

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
GARY WAYNE ORRISON) CASE NO. 06-10144
JUDITH ANN ORRISON)
)
Debtors)

DECISION AND ORDER

At Fort Wayne, Indiana, on May 26, 2006.

By a decision and order issued on May 2, 2006, the court directed the debtors to file an amended petition within ten (10) days. The order went on to specifically state that the failure to do so would result in the case being dismissed without further notice. The debtors did not comply with that order, neither did they seek an extension of time in which to do so. Accordingly, on May 15, 2006, the court did what it said it would do and dismissed the case. Within an hour of receiving the court's order dismissing the case, the debtors filed a motion to reinstate case, apparently asking the court to vacate the order of dismissal pursuant to Rule 59 of the Federal Rules of Civil Procedure.¹ That motion was denied by the court's order of May 16, 2006. The debtors have now filed a second motion to reinstate. The brief accompanying the motion indicates that its is based upon Rule 60 of the Federal Rules of Civil Procedure. That motion is presently before the court and it is 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).

¹The motion did not identify the statute or procedural rule upon which it was based. As it was filed within ten (10) days after the entry of the order in question, it was considered a motion filed pursuant to Rule 59.

The debtors argue that the failure to file an amended petition within ten days of the court's order directing them to do so was the result of excusable neglect under Rule 60(b)(1) of the Federal Rules of Civil Procedure. Any determination of excusable neglect is an equitable one taking into account, among other things, whether the reason for the delay was within the reasonable control of the movant. Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 395, 113 S.Ct. 1489, 1498 (1993). See also, Raymond v. Ameritech Corp., 442 F.3d 600 (7th Cir. 2006); Robb v. Norfolk & Western Ry. Co., 122 F.3d 354 (7th Cir. 1997).

Debtors explanation for the failure to comply with the court's order is simple – their counsel thought she had filed the amended petition and only realized that it had not been filed when she received the order dismissing the case. Counsel states that she must handle everything in the office by herself. She had placed the amended petition in the file while awaiting the court's decision and then apparently got busy and forgot to file it after the court ruled. Debtors argue that the failure to timely file the amended petition was not willful or intentional, and had it not been for counsel's oversight, it would have been timely filed. Counsel also argues that dismissal would unfairly prejudice the debtors, their creditors and the court by forcing everyone involved to incur additional expense and/or unduly devote more time and attention to the matter should the debtors refile their case.

The failure to comply with the court's order was fully within counsel's control and does not constitute excusable neglect. The Supreme Court has clearly stated that internal office problems will not excuse an attorney's failure to comply with a clearly stated filing deadline. Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 398, 113 S.Ct. 1489, 1499-1500 (1993). See also, Connecticut Nat. Mortg. Co. v. Brandstatter, 897 F.2d 883, 884-85 (7th Cir. 1990); United

States v. Fraya, S.E., 170 F.R.D. 346, 349 (D. Puerto Rico 1997). That type of excuse is essentially all that counsel offers here. More significantly, rather than being the product of excusable neglect, the present situation is the result of conscious decisions counsel made with regard to the issues raised by the court's order to show cause. The court notes that the amended petition is dated March 28, 2006 – that is the day before the hearing that was held to consider the issues raised by the order to show cause and counsel's response thereto: the hearing which led to the decision and order counsel failed to comply with resulting in the dismissal of this case. Thus, counsel had it within her power to moot the entire inquiry – to completely eliminate the need for the court to consider the issue and for the decision and order of May 2, 2006 – by submitting the amended petition at the hearing of the 29th. She did not do so. Instead, she chose to make the court take the time and go to the trouble of deciding the issue; to prepare and issue a decision, apparently hoping that the court would rule in her favor and that an amended petition might not be required. While there is nothing wrong with the desire to have the court decide the matter, counsel is hardly in a position to complain about the consequences of her strategic decision concerning when to file any amended petition.

The court sees no reason why it should vacate an order dismissing a case as a result of the failure to comply with a court imposed deadline, of which counsel was fully aware, when counsel was specifically told that dismissal would be the consequence of non-compliance. See, Pioneer, 507 U.S. at 394-96. “Inattentiveness to the litigation” and “missing a filing deadline because of slumber,” are not excusable, see, Matter of Plunkett, 82 F.3d 738, 742 (7th Cir. 1996), and that is what happened here. Although counsel argues that it would be fundamentally unfair to the debtors to have their case dismissed,

[h]olding the client responsible for the lawyer's deeds ensures that both clients and

lawyers take care to comply. If the lawyer's neglect protected the client from ill consequences, neglect would become all too common. It would be a free good – the neglect would protect the client, and because the client could not suffer the lawyer would not suffer either. Tolliver v. Northrop Corp., 786 F.2d 316, 319 (7th Cir. 1986). See also, Pioneer 507 U.S. at 396-97, 113 S.Ct. at 1499.

Furthermore, the dismissal of this case was without prejudice, see, 11 U.S.C. § 349(a), so the debtors are free to refile and whether they will incur any additional expenses in doing so is a matter within counsel's power to control.

Debtors' motion to reinstate filed on May 22, 2006 is therefore DENIED.

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