UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:	Tristan L. and Celia Welch, Debtors.	Case No.: 2:10-bk-27433-ER Chapter: 7 **MEMORANDUM OF DECISION DENYING DEBTORS' MOTION TO VACATE ORDER DENYING MOTION TO AVOID LIEN UNDER 11 U.S.C. § 522(f)** [No hearing required pursuant to Federal Rule of Civil Procedure 78(b) and Local Bankruptcy Rule 9013-1(j)(3)][1]

Tristan and Celia Welch (the "Debtors") seek an order to vacate the Court's *Order Denying With Prejudice Debtors' Motion to Avoid Lien Under 11 U.S.C. § 522(f) (Real Property) for Failure to Prosecute* [Doc. No. 26] (the "Order Denying the Second Lien Avoidance Motion"). For the reasons set forth below, the *Debtors' Motion to Vacate Order Denying their Motion to Avoid Lien Under 11 U.S.C. § 522(f)* [Doc. No. 30] (the "Reconsideration Motion") is DENIED.[2]

I. Background

The Debtors filed a voluntary petition for chapter 7 relief on May 3, 2010. On Schedule A, the Debtors listed an interest in real property located at 7540 Henness Circle A-204, Yosemite National, CA 95389 (the "Property") [Doc. No. 1]. The Debtors did not claim an exemption in the Property on Schedule C. On Schedule F, the Debtors listed the judgment of Creditors

[1] Notwithstanding the filing of a *Notice of Opposition and Request for a Hearing* [Doc. No. 31] by Creditors Adjustment Bureau, the Court determines that a disposition without oral argument is suitable.
[2] The Court will construe this motion as a motion for reconsideration.

Adjustment Bureau (the "Lienholder") in the sum of $3,200 as an unsecured nonpriority claim.[3] The Chapter 7 Trustee filed a Report of No Distribution on July 19, 2010. On September 3, 2010, the Debtors received their discharge and the case closed on September 29, 2010.

A. First Lien Avoidance Motion

Nearly nine years later, on September 5, 2019, the Debtors moved to reopen their case to file a motion to avoid a judicial lien in favor of the Lienholder [Doc. No. 17]. On September 6, 2019, the Court entered an *Order Granting Motion to Reopen for the Limited Purpose of Filing Lien Avoidance Motions under §522(f)* [Doc. No. 18].

On October 8, 2019, the Debtors filed a *Motion to Avoid Lien under 11 U.S.C. § 522(f) (Real Property)* [Doc. No. 20] (the "First Lien Avoidance Motion"), pursuant to Local Bankruptcy Rule ("LBR") 9013-1(o), seeking to avoid Lienholder's judicial lien against the Property in the sum of $4,144. The Lienholder timely filed its *Notice of Opposition and Request for a Hearing and Opposition to Debtor's Motion to Avoid Lien under 11 U.S.C. § 522(f) (Real Property)* [Doc. No. 22] (the "Opposition") on October 21, 2019.

Having found that the Debtors failed to schedule a hearing on the First Lien Avoidance Motion as prescribed in LBR 9013-1(o)(4), on January 17, 2020, the Court entered an *Order Denying Without Prejudice Debtor's Motion to Avoid Lien under 11 U.S.C. § 522(f) (Real Property) for Failure to Prosecute* [Doc. No. 24] (the "January 17 Order"). The January 17 Order directed the case to close thirty days therefrom, unless the Debtors filed a renewed lien avoidance motion.

B. Second Lien Avoidance Motion

On January 29, 2020, the Debtors filed the second *Motion to Avoid Lien under 11 U.S.C. § 522(f) (Real Property)* [Doc. No. 26] (the "Second Lien Avoidance Motion") under LBR 9013-1(o), pursuant to which the Debtors renewed their request to avoid Lienholder's judicial lien. The Lienholder again timely filed and served a notice of opposition and request for a hearing on January 31, 2020 [Doc. No. 27]. Pursuant to LBR 9013-1(o)(4), the deadline for Debtors to calendar a hearing date on the Second Lien Avoidance Motion was February 14, 2020.[4] The Debtors did not comply with this directive.

On February 19, 2020, the Court entered an order denying the Second Lien Avoidance Motion, but this time did so with prejudice, given the Debtors' second consecutive failed attempt to prosecute the matter [Doc. No. 28] (the "February 19 Order").

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[3] At the time this case was filed, the Debtors claim they were unaware that the Lienholder had recorded an abstract of judgment against the Property. Reconsideration Motion at 8 (all page citations follow the page numbers that are automatically affixed to the top of each page by the Electronic Case Filing (ECF) system).

[4] LBR 9013-1(o)(4) provides in relevant part: "[i]f a timely response and request for hearing is filed and served, within 14 days from the date of service of the response and request for hearing *the moving party* must schedule and give not less than 14 days' notice of a hearing." (emphasis added).

C. The Reconsideration Motion

The Debtors filed the Reconsideration Motion on February 25, 2020. The Reconsideration Motion seeks to set aside the February 19 Order pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure ("FRBP"), incorporating Federal Rule of Civil Procedure ("Civil Rule") 60(b), and 11 U.S.C. § 105.

The Debtors argue that Civil Rule 60(b)(1) relief is appropriate here because the failure to schedule a hearing on the Second Lien Avoidance Motion was beyond the Debtors' control and solely a result of their counsel's "mistake, inadvertence, surprise, or excusable neglect." In support of the Reconsideration Motion, the Debtors have attached the declaration of their counsel, Rob R. Nichols (the "Nichols Decl."). According to Mr. Nichols, on or about the time the Second Lien Avoidance Motion was filed, he received "notices from ECF, and the U.S. District Courts in the Eastern and Central Districts about upcoming outages due to upgrades of the filing systems." Nichols Decl., ¶ 7. Mr. Nichols further attests that he traveled out of Los Angeles from February 14 to February 17, "so [he] made a note in [his] calender [*sic*] for February 20th to obtain a hearing date at that time." *Id.* Accordingly, Mr. Nichols claims that he planned to obtain a hearing date on February 20, 2020 "[t]hat way outages and the time out of town would have passed." *Id.*

In addition, the Debtors assert that the February 19 Order should be vacated under Civil Rule 60(b)(6) based on "any other reason that justifies relief" as they have acted in good faith and will sustain significant prejudice if their requested relief is not granted. Finally, the Debtors seemingly argue that the Court should not have dismissed the Second Lien Avoidance Motion with prejudice because LBR 9013-1(o)(4) merely authorizes the court to deny the motion *without prejudice*. *See* Reconsideration Motion at 10 (citing to LBR 9013-1(0)(4)) (emphasis in original).

D. Opposition to the Reconsideration Motion

On March 5, 2020, the Lienholder timely filed the *Opposition of Creditor's Adjustment Bureau, Inc. to Motion to Vacate Order Denying Motion to Avoid Lien under 11 U.S.C. 55(f)* [Doc. No. 31] (the "Opposition"). The Opposition counters that the Reconsideration Motion should be denied in full because the Debtors have failed to meet their burden of proof with respect to their Civil Rule 60(b)(1) and (b)(6) arguments. The Lienholder specifically argues that the Debtors have neglected to discuss particular facts or cases that support the application of Civil Rule 60 (b)(1). The Lienholder argues that the Debtors have not established (a) that any system outages actually impaired counsel's ability to file documents, (b) that counsel sought out assistance to timely calendar a hearing on the Second Lien Avoidance Motion, or (c) that Debtors' counsel attempted to file a hearing request manually. Notwithstanding, the Lienholder maintains that even if the Debtors had requested a hearing date on February 20, as counsel attests, Debtors would have still failed to comply with the local bankruptcy rules. Opposition at 5. Furthermore, the Lienholders cite to numerous cases that generally stand for the proposition that "attorney error" is insufficient to support the application of either subsection (b)(1) or (b)(6). *See* Opposition at 5 (quoting *Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 666 (9th Cir. 1997) ("attorney error is insufficient grounds for relief under both Rule 60(b)(1) and (6)"); *id.* at 6 (quoting *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1101 (9th

Cir. 2006) ("Rule 60(b)(1) is not intended to remedy the effects of a litigation decision that a party later comes to regret"); *id.* at 8 (citing to *Liljeberg v. Health Services Acquisition Group*, 486 U.S. 847, 864, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)). Accordingly, the Lienholder asserts that based on the foregoing arguments there are no extraordinary circumstances warranting relief under Civil Rule 60(b)(6) either.

Finally, with respect to Debtors' last argument, the Lienholders points out that the language utilized in LBR 9013-1(o)(4) does not require the Court to invariably deny motions without prejudice, but instead, the local rules provide the Court with the discretionary power to deny motions with prejudice in certain circumstances.

The Lienholder submits that the Court should reject Debtors' third attempt to prosecute the matter in question and deny the Reconsideration Motion.

As of the date of this memorandum of decision, no reply is on file.

II. Findings and Conclusions

A. The Debtors Have Failed to Establish that their Inability to Prosecute the Second Lien Avoidance was a Result of Mistake, Inadvertence, Surprise, or Excusable Neglect

Civil Rule 60(b) permits the Court to relieve a party from an order for "mistake, inadvertence, surprise, or excusable neglect" or for "any other reason that justifies relief." Civil Rule 60(b)(1), (6) (incorporated through FRBP 9024).

The Debtors have not asserted any facts establishing that mistake, surprise, inadvertence, or excusable neglect impaired their ability to prosecute this matter. The determination of whether neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 382 (9th Cir. 1997). In the context of excusable neglect, "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396, 113 S. Ct. 1489, 1499, 123 L. Ed. 2d 74 (1993) (discussing "excusable neglect" under FRBP 9006(b)(1); *see also id.* at 381 (applying the equitable test established in *Pioneer* in a Rule 60(b) inquiry). "Inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect." *See id.* at 392.

On or about January 29, 2020, Mr. Nichols claims that he learned that there would be possible disruptions to the Court's electronic filing platform. Consequently, he opted to schedule a hearing on the Second Lien Avoidance Motion on February 20, after the February 14 deadline. The Court finds this vague explanation unconvincing. Although the Court is cognizant that system outages may prevent parties from lodging documents through the Court's filing platform, Mr. Nichols and his clients have not claimed that such a technical issue actually forestalled the prosecution of their lien avoidance motion. As noted by the Lienholder, the Debtors have not explained whether they even attempted to timely calendar a hearing. Further, Mr. Nichols does not furnish any explanation as to why he could not manually file a calendaring request, seek

technical assistance, notify court personnel of any purported technical issues, or make any other arrangements to ensure that a hearing on the Second Lien Avoidance Motion would be timely scheduled. Moreover, the Court is unclear as to how counsel's travel plans impacted his ability to schedule a hearing on time, especially since counsel had an opportunity to act before his departure on February 14.

The Debtors' inability to comply with LBR 9013-1(o)(4) is particularly disconcerting in light of the Court's prior denial of the First Lien Avoidance Motion for identical reasons. Acknowledging that non-bankruptcy attorneys may be unfamiliar with the local bankruptcy rules, the Court outlined the appropriate procedure under LBR 9013-1(o) in the January 17 Order. As such, the Debtors' conduct surpassed mere negligence. Moreover, the Debtors should have reasonably anticipated that the Lienholder would oppose their Second Lien Avoidance Motion based on the Lienholder's substantive opposition to the First Lien Avoidance Motion. The Debtors were not required to bring forth this matter under LBR 9013-1(o). Instead, the Debtors could have chosen to schedule a hearing on the Second Lien Avoidance Motion from the outset pursuant to LBR 9013-1(b). However, because the Debtors elected to proceed under LBR 9013-1(o), they were obligated to timely comply with the notice requirements under (o)(4).

B. The Debtors Have Not Asserted Extraordinary Circumstances Pursuant to Civil Rule 60(b)(6)

As the Ninth Circuit has explained, Civil Rule 60(b)(6) "should be used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment. Accordingly, a party who moves for such relief must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with…the action in a proper fashion." *Zurich Am. Ins. Co. v. Int'l Fibercom, Inc. (In re Int'l Fibercom, Inc.)*, 503 F.3d 933, 941 (9th Cir. 2007) (internal citations and quotations omitted).

The Debtors have not demonstrated that extraordinary circumstances prevented them from timely complying with LBR 9013-1(o)(4). Furthermore, while the Debtors underscore the significant prejudice they will sustain if the February 19 Order is not vacated, they fail to take into consideration the legal expenses accrued by the Lienholder in opposing lien avoidance on three separate occasions. Therefore, having weighed the balance of the equities, the Court is unpersuaded that the February 19 Order should be vacated under Civil Rule 60(b)(6).[5]

For the reasons stated above, the Court determines that the Debtors' lack of compliance was not the result of circumstance beyond their reasonable control. The Court further finds that, given that the Court already afforded the Debtors a second opportunity to prosecute their lien avoidance motion, and previously issued directions on the correct procedure to follow [Doc. No. 24], denial of the Reconsideration Motion will not result in manifest injustice.

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[5] LBR 9013-1(o)(4) does not mandate the denial of the Second Lien Avoidance Motion exclusively without prejudice. Instead, the Court has the discretion to deny a motion under LBR 9013-1(o) with or without prejudice. *See* LBR 9013-1(o)(4) ("If movant fails to obtain a hearing date, the court *may* deny the motion without prejudice.") (emphasis added).

III. Conclusion

For the reasons set forth above, the Debtors' Reconsideration Motion is DENIED. The Court will enter an order consistent with this Memorandum Decision.

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Date: March 12, 2020

Ernest M. Robles
United States Bankruptcy Judge