

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASEY LEE DAVIS

APPELLANT

v.

NO. 2009-CA-00066

IMPERIAL PALACE OF MISSISSIPPI, LLC

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT
CIVIL ACTION NO. A2402-07-088**

BRIEF OF APPELLEE

SUBMITTED BY:

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ORAL ARGUMENT IS NOT REQUESTED

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STATEMENT OF THE ISSUE

Imperial Palace of Mississippi, LLC submits that this appeal presents the following issue:

- 1) Whether or not Appellant's failure to timely execute a notice of appeal was a result of excusable neglect under Rule 4(g) of the Mississippi Rules of Appellate Procedure.

STATEMENT OF THE CASE

Nature and Course of the Proceedings Below

This is an appeal of the decision of Honorable Lawrence P. Bourgeois, Circuit Court Judge for the Second Circuit Court District for the State of Mississippi from his Final Order entered in this case on December 30, 2008, in which he denied the Plaintiff's Motion to Reopen Appeal Time.

This lawsuit was originally filed against the Defendant, Imperial Palace of Mississippi, LLC, on May 9, 2007, in which the Plaintiff alleged breach of fiduciary duty and invasion of privacy on the part of the Defendant. (R. at 9-10). On August 7, 2007, Imperial Palace of Mississippi, LLC (hereinafter "IPM"), filed its Motion for Summary Judgment. (R. at 36). The Plaintiff, Casey Lee Davis, filed her Response to the Motion for Summary Judgment on October 11, 2007, and the Defendant filed its Rebuttal on October 12, 2007. (R. at 62, 80). The Motion for Summary Judgment came for hearing on November 13, 2007 in front of Honorable Stephen B. Simpson. (T. at 1). On December 27, 2007, Judge Simpson issued a Judgment in which summary judgment was granted to IPM.¹ (R. at 108).

On January 30, 2008, the Plaintiff untimely filed her notice of appeal. (R.E.; R. at 112). Pursuant to Rule 4(a), of the Mississippi Rules of Appellate Procedure, notice of appeal shall be filed

¹ Judge Simpson left the bench in May of 2008 as he was appointed Commissioner of Public Safety. Judge Bourgeois was appointed as his replacement.

within thirty (30) days after the dated of entry of the judgment or order appealed from. On February 6, 2008, the Plaintiff filed a Motion to Reopen Appeal Time under Rule 4(h) of the Mississippi Rules of Appellate Procedure. (R.E.; R. at 113). IPM filed its Response to said Motion on March 5, 2008. (R. at 118). On November 20, 2008, said Motion came for hearing before Judge Bourgeois (R.E.; T. at 1), and on December 30, 2008, Judge Bourgeois issued a Final Order in which he denied the Plaintiff's Motion to Reopen Appeal Time. (R.E.; R. at 133). Thereafter, a Notice of Appeal was filed on January 9, 2009, to appeal Judge Bourgeois' Order entered in this case on December 30, 2008. (R.E. at 135).

Statement of the Facts

The Defendant was granted summary judgment in this case on December 27, 2007. (R. at 108). The Plaintiff filed her notice of appeal on January 30, 2008 (R. at 112), which was four (4) days past the thirty (30) day deadline set forth in Rule 4(a) of the Mississippi Rules of Appellate Procedure. The Plaintiff did not file a Motion to Reopen Appeal Time until February 6, 2008. (R.E.; R. at 113.) The Plaintiff's Motion to Reopen Appeal Time claimed that the deadline to file a notice of appeal had expired three (3) days before counsel had received a copy of the Judgment rendered by Judge Simpson, and that Plaintiff was entitled to an extension of time based on Rule 4(h) of the Mississippi Rules of Appellate Procedure which provides that a trial court may reopen time for appeal if the party entitled to notice did not receive notice of judgment within 21 days of its entry. (R.E.; R. at 113-14). Plaintiff's counsel later withdrew these assertions at the Motion Hearing held on November 20, 2008, claiming that his paralegal had represented to him at the time he filed the Motion to Reopen Appeal Time that Plaintiff's counsel's office had not received notification of judgment, when in fact, Plaintiff's counsel's office had received notification of judgment. (R.E.; T. at 3, ln.16-24). During the Hearing, and after retracting his Motion to Reopen

Time for Appeal, Plaintiff's counsel then asked the Court for an extension of time pursuant to Rule 4(g) of the Mississippi Rules of Appellate Procedure which provides that if one fails to file for an extension of time within the thirty (30) day deadline to file a notice of appeal, the trial court may allow for the extension of time to file the notice of appeal upon a showing of excusable neglect. (R.E.; T. at 5, ln.3-10).

Plaintiff's counsel blames his failure to timely file a notice of appeal on his paralegal. (R.E.; T. at 4-6). Counsel admits that he is a practitioner that also teaches at the University of Southern Mississippi, and that he relies heavily on his paralegal. (R.E.; T. at 4, ln.6-11). Counsel claims that his paralegal suffered a stroke shortly after February 6, 2008, and that prior to that point she had been displaying erratic behavior. (R.E.; T. at 5, ln.26-29; 6, ln. 1-6). Counsel further states that "[f]inally, when I asked her about it, we finally got it out, and it was late, but that's because I finally got the—just had to corner her and get the truth essentially." (R.E.; T. at 7, 8-13). No affidavit and no testimony was provided by Plaintiff's counsel's paralegal at anytime of the course of this litigation.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying the Plaintiff's Motion to Reopen Appeal Time. First, Plaintiff filed the wrong motion with the trial court, and as a result, did not even attempt to make a showing of excusable neglect until November 20, 2008, two hundred and ninety seven (297) days past the deadline to file for an extension of time. Regardless, Plaintiff and/or her counsel of record failed to make a sufficient showing of excusable neglect under Rule 4(g) of the Mississippi Rules of Appellate Procedure. Plaintiff's counsel had a duty to ensure that the notice of appeal was filed on time, and thus, cannot use his paralegal's oversight as a basis for excusable neglect. Therefore, the judgment made by the trial court should be affirmed by this honorable appellate court.

ARGUMENT

I. Standard of Review

The standard of review in this case is the abuse of discretion standard, a very difficult standard for the Appellant to overcome. “To the degree that a trial judge’s decision to grant or deny a motion for extension of time is based on a precept of law, the standard for this Court’s review shall be ‘plenary’; otherwise, this Court shall simply apply the abuse-of-discretion standard.” Ware v. Capers, 573, So. 2d 773, 776 (Miss. 1990) (citing Vianello v. Pacifico, 905 F.2d 699, 700 (3d Cir. 1990)). The trial court’s decision in the case *sub judice* was not based on a precept of law, rather, the decision in this case was based upon a factual determination by the trial court. Therefore, the abuse of discretion standard applies in this instance.

II. Plaintiff filed the wrong motion with the trial court, and as a result, did not attempt to make a showing of excusable neglect until November 20, 2008, two hundred and ninety seven (297) days past the deadline to file for an extension of time.

Rule 4(a) of the Mississippi Rules of Appellate Procedure provides that “the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from.” Summary judgment was granted in favor of IPM on December 27, 2007. (R. at 108). Plaintiff failed to file her notice of appeal until January 30, 2008, four (4) days past the deadline. (R.E.; R. at 112). Rule 2(a)(1) of the Mississippi Rules of Appellate Procedure states that “[a]n appeal shall be dismissed if the notice of appeal was not timely filed pursuant to Rules 4 or 5.” However, Rule 4(g) of the Mississippi Rules of Appellate Procedure allows the trial court to use its discretion in granting an extension of time in particular circumstances. Specifically, Rule 4(g) provides:

The trial court may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time otherwise prescribed by this rule. Any such motion which is filed before expiration of the prescribed time may be granted for good cause and may be ex parte unless the court otherwise requires.

Notice of any such motion which is filed after expiration of the prescribed time shall be given to other parties, and the motion shall be granted only upon a showing of excusable neglect. No such extension shall exceed 30 days past such prescribed time or 10 days from which the date of entry of the order granting the motion, whichever occurs later.

Emphasis added.

However, rather than file a motion for extension of time pursuant to Rule 4(g), Plaintiff incorrectly filed her Motion to Reopen Appeal Time pursuant to Rule 4(h) of the Mississippi Rules of Appellate Procedure, claiming that she was not given timely notice of the entry of judgment.² (R.E.; R. at 113-14). Plaintiff's counsel eventually withdrew that assertion, but not until the Motion Hearing on November 20, 2008. (R.E.; T. at 3, ln.16-24) It was not until then that Plaintiff's counsel requested an extension of time to file notice of appeal pursuant to Rule 4(g). Id. Rule 4(g) specifically states that "[n]otice of any such motion which is filed after expiration of the prescribed time shall be given to other parties." IPM never received notice that Plaintiff's counsel was moving for an extension of time pursuant to Rule 4(g) until the actual Motion to Reopen Time for Appeal was heard. At all pertinent times, the Defendant was under the impression that the Plaintiff was moving to reopen appeal time pursuant Rule 4(h). It was not until November 20, 2008, at the Hearing for the Motion to Reopen Appeal Time, that the Plaintiff first attempted to make a showing of excusable neglect under Rule 4(g). (R.E.; T. at 4-17). Therefore, the Plaintiff did not attempt to make a showing of excusable neglect until November 20, 2008, which was two hundred and ninety-seven (297) days past the deadline to file a motion for extension of time to file a notice of appeal.

² M.R.A.P. 4(h) provides: "The trial court, if it finds (a) that a party entitled to notice of the entry of judgment or order did not receive such notice from the clerk or an party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, which ever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal."

III. Plaintiff missed the deadline to file her notice of appeal, and did not make a sufficient showing of ‘excusable neglect’ pursuant to Rule 4(g) of the Mississippi Rules of Appellate Procedure to qualify for an extension of time to file the notice of appeal.

Assuming, *arguendo*, that Plaintiff’s Motion to Reopen Appeal Time, originally filed under Rule 4(h), could act dually as a motion for extension of time to file notice of appeal pursuant to Rule 4(g), then since the Plaintiff did not file her Motion to Reopen Appeal Time until February 6, 2008, over a week past the thirty (30) day deadline prescribed in Rule 4(g), the only way a motion for extension of time could be granted was upon a showing of excusable neglect. The trial court decided this “Motion to Reopen Time for Appeal” under Rule 4(g). (R.E.; R. at 133-34). Proceeding under Rule 4(g), the trial court held:

Plaintiff’s counsel asserts his failure to timely file a notice of appeal was due to secretarial problems. However, “preoccupation of counsel with other matters does not dispense with necessity of compliance with the rules.” Ware v. Capers, 573 So. 2d 773, 775 (Miss. 1990) (citing United States v. Bowen, 310 F.2d 45 (5th Cir. 1962). This Court does not find good cause or excusable neglect for Plaintiff’s failure to file a timely notice of appeal. Thus, Plaintiff’s motion to reopen appeal time should be denied.

Id. As the trial court held, the Plaintiff has utterly failed to make a sufficient showing of excusable neglect under Rule 4(g).

Plaintiff’s counsel claims that the reason the notice of appeal was filed late was because his paralegal “had suffered a series of strokes, and her mental capacities were impaired.” (Appellant’s Brief at 2, ¶ 2). Plaintiff’s counsel asserts that during this time he “[w]as under the impression that his filings were being handled in a timely manner.” (Appellant’s Brief at 2, ¶ 1). It was four (4) days past the filing deadline when Plaintiff’s counsel claims to have discovered that the notice of appeal had not been filed, and that he immediately had the notice of appeal filed. (Appellant’s Brief at 3, ¶ 2). Plaintiff’s counsel readily admits that he is a lawyer that also teaches at the University of

Southern Mississippi, and that he relies heavily on his paralegal for what he does. (R.E.; T. at 4, ln. 6-11).

As the trial court ruled in its Final Order, a mere secretarial oversight does not sufficiently show that the late filing of the notice of appeal was a result of “excusable neglect” pursuant to Rule 4(g). The excusable neglect standard is an extremely strict standard. The comment to Rule 4(g) notes the rule is based on Fed.R.App.P. 4(a)(5).³ Thus, federal treatment of requests for an out-of-time appeal are both persuasive and instrumental in analyzing the excusable neglect standard. Ware v. Capers, 573 So. 2d 773, 775 (Miss. 1990). “To be entitled to an extension of time for appeal...the defendant was required to show excusable neglect, a standard which is ‘strict’ and can only be met in extraordinary cases.” Id. (citing Aloqaili v. Nat’l Housing Corp., No. 90-3758, 1990 WL 155281, at *1 (6th Cir. Oct. 16, 1990)). “The ‘excusable neglect’ standard...is intended to be a strict one.” Id. (citing Allied Steel v. City of Abilene, 909 F.2d 139, 142 (5th Cir. 1990)). “Loosely interpreting ‘excusable neglect’ would convert the 30-day period for appeal...into a 60-day one—a result clearly not intended by the Rule’s framers.” Id. (citing Parke-Chapley Constr. v. Cherrington, 865 F.2d 907, 911 (7th Cir. 1989)).

In fact, in Hill v. World Class Automotive Corp., No. 06-CV-2496 (SLT)(RLM), 2008 WL 4809445 (E.D.N.Y.), plaintiff’s counsel tried to make a showing of excusable neglect pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure as a result of his failure to respond to an order to show cause which ultimately led to his client’s dismissal. The plaintiff in this case blamed his failure to respond to the court order on his paralegal for failing to check his email spam file to which notice of the order had been sent. Id. The Eastern District of New York, in adopting the

³Rule 4(a)(5) of the Federal Rules of Appellate Procedure provides that: “The district court may extend the time to file a notice of appeal if: (I) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) regardless of whether the motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that a party shows excusable neglect or good cause.”

Magistrate's ruling, held that "violations of his obligations as attorney of record cannot be excused by his paralegal's inadequate performance of delegated tasks, such as checking email or monitoring his case dockets." Id at 4.

Similarly, in McGill v. State of Tennessee, No. M2007-00040-COA-R3-CV, 2008 WL 151984 (Tenn.Ct.App.), the plaintiff's counsel, on an appeal from the Tennessee Claims Commission, attempted to make a showing of excusable neglect pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure because of her failure to respond to the Commission's show cause order which resulted in her client's dismissal. In doing so, counsel asserted that her paralegal had failed to prepare a response and had failed to advise her of this oversight. Id at 2. The Tennessee Court of Appeals held that a paralegal's failure to follow counsel's instructions does not constitute excusable neglect where that letter necessarily would have required counsel's signature. Id.

Finally, and perhaps most factually similar to the case at hand, in Lapico v. Portfolio Recovery Associates, LLC, No. 3:06-CV-173 (WWE), 2008 WL 1702187 (D. Conn. April 11, 2008), the plaintiff sought to make a showing of excusable neglect pursuant to Rule 60 of the Federal Rules of Civil Procedure as a result of his failure to respond to a motion to dismiss. Counsel claimed excusable neglect on the grounds that his paralegal was "suffering from severe emotional and mental stress as well as other specific mental conditions." Id at 1. In agreeing with the defendant, the district court held that counsel is the one who bears the ultimate responsibility to prosecute his client's claim, keep track of deadlines, and to respond to motions filed on the docket. Id at 3. "Blaming an associate or paralegal for his failure to track his client's case does not constitute excusable neglect." Id.

Likewise, Plaintiff's counsel in the case at hand, cannot make a showing of excusable neglect based on the fact that his paralegal failed to get the notice of appeal out on time. It was

clearly the responsibility of Plaintiff's counsel to ensure the notice of appeal was filed in a timely manner. The notice would have required Plaintiff's counsel's signature, and thus, the proverbial buck cannot be passed to the paralegal in this instance. Moreover, the Mississippi Supreme Court has held that "[f]iling a notice is a simple act, and a party must do all it could reasonably be expected to do to perfect the appeal in a timely fashion." Ware v. Capers, 573 So.2d 773, 775 (Miss. 1990).

Furthermore, the Plaintiff herself, in citing Flowers v. State, 805 So. 2d 654, 656 (Miss Ct. App. 2002), sets forth in her Appellant's Brief: "Where the trial court failed to make any specific findings of fact, this Court will assume that the issue was decided consistent with the judgment and these findings will not be disturbed on appeal unless manifestly wrong or clearly erroneous." (See Appellant's Brief at 6, ¶ 1). This is a burden that the Plaintiff simply cannot overcome. The trial court had the discretion to grant or deny Plaintiff's Motion to Reopen Appeal Time. The trial court found that the Plaintiff did not make a sufficient showing of excusable neglect because "preoccupation of counsel with other matters does not dispense with the necessity for compliance with the rules." (R. at 133-34) (citing Ware v. Capers, 573 So. 2d 773, 775 (Miss. 1990)). The trial court's findings cannot be said to be manifestly wrong or clearly erroneous. Plaintiff argues that the trial judge abused his discretion because "he did not address the medical issues that contributed to the inability of the paralegal to perform her work." (See Appellant's Brief at 4, ¶ 3). Again, Plaintiff's argument is misplaced because there was no need for the trial judge to do so. It is not a paralegal's duty to ensure that a notice of appeal be timely filed; rather, it is the duty of the attorney to ensure that a notice of appeal was filed in a timely manner. See Lapico v. Portfolio Recovery Associates, LLC, No. 3:06-CV-173 (WWE), 2008 WL 1702187 (D. Conn. April 11, 2008); see also Rule 1.3 of Mississippi Rules of Professional Conduct ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

IV. Plaintiff fails to make a sufficient showing of excusable neglect under the factors set forth in Pioneer.

The factors for determining excusable neglect are set forth by the United States Supreme Court in Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 1496-00, 123 L.Ed2d 74 (1993), a case based on the excusable neglect standard of Bankruptcy Rule 9006(b)(1). The factors, which the Plaintiff correctly set forth in her Brief, are as follows: (1) whether granting the delay will prejudice the debtor; (2) the length of delay and its impact on effective court administration; (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; (4) whether the creditor acted in good faith; and (5) whether clients should be penalized for their counsel's mistake or neglect. Id. (See also Appellant's Brief at 5, ¶ 2). It is worth noting that in this particular case, in assessing the culpability of respondents' counsel in relation to the excusable neglect factors, the Supreme Court provided:

“In assessing the culpability of respondents' counsel, we give little weight to the fact that counsel was experience upheaval in his law practice at the time of the bar date. We do, however, consider significant that the notice of the bar date provided by the Bankruptcy Court in this case was outside the ordinary course in bankruptcy cases. As the Court of Appeals noted, ordinarily the bar date in a bankruptcy case should be prominently announced and accompanied by explanation of its significance.” Id. at 398. Emphasis added. Clearly, in determining what constitutes excusable neglect, the Supreme Court gave great weight to the fact that the lower court did not give proper notice, yet gave little weight to the fact that the attorney was experiencing “upheaval” in his law practice at the time.

Plaintiff argues under the first Pioneer factor, that the extension of time for the Plaintiff to file the notice of appeal would not prejudice IPM. (See Appellant's Brief at 5, ¶ 3). Plaintiff bases this assertion on an argument made by IPM in its Response to Motion to Reopen Appeal Time. Id. Plaintiff's assertion is misplaced. IPM has been greatly prejudiced and will continued to be greatly prejudiced if this appeal is granted because Plaintiff's counsel's lack of attention has caused and will cause the IPM to incur additional attorney's fees and expenses.

Plaintiff also argues that IPM had made no claim that the court's actions in granting the Motion to Reopen Appeal Time would be detrimental to IPM. This assertion is inaccurate. IPM's counsel argued at the Motion hearing that the IPM would be prejudiced if the Court granted the Motion to Reopen Appeal Time by "the cost and the time they have to pay me and our law firm to keep going forward with this appeal." (R.E.; T. at 11, ln.27-29; 12, ln. 1).

Furthermore, Plaintiff argues under the third Pioneer factor that the delay in timely filing the notice for appeal was beyond Plaintiff counsel's control because there was know way counsel could have known of the medical impairment suffered by his paralegal at the time. Again, this assertion fails because the attorney is ultimately responsible for prosecuting his client's claim. While tasks may be delegated to the paralegal, the ultimate responsibility for the work product cannot. Plaintiff's counsel was required to sign the notice of appeal. Therefore, the argument that Plaintiff's counsel "was under the impression that the appeal would be timely filed" cannot stand. The notice of appeal could not have gotten outside the door of his office without his signature, thus he cannot blame his oversight on his paralegal's claimed illness. He had a responsibility to know the deadline. Moreover, filing a notice of appeal is not a burdensome task by any means. Thus, filing a timely notice of appeal in this instance was most certainly within reasonable control of Plaintiff's counsel. Also, Plaintiff's counsel has presented no affidavit or testimony regarding his paralegal's alleged illness. Rather, he has merely made the assertion that she was ill.

In arguing whether a client should be penalized for her counsel's mistake or neglect, Plaintiff cites and discusses Fallen v. United States, 378 U.S. 139, 84 S.Ct. 1689 (1964). (See Appellant's Brief p. 8, ¶ 2) Fallen is case in which a prisoner was allowed an extension of time to file an appeal, and Plaintiff argues that like the prisoner, she showed diligence in getting her notice of appeal filed despite the fact there were circumstances beyond her control. First of all, it should be noted that this case does not pertain to the excusable neglect standard, nor does it even pertain to a civil case. The

rules provided for in this case pertain to criminal proceedings. Furthermore, in this case, the petitioner had been sentenced to twenty (20) years in prison, and was forced to take on his appeal without any assistance of counsel. Clearly, the circumstances are much different in the case at hand. In fact, the circumstances were within the control of Plaintiff's counsel because although his paralegal was ill, it was Plaintiff's counsel's duty to make sure the notice of appeal was filed in a timely manner.

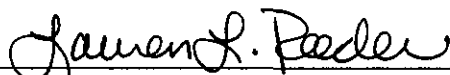



CONCLUSION

Because Plaintiff/Appellant has failed to make a sufficient showing of excusable neglect pursuant to Rule 4(g) of the Mississippi Rules of Appellate Procedure, IPM seeks to have the Order denying the Plaintiff's Motion to Reopen Time for appeal affirmed. Defendant also requests that all costs of this appeal, including attorney's fees, be taxed against the Appellant, Casey Lee Davis, and/or her attorney, and any and all further relief that this Honorable Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, **LAUREN L. REEDER**, attorney for appellee, Imperial Palace of Mississippi, LLC, certify that I have this day filed this Brief of the Appellee with the Clerk of this Court and have served a copy of this Brief of the Appellee by United States mail with postage prepaid on the following persons at these addresses:

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This the 16th day of September, 2009.



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