

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

UNITED STATES OF AMERICA,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
ROBERT P. TUERK,	:	NO. 05-CV-06088
Defendant	:	

MEMORANDUM

TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE

May 1, 2007

Defendant Robert P. Tuerk moves to open judgment entered on March 21, 2007. Tuerk claims his attorney, Robert Datner, inadvertently calendared the wrong date for Tuerk's response to plaintiff's motion for summary judgment, and appears to argue this inadvertence merits relief from final judgment under Fed. R. Civ. P. 60(b)(1). Tuerk also claims there are material issues of fact in dispute that preclude summary judgment. Tuerk's motions to open judgment and for stay of execution are denied for the following reasons.

1. During a scheduling conference on January 16, 2007, the parties selected, and agreed to, the deadlines set forth in the scheduling order entered on January 17, 2007. The parties agreed the matter could be resolved on summary judgment, and there would be no need for a trial. Accordingly, the scheduling order listed no trial date, but set forth all other stipulated filing dates.

By February 23, 2007, the date by which Tuerk was to have filed his motion for summary judgment, Tuerk had not filed any motion or sought an extension. During the week following February 23, 2007, my staff twice called attorney Datner to inquire about the status of his filing.

Datner returned the second call and informed my staff he did not intend to file a motion for summary judgment. On March 9, 2007, plaintiff filed its motion for summary judgment. March 16, 2007 was the deadline for Tuerk to file a response, but he did not file one, nor did he seek an extension. On March 20, 2007, therefore, plaintiff's motion for summary judgment was granted as unopposed, and judgment was entered on March 21, 2007 for \$129,580.28 plus interest from January 26, 2007 through March 19, 2007 at the daily rate of \$13.80, with interest on the judgment and costs.

2. Tuerk now claims attorney Datner inadvertently calendared April 8, 2007 as the date for a response to plaintiff's motion for summary judgment, not March 16, 2007, and believed that a response was not due until April 8, 2007. Tuerk also claims Datner did not receive a copy of plaintiff's motion for summary judgment until March 21, 2007. Tuerk appears to argue that Datner's neglect merits relief from final judgment under Rule 60(b)(1).

3. I may give relief from a judgment for "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). This rule is to be used to disturb the finality of judgments only on narrow grounds and upon a showing of exceptional circumstances. It is not intended to enable litigants to avoid the consequences of an adverse decision. Nevertheless, it should be liberally interpreted in favor of setting aside judgments on a proper showing of mistake, inadvertence, surprise, or excusable neglect. Smith v. Widman Trucking & Excavating, Inc., 627 F.2d 792, 795 (7th Cir. 1980).

Whether neglect is excusable is an equitable determination, taking account of all relevant circumstances surrounding the party's omission. Pioneer Inv. Servc. Co. v. Brunswick, Assoc. Ltd. P'ship, 507 U.S. 380, 395 (1993). The Pioneer decision established a four-part balancing

test for determining whether there had been “excusable neglect” in the bankruptcy context, but the court also reviewed various contexts in which the phrase appeared in the federal rules of procedure and made it clear the same test applies in all those contexts. Id.; Pincay v. Andrews, 389 F.3d 853, 855 (9th Cir. 2004). The Pioneer factors include: (1) the danger of prejudice to the non-moving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the moving party’s conduct was in good faith. Pioneer, 507 U.S. at 395. Fault in the delay is perhaps the most important single factor in determining whether neglect is excusable. Jennings v. Rivers, 394 F.3d 850, 856 (10th Cir. 2005). “An additional consideration is whether the moving party’s underlying claim is meritorious.” Id.

4. Applying the first two Pioneer factors, it does not appear plaintiff would be prejudiced by the relatively short delay required for Tuerk to file a response to its motion for summary judgment, should this matter be reopened. As to the remaining Pioneer factors, however, I cannot conclude that Tuerk’s conduct was in good faith because it is another example in a series of such incidents in this case. Attorney Datner’s neglect was also within his reasonable control and could easily have been prevented with minimal diligence.

Attorney Datner’s neglect in calendaring the wrong date was not excusable. On January 16, 2007, attorney Datner participated in the scheduling conference in which he and opposing counsel selected, and agreed to, the dates set forth in the scheduling order entered on January 17, 2007. Thus, the dates were not arbitrarily set by the court. Moreover, attorney Datner should have been reminded of the dates on the scheduling order when he received two calls from my staff regarding the due date of his motion for summary judgment. I find it significant that

attorney Datner did not file a motion for summary judgment and did not contact chambers to inform me he was not going to file one until my staff contacted him. Compare Williams v. New Orleans Public Serv., Inc., 728 F.2d 730, 734 (5th Cir. 1984) (repeated instances of disregard of the court's orders displayed "a willful pattern of disregard," not an isolated incident of inadvertence); Kunik v. Racine County, Wis., 106 F.3d 168, 174 (7th Cir. 1997) ("Excuses about failing to read motions before they are filed and untimely reviews of the record for supporting evidence for supporting evidence reveal cause for sanctions; they are not the kind of 'excusable neglect' that Rule 60(b) is designed to address.").

In an additional act of neglect or inadvertence, in paragraph seven of his motion to open summary judgment, Tuerk references his response to plaintiff's motion for summary judgment, which he represented was attached as an exhibit to his motion to open judgment. However, no exhibit was attached and there is no such exhibit filed with the Clerk of the Court.

Tuerk also claims attorney Datner did not receive a copy of plaintiff's motion for summary judgment until March 21, 2007. On March 9, 2007, however, Tuerk was served by both United States mail and electronic mail.¹ Pursuant to Section 7 of the Procedural Order on Electronic Case Filing ("ECF"), "[w]hen an ECF Filing User electronically files a pleading or other document using the ECF system, a Notice of Electronic Case Filing shall automatically be generated by the system, and shall be sent automatically to all parties entitled to service."

Electronic service "constitutes service of the filed document to all such parties and shall be

¹ The certificate of service attached to plaintiff's motion for summary judgment certifies that attorney Datner was served by United States mail on March 9, 2007. In addition, a clerk at the court's ECF Help Desk confirmed that plaintiff's motion for summary judgment was electronically mailed to attorney Datner on March 9, 2007.

deemed to satisfy the requirements of Rul 5(b)(2)(D) of the Federal Rules of Civil Procedure.”
Section 7 of the Procedural Order on ECF.

Attorney Datner has been registered on ECF since June 18, 2004. On March 8, 2006, attorney Datner entered his appearance on ECF, and on March 21, 2006, electronically filed on ECF the first of several electronic filings in this matter. The docket also reflects that on March 9, 2007, plaintiff’s motion for summary judgment was filed electronically on ECF. Thus, Tuerk cannot persuasively claim he did not receive plaintiff’s motion for summary judgment until March 21, 2007, or that he was not aware his response was due by March 16, 2007.

Finally, in proceedings rather portentous of this matter, default judgment was entered against Tuerk on January 10, 2006 for failure to appear, plead, or otherwise defend. On January 30, 2006, Tuerk moved to set aside the default judgment on the ground that judgment was invalid because service was improper. At a hearing before the Honorable John R. Padova, U.S. District Judge, on February 16, 2006, Tuerk argued that service at his business address registered with the Pennsylvania Disciplinary Board of the Supreme Court of Pennsylvania was improper because it was a “virtual” office where no one had the authority to receive service on his behalf. (Feb. 16, 2006 Hearing Tr. 3, 7, 11). Judge Padova granted Tuerk’s motion to set aside the default judgment, but stated he would be reporting Tuerk to the Disciplinary Board because Tuerk had testified he did not in fact have an office at the address registered with the Supreme Court of Pennsylvania.² (Id. at 18).

² At the February 16, 2006 hearing before Judge Padova, the following exchange occurred:

Mr. Tuerk: I never received service. I maintained an address at a virtual office . . . I don’t have property there, I don’t have employees or anything. Someone

Viewed in contact, therefore, attorney Datner's neglect was not excusable because it is

apparently dropped off the complaint to a receptionist there and they claim that was good service. I gave no authority to any of those people. . . . I do not let people walk in and I do not – I do not sit in that office . . . I have no office there whatsoever. I have the ability to request if I can meet clients in a meeting room and that's it. . . .

The Court: [Tuerk] has stated to the Court that he does not have an office at the address that he was served at. He concedes that that's the address to which he is registered in the Supreme Court of Pennsylvania, but he does not have an office at that address. I will notify the Supreme Court to that effect. . . .

Mr. Tuerk: I – for purposes of maintaining an office, they have to have an address where you meet clients, and I do meet clients there. . . .

The Court: What you said here was that you do not have an office at that address.

Mr. Tuerk: I don't have property or employees there full-time.

The Court: No, you said you do not have an office at that address.

Mr. Tuerk: Well, if I said that, I retract that, because, your Honor, I meet clients there. . . .

The Court: I'm going to send a transcript of this to the Disciplinary Board, sir. Okay? . . . Well, what you just did was, you just made a series of representations to the Court, we have relied on the representations that you have made. We have concluded what you have argued, which is right in your submissions, and that is that you do not have an office, business office, at that address . . . despite the fact that you're registered to that address. . . .

Tuerk: No, your Honor, I have that registered there because I meet clients there and that's all . . .

The Court: Mr. Tuerk, I'm reporting you to the Disciplinary Board. Okay? And he's served. And the other thing is, you know and understand your obligations and you be very, very sensitive about your obligations when you file an answer. Okay? Or however you intend to respond. Okay?

(Feb. 16, 2006 Hearing Tr. 3-4, 19-20).

part of a pattern of disregard for the court's orders, not an isolated incident of inadvertence or mistake. See Williams, 728 F.2d at 734.

5. Tuerk does not claim any grounds for relief under Rule 60(b)(6), and I find no extraordinary circumstances or other reasons that would trigger application of Rule 60(b)(6).

6. Tuerk next argues that there are several issues of fact in dispute. Tuerk offers conclusory statements without providing any competent evidence that would create any genuine issue of fact. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

According to the January 17, 2007 scheduling order, the parties had until February 23, 2007 to identify any facts in dispute that would require an evidentiary hearing or trial. Nothing was filed by either party. In addition, no filings to date present any legal or factual bases that justify overturning judgment entered in this case, and Tuerk's legal challenge that his claim is barred by the doctrine of laches was fully addressed in my memorandum opinion of March 20, 2007.

7. Tuerk's motion for stay of execution is denied because his motion to open summary judgment is denied. In any event, Tuerk has not filed the required bond, see 42 Pa. C.S.A. § 4306(d)(2), or established irreparable harm or any likelihood of prevailing on the merits.

CONCLUSION

For the foregoing reasons, Tuerk's motions to open summary judgment and for stay of execution are denied.

BY THE COURT:

\s\ TIMOTHY R. RICE
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U.S. MAGISTRATE JUDGE

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v.	:	
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ROBERT P. TUERK,	:	NO. 05-CV-06088
Defendant	:	

ORDER

AND NOW, this 1st day of May, 2007, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

1. Defendant's motion to open summary judgment is DENIED;
2. Defendant's motion for stay of execution is DENIED.

BY THE COURT:

\s/ TIMOTHY R. RICE
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U.S. MAGISTRATE JUDGE