United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re David L. Schram

Bankruptcy No. 00 B 10045

Adversary Caption: David Baran and Jeralyn Baran v. David L. Schram

Adversary No. 00 A 00607

Date of Issuance: July 24, 2001

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff: Cary S. Fleischer, Esq., Chuhak & Tecson, P.C., 225 West Washington, Suite 1300, Chicago, IL 60606

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
DAVID L. SCHRAM,	)	
	)	Chapter 7
Debtor.	)	Bankruptcy No. 00 B 10045
	)	Judge John H. Squires
	)	
DAVID BARAN and JERALYN BARAN,	)	
	)	
Plaintiffs.	)	
	)	
v.	)	Adversary No. 00 A 00607
	)	
DAVID L. SCHRAM,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of David L. Schram (the "Debtor"), misleadingly entitled "Motion to Vacate Default Judgment." As explained more fully herein, the Court denies the Debtor's motion because: (1) the judgment he seeks to vacate was entered following trial of which he had notice but at which he did not appear or present any evidence; and (2) his failures to comply with the orders and procedures of this Court do not constitute excusable neglect.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (I)

and (O).

II. FACTS AND BACKGROUND

On April 4, 2000, the Debtor, represented by counsel, filed a Chapter 7 petition. On July 10, 2000, David and Jeralyn Baran (the "Plaintiffs") filed an adversary complaint against him, seeking a determination that a debt he owed to them was non-dischargeable for fraud under 11 U.S.C. § 523(a)(2)(A) and for willful and malicious injury under 11 U.S.C. § 523(a)(6). The Debtor was not initially represented by an attorney in this adversary proceeding.

Service of summons and complaint was made within ten days pursuant to Fed. R. Bankr. P. 7004 and the return of service was filed. After an extension of time to answer was afforded by the Court, the Debtor filed his pro se answer, which referenced his address, for service purposes, as that at which he was served with summons and complaint. He filed the answer on August 25, 2000.

On that same day, the Debtor also filed a motion for summary judgment. He served a copy of the motion on the Plaintiffs, but did not notice the motion for hearing as required by Local Bankruptcy Rule 402(B). Nor did the motion for summary judgment comply with Local Bankruptcy Rule 402(M), which, among other things, requires that all motions for summary judgment be accompanied by a supporting memorandum of law and a separate statement of material facts as to which the movant contends there is no genuine issue.

On September 8, 2000, the Court denied the motion for summary judgment, without prejudice, and set the matter for further hearing. Thereafter, on November 17, 2000, the Court entered its usual Preliminary Pretrial Order (the "Preliminary Order"), which was mailed to the parties at their addresses of record. The Preliminary Order required the parties to confer prior to December 31, 2000, and to prepare and submit a joint pretrial statement by January 15, 2001. It also set a pretrial conference for January 26, 2001.

On December 14, 2000, the Plaintiffs' attorneys sent another copy of the Preliminary Order to the Debtor and requested by letter that he call them to discuss settlement as required by the Preliminary Order. (Plaintiffs' Memorandum in Opposition to Defendant's Motion to Vacate Default Judgment, Ex. A). The Plaintiffs' attorneys further requested that the Debtor confer with them in the preparation of the pretrial statement and sent him a copy of the sections they had prepared. (Plaintiffs' Memorandum, Ex. A).

The Debtor's only responses to this letter were two telephone messages, left on voice-mail at the Plaintiffs' attorneys' offices on January 5, 2001 and January 14, 2001, respectively, stating that he was aware of the Preliminary Order and that he was traveling extensively for business purposes. (Plaintiffs' Memorandum, Ex. B). In the January 14 message, the Debtor said that he would write to the Court about his unavailability.

The Debtor wrote a letter dated January 21, 2001 (the "January Letter"),

seemingly addressed[1] to both the Plaintiffs' attorneys and to the Judge presiding over this case, which reached only the Plaintiffs' counsel. In that letter, he stated that "[a]s a Pro Se Debtor/Defendant, I am using this informal letter to request continuance until after March 31, 2001. In early April, I will hire counsel, and we may proceed according to the schedule of the court and the attorneys." (Plaintiffs' Memorandum Ex. C). This letter was never filed with the Court and, indeed, never reached the Court.

The Plaintiffs timely filed their portion of the joint pretrial statement with the Court, and told the Court that their attorney had forwarded a draft to the Debtor, unsuccessfully requesting comments and revisions. The debtor never filed his portion of the pretrial statement. The Plaintiffs' attorney attended the scheduled pretrial conference, but the Debtor failed to attend same. The matter was set for trial on March 16, 2001 and the Court's Final Pretrial Order was entered and mailed to the parties, including the Debtor at his address of record, on January 30, 2001.

The trial took place as scheduled on March 16, 2001. The Debtor did not appear. At trial, the Plaintiffs told the Court about the January Letter. The Plaintiffs then established a prima facie case in their § 523(a)(2)(A) cause of action. The Debtor, not being present, failed to rebut any portion of the case. The Court entered its order

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[1] At the top of the page, where the name and address of the intended recipient generally appears in business correspondence, the Debtor typed the presiding Judge's name and the phrase "United States Bankruptcy Court" with no further address. The Debtor similarly listed the Plaintiffs' attorney's name with no address. The attorney's receipt of this letter establishes that the Debtor actually mailed it to him at a deliverable address, but there is no indication whatsoever that the Debtor ever mailed this letter to the Court.

determining the Plaintiffs' claim against the Debtor to be nondischargeable and the order was docketed on March 21, 2001. No further action was taken of record until the matter at bar was filed.

On June 1, 2001, the Debtor, now represented by counsel, filed the instant motion to vacate the default judgment. With the motion to vacate, the Debtor filed an affidavit in which he avers that he sent the January Letter to the presiding Judge, advising the Court of his unavailability due to his employment (Schram Aff. ¶ 4). The Debtor further swears that he was unaware that the trial had been set (Schram Aff. ¶ 6). The Debtor's motion does not cite to any statutory or case authority in support of his position, but merely suggests that the judgment should be vacated because he was pro se and did not understand that it was important to show up for trial.

The Plaintiffs filed a memorandum in opposition to the Debtor's motion. They acknowledge receipt of the January Letter and attach it as an exhibit to their brief, but note that, nevertheless, the Debtor did not advise anyone that he would not appear at the trial. They oppose the relief sought, noting that all parties, including pro se individuals, have the obligation to comply with court orders and that the Debtor ignored the ones entered by this Court at his own risk. They cite to Tuke v. U.S., 76 F.3d 155 at 156 (7th Cir. 1996) for the proposition that ignorance of rules of procedure may be an explanation but not an excuse, and wherein the court stated that failure to read a rule is the "antithesis of good cause." *Id.* The Plaintiffs further point out that they would be prejudiced by the relief sought because they went to the trouble and expense of complying with the Court's orders and if the

judgment is vacated, they will have to do so again. They argue that the Court should deny the relief requested because the Debtor's defaults were all within his own control. Finally, they argue that the Debtor failed timely to move the Court for a continuance and that his actions and omissions do not constitute excusable neglect.

The Debtor's reply indicates that he relies upon Fed R. Civ. P. 60(b)(1) and Fed. R. Bankr. P. 9024. In the reply, he contends that his failures constitute excusable neglect under Pioneer Inv. Servs. Co. v. Brunswick, 507 U.S. 380, 113 S.Ct. 1489 (1993); Robb v. Norfolk and Western, 122 F.3d 354 at 359 (7th Cir. 1997); and John v. Gudmundsen, 35 F.3d 1104 at 1117 (7th Cir. 1994). The Debtor argues that there is no danger of prejudice to the Plaintiffs if the Court vacates the judgment. (Defendants' [sic] Reply to Plaintiffs' Memorandum, at p.4).

III. APPLICABLE STANDARDS

Relief from the entry of the judgment at bar is governed by Rule 60(b) of the Federal Rules of Civil Procedure and its bankruptcy analog, Rule 9024 of the Federal Rules of Bankruptcy Procedure. Specifically, Rule 60(b)(1) provides in pertinent part

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the

> operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken....

Fed. R. Civ. P. 60(b).

Relief from a judgment under Rule 60(b)(1) for mistake, inadvertence, surprise or excusable neglect is an extraordinary remedy and is granted only in exceptional circumstances. C.K.S. Engineers, Inc. v. White Mountain Gypsum Co., 726 F.2d 1202, 1205 (7th Cir. 1984). The burden of establishing proper grounds for Rule 60 relief rests upon the movant. Helm v. Resolution Trust Co., 84 F.3d 874, 878 (7th Cir. 1996); National Bank of Joliet v. W. H. Barber Oil Co., 69 F.R.D. 107, 109 (N.D. Ill. 1975). A motion under Rule 60(b) is addressed to the sound discretion of the trial judge. Pretzel & Stouffer, Chartered v. Imperial Adjusters, Inc., 28 F.3d 42, 45 (7th Cir. 1994).

Ignorance or carelessness on the part of the litigant or his attorney will not allow a party to prevail on a motion for relief under Rule 60(b)(1). See e.g., North Central Illinois Laborer' District Council v. S.J. Groves & Sons Company, Inc., 842 F.2d 164, 167 (7th Cir. 1988); a negligent mistake evincing a lack of due care is not a proper ground for relief under the rule. Bershad v. McDonough, 469 F.2d 1333, 1337 (7th Cir. 1972). While pro se pleadings are to be construed liberally, Kincaid v. Vail, 969 F.2d 594, 598-99 (7th Cir. 1992), the Seventh Circuit has "never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." Members v. Paige, 140 F.3d 699, 702 (7th Cir. 1998) . "Although civil litigants who represent themselves ("pro se") benefit from various procedural protections not

otherwise afforded to the attorney represented litigant . . . pro se litigants are not entitled to a general dispensation from the rules of procedure or court-imposed deadlines." Jones v. Phipps, 39 F.3d 158, 163 (7th Cir. 1994). Requiring litigants to comply with procedural requirements is the best way to ensure evenhanded administration of the law. See, Members, 140 F.3d at 702.

IV. DISCUSSION

At first glance, the motion at bar seems to require the Court to balance two potentially competing policies: (1) the finality of judicial decision making and (2) a fresh start for an honest but unfortunate debtor. However, a close review of the record demonstrates that no real conflict is present. The Plaintiffs, having fully complied with the Court's pretrial orders, have proven their cause of action at the properly scheduled trial and shown that the Debtor dishonestly defrauded them under section 523(a)(2)(A). While the Debtor, however, completely failed to comply with either pretrial order, suffered a judgment to be entered against him, belatedly obtained counsel, and now effectively seeks a dispensation from both the rules of procedure and court-imposed deadlines. The Court will not grant the relief requested; the Debtor's failures to obey the Court's orders or follow its procedures were not because of any innocent misunderstanding or lack of familiarity with rules and procedures. Rather, the Debtor has at best displayed a grossly negligent disregard and, at worst, a willful indifference to and defiance of the Court's orders and procedures.

Even *Pioneer Investment*, the case cited by the Debtor in support of his argument that his neglect was excusable, confirms the Court's decision. In *Pioneer Investment*, the Supreme Court explained that courts should consider all the circumstances surrounding the party's failure to comply with orders or procedures. 507 U.S. at 395. Those circumstances include: "the danger of prejudice to the [opposing party], 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.*

Prejudice to the Opposing Party

Contrary to the Debtor's argument, prejudice to the Plaintiffs would result from the granting of the motion because the time, effort, and expense they incurred in complying with the Court's orders, and proving up their prima facie case, would be wasted. Additionally, the Court's time and effort expended in preparing for and conducting the trial, and making its findings and conclusions, would be wasted.

Length of Delay

The length of the Debtor's delay in complying with the Federal Rules of Civil Procedure, the Federal Rules of Bankruptcy Procedure, the Local Rules of this Court, the orders of this Court is effectively infinite. He is not merely late in complying; he has never complied. He did not even bother to show up for trial.

Impact on Judicial Proceedings

A finding that the Debtor's neglect was excusable would have a twofold impact on

judicial proceedings. First, it would effectively eviscerate this Court's pretrial orders, which have been affirmed in other, previous matters. See, e.g., In re Maurice, 138 B.R. 890 (Bankr. N.D. Ill. 1992), aff'd, 1992 WL 308535 (N.D. Ill. Oct. 19, 1992); aff'd, 21 F.3d 767 (7th Cir. 1994) (sanctioning a litigant for failure to comply with a pretrial order). Secondly, it would increase the burden on the court system by allowing pro se defendants to completely ignore court procedures and then to request a new trial.

Reasonable Control of the Movant

All of the Debtor's failures are attributable to his own decisions and actions. He chose to send the January Letter rather than to file a motion or otherwise properly plead before the Court. Assuming that he did attempt to send it to the Court, he chose not to send it by some sort of delivery system that would have provided proof that it was actually sent and to what address.[2] An unsupported statement that the Debtor sent a letter to the presiding Judge, which even if received and filed by the Court would not have excused the Debtor from attendance at trial, is insufficient cause to vacate the judgment.

What is more, the January Letter did not comply with any of the Federal Rules of Bankruptcy Procedure or the Rules of this Court. Even if the January Letter had reached the Court, it was not the timely motion for a continuance required under Fed. R. Bankr. P. 9013 and 9014. Nor was it noticed up for hearing and presented in accordance with Local Bankruptcy Rule 402B.[3] The Debtor should have been fully aware of these Local Rules

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[2] E.g., certified or registered mail or a private delivery service like FedEx or UPS.

[3] The Court also notes that merely requesting a continuance is no guarantee that a continuance will be entered. Local Bankruptcy Rule 404 does not require the Court to grant continuances even when all the parties agree to them; the decision to grant a continuance is within the Court's discretion.

and the Court's adherence to them after his improperly filed motion for summary judgment was dismissed.

The Movant's Good Faith

The Court cannot find that the Debtor acted in good faith during this progression of events. His attitude to the proceedings, the Court, and the Plaintiffs has been at best cavalier.

He has ignored orders and procedures. He did not respond in any way to the Court's pretrial orders, although he admits that he received them. He argues that he was too busy and too short of money to comply. However, hard-working people who are short of funds appear before this Court every day and follow its orders and procedures.

The Debtor does nothing but point to a letter that may never have been mailed and was not received by the Court. He has failed to appear for trial and asks the Court to accept his statement that, because he was pro se, he did not know that it was important.

He has chosen to place telephone calls to the opposing parties at times when he knew that the office would be empty. His excuse that he was traveling is disingenuous; there are telephones available seven days a week in every state of the Union. He attempted in this manner to force the Court and the Plaintiffs to wait on his convenience and to interpose a delay in the proceedings.

The facts and circumstances shown here demonstrate that the Debtor's neglect was of the inexcusable, not excusable, variety. Accordingly, the Plaintiffs' objections to the motion should be sustained and it should be denied.

V. CONCLUSION

For the foregoing reasons, the Court hereby denies the Debtor's motion to vacate the judgment entered against him.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
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	)	Chapter 7
Debtor.	)	Bankruptcy No. 00 B 10045
	)	Judge John H. Squires
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DAVID BARAN and JERALYN BARAN,	)	
	)	
Plaintiffs.	)	
	)	
v.	)	Adversary No. 00 A 00607
	)	
DAVID L. SCHRAM,	)	
	)	
Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated July 24, 2001, the Court denies the motion of David L. Schram to vacate default judgment.

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge

See attached Service List