

VERMONT SUPERIOR COURT
Windsor Unit
12 The Green
Woodstock VT 05091
802-457-2121
www.vermontjudiciary.org



CIVIL DIVISION
Case No. 23-CV-02999

Tony Gray
Plaintiff

v.

Jones Lang LaSalle America, Inc.,
Case Snow Management, Inc.,
and Weld Construction Co., LLC
Defendants

Decision on Motion for Extension of Time

Plaintiff Tony Gray alleges that he was injured on February 17, 2021, when he slipped and fell on ice in the parking lot of the United States Postal Service building in White River Junction. He filed a negligence complaint on July 14, 2023, against three defendants. As the court understands the complaint, the defendants are: the contractor who provides property maintenance at post-office locations throughout the northeastern United States (Jones Lang LaSalle Americas, Inc.), the subcontractor who provides snow-and-ice maintenance at multiple post-office locations throughout Vermont (Case Snow Management, Inc.), and the sub-subcontractor who was responsible for snow-and-ice maintenance at this particular location (Weld Construction Company, LLC). Plaintiff described the sub-subcontractor in the complaint as a limited-liability company that was “not in good standing” with the Vermont Secretary of State.

Plaintiff served the complaint upon the contractor and the subcontractor in a timely manner, but the sheriff was not able to serve the complaint upon the sub-subcontractor. Plaintiff had obtained contact information for the sub-subcontractor’s agent from the Vermont Secretary of State’s website, but the sheriff discovered on August 16, 2023, that “no such person” had been at that address for at least four years. The sheriff completed an attempted return of service and provided that document to plaintiff.

Plaintiff did not complete service upon the sub-subcontractor within the 60 days provided for by Rule 3(a). On September 14, 2023, 62 days after the complaint was filed, plaintiff moved for an extension of time within which to complete service. Plaintiff explained that the reason for not filing for an extension within the original time for service was that plaintiff’s attorney “mistakenly believed that service had been made” upon the sub-subcontractor. Plaintiff further characterized this as a “clerical error” on the part of plaintiff’s attorney, “who realized the error today after reading the attached

attempted return of service.” Plaintiff contends that an extension of time is reasonable because “[e]xtending the time for service will not prejudice” any of the defendants.

A motion for an extension of time made after the original time period has expired must demonstrate that “the party failed to act because of excusable neglect.” Vt. R. Civ. P. 6(b)(1)(B). The “excusable neglect” standard requires the court to consider all of the relevant circumstances, including the danger of prejudice to the adverse party, the length of the delay and its impact on the proceedings, the reason for the delay, whether the delay was reasonably within the control of the moving party, and whether the moving party acted in good faith. *Clark v. Baker*, 2016 VT 42, ¶ 18, 201 Vt. 610; *In re Town of Killington*, 2003 VT 87A, ¶ 16, 176 Vt. 60; 4B Wright & Miller, Federal Practice and Procedure: Civil § 1165. The standard is meant to be flexible enough to accommodate situations where the reason for the delay is not within the control of the moving party. But the time limitations must have some meaning. It would be unworkable for the rules to be interpreted as suggestions, and for every missed deadline to represent an opportunity for litigation regarding “the equities of enforcing the time bar.” *LaFrance Architect v. Point Five Development South Burlington, LLC*, 2013 VT 115, ¶ 10, 195 Vt. 543; *In re Lund*, 2004 VT 55, ¶ 5, 177 Vt. 465. If the rules are not followed, the consequence is a “de facto enlargement” of the prescribed time periods. *Lund*, 2004 VT 55, ¶ 5.

The most important consideration is whether the delay was within the reasonable control of the moving party. *In re von Turkovich*, 2018 VT 57, ¶ 5, 207 Vt. 545; *Town of Killington*, 2003 VT 87A, ¶ 16; *Vermont Human Rights Commission v. Town of Waterbury*, No. 231-4-19 Wncv, 2019 WL 13061480 (Vt. Super. Ct., Dec. 5, 2019) (Tomasi, J.); *Taft-Blakely v. Reinhart Foodservice, LLC*, No. 865-8-14 Cncv, 2015 WL 3935296 (Vt. Super. Ct., May 11, 2015) (Toor, J.). Here, it appears that the reason for the delay was that plaintiff’s attorney failed to read the sheriff’s attempted return of service in a careful and timely manner, and assumed mistakenly that service had been completed. This is the kind of oversight and inattention that is “totally within the control of the moving party or the moving party’s attorney” and “rarely if ever” amounts to excusable neglect. *LaFrance Architect*, 2013 VT 115, ¶ 15; *Ball v. Board of Bar Examiners*, 2008 VT 49, ¶ 6, 183 Vt. 628 (mem.); *Lund*, 2004 VT 55, ¶ 6; *Town of Killington*, 2003 VT 87A, ¶ 17.

In terms of the significance of the delay, complaints must be served upon the defendant within 60 days after they are filed with the court. Vt. R. Civ. P. 3(a). It is the plaintiff’s responsibility to complete service within the required time. If service is not timely made, “the action may be dismissed on motion.” *Id.* A defendant who is not timely served may elect to waive the motion, but if the motion is made, no showing of prejudice is required. *Dartmouth College v. Kozaczek*, 2010 VT 113, ¶ 2, 189 Vt. 593 (mem.); *Fercenia v. Guiduli*, 2003 VT 50, ¶ 12, 175 Vt. 541 (mem.); *Morrisseau v. Estate of Fayette*, 155 Vt. 371, 372 (1990). In this context, late is late, and there is not a grace period for service that is made somewhat after the time required. *Fercenia*, 2003 VT 50, ¶ 13; *Powers v. Chouinard*, 138 Vt. 3, 4 (1979); *Beebe v. Eisemann*, No. 733-10-09 Rdcv, 2011 WL 8472918 (Vt. Super. Ct., Sept. 20, 2011) (Teachout, J.).

Given these rules, the court ascribes significance to the consequences of the untimely motion. If plaintiff were to make service today, defendant could choose whether or not to file a motion to dismiss the lawsuit. If made, the court would rule upon the motion without considering whether or not defendant was prejudiced by the untimely service of the complaint. *Fercenia*, 2003 VT 50, ¶ 12; *Morrisseau*, 155 Vt. at 372. It is therefore not harmless to grant the requested extension of time, especially where (1) the decision about extension of time affects another party’s subsequent ability to

file a dispositive motion, (2) the party that is adversely affected does not have an opportunity to be heard on whether the extension should be granted, (3) the decision may also affect the rights of other parties, including the contractor and the subcontractor, and (4) excusable neglect is not otherwise present. A decision to grant the requested extension, although an easier gesture, would not address these concerns. For these reasons, the motion is denied.

Electronically signed on Wednesday, October 4, 2023 pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink, appearing to read "H. Dickson Corbett", with a stylized flourish at the end.

H. Dickson Corbett
Superior Court Judge

Vermont Superior Court
Filed 10/06/23
Windsor Unit