VERMONT SUPERIOR COURT
Bennington Unit
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CIVIL DIVISION
Case No. 23-CV-01280

Jeffrey Rivard v. State of Vermont et al.

ENTRY REGARDING MOTION

Title: Motion for Interlocutory Appeal; Motion to Extend Time to File Appeal ; (Motion: 14; 15)
Filer: Jeffrey M Rivard; Jeffrey M Rivard
Filed Date: October 05, 2023; October 07, 2023

Plaintiff Jeffrey Rivard filed two related motions. The first is a motion requesting permission for interlocutory appeal of this court's decision denying two of Plaintiff's motions for joinder. The second is a motion requesting more time to file an interlocutory appeal. Defendants oppose both motions. Plaintiff's motion for permission for interlocutory appeal is **DENIED**. Plaintiff's motion requesting more time to file an interlocutory appeal is **DENIED**.

I. Procedural History

On August 6, 2023, Plaintiff filed two almost identical motions titled "Motion to Enjoin." See both "Motion[s] to Enjoin" dated August 6, 2023. Although Plaintiff never explicitly stated, nor was it immediately apparent to the court under which rule he sought to proceed, the court ultimately interpreted Plaintiff to be requesting joinder of persons needed for just adjudication pursuant to V.R.C.P. 19(a). It appeared that Plaintiff was requesting that the court join the present docket with three other matters where he is the plaintiff pending in the Superior Court. On September 6, 2023, this court denied those motions for failing to state sufficient grounds required by Rule 19 and failing to abide by requirements for motions contained in Rule 7. Entry Regarding Motion dated September 6, 2023.

On October 5, 2023, Plaintiff filed a motion pursuant to V.R.A.P. 5(b), requesting permission for interlocutory appeal of this court's decision denying Plaintiff's motions for joinder. Plaintiff's Motion Request Permission for Interlocutory Appeal. To support the motion, Plaintiff states that the court's decision denying joinder was "erroneous," and that these matters should be joined because negligence is the basis of claim in each of the dockets. *Id.* at 1 and 4.

On October 7, 2023, Plaintiff filed a motion requesting an extension of the statutory time limit to file interlocutory appeal. Plaintiff's Request Time to File Extension. In this motion, Plaintiff concedes that he missed the window for an appeal in his motion requesting interlocutory appeal. However, he maintains that his untimeliness should be excused. See *Id.* at 2–12.

II. Motion to Extend the Time to File an Interlocutory Appeal Due to Excusable Neglect

Plaintiff states in his motion to extend the time to file that he is aware that his motion requesting permission for an interlocutory appeal was untimely. Plaintiff's Request Time to File Extension at 1–2. However, Plaintiff seemingly looks to V.R.C.P. 6(b)(1)(B) and 60(b)(1) to suggest that his untimeliness was due to excusable neglect, and as such, it should be excused.[1] In other words, Plaintiff believes this court should extend the statutory time limit to file an interlocutory appeal in his case. Throughout the motion, Plaintiff points to various life events that, according to him, constitute excusable neglect and serve to exempt him from abiding by the time limit in Rule 5(b)(5)(B). There is no explicit rule permitting the court to extend the time to file a motion pursuant to V.R.A.P 5(b) due to excusable neglect. However, to the extent that Plaintiff is presenting a novel argument, seeking to extend the excusable neglect doctrine as grounds for enlarging the time period to file an interlocutory appeal pursuant to V.R.C.P. 5, the court will explain below that, Plaintiff's stated reasons for untimeliness would not constitute excusable neglect.

The Vermont Supreme Court applies federal case law as persuasive authority to clarify the excusable neglect standard, specifically under V.R.A.P. 4, because the rule is substantially identical to Fed. R.App. P. 4. *In re Town of Killington*, 2003 VT 87A, ¶ 16, 176 Vt. 60. In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 392 (1993), the United States Supreme Court described the excusable neglect standard as a "strict one." Its approach was discussed, although not expressly adopted, by the Vermont Supreme Court in *Killington*, 2003 VT 87A, ¶ 16.

> In *Pioneer*, the Court enunciated factors for evaluating a party's claim of excusable neglect under a number of federal rules, including Fed. R.App. P. 4. These factors include: "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. While this standard ostensibly represents a modest liberalization of the "excusable neglect" concept in the federal rules, several federal circuit courts of appeal have recognized that the post-*Pioneer* threshold remains high.

Killington, 2003 VT 87A, ¶ 16 (citation omitted). The *Killington* Court also noted that "[d]espite the existence of a four-factor [*Pioneer*] test, the appropriate focus is on the third factor: the reason for delay, including whether it was within the reasonable control of the movant." *Id.* Federal courts also emphasize the third factor because, "[i]n the typical case, the first two *Pioneer* factors will favor the moving party: delay always will be minimal in actual if not relative terms, and the prejudice to the non-movant will often be negligible ...." *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003). Moreover, the absence of good faith in these cases is rarely an issue. *Id.*

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[1] V.R.C.P. 6(b)(1)(B) states that "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time on motion made after the time has expired if the party failed to act because of *excusable neglect*. (emphasis supplied). V.R.C.P. 6(b)(2) states that "[t]he court must not extend the time to act under Rule[] … 60(b)…." V.R.C.P 60(b)(1) states that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or *excusable neglect*." (emphasis supplied).

Many federal courts have taken a hard line when determining if neglect stemming from factors wholly within the control of a party or its attorney is "excusable." See e.g., *United States v. Hooper*, 43 F.3d 26, 28–29 (2d Cir. 1994) (per curiam) (affirming denial of Federal Rule 4(b) extension where delay resulted from legal assistant's ignorance of the rules); see also *Graphic Communications Int'l Union, Local 12–N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 8 (1st Cir. 2001) (affirming denial of an extension because late filing was result of ignorance of the law and "inattention to detail"). Vermont courts also follow this approach. See e.g., *Killington*, 2003 VT 87A, ¶ 19 (inattention to detail is not enough to extend the filing time for appeal); see also *In re Lund*, 2004 V 55, 177 Vt. 465, 467 (mistaken understanding of the law does not constitute excusable neglect).

While such results may seem harsh, courts must take "an appropriately hard line when it comes to determining when neglect that stems from factors totally within the control of a party or its attorney is 'excusable.'" *Killington*, 2003 VT 87A, ¶ 17. As the Second Circuit has noted

> We operate in an environment … in which substantial rights may be, and often are, forfeited if they are not asserted within time limits established by law. Judges, of course, make mistakes. We, like the district court, have considerable sympathy for those who, through mistakes—counsel's inadvertence or their own—lose substantial rights in that way.... [However,] the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced—where every missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities of enforcing the [time] bar.

Silivanch, 333 F.3d at 367-68 (alteration in original).

Thus, the determination of excusable neglect in this case must necessarily turn on the third *Pioneer* factor. The delay here, it appears, was completely within the control of Plaintiff. Indeed, in his motion, Plaintiff states that

> When I filed the interlocutory appeal, I had a thought if I was going to do this I needed to do this today, I don't know why I thought it was 30 days and I had already been aware that interlocutory appeals are timed at 14 days, I didn't read the entire rule, again, I can't be sure.

Plaintiff's Request Time to File Extension at 2. In other words, Plaintiff was aware of the time limit in Rule 5, but his ignorance or inattention to detail caused him to miss the deadline. Plaintiff describes, *inter alia*, his being tired, his children requiring care, his computer being old and slow, and issues with the United States Postal Service as some of the additional underlying reasons for his untimeliness. See Plaintiff's Request Time to File Extension at 3–12. While the court may empathize with Plaintiff's situation, the reasons he offers for his untimeliness were wholly within his control and it does not appear that they satisfy the strict standard for the finding of excusable neglect.

Thus, as indicated by the case law discussed above, Plaintiff's inattention to detail is not enough to extend the filing time for appeal. Accordingly, Plaintiff's motion to extend the time to file an interlocutory appeal must be denied.

III. Motion Requesting Permission for Interlocutory Appeal

A party's right to seek an interlocutory appeal in civil cases is governed by V.R.A.P. 5(b)(1). The rule provides that a trial court must grant any party's motion to file an interlocutory appeal if the court finds that

> (A) the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion; and
>
> (B) an immediate appeal may materially advance the termination of the litigation.

Id. The Vermont Supreme Court has interpreted Appellate Rule 5(b)(1) to require the moving party to prove three things

> (1) the ruling to be appealed must involve a controlling question of law; (2) there must be a substantial ground for difference of opinion on that question of law; and (3) an immediate appeal must materially advance the termination of the litigation.

State v. Pelican, 154 Vt. 496, 501 (1990) (quoting *State v. Wheel*, 148 Vt. 439, 440 (1987)). "The three factors should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal." *In re Pyramid Co. of Burlington*, 141 Vt. 294, 302, (1982) (quoting 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3930, at 156 (1977)). A party's failure to satisfy *any one* of these three requirements "precludes certification" by a trial court that the order at issue is appropriate for interlocutory appeal. *In re Pyramid Co. of Burlington*, 141 Vt. at 302. (emphasis supplied). The trial court exercises its discretion in granting or denying a party's motion seeking interlocutory review. *State v. Haynes*, 2019 VT 44, ¶ 33, 210 Vt. 417.

The first requirement a party must satisfy is that the ruling at issue involves a controlling question of law. "[A]n order that preordains the outcome of litigation is certainly controlling...." *In re Pyramid Co.*, 141 Vt. at 303. "[A]n order may [also] be 'controlling' if reversal would have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial." *Id.* Importantly though, for an issue to be a question of law for purposes of interlocutory appeals it must be

> capable of accurate resolution by an appellate court without the benefit of a factual record. If factual distinctions could control the legal result, the issue is not an appropriate subject for interlocutory appeal.

State v. McCann, 149 Vt. 147, 151 (1987) (quoting *In re Pyramid Co.*, 141 Vt. at 304); accord *Hubacz v. Village of Waterbury*, 2018 VT 37, ¶ 10 n.3, 207 Vt. 399 ("This Court's consideration of a question certified for interlocutory review addresses only questions of law."). As the *McCann* Court wrote, "'It is necessary . . . that the order [being appealed] involve a clear-cut question of law against a background of determined and immutable facts.'" *McCann*, 149 Vt. at 152 (quoting 9 Moore's Federal Practice ¶ 110.22[2], at 261 (2d ed. 1987).

Additionally, the court's inquiry into the first prong is closely related to the third prong of the test for interlocutory appeal. See *In re Duplan Corp.*, 591 F.2d 139, 148 n. 11 (2d Cir. 1978)

(noting tendency to make the "controlling question" requirement one with the "materially advance" requirement).

The court finds that Plaintiff here does not present a controlling question of law to be reviewed on appeal. To the extent that Plaintiff does state a question he deems controlling, simply stating that a question is "controlling" or that negligence is at issue in all the dockets does not satisfy the requirements of Rule 5(b)(1). *In re Pyramid Co.*, 141 Vt. at 304. ("Simply phrasing a question as turning on a matter of law does not create a question of law for purposes of V.R.A.P. 5(b).").

The court need not address the two remaining requirements as a party's failure to satisfy *any one* of the three requirements "precludes certification" by a trial court that the order at issue is appropriate for interlocutory appeal. *In re Pyramid Co.*, 141 Vt. at 302. However, even if the decision turned on the remaining two factors, Plaintiff has not shown that there is a "substantial ground for difference of opinion on [the controlling] question of law or that "an immediate appeal [would] materially advance the termination of the litigation." See V.R.A.P. 5(b)(1); *Pelican*, 154 Vt. at 501.

With respect to the second prong, the parties plainly disagree over whether the court's September 5, 2023, decision to deny joinder was correct. But that is by no means determinative. *In re Pyramid Co.*, 141 Vt. at 306. The court is not convinced that a "reasonable appellate judge could vote for reversal of the challenged order." *Id.* at 307.

As for the third prong, the court believes that permitting joinder here would actually impede litigation in each of the separate matters that Plaintiff seeks to join. The court concludes that its September 6, 2023, decision was justified for the reasons stated therein. Thus, Plaintiff's motion for permission to file an interlocutory appeal must be denied.

IV. Time to File a Motion for Interlocutory Appeal

The court is also required to deny Defendant's request because the motion was untimely filed. Pursuant to V.R.A.P. 5(b)(5)(A)

> [t]he motion must be filed within 14 days after entry of the order or ruling appealed from, but the State's motion in a criminal action must be filed within 7 business days after the decision, judgment, or order appealed from.

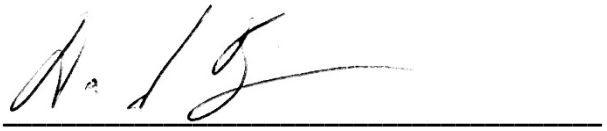
Defendant's motion seeks interlocutory appeal of a denial entered on the record on September 6, 2023. Plaintiff filed his motion requesting appeal on October 5, 2023. Although Plaintiff sought leave to extend the time to file his motion, the leave is denied in this order. Accordingly, Plaintiff's motion for appeal is untimely, having been filed more than 14 days following the entry of the denial of the two motions for joinder.

The court has no authority to grant a motion for interlocutory appeal where such motion was not filed within 14 days after the entry of the order or ruling appealed from. V.R.A.P. 5(b)(5)(A). Thus, pursuant to V.R.A.P. 5(b)(5)(A), the Court must also deny Defendant's motion for interlocutory appeal as untimely.

Order

Plaintiffs' Motion for extension of time to file an interlocutory appeal is **DENIED**. Plaintiff's Motion for permission to file an interlocutory appeal is **DENIED**.

Signed electronically October 26, 2023 pursuant to V.R.E.F 9(d).



David Barra
Superior Court Judge