

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-30937

STEPHEN WYN DUPUY  
a/k/a STEPHEN DUPUY

Debtor

**MEMORANDUM ON MOTION  
TO SET ASIDE DISMISSAL ORDER**

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*Pro se*

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**RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE**

This matter is before the court on the Debtor's July 18, 2002 Motion to Set Aside the Order of the Court and to Dismiss Without Prejudice." Also before the court is the Debtor's Amended Motion Regarding the Debtors [sic] Motion to Set Aside the Order of the Court and to Dismiss Without Prejudice' [ ] to Read as Follows: Motion to Make Leave to Set Aside and or Alternatively to Amend the Order of the Court Filed on June 20<sup>th</sup>" (collectively, Motion to Set Aside Dismissal) filed by the Debtor in open court at the scheduled August 14, 2002 hearing on this matter.<sup>1</sup> The Motion to Set Aside Dismissal was filed by the Debtor *pro se*.

## I

By his Motion to Set Aside Dismissal, the Debtor asks the court to revisit its June 20, 2002 Order which both dismissed this bankruptcy case and barred subsequent refile by the Debtor for 180 days. In material part, the Order set forth the relevant facts as follows:

The Debtor, through counsel in open court [at the June 19, 2002 confirmation hearing], acknowledged that his Chapter 13 Plan, as amended on June 4, 2002, is not confirmable. In addition, the court finds from statements made by the Debtor and Debtor's counsel in open court that the Debtor had no knowledge of the contents of the Amended Chapter 13 Plan filed June 12, 2002, and did not authorize its filing, nor did he authorize his attorney to sign his name. Further, the Debtor failed to consider a plan proposed by the Chapter 13 Trustee and Unizan Bank that satisfied their objections, met the confirmation requirements of 11 U.S.C. § 1325, and was recommended to the Debtor by his attorney. Of related importance, the Debtor has filed three prior Chapter 13 cases within the past three years, namely: Case No. 99-34073, which was filed October 5, 1999, and dismissed at the Debtor's request on November 8, 1999; Case No. 99-34753, which was filed November 19, 1999, and dismissed on motion of the Chapter 13 Trustee on October 11, 2000; and Case No. 01-33871, which was filed August 9, 2001, and dismissed on motion of the Chapter 13 Trustee on January 24, 2002.

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<sup>1</sup> At the hearing, the court also considered (and granted) the Debtor's unopposed July 18, 2002 Motion to Dismiss Attorney Charles Gordon.

This Chapter 13 case was filed on February 22, 2002, and the Debtor has had ample opportunity to present a confirmable plan but he has not done so. The court finds this failure to be a result of the Debtor's willful conduct. See *In re Lewis*, 67 B.R. 274, 276 (Bankr. E.D. Tenn. 1986) ("Willful" conduct is "intentional, knowing, and voluntary, as opposed to conduct which is accidental or beyond the person's control . . .") (citation omitted).

By his Motion to Set Aside Dismissal, the Debtor asks the court to either: (1) amend the Order by removing the 180-day bar language; or (2) fully set aside the Order to allow the Debtor another opportunity to file a confirmable Chapter 13 plan.

## II

As an initial matter, the court notes that the Motion to Set Aside Dismissal is untimely to the extent that it seeks amendment of the June 20, 2002 Order. Pursuant to FED. R. CIV. P. 59(e), as adopted by FED. R. BANKR. P. 9023, motions to alter or amend must be filed within ten days after the entry of the order or judgment. The Debtor's Motion to Set Aside Dismissal was not filed until 28 days after the entry of the Order.

To the extent that the Debtor seeks relief from the Order in its entirety, his Motion to Set Aside Dismissal is governed by FED. R. CIV. P. 60(b), as incorporated by FED. R. BANKR. P. 9024. Rule 60(b) provides in material 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; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise

vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The Debtor has not pointed to any set of facts triggering the provisions of Rule 60(b)(2)-(5). Further, subsection (b)(6) may be employed “only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the rule.” *Pruzinsky v. Gianetti (In re Walter)*, 282 F.3d 434, 439 (6<sup>th</sup> Cir. 2002), *petition for cert. filed* (U.S. July 24, 2002) (No. 02-141). Because the Debtor’s arguments are phrased in terms of “excusable neglect” and “honest mistake in judgment,” his Motion to Set Aside Dismissal will be analyzed under Rule 60(b)(1) only.

### III

Pursuant to subsection (b)(1) of Rule 60, the court “may” set aside its prior Order only if the Debtor can show that the Order was a result of “mistake, inadvertence, surprise, or excusable neglect.” Because the Debtor has failed to make such a showing, his Motion to Set Aside Dismissal will be denied.

As noted, the June 20, 2002 Order was two-pronged. It both dismissed the Debtor’s bankruptcy case and barred a repeat filing for 180 days. The dismissal was primarily based on the Debtor’s failure to timely propose a confirmable Chapter 13 plan. Similarly, the 180-day bar was chiefly a result of the Debtor’s willful failure to comply with orders of the court - specifically, his failure to file a confirmable plan by June 3, 2002, the date set forth in the court’s May 20, 2002

Order. See 11 U.S.C.A. § 109(g)(1);<sup>2</sup> see also 2 KING, COLLIER ON BANKRUPTCY ¶ 109.08, at 109-48 (15th ed. rev. 2002) (“[S]ection 109(g) prevents certain tactics on the debtor’s part that could be deemed abusive, and was enacted to prevent debtors from using repetitive filings as a method of frustrating creditor’s efforts to recover what is owed to them.”).

Other than suggesting negligence on the part of his former counsel, the Debtor offers no explanation as to why his (unconfirmable) Amended Chapter 13 Plan was untimely filed on June 4, 2002 - after the deadline ordered by the court. Even if the former counsel was negligent in some way (which has not been proven), the Debtor has not demonstrated that the negligence was “excusable” as required by Rule 60(b)(1). See *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 113 S. Ct. 1489, 1499 (1993) (Clients are responsible for the acts and omissions of their attorneys, and any neglect by counsel must be excusable.).

The present dismissal and 180-day bar are far from the result of “mistake, inadvertence, surprise, or excusable neglect.” Instead, they are wholly a result of the Debtor’s willful noncompliance with the Bankruptcy Code and the orders of this court, as exhibited by his failure to timely submit a confirmable plan. Even when given “one last chance” - both by this court and

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(g) Notwithstanding any other provision of this section, no individual . . . may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court . . . [.]

11 U.S.C.A. § 109(g)(1) (West 1993).

by counsel for the objecting parties - to accept an admittedly workable plan,<sup>3</sup> the Debtor *chose* not to accept the plan solely due to the presence of 180-day bar language. It is illuminating that, when faced with the choice of either (1) posturing over the consequences of his future plan noncompliance (the 180-day bar language) or (2) proceeding in good faith under an admittedly workable plan, the Debtor chose the former.

In sum, the court's June 20, 2002 Order stemmed from the Debtor's willful conduct. *See, e.g., In re Pike*, 258 B.R. 876, 883 (Bankr. S.D. Ohio 2001) ("[A] serial filer who repeatedly fails to perform the duties imposed on debtors by the Code" acts "willfully" for purposes of § 109(g)(1)). The Debtor has not demonstrated that the Order was the product of "mistake, inadvertence, surprise, or excusable neglect" as required by FED. R. CIV. P.60(b)(1) and FED. R. BANKR. P. 9024. His Motion to Set Aside Dismissal will accordingly be denied.

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<sup>3</sup> After the court denied confirmation of the Debtor's June 4, 2002 plan, it recessed to provide the Debtor, Chapter 13 Trustee, and counsel for Unizan Bank, the only objecting creditor, an opportunity to negotiate a confirmable plan. When the court resumed the bench, it was announced that the parties had indeed reached an agreement that would result in a plan that met the confirmation requirements of 11 U.S.C.A. § 1325(a) (West 1993). When that agreement was announced, however, it was rejected by the Debtor over the recommendation of his attorney. Given the Debtor's history of continually endeavoring to manipulate the court and his creditors both in this case and in his prior Chapter 13 filings, the court had no alternative but to take the action resulting in the June 20, 2002 dismissal Order. At the August 14, 2002 hearing on the Debtor's Motion to Set Aside Dismissal, the Debtor's former counsel reiterated that he had negotiated a plan on June 19, 2002, with the Trustee and Unizan Bank that was in the best interest of the Debtor and his creditors but that the Debtor refused to accept it.

An order consistent with this Memorandum will be entered.

FILED: August 15, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-30937

STEPHEN WYN DUPUY  
a/k/a STEPHEN DUPUY

Debtor

**ORDER**

For the reasons stated in the Memorandum on Motion to Set Aside Dismissal Order filed this date, the court directs that the Debtor's "Motion to Set Aside the Order of the Court and to Dismiss Without Prejudice" filed July 18, 2002, as amended by the "Amended Motion Regarding the Debtors [sic] Motion to Set Aside the Order of the Court and to Dismiss Without Prejudice" [] to Read as Follows: Motion to Make Leave to Set Aside and or Alternatively to Amend the Order of the Court Filed on June 20<sup>th</sup>" filed August 14, 2002, is DENIED.

SO ORDERED.

ENTER: August 15, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE