

VERMONT SUPERIOR COURT
Addison Unit
7 Mahady Court
Middlebury VT 05753
802-388-7741
www.vermontjudiciary.org



CIVIL DIVISION
Case No. 72-4-20 Ancv

Aerie Point Holdings, LLC vs. Vorsteveld Farm, LLC

ENTRY REGARDING MOTION

Title: Motion to Extend Time to File Appeal (Motion: 17)
Filer: Christian Chorba
Filed Date: September 21, 2022

The motion is DENIED.

Defendant seeks an extension of the time for filing an appeal of the Judgment signed August 15, 2022 and sent to the parties' attorneys on August 19, 2022.

Pursuant to V.R.A.P. 4 (d)(1), the trial court may extend the time for filing a notice of appeal if the request is made no later than 30 days after the expiration date of Rule 4(a)(1), which is 30 days after the judgment or order appealed from, and "the party shows excusable neglect or good cause."

Excusable Neglect

The parties agree that excusable neglect is determined by the four factors set forth in *In re Town of Killington*, 2003 VT 87A, in which the Court cites *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993). The factors were identified therein as follows:

- Danger of prejudice to the nonmovant
- Length of delay and potential impact on judicial proceedings
- Reason for the delay, including whether it was within the reasonable control of movant
- Whether movant acted in good faith

The Reporter's Notes to the 2006 Amendments to Rule 4 (d) provide succinct background:

Excusable neglect assumes fault on the part of the movant. In recent decisions, the Vermont Supreme Court has followed the lead of a number of federal courts of appeal in applying the excusable neglect standard very strictly, "lest there be a de facto enlargement of the appeal-filing time to sixty days." *In re Town of Killington*, 2003 VT 87A, ¶¶ 17, 19, 176 Vt. 60838 A. 2d 98 (internal office procedure breakdown not excusable neglect as matter of law); *Bergeron v. Boyle*, 2003 VT 89, ¶ 22, 176 Vt. 78, 838 A.2d 918 (lawyer's vacation and internal

office procedure breakdown not excusable neglect); *In re Lund*, 2004 VT 55, ¶ 7, 177 Vt. 465, 857 A.2d 279 (mem.) (mistaken reading of rule not excusable neglect).

V.R.A.P. 4 Reporter's Notes--2006 Amendment.

The first, second, and fourth factors of the *Killington/Pioneer* analysis are not particularly significant in this case. The Vermont Supreme Court stated in *Killington* that “[d]espite the flexibility of the standard and the existence of a four-factor test, the appropriate focus is on the third factor: the reason for delay, including whether it was within the reasonable control of the movant.” *Killington* at ¶ 16.

It is clear that although the Judgment was entered in the record on August 15, 2022, the court staff notified the attorneys of the Judgment on August 19, 2022. Thus, the appeal period expired no later than September 20, 2022 no matter how the time is computed. The motion was filed September 21, 2022, which is after that date.

As set forth in the Entry Order issued this day on Defendant's Motion to Clarify, counsel had clear notice that the Judgment was labeled as a “Judgment” and in its introductory line as a “final judgment.” Thus, the time to file a notice of appeal within the time required by the Rules was entirely within the control of Defendant as moving party. There is no representation of any events outside the control of Defendant and its attorney that affected the ability of Defendant to file a timely appeal through counsel.

While the motion was filed shortly after the deadline (whether measured from August 15th or August 19th), the effect of a court granting the motion where the timing was entirely within the Defendant's control would be to weaken the rule so that the decision would become a discretionary one on the part of the trial judge. Judges may exercise that discretion differently, thus applying the Rule inconsistently and perhaps resulting in a “de facto enlargement of the appeal-filing time to sixty days.” The holdings of the cases cited in the Reporter's Notes show that the standard is applied strictly. Since the 2006 Amendment there have been no contrary holdings related to untimely filing of a notice of appeal.

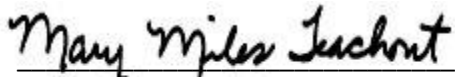
Thus, the level of the movant's control over the reason for lateness is critical, and is to be strictly construed. Meeting the excusable neglect standard requires a showing of some level of impact of outside circumstances that justifies an excuse from the requirement otherwise applicable in all cases. In this case, there has been no showing of circumstances beyond the control of the movant. Defendant's counsel was present at the August 15th hearing, familiar with the record as laid out in the other ruling issued this day, and able to read the clear language of the Judgment provided by the court. Even if Defendant's counsel mistakenly believed that there would be further discussion with Plaintiff's counsel about a possible agreement on specific terms of the odor injunction, once she had received the Judgment and seen that the language of it was to the contrary, it was within counsel's control to take action to clarify the situation prior to the expiration of the appeal period. The court concludes that the “excusable neglect” standard has not been met.

Good cause

The standard for good cause requires no fault on the part of the movant. “Good cause refers to situations in which there is no fault on the movant’s part – e.g., failure of the Postal Service to deliver the notice of appeal.” V.R.A.P. 4 Reporter’s Notes--2006 Amendment.

Here there is no indication of any cause outside of the moving party’s own failure to file a notice of appeal within the required time. (No notice of appeal has been filed to date, despite representations in Defendant’s memos.) The argument that Defendant’s counsel expected a process of further communication with Plaintiff’s counsel over terms to be included in the injunction is unsupported by the record. (See ruling issued this day on Motion #18.) Counsel’s misinterpretation, or alternatively the possibility of failure to meet the deadline through breakdown in office procedures, was wholly within the control of Defendant’s counsel as movant. The court concludes that the “good cause” standard has not been met.

Electronically signed pursuant to V.R.E.F. 9(d) on October 7, 2022 at 4:17 PM.

A handwritten signature in black ink that reads "Mary Miles Teachout". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Mary Miles Teachout
Superior Court Judge