

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

SUSAN DeFELICE, WILLIAM : CIVIL ACTION  
DIADDEZIO, ARTHUR FISCHER, :  
JOHN LARKINS, ANDREW MARCHIONI, :  
MICHAEL MEDVIDIK, CHARLES :  
MOUZANNAR, ALLEN POLMANN, :  
TERENCE ROSFELDER, ERIC STAHL :  
and ROBERT TUCKEY, JR. :  
 :  
 :  
v. :  
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 :  
EDWARD MICHAEL DASPIN, :  
EMPLOYEE PERSONNEL MANAGEMENT, :  
INC., MICHELE KAUFMANN, JOSEPH :  
KILRANE and HAROLD LEE : No. 01-1760

MEMORANDUM ORDER

Presently before the court is plaintiffs' motion for an extension of time to file an amended notice of appeal. Timely notice of appeal is a mandatory and jurisdictional requirement. See West v. Keve, 721 F.2d 91, 97 (3d Cir. 1983).

Plaintiffs filed a notice of appeal on July 24, 2002 from the court's order entered on June 25, 2002 granting the motions of defendants Daspin, Kilraine and Kauffman to dismiss plaintiffs' claims against them for failure to state a cognizable claim. Plaintiffs did not appeal from an order dismissing without prejudice plaintiffs' claims against defendant Employee Personnel Management, Inc. ("EPMI") for failure to effect service of process which was entered on June 24, 2002. It is this order which plaintiffs now seek leave to appeal.

Plaintiffs' motion was filed on August 12, 2002, almost three weeks beyond the deadline for an appeal. See Fed. R. App.

P. 4(a)(1)(B). A request for an extension of time to file a notice of appeal made after the original period for appeal has expired must be denied in the absence of a showing 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. 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 Orthopedic 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).

Counsel's explanation for his failure to comply is as follows.<sup>1</sup> A telefaxed copy of the order of dismissal regarding EPMI was paper clipped to another document pertinent to another litigation file to which it was misdirected. When counsel received another copy of the EPMI by regular mail a few days later, he filed the order without reviewing it. Counsel did

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<sup>1</sup>Counsel's explanation is presented in the body of plaintiffs' motion. No affidavits have been submitted.

review the accompanying memorandum of the court addressing defendants' motions to dismiss which included an explanation that the claims against EPMI would be dismissed without prejudice for failure to effect service in over a year or to show good cause for such failure. "Without thinking any deeper," counsel "simply assumed that the [other dismissal] order applied to EPMI as well." Counsel first accessed the court's electronic docket on August 9, 2002 while preparing a case summary for appeal and noticed the entry of the EPMI order. Counsel then retrieved from his case file the copy of the order received by mail two weeks earlier which he had filed without reading. He then also found in the other case file the copy of the order which had been telefaxed.

Counsel asserts that "[a]s embarrassing as it is to admit, Plaintiffs' counsel submits that the foregoing circumstances contribute [sic] excusable neglect." The court cannot conscientiously agree.

Where the reason for noncompliance is a significant lack of diligence or misunderstanding of a basic legal principle, 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. The occasional misdirection of a court order or other important document within a law office is reasonably foreseeable and prudent firms employ procedures to address such occurrences. Presumably, someone received the unrelated document to which the court's order was paper clipped. There is no showing or suggestion that whoever received that document would not have also looked at the court's one sentence order paper clipped thereto. That such individual, upon seeing a dispositive order, would not promptly ascertain the lawyer to whom the case was assigned and then redirect it to him is inexcusable.

Counsel's assumption that the order granting on substantive grounds the motions of defendants other than EPMI somehow applied to EPMI as well is not a satisfactory reason for the failure to comply. Service on EPMI had not been effected in the fourteen months since this action was initiated and no good cause therefor was ever presented. As no return of service was filed, counsel cannot credibly claim that this is a case of mistaken or imperfect service.

It is well established that in the absence of proper service, the court lacked personal jurisdiction over EPMI. See Ayres v. Jacobs & Crumplar, P.A., 99 F.3d 565, 569 (3d Cir. 1996). To assume in these circumstances that the court had disposed of claims against EPMI on the merits in an order which did not mention this defendant would be unreasonable.

Most importantly, counsel held in his hand a copy of the court order received by mail and chose not to read it. The concise order made unmistakably clear that plaintiffs' claims against EPMI were dismissed for failure to effect service. A court simply cannot accept as excusable the failure of counsel to read an order of court in a case for which he is responsible which has been mailed to and received by him.

The failure to comply did not result from inadvertence but from a studied lack of diligence. Taking counsel at his word, he failed to take basic precautions to provide for the misdirection of mail, failed to review the docket or file until more than two weeks after the lapse of time for appeal, made unreasonable assumptions and consciously failed to read the critical court order when it was in his hand. Had counsel simply taken a moment to read the order, the instant problem could have been obviated.<sup>2</sup> The court does not ascribe bad faith to counsel and indeed appreciates his candor. The court, however, cannot characterize the complete lack of diligence displayed as a substantial good faith effort toward compliance.

The delay was relatively brief and did not adversely impact any proceedings in this court. There has been no

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<sup>2</sup>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 distinguished and obscure counsel alike. A request for an extension must be assessed on the basis of the particular circumstances in the specific case presented.

demonstrable prejudice. 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.

The court is generally quite lenient in resolving requests for extensions. The court, however, cannot conscientiously conclude that plaintiffs have demonstrated excusable neglect in the circumstances presented.

**ACCORDINGLY**, this                    day of September, 2002, upon consideration of plaintiffs' Motion for Extension of Time to File Amended Notice of Appeal (Doc. #65), and the response in opposition thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**