SO ORDERED.

SIGNED this 21 day of December, 2005.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re: DANNY JOE HERRIN and MELODY ELAINE HERRIN Debtors.	)	Case No. 04-43472 Chapter 7
USAA FEDERAL SAVINGS BANK Plaintiff, v. DANNY JOE HERRIN and MELODY ELAINE HERRIN Defendants.	)	Adversary No. 05-7018
MBNA AMERICA BANK, N.A. Plaintiff, v. DANNY JOE HERRIN MELODY ELAINE HERRIN, Defendants.	)	Adversary No. 05-7019

MEMORANDUM AND ORDER DENYING PLAINTIFFS' MOTION TO SET ASIDE DISMISSAL AND SETTING DEADLINE FOR RESOLUTION OF MOTION FOR ATTORNEY'S FEES

This matter is before the Court on Plaintiffs' Motions to Set Aside Dismissal.[1] Plaintiffs are seeking to set aside the Court's orders of dismissal for lack of prosecution, which were filed on November 22, 2005.[2] The Court has reviewed the briefs submitted by the parties and is now ready to rule. This matter constitutes a core proceeding,[3] and the Court has jurisdiction to decide it. The Court denies the motions to set aside the orders dismissing these cases.

I. BACKGROUND

Both Plaintiffs, USAA Federal Savings Bank and MBNA America Bank, N.A., through identical counsel, initiated these adversary proceedings March 11, 2005, seeking determinations that certain credit card debt was nondischargeable pursuant to 11 U.S.C. § 523(a)(2). On June 1, 2005, the Court issued a Scheduling Order[4] requiring, *inter alia*, Plaintiffs' counsel to submit an agreed pretrial order by September 23, 2005. The order required he use the Court's approved form that is available on the Court's website. The Scheduling Order specifically provided the website address for the required pretrial order form.

On September 29, 2005, the Court conducted a Final Pretrial Conference, which was attended in person by counsel for Plaintiffs and for Defendants, despite the fact that Plaintiffs'

[1]Doc. 20 in Adv. No. 05-7018 and Doc. 23 in Adv. No. 05-7019.

[2]Doc. 17 in Adv. No. 05-7018 and Doc. 20 in Adv. No. 05-7019.

[3]28 U.S.C. § 157(b)(2)(I).

[4]Doc. 8 in Adv. No. 05-7018 and Doc. 12 in Adv. No. 05-7019.

counsel had not yet submitted the required pretrial order.[5] At the September 29, 2005 conference, after the Court and both counsel had jointly worked through all the required sections of the appropriate pretrial orders, the Court directed Plaintiffs' counsel to submit the appropriate pretrial orders within one week, making them due no later than October 6, 2005.[6]

On October 17, 2005, eleven days after the extended deadline to file the appropriate pretrial orders, at this Court's request, the Bankruptcy Court Clerk's Office sent Plaintiffs' counsel a Notice of Order Due,[7] informing Plaintiffs' counsel that the pretrial orders were now overdue. The Notice provided Plaintiffs' counsel an additional fifteen days, to November 1, 2005, to submit the pretrial orders, and warned Plaintiffs' counsel that the cases might be dismissed for lack of prosecution if the missing orders were not filed within the extended deadline. On November 9, 2005, one week after this third deadline had passed, the Court entered a Conditional Order of Dismissal for Lack of Prosecution[8] in each case, informing Plaintiffs' counsel that both cases "will be DISMISSED FOR LACK OF PROSECUTION" unless the pretrial orders were filed within ten more days.

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[5]The Court's pretrial order form, which has been in use in essentially the same format for over two years, with a minor modification made to address cm/ecf issues in January 2005, requires significant additional information from the parties than the information contained in the abbreviated pretrial order that Plaintiffs' counsel provided. The Bankruptcy Court in this District has found the form pretrial order form helpful, as it contains not only a full summary of the issues, theories, and requests for relief for the case that is preparing its way for trial or remaining dispositive motions, but it also contains general orders governing the course of all further proceedings, including the marking of exhibits, etc. Examples of information required in the court's pretrial order that was not provided in Plaintiffs' version include a) possible stipulations; b) issues and theories for each side; c) recitation of the exact relief requested by each party; d) list of citations to authority regarding any legal issues noted; e) list of exhibits to be introduced at trial; and f) a list of witnesses scheduled to testify for each party, including a brief summary of the witnesses' expected testimony.

[6]*See* Pacer, docket entry 10 entered September 29, 2005, which also sets out these deadlines.

[7]Doc. 12 in Adv. No. 05-7018 and Doc. 15 in Adv. No. 05-7019.

[8]Doc. 14 in Adv. No. 05-7018 and Doc. 17 in Adv. No. 05-7019.

On November 22, 2005, when the orders had still not been received, the Court entered an Order of Dismissal for Lack of Prosecution[9] in each case. On November 30, 2005, the Defendants filed a motion for attorney fees pursuant to 11 U.S.C. § 523(d). Plaintiffs then timely filed the current motions to reconsider on December 2, 2005, in each case.

II. ANALYSIS

Rule 9023 of the Federal Rules of Bankruptcy Procedure incorporates Rule 59 of the Federal Rules of Civil Procedure, and allows for alteration or amendment of judgments on the grounds of relief set forth in Rule 60(b) of the Federal Rules of Civil Procedure, as incorporated in Bankruptcy Rule 9024.[10] Rule 60(b) states:

> 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.[11]

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."[12] Plaintiffs' identical motions in each case cites to no case law authority, statute or rule in seeking reconsideration. Instead, the only excuse Plaintiffs provide is "a failure of communication in Plaintiffs' counsel's office regarding completion of the pretrial order," and a claim that "the

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[9]Doc. 17 in Adv. No. 05-7018 and Doc. 20 in Adv. No. 05-7019.

[10]*See In re Colley*, 814 F.2d 1008, 1010 (5th Cir. 1987).

[11]Fed. R. Civ. P. 60(b) (made applicable to this case pursuant to Fed. R. Bankr. P. 9024).

[12]C*alhoun v. Schultze*, 197 F.R.D. 461, 462 (D. Kan. 2000) (citing *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999)).

docketing system missed response dates to the Court's orders . . . ." Plaintiffs' motions admit to a series of missed dates and "docketing errors within counsel's office." From this, the Court concludes that Plaintiff is seeking reconsideration based upon excusable neglect.[13]

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."[14] However, "carelessness by a litigant does not afford a basis for relief under Rule 60(b)(1)."[15] Rule 60(b)(1) provides relief for mistakes that are inadvertent, excusable, and involve something more that mere carelessness.[16]

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."[17] 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 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."[18] Post-*Pioneer*, the

[13]Although the Court will only address the excusable neglect provision of Rule 60(b) in this written opinion, the Court has analyzed Plaintiffs' motion for reconsideration under all grounds in Rule 60(b) and finds no other basis for setting aside its dismissal of these cases.

[14]*Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 388 (1993) (quotations omitted).

[15]*Calhoun*, 197 F.R.D. at 462.

[16]*Woods v. Kenan (In re Woods)*, 173 F.3d 770, 779-80 (10th Cir. 1999).

[17]*Pioneer*, 507 U.S. at 395.

[18]*Id.*

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."[19]

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.[20]

Conclusory statements alone will not suffice to establish excusable neglect.[21] Counsel for Plaintiffs is thus required to plead and prove that his actions amounted to excusable neglect.

As noted above, Plaintiffs' counsel has only claimed that "there was a failure of communication in Plaintiffs' counsel's office regarding completion of the pretrial order," and that "the docketing system missed response dates to the Court's orders and ultimately the case was dismissed." The Court finds this proffered explanation fails to rise to the level of excusable neglect. The "failure of communication" and the "missed response dates" explanations are even less understandable in light of the fact that there were two separate cases, meaning counsel must have missed docketing deadlines at least 6 times—three times for each case, not counting the original Scheduling Order.

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[19]*City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994).

[20]*Farmers Ins. Group v. District Court of Second Judicial Dist.*, 507 P.2d 865, 867, 181 Colo. 85, 89 (1973) (citations omitted).

[21]See *Barta v. Long*, 670 F.2d 907, 909-10 (10th Cir. 1982).

Further, plaintiffs do not raise any of the other factors justifying their failures, such as danger to the opposing party or its impact on judicial proceedings if orders are set aside, and therefore the Court cannot find these factors exist to justify relief, either. Plaintiffs' counsel was given more than ample opportunity to comply with the Court's orders to submit pretrial orders in these cases. After originally failing to submit the appropriate orders by the date of the final pretrial conference, the Court personally informed Plaintiffs' counsel that he had one additional week to submit the pretrial orders. More importantly, he indicated this was adequate time, and never sought additional time.

After this deadline passed, and at this Court's request, the clerk's office sent notices to Plaintiffs' counsel informing him that the orders were past due, and specifically warned him that the cases could be dismissed if the orders were not submitted in the next fifteen days. This deadline passed, as well, yet the Court still did not dismiss the cases. Instead, the Court gratuitously gave Plaintiffs' counsel one additional opportunity to submit the pretrial orders by issuing an order conditionally dismissing the cases, but giving Plaintiffs' counsel ten (10) more days to file the pretrial orders. Once again, Plaintiffs' counsel failed to comply with the Courts' order and the cases were finally dismissed on November 22, 2005 – two months after the pretrial orders were initially due.

Again, the Court notes that this is not a case where only one, or even two, deadlines were missed by a party. Plaintiffs' counsel was given three separate deadlines to submit the corrected pretrial orders (in addition to the order to do so contained in this Court's original Scheduling Orders) in these two separate cases. In addition, the Court informed Plaintiffs' counsel on three separate occasions of the deadlines – including a direct, in person communication by the Court to Plaintiffs'

counsel on September 29, 2005, the written Notice of Order Due on October 17, 2005 and the Conditional Order of Dismissal for Lack of Prosecution on November 9, 2005.

Fault in filing the pretrial orders in these cases falls squarely on the failures of Plaintiffs' counsel, which he essentially admits in the motions for reconsideration. Unfortunately, clients must be held accountable for the acts and omissions of their attorneys.[22] The Supreme Court has found no merit to the contention that dismissal because of counsel's unexcused conduct imposes an unjust penalty on the client.[23]

The Court can only attribute Plaintiffs' failure to comply with any of the orders and notices to something in excess of excusable neglect; nothing in Plaintiffs' motions suggests anything even approaching personal tragedy, illness, family death or anything similar in severity or unpredictability. The Court cannot, given the number of chances Plaintiffs had to comply with the Court's orders, find that the failure to submit the pretrial orders in these cases amounted to excusable neglect. Although no definitive line can be easily drawn to determine what constitutes excusable neglect and what does not, the Court finds Plaintiffs' actions in these cases clearly fall well beyond the boundary of what could reasonably be considered excusable neglect. For these reasons, the Court finds no basis to reconsider its Orders of Dismissal entered on November 22, 2005.

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[22]See *Pioneer*, 507 U.S. at 396; *see also Canaan v Bartee*, 272 Kan. 720, 737 (2001) (citing *Damiani v. Rhode Island Hosp.*, 704 F.2d 12, 16 (1st 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.")).

[23]See *Pioneer*, 507 U.S. at 396.

Attorney Fees

The Court now turns its attention to Debtors' Motions for Attorney Fees,[24] filed pursuant to 11 U.S.C. § 523(d). Debtors' counsel failed to simultaneously provide an itemized statement of time to justify these requests, and Plaintiffs have not responded to either motion. This Court will thus establish the following deadlines. Debtors' counsel shall provide Plaintiffs' counsel an itemized fee statement for each case (or if the time was billed jointly, one statement for both cases), by **December 31, 2005.** The parties shall then have fourteen (14) days to attempt to negotiate an appropriate attorney fee award, unless Plaintiffs' counsel has some legal justification (other than excusable neglect) why Debtors' attorney is not entitled to such a fee award. If the parties agree on an amount of the award, they shall file a joint stipulation in each case setting forth the amount of the award by **January 14, 2006.** If the parties cannot agree on an award, Debtors' counsel shall forthwith file the fee itemization with the Court, and Plaintiffs shall then have until **January 24, 2006**, to file any written opposition to Debtors' motion for attorney fees. Debtors will then have ten days to file any reply, at which time the Court shall take the attorney fee issue under advisement.

IT IS, THEREFORE, BY THE COURT ORDERED that Plaintiffs' Motions to Set Aside Dismissal are denied. It is further ordered that Debtors' counsel and Plaintiffs' counsel shall attempt to file a joint stipulation regarding the requested attorney fees, by January 14, 2006. If they are unable to resolve the matter, counsel shall follow the deadlines set forth, above, at which time the matter shall be taken under advisement.

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[24]Doc. 19 in Adv. No. 05-7018, seeks $1,525 and Doc. 22 in Adv. No. 05-7019 seeks an additional $1,525.