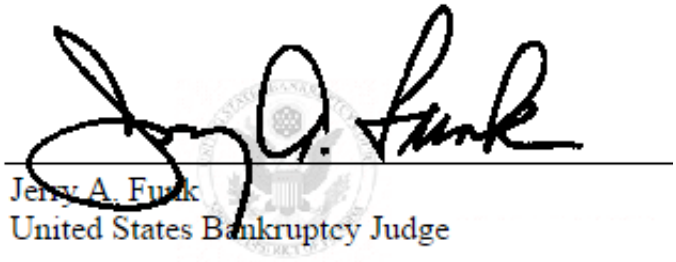
ORDERED.

Dated: December 13, 2017



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

GEORGE W. SCHWAN,

Debtor.
_____/

Case No. 3:17-bk-0912-JAF
Chapter 7

ORDER DENYING DIAMOND'S MOTION FOR RECONSIDERATION

This case is before the Court on a motion for reconsideration brought by LINDA DIAMOND ("Diamond") (Doc. 46), the CHAPTER 7 TRUSTEE'S (the "Trustee") response in opposition (Doc. 54), and GEORGE W. SCHWAN'S ("Debtor") response in opposition (Doc. 57). A hearing was held on the motion for reconsideration on November 15, 2017, at which time the Court heard argument from all parties and took the matter under advisement. For the reasons stated herein, the motion for reconsideration is denied.

Background

Diamond's motion for "reconsideration" (or relief from judgment) (Doc. 46) invokes Federal Rule of Civil Procedure 60(b) and asks the Court to rescind its prior order styled, Order Approving Settlement Agreement (the "Order Approving Settlement") (Doc. 44), which granted

the Trustee's motion to approve the compromise between him and the Debtor (Docs. 38 & 53). Diamond claims excusable neglect in failing to file a timely objection to the proposed compromise (the "Settlement Agreement") and requests an evidentiary hearing on her untimely objection.

In March 2017, Debtor initiated this bankruptcy case under Chapter 7 of the Bankruptcy Code. (Doc. 1). The claims register reflects unsecured claims totaling $350,020.12. Diamond filed the largest unsecured claim in the amount of $342,482.57. (Claim #1-2). Diamond's proof of claim relates to a state-court judgment entered in August 2013 (the "Judgment Debt"), resulting from litigation in which Debtor admitted taking a monetary advance from Diamond's closely held corporation in return for services that were never provided. (Claim #1-2 at 5). In September 2016, Diamond then filed proceedings supplementary in state court to collect on the Judgment Debt (the "Proceedings Supplementary"). She sought to undo certain allegedly fraudulent transfers pursuant to chapter 726, Florida Statutes, as well as to impose an equitable lien on real property allegedly concealed from collection efforts. Roughly six months later, Debtor filed his bankruptcy petition.

The previous motions, objections, and proceedings filed in the case.

In June 2017, Diamond filed an adversary proceeding against Debtor, Adv. No. 3:17-ap-0115 (the "Discharge Proceeding"), seeking to except the Judgment Debt from discharge pursuant to §§ 523(a)(2)(A), 523(a)(4), and 523(a)(6) of the Bankruptcy Code. (Doc. 8 in Adv. No. 3:17-ap-0115). The Discharge Proceeding remains pending at this time.

In July 2017, Diamond also filed a motion to dismiss Debtor's Chapter 7 petition pursuant to § 707(a). (Doc. 27 at 2). Both the Debtor and the Trustee filed responses in opposition (Docs. 30 & 32), and a preliminary hearing was held on September 6, 2017 (see below). The motion to dismiss remains pending in this case.

On September 5, 2017, the day before the preliminary hearing on Diamond's motion to dismiss, the Trustee filed his Amended Motion to Approve Settlement Agreement (the "Motion to Approve Settlement"), which sought approval of the Settlement Agreement between "(i) the Trustee, on the one hand, and (ii) the Debtor, George W. Schwan, (iii) Diane Schwan, (iv) Gale Deem, (v) the Diane L. Schwan Trust, and (vi) Right Time Investments, LLC, on the other hand." (Doc. 38 at 1-2). Debtor and these "Debtor-Related Parties" were the subjects of Diamond's state-court Proceedings Supplementary concerning fraudulent transfers. (Doc. 38 at 3).

The September 6 preliminary hearing.

On September 6, 2017, a preliminary hearing was held on both i) the Trustee's objection to Debtor's claims of exemption and ii) Diamond's motion to dismiss the bankruptcy petition. The Trustee asked to take his objection off the calendar because he had just filed the Motion to Approve Settlement the prior day which, if approved, would resolve the Trustee's exemption objection. The Court asked if the Motion to Approve Settlement needed to be set for evidentiary hearing or if it was filed using negative notice.

The Trustee's attorney said the motion was filed using negative notice, but that they had been in discussion with Diamond's attorney and anticipated an objection to the Motion to Approve Settlement. The Trustee's attorney stated: "[W]e will not know for another three weeks [i.e., 21 days] what objections will come in. [Diamond] is likely the only party in the case that would file an objection." Diamond's attorney acknowledged the same in open court and agreed with the representations made by the Trustee's counsel. Diamond's counsel knew when an objection to the Settlement Agreement was due and that appropriate action needed to be taken.

The Court then stated that a 4-hour evidentiary hearing on Diamond's motion to dismiss would be set by separate order and "in the event there are objections to the proposed compromise,

[ ] they will be heard at the same time." A written order setting trial was entered shortly after the preliminary hearing, and the trial was set for January 11, 2018 on Diamond's motion to dismiss. This evidentiary hearing remains pending on the Court's calendar.

The Settlement Agreement.

The Settlement Agreement called for Debtor and the Debtor-Related Parties to pay the Trustee $52,000.00 within fourteen days of approval in return for settlement of the claims listed in the agreement. (Doc. 38 at 5-6). Paragraphs 9 through 11 of the Settlement Agreement provide:

> 9) Except as otherwise specifically provided in this Settlement Agreement, . . . all creditors in this bankruptcy case and any other persons [ ] who have held, hold or may hold claims against the Debtor, Trustee or the bankruptcy estate regardless of the filing . . . shall be precluded and permanently enjoined on and after the Petition Date from (a) the commencement or continuation in any manner of any claim, action or other proceeding of any kind with respect to any claim [ ] against the Debtor and the Debtor-Related Parties for any and all matters related to the Debtor and the Debtor-Related Parties which it possessed or may possess prior to the Petition Date, including but not limited to the State Court Complaint, State Court Judgment, and Proceedings Supplementary Claims, (b) the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree or order with respect to any claim [ ] against the Debtor and the Debtor-Related Parties for any and all matters related to the Debtor and the Debtor-Related Parties which such entity possessed or may possess prior to the Petition Date, (c) the creation, perfection or enforcement of any encumbrance of any kind with respect to any claim [ ] against the Debtor and the Debtor-Related Parties for any and all matters related to the Debtor and the Debtor-Related Parties which it possessed or may possess prior to the Petition Date, and (d) the assertion of any claims that are released hereby.
>
> 10) The settlement and releases [ ] shall not impact any creditor's rights to assert a general unsecured nonpriority claim in the bankruptcy case or the Trustee's right to challenge the same.

> 11) The settlement and releases contained herein shall not impact any claim raised by Linda [Diamond] in the [Discharge] Proceeding or any defense of the Debtor thereto.

(Doc. 38 at 8-9).

Diamond's motion for reconsideration.

Diamond ultimately failed to file a timely objection to the Motion to Approve Settlement and, on October 3, 2017, the Court entered its Order Approving Settlement pursuant to the negative-notice procedure in Local Rule 2002-4. Diamond now seeks relief from the Order Approving Settlement on the basis of excusable neglect. She contends her counsel mis-calendared the due date for her objection as being due on October 4, when the correct due date was September 26. (Doc. 46 at 2, ¶ 4). To his credit, Diamond's counsel filed the instant motion for reconsideration and the untimely objection in the early morning of October 4, just hours after receiving electronic service of the Order Approving Settlement at midnight on October 3.

Diamond applies the Pioneer[1] four-factor test as follows. She argues the objection was filed the day after the order was entered and that all parties had anticipated an objection; therefore, there is no prejudice to the Debtor and any future delay would be minimal. She contends the failure to allow her objection would "destroy [her] ability to pursue the motion to dismiss." (Doc. 46 at 3). She also explains that the underlying cause "was a good faith mistake brought about [by her attorney's] rushed effort to catch up after Hurricane Irma and strep throat" and a failure to correctly calendar the due date for the objection. (Doc. 46 at 4, ¶ 15). She goes on to argue that the analysis should be one of equity and that she has "expended great sums and time since 2010" pursuing the state-court judgment and subsequent collection efforts. (Doc. at 46 at 4).

[1] Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993).

The Trustee contends that an attorney's direct negligence does not constitute excusable neglect. (Doc. 54 at 2). The Trustee also states: "[T]he Settlement Agreement does not seek to deny Diamond's right to seek dismissal of the Bankruptcy Case, nor does it seek to impact in any away her claims in the Discharge Action, though the Trustee opposes the relief sought by both pleadings." (Doc. 54 at 3).

Debtor contends that all claims for collection are of "questionable merit," that these claims have been resolved by the Settlement Agreement, and that Diamond's desire to prolong the litigation unnecessarily burdens the estate. (Doc. 57 at 5-8). Debtor goes on to address the merits of Diamond's untimely objection to the Motion to Approve Settlement.

Analysis

Rule 9024 of the Federal Rules of Bankruptcy Procedure makes Federal Rule of Civil Procedure 60(b) applicable in bankruptcy. Debtor proceeds under Rule 60(b)(1) and (b)(6), "which allow, in some instances, for relief from a final order or judgment for '(1) mistake, inadvertence, surprise, or excusable neglect; ... or (6) any other reason that justifies relief.'" In re Toney, 524 B.R. 908, 912 (Bankr. N.D. Ga. 2015); Fed. R. Civ. P. 60(b).

"[G]rounds assertable but failing to meet the standards of Rule 60(b)(1)-(5) may not be asserted under Rule 60(b)(6)." In re Taylor, Bean & Whitaker Mortg. Corp., 2016 WL 420309, at *4 n.3 (Bankr. M.D. Fla. Feb. 1, 2016). Therefore, the Court will focus on Diamond's Rule 60(b)(1) excusable-neglect argument.[2]

"The standard for setting aside a judgment is 'at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission.'" Toney, 524 B.R. at 912 (citing

[2] Moreover, this case does not demonstrate the "extraordinary circumstances" or "extreme and unexpected hardship" necessary for relief under (b)(6). See Rismed Oncology Sys., Inc. v. Baron, 638 F. App'x 800, 807 (11th Cir. 2015).

Pioneer Inv. Services Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380, 395 (1993)); Cheney v. Anchor Glass Container Corp., 71 F.3d 848 (11th Cir. 1996). In determining excusable neglect, the four-factor Pioneer test requires the Court to consider: (a) whether granting the delay will prejudice the debtor; (b) the length of the delay and its potential impact on judicial proceedings; (c) the reason for the delay, including whether it was within the reasonable control of the movant; and (d) whether the movant acted in good faith. Pioneer, 507 U.S. at 395.

In Macias, the Eleventh Circuit appears to hold that the Worldwide Web[3] three-element test should apply under Rule 60(b)(1) rather than the Pioneer four-factor test. In re Macias, 536 F. App'x 985, 988 (11th Cir. 2013) ("In other words, our three-part test governs this case."). Technically, Pioneer did not apply Rule 60(b)(1) but merely compared it to Bankruptcy Rule 9006(b)(1). Nevertheless, in addition to being an element test rather than a factor test, the key difference is that the Worldwide Web test considers the merits of the movant's untimely argument whereas the Pioneer test focuses on the pragmatic effect of allowing the untimely argument. Id. ("Pioneer simply emphasized the importance of efficient judicial administration and the presence or absence of prejudice to the nonmoving party."). Under either test, however, the result would be the same in the instant case.[4] The Court will analyze the Pioneer test for the parties' benefit because this was briefed by the parties. (Doc. 46).

Here, the determinative factor is the reason for the default and additional delay, which was the direct negligence of Diamond's counsel. While Diamond's counsel admits his negligence, the Court finds it to be inexcusable because his failure was the sole reason for the untimely filing. See

[3] In re Worldwide Web Sys., Inc., 328 F.3d 1291 (11th Cir. 2003).

[4] Under the Worldwide Web test, the movant "must show: '(1) it had a meritorious defense that might have affected the outcome; (2) granting the motion would not result in prejudice to the non-defaulting party; and (3) a good reason existed for failing to [raise a timely argument].'" Macias, 536 F. App'x at 987. Here, Diamond's argument fails on the third element of the Worldwide Web test for the same reason it fails under the Pioneer factor test.

In re Pettle, 410 F.3d 189, 192 (5th Cir. 2005) ("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."); see also Yeschick v. Mineta, 675 F.3d 622, 631 (6th Cir. 2012) ("Moreover, we have held that gross carelessness or inadvertent conduct that results in judgment will not give rise to a successful claim of excusable neglect if the facts demonstrate a lack of diligence."); Negron v. Celebrity Cruises, Inc., 316 F.3d 60, 62 (1st Cir. 2003) ("Unfortunately for Negron, routine carelessness by counsel leading to a late filing is not enough to constitute excusable neglect."); Martini v. A. Finkl & Sons Co., 955 F. Supp. 905 (N.D. Ill. 1997) ("Failure to timely file a complaint was a simple case of attorney negligence that did not justify relief from unfavorable judgment against the employee in his ADA claim against the employer.").

This case contrasts with other instances in which relief was granted on the basis of excusable neglect. In those cases where relief was granted, the lead attorney's own direct negligence was not the chief or sole cause for the untimeliness. See, e.g., Walter v. Blue Cross & Blue Shield, 181 F.3d 1198, 1202 (11th Cir. 1999) (reversing a denial of relief and holding that failure of a former secretary to record the deadline constituted excusable neglect); Cheney v. Anchor Glass Container Corp., 71 F.3d 848, 850 (11th Cir. 1996) (reversing a denial of relief and holding that a miscommunication and misunderstanding between the associate attorney and lead counsel caused the delayed filing and, therefore, constituted excusable neglect); cf. Advanced Estimating Sys., Inc. v. Riney, 130 F.3d 996, 999 (11th Cir. 1997) (dismissing the appeal based on attorney's untimely filing and holding that miscommunication or clerical error may constitute excusable neglect, but an attorney's failure to understand a procedural rule does not).

"Admittedly, this result appears to penalize innocent clients for the forgetfulness of their attorneys." Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc., 803 F.2d 1130, 1132 (11th Cir. 1986). However, the concern that Diamond will be unable to pursue her motion to dismiss is misplaced. The Settlement Agreement, by its own terms, does not curtail any right to pursue her claim in the Discharge Proceeding (Doc. 38 at 9) and there is no reason to think the Settlement Agreement could curtail Diamond's right to pursue her motion to dismiss the bankruptcy petition. Moreover, the Trustee disclaims any attempt to curtail her right to pursue either issue—although he opposes the contested matter and adversary proceeding on the merits. (Doc. 54 at 3).

In sum, the Trustee's business judgment found the Settlement Agreement to be appropriate and the Court will not exercise its discretion to undo that agreement simply because Diamond's counsel misunderstood (or forgot) which due date applied to this case. Just as the Trustee has a duty to resolve his Chapter 7 cases efficiently,[5] an attorney has a duty to represent his/her clients diligently. A party must live with the consequences of his/her voluntarily-selected attorney's actions and omissions, and the present circumstances mandate no different result. Pioneer, 507 U.S. at 397 ("Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.").

Accordingly, it is hereby ORDERED that Diamond's motion for reconsideration is DENIED. Diamond's motion to dismiss and Discharge Proceeding remain pending and all parties shall proceed accordingly.

[5] See generally 28 U.S.C. § 586 (defining the U.S. Trustee's and panel trustees' duties); *Handbook for Chapter 7 Trustees* at 4-1 ("A chapter 7 case must be administered to maximize and expedite dividends to creditors. A trustee shall not . . . unduly delay the resolution of the case.") available at https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-7-handbooks-reference-materials.