

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SECURITIES AND EXCHANGE : CIVIL ACTION
COMMISSION :
 :
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 v. :
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 DALE J. LANGE, FRANK G. :
LEPORE, MARK F. LEPORE, :
PHILIP S. PORTOGHESE, :
STUART W. PORTOGHESE, :
STEPHEN P. PORTOGHESE, and :
TIMOTHY L. GARNER : No. 97-6018

MEMORANDUM ORDER

Presently before the court is the Motion of Peter Dau, Leilani Witt, Birklebach Investment Securities, Inc. and Carl Birklebach for an Extension of Time to Appeal.

Timely notice of appeal is a mandatory and jurisdictional requirement. See West v. Keve, 721 F.2d 91, 97 (3d Cir. 1983). Movants filed a notice of appeal on May 31, 2002 from the court's order denying their motion to intervene, entered on March 28, 2002. The notice was thus filed beyond the deadline. See Fed. R. App. P. 4(a)(1)(B).¹

A request for an extension of time to file a notice of appeal filed after the original period for appeal has expired must be denied in the absence of excusable neglect. See Fed. R. App. P. 4(a)(5), Advisory Committee Notes; Consolidated Freightways Corp. v. Larson, 827 F.2d 916, 918 n.3 (3d Cir.

¹ The notice of appeal was actually entered on June 3, 2002.

1987). In assessing excusable neglect, courts consider all of the surrounding circumstances and weigh several pertinent factors which essentially focus on the reason for the failure to comply, the plausibility of the reason proffered, the exercise of professional competence, the extent of counsel's diligence, the nature of his efforts to comply, any prejudice to the nonmovant, and the length and effect on the proceedings of the delay. See In re Orthopedie Bone Screw Products, 246 F.3d 315, 322-23 (3d Cir. 2001); Larson, 827 F.2d at 919; Home Ins. Co. v. Law Offices of Jonathan DeYoung, 156 F. Supp. 2d 488, 490-91 (E.D. Pa. 2001).

The proffered reason for the failure to comply in this case is the belief of counsel that the time for an appeal ran from April 2, 2002, the day a subsequent order was entered denying another motion, one for a determination of superior interest. Movants suggest that it was only by the latter order that "all issues relating to their claims in the disgorged funds were resolved."² The proffered reason is not sound or satisfactory.

² Movants present the reason for the failure to comply in the body of their motion. No affidavit has been submitted. At the time the notice of appeal was due, movants were represented by counsel from Chicago as well as local counsel. There is no indication of whether a particular attorney of record had assumed responsibility for timely perfecting an appeal or whether each of movants' attorneys held the stated belief that the time to appeal did not commence on March 28, 2002.

It is well settled that an order denying intervention is a final appealable order. See Development Finance Corp. v. Alpha Housing, 54 F.3d 156, 158 (3d Cir. 1995); U.S. v. Alcan Aluminum, Inc., 25 F.3d 1174, 1179 (3d Cir. 1994). The failure to ascertain or comprehend the time in which to appeal does not constitute excusable neglect under Rule 4. See Amatangelo v. Borough of Donora, 212 F.3d 776, 779 (3d Cir. 2000) ("Rule 4(a)(1), which establishes the time to appeal, is neither obscure nor difficult to understand"); U.S. v. SmithKline Beecham Clinical Labs, Inc., 1998 WL 54379, *2 (E.D. Pa. Jan. 29, 1998); Nguyen v. City of Cleveland, 138 F. Supp. 2d 938, 939 (E.D. Ohio 2001) (failure to understand applicable appeal provision does not constitute excusable neglect or good cause for failure to file timely notice of appeal).

All pertinent issues relating to movants' claim were clearly resolved by the orders entered on March 28, 2002 which denied for lack of a legally protectable interest movants' request to intervene to present their claim of superior interest and which directed that the funds in which they asserted an interest be paid to the U.S. Treasury. Their request for a declaration of superior interest was then clearly moot.³ The

³ The entry of the order of April 2, 2002 was an administrative exercise to remove from the motions list a motion which otherwise would have been left to appear pending in perpetuity.

order entered on April 2, 2002 consistently, necessarily and ineluctably followed from the orders entered on March 28, 2002 from which it was evident that movants' attempt to assert a "superior interest" in the funds at issue had been conclusively rejected. In any event, the entry of that order did not make the orders entered on March 28, 2002 any more or less final and appealable. The suggestion that further substantive issues remained to be resolved after March 28, 2002 to render the orders entered on that date appealable seems contrived, if not disingenuous.

Where the reason for noncompliance is a failure to follow applicable legal precedent or prescribed procedures, the plausibility of that reason does not imbue it with any greater force.

The factor regarding counsel's provision for a readily foreseeable consequence is generally addressed to the preparations made, if any, to account for events or intervening circumstances during the appeal period. It may be noted, however, that even counsel who failed to ascertain that the time to appeal from an order denying a motion to intervene runs from the entry of that order could have reasonably foreseen that this at least might be an issue, and could have proceeded prudently to file a notice of appeal within a time frame which would obviate it.

There appears to have been a complete lack of diligence. Taking movants at their word, counsel intentionally let the time to appeal lapse rather than undertake basic research regarding the application of Rule 4(a) to orders denying motions to intervene, or even comprehending what at the least should have been a red flag issue which prudent counsel could have precluded by simply filing a notice of appeal by May 27, 2002.⁴ The court sees no reason to ascribe bad faith to movants. It is, however, difficult to characterize the lack of research or inquiry undertaken as a substantial good faith effort toward compliance.

The delay was brief and did not adversely impact any proceedings in this court. The Commission asserts that it would be prejudiced by the grant of an extension "because it would be forced to spend valuable and limited agency resources in defending against petitioners' legally unsupportable and factually inequitable claims."⁵

⁴ The court does not suggest that the failure to perform adequately on this occasion is indicative of the level of professional skill and competence generally displayed by counsel. The rules, however, apply equally to all counsel from the esteemed to the obscure and a request for an extension must be assessed on the basis of the particular circumstances in the specific case presented.

⁵ Movants claimed a right to disgorged funds obtained by the Commission in an enforcement action for insider trading affecting numerous investors predicated on movants' settlement of a civil action by them against the malefactors by which it was agreed that the resulting consent judgment in that action could only be satisfied from disgorged funds obtained by the Commission in the enforcement action.

It is true that the Commission has limited resources with which to pursue its important mission. The dedication of agency resources, however, would be required to defend against a timely appeal. The need to expend resources to defend should an extension otherwise be justified is not the type of prejudice contemplated. The meritoriousness of an appeal is not a factor generally considered in assessing a request for an extension. Rather, the inquiry focuses on the reasons for, and any adverse effects of, the failure to comply.

While an adverse impact upon proceedings from a lengthy delay or material prejudice to an opposing party may be dispositive, the absence of these factors is not. Otherwise, a mandatory time requirement would effectively be recast to provide for notice within the prescribed period or within a time thereafter sufficiently short to preclude disruption or prejudice from the delay.

Movants allowed the time for an appeal from the orders entered on March 28, 2002 to expire because their counsel overlooked or failed to comprehend the deadline. The suggestion that counsel perceived that those orders remained unappealable unless and until the court entered an order formally removing from the docket another motion which was clearly and necessarily rendered moot on March 28th is implausible. There is no

suggestion that counsel undertook any effort or made any inquiry to ascertain the final effect of the March 28th orders.

Within the parameters of the law, the court has generally been quite lenient in resolving such requests for extensions. The court, however, cannot conscientiously conclude that movants have demonstrated excusable neglect in the present circumstances.

ACCORDINGLY, this day of August, 2002, upon consideration of the Motion of Peter Dau, Leilani Witt, Birkelbach Investment Securities and Carl Birkelbach for an Extension of Time to Appeal (Doc. #24) and the opposition of the plaintiff Commission thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.