

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

In re:

Case No. 9:02-bk-25329-ALP
Chapter 7 Case

HANCOCK PROPERTIES MANAGEMENT
INC.,

Debtor. /

SHARI S. JANSEN, successor Chapter 7 Trustee,

Plaintiff,

vs. Adv. Pro. 9:03-ap-361

VOLUTE ENTERPRISES, INC., REID
SCHAEFER,
and GINA HYON a/k/a GINA SCHAEFER

Defendants.
_____ /

**ORDER ON PLAINTIFF'S MOTION FOR
RECONSIDERATION OF ORDER
VACATING DEFAULT AND DEFAULT
JUDGMENT**
(Doc. No. 76)

THE MATTER under consideration in this Chapter 7 liquidation case is a Motion for Reconsideration of Order Vacating Default and Default Judgment (Doc. No. 76) filed by Shari S. Jensen, the Successor Trustee (Trustee) for the estate of Hancock Properties Management, Inc. (the Debtor). The Order Vacating Default and Default Judgment was entered by this Court on April 13, 2005.

At the duly scheduled and noticed hearing on the Motion For Reconsideration, this Court heard argument of counsel for the Trustee and for the Defendants, considered the affidavits filed by both the Trustee and the Defendants, together with the relevant portion of the record, and based on the same now finds and concludes as follows.

It is clear that the Defendants' Motion For Relief From Default Judgment Orders Under Federal Rule of Bankruptcy Procedure 9024 (Doc. No. 62), which sought to set aside the default and the default judgment under Rule 60(b), as adopted

by F.R.B.P. 9024, is based on the attorney's attempt to seek forgiveness for disregarding her responsibility as an attorney on the grounds that she was involved in an accident on September 12, 2003. Ms. L. Kirk Rogers (Ms. Rogers) claims that because of her confused mental condition she was unable to properly attend to her duties to respond to the Complaint filed by the Trustee against her clients, Reid Schaefer (Mr. Schaefer), Gina Hyon (Ms. Hyon) and Volute Enterprises, Inc., (Volute) the Defendants named in the Complaint (Clients and/or Defendants).

The record in this case completely belies and refutes Ms. Roger's excuse and justification for not responding to the Complaint filed against her clients, the Defendants. First, the Complaint was filed on June 20, 2003, and was served on Ms. Rogers on June 27, 2003. Notice of filing the acceptance of services by Ms. Rogers was filed by the Trustee on July 18, 2003. (Doc. No. 5). Ms. Rogers' first accident as mentioned above was on September 12, 2003 thus, Ms. Rogers had approximately two months to respond to the Complaint filed against her clients.

The Plaintiff filed a Motion for Entry of Default on July 28, 2003, and served the same on Ms. Rogers and on the Defendants. (Doc. No. 6). On August 21, 2003, a default was entered against the Defendants; this was also served on Ms. Rogers. (Doc. No. 8). In addition to the Entry of Default, the Plaintiff filed Notice of Taking Depositions Duces Tecum of Corporate Representative of Volute Enterprises, Inc., Gina Hyon, and Reid Schaefer on October 22, 2003. (Doc. Nos. 10, 11, and 12).

It was not until November 26, 2003, that Ms. Rogers filed for the first time, any papers in this adversary proceeding. On that date, Ms. Rogers filed a Motion to Stay (Doc. No. 13) and also a Motion to Set Aside Entry of Default. (Doc. No. 14). Both Motions filed by Ms. Rogers were promptly scheduled for hearing, however, on December 18, 2003, the date of the hearing, this Court received communication from Ms. Rogers' office indicating that Ms. Rogers will not be able to attend the hearing since she was ill. For the reason stated above, this Court announced in open court that the Motions, which were before the Court, were rescheduled for February 5, 2004.

On February 5, 2004, the rescheduled hearing date of the Motion to Stay and on the Motion to Set Aside Entry of Default, Ms. Rogers

again failed to seek a continuance and failed to appear. On February 18, 2004, this Court entered an Order Denying the Motion to Stay (Doc. No. 19). On February 24, 2004, this Court entered an Order Denying Motion to Set Aside Entry of Default. (Doc. No. 21).

On March 25, 2004, the Plaintiff filed a Motion to Compel Discovery for the Records Custodian of Wachovia Bank to produce documents. (Doc. No. 23). The Motion was served on Ms. Rogers and on her Clients. On May 6, 2004, the hearing was held on the Motion to Compel Discovery and once again there was no appearance by Ms. Rogers or her Clients. On May 11, 2004, this Court entered the Order granting the Plaintiff's Motion to Compel. (Doc. No. 27).

It was not until May 27, 2004, the day before Ms. Rogers' second accident, Ms. Rogers filed a Verified Motion to Set Aside Order of February 24, 2004, Denying Motion to Set Aside Default and Incorporated Memorandum of Law (Verified Motion). (Doc. No. 29). The Verified Motion, which was initially set for hearing on July 8, 2004, was ultimately reset for August 19, 2004.

On August 19, 2004, the rescheduled hearing date on the Verified Motion, Ms. Rogers, although served notice of the hearing, failed to appear and did not seek a continuance. On August 27, 2004, this Court entered an Order Denying Motion to Set Aside Default. (Doc. No. 35).

It is evident from the history of this litigation as it appears from the record, that Ms. Rogers' continuous neglect to perform her duties and prepare to represent her clients is inexcusable, yet is sought to be excused on the bases that she was involved in two automobile accidents. This being the case, though it is not articulated, what is really being claimed by the Debtors is "excusable neglect." Present counsel seeks relief under Section 60 (b)(6), which provides relief from judgment for "any other reason justifying relief from the operation of the judgment." The case law has made it clear, however, that the relief available under Section 60 (b)(6) is available only for reasons "other" than the grounds set forth in Section 60 (b)(1),(2),(3),(4), or (5). United States v. Real Property & Residence 920 F.2d 788, 791 (11th Cir. 1991); Solaroll Shade and Shutter Corp. v. Bio-energy Systems Inc., 803 F.2d 1130 (11th Cir. 1986) "60(b)(1) and 60(b)(6) are mutually exclusive." Therefore, any claim for relief under 60(b)(6) is improper.

As a matter of law, the applicable rule to this claim is F.R.C.P. 60(b)(1), as adopted by, F.R.B.P. 9024(b)(1). Under this Rule the court may relieve a party from a final judgment for "mistake inadvertence, surprise or excusable neglect." Even assuming that this Court would find excusable neglect, which would be impossible to review under this record, such relief under 60(b)(1) must be filed within one year. Ms. Rogers' Motion was clearly outside the one year limitation and therefore, untimely. In light of this requirement, this Court is satisfied that, under these facts, it was an error to grant relief under F.R.C.P. 60(b)(1).

Further, this Court cannot accept, based on these facts, that the Debtors are entitled to relief under 60(b)(1), even if one year had not yet passed. This record is totally devoid of any evidence that Ms. Rogers' continuous and uninterrupted failure to properly represent the Debtors was based on "mistake" "inadvertence" "surprise" or "excusable neglect." The problem with Ms. Rogers' claim is that she had already failed to respond to the complaint long before her first accident. In fact, she had two months prior to the accident in which to respond to the Complaint filed against her clients. Moreover, she continuously ignored all notices. One would be hard pressed to find basis for relief for "excusable neglect" based on these facts.

Thus, unless this Court is further satisfied and finds that the Defendants should not be penalized for the neglect of their counsel because of their own hardships, the default should be reinstated. During this same time period, Mr. Schaefer was diagnosed with terminal melanoma and it was predicted that he had ninety days to live and Ms. Hyon had a hysterectomy which, unfortunately turned out to be a disaster. The Defendants, therefore, contend that they were unable to fully understand the proceedings and were unable to take appropriate actions to assure that their interests with regards to this adversary proceeding are properly represented.

To the extent the relief sought is based on the serious health conditions of the Debtor during the relevant time, such claim is equally unsupported by the record and by applicable law. The Debtors were consistently on notice of the pendency of the lawsuit filed against them. The record leaves no doubt that they received all notices of all hearings scheduled, yet they failed to assure that their interests were properly represented. They also failed to notify the Court about their problems

with Ms. Rogers. The Debtors had the duty, when they received the notice of entry of the default, to seek help at once and there is no evidence in this record that they were incapable to call Ms. Rogers or the Court or write to the Court of their predicament. In sum, their conduct is equally insufficient to find excusable neglect.

Based on the foregoing, the Motion for Reconsideration of Order Vacating Default and Default Judgment (Doc. No. 76) is proper and should be granted. Furthermore, the Order Vacating the Default and Default Judgment was improper and the Original Default and Default Judgment shall be reinstated.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Motion for Reconsideration of Order Vacating Default and Default Judgment be, and the same is hereby, granted and the Order on Defendants' Motion for Relief from Default Judgment Orders Under Federal Rule of Bankruptcy Procedure 9024 entered by this Court on April 13, 2005, be, and the same is hereby, vacated. It is further

ORDERED, ADJUDGED and DECREED that the Final Judgment entered by this Court on March 14, 2005, be, and the same is hereby, reinstated. It is further

ORDERED, ADJUDGED and DECREED that a pretrial conference shall be held on July 5, 2005, beginning at 9:30 a.m. at Courtroom 9A, Sam M. Gibbons United States Courthouse, 801 N. Florida Ave., Tampa, Florida. At the pretrial conference this Court shall consider all pending Motions.

DONE AND ORDERED at Tampa, Florida on June 3, 2005.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
United States Bankruptcy Judge