

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

September 21, 2015 at 10:00 a.m.

1.	13-35329-A-12	KELLY/DEBORA HEISER	MOTION TO
	SJS-7		VACATE DISMISSAL
			8-31-15 [86]

Tentative Ruling: The motion will be denied.

The debtors ask the court to vacate its September 2, 2015 order dismissing this case. See Fed. R. Civ. P. 60(b)(1). Rule 60(b), as made applicable here by Fed. R. Bankr. P. 9024, allows the court to set aside or reconsider an order or a judgment for:

"(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief."

"A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c).

"Relief under Rule 60(b) is discretionary and is warranted only in exceptional circumstances."

Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991), cert. denied, 506 U.S. 828 (1992).

The motion has been filed timely. It was filed on August 31, 2015, just before the court entered its September 2 order dismissing the case.

The trustee filed a motion on July 17, 2015, seeking dismissal of the case due to unreasonable delay that is prejudicial to creditors. Docket 75. The motion was set for hearing on August 24, 2015, under Local Bankruptcy Rule 9014-1(f)(1), which requires written opposition to the motion to be filed and served at least 14 days prior to the August 24 hearing.

While the debtors filed an amended chapter 12 plan and a motion to confirm that plan (Dockets 79 & 83), the debtors failed to file opposition to the trustee's dismissal motion. As a result, the court disposed of the dismissal motion without hearing. The court's ruling follows below:

"Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor, the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii)

is considered as consent to the granting of the motion. Cf. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

"The motion will be granted and the case will be dismissed.

"The chapter 12 trustee moves for dismissal because the debtors have failed to prosecute this case.

"11 U.S.C. § 1208(c) provides that 'on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including - (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors.'

"This case was filed on December 3, 2013. The debtors filed a plan on January 16, 2014 but voluntarily dismissed their plan confirmation motion, as noted in the minutes of the April 28, 2014 hearing on that motion. Docket 38. The debtors filed another plan on March 19, 2015 (Docket 67), but the court denied confirmation of that plan on May 11, 2015. Docket 72. The debtors have done nothing else to prosecute this case, which by now is approximately 22 months old. This is unreasonable delay that is prejudicial to creditors and it is cause for dismissal. The motion will be granted and the case will be dismissed."

The debtors claim that their counsel "erroneously calendared the hearing [on the the trustee's dismissal motion] as one under Local Bankruptcy Rule 9014-1(f)(2)(iii)." The motion also asserts that the debtors' counsel "was under the false pretenses that they had resolved the trustee's motion to dismiss and the motion would be ruled moot as Debtors had a new plan filed set for hearing." Docket 88 at 2.

The motion will be denied as the debtors have not established mistake, inadvertence, surprise, or excusable neglect.

"Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . [1) the danger of prejudice to the [opposing party]; 2) the length of delay caused by the neglect and its effect on the proceedings; 3) the reason for the neglect, including whether it was within the reasonable control of the moving party; and 4) whether the moving party acted in good faith]." Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 395 (1993).

The motion does discuss the standard for excusable neglect or the other Pioneer factors.

The reason for the neglect was entirely within the debtors' control because they, along with their counsel, were served with the dismissal motion and they obviously received it. Docket 78. The debtors' counsel admits the hearing on the motion was calendared. Docket 88 at 2.

There is a danger of prejudice to the creditors because they have been notified of the dismissal and have, as a result, relied on the absence of the automatic stay to take actions to enforce their claims.

Further, the court is not convinced of the debtors' good faith as this case had been pending prior to dismissal for approximately 22 months without a sustained, discernable effort by the debtors to confirm a plan. As noted in the ruling dismissing the case:

"This case was filed on December 3, 2013. The debtors filed a plan on January 16, 2014 but voluntarily dismissed their plan confirmation motion, as noted in the minutes of the April 28, 2014 hearing on that motion. Docket 38. The debtors filed another plan on March 19, 2015 (Docket 67), [over 14 months after filing the prior plan,] but the court denied confirmation of that plan on May 11, 2015. Docket 72. The debtors have done nothing else to prosecute this case, which by now is approximately 22 months old. This is unreasonable delay that is prejudicial to creditors and it is cause for dismissal. The motion will be granted and the case will be dismissed."

Docket 85.

The plan denied confirmation May 11, 2015 did not comply with the 45-day deadline of 11 U.S.C. § 1224. Docket 72.

The debtors filed their last chapter 12 plan (Docket 83), only after the trustee's dismissal motion was filed. The dismissal motion was filed on July 17, 2015, whereas the plan and plan confirmation motion were filed on August 18. Dockets 75, 79, 83.

Additionally, the debtors contend that their counsel thought the dismissal motion had been resolved. But, this motion offers no explanation about why the debtors' counsel thought the dismissal was resolved. For instance, there is no evidence that the trustee agreed to dismiss his motion because a new plan had been proposed. The mere filing of a plan and motion for confirmation of that plan did not automatically resolve or moot the dismissal motion. Even with the new plan and plan confirmation motion on file, the fact remains that this case was pending for approximately 22 months without much effort confirm a plan.

As such, the court is not convinced that the debtors have acted in good faith in this case and their failure to oppose timely the trustee's dismissal motion is a further indication of bad faith and ineffective and dilatory prosecution of the case.

The failure to file opposition to the dismissal motion was not a mistake, inadvertence or surprise. The debtors have not even attempted to persuade the court that if they had filed timely opposition to the motion, the court would have allowed the case to remain pending.

As this motion contains the substance of the debtors' opposition to the dismissal, the court would have still dismissed the case even if they had filed opposition to the dismissal motion. As noted above, this case had been pending prior to dismissal for approximately 22 months already, without the debtors making much effort to prosecute the case. Without any explanation, the debtors did not file a plan for over 14 months in the case. After dismissing their motion to confirm the plan filed on January 16, 2014, the debtors did not file another plan until March 19, 2015. Dockets 15 & 67.

The debtors have not established a basis for vacating the dismissal. The motion will be denied.

2. 14-28468-A-11 BUALAI WHITE
MRL-10

MOTION TO
APPROVE DISCLOSURE STATEMENT
7-7-15 [160]

Tentative Ruling: The motion will be granted.

The hearing on this motion was continued from August 24 in order for the debtor to file an amended disclosure statement.

The debtor asks for approval of its amended disclosure statement filed on August 31, 2015. Docket 177.

The motion will be granted and the amended disclosure statement will be approved, as it contains adequate information and the detail necessary that will permit creditors to make an informed decision regarding the plan. See 11 U.S.C. § 1125(a).