

Dated: December 16, 2021
The following is ORDERED:



M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
Darrel Keith Gibson
Debtor

Case No. 20-24901
Chapter 13

MEMORANDUM OPINION AND ORDER DENYING
DEBTOR'S COUNSEL'S APPLICATIONS FOR COMPENSATION

This matter is before the Court on Debtor's counsel's Applications for Compensation [DE 141, DE 142], Creditor Allergy and Asthma Care PLC's ("Allergy and Asthma"), and Creditor Medical Financial Services ("MFS") respective Objections thereto, [DE 151, DE 153] (collectively "Creditors"), and Debtor's counsel's Response to the objections of Allergy and Asthma [DE 209] and MFS [DE 212]. The Court held a hearing on November 17, 2021 and took this matter under advisement. This Court has jurisdiction to hear and determine this matter pursuant to 28 U.S.C.

§§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A). The Court finds that Debtor's counsel's Applications for Compensation are hereby denied. The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. CIV. P. 52, made applicable to this contested matter by FED. R. BANKR. P. 7052 and 9104.

FACTUAL AND PROCEDURAL BACKGROUND

On September 22, 2021, the Court issued an order sustaining Debtor's objections to Creditors' claims and disallowed those claims based on the Creditors' failure to provide supporting documentation under FED. R. BANKR. P. 3001, and granted Debtor's request for attorney's fees and costs as a sanction stemming from the noncompliance as provided for under FED. R. BANKR. P. 3001(c)(2)(D)(ii). Upon imposing the sanction, the Court ordered Debtor's counsel to file by September 30, 2021, two separate affidavits reflecting the attorney's fees and expenses incurred in connection with Debtor's objections to Creditors' claims. Debtor's counsel untimely filed the affidavits and Applications for Compensation on October 1, 2021. [DE 141, DE 142]. Creditor Allergy and Asthma filed an Objection to the Application for Compensation contending that the filing was late and untimely, and disputing the reasonableness of the requested fees. [DE 151]. Likewise, Creditor MFS filed an Objection to the Application for Compensation due to Debtor's counsel's failure to comply with the September 30, 2021 Court-ordered deadline. [DE 153]. Debtor's counsel replied to the Creditors' objections explaining that he was unable to secure a notary for the affidavits within the specified time frame and that failure to timely file constituted excusable neglect under FED. R. BANKR. P. 9006(b)(1). [DE 209, DE 212].

LAW AND ANALYSIS

Upon consideration of the facts and circumstances in this case, the Court concludes that Debtor's counsel has not demonstrated excusable neglect. Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure governs the extension of a court-ordered deadline and provides:

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 thereof is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

FED. R. BANKR. P. 9006(b)(1). A determination of excusable neglect "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission," including "the danger of prejudice to the [non-moving 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." *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

In *Pioneer*, the Supreme Court opined that requiring a showing of excusable neglect operates to "deter creditors or other parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve under Rule 9006(b)(1)." *Id.* The Supreme Court also noted that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable neglect.'" *Id.* at 392. The Sixth Circuit considers this standard difficult to satisfy. *Cnty. Fin. Servs. Bank v. Edwards (In re Edwards)*, 748 F. App'x 695, 698 (6th Cir. 2019) (collecting cases). Situations involving "clerical and office problems" seldom constitute excusable neglect. *Allied Domecq Retailing USA v. Schultz (In re Schultz)*, 254 B.R. 149, 153 -54 (B.A.P. 6th Cir. 2000) (quoting *Schmidt v. Boggs (In re Boggs)*, 246 B.R. 265, 268 (B.A.P. 6th

Cir. 2000) (citing *Pioneer*, 507 U.S. at 398; see also *In re Hess*, 209 B.R. 79, 83 (B.A.P. 6th Cir. 1997) (concluding “it is no excuse that a lawyer’s practice interferes with compliance with limitations and deadlines”); *In re Mizisin*, 165 B.R. 834, 835 (Bankr. N.D. Ohio 1994) (“[m]isunderstanding of the Bankruptcy Code and Rules and heavy workload of counsel do not constitute excusable neglect.”).

The Court’s September 22, 2021 Order directed Debtor’s counsel to file the fee affidavits by September 30, 2021. Debtor’s counsel untimely filed the affidavits and Applications for Compensation on October 1, 2021. At the hearing and in his reply to the Creditors’ objections to the applications, Debtor’s counsel requested that the Court nevertheless consider the untimely affidavits and applications based on excusable neglect.

Creditors both essentially assert the same argument of an untimely filing. Creditor MFS asserted that because Debtor’s counsel untimely filed the affidavit, it is a nullity – essentially nonexistent - and therefore it is not properly before the Court. Further, MFS argued that Debtor’s counsel did not meet the requirements for excusable neglect under FED. R. BANKR. P. 9006(b)(1). Similarly, Creditor Allergy and Asthma asserted that the applications were untimely. It is undisputed that Debtor’s attorney did not file for an extension of time and therefore the application for compensation may only be granted upon a showing of excusable neglect. The Court will now consider each *Pioneer* factor in turn demonstrating the reasons why, on balance, Debtor’s counsel’s request to consider the late filing on the grounds of excusable neglect falls short.

A. Risk of Prejudice

The Court first considers the risk of prejudice to the Creditors. Debtor agrees that the Creditors were prejudiced by the late one-day filing and asserts that “the degree to which they were prejudiced was as minimal as could be with Debtor’s counsel taking prompt steps to file their late

application less than a day after the filing deadline.” [DE 209 ¶ 12, DE 212 ¶ 12]. The Court disagrees. The analysis should not only consider how the one-day filing will prejudice Creditors alone; it is also the result of permitting Debtor’s counsel a late filing. While not explicit, Debtor’s counsel requests that the Court excuse his error but nevertheless sanction the Creditors for their failure to file supporting documentation in compliance with FED. R. BANKR. P. 3001, in addition to disallowing their claims. The Court is faced with the treatment of attorney errors: failure to comply with an order and failure to comply with bankruptcy procedural rules. Excusing the error and awarding the sanctions, when the Debtor’s counsel failed to comply with an order that was contingent upon directed compliance, would unfairly prejudice the Creditors. This factor weighs against Debtor’s counsel.

B. Reason for the Delay

Debtor’s counsel’s explanation for missing the deadline was that he “failed to make advanced arrangements for the necessary signing and notarizing parties to meet in person prior to September 30, 2021.” [DE 209 ¶ 9, DE 212 ¶ 9]. “Run-of-the-mill inattentiveness by counsel” does not qualify as excusable neglect. *Nathan v. Cavendish (In re Cavendish)*, 608 B.R. 802, 805 (Bankr. E.D. Mich. 2019) (quoting *Symbionics, Inc. v. Ortlieb*, 432 Fed. App’x. 216, 220 (4th Cir. 2011)). “The ‘error in Defendant’s counsel’s scheduling and calendaring process’ alleged in the Motion is not a valid excuse for defense counsel’s failure to be conscious of, and attend, the . . . final pretrial conference.” *In re Cavendish*, 608 B.R. at 805. Although filed a day late, Debtor’s counsel’s explanation cannot form the basis for excusable neglect. *In re Boggs*, 246 B.R. at 268. The Supreme Court gave “little weight to the fact that counsel was experiencing upheaval in his law practice.” *Pioneer*, 507 U.S. at 398. It is difficult to see here how difficulty in and failing to secure a notary by the known deadline satisfies the standard of excusable neglect. Taking the

proper steps to ensure that the affidavits were notarized in advance of the Court-ordered deadline was “within the reasonable control of the movant.” *Id.* at 395. This factor weighs also against Debtor’s counsel.

C. Length of Delay

Debtor’s counsel urges the Court to focus on the short one-day delay in filing of the affidavits on October 1, 2021 and that the delay, which did not exceed a calendar day, did not disrupt judicial proceedings. However, he took no action to call to the Court’s attention the untimeliness of the filings. At the hearing, Creditor MFS asserted that Debtor’s counsel filed the late affidavits hoping no one would notice and further pointed out that Debtor’s counsel asserted the FED. R. BANKR. P. 9006(b)(1) argument only after Creditors’ objections to the untimely filings of the affidavits. The Court notes that accepting counsel’s urgency to focus on the one-day delay in Debtor’s counsel favor would go against the aim of deterring late filings as explained in *Pioneer*. 507 U.S. at 395. Comporting with that aim, the Court believes it should insist upon compliance with Court-imposed filing deadlines. Late is, simply, late. Heavily relying on a “mere” one-day delay as Debtor’s counsel urges is a precedent this Court is unwilling to set, especially when considering excusable neglect and the high bar it demands. Upon this reasoning, the Court weighs this factor against Debtor’s counsel.

Debtor’s counsel also contrasts the facts of this case with that of the facts in *Pioneer*, highlighting that the Supreme Court considered filing a “late claim that came 20 days past the bar date and three months and twenty-two days past the notice date” to constitute excusable neglect, and that failing to arrange for a notary one day past the filing deadline likewise establishes excusable neglect. [DE 209 ¶ 15, DE 212 ¶ 15]. The facts are not the same. The *Pioneer* Court considered the fact that the ““peculiar and inconspicuous placement of the bar date in a notice

regarding a creditors['] meeting,' without any indication of the significance of the bar date, left a 'dramatic ambiguity' in the notification." *Pioneer*, 507 U.S. at 398 (citation omitted). For that reason, the Court concluded that "the unusual form of notice employed" required a finding of excusable neglect. *Id.* at 399. The language instructing Debtor's counsel to file the supporting affidavits for attorney's fees by September 30, 2021 was not inconspicuous and the Court's direction was clear.

D. Good Faith

Debtor's counsel contends that his actions to rectify the delayed filing were in good faith. After Creditors objected to the untimely filing, in earnest, Debtor's counsel asserted the grounds of excusable neglect urging the Court to exercise its discretion to consider the untimely one-day-late-filing, which he wholly admitted. The Court acknowledges this effort and finds no reason to find that Debtor's counsel did not act in good faith.

CONCLUSION

Based on the foregoing, the Court finds that Debtor's counsel did not timely file the supporting affidavits by the September 30, 2021 deadline, and the facts and circumstances surrounding that failure do not amount to excusable neglect. Therefore the Court must find that Debtor's counsel's Applications for Compensation [DE 141, DE 142] are hereby **DENIED** and the Creditors' objections are [DE 151, DE 153] are **SUSTAINED**. The Bankruptcy Court Clerk shall serve a copy of this Memorandum Opinion and Order to the parties listed below.

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