UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In Re:	)	
	)	
E-Z Serve Convenience Stores, Inc., et al.	)	**Case No. 02-83138 - 11D**
	)	**(Jointly Administered)**
Debtors.	)	
	)	

ORDER DENYING MOTION FOR RECONSIDERATION

This matter came on before this Court on April 3, 2003 to consider the motion of the CIT Group/Business Credit, Inc. for reconsideration of the Order allowing Rayburn, Cooper and Durham, P.A. to transfer to the Trustee a portion of the retainer, free and clear of all liens and claims. Appearing before the court was Kenneth Greene, on behalf of CIT Group, John A. Northen, on behalf of the Chapter 11 Trustee, Lisa Sumner, on behalf of the Unsecured Creditors Committee and Michael D. West, the Bankruptcy Administrator. After considering the matters set forth therein, and the record in the case, the Court makes the following findings of fact and conclusions of law:

BACKGROUND

E-Z Serve Convenience Stores, Inc., E-Z Serve Corporation, SSCH Holding Corp., Swifty Serve, LLC, and Swifty Serve Holding Corp. (collectively the "Debtors"), commenced their respective reorganization cases by filing voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on October 4, 2002. This Court ordered that the cases be administered jointly on October 7, 2002.

Prior to the Petition Date, the Debtors retained Rayburn, Cooper and Durham, P.A.

("RC&D") as their counsel in the Chapter 11 proceedings and deposited approximately $250,000.00 as a retainer. The Court entered an order on October 24, 2002 approving the Debtors' retention of RC&D as counsel nunc pro tunc to the petition date.

On October 18, 2002, an order was entered appointing a Chapter 11 Trustee. That order provided that the premium required to procure the Trustee's case bond be advanced from retainer funds currently held by counsel for the Debtors. Counsel for CIT Group was present at the hearing on the matter and did not comment upon or object to the use of the retainer funds. On November 18, 2002, the Trustee filed a report in which he disclosed the receipt of $130,000 from counsel for the Debtors

On January 9, 2003, RC&D filed a motion for authority to withdraw as counsel for the Debtors and to transfer to the Trustee the remaining portion of the pre-petition retainer held by counsel for the Debtors (the "Withdrawal Motion"). The Withdrawal Motion requested that the Court enter an order allowing RC&D to release the funds remaining in the retainer account in the amount of $150,000.00 to the Trustee, *free and clear of any pre-petition or post-petition liens.* (emphasis added). This request was articulated in the Withdrawal Motion in both paragraph twelve (12) of the Motion, and in paragraph E of the prayer for relief.

RC&D properly served CIT Group's counsel with a copy of the Withdrawal Motion. On or about January 10, 2003, the clerk issued and served a notice scheduling the Withdrawal Motion for hearing on February 6, 2003 at 10:00 a.m. On or about January 27, 2003, the clerk issued and served an amended notice of hearing which changed the time of the hearing on the Withdrawal Motion to 11:00 a.m. on February 6, 2003. CIT Group acknowledges receipt of service of the Withdrawal Motion and both notices issued by the clerk. A hearing on the

Withdrawal Motion was held on February 6, 2003. CIT Group did not file a written response to the Withdrawal Motion or appear at the February 6, 2003 hearing. The Court entered an order granting the uncontested Withdrawal Motion on February 11, 2003 (the "Withdrawal Order") and allowing the transfer of the unused portion of the RC&D retainer funds to the Trustee free and clear of liens. On March 10, 2003, CIT Group filed a motion for reconsideration of the Withdrawal Order.

Pre-petition, the Debtors and CIT Group had entered into a Financing Agreement (the "Financing Agreement") dated September 23, 1999 pursuant to which CIT Group made loans and extended credit to the Debtors. CIT Group was secured by first priority perfected liens and security interests in certain assets and properties of the Debtors, including accounts, inventory and general intangibles. At the time of filing, the Debtors were indebted to CIT Group in the amount of approximately $17 million, with an additional exposure of approximately $4.1 million arising from outstanding stand-by letters of credit. In addition, the Debtors had insufficient funds to pay accrued payroll or withholding taxes, had gasoline on the premises which constituted a potential environmental hazard, and had no ability to secure the stores from vandalism or theft. As a result, the automatic stay was immediately lifted as to CIT and all of its collateral as set forth in the Financing Agreement, except for outstanding accounts of the Debtors, to allow CIT to collect and liquidate the Debtors' inventory.

In the present motion, CIT Group claims it has a first priority perfected security interest in the retainer refund pursuant to the Financing Agreement, and asserts that the CIT Group's failure to submit an objection to the Withdrawal Motion constitutes mistake, inadvertence, or excusable neglect pursuant to Federal Rule of Civil Procedure 60(b)(1), made applicable by Bankruptcy

Rule 9024. Accordingly, CIT Group requests that the Withdrawal Order be reconsidered and amended to preserve CIT Group's lien, or in the alternative, to reserve CIT Group's right to commence an adversary proceeding or contested matter to determine the extent, priority and validity of the CIT Group's lien.

DISCUSSION

Rule 60(b)(1) provides for relief from a judgment or order of the court on the basis of "mistake, inadvertence, surprise, or excusable neglect." Fed.R.Civ.P. 60(b)(1). A Rule 60(b) motion must be filed within one year of the order from which the movant seeks relief. Id. In Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), the United States Supreme Court set forth the standard for excusable neglect. Neglect includes simple, faultless omissions to act and omissions caused by carelessness. Id. at 388, 113 S.Ct. at 1494. The determination of whether the neglect was excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." Id. at 395, 113 S.Ct. at 1498. Excusable neglect under Rule 60(b)(1) should be determined from the totality of the circumstances surrounding the incident, including the danger of prejudice to the debtor, the length of the delay and potential impact on judicial proceedings, the reason for the delay including whether it is within the reasonable control of the movant, and whether the movant acted in good faith. Pioneer, 507 U.S. at 395, 113 S.Ct. at 1498.

Relief under Rule 60(b)(1) is only appropriate upon a finding of extraordinary circumstances and is not easily demonstrated. Thompson v. E.I. DuPont de Nemours & Co., 75 F.3d 530, 534 (4th Cir. 1996) (no excusable neglect where the neglect at issue was "nothing more

than inexcusable run-of-the-mill inattentiveness by counsel); see also Compton v. Alton S.S. Co., 608 F.2d 96, 102 (4th Cir.1979); In re Design Classics, Inc., 788 F.2d 1384 (8th Cir. 1986). The party seeking relief based upon Rule 60(b)(1) bears the burden of proving excusable neglect by a preponderance of the evidence. See In re Bulic, 997 F.2d 299, 302 (7th Cir.1993); In re Houbigant, Inc., 188 B.R. 347, 354 (Bankr. S.D.N.Y.1995).

Here, CIT Group failed to timely object to the Withdrawal Motion or appear at the hearing, despite notice. CIT Group contends that since neither the caption of the Withdrawal Motion nor the notices of hearing thereon mentioned that the Withdrawal Motion sought to avoid all prepetition and postpetition liens in the refund of the retainer, CIT Group assumed that it had no interest in the subject of the Withdrawal Motion. CIT Group further contends that no party in interest will be prejudiced by the reconsideration of the Withdrawal Motion because this motion was filed just one month subsequent to the entry of the order granting the Withdrawal Motion, and because CIT Group's objection could be heard in conjunction with CIT Group's timely objection to a similar withdrawal motion filed by the Debtors' co-counsel.

In examining the circumstances surrounding this motion, the court finds that CIT Group's failure to respond to the motion or appear at the hearing on the Withdrawal Motion, despite having been served with both the motion and the notices of hearing, was the result of neglect; however, the court concludes that the factual circumstances surrounding this motion do not constitute excusable neglect.

The Fourth Circuit has indicated that the "most important of the factors identified in Pioneer for determining whether "neglect" is "excusable" is the *reason* for the failure." Thompson v. E.I. DuPont de Nemours & Co., 75 F.3d at 534 (emphasis added). In determining

whether a party's neglect of deadline to object was excusable, the court is required to take into account all relevant circumstances surrounding party's omission. In re Ceresota Mill Limited Partnership, 211 B.R. 315 (8th Cir. BAP 1997) (circumstances considered by the court included the fact that the movant's attorney had been involved in the case throughout its history and had never raised the issue). In this case, the reason for CIT Group's failure to make a timely objection or attend the hearing was entirely within the reasonable control of the movant. Counsel for CIT Group has been present at nearly every hearing, and consistently provided exceedingly detailed comments to the proceedings and updates on the status of CIT Group's role in the case. The existence, size and possible use of excess prepetition retainer funds has been discussed at multiple hearings, providing ample opportunity for CIT Group to note its belief that it had a lien on those funds. In fact, the record clearly reflects that a substantial portion of the retainer funds have already been disbursed to pay for the Trustee's bond and to provide additional cash liquidity for the Trustee, yet at no point prior to the present motion did CIT Group comment on the use of those funds or a possible lien.

CIT Group had sufficient notice to act in a timely manner prior to the entry of the order granting the Withdrawal Motion. Upon receipt of a motion and notices of a hearing, a party is responsible for taking the appropriate action, such as reviewing the documents and determining whether a response was appropriate. See In re Leary, 274 B.R. 34 (Bankr. D. Conn. 2002) (creditor failed to demonstrate excusable neglect where it received a copy of the pleading and notice of hearing but, for whatever reason, did not respond). The caption of the Withdrawal Motion clearly referenced the transfer of the pre-petition retainer and the motion itself clearly requested that the transfer of funds be free and clear of liens. The language of the motion was

readily apparent and unambiguous. While counsel for CIT Group contends that the language pertaining to any liens on the retainer was "buried" in the motion, the caption of the motion should have put counsel on notice to read the actual motion. Simply reading the Withdrawal Motion would have alerted counsel for CIT Group to the proposed disposition of the retainer funds, and the failure to do so does not constitute "excusable neglect."

Furthermore, the court finds that reconsideration of the Withdrawal Motion will prejudice the Debtors and have an impact on the bankruptcy proceeding. The retainer funds were returned to the Trustee upon the entry of the order and those funds have been entirely dispersed. The order approving the Withdrawal Motion was entered on February 11, 2003, and the motion was not filed until March 10, 2003. While this is not an excessive amount of time, all parties are well aware of the Trustee's need for cash in this case, and the tremendous expenses that are incurred by the Trustee on a daily basis just to maintain the estate. Each day that passed before CIT Group filed its motion resulted in further depletion of the returned retainer funds. Therefore, as a result of the delay, the nature of CIT Group's claims against the estate, if any, have changed. If the Withdrawal Order is modified such the retainer funds are deemed to have been under the continuing lien of CIT Group, if such lien exists, then the Trustee could be faced with a claim by CIT Group that he utilized cash collateral months ago without providing adequate protection.

While the court finds that the good faith of counsel for CIT Group weighs in favor of their motion, such good faith does not outweigh the other circumstances surrounding this motion. Therefore, the court concludes that CIT Group has failed to establish excusable neglect and denies reconsideration of the of the Withdrawal Motion.

Lastly, while not set forth in CIT's motion, at the hearing counsel for CIT asserted that

RC&D's Withdrawal Motion should have been brought as an adversary proceeding or a contested matter. The court need not reach the issue of whether this matter should have been litigated in the context of an adversary proceeding, though the court notes that pursuant to § 363(c)(2)(B) the court may authorize the use of cash collateral after notice and a hearing. 11 U.S.C. § 363(c)(2)(B). Parties may waive their right to protest the lack of an adversary proceeding when they knowingly failed to litigate a Rule 7001 issue which they had an opportunity to litigate. In re Village Mobile Homes, Inc., 947 F.2d 1282, 1283 (5th Cir. 1991); In re Zale Corp., 62 F.3d 746 (5th Cir.1995). In this instance, the court finds that notice was adequate and CIT had a full and fair opportunity to assert its claim to the retainer funds held by RC&D. CIT's motion for relief from stay makes no mention of a possible interest in the cash held by RC&D, and, after the stay was lifted, CIT made no effort to collect those funds from RC&D. Counsel for CIT was present at the hearing at which the use of the retainer funds by the Trustee for expenses of the estate was first raised and addressed, and had an opportunity to raise the issue of a possible interest in the retainer funds at that time. At no point during the course of this Chapter 11 proceeding, either in writing or at one of the multiple hearings at which the retainer funds were mentioned,[1] did CIT object to the use of the retainer funds. CIT was clearly aware of the issues and knowingly failed to litigate this issue.

[1] At a hearing on October 17, 2002, the parties discussed the use of retainer funds to pay for the Trustee's bond. At a hearing on October 29, 2002, the parties discussed the possibility of using the retainer funds to pay the Debtors' insurance carrier. At a hearing on November 26, 2002, the parties discussed whether any retainers paid to the Trustee or returned to the estate were within the scope of a post-petition lien granted to GE Capital for post-petition financing. Counsel for CIT was present at each of these hearings and did not object or comment on the use of the retainer funds.

For the reasons stated herein, the motion for reconsideration is hereby DENIED.

This the 9th day of May 2003.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge