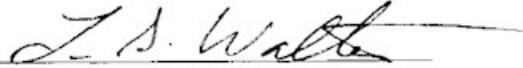


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: September 17, 2007


Lawrence S. Walter
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: ANITA G. KEATON
JAMES D. KEATON,

Debtors

Case No. 03-36151
Adv. No. 07-3010

ANITA G. KEATON, ET AL.,

Plaintiffs

Judge L. S. Walter
Chapter 13

v.

JP MORGAN CHASE (F.K.A. BANK ONE),

Defendant

DECISION OF THE COURT DENYING
MOTION TO VACATE DEFAULT JUDGMENT

This matter is before the court on the Motion to Vacate Default Judgment filed by Defendant JP Morgan Chase Bank, N.A. f.k.a. Bank One, N.A. (“Chase”) on June 29, 2007

(“Motion to Vacate”) [Adv. Doc. 8]; the Response to Defendant’s Motion to Vacate Default Judgment filed by Plaintiffs-Debtors Anita and James Keaton (“Debtors”) (“Response”) [Adv. Doc. 10]; and Chase’s Reply Memo Supporting Its Motion to Vacate Default Judgment filed on August 15, 2005 (“Reply”) [Adv. Doc.12].

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(a) and the general order of reference entered in this district. This is a core proceeding pursuant to 28 U.S.C. § 158 (b)(2)(K).

FACTUAL AND PROCEDURAL BACKGROUND

On July 7, 2003, Debtors filed a petition for relief under Chapter 13 of the United States Bankruptcy Code (11 U.S.C. § 1301 *et seq.*). [Doc. 1]. Debtors listed Chase on Schedule D of their petition as a secured creditor. [Doc. 1]. Chase did not enter an appearance in the bankruptcy case; nor did it file a proof of claim.

On January 18, 2007, Debtors commenced this adversary proceeding to compel Chase to file a proof of claim in connection with Chase’s purported mortgage lien on Debtor’s real property located at 3370 Little York Road, Dayton, Ohio (“Property”) or, in the alternative, to avoid Chase’s lien on the Property. [Adv. Doc. 1]. Debtor James Keaton and his deceased former wife, Susan Keaton, allegedly granted Chase the mortgage to secure a note given by Susan Keaton to Chase. Chase’s answer was due March 1, 2007. [Adv. Doc. 2]. Based on Chase’s failure to timely file an answer or a proof of claim, Debtors filed a Motion for Default Judgment on April 4, 2007 (“Default Motion”). [Adv. Doc. 5]. Following the expiration of the deadline for Chase to object to the Default Motion, the court, on May 31, 2007, entered an Order Granting Default Judgment pursuant to which Chase’s lien on the Property was released (“Default Judgment”) [Adv. Doc. 6]. On June 12, 2007, the court closed the Adversary

Proceeding.

On June 29, 2007, Chase filed its Motion to Vacate arguing that Chase's failure to file an answer was the result of "excusable neglect" because one of its employees negligently failed to hire outside counsel. [Adv. Doc. 8]. On July 25, 2007, Debtors filed their Response to Chase's Motion to Vacate contending that vacating the Default Judgment would prejudice them because it would disrupt the finality of their discharge. [Adv. Doc. 10].¹ Chase filed its Reply on August 15, 2007. [Adv. Doc. 11]. Chase does not challenge the sufficiency of service of the summons and complaint or the Default Motion.

LEGAL ANALYSIS

The process of setting aside default entries and judgments is governed by Fed. R. Civ. P. 55(c) which applies to bankruptcy adversary proceedings by virtue of Fed. R. Bankr. P. 7055. Because Chase seeks to vacate a default judgment rather than an entry of default, Rule 55(c) mandates recourse to Fed. R. Civ. P. 60(b) which applies to adversary proceedings pursuant to Fed. R. Bankr. P. 9024². This rule allows the court to grant a party relief from a final order or judgment for, among other causes, "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). Chase focuses its request for such relief upon the defense of "excusable neglect."

In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), the Supreme Court reviewed the meaning of the term "excusable neglect" in the bankruptcy context. The court concluded that the term is a "somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." *Id.* at 392. In its final analysis, the Supreme Court concluded that the process of determining what

¹ In further response to Chase's Motion to Vacate, Debtors filed a motion to reopen their estate case (#03-36151) so as to take whatever actions deemed necessary should this court grant Chase's Motion. The court granted the Debtors' motion by order dated September 4, 2007.

² There are some limitations to the applicability of Rule 60(b) in bankruptcy proceedings but those limitations are not relevant to this case. Fed. R. Bankr. P. 9024.

types of neglect are excusable, “is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Id.* at 395. The Supreme Court established several nonexclusive factors to consider in this analysis: 1) the danger of prejudice to the debtor; 2) the reason for the delay including whether it was within the reasonable control of the movant; 3) the length of the delay and its potential impact on the judicial proceedings, and 4) whether the movant acted in good faith. *Id.*

While the Sixth Circuit has not manifestly applied the *Pioneer* analytical construct to excusable neglect determinations, its analysis in Rule 60(b) cases has been consistent with *Pioneer*. *Bavely v. Powell (In re Baskett)*, 219 B.R. 754, 759 (6th Cir. B.A.P. 1998). In the Sixth Circuit, when Rule 60(b) is invoked to set aside a default judgment, consideration must be given to the same three equitable factors used to determine whether there is “good cause” for setting aside a default entry under Fed. R. Civ. P. 55(c): “1) whether the non-defaulting party will be prejudiced; 2) whether the defendant has a meritorious defense; and 3) whether the culpable conduct of the defendant led to the default.” *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983). However, in the context of setting aside a default judgment, the scope of the court’s equitable inquiry is narrowed and, under rule 60(b)(1), the culpability factor is framed in terms of “excusable neglect.” *Waiferson Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992); *Thompson v. American Home Assur. Co.*, 95 F.3d 429, 433 (6th Cir. 1996). Further, the three factors are not to be balanced, but rather the movant must first prove that the default was the product of excusable neglect before the other two factors may be considered. *Waiferson*, 976 F.2d at 292; *see also Manufacturers’ Indus. Relations Ass’n v. East Akron Casting Co.*, 58 F.3d 204, 209 (6th Cir. 1995).

This court does not find that Chase’s default was the result of excusable neglect. Consequently, the Motion to Vacate must be denied.

Chase maintains that its failure to timely file an answer to the adversary complaint was due to the negligent failure of an unnamed employee in its Texas office to hire outside counsel. While the memorandum accompanying the Motion to Vacate contains some speculation as to why the unnamed employee might have made this mistake, Chase ultimately admits in its Reply that the employee's affidavit has not been submitted because the employee has no memory whatsoever of the complaint or the incident in question. A second purportedly "minor" reason for the failure to file an answer, that Chase was "slightly behind in the processing of incoming pleadings in early 2007," is cited in the affidavit of Nancy Sikora, Assistant Vice President in the Legal and Compliance Department of Chase ("Sikora Affidavit"). However, in its Reply, Chase recants this assertion and affirmatively states that the backlog had no impact on Chase's failure to file an answer. Consequently, Chase's claimed excusable neglect boils down to the failure of an unnamed employee to hire outside counsel for reasons that are unknown.

Chase's argument is weakened by the absence of any explanation or excuse for the employee's miscue, but more importantly, the argument simply does not address Chase's failure to timely file an answer. The answer was due March 1, 2007. According to the Sikora Affidavit, the complaint or its electronic equivalent was emailed to the Texas office (and the reputed negligent employee) on March 9, 2007, eight days after the answer was due. Obviously, even if the Texas employee had followed correct bank litigation procedures and had hired outside counsel, it was too late to respond to the complaint; Chase had already missed the answer deadline and was in default. Chase offers no explanation or excuse as to the neglect that actually caused the default. In the absence of such an explanation, the court cannot discern the excusable neglect that might negate Chase's culpability. In other words, Chase has simply failed to carry its burden of demonstrating why it is not culpable. *See, White v. Kent (In re DMG Mortgage)*, 227 B.R. 133, 135 (Bankr. S.D. Ohio. 1998) (relief from default judgment pursuant to Rule 60(b)(1)

was denied where defendant bank offered no explanation as to why its procedures for the distribution of litigation which led to its failure to answer adversary complaint failed); *see also Slutsky v. American Express Travel Related Services Co. (In re William Cargill Contractor, Inc.)*, 209 B.R. 435, 438 (6th Cir. B.A.P. 1997) (generally, a defendant's conduct is considered culpable if there is no excuse for the default).

Chase places considerable reliance on *In re Jarman*, 2004 Bankr. Lexis 984 (Bankr. E.D. Ky. 2004). In *Jarman*, despite a trustee's failure to provide any reason for her failure to respond to a motion for relief from stay, the court granted the trustee's motion to reinstate the stay because the trustee had made a sufficient showing of a meritorious defense and a lack of prejudice to the non-moving party. *Id.* at *1 & *2. The court further explained that the trustee's conduct was not culpable because the court could not find an intent by the trustee to thwart judicial proceedings or recklessly disregard the effect of her conduct on those proceedings. *Id.* at *7.

To the extent that the *Jarman* decision may be interpreted to hold that the defaulting party has no burden to demonstrate some basis for excusable neglect and that the non-moving party must instead demonstrate an intent by the defaulting party to thwart judicial proceedings or a reckless disregard for the proceedings, this court must respectfully disagree. As already discussed, precedent in the Sixth Circuit makes it abundantly clear that the party seeking vacation of a judgment must, as a prerequisite to consideration of other factors, show that the default was attributable to excusable neglect. *See Waifersong*, 976 F.2d at 292 ("It is only when the defendant can carry this burden [of demonstrating that his default was the product of excusable neglect] that he will be permitted to demonstrate that he can satisfy the other two factors..."). However, it is more likely that the *Jarman* court was merely reacting to the particular circumstances before that court: A relief from stay order that was the product of a

motion and a short notice period (15 days) rather than an adversary proceeding replete with full due process safeguards such as complaint, summons, and subsequent motion under Rule 55; a course of conduct by the trustee in that particular case and perhaps over a period of years that would render any kind of disregard or negative intent inconceivable; and the overwhelmingly obvious merit to the trustee's defense and the equally obvious lack of prejudice to the other party.

Our case is much different. Chase was properly served with complaint and summons; it failed to file an answer by the due date; and it has provided no explanation or excuse for its failure. Furthermore, after allowing Chase an additional month to answer, Debtors filed their Default Motion which they dutifully served on Chase. Chase again filed no response even though judgment was not entered until nearly two months later. This pattern of conduct by Chase may be reasonably viewed as symptomatic of a reckless disregard for the effect of its conduct on these judicial proceedings, particularly in the absence of any germane explanation.

Compounding this view is Chase's complete lack of attention to its interests throughout the Debtors' four-year chapter 13 bankruptcy case. Although Debtors allowed for payment of the Chase mortgage in their chapter 13 plan and regularly made the requisite payments to the trustee over the years, the trustee was never able to disburse the funds because Chase failed to file a proof of claim in the case and made no other appearance to protect its interests. Given Chase's extraordinary dereliction and Debtors understandable need to bring some finality to their chapter 13 case, Debtors filed an adversary proceeding to force Chase to file a proof of claim or otherwise avoid the mortgage. Chase has exhibited a pattern of neglect which is simply not excusable. *See Bank One, National Association v. Bever (In re Bever)*, 300 B.R. 262, 269 (6th Cir B.A.P. 2003) (mortgagee was not entitled to relief from judgment where as a result of mortgagee's failure to respond to trustee's complaint, mortgagee's lien had been avoided...any

alleged windfall to debtors was not the result of trustee's failure to properly perform her duties, but of mortgagee's failure to participate in bankruptcy process).

Because Chase has failed to establish that its conduct was the result of excusable neglect, the court need not evaluate the other two *United Coin Meter* factors. Nevertheless, it is worth noting that vacation of the Default Judgment against Chase would result in significant prejudice to Debtors.

Prejudice is not established, in the context of a motion for relief from default judgment based on excusable neglect, merely from the fact that the defaulting party will be permitted to defend on the merits; setting aside a default must prejudice plaintiff in a more concrete way, such as loss of evidence, increased difficulties in discovery, or greater opportunities for fraud and collusion. *Berthelsen v. Kane*, 907 F.2d 617, 621 (6th Cir. 1990).

The resulting prejudice to Debtors in this case is no less concrete. Debtors have played by the rules. They afforded appropriate notice to all their creditors, including Chase, and successfully confirmed a chapter 13 plan. They implemented that plan by paying their debts within their means to do so over four years. Debtors have a right to a discharge of their remaining unsecured debts and a right to a final accounting of any remaining obligations, including secured debt, so that they can have their "fresh start." Unfortunately, because Chase was unresponsive, Debtors had to file suit to get Chase's attention. Chase continued to ignore them, so they ultimately obtained a default judgment avoiding Chase's mortgage. They have now received their discharge, all funds have been distributed, and the case has been closed.

Debtors and the trustee have relied on the confirmed plan and the finality of the Default Judgment in administering this bankruptcy estate and distributing funds appropriately. Vacating the Default Judgment would in effect undo the plan and its implementation in contravention of

11 U.S.C. §1327(a)³ and undermine Debtors' discharge "of all debts provided for by the plan." It would either require recovery and redistribution of plan funds or place Debtors four years in arrears on their mortgage to Chase, assuming that the mortgage is valid. Even if Chase had not been culpable, the substantial prejudice to Debtors would weigh strongly against vacating the Default Judgment.

Chase had multiple opportunities to assert its rights in this bankruptcy case. It didn't even bother to file a proof of claim so as to collect its money. The adversary proceeding and motion for default gave it two more opportunities to respond. *See DMG Mortgage*, 227 B.R. at 135; *see also Bever*, 300 B.R. at 269. Granting relief from judgment to Chase is simply unjustified where Chase cannot even provide an explanation for its negligence and where Debtors would be unfairly prejudiced.

CONCLUSION

For the foregoing reasons, Chase's Motion to Vacate Default Judgment is **DENIED**.

SO ORDERED.

cc:

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³ "The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan."
11 U.S.C. § 1327(a).

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