

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE)
)
YOUNG, JOSEPH & SANDRA,)
)
Debtors.) Cause No. **98-CV-248-WDS**
)
LAURA K. GRANDY, TRUSTEE,) Bankruptcy No. 96-32879
)
Appellee,) Adv. No. 97-3207
)
COMMERCIAL CREDIT LOANS, INC.,)
)
Appellant.)

MEMORANDUM OF OPINION

STIEHL, District Judge:

This matter is before the Court on appeal from the United States Bankruptcy Court for the Southern District of Illinois. For the reasons stated below, this Court affirms the ruling of the bankruptcy court.

BACKGROUND

On November 13, 1996, debtors filed for bankruptcy pursuant to Chapter 13 of the Bankruptcy Code. The debtors moved to convert the Chapter 13 proceedings into Chapter 7 proceedings and the Bankruptcy Court granted debtors' motion on February 12, 1997. Appellee was named the trustee in the Chapter 7 proceedings. As trustee, appellee sought to recover debtors' van, a 1988 Dodge Caravan VIN #284FK41K1JR760227, which was

given to appellant who subsequently sold the van. Because appellant no longer possesses the van, appellee seeks to recover the value of the van, \$6,000.

On November 25, Commercial Credit Loans, Inc. filed a Proof of Claim to establish it possessed a security interest in debtors' van. On December 10, 1996, James W. McRoberts, the Chapter 13 trustee, responded by filing a Complaint to Avoid Lien pursuant to **11 U.S.C. § 541(a)(1)**. On January 9, 1997, Commercial Credit Loans, Inc. responded to the trustee's complaint asserting that the Certificate of Title demonstrated that it was a secured creditor. In the case caption, appellant named itself Commercial Credit Plan, Inc. On the Certificate of Title, appellant is referred to as Commercial Credit. Commercial Credit, Commercial Credit Plan, Inc., and Commercial Credit Loans, Inc. all share the same address: 231 East Delmar, Alton, Illinois.

The Bankruptcy Court scheduled a hearing to determine whether Commercial Credit Plan, Inc. possessed a security interest in the van. Appellee Grandy, who was substituted for McRoberts as trustee as a result of debtors' conversion to Chapter 7, reported to the Bankruptcy Court that "Commercial Credit" agreed that the lien should be avoided. The Bankruptcy Court entered an order avoiding the lien, holding that the

trustee shall have first lien position and Commercial Credit, Plan, Inc. will have a general unsecured claim.

At the hearing on appellee's motion to turnover property, debtors testified that they were no longer in possession of the van, and that they turned over possession of the van to appellant. According to the trustee, she tried to contact appellant and its counsel about the van, and appellant denied being in possession of the van. However, appellant was attempting to transfer title of the van to itself pursuant to its alleged lien. Toward that end, a notice of intent of the debtor was filed in which the lienholder was identified as Commercial Credit and Commercial Credit Loans, Inc. According to appellant, the debtors voluntarily surrendered the van to the appellant who subsequently sold the van for \$600. Appellant also contends it did not possess actual knowledge of the Order avoiding its lien when it sold the van.

To recover the van, the trustee filed a complaint for, and served appellant's attorney, Wesley Kozeny, and CT Corporation Systems, Inc., appellant's registered agent. Appellant failed to answer the summonses, and the Bankruptcy Court issued a notice of default entitlement against Commercial Credit Loans, Inc. which provided for a twenty day period within which appellee could file a motion for default. Appellee timely filed

her motion for default and the Bankruptcy Court set a hearing for December 17, 1997. Notice of the hearing and prospective default judgment was sent to Kozeny. Appellant failed to attend the hearing and the Bankruptcy Court granted the trustee's motion for default pursuant to **Fed. R. Civ. P. 55**. The judgment was for \$6,000.

On January 17, 1998, Commercial Credit Loans, Inc. filed a motion for a new trial and an alternative motion to alter or to amend judgment. The attorney of record for Commercial Credit Loans, Inc. was Kozeny. The Bankruptcy Court construed the motions as motions to set aside judgment pursuant to **Fed. R. Civ. P. 60(b)**, and denied the motions.

Commercial Credit Plan, Inc. filed its appeal pursuant to **Bankr. Rule 8002**. On appeal, appellant argues: 1) the Court has no jurisdiction over Commercial Credit Plan, Inc.; 2) service upon Commercial Credit Plan, Inc. was improper; 3) the Bankruptcy Court should not have entered a default judgment pursuant to **Rule 55**; and 4) the Bankruptcy Court should have granted its Motion to Set Aside Judgment pursuant to **Rule 60(b)**.

ANALYSIS

Appellant contends that both this Court and the Bankruptcy Court lack jurisdiction over Commercial Credit Loans, Inc., because the proper party is Commercial Credit Plan, Inc., not

Commercial Credit Loans, Inc. It is also alleged that Commercial Credit Plan, Inc. is a separate legal entity apart from Commercial Credit Loans, Inc. Thus, according to appellant, because the order avoiding lien was entered against Commercial Credit Plan, Inc. it is ineffective as to Commercial Credit Loans, Inc. and, therefore, the default judgment entered against Commercial Credit Loans, Inc. is invalid.

The source of the confusion rests with Commercial Credit Loans, Inc., because it has filed documents and pleadings as Commercial Credit Loans, Inc. and Commercial Credit Plan, Inc. For example, Commercial Credit Loans, Inc. filed a proof of claim to establish it possessed a security interest in the van but Commercial Credit Plan, Inc. replied to appellee's response. In light of the record, the Court finds that Commercial Credit Plan, Inc., and Commercial Credit Loans, Inc. refer to the same entity. Both are located at 231 East Delmar, Alton, Illinois, and both have filed motions in the course of the proceedings to protect the same security interest in the van. Thus, this Court and the Bankruptcy Court possess jurisdiction over appellant.

Appellant argues that the complaint for turnover of property was improperly served for two reasons: 1) its registered agent, CT Corporation Systems, failed to forward the summons to the proper party; and 2) Kozeny had not been retained by appellant

when the summons was served. **Bankruptcy Rule 7004** states that a domestic corporation may be served by "mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if tile agent is authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." **Id.** In this case, appellee's verified service upon appellant's attorney, Kozeny, clearly constituted proper service. Although appellant claims that Kozeny was not retained at the time he was served, he had represented appellant in this case since January 9, 1997. Appellant's contention that its registered agent failed to notify it is also without merit because CT Corporation Systems was properly served. **Barr v. Zurich Ins. Co., 985 F. Supp. 701, 704 (S.D. Tex. 1997).**

Appellant also alleges that prior to entry of the default judgment, debtors' account was transferred to the Commercial Credit Corporation office in Maryland, and as a result, it no longer possessed any interest in the van. Thus, according to appellant, appellee should have filed a complaint to avoid lien against the Maryland office. Contrary to appellant's allegation, it may be liable pursuant to the default judgment. Appellant responded to the trustee's motion to avoid lien and

consented to the order avoiding lien. Moreover, appellant continues to have an interest in the van because it sold the van in violation of the order avoiding lien. Therefore, appellant is the proper party in this suit.

Next, appellant argues that a default judgment should not have been granted pursuant to **Rule 55(a)**. **Rule 55(a)** states that default judgment shall be entered when "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend." *Id.* Specifically, appellant argues that the van is worth far less than \$6,000 and, therefore, the \$6,000 includes sanctions against appellant that were not pled in the complaint. Appellant argues that the Bankruptcy Court must make an express finding that appellant engaged in contumacious conduct in order to impose sanctions.

Appellant is correct when it states that default judgments are generally disfavored by the Court, however, in this case, default judgment is appropriate. *Brever Elec. Mfg. Co. v. Toronado Sys. Of Am.*, 687 F.2d 182, 185 (7th Cir. 1982). Pursuant to **Rule 55**, default judgment is proper "when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise." **Rule 55(a)**. **Bankruptcy Rule 7055** states that **Rule 55** applies in

adversarial proceedings before a Bankruptcy Court. In this case, appellant failed to attend the hearing scheduled before the Bankruptcy Court regarding the of the van. Nor did appellant file any motion or pleading with the Bankruptcy Court contesting appellee's claim. Moreover, appellant had sold the van in violation of the Bankruptcy Court's order avoiding lien. Thus, the entry of default for \$6,000 was proper. The Court agrees with the \$6,000 judgment, because \$6,000 was the book value of the van listed on debtor's schedules, as the appellant conceded before the Bankruptcy Court, and therefore no sanction has been imposed upon appellant.

Finally, appellant argues that the Bankruptcy Court erred by denying its motion to set aside default judgment. Appellant filed a motion for a new trial and an alternative motion to alter or amend judgment which the Bankruptcy Court construed as motions to set aside judgment pursuant to **Fed. R. Civ. P. 60(b)**. Appellant argued that its failure to contact Kozeny, its attorney, constituted excusable neglect to set aside the default judgment.

Two different rules permit the default judgment to be set aside: **Rule 55(c)** and **60(b)**. **Rule 55(c)** empowers the Court to set a side a default judgment if appellant can demonstrate: good cause for the default; quick action to correct it; and a

meritorious defense to the complaint. *Id.*, *United States v. DiMucci*, 879 F.2d 1488, W95 (7th Cir. 1989). Rule 60(b) lists several reasons for relief, however, the applicable section in this case is (b)(1) because appellant alleges "excusable neglect." The Supreme Court defined "excusable neglect" in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 388-97 (1993). Although *Pioneer* involved Bankr. Rule 9006(b)(1), the Supreme Court also discussed the term's use in other procedural rules, including Fed. R. Civ. P. 60(b)(1). *Pioneer*, 507 U.S. at 393-95. The Supreme Court specifically stated that under Rule 60(b)(1) excusable neglect "encompass[es] situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 394. To determine whether "excusable neglect" occurred, the Supreme Court noted that a trial court must take an equitable accounting of all relevant circumstances. *Id.* at 388-95. After the Supreme Court decided *Pioneer*, the Seventh Circuit held that the Rule 55(c) "good cause" test is the same as the Rule 60(b) test, although the test is more stringently applied under Rule 60(b). *R.J. O'Brien & Assoc., Inc.*, 998 F.2d 1394, 1401 (7th Cir. 1993).

In *Matter of Plunkett*, the Seventh Circuit held that inattentiveness to the litigation does not amount to "excusable

neglect," and, specifically, that "[m]issing a deadline because of slumber is fatal." **82 F.3d 738, 742 (7th Cir. 1996)**. In ***Plunkett***, a bankruptcy case, a junior mortgagee, Emerald, filed an informal proof of claim and sought to amend the proof of claim; however, the bankruptcy court had already set a final date for creditors to file claims. ***Id.* at 740**. Because Emerald originally filed a proof of claim, the bankruptcy trustee sent notice to Emerald and posted public notice. ***Id.* at 738**. The notices went unanswered. Emerald abandoned the case by failing to meet the simple legal requirement to keep its claim alive by filing a one-page claim. ***Id.* at 738, 742**. By abandoning its case, especially when maintaining it was simple, the Seventh Circuit held Emerald had inexcusably neglected its claim. ***Id.* at 738, 742**.

In this case, appellant's failure to contact its attorney was negligence *per se*. A litigant cannot be allowed to escape the consequences of its failure to contact its attorney merely by claiming it neglected or forgot to contact him. Appellant's negligent handling of its case does not rise to the level of excusable neglect. Instead, appellant failed to deliver legal notices and documents to its attorney and provided no explanation for its conduct. In addition, by selling the van in violation of a court order, appellant has demonstrated that it

had previously ignored other legal notices.

CONCLUSION

Accordingly, the Court **AFFIRMS** the decision of the bankruptcy court.

IT IS SO ORDERED.

DATED: December 18, 1998

/s/ William D. Stiehl
District Judge