing on the trustee’s motion, on June 10, 2014, and that any party wanting to oppose the motion should file an objection or other response to it no later than seven days prior to the hearing. Despite this, the debtors did not file anything in response to the motion and did not attend the scheduled hearing. Moreover, despite their assumption that their then former attorney would handle the matter, after receiving the trustee’s motion they never successfully contacted him to learn if he had actually done so; they never contacted the trustee prior to the hearing to see if anything had been done, inquire about the problem or learn what might need to be done to solve it. And they did not attend the hearing. Just about any of those things –

particularly attending the scheduled hearing – could well have avoided dismissal; yet Debtors did none of them. Burying one’s head in the sand with the hopes that things would fix themselves does not constitute excusable neglect. See, Easley v. Kirmsee, 381 F.3d 693, 697-98 (7th Cir. 2004) (“unilateral assumptions” do not constitute excusable neglect); Matter of Plunkett, 82 F.3d 738, 742 (7th Cir. 1996) (“Inattentiveness to the litigation” and missing “a deadline because of slumber” are not excusable).

The court acknowledges that the debtors may not have been well served by their former counsel. Yet, with but a little effort on their part, they could have avoided the consequences of his shortcomings. Debtors’ motion to alter or amend is DENIED.

SO ORDERED.

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