

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

IN RE:	:	CASE NO. G11-24956-REB
	:	
RAFAEL RIVERA,	:	
	:	
Debtor.	:	
	:	
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RAFAEL RIVERA,	:	ADVERSARY PROCEEDING
	:	NO. 13-2092
	:	
Plaintiff,	:	
	:	
v.	:	
	:	CHAPTER 13
HSBC BANK USA, N.A., as Trustee for	:	
Certificate Holders of the ACE SECURITIES	:	
CORP HOME EQUITY LOAN TRUST,	:	
SERIES 2006-NC2, Asset Backed Pass Through	:	
Certificates,	:	
	:	
Defendant.	:	JUDGE BRIZENDINE
	:	

**ORDER DENYING PLAINTIFF'S MOTION
TO AMEND ORDER DISMISSING COMPLAINT
AND DENYING MOTION TO REOPEN ADVERSARY CASE**

Before the Court are the following motions. In the first motion, filed on November 4, 2013, Plaintiff-Debtor Rafael Rivera seeks relief from this Court's Order entered herein on September 24, 2013, in which the Court granted the motion of Defendant named above, HSBC Bank USA, N.A., as Trustee for the Certificate Holders of the Ace Securities Corp. Home Equity Loan Trust, Series 2006-NC2, Asset Backed Pass Through Certificates, and dismissed this adversary proceeding. Debtor requests the Court to amend its Order to provide that the dismissal is without prejudice. In the second motion, also filed on November 4, 2013, Debtor seeks to reopen this adversary proceeding so that his motion to

amend may be considered. Defendant filed separate responses to each motion on November 15 and November 18, 2013, respectively. Upon review of Debtor's motions and the responses thereto, the Court concludes that Debtor has failed to establish sufficient grounds for granting the relief requested. Specifically, the Court concludes that Debtor has not shown that this adversary proceeding should be reopened, one month since its dismissal, to allow the filing of an amended complaint arising from the same basic alleged factual narrative as the first complaint, recast to assert various theories of recovery against Defendant, evidently structured to counter Defendant's objections to his initial complaint.

Debtor, while acting *pro se*, commenced this adversary proceeding through the filing of a complaint on April 16, 2013. In response to Defendant's well-argued and heavily-cited motion to dismiss the complaint on grounds that it did not state viable claims for relief under either federal bankruptcy law and procedure, or under Georgia state law, Debtor, who subsequently retained counsel, represented on June 18, 2013 that he would be filing an amended complaint, which he did not do. In view of same, after a period exceeding ninety days, the Court entered an Order on September 24, 2013, granting Defendant's motion and dismissing this adversary proceeding with prejudice.¹

As argued by Defendant, in the current pair of motions filed by Debtor on November 4, 2013, what Debtor is actually seeking now is a second opportunity to bring its previously dismissed claims for relief against Defendant. In turn, Debtor's counsel contends that while an amended complaint was being revised, he mistakenly assumed that the Court would schedule a hearing on the motion to dismiss before granting same with prejudice. Notice of the scheduling of such a hearing, counsel maintains, would have

¹ The Court also granted a similar motion in related Adversary Proceeding No. 13-2091 styled *Rivera v. Bank of America, N.A.* In that proceeding, Debtor has also filed a motion to amend order of dismissal and to reopen that adversary proceeding as well, to which this particular defendant has likewise responded. Those motions are addressed by separate order as entered in that proceeding.

triggered the filing and delivery of the complaint as amended, which has been “totally re-written...to comport with the law....” Plaintiff’s Motion to Amend, ¶ 10 (Docket Entry No. 12).

As provided under Rule 60(b)(6) of the Federal Rules of Civil Procedure, which is incorporated herein under Rule 9024 of the Federal Rules of Bankruptcy Procedure, “the court may relieve a party...from a final judgment [or] order” for reasons including “mistake, inadvertence, surprise, or excusable neglect,” as well as “any other reason that justifies relief.” Motions under Rule 60(b) are directed to the sound discretion of the court, and guidance for determining excusable neglect is offered in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P’ship*, 507 U.S. 380, 383, 113 S.Ct. 1489, 23 L.Ed.2d 74 (1993); see also *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 849-50 (11th Cir. 1996). In *Pioneer*, the U.S. Supreme Court stated that this determination “is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” 507 U.S. at 394, 113 S.Ct. at 1497. The equitable framework set forth in *Pioneer* requires the court to weigh such factors as the danger of prejudice to the party opposing the request for relief, the length of the delay produced by the litigant and its effect on the proceedings, the reason for the delay in issue and whether same was within the litigant’s reasonable control, and the good faith of the litigant. *Id.* at 395, 113 S.Ct. at 1498; *Cheney*, 71 F.3d at 850.

Debtor and his counsel appear to have been negligent in this matter and the Court must decide whether same is excusable considering all of the circumstances surrounding Debtor’s failure to file a timely, amended complaint or other further response to the motion to dismiss.² Debtor’s counsel avers

² Clients are accountable for the acts and omissions of their lawyer, and in terms of examining the reason for the delay and whether same was in the litigant’s control, such inquiry must center on whether the neglect of both the client and his attorney is excusable. *Pioneer*, 507 U.S. at 396-97, 113 S.Ct. at 1499. In addition, while innocent oversight or miscommunication or clerical error may support a finding of excusable neglect, the failure to comprehend a rule may not. See

that based upon his experience, his expectation of a hearing was reasonable. Counsel does not state, however, that the Court at any time misled him into believing that a ruling would not be forthcoming upon a pending motion, to which Debtor had responded and made certain representations, in the absence of a hearing. Instead, three months were allowed to elapse without anything being filed, at which point the Court entered its Order based on his apparent decision not to present an amended pleading as he originally indicated.

Contrary to his implied insistence, it is not the Court but counsel and finally the Debtor who bear responsibility for filing and prosecuting any claims they believe warrant relief in a timely manner. As concluded in *Briones v. Riveria Hotel & Casino*, 116 F.3d 379 (9th Cir. 1997), a court's lack of warning to a *pro se* litigant that the failure to respond to a motion to dismiss could lead to a dismissal does not necessarily excuse the neglect of the litigant in terms of his exercising diligence regarding, and responsibility for, the prosecution of his complaint. Debtor should have been monitoring this case more closely to ensure that his claims were submitted in proper form for review, especially in view of a pending motion to dismiss with prejudice.

The Court finds no evidence that Debtor has not acted in good faith in this matter. At some point, however, Defendant is entitled to a ruling on its motion, especially in view of the scope and

Walter v. Blue Cross & Blue Shield United of Wisconsin, 181 F.3d 1198, 1202 (11th Cir. 1999), citing *Cheney*, 71 F.3d at 850.

Further, in the Motion to Amend, counsel offers to withdraw from this proceeding so that "the same counsel [will not receive] two procedural chances when only one is warranted" (Motion, ¶ 16). Yet, counsel seems to confuse his role with that of his client, the actual party in interest, who is the one who would directly benefit from having several 'procedural chances' to assert what is, after all, his claim. In other words, if the Court allowed the suit to go forward, it is the Debtor who stands to gain more so than his lawyer, as the Defendant would still have to defend against such suit, whether or not Debtor changes lawyers.

complexity of the claims asserted against it, which would require the expenditure of time and money in the preparation of a defense.³ Once it obtained a ruling, absent some appropriate justification, and while the Court seeks to balance the desire to achieve finality with the policy favoring the hearing of claims on their merits, Defendant like any other party should be entitled to rely on some sense of repose regarding the Court's determination of the procedural status of Debtor's alleged claims on the circumstances as presented in this case.⁴ The Court also observes that the delay witnessed in this proceeding is in excess of 90 days as noted above, which is longer than the one month period seen in *Walter, supra*, 181 F.3d at 1202. In addition, unlike the non-moving party in that case, here Defendant has not conceded a lack of prejudice in allowing the matter to go forward.

Debtor further argues that he should be allowed to prosecute his claims because the issues he seeks to litigate are faced by other homeowners, and he should have a chance to be heard. Moreover, he equates such claims with a direct challenge to Defendant's proof of claim in this case, and maintains that a judgment in his favor will benefit all creditors of this estate.⁵ Based upon a review of the first amended and restated consolidated complaint, however, which is attached as an exhibit to the Motion to amend, and without commenting on the merit of his claims, this Court expresses as a supplemental point to its analysis, its initial impression that subject matter jurisdiction may not lie in this forum with respect to many of state law claims asserted by Debtor.

³ The claim asserted is large in scope, including damages amounting to \$545,000.00 according to the original adversary cover sheet, and complex in nature involving claims under New York state trust law, breach of contract, and construal of a national mortgage settlement.

⁴ The Court makes no ruling regarding whether or not these claims as reconstituted may be brought and tried in another forum.

⁵ A review of the record reveals that Debtor has not filed an objection to Defendant's claim in his main Chapter 13 case.

Even in his own reply brief, filed on December 16, 2013, Debtor either tacitly or unintentionally appears to recognize same. For example, in response to Defendant's argument that claims like those of Debtor have been rejected by Georgia courts, he states that Georgia courts have not yet considered claims of the nature presented by Debtor. Further, Debtor states that his claims "necessarily invoke New York trust laws" in regard to whether Defendant may have violated certain formational trust documents.

As a federal bankruptcy court, this court may apply and construe state law and decide issues and claims arising under state law in certain circumstances. But, although the claims asserted by Debtor may have some bearing on his bankruptcy estate, questions of jurisdiction could still arise. This observation is especially true when such claims appear to be related to a private rights dispute for damages by a debtor against a creditor arising exclusively under state law and only intended to augment the estate. For purposes of jurisdiction, such a situation could be considered distinguishable from matters stemming from federal bankruptcy law or capable of resolution in the claims allowance process in connection with the creditor's proof of claim under same.

In addition, the Court observes that Debtor's original claims for relief were alleged in connection with a determination of dischargeability of his obligation to Defendant under 11 U.S.C. § 523(a)(2), 523(a)(4), and 523(a)(6) according to the adversary cover sheet. These claims do not appear to be contained in the body of the complaint itself, which refers to provisions under Title 18 and 26 of the United States Code. Claims related to dischargeability may now be apparently intended by Debtor to relate to the allegations set forth under the causes of action regarding alleged negligent misrepresentation and fraudulent concealment in connection with an alleged attempted loan modification that led Debtor to believe it was necessary to allow his loan to go into default. The restated prayers seem mostly directed to affirmative claims for damages, however, as opposed to dischargeability determinations or

disallowance claims, though Debtor may also be seeking to challenge the validity, extent, and priority of Defendant's lien interest as stated in paragraph 1 of that document.

In any event, based upon the above discussion, the Court finds and concludes that Debtor has not established grounds for applying excusable neglect with respect to his failure to file an amended and restated complaint on a timely basis in the face of a pending motion to dismiss.

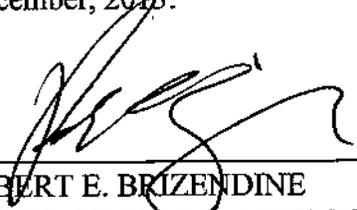
Accordingly, it is

ORDERED that the Motion of Plaintiff-Debtor To Amend Order Dismissing Complaint, as entered herein on September 24, 2013, and Motion To Reopen Adversary Proceeding be, and the same hereby are, **denied**.

The Clerk is directed to serve a copy of this Order upon counsel for Plaintiff-Debtor, counsel for Defendant HSBC Bank USA, N.A., as Trustee for the Certificate Holders of the Ace Securities Corp. Home Equity Loan Trust, Series 2006-NC2, Asset Backed Pass Through Certificates, and the Chapter 13 Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 20th day of December, 2013.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE