UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc., an Illinois non-profit corporation, and Danny Lee Shelton, individually, Plaintiffs, v. Gailon Arthur Joy and Robert Pickle, Defendants.	Case No.: 07-40098-RWZ

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO ENLARGE TIME TO FILE DOCUMENT NO. 249

Plaintiffs violated Local Rule 7.1(b)(3) by not first obtaining leave of court before filing their untimely response (Doc. 249) to Defendants' motion. (Doc. 245). Defendants requested that Plaintiffs withdraw Plaintiffs' response and instead file a motion for leave to file, thus removing from Defendants the prejudice of having to reply to a response that might never be accepted by the Court anyway. Plaintiffs refused to accommodate Defendants in this way, and thus failed to take an opportunity to remove the frivolous basis for sanctions against Defendants that Plaintiffs had included in their response. Under the circumstances, Plaintiffs' counsel's neglectful forgetting what Local Rule 5.4(D) requires can hardly be found to be "excusable."

FACTS

Plaintiffs admit that Plaintiffs' response to Defendants' motion to file two supplemental exhibits was due by 6:00 p.m. on April 15, 2010. (Doc. 252 p. 2). Plaintiffs admit that Plaintiffs did not timely file their response. (*Id.*).

As the reason for not complying with Local Rule 5.4(D), Plaintiffs' counsel testifies under oath, "I had forgotten that the Local Rule in Massachusetts requires that electronic filings be performed by 6:00 P.M. EDT." (Doc. 253 ¶ 2).[1]

When Defendants first conferred with Plaintiffs' counsel regarding Defendants' contemplated motion to strike Plaintiffs' untimely response, Plaintiffs' counsel responded, "I oppose it and will seek sanctions for your harassing, abusive and frivolous conduct." (Affidavit of Robert Pickle ("Pickle Aff.") Ex. A p. 4). No basis was given for this threat. (*Id.* pp. 3–4).

Defendants then wrote Plaintiffs' counsel several times more, pointing out that he had failed to file a motion for leave to file his response out of time. (*Id.* pp. 2–3). Defendants requested that Plaintiffs withdraw Plaintiffs' response, and then file a motion to take leave, attaching to that motion the proposed response as required. (*Id.* p. 2). Defendants recommended this course as it would save Defendants from the prejudice of replying to a response before the Court even decides to allow that response. (*Id.*).

Plaintiffs' counsel then offered to stipulate to extend the time. (*Id.* p. 1). Defendants saw no purpose in stipulating to extending the time to file Plaintiffs' response , particularly when that response seeks monetary sanctions against Defendants. (*Id.*). Defendants repeated their position that Plaintiffs should withdraw their response and then file a motion to take leave. (*Id.*).

Plaintiffs have now filed a motion to extend the time (Doc. 251) without withdrawing

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[1]Plaintiffs' counsel executed and filed two affidavits: Doc. 253 was filed at 1:32 p.m. EDT, and Doc. 254 was filed at 1:51 p.m. EDT. Doc. 253 was prepared just in case Defendants did not respond by noon CDT on April 19 to Plaintiffs' 10:15 a.m. CDT email. (Doc. 253 ¶ 3; Pickle Aff. Ex. A at p. 1). Since Defendants did reply by 11:03 a.m. CDT (*Id.*), Doc. 253 must have been filed by mistake.

However, ¶ 2 of Doc. 253, quoted above, is much more succinct in admitting that Plaintiffs' counsel forgot the local rule. It is as if Plaintiffs' counsel realized that forgetting the rule does not constitute excusable neglect, and so ¶ 2 was intentionally made much more obscure in Doc. 254: "I was generally aware of the local rule in Massachusetts requiring that electronic filings be performed by 6:00 P.M. EDT on the due date, but was not mindful of that rule on April 15, 2010." The meaning, however, is the same. Plaintiffs' counsel forgot.

their response, and Defendants are prejudiced by having to prepare a reply to that response, even if that response is ultimately rejected by this Court.

ARGUMENT

I. PLAINTIFFS DID NOT SEEK LEAVE OF COURT BEFORE FILING

Prior to filing their response, Plaintiffs failed to file a motion pursuant to Fed. R. Civ. P. 6(b)(1) in order to extend the time to file their response.

Local Rule 7.1(b)(3) states in relevant part:

> All other papers not filed as indicated in subsections (b)(1) and (2), whether in the form of a reply brief or otherwise, may be submitted only with leave of court.

Since Plaintiffs' response was not filed within 14 days of service of Defendants' motion "as indicated in subsection[] (b)...(2)," it fell into the category of "[a]ll other papers," and thus required obtaining leave of court *before* being filed. Plaintiffs failed to obtain leave of court before filing their response.

On March 4, 2008, Plaintiffs filed a motion to strike a submission by Defendants on the grounds that Defendants had violated Local Rule 7.1(b)(3), the very rule Plaintiffs have now violated. (Doc. 53 pp. 2–3). Plaintiffs' motion to strike was granted on March 10, 2008. Therefore, equity demands that Plaintiffs show compelling reasons why Plaintiffs' submission should be accepted out of time when Plaintiffs never sought leave of court as required.

II. DEFENDANTS ARE PREJUDICED BY HAVING TO REPLY TO A RESPONSE THAT MAY NEVER BE ACCEPTED BY THE COURT

Because Plaintiffs refused to withdraw Plaintiffs' response before first obtaining leave of the court to file it, Defendants are prejudiced by having to prepare a reply regardless of the outcome of the instant motion.

A. Plaintiffs Err Again: Reply Briefs Are Authorized

Plaintiffs state, "Counsel made a simple mistake which caused no prejudice to anybody,

especially given that no reply brief is authorized ....” (Doc. 252 p. 3). Plaintiffs must here be admitting that having to write a reply brief is a form of prejudice against Defendants. But Plaintiffs’ statement is false, and Plaintiffs know it.

The scheduling order of this case explicitly authorizes reply memoranda. (Doc. 20 p. 3). It was the very same Plaintiffs’ counsel who pointed out this authorization around July 16, 2008, to Defendants in court filings. (Doc. 87; Doc. 87-1**)**. Since that time, the parties have filed eleven replies to responses to motions, the most recent being on March 16, 2010. (Doc. 91; Doc. 108; Doc.113; Doc.149; Doc.161; Doc. 177; Doc. 179; Doc. 190; Doc. 213; Doc. 223; Doc. 242).

Under these circumstances, Plaintiffs’ materially false statement (“no reply brief is authorized”) is utterly inexcusable.

B. Plaintiffs Reject Defendants’ Suggested Accommodation

Plaintiffs’ counsel falsely states, “The undersigned asked Mr. Pickle to specify any prejudice that may have resulted, and offered to make any reasonable accommodation to cure such prejudice.” (Doc. 252 p. 2). Any reasonable accommodation? Yet the counselor in his correspondence and in his memorandum completely failed to explain why Defendants’ preferred accommodation was unreasonable: Defendants had requested Plaintiffs’ counsel to withdraw his response and to file a motion to take leave to file his response out of time. (Pickle Aff. Ex. A pp. 1–2). Defendants’ preferred accommodation was unquestionably reasonable.

C. Why Plaintiffs Rejected Defendants’ Suggested Accommodation

On April 19, 2010, Defendants wrote Plaintiffs’ counsel the following:

> Therefore, you should have filed a motion seeking leave to file your response out of time, *with your proposed response filed as an attachment to that motion as required.* This you also did not do.
>
> Therefore, will you be correcting this matter by filing notice withdrawing your response, and then filing a motion seeking leave to file your response, *with your proposed response attached to that motion?*

(Pickle Aff. Ex. A p. 2, italics added). Plaintiffs could not follow this course without revealing the utterly frivolous nature of the basis for Plaintiffs' request for sanctions in Plaintiffs' response.

Plaintiffs had cited a U.S. District Court case from Minnesota where a judge strongly reprimanded an attorney for attaching a proposed supplemental brief to a motion seeking leave to file that brief. (Doc. 249 pp. 1–2). *Hartford Fire Ins. Co. v. Clark*, No. 03-cv-3190 (PJS/JJG), Order (D. Minn. Jan. 29, 2010). However, this district's rules differ from those of the District of Minnesota:

> In any case of an electronic filing in which a party seeks leave of court to file a document or to amend a document previously filed, the party ***must*** attach electronically to the motion seeking leave a copy of the document which the party proposes to file.

D. Mass. CM/ECF Admin. P. § O, emphasis added. Therefore, Defendants' proposed supplemental exhibits had to be attached to the motion for leave to file, as well as be attached to an affidavit. Defendants' obeying Procedure O is by no means a basis for sanctions, and Plaintiffs could not file a motion to take leave without revealing that fact.

The far nobler course would have been for Plaintiffs to follow Defendants' recommendation and withdraw their response. This would have given Plaintiffs the opportunity to edit out Plaintiffs' frivolous legal argument[2] before filing their motion to take leave to file their untimely response. But Plaintiffs once again chose not to correct their erroneous response.

III. DEFENDANTS ARE PREJUDICED BY PLAINTIFFS HAVING LAST WORD

Since reply briefs are authorized for this case (Doc. 20 p. 3), Defendants are able to correct on reply the misstatements and misrepresentations Plaintiffs commonly put into Plaintiffs' responses. This has been helpful.

However, Plaintiffs' refusal to withdraw their response until Plaintiffs are granted leave to

[2]Plaintiffs' frivolous legal argument could be worthy of Rule 11 sanctions since reasonable inquiry would have revealed the error.

file it has created a situation in which Plaintiffs will have the last word this time around. Defendants' reply for Defendants' April 1 motion (Doc. 245) will be due before Plaintiffs' reply for Plaintiffs' April 19 motion (Doc. 251) will be due. This will be prejudicial to Defendants if Plaintiffs include in their reply facts or argument that have a bearing on Defendants' motion.

IV. PLAINTIFFS' NEGLECT IN THIS INSTANCE IS NOT "EXCUSABLE"

Plaintiffs correctly state that Fed. R. Civ. P. 6(b)(1)(B) permits motions to extend the time after the fact on the basis of "excusable neglect." (Doc. 251 p. 3; Doc. 252 p. 3). But Plaintiffs have failed to explicitly explain why forgetting Local Rule 5.4(D) (Doc. 253 ¶ 2) in this instance constitutes neglect that happens also to be excusable.

The United States Supreme Court discussed the meaning of "excusable neglect" in *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993).

> Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that "excusable neglect" under Rule 6(b) is a somewhat "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant.

Pioneer, 507 U.S. at 392. Thus, forgetting what Local Rule 5.4(D) requires does not "usually constitute 'excusable' neglect."

According to the Supreme Court, to determine whether neglect is "excusable," the Court must take account of all relevant circumstances surrounding a party's delay, including (1) the danger of prejudice to the other parties, (2) the length of the delay and its potential impact on the case, (3) the reason for the delay, including whether it was within the reasonable control of the parties seeking relief, and (4) whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395. These four equitable factors weigh against finding Plaintiffs' neglect to be "excusable":

(1) Defendants are prejudiced by having to reply to a response that may never be accepted. (*supra* 3–4). Defendants are also prejudiced if Plaintiffs in their reply to this response

stray into addressing Defendants' motion for leave to file two supplemental exhibits. (*supra* 5–6).

(2) The delay is small, and the delay itself has no direct affect on the case other than the prejudice already mentioned. Unfortunately for Plaintiffs, this is not the only factor to be considered.

(3) In *Pioneer,* what justified the finding that the neglect in that case was excusable was the unusual form of notice in that bankruptcy case. 507 U.S. at 398–399. Instead of the bar date being "prominently announced and accompanied by an explanation of its significance," it was inconspicuously placed in a notice regarding a creditors' meeting, leaving a "dramatic ambiguity" in the notification. 507 U.S. at 398.

In stark contrast, in this instance, Plaintiffs describe no circumstances upon which to base a finding that Plaintiffs' neglect was excusable. Plaintiffs' counsel allegedly forgot what Local Rule 5.4(D) requires, and Plaintiffs' counsel well knows that this explanation will not suffice. (*supra* 2 n.1). Did he also forget that the scheduling order authorizes reply briefs? (Doc. 252 p. 3; Doc. 20 p. 3; *supra* 3–4). Did he also forget that proposed documents must be attached to motions to take leave? (Doc. 249 pp. 1–2; *supra* 4–5). D. Mass. CM/ECF Admin. P. § O. It is difficult to categorize so many alleged lapses in memory as "excusable."

(4) Plaintiffs rejected Defendants' preferred and requested accommodation of withdrawing their response, filing a motion for leave to file, and attaching Plaintiffs' response to that motion as required, thus prejudicing Defendants. (Pickle Aff. Ex. A pp. 1–2; *supra* 3–6). Plaintiffs thereby rejected a golden opportunity to correct Plaintiffs' response by removing Plaintiffs' frivolous argument for sanctions from Plaintiffs' response, namely, that Defendants should be sanctioned for attaching as required proposed exhibits to a motion for leave to file. (Doc. 249 p. 1; *supra* 4–5). Plaintiffs in the instant motion pretend that Defendants never suggested a reasonable accommodation, or pretend that Defendants' requested accommodation

was not reasonable. (Doc. 252 p. 2; *supra* 4). Plaintiffs' actions and statements could hardly be described as being made in good faith.

CONCLUSION

Plaintiffs failed to seek leave of court before filing their untimely response. Plaintiffs refused to accommodate Defendants by withdrawing Plaintiffs' response and filing a motion for leave to file. Defendants must therefore prepare a reply even if Plaintiffs' response is never accepted. Plaintiffs will now have the last word since Plaintiffs' reply will be due after Defendants' reply is due.

Plaintiffs failed to explicitly show why their neglect in this instance is excusable. In light of the resulting prejudice to Defendants, Plaintiffs' stated reason for the delay, and a showing of bad faith on Plaintiffs' part, Plaintiffs' motion should be DENIED.

Respectfully submitted,

Dated: April 26, 2010

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and

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AFFIDAVIT OF SERVICE

Under penalty of perjury, I, Bob Pickle, hereby certify that this document, with accompanying affidavit and exhibit, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Dated: April 26, 2010

/s/ Bob Pickle
Bob Pickle