UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

June 4, 2004

Keith A. Gauer, Esq.
Counsel for Plaintiff
Post Office Box 1030
Sioux Falls, South Dakota 57101

Tara L. Glasford, Esq.
335 North Main, Suite 220
Post Office Box 2118
Sioux Falls, South Dakota 57106

Subject: *CorTrust Bank, N.A. v. Loren D. and Jean A. Miller (In re Miller)*, Adv. No. 04-4016;
Chapter 7; Bankr. No. 04-40136

Dear Counsel:

The matter before the Court is the Motion to Set Aside Default Judgment and attendant brief and affidavit filed by or for Defendants-Debtors on June 3, 2004. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Motion will be granted.

Summary. Loren D. and Jean A. Miller ("Debtors") filed a Chapter 7 petition in bankruptcy on February 2, 2004. CorTrust Bank, N.A., ("Bank") timely commenced an adversary proceeding against Debtors seeking a denial of their discharge or, in the alternative, a determination that the Bank's claim against Debtors was nondischargeable. The Bankruptcy Clerk's office issued a summons on April 27, 2004. Counsel for the Bank served the summons and complaint that day and filed a certificate. The summons stated, in pertinent part:

> *You must serve a copy of your motion or answer upon* **Attorney Keith A. Gauer, P.O. Box 1030, Sioux Falls, SD 57101-1030,** within 30 days of the date the Bankruptcy Clerk issued this Summons, which is shown below, or if you are the United States government or an agency thereof, within 35 days of the date the Bankruptcy Clerk issued this Summons.

[Bolded text in original]. The summons included, toward the bottom of the page:

Date issued: April 27, 2004.

[Bolded text in original].

Debtors did not timely file an answer. The Clerk noted their default by docket entry on May 28, 2004. Later that day, the Bank sought and obtained a default judgment.

On June 1, 2004, Debtors filed an answer. On June 3, 2004, Debtors filed a Motion to Set Aside Default Judgment and supporting brief and affidavits. They essentially argued that Fed.R.Bankr.P. 9006(f) gave them three additional days to timely file their answer and that the actual deadline to file it was June 1, 2004.

DISCUSSION. Federal Rule of Bankruptcy Procedure 9006(f) provides:

> When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper **other than process** is served by mail or under Rule 5(b)(2)(C) or (D) F.R.Civ.P., three days shall be added to the prescribed period.

[Emphasis added.] As stated in the summons it was the Clerk's date of *issuance* that triggered the thirty-day answer period, not the service of the summons and complaint. *Constellation Development Corp. v Dowden (In re McAdams, Inc.)*, 999 F.2d 1221, 1225 (8th Cir. 1993)(Rule 9006(f) only applies when a notice served by mail establishes a response deadline). Thus, the answering period was not a "prescribed period after service of a notice or other paper" that is governed by the rule. Moreover, as indicated by the emphasized text of Rule 9006(f) above, by its own terms the rule does apply to the service of a summons, which Debtors acknowledged in their brief is "process." *In re Antell*, 155 B.R. 921, 930 (Bankr. E.D. Pa. 1992). Thus, the thirty-day answer period began April 28, 2004, and ended May 27, 2004, and the Clerk's entry of default and the default judgment were appropriately entered the May 28, 2004.

Though Debtors stood by their deadline calculation in their brief, they nonetheless asked the Court to vacate the default judgment on excusable neglect grounds under Fed.R.Bankr.P. 9024, which incorporates Fed.R.Civ.P. 60(b)(1).

> Under Fed.R.Civ.P. 60(b)(1), a district court may grant relief from a default judgment because of "mistake, inadvertence, surprise, or excusable neglect." The term "excusable neglect" in this rule "is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence," *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 394, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993).
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> ....
>
> In deciding whether to set aside a default judgment for "excusable neglect," a district court ought not to focus narrowly on the negligent act that caused the default and ask whether the act was itself in some sense excusable. Instead, the court should take account of "all relevant circumstances surrounding the party's omission," *Pioneer Investment*, 507 U.S. at 395, 113 S.Ct. 1489. The inquiry is essentially an equitable one, and the district court is required to engage in a careful balancing of multiple considerations, including "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith," *id.* .... We have also concluded that "the existence of a meritorious defense continues to be a relevant factor," [*Johnson v. Dayton Electric Manufacturing Co.*, 140 F.3d 781, 784 (8th Cir. 1998)], in deciding these kinds of cases after *Pioneer Investment*.

Union Pacific Railroad Co. v. Progress Rail Services Corp., 256 F.3d 781, 782-83 (8th Cir. 2001). That said, however, a mistake of law, as occurred in this case when Debtors' miscalculated the deadline for filing their answer, generally is not recognized as a basis for a relief from a judgment. *Ceridian Corp. v. SCSC Corp.*, 212 F.3d 398, 404 (8th Cir. 2000). The same conclusion has been reached by other circuits since *Pioneer Investments, id.* at 404, where the Supreme Court noted "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable neglect[.]'" *Pioneer Investments*, 507 U.S. at 392.

The Court of Appeals for this circuit, however, has tempered the general rule in certain circumstances. In *Jones Truck Lines, Inc. v. Foster's Truck & Equipment Sales, Inc. (In re Jones Truck*

Lines, Inc.), 63 F.3d 685, 687-88 (8th Cir. 1995), a defendant in an adversary proceeding failed to timely file an answer, in part because it had relied upon a customary state procedure rather than federal. Noting that the entry of a default judgment is not favored by the law and that a default judgment should be a rare judicial act, the Court concluded that the equities should tip in favor of finding excusable neglect and a default judgment should be vacated when there has been a marginal failure to comply with time requirements. *Id.* (quoting therein *United States ex re. Time Equipment Rental & Sales, Inc. v. Harre*, 983 F.2d 128, 130 (8th Cir. 1993), and *Comiskey v. JFTJ Corp.*, 989 F.2d 1007, 1009 (8th Cir. 1993)(quoting *Edgar v. Slaughter*, 548 F.2d 770, 773 (8th Cir. 1977))).

In this adversary proceeding, Debtors erroneously calculated when their answer was due. The miscalculation was due in part to a negligent misreading of the summons itself and a misapplication of Rule 9006(f), which the Court acknowledges is not easily deciphered and applied; there is no indication of bad faith. Debtors' delay in filing a motion to vacate the default was prompt and they have already filed an answer. The prejudicial impact on the Bank if the default judgment is vacated will be minimal. Moreover, the significant relief sought by the Bank -- a denial of Debtors' general discharge -- is better considered following a trial on the merits, especially where Debtor's late-filed answer has raised several disputes regarding material facts. Accordingly, the default judgment will be vacated and Debtors' June 1, 2004, answer will be allowed to stand. *Compare Hartford Casualty Insurance Co. v. Food Barn Stores, Inc. (In re Food Barn Stores, INc.)*, 214 B.R. 197, (B.A.P. 8th Cir. 1997)(excusable neglect not found where mistake of law occurred and also where time had passed and relevant records had been destroyed).

An order vacating the default judgment will be entered and a pre-trial conference will be set.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
JUN 04 2004
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

cc: adversary file (docket original; serve parties in interest)

JUN 04 2004
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota

Keith A. Gauer
PO Box 1030
Sioux Falls, SD 57101-1030

Tara Glasford
Glasford Law Office
335 N. Main St. Suite 220
Sioux Falls, SD 57104

John S. Lovald
Trustee
PO Box 66
Pierre, SD 57501

Jean A. Miller
PO Box 126
Monroe, SD 57047

Loren D. Miller
PO Box 126
Monroe, SD 57047