

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN RE: CASE NO. 05-40690)
)
DAVID H. NELSON)
)
Debtor)
)
)
CHARLES O. PROSPAL)
)
Plaintiff)
)
vs.) PROC. NO. 05-4025
)
DAVID H. NELSON)
)
Defendant)

DECISION AND ORDER
DENYING MOTION TO RECONSIDER

At Fort Wayne, Indiana, on July 14, 2006

The scheduling order in this adversary proceeding required the parties to jointly file a proposed pre-trial order by February 17, 2006. When they had not done so by March 15, the court issued an order to show cause warning that the proceeding would be dismissed, without further notice, unless they either complied with the court's order or plaintiff was able to show cause, in writing, why the proceeding should not be dismissed. Two days later, on March 17, 2006, plaintiff's counsel filed a request for a status conference. This request indicated that the parties had spent all of their time in unsuccessful settlement negotiations and asked the court to hold a status conference and/or issue new litigation deadlines. In response, the court issued its order of March 21, 2006, setting the matter for a final pre-trial conference "for the purposes of formulating a joint pre-trial order." This order also imposed important obligations upon each party in order to properly prepare

for the conference. In essence, they were each required to file their respective portions of a proposed pretrial order no later than fourteen days prior to the pre-trial conference, then they were to meet in person for the purposes of formulating a joint pretrial order, and, finally, as a result of that meeting, jointly file either a proposed pretrial or a joint statement indicating there were not able to agree upon such a order (such a statement also had to contain all aspects of the pre-trial order they could agree upon, identify what they were not able to agree upon and the reasons why) no later than three days prior to the final pre-trial conference. The order went on to specifically state: “[T]he failure to comply with the requirements of this order may result in the entry of judgment against the disobedient party, by default, without further notice or hearing.”

By the time of the final pretrial conference the only thing that had been done to comply with the court’s order of March 21 was the filing of the separate statements from each party. There was no joint proposed pretrial order and no joint statement concerning the parties’ inability to agree upon a pre-trial order. As a result, for the reasons stated in open court, the court did more or less precisely what is said might be done and ordered that the case would be dismissed unless either the trustee or the U.S. Trustee filed a motion to intervene or be substituted for the original plaintiff.¹

The original plaintiff has asked the court to reconsider the court’s decision and allow it to proceed with this litigation. The brief accompanying the motion indicates that it is based upon Rule 60 of the Federal Rules of Civil Procedure and, as such, 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). Counsel essentially states

¹The trustee’s motion to intervene in this proceeding was filed on April 26, 2006 and granted on May 17, 2006.

that he did not receive “actual copies” of some of the court’s orders, because he received some of them in hard copy through the mail and some of them electronically through the court’s ECF system.² Thus, he became confused over the way he was to receive the court’s orders, his failure to comply with those orders was a result of this confusion and was not intentional, and that this constitutes excusable neglect.

There can be no question that this adversary proceeding has not been prosecuted in accordance with the court’s orders. A pretrial order was not filed when it was due and when counsel was given the opportunity to correct that problem or show cause why the case should not be dismissed, he proffered an insufficient explanation. See, In re Collins, 2000 WL 1772764 (Bankr. N.D. Ind. 2000)(settlement negotiations do not relieve litigants of the obligation to comply with a scheduling order). Then, when he was given yet another chance to correct the problem, through the court’s order of March 21 and the final pre-trial conference of April 12, he once again failed to comply with the court’s order. While counsel argues that his failure to comply with the court’s orders was not intentional, that is not the issue. The issue is whether that failure is attributable to excusable neglect. A 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).

Counsel’s failure to comply with the court’s orders because he did receive them in the

²All of the orders in question were electronically served upon counsel through the court’s ECF system. Additionally, the scheduling order of September 20 was also served upon counsel through the mail via the BNC.

manner which he expected or preferred (hard copy through the mail) does not constitute excusable neglect. By registering as a user of the court's ECF system, counsel consented to receive notice electronically and waived the right to receive notice by first-class mail. Fifth Amended Order Authorizing Electronic Case Filing ¶ 3(b)(i). Although he may have received the scheduling order of September 20 both electronically and through the mail, there is nothing about that single instance of dual service that would reasonably lead anyone to believe that service by mail would always be the norm. The important issue, however, is not how counsel was served with the court's orders but whether they were served upon him. Even though counsel has the obligation to monitor the court's docket, *see, Fox v. American Airlines, Inc.*, 389 F.3d 1291, 1294 (D.C. Cir. 2004); *United States, ex rel. McAllan v. City of New York*, 248 F.3d 48, 53 (2nd. Cir. 2001); *Williams v. Hatcher*, 890 F.2d 993, 995 (7th Cir. 1989); *DeRango v. United States*, 864 F.2d 520, 523 (7th Cir. 1988); *In re DeLaughter*, 295 B.R. 317, 320 (Bankr. N.D. Ind. 2003), if an attorney was never served with a particular order, the court is inclined to be more sympathetic than it would be if the order was simply ignored. Here, there is no question that the court's orders (as well as everything else filed in the case) were all electronically served upon counsel. Indeed, counsel does not argue that he did not receive the orders, just that he did not receive them in the format he expected and, since he expected to receive them in hard copy disregarded them until that time. That counsel and his staff (despite having taken ECF training) may not have been familiar with how to download those orders³ and, since counsel expected to receive them in hard copy, felt there was no need to learn how to do so is astonishing. It is incumbent upon attorneys to adopt internal office procedures that ensure

³How difficult can it be to activate a hyperlink (via a left mouse click) on an electronic docket or in a notice of electronic filing to open a document and read it?

the court's notices and orders are brought to their attention once they have been received. In re Schlosser, 100 B.R. 348, 350 (Bankr. S.D. Ohio 1989); Greene v. Union Mut. Life Ins. Co., 102 F.R.D. 598, 603 (D. Maine 1984). Disregarding orders which were received in a manner different from the one counsel wanted is unacceptable.⁴

It is counsel's responsibility to monitor the progress of their cases and the court's docket. Fox v. American Airlines, Inc., 389 F.3d 1291, 1294 (D.C. Cir. 2004); United States, ex rel. McAllan v. City of New York, 248 F.3d 48, 53 (2nd. Cir. 2001); Williams v. Hatcher, 890 F.2d 993, 995 (7th Cir. 1989); DeRango v. United States, 864 F.2d 520, 523 (7th Cir. 1988); In re DeLaughter, 295 B.R. 317, 320 (Bankr. N.D. Ind. 2003). Counsel did not do so. He chose to disregard orders when he did not receive them in the manner he preferred, he apparently did not check the court's docket to learn what the court expected of him, and he failed to set up appropriate procedures in his office for the processing of electronic notices that were sent to him. In light of this, is it any wonder that this case was not prosecuted with the diligence required by the court's orders or that it was dismissed as result thereof? Even now, counsel still has not corrected the problem that finally led to the order of dismissal – the failure to file the joint pre-trial order or joint statement required by the order of March 21. See, Tolliver v. Northrup Corp., 786 F.2d 316, 319 (7th Cir. 1986) (“It would take an extraordinary set of facts – one we cannot now imagine – to make a case of ‘abuse of discretion’ in failing to restore to the docket a case in which the defaulting party is still in default at the time the [] judge rules on the motion to vacate.”).

The motion to reconsider the court's order of April 24, 2006 is DENIED. This case will go

⁴Counsel's attempt to lay the blame for his failure to comply with the court's orders upon the clerk's office is also unacceptable. See, In re DeLaughter, 295 B.R. 317, 320-321 (Bankr. N.D. Ind. 2003).

forward with the Trustee as the sole plaintiff.⁵

/s/ Robert E. Grant

Judge, United States Bankruptcy Court

⁵The trustee apparently believes the action lacks sufficient merit to justify taking it to trial because, on July 13, 2006, he filed a stipulation for dismissal with defendant's counsel.