In the United States Bankruptcy Court

for the Northern District of Iowa

LEON FRANCIS HAGEMAN
Debtor(s).

Bankruptcy No. 94-60749KW
Chapter 7

ORDER RE TIMELINESS OF RESISTANCE TO MOTION TO AVOID LIEN

On March 22, 1995, the above-captioned matter came on for hearing in Waterloo pursuant to assignment. The matter up for hearing was Timeliness of Resistance to Motion to Avoid Lien. Appearing were Attorney Joe Peiffer for Debtor/Movant and Attorney Christopher O'Donohoe for Creditor Leona Kriener.

Debtor filed his Chapter 7 bankruptcy petition on May 5, 1994. On January 20, 1995, he filed a Motion to Avoid Lien, seeking to avoid a judicial lien held by Luke and Leona Kriener on property which Debtor asserts is his homestead in Winneshiek County. The lien was based on a June 8, 1990 judgment entered in Iowa District Court in Winneshiek County in Case No. 21642 entitled Luke and Leona Kriener v. Leon Hageman. Debtor sought to avoid the judicial lien under 522(f)(1).

On January 23, 1995, Debtor filed a related Notice of Filing a Motion to Avoid Lien, attached hereto as Exhibit "A". This Notice was sent to Luke and Leona Kriener in Cresco, Iowa as well as to Attorney Christopher O'Donohoe in New Hampton, Habbo Fokkena (the Chapter 7 Trustee), and the U.S. Trustee's Office. The Notice stated that any party opposing the Motion had 20 days from the date of the Notice within which to file an objection. The notice further stated: "If a timely filed objection is not made, an order will enter granting the Motion to Avoid Lien."

No objection was received prior to the bar date which expired on or about February 13. On February 17, 1995, Debtor presented a proposed order to the Court based on the failure of any party to object. The Court entered the order on February 17 avoiding the Krieners' judicial lien on Debtor's homestead property.

On February 22, 1995, Leona Kriener, one of the judgment Plaintiffs in the legal action which formed the basis for the judicial lien, filed a Resistance to Motion to Avoid Lien. This resistance was filed by Attorney Christopher O'Donohoe, who is an attorney for Leona Kriener and one of the individuals who received the Notice of Filing a Motion to Avoid Lien.

When the Resistance to Motion to Avoid Lien was received, the scheduling clerk set the matter for hearing automatically. The Court, upon discovering that this matter had been set for hearing, examined the file and determined that a hearing should not be held on the merits until the issue of the timeliness of the resistance was resolved. The Court set the matter for hearing only on the timeliness of the Resistance.

At the hearing, no evidence was presented. Attorney O'Donohoe stipulated that he had personally received a copy of the Notice of Filing a Motion to Avoid Lien. He asserts, however, that he believed

at that time that the Court would either set a hearing on the matter or order an answer before ruling on the merits of the motion. He states that he did not carefully read the Motion to Avoid Lien and did not see the bar date notice in the Notice itself.

Creditor Kriener has not filed a motion to set aside the order granting the lien avoidance but rather simply filed a resistance. During the hearing, however, an oral reference was made to a request to vacate the order. Creditor has now filed a "Memorandum of Law" which inaccurately refers to a request to the Court to enlarge the time for filing the resistance. No motion for enlargement of time appears in the file.

Debtor asserts that since no objection to the Motion to Avoid Lien was timely filed and since notice was properly made, the matter has been ruled upon and is now, therefore, preclusive. He cites Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) and Rule 4003. Upon inquiry from the Court, Attorney Peiffer stated that the only real prejudice to the Debtor is the incurrence of attorney's fees resulting from this extra work. However, in his Brief filed March 31, 1995, Debtor asserts that he signed up for the ASCS program in reliance on the order avoiding the lien.

The Federal Rules of Bankruptcy Procedure provide that lien avoidance under § 522(f) shall be by motion as a contested matter. Fed. R. Bankr. P. 4003(d). No response is required unless otherwise ordered by the Court. Fed. R. Bankr. P. 9014. This Court has ordered otherwise by adoption of Local Rule 25, effective November 1, 1989, which states that a § 522(f) motion shall be accompanied by a notice advising interested parties that the motion will be granted if an objection is not filed within 20 days. Bankr. N.D. Iowa R. 25(2) (copy attached as Exhibit "B").

Debtor's Notice of Motion to Avoid Lien complies with Local Rule 25. Creditor Kriener failed to make a timely objection before the 20-day bar date and the Motion was granted in accordance with that rule. The use of bar dates is essential to efficient docket control. In re Peterman, 71 B.R. 624, 626 (Bankr. S.D. Iowa 1987). In Peterman, the government failed to timely object to a motion to avoid its lien and later requested the court to reconsider and vacate the order granting the motion. Id. at 625. The court refused, stating that any exception to enforcement of the bar date must be on compelling equitable principles under Rule 9006(b). Id. at 626.

On motion made after the expiration of the time to object, the Court may permit an act to be done where the failure to act was the result of excusable neglect. Fed. R. Bankr. P. 9006(b)(1). Also, on motion made within a reasonable time, the Court may relieve a party from an order for the reason of excusable neglect. Fed. R. Civ. P. 60(b); Fed. R. Bankr. P. 9024. Creditor Kriener has failed to make a formal motion for enlargement of time under Rule 9006(b) or for relief from the order under Rule 60 (b), although it appears that an attempt is now made to treat the Resistance as a request for such relief.

The U.S. Supreme Court considered the meaning of "excusable neglect" in Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 113 S. Ct. 1489 (1993), in determining whether failure to file a claim before the bar date constituted excusable neglect under Rule 9006(b). It holds that the rule encompasses both faultless omissions and carelessness. Id. at 1495. Thus, excusable neglect is not limited to situations where the delay was due to circumstances beyond the respondent's control. Id. at 1496. It is a flexible concept which can encompass situations where the failure to meet a deadline is attributable to negligence. Id. at 1497. The proper focus is upon whether the neglect of the respondents and their counsel was excusable. Id. at 1499 (emphasis in original). The Court also noted that inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect. Id. at 1496.

In determining whether a party's neglect is excusable, the Court examined several factors, including:

> the danger of prejudice to the debtor, 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.

Id. at 1498. In Pioneer, the fact that the notice of the bar date was peculiar and ambiguous coupled with a lack of prejudice to the petitioner or to judicial administration and the lack of any bad faith supported a finding that the neglect of the respondents' counsel was excusable. Id. at 1500.

The Pioneer standards were applied by the Eighth Circuit in In re Harlow Fay, Inc., 993 F.2d 1351, 1352 (8th Cir.), cert. denied, 114 S. Ct. 87 (1993). The court held that counsel's reduction of staff and relocation of offices was not excusable neglect. Pioneer was also applied in In re Danielson, 981 F.2d 296, 298 (7th Cir. 1992), which stated that inattention to a case does not qualify as excusable neglect. That case further noted that courts do not have general equitable discretion to excuse violations of time limits contained in the bankruptcy statutes and rules. Id., citing Taylor v. Freeland & Kronz, 503 U.S. 638 (1992).

The Eighth Circuit holds that Rule 60(b) is not a vehicle for relief because of attorney's lack of awareness of rules. Sutherland v. ITT Continental Baking Co., 710 F.2d 473, 476 (8th Cir. 1983); see also In re Waldrop, No. L88-01797C, slip op. at 3 (Bankr. N.D. Iowa May 24, 1994) (holding that disappointment in legal advice did not constitute grounds for relief under Rule 60(b)); In re Seyfert, No. 87-01375D, slip op. at 3 (Bankr. N.D. Iowa Oct. 8, 1987) (stating that lack of knowledge of rules by an attorney does not constitute excusable neglect under Rule 60(b)(1); failure of attorney to calendar a hearing did not constitute excusable neglect). Rule 60(b) relief should not be afforded based on ignorance of the law or carelessness of the parties in having failed to timely effect a choice of remedy. In re Leiter, 109 B.R. 922, 925 (Bankr. N.D. Ind. 1990).

Neglect is not generally excusable where it results from a lack of knowledge of substantive or procedural aspects of bankruptcy practice. In re Dixon, 89 B.R. 684, 685 (M.D. Tenn. 1988). Where the attorney had failed to check the applicable rule and assumed there was additional time to file a brief, the court held that assumption did not establish excusable neglect. Id. A court did grant relief, however, for excusable neglect where a new notice form instituted the month before changed prior practice by requiring an answer to a motion to avoid lien. Oswald v. ITT Fin. Servs., 85 B.R. 541, 543 (Bankr. W.D. Mo. 1988).

Local Rule 25 does not constitute a recent change in local practice, having been in effect since November of 1989. Here, there was a failure to consult that Rule and failure to read the unambiguous notice which stated that a response to the Motion to Avoid Lien was required. Granting Creditor Kriener relief from the order avoiding her lien would result in some prejudice to Debtor based on the incurrence of further attorney fees and potential unspecified problems with the ASCS program. Any delay caused by allowing the late Resistance and its impact on these proceedings would not be substantial. However, the cause of the delay is a failure to be cognizant of local practice or to comply with the clear provisions of the notice. The assumption that the Court would set the Motion to Avoid Lien for hearing in the absence of a resistance does not constitute excusable neglect.

No showing of excusable neglect has been made. Proper notice was made, the bar date expired and a response was required but was not timely filed. The Court concludes that the failure to heed the notice and the failure to be cognizant of the Local Rules does not constitute excusable neglect.

WHEREFORE, Creditor Leona Kriener's Resistance to Motion to Avoid Lien is OVERRULED.

FURTHER, Creditor Kriener is not entitled to relief from the Court's Order filed February 17, 1995 granting Debtor's Motion to Avoid Lien under Fed. R. Civ. P. 9006(b) or 9024.

SO ORDERED this 5th day of April, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge