

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re: **Christopher J. Lewis**
Case No.: **04-40459**

Chapter 7

NOTICE OF HEARING ON MOTION TO VACATE DISMISSAL OF CASE

TO: The United States Trustee, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11USC Section 707(b) and said Petition was granted by an Order of this Court dated June 16, 2004.

The debtor has filed a Motion for relief from the Judgment of the Court and for the reopening of Chapter 7 proceedings. The Court will hold a hearing on this Motion before the Honorable Nancy C. Dreher **at 10:30 am on Wednesday, October 27, 2004**, in Courtroom No. 7 West, at the United States Bankruptcy Court, United States Courthouse, at 300 South Fourth Street in Minneapolis, Minnesota.

Any response to this Motion must be filed and delivered not later than Friday, October 22, 2004, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays, and legal holidays), or filed and served by mail not later than Wednesday, October 20, 2004, which is seven days before the time set for hearing (excluding intermediate Saturdays, Sundays, and legal holidays). Local Bankruptcy Rule 9006-1 dated April 15, 1997, amended effective January 1, 2002.

Dated: _____

CLERK OF BANKRUPTCY COURT

By:

Deputy Clerk

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re: **Christopher J. Lewis**
Case No.: **04-40459**

**NOTICE OF HEARING ON MOTION TO VACATE DISMISSAL OF CHAPTER 7
CASE AND FOR REINSTATEMENT OF CHAPTER 7 CASE**

TO: The United States Trustee and other entities specified in Local Rule 9013-3.

1. The debtor, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this Motion before the Honorable Nancy C. Dreher **at 10:30 am on Wednesday, October 27, 2004**, in Courtroom No. 7 West, at the United States Bankruptcy Court, United States Courthouse, at 300 South Fourth Street in Minneapolis, Minnesota.

3. Any response to this motion must be filed and delivered not later than Friday, October 22, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays, and legal holidays), or filed and served by mail not later than Wednesday, October 20, 2004, which is seven days before the time set for hearing (excluding intermediate Saturdays, Sundays, and legal holidays). Local Bankruptcy Rule 9006-1 dated April 15, 1997, amended effective January 1, 2002. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. The Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commenced in this Chapter 7 case was filed on February 2, 2004. The debtor's petition was dismissed by this Court on June 16, 2004.

5. Upon receipt of the Trustee's Motion for Dismissal under 11 U. S. C. Section 707(b), I met with Mr. Lewis in my office on Saturday, June 5, 2004, and obtained his signature on an Unsworn Declaration for amending Schedules I and J to meet the objections of the Trustee and to accurately reflect the Debtor's income and expenses.

6. Counsel for Debtor contacted the Attorney for the United States Trustee and, in a telephone conversation, advised the Attorney that I was committed to a vacation out of the country beginning June 15, 2004, which had been scheduled for a year, and which began the day prior to the date of the hearing of the motion. At that time, counsel was confident that Schedules I and J would be filed with the Court well before the scheduled hearing date of June 16, 2004. I was aware that Federal offices would be closed on Friday, June 11, 2004, due to the death of the

former President. The Attorney for the Trustee indicated that he would be willing consider agreeing to a continuance of the hearing under these circumstances.

7. On June 9 or 10, I dictated a letter to Trustee's counsel indicating that we had discussed the matter and I enclosed to the Attorney a proposed amended Schedules I and J, together with a check stub which verified our figures. The letter was prepared well in advance of the June 16, 2004, hearing. I designated the letter for fax transmission on indicated on the document, and I signed the letter on June 14, 2004. I expected that the letter and enclosures would be faxed to the Attorney as soon as possible.

8. Upon my return to my office on July 1, 2004, I received a copy of the Court's Order dismissing the case and a letter from the Trustee's counsel indicating that he had no record of discussing the matter with Debtor's counsel.

9. On review of the file, it appeared that my letter was not transmitted until June 18, 2004. I was informed by my assistant that she had difficulty accomplishing the electronic filing and did not send out the fax letter to counsel until she succeeded in getting assistance in filing Schedules I and J electronically. An analysis of our computer memory indicated that there had been no computer activity in my office on June 15 or 16, 2004.

10. Counsel's full-time office assistant had given birth prematurely on May 31, 2004. Her last day at work going to be July 2, 2004, which would allow a two-week period for my full-time assistant to train in my part-time assistant with the electronic filing and for her to assume several other duties. The premature birth, combined with counsel's vacation, deprived my part-time assistant of the necessary in e-filing and in calendaring.

11. Debtor's counsel acknowledges the duty to supervise office staff. While Debtor's attorney wrongfully assumed that the appropriate fax transmission would be made, Debtor's attorney submits that he made a good faith attempt to amend the Petition to conform to the fax, to inform opposing counsel of Debtor's intentions, and to obtain a continuance.

12. Debtor's counsel submits that the activity of Debtor's counsel constitutes "excusable neglect" within the terms of FED.R.BANKR.P. 9006(b)(1,11U.S.C.)

BANKRUPTCY RULES

1. This Motion arises under FED.R.BANKR.P. 9024 and FED.R.BANKR.P. 5010. This Motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5. Movant requests that the Court vacate its dismissal, that the Court grant the debtor leave to file his amended Schedules I and J, that the Chapter 7 Petition of the debtor be reinstated and the case administered by the Trustee in due course.

2. The lists, schedules, and statements filed by the debtor and set forth in the Trustee's Motion are in error. Instead, by debtor's Amended Schedules I and J, the debtor could not pay a substantial portion of his dischargeable debt without hardship.

(a) On debtor's Amended Schedule I, Current Income of Individual Debtor's, the debtor has listed a total monthly gross income of \$2,546.00. That sum, less deductions for payroll taxes and Social Security of \$616.00, insurance of \$43.00, union dues of \$12.00, and child support of \$552.00, leaves the debtor with a monthly net income of \$1,323.00. The debtor has no additional income from Apex Ironworks, Inc. The debtor is divorced and has two dependent daughters.

(b) On debtor's Amended Schedule J, Current Expenditures of Individual Debtors, the debtor lists total monthly expenses of \$1,454.20. As the debtor has claimed the child support expense of \$552.00 as deducted from his payroll, debtor has amended his Schedule J to exclude this amount to avoid duplication.

(c) Total monthly net income of \$1,323.00, minus the total monthly expenses of \$1,454.20, provides the debtor with monthly disposable income of (\$131.20).

The debtor may testify as a witness.

WHEREFORE, the debtor respectfully requests that his Chapter 7 case be reinstated and that the Court vacate its dismissal.

Executed on: October 8, 2004

Daniel S. Rethmeier

/s/ Daniel S. Rethmeier
RETHMEIER LAW OFFICE, PLLC
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(320) 251-7050

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re: **Christopher J. Lewis**
Case No.: **04-40459**

MEMORANDUM OF LAW

This memorandum is submitted pursuant to Local Rule 9013-2(a). It appears that the Debtor may have relief from the Judgment of the Court under FED.R.BANKR.P. 9024 and may obtain reopening of the case under FED.R.BANKR.P. 5010.

Analysis

Any Motion for Relief from Judgment is subject to FED.R.BANKR.P. 9024 which provides that Rule 60 F. R. Civ. P. applies in cases under the code except that a Motion to reopen a case under the code is not subject to the one year limitation. Prescribed in 60(b).

This case was dismissed by Order of the Court dated June 17, 2004. FED.R.BANKR.P. 5010 provides that a case may be reopened on Motion of the Debtor or other party in interest pursuant to Section 350(b) of the code. Section 350(b) of the code provides “a case may be reopened in the Court in which such case was closed to administer assets, to accord relief to the Debtor, or for other cause.”

(1) The case should be reopened to provide relief for the Debtor.

By his amended Schedules I and J, it appears that this case is appropriate to provide relief to the Debtor. Amended Schedules I and J, verified by photo copies of the Debtor’s paycheck stubs, indicate that the Debtor’s income is nowhere near the income indicated on his original Schedule I. The Trustee’s reading of the original Schedule I, which attributes to the Debtor a gross monthly income of \$7,400.00, is the heart of the Trustee’s Dismissal Motion under 11 U.S.C. 707(b). The deductions for payroll taxes and Social Security of \$459.00, insurance of \$461.00, and “other” of \$1,436.00 is clearly out of line with a gross income of \$7,400.00. Debtor has amended Schedule I to correct this error. Debtor has amended Schedule J to eliminate the double reporting of maintenance/support of \$552.00, noted on the payroll deduction.

(2) The failure of the debtor to respond to the Trustee’s Motion is due to “excusable neglect” which the Court may consider.

In *Pioneer Investments Services Co. v. Brunswick Associates Ltd. Partnership* 507 U.S. 380, 123 L.Ed.2d74, the Supreme Court established a four-part test for excusable delay. All courts must consider:

- a. The danger of prejudice to the Debtor,
- b. The length of the delay and its impact on proceedings,
- c. The reason for the delay,
- d. Whether the person who missed the deadline was acting in a good faith.

FED.R.BANKR.P. 9006(b)(1) contemplates that Courts are permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances a party's control. In holding that an attorney's inadvertent failure to file a proof of claim by the bar date could constitute "excusable neglect" within the meaning of this rule, are based on the underlying policies of the bankruptcy rules which vest broad equitable powers to the Courts to insure the success of a Debtor's reorganization.

The proper focus is upon whether the neglect of Debtor and his counsel was excusable. *Link vs. Wabsh R.C.o.* 370 U.S. 626, 82 S.Ct. 1386 8 L.Ed.2d734.

In this case, the creditors would not be prejudiced by the reopening of this case and by the filing of Amended Schedules I and J. The Debtor has a no-asset bankruptcy and is unable to fund a Chapter 13 Plan. The reopening of this case would have no adverse impact on efficient Court administration. To the contrary, a reopening of the existing file would obviate the opening of a new Chapter 7 or Chapter 13 file. The reason for the delay was not outside the Debtor's control, but Debtor and his counsel acted in good faith to amend the Schedules and to respond to the Trustee's Motion.

Wherefore, the Debtor submits this memorandum in support of his Motion to obtain relief from the Judgment of the Court and to reopen his Chapter 7 Petition.

Executed on: October 8, 2004

Daniel S. Rethmeier

/s/ Daniel S. Rethmeier
RETHMEIER LAW OFFICE, PLLC
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St. Cloud, MN 56302-0754
(320) 251-7050

CERTIFICATE OF SERVICE

In re:)
)
Christopher J. Lewis,)
)
)
)
)
 Debtor(s))

Case No. **04-40459**
Chapter 7 Case

I, Lynn M. Hoff, declare under penalty of perjury that on October 8th, 2004, I served a copy of the foregoing proposed Notice of Hearing on Motion to Vacate Dismissal of Case, Notice of Hearing on Motion to Vacate Dismissal of Chapter 7 Case and for Reinstatement of Chapter 7 Case, Memorandum of Law and proposed Order by United States mail, postage prepaid, to each person or entity named below:

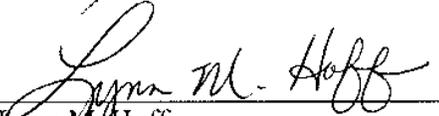
Habbo G. Fokkena, Region 12
United States Trustee

By:
Michael R. Fadlovich, Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Christopher J. Lewis
11438 Montgomery Avenue Southwest
Howard Lake, MN 55349

See attached Matrix of creditors served.

Dated: 10/8/04



Lynn M. Hoff

matrix

Allied Interstate
for MCI
15 Hazel Wood Drive, Suite #102
Amherst, NY 14228

AT&T Wireless
PO Box 2667
Houston, TX 77252-2667

B. Tracey
PO Box 930170
Dallas, TX 75393-0170

CBSA Collections
for Stillwater Sports Medicine
123 West 7th Street, Suite #300
PO Box 1929
Stillwater, OK 74076-1929

Chrysler Financial
PO Box 977
Roanoke, TX 76262-0977

Collections, Inc.
for Stillwater Radiology, Inc.
PO Box 1145
Stillwater, OK 74076-1145

David Kerr, DO
PO Box 2494
Stillwater, OK 74076-2494

Debt Recovery Solutions, Inc.
for SPRINT
900 Merchants Concourse, Suite #106
Westbury, NY 11590-5114

Forster & Garbus
for AT&T Wireless
PO Box 9030
Farmingdale, NY 11735-9030

Groom & Hammond, P.C.
for Southwestern Bell Yellow Pages
Jeffrey E. Tate
100 North Broadway, Suite #3000
Oklahoma City, OK 73102

LiquiDebt Solutions
for Southwestern Bell Yellow Pages
29W110 Butterfield Road, Suite #108
Warrenville, IL 60555

Southwestern Bell
PO Box 930170
Dallas, TX 75393-0170

Stillwater Medical Center
PO Box 268905
Oklahoma City, OK 73126-8905

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re: **Christopher J. Lewis**
Case No.: **04-40459**

Chapter 7

ORDER

At Minneapolis, Minnesota, the _____ day of _____, 2004.

This matter came before the Court for hearing on the Motion of the Debtor for an Order vacating the dismissal of his Chapter 7 case pursuant to 11 U.S.C. 707(b) and to reopen his case under FED.R.BANKR.P. 5010. Appearances were noted in the record.

Based on the motion of the Debtor, the schedules and statements filed by the Debtor under oath, and all the files, records and proceedings herein,

IT IS HEREBY ORDERED:

That the Order of the Court dismissing Debtor's Chapter 7 case is vacated pursuant to FED.R.BANKR.P. 9024 and is reopened pursuant to FED.R.BANKR.P. 5010.

The Honorable Nancy C. Dreher
United States Bankruptcy Judge