

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-185

APRIL TERM, 2004

	} APPEALED FROM:
	} }
	} Franklin Superior Court
Bruce Batchelder, Jr.	}
	}
v.	} DOCKET NO. S158-00 FCr
	}
Steven Gold, et al.	} Trial Judge: Dennis R. Pearson
	}
	}
	}

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals from the trial court's partial dismissal of his V.R.C.P. 75 complaint, which alleged that the Department of Corrections had wrongfully deprived him of earned reduction of term (ERT)¹ credits for the period between September 1995 through August 1998. The trial court concluded that this claim was time-barred pursuant to V.R.C.P. 75(c), and that plaintiff had not demonstrated excusable neglect so as to warrant an extension of time under V.R.C.P. 6(b). On appeal, plaintiff contends that the court erred in: (1) considering prejudice to the Department in ruling that he had failed to demonstrate excusable neglect; (2) finding prejudice to the Department; and (3) failing to apply a less stringent standard for excusable neglect based on his pro se status. We affirm.

Plaintiff is an inmate committed to the control and custody of the Commissioner of the Vermont Department of Corrections. He is serving a sentence of fifty-five years to life for first degree murder and second degree murder. In March 2000, plaintiff filed a pro se complaint pursuant to V.R.C.P. 75. Counsel was appointed, and an amended complaint was filed. In his complaint, plaintiff alleged that the Department had unlawfully denied him the maximum amount of ERT between September 1995 through August 1998 and between July 1999 through October 1999.² The Department moved for summary judgment in September 2002, arguing in part that plaintiff's claims were time barred under V.R.C.P. 75(c)³ and by the equitable doctrine of laches. Plaintiff filed a motion in opposition, and he also sought an enlargement of time in which to file his Rule 75 complaint. In support of the latter, plaintiff asserted that he had failed to file a timely complaint because he was unaware that he had a cause of action against [the Department] until he educated himself regarding [Department] rules and the caselaw governing them. The trial court granted appellant's motion for an extension of time in November 2002.

After a hearing, the court reversed its earlier order granting plaintiff's request for an extension of time as to his claimed ERT between September 1995 through August 1998, and granted summary judgment for the Department on this claim. The court credited the Department's assertion that, given the passage of time, it would be unable to accurately or completely reconstruct the reasons why a particular ERT award was made or not made, since it would have only the paper record on which to rely. The court found this concern particularly relevant where, as here, the Department would need to respond to an inmate's cursory statement under oath that he had been able and willing to engage in such programming but the Department had arbitrarily denied him the opportunity to do so. The court stated that the preservation of available evidence, and the prevention of stale claims, are the policy goals of all statute of limitations type requirements, and here V.R.C.P. 75(c)'s presumption of a 30-day filing requirement strongly indicates that the likely onset of prejudice should be measured in months, not years. In any event, the court explained, plaintiff had not shown how or why his failure to bring these claims in a more timely manner amounted to excusable neglect. Thus, based on its decision not to grant plaintiff an extension under Rule 6(b), the court found plaintiff's

claims untimely. The court consequently granted summary judgment for the Department. This appeal followed.

We review a grant of summary judgment using the same standard as the trial court. Richart v. Jackson, 171 Vt. 94, 97 (2000). Summary judgment is appropriate when, A taking all allegations made by the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. @ Id.; V.R.C.P. 56(c). In this case, the trial court= s summary judgment decision rested on its denial of plaintiff= s request for an extension of time in which to file his Rule 75 complaint; we review that decision for abuse of discretion. Shields v. Gerhart, 163 Vt. 219, 221 (1995).

Plaintiff first argues that the trial court erred in considering prejudice to the Department when it found a lack of A excusable neglect@ under V.R.C.P. 6(b). Plaintiff did not raise this specific argument below, however, and we consider it waived. See State v. Ben-Mont Corp., 163 Vt. 53, 61 (1994) (A To properly preserve an issue for appeal a party must present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it.@). In any event, this argument is without merit. See In re Town Killington, 2003 VT 87A, & 16, 838 A.2d 98 (interpreting term A excusable neglect@ under V.R.A.P. 4 to include consideration of the following factors: 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). Thus, prejudice to the Department was a proper factor for the court= s consideration.

Plaintiff next argues that there is no evidence in the record to support the court= s finding of prejudice. According to plaintiff, because the Department failed to submit an affidavit from his caseworkers for 1995 through 1998, the court lacked information about whether those persons could defend their ERT decisions. We find this argument without merit. The court did not err in concluding that the Department would be prejudiced if plaintiff= s motion for an extension of time were granted. The Department maintained that to defend against plaintiff= s claims, it would need to reconstruct events that caseworkers were unlikely to remember. The documents submitted to the trial court showed that the written record of plaintiff= s ERT awards was sparse. Given the passage of time, the discretionary nature of ERT, and the thirty-day filing requirement contemplated by Rule 75, the court reasonably concluded that the Department would be prejudiced by the delay. Moreover, we note that plaintiff did not offer any reason for his delayed filing beyond his assertion that he was unaware that he had a cause of action against the Department until he educated himself regarding Department rules and the case law governing them. Ignorance of the law and facts does not provide a basis for finding excusable neglect. See Shields, 163 Vt. at 221. In light of these considerations, we find no abuse of discretion in the court= s denial of plaintiff= s request for an extension of time.

We do not address plaintiff= s final argument that the trial court erred by failing to apply a less stringent A excusable neglect@ standard in light of his pro se status. Plaintiff waived this claim by failing to raise it below. See Ben-Mont Corp., 163 Vt. at 61.

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Paul L. Reiber, Associate Justice

1. Earned reduction of term credit is a discretionary reduction in an inmate's sentence that may be awarded by the

Department of Corrections if an inmate participates in available treatment, education, work, or vocational programming. See 28 V.S.A. § 811(b); *Conway v. Gorczyk*, 171 Vt. 374, 379 (2000).

2. The court granted summary judgment for plaintiff on his claimed ERT between July and October 1999, and neither party challenges this portion of the court's order on appeal.

3. V.R.C.P. 75(c) requires, in relevant part, that a complaint challenging governmental action must be filed within thirty days after notice of any challenged governmental action or refusal to act unless the court enlarges the time in accordance with V.R.C.P. 6(b), and, in the event of a failure to act, within six months after the expiration of time in which action should reasonably have occurred. Rule 6(b)(2) allows the trial court, in its discretion, and on motion filed after the expiration of a specified period, to allow an act to be done where the failure to act was the result of "excusable neglect."