UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

In re:	
JOHN/GLENDA VAN DOORN,	Case No. 06-22175-B-7
	Docket Control No. CRR-1
Debtors.	Date: October 24, 2006
	Time: 9:30 a.m.

On or after the calendar set forth above, the court issued the following ruling. The official record of the ruling is appended to the minutes of the hearing.

Because the ruling constitutes a "reasoned explanation" of the court's decision under the E-Government Act of 2002 (the "Act"), a copy of the ruling is hereby posted on the court's Internet site, www.caeb.uscourts.gov, in a text-searchable format, as required by the Act. However, this posting does not constitute the official record, which is always the ruling appended to the minutes of the hearing.

DISPOSITION AFTER ORAL ARGUMENT

The debtors' motion for the court to reconsider its September 12, 2006 order converting their Chapter 13 case to Chapter 7 and grant relief from the court's judgment is denied.

Movants, the debtors in this case, seek relief under Fed. R. Civ. P. 60(b)(1) and (b)(2), made applicable by Fed. R. Bankr. P. 9024. Rule 60(b)(1) allows for relief from a final order for "mistake, inadvertence, surprise, or excusable neglect." Movants allege a series of mistakes and omissions made by their first attorney in this case. They allege that their attorney mistakenly scheduled a third

deed of trust securing a claim of $20,000 was included in Schedule D, when no such claim existed. They allege that their attorney neglected to amend their schedules to reflect a lower amount of secured debt after a post-petition foreclosure sale on real property held by their son, which partially satisfied the secured claims encumbering movants' own property. And they allege that their attorney failed to bring these facts to the attention of the court and the Chapter 13 trustee by responding to the trustee's motion to convert their case to Chapter 7. If these mistakes had not occurred, and if their attorney had not been negligent, movants argue, their case would not have been converted to Chapter 7.

But the movants' argument fails to address how, even if the court finds everything they allege to be true, they would have been eligible to be debtors in Chapter 13 pursuant to the requirements of 11 U.S.C. § 109(e). Section 109(e) provides: "Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $307,675 and noncontingent, liquidated, secured debts of less than $922,975 . . . may be a debtor under Chapter 13 of this title." 11 U.S.C. § 109(e) (emphasis added). The Ninth Circuit has held that the rule for determining Chapter 13 eligibility "should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith." In re Scovis, 294 F.3d 975, 982 (9th Cir. 2001). Debtors filed this case on June 22, 2006. Accepting that movants' attorney's mistaken inclusion of a third $20,000 secured claim on their Schedule D was a mistake for the purposes of Rule 60(b), the movants' secured debt on the date the petition was filed

would still have exceeded the statutory Section 109(e) statutory maximum by $79,025. Further, even if the court accepts that the August 16, 2006 foreclosure sale reduced the total amount of movants' secured debt by $225,000, this sale took place after the date the movants filed their petition and cannot be considered for purposes of their eligibility under Section 109(e). Movants have cited no authority for the proposition that post-petition events should affect Chapter 13 eligibility pursuant to Section 109(e). Their argument that they filed their petition in good faith knowing that by the time the foreclosure sales took place their secured debt would be under the statutory maximum is not persuasive. Movants have admitted in their motion and in the declaration of John Van Doorn that on the date of filing, they were not eligible to be debtors under Chapter 13 and they were aware that they were not eligible to be debtors under Chapter 13.

Furthermore, movants' argument for relief pursuant to Rule 60(b)(2) is not persuasive. Pursuant to Rule 60(b)(2), a court may order relief from a final order due to newly discovered evidence which by due diligence could not have been timely discovered. Movants allege that the evidence that they have provided of the August 15, 2006 foreclosure sale and a foreclosure sale scheduled for September 21, 2006 is newly discovered evidence that was uncovered by their second attorney after movants terminated their first attorney. This evidence, however, could have been timely discovered by due diligence prior to the hearing on the trustee's motion to convert (filed July 28, 2006 and heard September 9, 2006). The declaration of John Van Doorn states that debtors were informed by their first attorney that the foreclosure sales would take place. Section 7.02 of the debtors'

Chapter 13 plan, filed on July 19, 2006, also notes that the deeds of trust held by debtors' secured creditors were collateralized by other properties that were "currently being foreclosed upon." Evidence of the foreclosure sales could have been timely discovered by due diligence prior to the hearing on the trustee's motion to convert. Furthermore, even if the court were persuaded by movants' argument, evidence of the foreclosure sales would not have affected movants' eligibility on the date of the filing of the petition to be debtors under Chapter 13, as noted above.

Moreover, the court does not find persuasive movants' argument that they should not be forced to suffer for the alleged misconduct of their first attorney. The United States Supreme Court has held that "clients must be held accountable for the acts and omissions of their attorney." Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 396 (1993). Pioneer clearly states that clients are held accountable for the conduct of their chosen agent, their counsel. Id. at 396-97. The Ninth Circuit follows this rule. "As a general rule, parties are bound by the actions of their lawyers, and alleged attorney malpractice does not usually provide a basis to set aside a judgment pursuant to Rule 60(b)(1)." Casey v. Alberston's, Inc., 362 F.3d 1254, 1260 (9th Cir. 2004). This Ninth Circuit has reiterated and expanded this rule in a recent decision:

> We agree that Rule 60(b)(1) is not intended to remedy the effects of a litigation decision that a party later comes to regret through subsequently-gained knowledge that corrects the erroneous legal advice of counsel. For purposes of

subsection (b)(1), parties should be bound by and accountable for their deliberate actions of themselves and their chosen counsel. This includes not only an innocent, albeit careless or negligent, attorney mistake, but also intentional attorney misconduct. Such mistakes are more appropriately addressed through malpractice claims.

Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d 1097, 1101 (9th Cir. 2006). The court declines to follow the authority from the Fourth and Fifth Circuits cited by the movants, as they are inconsistent with the Supreme Court and Ninth Circuit authorities that are binding on this court.

Therefore, the court finds that the movants are not entitled to relief under Federal Rule of Civil Procedure 60(b).

The court will issue a minute order.