

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

IN RE:	§	
	§	
TONY LYNN SCHMIDT AND	§	CASE NO. 99-60538-RLJ-7
HELEN RUTH SCHMIDT,	§	
	§	
Debtors.	§	
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LINDA SUE HOHMANN,	§	
	§	
Plaintiff	§	
	§	
v.	§	ADV. NO. 01-6004
	§	
TONY LYNN SCHMIDT,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION

The court considers the Rule 60(b) motion of Tony Lynn Schmidt, the debtor and defendant in this bankruptcy proceeding, requesting that the court set aside the default judgment entered against Schmidt on January 30, 2002. Hearing was held March 29, 2002. This court has jurisdiction of this matter under 28 U.S.C. §§ 1334 and 157(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). This Memorandum Opinion contains the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052, 9014.

The default judgment was entered on the motion requesting entry of default judgment filed by the Plaintiff, Linda Sue Hohmann, on January 29, 2002. The original complaint initiating this adversary proceeding was filed by Hohmann on October 3, 2001; it was served on Schmidt by first class mail on

October 16, 2001. On December 13, 2001, Hohmann filed her first amended complaint for the purpose of correcting an incorrect zip code in the original service address. A new summons was issued and sent via certified mail and first class mail on December 17, 2001.

The complaint alleges that Schmidt is obligated to Hohmann under a divorce decree, which was subsequently reduced to a judgment for \$10,000.00, and that such obligation constitutes a nondischargeable claim under section 523(a)(5) or section 523(a)(15) of the Bankruptcy Code.

Schmidt failed to file a timely response or other answer to either the original complaint or the amended complaint. On February 1, 2002, two days after entry of the default judgment, Schmidt answered the complaint and moved to set aside the default judgment. The default judgment awards Hohmann a judgment against Schmidt in the amount of \$10,000.00, plus accrued pre-judgment and post-judgment interest and interest to be accrued after date of judgment at the applicable rate. In addition, the judgment provides that the entire debt, including attorney's fees, is not dischargeable under section 523(a)(15) of the Bankruptcy Code (11 U.S.C.).

Schmidt does not dispute that he was served or that he failed to timely respond to the complaint. He also admits that he discussed the matter with his bankruptcy attorney. His excuse for failing to answer is that he was unable to pay counsel for handling this adversary (as opposed to the underlying bankruptcy case). After he had defaulted, he apparently obtained the funds necessary to employ his bankruptcy counsel to defend this adversary.

Bankruptcy Rule 7055 states that Rule 55 of the Federal Rules of Civil Procedure applies in adversary proceedings. Federal Rule 55(c) states that “[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in

accordance with Rule 60(b).” Under Rule 60(b), the courts typically consider three factors in deciding whether to set aside a default judgment: (1) the defaulting party’s conduct in connection with the default; (2) whether the defaulting party has presented a meritorious defense; and (3) whether setting aside the default would prejudice the plaintiff. *See Lacy v. Sitel Corp.*, 227 F.3d 290, 292 (5th Cir. 2000); *Al-Torki v. Kaempfen*, 78 F.3d 1381, 1384-85 (9th Cir. 1996); *Cody v. Mello*, 59 F.3d 13, 16 (2d Cir. 1995). These factors are not necessarily exclusive, however. “Whatever factors are employed, the imperative is that they be regarded simply as a means of identifying circumstances which warrant the finding of ‘good cause’ to set aside a default. The decision necessarily is informed by equitable principles.” *Dierschke v. O’Cheskey (In the Matter of Dierschke)*, 975 F.2d 181, 184 (5th Cir. 1992). Moreover, an intentional failure to answer may constitute sufficient cause to warrant denial of a motion to set aside a default. *See Lacy*, 227 F.3d at 292.

Here, Schmidt and his bankruptcy attorney were aware of the complaint and the need to file a timely response. Despite this, Schmidt chose not to respond. In considering whether the defaulting party’s conduct in failing to timely respond is excusable, the courts turn to the excusable neglect standard set forth by the Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 394, 113 S.Ct. 1489, 1497 (1993). In *Pioneer*, the Supreme Court held that excusable neglect contemplates inadvertence, mistake, or carelessness, as well as intervening circumstances beyond a party’s control. *Id.* The determination of whether neglect is excusable is at bottom an equitable one, taking account of all relevant circumstances. *See* 507 U.S. at 395, 113 S.Ct. at 1498. An extensive analysis of whether Schmidt’s failure to answer was excusable is not necessary here, however. Schmidt’s failure was not caused by inadvertence, mistake, or carelessness. No intervening event

prevented him from answering. Schmidt's failure was intentional.

The court considers Schmidt's conduct alone as sufficient to justify denial of his motion. *See Lacy*, 227 F.3d at 292. Regardless, the court will briefly address the other two factors traditionally considered by the courts. First, Schmidt has failed to sufficiently raise a meritorious defense. Both in his response and in argument made by counsel at hearing, Schmidt contends that the underlying obligation is not for alimony, maintenance, or support and therefore does not fall within the purview of section 523(a)(5) of the Bankruptcy Code. However, as noted above, the judgment was taken as a nondischargeable judgment under 523(a)(15) of the Code. Specifically, section 523(a)(15) makes nondischargeable a debt that is

not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce . . . divorce decree . . . or other order of a court of record . . . unless –

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor . . . or,

(B) discharging such debt will result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15)(2001). In response, Schmidt makes only the conclusory statement that he cannot pay the obligation and that “all income is needed for support of the Debtor and his dependents.”

This does not sufficiently raise a meritorious defense. *See Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167, 173 (2d Cir. 2001) (“In connection with a motion to vacate default judgment, a defendant must present more than conclusory denials when attempting to show the existence of a meritorious defense The test of such a defense is measured not by whether there is a likelihood that it will carry

the day, but whether the evidence . . . would constitute a complete defense”); *Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 59 v. Superline Transp. Co., Inc.*, 953 F.2d 17, 21 (1st Cir. 1992). Next, with respect to whether setting aside the default would prejudice Hohmann, the court notes that little prejudice would result to Hohmann if the default were set aside. No argument is made of potential prejudice to Hohmann. The delay occasioned by setting aside the default, as well as the necessity of going forward with trial, is not sufficient to constitute prejudice. *U.S. v. One Parcel of Real Prop.*, 763 F.2d 181, 183 (5th Cir. 1985); *Goldstein v. Gordon*, 2002 WL 324289 *5 (N.D. Tex. 2002) (slip copy). *See also Cody v. Mello*, 59 F.3d at 16.

Finally, as stated above, the judgment awards attorney’s fees and declares that such fees, along with the underlying debt, are nondischargeable. To the extent such fees are those fees incurred in prosecuting the complaint, the court is of the opinion that inclusion of attorney’s fees as part of the judgment is improper. The judgment should therefore be revised to exclude any award for attorney’s fees incurred in prosecuting the complaint.

Upon the foregoing authorities, the court denies Schmidt’s motion under Rule 60(b), but concludes the judgment should be revised to exclude any award of attorney’s fees for prosecuting the complaint. The court will prepare an order.

SIGNED April 24, 2002.

ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE