

AUG - 7 2007

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF GEORGIA
 ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
AARONIA SIMS,)	CASE NO. 07-65562-MHM
)	
Debtor.)	

)	
ROYAL INSURANCE COMPANY)	
OF AMERICA,)	
)	
Movant,)	
v.)	CONTESTED MATTER
)	
AARONIA SIMS,)	
)	
Respondent.)	

ORDER DENYING MOTION FOR RECONSIDERATION

Debtor filed a motion to avoid the judicial lien of Royal Insurance Company of America ("Royal"). Debtor's motion to avoid lien (the "Motion") was accompanied by a Notice of Requirement of Response (the "Notice"), which was incorrectly dated May 12, 2007. The filing date, however, which appears clearly on the Motion and the Notice that Royal received was April 12, 2007. The Notice sets forth that any response must be filed within 20 days of the date of service. The certificate of service that accompanied the Motion and the Notice was dated April 12, 2007. No response was timely filed and an order granting the Motion was entered May 8, 2007.

On May 9, 2007, Royal filed a motion for reconsideration. As grounds for Royal's request to set aside the order entered May 8, 2007, Royal points to the erroneous date on

the Notice and also asserts that the documents served upon Royal did not contain the certificate of service. Therefore, Royal contends the failure to timely file a response to the Motion was due to excusable neglect. Royal, however, fails to describe or summarize the factual or legal basis of its defense to Debtor's motion to avoid lien.

No provision in the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") nor the Bankruptcy Local Rules specifically provides for reconsideration of orders entered by the court. Royal's motion for reconsideration is filed pursuant to Bankruptcy Rule 9024, which incorporates FRCP 60(b). A movant may obtain relief from a judgment or order for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under [Bankruptcy] Rule [9023];
- (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. Proc. 60(b), incorporated Bankruptcy Rule 9024.

"Excusable neglect" is a concept used in more than one of the provisions of the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure. The concept of excusable neglect is not, however, defined in either body of rules. Prior to

March, 1993, Eleventh Circuit precedent established that a party may claim excusable neglect only if its "failure to timely perform a duty was due to circumstances which were beyond [its] reasonable control." *In re South Atlanta Financial Corp.*, 767 F.2d 814, 817 (11th Cir. 1986).

The Supreme Court, however, addressed the concept in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 113 S. Ct. 1489 (1993), and rejected the stringent standard of the Eleventh Circuit. The Supreme Court recognized that a broad range of explanations may be given for a party's failure to act, extending from forces beyond the party's control--such as acts of God and unforeseeable human intervention--to the party's choice to "flout" a deadline. In between those two extremes lie cases in which a party may choose to miss a deadline, "although for a very good reason, such as to render first aid to an accident victim discovered on the way to the courthouse," and cases in which the party misses a deadline due to inadvertence, mistake or neglect. *Id.* at 1494.

In its decision concerning the point in this range of explanations where excusable neglect falls, the Court held that "neglect" should be accorded its ordinary meaning which encompasses "both simple, faultless omissions to act and, more commonly, omissions caused by carelessness." *Id.* at 1494-95. The Court then explained that in determining whether a party's neglect is excusable, a court must take into account "all relevant circumstances surrounding the party's omission." *Id.* at 1498. The factors to be considered include the danger of prejudice to the opposing party, 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.

Id.

In the instant case, although the date on the Notice was erroneous, the filing date of the Motion and the Notice was clearly displayed on the top of each page of the documents served upon Royal. Even if the certificate of service had not been attached,¹ the filing date should have been sufficient to prompt Royal to further inquiry regarding the deadline for its response. Its failure to do so does not constitute excusable neglect.

Additionally, even if Royal were able to show excusable neglect, Royal must also show it had a meritorious defense to the Motion. *Florida Physician's Insurance Co., Inc. v. Ehlers*, 8 F. 3d 780 (11th Cir. 1993). This Royal failed to do. Vacating the order granting the Motion would be a futile act if Royal has no meritorious defense to Debtor's Motion.

Accordingly, it is hereby

ORDERED that Royal's motion for reconsideration is *denied*.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor, Debtor's attorney, and the Chapter 13 Trustee.

IT IS SO ORDERED, this the 6th day of August, 2007.



MARGARET M. MURPHY
UNITED STATES BANKRUPTCY JUDGE

¹ The correctly-dated certificate of service is attached to the filed motion to avoid lien.