



**SO ORDERED,**

**Judge Neil P. Olack  
United States Bankruptcy Judge  
Date Signed: December 21, 2016**

**The Order of the Court is set forth below. The docket reflects the date entered.**

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

**LYNDA FAYE JACKSON,**

**CASE NO. 16-03263-NPO**

**DEBTOR.**

**CHAPTER 13**

**ORDER DENYING MOTION TO VACATE  
DISMISSAL AND REINSTATE CHAPTER 13 CASE**

There came before the Court for consideration the Motion to Vacate Dismissal and Reinstate Chapter 13 Case (the "Motion") (Dkt. 30) filed by Lynda Faye Jackson, the debtor (the "Debtor") in the above-styled chapter 13 bankruptcy case (the "Bankruptcy Case"). After fully considering the matter, the Court finds as follows:

**Jurisdiction**

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Notice of the Motion was proper under the circumstances.

**Facts**

1. The Debtor filed a voluntary petition for relief pursuant to chapter 13 of the

Bankruptcy Code on October 5, 2016 (the “Petition”) (Dkt. 1).<sup>1</sup>

2. On October 19, 2016, the Debtor filed the Motion for Extension of Time in Which to File Required Statements, Schedules, Chapter 13 Plan and Lists Pursuant to Bankruptcy Procedure Rule 1007 (the “First Extension Motion”) (Dkt. 10). In the First Extension Motion, the Debtor requested an additional fourteen (14) days in which to file the documents required by Federal Rule of Bankruptcy Procedure 1007 (the “Preliminary Documents”) (First Extension Mot. at 1). According to the Debtor, she had been unable to provide her attorney with the Preliminary Documents prior to the October 19, 2016, deadline because she did not have a computer or e-mail access, but “she now has a friend to assist her in faxing and scanning documents for review.” (*Id.*).

3. The Court entered the Order Granting Motion for Extension of Time in Which to File Required Statements, Schedules, Chapter 13 Plan and Lists Pursuant to Bankruptcy Procedure Rule 1007 (the “First Extension Order”) (Dkt. 12) on October 21, 2016, extending the deadline for the Debtor to submit the Preliminary Documents to November 2, 2016. In the First Extension Order, the Court provided that “any additional request for an extension of time to file the Preliminary Documents must include a demonstration of good cause, may be summarily denied by the Court, and may be granted only after notice and an opportunity for hearing on expedited

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<sup>1</sup> The Petition constituted the Debtor’s fifth bankruptcy case total, and her third chapter 13 bankruptcy case since January 2015: 1) the Debtor initiated Case No. 15-00270-NPO on January 29, 2015, which was dismissed on July 2, 2015, for failure to make plan payments (Dkt. 35); 2) the Debtor initiated Case No. 15-02743-NPO on September 4, 2015, which was dismissed on January 13, 2016, for failure to make plan payments (Dkt. 36); and 3) the Bankruptcy Case. These facts demonstrate that the issue is not solely related to the Debtor’s failure to file the Preliminary Documents as portrayed in the Motion. The fact that the Debtor has had three (3) bankruptcy cases, including the Bankruptcy Case, dismissed for failure to make plan payments or file the required documents causes the Court to question whether the Motion was filed in good faith.

notice.” (First Extension Order at 1-2). The Court further held that if the Debtor failed to file the Preliminary Documents before the deadline, the Bankruptcy Case could be dismissed and the Court could bar the Debtor from filing a subsequent bankruptcy case for 180 days pursuant to § 109(g)(1).<sup>2</sup>

4. The Debtor requested a second extension of the deadline to file the Preliminary Documents in the Second Motion for Extension of Time in Which to File Required Statements, Schedules, Chapter 13 Plan and Lists Pursuant to Bankruptcy Procedure Rule 1007 (the “Second Extension Motion”) (Dkt. 16) on November 4, 2016. In the Second Extension Motion, the Debtor again claimed that she did not have a computer or e-mail access, but that she “now has a friend to assist her in faxing and scanning documents for review.” (Second Extension Mot. at 1). Accordingly, she requested that the Court against extend the deadline to submit the Preliminary Documents to November 16, 2016. (*Id.*).

5. The Court entered the Order Granting Second Motion for Extension of Time in Which to File Required Statements, Schedules, Chapter 13 Plan and Lists Pursuant to Bankruptcy Procedure Rule 1007 (the “Second Extension Order”) (Dkt. 17) on November 7, 2016, allowing the Debtor until November 16, 2016, to file the Preliminary Documents. The Court again provided that an additional extension request “must include a demonstration of good cause, may be summarily denied by the Court, and may be granted only after notice and an opportunity for a hearing on expedited notice.” (Second Extension Order at 2). Additionally, the Court held that a dismissal could result in a 180-day bar under § 109(g)(1). (*Id.*).

6. The Debtor did not file the Preliminary Documents before the November 16, 2016,

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<sup>2</sup> Hereinafter, all code sections refer to the Bankruptcy Code found in title 11 of the U.S. Code unless indicated otherwise.

deadline imposed by the Second Extension Order and the Court entered the Order Dismissing Case (the “Dismissal Order”) (Dkt. 19) on November 18, 2016. “The deadline has passed, and the Debtor has not filed any of the Preliminary Documents or requested any additional extension of time. Accordingly, the Court finds that the Bankruptcy Case should be dismissed and that the Debtor should be prohibited from filing any new bankruptcy case within 180 days from the date of this Order.” (Dismissal Order at 1-2).

7. The Debtor filed the Motion on November 29, 2016. In the Motion, the Debtor requested that the Court vacate the Dismissal order and reinstate the Bankruptcy Case because her attorney did not receive the Preliminary Documents “timely to file before the extension deadline.” (Mot at 1). “Debtor does not have email or computer access to quickly transmit the necessary documents. Debtor utilized the United States Postal Services and that cause[d] a delay in receipt.” (*Id.*). According to the Motion, the Preliminary Documents have now “been received, reviewed and properly populated into the required Schedules, Statements and Plan.” (*Id.*).

### **Discussion**

The Debtor asserted no legal basis or authority for the relief she requested in the Motion. After reviewing the applicable law, the Court finds that either Federal Rule of Bankruptcy Procedure 9023 (“Rule 9023”) or Federal Rule of Bankruptcy Procedure 9024 (“Rule 9024”) could provide a basis for the relief requested in the Motion. Rule 9023 governs motions for new trials or motions to alter or amend a judgment, and provides that Federal Rule of Civil Procedure 59 (“Rule 59”) governs the standard for granting such relief. FED. R. BANKR. P. 9023. Rule 9024 provides a basis for relief from an order, and applies the standard of Federal Rule of Civil Procedure 60 (“Rule 60”). FED. R. BANKR. P. 9024. The Court will consider both Rule 9023 and Rule 9024 in determining the proper disposition of the motion.

## **I. Rule 9023**

The Fifth Circuit Court of Appeals has held that courts should consider a motion for relief from a final order under Rule 9023 filed within the time permitted by Rule 59 as a motion to alter or amend the order under Rule 59. *Harcon Barge Co. v. D. & G. Boat Rentals, Inc.*, 784 F.2d 665, 668 (5th Cir. 1986). “Motions to ‘reconsider,’ to ‘vacate’ or to ‘set aside’ are motions under Rule 9023.” *In re Salmeron*, No. 10-38945-H3-13, 2012 WL 1354858, slip op. at \*2 (Bankr. S.D. Tex. Apr. 16, 2012) (citations and quotations omitted). The Debtor requested that the Court “vacate” the Dismissal Order. (Mot. at 1). Accordingly, the Court considers the Motion under the standards of Rule 59.

There are three (3) grounds that support a motion to alter or amend a judgment under Rule 59(e): (1) an intervening change in controlling law; (2) new evidence not previously available; and (3) the need to correct a clear or manifest error of law or fact to prevent manifest injustice. *Williams v. Miss. Action for Progress, Inc.*, 824 F.Supp. 621, 623-24 (S.D. Miss. 1993); *See Tex. Comptroller of Pub. Accounts v. Transtexas Gas Corp., (In re Transtexas Gas Corp.)*, 303 F.3d 571, 581 (5th Cir. 2002) (Rule 59(e) motion calls into question the correctness of a judgment). Thus, a motion for reconsideration is appropriate when a court has misapprehended the facts, a party’s position, or controlling law. *Id.* Other than her claim that she lacked access to a computer or e-mail and was unable to provide the Preliminary Documents to her attorney, the Debtor asserted no legal basis to support her request that the Court vacate the Dismissal Order. The Court finds no evidence that there has been any change in the controlling law, that new evidence has been discovered, or that a clear or manifest error of law or fact was committed. The Court finds that because none of the three (3) grounds supporting a motion to vacate a final judgment are satisfied, the Rule 59 standard is not satisfied.

## II. Rule 9024

Although the bankruptcy court in *In re Salmeron* stated that a motion to vacate is properly considered under Rule 9023, it is possible that the Debtor's request that the Court "vacate" the Dismissal Order was actually intended to be a motion for relief from a judgment or order under Rule 9024. Accordingly, for the sake of completeness, the Court considers the Motion under Rule 9024. Rule 9024 adopts the standard of Rule 60, which states that "on a motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" for a variety of reasons, including 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly discovered evidence; 3) fraud, misrepresentation, or misconduct by an opposing party; 4) the judgment is void; 5) the judgment has been satisfied; or 6) any other reason that justifies relief. FED. R. CIV. P. 60(b)(1)-(6). The Fifth Circuit has held that "[i]mplicit in the fact that [Rule 60] affords extraordinary relief is the requirement that the movant make a sufficient showing of unusual or unique circumstances justifying such relief." *Pryor v. U.S. Postal Serv.*, 769 F.2d 281, 286 (5th Cir. 1985). Additionally, Rule 60 relief is generally inappropriate when a party demonstrates "[g]ross carelessness, ignorance of the rules, or ignorance of the law." *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 356 (5th Cir. 1993).

Based on the Court's review of Rule 60, it appears that the Debtor's only possible grounds for relief from the Dismissal Order under Rule 60, other than the discretionary provision of Rule 60(b)(6), would be under the "inadvertence" prong of Rule 60(b)(1). This prong allows a court to reconsider its order "if a party or attorney has failed to complete some required actions despite exercising due diligence." *In re Wilkinson*, 457 B.R. 530, 540 (Bankr. W.D. Tex. 2011). However, "a court will deny relief on a determination that the facts and circumstances demonstrate a lack of diligence in pursuing or defending an action." *Id.* "The determination of due diligence

is a fact question.” *Contreras v. Chavez*, 420 F. App’x 379, 381 (5th Cir. 2011) (quotation omitted). The standard for determining whether a party exercised due diligence “is the ordinary prudent person standard.” *Saenz v. Keller Indus. of Tex., Inc.*, 951 F.2d 665, 667 (5th Cir. 1992). “[L]ack of due diligence may be found as a matter of law if the [party] offers no excuse for his failure to [take action], or if the [party’s] excuse conclusively negates diligence.” *Id.* (citation omitted).

Rule 60(b)(6) allows the Court to reconsider an order for “any other reason that justifies relief.” FED. R. CIV. P. 60(b)(6). The Fifth Circuit has “construed a successful motion for relief pursuant to Rule 60(b)(6) as one where the claim for relief is based on extraordinary circumstances and not falling within any of the preceding categories.” *Hinojosa Engin., Inc. v. Lopez (In re Treyson Dev., Inc.)*, Adv. No. 15-7014, 2016 WL 1604347, at \*14 (Bankr. S.D. Tex. Apr. 19, 2016) (citing *Williams v. Thaler*, 524 F. App’x 960, 963 (5th Cir. 2013); *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012)). Pursuant to Rule 60(b)(6), “federal courts have broad authority to relieve a party from a final judgment upon terms as are just, provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5).” *In re Treyson Dev. Inc.*, 2016 WL 1604347, at \*15 (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862-63 (1988)). The “any other reason” language of Rule 60(b)(6) is “commonly referred to as a ‘grand reservoir of equitable powers to do justice.’” *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (quoting *Rocha v. Thaler*, 619 F.3d 387, 400 (5th Cir. 2010)).

In both the First Extension Motion and the Second Extension Motion, the Debtor claimed that she did not have a computer or e-mail access and was unable to file the Preliminary Documents. In the First Extension Order and the Second Extension Order, the Court held that if the

Debtor failed to file the Preliminary Documents before the new deadline or failed to make a good cause showing for an extension, the Bankruptcy Case could be dismissed and she could be barred from filing for 180 days. When the Debtor failed to comply with the Second Extension Order and did not request a third extension, the Court entered the Dismissal Order. As the bankruptcy court in *In re Wilkinson* noted, courts will not reconsider under Rule 60(b)(1) when a party demonstrates a lack of due diligence. Here, the Debtor demonstrated a lack of due diligence in failing to file the Preliminary Documents. Despite receiving two (2) extensions and being warned that she faced possible dismissal and the imposition of a filing bar, the Debtor failed to file the Preliminary Documents and did not request a third deadline extension. Additionally, in the First Extension Motion and the Second Extension Motion, the Debtor stated that she “now has a friend to assist her in faxing and scanning documents for review.” (First Extension Mot. at 1; Second Extension Mot. at 1). Nonetheless, the Debtor still failed to file the Preliminary Documents. Accordingly, the Court finds that the Debtor did not satisfy the Rule 60(b)(1) prong.

Essentially, the Dismissal Order was a result of the Debtor’s “gross carelessness” in failing to file the Preliminary Documents, which the Fifth Circuit has held is not a sufficient basis for granting the relief requested. *Edward H. Bohlin Co.*, 6 F.3d at 536. The Court, therefore, finds that relief should not be granted under Rule 60(b)(6). The Court granted the Debtor multiple opportunities to comply with Rule 1007 by extending the deadline, but the Debtor failed to comply. She has not indicated a change in circumstances or a novel reason for why she was unable to comply. In the Motion, like she alleged in the First Extension Motion and the Second Extension Motion, she claimed she lacked computer access and was unable to comply. The Petition was filed on October 5, 2016, meaning she had over one (1) month to file the Preliminary Documents before the Dismissal Order was entered on November 18, 2016. Even without



computer access, the Debtor should have been able to file the Preliminary Documents within this time period *via* the United States Postal Service. Additionally, as she claimed since the First Extension Motion was filed on October 19, 2016, she had a friend helping her fax and scan the Preliminary Documents, meaning they could have been sent to her lawyer for filing on that date. For the foregoing reasons, the Debtor has not satisfied the Rule 60 standard, and relief, therefore, should not be granted pursuant to Rule 9024.

### **Conclusion**

The Debtor failed to meet the standards proscribed by both Rule 9023 and Rule 9024. Rule 59, which applies to Rule 9023, requires the Debtor to demonstrate an intervening change in controlling law; new evidence not previously available; or the need to correct a clear or manifest error of law or fact to prevent manifest injustice in order to obtain relief, which she failed to do. The Debtor also failed to satisfy the Rule 60 standard, which is applicable to Rule 9024, because she did not exercise due diligence when she failed to file the Preliminary Documents, and equitable principles do not require the Court to vacate the Dismissal Order. Accordingly, the Court finds that the Motion should be denied.

IT IS, THEREFORE, ORDERED that the Motion is hereby denied.

##END OF ORDER##