SO ORDERED,

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: March 28, 2025

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

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: ROBERT W. BATES	**CASE NO. 23-02485-KMS**
DEBTOR	**CHAPTER 7**
GRETEL HARRIS **PERRY D. HARRIS**	**PLAINTIFFS**
V.	**ADV. PROC. NO. 24-00003-KMS**
ROBERT BATES, Individually and **d/b/a EYE WATCH MAINTENANCE**	**DEFENDANT**

ORDER DENYING MOTION TO REOPEN ADVERSARY (ADV. DKT. # 11)

THIS MATTER is before the Court on the Motion to Reopen Adversary ("Motion") by Plaintiffs Gretel Harris and Perry D. Harris (collectively "Harris") after dismissal for failure to prosecute. Adv. ECF No. 11.[1] Having considered the matter, the Court finds that the Motion should be denied. The Court has jurisdiction over the subject matter and the parties to this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (I).

[1] Electronic case filing document numbers in this adversary proceeding are designated as "Adv. ECF No. ___." *See The Bluebook: A Uniform System of Citation* R. B17.1.4, at 26 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020). Document numbers in the underlying bankruptcy case are designated as "ECF No. ___."

Factual and Procedural Background

1. October 25, 2023, Robert W. Bates filed a petition for relief under Chapter 7 of the Bankruptcy Code. ECF No. 1.

2. Bates listed Harris with an "alleged claim" of $14,000 on his schedule of unsecured creditors. ECF No. 3 at 17; ECF No. 12 at 9; ECF No. 26 at 9.

3. On February 12, 2024, one day before the expiration of the deadline to file nondischargeability complaints (ECF No. 8), Harris filed an adversary Complaint against Robert Bates, Individually and d/b/a Eye Watch Maintenance, seeking to except debt from discharge pursuant to § 523(a)(2)(A)[2] (for money obtained by false pretenses, false representation or actual fraud) and § 523(a)(4) (for fraud or defalcation while acting in a fiduciary capacity). Adv. ECF No. 1. Harris alleged the following:

- Bates "conspired to and did swindle" approximately $10,660 from Harris. Adv. ECF No. 1 at 1.
- Harris filed suit (in the County Court of Madison County, Mississippi) against Bates on September 1, 2020, alleging fraud and conversion in relation to a contract. Adv. ECF No. 1 at 2; Adv. ECF No. 17.
- An agreed judgment was entered in the County Court on July 19, 2021. Adv ECF No. 1 at 2; Adv. ECF No. 15. Bates was to pay Harris $9,000 by November 1, 2021, and in the event of default, $10,660 plus attorney's fees and costs. *Id.*
- Bates conceded that he obtained funds through fraud and conversion and that the debt would be nondischargeable in any bankruptcy proceeding.[3] Adv. ECF No. 1 at 2; Adv. ECF No. 15 at 2.

[2] Unless otherwise noted, code sections refer to the Bankruptcy Code found at title 11 of the United States Code.

[3] Although an agreement that concedes certain factual issues (such as fraud) may result in issue preclusion in the subsequent bankruptcy case, the agreement as to nondischargeability may be unenforceable. Courts have held that a prepetition waiver of discharge is a violation of federal law or public policy. *See In re Roberson Cartridge Co., LLC*, No. 22-20192-rlj7, 2023 WL 2393809, at *7 (Bankr. N.D. Tex. Mar. 7, 2023) (it is settled principal that advance agreement to waive benefits of bankruptcy laws is void as against public policy); *Howard v. Eckerd (In re Eckerd)*, No. 18-41521, Adv. No. 18-4092, 2019 WL 5250774, at *9 (Bankr. E.D. Tex. Oct. 16, 2019) ("the enforceability of a pre-petition provision rendering a particular debt nondischargeable is uniformly rejected as a violation of public policy"); *Bank of China v.* Huang, 275 F.3d 1173, 1177 (9th Cir. 2002) ("It is against public policy for a debtor to waive the prepetition protection of the Bankruptcy Code. This prohibition of prepetition waiver has to be the law; otherwise, astute creditors would routinely require their debtors to waive.") (internal citation omitted); *Hayhoe v. Cole (In re Cole)*, 226 B.R. 647, 653 (B.A.P. 9th Cir. 1998) ("If bankruptcy courts enforced prepetition waivers of discharge, they would effectively be creating an exception to discharge that Congress had not enumerated."); *Klingman v. Levinson*, 831 F.2d 1292, 1296 n. 3 (7th Cir. 1987) ("For public policy reasons, a debtor may not contract away the

- After Bates defaulted on the agreed judgment, the County Court entered an order enforcing the judgment on March 1, 2023, awarding $10,660, plus attorney's fees and costs of $4,301, for a total of $14,961. Adv. ECF No. 1 at 2-3; Adv. ECF No. 16
- Harris seeks a judgment of nondischargeability against Bates for $14,961, with reasonable attorney's fees and costs of litigation. Adv. ECF No. 1 at 2-3.

4. Summons was issued in the adversary proceeding by the Clerk of Court on February 12, 2024, the same day the Complaint was filed.[4] Adv. ECF No. 4.

5. On April 1, 2024, seven weeks after the Complaint was filed, Harris' attorney was given notice that an appropriate pleading should be submitted to the Clerk within fourteen days to avoid dismissal of the Adversary for failure to prosecute. Adv. ECF No. 5.

6. On April 3, 2024, the Debtor's Chapter 7 Order of Discharge was entered. ECF No. 24. The Order states that not all debts are discharged, including debts that the bankruptcy court has or will decide are not discharged. *Id.* at 2.

7. On April 15, 2024, the Clerk issued an alias summons on request from Harris. Adv. ECF No. 6.

8. On May 30, 2024, six weeks after the alias summons issued, Harris' attorney was given another notice that an appropriate pleading should be submitted to the Clerk within fourteen days to avoid dismissal for failure to prosecute. Adv. ECF No. 7.

9. On June 14, 2024, the Court entered the Order Dismissing Adversary Proceeding, finding that "Counsel for the Plaintiffs failed to advise the Court of their intention to proceed with this Adversary." Adv. ECF No. 8.

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right to a discharge in bankruptcy. However, a debtor may stipulate to the underlying facts that the bankruptcy court must examine to determine whether a debt is dischargeable.").

[4] Federal Rule of Bankruptcy Procedure 7004(e) provides that summons and complaint must be served or deposited in the mail within 7 days after the summons is issued, or a new summons must be issued. Fed. R. Bankr. P. 7004(e). Under Federal Rule of Civil Procedure 4(m), applicable through Federal Rule of Bankruptcy Procedure 7004(a)(1), if the defendant is not served within 90 days after the complaint is filed, the action may be dismissed without prejudice or the court may order service within a specified time. Fed. R. Civ. P. 4(m).

10. On July 1, 2024, the Adversary Proceeding was administratively closed by the Clerk.

11. On July 16, 2024, a month after the dismissal and five months after the Complaint was filed, Harris' attorney attempted to file a Motion to Reopen Adversary but used an incorrect docket event. Adv. ECF No. 9. He was directed to refile the motion using the correct docket event. Dkt. Remark, July 16, 2024.

12. On September 9, 2024, over seven weeks later, the Motion to Reopen Adversary was refiled. Adv. ECF No. 11.

13. The Motion was set for hearing on October 24, 2024. Adv. ECF No. 12. No response was filed and the matter was removed from the hearing calendar. Adv. ECF No. 14.

15. On October 25, 2024, Harris' counsel filed Exhibits that were referenced in but not attached to the adversary Complaint. *See* Agreed J., Adv. ECF No. 15; Order Granting Mot. to Enforce Agreed J., Adv. ECF No. 16; State Court Compl., Adv. ECF No. 17.

Analysis

Harris requests that the adversary proceeding be reopened under 11 U.S.C. § 350, Federal Rules of Bankruptcy Procedure 5010 and 9024, and Federal Rule of Civil Procedure 60. Adv. ECF No. 11 at 1, 3-4, 8. Section 350 deals with "[c]losing and reopening cases," and Rule 5010 relates to appointment of a trustee on the reopening of a case under § 350(b). *See* 11 U.S.C. § 350;[5] Fed. R. Bankr. P. 5010. Because Bates' bankruptcy case has not yet been closed by the court, § 350 will not be addressed as grounds for relief from the dismissal order entered in the adversary proceeding.

[5] In full, § 350 provides the following:

> **11 U.S.C. § 350. Closing and reopening cases**
> (a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.
> (b) 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.

11 U.S.C. § 350.

See Lustig v. Blakesley (In re Blakesley), No. 19-20566-PRW, Adv. No. 21-2001-PRW, 2021 WL 5985327, at *3 (Bankr. W.D.N.Y. Dec. 16, 2021) ("Section 350(b) of the Code applies only to reopening *bankruptcy cases*, not to adversary proceedings."); *but see Mitchell v. Keesee (In re Mitchell)*, No. 11-08880-8-SWH, Adv. No. 13-00043-8-SWH, 2018 WL 1577710, at *5 (Bankr. E.D.N.C. Mar. 29, 2018); (court noted split as to whether § 350 applies to reopening of adversary); *see also* (*Woodcock v. U.S. Dep't of Educ. (In re Woodcock)*, 301 B.R. 530, 533 (B.A.P. 8th Cir. 2003) ("While bankruptcy cases are closed and reopening them has significance, adversary proceedings, like civil actions, are not closed in any meaningful way. They are terminated or closed only for statistical purposes."); *Blake v. Trutwein (In re Trutwein)*, 381 B.R. 417, at *3 n. 4 (B.A.P. 9th Cir. 2007) (motion to reopen was treated and argued as Rule 60(b)(1) motion for relief from dismissal of adversary).

A. Rule 60(b) – Relief from Judgment

Rule 60 of the Federal Rules of Civil Procedure, generally applicable in bankruptcy cases through Rule 9024 of the Federal Rules of Bankruptcy Procedure, provides grounds for relief from a final judgment, order or proceeding:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). "The purpose behind Rule 60(b) is to balance the principle of finality of a judgment with the interests of the court in seeing that justice is done in light of all the facts." *Allen v. Wal-Mart Stores, LLC*, No. H-16-1428, 2017 WL 7688383, at *2 (S.D. Tex. May 31, 2017) (internal quotation mark omitted) (citing *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981)).

B. Rule 60(b)(1) – Excusable Neglect

Harris contends that the failure to timely comply with the Court's deficiency notices that resulted in dismissal of the adversary proceeding was the result of excusable neglect under Rule 60(b)(1). Adv. ECF No. 11. That section provides for relief from judgment on the basis of "mistake, inadvertence, surprise, or *excusable neglect*." *See* Fed. R. Civ. P. 60(b)(1) (emphasis added). More specifically, Harris asserts that:

> While Plaintiffs cannot say that they have a concrete reason for the delay caused by no fault of their own, it is simply the rigors of the undersigned counsel's extensive practice that led to a clerical oversight in this case. Undersigned counsel's secretary was not included on the notices issued through the Bankruptcy Court's ECF system. So although she called the clerk's office several times to see whether the summonses had issued, she did not receive the notice that the summonses had issued or the deficiency notices. Plaintiffs did not intentionally delay pursuing their claim—the delay was simply due to oversight and clerical errors.

Adv. ECF No. 11 at 7.

In determining whether a party's neglect of a deadline was excusable, the Supreme Court held that "[b]ecause Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). Factors to consider include: "(1) the danger of prejudice to the [opposing party], (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was

within the reasonable control of the movant, and (4) whether the movant acted in good faith."[6] *Pettle v. Bickham (In re Pettle)*, 410 F.3d 189, 192 (5th Cir. 2005) (citing *Pioneer*, 507 U.S. at 395).[7]

Motions under Rule 60(b)(1) "will be granted only if there are unique or sufficiently unusual circumstances to justify such relief." *Falconer v. Lehigh Hanson, Inc.*, No. 4:11-CV-373, 2013 WL 3480382, at *2 (S.D. Tex. July 9, 2013) (internal quotation marks omitted). "[I]nadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect. . . ." *Pioneer*, 507 U.S. at 392. *But see Magee v. Miss. Dep't of Revenue*, No. 1:19cv345-HSO-JCG, 2019 WL 13201968, at *2 (S.D. Miss. Dec. 5, 2019) ("This standard is 'lenient and comprehensive' in the sense that it is not designed to punish parties for single instances of 'unforeseeable human error beyond [their] reasonable control.'" (citing *Coleman Hammons Constr. Co. v. Occupational Safety & Health Rev. Comm'n*, 942 F.3d 279, 283-84 (5th Cir. 2019))).

Considering whether neglect is excusable, courts acknowledge that "[a] party has a 'duty of diligence to inquire about the status of a case.'" *Trevino v. City of Fort Worth*, 944 F.3d 567, 571

[6] "The . . . court need not rigorously apply each of these factors in every case but should take them into account when making its determination." *Razvi v. Dallas Fort Worth Int'l Airport*, No. 21-10016, 2022 WL 4298141, at *2 (5th Cir. Sept. 16, 2022) (citing *Silvercreek Mgmt., Inc. v. Banc of Am. Sec., LLC*, 534 F.3d 469, 472 (5th Cir. 2008)).

[7] "While *Pioneer* analyzed "excusable neglect" in the context of Federal Rule of Bankruptcy Procedure 9006(b)(1), the Fifth Circuit has subsequently applied the *Pioneer* analysis in cases involving Federal Rules of Civil Procedure 60(b) and 6(b)." *Arredondo v. City of San Marcos*, No. 1:22-cv-684-DAE, 2024 WL 4998545, at *2 n.1 (W.D. Tex. Oct. 22, 2024) (citing *Razvi v. Dallas Fort Worth Int'l Airport*, No. 21-10016, 2022 WL 4298141, at *2 (5th Cir. Sept. 16, 2022). *See also Coleman Hammons Constr. Co. v. Occupational Safety & Health Rev. Comm'n*, 942 F.3d 279, 283 (5th Cir. 2019) ("Although Pioneer was a civil bankruptcy case, this court and others have applied it to 'excusable neglect' inquiries under the Federal Rules of Civil Procedure." (citing *Halicki v. La. Casino Cruises, Inc*., 151 F.3d 465, 469 (5th Cir. 1998))). *But see In re Wigington*, No. 18-42230, 2021 WL 2134651, at *3 n.1 (Bankr. E.D. Tex. May 25, 2021) ("In the context of Bankruptcy Rule 9006(b)(1), which relates to enlargements of time, the U.S. Supreme Court has opined that 'excusable neglect' encompasses negligence and carelessness . . . [t]he Fifth Circuit, however, has rejected the use of a *Pioneer* analysis in the context of Rule 60(b)(1) motions.").

(5th Cir. 2019) ("[C]ounsel's carelessness with or misapprehension of the law or local rules does not justify relief."). *See also Thompson v. White (In re Thompson)*, 823 F. App'x 280, 281 (5th Cir. 2020) (after dismissal of appeal for want of prosecution, Rule 60(b)(1) motion was denied on basis of gross carelessness and not excusable neglect for failure to check post office box and failure to check status of case); *Smith-Hubbard v. AMICA Mut. Ins. Co*., No. 23-40331, 2024 WL 747249, at *2 (5th Cir. Feb. 23, 2024) (court noted duty of diligence and party's failure to check the court's docket); *Rodriguez v. CitiMortgage, Inc*., No. 5-14-CV-380-RP, 2015 WL 13796698, at *3 (W.D. Tex. Mar. 26, 2015) (no explanation was offered for failure to monitor deadlines in case); *but see Razvi v. Dallas Fort Worth Int'l Airport*, No. 21-10016, 2022 WL 4298141, at *5 (5th Cir. Sept. 16, 2022) (district court's denial of Rule 60(b)(1) was reversed where a single calendaring error was made by legal assistant). *See also Falconer v. Lehigh Hanson, Inc.*, No. 4:11-CV-373, 2013 WL 3480382, at *5 (S.D. Tex. July 9, 2013) (excusable neglect was not established where case was dismissed for failure to prosecute and where dilatory ways continued). "In fact, a court would abuse its discretion if it were to reopen a case under Rule 60(b)(1) when the reason asserted as justifying relief is one attributable solely to counsel's carelessness with or misapprehension of the law or the applicable rules of court." *Pettle v. Bickham (In re Pettle)*, 410 F.3d 189, 192 (5th Cir. 2005) (*citing Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 356–57 (5th Cir.1993)).

C. Application of excusable neglect factors

Danger of prejudice to opposing party: There is a risk of prejudice to the Debtor if the motion for relief from judgment is granted. Dismissal of the adversary effectively results in discharge of the debt owed to Harris, notwithstanding Bates concession of fraud in the state court judgment. *See* § 523(c) (debtor is discharged from debts of kind specified in § 523(a)(2), (4) or (6)

unless court determines debt excepted from discharge). Relief from the dismissal could, on the other hand, result in a nondischargeable judgment.

Length of delay and impact: The summonses issued by the Clerk were allowed to expire before service, *see* Fed. R. Bankr. P. 7004(e), and by the time the adversary was dismissed for failure to prosecute, over 90 days had passed from the filing of the Complaint, subjecting it to dismissal, *see* Fed. R. Civ. P. 4(m). Another month passed before the Motion to reopen was filed and two more months before the correction of the docket event for the Motion. The impact of granting the motion for relief would revive an action dismissed on the basis of failure to serve process within the time specified under the rules.

Reason for delay and control of the movant: The reason for the delay strongly weighs against Harris. Under Rule 7004(e), summons and complaint must be served with 7 days of issuance or a new summons must be issued. And the complaint must be served within 90 days or the action is subject to dismissal under Rule 4(m). The plaintiff and counsel are charged with a duty of diligence to monitor the case, and to check the docket. The summons was issued by the Clerk the day the complaint was filed and the alias summons was issued the day it was requested. The fact that the secretary may not have been on the service list was of no consequence since there was a duty to monitor the case and the docket, especially when counsel was on the service list. The reason for the failure to timely comply with the court's deficiency notices and to serve the summons was within the control of the movant. *See W. Wilmington Oil Field Claimants v. Nabors Corp. Servs. Inc. (In re CJ Holding Co.)*, 27 F.4th 1105, 1116 (5th Cir. 2022) (courts less likely to find excusable neglect when reason for delay was within movant's reasonable control); *KSMI Props. v. South (In re South)*, 647 B.R. 535, 538-39 (Bankr. E.D. Tex. 2023) (on Rule 60(b) motion to reopen adversary that had been dismissed for want of prosecution when defendant was not

timely served, court found that allowing more time for service would result in further delay, that circumstances were not excusable neglect and were within reasonable control of plaintiff).

Good faith: There is no evidence that movant was not acting in good faith, especially since the failure to act could ultimately result in a benefit to the debtor.

In consideration of the factors and circumstances, Harris did not meet the burden to show that relief from the judgment should be allowed.

Conclusion and Order

The Court concludes that the movant has not established justification for relief under Rule 60(b)(1) or any other section of Rule 60(b). *See Smith-Hubbard v. AMICA Mut. Ins. Co*., No. 23-40331, 2024 WL 747249, at *3 (5th Cir. Feb. 23, 2024) ("We have consistently held that relief under 60(b)(6) is mutually exclusive from relief available under sections (1)-(5) . . . That means that an action cannot be brought through the catch-all provision of Rule 60(b)(6) if it could have been brought through one of the Rule's first five subsections.") (internal quotation marks and citations omitted).

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion is **DENIED**.

##END OF ORDER##