

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ILLINOIS**

**IN RE:**

**MICHAEL S. KIRCHNER and  
PATRICIA A. KIRCHNER,  
Debtors.**

**No. 03-31298**

**VIRGIL MEAD, d/b/a  
LERRY-MEAD CONCRETE,  
Plaintiff,**

**VS.**

**Adv. No. 03-3143**

**MICHAEL S. KIRCHNER,  
  
Defendant.**

**OPINION**

The issue before the Court is whether to vacate the order dismissing the Plaintiff's complaint for failure to appear at the time the case was set for trial. The facts giving rise to the issue are basically uncontested.

The Plaintiff filed a complaint objecting to the Defendant's discharge under § 727(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 727(a)(2)(A), on the grounds that the Defendant, as an officer of Westin Group, Inc., with intent to hinder, delay and/or defraud Plaintiff, transferred certain real estate upon which the Plaintiff held a mechanics lien pursuant to a false mechanics lien affidavit, which failed to reveal the Plaintiff's lien. After the Defendant filed an answer, the matter was set for trial and when the Defendant appeared for trial and the Plaintiff failed to do so, the complaint was dismissed.

The Plaintiff then filed a Motion to Reinstate the complaint on the grounds of excusable neglect. The Plaintiff's attorney argues that his office was in shambles, that there was a companion case pending where discovery was in the process and a continuance had been granted, and an

associate in his office mistakenly took this case off the attorney's calendar, thinking it was continued as well.

The Defendant objects to a reinstatement, arguing that his attorney spoke to the Plaintiff's attorney just six days prior to the trial date, so the Plaintiff's attorney knew of the trial date, and that at this point the Plaintiff has no evidence to support a claim against the Defendant. The Plaintiff's attorney acknowledges the latter argument to be true, but asserts that given time to complete discovery he could find such evidence and if he fails to do so he will voluntarily dismiss the complaint.

After a hearing on the original Motion to Reinstate, the Plaintiff filed an Amended Motion to Reinstate alleging that after the hearing discovery was completed which produced evidence in support of the complaint. The Defendant did not respond to the amended motion.

Federal Rule of Civil Procedure 60(b)(1), made applicable to bankruptcy proceedings by Rule 9024 of the Federal Rules of Bankruptcy Procedure, provides that good cause to set aside a judgment can consist of mistake, inadvertence, surprise, or excusable neglect. The Supreme Court has determined that what constitutes "excusable neglect" under Fed.R.Civ.P. 60(b) is:

[A]t bottom an equitable [consideration], taking account of all the relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the [defendant], 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.

*Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380,395,113 S.Ct. 1489, 123L.Ed.2d74 (1993). The court in *Pioneer* held that "for purposes of Rule 60(b), 'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 394. The excusable neglect standard applies to a party as well

as to neglect by an attorney, *Farley Inc. v. Ohio Bureau of Workers' Compensation*, 213 B.R. 138 (N.D.Ill. 1997), and courts making decisions under Fed.R.Civ.P. 60(b) are provided a great deal of latitude with which to make their decision. *Tolliver v. Northrop Corp.*, 786 F.2d 316, 319 (7<sup>th</sup> Cir. 1986).

The single most important factor under *Pioneer* is control over the circumstances of the delay. *See City of Chanute, Kan. v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10<sup>th</sup> Cir. 1994). While relieving a party of a final judgment under Fed.R.Civ.P. 60(b) should be reserved for exceptional circumstances, *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1204-05 (7<sup>th</sup> Cir. 1984), cases should, whenever possible, be decided on their merits. *Ocampo De Kalb, LLC v GMAC Commercial Mort. Corp.*, 169 F.Supp.2d 810 (N.D.Ill. 2001). As the court in *Ocamponoted*, "The bottom line is that it is unfair to enter judgment against a party without affording it a reasonable opportunity to defend itself." *Id* at 814.

In *O'Brien v. R.J. O'Brien & Associates, Inc.*, 998 F.2d 1394, 1401 (7<sup>th</sup> Cir. 1993), the Seventh Circuit held that to prevail under Rule 60(b), the moving party must show 1) good cause for its default, 2) quick action to remedy that default, and 3) a meritorious position in the underlying action. *See also, Accord Jones v. Phipps*, 39 F.3d 158, 162 (7<sup>th</sup> Cir. 1994). While these three factors guide a court's decision, other factors may also influence the decision including the burden on the court's docket, the legitimate reliance on the default by the nonmoving party, and "the policy considerations favoring termination of stalled litigation against the possibility of injustice based, in part, upon the substantive merit of the nonmovant's claims and the moving party's proffered excuses for the default." *Swaim v Moltan Co.*, 73 F.3d 711, 722 (7<sup>th</sup> Cir. 1996). Importantly, to obtain relief under Rule 60(b), the Plaintiff's substantive complaint must have merit, *Matter of Busick*, 719 F.2d 922, 926 (7<sup>th</sup> Cir. 1983), as judicial economy requires that a Rule 60(b) demonstrate a meritorious claim or it would be a waste of time to reopen proceedings.

As one court, addressing the excusable neglect standard, noted, "[w]hen counsel's inability to act is

the result of events that could reasonably have been anticipated, courts will not find excusable neglect." *In re Aponte*, 91 B.R. 9, 12 (Bankr.E.D.Pa. 1988). Courts have routinely held that excusable neglect must arise from extraordinary situations and cannot be used as a vehicle for relief because of an attorney's incompetence or carelessness. *See, e.g., Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565 (11th Cir. 1987) (attorney's busy practice is not sufficient to establish excusable neglect under Fed.R.Civ.P. 6(b)); *Sutherland v. ITT Continental Baking Co., Inc.*, 710 F.2d 473 (8th Cir.1983) (attorney's failure to appear at trial is insufficient to form the basis for Rule 60(b)'s excusable neglect relief).

The complaint should be reinstated. As a general rule, courts favor cases being decided on their merits. As to the facts of this case, standing alone the attorney's failure to appear at trial is not excusable neglect. However, apparently there was confusion in the attorney's office arising from the fact there was a companion case that was continued which led to the removal of the trial date from the attorney's calendar for this case. When the dismissal was entered, the Plaintiff's attorney acted quickly to have it vacated. While missing a trial date is serious, there is no indication the Plaintiff's attorney acted other than in good faith. The Defendant did not argue there would be any prejudice arising from a reinstatement. The Defendant's main argument is that the Plaintiff does not have a meritorious claim. However, he did not respond to the allegations set forth in the amended motion, which the Plaintiff contends supports the allegations of the complaint. Finally, there would be no burden to the Court in reinstating the complaint.

This Opinion constitutes this Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate Order will be entered.

Dated: March 20, 2004

/s/ WILLIAM V. ALTENBERGER  
UNITED STATES BANKRUPTCY JUDGE

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