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AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BOUNDARY**

ROBERT MICHAEL,)
)
) *Plaintiff,*)
) **312**
)
 vs.)
)
) **STEPHEN F. SMITH et al.,**)
)
) *Defendants.*)
)
)
)

Case No. **BF CV 2007**

**MEMORANDUM DECISION AND
ORDER: 1) DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION
OF THIS COURT'S ORDER
GRANTING DEFENDANTS' MOTION
TO DISMISS, AND 2) DENYING
PLAINTIFF'S MOTION TO STRIKE**

I. PROCEDURAL HISTORY AND BACKGROUND.

Plaintiff Robert Michael (Michael) was represented by attorney defendant Stephen F. Smith in Boundary County case number CV 2003 432, entitled *Leon's Mfg. Co. Inc., et al., v Robert Michael, et al.* This case resulted in a judgment entered against Michael on September 2, 2005. On October 13, 2005, Michael filed for bankruptcy in Case No. 05-29868-TLM. Affidavit of Bankruptcy Trustee, Barry Zimmerman, p. 1, ¶ 1. The Order of Discharge in that bankruptcy case was filed on January 12, 2007, the bankruptcy was discharged on February 8, 2006, and the bankruptcy was terminated on June 13, 2007.

On August 29, 2007, Michael filed the Complaint in this case alleging legal malpractice by Smith in the *Leon's* case. Michael alleged *inter alia* that Smith failed to properly prepare a counterclaim, failed to properly plead fraud or to request punitive

damages for Michael, and committed fraud, misrepresentation, and fraudulent concealment.

Smith moved this Court for an Order of Summary Judgment arguing that since Michael failed to list or mention the instant legal malpractice case in his bankruptcy case, Michael does not have standing to bring this legal malpractice action, and should be judicially estopped from doing so. This Court denied Smith's Motion for Summary Judgment on July 16, 2008.

Smith then filed a Motion to Dismiss this action for failure to join an indispensable party, the bankruptcy trustee, pursuant to I.R.C.P. 12(b)(7). Michael moved for a continuance of the September 2, 2008, hearing on Defendant's Motion to Dismiss in order to determine what, if anything, the Bankruptcy Court would do. At that hearing on September 2, 2008, this Court heard the reasons for Michael's Motion to Continue. To allow Smith the opportunity to find out what action the bankruptcy trustee might have taken, this Court granted Michael's Motion to Continue the hearing on Smith's Motion to Dismiss, and re-scheduled the Motion to Dismiss for October 15, 2008. At the hearing on October 15, 2008, no additional filings had been made, counsel for Smith represented to the court that Barry Zimmerman had been appointed bankruptcy trustee, that he had spoken to Zimmerman who indicated he had no intention of coming into this case, that Zimmerman felt that this case should be dismissed as it was never listed as an asset in Michael's bankruptcy case, and that Zimmerman felt he as trustee "owned" this case. The Court indicated that it was uncomfortable dismissing this case unless some admissible evidence regarding the trustee's position was submitted. This Court made it clear on the record that the Motion to Dismiss was not under advisement, and that there would be no ruling on the Motion to Dismiss until an affidavit or sworn

testimony from Zimmerman was provided, and that it was up to one of the parties to notice the Motion to Dismiss up for a future hearing. That earlier Motion to Dismiss has never been ruled upon. Again, the focus of that Motion to Dismiss was failure to join an indispensable party. Michael argues this prior motion based on failure to sue an indispensable party is now moot. Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant Stephen F. Smith's Motion to Dismiss, pp. 5-6. This Court agrees the prior Motion to Dismiss is now moot.

Barry Zimmerman was appointed Trustee by the Bankruptcy Court and opted not to enter the instant case as a party. On December 8, 2008, Zimmerman sold Smith the cause of action Michael had against Smith in this case. Affidavit of Bankruptcy Trustee Barry Zimmerman, p. 2, ¶¶ 4, 5. Smith filed a new Motion to Dismiss on December 30, 2008. The focus of this Motion to Dismiss was the fact that in Michael's bankruptcy case, which was previously closed was now reopened, the Bankruptcy Trustee had sold Michael's right, title and interest in the case before this Court to Smith, and because "the defendant now owns the cause of action and asks, without further costs or delay, that the Court dismiss the action." Motion to Dismiss, p. 2. On January 7, 2009, Michael filed Plaintiff's Opposition to Defendant Stephen F. Smith's Motion to Dismiss. Smith then filed an Affidavit of Bankruptcy Trustee Barry Zimmerman and Defendant's Memorandum in Support of Motion to Dismiss on January 13, 2009. On January 21, 2009, this Court granted defendant's Motion to Dismiss. On February 2, 2009, this Court entered a Judgment which granted Smith a judgment of dismissal against Michael.

On February 3, 2009, Michael, *pro se*, filed "Plaintiff's Motion for Reconsideration of Memorandum Decision and Order Granting Defendant's Motion to Dismiss I.R.C.P.

59(E) and 60(B), 11(a)(2)(B) and Enlargement of Time to File an Affidavit Per I.R.C.P. 6(b)(1)&(2)”, and an “Affidavit of Plaintiff in Support of Plaintiff’s Motion for Reconsideration and Enlargement.” On February 5, 2009, Smith, through counsel, filed a two-page “Response to Plaintiff’s Motion for Reconsideration.” On February 24, 2009, Michael filed a sixty-seven-page “Plaintiff’s Memorandum of Points and Authorities in Support of His Motion for Reconsideration and Enlargement of Time”. On February 25, 2009, Michael filed “Plaintiff’s Motion to Strike Defendant Stephen F. Smith’s Memorandum in Support of His Motion to Dismiss, and the Affidavit of Trustee Barry Zimmerman, All Submitted Untimely for the Hearing Held on January 21, 2009.” On February 27, 2009, Michael filed “Plaintiff’s Reply to Defendant Stephen F. Smith’s Response to Plaintiff’s Motion for Reconsideration and Enlargement of Time.” On March 2, 2009, Smith filed “Defendant’s Response to Plaintiff’s Motion to Strike Memorandum in Support of Motion to Dismiss and Affidavit of Barry Zimmerman.” Oral argument was held on March 11, 2009.

At oral argument, Michael requested the Court allow the testimony of Barry Zimmerman, whom Michael had served a subpoena for the hearing. Zimmerman was allowed to testify.

II. ANALYSIS.

A. Motion for Reconsideration Under Rule 11(a)(2)(B).

Michael moves this Court for reconsideration pursuant to I.R.C.P. 11(a)(2)(B), to alter or amend its judgment pursuant to I.R.C.P. 59(e), and for relief of a final judgment based on mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, or other reasons justifying relief under I.R.C.P. 60(b). Idaho Rule of Civil Procedure 11(a)(2)(B) reads:

A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made *after* entry of final judgment may be filed within fourteen (14) days from the entry of such order...

I.R.C.P. 11(a)(2)(B) (emphasis added). A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006). Here, this Court's January 21, 2009, Memorandum Decision and Order Granting Defendant's Motion to Dismiss which dismissed Michael's claims with prejudice was a *final* Order, not an *interlocutory* order. Thus, Michael cannot move for reconsideration pursuant to I.R.C.P. 11(a)(2)(B) as he does not seek reconsideration of an interlocutory order or an order made *after* entry of final judgment.

B. Motion to Alter or Amend a Judgment under Rule 59(e)

Although it is not clear, Michael appears to seek reconsideration for two substantive reasons: (1) Michael argues he had a shared interest with the bankruptcy estate in some causes [fraudulent concealment, breach of contract, and professional negligence/legal malpractice] and these causes of action "are post-petition and therefore the estate has no interest in them" and (2) Michael argues determination of who is a party to the lawsuit must be determined by state law, not federal law or a bankruptcy trustee. Memorandum of Points and Authorities on Reconsideration and Enlargement of Time, p. 23. As discussed *supra*, reconsideration is not proper here as Rule 11(a)(2)(B) may only be invoked when seeking reconsideration of a Court's interlocutory order or order made after the entry of final judgment. Additionally, though

not yet relevant, there can be no reconsideration of any Orders entered on motions filed under Rule 59(e) or 60(b). See I.R.C.P. 11(a)(2)(B). Michael's motion must be treated as one to alter or amend a judgment.

"A motion to reconsider a dismissal order properly should be treated as a motion to alter or amend a judgment under I.R.C.P. 59(e) if the motion was timely filed." *Ross v. State*, 141 Idaho 670, 671, 115 P.3d 761, 762 (Ct.App. 2005); *Straub v. Smith*, 145 Idaho 65, 71, 175 P.3d 754, 760 (2007). A motion to alter or amend a judgment, pursuant to Rule 59(e) "shall be served not later than fourteen (14) days after entry of the judgment." I.R.C.P. 59(e). In *Straub*, the Smiths made a motion to reconsider under I.R.C.P. 11(a). The Idaho Supreme Court stated:

However, a party may only make a motion to reconsider interlocutory order or orders entered *after* the entry of final judgment. I.R.C.P. 11(a)(2). The dismissal was a final judgment and, thus, the Smith's motion to reconsider should be treated as a motion to modify or amend the order of dismissal.

Id. (emphasis added). Under Rule 59(e) this Court may correct any alleged legal and factual errors. In *Straub*, the Supreme Court reversed the district court's denial of reconsideration, treating the motion as one to alter or amend under I.R.C.P. 59(e). 145 Idaho 65, 71, 175 P.3d 754, 760. The Smiths had supported their motion with an affidavit alerting the court to the fact that they had stipulated to dismissal with prejudice, but had not agreed to waive costs. *Id.* "Thus, if the court entered the order denying costs and fees because it understood that to be part of the stipulation terms, the Smiths' motion alerted it to the factual error and the motion gave it the opportunity to correct that error." *Id.* Michael's instant motion is treated as one to alter or amend a judgment, but the Court will not consider new evidence in motions to alter or amend under I.R.C.P. 59(e).

Rule 59(e) motions were discussed by the Idaho Supreme Court in *Coeur d'Alene Mining Co. v. First National Bank of Idaho*, where the Court stated:

A Rule 59(e) motion to amend a judgment is addressed to the discretion of the court. An order denying a motion made under rule 59(e) to alter or amend a judgment is appealable, but only on the question of whether there has been a manifest abuse of discretion. Rule 59(e) proceedings afford the trial court the opportunity to correct both errors of fact and law that had occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.

118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990) (quoting *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct.App. 1982)).

Here, Michael seeks an enlargement of time in which to “seek either another affidavit from the trustee, he has been contacted once each in by [sic] person, telephone, and email, and also to file with the U.S. Bankruptcy Court for the District of Idaho for an interpretation of pertinent bankruptcy law questions”, but such a request is not permitted under Rule 59(e). “Because Rule 59(e) motions are brought after judgment, new evidence may not be presented with such motions.” *Johnson v. Lambros*, 143 Idaho 468, 471-72, 147 P.3d 100, 103-04, n. 3. Michael’s request that this Court alter or amend its judgment of dismissal therefore must be considered only in light of the “status of the case as it existed when the court rendered the decision upon which the judgment is based.” *Coeur d'Alene Mining*, 118 Idaho 812, 823, 800 P.2d 1026, 1037. Michael’s request for an extension of time to file an affidavit by the Trustee must be denied, at least for purposes of his I.R.C.P. 59(e) motion.

Again, it is unclear, but it appears Michael argues federal bankruptcy law should not have been applied to assets Michael acquired post-bankruptcy petition.

Memorandum of Points and Authorities on Reconsideration and Enlargement of Time,

p. 43. Michael asserts his claims for fraud and “last legal malpractice/professional negligence, with punitive assertions” are such later-acquired assets. *Id.* Michael states the Court wrongfully relied on the trustee’s decision (presumably to sell the causes of action in *Robert M. Michael v. Stephen Smith, et al.*) because the trustee erred in determining “how to apply bankruptcy law to plaintiff’s Idaho civil law suit [sic].” *Id.*, p. 47. This is apparently a legal error which Michael attributes to this Court. What Michael continues to be mistaken about is that his instant claims arose out of *Leon’s Mfg. Co. Inc., et al., v. Robert Michael, et al.* (CV 2003 432, Boundary County). In *Leon’s*, Michael was represented by the instant defendant Smith and the case resulted in a judgment against Michael on September 2, 2005. On October 13, 2005, Michael filed for bankruptcy and the bankruptcy was discharged on February 8, 2006. On August 29, 2007, Michael filed a complaint in the instant case alleging malpractice by Smith in the *Leon’s* case. Thus, Michael’s action against Smith accrued at the time of the occurrence, act, or omission complained of. I.C. § 5-219(4); *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960 (1994) (“Idaho Code § 5-219(4) provides a two-year statute of limitations for professional malpractice causes of action. It also provides that the cause of action accrues at the time of the occurrence, act, or omission complained of.”). Despite Michael’s filing suit against Smith on August 29, 2007, his action accrued on or about September 2, 2005, before his bankruptcy filing on October 13, 2005. See *Tingley*, 125 Idaho 86, 89, 867 P.2d 960, 963 (“In this case, as a matter of law, the latest possible date that Tingley’s malpractice cause of action accrued under I.C. § 5-219(4) is November 16, 1983, the date the underlying personal injury action was dismissed”).

It is without question that federal bankruptcy law determines the scope of a

debtor's bankruptcy estate. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05, 103 S.Ct. 2309 (1983). As this Court has previously stated, it is the bankrupt estate, created when the bankruptcy action is commenced, that includes all legal or equitable interests held by the debtor at the time the action is commenced. 11 U.S.C. §541 (a). See *Scarlett v. Barnes*, 121 Bankr. 578 (Bankr.W.D.Mont. 1990) (legal malpractice action is property of the bankrupt estate); see also *Tingley v. Harrison*, 125 Idaho 86, 91, 867 P.2d 960, 965. The Fifth Circuit Court of Appeals has explained:

[S]tate law determines only whether a cause of action accrued to the debtor *as of the commencement of the bankruptcy case*. Once that determination has been made, federal law controls whether a trustee can maintain the cause of action on behalf of the bankruptcy estate. Federal law provides that when a legal malpractice cause of action has accrued to a debtor as of the commencement of the bankruptcy case, it becomes part of the debtor's bankruptcy estate.

In re Sergestrom, 247 F.3d 218, 224 (5th Cir. 2001). (emphasis in original). In *Sergestrom*, the Court determined that a legal malpractice claim had accrued according to Texas law. Sergestrom never denied or waived the malpractice action prior to commencement of her bankruptcy and therefore, the Court concluded that where no tenable basis in federal law was provided for withholding Sergestrom's legal malpractice claim from her bankruptcy estate, "we conclude that the estate can pursue the claim." *Id.* Similarly, the cause of action in the instant matter accrued according to Idaho law on or about September 2, 2005, before Michael's bankruptcy filing on October 13, 2005. And federal law provides a cause of action accruing before commencement of a bankruptcy case becomes part of the bankruptcy estate. *Sergestrom*, 247 F.3d 218, 224.

Michael's contention that he has a shared interest with the bankruptcy estate in the fraudulent concealment, breach of contract, and professional negligence/legal

malpractice causes of action is related to his contention that state law, not federal law or a bankruptcy trustee, determines who is a party to the lawsuit. See Memorandum of Points and Authorities on Reconsideration and Enlargement of Time, p. 23. Michael provides no legitimate support for this shared interest proposition. Again, because the alleged occurrences, acts, or omissions complained of took place before the bankruptcy filing on October 13, 2005, the causes of action accrued before commencement of the bankruptcy case and became part of the bankruptcy estate. See, *supra*. As such, Michael has no interest in the cause of action. “As a general matter, upon filing of a petition for bankruptcy, ‘all legal or equitable interests of the debtor in property’ become the property of the bankruptcy estate and will be distributed to the debtor’s creditors.” *Rousey v. Jacoway*, 544 U.S. 320, 325, 125 S.Ct. 1561, 1565 (2005); 11 U.S.C. § 541(a)(1) (emphasis added). There is absolutely no support for Michael’s contentions. Michael’s request to alter or amend this Court’s dismissal fails.

C. Motion for Relief from Final Judgment.

A motion for relief from a final judgment, pursuant to I.R.C.P. 60(b), is committed to the sound discretion of the trial court. *Clear Springs Trout Co. v. Anthony*, 123 Idaho 141, 143, 845 P.2d 559, 561 (1992); *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979). Denial of an I.R.C.P. 60(b) motion is reviewed for an abuse of discretion. *Alderson v. Bonner*, 142 Idaho 733, 743, 132 P.3d 1261, 1271 (Ct.App.2006). Where a motion invokes discretionary grounds for relief from a judgment, the standard is review is abuse of that discretion. *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 704 P.2d 960 (Ct.App.1985). Where the grounds are non-discretionary, as when a judgment is void, the question presented is one of law over which reviewing courts exercise free review. *Id.*

As stated *supra*, Michael's reasoning is flawed. While Michael argues throughout his sixty-seven-page memorandum that it was the Court and opposing counsel who erred, Michael has shown no legitimate basis for those aspersions. This Court properly applied state and federal law to Smith's Motion to Dismiss and there has been no evidence or argument presented by Michael of any mistake, inadvertence, surprise or excusable neglect on his part. See I.R.C.P. 60(b)(1). In Michael's Motion for Reconsideration, Michael states (under the heading Procedural Background) that during the 1:30 p.m. hearing to dismiss, he was at the Trustee's office "discussing his affidavit and its origin, its extra-federal judicial, and its significant errors of fact and law." Motion for Reconsideration, p. 3. Michael admits it was an error on his part to arrive at 2:30 p.m. for what he erroneously believed to be a 3:00 p.m. hearing. *Id.* Michael also states it was excusable neglect on his part to have neglected to "endeavor to endeavor to get something before this court to point out all the problems with this latest motion to dismiss." *Id.*, p. 6. However, no showing of excusable neglect in this regard has been made. Excusable neglect is determined by examining what might be expected of a reasonably prudent person under similar circumstances. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct.App. 1983). Neither being wrong about a properly noticed-up hearing time or failing to continue the hearing to procure additional evidence is acting as a reasonably prudent person would under similar circumstances.

There has been no showing of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial. I.R.C.P. 60(b)(2). In an abundance of caution, the Court allowed Michael to examine the Bankruptcy Trustee Barry Zimmerman as a witness at the March 11, 2009, hearing. Zimmerman's testimony added no credence to Michael's misguided legal arguments and inaccurate

factual claims. As this matter was dismissed with prejudice, Michael cannot move for a new trial and Rule 60(b)(2) is inapplicable.

Michael now alleges fraud, misconduct, and/or misrepresentation on the part of both the Court and opposing counsel throughout his Memorandum. Michael states the Court: refused to acknowledge submission on his motion for default judgment and misstated the law and facts; allowed late filings by Smith; the Court coached and advocated for Smith; used its own fax machine to transmit materials to Michael; and summarily dismissed the matter in its Memorandum Decision and Order, reaching flawed findings of fact and conclusion of law, *inter alia*. Memorandum of Points and Authorities on Reconsideration and Enlargement of Time, pp. 59-65. Michael claims Smith's attorney Manderson Miles: presented hearsay testimony; changed his "story" regarding trying to buy the case or not; engaged in "antic" and was "playing both sides and got caught"; and served copies of filings to Michael in an untimely fashion, *inter alia*. Memorandum of Points and Authorities on Reconsideration and Enlargement of Time, pp.13-22. Even if true, none of these allegations meet the requirements of Rule 60(b)(3). See *Anderton v. Herrington*, 113 Idaho 73, 741 P.2d 360 (Ct.App. 1987) (Perjury or misrepresentation by a party or witness does not constitute the fraud contemplated by I.R.C.P. 60); *Compton v. Compton*, 101 Idaho 328, 334, 612 P.2d 1175, 1181 (1980) (Fraud, for the purposes of this rule, requires more than interparty misconduct and "will be found only in the presence of such 'tampering with the administration of justice' as to suggest 'a wrong against the institutions set up to protect and safeguard the public'".)

Rule 60(b)(4) allows relief from a void judgment, but generally only where a court lacks the jurisdiction to enter judgment, such as where the court lacks either personal

jurisdiction or subject-matter jurisdiction. See *Catledge v. Transport Tire Co.*, 107 Idaho 602, 607, 691 P.2d 1217, 1222 (1984). Michael has not alleged any jurisdictional defect. Michael has also not set forth any evidence that the “judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated” such that the dismissal with prejudice would no longer be equitable. See I.R.C.P. 60(b)(5).

Finally, Michael can point to no reasons justifying relief from the operation of the dismissal. Idaho Rule of Civil Procedure 60(b)(6) was not intended to allow a Court to reconsider the legal basis for its original decision. *First Bank & Trust v. Parker Cros., Inc.* 112 Idaho 30, 32, 730 P.2d 950, 952 (1986). For all of the reasons set forth, Michael’s request for relief from the dismissal with prejudice is denied.

D. Motion to Reconsider Order Denying Default Judgment.

Michael also seeks reconsideration of the Court’s denial of his application for default judgment. Memorandum of Points and Authorities on Reconsideration and Enlargement of Time, p. 41. Michael argues the Court erred in failing to address his motion for default judgment and that he did file a three-day notice of intent to take default as required by I.R.C.P. 55 (b)(2). *Id.*, p. 67. Michael filed Applications for Entry of Default on April 18, 2008. Michael filed his Motion for Default Judgment on the same date. This Court, at a status conference on May 7, 2008, informed Michael that default could not be sought against a party who had appeared when no three-day notice had been filed. Having not moved for reconsideration within fourteen days as required by Rule 11(a)(2)(B), Michael is now time-barred from requesting reconsideration of this issue. Granting or denying a motion for reconsideration is left to the sound discretion of this Court. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). Under the

facts of this case, denial of the motion is proper.

E. Motion to Strike.

It is only Michael's Motion to Strike which Smith addresses in his briefing. See Response to Plaintiff's Motion for Reconsideration, filed February 5, 2009, and Smith's Response to Plaintiff's Motion to Strike Memorandum in Support of Motion to Dismiss and Affidavit of Barry Zimmerman, filed March 2, 2009. Michael moves this Court for an Order Striking Defendant's Memorandum in Support of Motion to Dismiss and Affidavit of Barry Zimmerman, filed January 5, 2009, and January 13, 2009, respectively, as being untimely filed for the hearing on the Motion to Dismiss held January 21, 2009. Michael argues Smith improperly filed his Motion to Dismiss on January 5, 2009, by not serving the Affidavit of Barry Zimmerman on that date. Plaintiff's Motion for Reconsideration, p. 5. Michael states he did not receive the Affidavit until January 15, 2009, and takes issue with not having been served by fax as he had been in the past as well as his not having the opportunity to file an opposing affidavit. *Id.* Michael argues the Motion to Dismiss filed January 5, 2009, was not timely. Memorandum of Points and Authorities on Reconsideration and Enlargement of Time, p. 19. However, I.R.C.P. 7(b)(3) requires only that a written motion, and notice of hearing thereon, be served so that it is received no later than fourteen days before time of hearing. I.R.C.P. 7(b)(3)(A). In the instant issue, Michael himself concedes he received service on January 5, 2009, sixteen days before hearing. *Id.*, p. 19. And as Smith points out, Michael never requested more time, never submitted reasons why the hearing should not be held on January 21, 2009, and ultimately failed to preserve his objection thereto by failing to appear. Defendant's response to Plaintiff's Motion to Strike, p. 2.

Michael next argues on January 15, 2009, he received Smith's memorandum

supporting the motion along with the Bill of Sale, a copy of *In re Lopez*, and the Trustee's Affidavit. Memorandum of Points and Authorities on Reconsideration and Enlargement of Time, p. 20. Michael had filed his Opposition to Defendant's Motion to Dismiss on January 7, 2009. Michael states his receipt of the memorandum and supporting documents, filed on January 13, 2009, and received by him on January 15, 2009, was untimely and any affidavit should have been filed with the motion itself on January 5, 2009. Memorandum of Points and Authorities on Reconsideration and Enlargement of Time, pp. 20-21. Smith responds the Trustee's Affidavit was filed in support of Smith's reply memorandum, which was filed in response to Michael's Opposition to the Motion to Dismiss. Defendant's Response to Plaintiff's Motion to Strike, p. 3. As such, Smith argues I.R.C.P. 7(b)(3)(E) requires the reply memorandum and supporting documents need only be filed two days before hearing. *Id.*

A plain reading of the Idaho Rules of Civil Procedure shows affidavits supporting motions shall be served with the motion. I.R.C.P. 7(b)(3)(B). Thus, while reply briefs need only be served so that they are received two days before hearing on the matter, the filing of affidavits must comply with Rule 7(b)(3)(B). Nevertheless, the Idaho Court of Appeals has stated notice rules are not jurisdictional and do not provide grounds for reversal on appeal where a party has no substantive defense to the motion and is not prejudiced by inadequate notice. *Keeven v. Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (Ct.App. 1994). Here, Michael received the Bill of Sale sixteen days before hearing. It is unlikely he was prejudiced by not receiving in a timely fashion an affidavit setting forth the circumstances of that Bill of Sale, memorializing what occurred at the very sale at which Michael was present. Certainly Michael has not articulated any prejudice.

Finally, Michael's failure to appear at the hearing on the motion to dismiss was not the result of excusable neglect. *See supra*. Michael had made a ninety-mile trip to Kootenai County, erred as to the time of the hearing and spent the hearing time at the Bankruptcy Trustee's office. This is not what might be expected of a reasonably prudent person under similar circumstances. *See Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct.App. 1983). As such, Michael did not object, and his claim that this Court improperly considered hearsay evidence must fail.

III. ORDER.

IT IS HEREBY ORDERED "Plaintiff's Motion for Reconsideration of Memorandum Decision and Order Granting Defendant's Motion to Dismiss I.R.C.P. 59(E) and 60(B), 11(a)(2)(B) and Enlargement of Time to File an Affidavit Per I.R.C.P. 6(b)(1)&(2)" is DENIED.

IT IS FURTHER ORDERED "Plaintiff's Motion to Strike Defendant Stephen F. Smith's Memorandum in Support of His Motion to Dismiss, and the Affidavit of Trustee Barry Zimmerman, All Submitted Untimely for the Hearing Held on January 21, 2009" is DENIED.

Entered this 16th day of March, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 21st day of January, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>
Manderson L. Miles	(208) 746-0118

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Deputy Clerk