IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA

In the Matter of	:	
JEFFREY L. LUCAS, HOLLY A. LUCAS,	:	Case No. 94-02449-C J
Debtors.	:	Chapter 7
FIRST COMMUNITY NATIONAL BANK,	:	Adv. Pro. No. 94-94142
Plaintiff,	:	
v.	:	
JEFFREY L. LUCAS, HOLLY A. LUCAS,	:	
Defendants.	:	

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MEMORANDUM OF DECISION AND ORDER

On April 4, 1996 the court conducted an evidentiary hearing on defendants' motion to set aside default judgment and plaintiff's objection to the motion. Arnold O. Kenyon, III appeared on behalf of the plaintiff. Michael L. Jankins appeared on behalf of the defendants. The matter was considered fully submitted at the conclusion of the hearing.

BACKGROUND

On December 12, 1994 First Community National Bank (Bank), then represented by Richard O. McConville, commenced this adversary proceeding against the Chapter 7 debtors, Jeffrey L. Lucas and Holly A. Lucas (debtors). The Bank objected to the entry of a general discharge of debt under 11 U.S.C. section 727 and sought a determination that the debt owed it by the debtors was

nondischargeable under 11 U.S.C. section 523.[1]

The summons, file-stamped December 14, 1994, and a copy of the complaint were served by mail upon the debtors, the U.S. Trustee and the chapter trustee on December 16, 1994. In addition to giving notice of the pretrial conference on March 2, 1995, the summons provided the following information:

> YOU ARE SUMMONED and required to submit a motion or answer to the complaint which is attached to this summons to the clerk of the bankruptcy court within 30 days after the date of issuance of this summons,
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> . . . .
>
> **IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.**

(Emphasis in the original.)

According to proofs of service filed with the court on December 30, 1994, both debtors were personally served the complaint and proof of claim on December 20, 1994.[2]

On December 28, 1994 the Bank filed its first amendment to the complaint, both adding a factual paragraph and also deleting the

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[1] The cause of action typed on the adversary proceeding cover sheet is "Action to Question dischargability [sic] of a [sic] Debts on Notes and Mortgages 11 U.S.C. §523" and the corresponding box contains a typed "X". The cover sheet also bears a handprinted "X" before the section 727 box, a handwritten notation "Per atty 12-13-94" and the initials of the individual processing the case in the clerk's office.

[2] The copy of the cover sheet attached to the proofs of service does not contain the handwritten notations on the original.

prayer and replacing it with one that omitted words referring to denial of the discharge but included a reference to section 727. In addition to the aforementioned parties, the amendment was served by mail on December 27, 1994 on John Meyer who was representing the debtors in the Chapter 7 case.

The debtors did not respond to the amended complaint by January 13, 1995, as required by Federal Rules of Bankruptcy Procedure 7012(a) and 7015. They did not apply for an extension of time within the 30-day time period as permitted by Federal Rule of Bankruptcy Procedure 9006(b)(1).

No stipulated scheduling order was submitted prior to the pretrial conference date of March 2, 1995. No party and no attorney appeared at the time and place designated for the conference. Accordingly, the court docketed the following order on March 3, 1995:

> Based on today's hearing, it is hereby ORDERED that: this adversary proceeding shall be dismissed on March 17, 1995 without further notice and hearing for lack of prosecution **UNLESS** plaintiff's counsel submits by March 14, 1995 **both** the completed stipulated scheduling order **and** a statement explaining counsel's failure either to submit the order timely or to appear at the time scheduled for the pretrial conference.

(Emphasis in the original.) The order was served on the debtors, the Bank's counsel, the U.S. Trustee and the chapter trustee.

The Bank did not comply with the March 3, 1995 order. Instead on March 23, 1995 the Bank submitted a motion for default judgment.

On March 27, 1995 the adversary proceeding was dismissed and closed by operation of the court's March 3 order. On March 28,

1995 the court entered an order returning the motion for default, noting the proceeding had been closed. That order was served only on the Bank's attorney.

On April 7, 1995 either the debtors or their attorney submitted a resistance to the motion for default judgment. On April 12, 1995, the court entered an order returning that document, noting the proceeding had been closed. The clerk's certificate of service does not indicate who received that return order.

On April 21, 1995 the court entered an order returning a motion for reconsideration and motion for default judgment presented on April 19, 1995. Though the designation of the document would suggest the Bank had presented the motion, the clerk's certificate of service indicates the order was served only on the debtors' attorney.

On May 9, 1995 the Bank filed a "motion to set aside dismissal and discharge as to this defendant and reinstate adversarial proceeding". Among other things, the motion pointed out the clerk's office had been using the wrong address for Bank's counsel. That error resulted in his not knowing about the March 3, 1995 order in time to respond accordingly. The motion, bar date, amended bar date and memorandum brief in support of the motion were served on debtors' attorney, the U.S. Trustee and the chapter trustee, not on the debtors.

On May 12, 1995 debtors' attorney filed a motion to withdraw as counsel. He alleged the debtors had not provided requested information to him to assist in their defense. He requested

permission to withdraw from the proceeding and time for the debtors to obtain new counsel. The motion and bar date were served on the debtors, Bank's counsel, the U.S. Trustee and the chapter trustee.

On May 16, 1995 debtors' attorney filed a timely resistance to the Bank's May 9, 1995 motion and served the debtors, the Bank's attorney and the U.S. Trustee and the chapter trustee. Among other allegations, debtors' attorney stated the debtors had encountered problems obtaining certain documents from the Bank. He asked that the Bank's motion be denied or that the debtors be given sufficient time to secure the services of another attorney.

On June 1, 1995 the Bank filed a response in which it asked, among other things, that its motion be heard prior to debtors' attorney withdrawing from the proceeding. The response was served on the debtors, their attorney, the U.S. Trustee and the chapter trustee.

On June 16, 1995 the court conducted a telephonic hearing on the May 9, 1995 motion. Mr. McConville and Mr. Meyer appeared for their respective clients. Satisfied that the dismissal of the proceeding was caused by the clerk's office sending the March 3, 1995 order to the former address of Bank's counsel, the court granted the motion. A minute order to that effect was entered on June 19, 1995. The order was served on the debtors, their attorney, the Bank's attorney and the U.S. Trustee.

During the telephonic hearing, the court instructed the Bank's counsel to utilize the bar date notice procedure if it wished to pursue another motion for default. That was done to afford some

extra response time to the debtors given Mr. Meyer's impending withdrawal from the proceeding.

Unfortunately, when the Bank did submit the motion, bar date and brief in support of the motion on June 19, 1995, the clerk's office filed the motion and brief but returned the bar date notice.[3] The Bank's counsel, however, had served all three items on the debtors, their attorney and the trustees. The clerk's certificate of service does not indicate who received the return order regarding the bar date notice.

On June 22, 1995 the undersigned noticed the June 21, 1995 order during a review of pending matters. She thereupon entered an order vacating the previous day's order and directing the bar date be filed as of the date it was submitted. The clerk's office served the June 22, 1995 order on the Bank's counsel.

Meanwhile, since no objections were filed to Mr. Meyer's motion to withdraw as counsel for the debtors, the court entered an order granting his motion on June 20, 1995. The court struck the proposed language regarding giving the debtors a date certain to obtain new counsel. That was done in light of the bar dated motion for default. The order was served on Mr. Meyer, the debtors, the trustees and the Bank's attorney.

When the July 6, 1995 bar date on the motion for default judgment passed without any objection being filed, the court

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3 The June 21, 1995 order returning that document states "[b]ar date notice not required" and reflects the undersigned judge's signature stamp was utilized.

considered the proposed order prepared by Bank's counsel. The court added language, indicating the default encompassed denial of the general discharge in addition to the nondischargeability of the Bank's claim,[4] and struck language regarding attorney fees for the Bank's counsel.[5] The edited order was filed July 12, 1995 and served on the Bank's attorney, the debtors and the trustees. A judgment denying the general discharge was entered in both the adversary proceeding and the chapter case on July 13, 1995 and served on all parties in interest.

On October 11, 1995, almost three months after the adversary proceeding was closed, Mr. Jankins filed the pending motion with a bar date notice to all parties in interest. The debtors allege Mr. Meyer's failure to file an answer to the complaint is the primary reason the default was entered against them. The debtors contend they provided Mr. Meyer the information he requested and routinely returned his phone calls. They make a blanket assertion they want to defend against the allegations in the complaint and request at least 15 days to file an answer.

On November 8, 1995 Mr. Kenyon timely filed the Bank's objection to the debtors' motion. The objection was served on Mr.

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4 Reading the complaint and the amendment together, the court concluded the allegations in the complaint referencing certain subsections of section 727 and the amended prayer's reference to section 727 could not be ignored. See generally Local Bankruptcy Rule 19(e).

5 The court did not edit the typographical error referencing nonexistent section 529, instead of section 523.

Jankins and the trustees. Basically, the Bank contends the debtors received proper service of the action and proper representation from Mr. Meyer.

DISCUSSION

Fed. R. Bankr. P. 7055 incorporates Fed. R. Civ. P. 55(c), which allows a court to set aside a default judgment in accordance with Rule 60(b), which in turn provides in pertinent part:

> 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.

While both the entry of a default judgment and the ruling on a motion to set aside a default judgment are committed to the sound discretion of a trial court, Federal Trade Comm'n v. Packers Brand Meats, Inc., 562 F.2d 9, 10 (8th Cir. 1977) (per curiam), this discretion is somewhat narrowed by the strong policy against default judgments. Marshall v. Boyd, 658 F.2d 552, 554 (8th Cir. 1981). The entry of default judgment is not favored by law, United States ex rel. Time Equip. Rental & Sales, Inc. v. Harre, 983 F.2d 128, 130 (8th Cir. 1993), and should be a rare judicial act, Comiskey v. JFTJ Corp., 989 F.2d 1007, 1009 (8th Cir. 1993). A court abuses its discretion if it enters a default judgment for a marginal failure to comply with a time requirement as opposed to willful violations of court rules, contumacious conduct or

intentional delays. Harre, 983 F.2d at 130.

Courts typically consider the following factors in determining whether a default judgment should be set aside under Fed. R. Civ. P. 55(c):

1) whether the non-defaulting party will be prejudiced;

2) whether the defendant, as the defaulting party, has a meritorious defense; and

3) whether the willful or culpable conduct of the defendant led to the default.

Coon v. Grenier, 867 F.2d 73 (1st Cir. 1989); Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981); Zawadski de Bueno v. Bueno-Castgro, 822 F.2d 416 (3rd Cir. 1987); Smith v. Commissioner, 926 F.2d 1470, 1479 (6th Cir. 1991). Cf. McGrady v. D'Andrea Electric, 434 F.2d 1000 (5th Cir. 1970) (only the first two criteria were considered); Gulf Coast Fans, Inc. v. Midwest Electronics Importers, Inc., 740 F.2d 1499 (11th Cir. 1984) (same). Neither ignorance nor carelessness on the part of the litigant or his attorney provides grounds for relief under Rule 60(b)(1). Ben Sager Chemicals Int'l v. E. Targosz & Co., 560 F.2d 805 (7th Cir. 1977). See also United States v. Thompson, 438 F.2d 254, 256 (8th Cir. 1971) (ignorance or carelessness of an attorney is generally not cognizable under Fed. R. Civ. P. 60(b)). In evaluating the three criteria set forth above, doubts are to be resolved in favor of a trial on the merits. Meehan v. Snow, 652 F.2d at 277.

With respect to the first criterion of prejudice to the Bank, the record must reveal that the delay has, for example, resulted in

the loss of evidence, created increased difficulties of discovery, or provided greater opportunity for fraud and collusion. INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391, 398 (6th Cir. 1987). Aside from the obvious ordinary toll the passage of time takes on witnesses' recollections of events, the record does not otherwise establish the Bank would be prejudiced by reinstating the proceeding at this point in time.

The second criterion requires the debtors to set forth a meritorious defense. That is, they must present more than a conclusory denial. Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 98 (2d Cir. 1993). They must suggest evidence that, if proven at trial, would constitute a complete defense. Enron Oil Corp., id.; United States v. Moradi, 673 F.2d 725, 727 (4th Cir. 1982); United Coin Meter v. Seaboard Coastline Railroad, 705 F.2d 839, 844-46 (6th Cir. 1983). The record is devoid of any clue regarding any defense, meritorious or not. In their motion to set aside the default judgment, the debtors only allege they intend to defend against the lawsuit and request at least 15 days to file an answer.

With respect to the third factor, the record must demonstrate the debtors intended to thwart the proceeding or recklessly disregarded the effect their conduct had on this proceeding. Shepard Claims Service v. William Darrah & Associates, 796 F.2d 190, 192 (6th Cir. 1986). See also Capitol Life Ins. Co. v. Schnure, 665 F.2d 237, 239 (8th Cir. 1981) (to disregard altogether standard procedural requirements and specific court directives constitutes a blatant and willful showing of disrespect and

contempt for the judicial process which the court cannot condone). The court record reveals the debtors received the complaint, the summons, the amendment to the complaint, Mr. Meyer's motion to withdraw and the order granting the motion, the bar dated motion for default judgment and the order granting that motion, and the judgment denying discharge. Mr. Lucas did not dispute receiving those documents in his testimony. Yet, the debtors did nothing to respond in court to any of those filing events until October 11, 1995, nearly three months after the default judgment was entered and the adversary proceeding was closed. Nor did they take any steps to secure new counsel after Mr. Meyer's withdrew, even though they were aware that event "puts us in serious problems to defend ourselves." (Exhibits J and K.)

Basically the debtors blame their predicament on Mr. Meyer. However, they presented no evidence in support of their assertion that they provided him with the documents and other information he requested and routinely returned his phone calls. Ironically, the exhibits they offered appear to lend more support to statements in Mr. Meyer's motion to withdraw. For example, Mr. Meyer or his assistant sent letters to the defendants on November 30 and December 19, 1994, and on January 12, March 16 and March 24, 1995, requesting information, documents or response. (Exhibits A, B, C, E and G.) In a letter sent to Mr. Meyer on March 20, 1995, the debtors stated in part: "We just wanted to drop you a note to let you know that we are well aware of everything still going on. We've hesitated to call in and check up on things due to the fact that we

figured the matter is still pending so much upon Lenox." (Exhibit F.) On March 24, 1995 Mr. Meyer responded: "I am at a loss to understand why you have not returned my calls or otherwise communicated with this office since the first part of the year until your letter dated March 20, 1995." He then adds: "It is extremely imperative that we discuss this matter [the motion for default] in person at the very earliest opportunity." (Exhibit G.) In letters to the U.S. Trustee and the chapter trustee in late May 1995, the debtors allege they "did get all the financial records, checks, and other records John Meyer asked for as quickly as our bank provided them to us," but did not indicate they actually forwarded the documents to him. (Exhibits J and K.) The debtors also alleged that they "quit calling and decided to write letters instead because each phone call was costing us .25 hours x $150.00 per hour." (Id.)

Neither the adversary file reviewed above nor the testimony and evidence submitted by the debtors support finding that Mr. Meyer did not properly represent the debtors when he was their attorney of record. Even if Mr. Meyer had committed some dereliction of duty alleged by the debtors, represented clients have a duty to "follow the progress of the case" and "regularly inquire of their lawyer or the court as to the case's current status." Inryco, Inc. v. Metropolitan Engineering Co., 708 F.2d 1225, 1234 (7th Cir. 1983), cert. denied, Metropolitan Erecting Co. v. Inryco, Inc., 464 U.S. 937, 78 L. Ed. 2d 313, 104 S. Ct. 347

(1983). Furthermore, the Supreme Court has held clients are accountable for the acts and omissions of their attorneys. Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, L.Ed.2d. 734 (1962). The Court found "no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client." Id. at 633. To the contrary, the Court stated:

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'

Id. at 633-634 (quoting Smith v. Ayer, 101 U.S. 320, 326, 25 L.Ed. 955 (1880)). See also United States v. Cirami, 535 F.2d 736, 741 (2d Cir. 1976) (even if gross negligence provides a basis for Rule 60(b)(6) relief, the record before the court failed to establish any gross negligence or misleading of the appellants by counsel and was bereft of any indication of client diligence); Inryco, Inc. v. Metropolitan Engineering Co., 708 F.2d at 1234 (noting that courts allowing relief because of a lawyer's misbehavior "uniformly require a diligent, conscientious client").

The debtors claim that they did not understand the ramifications of certain events or the meaning of a "judgment against" them is suspect, particularly given their knowledge of the pending lawsuit against them and their awareness that Mr. Meyer's withdrawal had put them "in serious problems" to defend themselves.

Language concerning the judgment appeared repeatedly and often conspicuously in the complaint, the summons, the motion for default, the court order granting the motion, and the judgment. That should have alerted any lay person with average education, like the debtors, and exercising reasonable diligence, unlike the debtors, to respond in a timely fashion. Indeed, it is an axiom in Anglo-American jurisprudence that ignorance of the law is not a defense.

The debtors also suggest their dispute with Mr. Meyer over his fees caused the delays. Courts have rejected that argument. See, e.g., In re Hardy, 187 B.R. 604 (Bankr. E.D. Tenn. 1995) (the debtor's motion to set aside default judgment denied because he had raised no meritorious defense, did receive the complaint and summons, and had ample time to respond to the complaint; the debtor's argument that he was excused from responding to the complaint because he failed to reach an agreement regarding attorney's fees was found without merit); In re Hancock, 160 B.R. 677 (Bankr. M.D. Fla. 1993) (motion to set aside default judgment denied despite showing of a meritorious defense; the defendant's argument that his failure to answer was the result of excusable neglect because he did not have the money to pay an attorney was rejected).

Finally in Jones Trucking Lines, Inc. v. Foster's Truck & Equipment Sales, Inc. (In re Jones Truck Lines, Inc.), 63 F.3d 685 (8th Cir. 1995), the Eighth Circuit Court of Appeals held the bankruptcy court abused its discretion in refusing to set aside a

default judgment for excusable neglect. The court cited Pioneer Investment Services Co. v. Brunswick Associates LP, 507 U.S. 380 (1993), in which the Supreme Court listed several factors a trial court should consider when making what is essentially an equitable determination. Those factors 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. at 395.

This case is distinguishable from Jones Truck Lines. In that adversary proceeding to recover an alleged preferential transfer, the defendant's counsel entered his appearance one month after the complaint was filed and then filed an answer one month later. The plaintiff permitted the litigation to continue without moving for default judgment until more than five months after the complaint had been filed and after having responded to the defendant's post-answer motion for summary judgment. Additionally, the parties exhibited interest in pursuing settlement while the defendant's time for filing an answer was running, and the defendant's counsel filed an answer to the complaint as soon as the default was brought to his attention. Accordingly, the court found that the length of the defendant's delay in responding to the complaint and its impact on judicial proceedings were not significant.

In contrast, while the Bank did not submit its first Motion for Default Judgment until more than two months after the default occurred, the debtors took ten months to indicate an intent to

answer the complaint and then without providing any specifics. Even if debtors' failure to respond to the complaint prior to the entry of the default judgment could somehow be construed due to "excusable neglect," their waiting three more months before requesting relief from the default judgment and still providing no theory about their defense can not be condoned.

CONCLUSION

Mindful of the strong judicial policy against default judgment and the harshness of denial of discharge in bankruptcy, the court nevertheless concludes the record does not support a finding of excusable neglect or any other reason justifying relief from the operation of the judgment under Federal Rule of Bankruptcy Procedure 7055.

ORDER

THEREFORE, IT IS ORDERED that the debtors' Motion to Set Aside Default Judgment is denied.

Dated this 3rd day of June, 1996.

LEE M. JACKWIG
U.S. BANKRUPTCY JUDGE