

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

KATIE JOSEPH, a minor, by and through	:	
PAMELA JOSEPH, her mother and natural	:	
guardian, and PAMELA JOSEPH, individually,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	NO. 98-1777
v.	:	
	:	
THE GAP INCORPORATED,	:	
	:	
Defendant.	:	

**MEMORANDUM**

Buckwalter, J.

March 1, 1999

Presently before the Court is the Plaintiffs' motion to vacate the order dismissing their complaint pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. For the reasons discussed below, Plaintiffs' motion is **DENIED**.

I. BACKGROUND

Plaintiffs originally filed their complaint in the Court of Common Pleas of Lehigh County, Pennsylvania alleging claims of strict liability, breach of express and implied warranties, negligence, and negligent infliction of emotional distress arising from injuries caused by Defendant's clothing. See generally Pls.' Compl. Attorney John D. Reinhart represented Plaintiffs when they instituted this litigation. See id. The matter was removed to this Court on April 3, 1998. See Notice of Removal.

Sometime after the action was removed, a mediation session was held in an attempt to settle Plaintiffs' claims. See Pls.' Mem. at 1. Following the mediation, Plaintiffs'

counsel, Mr. Reinhart, suggested that they seek a second legal opinion in regard to the value of their case. See id. Plaintiffs consequently consulted with Attorney John P. Karoly, Jr. and retained him as counsel. See id. at 2. Mr. Karoly alleges that, while he consulted with Mr. Reinhart about assuming the representation of Plaintiffs, he was not immediately retained, and he “was not provided the file from the prior counsel of record.” Id.

On July 28, 1998, Defendant filed a motion to compel the provision of supplemental answers to previously served interrogatories, the production of requested documents, and the depositions of Katie Joseph and Plaintiffs’ expert. See Def.’s Motion to Compel. Defendant attached to the motion proof of completed service upon Mr. Reinhart, see id. (Exhibit E thereto), but in light of the confusion as to who was representing Plaintiffs, Defendant also sent a letter to Mr. Karoly enclosing a copy of the motion to compel, see Def.’s Mem. (Exhibit B thereto). On August 19, 1998, this Court entered an order granting Defendant’s unopposed motion to compel. A copy of that order was sent to Mr. Reinhart, as recorded on the docket sheet, see Docket No. 9, and on the original copy of the order.

After the time periods set forth in the August 19, 1998 order expired, Defendant filed a motion to dismiss for failure to comply with the court’s order pursuant to Federal Rule of Civil Procedure 37. See Def.’s Motion to Dismiss. Notably, Defendant attached to this motion proof of completed service upon Mr. Karoly. See id. In its brief, Defendant informed the Court that Mr. Karoly was “possibly representing Plaintiffs,” see id. ¶ 8, and attached a series of correspondences between Defendant’s counsel and Mr. Karoly advising him of the status of its motion to compel, see id. (Exhibit B thereto).

On September 29, 1998, as a result of Plaintiffs' repeated violations of this Court's orders, this Court granted Defendant's motion to dismiss with prejudice. Again, a copy of that order was sent to Mr. Reinhart, as recorded on the docket sheet, see Docket No. 11, and on the original copy of the order. On October 5, 1998, proof of completed service upon Mr. Karoly of the August 28, 1998 order dismissing Plaintiffs' complaint was filed in the clerk's office. See Certificate of Service. On January 26, 1999, approximately three and one-half months later, Plaintiffs moved pursuant to Fed. R. Civ. P. 60(b) to vacate the August 29, 1998 dismissal. The Court infers from these papers that Mr. Karoly has now replaced Mr. Reinhart as counsel of record, however, Defendant's response seems to indicate that they are co-counsel, as both Mr. Karoly and Mr. Reinhart were served.

## II. DISCUSSION

In their motion for relief, Plaintiffs list mitigating factors to excuse their delay in responding to the Court's orders and contend that any delay or dilatoriness was the result of the actions of their prior counsel. See Pls.'s Mem. at 3. Plaintiffs argue that the judgment be vacated because: (1) Plaintiff is fourteen years of age; (2) Plaintiffs were in the process of changing attorneys at the request of Mr. Reinhart; (3) the discovery period did not close until October 15, 1998; (4) Plaintiffs have provided substantive discovery; (5) the requested discovery was five supplemental interrogatory answers; (6) Plaintiffs have acted in good faith and any delay or dilatoriness was the result of the actions of their prior counsel; and (7) their Petition is timely under Fed. R. Civ. P. 60(b). See id. Plaintiffs further claim that they have demonstrated no willfulness in failing to respond to the Court's orders. See id. at 2.

Under Rule 60(b)(1), a party may be entitled to relief from a judgment upon a showing of “mistake, inadvertence, surprise or excusable neglect.” Rule 60(b)(6), a catch-all provision, permits similar relief for “any other reason.” Motions brought pursuant to Rule 60 are addressed to the sound discretion of the court and are to be granted only in exceptional circumstances. See Kraus v. Consolidated Rail Corp., et al., No. CIV.A. 88-5878, 1991 WL 46272, at \*2 (E.D. Pa. Mar. 27, 1991) (quoting Boughner v. Secretary of Health, Educ. & Welfare, 572 F.2d 976, 977 (3d. Cir. 1978)). Additionally, the motion must be “made within a reasonable time and, for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.” Fed. R. Civ. P. 60(b). To determine whether an attorney’s behavior constitutes excusable neglect, it is necessary to examine all relevant factors including the danger of prejudice to the non-movant, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was in reasonable control of the movant, and whether the movant acted in good faith. See Pioneer Inv. Serv., Inc. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 385 (1993).

Here, Plaintiffs’ failure to respond to the Court’s September 29, 1998 order dismissing Plaintiffs’ complaint due to counsel’s mismanagement of their case does not constitute mistake or excusable neglect within the meaning of Rule 60(b)(1).<sup>1</sup> In fact, Plaintiffs’ counsel’s disregard for this Court’s orders and rules amounts to an inexcusable form of neglect -- gross negligence. The Court is not persuaded by Plaintiffs’ argument that their negligence was the fault of their prior counsel, Mr. Reinhart, and his failure to hand over their file to Mr. Karoly. It is unclear as to whether Mr. Karoly actually received or was even aware of either the motion to

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<sup>1</sup> The Court finds no basis for granting relief pursuant to Rule 60(b)(6).

compel or the Court's August 19, 1998 order granting that motion. However, it is clear from the record that Mr. Karoly was on notice of Defendant's motion to dismiss and the order granting the dismissal as he was served with a copy of both. Yet, Mr. Karoly not only failed to file a brief in response to the motion to dismiss, but also waited almost four months after the order was granted dismissing the case, which this Court considers an unreasonable amount of time, to file the motion to vacate. See e.g., Dominguez v. United States, 583 F.2d 615, 618 (2d Cir. 1978) (holding that three months is ample time to file a "short and simple" Rule 60(b) motion). Unfortunately, since there is no particularized showing of exceptional circumstances explaining counsel's gross negligence and no indication of diligent efforts by Plaintiffs to induce him to fulfill his duty, Plaintiffs are bound by the inexcusable conduct of their counsel.

The Court notes that there is some confusion over Mr. Karoly's role in the litigation. This confusion stems from Mr. Reinhart's failure to withdraw his appearance and Mr. Karoly's failure to enter his appearance when he assumed representation of Plaintiffs. As a result of counsel's inaction, the Clerk's Office continues to mail copies of Defendant's motions and the Court's orders to Mr. Reinhart, and Defendant continues to list Mr. Reinhart as Plaintiffs' counsel. While Mr. Karoly filed the present motion to vacate the order dismissing Plaintiffs' case, which constitutes an entry of appearance under Rule 5.1 of the Eastern District's Local Rules of Civil Procedure, he has not filed a separate entry of appearance, from which it would have been clear to Defendant, the Clerk's Office, and this Court that he is the counsel of record and not Mr. Reinhart.

### III. CONCLUSION

For the foregoing reasons, Plaintiffs motion is **DENIED**. An appropriate order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KATIE JOSEPH, a minor, by and through	:	
PAMELA JOSEPH, her mother and natural	:	
guardian, and PAMELA JOSEPH, individually,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	NO. 98-1777
v.	:	
	:	
THE GAP INCORPORATED,	:	
	:	
Defendant.	:	

**ORDER**

AND NOW this 1st day of March, 1999, upon consideration of Plaintiffs' Petition to Vacate Order Dismissing Cause of Action pursuant to Fed. R. Civ. P. 60(b) (Docket Nos. 13 & 14), and Defendant's Response thereto (Docket No. 15), it is hereby **ORDERED** that Plaintiffs' motion is **DENIED**, in accordance with the accompanying memorandum.

BY THE COURT:

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RONALD L. BUCKWALTER, J.