ORDERED.

Dated: August 04, 2020

Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re	)	
	)	
Ruth Ortiz Santiago,	)	Case No. 6:10-bk-16771-KSJ
	)	Chapter 7
Debtor.	)	
	)	

ORDER DENYING CREDITORS' JOINT MOTION TO VACATE ORDER GRANTING DEBTOR'S MOTION FOR CONTEMPT AND IMPOSING SANCTIONS AND FINAL JUDGMENT

Arguing excusable neglect under Rule 60(b)(1) of the Federal Rules of Civil Procedure,[1] National Collegiate Student Loan Trusts[2] (collectively "Creditors") ask this Court to vacate its Order Granting Debtor's Motion for Contempt and Imposing Sanctions and the related Final Judgment.[3] Finding the Creditors demonstrate no excusable neglect for their failure to timely respond, the motion is denied.

[1] Fed. R. Civ. P. 60(b)(1), incorporated into the Bankruptcy Code by Federal Rule of Bankruptcy Procedure 9024.
[2] Movants include the National Collegiate Student Loan Trust 2006-1, National Collegiate Student Loan Trust 2006-2, National Collegiate Student Loan Trust 2005-1, and National Collegiate Student Loan Trust 2007-3.
[3] Creditors' Joint Motion to Vacate Order Granting Debtor's Motion for Contempt and Imposing Sanctions and Final Judgment is Doc. No. 33. The Order and Final Judgment Creditors seek to vacate are Doc. Nos. 27 and 28.

On September 21, 2010, Ruth Gimenez Ortiz (the "Debtor") filed this Chapter 7 bankruptcy case scheduling three loans owed to the Creditors.[4] Debtor co-signed the three loans, which were disbursed to her daughter in 2005, 2006, and 2007.[5] On January 11, 2011, Debtor received a Discharge.[6] Creditors continued collection efforts after the Discharge,[7] eventually filing three separate lawsuits (the "Lawsuits") against the Debtor.[8] In the Creditors' view, the loans are student loans excepted under 11 U.S.C. Section 523(a)(8), and as a result not discharged.[9] Debtor disagrees believing the loans are *not* student loans, were discharged, and the continuing collection efforts violated the discharge injunction prohibiting creditors from collecting discharged debts. Debtor made a substantial effort to stop the Creditors' collection efforts before seeking sanctions in the Bankruptcy Court.[10] She heard nothing in return but utter silence.

So, on October 1, 2019, Debtor filed a Motion for Contempt and Request for Sanctions (the "Sanctions Motion") against the Creditors, alleging Creditors' attempts to collect on the loans violated her Discharge.[11] The same day Debtor's counsel properly served the Sanctions Motion on

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[4] Doc. No. 1.
[5] Debtor's daughter filed Chapter 7 Bankruptcy on June 16, 2010. *See* Case No. 6:10-bk-10520-KSJ.
[6] Doc. No. 12.
[7] Doc. No. 33-1, ¶¶ 23, 33, 43. Under Section 524(a)(2) of the Bankruptcy Code, a discharge "operates as an injunction against the commencement or continuation of action … or an act, to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). In *McLean*, the Eleventh Circuit Court of Appeals joined "other circuits in concluding that § 524(a)(2) is an expansive provision designed to prevent any action that has the effect of pressuring a debtor to repay a discharged debt ..." *In re McLean*, 794 F.3d 1313, 1320 (11th Cir. 2015). By barring such actions, the discharge injunction plays an "important role in achieving the Bankruptcy Code's overall policy aim of giving a debtor a 'fresh start.'" *Matter of Jenkins*, 608 B.R. 565, 568 (Bankr. N.D. Ala. 2019) (quoting *McLean*, 794 F.3d at 1321).
[8] *See* Case No. 2019-CA-006526-O brought in Orange County, Florida; Case No. 2019-CA-007571-O brought in Orange County, Florida; Case No. 2019-CA-008939 brought in Orange County, Florida. Creditors insist they did not file collection lawsuits against Debtor. Doc. No. 33, p. 6.
[9] Doc. No. 33, p. 10-11.
[10] On September 12, 2019, Debtor's counsel sent letters via certified mail to Creditors' registered agent informing Creditors they had violated the discharge injunction by filing the three Lawsuits. The letter asked Creditors to "contact our office to resolve the matter no later than September 26, 2019; failure to do so shall result in our filing to reopen our client's bankruptcy filing and seeking sanctions." Debtor's counsel also sent the letters to Creditors' state court counsel in the Lawsuits. All these letters were received because their agents acknowledged receipt by September 20, 2019. Creditors, however, never responded.
[11] Doc. No. 17.

Wilmington Trust Company, Creditors' correct registered agent.[12] Creditors' registered agent admits receiving the Sanctions Motion on October 7, 2019,[13] though Creditors do not acknowledge this date in their Motion to Vacate.[14] Creditors were properly served with the Sanctions Motion.

Creditors also later received proper service of the hearing notice. The Court scheduled a hearing on the Sanctions Motion for December 17, 2019. On October 22, 2019, Debtor's counsel correctly served a copy of the Notice of Hearing via regular mail, again to Creditors' proper registered agent.[15] Creditors acknowledge their registered agent received the notice, but did not specify the date of receipt or what actions they took upon receiving the hearing notice.

Under the Creditors' "standard intake process for new legal matters of this type," their registered agent forwarded the Sanctions Motion and Notice of Hearing to Creditors' sub-servicer Transworld Systems Inc. ("TSI").[16] Creditors did not disclose when this happened or whether the transmittal occurred in one or two deliveries. In its role as sub-servicer, TSI should have coordinated with outside counsel to prosecute and defend litigation in which Creditors are a party.[17] TSI failed to do its job on the Sanctions Motion.

Creditors further explain that when their registered agent forwards a new legal matter to TSI, it is assigned to a support services team member.[18] Apparently, team members are trained to document new legal matters and forward them to TSI's legal and compliance department for proper handling.[19] Creditors explain via Bradley Luke's affidavit, a TSI employee, that the team member

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[12] Debtor's counsel also served the Sanctions Motion on Creditors' state court counsel in the Lawsuits. Doc. No. 17, p. 9-10.
[13] Doc. No. 33, p. 27.
[14] Doc. No. 33, p. 7.
[15] Debtor's counsel again also served the Notice of Hearing on Creditors' state court counsel in the Lawsuits. Doc. No. 22.
[16] Doc. No. 33, p. 7.
[17] *Id.*
[18] *Id.*
[19] *Id.* at p. 7-8.

assigned to the matter "made an inadvertent mistake when handling the Sanctions Motion and notice of hearing by not forwarding the documents to the appropriate resources to review and retain counsel to defend."[20] That's the entire explanation offered by the Creditors to support their claim of "excusable neglect."

On December 17, 2019, the Court held the scheduled and properly noticed hearing on the Sanctions Motion.[21] Creditors filed no response to the Sanctions Motion and did not attend the hearing.[22] On January 9, 2020, the Court entered its Order Granting Debtor's Motion for Contempt and Imposing Sanctions ("Order").[23] Based on Debtor's unchallenged assertions that the loans were discharged personal (not educational) loans, I found the Creditors repeatedly had violated the Debtor's Discharge and awarded compensatory damages and attorney's fees and costs.[24] Debtor's counsel promptly served copies of both the Order and Final Judgement on Creditors' registered agent.[25] The Bankruptcy Noticing Center also sent notice of the Final Judgment to Creditors' registered agent.[26]

Creditors continued to take no action. On February 10, 2020, Debtor advised Creditors of their failure to comply with the Order through certified mail to Creditors' registered agent and TSI.[27] Then, on February 21, 2020, the Court closed Debtor's bankruptcy case.[28] Creditors claim they first heard of the Sanctions Motion and related judgment on this date.[29] Over a month later,

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[20] *Id.* at p. 8.
[21] Doc. No. 25.
[22] Doc. No. 33, p. 2.
[23] Doc. No. 27.
[24] *Id.* A related Final Judgment was entered on January 10, 2020. Doc. No. 28.
[25] Doc. Nos. 30 and 31.
[26] Doc. No. 29.
[27] Doc. No. 34, p. 16-17. Debtor's counsel again also provided notice to Creditors' state court counsel in the Lawsuits.
[28] Doc. No. 32.
[29] Doc. No. 33, p. 8.

Creditors filed their Joint Motion to Vacate the Order and Final Judgment, contending their absence from the proceedings was due to excusable neglect.[30]

Under Rule 60(b)(1), a court may relieve a party from a final judgment or order upon showing excusable neglect.[31] Per the United States Supreme Court, excusable neglect includes "situations in which the failure to comply with a filing deadline is attributable to negligence."[32] Excusable neglect is based in equity and considers "the totality of the circumstances surrounding the party's omission."[33] To set aside a default judgment by excusable neglect in the Eleventh Circuit, the defaulting party must show: (1) they had a meritorious defense; (2) granting the motion would not prejudice the other party; and (3) they had a "good reason" for failing to respond.[34]

Here, the Court finds, even if the Creditors asserted a meritorious defense to the Sanctions Motion[35] and any prejudice to the Debtor would be minimal,[36] the Creditors give no valid reason, much less a "good reason," for failing to attend the hearing or oppose the entry of the Order and Final Judgment.

Creditors emphasize their failure to respond to the Sanctions Motion and appear at the hearing was "an inadvertent error, not intentional misconduct."[37] As an initial matter, the Court notes in making this "good reason" argument, Creditors rely on an incorrect legal standard.

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[30] Doc. No. 33, filed on March 25, 2020.
[31] *Chege v. Georgia Dep't of Juvenile Justice*, 787 F. App'x 595, 597 (11th Cir. 2019); Fed. R. Civ. P. 60(b)(1).
[32] *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 394, 113 S.Ct. 1489.
[33] *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 934 (11th Cir. 2007).
[34] *Grant v. Pottinger-Gibson*, 725 F. App'x 772, 775 (11th Cir. 2018); *Sloss*, 488 F.3d at 934; *In re Worldwide Web Systems, Inc. v. Feltman*, 328 F.3d 1291, 1295 (11th Cir. 2003).
[35] Creditors assert they have two meritorious defenses. First, they contend Debtor's bankruptcy did not discharge the loans because they were made to repay an educational benefit and, because they were made under a program guaranteed by a non-profit institution, which renders the loans non-dischargeable under Section 523(a)(8). Second, Creditors assert they had an objectively reasonable basis for believing the loans were not discharged based on the Debtor classifying the loans as "student loan[s]" on her Schedule F.
[36] Creditors argue the Debtor would not be prejudiced because vacating the Order and Final Judgment would only result in a simple delay, not lost evidence, more difficult discovery, or risk of fraud and collusion.
[37] Doc. No. 33, p 14.

Creditors cite to *Cooper v. Lane*[38] for the proposition that a court evaluates the willfulness and culpability of the moving party's actions in a "good reason" analysis.[39] However, *Cooper* concerns setting aside a default for good cause under Rule 55(c), not the more rigorous excusable neglect standard.[40] Creditors also cite to *Gerstenhaber v. Matherne Holdings*, and suggest a good reason exists if the moving party "was not acting out of disrespect for the Court or intentional disregard for [the] proceedings."[41] But, this portion of the opinion was under the "considering all of the relevant factors" of the Court's discussion of excusable neglect.[42] The District Court for the Southern District of Florida, in considering the totality of the circumstances, simply concludes the party intended "no disrespect." The Court did not hold that "intending no disrespect" constituted a "good reason" to vacate a prior order and never conducted a "good reason" analysis in its opinion.[43]

The issue here is not whether the Creditors here intended disrespect. I assume they always treat court proceedings respectfully and meant no disrespect. The actual issue is whether their failure to timely participate in this dispute was due to *excusable neglect*.

The Debtor gets the legal standard right, relying on Eleventh Circuit cases *Sloss* and *Gibbs*. In *Sloss* the Eleventh Circuit Court of Appeals upheld a finding of no excusable neglect when the defendant actually tried to get counsel and file an answer explaining that "… Rule 60(b)(1) cases have consistently held that where internal procedural safeguards are missing, a defendant does not have a 'good reason' for failing to respond to a complaint."[44] The Eleventh Circuit further

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[38] *Cooper v. Lane*, No. 5:19-CV-273 (MTT), 2019 WL 5309116, at *1 (M.D. Ga. Oct. 21, 2019).
[39] Doc. No. 33, p. 14.
[40] *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1338 (11th Cir. 2014) (identifying the excusable neglect standard is more rigorous than the good cause standard).
[41] *Gerstenhaber v. Matherne Holdings, Inc.*, No. 18-61213-CIV, 2018 WL 6261848, at *2 (S.D. Fla. Nov. 6, 2018); Doc. No. 33, p. 14.
[42] *Id*.
[43] *Id.*
[44] *Sloss*, 488 F.3d at 935.

highlighted "it is important to know exactly when certain actions were taken."[45] Nonspecific affidavits and the "lack of detail …[are] fatal to [the defaulting party's] Rule 60(b)(1) motion."[46]

Here, Creditors do not credibly explain their failure to timely defend the Sanctions Motion. Creditors *separately* received the Sanctions Motion and Notice of Hearing. Receipt was at least three weeks apart between the two mailings. Creditors' registered agent perhaps forwarded the Sanctions Motion and Notice of Hearing to Creditors' sub-servicer, TSI, but we do not know if they were sent together or at separate times. The sub-servicer TSI apparently assigned the matter to an employee who failed to take action. Again, we have no details on this process or the exact actions taken. Creditors claim they did not hear of the Sanctions Motion and related judgment until February 21, 2020,[47] the date the Court closed the bankruptcy case. Yet, Creditors do not explain how or why they only learned of the judgment then, nor do they explain why they did not seek to vacate the Order and Final Judgment until over a month later.

Instead, Creditors highlight their "standard intake process" where "specially trained employees of [their sub-servicer] monitor and track all litigation related to [Creditors]."[48] Creditors then merely explain that "[d]espite this training, the employee assigned to this matter made an inadvertent mistake when handling by not forwarding the Sanctions Motions and notice of hearing to the appropriate resources for review and to retain outside counsel."[49] I find this explanation insufficient. Creditors' use of the singular to describe the apparent mishandling of multiple notices on multiple days, or Creditors' lack of any real chronological detail in describing what happened

[45] *Id*.
[46] *Id.*
[47] Doc. No. 33, p. 8.
[48] Doc. No. 33, p. 14.
[49] *Id.*

does not constitute excusable neglect or even a "good reason" to vacate the Order and Final Judgment.

Finally, though not binding, this Court is convinced that the Creditors had ample prior *informal* notice of the Debtor's concerns prior to the hearing, and they just ignored it.[50] Creditors repeatedly disregarded or mishandled the Debtor's pleas to stop their collection efforts and the court filings until months after the Final Judgment was entered. They now seek to undo the orders offering no valid reason for their inaction.

If Creditors' argument for excusable neglect were accepted, respondents could freely ignore court proceedings until an unfavorable ruling issued and then claim "mistake" supplying no details or justification for not timely participating. Such is not the standard. Creditors have failed to show excusable neglect that would justify vacating the Order and Final Judgment.

Accordingly, it is

ORDERED:

1. Creditors' Joint Motion to Vacate Order Granting Debtor's Motion for Contempt and Imposing Sanction and Final Judgment for Excusable Neglect Under Fed. R. Civ. P. Rule 60(b)(1) (Doc. No. 33) is **DENIED**.

2. The Order and Final Judgment remain valid and subject to enforcement, upon which execution shall lie.

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Debtor's Counsel, Elayne M. Conrique, is directed to serve a copy of this order on all interested parties.

[50] *See e.g.* nn.11, 13, and 16.