

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
DANNY JO JOHNS and)	CASE NO. 05-34390 HCD
BEVERLY JEAN JOHNS,)	CHAPTER 7
DEBTORS.)	
)	
)	
NAS GAS, INC.,)	
PLAINTIFF,)	
vs.)	PROC. NO. 05-3110
)	
DANNY JO JOHNS and)	
BEVERLY JEAN JOHNS,)	
DEFENDANTS.)	

Appearances:

David C. Appel, Esq., attorney for plaintiff, 2621 B Chicago Street, Valparaiso, Indiana 46383; and

Alan D. Burke, Esq., attorney for debtors, 113 East Tenth Street, Rochester, Indiana 46975.

MEMORANDUM OF DECISION

At South Bend, Indiana, on January 27, 2006.

Before the court is the Verified Motion to Vacate Order Dismissing Adversary Proceeding, filed on January 24, 2006, by plaintiff NAS Gas, Inc. The Motion asserts that counsel did not receive notice of the pre-trial conference and asks that the dismissal of the plaintiff's complaint be vacated. For the reasons stated below, the court denies the plaintiff's Motion.

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) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1)(A)

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 Rules of Bankruptcy Procedure 7052 and 9014. 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

The plaintiff NAS Gas, Inc., filed a “Complaint to Determine Dischargeability of Debt and for Denial of Discharge.” Three days after the debtors Danny Jo Johns and Beverly Jean Johns filed an Answer to the Complaint, the court entered its Preliminary Pre-Trial Order, setting a telephonic pre-trial conference for January 18, 2006, at 9:30 a.m. E.S.T. and giving instructions concerning the conference and other pre-trial procedures. *See* R. 8, “Order of December 22, 2005.” The Order was electronically mailed to David C. Appel, plaintiff’s counsel, at the email address he had given the court. It was sent electronically to the United States Trustee’s Office, as well. *See id.* On December 24, 2005, the plaintiff NAS Gas, Inc., also was served the Order by first-class mail. *See* R. 9 (“Certificate of Service”).

The Preliminary Pre-Trial Order makes clear that the court calls the attorneys for the conference, and states further: “The court will place a conference call to all counsel at the designated time. The court will place the call to the office telephone of each counsel unless counsel notifies the court, prior to the date of the hearing, of an alternate phone number.” R. 8. Counsel for the plaintiff was not present for the telephonic pre-trial conference on January 18, 2006. Because neither he nor anyone on his staff was available to answer the telephone, the court’s judicial staff member left a voice mail message concerning the attempted communication to set up the conference. After conferring with counsel for the debtors, who had appeared, the court sua sponte and not at the request of debtors’ counsel dismissed the adversary case.

On January 20, 2006, the court entered its Order Dismissing Adversary Proceeding. *See* R. 10. This Order also was mailed electronically to Mr. Appel, at the same email address to which the December 22, 2005

Order was sent, and by first-class mail to his client NAS Gas, Inc. *See* R. 10, 11. On January 24, 2006, plaintiff, by counsel, having received that Order, filed its Verified Motion to Vacate Order Dismissing Adversary Proceeding. *See* R. 12.

The plaintiff states in its Motion that plaintiff's counsel never received an email or other electronic transmission advising him of the entry of the bankruptcy court's Preliminary Pre-Trial Order. Nor did plaintiff's counsel have any communication with debtors' counsel concerning the pre-trial order or the telephonic pre-trial hearing. He asserts that his failure to be available for the telephonic hearing on January 18, 2006 was "due to a complete lack of knowledge on the part of Plaintiff's Counsel concerning said hearing, and due to no other cause." R. 12, p.2, ¶ 6. The plaintiff asks that the sanction of dismissal should be vacated as "unduly harsh and unfair to the Plaintiff." *Id.*

Attached to the Motion was the Verified Affidavit of Dana M. Hand, Mr. Appel's full-time office administrator. She stated that she has sole responsibility for monitoring receipt of email notifications from the ECF/Pacer system used by the United States Bankruptcy Court for the Northern District of Indiana. She was trained to use the system and is well experienced in its use, she said. She attested that she checked Attorney Appel's email notifications between December 22, 2005 and January 18, 2006 "on an average of at least three times per week" and affirmed that he never received electronic notification of the Order. R. 12, Att., ¶ 4.

Discussion

The court will treat the plaintiff's Verified Motion to Vacate Order as a Motion to Alter or Amend Judgment, because it was filed within ten days of the entry of the Court's Order of January 20, 2006. *See* Fed. R. Bankr. P. 9023; Fed. R. Civ. P. 59(e) ("Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."); *see also In re DeLaughter*, 295 B.R. 317, 319 (Bankr. N.D. Ind. 2003). To succeed in a Rule 59(e) motion, the plaintiff is required to establish clearly a manifest error of law, an intervening change in the controlling law, or newly discovered evidence. *See Romo v. Gulf Stream Coach, Inc.*,

250 F.3d 1119, 1121 n.3 (7th Cir. 2001) (citations omitted). The Seventh Circuit Court of Appeals has defined “manifest error” as a court’s ““wholesale disregard, misapplication, or failure to recognize controlling precedent.”” *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir.2000), *cert. denied*, 531 U.S. 1152 (2001) (quoting *Sedrak v. Callahan*, 987 F.Supp. 1063, 1069 (N.D. Ill.1997)). The burden is on the party seeking reconsideration to demonstrate the existence of manifest errors of fact or law. *See In re Nosker*, 267 B.R. 555, 565 (Bankr. S.D. Ohio 2001); *cf. Lekas v. Briley*, 405 F.3d 602, 615 n.8 (7th Cir. 2005).

The reason given by plaintiff’s counsel for asking the court to vacate its Order is straightforward: Neither he nor his office administrator received the electronic notice of the Preliminary Pre-Trial Order. His failure to attend the telephonic hearing occurred only because he did not know that there was a hearing, he said.

It is long-settled bedrock law, in this and every circuit, that “[w]here a letter is properly addressed and mailed, there is ‘a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed.’” *Boomer v. AT & T Corp.*, 309 F.3d 404, 415 n.5 (7th Cir. 2002) (quoting *Hagner v. United States*, 285 U.S. 427, 430, 52 S. Ct. 417, 76 L.Ed. 861 (1932)). It is equally clear that “denial of receipt is insufficient to rebut a presumption that proper notice was given.” *In re Eagle Bus Mfg., Inc.*, 62 F.3d 730, 735 (5th Cir.1995) (*quoted in In re Anderson*, 330 B.R. 180, 185 (Bankr. S.D. Tex. 2005)). The same presumption of receipt is applied, now, when notice is properly sent electronically. *See Ridley v. Holt (In re Holt)*, 310 B.R. 675, 680 (Bankr. N.D. Tex. 2004) (“As with proof of mailing of a notice by first class mail, proof of electronic notice presumes receipt of the notice.”). The rebuttal of that presumption requires evidence, and some courts require clear and convincing evidence. *See, e.g., Jorgenson v. State Line Hotel, Inc. (In re State Line Hotel, Inc.)*, 323 B.R. 703, 708 n.5 (9th Cir. B.A.P. 2005).

The [plaintiffs’] counsel must present evidence to rebut that presumption [of receipt of electronic notice]. While the court does not question counsel’s representation that she personally did not receive the notice, counsel did not present evidence about how her office processes electronic notice to support a finding that the office did not receive the notice. Without that evidence, the presumption of receipt has not been rebutted.

In re Holt, 310 B.R. at 680; *see also In re Sands*, 328 B.R. 614, 619 (Bankr. N.D.N.Y. 2005) (requiring a party to provide evidence that there was a technical problem in the clerk's office).

In this case, the evidence was presented by the attorney's office administrator, who explained in her Affidavit that her procedure was to check email notifications three times a week. Although the court was surprised that she did not check at least three times a day, it also was puzzled that she did not discover the emailed Order at some point during the 27 days between the transmission of the Order and the pre-trial conference. The court therefore reviewed its procedures for electronic notification in this case. It found that the Preliminary Pre-Trial Order of December 22, 2005, was transmitted electronically on December 22, 2005, to plaintiff's counsel, who is a CM/ECF participant.¹ The court's technical systems staff verified that there were no undeliverable messages returned to the court from Mr. Appel's office and no evidence of failure in the electronic filing system on that date. On December 24, 2005, the Order was sent in printed form or "hard copy" to the plaintiff itself by first-class conventional mail.² The court notes, as well, that the court's judicial staff member spoke with someone in Mr. Appel's office on the afternoon of January 18, 2006, and verified that Mr. Appel's email address was correct. It also notes that the court used the same email address to send Mr. Appel its Order Dismissing Adversary Proceeding on January 20, 2006, and it was received.

The court finds, therefore, that the plaintiff has failed to present sufficient evidence to rebut the presumption that proper electronic notice was given. Nor did the plaintiff demonstrate, in any way, the existence of a manifest error of law, an intervening change in the controlling law, or newly discovered evidence, as Rule

¹ Mr. Appel was given training in Case Management and Electronic Case Filing procedures on November 10, 2003, in the Hammond Division of this court. His office administrator stated that she, too, attended the training seminar and is experienced in the use of CM/ECF procedures and the PACER system. By registering as an ECF User, a trained participant has consented to receive notice electronically rather than by first class mail. *See* Fifth Amended Order Authorizing Electronic Case Filing, ¶ 3(b).

² The company contracted by the Administrative Office of the United States Courts to mail notices for the Court is BAE Systems Information Technology. The docket in this case records that, on December 24, 2005, BAE Systems served the Preliminary Pre-Trial Order of December 22, 2005, on NAS Gas, Inc., and the debtors and debtors' counsel. *See* R. 9.

59(e) requires. Because the plaintiff has not established a basis for invoking Rule 59(e), the court finds that there is not sufficient justification to conduct a hearing.

Moreover, the court determines that counsel's nonappearance at the conference does not qualify as "excusable neglect" under the Supreme Court's 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). Taking into account all the relevant facts and circumstances concerning counsel's failure to appear at the telephonic conference, as required under *Pioneer*, it determines that his conduct does not constitute excusable neglect or any other reason that would justify relief from the court's Order of January 20, 2006. It further finds that the plaintiff is "held accountable for the acts and omissions of their chosen counsel." *Id.* at 397, 113 S. Ct. at 1499.

Conclusion

Based upon a consideration of all the relevant facts and circumstances surrounding the failure of plaintiff's counsel to attend the court's scheduled telephonic pre-trial hearing on January 18, 2006, the court denies the plaintiff's Verified Motion to Vacate Order Dismissing Adversary Proceeding.

SO ORDERED.

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