

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
CENTENNIAL COMMUNICATIONS, INC.,)	CASE NO. BK81-82295
)	
DEBTOR)	A93-8022
)	
ESTATE OF CENTENNIAL)	
COMMUNICATIONS, INC.,)	
)	CH. 11
Plaintiff)	
vs.)	
)	
GEORGE MAC VOGELEI and)	Filing No. 45, 47
RICHARD H. OSTBERG,)	
)	
Defendant)	

MEMORANDUM

Hearing was held on February 5, 1996, on Motion to Vacate Default Judgment filed by George Mac Vogeley and Objection by the Estate of Centennial Communications, Inc. Appearances: Mary Lou Perry for movant/defendant.; Douglas Quinn, Robert Ginn and Bill Bianco for Estate. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A), (C), (E) and (O).

Background

This adversary proceeding was brought, in the name of the debtor, by creditors of the estate of Centennial Communications, Inc. to recover assets of the bankruptcy estate from a former director, officer and shareholder of the debtor -- George Mac Vogeley. Mr. Vogeley is a resident of California and is licensed to practice law in that state. The present issue is whether the court should grant relief from a judgment entered on December 23, 1994, which granted a default judgment in the amount of \$904,000.00 plus interest in favor of the plaintiff to sanction Mr. Vogeley for repeated non-compliance with the discovery requests of the plaintiff and with this court's orders directing Mr. Vogeley to comply with discovery. See FED. R. CIV. P. 37(b)(2)(C).

Summary of the Decision

The motion to vacate the judgment is denied.

A. The History of the Bankruptcy Case

Centennial Communications, Inc. is a debtor under Chapter 11 of the Bankruptcy Code in case number BK81-02295. An amended plan was confirmed on July 8, 1982. The confirmed plan approved the sale of all of the debtor's assets to the Richard Marshall Corporation, which consisted of insiders of the debtor, including Richard H. Ostberg, another shareholder, director and officer of the debtor. Mr. Vogelei was a shareholder on the date of the petition, but was not associated with the Richard Marshall Corporation. Mr. Ostberg and Mr. Vogelei were also two of the twenty largest unsecured creditors of the debtor. After the plan was confirmed, Mr. Ostberg became president of the debtor, replacing Marshall Hambric, another shareholder and director.

The debtor's assets consisted of two radio stations. Under the confirmed plan, the proceeds from the sale of the radio stations were to be held and disbursed by First National Bank of Omaha in accordance with the distribution scheme approved in the plan. In addition, the confirmed plan provided that the debtor would remain in existence as a non-operating entity whose only purpose as an entity was the right to be paid the proceeds under the promissory note from the sale of the radio stations. The Richard Marshall Corporation was not able to make the payments due under the promissory note and subsequently sold its interest in the debtor's assets to a third party who assumed the purchase agreement between the debtor and the Richard Marshall Corporation. After the new sale was consummated, Mr. Vogelei became an officer and director of the debtor. Neither the sale to the third party nor the changes in management of the debtor was disclosed to or approved by the bankruptcy court.

On the motion of Mr. Hambric, the former president who remained a shareholder and disputed creditor of the debtor, this court ordered the debtor to make an accounting of receipts and disbursements on December 1, 1988. The debtor did not respond until a hearing was scheduled to appoint a trustee, and on April 17, 1989, Mr. Ostberg, the president of the debtor, filed a report which provided that between 1986 and 1988, \$1,140,366.00 in funds were received by the debtor from the Internal Revenue Service. The report stated that the third party purchaser of the radio stations paid off the promissory note to the debtor early, but that the IRS initially levied upon the funds by right of a lien stemming from a jeopardy assessment issued in 1986 for failure to pay income taxes. However, the report also stated that the debtor successfully challenged the IRS's tax claim and that the IRS repaid all of the funds to the debtor, and that the debtor had then disbursed \$94,922.49 pursuant to the plan. Defendant, Mr. Vogelei, has since

represented to this court that he served as counsel for the debtor during the tax litigation [hereinafter, the funds paid to the debtor by the IRS shall be referred to as the "IRS funds"].

On August 18, 1989, the debtor was ordered to provide a complete accounting of income and expenses, assets and liabilities from the date of the radio station sale to the date of the order, provide copies of records supporting such accounting, respond to the discovery requests of Mr. Hambric, and provide documents related to the IRS funds within thirty (30) days. The debtor did not comply with the August 18, 1989, order, and on February 21, 1990, a hearing was held on a motion for sanctions, attorney fees, and order to show cause why the debtor should not be held in contempt for failing to comply with the order. On April 4, 1990, an order was entered granting all post-confirmation expenses incurred by Mr. Hambric to obtain information from the debtor regarding plan consummation, and scheduled a hearing for the debtor's officers to appear before the court to establish a record as to why the August 18, 1989, order was ignored.

Thereafter, Mr. Vogeley, acting for the debtor, asserted in pleadings that he did not understand the April 4, 1990, order. The order was clarified on May 29, 1990, and explicitly set forth the type of information that the debtor was to provide in thirty days. If the debtor was unable to provide such information, a detailed statement setting forth why the debtor could not comply with the order was to be filed. Mr. Vogeley signed sworn affidavits on July 5, 1990, August 27, 1990, and August 30, 1990, copies of which are in the bankruptcy case file, which stated that he had collected all of the documents of the debtor's post-confirmation operations that he knew to exist and delivered them to all interested parties.

On December 18, 1990, the debtor filed a "Final Report of Debtor-in-Possession," but the report failed to address income received by the debtor after 1986 and did not offer any explanation of the whereabouts of the IRS funds. Mr. Hambric and other creditors objected to the report on the basis that the only records turned over pursuant to the May 29, 1989, order related to pre-1984 business of the debtor. The objections alleged that the insiders of the debtor had engaged in self-dealing and had converted the proceeds from the sale. The other objecting creditors included William C. Healy; the American Society of Composers, Authors and Publishers (ASCAP); Heron, Burchette, Ruckert & Rothwell (the law firm) [hereinafter these three creditors shall be collectively referred to as the "objecting creditors" unless otherwise noted].

This court declined to approve the Final Report on April 3, 1991, and gave the debtor ten (10) days from that date to file a statement with the court to show cause why the debtor failed to comply with the previous orders of the court and why sanctions should not be imposed. Mr. Vogeley filed an affidavit on April 15, 1991, stating that there had been a theft of the debtor's records

from a warehouse, that he was unaware of the claims of some of the objecting creditors, and that in his opinion none of the objecting creditors had valid claims. Mr. Vogelei took the position that Mr. Hambric's claim was previously settled, that Mr. Healy's claim was a post-confirmation debt, that ASCAP's claim had not been allowed and therefore, he was not aware of the claim, and that he was unaware that the court had previously allowed the law firm's claim. The court, in response, gave Mr. Vogelei and the debtor thirty (30) days, which was later extended, to file an accounting of all of the funds received from the IRS and others, and to amend the final report.

On June 4, 1991, the debtor filed an Amended Final Report. The amended report stated that the IRS funds totaled \$904,277.78 in 1988 and were disbursed in the following manner: a "loan" to a radio station, not part of the bankruptcy estate, in the amount of \$286,233.20; a payment in the amount of \$387,400.00 to an entity called the "Sherwood Trust;" and the remainder to individuals, many of whom were insiders of the debtor. The report also alleged that the law firm was the only objecting creditor with standing to object to the amended report.

On August 23, 1991, this court stated in an order that it appeared on the face of the Amended Final Report that the debtor disbursed the IRS funds contrary to the terms of the confirmed plan and that the officers of the corporation had engaged in self-dealing, and the court ordered that a trial be scheduled to provide Mr. Vogelei and Mr. Ostberg the opportunity to explain what had happened to the IRS funds. The debtor was also ordered to turn over all evidence requested by the objecting creditors and further suggested that since the debtor was able to compile the data for the final reports and to litigate and settle the IRS's claim, the debtor should have access to some, if not all, of the previously ordered records. If those documents were not provided, Mr. Vogelei and Mr. Ostberg were ordered to provide a statement to the court specifically addressing any requested discovery that was not turned over.

The order also provided that the objections to the standing of the objecting creditors were to be addressed at the trial on the accounting of the IRS funds.

A pre-trial statement was prepared regarding the creditors' objections to the Amended Final Report and the debtor's objection to the standing of the objecting creditors as parties in interest. The debtor notified the court in a status report that the objecting creditors had not made any further discovery requests, but the creditors denied that discovery was completed and alleged that the debtor still had not complied with this court's previous orders to turn over discovery.

On April 24, 1992, the objecting creditors -- Healy, the law firm and ASCAP -- requested permission from the court to pursue corporate assets on behalf of the debtor against Mr. Vogelei and Mr. Ostberg. On May 29, 1992, Mr. Vogelei, on behalf of the debtor, resisted by raising the defense that any money received by him or Mr. Ostberg constituted reimbursements of post-petition loans to the post-confirmation debtor for its operations. The court overruled the debtor's resistance and granted the objecting creditors' motion to pursue corporate assets on May 29, 1992.

B. The History of the Adversary Proceeding

The objecting creditors, acting on behalf of the debtor (the plaintiff), filed this complaint on February 11, 1993. While a summons was issued to serve Mr. Ostberg, no Certificate of Service was filed for Mr. Ostberg, and Mr. Vogelei is the only active defendant [hereinafter Mr. Vogelei shall be referred to as "the defendant"].

The plaintiff alleged that the disbursements from the \$904,277.78 in IRS funds which were disclosed in the Amended Final Report were to insiders of Mr. Ostberg and Mr. Vogelei. Specifically, the plaintiff argues that the "Sherwood Trust" is a trust account maintained by Vogelei and/or his law firm in connection with dealings that the defendant's law firm had with other entities and that the radio station which received the "loan" was owned by a general partnership between Vogelei and Ostberg, both of whom had personal guaranteed loans relieved by the "loan" from the debtor. None of the IRS funds disbursed have been repaid to the debtor.

The complaint requests that the proceeds of the disbursed IRS funds, as property of the estate, be turned over to the debtor, that all unauthorized "loans" or other payments to insiders be repaid to the debtor, that all records, books, documents and papers relating to the debtor's property or financial affairs be turned over to the plaintiff, that the court find that the defendant converted property of the estate, that the defendant submit a full accounting of the debtor and of his personal records showing how the IRS funds were disbursed, and finally, that attorney fees and costs be awarded.

The defendant did not initially answer the complaint, but after a motion for default judgment was filed, the defendant answered on May 28, 1993, and the default motion was withdrawn. In his answer, the defendant stated that the business of the Sherwood Trust is protected by an attorney-client privilege, that he did not convert property of the estate, that the disbursements were in accordance with the confirmed plan and in the ordinary course of the debtor's business, that the defendant is not in possession of property of the estate, that the plaintiff has failed to state a cause of action, that the court lacks subject matter jurisdiction

to adjudicate Healy's claim, and finally, that all records were destroyed in a fire and therefore, the defendant cannot provide a more thorough accounting.

C. The Discovery Dispute in the Adversary Proceeding

The plaintiff filed its initial Notice of Service of Discovery Documents in this adversary proceeding on June 28, 1993. The discovery request was served upon the defendant's Omaha attorney.

On September 28, 1993, the plaintiff, in a response to a preliminary pretrial notice, stated that the defendant failed to comply with the plaintiff's June discovery request, that the attorney for the defendant could not be reached, that the defendant's attorney had moved his office, and that sanctions and attorney fees should be awarded to the plaintiff for failure to comply with the discovery request. This notice was sent to the defendant's attorney at his last known address.

On October 4, 1993, this court granted the defendant until November 1, 1993, to comply with the June 28, 1993, discovery request, and if the defendant missed the November 1, 1993, deadline, the court warned: "[S]anctions in the form of an assessment of attorney fees and perhaps in the form of a refusal to permit defendants to present evidence in support of their position will be considered." Filing no. 12. Notice of this order was sent to the defendant's attorney at his last known address.

On December 10, 1993, the plaintiff filed a Motion for Further Relief which alleged that the defendant did not fully comply with the court's October 4th order. The plaintiff stated that the responses to discovery from the defendant were not received until November 5, 1993, which was after the November 1 deadline set by the court, that the plaintiff subsequently wrote to the defendant's attorney to request that the responses be supplemented on the basis that the responses were evasive or incomplete, and that the defendant failed to supplement his responses. Finally, the plaintiff renewed the request for sanctions for attorney's fees and costs and for an order denying the defendant the right to submit evidence in his defense.

Specifically, the answers to the Interrogatories that the plaintiff objected to included: the defendant's assertion of an attorney-client privilege between himself and all matters regarding the Sherwood Trust; the defendant's lack of detail regarding to whom the funds from the IRS were distributed, what type of records verified these transfers and who possessed those records; lack of detail regarding other parties who may have information; and vague answers regarding the witnesses to be called for the defense. The plaintiff sent notice of this motion to the defendant's attorney.

In a Journal Entry entered on February 24, 1994, this court stated that the sole issue in this case is how the IRS funds were disbursed and that only two persons, Mr. Vogelei and Mr. Ostberg, have the answer. The court also found that as a shareholder, officer, director, and tax litigator of the post-confirmation debtor, the defendant did have knowledge of how the IRS funds were disbursed and that the defendant could not claim a generic "attorney-client" privilege without first establishing a legal basis for that privilege. The defendant, as a former officer and attorney of the debtor, was determined to have had access to and had to turn over all documents and bank statements in his possession or within his reach. The defendant was given until March 31, 1994, to comply with the discovery request or face sanctions including: "assessment of attorney fees, court costs and an order barring the presentation of documentary evidence or oral testimony by Mr. Vogelei which is inconsistent with the responses to the discovery requests." A copy of the order was mailed to the defendant's attorney at his last known address.

On April 19, 1994, the plaintiff renewed the motion for sanctions. The plaintiff alleged that its own discovery efforts revealed that the defendant had deposited at least one half of the IRS funds in the accounts of the defendant's law firm at West America Bank, which fact had never been disclosed by the defendant in his responses to discovery and which fact had been answered to the contrary by the defendant in his responses. The plaintiff requested attorney fees and expenses and requested that the court consider entering a default judgment against the defendant. Notice of the hearing on this motion was served upon the defendant's attorney at the new address that the attorney had begun to use in his pleadings.

In an order entered on May 27, 1994, the entry of a default judgment was threatened unless the defendant started to comply with the plaintiff's discovery requests:

Plaintiff... shall have, pursuant to F.R.C.P. 37(b)(2)(C), and Bankruptcy Rule 7037, judgment against the Defendant George (MAC) Vogelei, for the sum of Nine Hundred Four Thousand Dollars (\$904,000.00), plus interest, plus an award of attorney's fees and costs, unless said Defendant Vogelei makes the previously ordered discovery, and provides evidence satisfactory to the Court that such judgment is inappropriate, within 21 days of the entry of this order....

It is further Ordered that if Defendant George (Mac) Vogelei does not make discovery and otherwise persuade this Court that judgment is inappropriate within the time

period set forth above, this Court will, upon receipt of proof of service by counsel for Estate of Centennial Communications, Inc., of this order upon Defendant George (Mac) Vogelei and his counsel of record, enter judgment in accordance with this order against Defendant George (Mac) Vogelei, *without further notice to any party.*

Filing no. 24, ¶¶ 1 & 3 (emphasis added).

This order was served upon the defendant by mail and by Federal Express at his California address. The order was also served upon the defendant's attorney at his new Omaha address.

On June 17, 1994, the defendant responded to the court's order. The attorney for the defendant argued that he was not aware of the court's February order until mid-April 1994 because the attorney had moved his office yet again and the order was not, therefore, forwarded to him until April. The attorney stated that he mailed a copy of the order to the defendant, but that the defendant had to become current on attorney fees before the attorney would take any further action on the defendant's behalf. The attorney for the defendant argued that a default judgment would be too extreme in light of these circumstances, and argued instead that a sanction of attorney fees and expenses would be more appropriate. Accompanying the response was a Supplement Response to Interrogatories. The response named the beneficiary of the Sherwood Trust, the bank which handled the law firm's account, and the response claimed that all records of the debtor had been turned over to Hambric's attorney in the bankruptcy case and that the defendant did not retain any records of the debtor or of his own business affairs. The response was signed by the defendant's attorney, and not by the defendant.

A hearing on the response was scheduled for August 1, 1994. Notice of the hearing was sent to the defendant's attorney and to the defendant in California. This hearing was rescheduled to September 2, 1994. Notice of the rescheduled hearing was sent to the defendant in California and to the defendant's attorney at his new address in Omaha. The defendant's attorney appeared at the September 2, 1994, hearing, and after the hearing, the defendant and his attorney both received notice that the matter was taken under advisement.

An order was filed on September 26, 1994. The order noted that the supplemental interrogatories violated FED. R. CIV. P. 33(b)(2) because they were not signed by the defendant. The order also informed defendant that the supplemental responses did not properly address the IRS funds. The defendant had argued at the hearing that he was not "aware of the exact issues concerning the tax refund until just a few days prior to the hearing." However,

the order noted that the defendant did not submit any sworn affidavits or other evidence providing an explanation as to why he failed to comply with the discovery requests, but that the plaintiff had submitted evidence giving the court reason to believe that the defendant did in fact know about the issues raised in the discovery requests.

The order noted that the defendant, who was himself a licensed attorney represented by counsel in this matter, had significantly delayed the case by ignoring the Federal Rules of Civil Procedure and the many orders of this court directing him to comply with discovery but, the defendant was to be given one more chance before entertaining a default judgment sanction. The order granted the defendant until October 25, 1994, to "fully and completely" answer every interrogatory and request for admissions. The defendant was warned that he could not answer "I don't know" because even if the documents were destroyed or otherwise disposed of, the defendant could at least give his personal testimony as to what happened to the funds from the IRS. The plaintiff was awarded attorney fees and costs.

Regarding future consequences for noncompliance, the order contained the following warning:

[I]f the discovery requests are not fully answered under oath as provided in this order and answered on a timely basis, the Court will enter an order granting a monetary award to the plaintiff and may prohibit defendant from presenting any evidence in his own behalf at the trial of this matter. This threat has been suggested by this Court in its order of February 24, 1994, Filing No. 19. Counsel for the defendant claims that Mr. Vogeley claims that he did not receive a copy of that order. Whether he received it or not, he has not obeyed it. He will obey this order or he will suffer the consequences.

Filing no. 32, at 3.

A copy of this order was mailed by the clerk of court to the defendant's attorney at the address last used by the attorney and directed the plaintiff to mail a copy of the order directly to Mr. Vogeley. A few weeks passed and nothing further was heard from any party. The parties were ordered on November 10, 1994, to submit a status report by December 1, 1994. Notice of this order was sent to the defendant's attorney at his address on record with the court.

The plaintiff filed a status report on November 30, 1994, and stated that the attorney for the defendant had requested an

extension of the October 25, 1994, deadline for discovery compliance. The plaintiff attached a Supplemental Response to Interrogatories, which was once again signed by the defendant's attorney, not the defendant, but attached to the supplement was a signed notarized statement dated October 28, 1994, wherein the defendant stated that he read the Supplemental Response to Interrogatories and believed them to be true to the best of his knowledge. The plaintiff also noted that the attorney for the defendant had promised additional documents were forthcoming, but that said promised documents had not been delivered as of November 30, 1994. The plaintiff also noted that the Supplemental Response to Interrogatories was not responsive, specifically because the defendant did not attempt to establish the documentary support for the "loans" to the debtor by the Sherwood Trust and other parties which had received payments from the pool of IRS funds. The plaintiff also alleged that the defendant would not respond to attempts to contact him to set up a time to take his deposition. The report indicates that both the defendant and his attorney were served a copy of the report by the plaintiff.

On the same date, the plaintiff filed a breakdown of the attorney fees expended in attempting to get the defendant to comply with discovery. Notice of this itemization was sent to both the defendant and the defendant's attorney.

Defendant filed no status report and did not respond to the status report submitted by plaintiff. On December 23, 1994, a judgment was entered against the defendant, pursuant to the court's order of September 26, 1994, for attorney fees and costs. A copy of this order was sent by the court to the defendant's attorney.

On the same date, the court granted a default judgment in favor of the plaintiff and against the defendant in the amount of \$904,000.00 plus interest from and after January 1, 1989, with costs and attorney fees to be taxed by the court, but not duplicative of those attorney fees and costs awarded in the separate December 23, 1994, order. In this judgment entry, the court noted that the only response to its September 26, 1994, order was the Supplemental Response to Interrogatories and found that the answers contained in the supplement were inadequate in light of previous orders. The court, having found that the defendant had been afforded ample opportunity to comply with discovery, entered judgment pursuant to the authority of in FED. R. BANKR. P. 7037 and FED. R. CIV. P. 37(b)(2)(C). Notice of the judgment was sent to the defendant's attorney at his last known address.

After the default judgment was entered, the defendant did not contact this court until the present motion was filed. In the meantime, a status hearing was held on August 25, 1995, notice of which was sent directly to the defendant and to his attorney in Omaha, but neither the defendant nor his attorney made an appearance at the status hearing.

On December 27, 1995, the defendant, through a new attorney, filed this motion for relief from the default judgment of December 23, 1994. Said motion was subsequently amended, and the amended version is located at filing number 58. The defendant requests that the court grant relief from the judgment on the following grounds: the defendant did in fact comply with all discovery requests; the court erred in its findings of incomplete discovery before entering the judgment; the plaintiff did not articulate any need for further discovery to defendant; the \$904,000.00 judgment is a greater amount of money than was ever in the defendant's possession; the defendant did not have notice that the status report filed by the plaintiff would trigger a default judgment; the defendant has not been able to reach his Omaha attorney since November 1994; the defendant was unaware that his attorney did not respond to the plaintiff's status report; the defendant did not get notice of the judgment until February 8, 1995, which was after the time to appeal had run; the plaintiff was not prejudiced by the delay because the information is primarily documentary in nature; the plaintiff by not making its discovery requests more specific caused the delay in this case; and the defendant has a meritorious defense to the causes of action in the complaint and should not be precluded from seeking a decision on the merits.

Decision

1. Mr. Vogelei failed to file his Federal Rule of Civil Procedure 60(b)(1) motion within one year after the default judgment was entered, and therefore, his Rule 60(b)(1) motion is denied.
2. Even if Mr. Vogelei's Rule 60(b)(1) motion had been timely filed, he has failed to show that he is entitled to relief from the default judgment for excusable neglect, and therefore, the motion is also denied on its merits.

Discussion

1. Timeliness of Rule 60(b)(1) Motion

The defendant is requesting that the court grant relief from the default judgment for mistake, inadvertence, surprise or excusable neglect pursuant to Bankruptcy Rule 9024 and Federal Rule of Civil Procedure 60(b)(1). Bankruptcy Rule 9024 applies Federal Rule 60(b)(1) for relief from a judgment. FED. R. BANKR. P. 9024. Federal Rule 60(b)(1) provides:

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;... The motion shall be made within a reasonable time, and for reasons (1),... not

more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

FED. R. CIV. P. 60(b)(1); see also FED. R. BANKR. P. 7055(c) (stating a Rule 60(b) motion may be made to set aside a default judgment in an adversary proceeding). The one year time period set under Bankruptcy Rule 9024 may not be enlarged by the bankruptcy court. See FED. R. BANKR. P. 9006(b)(2); see also Federal Deposit Ins. Corp. v. Brenesell (In re Brenesell), 109 B.R. 412, 418 (Bankr. D. Haw. 1989).

The same rule applies to all federal courts through Federal Rule 6(b), which states that courts have no authority to enlarge the one year time period for filing a Federal Rule 60(b) motion. FED. R. CIV. P. 6(b). Therefore, motions made pursuant to Rule 60(b)(1) must be made within one year of the entry of the judgment. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 113 S. Ct. 1489, 1497, 123 L. Ed. 2d 74 (1993); Robinson v. Armontrout, 8 F.3d 6, 7 (8th Cir. 1993); Charles C. MacLean, III, Architect, Ltd. v. Ozark Mountain Country Mall, Inc. (In re Branson Mall, Inc.), 970 F.2d 456, 462 (8th Cir. 1992); Chicago & N. W. Ry. Co. v. Union Packing Co., 527 F.2d 592, 592 (8th Cir. 1976); Hale v. Ralston Purina Co., 432 F.2d 156 (8th Cir. 1970); United States v. Thompson, 438 F.2d 254, 256 (8th Cir. 1971); see also United States v. Dakota Cheese, Inc., 923 F.2d 576, 577 (8th Cir. 1991) (affirming order denying motion to set aside which was essentially a Rule 60(b)(2) motion and was time-barred); Lester v. Empire Fire & Marine Ins. Co., 87 F.R.D. 466, 467 (E.D. Mo. 1980), aff'd, 653 F.2d 353, 354 (8th Cir. 1981) (refusing to permit a motion under Rule 60(b)(6) when motion was in essence a Rule 60(b)(3) motion and was time barred).

The court file reflects that the judgment was signed and docketed by the court on December 23, 1994. See Filing no. 37. Bankruptcy Rule 9021 states that a judgment is effective in an adversary proceeding when entered pursuant to Federal Rule 5003(a), which provides that the effective date is the date said judgment is docketed. FED. R. BANKR. P. 9021; FED. R. BANKR. P. 5003(a); see also FED. R. CIV. P. 58. Therefore, December 23, 1994, was the effective date that the judgment was entered.

The defendant filed the Federal Rule 60(b) motion on December 27, 1995. This date was one day too late. The one year time period expired on December 23, 1995, which was a Saturday. Bankruptcy Rule 9006 states that when computing a period of time prescribed by the Bankruptcy Rules or the Federal Rules of Civil Procedure the last day is not included if it falls on Saturday, Sunday, or a legal holiday. FED. BANKR. R. 9006(a); see also Brenesell, 109 B.R. at 416 (citation omitted). In the present

case, the day after December 23, 1995, was a Sunday, and the following Monday, December 25, 1995, was a legal holiday. Therefore, the last day for the defendant to file a Federal Rule 60(b) motion was December 26, 1995, which was a Tuesday and which was not a legal holiday in 1995.

The defendant has argued that he did not have sufficient funds to bring the motion to grant relief from the judgment until December 27, 1995. Even though the bankruptcy court does not have authority to enlarge the one year time period, the defendant admitted that he knew of the default judgment by February of 1994. As a licensed attorney, the defendant could have filed on his own behalf if he did not have adequate funds to hire an attorney.

After one year has passed, the only authority to grant relief from a judgment is through Rule 60(b)(6) for "any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b)(6); FED. R. BANKR. P. 9024. Rule 60(b)(6), however, is mutually exclusive from Rule 60(b)(1), and "thus a party who failed to take timely action due to "excusable neglect" may not seek relief more than a year after the judgment by resorting to subsection (6). Pioneer, 113 S. Ct. at 1497 (citation omitted). Pursuant to Rule 60(b)(6), the defendant would have to show "extraordinary circumstances" and show that he is faultless in the delay, but since the defendant is not faultless for the delay in this case and since he has sought relief pursuant to Rule 60(b)(1), he is not entitled to seek relief pursuant to Rule 60(b)(6). Id.

The defendant's Rule 60(b)(1) motion is denied because the motion was filed after the one year deadline.

2. Alternative Decision on Rule 60(b)(1) Merits

Even if this court had found that the defendant's Rule 60(b)(1) motion was timely, the defendant would not be entitled to relief from the judgment under Rule 60(b)(1) because the defendant has not shown that his failure to act was the result of excusable neglect.

Generally, a Rule 60(b) motion must be made within the period for filing an appeal to prevent parties from using a Rule 60(b) motion as a substitute for an untimely appeal. Townsend v. Terminal Packaging Co., 853 F.2d 623, 624 (8th Cir. 1988); Sanders v. Clemco Indus., 862 F.2d 161, 169 (8th Cir. 1988). In this case, however, the defendant alleges that he did not receive notice of the default judgment until February of 1995, which was after the appeal period had expired. See, FED. R. BANKR. P. 8002(a). Since this court did not send a copy of the default judgment directly to the defendant, as it had sent prior orders, but sent notice to his Omaha attorney, the defendant shall receive the benefit of the doubt and the merits of the defendant's Rule 60(b)(1) motion shall be discussed, even though the defendant should be treated as having

all notice which may be charged to his attorney. See Pioneer, 113 S. Ct. at 1499.

The defendant may not address the underlying merits of the default judgment through a Rule 60(b)(1) motion because the merits of the default judgment are not appealable through a Rule 60(b)(1) motion. Employment Sec. Div. v. W.F. Hurley, Inc. (In re W.F. Hurley, Inc.), 612 F.2d 392, 395-96 (8th Cir. 1980)). Instead, the defendant must show mistake, surprise, inadvertence, or excusable neglect. Securities & Exch. Comm'n v. Seaboard Corp., 666 F.2d 414, 416 (9th Cir. 1982) (following same rule as Eighth Circuit that denial of Rule 60(b)(1) motion and subsequent appeal does not bring the underlying judgment for review).

A Rule 60(b) motion "provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances." United States v. Young, 806 F.2d 805, 806 (8th Cir. 1986), cert. denied, 484 U.S. 836, 108 S. Ct. 117, 98 L. Ed. 2d 76 (1987); Sanders, 862 F.2d at 169 n. 14. This includes showing good cause for failing to act sooner and showing that no undue hardship be imposed on other parties. Kotlicky v. United States Fidelity & Guar. Co., 817 F.2d 6, 9 (2nd Cir. 1987).

One bankruptcy court in this circuit has noted when deciding whether to grant relief to a final judgment under Rule 60(b), that the following principles apply:

The decision to grant relief under F.R. Civ. P. 60(b) is generally within the sound discretion of the court....The concept of setting aside judgments should be construed narrowly in the interest of finality.

In re Rice, 42 B.R. 838, 842 (Bankr. D.S.D. 1984) (citations omitted). The defendant, as the moving party, has the burden of establishing that he is entitled to relief under Rule 60(b), and "[m]erely raising an issue is not enough." Id. at 843 (citing 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2857, *et seq.* (1973)).

To determine whether to grant relief from a judgment pursuant to a Rule 60(b)(1) motion, the court must consider the definition of "excusable neglect" set forth by the Supreme Court in Pioneer Investments. In Pioneer, the Supreme Court ruled that the concept of "neglect" encompassed both intervening circumstances beyond the control of the movant and omissions caused by carelessness, mistake or inadvertence. 113 S. Ct. at 1495. For such "neglect" to be "excusable," the Supreme Court decided that the determination is equitable in nature and takes into account all relevant circumstances, including consideration of the following factors:

- (1) the danger of prejudice to the debtor,

(2) the length of the delay and its potential impact on judicial proceedings,

(3) the reason for the delay, including whether it was in the reasonable control of the movant, and

(4) whether the movant acted in good faith.

Id. at 1498.

The defendant has failed to show that he is entitled to relief from the default judgment entered on December 23, 1994, for excusable neglect.

(1) Danger of Prejudice to the Debtor

If the court granted relief from its December 23, 1994, judgment, the plaintiff would be prejudiced by the long delays caused by the defendant's failure to comply with discovery and by the long time period the defendant waited to file the Rule 60(b)(1) motion. This adversary proceeding was initiated to recover proceeds allegedly converted from the debtor by the defendant. The alleged conversion took place by 1988. Beginning in 1989, this court issued five orders in the bankruptcy case directing the defendant to make a full accounting of the IRS funds and to turn over the relevant documents. Once the adversary proceeding began, this court issued four more orders during 1993 and 1994 directing the defendant to comply with the plaintiff's discovery requests. In other words, the defendant has been ordered by this court nine times in six years to make the proper disclosures regarding what happened to the IRS funds.

In addition to the length of time spent disputing discovery, the defendant also waited to file the Rule 60(b)(1) motion to the date that the defendant erroneously believed to be the absolute last day to file a Rule 60(b)(1) motion. The defendant knew of the default judgment by his own admission in February of 1995, and the defendant had notice of a status hearing held in July 1995 in the adversary case. The defendant had numerous opportunities to bring this Rule 60(b)(1) motion so that this case could proceed on its merits.

The defendant takes the position that he was not aware that his Omaha attorney had not responded to this court's November 10, 1994, order directing the parties to file a status report and that he could not act earlier on the Rule 60(b)(1) motion because he did not have sufficient funds to hire a new attorney in Omaha until December 27, 1995. Neither excuse gives reasonable cause for the delays caused in this case.

The defendant alleges that his original attorney in the adversary proceeding neglected to respond to the plaintiff's status

report and that the defendant could not contact his attorney after November of 1994. In Pioneer, the Supreme Court reinforced its long standing rule that clients are accountable for the acts and omissions of their attorneys. 113 S. Ct. at 1499. The Eighth Circuit strictly follows this principle:

A party chooses counsel at his or her peril. Counsel's disregard of his or her professional responsibilities can lead to extinction of his or her client's claims. It is a well-established principle that a party is responsible for the actions and conduct of his or her counsel and that, under appropriate circumstances, dismissal or default may be entered against a party as a result of counsel's actions.

Comiskey v. JFTJ Corp., 989 F.2d 1007, 1010 (8th Cir. 1993);
Boogaerts v. Bank of Bradley, 961 F.2d 765, 768 (8th Cir. 1992).

The defendant's allegations against his former attorney, therefore, are not cause for finding excusable neglect. As an attorney himself, the defendant should have been put on notice to inquire about the status of his case with the court after he was unable to contact his attorney in November, 1994. The Fifth Circuit Court of Appeals in Travelers Indem. Co. v. United States (In re Ta Chi Navigation), held in a case where the moving party filed a Rule 60(b) motion one day before the expiration of the one year period that the district court did not abuse its discretion by denying the motion on the ground that the failure of the moving party to inquire of the status of the case for almost one year amounted "to want of adequate care or ignorance of the rules." 728 F.2d 699, 703-04 (5th Cir. 1984); see also Brenesell, 109 B.R. at 420 (citing Ta Chi Navigation). There is no evidence regarding why the defendant's attorney did not respond to the plaintiff's status report, but assuming for the limited purpose of this argument that the attorney did have a duty to act, the failure to act by the defendant's attorney is not for cause for the defendant to hide behind that attorney's omissions for excusable neglect purposes. Only the defendant had the power to apprise this court of any omissions by his attorney, and the defendant's failure to remain diligent is not excusable neglect.

The defendant's next argument is that the plaintiff is not prejudiced because the information relevant to this case is primarily documentary in nature. This argument is without merit and is not made in good faith. A consistent problem in this case has been the defendant's refusal to turn over documents. The plaintiff's final status report of November 30, 1994, attached a letter from the defendant's attorney which represented that more documents were in the mail and on their way to Omaha from the defendant. The plaintiff's status report also notes that those

documents never reached the plaintiff, which may mean that the documents are still in the possession of the defendant. However, in the defendant's Rule 60(b)(1) motion, the defendant takes the position that all documents have been turned over. From the evidence in the record, including the last letter from defendant's counsel to plaintiff's counsel, it is concluded that the defendant has not turned over all documents and the court finds that the defendant's position is without merit.

Since over eight years have transpired since the IRS funds were distributed by the defendant, the ability of the plaintiff to secure the discovery which was once in existence is now in serious jeopardy. Other parties who may have once held relevant information may have destroyed their records, and the ability of parties to recollect the events at issue will have decreased over the passage of so much time. In addition, the defendant presently denies having any more documents, even though before the default judgment was entered, representations were made to the contrary. There is no evidence that if this court were to grant the Rule 60(b)(1) motion, the defendant would not simply continue engaging in conduct designed to evade discovery and further delay this case to the prejudice of the plaintiff.

(2) Length of Delay and Impact on Proceedings

The length of the delay in this case has been prejudicial to the judicial proceedings in this case. The numerous orders in the bankruptcy case and in the adversary proceeding have consistently found that the defendant has failed to comply with discovery and have consistently ordered the defendant to so comply.

The defendant has consistently represented that he has completely provided all available discovery. However, after each instance where the court has found against this representation based upon information uncovered by the plaintiff through other discovery and has threatened the defendant with sanctions for withholding discovery, the defendant has produced more discovery. However, such production has been limited to the scope of what the plaintiff has already discovered and presented as evidence before this court to show that the defendant is not complying with the court's orders. Defendant only provides documents and information if plaintiff first learns about such documents or information from other sources.

There are two specific examples of when this type of conduct has occurred in this adversary proceeding. The first was after the plaintiff filed its April 14, 1994, motion for sanctions. In the motion, the plaintiff revealed that the defendant deposited over one half of the IRS funds into his law firm account at West America Bank. Up to that point, the defendant had been representing to this court that he had fully complied with all discovery and did not have information or records relating to any law firm accounts.

However, on June 17, 1994, after defendant was threatened with a default judgment, the defendant supplemented his discovery responses. The scope of the supplements, however, was limited to what the plaintiff already knew about West America Bank and about the beneficiary of the Sherwood Trust.

The second example is in the September 26, 1994, order where the court found that the plaintiff had submitted additional evidence which showed that the defendant was withholding information from the plaintiff. In response to this allegation and the threat of a default judgment, the defendant once again supplemented his discovery responses, which were attached to the plaintiff's November 29, 1994, status report. These responses were once again evasive and inadequate. The defendant did not turnover all documentation to the plaintiff and the defendant did not provide any information to establish or explain a basis for the alleged post-confirmation "loans".

(3) Reason for Delay and Whether within Control of Defendant

The defendant alleges that the status report is really a motion with a request for sanctions and penalties and that the plaintiff failed to give appropriate notice of a resistance date pursuant to Local Rule 9014. See GENERAL ORDER 95-1 (listing the motions that Local Rule 9014 applies to in an adversary proceeding), NEB. R. BANKR. P. 9014. However, as noted by the court during the hearing, General Order 95-1 was issued on August 24, 1995, and from December 3, 1993, to the date of the General Order, Local Rule 9014 did not apply to motions filed in adversary proceedings. NEB. R. BANKR. P. Appendix A (Dec. 3, 1993). Therefore, the plaintiff, when filing the status report and serving it on defendant, and assuming for the limited purpose of the defendant's argument that the status report was a motion, was not required to give a resistance date to the defendant in accordance with Local Rule 9014. The change in the Local Rules also explains why the plaintiff did set a resistance date pursuant to Local Rule 9014 in its September 28, 1993, motion and every motion thereafter.

The defendant's argument that he was not aware that the status report would trigger a default judgment is baseless. The defendant was informed in the May 27, 1994, order that this court would enter a default judgment without notice if the defendant failed to comply with the plaintiff's discovery requests. After this order, the defendant's attorney filed supplemental responses, which were found to be inadequate on September 26, 1994. The September 26, 1994, order, however, gave the defendant one more chance to comply, but stated that the plaintiff would be granted a monetary award if the defendant did not "fully" answer each discovery request. The court independently requested status reports from the parties to follow up on the September 26, 1994, order. The plaintiff's status report was not a motion, but the plaintiff's response to the court's order. The defendant did not file a status report.

The record made by the orders and during the accompanying hearings put the defendant on notice that a default judgment would result if the defendant failed to fully answer the discovery requests. In Williams v. Texaco, Inc., 165 B.R. 662, 674 (D.N.M. 1994), the only bankruptcy case to address a Rule 60(b)(1) motion for relief from a Rule 37(b)(2)(C) sanction, the district court noted that it was not necessary to provide an evidentiary hearing before imposing the sanctions when "there was nothing left for the court to do at the formal hearing except waste more time of the court and the parties." Id. (quoting Godlove v. Bamberger, Foreman, Oswald & Hahn, 903 F.2d 1145, 1148-49 (7th Cir. 1990), cert. denied, 499 U.S. 913, 111 S. Ct. 1123, 113 L. Ed. 2d 230 (1991)). In the present case, the defendant had prior notice of the possibility of a sanction and had been warned that he would face a default judgment if he failed to fully disclose all information requested by the plaintiff. The defendant did not adequately disclose, and the defendant did not give this court any reason why the default judgment should not have been entered against him. Therefore, an additional hearing before the imposition of the default judgment was unnecessary in this case.

The defendant's allegation that the plaintiff is the responsible party for the delays in discovery is without merit. The defendant alleges that the plaintiff failed to make its discovery requests specific enough, but the defendant has had several years and several court appearances to have the plaintiff clarify its discovery requests or have the court clarify its own orders. This court has on several occasions accommodated the defendant by granting him additional time to provide discovery to the plaintiff, and the defendant could have requested any clarifications at those hearings. The defendant could have appealed, requested reconsideration, or clarification of this court's orders as they were issued. Instead, the defendant tried to stall the process by misleading this court and the plaintiff as to his intentions to comply with discovery.

Similarly, the defendant's assertion that the plaintiff did not inform the defendant that further discovery was necessary is without merit. The letter from the defendant's attorney, which is attached to the plaintiff's November 30, 1994, status report, shows that the defendant had represented that further disclosure was forthcoming. In addition, the defendant pled in his Rule 60(b)(1) motion that he was unaware that his attorney failed to respond to the plaintiff's status report. Such an argument discloses that the defendant had notice of the status report and was aware before the default judgment was entered that the plaintiff did not find the supplemental disclosures adequate.

The defendant is personally knowledgeable of how the IRS funds were disbursed, and the defendant is an attorney. The defendant's argument that he does not "understand" what he is supposed to disclose after all of the years spent dragging his heels in this

matter and after all of the occasions to which he has represented that he has fully complied with this court's orders is not only indicative of the games that the defendant has played over the course of the discovery process, but is also indicative of bad faith on the part of this defendant.

(4) Good Faith of Vogelei

The defendant's next allegation is that this court erred because the defendant did in fact respond to the discovery requests of the plaintiff in good faith. Under the procedural rules for discovery, evasive or incomplete disclosure, answers or responses are treated as a failure to disclose. FED. R. BANKR. P. 7037; FED. R. CIV. P. 37(a)(3). In the bankruptcy case, the defendant first alleged that he provided all documents in his possession and all relevant information regarding the IRS funds to Mr. Hambric, which Mr. Hambric regularly disputed. Filing. no. 284, att. ex. A.

Second, the defendant alleged that the debtor's records were stolen:

The undersigned has testified under oath in this Court regarding a theft of the records which were kept in a storage warehouse of the Debtor and the undersigned has submitted an affidavit to this Court testifying that copies of all of Debtor's records which had been discovered as of the date of the Final Report have been provided to Mr. Hambric in response to his discovery in the claims litigation. Additional records have been discovered and debtor is in the process of supplementing its reponse [sic] to the Hambric Discovery Request.

BK81-2295, Filing no. 314, ¶ 11(e). It is also relevant that the defendant represented repeatedly in this document that he provided "copies" of the debtor's documents to Mr. Hambric.

Presently in the adversary proceeding, Mr. Vogelei states that the attorney for Mr. Hambric in the bankruptcy case has possession of all of the debtor's original records and that the defendant "has retained no copies" of those records. See Supplemental Responses to Request for Production of Documents, Ex. 1, att. ex. 6 (undated); Answers to Interrogatories, Nov. 5, 1993; Responses to Request for Production of Documents, Nov. 5, 1993; Supplemental Responses to Request for Production of Documents, Ex. 1, att. ex. 6 (undated). However, as the preceding quotation shows, the defendant stated during the bankruptcy case that he sent Mr. Hambric copies of the original documents.

In the defendant's Answer to the Complaint in the adversary proceeding, the defendant, through his attorney, pled that he could not provide an accounting of the funds because of a fire:

For further answer and by way of affirmative defense, this Defendant has previously exercised his best efforts to provide the Bankruptcy Court and all creditors with an accounting and that further and more in depth accounting is not available due to the loss and destruction of financial records in a fire.

Filing no. 7, ¶ [7, misidentified as 6] at 6. The defendant has at different times represented that he turned over all of the original documents, that the documents were stolen, and that the documents were destroyed in a fire. The defendant's inconsistency regarding what in fact happened to the relevant documents is indicative of the defendant's bad faith.

Currently, the defendant is taking the position that he has fully complied with the plaintiff's discovery requests, that he does not have access to the debtor's documents, and that he retains no business records of his law firm or personal business dealings. An examination of the information contained in the two supplemental responses submitted to the court in the adversary proceeding further reveals how the defendant has not acted in good faith and reveals why this representation is unbelievable.

Earlier in this opinion the court discussed how the defendant represented to the court that he had completely complied with discovery, but when the plaintiff confronted the defendant with sanctions, the defendant was suddenly able to produce information regarding his law firm's bank accounts in the first supplement, and the names of the parties who received disbursements from the IRS funds in the second supplement. The information in these supplements, especially the second supplement, is detailed enough to indicate that the defendant has been withholding information from the plaintiff.

Further evidence that the defendant has been intentionally withholding information is apparent when the information contained in the Amended Final Report is compared to the information disclosed in the adversary proceeding. As was mentioned in a prior order, the defendant could not have litigated the tax claim or prepared the Amended Final Report without possessing the relevant documents or without at least having knowledge of some of the information that the defendant has refused to provide to the plaintiff. The defendant has steadfastly denied having possession of such information or knowledge of how the proceeds were distributed. However, as the supplements served in November of

1994 show, the defendant does in fact have access to such information.

When the defendant has submitted responses to discovery requests, the substance of the information disclosed has always been a regurgitation of the information that the plaintiff discovered from other sources. For example, in the Interrogatories and Responses stamped November 5, 1993, the defendant denies having knowledge of or possession of any documents which related to facts not already contained in the pleadings in the bankruptcy case and the adversary proceeding. The only substantial information contained in these responses regarded the ownership division between Mr. Vogeley and Mr. Ostberg in the entity which owned the radio station located in Oregon, and the plaintiff first brought these facts to the attention of the court in the bankruptcy case.

The defendant's first set of supplements provided in summary that the defendant did not have possession of the debtor's documents, that he did not have possession of his own business records or of the records of other entities that he owns, and that the Sherwood Trust was in fact a trust account maintained by the defendant and/or his law firm. Ex. 1, att. exs. 6 & 7. None of this information contained facts which the plaintiff had not already asserted in the complaint or in the bankruptcy case.

In the second supplement filed on November 2, 1994, the defendant, after approximately five years of denying any knowledge of how the IRS funds were distributed, provided a summary of how the funds were distributed. Even on the defendant's own admissions, virtually all of the IRS funds ended up in his trust account.

The defendant's answers in the second supplement fell short of satisfying the plaintiff's discovery requests. The defendant did not turn over documents and answers regarding the business interests of the defendant and his law firm regarding those entities which received funds from the debtor. The defendant has failed to turn over any information or documents to establish that entities which received funds from the debtor were in fact entitled to such funds. The defendant has also failed to turn over the documents that he represented to the plaintiff were forthcoming.

The defendant is also alleging that the default judgment has denied him the right to put on a meritorious defense, but the defendant has not supported this allegation by actually raising a meritorious defense. The confirmed plan clearly provided that the proceeds from the sale of the radio stations were to be turned over to a bank for distribution in accordance with the confirmed plan and that the debtor was to remain a non-operating entity. Therefore, any alleged undocumented "loans" to the debtor during the post-confirmation period were not in the ordinary course of business, as the defendant has alleged, since the debtor was not an

operating business. In addition, these "loans" do not appear to be in accordance with the plain language of the confirmed plan.

In the bankruptcy case, when the original report was filed in 1989, the court found that it appeared on the face of that report that the defendant converted funds for his own benefit. The defendant raises several arguments about how he has not been given a chance to argue the merits of this finding, but a review of this orders in the bankruptcy case and the adversary proceeding shows that the defendant has had every opportunity to provide discovery or to provide a satisfactory explanation as to his right to use the IRS funds as he saw fit, rather than in compliance with the confirmed plan.

The defendant did not act in good faith in responding to the plaintiff's discovery requests. The defendant intentionally withheld information and delayed this adversary proceeding to prevent this case from proceeding on the merits.

After considering the factors enumerated in Pioneer, the court finds that the conduct of the defendant in failing to respond to this court's request for a status report and for waiting for over one year after default judgment was entered against the defendant before filing a Rule 60(b)(1) motion was not excusable neglect. The defendant's Rule 60(b)(1) motion for relief from the default judgment entered on December 23, 1994, is denied.

Separate journal entry to be filed.

DATED: April 18, 1996

BY THE COURT:

Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

QUINN, DOUGLAS	341-0216
PERRY, MARY LOU	393-8645
GINN, ROBERT	348-1111
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