IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
SCOTT EDWIN SOUTH	§	Case No. 22-40365
	§	
	§	
	§	
Debtor	§	Chapter 7

KSMI PROPERTIES, LLC	§	
	§	
Plaintiff	§	
v.	§	Adversary No. 22-04035
	§	
SCOTT EDWIN SOUTH,	§	
	§	
Defendant	§	

ORDER DENYING MOTION FOR LEAVE
TO REOPEN CASE AND VACATE DISMISSAL ORDER

ON THIS DATE the Court considered the "Motion for Leave to Reopen Case and Vacate Dismissal Order" (the "Motion") filed by the Plaintiff, KSMI Properties, LLC, on November 30, 2022. The Court finds that the argument and authorities of Plaintiff are adequately presented in the pleadings and that the Court's decision regarding the Motion would not be significantly aided by oral argument. The Motion asks for "leave of Court to reopen the case, vacate the dismissal order, and reinstate the case on the Court's docket."[1]

The Rules of Bankruptcy Procedure do not specifically provide for a motion to

[1] Mot., 2, ECF No. 17.

vacate a final judgement or order. "However, [d]epending on the time that the motion is served, a motion to ... vacate may be treated either as a motion to alter or amend the judgment under Rule 59(e), made applicable by Bankruptcy Rule 9023, or as a motion for relief from judgment under Rule 60(b), made applicable by Bankruptcy Rule 9024." *Ramirez Rosado v. Banco Popular de P.R. (In re Ramirez Rosado)*, 561 B.R. 598, 607 (B.A.P. 1st Cir. 2017).[2] In this circuit whether such a motion is treated as filed pursuant to Fed. R. Civ. Pro. 59(e) or Fed. R. Civ. Pro. Rule 60(b) depends on the time at which the motion was filed. *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347 (5th Cir. 1991). In this case the Motion was filed more than 14 days of entry of the dismissal order and so is construed as one made under Rule 60(b).

Fed. R. Civ. P. 60(b) allows a Court to relieve a party from a final judgment or order "for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or

[2] Bankruptcy courts have more discretion to alter or amend judgments and orders which do not dispose of all claims. *See* Fed. R. Civ. P. 54(b), applicable pursuant to Fed. R. Bankr. P. 7054(a). Rule 54(b) states in part that "Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. "[R]elief under Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination of litigation." *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001); *In re Wigington*, 2021 WL 2134651 at *3 (Bankr. E.D. Tex. May 25, 2021). "Bankruptcy courts have broad discretion in deciding motions for relief under Rule 60(b)." *Roman v. Carrion (In re Rodriguez Gonzalez)*, 396 B.R. 790, 802 (B.A.P. 1st Cir. 2008). A request for relief under Rule 60(b)(5) or (6) "is considered extraordinary." *In re Coffman*, 271 B.R. 492, 498 (Bankr. N.D. Tex. 2002).

The Motion does not cite Rule 59(e), nor any particular provision of Rule 60(b). However, Plaintiff appears to seek relief under Rule 60(b)(1) because the reason given in Motion for seeking relief from the prior dismissal is "that the failure to abide by the Court's Order was due to accident and/or mistake and not by conscious indifference to the Court's Orders."[3] Relief under Rule 60(b)(1) is "intended to provide relief to a party in only two instances: (1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 490 (6th Cir. 2000). Plaintiff must establish that it qualifies for Rule 60(b) relief by "clear and convincing evidence." *Lonsdorf v. Seefeldt*, 47 F.3d

[3] Mot., ¶ 3, 2, ECF No. 17.

893, 897 (7th Cir.1995). Rule 60(b)(1)'s plain language "does not extend to the actions of individuals or entities who are not parties." *Id.*

The Motion does not allege that the Court "has made a substantive mistake of law or fact in the final judgment or order" and so is understood to seek relief because of excusable neglect. A determination of "excusable neglect" under Rule 60(b) is "an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. v. Brunswick Assocs., Ltd. P'ship*, 507 U.S. 380, 395 (1993). The circumstances to be considered 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." *Id.* This Court has stated that it is "well-established, however, that 'inadvertent mistake'[,] ... [g]ross carelessness, ignorance of the rules, or ignorance of the law are insufficient bases for 60(b)(1) relief.....'" *In re Wigington*, 2021 WL 2134651, at *3 (Bankr. E.D. Tex. May 25, 2021), *quoting Pettle v. Bickham*, 410 F.3d 189, 192 (5th Cir. 2005).

This adversary proceeding was dismissed on November 15, 2022 for want of prosecution.[4] Originally filed on June 29, 2022, no summons was served on Defendant by July 27, 2022 causing the Court to set a deadline for Plaintiff to prove service, attempt

[4] Dism. Ord., ECF No. 15.

service again, or show cause why the adversary should not be dismissed.[5] Plaintiff failed to comply with this deadline resulting in issuance of a "Notice of Intent to Dismiss For Want of Prosecution" on August 24, 2022.[6] Only then did Plaintiff seek authorization to serve Defendant by alternative means, which the Court granted.[7] Plaintiff, however, failed to timely comply with this alternative service order and as a result this adversary was dismissed for want of prosecution.[8]

The explanation given for this latest failure to timely comply with an order is that Plaintiff "assumed that the process server filed the proof of returns with the Court to comply with the Court's Order."[9] This explanation is insufficient to provide "clear and convincing evidence" worthy of relief under Rule 60(b)(1). The return of service attached to Plaintiff's Motion indicates that personal service on Defendant was accomplished more than seven days after issuance of the summons served.[10] This fails to comply with Fed. R. Bankr. P. 7004(e) and thus with this Court's alternative service order. Similarly, no proof of timely service by first class mail within seven days after

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[5] Ord. Re. Serv., ECF No. 4.

[6] ECF No. 8.

[7] Ord. Gr. Alt. Serv., ECF No. 11; *KSMI Props. LLC v. S.*, 645 B.R. 205 (Bankr. E.D. Tex. 2022).

[8] Dism. Ord., ECF No. 15.

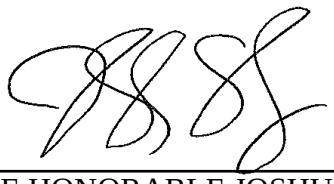
[9] Mot., ECF No. 17 at 2.

[10] *Id*. at Ex. A. Summons was issued October 27, 2022, but not served by personal service until November 10, 2022.

issuance of the summons served has been submitted.[11] This also fails to comply with this Court's alternative service order. Reopening this adversary would undoubtedly prejudice Defendant, who would need to be served again in compliance with the applicable rules. Further, this case has been pending more than six months yet Defendant has not been successfully served. No allegation has been made that Defendant is avoiding service. Allowing more time for Plaintiff to attempt to accomplish service would only result in further delay. These circumstances are not excusable neglect, and were within the reasonable control of Plaintiff. Accordingly, the Court finds that just cause exists for the entry of the following order.

IT IS THEREFORE ORDERED that the "Motion for Leave to Reopen Case and Vacate Dismissal Order" filed by the Plaintiff, KSMI Properties, LLC, on November 30, 2022 is **DENIED**.

Signed on 01/17/2023



THE HONORABLE JOSHUA P. SEARCY
UNITED STATES BANKRUPTCY JUDGE

[11] Summons was issued October 27, 2022, but not deposited in the mail until November 7, 2022 at the earliest. *Id*. It is unclear whether service by mail was by certified mail only, or by certified mail and first class mail. *Id*. Service by first class mail is what this Court's alternative service ordered required, and is also what Fed. R. Bankr. P. 7004(b) requires when summons is served by mail.