

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

FILED

IN RE: ASBESTOS PRODUCTS : Consolidated Under
LIABILITY LITIGATION (No. VI) : MDL DOCKET NO. 875

JUN - 9 2011

JOHN LEE JONES and KAREN LEE :
JONES :

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

:
: Case No. 10-83235

v. :

VARIOUS DEFENDANTS :

: Transferred from the Central
: District of California
:

ORDER

AND NOW, this **7th** day of **June, 2011**, it is hereby

ORDERED that Plaintiffs' Objections to Magistrate Judge Thomas J. Reuter's Report and Recommendation (doc. no. 21) filed on April 19, 2011 are **DENIED**.

It is further **ORDERED** that Plaintiffs' Motion for relief from Order of Dismissal under F.R.C.P. 60(b)(1) is **DENIED**.¹

¹ The instant action was filed in California Superior Court, Los Angeles County, on August 23, 2010, alleging injuries due to asbestos exposure against various defendants. (R&R at 1.) The case was removed to the United States District Court of the Central District of California on September 9, 2010. (Id.)

The events leading up to the current dispute between Defendant John Crane, Inc. ("John Crane") are as follows:

- **November 1, 2010:** The Honorable Manuel L. Real, United States District Judge for the Central District of California, held a hearing and orally granted Defendant John Crane's unopposed Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). (Id.) Plaintiffs had not opposed John Crane's motion, nor attended the hearing. (Id.)

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- **November 4, 2010:** Plaintiffs filed a Motion for Relief under Federal Rule of Civil Procedure 60(b)(1) (hereinafter "Rule 60(b) motion"), stating that they failed to answer John Crane's motion and appear at the scheduled hearing as a result of "excusable neglect," as envisioned by the rule. (Id. at 2.)
 - **November 3, 2010 or November 8, 2010:** Case was transferred to the Eastern District of Pennsylvania as part of MDL 875 In Re: Asbestos. The parties state that the date of transfer was November 8, 2010, but the Eastern District of Pennsylvania docket reflects that the date of transfer was November 3, 2010. This five (5) day discrepancy is not relevant to consideration of the instant issues. Regardless of the date of transfer, Plaintiffs' Rule 60(b) motion was pending at the time of transfer. Upon transfer, the Rule 60(b) motion was denied without prejudice. (See Administrative Order No. 11, discussed infra.)
 - **November 22, 2010:** Judge Real entered a Minute Order noting that because of the transfer, there was "no longer . . . jurisdiction to hear plaintiffs' Rule 60(b) motion for relief from order." (R&R, doc. no. 19, at 3.)
 - **February 1, 2011:** John Crane filed a Petition, requesting that this Court enter a signed order granting John Crane's Motion to Dismiss. (doc. no. 7.) The basis for Defendant's request was that Judge Real's Order granting the motion was memorialized in the transcript of the hearing, but there was no signed order, as the case was transferred to MDL 875 before a signed order was entered by Judge Real. (Id.)

Plaintiff opposed John Crane's motion, requesting the opportunity to re-file its pending Rule 60(b)(1) motion in the Eastern District of Pennsylvania.
 - **April 5, 2011:** Magistrate Judge Rueter recommended that John Crane's Petition be granted, because "[u]nder the law of the case doctrine, as an MDL transferee court, this court must respect and follow Judge Real's

dismissal order in the absence of extraordinary circumstances." (R&R, doc. no. 19.) Judge Rueter noted that if Plaintiff wanted consideration of its Rule 60(b)(1) motion, it could re-file it in the Eastern District of Pennsylvania. (*Id.* at 4, no. 1.)

- **April 6, 2011:** Plaintiffs re-file their pending Rule 60(b) motion in the Eastern District of Pennsylvania.
- **April 19, 2011:** Plaintiffs file objections to Judge Rueter's recommendation that John Crane's motion for order be granted.

Based on the above, there are currently two issues pending before the Court that arise out of the dismissal of John Crane from the instant case. The first issue, raised in Plaintiffs' objections, is whether Judge Rueter was correct in declining to modify Judge Real's Order dismissing John Crane. The second issue, raised in Plaintiffs' renewed Rule 60(b) motion, is whether they meet the "excusable neglect" standard set forth in the rule.

As Judge Rueter recognized, a multidistrict litigation transferor judge is bound by the "law of the case" doctrine in its reconsideration of an action taken by the transferee judge. In Re: Pharmacy Benefit Managers Antitrust Litig., 582 F.3d 432 (3d Cir. 2009). The "law of the case" doctrine advances the principle that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618 (1983). "The . . . doctrine does not restrict a court's power but rather governs the exercise of discretion." Pub. Interest Research Grp. of NJ, Inc. v. Magnesium Elektron, 123 F.3d 111, 116 (3d Cir. 1997). In exercising discretion, a court should only revisit a transferor court's decisions under "extraordinary circumstances such as where the initial decision was clearly erroneous and would make a manifest injustice." Christianson v. Colt Indus. Operation Cor., 486 U.S. 800, 816 (1988) (citing Arizona v. California, 460 U.S. at 618 n.8).

The Court agrees with Judge Rueter that Plaintiffs have failed to make a showing of the "extraordinary circumstances" necessary to warrant a modification of Judge Real's order. Therefore, this Court is obligated to uphold and confirm Judge Real's oral order, which undoubtedly has the same force and

effect as a written order. See United States v. Scarfo, 263 F.3d 80, 88 (3d Cir. 2001); Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 364065 (2d Cir. 2003).

As to the second issue, Plaintiffs' currently pending Rule 60(b) motion, this Court is not bound by the "law of the case" doctrine, as Judge Real did not address the merits of Plaintiffs' "excusable neglect" argument. Rather, the motion was denied without prejudice with leave to re-file in the Eastern District of Pennsylvania, which Plaintiffs have now done, pursuant to Administrative Order No. 11. (See doc. no. 2) ("All Motions pending in MDL 875 which are neither granted nor denied as of the date of transfer of a case from the Clerk of the Transferor Court to the Clerk of the Transferee Court shall be deemed denied without prejudice and with all time requirements held in abeyance from the initial date of filing. Counsel may refile any unresolved motions for further transferee court action . . ."). Therefore, the merits of Plaintiffs' Rule 60(b) motion will be addressed by this Court.

Plaintiffs assert that Judge Real's Order should be set aside based on "excusable neglect," as "Plaintiffs' failure to file an opposition to John Crane's motion to dismiss and failure to appear at the hearing on the motion were solely the result of a calendaring error made inadvertently by plaintiff's attorney." (Pl.'s Mot., doc. no. 20, at 4.)

Federal Rule of Civil Procedure 60(b)(1) allows a District Court to grant a party relief from final judgment based upon a finding of "excusable neglect." Nara v. Frank, 488 F.3d 187, 193 (3d Cir. 2007). The test is an "equitable" one, and requires that the Court weigh the "totality of the circumstances." Id. at 194 (citing Pioneer Inv. Serv.'s Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380 (1993)). Specifically, the Court must consider four factors: "the danger of prejudice [to the non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Pioneer, 507 U.S. at 395; Nara, 448 F.3d at 194.

As to prejudice, John Crane would be prejudiced by granting Plaintiff's Rule 60 motion at this juncture. While a finding of prejudice requires something more than mere delay in "realizing satisfaction on a claim," Feliciano v. Reliant Tooling Co., 691

F.2d 653, 656-57 (3d Cir. 1982), the prejudice here is more than mere delay. John Crane would be prejudiced by the significant waste of resources that would occur if this court were to re-entertain its timely filed and substantively granted motion to dismiss. It would necessitate the re-filing of the motion, a possible reply brief, and a possible trip to Philadelphia for oral argument. See Ethan Michael, Inc. v. Union Twp., 382 Fed. App'x 906, 909 (3d Cir. 2010) (upholding the District Court's finding that the prejudice at issue was the "time and expense and anxiety" that would occur from re-opening the litigation against the previously-dismissed defendant.)

As to the length of the delay and its impact on proceedings, these factors weigh heavily in favor of denying Plaintiffs' Rule 60(b) motion. It is significant that Plaintiffs waited to bring the Rule 60(b) motion to this Court's attention until five (5) months after the case was transferred to MDL 875, and did so only in response to John Crane's Petition for a confirmatory order. (See Def.'s Resp., doc. no. 22, at 11) ("[P]laintiffs did nothing in the Court to resolve this issue, but rather waited until [John Crane] filed its petition to request that a formal dismissal order be signed."). The Court finds that if Plaintiffs were reasonably diligent about rectifying their initial oversight, they would have re-filed their Rule 60 motion immediately upon transfer to MDL 875, pursuant to Administrative Order No. 11. See, e.g. Nara, 488 F.3d at 192 (3d Cir. 2007) (declining to find excusable neglect based on overall "negligence in handling" the matter by failing to register for electronic case updates as required and waiting over two weeks after the district court's order to file a Rule 60(b) motion); see also Ethan Michael, Inc., 382 Fed. App'x at 909 (a finding of excusable neglect was not warranted when movant waited for five months after the grant of an unopposed motion to dismiss to file the Rule 60(b) motion, because such a "casual approach" to remedying the dismissal of a case indicated that the neglect was not excusable).

Further, the stated reason for the delay does not trigger a finding of excusable neglect, as the circumstances were entirely and exclusively within Plaintiffs' control. "[A]n attorney's failure to respond to a motion due to carelessness, mistake, or ignorance of the rules does not amount to excusable neglect." Id. In the instant case, Plaintiffs readily admit that they received electronic notice of the motion, but assert that upon receiving the notification, "no one at the office added the opposition due date for the motion or its hearing date to the

office's master calendar," causing the failure to respond and appear. (See doc. no. 20 at 3.) Certainly this constitutes neglect, but Plaintiffs have done nothing to explain why it is excusable.

As to the final factor, there is no evidence of bad faith on the part of Plaintiffs. However, the application of the first three factors militate against a finding of excusable neglect for failing to answer John Crane's motion to dismiss or appear at the scheduled hearing before Judge Real. See Nara at 193 (finding no "excusable neglect" even though there was "no evidence [of] bad faith.")

Under these circumstances, Plaintiffs' Rule 60(b) motion will be denied.

It is further **ORDERED** that, pursuant to the Honorable Manuel Real's November 1, 2010 oral dismissal Order, Defendant John Crane's Motion to Dismiss Plaintiff's Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is **GRANTED**.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Eduardo C. Robreno", written over a horizontal line. The signature is cursive and includes a long horizontal stroke at the end.

Eduardo C. Robreno, J.