

In the United States Bankruptcy Court
for the Northern District of Iowa
Western Division

JERRY WAYNE SEARS
d/b/a Argonaut Marketing Inc.
Debtor(s).

Bankruptcy No. 94-50981XS

Chapter 7

CONSTANCE MATALONI and
ROBERT E. GRIFFIN as Executors
of the Estate of Betty J.
Griffin Deceased
Plaintiff(s)

Adversary No. 94-5133XS

vs.

JERRY WAYNE SEARS
Defendant(s)

RULING RE: MOTION TO REINSTATE PROCEEDING

The matter before the court is plaintiffs' motion to reinstate this adversary proceeding. Defendant objects to the motion. Hearing was held July 5, 1995, in Sioux City. Dale S. Honken, Esq. appeared for plaintiffs. Donald H. Molstad, Esq. appeared for the defendant.

Facts

Jerry Wayne Sears filed his chapter 7 petition on June 13, 1994. Constance Mataloni and Robert E. Griffin, as executors of the estate of Betty J. Griffin, timely filed a complaint seeking a determination that Sears is indebted to the estate of the late Ms. Griffin and that such debt should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A) and 523(a)(4). Plaintiffs claimed that Sears defrauded Ms. Griffin while he was acting in a fiduciary capacity as her financial advisor. The court held a telephonic scheduling conference with the parties' attorneys on January 6, 1995. The court set a discovery deadline of March 19, 1995. Apparently most, if not all, discovery had been completed as part of the plaintiffs' state court action against the defendant. The state court action was based on the same facts. It was set for trial as a state court lead-off case on June 14, 1993. Trial was stayed by debtor's bankruptcy filing.

This court's scheduling order contained the following: COUNSEL FOR ALL PARTIES ARE ORDERED to confer with all opposing counsel within twenty (20) days after the time limit for the completion of discovery, and together prepare in writing and file with the Clerk of the Court fifteen (15) days thereafter, a JOINT DOCUMENT, captioned "PRETRIAL STATEMENT" containing the following. . . ."

The order contained this warning:

IF THE PRETRIAL STATEMENT IS NOT TIMELY FILED, THE COURT MAY DISMISS THE COMPLAINT AND ANY COUNTERCLAIMS, CROSS CLAIMS OR THIRD-PARTY ACTIONS WITHOUT FURTHER NOTICE OR HEARING.

Plaintiffs designated expert witnesses on February 6, 1995, but thereafter there were no further filings by the parties. The court dismissed the proceeding on April 28, 1995, for failure of the parties to file the joint pretrial statement (docket no. 12). Notice of the dismissal was mailed to attorneys Honken and Molstad. Honken represents that he did not receive notice of the dismissal and did not learn of it until May 30, 1995, when the clerk was contacted about the status of the case. On May 31, 1995, Honken, on behalf of plaintiffs, moved to reinstate the proceeding.

Honken tells the court that he misunderstood the court's scheduling order, and that it was his oversight that caused the pretrial statement not to be filed. Counsel for defendant contends that the court's scheduling order was clear and that the proceeding should not be reinstated because of the plaintiffs' failure to comply with it.

Conclusions

Plaintiffs seek relief from the court's order of dismissal. The court may grant such relief if it finds that the order was entered as a result of plaintiffs' counsel's "excusable neglect." Fed.R.Bankr.P. 9024, incorporating Fed.R.Civ.P. 60(b). A determination of this matter entails an "equitable inquiry." See Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 113 S.Ct. 1489, 1495 (1993). "[F]or 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 1497. In determining whether the neglect in this case was excusable, the court may consider various facts: the danger of prejudice to the other party; the length of the delay and its impact on judicial administration; the reason for the delay and whether it was within the reasonable control of the negligent person; and whether that person has acted in good faith. Id. at 1498.

The court has considered these factors and concludes that the proceeding should be reinstated. There is little, if any, prejudice to the defendant in this case. The procession to trial has been interrupted, but that is not an effect that cannot be, to a large extent, corrected. Defendant has pointed to no other prejudice. Furthermore, defendant bears some portion of the responsibility here. Both parties' counsel are responsible for the preparation and filing of the pretrial statement. The scheduling order says as much. To ensure that the statement is filed on time and that the case moves forward, the court has placed the burden on plaintiffs' counsel in adversary proceedings to take the lead in seeing that the conference is held and the statement is filed. But that does not lessen the responsibility of other counsel in the case. The penalty for failure falls mostly on plaintiffs, but defendants may also be penalized if there is a counterclaim which is dismissed. Nonetheless, by placing the burden on a plaintiff's counsel, the court never intended that a defendant's counsel could sit quietly and make no effort to see that the statement is filed, and then reap the reward of a dismissal of claims against his client. The result here might be different if defendant's counsel had made unsuccessful efforts to get the plaintiffs' counsel to meet and to prepare the statement. That did not happen in this case.

I find no bad faith on the part of plaintiffs or their counsel. Any detrimental impact on judicial administration in this particular case is correctable, especially since discovery has been completed, and the case lacks only the statement to be ready for trial. The reason for the delay was simple negligence. The scheduling order was clear. Nowhere does it state that the pretrial statement was not due until after the trial date is set. It says the opposite. Properly calendaring the deadline was within the reasonable control of plaintiffs' counsel. But in balancing all factors and especially considering that defendant's counsel had a responsibility to work with plaintiffs' attorney and did not, the court finds the neglect to file the joint pretrial statement excusable. Accordingly,

IT IS ORDERED that plaintiffs' motion to reinstate this proceeding is granted. This proceeding is reinstated. The order of dismissal is vacated. Counsel shall have 21 days from the date of this order to file the joint pretrial statement. The clerk will set a phone conference for the purpose of selecting a trial date. The conference shall be set for August 16, 1995.

SO ORDERED THIS 19th DAY OF JULY 1995.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U.S. mail to: Dale Honken, Don Molstad and U. S. Trustee.