

VERMONT SUPERIOR COURT
Washington Unit
65 State Street
Montpelier VT 05602
802-828-2091
www.vermontjudiciary.org



CIVIL DIVISION
Case No. 22-CV-00548

Joseph Bruyette v Nicholas Deml et al

ENTRY REGARDING MOTION

Title: Motion to Set Aside Judgment (Motion: 3)
Filer: Emily Tredeau
Filed Date: March 12, 2023

Plaintiff asks the Court to vacate its judgment and belatedly extend the time for him to file and serve an opposition to Defendants' motion for summary judgment. *Vt. R. Civ. P. 59 & 6*. Defendants have opposed the motion. The motion turns on whether Plaintiff can establish "excusable neglect" for his failure to oppose Defendants' motion for summary judgment in the first instance.

In determining whether excusable neglect exists, courts can consider "the danger of prejudice to the [nonmovant], 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." *In re Town of Killington*, 2003 VT 87A, ¶ 16, 176 Vt. 60, 67-68 (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)). Our High Court has also stated, however, that "the appropriate focus is on the third factor: the reason for delay, including whether it was within the reasonable control of the movant." *In re Town of Killington*, 2003 VT 87A, ¶ 16, 176 Vt. at 68. The threshold to grant such a motion is "high" and will be found "only in rare cases." 2003 VT 87A, ¶¶ 16, 17, 176 Vt. at 68-69.

Cases are also legion that breakdowns in office procedures and other matters within the control of counsel simply do not amount to excusable neglect. *In re von Turkovich*, 2018 VT 57, ¶ 6, 207 Vt. 545, 549 (collecting cases on that point); *but cf. Clark v. Baker*, 2016 VT 42, ¶ 23, 201 Vt. 610, 621 (extreme personal catastrophes suffered by counsel, taken together, may suffice). The Supreme Court has instructed trial courts to take a "hard line" regarding excuses that were fully in control of parties or counsel. *In re Town of Killington*, 2003 VT 87A, ¶ 17, 176 Vt. at 68-69.

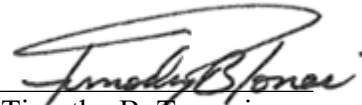
As a matter of law, Plaintiff's motion provides no factual grounds that might meet the excusable neglect standard as it has been defined by the Vermont Supreme Court. Nor has he provided case authority that would support a finding of excusable neglect on the present facts.

Further, the Court is dubious that Plaintiff can proceed on a case such as this without an expert. The summary judgment record reflects that Plaintiff has a chronic condition that spans ten years and that the Defendant consulted with specialists as to his course of treatment. Nonetheless, the Court does not preclude the possibility of a viable claim. As a result, while the Court does not vacate the dismissal, it will rule that the dismissal is without prejudice.

The Court urges counsel for both parties to confer with their clients to ensure that Plaintiff is receiving appropriate medical care for his present condition. Nothing in this Order should be read to relieve the Defendants of their duty to provide such ongoing care. If there remains a disagreement as to the level of care needed, counsel should work to ensure that the issue can be considered and grieved in an expedited manner.

WHEREFORE, the motion is denied.

Electronically signed on Wednesday, March 29, 2023, pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink, appearing to read "Timothy B. Tomasi", written over a horizontal line.

Timothy B. Tomasi
Superior Court Judge