

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

MARK HUTTON and CLEAR MEADOW  
INVESTMENT LLC,

Plaintiffs,

vs.

Case No. 07-2041-JTM

DEUTSCHE BANK AG, *et al.*,

Defendant.

MEMORANDUM AND ORDER

The present matter arises on plaintiffs' motion to alter and amend the judgment and to reconsider and/or vacate the court's order of July 25, 2007 (Dkt. No. 30). Under the court's July 25, 2007 order, the court granted defendants' motion to dismiss because the plaintiff failed to respond within the time required by Kansas Rules. *See* D. Kan. Rule 7.4 and 6.1(d).

Plaintiffs argue that excusable neglect occurred because plaintiffs filed a motion for leave to file a first amended complaint on June 11, 2007 (Dkt. Nos. 21 and 22). The Amended Complaint was attached as Exhibit 1 to plaintiffs' amended motion to amend the complaint. On July 3, 2007, the court granted plaintiff's motion to file a first amended complaint. At that time, plaintiffs' counsel was under the assumption that as of the date the court granted the motion to amend, the proposed Amended Complaint that was attached as Exhibit 2 was deemed filed and there was no need to file the Amended Complaint as a separate document. Additionally, counsel was under the impression that because an amended complaint supersedes the original complaint,

the motion to dismiss the original complaint was moot and that the defendants would either answer or file a motion to dismiss the amended complaint. Therefore, the plaintiffs request relief from the July 25, 2007 order based on excusable neglect and request leave to file the amended complaint out of time, for the court to vacate its July 25, 2007 order, or in the alternative, to dismiss the action without prejudice.

Under Fed. R. Civ. P. Rule 60(b): “On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.” Because plaintiffs have demonstrated mistake and excusable neglect, the court grants plaintiffs leave to file the amended complaint and are given thirty calendar days from the date of this order to respond to defendants’ motion to dismiss based on the facts alleged in the filed Amended Complaint.

IT IS ACCORDINGLY ORDERED this 22<sup>nd</sup> day of August, 2007 that plaintiffs’ motion (Dkt. No. 30) is granted. The clerk of court is directed to re-open the case and set aside the court’s judgment (Dkt. No. 29).

IT IS FURTHER ORDERED that plaintiffs are given leave to file the amended complaint. Plaintiffs are to respond to defendants’ motion to dismiss thirty calendar days from the date of this order.

s/ J. Thomas Marten  
J. THOMAS MARTEN, JUDGE