



IT IS ORDERED as set forth below:

Date: September 03, 2009

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

IN THE MATTER OF:	:	CASE NUMBER: 09-40795-PWB
	:	
BRETT TERENCE BAILEY	:	
and ANDREA DENESE BAILEY,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Debtors.	:	BANKRUPTCY CODE

**ORDER DENYING MOTION TO VACATE ORDER OF DISMISSAL
AND REOPEN CASE**

This Chapter 13 case was dismissed on May 21, 2009. According to the Chapter 13 Trustee's objections to confirmation, the Debtors failed to attend a meeting of creditors and failed to fund their plan. Since the Courtroom Deputy Clerk's calendar notes reflect that the objections to confirmation filed by the Trustee were not contested by the Debtors, the Court will presume that this was the basis for denial of confirmation and dismissal of the case.

One month later, the Debtors filed a "Motion to Vacate Order of Dismissal and Reopen Case." [Doc. 18]. No factual basis is asserted for reopening this case other than the vague

statement that “The interests of justice and the facilitation of the Debtor’s [sic] debt reorganization would best be served by the continuation of the present Chapter 13 proceeding.” (Doc. 18, ¶ 6). When the motion came on for hearing on July 15, 2009, the Debtors’ attorney and the Chapter 13 Trustee announced that a consent order would be presented whereby the case would be reopened and the Debtors’ attorney would send notice of new dates for a meeting of creditors and confirmation hearing within 10 days of the entry of the order reopening the case. Because the parties announced a consent order, the Court did not hear the merits of the motion.

Seven weeks after the hearing, no order has been presented. Thus, this case – filed six months ago and in which a meeting of creditors has not been held – remains dismissed. Notwithstanding the announcement at the hearing, the failure to present in a timely manner an order on this motion leads the Court to conclude that the Debtors have abandoned their request to reopen this case.¹ Accordingly the Court will deny the motion for want of prosecution.

The Court makes a further observation. The Debtors have sought relief from the dismissal order under Rule 60(b) of the Federal Rules of Civil Procedure, made applicable by Rule 9024 of the Federal Rules of Bankruptcy Procedure.² Rule 60(b) provides:

¹See BLR 9013-2 (A proposed order shall “be submitted to the Bankruptcy Judge within seven days from the date of pronouncement or scheduled hearing, if applicable.”).

²The Debtors have properly invoked Rule 9024. The Court observes that motions such as this are often styled “Motion to Reopen Case” in reliance on 11 U.S.C. § 350(b). Section 350(b) is only relevant to the extent it is read in conjunction with § 350(a). Section 350(a) provides that the court shall close a case “[a]fter an estate is fully administered and the court has discharged the trustee.” Section 350(b) in turn provides that “[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.” Thus, § 350 contemplates that “reopening” is available for “fully administered” and closed cases. An unconfirmed and unadministered chapter 13 case that is dismissed may not be reopened under § 350(b). See *In re Singleton*, 358 B.R. 253, 257 (D.S.C. 2006) (bankruptcy court erred when, pursuant to § 350(b), it “reopened” chapter 13 case previously dismissed for failure to file plan and

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

The Court concludes that there is no basis for vacating the dismissal and reopening this case. The Debtors have asserted no factual basis in their motion to warrant relief from the dismissal order under Rule 60(b). Failure to prosecute a case - without the allegation of further facts - does not fall within any of the categories of Rule 60(b). Moreover, the delay in filing the motion - four weeks after the dismissal of the case - weighs against relief. In the time between the dismissal of the case and the filing of the motion, creditors may have taken steps to exercise their nonbankruptcy rights on the (rightful) assumption that a case is dismissed. Further, to the extent deadlines for filing proofs of claim or objecting to dischargeability of debts have lapsed while the case stands dismissed, such deadlines must be extended, leading to potential confusion for

schedules); *In re King*, 214 B.R. 334, 335 (Bankr. W.D. Tenn. 1997) (“case which is dismissed is not one which is fully administered and, thus, may not be reopened under § 350(b)”). The proper procedural avenue for vacating a dismissal order is Rule 9023 or Rule 9024 of the Federal Rules of Bankruptcy Procedure as discussed herein.

creditors.³ Rule 60(b) is not an opportunity for a debtor to “try again” when there has been no demonstrable prosecution of the case.

Even if the Debtors had filed a motion for reconsideration within 10 days of the dismissal of the case, the result would not likely be different. Rule 9023 of the Federal Rules of Bankruptcy Procedure and Rule 59 of the Federal Rules of Civil Procedure govern motions to alter or amend judgments. Motions filed pursuant to these rules are "properly characterized as motions for reconsideration and are within the discretion of the trial court to grant or deny." *In re Oak Brook Apartments of Henrico County, Ltd.*, 126 B.R. 535, 536 (Bankr. S.D.Ohio 1991). BLR 9023-1 provides that a motion to reconsider must be filed within ten days of the entry of an order or judgment. A motion for reconsideration serves a “limited function-to correct manifest errors of law or fact or to present newly discovered evidence.” *In re Ionosphere Clubs, Inc.*, 103 B.R. 501, 503 (Bankr. S.D.N.Y. 1989).

Reconsideration of a dismissal may be warranted, for example, if a chapter 13 case was dismissed in error at a confirmation hearing because of a miscommunication between the chapter 13 trustee and the debtor’s attorney or if there is the mistaken belief that the debtor’s plan was not funded when in fact the employer had not timely remitted the deducted chapter 13 plan payments. In both cases, if a motion is filed within ten days, a motion to reconsider is appropriate because the debtor is requesting the court reconsider the facts or law underlying the dismissal of the case. Here, because the Debtors failed to assert that the dismissal order was based upon an error of fact or law

³In this case, the deadline for filing a complaint to determine dischargeability of certain debts expired on June 12, 2009, and the deadline for non-governmental creditors to file a proof of claim expired on July 13, 2009. Thus, both deadlines passed after the dismissal of the case, but before the hearing on the Debtors’ motion.

that would warrant reconsideration, the Court could not properly grant their motion under Rule 9023 even if it had been timely filed under that Rule.

Based on the Debtors' failure to submit an order on their motion, the Court concludes that the Debtors have abandoned their request to vacate the dismissal and reopen this case. Notwithstanding the failure to present an order, the Court concludes that there is no legal basis for vacating the dismissal since the Debtors have offered no factual basis for relief under Bankruptcy Rule 9023 or Rule 60(b), made applicable by Bankruptcy Rule 9024. Accordingly, it is

ORDERED that the Debtors' motion to vacate the Order of dismissal and reopen this case is denied.

End of Order

Distribution List

Timothy Howell Paschall
Law Office of Matthew T. Berry
Suite 400
2751 Buford Highway
Atlanta, GA 30324

Brett Terence Bailey
321 Paces Lake Ridge
Dallas, GA 30157

Andrea Denese Bailey
321 Paces Lake Ridge
Dallas, GA 30157

Mary Ida Townson
Chapter 13 Trustee
Suite 2700 Equitable Bldg.
100 Peachtree Street, NW
Atlanta, GA 30303