

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 7

CHRISTOPHER J. LEWIS

BKY 04-40459

Debtor.

UNITED STATES TRUSTEE'S OBJECTION TO MOTION TO
VACATE DISMISSAL AND TO REINSTATE CASE

The United States Trustee, by his undersigned attorney, does hereby object to the motion by the Debtor for an order vacating the dismissal of this case. In furtherance of her objections, the U.S. Trustee states as follows:

1. This matter is set for hearing at 10:30 a.m. on Wednesday, October 27, 2004, before the Honorable Nancy C. Dreher, United States Bankruptcy Judge, Courtroom 7 West, U.S. Courthouse, 300 South Fourth Street, Minneapolis, MN 55415.

2. The debtor commenced this case by filing a voluntary petition under chapter 7 on February 2, 2004. On May 5, 2004, the U.S. Trustee, via the undersigned attorney, filed and served a motion to dismiss the case as a substantial abuse pursuant to 11 U.S.C. §707(b). On June 16, 2004, the court entered an order granting the motion to dismiss the case and the case has now been dismissed. As a result, the debtor did not receive a discharge.

3. The U.S. Trustee's motion to dismiss was granted as a default due to the debtor's failure to file a response. One day subsequent to dismissal of the case, June 17, 2004, the debtor, via his counsel, filed amended Schedules I and J.

4. The debtor, via his counsel, on October 8, 2004, filed a motion to vacate the dismissal order and reinstate the debtor's chapter 7 case^{1/}. The basis for the debtor's motion appears to be the "excusable neglect" of debtor's counsel. The debtor now states that his original schedules filed under oath were "in error" and he also seeks leave to file amended Schedules I and J and to have his case "reinstated".

OBJECTIONS

5. The U.S. Trustee objects to the relief sought by the debtor. The relief sought by debtor must be denied because there was no Excusable Neglect which justifies revocation of the dismissal order. In addition, motions claiming excusable neglect must be brought within a reasonable time, as required by Fed. R. Bankr. P. 9024(b) (incorporating Fed. R. Civ. P. 60) and the present motion was not.

6. The debtor relies on the principle of excusable neglect, as established in Pioneer Investment Services, v. Brunswick, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), to establish that this court must now revoke its prior dismissal order. The Pioneer case dealt with a late filed Proof of Claim and whether the circumstances required that the court consider it to have been timely filed. The Pioneer case requires a court considering an excusable neglect argument to consider all equitable arguments. Pioneer at 1498. In sustaining the appeals court, Pioneer recognized the "relevant circumstances"

^{1/} Although the certificate of service attached to the Debtor's motion states that the U.S. Trustee was served, the U.S. Trustee did not receive a copy of the motion by mail and was not aware of the motion until Monday, October 25, 2004.

addressed by the Sixth Circuit. Those relevant circumstances which must be addressed in order for the court to make a finding of excusable neglect are as follows:

1. The danger of prejudice to the debtor;
2. The length of the delay and its impact on the judicial proceedings;
3. The reason for the delay, including whether the delay was beyond the reasonable control of the movant;
4. Whether the movant acted in good faith.

Pioneer, at 1498.

In the present case, the debtor fails to meet any of these four factors and the relief sought must therefore be denied.

There was no good reason for delay in responding to the dismissal motion
and such delay was within the reasonable control of the debtor

7. The Debtor's Motion seems to principally rely on the third element set forth above, namely that the reason for the delay was beyond the reasonable control of the debtor and his counsel and the result was a failure to object to the motion. This assertion is simply without merit.

8. The U.S. Trustee's motion was filed and served on May 5, 2004, with a hearing scheduled for six weeks later on June 16, 2004. The U.S. Trustee's motion was based on all the sworn bankruptcy schedules and statements filed by the Debtor under oath.

9. According to Debtor's Motion (¶5), the Debtor and his attorney first met to discuss the U.S. Trustee's dismissal motion on Saturday, June 5, 2004, which was four and one half weeks after the motion was filed and served and only two days before any response to the motion was required to be served by

mail. According to Debtor's motion, four or five days later, on June 9 or 10, debtor's counsel dictated a letter to the U.S. Trustee indicating the opposition to the dismissal motion. Four or five days after that, on June 14, 2004, the support staff for Debtor's counsel apparently had completed transcription of the responsive letter and Debtor's counsel signed it, expecting it to be sent via facsimile to the U.S. Trustee. This was three days after any formal response to the dismissal motion was due to be served by delivery on parties. All of this apparently occurred while debtor's counsel knew he had "a vacation out of the country beginning June 15, 2004, which had been scheduled for a year . . .". (Debtor's Motion, ¶6). The Debtor's motion further concedes that the letter signed June 14, 2004, was not transmitted to the U.S. Trustee until June 18, 2004, which was two days after the dismissal order was entered.

10. The deadline for responding to the U.S. Trustee's motion to dismiss was clear. The debtor had over five weeks to address the dismissal motion. Nevertheless, the debtor and his counsel, either negligently or through indifference, failed to begin addressing the matter until the week before the motion was to be heard and the week before counsel left the country. The blame for failure to timely respond lies either with debtor or his counsel and nobody else. No outside events affected the delay in responding to the U.S. Trustee's motion and, as a result, the motion fails to establish that the delay was reasonable and not within the control of movant. As a result, the Debtor's Motion to Vacate fails to meet the third element of the Pioneer test.

The Length of the Delay, its Impact on the Proceedings and the
Prejudice to the Trustee and Estate by the Delay

11. The Debtor's motion also fails to meet the first and second elements of the Pioneer test. Although in Pioneer, the first element was characterized as prejudice to the debtor, it actually consists of

prejudice to the adverse party who in the present case would be the U.S. Trustee. Here the U.S. Trustee, as the adverse party, has been adversely prejudiced by Debtor's delay. In addition, the delay in bringing the Motion to Vacate has had a substantial impact on the proceedings.

12. The initial delay of a couple days in responding to the U.S. Trustee's dismissal caused the Debtor's case to be dismissed by default. On its own, this would not have been overly prejudicial to the U.S. Trustee as the adverse party. However, the delay in bringing the Motion to Vacate is severely prejudicial to the U.S. Trustee and adversely affects the proceedings and the U.S. Trustee's ability to preserve his position.

13. The dismissal order was entered on June 16, 2004, and on October 8, 2004, over three and a half months later, the debtor files this Motion to Vacate. As a matter of due course, the U.S. Trustee destroyed his file in the debtor's case about a month after the case was dismissed. In preparing to respond to the debtor's motion, the U.S. Trustee had no file to review. The undersigned counsel to the U.S. Trustee was able to go into his computer to find a saved version of his letter to debtor's counsel in this case written on June 17, 2004, after the case was dismissed. A reprinted version of that letter is attached as Exhibit A. That letter clearly establishes that the first time the U.S. Trustee had any indication that the debtor opposed dismissal of his case was after the dismissal order was entered. The U.S. Trustee has nothing else related to the case other than documents in the court's file.

14. Since the U.S. Trustee's file is gone, some of the information on which the motion was based is also gone, such as documents which provided confirmation of income levels and living expenses. For the Debtor to simply assert that the court can, after four months, vacate its dismissal order and allow the debtor to file modified schedules showing a lack of income in excess of expenses, thereby overcoming the U.S. Trustee's motion so that the debtor can then obtain a discharge, is simply improper. The effect of granting

the Debtor's motion would be severely prejudicial to the U.S. Trustee and would wholly undermine the U.S. Trustee's motion to dismiss.

Whether Movant acted in Good Faith

15. A review of the facts set forth above clearly shows that the movant and his counsel did not act in good faith. Debtor's counsel, knowing that he was leaving on a foreign vacation, knowing that his key support person left on maternity leave, and knowing that the person in charge perhaps was not capable of undertaking an electronic filing, clearly did not act in good faith when he neglected to make sure that the motion to dismiss facing his client was fully addressed. The Movant also clearly fails to meet the good faith test of Pioneer.

16. The facts of the case and the events subsequent to dismissal of the case clearly establish that if there was neglect on the part of the debtor or his counsel, it clear was not excusable neglect and is therefore not a basis to revoke the dismissal.

Failure to comply with Fed. R. Bankr. P. 9024

17. The Debtor's motion must also be denied because it was not timely brought, as required by Fed. R. Bankr. P. 9024, which incorporates Fed. R. Civ. P. 60(b). Under that Rule, motions for excusable neglect "shall be made within a reasonable time . . .". For the reasons set forth above, the three and one half month delay between the entry of the dismissal order and the filing of the present motion simply fail to comply with the requirements of that rule.

18. The debtor's motion to vacate dismissal was simply not brought within a reasonable time. There was no excusable neglect and there is no basis to vacate the dismissal order. Any other result would be prejudicial to the U.S. Trustee and therefore cause to deny the relief sought.

WHEREFORE, the United States Trustee objects to the debtor's motion for an order vacating the dismissal of the case and the reinstatement of the case under chapter 7. The U.S. Trustee submits that the requested relief be denied in its entirety.

HABBO G. FOKKENA
United States Trustee
Region 12

Dated: October 25, 2004

By: e/Michael R. Fadlovich
Michael R. Fadlovich
Attorney/Advisor #158410
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
612/664-5500

EXHIBIT "A"

June 17, 2004

Daniel S. Rethmeier, Esq.
Rethmeier Law Office
12 North Sixth Ave.
P.O. Box 754
St. Cloud, MN 56302

Via Facsimile & Mail
320/566-7050

RE: Christopher J. Lewis
BKY 04-40459

Dear Mr. Rethmeier:

At 10:06 this morning, June 17th, I received for the first time via facsimile your letter dated June 14, 2004. In the letter you indicated the debtor's resistance to the U.S. Trustee's motion to dismiss the case under §707(b). That motion was scheduled for hearing by the court yesterday and the motion to dismiss was granted by default. The case has now been dismissed by the court.

Your letter indicates that we had prior discussions regarding your absence from the country on the hearing date and your desire to have the matter continued. I diligently looked through all my 707(b) files and phone records and do not have a record of any such conversation with you about this case.

Unfortunately, under the circumstances, there is really nothing I can do for you at this point. If you feel you need to have the matter addressed, you should probably bring a motion to the court.

If there are any questions, please contact me.

Sincerely,
HABBO G. FOKKENA
United States Trustee
Region 12

By: _____
Michael R. Fadlovich

enclosure

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 7

CHRISTOPHER J. LEWIS

BKY 04-40459

Debtor.

MEMORANDUM OF LAW IN SUPPORT OF
UNITED STATES TRUSTEE'S RESPONSE TO
MOTION TO VACATE DISMISSAL OF CHAPTER 11 CASE

The U.S. Trustee submits this memorandum in support of her motion in opposition to the motion to vacate the dismissal of this case.

Federal Rule of Bankruptcy Procedure 9006(b) provides for the enlargement of time periods under the Bankruptcy Code:

(b) ENLARGEMENT

(1) IN GENERAL. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion ... (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

FED. R. BANKR. P. 9006(b).

The Supreme Court of the United States has previously defined the standards to consider for “excusable neglect” under Rule 9006(b). In *Pioneer Inv. Servs. V. Brunswick Assocs. Ltd. Partnership*, held that “excusable neglect” existed when a party or counsel acts with inadvertence, mistake, or

carelessness, as well as when circumstances intervene which are beyond the party's control. 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). Conduct may be found to be excusable after examination of the following factors:

1. Prejudice to the trustee and the estate caused by the delay;
2. The length of the delay and its impact on the judicial proceedings;
3. The reason for the delay, including whether the delay was beyond the reasonable control of the movant;
4. Whether the movant acted in good faith.

It is irrelevant whether the non-feasance was by the debtor or by debtor's counsel. "Clients must be held accountable for the acts and omissions of their attorneys. Pioneer, at 1499, citing Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct 1386 (1962).

Based on the foregoing, the court should refuse to hear the motion to vacate the dismissal order.

HABBO G. FOKKENA
United States Trustee
Region 12

Dated: October 25, 2004

By: e/Michael R. Fadlovich
Michael R. Fadlovich
Attorney/Advisor #158410
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
612/664-5500

CERTIFICATE OF SERVICE

| | | |
|----------------------|---|-------------------------|
| In Re: |) | |
| |) | |
| Christopher J. Lewis |) | Bankruptcy No. 04-40459 |
| |) | |
| Debtor(s). |) | Chapter 7 Case |
| |) | |
| |) | |

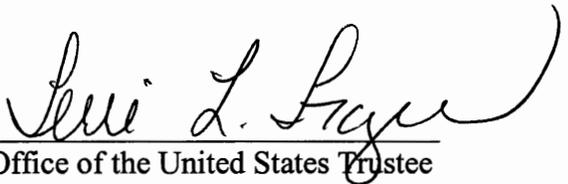
I, Terri Frazer, declare under penalty of perjury that on October 26, 2004, I served a copy of the foregoing US Trustee's Objection to Motion to Vacate Dismissal and to Reinstate Case by U.S. mail, postage prepaid, to each person named below:

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

Daniel Rethmeier
PO Box 754
St. Cloud, MN 56302

Terri Georgen
PO Box 16355
St. Paul, MN 55116

Dated: 10-26-04

By: 
Office of the United States Trustee

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 7

CHRISTOPHER J. LEWIS

BKY 04-40459

Debtor.

ORDER

At Minneapolis, Minnesota, this ____ day of _____, 2004.

This matter came before the court on the motion by the debtor for an order vacating the June 16, 2004, order dismissing the case, thereby reinstating the case under chapter 7. Michael R. Fadlovich appeared as counsel to the U.S. Trustee. Other appearances were as noted in the record.

Based upon the pleadings, the arguments of counsel, the findings of the court on the record and all the files and records herein, it is hereby ORDERED:

That the debtor's motion to vacate the dismissal order is denied.

NANCY C. DREHER
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

In re:)
) Chapter 7 case
 CHRISTOPHER J. LEWIS)
)
 Debtor.) Bankruptcy Case # 04-40459-NCD
)
)

The undersigned hereby certifies under penalty of perjury that he is an employee in the Office of the United States Trustee for the District of Minnesota and is a person of such age and discretion as to be competent to serve papers. That on October 26, 2004, he served a copy of the attached: United States Trustee's Objection to Motion to Vacate Dismissal, Supporting Memorandum and proposed order by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.

Addressee(s):

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Via Mail & Facsimile
(320)566-7050

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