United States Bankruptcy Court
District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
JEAN WILKINSON,
Debtor. No. 7-92-13715 SA

PHILLIP E. CUSHMAN and
JANETTE R. CUSHMAN,
Plaintiffs,
v. No. 93-1020 S

JEAN WILKINSON,
Defendant.

MEMORANDUM OPINION ON MOTION TO REOPEN ADVERSARY PROCEEDING AND SET ASIDE DEFAULT JUDGMENT

This matter came before the Court for a final hearing on the motion of defendant Jean Wilkinson ("Defendant" or "Debtor") to reopen this adversary proceeding and set aside the default judgment ("Motion"). Defendant appeared through her attorney Michael Daniels. Plaintiffs Phillip and Janette Cushman ("Cushmans") appeared through their attorney Donald Becker. Defendant seeks to set aside the default judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure. The Court conducted an evidentiary hearing on the motion, and now issues this Memorandum Opinion as its Findings of Fact and Conclusions of Law. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

Specific Procedural History of the Motion

Defendant filed her chapter 7 bankruptcy proceeding on October 21, 1992 in the District of New Mexico[1]. Eric Elmore, Attorney, represented her in this case. The first meeting of creditors was set for December 2, 1992 and the last day to oppose discharge and/or contest dischargeability of debts was February 1, 1993. The Cushmans filed this adversary proceeding on January 28, 1993. The summons was issued on February 8, 1993 setting a pretrial conference for March 15, 1993. The Certificate of Service on file shows that the summons and complaint were served on February 16, 1993, on both defendant at her address of record and attorney Elmore[2]. The summons required the filing of an answer no later than March 10, 1993. Two days earlier, on March 8, 1993, Defendant filed a chapter

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[1]The Court granted the Cushmans' motion to change the venue of the underlying bankruptcy case at an April 19, 1993 hearing, transferring the case to the District of Oregon.

[2]The Certification of Service, filed February 16, 1993 was not signed. Barbara Long, a paralegal for the Cushmans' then attorney Steven C.M. Long, filed an affidavit on September 29, 1994 in the by-then closed adversary proceeding, that states she in fact mailed the complaint and summons on the date specified in the certificate.

13 petition through attorney Ken Egan. No answer or other responsive pleading was filed in the adversary. On March 15, 1993, judgment was entered by default declaring that a debt owed by defendant in the sum of $137,500 plus interest at the rate of 9% from July 18, 1988[3] was excepted from discharge pursuant to section 523(a)(6). The adversary proceeding was then closed on April 5, 1993.

On November 1, 1993, Andrew Toth-Fejel, an Oregon lawyer, filed a motion to appear pro hac vice for defendant, and also filed a motion to change venue of this adversary proceeding to the District of Oregon. The motion for change of venue was heard on November 16, 1993, and denied. On August 25, 1994, attorney Michael Daniels entered his appearance for defendant by filing the Motion to Reopen and Set Aside Default Judgment. There were several preliminary hearings on the motion to set aside before the Hon. Judge Rose, but the motion was not tried until the case was effectively assigned to this Judge in late 1998.

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[3]This debt is evidenced by a judgment entered in Clackamas County, Oregon on July 11, 1988.

The Motion to Reopen and Set Aside Judgment

The motion to reopen and set aside default judgment alleges, in part, that defendant had no actual knowledge of the case and that she never received the summons and complaint; that her attorney did not provide it to her, inform her of it, or advise her regarding it; that she suffers from a mental impairment and needed the guidance of an attorney; and that the state court complaint contained no allegations of intentional, malicious or willful conduct that would serve as the basis for a nondischargeability complaint under section 523(a)(6).

Before turning to the merits of defendant's motion, the Court finds another, simpler, way to resolve this matter. Defendant filed a chapter 13 proceeding on March 8, 1993. This petition triggered an automatic stay, which was applicable to the nondischargeability complaint pending in the chapter 7 case. The default judgment was entered in violation of the automatic stay and should be set aside.[4] However, even if the

[4] The Court assumes that neither Judge Rose nor creditors' then counsel (Steven C.M. Long) were aware of the chapter 13 filing. However, Mr. Long testified that at the pretrial conference a week later, on March 15, at which Judge Rose entered the default judgment submitted by Mr. Long, it was Mr. Egan (who filed the chapter 13 case) rather than Mr. Elmore (who filed the chapter 7 case) that Judge Rose sought to get on the telephone at the hearing for the Debtor.

default judgment were not in violation of the automatic stay, the Court finds that defendant has shown good grounds to set aside the default judgment.

Facts and Additional Procedural History

In support of her motion, Defendant put on videotaped testimony of her psychologist, and testified on her own behalf. The testimony of the psychologist (Steven Malone, Ph.D.) was essentially uncontradicted. He was treating defendant in the fall of 1992, and performed an evaluation of her in February 1993. Defendant had dysthmia[5] and an organic personality disorder in a schizotypal style[6], a condition (as she had it)

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[5] "Dysthmia is a disorder involving chronically depressed mood occurring most of the day, more days than not, for at least 2 years. In addition to depressed mood, symptoms can include appetite and sleep problems, low energy and self-esteem, poor concentration, difficulty making decisions, and feelings of hopelessness." Portnoff v. Apfel, 1998 WL 23171, 1 at n.1 (E.D. Pa. 1998)(citing Diagnostic and Statistical Manual of Mental Disorders, 345-46 (4th ed. 1994)).

[6] According to Dr. Malone, an organic personality disorder in a schizotypal style differs from schizophrenia in that both conditions lead to odd beliefs and affect, but the former condition includes occasional rather than ongoing hallucinations or delusions. An example of the former condition would be that three out of four times she had an appointment downtown, Defendant would find that she had forgotten her purse, or forgotten quarters for parking, or would find that she arrived at the wrong time, or would forget the appointment altogether, and then become extremely frustrated.

Schizotypal personality disorder is described in the

now included in the term dementia. She was brain impaired, and had difficulty interacting with people. She found daily life difficult, constantly losing and forgetting things. She led a disorganized and chaotic life due to cognitive deficits. She had suffered a brain injury. She was under considerable stress: her father (who himself was probably schizophrenic) had died of cancer, her husband had died of cancer, and the Cushman's Oregon lawsuit upset her and she obsessed on it. Defendant had psychotic symptoms including hallucinations and

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Diagnostic and Statistical Manual of Mental Disorders:

> The essential feature is a personality disorder in which there are various oddities of thought, perception, speech, and behavior that are not severe enough to meet the criteria for schizophrenia. No single feature is invariably present. The disturbance in the content of thought may include magical thinking (or in children, bizarre fantasies or preoccupations), ideas of reference, or paranoid ideation. Perceptual disturbances may include recurrent illusions, depersonalization, or derealization (not associated with panic attacks). Often, speech shows marked peculiarities: concepts may be expressed unclearly or oddly or words used deviantly, but never to the point of loosening of associations or incoherence. Frequently, but not invariably, the behavioral manifestations include social isolation and constricted or inappropriate affect that interferes with rapport in face-to-face interaction.

United States v. Shakur, 560 F.Supp. 318, 330 at n. 14 (S.D. N.Y. 1983)(citing Diagnostic and Statistical Manual of Mental Disorders 312 (3d ed. 1980)).

depersonalization experiences[7]. Her social functioning was markedly impaired and she could take any single interaction and get confused, distorting it and misunderstanding it. Intellectually she was “low normal” and her concentration was “low normal”. It was difficult for her to remember what people said. The psychologist’s most important finding was that on good days she would be merely “impaired” but on bad days she would seem like she had a mild case of Alzheimer’s disease. His diagnosis was organic personality disorder or dementia, generalized anxiety disorder, and longstanding dysthmia.

In Dr. Malone’s opinion, she was likely not to understand what was occurring in a courtroom situation; she might understand somewhat after a month or so, but not on a day to day basis. She was also likely to miss or ignore her mail. She might in fact have contacted her attorney often over a

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[7]Depersonalization is described as:

> [A]n alteration in the perception or experience of the self so that the usual sense of one’s own reality is temporarily lost or changed. This is manifested by a sensation of self estrangement or unreality ... Derealization is frequently present. This is manifested by a strange alteration in the perception of one’s surroundings so that a sense of the reality of the external world is lost.

United States v. Shakur, 560 F.Supp. 318, 330 at n. 14 (S.D. N.Y. 1983)(citing Diagnostic and Statistical Manual of Mental Disorders 259 (3d ed. 1980)).

short period of time, but that would also be consistent with his diagnosis of the schizotypal aspect of her illness: she obsessed about this problem with the Cushmans for years, but her cognitive deficits would have led her to focus on details that no one else would think were significant. He assumed that she had some (or a lot of) help writing the letters shown to her by Cushmans's counsel.[8] Dr. Malone assumed that Defendant's condition existed prior to 1992, and it was just as bad the last time he saw her, in 1998.

During the trial, the Court had ample opportunity to assess the Debtor's demeanor; everything the Court observed fully supported the opinion of her psychologist. For example, throughout her testimony Debtor appeared extremely anxious and rushed her words as if desperate that she would not be allowed to explain what had happened to her. She lost her composure

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[8] While Dr. Malone apparently thought her letters (deposition exhibits 1-8) were done well enough to suggest she had help writing them, the impression the letters left on this judge, particularly after observing Defendant testify, was of someone struggling to communicate urgently but so strangely that it detracted from her message. While it is true, as the Cushmans repeatedly emphasized, that Dr. Malone said that Defendant could get by "with a little help from her friends", the details of his testimony suggested Defendant's deficits were far in excess of the minor level of help she needed as suggested by the phrase (or, for that matter, by the Beatles' song).

more than once. At one point she became alarmed when she was asked for her social security number, and asked almost crying why someone wanted that information from her.

In addition to the psychologist's evidence, Debtor testified about various events relevant to this case. It was clear to the court that she did not understand the nature of the Oregon state court case. It was also clear that she was confused about bankruptcy and the chronology of her bankruptcy cases.

The Debtor began by explaining the circumstances of her meeting the Cushmans and what led to the lawsuit, which apparently was based on allegations that the Debtor, contrary to the zoning regulations of Milwaukie, Oregon, maintained a duplex, conducted a business out of the house (selling Shaklee products), built a storage shed instead of a swimming pool on a portion of the property, and maintained a cattery. The filing of that complaint resulted in a jury trial conducted while the Debtor was caring for her mother, who was blind and confined to a wheelchair, and had seventeen different medical conditions, including having suffered a stroke which required Debtor to provide her care. Before the end of the trial, Debtor herself became ill with blood poisoning and was hospitalized, and did

not learn of the verdict from her counsel until at least several days after the trial. The jury awarded a verdict of $137,000.00 to the Cushmans. Debtor unsuccessfully appealed the verdict.[9]

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[9] The amount of the award, and the fact of the award itself, are not challenged in the Motion. But the Debtor's account of her attorneys' work in that case is similar to the accounts of the work done for her by most of her other attorneys. For example, she described her attorneys as bringing boxes full of her documents to the trial, and going over them with her during the trial. She also says that when she consulted another attorney about an appeal, that attorney told her that her homeowner's policy would have paid for the defense of the first trial. She said that her trial attorneys had not told her that, had instead charged her for all their work, and subsequently told her that they had considered and rejected on their own the possibility of making a demand for a defense on her homeowners policy. She said that another homeowner's policy did pay for the appeal, which was unsuccessful.

The Court has some concerns about the Debtor's litany of complaints against a series of attorneys, except for her counsel for this Motion, who represented her (besides how badly such a list of complaints reflects on the legal system). Ordinarily the assertion that a whole series of lawyers had malpracticed, one after the other, would raise a credibility issue. Indeed, it was this judge's experience, when earlier practicing as an attorney, that frequently those clients who came in complaining most vociferously about how badly they had previously been represented turned out to be themselves the source of the problem. In this instance, however, as set out below, a review of the files/docket sheets from the four New Mexico cases and this adversary proceeding, plus materials from the Oregon chapter 11 case, and a short Westlaw search, strongly suggests that Debtor was correct in her assessment. And in any event, no contrary evidence was presented by the Cushmans, who had the option of presenting testimony from the attorneys in question. (The Cushmans argued that Defendant chose attorneys whom she knew would practice unethically, as

When questioned about what happened after the dismissal, the Debtor testified that she had understood her insurance would pay her debts and file some type of appeal, but in the end it was not successful. She did not quite understand how this would work or why it had not been successful, it was a "court type of thing."

Following the jury verdict, Debtor consulted an attorney, William Claussen, who recommended a chapter 11 bankruptcy. At the time, she had medical bills related to her mother's final illness and the $137,500 judgment. Debtor filed this Chapter 11 on September 8, 1988 in the District of Oregon, Case 388-04020-P11. Her chapter 11 lasted for about 2 1/2 years but was

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part of a strategy of multiplying proceedings and vexing the Cushmans. The Court finds no support for that argument in the record or in Defendant's demeanor at trial.) Of course, the findings in this memorandum concerning the conduct of those attorneys should be taken only for what they are: findings which the Court needed to make for purposes of deciding the Motion but rendered without those attorneys having had any input into the process of deciding the Motion.

dismissed[10] in January, 1991[11]. After the appeal didn't work

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[10]Plaintiff's Exhibit 37 is a transcript of the January 11, 1991 hearing in which the Hon. Judge Perris, Bankruptcy Judge, dismissed the chapter 11 for lack of good faith evidenced by a pattern of transferring and encumbering assets prepetition, failing to disclose transfers on the statement of financial affairs, failing to disclose assets, and failure to comply with discovery. On cross examination at the hearing on the Motion, defendant did not know or understand the contents of Judge Perris' ruling. She did testify, however, that prepetition transactions in which she purchased a $35,000 insurance policy and a $3,000 handgun were advised by Mr. Claussen (presumably in an attempt to maximize exemptions); in fact, the evidence (the letters comprising exhibits 1 and 2) supported her contention that the attorney arranged an insurance transaction and it took place at his office. Nothing in the transcript of the January 11, 1991 hearing suggests that Mr. Claussen, who was still representing Defendant, told Judge Perris of his role in these transactions. She also testified that she mortgaged her real estate for a $70,000 loan before she learned of the jury verdict in order to take care of her mother and fix the problems the Cushmans were complaining of, and that she had set aside $10,000 with her brother for the appeal of the jury verdict, and told Mr. Claussen about those transactions. She also could not remember transferring any property before her chapter 11, although she did testify that at some point some attorneys helped her set up a revocable living trust.

[11]In 1996 Mr Claussen was suspended for one year from the practice of law by the Supreme Court of Oregon, for activities unrelated to the debtor's chapter 11 that occurred during 1988 through 1990, the same time period he represented debtor. In re Conduct of Claussen, 909 P.2d 862, 873, 322 Or. 466, 487 (1996)(en banc). Among the findings were: Claussen intentionally failed to disclose facts to the bankruptcy court that he was duty-bound to disclose, and that he made affirmative statements that he knew were untrue, Id. at 870, 322 Or. at 481; Claussen engaged in a course of conduct that prejudiced the procedural functioning of the bankruptcy court and affected the substantive interest of the parties, the effect of which was to "derail" a Chapter 11 proceeding, Id.

out, defendant decided to move to Las Cruces, New Mexico.

According to Defendant, she then visited with Kenneth Egan, an attorney, who recommended that she file a chapter 13 proceeding. But as she suggested in her testimony when she expressed concern that she might have dates and events mixed up, Debtor is incorrect in her chronology. The first filing in New Mexico was a chapter 7 with attorney Eric Elmore, on October 21, 1992. Later, Defendant testified that she communicated with Elmore often, who always said that nothing was going on in the case[12]. Plaintiff's exhibit 32 is a summary of defendant's telephone bills showing calls to Elmore. Between January 29, 1993 and March 5, 1993 there were 20 long distance telephone calls to Elmore. Five of them were over 15 minutes in length. It therefore appears that defendant went to great lengths to keep informed. Defendant testified that

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at 871, 322 Or. at 483-84; and Claussen intentionally failed to disclose a settlement of the parties to the bankruptcy court that he was required to disclose, Id., 322 Or. at 484.

[12]Mr. Elmore was subsequently suspended indefinitely from the practice of law for multiple violations of the Rules of Professional Conduct, including incompetence in bankruptcy representation involving an unrelated chapter 7 proceeding. Matter of Elmore, 934 P.2d 273, 276, 123 N.M. 79, 82 (1997). One of the findings was that he failed to notify his client regarding correspondence from opposing counsel or its contents. Id. at 274, 123 N.M. at 80.

Elmore never told her about the pendency of this adversary proceeding. Later, Elmore made statements to one of Debtor's Oregon attorneys[13] that he did not think it necessary to send a copy of the nondischargeability complaint to Defendant. And

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[13]When venue of the bankruptcy was transferred to Oregon, defendant employed attorney Toth-Fejel to represent her in Oregon. She testified that later she paid him $3,000 to represent her in this adversary proceeding; the record shows that the extent of his representation was the filing of a motion to appear pro hac vice and a motion to transfer venue of the adversary proceeding to Oregon, and appearing by telephone at one preliminary hearing. When the motion to change venue was denied in November, 1993, defendant at first assumed Toth-Fejel was still working on the case, but later found out he was not. As soon as she discovered this she started to look for substitute counsel. Over the next months she contacted various attorneys to represent her. She also testified that she was somewhat confused as to where she needed to be represented, given that venue of her chapter 7 case had changed to Oregon. Given these circumstances, the Court finds that the motion to reopen and set aside the default judgment was filed within a reasonable time.

As an interesting note, the Court discovered that Mr. Toth-Fejel was also the subject of disfavor (albeit much later in time) with the Bankruptcy Court for the District of Oregon. In Toth-Fejel v. Kramer Toth-Fejel Law Firm (In re Des Chuttes Investments, Inc.), 1999 WL 1012870 (D. Or. 1999), the United States District Court affirmed a decision of the bankruptcy court assessing sanctions in the amount of $105,424.29 against Mr. Toth-Fejel and Des Chuttes for "representation of Des Chuttes in a frivolous Chapter 11 bankruptcy proceeding." Id. at 1. The bankruptcy court found that Toth-Fejel's unprofessional legal representation was essential to his client's fraud, and found that he "wilfully breached his duty to investigate both the legitimacy of Des Chuttes' bankruptcy petition, which was clearly filed in bad faith and [a motion] which was neither warranted by existing law nor premised on a good faith basis for modification of existing law." Id. at 3.

sometime after that, when Defendant confronted Mr. Elmore in his office about her file, he gave it to her shouting "Take the whole file!" This was the first time that Defendant saw a copy of the Cushman complaint.

On March 8, 1993 defendant filed a chapter 13 case with attorney Kenneth Egan[14]. Shortly thereafter, Mr. Egan told her that there was some type of technical objection and mechanical problem, which was not a good way to start a case, so she would be better off refiling the Chapter 13 case, to correct the error[15]. She had no idea what the error was, but took her

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[14]Case 13-93-10769 was filed while the chapter 7 was still pending. It is unclear to the Court why defendant believed she needed to consult a bankruptcy attorney at this time if she were unaware of the pending dischargeability complaint. However, the uncontradicted testimony was that she had no knowledge of the complaint, despite the fact that there was no evidence that the mailing of the original complaint and summons was unsuccessful. Her lack of actual knowledge would be consistent with Dr. Malone's testimony that she would forget to pick up her mail.

[15]The docket for this case shows that the Cushmans filed a motion to dismiss the first chapter 13 on April 16, 1993, to which the debtor responded on May 3, 1993. The Chapter 13 trustee then filed a motion to dismiss or convert on June 4, 1993. Notice of this motion was served on June 18, 1993; debtor never responded to the trustee's motion (perhaps this was the mechanical problem referred to by the attorney). The Cushmans then submitted to Judge Rose an order granting their motion, which was signed and entered on July 2, 1993. This order incorrectly recites that no response had been filed to the Cushmans' motion to dismiss. Mr. Egan did nothing to correct the record, perhaps because by this time he had

attorney's advice and refiled[16]. She testified that the entire process was Mr. Egan's idea, and she went along. On cross examination defendant was asked if she was aware that she had multiple bankruptcies pending at various times; she responded that she always went through her attorneys and thought it was "okay". She did not believe that she ever made any chapter 13 payments, and at first did not know what those were, confusing plan payments with mortgage payments that were being made on mortgaged property in Oregon. She could not remember going to court in either chapter 13 case, but did recall being in the courthouse.

Next, defendant's companion decided that he wanted to live in Texas, so he and defendant moved again. In Texas, defendant went to a Mr. Clarkson, attorney, for advice on another bankruptcy. He told her that she had not lived in the state long enough to file another bankruptcy, but that she should return later. She did, and on or about September 3, 1993, he filed the third chapter 13 on her behalf. This time she does

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already filed another chapter 13 case for the Debtor.

[16]She filed case 13-93-12087 on June 30, 1993. The first chapter 13 was not dismissed until July 2, 1993. Mr. Egan did not disclose the previous chapter 13 filing on the later petition.

recall making payments to a trustee for several months, but she could not recall his name. Her recollection of the Texas case was that Clarkson said she missed some kind of a "meeting" and that nothing could be done and the case was over[17]. She testified that Clarkson did not tell her about this meeting, but that he claimed that he had.

According to defendant, she then moved back to New Mexico and returned to Mr. Egan, who told her that she now needed a chapter 7, not a chapter 13. He claimed that he did not do chapter 7 cases and referred her to attorney Eric Elmore. Again, Defendant's facts and chronology are wrong. Mr. Elmore filed the chapter 7 proceeding for her (her first New Mexico

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[17]The Honorable Leif Clark, of the United States Bankruptcy Court for the Western District of Texas, San Antonio Division, entered an order on February 11, 1994 dismissing defendant's chapter 13 case number 93-52922-C with prejudice because her debt exceeded the chapter 13 jurisdictional limits. The Court also awarded $10,000 sanctions for a pattern of filing abuse, noting that between the filing of the motion to dismiss the Texas case and the February 10, 1994 hearing on the motion the debtor had filed her fourth chapter 13 case, this time in New Mexico, with her debt still exceeding the jurisdictional limits. Nothing in Judge Clark's decision suggests he was informed that Debtor had not signed the fourth chapter 13 petition, or for that matter, that he was informed about Defendant's mental condition or the representation she had received from her previous attorneys. At the trial on the Motion before this Court Defendant seemed surprised that she did not qualify for a chapter 13 proceeding, and wondered why the attorneys had filed those cases for her if she did not qualify.

case) on October 21, 1992. Mr. Egan filed the first chapter 13 proceeding on March 8, 1993 and a second one on June 30, 1993 (while the first one was still pending). After defendant returned to New Mexico, she filed her final chapter 13 petition on January 18, 1994, with attorney Egan[18].

Plaintiffs argued, but presented no evidence, that they would be prejudiced if the relief were granted. It is obvious that many years have passed since the Oregon judgment was entered, which could present tactical problems; on the other hand, this Motion was filed in September, 1994, about eighteen months after the entry of the default judgment.

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[18] The Debtor did not sign this petition; Mr. Egan actually signed the petition "for Jean Wilkinson". He failed to list either of the prior chapter 13 bankruptcies he had filed for her or her Texas bankruptcy on the petition. Mr. Egan had disciplinary proceedings filed against him by the Disciplinary Board of the Supreme Court of the State of New Mexico as a result of his Wilkinson filings. The charges focus on his failure to disclose the prior filings on the petitions, and for filing chapter 13 petitions when the unsecured debts were in excess of the limits of 11 U.S.C. § 109(e). In January, 2000, he entered into a Conditional Agreement Admitting Charges and Consent to Discipline, admitting that he had 1) knowingly failed to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a fraudulent act by a client, 2) knowingly disobeyed an obligation under the rules of a tribunal, and 3) engaged in conduct prejudicial to the administration of justice. Defendant was neither a party to nor a witness in the disciplinary proceedings; therefore the proceedings against Mr. Egan do not constitute a finding binding on Defendant that she engaged in any fraudulent activity.

Conclusions of law

Applicable Rules and Statute.

Bankruptcy Code section 362(a)(1) provides, in part:

> (a) Except as provided in subsection (b) of this section, a petition ... operates as a stay, applicable to all entities, of -
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

Federal Rules of Civil Procedure 55 and 60 are made applicable to this case by Federal Bankruptcy Rules 7055 and 9024.

Rule 55(c) provides, in relevant part:

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 60(b) provides, in relevant 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:... (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.

Default judgment was entered based on Section 523(a)(6), which states:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt - ...
> 6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

Discussion

1. The automatic stay

This adversary proceeding was filed January 28, 1993. Debtor filed her first chapter 13 proceeding on March 8, 1993, and the automatic stay of section 362 took effect for that case. 11 U.S.C. §362. There is no exception in section 362 that would eliminate the stay in successive filings. Carr v. Security Savings & Loan Ass'n, 130 B.R. 434, 438 (D. N.J. 1991)("Congress, if it wished, could have created an exception to the imposition of the automatic stay where successive petitions are filed, but it did not.") See also In re Norris, 39 B.R. 85, 87 (E.D. Pa. 1984)("[A] bankruptcy judge in a pending proceeding simply does not have the power to determine that the automatic stay shall not be available in subsequent bankruptcy proceedings.")

There is no question that the stay applies to actions in federal courts as well as state courts. See e.g., Retail

Marketing Company v. King (In re Mako, Inc.), 985 F.2d 1052, 1053 n.1 (appeal of decision in bankruptcy avoidance action stayed when defendant filed his own bankruptcy proceeding); Dillon v. Fibreboard Corporation, 919 F.2d 1488, 1489 n.1 (10th Cir. 1990)(Federal Court of Appeals prohibited from adjudicating claims against Celotex when it filed chapter 11 during pendency of appeal). Therefore, the Court concludes that this pending adversary proceeding was automatically stayed.

Actions taken in violation of the automatic stay are void and without effect. Ellis v. Consolidated Diesel Electric Corporation, 894 F.2d 371, 372 (10th Cir. 1990). See also Franklin Savings Association v. Office of Thrift Supervision, 31 F.3d 1020, 1022 (10th Cir. 1994); Job v. Calder (In re Calder), 907 F.2d 953, 956 (10th Cir. 1990)[19]. A subsequent

[19]Calder does recognize that equitable principles may, in some circumstances, apply as a defense to claimed violations of the stay when creditor lacks actual knowledge of the bankruptcy and the debtor's unreasonable behavior contributes to the "creditor's plight." 907 F.2d at 956. The example cited by the Court of Appeals involved the debtor actively litigating in state court and invoking the stay just as judgment was about to be entered. Id. In the case at bar the debtor did not know about the pending adversary and the Court assumes that creditor did not know about the pending chapter 13 bankruptcy. The simple fact of filing the chapter 13 case is not, as a matter of law and without more evidence, unreasonable behavior on defendant's part. See Johnson v.

termination of the automatic stay does not validate judicial actions taken when the stay was in place. Ellis 894 F.2d at 373. Compare Schwartz v. United States (In re Schwartz), 954 F.2d 569, 575 (9th Cir. 1992)(tax assessment made in violation of stay during chapter 11 case is void and not allowable as a claim in subsequent chapter 13 case). The automatic stay was not terminated in the chapter 13 case before entry of the default judgment in this adversary, so the default judgment is void. The fact that the chapter 13 case was later dismissed, with the dismissal terminating the stay, see 11 U.S.C. § 362(c)(2)(B), does not retroactively validate the judgment.

2. Relief from judgment

Under Rule 60(b), which standards Rule 55(c) invokes when a party is seeking relief from a default judgment, a court may set aside a final judgment "on motion and upon such terms as are just." United States v. Timbers Preserve, Routt County, Colorado, 999 F.2d 452, 454 (10th Cir. 1993)(citations omitted). Rule 60(b)(6) gives the court "a grand reservoir of

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Home State Bank, 501 U.S. 78, 87 (1991)("Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief."); Gier v. Farmers State Bank of Lucas, Kansas (In re Geir), 986 F.2d 1326, 1330 n.2 (10th Cir. 1993)(filing chapter 13 before chapter 7 discharge is entered is only "evidence" of bad faith.)

equitable power to do justice in a particular case", but relief should only be granted "in extraordinary circumstances and only when necessary to accomplish justice." Cashner v. Freedom Stores, Inc., 98 F.3d 572, 579 (10th Cir. 1996). In those appropriate circumstances, courts require three conditions to set aside a default judgment: (1) the moving party's culpable conduct did not cause the default; (2) the moving party has a meritorious defense; and (3) the nonmoving party will not be prejudiced by setting aside the judgment. Timbers Preserve, 999 F.2d at 454 (citations omitted). See also Waifersong, Ltc. Inc. v. Classic Music Vending, 976 F.2d 290, 292 (6th Cir. 1992)(same three factors).

Having considered the testimony, the exhibits submitted into evidence, the records in the cases, and being sufficiently advised, the Court finds that the motion to set aside default judgment should be granted. First, this opinion will discuss the reasons that it finds the circumstances in this case to be sufficiently exceptional to justify the extraordinary relief of Rule 60(b)(6). Second, the opinion will analyze the facts of the case under the three Timbers Preserve conditions.

A. Exceptional circumstances

As noted above, relief under Rule 60(b)(6) should be granted only in exceptional circumstances. Cashner, 98 F.3d at 579. In

Pelican Production Corporation v. Marino, the Court of Appeals for the Tenth Circuit, although upholding a denial of relief in that case, provided some guidance about when relief might be appropriate:

> We find nothing about this case so unusual or compelling that we need reverse the district court on its determination that no relief is warranted [under Rule 60(b)(6)]....
>
> Here we do not have a case involving an uneducated appellant, unaccustomed to litigation. Compare United States v. An Undetermined Quantity of an Article of Drug Labeled as Benylin Cough Syrup, 583 F.2d 942, 947 (7th Cir. 1978)(per curiam)(upholding denial of relief where drug manufacturer was not an indigent, unsophisticated party without legal counsel) with Transport Pool Div. of Container Leasing, 319 F.Supp. at 1312 (granting relief where appellant was an uneducated layman, who could not read, and had difficulty understanding the legal proceedings involved even after patient explanation).

893 F.2d 1143, 1147 (10th Cir. 1990). The Court looked at education and sophistication of the movant, whether the movant was represented by counsel, and the ability of the movant to understand the proceedings. In the case before the Court we have a movant who was unrepresented in the adversary (in fact

essentially abandoned by an attorney on whom she relied) with little, if any, understanding of the various bankruptcy proceedings. See also United States v. Cirami, 563 F.2d 26, 34 (2nd Cir. 1977)("constructive disappearance" of movant's attorney is an extraordinary event justifying 60(b)(6) relief); Balik v. Apfel, 37 F.Supp.2d 1009, 1010-11 (S.D. Oh. 1999)(psychological impairment of party justifies 60(b)(6) relief); Rooks v. American Brass Company, 263 F.2d 166, 168 (6th Cir. 1959)(defendant was ill with meningitis, wife did not inform him of summons; held, good grounds to set aside default judgment (court did not identify subsection of 60(b) upon which it relied.)); Pierre v. Bernuth, Lembcke Co., Inc., 20 F.R.D. 116, 117-118 (S.D.N.Y. 1956)(confinement to mental hospital justifies 60(b)(6) relief).

Next, normally, simple attorney negligence is not redressable by Rule 60(b)(6). "[Rule 60(b)(1) and 60(b)(6)] are mutually exclusive, and thus a party who failed to take timely action due to 'excusable neglect' may not seek relief more than a year after the judgment by resorting to subsection (6)." Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380, 393 (1993). However, if the conduct of the attorney amounts to gross or

inexcusable neglect, some courts have granted relief under Rule 60(b)(6), particularly when there is a showing of diligence on the part of the defaulted party. See e.g., L.P. Steuart, Inc. v. Matthews, 329 F.2d 234, 235 (D.C. Cir.), cert. denied 379 U.S. 824 (1964); Transport Pool Division of Container Leasing, Inc. v. Joe Jones Trucking Co., Inc., 319 F.Supp. 1308, 1311-12 (N.D. Ga. 1970); In re Robenson, 124 B.R. 757, 758-59 (N.D. Il. 1991)(citing cases); Darden v. Dandridge, 1991 WL 111439 at 2-3 (D.D.C. 1991). In those cases the courts refused to attribute the inexcusable behavior of the attorney to the client. Likewise, this Court is hesitant to visit the consequences of Mr. Elmore's behavior on Defendant.

B. Timbers Preserve conditions

i. Defendant's culpability

Generally, a party's conduct will be considered culpable only if the party defaulted willfully or has no excuse for the default. Timbers Preserve, 999 F.2d at 454.

In this case, defendant testified, and the Court finds credible, that she never actually received the summons and complaint, and that her attorney never informed her of this adversary proceeding. Therefore, the Court finds that she did not willfully default. See id. (citing Meadows v. Dominican

Republic, 817 F.2d 517, 521 (9th Cir.) cert. denied 484 U.S. 976 (1987)(receiving actual notice and failing to respond is culpable conduct.)) See also Golden & Mandel v. Angeli (In re Angeli), 216 B.R. 101, 106-07 (Bankr. E.D. N.Y. 1997)(depression and inability to face reality precludes finding of willfulness).

The Court also finds that defendant has an excuse for the default. In this case it was reasonable for defendant, given her mental condition and her general confusion and lack of sophistication about legal matters, to assume her interests were being protected. See Transport Pool Division of Container Leasing, Inc., 319 F.Supp. at 1312 (uneducated layperson with extreme anxiety coupled with inexcusable neglect of counsel justifies 60(b)(6) relief). See also Leshore v. County of Worcester, 945 F.2d 471, 472-73 (1st Cir. 1991)(illness of attorney justifies setting aside default). Therefore, the Court finds that defendant meets the first Timbers Reserve condition.

ii. Meritorious defense

For the purposes of a Rule 60(b) motion, defendant only needs to show that her version of the facts supporting a defense to the adversary proceeding, if true, would constitute

a defense. Olson v. Stone (In re Stone), 588 F.2d 1316, 1319 (10th Cir. 1978). Her version of the facts supporting her defense are deemed to be true. Id. The focus is on the sufficiency of the facts contained in her motion. Id.

Defendant's motion alleges that plaintiff's claim is one for nuisance and negligence. The plaintiff's state court complaint, attached to the motion as Exhibit A, contains no allegation of intentional, malicious or willful conduct, no allegation of intent to harm and no request for exemplary or punitive damages. The judgment, attached as Exhibit B, contains no findings regarding intentional, willful or malicious conduct and awards no punitive or exemplary damages. Defendant claims that the debt is a "garden variety nuisance debt" with no special circumstances that would make it nondischargeable. If this debt really were only based on negligence, this would be a complete defense to the section 523(a)(6) claim. See Kawaauhau v. Geiger, 523 U.S. 57, 64 (1998)(holding that debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)). Defendant meets the second Timbers Reserve test.

iii. Prejudice to plaintiffs

> The concept of prejudice in the context of Bankruptcy Rule 9024 means that the party opposing the motion will be unduly burdened in attempting to present the claims advanced in the original proceeding as a result of the inaction of the party against whom default judgment was obtained.

Logan v. Hillier (In re Meyer), 84 B.R. 498, 500 (Bankr. S.D. Oh. 1988). Delay alone is insufficient to constitute prejudice. Batstone v. Emmerling (In re Emmerling), 223 B.R. 860, 869 (2nd Cir. B.A.P. 1997). See also Pierre v. Bernuth, Lembcke Co., Inc., 20 F.R.D. at 117 (case reopened three years after dismissal despite "severe hardship" of having to prove up a case from an incident eight years earlier).

Plaintiffs claimed they would be prejudiced if the default were set aside, because they would then have to try the state court case over again. The Court has several responses.

First, the possibility of retrial is true for any dischargeability case based on a state court judgment, absent any claim preclusion issues. It is just a fact of bankruptcy law. Had there been no default, plaintiffs would have had to prove their case.

Second, the matter most likely would not be a complete re-trial in any event, because the issues would focus around willful and malicious injury, which were not issues in the

state court case. Therefore, the issues are quite different. In fact, the only prejudice the Court sees is that, if forced to prove their case, the plaintiffs will have been delayed until the end of the case in collecting on their judgment. Mere delay in satisfying a claim is not sufficient prejudice to deny a motion to set aside a default. United Coin Meter Company, Inc. v. Seaboard Coastline Railroad, 705 F.2d 839, 845 (6th Cir. 1983).

Third, Cushmans argued that because of Debtor's behavior, they had expended substantial resources pursuing collection of the debt owed to them. To begin with, by virtue of the liquidation of Debtor's property in the chapter 7 case that was transferred to Oregon, the Cushmans have received distributions totaling somewhere between $150,000.00 to $180,000.00. And Debtor paid to the Cushmans the $10,000.00 which Judge Clark assessed as a sanction for the multiple filings. Therefore, the Debtor also meets the third condition set out in Timbers Preserve.

Conclusion

The facts of this case are deeply disturbing. The underlying assumption of the adversary system which the courts use to resolve disputes is that a party is competent to pursue

her own interests and help in her representation, and that if that is not the case, the attorney for the party will discover that and remedy the problem or bring it to the court's attention. Based on the evidence presented in support of the Motion, that assumption repeatedly proved incorrect. The legal system appears to have failed over and over again for close to a decade in this case. And that fact ought to provide, and does provide, a sufficient basis for granting Rule 60(b)(6) relief to Defendant.

The Court will enter an Order granting the Motion to Reopen Case and Set Aside Default Judgment.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the listed counsel and parties.

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