

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

<b>IN RE:</b>	)	
	)	
<b>JOHN BRADFORD PAYNE,</b>	)	<b>Case No. 03-40475-7</b>
	)	
<b>Debtor.</b>	)	

**MEMORANDUM AND ORDER DENYING DEBTOR'S  
MOTION FOR RECONSIDERATION**

This matter is before the Court on Debtor, John Payne's (hereinafter "Payne"), Motion for Reconsideration<sup>1</sup> of the Order Denying Debtor's Motion to Set Aside Order Sustaining Trustee's Objection to Debtor's Homestead Exemption.<sup>2</sup> In other words, this is a motion to reconsider the denial of a previous motion to reconsider. The Court has jurisdiction to decide this matter,<sup>3</sup> and it is a core proceeding.<sup>4</sup>

**I. FINDINGS OF FACT**

1. On April 17, 2003, the Chapter 7 Trustee (hereinafter "Trustee") filed an Objection to Debtor's Homestead Exemption (hereinafter "Trustee's Objection").
2. The Trustee filed and served a notice of her objection with an objection deadline of May 6, 2003, and an opportunity for hearing, if any response was filed, on May 14, 2003. Debtor did not file

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<sup>1</sup>Doc. No. 28.

<sup>2</sup>Doc. No. 27.

<sup>3</sup>28 U.S.C. § 1334.

<sup>4</sup>28 U.S.C. § 157(b)(2)(B).

a response by the deadline of May 6, 2003, and no hearing was held. The Trustee could, and should, have submitted a proposed order, on May 16, 2003.<sup>5</sup>

3. On September 4, 2003, the Trustee filed a related Adversary Proceeding seeking turnover of the funds realized by Debtor from the post-petition sale of his Kansas homestead. The Trustee alleged that the sale of the Kansas homestead was closed one day after the filing of bankruptcy, and that the Debtor has not used the proceeds to reinvest in another homestead in Kansas. The Complaint was mailed to Debtor on September 11, 2003 at the address contained for him in the court file, P.O. Box 1972, Sharpsburg, N.C. 27878.
4. This Sharpsburg, N.C. address is identical to the address that Debtor's counsel had sent to the Clerk of the Court by letter dated May 21, 2003, in compliance with Fed. R. Bank. P. 4002(5), which requires debtors to file with the court a statement of any change of address.
5. Although the Trustee delayed providing to the Court an order sustaining her objection to Debtor's Homestead Exemption, when it was ultimately presented to the Court, it was immediately signed on September 8, 2003 (hereinafter "September 8, Order") because there had been no response any time between its filing in April, and its presentation in early September, 2003.
6. On September 22, 2003, fourteen days after the Court entered the September 8, Order, and several days after Debtor (and his counsel) would have received a copy of the Complaint in the Adversary Proceeding, Debtor, through counsel, filed a Motion to Set Aside Order Sustaining Trustee's Objection to Debtor's Homestead Exemption (hereinafter "Motion to Set Aside").

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<sup>5</sup>See D. Kan. LBR 9004.1(b).

Debtor's move to North Carolina and counsel's attendant loss of contact with Debtor were noted as the only reasons for Debtor's failure to file any response to the Trustee's April 17, 2003 Objection.

7. Although the Motion to Set Aside attempted to explain why no response was filed to the Trustee's April 17, 2003 Objection, it did not attempt to explain why the Motion to Set Aside the order was filed more than ten days after the date of the Order.
8. Debtor's Motion to Set Aside was heard on October 30, 2003, and the Court continued the matter to a January 7, 2004 hearing, requiring counsel to file a brief outlining why the motion to vacate was filed out of time, and why that constituted excusable neglect such that the Court should vacate the order. The brief was due November 19, 2003.<sup>6</sup>
9. The Court also ordered the parties to file a Stipulation of Facts by November 14, 2003 regarding Debtor's claimed excusable neglect.<sup>7</sup>
10. The Court received no Stipulation of Facts on or before November 14, 2003, or at any time thereafter, and no brief was received from Debtor on or before November 19, 2003. In addition, no motion was made to file those pleadings out of time.
11. Clerk's staff contacted the office of counsel for Debtor about the missing stipulation and brief on November 19, 2003 and again November 20, 2003, speaking each time with a staff member, and Clerk's staff then notified this judge about the missing pleadings. Because of the importance of

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<sup>6</sup>See Doc. No. 26.

<sup>7</sup>*Id.*

deciding cases on their merits, instead of by default, the Court directed the Clerk to make one last contact. It was made November 25, 2003, by a telephone call to Debtor's counsel's office.<sup>8</sup>

12. The Court then allowed 15 more days, after this series of court contacts, for the pleadings to be filed. When they were not, the Court entered the Order Denying Debtor's Motion to Set Aside Order Sustaining Trustee's Objection to Debtor's Homestead Exemption on December 10, 2003, finding that Debtor had failed to prosecute the untimely Motion to Set Aside.
13. Debtor's counsel filed no Motion to Reconsider that order, but on December 22, 2003, the Court received a letter<sup>9</sup> from Debtor, individually, asking for "help ... in resolving [my] situation." Because that letter was received on the tenth day after entry of the December 10, 2003 order, the Court liberally treated it as a timely Motion for Reconsideration of the Court's December 10, 2003 order denying the untimely September 22, 2003 Motion to Set Aside.
14. On December 23, 2003, this Court sent an acknowledgment letter back to Mr. Payne, with a copy to his counsel and to Trustee, indicating there was a Scheduling Conference in the companion Adversary Proceeding set for January 7, 2004, and that if he intended to pursue the reconsideration, his "attorney should file a memorandum with the Court prior to January 7, 2004, so that the Trustee and the Court will know the legal bases for any such motion."<sup>10</sup>
15. As of January 7, 2004, no brief had been filed. The Court then gave the parties an opportunity to try to reach a settlement, which they requested, but upon no settlement being reached, the Court

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<sup>8</sup>See Clerk notes, Court file.

<sup>9</sup>See Doc. No. 28.

<sup>10</sup>*Id.* at p. 2, and Scheduling Order, Doc. 30.

set February 20, 2004 as yet another deadline for filing the brief which should have been filed, on the issue of excusable neglect, by September 18, 2003. Debtor's counsel did file the brief on February 11, 2004, but, again, no stipulation of facts has ever been received.

16. Debtor's counsel originally argued, in his September 22, 2003 Motion to Vacate, that his failure to file a response to Trustee's Objection to Homestead Exemption, between May 6, 2003 and September 22, 2003, was due to his client moving out of state, and his inability to contact his client. Counsel now forthrightly admits, in his February 20, 2004 Memorandum, that that statement was not true. He admits that he did in fact notify the Court on May 21, 2003 of Debtor's change of address, but now claims that he "did not notice the change [of address] was in his file until sometime in October of 2003 ..."<sup>11</sup>
17. Instead of relying on his client's absence, Debtor's counsel now relies on the fact that he had been involved in his own personal divorce and custody proceedings as the "excusable neglect" in timely filing the original Motion to Vacate the Court's default order granting Trustee's Objection to Homestead Exemption. No affidavit was presented outlining the period during which he was incapacitated in fulfilling his legal duties, what efforts were taken to have his legal business covered by other competent counsel, or even the degree of incapacitation caused by his family situation, and no stipulation of facts exists on this or any other issue.
18. Debtor admitted in his December 22, 2003 letter that by that date, he had fully spent the alleged \$28,000 in homestead proceeds that were the subject of Trustee's April 17, 2003 objection to exemption, and that "I'm having trouble making ends meet. I not (sic) even sure I'll be able to pay

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<sup>11</sup> See Doc. No. 32, ¶ 10.

my next months (sic) rent.”<sup>12</sup> At the time of the objection, Trustee alleged that Debtor had admitted spending approximately \$15,000 of the \$28,000 as of the date of the § 341 hearing held April 1, 2003.

## II. ANALYSIS

### A. Standard of Review for Motions for Reconsideration

As noted above, this is actually Debtor’s Motion to Reconsider the Court’s denial of his original Motion to Vacate. Pursuant to D. Kan. Rule 7.3, therefore, Debtor must outline any intervening change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice in order to prevail on this Motion. Debtor only argues that it was his counsel’s excusable neglect that has resulted in manifest injustice to him, and does not rely on the other factors. Where the ground alleged is excusable neglect under Rule 60(b)(1), “[t]he burden is upon the party moving to have the judgment set aside to plead and *prove* excusable neglect.”<sup>13</sup>

### B. Debtor cannot be relieved of September 8 Order under Rule 9023

Extensions of time in bankruptcy cases are generally governed by Fed. R. Bankr. P. 9006(b). It provides as follows:

“(1) IN GENERAL. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on

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<sup>12</sup>See Doc. 27.

<sup>13</sup>*In re Folger*, 149 B.R. 183, 185 (D. Kan. 1992) (quoting *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990)) (emphasis in original).

motion made after the expiration of the specified period where the failure to act was the result of excusable neglect.

(2) ENLARGEMENT NOT PERMITTED. The court may not enlarge the time for taking action under Rules ... 9023, and 9024.”<sup>14</sup>

As Rule 9006(b)(1) unequivocally states, the Court may, under certain conditions, enlarge the time for an act where the failure to act was caused by excusable neglect. Enlargement is not permitted, however, if it is inconsistent with Rules 9023 and 9024.

Debtor’s motion is properly considered either as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), which is made applicable to bankruptcy cases pursuant to Fed. R. Bankr. P. 9023, or as a motion for relief from judgment under Fed. R. Civ. P. 60(b), which is made applicable pursuant to Rule 9024. Rule 59(e) requires that any motion to alter or amend be filed no later than ten days after entry of judgment. Debtor did not file his September 22, 2003 motion to vacate within ten days of the September 8, Order, and therefore that motion was untimely under Fed. R. Civ. P. 59(e).

### **C. Debtor cannot be relieved of September 8 order under Rule 9024**

Having already found that Rule 9023 does not provide relief, because the Motion was filed outside the required ten day period, the Court now looks to Bankruptcy Rule 9024. It states that

“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: (1) mistake, inadvertence, surprise, or excusable neglect; ... or (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.”<sup>15</sup>

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<sup>14</sup>Fed. R. Bankr. P. 9006(b).

<sup>15</sup>Fed. R. Bankr. P. 9024.

As the District Court in Kansas has noted, “the ‘mistake’ provision in Rule 60(b)(1) provides for the reconsideration of judgments only where (1) a party has made an excusable litigation mistake ... or (2) the court has made a substantive mistake of law or fact in the final judgment or order.”<sup>16</sup> Debtor does not contend that the Court has made any mistake of law or fact, therefore the Court will only focus on counsel’s alleged excusable neglect in not timely filing the Motion to Set Aside the September 8, 2003 order to determine whether it constitutes an “excusable litigation mistake.”

The Supreme Court has stated that “[t]he ordinary meaning of neglect is to give little attention or respect to a matter or ... to leave undone or unattended to especially through carelessness.”<sup>17</sup> However, “carelessness by a litigant does not afford a basis for relief under Rule 60(b)(1).”<sup>18</sup> Rule 60(b)(1) provides relief for mistakes that are inadvertent, excusable, and involve something more than mere carelessness.<sup>19</sup>

In deciding which types of neglect are excusable, the Supreme Court noted in a case dealing with late claims that “the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.”<sup>20</sup> The Court must consider several key factors. Those factors include “the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial

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<sup>16</sup>*Calhoun v. Schultze*, 197 F.R.D. 461, 462 (D. Kan. 2000) (citing *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10<sup>th</sup> Cir. 1999)).

<sup>17</sup>*Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 388 (1993) (quotations omitted).

<sup>18</sup>*Calhoun*, 197 F.R.D. at 462.

<sup>19</sup>*Woods v. Kenan (In re Woods)*, 173 F.3d 770, 779-80 (10<sup>th</sup> Cir. 1999).

<sup>20</sup>*Pioneer*, 507 U.S. at 395.

proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.’<sup>21</sup> Post-*Pioneer*, the Tenth Circuit has determined that of these factors, “fault in the delay remains a very important factor--perhaps the most important single factor--in determining whether neglect is excusable.’<sup>22</sup>

This Court finds the language used by the Colorado Supreme Court helpful in explaining the concept of excusable neglect:

Excusable neglect involves a situation where the failure to act results from circumstances which would cause a reasonably careful person to neglect a duty. It is impossible to describe the myriad situations showing excusable neglect, but in general, most situations involve unforeseen occurrences such as personal tragedy, illness, family death, destruction of files, and other similar situations which would cause a reasonably prudent person to overlook a required deadline date in the performance of some responsibility.<sup>23</sup>

Conclusory statements alone will not suffice to establish excusable neglect.<sup>24</sup> Counsel for Debtor is thus required to plead and prove that his actions amounted to excusable neglect.

In the Motion to Vacate, counsel originally claimed that during Debtor’s move from Kansas to North Carolina, he lost contact with Debtor, resulting in the failure to respond to the Trustee’s Objection. Counsel has now admitted, in his Memorandum in Support of Defendant’s Motion for Reconsideration, that he in fact had Debtor’s new address and phone number from at least May 21, 2003, forward, months

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<sup>21</sup>*Id.*

<sup>22</sup>*City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10<sup>th</sup> Cir. 1994).

<sup>23</sup>*Farmers Ins. Group v. District Court of Second Judicial Dist.*, 507 P.2d 865, 876, 181 Colo. 85, 89 (1973) (citations omitted).

<sup>24</sup>See *Barta v. Long*, 670 F.2d 907, 909-10 (10<sup>th</sup> Cir. 1982).

before the Court entered the order sustaining the homestead objection.<sup>25</sup> Accordingly, even if it is true that Debtor had not provided counsel with his new address for some short period of time prior to the May 6 objection deadline, it is clear that had Debtor filed a motion to file a response out of time to the trustee's objection to exemptions it would likely have been granted, since the Court had not yet signed an order granting the objection and the Court would have preferred to resolve this matter on its merits.<sup>26</sup>

Debtor's counsel also claims he failed to file timely pleadings because of divorce and custody proceedings in his personal life. He unfortunately provided no detail to the Court that would allow the Court to make findings of excusable neglect. This is, at least in part, why the required stipulation of facts was ordered to be filed. Again, because it is Debtor's burden to prove excusable neglect, and Debtor failed to file the very stipulations of fact that might have allowed such findings, this failure is fatal.

In effect, Debtor's counsel had from April 17, 2003 to September 18, 2003 (ten days after entry of order sustaining objection) to attend to this case and file appropriate pleadings. The Court finds that this delay—and all the attendant delays caused by Debtor's failure to timely file the required brief on the excusable neglect issue—appears to have caused significant prejudice to the estate. Between the time the Trustee filed the objection to exemptions, and the time the Court originally denied the first Motion to Reconsider, Debtor had spent all the proceeds from the sale of the homestead, and claimed to have no money with which to repay the estate, in the event the estate prevailed.<sup>27</sup> Furthermore, the Court has been

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<sup>25</sup>See Doc. No. 13.

<sup>26</sup>See *Gomes v. Williams*, 420 F.2d 1364, 1366 (10<sup>th</sup> Cir. 1970) (noting “The preferred disposition of any case is upon the merits and not by default judgment.”).

<sup>27</sup>The Trustee also contends that she told Debtor at the § 341 meeting not to spend the remaining sale proceeds from the house until the matter was resolved. A letter from the Trustee to

provided with no evidence on which to base any finding that it was not within the reasonable control of Debtor or his counsel to prevent this delay. If Debtor's counsel had provided evidence, or even made the argument, that he was continually out of his office for that entire five (5) month period, and was somehow incapacitated during that period from either attending to his legal business or seeking assistance from other lawyers who would handle cases in his absence, there might be some basis to consider this "excusable" neglect. Debtor's counsel makes no such argument, and the argument he does make is insufficient to deem this failure excusable. Instead, this looks like a case where counsel was simply inattentive to the file, over a several month period.

The Supreme Court has found that little weight should be given to upheaval in an attorney's practice when considering excusable neglect, and so has the Tenth Circuit Bankruptcy Appellate Panel (hereinafter "BAP").<sup>28</sup> In *In re Lang*, counsel argued that her failure to timely file a notice of appeal was a result of excusable neglect because of the press of other business in her legal practice. The BAP ruled that there is no support for the proposition that the pressure of other business matters constitutes excusable neglect in making an untimely filing.<sup>29</sup> This Court notes that Debtor's counsel, likewise, has cited nothing to support

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Debtor dated April 1, 2003 also warns Debtor "don't spend remaining sale proceeds." See Exhibit A to Trustee's Memorandum in Opposition to Defendant's Motion for Reconsideration. Doc. No. 17. Unfortunately, because the parties failed to file a Stipulation of Facts, this fact is also not "in evidence," so the Court does not rely on this fact in making this decision.

<sup>28</sup>*Pioneer*, 507 U.S. at 398.

<sup>29</sup>See *Lang v. Lang (In re Lang)*, 305 B.R. 905, 910 (10<sup>th</sup> Cir. B.A.P. 2004) (holding that "[Lang] has not cited, and the Court in conducting its own research, has been unable to locate, a single case that stands for the proposition she asks us to adopt: namely, that the failure to comply with the deadline for the filing of a notice of appeal due to the press of other business constitutes excusable neglect. Virtually all of the published decisions on the issue, both pre-and post-*Pioneer*, reach the opposite conclusion. We believe that the language contained in *Pioneer* to the effect that 'upheaval' in

his argument that his reason for not filing any pleading, over more than four months, was as a result of excusable neglect, and the Court's own research has not discovered any such case law.

Debtor's counsel asserts that the untimeliness was an innocent mistake, but his failure to follow Rules 59 and 60 do not amount to excusable neglect. Neither the very temporary loss of Debtor's address or counsel's personal legal proceedings provide any excuse for failing to attend to business between May 6, 2003 and September 18, 2003. The Court has received no information or evidence that this failure was not entirely within counsel's control, and therefore, it cannot constitute excusable neglect.

### **C. Rule 60(b)(6) also does not warrant relief**

Counsel asserts that the fault for the delay was his own, not Debtor's, and that the Court should set aside the default order sustaining objection to homestead exemption and instead allow a hearing on the merits to prevent manifest injustice to Debtor, presumably under Rule 9024 and Rule 60(b)(6). "Rule 60(b)(6) has been referred to as a grand reservoir of equitable power to do justice in a particular case," but "[a] court will only award Rule 60(b)(6) relief in extraordinary cases."<sup>30</sup>

Unfortunately, clients must be held accountable for the acts and omissions of their attorneys.<sup>31</sup> The Supreme Court has found no merit to the contention that dismissal because of counsel's unexcused conduct

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a law practice is not probative of excusable neglect precludes Ms. Lang's reliance upon *Pioneer*.”).

<sup>30</sup> *Pelican Production Corp. v. Marino*, 893 F.2d 1143, 1147 (10<sup>th</sup> Cir. 1990) (internal citations omitted).

<sup>31</sup> See *Pioneer*, 507 U.S. at 396; see also *Canaan v Bartee*, 35 P.3d 841, 272 Kan. 720, 737 (2001) (citing *Damiani v. Rhode Island Hosp.*, 704 F.2d 12, 16 (1<sup>st</sup> Cir. 1983) (holding that “The argument that the sins of the attorney should not be visited on the client is a seductive one, but its siren call is overborne by the nature of the adversary system.”)).

imposes an unjust penalty on the client.<sup>32</sup> While the Court allowed Debtor's personal letter to be treated as a Motion for Reconsideration, notwithstanding the fact he was simultaneously represented by counsel, the Court cannot deem the original Motion to Vacate timely simply because a penalty will be imposed on Debtor.

The Court has not reached the merits of the trustee's objection, because it need not do so when the party moving to set aside a judgment pursuant to Rule 60(b)(1) fails to establish excusable neglect.<sup>33</sup> Debtor's failure to file a stipulation of facts has deprived this Court of necessary facts to fully evaluate whether a homestead existed on the date of filing, because whether a homestead exists is a question of fact.<sup>34</sup> The Court does not have facts such as whether Debtor was physically occupying the house as his homestead on the date of filing, when Debtor moved from the homestead, when he listed the house for sale, when he signed the contract for sale, when he established a new homestead in North Carolina, and what Debtor's intentions were about the use the net proceeds to establish a new homestead, or for other purposes.

Thus, this Court cannot say whether Debtor would have prevailed, or not, even had he complied with procedural rules that might have prevented a default order sustaining the objection. And even if Debtor had demonstrated he was occupying the home as his homestead on the date of filing, he may have

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<sup>32</sup>See *Pioneer*, 507 U.S. at 396.

<sup>33</sup>*In re Folger*, 149 B.R. at 188.

<sup>34</sup>See *Matter of Estate of Phillippe*, 933 P.2d 151, 153, 23 Kan. App. 2d 436, 437 (1997).

had to demonstrate an intent to remain in the house as his homestead, or to reinvest the proceeds in another homestead located in Kansas, which some courts have required.<sup>35</sup>

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<sup>35</sup>*See In re Ginter*, 282 B.R. 16, 18-19 (Bankr. D. Kan. 2002).

### **III. Conclusion**

Debtor has the burden to establish that the original Motion to Reconsider, which was untimely, should be set aside under Rule 9024 as a result of excusable neglect, and he has failed to meet this burden. Debtor's counsel's reasons for failing to timely file the Motion are unconvincing, and it certainly seems to the Court that failure to respond to the Trustee's April, 2003 objection to exemptions at any time between April and September, and then to timely file a Rule 9023 motion, were within Debtor or his counsel's control. Furthermore, Debtor's counsel's failure to timely move for reconsideration, and then to fail to file the appropriate brief (and stipulation) after several warnings by the Clerk, appears to have caused prejudice to the estate. Further, the length of the delay has been significant. Trustee filed her objection in April 2003, and it is now July 2004. Finally, although this Court has not specifically found the serial delays are as a result bad faith, the record does not reflect any basis for finding that Debtor or his counsel have acted in good faith. The Court thus finds that Debtor's failure to timely oppose the order sustaining Trustee's objection does not constitute excusable neglect.

The Court must balance the desire for resolution of cases on their merits versus judicial need for finality and efficiency of litigation. In this case, that balance is decidedly in favor of the estate. **IT IS, THEREFORE, ORDERED** that Debtor's Motion to Reconsider the Court's denial of his first Motion to Set Aside Order Sustaining Trustee's Objection to Debtor's Homestead Exemption is denied. Debtor has not shown that his counsel's conduct constitutes excusable neglect under Rule 60(b)(1), and counsel has not shown any extraordinary circumstances that would cause the Court to grant relief under Rule 60(b)(6).

**IT IS SO ORDERED** this \_\_\_\_ day of July, 2004.

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JANICE MILLER KARLIN  
United States Bankruptcy Judge  
District of Kansas

**CERTIFICATE OF MAILING**

The undersigned certifies that a copy of the Order Denying Defendant's Motion for Reconsideration was deposited in the United States mail, postage prepaid on this \_\_\_\_ day of July, 2004, to the following:

Lloyd Graham  
711 N. Washington  
P.O. Box 87  
Junction City, Kansas 66441

Darcy D. Williamson  
Chapter 7 Trustee  
Topeka, Kansas 66603

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DEBRA C. GOODRICH  
Judicial Assistant to:  
The Honorable Janice Miller Karlin  
Bankruptcy Judge

