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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
MICHAEL EUGENE WORTHINGTON, **PAMELA SUE WORTHINGTON,**	**CASE NO. 00-40911-13** **CHAPTER 13**
DEBTORS.	
MICHAEL EUGENE WORTHINGTON, **PAMELA SUE WORTHINGTON,**	
PLAINTIFFS,	
v.	**ADV. NO. 01-7011**
UMLIC VP LLC, substituted for former defendant GMAC MORTGAGE CORP.,	
DEFENDANT.	

ORDER DENYING DEFENDANT UMLIC VP LLC'S MOTION FOR RELIEF FROM ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFFS

This proceeding is before the Court on the creditor-defendant's motion for relief from an order granting summary judgement. Creditor-defendant UMLIC VP LLC ("UMLIC") appears by counsel Steven M. Leigh of Martin, Leigh, Laws & Fritzlen, P.C., Kansas City, Missouri. The debtors appear by counsel Fred W. Schwinn. The Court has reviewed the relevant pleadings and is now ready to rule.

FACTS

In May 1999, Michael Eugene Worthington and Pamela Sue Worthington ("Debtors") obtained a loan from Empire Funding Corporation ("Empire") that was secured by a mortgage on their

residence. Nearly a year later, the Debtors filed a Chapter 13 bankruptcy petition. Shortly thereafter, in June 2000, they notified Empire and its loan servicing agent, GMAC Mortgage Corporation ("GMAC") that they were rescinding the transaction pursuant to the Truth in Lending Act ("TILA"), 15 U.S.C.A. §1635, and Regulation Z, 12 C.F.R. §226.23. On January 31, 2001, the Debtors filed this proceeding to obtain a determination of the effect of their effort to rescind.

In their complaint, the Debtors alleged that Empire had assigned its rights and obligations in their loan transaction to GMAC. GMAC filed an answer and participated in the proceeding. A report of parties planning meeting was submitted that proposed various deadlines for the litigation, including one for either side to join additional parties or amend their pleadings, and another for them to file dispositive motions. The Court adopted the proposed deadlines. The Debtors later obtained an extension of the deadline for dispositive motions and filed a motion for summary judgment ("Summary Judgment Motion") on November 13, 2001, within the extended time. GMAC filed a motion asking for an extension of time to December 20 to respond to the motion.

At a pretrial conference on November 26, GMAC also asked for additional time to join third-party defendants. At that conference, GMAC's attorney assured the Court that GMAC was the proper defendant in this proceeding. The Court gave GMAC twenty days to join third-party defendants and to respond to the Debtors' Summary Judgment Motion. The twenty days passed, and two months later, GMAC still had not joined any other party, had not responded to the Debtors' Motion, and had not sought any extension of time to do either. So on February 26, 2002, the Court granted the Debtors' motion for summary judgment ("Summary Judgment Order"). In May 2002, the Court signed a supplemental order prepared by the Debtors' attorney that would implement one part of

the judgment.

In the meantime, certain potentially relevant pleadings were filed in the Debtors' main bankruptcy case. In their schedules, the Debtors had listed Empire as a creditor owed about $50,000 secured by a second mortgage on their home. On September 17, 2001, Calmco Servicing, L.P. ("Calmco"), filed a proof of claim "as subservicing agent for DLJ Mortgage Capital It's [sic] Successors and Assignees," asserting a claim of about $50,000 secured by real estate. An attachment to the proof of claim stated: "Copies of the mortgage loan documents will follow." The Debtors immediately filed an objection to the proof of claim, asserting that they had rescinded the mortgage on which the claim was based and that the claim had been filed out of time. They served Calmco with notice of a time to object to their objection, but it filed no response, nor did anyone else respond. An order disallowing Calmco's claim was filed on November 15, 2001. On February 4, 2002, a notice of claim transfer was filed stating that Calmco had transferred its claim to "UMLIC VP."

On April 11, 2002, Mr. Leigh entered his appearance in the main case for a creditor identified as "United Mortgage & Loan Investment Corporation" ("United Mortgage"), and filed a motion asking for stay relief, dismissal of the case, or adequate protection ("Stay Relief Motion"), based on the Debtors' alleged default on a note secured by a mortgage on their home. Documents attached to the Stay Relief Motion indicated that Empire had assigned the note and mortgage to "UMLIC VP LLC" in May 1999. The Debtors objected, contending that they had rescinded the transaction with Empire and the Court had voided the mortgage, but asking that the matter be consolidated with Adversary Proceeding No. 01-7011 if the Court allowed it to proceed. The Stay Relief Motion came on for hearing on May 8, but according to the minute sheet, the parties agreed to continue the matter, and the

Court signed the supplemental order mentioned above that would implement part of the Debtors' judgment. United Mortgage withdrew the Stay Relief Motion the following month.

On June 5, on behalf of United Mortgage, Mr. Leigh filed a motion in the adversary proceeding for relief from the Summary Judgment Order ("Motion for Relief from Judgment"). In that Motion, United Mortgage alleged that GMAC was the servicer of the note and mortgage for Empire when the Debtors filed their adversary complaint, and that Calmco had filed the September 2001 proof of claim as subservicing agent for GMAC, rather than the "DLJ Mortgage Capital" actually named on the proof of claim. United Mortgage asserted that it had received the note and mortgage as part of a "loan package portfolio" that GMAC transferred to it on October 31, 2001. The affidavit supporting these assertions actually stated that "UMLIC VP LLC," not United Mortgage, had received the loan package portfolio on that date, and did not identify who transferred the portfolio to that company. United Mortgage contended that it was not notified of the Debtors' adversary proceeding until April 16, 2002, when the Debtors' objected to the Stay Relief Motion it had filed in the main case. It offered no explanation for having waited from April 16 until June 5 to file its Motion for Relief from Judgment. It offered no explanation for GMAC's failure to respond to the Debtors' Summary Judgment Motion, or to inform the Court of the transfer of the note and mortgage. It offered no explanation for GMAC's apparent failure to inform it of the pending adversary proceeding, or for its own failure to take action if GMAC did inform it of the proceeding.

The Debtors objected to the Motion for Relief from Judgment. Their attorney alleged that an attorney had contacted him in October 2001 and told him that Calmco had bought the mortgage from GMAC. He then contacted GMAC's counsel who told him that the mortgage had been sold by

mistake and was being repurchased, so GMAC was still the proper party in the adversary proceeding. As indicated above, GMAC's counsel repeated this assertion to the Court at a pretrial conference in November 2001.

United Mortgage's Motion for Relief from Judgment was set for hearing in July 2002, but was continued until August 26. On that day, Mr. Leigh submitted a memorandum and affidavit on behalf of "UMLIC VP LLC" ("UMLIC"). In the affidavit, an employee of UMLIC stated: "UMLIC is the holder, owner and / or servicer" of the Debtors' note and mortgage, and that UMLIC has no right of recourse on the note against Empire, GMAC, or Calmco. In the memorandum, responding at the Court's request to an issue raised by the Debtors' counsel, Mr. Leigh argued that UMLIC has standing to seek relief under Federal Rule of Civil Procedure 60(b) because, as GMAC's assignee, UMLIC is GMAC's legal representative and is also in privity with GMAC. A few days after the August 26 hearing, Mr. Leigh filed a motion to substitute UMLIC for GMAC as the defendant in this proceeding because it is the true party in interest as the assignee of the subject of the action. He added that he had mistakenly entered his appearance for United Mortgage. This motion was not opposed, and has been granted. Because it is now a named defendant, UMLIC clearly has standing to seek relief from the Summary Judgment Order. The Court concludes the standing issue has become moot.

DISCUSSION AND CONCLUSIONS

In support of its Motion for Relief from Judgment, UMLIC cites the following parts of Federal Rule of Civil Procedure 60, made applicable to bankruptcy cases, with certain exceptions not involved here, by Federal Rule of Bankruptcy Procedure 9024:

> (b) 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.

In its arguments, though, UMLIC relies solely on the assertion that its failure to appear and defend its position in this proceeding was the result of excusable neglect, so the Court will immediately overrule UMLIC's effort to rely on subsection (b)(6) of the Rule. The Court notes that Rule 60(b) also provides: "The motion [for relief from a judgment] 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."

Like Civil Rule 60(b)(1), Bankruptcy Rule 9006(b)(1) provides that a motion to extend a covered procedural time period, filed after the time period has expired, may be granted if the failure to act timely was the result of "excusable neglect." In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*,[1] the Supreme Court considered the meaning of that phrase in Rule 9006(b)(1). Initially, the Court quoted an ordinary meaning of "neglect" from *Webster's Ninth New Collegiate Dictionary 791 (1983)*: "'to leave undone or unattended to, *esp[ecially] through carelessness*.'"[2] Thus, the Court explained, "neglect" encompasses both faultless omissions to act and omissions caused by carelessness.[3] Certainly, situations where neglect is caused by an accident, ill

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[1]507 U.S. 380 (1993).

[2]507 U.S. at 388 (emphasis added by Court).

[3]507 U.S. at 388.

health, incarceration, or an act of God will usually, if not always, be held to be excusable.[4] The Court said: "Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' . . . is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant."[5] This leaves the more difficult question of what omissions caused by carelessness are excusable. In these situations, the Supreme Court held that the determination is an equitable one, taking into account all relevant circumstances surrounding the omission. Relevant circumstances include "the danger of prejudice to the debtor, 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."[6] Since *Pioneer*, the Tenth Circuit has said that "fault in the delay remains a very important factor—perhaps the most important single factor—in determining whether neglect is excusable."[7] Although *Pioneer* was construing the phrase "excusable neglect" in Bankruptcy Rule 9006(b)(1), the Court sees no reason to interpret the phrase differently under Civil Rule 60(b).

Relying on its uncontested assertion that GMAC transferred the note and mortgage to it on October 31, 2001, UMLIC argues that the Debtors' Summary Judgment Motion was filed and granted while it was the owner of the note and mortgage but without notice to it of the proceeding. It suggests

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[4]*See* 507 U.S. at 394 (court permitted to find excusable neglect if circumstance beyond movant's control caused failure to comply with deadline).

[5]507 U.S. at 392.

[6]507 U.S. at 395.

[7]*City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994), *cert. denied*, 513 U.S. 1191 (1995).

that the notice of assignment from Calmco to UMLIC that was filed on February 4, 2002, made the Debtors and their counsel aware that UMLIC had become the holder of the claim, and complains that they did not notify it of the adversary proceeding. This lack of notice, UMLIC continues, excuses its failure "to file a response to Debtors' Complaint." The Court assumes that UMLIC meant to argue that the lack of notice excuses its failure to respond to the Summary Judgment Motion, rather than the complaint. UMLIC offers no explanation for GMAC's failure to respond to the Summary Judgment Motion or GMAC's apparent failure to notify it of the pending adversary proceeding. UMLIC also offers no explanation why it waited seven weeks after learning of the Summary Judgment Order before it filed its Motion for Relief from Judgment.

UMLIC's argument assumes that the Debtors (and possibly the Court) had an obligation to notify it of the pending adversary proceeding once they learned that GMAC's claim might have been transferred to UMLIC. This overlooks the fact that the obvious party to have advised UMLIC of the pending lawsuit would have been GMAC, its assignor. UMLIC has cited no substantive law authority suggesting that either the Debtors or the Court had any obligation to notify UMLIC of or to make it a party to the proceeding, and the Court is aware of none. Furthermore, Civil Rule 25(c), made applicable to adversary proceedings by Bankruptcy Rule 7025, provides in pertinent part: "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." A leading treatise on federal civil procedure explains: "The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will

be binding on his successor in interest even though he is not named."[8] Thus, even assuming that the pleadings UMLIC cites provided notice that it had become the owner of the note and mortgage, under the applicable rules of procedure, no one was required to make UMLIC a party to this proceeding.

So, at best, UMLIC has shown that it knew nothing about the Summary Judgment Order until April 16, 2002, when the Debtors' mentioned it in their objection to UMLIC's (actually United Mortgage's) Stay Relief Motion. Even if the Court were willing to ignore everything that had happened in this proceeding before that date, though, UMLIC has offered no explanation at all for having waited seven weeks until June 5 to ask the Court to set the Summary Judgment Order aside. In cases decided under the *Pioneer* standard, two federal district court judges in Kansas have found relatively short delays in missing deadlines to be inexcusable. In *Calhoun v. Schultze*,[9] Judge Vratil ruled that counsel's claim that he mistakenly thought a motion to dismiss did not need to be responded to until the deadline set by a scheduling order for filing summary judgment motions did not excuse a delay of about eight weeks in responding to the motion to dismiss, even though the party that filed the motion had asked the court to treat it as one for summary judgment, that party suffered no prejudice because of the delay, and nothing in the record showed whether the movant had acted in good faith.[10] In *Thomas v. Board of Education*,[11] Judge Crow ruled that counsel's confusion in thinking that attorneys' fees were

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[8]7C Wright, Miller & Kane, *Federal Practice & Procedure: Civil, 2d*, §1958 at 555 (1986).

[9]197 F.R.D. 461 (D.Kan. 2000).

[10]197 F.R.D. at 462-63.

[11]177 F.R.D. 488 (D.Kan. 1997).

covered by a local rule about costs, rather than federal and local rules specifically about attorneys' fees did not excuse a twelve-day delay in filing a motion for an extension of time to file a motion for attorneys' fees, even though none of the other *Pioneer* factors weighed against excusing the neglect.[12] Here, UMLIC has offered no explanation at all for its failure to act sooner after it learned of the Summary Judgment Order. Although Rule 60(b) required UMLIC to seek relief from the Order only within a "reasonable time," the Court is convinced that reasonable counsel would consider discovery of the Summary Judgment Order to constitute an emergency situation, requiring the quickest possible response. Under Bankruptcy Rule 7012(a), a defendant has only thirty days to respond to a newly-filed complaint. This would appear to the Court to be the longest time counsel might reasonably think could be allowed to pass before seeking relief from a judgment without offering any reason for additional delay.

Of course, the circumstances of this case are not so favorable to UMLIC. UMLIC concedes that GMAC assigned the note and mortgage to it while this adversary proceeding was pending. Under Kansas law, an assignee ordinarily gets no more rights than its assignor had.[13] While parties who feel they are doing poorly in a lawsuit might frequently resort to assignments if their assignees would be free of their assignors' errors and oversights in the pending litigation, UMLIC has cited no authority for such a practice, and the Court cannot believe there is any. Indeed, the Court is certain that UMLIC would

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[12] 177 F.R.D. at 489-91.

[13] *OXY USA, Inc., v. Colorado Interstate Gas Co.*, 20 Kan. App. 2d 69, 79-80 (1994) ("The assignee 'stands in the shoes of the assignor.' This is a time-honored rule of law, and it means that the obligations, defenses, etc., which burden the assignor will equally burden the assignee."); *Commerce Bank, N.A., v. Chrysler Realty Corp.*, 244 F.3d 777, 783-84 (10th Cir. 2001) (finding *OXY USA* "instructive" about Kansas law on question of extent of assignee's rights).

complain mightily if the parties' positions were reversed in this case, and it was trying to preserve a summary judgment against an assignee of the Debtors. Consequently, UMLIC not only needed to establish that its seven-week delay in seeking to set aside the Summary Judgment Order constituted "excusable neglect," it needed to show at least that GMAC's apparent failure to inform UMLIC of the pending litigation was excusable, and probably also that GMAC's definite failure to respond to the Debtors' summary judgment motion was excusable.

The Court has found no decision involving a successor's effort to obtain relief under Rule 60(b) on the basis of excusable neglect. The Court has found one case that involved a Rule 60(b) motion by a successor, but the district court there found that the original defendant had deliberately defaulted and the Federal Circuit affirmed that finding because it was not an abuse of discretion.[14] While no explanation has been offered here for GMAC's failure to respond to the Summary Judgment motion or for UMLIC's delay in seeking relief under Rule 60(b), the Court will not go so far as to find that either of them deliberately defaulted. Two other decisions, although distinguishable, are more helpful. In *Pioneer*, the Supreme Court gave "little weight" to the fact the movants' counsel was experiencing upheaval in his law practice at the time of his negligent omission due to his withdrawal from his former law firm.[15] The Ninth Circuit relied on this portion of *Pioneer* in rejecting a party's effort to show its omission was excusable because it was undergoing a corporate reorganization.[16] The Court believes

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[14]*Minnesota Mining & Manufacturing Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1259-61 (Fed. Cir. 1985).

[15]507 U.S. at 384 & 398.

[16]*United States ex rel. Familian Northwest, Inc., v. RG & B Contractors, Inc.*, 21 F.3d 952, 954 & 956 (9th Cir. 1994).

these cases provide some support by analogy for the Court's refusal to ignore GMAC's neglect of this proceeding and apparent failure to advise UMLIC about the proceeding in connection with the assignment of the note and mortgage. In the absence of any effort to explain GMAC's failings, its neglect cannot be found to be excusable. As GMAC's assignee, UMLIC is bound by the consequences of those failings.

Because UMLIC has not shown that its own delay in seeking Rule 60(b) relief or that GMAC's failure to defend this proceeding resulted from excusable neglect, its request for relief from the Summary Judgment Order must be denied.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of April, 2003.

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JAMES A. PUSATERI
BANKRUPTCY JUDGE